AN INSURANCE PRESENTATION YOU CAN USE:

HOW TO WRITE INSURANCE SPECIFICATIONS FOR A SHOPPING CENTER LEASE

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I. INTRODUCTION

A. Contractual Risk Allocation.

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity, exculpation, release and limitation of liability provisions. Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party to the other. The most common method of risk management is through contractual provisions for insurance. The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria:

- Risk is transferred to party best able to control the risk.
- Risks retained are appropriate and affordable.
- Risk as an element of the overall transaction and negotiation is incorporated at the onset.
- Indemnity, insurance, and other pertinent conditions are not so onerous that contract negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.
- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.
- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.
- Insurance and other support for the indemnity is in place when a loss occurs.
- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.
- The performance of the contract is monitored and regularly evaluated.

B. Annotated Forms

This article examines the role of insurance in leaseholds. Standard liability and property insurance forms and endorsements available to landlords and tenants are identified and discussed. Also discussed are forms of property insurance that are commonly encountered, builder's risk, boiler and machinery coverage, flood insurance, ordinance or law coverage, glass insurance and sign insurance. Attached to this article are two approaches to lease insurance provisions – Insurance Specifications in the form of an Exhibit to the Lease and Insurance Specifications in a Narrative Format as lease provisions in the body of the lease. Each of these forms have been annotated with case law discussion and the author's comments and advice.

II. FORMS

A. Lease Provisions

1. Form A.1. Insurance Specifications as Exhibit to Lease. The following is a form of insurance specifications that are designed for attachment as an exhibit to a lease. They are to be incorporated by reference.

LEASE

Section 11.1 Tenant's Insurance. The parties agree to maintain the property and liability insurance policies specified for the party to maintain in Exhibit A to this Lease.

EXHIBIT A TO LEASE
INSURANCE SPECIFICATIONS[2]

A. General Insurance Requirements

1. Definitions. For purposes of this Lease:

a. Landlord Parties. "Landlord Parties" means (a) _____ ("Landlord"), (b) the Project, (c) any lender whose loan is secured by a lien against the Leased Premises, (d) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, and (e) any directors, officers, employees, or agents of such persons or entities.

b. Tenant. "Tenant" means (a) _____ and (b) subtenants of any tier.

c. ISO. "ISO" means Insurance Services Office.[3]

2. Policies.

a. Insurer Qualifications. All insurance required to be maintained by Tenant must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or Standard & Poor Insurance Solvency Review A-, or better,[4] and authorized to engage in the business of insurance in the State in which the Improvements are located.[5]

b. No Waiver. Failure of Landlord to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Landlord to identify a deficiency from evidence that is provided shall not be construed as a waiver of Tenant's obligation to maintain such insurance.

c. Delivery Deadlines. Tenant shall provide Landlord within 10 days of Landlord's request with certified copies of all insurance policies. Renewal policies, if necessary, shall be delivered to the Landlord prior to the expiration of the previous policy.

d. Occupancy. Commencement of occupancy without provision of the required certificate of insurance and/or required endorsements, or without compliance with any other provision of this Lease, shall not constitute a waiver by any Landlord Party of any rights. The Landlord shall have the right, but not the obligation, of prohibiting the Tenant or any subtenant from occupying the Leased Premises until the certificate of insurance and/or required endorsements are received and approved by the Landlord.

3. Limits, Deductibles and Retentions.

a. Coverage Limits. The limits of liability may be provided by a single policy of insurance or by a combination of primary[6] and excess[7] policies, but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required herein.

b. **Deductible and Retention Limits.** No deductible[8] or self-insured retention[9] shall exceed $25,000 without prior written approval of the Landlord, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at the Tenant's sole risk. The Tenant shall not be reimbursed for same.

c. **Policy Limits.** "Limits" set out in these specifications are the minimum dollar amount of insured coverage for the risk or peril specified. If Tenant or its contractors maintain greater limits, then these specifications shall not limit the amount of recovery available to Landlord.

4. **Forms.**

a. **Approved Revisions and Substitutions.** If the forms of policies, endorsements, certificates, or evidence of insurance required by these specifications are superseded or discontinued, Landlord will have the right to require other equivalent forms.

b. **Approved Forms.** Any policy or endorsement forms other than a form specified in this exhibit must be approved in advance by Landlord.

c. **Compliance with Laws.** If any additional insured requirements are deemed to violate any law, statute or ordinance, the additional insured requirements, including any additional insured policy provision or endorsements procured pursuant to this Lease, shall be reformed to provide the maximum amount of protection to the Landlord Parties as allowed under the law.

