# INSURANCE ISSUES IN DISTRESSFUL TIMES

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## LAW RELATED PUBLICATIONS*

CONDOMINIUMS: *Documentation for the To-Be-Built Office Condominium*, State Bar of Texas, Advanced Real Estate Drafting Course (2005).

FORECLOSURE: TEXAS FORECLOSURE MANUAL (State Bar of Texas – 1990, 2nd ed. 2006, and 2008, 2010 Supplements). (Available from State Bar of Texas). *Ins and Outs of Deed of Trust Foreclosures - Practical Tips for the Practitioner*, State Bar of Texas, Advanced Real Estate Law Course (2005).

RISK MANAGEMENT: *Annotated Risk Management Provisions (Focus on Texas Real Estate Forms Manual's Retail Lease)*; *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)*; *Risk Management*; and *Shifting of Extraordinary Risk: Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation and Exculpation*, State Bar of Texas, Annual Advanced Real Estate Drafting Course (2007, 2003, 2002) and the Annual Advanced Real Estate Law Course (2006); *Additional Insured Endorsements to Liability Policies: Typical Defects and Solutions*", State Bar of Texas, Advanced Real Estate Drafting Course (2008); and *CGL Coverage of Defective Work*, ACREL Fall Program October 2009; *Distress and Insurance*, ACREL Fall Program October 2010.

SALES: *The Law of "As Is"*, State Bar of Texas, Agricultural Law Course 2009 (2009); and *Field Guide for Due Diligence on Income Producing Properties* (2000) and *Papering The Deal: From Land Acquisition to Development*, State Bar of Texas, Advanced Real Estate Law Course (2004).

* Copy of articles may be downloaded from website: www.gdhm.com.

## HONORS AND ACCOMPLISHMENTS

American College of Real Estate Lawyers (2007 – 2010); The Best Lawyers in America (Real Estate) (2000 - 2010); Who's Who in America (1995 - 2010) and Who's Who in American Law (1985 - 2010); and Texas Monthly, Super Lawyer - Real Estate (2001-2010). Established the Palmer Drug Abuse Program in Corpus Christi in 1979 and in Austin in 2000 as programs helping teens and young adults recover from alcohol and drug abuse.

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## LAW RELATED PRESENTATIONS AND PUBLICATIONS

Presentations on real property, commercial lending, insurance, and related topics to:
ABA (American Bar Association); Business Law Section and Real Property, Trust and Estate Law Section
ACREL (American College of Real Estate Lawyers)
AECRE (Association of Executives in Commercial Real Estate)
ALI-ABA
Business Law Today (ABA)
Houston Commercial Finance Roundtable
ICSC (International Council of Shopping Centers); Law Conference and Gulf Coast Exchange
Louisiana Bankers Association
Louisiana Bar Association
Louisiana Land Title Association
Louisiana Mineral Law Institute
LSU Law School
New Orleans Bar Association
South Texas School of Law
State Bar of Texas
The Business Lawyer (ABA)
Tulane University Law School
University of Houston Law Center

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# DISTRESS AND INSURANCE

*Insurance issues arising from default by developers, landlords, tenants and contractors.*

Bill Locke and Marilyn C. Maloney

## I. INTRODUCTION

When one of the parties to a transaction is in financial distress (the "***distressed party***"), the other parties (the "***parties to be protected***") should ask the following questions:

- Is there an increased risk for the occurrence of bodily injury or property damage?
- Are my insurable interests insured?
- How do I know they are insured?
- Am I relying on the distressed party to provide liability or property insurance to protect my insurable interest?
- If so, will I be notified in advance of cancellation of the insurance?
- What if the distressed party does not pay the insurance premium?
- What happens if the distressed party does not contact the insurer or cooperate with the insurer after the occurrence of an insured loss or peril?
- If the insured loss or peril occurs, is my insurable interest adequately protected?
- Who will adjust the loss?
- To whom will the insurance proceeds be paid?

Unfavorable answers to these questions will determine if there is a risk that insurance will not appropriately or adequately afford protection to the parties to be protected (a "***financial distress risk***").

## II. PARTIES TO THE POLICY

Covered losses are paid under an insurance policy to or on behalf of an ***insured***. The Declarations Page[1] of an insurance policy names the person or organization who is the insured and such person or organization is the ***named insured***. If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the ***first named insured***.

Additionally, the policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy[2] on which an organization is the named insured, may provide that the organization's employees are automatically covered and are ***automatic insureds***.[3] Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the ***mortgageholder*** as their interests may appear.

Under a CGL policy many types of persons or organizations may be added by endorsement as an ***additional insured***, upon approval of the insurer. Many liability insurers issue ***blanket endorsements*** specifying certain parties that are ***automatic additional insureds*** under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy.[4] A review of the standard additional insured endorsements contained in the **Appendix** will reveal that limitations[5] and exclusions[6] for coverage may be contained in an additional insured endorsement. A common error in insurance specifications is to specify that a party is to be added to the named insured's policy as an ***additional named insured***.[7]

In a property policy, the insured is the party identified on the Declarations Page as having an ***insurable interest*** in the covered property and to whom loss

payments will be paid if the property is damaged or destroyed. Third parties may be designated by endorsement to the property policy as an ***additional insured*** to protect their ***additional interests***.[8]

## III. THE RISK OF NO INSURANCE

### A. Certificates of Insurance Are Not Insurance[9]

#### 1. Not Reasonable to Rely on an ACORD Certificate or Evidence of Insurance

#### a. Disclaimers

An ACORD[10] Certificate of Insurance and ACORD Evidence of Insurance should not be relied on as being accurate or as properly defining coverages, exclusions, and deductibles.[11]

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

> **THIS [*CERTIFICATE / EVIDENCE OF PROPERTY INSURANCE / EVIDENCE OF COMMERCIAL PROPERTY INSURANCE*][12] IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE [*CERTIFICATE HOLDER / ADDITIONAL INTEREST NAMED BELOW*]. THIS [*CERTIFICATE/ EVIDENCE OF INSURANCE*] DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THE CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE [*CERTIFICATE HOLDER / ADDITIONAL INTEREST*].[13] [14]**

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

> [*THIS IS TO CERTIFY THAT*][15] 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.

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

> An insured has a duty to read the insurance policy and is charged with knowledge of its provisions…. The Court concludes that (the party to be protected), claiming to be an additional "insured" under (the policy) should be held to the same obligation as a named insured to review a policy of insurance on which it seeks to rely,

> and its reliance solely on the agent's certificate of insurance is not reasonable under the circumstances presented by the admissible evidence. …. [T]here is no admissible evidence to suggest that (the party to be protected), had it made the request, would have been unable to obtain and read the insurance policy in issue…. Moreover, (the party to be protected), the holder of a certificate of insurance, was warned it was not entitled to rely on the certificate itself for coverage. The certificate stated to the holder that the certificate did not create coverage…. The certificate issued by (the insurance broker) prominently stated that it was "issued as a matter of information only" and did not "amend, extend or alter" coverage provided by the listed policies. Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) … Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiff's reliance upon (the insurance broker's) representation of (the party to be protected's) additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

184 F.Supp.2d at 603-04 (footnotes omitted).

**b. Signed by an "Authorized Representative"**

ACORD Certificates or Evidences of Insurance are issued by a "***Producer***" and are signed by an "***Authorized Representative***". Neither of these terms are defined on the face of the standard ACORD form. Except for the multiple disclaimers of authority and accuracy, the ACORD Certificate of Insurance and the Evidence of Insurance are silent on the authority of the Authorized Representative to bind the listed Insurers. The ACORD Certificate of Insurance and Evidence of Insurance do not identify whether the Producer is the agent for the Insured, the agent for the Insurer, or a dual agent for both the Insured and the Insurer.

Some courts in determining whether an ACORD form may be relied on despite the disclaimers have drawn a distinction on whether the Authorized Representative is a "broker"; a "soliciting agent"; a "recording agent"; a "dual agent"; a "special agent"; or an "insurer's agent".[16] Other courts have held that the insurer is estopped[17] from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate,[18] especially if the certificate does not contain ACORD-type disclaimers.[19]

*Certificate Issued by "Soliciting Agent".* In *TIG Ins. Co v. Sedgwick James of Washington,* 276 F.3d 754 (5th Cir. 2002) the Fifth Circuit agreed with the district court's determination that the issuing agent (Sedgwick) was a "soliciting agent" as opposed to a "recording agent", and thus did not have actual authority to amend the policy to add Safety Lights as an additional insured. The court noted that the agency agreement between Sedgwick and Lumbermens authorized Sedgwick to solicit insurance on behalf of Lumbermens but permitted Sedgwick to bind Lumbermens only "to the extent specific authority (was) granted in the schedule(s) attached". Sedgwick had the authority to issue certificates of insurance and binders but lacked the authority to modify the policy itself.

*Certificate Issued by "Recording Agent".* The court in *United States Fidelity and Guaranty Co. v. Travis Eckert Agency, Inc.*, 824 S.W.2d 628 (Tex. App. – Austin 1991, writ denied) held that USF&G was bound by an additional insured endorsement issued by its recording agent even though the endorsement form was not an authorized form.

*Certificate Issued by Insurer.* Another court, faced with an insurer-issued certificate certifying to a certificate holder that the insured had business auto liability insurance, held that the certificate bound the insurer to cover an injury that occurred before the policy was issued, where the list of covered trucking companies did not include the certificate holder. The court concluded that as of the date of the accident, the certificate was the policy and the insurer could not rely on the policy's disclaimer that "the insurance afforded by the listed policy(ies) is subject to all their terms, exclusions, conditions" as there was no policy at the time of the certificate's issuance.[20]

**c. Errors Are Common in Certificates and Evidences of Insurance**

An amazingly common problem in the insurance industry is the issuance by the Producer of a certificate of insurance certifying to a party to be protected that it is an additional insured on the protecting-party's insurance, but then its failure to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company refuses to provide coverage.

As observed by one commentator:

> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.[21]

As another commentator notes,

> Although a broker for the subcontractor (policyholder) may have prepared the certificate of insurance, in many cases he or she did not follow through and actually obtain the necessary endorsement…. As a result, although a developer may hold a certificate that states it is named as an additional insured on the subcontractor's policy of insurance, the subcontractor's carrier will deny the tender of defense and contend that the agent did not have express authority to bind the carrier.[22]

The commentator in COUCH ON INSURANCE[23] offers the following advice:

> Where an entity requires another to procure insurance naming it an additional insured, that party should not rely on a mere certificate of insurance, but should insist on a copy of the policy. A certificate of insurance is not part of the policy - if it states that there is coverage but the policy does not, the policy controls.

Failure timely to discover the error in the certificate or evidence of insurance can bar a breach of contract action against the insured. In *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006), the follow up breach of contract state court action for failure to provide additional insured protection to the holding in *TIG Ins. Co v. Sedgwick James of Washington,* 276 F.3d 754 (5th Cir. 2002), the Texas Supreme Court held that the discovery rule did not apply to defer accrual of the 4 year statute of limitations. Safety Lights and TIG, under their subrogation rights, filed suit against Via Net and its parent, U. S. Delivery, within 4 years after they had been notified by Lumbermens that Safety Lights was not an additional insured on Lumbermens CGL policy. This was however more than 4 years after the issuance of the certificate of insurance. The court of appeals had held that Safety Lights could not have discovered the breach of contract by Via Net until the denial of coverage by Lumbermens and thus the discovery rule postponed accrual of the 4 year statute of limitations applicable to breaches of contract. The Texas Supreme Court disagreed and held:

> Contracting parties are generally not fiduciaries. (citation omitted). Thus, due diligence requires that each protect its own interests. (citation omitted).… Due diligence may include asking a contract partner for information needed to verify contractual performance. (citation omitted). If a contracting party responds to such a request with false information, accrual may be delayed for fraudulent concealment. (citation omitted). But failing to even ask for such information is not due diligence.

> (citation omitted). Safety Lights argues that it acted diligently by obtaining a certificate of insurance listing it as an additional insured. But the certificate warned that it conferred no rights and was limited by the underlying policy. Safety Lights argues, with some force, that there is little use for certificates of insurance if contracting parties must verify them by reviewing the full policy. But the purpose of such certificates is more general, "acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers". Black's Law Dictionary 240 (8th ed. 2004). Given the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk. Moreover, in this case Safety Lights learned of the breach within a few months after it occurred. While the facts of this specific case do not govern the categorical inquiry, they are not atypical. Additional-insured status under a general liability policy generally provides coverage for personal injury and property damage claims, most of which must be brought within two years of injury. (citation omitted). Accordingly, unless no claims are filed for a long time, breach will generally be discovered within four years…. Some contract breaches may be inherently undiscoverable and objectively verifiable. But those cases should be rare, as diligent contract parties should generally discover any breach during the relatively long four-year limitations period provided for such claims.

### d. Certificates and Binders Are Sometimes Issued Prior to Policy Issuance

A certificate of insurance is only evidence of insurer's intent to provide insurance and is not a contract to insure.[24] Certificates and binders are on many occasions issued prior to the issuance of the policy. This can result in situations where a subsequently issued policy excludes coverages expected by an additional insured shown in the certificate.[25] Even in the case of a renewal, additional insured status may be dropped and reliance on a certificate designating insured status may not be relied upon.

### e. Deficient Insurance Specifications Excuse Certificates Which Incorrectly Certify Existence of Additional Insured Coverage

In one case a general contractor's failure to include in its insurance specifications that it be listed as an additional insured on its subcontractor's CGL policy prevented it from recovering against its subcontractor for breach of contract in failing to provide additional insured coverage, even though the subcontractor had provided the contractor with a certificate of insurance certifying to the general contractor that it was an additional insured.[26] The court found that the ACORD certificate's disclaimer negated reasonable reliance by a landowner on an erroneous statement in the certificate the landowner was an additional insured. The court noted that the landowner did not attempt to obtain a copy of the policy or the endorsement. This case involved a contract that did not call for the landowner to be designated as an additional insured, but prior to execution of the contract, the contractor told the landowner that it would be an additional insured and produced a certificate of insurance designating the landowner as an additional insured. The court held that the contractor had no duty to cause the landowner to be an additional insured.[27]

### f. Certificates Which Correctly Certify Existence of Additional Insured Coverage, But Coverage Is Unsuitable

An Illinois court[28] has held that an insurer was not liable to an additional insured, a general contractor, for coverage of injuries suffered by an employee of the named insured, a roofing subcontractor, even though the named insured provided the additional insured with a certificate of insurance reflecting that the additional insured was covered by the named insured's liability insurance as to a particular project, where the insurance policy was endorsed to exclude coverage to the subcontractor for bodily injury arising out of the subcontractor's roofing work! The court, relying on the ACORD disclaimer language, held:

> Plaintiffs (the general contractor-additional insured and its own CGL insurer) argue that there was an

> ambiguity in the certificate at issue because the language of the certificate implied that some form of insurance was provided but the exclusion in the policy excluded all possible coverage for the … project. However, pursuant to the statements in the certificate, the plaintiff was advised to look at the policy to ascertain the nature and the extent of coverage. We conclude it was also … (the general contractor) rather than American Country's (the roofer's CGL insurer) duty to determine whether this coverage was adequate for the intended purpose. To hold otherwise would place an excessive burden on insurers to review all construction contracts in order to determine the insurance needs of the project prior to issuing a certificate of insurance. Lastly, although plaintiffs argue that they never received a copy of the policy, there is no evidence in the record that they requested one.

In *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000), a case where the court applied Texas law, the court's decision emphasizes why it is important to obtain and read a copy of the additional insured endorsement and not to rely either upon a statement in the certificate of insurance that the party to be protected is an additional insured for liabilities arising out of the protecting party's work or upon a general statement in the contract that the party to be protected is to be listed as an additional insured on the protecting party's commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said

> the negligence of the additional insured is excluded

and that the certificate of insurance stating that party to be protected was an additional insured and the contractual provision in the contract between the party to be protected and the protecting party that the party to be protected be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence.[29]

The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E.D. Tex. 1994) also illustrates the risk inherent in not reading the insurance policy of the protecting party. The court found that a fact issue existed defeating a summary judgment motion on whether the party to be protected had accepted the protecting party's insurance policy which contained an additional insured provision that included the party to be protected, although the provision was worded so as to exclude coverage in cases where the party to be protected was already insured (a so-called "***escape clause***").

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

The protecting party provided insurance naming the party to be protected as an additional insured and therefore did not violate the covenant to name the party to be protected as an additional insured, but the additional insured provision contained an escape clause! Timely review and objection may need to occur to defeat this waiver argument!

## 2. Standard Certificate Does Not Disclose Policy "Exclusions" or "Modifications"

The 2009 revision to the ACORD 25 Certificate of Liability Insurance eliminated from the Remarks box the directive to disclose "exclusions added by endorsement".

The standard certificate does not disclose whether the insured's CGL policy contains or excludes coverage for the insured's liability assumed under an "***insured contract***" (this coverage is known as "***contractual liability insurance***", and is referred to in this article as "***indemnity insurance***"). The standard CGL policy provides indemnity insurance. It provides indemnity insurance by stating that an insured contract is an exception to one of the policy's exclusions from coverage.[30] The standard certificate does not disclose whether the insured's liability policies, including the additional insured endorsement thereto, have been modified with one of the following endorsements limiting or eliminating indemnity insurance. The endorsements noted in the next two paragraphs materially reduce the scope of the indemnity insurance coverage provided by the standard policy. The CG 21 39 is not classified as an "exclusion" even though it is one of the most severe exclusions in the industry. As

discussed in these paragraphs addition of these endorsements to the CGL policy potentially materially reduces the scope of the indemnity insurance provided by the standard CGL policy. Perhaps, an insurance certificate's producer will be responsive to insurance specifications specifically requiring that the certificate of insurance disclose modification of the policy by either a CG 21 39 or a CG 24 26.

**a. ISO CG 21 39**[31]

ISO endorsement CG 21 39 10 93 Contractual Liability Limitation removes from the standard CGL policy's coverage the coverage provided via paragraph f in the list of contracts constituting an insured contract.[32] This endorsement eliminates from the standard policy coverage indemnity insurance for contractually assumed tort liability of another person. This endorsement eliminates coverage that provides the funding for most indemnification agreements.

**b. ISO CG 24 26**[33]

ISO endorsement CG 24 26 Amendment of Insured Contract Definition was added in 2004. It limits contractual liability coverage for indemnities of the named insured to injuries or damages "caused, in whole or in part, by the named insured or those acting on behalf of the named insured". This wording is similar to the revision made to the CG 20 10 and was in response to cases holding that the prior wording extended coverage to liabilities arising out of the sole fault of the indemnitee or additional insured.

## 3. Failure to Obtain a Certificate"

Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate.[34]

**a. Waiver**[35]

Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate.[36]

**b. Loss of Benefits**[37]

There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (e.g., agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected;[38] (3) a erroneous certificate may provide a basis for recovery on the issuing agent's E & O policy or establish a contractual undertaking by the agent to provide the certificated coverage;[39]

**B. No Advance Notice of Cancelation**[40]

### 1. Standard Policy's Cancellation Notice Requirement

The standard liability policy provides for notice of nonrenewal to be sent to the "***first named insured***"[41] as opposed to each "insured" or each "named insured." When and how a policy may be canceled by the insurer is regulated by statute in every state. Most states additionally address notice of cancellation. However, these statutes do not necessarily use terms identifying the parties in the same way as are used in the standard policy or in policies issued by the most frequent insurers. Statutes requiring that notice of cancellation be sent vary from giving notice to "*the policyholder*," a "*person insured*," "*an insured*," "*the insured*," "*the named insured*," or to the "*first named insured.*"[42] Some states do not have statutes regarding notice of cancellation.[43] In order for an additional insured to be assured that the issuer of the liability insurance is contractually obligated to give it notice of cancellation, both the primary CGL policy issuer and the umbrella policy insurer must commit by endorsement of its policy to give the additional insured notice.[44]

### 2. Certificate and Evidence of Insurance Cancellation Notice Statement

**a. ACORD Forms**

The ACORD 24 Certificate of Property Insurance, ACORD 25 Certificate of Liability Insurance and ACORD 28 Evidence of Commercial Property Insurance were revised in late 2009 and early 2010 to change the Cancellation notice language to read as follows:[45]

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

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

**SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL ___ DAYS WRITTEN NOTICE TO THE [*CERTIFICATE HOLDER NAMED TO THE LEFT/ADDITIONAL INTEREST NAMED BELOW*], BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.**

Similar language appeared in the ACORD Certificate of Property Insurance.

A New York appeals court[46] has held that the presence of an ACORD "endeavor"-type notice of cancellation provision in the certificate does not impose on the insurer a contractual obligation to give the certificate holder notice of cancellation of the policy for the insured's premium non-payment. The court held that the insurer satisfied its contract obligations by complying with the contract's requirement of giving notice to the "first named insured" (the insurer's customer). The court pointed to a New York statute which required notice to the first named insured but did not also specify that notice be given to additional insureds. The court dismissed the additional insured/certificate holder's arguments as follows:

> Charlew contends that it reasonably relied, to its detriment, upon the certificate of insurance which named it as an additional insured and, therefore, under our decision in [citation omitted], Merchants Mutual was equitably estopped from denying coverage. Notably, however, the situation presented herein is distinguishable because the Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. "Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage." (citations omitted). Furthermore, Charlew argues that the policy was not properly cancelled because it was not notified of such action, as an additional insured…. Even assuming that Merchants Mutual received the policy change request from Weller-Marcil, we disagree with that argument. Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in … (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled … (citation omitted), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance … (quotation of the ACORD language is omitted.).

*Id.* at 753-54.

### b. Manuscripted Changes to the ACORD Form

In a Fifth Circuit case, *United States Pipe & Foundry Co. v. United States Fidelity & Guaranty Co.,* 505 F.2d 88 (5th Cir. 1974), the Court of Appeals refused to find that the certificate's manuscripted notice of cancellation provision created any right to notice in favor of the certificate holder. The lessee provided the lessor with a certificate of insurance indicating that lessee had CGL insurance in place covering lessee's operations at the leased premises. Thereafter due to nonpayment by lessee of the policy's premium the insurer, USF&G, cancelled the policy, notifying the lessee and not the lessor. Three months after the policy

was cancelled, an explosion occurred on the leased premises, resulting in extensive damage to neighboring properties. Over 1,100 lawsuits were filed against the lessor. The certificate contained both the printed ACORD "endeavor"-type notice provision and an added typed provision as follows:

> (Insurer) will make every effort to notify the holder of this Certificate of any material change in or cancellation of these policies, but assumes no responsibility for failure to do so.
>
> (Added typed provision):
>
> A 10-day notice will be given to the holder of this certificate, in the event of cancellation.

In finding that the certificate did not confer rights on the certificate holder, the court held

> Since U.S. Pipe was not a named beneficiary under the insurance policy, any coverage which it seeks to enjoy would have to arise from the certificate of insurance. A certificate issued to a lessor indicating that liability insurance has been acquired by the lessee does not constitute a contract between the lessor and the insurer. (Citations omitted.) The certificate simply provides a method whereby a lessee can show that he has complied with a lease provision requiring that insurance be obtained. The provision regarding notification in the event of cancellation is a mere promise, unsupported by any consideration.

## IV. LEASES

Generally, to be eligible for insured status under a property policy, the insured must have an ***insurable interest*** in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometimes require the tenant to insure the improvements and to name the owner-lessor as an additional insured.

### A. Standard Endorsements

#### 1. ISO CP 12 19 Additional Insured – Building Owner

In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as an additional insured on a tenant's property policy covering the building. It is the insureds who receive the loss payment under a property policy. Thus it is unnecessary to specify that an additional insured is also designated as a ***loss payee***. The phrase "***as their interests may appear***" often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy proceed checks. Under the CP 12 19 the building owner is an additional insured with respect to the coverage provided for direct physical damage to the building and covered loss is adjusted with and payable to both the tenant, as the first named insured (the insured whose name is listed first in the Declarations), and to the building owner, as additional insured.

The ISO CP 12 19 Building Owner Additional Insured Endorsement does not provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO common policy conditions states that notice of cancellation is given only to the first named insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant. In *Scottsdale Ins. Co. v. Mason Park Partners, LP,* 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have

obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured.

*Additional caveats*. The ISO property policy cancellation provisions address only notice for cancellations by the insurer.[47] There is no provision that notice be sent to the landlord if the tenant cancels the policy. There is no provision that notice of cancellation by the insurer is to be given by the insurer to the landlord. Further, notice is not otherwise provided to be given to the building owner under the tenant's property policy as the cancellation condition in the common policy conditions form (IL 00 17) provides that the insurer is to notify only the first named insured. To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy.

### 2. ISO CP 12 18 Building Owner Loss Payable[48]

Also, in November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

### 3. ISO CP 15 03 Business Income – Landlord as Additional Insured (Rental Value) Endorsement

This endorsement to the tenant's property policy adds the person identified in the endorsement (the landlord) as an insured for loss of "rental value" and thus meets lease requirements that the tenant obtain coverage for loss of the additional insured's rental income. The ISO CP 15 03 provides that notice of insurer cancellation will be provided by the insurer to the additional insured, landlord.

## B. No Protection for Insured's Acts

Unlike standard mortgagee coverage discussed in Part VI of this article, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (e.g., landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for all insureds.

## C. Vacancy Clauses[49]

The standard commercial property policy addresses the increased insurance risk arising out of the vacancy of the covered property.[50] The standard commercial property policy states that a building is "***vacant***" unless

> at least 31% of its total square footage is:
> (i) Rented to a lessee or sub-lessee and used by the lessee or sublessee to conduct its customary operations; and/or
> (ii) Used by the building owner to conduct customary operations.[51]

A building under construction or renovation is not considered vacant under the standard commercial property policy.[52] It further provides that if the building has been vacant for more than 60 consecutive days losses or damages from the following six causes are not covered losses: (1) vandalism;[53] (2) sprinkler leakage, unless the insured has protected the system against freezing; (3) building glass breakage; (4) water damage; (5) theft; or (6) attempted theft. In *Essex Ins. Co. v. Eldridge Land, L.L.C.*, 2010 WL 1992833 (Tex. App. – Hou. [14th Dist.] May, 2010) the court held that damage to the interior of an insured building inflicted by thieves incidentally to their theft of copper wiring and copper pipe fell within the theft exclusion to vacancy coverage under a standard commercial property policy. Also see *Nautilus Ins. Co. v. Steinberg*, 316 S.W.3d 752 (Tex. App. – Dallas 2010, no writ) similarly holding that damage to roof HVAC caused by thieves removing copper wiring is excluded from coverage under the standard policy.

The standard commercial policy further provides that with respect to Covered Causes of Loss other than those listed as (1) – (6) above, the amount the insurer would otherwise pay for the loss or damage is reduced by 15%.

However, some commercial property policies provide that the policy is cancelled and no proceeds are payable if the property is vacant for a specified period. In *Lynn v. USAA Casualty Ins. Co.*, 1997 WL 61485 (Tex. App. – San Antonio 1997, writ denied) a vacancy clause

prevented coverage. In this case the vacant house did not contain any appliances, furniture or other contents, except for one metal desk, as all contents had been stolen during various break-ins and the owner had not spent a night at the house for more than a year as there was no bed.[54]

Some commercial property policies suspend coverage rather than void the policy where the insured property is vacant. *Barlow v. Allstate Texas Lloyds*, 214 Fed. Appx. 435 (5th Cir. 2007).

Policies are sometimes written with knowledge of the insurer that a portion of the premises will be vacant and in such cases the insured will covenant to keep the vacant portion secure.[55] Also, some commercial property policy forms require the insured to notify the insurer that the premises have become vacant and permit the insurer to elect to continue coverage or cancel coverage unless a vacancy permit or rider issue issued and paid for.[56] Some commercial property policies trigger coverage termination if the property is "***unoccupied***" for a specified period as distinguished from being "vacant".[57] The fact that the commercial property policy was not delivered to the insured until after the fire loss and it precluded coverage through a vacancy clause that was not specifically identified in the binder issued to the insured may not preclude exclusion's application.[58]

Most homeowners property policies[59] provide that they do not insure against loss caused by vandalism and malicious mischief, if the dwelling has been vacant for more than 60 consecutive days immediately before the loss.[60] A dwelling may be "unoccupied" but not "vacant".[61] Most homeowners insurers will not continue to insure a vacant home. There are a very limited number of insurers in the business of insuring vacant homes and the premium can be five times the premium for an occupied dwelling.[62]

## V. CONSTRUCTION

### A. Builder's Risk Insurance

#### 1. Insureds

Standard property insurance policies usually will not cover loss associated with buildings under construction except for additions under construction, alterations and repairs to the building or structure[63] and to a limited extent buildings under construction on newly acquired premises through an extension of coverage.[64] There is no standard builder's risk policy, like there is a commonly recognized standard ISO CGL policy. ISO has a builder's risk policy, but builder's risk policies are considered to be *Inland Marine* policies and there is a wide divergence in builder's risk coverages insurer to insurer.[65] The owner and all contractors and major subcontractors should be named as named insureds under a builder's risk policy.[66] Phrases like "*as their interests may appear*" should not be included either in contractual specifications, insurance certificates or the policy, as this qualification has been the source of subrogation claims by insurers against an insured under builder's risk policies in cases where there has not been an express waiver of subrogation.[67]

#### 2. Common Errors and Problems[68]

##### a. Review of Policy Delayed Until After Construction Commencement

Like the other insurance products discussed in this article, the actual builder's risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The actual policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Insurance or even a ACORD Binder, the policy itself is the contract of insurance and contains extensive terms and conditions that should be reviewed and approved prior to commencement of work. A great level of "distress" can occur, if an assumed coverage in fact is not included in the policy, despite the best written insurance specifications, and a loss occurs before issuance of the policy. If construction will commence before issuance and delivery of the policy, one avenue may be to have the insurer deliver a specimen policy and specimen endorsements.

##### b. Coverage Amount

Failure of the policy amount to reflect the full loss exposure is a common error. The contractor's contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor's contract sum could lead to a significant uninsured loss.

##### c. Coverage for Architect's Fees, Owner Supplied Materials, Debris Removal, Full

**Limit Coverage of Flood and Earthquakes, and Elimination of Law and Ordinance Exclusions**

Many commonly expected coverages are available only through policy endorsement and are not part of the issuer's standard policy form, such as coverage for the owner's additional architect's fees arising out of an insured loss; coverage for owner supplied materials; amending the law and ordinance exclusion to cover costs of demolition of the intact portion of a building when a law, ordinance or regulation requires that the entire structure be torn down; endorsement to include full collapse coverage, including collapse resulting from design error; and verification that sublimits (e.g., sublimits for flood and earthquake coverage) are adequate or eliminated.

### 3. Delay Damages[69]

#### a. Soft Cost Endorsement[70]

Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes.

#### b. Delayed Completion and Force Majeure Endorsement

Another endorsement that may be available to insure against a financial distress risk is a delayed completion and force majeure endorsement. This endorsement supplements the risk of covered loss to cover consequential damage losses due to completion delays and force majeure events not otherwise covered. This endorsement extends coverage for losses due to strikes and labor disputes, changes in law (e.g., building codes, emission standards), acts of God, adverse weather conditions and off-site physical damage to materials or equipment.

## B. Performance Bond

### 1. Coverage of Delay Damages

Subject to the terms of the construction contract,[71] delay damages and other consequential damages arising out of a contractor's default may be included within the scope of the surety's obligations under the standard performance bond.[72]

### 2. Coverage for Contractor's Failure to Provide Insurance

There is authority that the party to be protected, performance bond obligee, may recover from the performance bond surety if the contractor/bond obligor fails to provide contracted for insurance.[73]

# VI. MORTGAGES AND SECURITY INTERESTS

One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property.[74] If the mortgagee does not carry its own insurance, but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There are more than one form of endorsement for this purpose and they provide widely different protection.

## A. Mortgagee's Rights to Insurance Proceeds[75]

Both the mortgagor and mortgagee have insurable interests in mortgaged property. Either mortgagor or mortgagee can purchase a property insurance policy on the mortgaged property. A mortgagor may insure the mortgaged property in an amount equal to the property's value.[76] A mortgagee does not have an insurable interest in the property in excess of its secured debt.[77] Absent a contractual undertaking to insure the mortgaged property and to insure the interest of the mortgagee, the mortgagor does not have an obligation to do so. However, it is customary in commercial financing to require the mortgagor to carry insurance for the joint interest of both mortgagor and mortgagee. As observed by a well-known commentator on insurance matters,

> Rather than have both the borrower and lender buy separate policies of property insurance to protect their respective interests, the lender typically requires the borrower to do two things:

> First, the borrower covenants in the mortgage that there will be property insurance maintained for the benefit of the mortgagee; and
>
> Second, the lender requires the borrower to obtain a property policy with a loss payable clause in favor of the lender.
>
> The effect of the first requirement is addressed below in the discussion of competing claims to insurance proceeds in those instances in which fire insurance is obtained but a loss payable clause in favor of the lender is not. The effect of a loss payable clause in favor of the lender is to grant to the lender a direct interest in the fire policy that has been obtained by the mortgagor.[78]

## B. Different Forms of Mortgagee Interest Endorsements

At least three types of mortgagee clauses cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause.

### 1. Simple Loss Payee/Open Mortgage Clause

Courts have held that a clause that simply provides that insurance proceeds will be payable to a mortgagee "as its interest may appear" links the mortgagee's recovery to the right of the mortgagor to recover and exposes the mortgagee to risks that the insurer will be afforded a defense to payment to the mortgagee based upon inequitable conduct of the mortgagor.[79]

### 2. Standard Mortgage Clause[80]

Standard commercial property policies (e.g., ISO's CP 00 10) automatically extend coverage to the mortgagee as an insured through the inclusion of the *standard mortgage clause*. Other property insurance forms that do not include a mortgage clause must be endorsed to provide coverage equivalent to that contained in CP 00 10. The standard mortgage clause was developed to protect recovery by the mortgagee even though the insurance contract between the mortgagor and the mortgagee might be voided by the insurance company because of certain omissions or acts by the mortgagor (for example, neglect, arson, concealment). Attached in the **Appendix** is the standard mortgage clause found in ISO CP 00 10 commercial property policy.[81] Courts hold that a standard mortgage clause grants independent rights to the mortgagee from the insurer that can be enforced regardless of the actions of the mortgagor. A standard mortgage clause, like the open mortgage clause, provides that the loss will be payable to the mortgagee "as its interest may appear", but it goes further to provide that the insurance, as to the mortgagee, will not be invalidated by acts of the insured.[82]

### 3. Nature of Mortgagee's Interest – Ownership Interest in Proceeds vs. Security Interest[83]

A mortgagee clause gives the mortgagee a direct contractual right with the insurer to be paid the policy's proceeds up to the balance owing on the secured debt, but subject to the limitations discussed at Section C.1 below. In the context of a mortgagor's bankruptcy proceeding, the property policy's proceeds up to the mortgagee's insurable interest are not property of the bankrupt.[84] The UCC recognizes that a mortgagee loss payee's interest in mortgaged property policy proceeds takes precedence over claims of a holder of a perfected security interest in collateral that has been damaged or destroyed.[85]

### 4. Equitable Lien on Insurance Proceeds

If a mortgagor is charged with the duty of obtaining insurance on the mortgaged property with loss proceeds payable to the mortgagee but the policy does not contain such a loss payable provision, courts in equity in many jurisdictions will treat the policy as having contained the loss-payable provision and entitle the mortgagee to recover under the policy.[86]

## C. Special Issues for Lenders in Workouts

Over the past several years, even seemingly strong developers and well-structured real estate projects have experienced difficulties, ranging from loss of value, loss of access to capital, and loss of buyers or tenants. As a lender reviews its portfolio of troubled loans, several areas deserve special attention.

### 1. Provisions in Loan Documents for Handling of Insurance Proceeds; Replacement Cost Insurance

Most mortgages provide the lender the right to receive the insurance proceeds and control their use after an insured loss. Depending upon the documentation, the lender may have total discretion whether to allow the borrower access to the funds to repair or replace the project or to utilize the proceeds to pay down or pay off the secured loan. Often, the documents stipulate complex requirements for release of funds, similar to those in a construction loan, such as production of a detailed budget, use of a bonded construction contract, production of permits, evidence that the borrower has other funds necessary to complete the project, draw schedules, and other procedures for release of funds. In certain instances, the lender may have agreed to utilize funds to pay off the loan only if the loss occurs in the last period of the loan. If the lender is involved in workout or forbearance negotiations with the borrower, it should consider whether the provisions of casualty loss, negotiated years earlier in a different economy, are still appropriate or whether they need to be re-worked.

Recall that property insurance is typically written on either a replacement cost basis or an actual cost basis. Replacement cost insurance provides proceeds in an amount necessary to replace the lost or damaged property with similar types and styles of materials and is typically the more expensive policy as it provides a higher amount of coverage. Actual cost insurance pays losses on the basis of the initial value of the property less physical depreciation, which can often be a significant reduction. If the lender has required the borrower to place its property insurance on a replacement cost basis (rather than actual cash value) the insurer will be obligated to pay the full replacement cost only if the project is repaired.[87] If the lender elects to apply the proceeds to repayment of the loan, the lower amount will be paid. While borrowers typically object to the lender's option on the grounds that it causes the borrower to carry more expensive insurance than it may eventually use, lenders typically insist on retaining the option. Parties may contract as to the disposition to be made of the insurance proceeds for a casualty loss. [88] Courts in many jurisdictions have refused to find such an arrangement grossly inequitable or against public policy, because the mortgagor actually benefits by having the proceeds applied to his debt.[89]

### 2. The Self-Insured Borrower

As part of its workout review, the lender should review the provisions of the mortgage or credit agreement that allowed the borrower to self-insure some or all of the risks of loss to the mortgaged property. If well drafted, the mortgage did not simply provide that the borrower might self-insure at its option; this is an empty term that gives the lender almost meaningless protection.[90] However, if the borrower was authorized to maintain a high deductible or self-insured retention, if the right to self-insure was not tied to a particular net worth or compliance with other financial tests by the borrower, or if other provisions expose the lender to risks from the financial situation of the developer, the lender should consider renegotiating the insurance clauses as a part of any workout or forbearance agreement.

## D. Insurance Issues in Foreclosure[91]

*U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*,[92] a decision by the Tennessee Supreme Court, addressed a potential trap for lenders in foreclosure. In this case, the lender commenced foreclosure proceedings that were stayed by a bankruptcy filing of the borrower. Approximately six months later, while no further actions in foreclosure had been taken, the property was destroyed. The loss was apparently due to the fault (but not the intentional act) of the homeowner. The insurer objected to paying the mortgagee on the grounds that it had failed to notify the insurer of an "increase in hazard" (as it was required to do under law and the insurance contract) upon filing foreclosure. The appellate court agreed with the insurer and dismissed the claim of the mortgagee. The Tennessee Supreme Court reversed and held that while the filing of foreclosure proceedings may have constituted an increase in a moral hazard (namely, that the mortgagor might destroy the property in an attempt to receive the proceeds) this was not the type of increase of hazard that would invalidate the policy. Presumably only physical changes to the property would result in that type of increase of hazard.

While the ultimate decision in *U.S. Bank* was favorable to lenders, there are a few caveats. First, as noted in Section D.1.b. below, a particular policy might require notice of foreclosure proceedings in order to retain coverage. Lenders should examine property insurance policies as part of their collateral review and preparation for foreclosure. Second, if the filing of the foreclosure proceedings encourages the mortgagor to abandon the house, leaving it unsecured and vacant, depending on the terms of the property policy, this might constitute the sort of physical increase in hazard that an insurer might raise as a defense to payment. As noted in Section D.1.b. below, that situation would also

require notice to the insurer. The ultimate lesson from *U.S. Bank* is that lenders contemplating or filing foreclosures have to examine their policies and secure the property to avoid potential disputes with the property insurers.

## 1. Casualty Loss Prior to Foreclosure

### a. Preliminary Considerations

If a casualty loss is sustained before the foreclosure sale, the following questions should be asked and answered: (1) Will the claim be settled before the foreclosure sale? (2) Who is entitled to the proceeds: the note holder, the mortgagor, or the purchaser at the foreclosure sale? (3) Will a greater recovery be available if the proceeds are applied in reconstruction of the mortgaged property than if they are taken as a cash payment? (4) Will the insurer insist on the premises being repaired as opposed to its paying a cash settlement? (5) Do the policy and proceeds cover contents or trade fixtures not encumbered by the deed of trust?

### b. Notices to Insurance Company

Some property insurance policies require the mortgagee to notify the insurance carrier of the commencement of foreclosure. Notice is given to the insurance carrier so that it can protect its position by purchasing the secured indebtedness or bidding at the foreclosure sale, especially if a casualty loss has occurred before the foreclosure sale. The safest practice is to notify the insurance company of a pending foreclosure sale and to notify the company of the change of ownership after the foreclosure sale.

Further, if the mortgagor abandons the mortgaged property before the foreclosure sale, the mortgagee must confirm continuation of coverage. This is because most property insurance policies exclude or reduce coverage after the insured property is vacant for more than a certain period of time, often 60 days.[93] This limitation arises from the possibility of vandalism, glass breakage, theft, and other casualties when the property is unprotected. Although a company may offer an endorsement to override the vacancy exclusion, these typically provide coverage for short periods of time, often 60 or 90 days, and often at a greatly increased premium. As noted in the discussion of the vacancy clause and leases in section IV.C of this paper, the standard commercial property policy provides that it does not cover loss from six causes (e.g., vandalism and theft) following the insured's vacating the premises for a period of 60 days, but does cover losses from other Covered Causes (e.g., fire) but with a 15% reduction in proceeds. The standard mortgage clause in the standard commercial property policy provides for coverage for the mortgagee even in the event the premises are vacant for greater than 60 days as follows:

> 2. Mortgageholders
> … d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgagor:
> (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
> (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
> (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.[94]

## 2. Relationship of Proceeds to Secured Debt

The note holder's right to the property insurance proceeds depends on the existence of an insurable interest in the mortgaged property, typically referred to in the property policy by the phrase "as their interest may appear at time of loss."[95] A mortgagee's interest in the policy is limited to the secured indebtedness due it. Therefore, the note holder's interest will vary depending on the action taken before the insurer disburses the insurance proceeds. If the property is foreclosed on before the proceeds are distributed, the mortgagee's right to the proceeds may be reduced or extinguished, depending on the mortgagee's interest remaining after foreclosure. If the mortgagee purchases the mortgaged property for the amount of the debt outstanding, the mortgagee will have no right to the insurance proceeds.[96]

If the mortgagee purchases the mortgaged property for less than the balance owed on the secured debt, the mortgagee may recover from the insurer, as from the mortgagor, the deficiency (up to the policy limits).[97]

### 3. Bid Strategy

#### a. Liquidating Casualty-Loss Claim Before Foreclosure Sale

The mortgagee should postpone the foreclosure sale until after the amount payable on the insurance policy is determined. Otherwise, the mortgagee risks overbidding by establishing a deficiency less than the amount of the insured casualty loss.

#### b. Foreclosure Before Applying Insurance Proceeds to Secured Debt

The mortgagee may feel that foreclosing before the insurance proceeds are liquidated and applied to reduce the secured debt is necessary. In such situations, the mortgagee should be careful to bid low enough to establish a deficiency equal to the insurance proceeds. The lender may be placed in a dilemma should it face competitive bidding. To be the successful bidder at the foreclosure sale and thereby be the owner of the policy and the recipient of its proceeds, the lender may be forced to bid up to its outstanding indebtedness and thereby extinguish or pro rata extinguish its claim on the insurance policy. The best course of action appears to be to have the proceeds liquidated and applied to the secured debt before the foreclosure sale. The lender is then in the position to bid at the foreclosure sale an amount equal to the lesser of the then indebtedness or the perceived value of the mortgaged property "as is".

### E. Casualty Loss After Foreclosure

After foreclosure the mortgagee's interest may continue in property insurance on which it was listed as a mortgagee prior to foreclosure as to casualty loss proceeds from a casualty occurring after foreclosure.[98]

### F. Personal Property

A person with an insurable interest in personal property may be designated as a ***loss payee*** under the property insurance covering the personal property. Two forms of loss payee clauses are a ***loss payable clause*** and a ***lenders loss payable clause***. In the **Appendix** is the ISO CP 12 18 06 07 Loss Payable Provisions endorsement. This endorsement provides a schedule to designate the loss payee, the property in which the loss payee has an insurable interest, and which type of loss payable clause applies. Also, see the chart in the **Appendix** Chart of Additional Interests Insurance Provisions[99] comparing the rights of a secured creditor or personal property lessor under a loss payee clause with a lenders loss payable clause. The difference between the protection afforded under lenders loss payable clause as compared to a loss payable clause is analogous to the difference between the protection afforded under to a mortgagee by the standard mortgage clause as compared to an open mortgage clause.

#### 1. Loss Payable Clause[100]

Under the standard loss payable clause losses are adjusted with the insured and policy proceeds are payable jointly to the insured and the loss payee. Under the standard loss payable clause the loss payee does not have any further rights or responsibilities. The loss payee has no more right to recover under the policy than does the insured and the loss payee's recovery may be lost due to the acts of the insured.[101]

#### 2. Lenders Loss Payable Clause[102]

A secured party that is designated on the insured's personal property policy as a loss payee under a *lenders loss payable clause* has the same rights and responsibilities that a mortgage holder has under the standard mortgage clause. While the mortgage clause is automatically a part of a standard property policy as to mortgaged real property, a personal property secured party must request that it be designated as a loss payee with a lenders loss payable clause endorsement.

## VII. RECEIVERSHIP AND BANKRUPTCY

### A. Receiverships

In recent years the request for appointment of receivers in connection with foreclosures has increased dramatically. Lenders and servicers have resorted to receiverships to operate and even sell the property, without proceeding to a foreclosure sale. [103] The rights and obligations of the receiver are established both by applicable state or federal law and in the order of receivership. Typically, these require the receiver to post a bond to insure its faithful performance, address operation of the premises, collection of rents, maintenance of insurance and, if permitted by the court and applicable law, to sell the property and distribute the proceeds.

Surprisingly, other than the *Block* 37 case discussed below, there has been little discussion of the insurance issues arising in connection with receiverships,

possibly because they were relatively seldom used prior to the recent financial meltdown. The cases that do address these issues date prior to 1940; since so much of insurance law hinges on the analysis of policy language and since insurance policies have continually changed over time, reliance on these early cases should be tempered with consultation with knowledgeable insurance advisors.

There are at least three parties whose interest in the property should be considered: the owner, the mortgagee, and the receiver. During a receivership, the receiver, rather than the owner or its property manager is in possession of the property and entitled to receive the rentals and take preservative measures. The receiver assumes responsibility for the maintenance and preservation of the property, presumably including loss from fire or other property damage. The mortgage debt remains outstanding, so the mortgagee's insurable interest remains in the property. Since the mortgage has not been foreclosed, the owner still retains its interest in the property.

Under the rationale of the *U.S. Bank*[104] case the property insurance, if still in force and with the proper mortgagee/loss payee endorsement, should still protect the lender who is the beneficiary of the mortgage debt. Unless the owner and its insurer consent to an assignment of rights under the property policy, the receiver should not assume that it is entitled to coverage under the owner's policy. The typical ISO form restricts the right of the insured to transfer rights under the policy without the insurer's consent. There is, however, at least some old authority that the appointment of the receiver does not breach this restriction, on the grounds that the possession of the receiver is for the benefit of all parties involved.[105] `Often, however, the property insurance has lapsed or is close to expiration and the receiver must obtain insurance to protect the property. While the receiver has the authority to obtain such insurance, it is unclear whether this is on the basis of the receiver's insurable interest in the property or whether it simply has the authority to take that action on behalf of the parties (owner, mortgagee, or other creditor) who will ultimately benefit from the insurance.[106]

A recent Illinois case involves a dispute over insurance as a basis for a defense against the appointment of a receiver. In *Bank of America, N.A. v. 108 N. State Retail LLC*[107] the mortgagee sued for foreclosure of its mortgage, based upon an alleged 46 million dollar shortfall in construction funds necessary for the completion of the "Block 37" project in Chicago. The developer/mortgagor provided insurance for the project, still in the construction phase, under a wrap-program, or owner controlled insurance program ("***OCIP***"). Apparently, the appointment of the receiver was delayed for several weeks as the receiver attempted to obtain its own OCIP insurance or to require an assignment by the developer of its OCIP. Although receivers have been touted as an efficient way to complete projects that fall into default while still under construction, this case may be an example of issues that might make such appointments impracticable.

## B. Bankruptcy

While the foregoing issues all apply to lenders outside of bankruptcy, special rules and issues arise when the borrower files for reorganization or liquidation under the protection of the Bankruptcy Code. The primary question for the bankruptcy lawyer is whether the insurance policy and the insurance proceeds are property of the bankruptcy estate. Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, broadly defines the bankruptcy estate to include "all legal and equitable interests of the debtor in property as of the commencement of the case" and "proceeds ... of or from property of the estate." While cases have held that the result is that insurance policies constitute property of the bankrupt estate the important question for the secured lender is whether the *proceeds* of insurance also constitute property of the estate. The general test seems to focus on whether, in the absence of bankruptcy, the debtor would have had a claim to the proceeds.[108] Property insurance policies whose proceeds are payable to a creditor pursuant to a mortgagee/loss payee rider are not property of the estate.[109]

## APPENDIX

### Charts



### Liability Insurance



### Property Insurance



### Certificates, Evidences and Insurance Binder

## CHART OF ADDITIONAL INTERESTS PROPERTY INSURANCE PROVISIONS

| Type of Endorsement | Typical Insurable Interest | Receipt of Loss Payment | Typical Notice of Cancellation | Coverage Despite Insured's Acts |
|---|---|---|---|---|
| Mortgageholders Provision or Endorsement[1] | Holds mortgage on covered building(s) | Exclusive | For cancellation by the insurer; 30 days, except 10 days nonpay. May include 10 days' notice of nonrenewal. | Yes |
| Lenders Loss Payable Clause[2] | Creditor with an interest in covered personal property | Exclusive | For cancellation by the insurer only; 30 days, except 10 days nonpay. May include 10 days' notice of nonrenewal. | Yes |
| Loss Payee Clause[3] | Leases personal property to the insured, may also be a creditor | May be exclusive or shared with the insured | None, unless specifically requested. | No |
| Additional Insured Endorsement[4] | Owner of building(s) leased to the insured | Shared with the insured | None, unless specifically requested (ISO standard property policy Cancellation Provisions provides for notice only to "the first named insured"). | Yes |

[1] Mortgageholders Provision. See Mortgageholders Provision in **Appendix** form ISO CP 00 10 06 07 Building and Personal Property Coverage Form, Additional Conditions Paragraph F.2, p.p. 13-15.

[2] Lenders Loss Payable Clause. See **Appendix** form ISO CP 12 18 06 07 Loss Payee Provisions Paragraph D Lenders Loss Payable Clause.

[3] Loss Payee Clause. See **Appendix** form ISO CP 12 18 06 07 Loss Payee Provisions Paragraph D Loss Payee Clause.

[4] Additional Insured Endorsement. See **Appendix** form ISO CP 12 18 06 07 Loss Payee Provisions Paragraph F Building Owner Loss Payable Clause, which is also discussed in the Article at IV.A.2 (note under this endorsement form, notice of cancellation is not required to be given to the additional insured landlord). Also see ISO CP 12 19 11 08 Additional Insured – Building Owner endorsement (copy not in Appendix) discussed in Article at IV.A.1 (note under this endorsement, notice of cancellation is not required to be given to the additional insured landlord); and ISO CP 15 03 Business Income – Landlord as Additional Insured (Rental Value) Endorsement (copy not in Appendix), which is discussed in the Article at IV.A.3 (note under this endorsement, notice of cancellation is expressly provided to be given to the additional insured landlord).

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# TEXAS CHANGES – AMENDMENT OF CANCELLATION PROVISIONS OR COVERAGE CHANGE

This endorsement modifies insurance provided under the following:

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

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

**SCHEDULE**

| | |
|---|---|
| **1.** | **Name:** |
| **2.** | **Address:** |
| **3.** | **Number of days advance notice:** |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. | |

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# LESSOR – ADDITIONAL INSURED AND LOSS PAYEE

This endorsement modifies insurance provided under the following:

COMMERCIAL LIABILITY UMBRELLA COVERAGE PART

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

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

| | |
|---|---|
| Endorsement Effective: | Countersigned By: |
| Named Insured: | (Authorized Representative) |

**SCHEDULE**

| |
|---|
| Insurance Company<br>Policy Number<br>Effective Date |
| Expiration Date |
| Named Insured<br>Address |
| Additional Insured (Lessor)<br>Address |
| Designation or Description of "Leased Autos" |

| **Coverage** | **Limit Of Insurance** |
|---|---|
| Liability | $ Each "Occurrence" |

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

Subject to such coverage provided in the "underlying insurance", the following cancellation provisions apply:

**1.** If we cancel the policy, we will mail notice to the lessor in accordance with the Cancellation Common Policy Condition.

**2.** If you cancel the policy, we will mail notice to the lessor.

**3.** Cancellation ends this agreement.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

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

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

| **Name Of Additional Insured Person(s) Or Organization(s):** | **Location(s) Of Covered Operations** |
|---|---|
| [*insert name of additional insureds*: (a)_____, and its successors and assigns, and its directors and employees (the owner/landlord), (b) _____ (the landlord's management company), (c) _____ (the landlord's lender), (d), _____, and its successors and assigns, and its members and employees, and (e) ("tenant's lender".] | [*insert building address*.] |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. | |

**A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused[2], in whole or in part, by:

**1.** Your acts or omissions; or

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

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

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

This insurance does not apply to "bodily injury" or "property damage" occurring after:[3]

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

**2.** That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.[4]

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

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

> The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent.
>
> The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured's employee is barred by the workers' comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer.

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

[4] Crafting an Additional Insured Endorsement. A good contract drafting practice is to attach to the parties insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

Notification Requirement. The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. See **Appendix** form ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Change for notification endorsement to a CGL policy. The following is sample notification language to be added on the face of the additional endorsement form.

In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least ___ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:

Additional insured's name and address: _____.

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# 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[1] (Part Leased to You):

[*insert suite no., street address and other descriptive information as to what is the "premises"* and add the following: and the appurtenant use of the "Common Areas" as defined in the Lease between _____ as Tenant and _____, as Landlord].

**2.** Name of Person or Organization (Additional Insured):[2]

[*insert name of additional insureds*: (a) _____, and its successors and assigns (the owner/landlord), and its directors and employees, (b) _____, (property manager), and (c) _____ (owner's lender)].

**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[3] the ownership, maintenance or use[4] of that part of the premises[5] leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to[6]:

**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.[7]

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

[2] What Persons in Addition to Landlord to be Additional Insureds? 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 by name be identified and listed in the Schedule provided in the additional insured endorsement form to identify the additional insureds.

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

[4] "Out of Ownership, Maintenance or Use of Premises." Coverage also is broad as it covers the additional insured's liability for Injuries arising out of its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)." This language is broad. It applies clearly to the landlord's vicarious liability for acts of the tenant (i.e., the "*use*" of the premises). The language is also expansive and general enough to apply directly to the landlord's own negligence. It covers liability arising out of the "*ownership*" and "*maintenance*" of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant. The ISO industry standard additional insured endorsement form above does not expressly extend coverage to the additional insured's sole negligence. It also does not expressly exclude coverage of a landlord's sole negligence. In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover a landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers a landlord's sole negligence.

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

The most common factually litigated scenario regarding these endorsements involves injuries occurring "**outside**" the "**part**" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. Some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Cases Finding No Coverage.

For example, in *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the covered location where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility.

*See Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.*, 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003) a case involving an injury that occurred to a HVAC repairman who was injured while walking on the roof of a landlord's multi-tenant retail center to get to a HVAC unit that the tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was the above ISO CG 20 11 Additional Insured – Managers and Lessors of Premises. The court found that the additional insured endorsement did not insure the landlord for the injury as the injury neither occurred in the retail space leased to tenant or on the roof directly above the space.

*Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)-additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was

injured when he slipped on ice while loading a truck parked in the alley behind the shopping center) and the additional insured endorsement described the "premises" as the 3,200 square feet of space occupied by the named insured tenant. The court stated:

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

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

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

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

See also cases construing the scope of indemnities as to injuries arising out of the use of the "premises" as not extending to injuries not occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts): Rensselaer *Polytechnic Inst.* v. *Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991). The court was not persuaded that a duty to indemnify existed by the argument that, although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co.* v. *Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)–finding no duty to indemnity where the cause of the damage occurred outside the leased premises.

Cases Finding Coverage.

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

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

*Franklin Mut. Ins.* v. *Security Indem. Ins.*, 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). *Also see ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)–court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it

provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that named insured's CGL policy provided coverage to the named insured for garage operations including

> the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business.

The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press* v. *G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred. Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp.* v. *Northbrook Property & Casualty Insurance Co.*, 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97–1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy additional insured endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premises." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend additional insured coverage is illustrated by *SFH, Inc.* v. *Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as additional insureds. Coverage was affected through a blanket additional insured endorsement covering all additional insureds required by named insured's contracts to be covered. The additional insured language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

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

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

[7] Crafting an Additional Insured Endorsement. A good contract drafting practice is to attach to the parties insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

Notification Requirement. The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. See **Appendix** form ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Change for notification endorsement to a CGL policy. The following is sample notification language for the notification to be added on the face of the additional endorsement form.

In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least ___ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:

Additional insured's name and address: _____ .

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – MORTGAGEE, ASSIGNEE, OR RECEIVER

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

**Name of Person or Organization:**

**Designation of Premises:**

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

**1.** ~~WHO IS AN INSURED~~ (Section II) is amended to include as an insured the person(s) or ~~organization(s)~~ shown in the Schedule but only with respect to their liability as mortgagee, assignee, or receiver and arising out of the ownership, maintenance, or use of the premises by you and shown in the Schedule.

**2.** This insurance does not apply to ~~structural alterations, new~~ construction and demolition operations performed by or for that person or organization.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION[1]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

| **Name Of Additional Insured Person(s) Or Organization(s)** |
|---|
| [*insert name of additional insureds*: (a) _____ (the primary additional insured), and its successors and assigns, and its members and employees and (b) _____ (the designated primary additional insured's lender.)] |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. |

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

**A.** In the performance of your ongoing operations; or

**B.** In connection with your premises owned by or rented to you.[3]

1 "Catch All" Designated Person Additional Endorsement Form - Designating Tenant as an Additional Insured on Landlord's CGL Policy. This endorsement may be used when no other ISO form exists for the purpose or when the parties designate this form as the form to be used. This form is suitable for use to designate a tenant as an additional insured on Landlord's CGL policy. In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy. In cases where the landlord is to be included as an additional insured on the tenant's CGL policy and the tenant is to be included on a landlord's CGL policy, the insurance specifications and the additional insured endorsements must be drafted to allocate on a geographic basis the areas where the landlord's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, the common areas) and the areas where the tenant's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, inside the suite or demised premises leased to the tenant, exclusive of common areas).

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

3 Crafting an Additional Insured Endorsement. A good contract drafting practice is to attach to the parties' insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

Notification Requirement. The parties insurance specifications in addition to specifying that the additional insured endorsement be a specific ISO form might also provide that the ISO form is to be manuscripted to include within it advance notification to the additional insured of cancellation of the named insured's policy due to nonpayment of premium or due to other events. Additionally, it could specify advance notification of non-renewal or material changes to the policy. See **Forms H-I** form separate endorsements to the policy. The following is sample notification language for the notification to be added on the face of the additional endorsement form.

> In the event of cancellation or material change that reduces or restricts the insurance afforded to the additional insured, we agree to mail prior written notice of cancellation or material change to the additional insureds listed in the Schedule to the following address, or such other address for the additional insured of which we have been notified by the additional insured, at least ___ days before the effective date of the cancellation or material change, and in the case of material change the notification shall provide to the additional insured a copy of the material changes:
>
> Additional insured's name and address: _____ .

The additional insured should also require in its insurance specifications that the named insured's insurer recognize that the coverage afforded by the additional insured endorsement to the additional insured is primary and noncontributory, meaning that any other insurance of the additional insured shall be deemed to be excess to the coverage afforded by additional insured endorsement.

> Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the additional insured named above, whether primary, excess, or contingent, and even though such other insurance provides that it is primary insurance; and we will not seek contribution from any other insurance of the additional insured.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# CONTRACTUAL LIABILITY LIMITATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The definition of "insured contract" in the DEFINITIONS Section is replaced by the following:

"Insured contract" means:

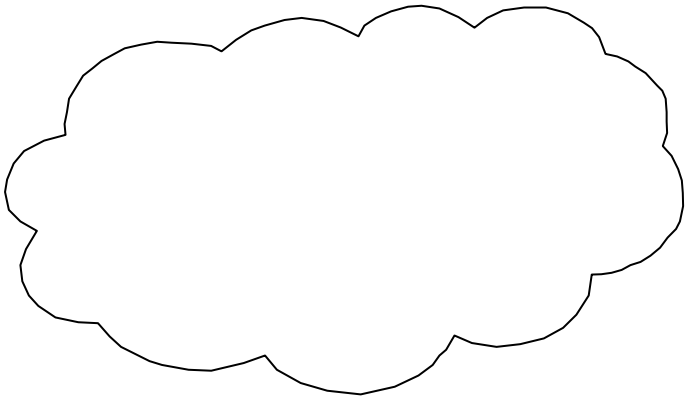
**a.** A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

**b.** A sidetrack agreement;

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

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

**e.** An elevator maintenance agreement.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph **9.** of the **Definitions** Section is replaced by the following:

**9.** "Insured contract" means:

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

**b.** A sidetrack agreement;

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

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

**e.** An elevator maintenance agreement;

**f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, 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.

Paragraph **f.** does not include that part of any contract or agreement:

**(1)** That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

**(2)** That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

**(a)** Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

**(b)** Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

**(3)** Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities

# COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS PAGE

POLICY NO. EFFECTIVE DATE _____/_____/_____ ☐ "X" If Supplemental Declarations is Attached

NAMED INSURED

DESCRIPTION OF PREMISES

| Prem. No. | Bldg. No. | Location, Construction And Occupancy |
|---|---|---|

COVERAGES PROVIDED Insurance At The Described Premises Applies Only For Coverages For Which A Limit Of Insurance Is Shown

| Prem. No. | Bldg. No. | Coverage | Limit Of Insurance | Covered Causes Of Loss | Coinsurance* | Rates |
|---|---|---|---|---|---|---|

*If Extra Expense Coverage, Limits On Loss Payment Applicable Only When Entries Are Made In The Schedule Below

OPTIONAL COVERAGES

| Prem. No. | Bldg. No. | Agreed Value Expiration Date | Agreed Value Cov. | Agreed Value Amount | Replacement Cost (X) Building | Replacement Cost (X) Pers. Prop. | Replacement Cost (X) Including "Stock" |
|---|---|---|---|---|---|---|---|

| Inflation Guard (%) Bldg. | Inflation Guard (%) Pers. Prop. | *Monthly Limit Of Indemnity (Fraction) | Maximum Period Of Indemnity (X) | *Extended Period Of Indemnity (Days) |
|---|---|---|---|---|

*Applies to Business Income Only

MORTGAGEHOLDERS

| Prem. No. | Bldg. No. | Mortgageholder Name And Mailing Address |
|---|---|---|

DEDUCTIBLE

$500. Exceptions:

FORMS APPLICABLE

To All Coverages:

To Specific Premises/Coverages:

| Prem. No. | Bldg. No. | Coverages | Form Number |
|---|---|---|---|

# COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

**A. Cancellation**

**1.** The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

**2.** We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

**a.** 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or

**b.** 30 days before the effective date of cancellation if we cancel for any other reason.

**3.** We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

**4.** Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

**5.** If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

**6.** If notice is mailed, proof of mailing will be sufficient proof of notice.

**B. Changes**

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declaration is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

**C. Examination of Your Books and Records**

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

**D. Inspections and Surveys**

**1.** We have the right to:

a. Make inspections and surveys at this time;

b. Give you reports on the conditions we find; and

c. Recommend changes.

**2.** We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

**a.** Are safe or healthful; or

**b.** Comply with laws, regulations, codes and standards.

**3.** Paragraphs **1.** and **2.** of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

**4.** Paragraph **2.** of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

**E. Premiums**

The first Named Insured shown in the Declarations:

**1.** Is responsible for the payment of all premiums; and

**2.** Will be the payee for any return premiums we pay.

**F. Transfer of Your Rights and Duties Under This Policy**

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

# COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

**A. CONCEALMENT, MISREPRESENTATION OR FRAUD**

This coverage part is void in any case of fraud by you as it relates to this coverage part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

**1.** This coverage part;

**2.** The covered property

**3.** Your interest in the covered property; or

**4.** A claim under this coverage part.

**B. CONTROL OF PROPERTY**

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this coverage part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

**C. INSURANCE UNDER TWO OR MORE COVERAGES**

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

**D. LEGAL ACTION AGAINST US**

No one may bring a legal action against us under this coverage part unless:

**1.** There has been full compliance with all of the terms of this coverage part; and

**2.** The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

**E. LIBERALIZATION**

If we adopt any revision that would broaden the coverage under this coverage part without additional premium within 45 days prior to or during the policy period, the broadened coverage will immediately apply to this coverage part.

**F. NO BENEFIT TO BALLEE**

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

**G. OTHER INSURANCE**

**1.** You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this coverage part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable limit of insurance under this coverage part bears to the limits of insurance of all insurance covering on the same basis.

**2.** If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable limit of insurance.

**H. POLICY PERIOD, COVERAGE TERRITORY**

Under this coverage part:

**1.** We cover loss or damage commencing:

**a.** During the policy period shown in the declarations; and

**b.** Within the coverage territory.

**2.** The coverage territory is:

**a.** The United States of America (including its territories and possessions);

**b.** Puerto Rico; and

**c.** Canada.

## I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this coverage part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

**1.** Prior to a loss to your covered property or covered income.

**2.** After a loss to your covered property or covered income only if, at time of loss, that party is one of the following:

**a.** Someone insured by this insurance;

**b.** A business firm:

**(1)** Owned or controlled by you; or

**(2)** That owns or controls you; or

**c.** Your tenant.

This will not restrict your insurance.

# BUILDING AND PERSONAL PROPERTY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **H.,** Definitions.

**A. Coverage**

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

**1. Covered Property**

Covered Property, as used in this Coverage Part, means the type of property described in this section, **A.1.**, and limited in **A.2.**, Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

**a.** Building, meaning the building or structure described in the Declarations, including:

**(1)** Completed additions;

**(2)** Fixtures, including outdoor fixtures;

**(3)** Permanently installed:

**(a)** Machinery and

**(b)** Equipment;

**(4)** Personal property owned by you that is used to maintain or service the building or structure or its premises, including:

**(a)** Fire-extinguishing equipment;

**(b)** Outdoor furniture;

**(c)** Floor coverings; and

**(d)** Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

**(5)** If not covered by other insurance:

**(a)** Additions under construction, alterations and repairs to the building or structure;

**(b)** Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

**b. Your Business Personal Property** located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property – Separation Of Coverage form:

**(1)** Furniture and fixtures;

**(2)** Machinery and equipment;

**(3)** "Stock";

**(4)** All other personal property owned by you and used in your business;

**(5)** Labor, materials or services furnished or arranged by you on personal property of others;

**(6)** Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:

**(a)** Made a part of the building or structure you occupy but do not own; and

**(b)** You acquired or made at your expense but cannot legally remove;

**(7)** Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property Of Others.

**c. Personal Property Of Others** that is:

**(1)** In your care, custody or control; and

**(2)** Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

**2. Property Not Covered**

Covered Property does not include:

**a.** Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;

**b.** Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;

**c.** Automobiles held for sale;

**d.** Bridges, roadways, walks, patios or other paved surfaces;

**e.** Contraband, or property in the course of illegal transportation or trade;

**f.** The cost of excavations, grading, backfilling or filling;

**g.** Foundations of buildings, structures, machinery or boilers if their foundations are below:

**(1)** The lowest basement floor; or

**(2)** The surface of the ground, if there is no basement;

**h.** Land (including land on which the property is located), water, growing crops or lawns;

**i.** Personal property while airborne or waterborne;

**j.** Bulkheads, pilings, piers, wharves or docks;

**k.** Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;

**l.** Retaining walls that are not part of a building;

**m.** Underground pipes, flues or drains;

**n.** Electronic data, except as provided under the Additional Coverage, Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, **n.,** does not apply to your "stock" of prepackaged software;

**o.** The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems. Refer to the Coverage Extension for Valuable Papers And Records (Other Than Electronic Data) for limited coverage for valuable papers and records other than those which exist as electronic data;

**p.** Vehicles or self-propelled machines (including aircraft or watercraft) that:

**(1)** Are licensed for use on public roads; or

**(2)** Are operated principally away from the described premises.

This paragraph does not apply to:

**(a)** Vehicles or self-propelled machines or autos you manufacture, process or warehouse;

**(b)** Vehicles or self-propelled machines, other than autos, you hold for sale;

**(c)** Rowboats or canoes out of water at the described premises; or

**(d)** Trailers, but only to the extent provided for in the Coverage Extension for Non-owned Detached Trailers;

**q.** The following property while outside of buildings:

**(1)** Grain, hay, straw or other crops;

**(2)** Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, trees, shrubs or plants (other than "stock" of trees, shrubs or plants), all except as provided in the Coverage Extensions.

**3. Covered Causes Of Loss**

See applicable Causes Of Loss Form as shown in the Declarations.

**4. Additional Coverages**

**a. Debris Removal**

**(1)** Subject to Paragraphs **(3)** and **(4),** we will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

**(2)** Debris Removal does not apply to costs to:

**(a)** Extract "pollutants" from land or water; or

**(b)** Remove, restore or replace polluted land or water.

**(3)** Subject to the exceptions in Paragraph **(4),** the following provisions apply:

**(a)** The most we will pay for the total of direct physical loss or damage plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained loss or damage.

**(b)** Subject to **(a)** above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

**(4)** We will pay up to an additional $10,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:

**(a)** The total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage.

**(b)** The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

Therefore, if **(4)(a)** and/or **(4)(b)** apply, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus $10,000.

**(5) Examples**

The following examples assume that there is no Coinsurance penalty.

**EXAMPLE #1**

| | |
|---|---|
| Limit of Insurance: | $90,000 |
| Amount of Deductible: | $ 500 |
| Amount of Loss: | $50,000 |
| Amount of Loss Payable: | $49,500 |
| | ($50,000 – $500) |
| Debris Removal Expense: | $10,000 |
| Debris Removal Expense Payable: | $10,000 |
| ($10,000 is 20% of $50,000.) | |

The debris removal expense is less than 25% of the sum of the loss payable plus the deductible. The sum of the loss payable and the debris removal expense ($49,500 + $10,000 = $59,500) is less than the Limit of Insurance. Therefore the full amount of debris removal expense is payable in accordance with the terms of Paragraph **(3).**

**EXAMPLE #2**

| | |
|---|---|
| Limit of Insurance: | $90,000 |
| Amount of Deductible: | $ 500 |
| Amount of Loss: | $80,000 |
| Amount of Loss Payable: | $79,500 |
| | ($80,000 – $500) |
| Debris Removal Expense: | $30,000 |
| Debris Removal Expense Payable | |
| Basic Amount: | $10,500 |
| Additional Amount: | $10,000 |

The basic amount payable for debris removal expense under the terms of Paragraph **(3)** is calculated as follows: $80,000 ($79,500 + $500) x .25 = $20,000; capped at $10,500. The cap applies because the sum of the loss payable ($79,500) and the basic amount payable for debris removal expense ($10,500) cannot exceed the Limit of Insurance ($90,000).

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph **(4),** because the debris removal expense ($30,000) exceeds 25% of the loss payable plus the deductible ($30,000 is 37.5% of $80,000), and because the sum of the loss payable and debris removal expense ($79,500 + $30,000 = $109,500) would exceed the Limit of Insurance ($90,000). The additional amount of covered debris removal expense is $10,000, the maximum payable under Paragraph **(4)**. Thus the total payable for debris removal expense in this example is $20,500; $9,500 of the debris removal expense is not covered.

**b. Preservation Of Property**

If it is necessary to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss or damage to that property:

**(1)** While it is being moved or while temporarily stored at another location; and

**(2)** Only if the loss or damage occurs within 30 days after the property is first moved.

**c. Fire Department Service Charge**

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to $1,000, unless a higher limit is shown in the Declarations, for your liability for fire department service charges:

**(1)** Assumed by contract or agreement prior to loss; or

**(2)** Required by local ordinance.

No Deductible applies to this Additional Coverage.

**d.** Pollutant Clean-up And Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

**e. Increased Cost Of Construction**

**(1)** This Additional Coverage applies only to buildings to which the Replacement Cost Optional Coverage applies.

**(2)** In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in **e.(3)** through **e.(9)** of this Additional Coverage.

**(3)** The ordinance or law referred to in **e.(2)** of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of loss.

**(4)** Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:

**(a)** You were required to comply with before the loss, even when the building was undamaged; and

**(b)** You failed to comply with.

**(5)** Under this Additional Coverage, we will not pay for:

**(a)** The enforcement of any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or

**(b)** Any costs associated with the enforcement of an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.

**(6)** The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is $10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which

applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of: $10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

**(7)** With respect to this Additional Coverage:

**(a)** We will not pay for the Increased Cost of Construction:

**(i)** Until the property is actually repaired or replaced, at the same or another premises; and

**(ii)** Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.

**(b)** If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of **e.(6)** of this Additional Coverage, is the increased cost of construction at the same premises.

**(c)** If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of **e.(6)** of this Additional Coverage, is the increased cost of construction at the new premises.

**(8)** This Additional Coverage is not subject to the terms of the Ordinance Or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.

**(9)** The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increased cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage, as stated in **e.(6)** of this Additional Coverage, is not subject to such limitation.

**f. Electronic Data**

**(1)** Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data.

**(2)** Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.

**(3)** The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage, Electronic Data, subject to the following:

**(a)** If the Causes Of Loss – Special Form applies, coverage under this Additional Coverage, Electronic Data, is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.

**(b)** If the Causes Of Loss – Broad Form applies,

coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that form.

**(c)** If the Causes Of Loss Form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.

**(d)** The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.

**(4)** The most we will pay under this Additional Coverage, Electronic Data, is $2,500 for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

**5. Coverage Extensions**

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

If a Coinsurance percentage of 80% or more, or a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

**a. Newly Acquired Or Constructed Property**

**(1) Buildings**

If this policy covers Building, you may extend that insurance to apply to:

**(a)** Your new buildings while being built on the described premises; and

**(b)** Buildings you acquire at locations, other than the described premises, intended for:

**(i)** Similar use as the building described in the Declarations; or

**(ii)** Use as a warehouse.

The most we will pay for loss or damage under this Extension is $250,000 at each building.

**(2) Your Business Personal Property**

**(a)** If this policy covers Your Business Personal Property, you may extend that insurance to apply to:

**(i)** Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions;

**(ii)** Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations; or

**(iii)** Business personal property that you newly acquire, located at the described premises.

The most we will pay for loss or damage under this Extension is $100,000 at each building.

**(b)** This Extension does not apply to:

**(i)** Personal property of others that is temporarily in your possession in the course of installing or performing work on such property; or

**(ii)** Personal property of others that is temporarily in your possession in the course of your manufacturing or wholesaling activities.

**(3) Period Of Coverage**

With respect to insurance on or at each newly acquired or constructed property, coverage will end when any of the following first occurs:

**(a)** This policy expires;

**(b)** 30 days expire after you acquire the property or begin construction of that part of the building that would qualify as covered property; or

**(c)** You report values to us.

We will charge you additional premium for values reported from the date you acquire the property or begin construction of that part of the building that would qualify as covered property.

**b. Personal Effects And Property Of Others**

You may extend the insurance that applies to Your Business Personal Property to apply to:

**(1)** Personal effects owned by you, your officers, your partners or members, your managers or your employees. This Extension does not apply to loss or damage by theft.

**(2)** Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is $2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

**c. Valuable Papers And Records (Other Than Electronic Data)**

**(1)** You may extend the insurance that applies to Your Business Personal Property to apply to the cost to replace or restore the lost information on valuable papers and records for which duplicates do not exist. But this Extension does not apply to valuable papers and records which exist as electronic data. Electronic data has the meaning described under Property Not Covered, Electronic Data.

**(2)** If the Causes Of Loss – Special Form applies, coverage under this Extension is limited to the "specified causes of loss" as defined in that form, and Collapse as set forth in that form.

**(3)** If the Causes Of Loss – Broad Form applies, coverage under this Extension includes Collapse as set forth in that form.

**(4)** Under this Extension, the most we will pay to replace or restore the lost information is $2,500 at each described premises, unless a higher limit is shown in the Declarations. Such amount is additional insurance. We will also pay for the cost of blank material for reproducing the records (whether or not duplicates exist), and (when there is a duplicate) for the cost of labor to transcribe or copy the records. The costs of blank material and labor are subject to the applicable Limit of Insurance on Your Business Personal Property and therefore coverage of such costs is not additional insurance.

**d. Property Off-premises**

**(1)** You may extend the insurance provided by this Coverage Form to apply to your Covered Property while it is away from the described premises, if it is:

**(a)** Temporarily at a location you do not own, lease or operate;

**(b)** In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or

**(c)** At any fair, trade show or exhibition.

**(2)** This Extension does not apply to property:

**(a)** In or on a vehicle; or

**(b)** In the care, custody or control of your salespersons, unless the property is in such care, custody or control at a fair, trade show or exhibition.

**(3)** The most we will pay for loss or damage under this Extension is $10,000.

**e. Outdoor Property**

You may extend the insurance provided by this Coverage Form to apply to your outdoor fences, radio and television antennas (including satellite dishes), trees, shrubs and plants (other than "stock" of trees, shrubs or plants), including debris removal expense, caused by or resulting from any of the following causes of loss if they are Covered Causes of Loss:

**(1)** Fire;

**(2)** Lightning;

**(3)** Explosion;

**(4)** Riot or Civil Commotion; or

**(5)** Aircraft.

The most we will pay for loss or damage under this Extension is $1,000, but not more than $250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence.

**f. Non-owned Detached Trailers**

**(1)** You may extend the insurance that applies to Your Business Personal Property to apply to loss or damage to trailers that you do not own, provided that:

**(a)** The trailer is used in your business;

**(b)** The trailer is in your care, custody or control at the premises described in the Declarations; and

**(c)** You have a contractual responsibility to pay for loss or damage to the trailer.

**(2)** We will not pay for any loss or damage that occurs:

**(a)** While the trailer is attached to any motor vehicle or motorized conveyance, whether or not the motor vehicle or motorized conveyance is in motion;

**(b)** During hitching or unhitching operations, or when a trailer becomes accidentally unhitched from a motor vehicle or motorized conveyance.

**(3)** The most we will pay for loss or damage under this Extension is $5,000, unless a higher limit is shown in the Declarations.

**(4)** This insurance is excess over the amount due (whether you can collect on it or not) from any other insurance covering such property.

Each of these Extensions is additional insurance unless otherwise indicated. The Additional Condition, Coinsurance, does not apply to these Extensions.

**B. Exclusions And Limitations**

See applicable Causes Of Loss Form as shown in the Declarations.

**C. Limits Of Insurance**

The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is $2,500 per sign in any one occurrence.

The amounts of insurance stated in the following Additional Coverages apply in accordance with the terms of such coverages and are separate from the Limit(s) of Insurance shown in the Declarations for any other coverage:

**1.** Fire Department Service Charge;

**2.** Pollutant Clean-up And Removal;

**3.** Increased Cost Of Construction; and

**4.** Electronic Data.

Payments under the Preservation Of Property Additional Coverage will not increase the applicable Limit of Insurance.

**D. Deductible**

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss, and will pay the resulting amount or the Limit of Insurance, whichever is less.

When the occurrence involves loss to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

**EXAMPLE #1**

(This example assumes there is no Coinsurance penalty.)

| | |
|---|---|
| Deductible: | $ 250 |
| Limit of Insurance – Building #1: | $60,000 |
| Limit of Insurance – Building #2: | $80,000 |
| Loss to Building #1: | $60,100 |
| Loss to Building #2: | $90,000 |

The amount of loss to Building #1 ($60,100) is less than the sum ($60,250) of the Limit of Insurance applicable to Building #1 plus the Deductible.

The Deductible will be subtracted from the amount of loss in calculating the loss payable for Building #1:

$ 60,100
– 250
$ 59,850 Loss Payable – Building #1

The Deductible applies once per occurrence and therefore is not subtracted in determining the amount of loss payable for Building #2. Loss payable for Building #2 is the Limit of Insurance of $80,000.

Total amount of loss payable:

$59,850 + $80,000 = $139,850

**EXAMPLE #2**

(This example, too, assumes there is no Coinsurance penalty.)

The Deductible and Limits of Insurance are the same as those in Example #1.

| | |
|---|---|
| Loss to Building #1: | $70,000 |
| (Exceeds Limit of Insurance plus Deductible) | |
| Loss to Building #2: | $90,000 |
| (Exceeds Limit of Insurance plus Deductible) | |
| Loss Payable – Building #1: | $60,000 |
| (Limit of Insurance) | |
| Loss Payable – Building #2: | $80,000 |
| (Limit of Insurance) | |
| Total amount of loss payable: | $140,000 |

**E. Loss Conditions**

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

**1. Abandonment**

There can be no abandonment of any property to us.

**2. Appraisal**

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

**a.** Pay its chosen appraiser; and

**b.** Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

**3. Duties In The Event Of Loss Or Damage**

**a.** You must see that the following are done in the event of loss or damage to Covered Property:

**(1)** Notify the police if a law may have been broken.

**(2)** Give us prompt notice of the loss or damage. Include a description of the property involved.

**(3)** As soon as possible, give us a description of how, when and where the loss or damage occurred.

**(4)** Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

**(5)** At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.

**(6)** As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

**(7)** Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

**(8)** Cooperate with us in the investigation or settlement of the claim.

**b.** We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

**4. Loss Payment**

**a.** In the event of loss or damage covered by this Coverage Form, at our option, we will either:

**(1)** Pay the value of lost or damaged property;

**(2)** Pay the cost of repairing or replacing the lost or damaged property, subject to **b.** below;

**(3)** Take all or any part of the property at an agreed or appraised value; or

**(4)** Repair, rebuild or replace the property with other property of like kind and quality, subject to **b.** below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

**b.** The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

**c.** We will give notice of our intentions within 30 days after we receive the sworn proof of loss.

**d.** We will not pay you more than your financial interest in the Covered Property.

**e.** We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.

**f.** We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

**g.** We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:

**(1)** We have reached agreement with you on the amount of loss; or

**(2)** An appraisal award has been made.

**h.** A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the loss to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the loss to the party wall, subject to all applicable policy provisions including Limits of Insurance, the Valuation and Coinsurance Conditions and all other provisions of this Loss Payment Condition. Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of the Transfer Of Rights Of Recovery Against Others To Us Condition in this policy.

**5. Recovered Property**

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

**6. Vacancy**

**a. Description Of Terms**

**(1)** As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in **(1)(a)** and **(1)(b)** below:

**(a)** When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

**(b)** When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

**(i)** Rented to a lessee or sub-lessee and used by the lessee or sublessee to conduct its customary operations; and/or

**(ii)** Used by the building owner to conduct customary operations.

**(2)** Buildings under construction or renovation are not considered vacant.

**b. Vacancy Provisions**

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

**(1)** We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

**(a)** Vandalism;

**(b)** Sprinkler leakage, unless you have protected the system against freezing;

**(c)** Building glass breakage;

**(d)** Water damage;

**(e)** Theft; or

**(f)** Attempted theft.

**(2)** With respect to Covered Causes of Loss other than those listed in **b.(1)(a)** through **b.(1)(f)** above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

**7. Valuation**

We will determine the value of Covered Property in the event of loss or damage as follows:

**a.** At actual cash value as of the time of loss or damage, except as provided in **b., c., d.** and **e.** below.

**b.** If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is $2,500 or less, we will pay the cost of building repairs or replacement.

The cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

However, the following property will be valued at the actual cash value even when attached to the building:

**(1)** Awnings or floor coverings;

**(2)** Appliances for refrigerating, ventilating, cooking, dishwashing or laundering; or

**(3)** Outdoor equipment or furniture.

**c.** "Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.

**d.** Glass at the cost of replacement with safety-glazing material if required by law.

**e.** Tenants' Improvements and Betterments at:

**(1)** Actual cash value of the lost or damaged property if you make repairs promptly.

**(2)** A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:

**(a)** Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and

**(b)** Divide the amount determined in **(a)** above by the number of days from the installation of improvements to the expiration of the lease.

If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.

**(3)** Nothing if others pay for repairs or replacement.

## F. Additional Conditions

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

### 1. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies.

**a.** We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.

Instead, we will determine the most we will pay using the following steps:

**(1)** Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;

**(2)** Divide the Limit of Insurance of the property by the figure determined in Step **(1);**

**(3)** Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step **(2);** and

**(4)** Subtract the deductible from the figure determined in Step **(3).**

We will pay the amount determined in Step **(4)** or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

**EXAMPLE #1 (UNDERINSURANCE)**

| | | |
|---|---|---|
| When: | The value of the property is: | $250,000 |
| | The Coinsurance percentage for it is: | 80% |
| | The Limit of Insurance for it is: | $100,000 |
| | The Deductible is: | $ 250 |
| | The amount of loss is: | $ 40,000 |

Step **(1):** $250,000 x 80% = $200,000
(the minimum amount of insurance to meet your Coinsurance requirements)

Step **(2):** $100,000 ÷ $200,000 = .50

Step **(3):** $40,000 x .50 = $20,000

Step **(4):** $20,000 – $250 = $19,750

We will pay no more than $19,750. The remaining $20,250 is not covered.

**EXAMPLE #2 (ADEQUATE INSURANCE)**

| | | |
|---|---|---|
| When: | The value of the property is: | $ 250,000 |
| | The Coinsurance percentage for it is: | 80% |
| | The Limit of Insurance for it is: | $ 200,000 |
| | The Deductible is: | $ 250 |
| | The amount of loss is: | $ 40,000 |

The minimum amount of insurance to meet your Coinsurance requirement is $200,000 ($250,000 x 80%). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than $39,750 ($40,000 amount of loss minus the deductible of $250).

**b.** If one Limit of Insurance applies to two or more separate items, this condition will apply to the total of all property to which the limit applies.

**EXAMPLE #3**

When: The value of the property is:

| | |
|---|---|
| Building at Location #1: | $ 75,000 |
| Building at Location #2: | $ 100,000 |
| Personal Property at Location #2: | $ 75,000 |
| | $ 250,000 |
| The Coinsurance percentage for it is: | 90% |
| The Limit of Insurance for Buildings and Personal Property at Locations #1 and #2 is: | $ 180,000 |
| The Deductible is: | $ 1,000 |
| The amount of loss is: | |
| Building at Location #2: | $ 30,000 |
| Personal Property at Location #2: | $ 20,000 |
| | $ 50,000 |

Step **(1):** $250,000 x 90% = $225,000
(the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)
Step **(2):** $180,000 ÷ $225,000 = .80
Step **(3):** $50,000 x .80 = $40,000
Step **(4):** $40,000 – $1,000 = $39,000

We will pay no more than $39,000. The remaining $11,000 is not covered.

**2. Mortgageholders**

**a.** The term mortgageholder includes trustee.

**b.** We will pay for covered loss of or damage to buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear.

**c.** The mortgageholder has the right to receive loss payment even if the mortgageholder has started foreclosure or similar action on the building or structure.

**d.** If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgageholder:

**(1)** Pays any premium due under this Coverage Part at our request if you have failed to do so;

**(2)** Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

**(3)** Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

All of the terms of this Coverage Part will then apply directly to the mortgageholder.

**e.** If we pay the mortgageholder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

**(1)** The mortgageholder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and

**(2)** The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired.

At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

**f.** If we cancel this policy, we will give written notice to the mortgageholder at least:

**(1)** 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or

**(2)** 30 days before the effective date of cancellation if we cancel for any other reason.

**g.** If we elect not to renew this policy, we will give written notice to the mortgageholder at least 10 days before the expiration date of this policy.

**G. Optional Coverages**

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

**1. Agreed Value**

**a.** The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for loss of or damage to that property than the proportion that the Limit of Insurance under this Coverage Part for the property bears to the Agreed Value shown for it in the Declarations.

**b.** If the expiration date for this Optional Coverage shown in the Declarations is not extended, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage expires.

**c.** The terms of this Optional Coverage apply only to loss or damage that occurs:

**(1)** On or after the effective date of this Optional Coverage; and

**(2)** Before the Agreed Value expiration date shown in the Declarations or the policy expiration date, whichever occurs first.

**2. Inflation Guard**

**a.** The Limit of Insurance for property to which this Optional Coverage applied will automatically increase by the annual percentage shown in the Declarations.

**b.** The amount of increase will be:

**(1)** The Limit of Insurance that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Limit of Insurance, times

**(2)** The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times

**(3)** The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365.

**EXAMPLE**

| | | |
|---|---|---|
| If: | The applicable Limit of Insurance is: | $100,000 |
| | The annual percentage increase is: | 8% |
| | The number of days since the beginning of the policy year (or last policy change) is: | 146 |
| | The amount of increase is: $100,000 x .08 x 146 ÷ 365 = | $ 3,200 |

**3. Replacement Cost**

**a.** Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Valuation Loss Condition of this Coverage Form.

**b.** This Optional Coverage does not apply to:

**(1)** Personal property of others;

**(2)** Contents of a residence;

**(3)** Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-abrac; or

**(4)** "Stock", unless the Including "Stock" option is shown in the Declarations.

Under the terms of this Replacement Cost Optional Coverage, tenants' improvements and betterments are not considered to be the personal property of others.

**c.** You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.

**d.** We will not pay on a replacement cost basis for any loss or damage:

**(1)** Until the lost or damaged property is actually repaired or replaced; and

**(2)** Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

With respect to tenants' improvements and betterments, the following also apply:

**(3)** If the conditions in **d.(1)** and **d.(2)** above are not met, the value of tenants' improvements and betterments will be determined as a proportion of your original cost, as set forth in the Valuation Loss Condition of this Coverage Form; and

**(4)** We will not pay for loss or damage to tenants' improvements and betterments if others pay for repairs or replacement.

**e.** We will not pay more for loss or damage on a replacement cost basis than the least of **(1), (2)** or **(3),** subject to **f.** below:

**(1)** The Limit of Insurance applicable to the lost or damaged property;

**(2)** The cost to replace the lost or damaged property with other property:

**(a)** Of comparable material and quality; and

**(b)** Used for the same purpose; or

**(3)** The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in **e.(2)** above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

**f.** The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

**4. Extension Of Replacement Cost To Personal Property Of Others**

**a.** If the Replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable. If the Declarations show this Extension as applicable, then Paragraph **3.b.(1)** of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.

**b.** With respect to replacement cost on the personal property of others, the following limitation applies:

If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item(s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

**H. Definitions**

**1.** "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

**2.** "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

**3.** "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUILDERS' RISK COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY

**SCHEDULE**

| | | | | | |
|---|---|---|---|---|---|
| **Premises Number:** | | **Building Number:** | | **Applicable Clause (Enter C., D., E., or F.):** | |
| **Description Of Property:**<br><br>**Loss Payee Name:**<br><br>**Loss Payee Address:** | | | | | |
| **Premises Number:** | | **Building Number:** | | **Applicable Clause (Enter C., D., E., or F.):** | |
| **Description Of Property:**<br><br>**Loss Payee Name:**<br><br>**Loss Payee Address:** | | | | | |
| **Premises Number:** | | **Building Number:** | | **Applicable Clause (Enter C., D., E., or F.):** | |
| **Description Of Property:**<br><br>**Loss Payee Name:**<br><br>**Loss Payee Address:** | | | | | |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. | | | | | |

**A.** When this endorsement is attached to the Standard Property Policy **CP 00 99,** the term Coverage Part in this endorsement is replaced by the term Policy.

**B.** Nothing in this endorsement increases the applicable Limit of Insurance. We will not pay any Loss Payee more than their financial interest in the Covered Property, and we will not pay more than the applicable Limit of Insurance on the Covered Property.

The following is added to the **Loss Payment** Loss Condition, as indicated in the Declarations or in the Schedule:

**C. Loss Payable Clause**

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

**1.** Adjust losses with you; and

**2.** Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

**D. Lender's Loss Payable Clause**

**1.** The Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:

**a.** Warehouse receipts;

**b.** A contract for deed;

**c.** Bills of lading;

**d.** Financing statements; or

**e.** Mortgages, deeds of trust, or security agreements.

**2.** For Covered Property in which both you and a Loss Payee have an insurable interest:

**a.** We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.

**b.** The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.

**c.** If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:

**(1)** Pays any premium due under this Coverage Part at our request if you have failed to do so;

**(2)** Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

**(3)** Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee.

**d.** If we pay the Loss Payee for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

**(1)** The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and

**(2)** The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

**3.** If we cancel this policy, we will give written notice to the Loss Payee at least:

**a.** 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or

**b.** 30 days before the effective date of cancellation if we cancel for any other reason.

**4.** If we elect not to renew this policy, we will give written notice to the Loss Payee at least 10 days before the expiration date of this policy.

**E. Contract Of Sale Clause**

**1.** The Loss Payee shown in the Schedule or in the Declarations is a person or organization you have entered a contract with for the sale of Covered Property.

**2.** For Covered Property in which both you and the Loss Payee have an insurable interest we will:

**a.** Adjust losses with you; and

**b.** Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

**3.** The following is added to the **Other Insurance** Condition:

For Covered Property that is the subject of a contract of sale, the word "you" includes the Loss Payee.

**F. Building Owner Loss Payable Clause**

**1.** The Loss Payee shown in the Schedule or in the Declarations is the owner of the described building, in which you are a tenant.

**2.** We will adjust losses to the described building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner's property.

**3.** We will adjust losses to tenants' improvements and betterments with you, unless the lease provides otherwise.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

# ADDITIONAL INSURED – BUILDING OWNER

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

**SCHEDULE**

| | | | |
|---|---|---|---|
| **Premises Number:** | | **Building Number:** | |
| **Building Description:**<br><br>**Building Owner Name:**<br><br>**Building Owner Address:** | | | |
| **Premises Number:** | | **Building Number:** | |
| **Building Description:**<br><br>**Building Owner Name:**<br><br>**Building Owner Address:** | | | |
| **Premises Number:** | | **Building Number:** | |
| **Building Description:**<br><br>**Building Owner Name:**<br><br>**Building Owner Address:** | | | |
| Information required to complete this Schedule, if not shown above, will be shown in the Declarations. | | | |

The building owner identified in this endorsement is a Named Insured, but only with respect to the coverage provided under this Coverage Part or Policy for direct physical loss or damage to the building(s) described in the Schedule.

**ADDITIONAL EXPENSE – SOFT COST COVERAGE**

This endorsement modifies insurance under the following:

**BUILDERS' RISK COVERAGE FORM**

A. The following is added to Additional Coverages:

1. We cover your additional expenses as indicated below which result from a delay in the completion of the project beyond the date it would have been completed had no loss occurred. The delay must be due to direct physical loss to Covered Property and be caused by or result from a Covered Cause of Loss. We will pay covered expenses when they are incurred.

   a. Coverage and Limits of Insurance
   Coverage under this endorsement applies only to those items indicated by an "x" in the box below:

   ☒ **Rents and Rental Value Coverage.** We will pay the actual "loss" of net rental income which results from delay beyond the projected completion date. But we will not pay more than the reduction in rental income less charges and expenses which do not necessarily continue.

   ☒ **Additional Advertising and Promotional Expenses.** We will pay the necessary additional advertising and promotional expenses which you incur you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Insurance Expense.** We will pay the necessary additional insurance expense for extending or renewing coverage which you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Interest Expense.** We will pay the cost of necessary additional interest on money you borrow to finance construction or repair which you incur you incur as a result of a delay in the completion date of the Project. This expense may arise from obligations to the interim financier or from cancellation of the permanent financing arrangements, including loan closing costs and remarketing of bonds.

   ☒ **Additional Leasing/Commission Expenses.** We will pay the necessary additional costs of renegotiating and pre-leasing of the Project, including costs of additional commissions incurred upon renegotiating leases that result from the renegotiation of leases which you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Legal and Accounting Fees.** We will pay the necessary additional legal and accounting fees you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional License, Building Inspection and Permit Fees.** We will pay the necessary additional license, building inspection and permit fees which you incur as a result of a delay in the completion date of the Project.
   ☒ **Additional Real Estate Taxes/Ground Rents or Other Assessments.** We will pay the necessary additional real estate taxes, ground rents or other assessments which you incur you incur as a result of a delay in the completion date of the Project.

   ☒ **Additional Professional Fees.** We will pay the necessary additional architectural, engineering, and other professional fees which you incur you incur as a result of a delay in the completion date of the Project.

☒ **Additional Project Administration Expense/General Overhead.** We will pay the necessary additional project administration expenses which you incur you incur as a result of a delay in the completion date of the Project.

The most we will pay for "loss" for all coverages provided by this endorsement is $_____ in any one occurrence.

[1] Declarations Page. Attached in the **Appendix** is an example of a property policy's Declaration Page, the standard form ISO CP DS 11 10 00 Commercial Property Coverage Part Declarations Page. Liability policies have a similar Declarations Page on which is listed the named insured and list of amendments and endorsements to the policy.

[2] The Standard CGL Policy. There are many forms of "liability policy", addressing different types of risks, e.g., automobile liability, workers injury liability. Subject to specified exclusions, commercial general liability (called in this article "***CGL***") policies indemnify the insured from liability for "bodily injury", "property damage", and "personal and advertising injury", as those terms are defined in the CGL policy.

The Insurance Services Office, Inc., a trade organization of over 3,000 insurance companies, is commonly known as "***ISO***". ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "standard form". ISO designates each of its forms with a designation composed of four elements. For example, the additional insured endorsement form, CG 20 26 07 04 Additional Insured – Designated Person or Organization, attached in the **Appendix**, is composed of the following components: "***CG***": the CG prefix identifies this form as part of ISO's commercial general liability form series introduced in 1986. Prior to this time, ISO designated this series as GL in connection with its comprehensive general liability forms. Beginning in 1986, ISO renamed its general liability forms "commercial general liability" out of concern that the word "comprehensive" was misleading. The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsement are grouped according to their function. In this case the number "***20***" refers to group 20, which are all of the endorsements that confer additional insured status on particular persons or organizations. The second set of numbers identifies this endorsement within its group—this case it indicates which additional insured endorsement is being referenced; endorsement "***26***" within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this endorsement is titled "Additional Insured – Designated Person or Organization". The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. In the referenced endorsement, the edition date is "***07 04***" or July 2004. November 1985 is the initial date of all ISO forms for the "CG" system.

[3] Automatic Insureds. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations.

[4] The Standard Additional Insured Endorsements to the Standard CGL Policy. Attached in the **Appendix** are some of the most frequently issued standard additional insured endorsement forms: ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors; ISO CG 20 11 01 96 Additional Insured – Managers or Lessor of Premises; ISO CG 20 18 11 85 Additional Insured – Mortgagee, Assignee, or Receiver; and ISO CG 20 26 07 04 Additional Insured – Designated Person or Organization.

[5] Limitations to Coverage Contained in Additional Insured Endorsements to Liability Policies. ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization was revised effective July, 2004 to limit coverage of the additional insured to liability for bodily injury, property damage 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 location(s) designated above. (italics added for emphasis by authors.)

Prior to the 2004 revision, the CG 20 10 provided the additional insured coverage for bodily injury, property damage and advertising injury

*arising out of* your ongoing operations performed for that insured. (Italics added for emphasis by authors.)

The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured. The 2004 revision requires that there be a causal connection between the acts or omissions of the named insured and the liability. Note, however, that the revised language does not specifically address whether covered liability can arise out of the sole negligence or contributory negligence of the additional insured. It only mentions the partial or sole involvement of the named insured.

[6] Exclusions to Coverage Contained in Additional Insured Endorsements to Liability Policies. For example, ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization contains two exclusions from coverage, B.1 an exclusion for bodily injury and property damage occurring after work has been completed and B.2 an exclusion for bodily injury and property damage occurring after that portion of "your work" out of which the injury or damage arises has been put to its intended use.

[7] Common Error – Specifying "Additional Named Insured". There is no CGL party classification called an "additional named insured". The origin of this erroneous specification likely arose when named insured status carried with it a right to be notified of policy cancellation. As noted in a later discussion in this article, the standard CGL policy provides for cancellation notification to be sent to the "first named insured" and does not require cancellation notice to be sent to all named insureds, automatic insureds, blanket additional insureds or other additional insureds. Coupling the term "named" with additional insured can have unintended consequences. Named insureds have the following responsibilities under a CGL policy, which additional insureds do not: named insureds have more stringent reporting requirements; certain policy exclusions apply to named insureds that do not apply to additional insureds; and named insureds are to reimburse the amount of any deductible paid by the insurer.

[8] Additional Insured Endorsements to Property Policies. Attached in the **Appendix** is a standard endorsement form, the ISO CP 12 18 06 07, by which a lessor may be designated as a loss payee on a tenant's commercial property policy insuring the building and tenant improvements and betterments.

[9] Certificates of Insurance. ADDITIONAL INSURED BOOK, Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance, pp. 345 (International Risk Management Institute, Inc. www.IRMI.com 5th ed. 2004); CONTRACTUAL RISK TRANSFER (International Risk Management Institute, Inc. 2010) §15A-D Insurance Certificates; and 2 INSURANCE CLAIMS AND DISPUTES (5th ed. 2010) § 6:37A. Certificates of Insurance.

[10] ACORD Forms. ACORD, Agency-Company Operations Research and Development. ACORD is a trade organization of insurance companies, brokers and agencies. In 1976 it introduced the first standardized certificate of insurance for use by its members. The ACORD certificates of insurance have become the industry standard and are commonly specified by parties in their insurance specifications. www.acord.org. See the **Appendix** for samples of the ACORD 24, 25, 28 and 75.

| ACORD Form | Form Title | Binding Evidence |
|---|---|---|
| ACORD 24 (2009/09) | Certificate of Property Insurance (minimal info) | No |
| ACORD 25 (2010/05) | Certificate of Liability Insurance (minimal info) | No |
| ACORD 27 (2003/10) (rev. 2006/07) | Evidence of Property Insurance (residential and personal lines – no longer available for commercial) | No |
| ACORD 28 (2003/10) | Evidence of Commercial Property Insurance (significant info) | Yes (obsolete) |
| ACORD 28 (2009/12) | Evidence of Commercial Property Insurance (significant info) | No |
| ACORD 75 (2010/04) | Insurance Binder (minimal info on property & liability) | Yes |

[11] Misplaced Reliance on ACORD Forms. W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

Sample of Cases Finding Reliance Unreasonable.

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

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

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

Illinois. *National Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (1st Dist. 1992) and judgment aff'd in part, rev'd in part, 632 N.E.2d 1039 (1994) court held the fact that certificate of liability insurance did not contain notation that the additional insured endorsement did not cover the additional insured's negligence did not obligate the insurer to cover the additional insured's negligence; the certificate was issued "for information only"; *Lezak & Levy Wholesale Meats v. Illinois Employers Ins. Co.*, 460 N.E.2d 475 (Ill. 1984) the certificate's disclaimer notice protected the insurer from claims by a meat packing company falling within the exclusion in the cold storage company's liability policy for loss caused by failure of refrigeration equipment.

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

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

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

Washington. *Postlewait Construction, Inc. v. Great American Ins. Co.,* 106 Wash.2d 96, 720 P.2d 805 (1986) finding that an erroneous certificate of insurance listing lessor and certificate holder as an insured did not create a cause of action by lessor against insurer for breach of an insurance contract.

[12] "Certificates" or "Evidences". The ACORD 24 and 25 are "certificates" of insurance. The ACORD 27 and 28 are "evidences" of insurance. The basic difference between a "certificate" and an "evidence" of insurance is certificates are addressed to a "certificate holder" and an "evidence" is addressed to the owner of an "additional interest". A certificate holder may not be an insured under the policy or policies listed in the certificate. The owner of an additional interest to which an evidence of insurance is provided owns an interest in the proceeds of the policy or policies listed in the evidence of insurance.

[13] Certificate/Evidence Not a Contract. The September, 2009 revision to the ACORD 25 Certificate of Liability Insurance moved this disclaimer, which formerly appeared on the back of the ACORD 25, to a new disclaimer box on the front of the certificate immediately below this disclaimer box.

[14] Notice Regarding Additional Insureds and Subrogation Waivers. The September, 2009 revision to the ACORD Certificate of Liability Insurance also moved from the back of the certificate to a new disclosure box on the front of the certificate immediately following the first disclosure box the following notice:

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

[15] Certifying Language. The only difference in this disclaimer in the ACORD certificates is that the ACORD 24 Certificate of Property Insurance introduces the disclaimer with "This is to certify that".

[16] Authorized Representatives That Are Soliciting Agents or Independent Brokers as Opposed to Recording Agents or Employees of the Insurer.

See cases cited at Footnote 13; also see discussion at 43 AM. JUR.2d (2 ed. 2010) Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW (2010) §11:171Certificates of Insurance – Generally; COUCH ON INSURANCE (3 ed. 2010) §§ 27:20 Act of Soliciting Agent – Insufficient to Justify Reformation; 45:1 Brokers Versus Agents; Definitions and Distinctions; 48:61 Soliciting and Collecting Agents; 48:62 Recording Agents; 27 TEX. PRAC., Consumer Rights and Remedies § 5.5 Insurance Agents (3d ed. 2009); and TEX. PRAC. GUIDE, Insurance Litigation § 6:4 Insurer's Vicarious Liability for Agent's Conduct – Agency – "Who are "Agents"/ What Constitutes "Acting as Agent"?; § 6:10 Insurer's Vicarious Liability for Agent's Conduct – Authority of Agent – Historical Distinction Between "Recording" and "Soliciting" Agents (2009).

Alabama. *Certificate Issued by Tenant's Broker*: In *United States Pipe and Foundry Co. v. United States Fidelity and Guaranty Co.*, 505 F.2d 88 (5th Cir. 1974) the court stated

> A certificate issued to a lessor indicating that liability insurance has been acquired by the lessee does not constitute a contract between the lessor and the insurer…. The certificate simply provides a method whereby a lessee can show that he has complied with a lease provision requiring that the insurance be obtained by the lessee. The provision regarding notification in the event of cancellation is a mere promise, unsupported by any consideration.

Illinois. In *S.L.A. Property Management v. Angelina Casualty Co.*, 856 F.2d 69 (8th Cir. 1988) the court held that a certificate, which listed a different person as the additional insured, did not control over the actual listing on the policy endorsement.

Michigan. *Certificate Issued by Subcontractor's Broker*: In *West American Ins. Co. v. Meridian Mut. Ins. Co.*, 583 N.W.2d 548, 549 (Mich. 1998) in a case of first impression for Michigan, the court held that a liability insurer owed no duty to advise a contractor about inaccuracies in, or subsequent changes to, a certificate of insurance issued to the contractor by the subcontractor's agent. The policy had been cancelled two weeks before effective date of the certificate.

New York. *Certificate Issued by Tenant's Broker*: In *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 303 A.D.2d 245 (N.Y. – 1st Dept. 2003) the court held that a tenant's insurance broker, which issued certificate of insurance to a landlord which erroneously stated that the tenant's insurance policy, naming landlord as an additional insured, contained rental coverage insurance for landlord's benefit, had no liability to landlord on ground that the broker and the landlord had no contractual relationship, privity, requisite to the imposition of liability for negligent misrepresentation; in *McKenzie v. New Jersey Transit Rail Operations*, 772 F.Supp. 146, 149 (S.D.N.Y. 1991) another New York court held that an independent broker has no authority to bind an insurer; and in *First Financial Ins. Co. v. Jetco Contracting Corp.*, 2000 WL 1013945 (S.D.N.Y. 2000) a New York court noted that the issuance of certificate by a general contractor's broker did not favor finding authority in the broker to bind the insurer as "a broker works for and is a representative of the insured, not the insurer".

Wisconsin. *Mercado v. Mitchell*, 264 N.W.2d 532 (Wis. 1978).

[17] Estoppel. Acts of agent stopping insurer:

Florida. *Criterion Leasing Group v. Gulf Coast Plastering & Drywall*, 582 So.2d 799 (Fla. App. 1991) under doctrine of promissory estoppel, insurer was prevented from denying workers' compensation coverage to subcontractor's employee when subcontractor was named as a "coinsured" on certificate of insurance.

Georgia. *Sumitomo Marine & Fire Insurance Co. of America v. Southern Guaranty Ins. Co. and Columbia Nat. Ins. Co.*, 337 F. Supp.2d 1339 (U.S.D.C. No. Dist. Ga. 2004). Certificate holder who relied on a certificate confirming additional insured status was still able to obtain both defense and indemnity in a case where the certificate stated the certificate holder was an additional insured, but no additional insured endorsement was issued (certificate reads: "certificate holder is named additional insured as its interest may appear").

West Virginia. The court in *Marlin v. Wetzel County Bd. of Education*, 569 S.E.2d 462 (W. Va. 2002) held an insurance agent's misrepresentation estopped the insurer from denying additional insured coverage as the court found that the certificate holder "reasonably" relied on the certificate to its detriment.

[18] "Authorized Representatives" That Are Recording Agents or Employees of the Insurer. Annot., *Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks Not Covered by its Terms or Expressly Excluded Therefrom*, 1 A.L.R.3d 1139, 1144 (1965).

Colorado. *Struble v. American Family Ins.*, 172 P.3d 950, 956 (Co. 2007).

Illinois. In *Dumenric v. Union Oil Co. of California*, 606 N.E.2d 230 (1st Dist. 1992) the court held the insurer was bound by recitations in a certificate issued by broker rather than the insured's agent in a case where the insurer created the appearance of authority in the broker.

Iowa. In *Weitz Co., LLC v. Travelers Cas. & Sur. Co. of America*, 266 F. Supp.2d 984 (S.D. Iowa 2003) a summary judgment against an additional insured was precluded by a certificate issued by an insurer that identified the contractor as an additional insured.

New York. *Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd.,* 776 N.Y.S.2d 257 (1st Dep't 2004); *Lenox v. Excelsior Ins. Co.*, 255 A.D.2d 644, 645, 679 N.Y.S.2d 749, 750 (1998); *Zurich Ins. Co. v. White*, 221 A.D.2d 700, 633 N.Y.S.2d 415 (1995) the court held that an insurer was estopped from asserting deductibles to liability coverage when the certificate of insurance represented there were no deductibles; *Bucon, Inc. v. Pennsylvania Mfg. Assoc. Ins. Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (1989) the found that an insurer was estopped from denying the existence of the plaintiff's coverage after the insurer issued a certificate of insurance identifying the plaintiff as an "additional insured"; the certificate's disclaimer language could not disclaim misrepresentation by the insurer that plaintiff was an additional insured.

North Dakota. *Blackburn, Nickels & Smith, Inc. v. National Farmers Union Property and Cas. Co.*, 482 N.W.2d 600, 603 (N. D. 1992).

[19] Cases Finding Certificate Created Coverage. In an Illinois state court decision, *International Amphitheatre Co. v. Vanguard Underwriters Ins. Co.*, 532 N.E.2d 493 (1998), the court held that the additional insured was covered for its negligence despite an exclusion in the named insured's policy because the certificate of insurance did not contain the exclusion and did not contain an ACORD-type disclaimer. *Also see J. M. Corbett Co. v. Ins. Co. of North America*, 43 Ill. App.3d 624, 357 N.E.2d 125 (1976) a court held that a certificate without an ACORD-type disclaimer was found to provide additional insured coverage even though the policy did not); and *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7th Cir. 1993) where a court held that a certificate became the policy when no policy existed.

[20] Certificate May Be Policy Equivalent if Policy Issued after Certificate. *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7th Cir. 1993).

[21] Additional Insured Treatise. THE ADDITIONAL INSURED BOOK 5th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 349-50 (International Risk Management Institute, Inc. www.IRMI.com 2004).

[22] Comment on Additional Insured Endorsements. Richard H. Gluckman, *et al*, *Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation*, 21 CONSTRUCTION LAWYER 30, 33-34 (Winter 2001).

[23] Advice. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE § 242:33 (3d ed. 1997). Similar advice is found at Malecki on Insurance, *Certificates of Insurance – When a Court Says Certificates Cannot Be "Reasonably" Relied On, Certified Copies Of Policies May Be The Answer* (August 2007 Vol. 16, No. 10 pp. 1-4).

[24] Certificate is Not Insurance. In *Kermanshah Oriental Rugs v. GO*, 47 A.D.3d 438 (N.Y. 2008) the court held that a certificate of insurance was merely evidence of a carrier's intent to provide coverage, but not a contract to insure the designated party; nor was the certificate conclusive proof, standing alone, that a contract for insurance existed; the claim that insurance was never procured remained unchallenged. In *Griffin v. DaVinci Development, LLC*, 845 N.Y.S.2d 97 (N.Y. 2007) the court found no privity of contract with insurer or insurance broker and no right to claim third party beneficiary status by premises owner in a suit against an insurer and contractor's insurance broker for broker having issued multiple certificates of insurance showing owner as an additional insured when in fact no insurance was subsequently issued.

[25] Policy Issued Subsequent to Certificate or Binder May Eliminate Expected Coverage. In *American Country Ins. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (Ill. 1998) a general contractor, which as designated as an additional insured on subcontractor's insurance certificate, was bound by policy exclusions and conditions in a subsequently issued policy and additional insured endorsement limiting coverage to strict liability. The endorsement read: "This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured". The court noted "Just because there are fewer strict liability claims than negligence claims does not make the coverage illusory".

[26] Deficient Insurance Specifications in Contract. *Public Administrator of Bronx County v. Equitable Life Assurance Society,* 198 A.D.2d 105, 603 N.Y.S.2d 830 (N.Y. 1993).

[27] No Insurance Specifications in Contract. Also see discussion of this issue at Malecki on Insurance, *Certificates of Insurance – When a Court Says Certificates Cannot Be "Reasonably" Relied On, Certified Copies Of Policies May Be The Answer* (August 2007 Vol. 16, No. 10 pp. 1-4); and THE ADDITIONAL INSURED BOOK 5th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance, p. 345 (International Risk Management Institute, Inc. www.IRMI.com 2004).

[28] Read the Policy. *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill. App.3d 543, 572 N.E.2d 1112 (Ill. 1991).

[29] Endorsement Gutted Expected Coverage. *See National Union Fire Ins. Co. v. Glenview Park District*, 230 Ill. App.3d 578, 594 N.E.2d 1300 (Ill. 1992), *aff'd in part, rev'd in part*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994) additional insured park district was bound by endorsement that excluded coverage for the additional insured's own negligence; certificate of insurance contained standard ACORD disclaimers, but did not indicate the limitation on coverage; and *Liberty Mut. Fire Ins. v. Statewide*, 352 F.3d 1098, 1099 (Ill. 2003) coverage not illusory under policy that limited additional insured's coverage to strict liability, despite status as additional insured on certificate. But see the holding of the Texas Supreme Court in *ATOFINA Petrochemicals, Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) in which the court noted that a similarly worded endorsement, if so interpreted, would be illusory.

[30] Indemnity Insurance. Indemnity insurance is provided by the standard CGL policy. This coverage is provided by creating an "exception" to an "exclusion" from coverage. Paragraph 2 to Section I Coverages sets out the following exclusions to the coverage created in Paragraph 1:

> 2. Exclusions
> This insurance does not apply to:…
> b. Contractual Liability
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
> …
> (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonably attorneys fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

"Insured contract" is defined in Paragraph 9 of Section V Definitions of the standard CGL policy as follows:

> 9. "Insured contract" means:
> a. A contract for lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
> b. A sidetrack agreement;
> c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad.
> d. An obligation, as required by ordinance, to indemnity a municipality, except in connection with work for a municipality;
> e. An elevator maintenance agreement;
> **f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
> Paragraph f. does not include that part of any contract or agreement: (1) That indemnifies a railroad…; (2) That indemnifies an architect, engineer or surveyor …; or (3) Under which the insured, if an architect, engineer or surveyor, assumes ….

[31] ISO CG 21 39. A copy of the ISO CG 21 39 is contained in the **Appendix** to this article.

[32] Insured Contracts. See standard CGL policy's definition of an "insured contract" set out in Footnote 36. Paragraph f excepts from the exclusion of coverage for insured contracts a written contract by which the named insured assumes the tort liability of another by contract entered into prior to the occurrence of the bodily injury (*i.e.*, an intermediate or broad form indemnity). Adding this endorsement to a standard liability policy leaves coverage intact for the other 5 types of insured contracts (a-e).

[33] ISO CG 24 26. A copy of the ISO CG 24 26 is contained in the **Appendix** to this article.

[34] Benefits of Standard Certificates. CONTRACTUAL RISK TRANSFER (International Risk Management Institute, Inc. 2010) XV.C.4 Insurance Certificates – Benefits of Standard Certificates.

[35] ISO CG 21 39. A copy of the ISO CG 21 39 is contained in the **Appendix** to this article.

[36] Waiver.

Tenant Permitted to Commence Build-Out Without Proof of Insurance. In *G Four Bellingham, LLC v. Oishii Teriyaki, Inc.*, 142 Wash. App. 1034, ___ P.2d ___ (Ct. App. 2008) the court was unwilling to evict a tenant for failing to provide its landlord with a certificate of insurance showing $2 million in liability coverage as required by the lease. At trial the tenant established that it had $1 million in liability insurance and that landlord had permitted it to undertake tenant improvement build-out without requiring the certificate. Landlord did not raise lack of an insurance certificate and insufficient limits until after filing suit to evict the tenant. The eviction suit was filed in part based on another prospective tenant executing a back-up lease for the space. The court of appeals stated:

> This suggests that [the owner] did not consider the insurance shortfall a serious issue during the tenancy or initial stages of the unlawful detainer action. The trial court's determinations that the one million dollars in insurance was adequate and that the shortfall was not a material breach are supported by substantial evidence. The [trial] court did not err in finding the insurance issue insufficient to justify eviction.

Contract Permitted to Commence Work Without Proof of Insurance. In *Geier v. Hamer Enters., Inc.*, 589 N.E.2d 711 (App. Ct. 1st Dist. 1992) the court held that the owner waived the construction contract's insurance requirement by permitting the contractor to begin work without insurance verification. Also, see *JCM Constr. Co., Inc. v. Orleans Parish Sch. Bd.*, 663 So.2d 429 (La. Ct. App. 4th Cir. 1995) where a contractor was found not to be liable for a vandal callused fire loss even though it failed to furnish contractually required builder's risk insurance on grounds that owner accepted a certificate which did not list builder's risk insurance; *Vakilzadeh Enters., Inc. v. Housing Authority of the City of DeKalb,* 635 S.E.2d 825 (Ga. Ct. App. 2006); and *Whalen v. K-Mart Corp.*, 519 N.E.2d 991 (Ill. App. Ct. 1st Dist. 1988).

[37] ISO CG 21 39. A copy of the ISO CG 21 39 is contained in the **Appendix** to this article.

[38] Potential Lost Benefit – Ground to Disregard Disclaimers. A court may under some circumstances determine to disregard certificate disclaimers. *Bucon, Inc. v. Pennsylvania Mfg. Ass'n Ins. Co.*, 547 N.Y.S.2d 925 (N.Y. App. Div. 3d Dep't 1989); and see discussion in this article of cases where the standard certificate is executed by a "recording" agent or by an employee of the insurer.

[39] Potential Lost Benefit – Recovery Against Agent – Mistake; Fraud. *Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc.*, 795 N.Y.S.2d 619 (N.Y. App. Div. 2d Dep't 2005)-contract with agent breached; *Handley v. Providence Mut. Fire Ins. Co.*, 898 A.2d 492 (N.H. 2006)-fraud issue.

[40] Notice of Cancellation. 17 WILLISTON ON CONTRACTS § 49:130 Notice of Cancellation (4th ed. 2010).

[41] First Named Insured. ISO's CG 00 01 CGL Section IV Commercial General Liability Conditions provides

> 9. When We Do Not Renew
> If we decide not to renew this Coverage Part, we will mail or deliver to the *first Named Insured* shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date. If notice is mailed, proof of mailing will be sufficient proof of notice.

[42] Statutorily Required Cancellation Notice.

California. A court in California has interpreted California statutes requiring cancellation notice to "the named insured" as requiring that cancellation notice be sent to an additional insured by finding that the word "the" means "each". The court then

determined that the designation of a landlord as an additional insured in an additional insured endorsement made the landlord a named insured on the policy. *Kotlar v. Hartford Fire Ins. Co.*, 83 Cal. App.4th 116 (2000). The court rejected Hartford's argument that "the" referred to the party that paid for the policy and is singular and only refers to a single person or entity in contrast to "a". The court's finding that an additional insured is a named insured on the policy is contrary to common industry understanding of who is a "named insured" on a CGL policy.

New York. The court in *Wainwright v. Charlew Constr. Co.,* 302 A.D.2d 784, 755 N.Y.S.2d 751 (N.Y. Ad 3rd Dep't 2003) noted that the New York Insurance Code only provided for notice of cancellation to be sent to "the first named insured" and therefore did not need to be sent to other insureds under a policy.

[43] No Statutorily-Required Cancellation Notice. Alabama, Delaware, District of Columbia, Hawaii and West Virginia.

[44] Notice of Cancellation Endorsements to CGL and Umbrella Policy. In the **Appendix** are an ISO CG 02 05 12 04 Texas Changes – Amendment of Cancellation Provisions or Coverage Changes and an ISO CU 24 19 12 01 Lessor – Additional Insured and Loss Payee. The first form is an example of a state-filed form where the insurer contracts to give its CGL policy additional insured a certain number of days advance notice of cancellation or material change in policy terms. Notice that this form does not address cancellation of the CGL policy by the named insured. The second form is an example of an endorsement to an umbrella liability policy where the umbrella insurance carrier commits to give an additional insured lessor notice of cancellation of the umbrella policy, whether occurring due to cancellation by the insurer or by the named insured lessee.

[45] ACORD's Explanation for Revisions. ACORD offers the following reasoning for changing the Cancellation notice language:

> The word "endeavor" was removed because policy cancellation provisions generally don't use the word "endeavor". Only a policy can obligate an insurer to provide notice of cancellation. Unless a policy's provisions explicitly provide for notice to a party also listed as the certificate holder on the certificate of insurance, the insurer is not obliged to notify that party.
>
> The new language is compliant with state insurance regulatory requirements in all states, and specifically responsive to bulletins issued last year by the South Dakota Insurance Department. Since the form is national, not state-specific and is filed where required, only the version of the form containing the new language should be used in all states.
>
> Certificates of Insurance may be viewed as a summarized reflection of an insurance policy and are only informational. The policy is the definitive source for its provisions, not the certificate. If any party in addition to the first named insured desires a copy of a cancellation notice in the event the policy is cancelled, that party should be expressly endorsed onto the policy as a cancellation notice recipient. *www.acord.org*.

[46] "Endeavor". *Wainwright v. Charlew Constr. Co.,* 302 A.D.2d 784, 755 N.Y.S.2d 751 (N.Y. Ad 3rd Dep't 2003). *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882 (10th Cir. 1991) "The language in the notice of cancelation clause appears to be phrased so as to avoid creating any firm obligation to give notice". Also see *Nazami v. Patrons Mutual Ins. Co.*, 910 A.2d 209 (Conn. 2006).

[47] Non-ISO Policies – Notice of Cancellation. Some insurers' policies provide that the insurer will give notice of cancellation to all insureds, thus including notice to additional insureds in addition to the first named insured.

[48] ISO CP 12 18 Loss Payable Provisions. See ISO CP 12 18 06 07 Loss Payable Provisions, Optional Clause F Building Owner Loss Payable Clause in the **Appendix**.

[49] Treatises. See 17 AM. JUR. PROOF OF FACTS2d 103 "Vacancy" of Insured Commercial Structure (2010); Annot., *What constitutes "vacant or unoccupied" dwelling within exclusionary provision of fire insurance policy* 47 A.L.R.3d 398 (1973); 45 C.J.S. Insurance § 999 Change in Use or Occupancy and §1002 What Constitutes Vacancy or Nonoccupancy.

[50] Vacancy Clause in Standard Commercial Property Policy. See Paragraph E.6 on page 13 of standard commercial property policy form in the **Appendix**.

[51] Customary Operations. The court in *Langill v. Vermont Mut. Ins. Co*., 268 F.3d 46 (Ma. 2001) found that a property is vacant even though the owner sporadically spent time refurbishing an unoccupied rental property vacated by tenants three months prior to arson loss; in *Catalina Enterprises v. Hartford Ins.*, 67 F.3d 63, 64 (Md. 1995) the court held that an industrial storage warehouse was considered to be vacant even though scaffolding and a hand truck had remained in the premises after

tenant vacated five months previously; and in *Schmidt v. Underwriters*, 82 P.3d 649 (Or. 2004) the court held that an intent to commence residency in premises that had been vacant for more than 60 days at time of fire was not sufficient to constitute use.

[52] Buildings under Construction or Renovation. See Paragraph E.6a(2) on page 13 of standard commercial property policy form in the **Appendix**. The court in *Myers v. Merrimack Mut. Fire Ins.*, 601 F.Supp. 620, 621 (Il. 1985), judgment aff'd, 788 F.2d 468 (7th Cir. 1986) interpreted a fire policy that contained a construction exception to the vacancy clause as not excepting repairs or renovations but only the construction of something which did not previously exist or the creation of something new.

[53] Vandalism Exclusion. In *Sorema N. Am. Reinsurance Co. v. Johnson*, 574 S.E.2d 377 (Ga. 2002) the vandalism exception applied preventing a mortgagee, which acquired property through foreclosure, from coverage for damages caused post foreclosure by vandals; the fact that the former mortgagor's equipment was left on premises did not mean that the property was not vacant; in *MDW Enterprises v. CNA Ins. Co.*, 772 N.Y.S.2d 79 (NY 2004) the vandalism exception did not exclude coverage for arson destroying a building that had been vacant for the preceding 15 months while pending sale.

[54] Vacancy Clause in Some Policies Provides for Cancellation of Coverage. Also see *Carolina Ins. Co. of Wilmington, N.C. v. St. Charles*, 98 S.W.2d 1088 (Tenn. 1936); and *Republic Ins. Co. v. Dickson*, 69 S.W.2d 599 (Tex. Civ. App. – Beaumont 1938, writ dism'd).

[55] Policy Issued With Insurer's Knowledge of Vacancy or Partial Vacancy. In *730 J&J LLC v. Twin City Fire*, 740 N.Y.S.2d 119 (NY 2002) the policy did not cover fire loss; insured breached warranty to keep vacant 3rd and 4th floors of building locked and secured.

[56] Notice Provisions. *National Mut. Fire Ins. Co. v. Duncan*, 98 P. 634 (Colo. 1908); *Corey v. Niagra Fire Ins. Co.*, 47 S.W.2d 955 (Ky. 1932); *Hartford Fire Ins. Co. v. Merrimack Mut. Fire Ins. Co.*, 457 A.2d 410 (Me. 1983); *Lumbermens Mut. Cas. Co. v. Thomas*, 555 S.2d 67 (Miss. 1989).

[57] Occupancy Clause. In *Grannemann v. Columbia Ins. Gro.*, 931 S.W.2d 502, 504 (Mo. 1996) a city's order prohibiting occupancy due to disrepair of property did not render insured's performance impossible and excuse compliance with occupancy requirement in property policy and vandalism loss was excluded from coverage of loss on premises that was unoccupied for over four months prior to loss; in *Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527, 529 (NE 2004) sporadic presence of insureds and their workers to make renovations did not rise to the level of residency; and in *Young v. Linden*, 719 N.E.2d 556 (Oh. 1998) a court held that a property policy did not cover loss due to erroneous demolition of an unoccupied tavern by a contractor hired by the purchaser at a tax lien foreclosure sale, which was subsequently set aside, as vacancy clause in the policy provided for no coverage for any loss or damage occurring if building became "vacant" *or* "unoccupied" for more than specified periods (presence of $100,000 worth of personal property in tavern did not constitute "occupancy").

[58] Policy Not the Binder Governs. *Gas Kwick Inc. v. United Pacific*, 58 F.3d 1536, 1538 (Fl. 1995).

[59] Standard Homeowners Property Policies. See MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 5th Ed. HO 00 03 10. The standard homeowners policy defines covered property as being a "***residence premises***", a place where the insured resides. To be a "residence premises" some courts have held that the insured must have resided at the premises and intent to reside at the premises at some indefinite future date may not be sufficient. In *Varsalona v. Auto-Owners Ins. Co.,*, 637 S.E.2d 64 (Ga. 2006) the court found that the premises were not the insured's residence premises as the insured had never lived there or used it as their residence; and despite their intent originally to reside in the house when they purchased it, a change in the insureds' plans led to occupancy by the insureds' daughter; in *Schmidt v. Underwriters,* 82 P.3d 649, 650 (Or. 2004) the court found it was not sufficient that son intended to live at the insured house in order for it not to be vacant at the time of a fire; *also see Marshall v. Tower Ins. Co. NY*, 845 S.2d 90, 91, 44 A.D.3d 1014 (NY 2007) where the court found there was no coverage as the insured never resided at the premises. Vacancy issues occur frequently in the context of estates. In *Estate of Higgins v. Wash. Mut.*, 838 A.2d 778 (Pa. 2003) the court held that a 60-day vacancy clause precluded coverage where policy was renewed by named insured's estate after she died.

Tenants. Some courts have extended coverage to a rental by the insured after an initial occupancy by the insured. In *Dixon v. First Premium Ins.*, 934 So.2d 134, 139 (La. 2006) the court held that the homeowners policy covered a fire loss to the insured's home, which occurred after the insured moved out of the home but while it was rented to a tenant.

Remodeling. Some policies provide that periods of remodeling do not constitute vacancy. In *Garcia v. Farmers* Ins. *Exchange*, 122 F.Supp.2d 926, 928 (Il. 2000) the court held that the policy covered fire damage to a house purchased by the insured with the intention of remodeling, where trespassers broke in, lit a candle, and fell asleep, even if the insured misrepresented to the agent that the house would be occupied; the vacancy provision did not preclude coverage; the fire was accidental, and not the result of

vandalism. However, the court in *Mortgage Bancorp. v. New Hampshire Ins.*, 677 P.2d 726, 727 (Or. 1984) held that where remodeling had ceased due to unavailability of financing, 30 day vacancy exclusion operated to avoid coverage for vandalism.

[60] Arson and Other Excluded Perils. If the dwelling is vacant for longer than 60 days, most homeowners policies also will exclude losses ensuing from vandalism and malicious mischief. There is a split in jurisdictions as to whether arson is classified as vandalism: courts holding arson is a form of vandalism – *Costabile v. Metro Prop. & Cas. Co.* 193 F.Supp.2d 465, 474 (Ct. 2002), *Estes v. St. Paul Fire & Marine Ins. Co.*, F.Supp.2d 1227, 1229 (Ks. 1999), and *Battishill v. Farmers Alliance*, 127 P.3d 1111, 1112 (N.M. 2006); courts holding arson is not a form of vandalism – *Mutual Fire v. Ackerman*, 872 A.2d 110, 116 (Md. 2005).

Other Policy Provisions May Be the Source of Exclusion in the Case of Vacancy. For example, if the heat is not maintained at the premises, losses due to freezing of pipes may be excluded. *Kent v. Farm Bur. Mut. Ins. of Id.*, 906 P.2d 146, 147 (Id. 1995) insured lienholders of a vacant home could not recover for damage caused by a ruptured pipe due to cold weather under accidental discharge or overflow peril.

[61] "Unoccupied" But Not "Vacant". Vacancy is a fact question. In *Andrews v. USAA*, 837 So.2d 1190, 1191 (Fl. 2003) it was determined that the lower court abused its discretion in directing a verdict on whether a dwelling was vacant where different conclusions could be drawn from the evidence. A determination of vacancy may not be avoided if the premises do not convey the appearance of residential living. The court in *Venneman v. Badger Mutual Ins. Co.*, 334 F.3d 772, 773(Minn. 2003) held that an insured's sporadic nighttime visits and remodeling projects did not qualify the property for the "being constructed" exception to the vacancy exclusion under the homeowners policy in question; *also see Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527, 529 (Ne. 2004) and in *Barlow v. Allstate Texas Lloyd*, 214 Fed. Appx. 435, 436 (Tex. 2007) the court found that a fire loss not was covered in a case where the insured had moved out of residence and removed all furniture.

See Hungelmann, INSURANCE FOR DUMMIES (www.JackHungelmann.com) for good advice on how to avoid a "vacant" home. Hungelmann advises his readers that a home may be considered vacant unless it has kitchen appliances, a table and chairs, at least one bed on which to sleep, and somewhere to sit. He further advises his readers to furnish a home with rental furniture to avoid it being classified as vacant. Further mentions that the owner's real estate agent could "stage" the home with furnishings. Further advice from Hungelmann is for the home owner to reduce the risk of a major loss from break-ins, fires, smoke damage and water damage from frozen pipes in an unoccupied home by installing a central alarm monitored for burglar and fire/smoke and to add an optional temperature sensor to protect the pipes from freezing. Depending on policy terms, a dwelling may not be vacant, if it is occupied by a caretaker or a month-to-month tenant.

[62] Limitations of Recovery to Actual Cash Value. If an insurer is willing to insure a vacant home, it may limit coverage to actual cash value as opposed to replacement cost.

[63] Additions, Alterations and Repairs. See definition of Covered Property at Paragraph A.1.a.(5)(a) on page 1 of the standard commercial property policy form in the **Appendix**.

[64] Newly Acquired or Constructed Property. See Coverage Extension at Paragraph A.5.a on page 1 of the standard commercial property policy form in the **Appendix**.

[65] Inland Marine Policies. Inland marine policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods need to address the exposure. Construction is recognized as a special exposure. A commonly used inland marine policy for builder's risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

[66] List All Parties as Named Insureds. *Employers' Fire Ins. Co. v. Behunin*, 275 F.Supp. 399 (Colo. 1967); *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. 1974); *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313 (Ind. 1989); and *Tri-State Ins. Co. v. Commercial Group W., LLC*, 698 N.W.2d 483 (N.D. 2005).

[67] "As Their Interests May Appear" ("***ATIMA***") and Similar Phrases and Circumstances May Raise a Subrogation Issue. *Paul Tishman Co., Inc. v. Carney & Del Guidice, Inc.*, 320 N.Y.S.2d 396 (1971), aff'd 359 N.Y.S.2d 561 (N.Y. 1974); *Turner Constr. v. John B. Kelly Co.*, 442 F.Supp. 551 (Penn. 1976) subrogation against named insured subcontractor permitted even though policy contained a waiver of subrogation endorsement. *But see St. Paul Fire & Marine Ins. Co. v. F. D. Sprinkler, Inc.*, No. 119 021/06, N.Y. Sup. Ct. (Aug. 2009) where the court rejected the insurer's argument that ATIMA language limited the insurable interest of the sprinkler subcontractor to its work as opposed to the consequential damages to 21 floors of the building which arose out of an accidental discharge from a sprinkler head located in a temporary bathroom on the 21st floor.

[68] Builder's Risk Insurance. A comprehensive discussion of builder's risk insurance specifications, coverages, exclusions, limits and sublimits is beyond the scope of this article.

[69] Extended Coverage Endorsements to Builder's Risk Policy. 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW (2010) §§ 11:116 Builder's risk soft cost coverage; Delayed completion and force majeure insurance.

[70] Soft Cost Endorsement. See the manuscripted Additional Expense – Soft Cost Coverage Endorsement in the **Appendix**.

[71] AIA General Conditions Waive Consequential Damages for Delayed Performance Except for Liquidated Damages. AIA Document A201-General Conditions of Contract § 15.1.6 provides that the Owner waives claims against the Contractor for consequential damages as follows:

> § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES
>
> The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes
>
> .1 damages incurred by the Owner for rental expenses, for loss of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
> .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
>
> This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

The AIA Performance Bond form addressed in the next footnote still reflects the pre-1997/2007 revisions to the A201 General Conditions. The AIA 312-1984 reflects the pre-1997 language of the A201 which did not include a mutual waiver of consequential damages. ConsensusDOCS Document 200 at ¶ 6.3 excludes from the effect of the mutual waiver of consequential damages, both liquidated damages (as does the AIA A201) and insurance (which is not excluded in the A201). ConsensusDOCS 200 provides:

> The Owner and the Contractor agree to waive all claims against each other for any consequential damages that may arise out of or related to this Agreement. The Owner agrees to waive damages including but not limited to the Owner's loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, or loss of reputation. The Contractor agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity or loss of reputation.

[72] AIA Performance Bond Covers Delay Damages. AIA Document A312-1984 Performance Bond expressly allows recover of delay damages attributable to the contractor's default or the surety's delayed completion under a takeover agreement. A312 provides:

> 6. … To the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the Construction Contract, the Surety is obligated without duplication for:
>
> 6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
> 6.2 Additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and
> 6.3 Liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

*See* Langley and Houston, *Liability of the Performance Bond Surety for Damages (Under Contract of Suretyship)*, THE LAW OF PERFORMANCE BONDS 431 (2d. 2009); Sheak, *Liquidated Damages and the Surety: Are They Defensible?*, 9 CONSTR. LAW 19 (Ap. 1989); Douglas, McCarthy and Nelson, *Delay Claims Against the Surety*, 17 CONSTR. LAW 4 (July 1997).

Finding Coverage. *Prudence Co. v. Fidelity & Deposit Co. of Maryland,* 297 U.S. 198, 56 S. Ct. 387, 80 L. Ed. 581 (1936), amended on other grounds, 298 U.S. 642, 56 S. Ct. 935, 80 L. Ed. 1374 (1936) surety liable to dual obligee for delay damages; *Mason v. City of* Albertville, 158 So.2d 924 (Ala. 1963) liquidated damages; *Amerson v. Christman,* 68 Cal. Rptr. 378 (3d Dist. 1968); *Cates Construction, Inc. v. Talbot Partners,* 980 P.2d 407, 413-15 (Ca. 1995) lost equity delay damages; *New Amsterdam Cas. v. Mitchell*, 325 F.2d 474 (5th Cir. – Ga. 1963) lost rents and additional interest; *U S. for Use and Benefit of D & P Corp. v. Transamerica Ins. Co.*, 881 F. Supp 1505 (D. Kan. 1995); *Phoenix Assurance Co. of N.Y. v. Appleton* City, 296 F2d 787 (8th Cir. 1961) interest on bonds – bond provided: "In event that the contractor shall not complete work on this project in the specified time there shall be deducted from the total payment an amount equal to the interest on all bonds issued for this project, for the time required to complete over the specified time".; *Miracle Mile Shopping Ctr. v. National Union Indem.* 299 F.2d 780, 783 (7th Cir. – Indiana 1962) value of lost use; *Hemenway Co. v. Bartex, Inc. of Tex.*, 373 So.2d 1356 (La. App. 1979) lost rent and loss of use; *General Ins. Co. of Am. v. Hercules Constr.*, 385 F.2d 13 (8th Cir.-Mo. 1967) delay damages-extra erection labor and equipment costs, premium time, and extra costs for keeping project open *Siemens Westinghouse Power Corp. v. Dick Corp.*, 293 F. Supp.2d 336 (S.D. N.Y. 2003), judgment entered, 220 F.R.D. 232 (S.D. N.Y. 2004) holding a performance bond surety liable for $6 million in liquidated damages owed by its principal); *Southern Roofing & Petroleum v. Aetna Ins.*, 293 F. Supp. 725, 731-32 (E. D. Tenn. 1968) liquidated damages; *Smart v. U. S. Fid. & Guar.*, 513 S.W.2d 291, 296 (Tex. App. 1974) lost profits; *Continental Realty v. Andrew J. Crevolin Co.*, 380 F. Supp. 246, 251 (S. D. W.Va. 1974) lost profits and loan interest.

Finding No Coverage. *American Home Assur. Co. v. Larkin General Hosp., Ltd.*, 593 So.2d 195 (Fla. 1992) no delay damages under AIA A-311; *Mycon Const. Corp. v. Board of Regents of* State, 755 So.2d 154 (Fla. Dist. Ct. App. 4th Dist. 2000) "Because the performance bond contains no provision for damages for delay, the surety cannot be held liable for such damages… . [The delay] was not related to any breach of duty by the surety. Any delay in payment by the surety is covered by interest".; *Downingtown Area School Dist. V. International Fidelity Ins. Co.* 769 A.2d 560 (Pa. Commw. Ct. 2001) no delay damages; *Marshall Contractors v. Peerless Ins.*, 827 F. Supp. 91, 94-96 (D.R.I. 1993) no exposure for consequential damages.

Finding No Coverage or Reduced Coverage Based on Terms of Bonded Contract. *McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188 (2nd Cir. 1995) based on clause protecting contractor from liability for "special, incidental or consequential damages"; *U.S. Fidelity and Guar. Co. v. West Rock Dev. Corp.*, 50 F. Supp.2d 127 (D. Conn. 1999) construction contract's liquidated damage provision capped surety's delay damage liability.

[73] Performance Bonds as "Backstop" to Insurance Specifications. In *Carroll-Boone Water Dist. V. M & P Equip. Co.*, 661 S.W.2d 345 (Ark. 1983) the Arkansas supreme court held that a performance bond covered damage to a project caused by a subcontractor that would have been covered by insurance specified to be carried by the contractor but which contractor failed to carry; also see *Hartford Fire Ins. Co. v. Reifolo Constr. Co.*, 410 A.2d 658 (N.J. 1980) court held that performance bond protected owner against fire loss which would have been covered by the builder's risk policy had contractor not breached its contract by allowing the policy to lapse; and *U.S. Fid. & Guaranty Co. v. Doheny*, 123 F.2d 746 (9th Cir. 1941) finding that performance bond covered loss which would have been covered had contractor provided auto liability insurance as was erroneously specified in the certificate of insurance.

[74] Lender's Primary Concern. Joshua Stein, *What a Mortgage Lender Needs to Know About Property Insurance: The Basics*, THE REAL ESTATE FINANCE JOURNAL Winter 2001; and *Benchmark Insurance Requirements for Commercial Real Estate Loans and Why They Say What They Say*, THE REAL ESTATE FINANCE JOURNAL Winter 2004, each found at www.joshuastein.com.

[75] Mortgagee's Rights under Fire Insurance Policy. 13 WILLISTON ON CONTRACTS § 37:51 Mortgagee's Rights under Fire Insurance Policy (4th ed. 2010).

[76] Insurable Value. The two most common approaches are replacement cost and actual cash value. Under a replacement cost policy, the insured may recover the cost to repair or replace damaged property without deduction for depreciation. Coverage written on actual cash value is subject to deduction to reflect physical depreciation from the replacement cost. Both approaches are based on the cost to replace the property at the time of the loss. Neither original purchase price nor market value enters into the calculation. The amount of the mortgage is irrelevant. Most property policies include a coinsurance clause that penalizes the insured for failing to insure the property the required amount (e.g., 80% of replacement cost) by deducting a proportionate amount from loss recoveries.

[77] Mortgagee's Insurable Interest Limited to Secured Debt. *See Sportsmen's Park v. N. Y. Prop. Underwriting Ass'n,* 470 N.Y.S.2d 456, 459 (N.Y. 1983):

> The extent of a mortgagee's interest is determined, in the first instance, by the total amount of its lien, including the outstanding principal amount of the debt plus interest, plus any amounts expended to protect its security (*i.e.*, taxes, insurance premiums, etc.), all as of the date of the fire [citations omitted].

*Rushing v. Dairyland Ins. Co.*, 456 S.2d 599 (La. 1984) in describing the mortgagee's rights under a loss payable clause:

> (A loss payable clause) is no more than a provisional appointment by the debtor of the one to whom the proceeds of the policy shall be paid to the extent of that person's interest. Its purpose is to protect the mortgagee's interest, which is the balance of the mortgage debt. The interest that is insured, however, is the debtor's interest in the mortgaged property. Accordingly, when an insured loss occurs, the insurer is liable for the value of the loss to the extent of the policy limits and must direct payment to the loss payee up to the balance of the mortgage debt. Therefore, if the mortgage debt no longer exists, the loss payee is not entitled to any of the proceeds.

[78] Lender's Interest in Policy Proceeds. Scott B. Osborne, *Lender's Security Interest in Casualty Policy Proceeds*, ACREL Workshop, Seattle, 1994.

[79] Open Mortgage Clause. An "open" mortgage clause provides that any loss is payable to the lender "as its interest may appear". This type clause exposes the lender to all the defenses and limitations that the insurer has against the insured mortgagor, such as failure to pay the premium or perform a condition for coverage under the policy. See cases and discussion at 48 A.L.R. 121 (1927) and 38 A.L.R. 367 (1925) and Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE 3d § 65:8 (2010). Examples of the effect of such a clause are *Commerce Bank & Trust Co. v. Centennial Ins. Co.*, 446 N.E.2d 73 (Mass. 1983) and *Pioneer Food Stores Coop., Inc. v. Fed. Ins. Co.*, 563 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991). In *Commerce Bank* the mortgagee claimed that it should receive the insurance proceeds regardless of whether the loss was caused by a fire set by the mortgagor. While the court did not determine the question of arson, it held that because the mortgagee was essentially merely a loss payee, it could recover only if the mortgagor would have been entitled to recover. *Pioneer* also involved suspected arson by the mortgagor; because the mortgagor would not provide financial information or submit sworn affidavits regarding the loss, the mortgagee was denied recovery. Not all borrowers facing financial difficulty consider insurance fraud as the way out of their problems, but the mortgagee of one who has taken this path will be unprotected if it is simply named as loss payee or is covered under an "open mortgage clause" type of endorsement.

[80] Standard Commercial Property Policy Conditions – Mortgageholders. See 4 COUCH ON INSURANCE 3d § 65:48 "Standard" or "Union" Mortgage Clause – General Rule That Mortgagee Unaffected (2010). Also, see the **Appendix** for the standard commercial property policy, ISO CP 00 10 06 07 Building and Personal Property Coverage Form, at Paragraph F, Additional Conditions, Paragraph 2 Mortgageholders on pages 13 and 14 of the policy for the inclusion within the standard policy of the standard mortgage clause protections for the mortgagee.

[81] Protections Contained in the Standard Mortgage Clause. The most significant protections afforded by the standard mortgage clause are the following:

(1) insurance proceeds are paid to the mortgagee, not to the insured or to the mortgage and the insured jointly;

(2) coverage applies for the benefit of the named mortgagee even if coverage is denied the insured because of some violation by the insured of the policy's conditions;

(3) the mortgagee is to be given notice of policy cancellation by the insurer – 10 days' notice of cancellation for nonpayment of premium and 30 days' notice when cancellation is for other reasons; and

(4) the mortgagee is to be given 10 days' notice on nonrenewal.

Numerous cases exist upholding the standard mortgage clauses requirement that notice must be given. *E.g., Firstbank Shinnston v. West Virginia Ins. Co.*, 408 S.E.2d 777 (W. Va. 1991) held that a fire insurance company could not remove the lender under a deed of trust from the owner's insurance policy without giving notice to the lender of the cancellation. In that case, a homeowner had agreed through a standard mortgage clause to maintain fire insurance on his home, which was subject to a deed of trust securing a loan from Firstbank Shinnston. After two items of correspondence sent to the bank were returned undelivered to the insurance company, the insurance company unilaterally deleted the bank as an additional insured under the policy. The house burned, and the homeowner collected $18,000 from the insurance company but did not rebuild. As a result, the insurance company canceled the policy. The homeowner also defaulted on his loan. Firstbank Shinnston sought to collect the insurance proceeds from the fire, and the insurance company refused coverage. This court held on those facts that cancellation of the policy

was not effective as to Firstbank Shinnston, because the insurance company failed to notify the bank that its interest as mortgagee was being canceled.

[82] Mortgagee Clause Protections. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE § 65:9 (3d ed. 1997). Examples of cases that provided payments to the mortgagee under such clauses are *Nat. Comm. Bank & Trust Co. v. Jamestown Mut. Ins. Co*., 334 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1972) and *Foremost Ins. Co. v Allstate Ins. Co.,* 460 N.W. 2d 242 (1990). In the *National Commercial Bank* case the insurer claimed that material misrepresentations of the insured voided the policy. However, the court found that the standard mortgage clause created a separate contract between insurer and mortgagee that was not affected by the actions of the insured. *Foremost* involved yet another case of arson by the insured, but because the policy named the mortgagee under the standard or union clause, it was entitled to recover despite the actions of the insured. *See*, John W. Steinmetz and Stephen E. Goldman, *The Standard Mortgage Clause in Property Insurance Policies*, 33 TORT & INS. L. J. 81 (1997).

[83] Treatise. 44A AM. JUR.2d Insurance § 1704 Creditors; Lienholders—As Loss Payee on Property Insurance (2010).

[84] Bankruptcy of the Mortgagor. *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949, 951 (5th Cir. 1978) the court states

> Because the mortgagee has a contractual right to money payable under the loss payable clause, the mortgagor has no right to that money. Thus the money or right to receive the money is not property or a right to property belonging to the mortgagor.

[85] UCC Priorities. *Judah AMC & Jeep, Inc. v. Old Republic Ins. Co.,* 293 N.W.2d 212 (Io. 1980); *United Companies Life Ins. Co. v. State Farm & Fire Cas. Co.,* 477 S.2d 645 (Fla. App. 1 Dist. 1985); 9 Anderson, UNIFORM COMMERCIAL CODE, § 9-306:15 (3rd ed. 1985). At least one state, California, requires the mortgagee to give written notice to the insurer to perfect the mortgagee's security interest in insurance proceeds. CA. COMM. CODE §9312(b)(4).

[86] Texas: *State Farm Fire & Casualty Co. v. Leasing Enterprises*, 716 S.W.2d 553, 554 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Wade v. Seeburg*, 688 S.W.2d 638, 639 (Tex. App.—Texarkana 1985, no writ); *see also Beneficial Standard Life Insurance Co. v. Trinity National Bank*, 763 S.W.2d 52, 54-55 (Tex. App.—Dallas 1988, writ denied). In *U.S. Bank N.A. v. Safeguard Ins. Co.*, 422 F. Supp.2d 698 (N. D. Tex. 2006), the court held that although the mortgagee was not listed on the mortgagor's property policy as an additional insured, the mortgagee was entitled to the insurance proceeds under the equitable lien doctrine because the mortgage required the mortgagor to cause the insurance company to list the mortgagee as an additional insured. The court also held that the mortgagee's right to the proceeds could not be defeated by its subsequent foreclosure on three of the four apartment projects insured under the policy, including the two projects that sustained insured damage, as a deficiency still existed, even though the deed of trust expressly provided that the mortgage lien continued as a lien on the balance of the mortgaged property.

Sample Other Jurisdictions: *Merchants Nat'l Bank v Southeastern Fire Ins. Co.*, 751 F.2d 771 (5th Cir. 1985); and *Knapp v. Victory Corp.*, 302 S.E. 2d 330 (S.C. 1983); *Gulf Nat. Bank v. Hartford Fire Insurance Co.*, 264 S.2d 401 (Miss. 1972)*;* and *Schleimer v. Empire Mut. Ins. Co.*, 318 N.Y.S.2d 182, rev'd 337 N.Y.S.2d 872, aff'd 352 N.Y.S.2d 429 (N.Y. 1971). Although Louisiana does not recognize courts in equity, Louisiana courts have awarded insurance proceeds under alternate theories. *Diaz v. Cherokee Ins. Co.*, 275 So. 2d 922 (La. App. 4th Cir. 1973) judicially reformed a policy lacking the designation of mortgagee in the loss payable clause based upon evidence that the mortgage required the mortgagor to keep the property insured to protect the interests of the mortgagee. *See,* Scott Osborne and Julie Williamson, *Living with Loan Documents after a Casualty Loss*, ACREL Workshop, Seattle, 1994.

[87] Payment of Replacement Cost on Repair. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE §§ 176:59, 60, and 64 (3d ed. 1997).

[88] Freedom of Contract. *Schultz v. Morton*, 101 S.W.2d 373, 375 (Tex. Civ. App.—Dallas 1936, writ ref'd). In *Lewis v. Wells Fargo Home Mortgage, Inc.,* 248 S.W.3d 828 (Tex. App. – Texarkana 2008, no pet.) the court reviewed a mortgagee's conduct in applying insurance proceeds to reconstruct a home destroyed by fire. After the fire, which occurred two weeks after Lewis bought the home, Lewis made no payments on the note and Wells Fargo foreclosed. Lewis sued to declare that the debt had been satisfied by the payment of the insurance proceeds to Wells Fargo, that as a result the foreclosure was wrongful and that Wells Fargo had constructed the home on Lewis's land as an unencumbered improvement. Lewis also complained that the house as constructed was inferior to the house that preexisted the fire and thus Wells Fargo had not used the insurance proceeds for "restoration or repair" but instead for "reconstruction or rebuilding". The court found that Lewis' complaint about the quality of construction was a severed matter remaining to be resolved by the trial court and affirmed the trial court's granting of partial summary judgment in favor of Wells Fargo that it was the owner of the property.

[89] Does Not Violate Public Policy. *Zidell v. John Hancock Mutual Life Insurance Co.*, 539 S.W.2d 162, 165 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). *English v. Fischer,* 660 S.W.2d 521 (Tex. 1983). In an interesting case where the mortgagors did not offer evidence that they had equity in their home, the court in *Anchor Mortgage Services v. Poole*, 738 S.W.2d 68 (Tex. App.—Fort Worth 1987, writ denied) held that the mortgagors failed to show that they sustained any damages from the mortgagee's breach of its oral agreement to disburse a portion of the insurance proceeds to start repair work. The court reasoned that although the mortgagors may have suffered the loss of the funds because of foreclosure in accordance with the terms of the deed of trust, the mortgagors were also relieved of the obligation to make repairs. *Anchor Mortgage Services*, 738 S.W.2d at 71. However, other states, for example California, there is case law to the contrary which limits the mortgagee's right to proceeds unless it can demonstrate that its security interest has been impaired. In California the effect of the case law has been somewhat ameliorated by statute and the repair provisions in loan documents typically give the mortgagee a great deal of control over disbursement of proceeds.

[90] Self Insurance. See, Marilyn C. Maloney and David J. Weiner, *Do Your Documents Leave any Gaps? Planning in Advance for Disasters*, State Bar of Texas 30th Annual ADVANCED REAL ESTATE SEMINAR, Chapter 38 (2008); Ann Peldo Cargile, Stephen K. Cassidy, and Arthur E. Pape, *Are you Bare or Are you Covered; An Examination of Some Key Issues Raised by Self-Insurance*, THE ACREL PAPERS, Fall 2002 at 341.

[91] Treatises. 45 C.J.S. Insurance – Fire Insurance Policies – What Constitutes an Increase in Risk § 1011 (2010); 59 C.J.S. Mortgages – Insurance – Proceeds § 378 (2010); WILLISTON ON CONTRACTS § 37:51 Mortgagor's Rights under Fire Insurance Policy (2010).

[92] Foreclosure Proceedings Not an Increase in Hazard. *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co*., 277 S.W. 3d. 381 (Tenn. 2009).

[93] Vacancy. See Paragraph E6 Loss Conditions – Vacancy in the standard commercial property insurance coverage form in the **Appendix**; and see discussion of discussion of vacancy clauses at IV.C of this paper. See *Perry State Bank v. Farmers Al.*, 953 S.W.2d 155, 159 (Mo. 1997) court held that mortgagee could not recover for fire loss where premises had been vacant for four months as bank had duty to notify insurer of a change in occupancy or increase of hazard.

[94] Mortgageholder Protection. *Murray v. North Country Ins. Co.*, 716 N.Y.S.2d 820 (3rd Dept. N.Y. 2000) court held that policy provision requiring mortgagee to notify insurer of any change in occupancy did not require mortgagee to notify insurer that the building was vacant for more than 60 days.

[95] Mortgagee's Insurable Interest. If a covered loss occurs prior to foreclosure, the ability of the mortgagee to recover against the proceeds depends upon its actions in the foreclosure. If it bids in the full amount of its debt its mortgage debt would be extinguished, it would not have an insurable interest, and it could not recover insurance proceeds. *Arkansas Teacher's Retirement Sys. v. Coronado Properties*, 801 S.W. 2d 50 (Ark. App. 1990); *Imperial Mortgage Corporation v. Travelers Indemnity Company of Rhode Island*, 599 P. 2d 276 (Colo. App. 1979); *Phalen Park State Bank v Reeves*, 251 N.W. 2d 135 (Minn. 1977); John W. Steinmetz and Stephen E. Goldman, *The Standard Mortgage Clause in Property Insurance Policies*, 33 TORT & INS. L. J. 81, 102 (1997); Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE §§ 65:12 and 65:59 (3d ed. 1997).

[96] Full Credit Bids at Foreclosure Sale After a Casualty Loss. In *Helmer v. Texas Farmers Insurance Co.*, 632 S.W.2d 194, 196 (Tex. App.—Fort Worth 1982, no writ), the court succinctly stated "no mortgagee's indebtedness; no indebtedness or liability to mortgagee from the insurance company". In *Beneficial Standard Life Insurance Co. v. Trinity National Bank*, 763 S.W.2d 52 (Tex. App.—Dallas 1988, writ denied), the court refused to find that the insurer's full credit bid at the foreclosure sale should be reformed to be reduced by the amount of the insurance proceeds even though the mortgagee was unaware of the casualty loss at the time of the foreclosure sale. The insurer brought the action to determine who was entitled to the insurance proceeds. The court upheld the award of the proceeds to the second lienholder and the mortgagor as opposed to the first lienholder, who had mistakenly bid an amount equal to the balance due on the first-lien indebtedness. *Beneficial Standard Life Insurance Co.*, 763 S.W.2d at 55-56. The court refused to conform its decision to the judgment in a separate court action brought by the first lienholder against the substitute trustee to reform the bid price. The second lienholder and the mortgagor were not parties to the separate reformation suit. Additionally, because there was no agreement between the lienholders, there could be no reformation on the theory of mutual mistake of the parties. *Beneficial Standard Life Insurance Co.*, 763 S.W.2d at 56.

[97] Allocation of Preforeclosure Loss Proceeds to Deficiency Remaining After Foreclosure. In *Helmer v. Texas Farmers Insurance Co.*, 632 S.W.2d 194, 195 (Tex. App.—Fort Worth 1982, no writ), the court held that an insurer was obligated to pay only $25.70 to a mortgagee on a secured debt of $6,725.70, after the mortgagee had purchased the mortgaged property at the foreclosure sale for $6,700.00. In *Campagna v. Underwriters at Lloyd's London*, 549 S.W.2d 17, 18-19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.), the mortgagee's recovery against the insurer was $408, the difference between the $2,551 balance on the

secured debt and the mortgagee's successful bid of $2,143. The court rejected the mortgagee's argument that the mortgagee's right of recovery under the policy should be the difference between the amount of the debt and the market value of the mortgaged property after the fire and that the amount bid at the foreclosure should be irrelevant.

[98] Mortgagee's Interest in Insurance Proceeds from a Post-Foreclosure Casualty. In *Fireman's Fund Insurance Co. of Texas v. Jackson Hill Marina, Inc.*, 704 S.W.2d 131, 136 (Tex. App.—Tyler 1986, writ ref'd n.r.e.), the court held that the mortgagee, which had purchased the mortgaged property at the foreclosure sale, was entitled to the insurance proceeds on the policy purchased by the mortgagor before foreclosure for a casualty occurring after the foreclosure sale. The recovery was limited to the amount of the loan deficiency. The mortgagor was held not to be entitled to the insurance proceeds, because the insurer had been put on notice of the change of ownership.

[99] Additional Interests Approaches Comparison. Exhibit XIV.P.3 at page 7, Chapter XIV CONTRACTUAL RISK TRANSFER (International Risk Management Institute, Inc. 2010).

[100] Loss Payable Clause. See ¶ C Loss Payable Clause in ISO CP 12 18 06 07 Loss Payable Provisions endorsement found in the **Appendix**.

[101] Loss Payee's Recovery Lost Due to Acts of Insured. In *Wometco Home Theatre, Inc. v. Lumbermen's Mut. Cas. Co.*, 468 N.Y.S.2d 625 (N.Y. App. Div. 1983) the court construed the rights of a loss payee under the following standard policy language, "Loss if any, shall be adjusted with the insured and shall be payable to the insured and Wometco Home Theatre … as their interest may appear". The court held that the insured's failure to comply with the policy's condition that suit be filed against the insurer within 12 months of the discovery of the covered occurrence barred both the insured's and the loss payee's right to recovery. The court stated,

> In the absence of a provision that the insurance policy shall not be invalidated by an act or neglect of the insured … a "los payee" is not itself an insured under the policy; it is merely the designated person to whom the loss is to be paid. It is established that such a loss payee may only recover if the insured could have recovered.

[102] Lenders Loss Payable Clause. See ¶ D Lender's Loss Payable Clause in ISO CP 12 18 06 07 Loss Payable Provisions endorsement found in the **Appendix**.

[103] Receivers. Morris A. Ellison, Lawrence M. Dudek, and Samuel H. Levine, *'Tis Better to Receive - The Use of a Receiver in Managing Distressed Real Estate,* 2009 THE ACREL PAPERS 1; *Bearish Real Estate Loan Climate Creates Bull Market for Emergency Breed of Receivers,* REAL ESTATE LAW AND INDUSTRY, Vol. 3, No. 11 (BNA, June, 2010).

[104] Foreclosure Proceedings Not an Increase in Hazard. *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 277 S.W. 3d. 381 (Tenn. 2009).

[105] Receiver's Claim to Insurance Proceeds. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE § 42:27 (ed. 3d. 1997) and cases cited therein.

[106] Receiver's Claim to Insurance Proceeds. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE §42:27 (3d ed. 1997).

[107] Block 37. No. 1-09-3523 (Ill. Ct. App. March, 2010).

[108] Property of the Estate – General Test. *In the Matter of Equinox Oil Company, Inc.*, 300 F. 3d. 614 (5th Cir. 2002); *In the Matter of Edgeworth*, 993 F. 2d 51 (5th Cir. 1993); *In re Louisiana World Exposition, Inc.,* 832 F.2d 1391 (5th Cir. 1987).

[109] Mortgagee/Loss Payee. *In the Matter of Equinox Oil Company, Inc.*, 300 F. 3d. 614 (5th Cir. 2002).