5. **Evidence of Insurance.**[10] Insurance must be evidenced as follows:

a. **Form.** Liability insurance: ACORD™ Form 25 (2010/05) *Certificates of Liability Insurance* for liability coverages. Property Insurance: ACORD™ Form 28 (2009/12) *Evidence of Commercial Property Insurance* for property coverages.[11]

b. **Delivery Deadlines.** Evidence to be delivered to Landlord prior to entry on Leased Premises and thereafter at least [30][12] days prior to the expiration of current policies or on replacement of each certified coverage and within 10 days of Landlord's request for an updated certificate.[13]

c. **Certificate Requirements.**[14] Certificates must:

(1) **Insured.** State the insured's name and address.[15]

(2) **Insurer.** State the name of each insurance company affording each coverage, policy number of each coverage, policy dates of each coverage, all coverage limits and sublimits, if any, by type of coverage, and show the signature of the authorized representative signing the certificate on behalf of the insurer.

(3) **Additional Insured Status and Subrogation Waiver.** Specify the additional insured[16] status and waivers of subrogation[17] as required by these specifications.

(4) **Primary Status.** State the primary and non-contributing status required herein.[18]

(5) **Deductibles and Self-Insured Retentions Stated.** State the amounts of all deductibles and self-insured retentions.[19]

(6) **Copy of Endorsements and Policy Declaration Page.** Be accompanied by certified copies of all required endorsements and policy declaration page reflecting issuance of the endorsements.[20]

(7) **Notices.** Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation [and material change] will be sent to the certificate holder.[21]

(8) **Certificate Holder.**[22] Be addressed to the Landlord as the certificate holder and show Landlord's correct address. Separate certificate addressed to Landlord's lender.

(9) **Producer.** State the producer of the certificate with correct address and phone number listed.[23]

(10) **Authorized Representative.** Be executed by a duly authorized representative of the insurers.[24]

6. Tenant Insurance Representations to Landlord Parties.

a. **Minimum Requirements.** It is expressly understood and agreed that the insurance coverages required herein (a) represent Landlord Parties' minimum requirements and are not to be construed to void or limit the Tenant's indemnity obligations as contained in this Lease nor represent in any manner a determination of the insurance coverages the Tenant should or should not maintain for its own protection; and (b) are being, or have been, obtained by the Tenant in support of the Tenant's liability and indemnity obligations under this Lease. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of the Tenant, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of this Lease.

b. **Defaults.** Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, this Lease. If the Tenant shall fail to remedy such breach within five business days after notice by the Landlord, the Tenant will be liable for any and all costs, liabilities, damages and penalties resulting to the Landlord Parties from such breach, unless a written waiver of the specific insurance requirement is provided to the Tenant by the Landlord. In the event of any failure by the Tenant to comply with the provisions of this Lease, the Landlord may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to the Tenant, purchase such insurance, at the Tenant's expense, provided that the Landlord shall have no obligation to do so and if the Landlord shall do so, the Tenant shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.

c. **Survival.** This Exhibit is an independent contract provision and shall survive the termination or expiration of the Lease.[25]

7. Insurance Requirements of Tenant's Subtenants.

a. **Subtenant Coverage.** If Tenant is permitted by the Lease to sublease any space, insurance similar to that required of the Tenant shall be provided by all subtenants (or provided by the Tenant on behalf of subtenants) to cover operations performed under any sublease agreement. The Tenant shall be held responsible for any modification in these insurance requirements as they apply to subtenants. The Tenant shall maintain certificates of insurance from all subtenants containing provisions similar to those listed herein (modified to recognize that the certificate is from subtenants) enumerating, among other things, the waivers of subrogation, additional insured status, and primary liability as required herein, and make them available to the Landlord upon request.

b. **Subtenant's Waiver of Recovery; Subtenant's Waiver of Subrogation.** The Tenant is fully responsible for loss and damage to its property on the site, including tools and equipment, and shall take necessary precautions to prevent damage to or vandalism, theft, burglary, pilferage and unexplained disappearance of property. Any insurance covering the Tenant's or its subtenants property shall be the Tenant's and its subtenant's sole and complete means or recovery for any such loss. To the extent any loss is not covered by said insurance or subject to any deductible or co-insurance, the Tenant shall not be reimbursed for same. Should the Tenant or its subtenants choose to self insure this risk, it is expressly agreed that the Tenant hereby waives, and shall cause its subtenants to waive, any claim for damage or loss to said property in favor of the Landlord Parties.

8. **Use of the Landlord's Property.**

The Tenant, its agents, employees, subtenants or suppliers shall use the Landlord's property only with express written permission of the Landlord's designated representative and in accordance with the Landlord's terms and condition for such use. If the Tenant or any of its agents, employees, subtenants or suppliers utilize any of the Landlord's property for any purpose, including machinery, equipment or similar items owned, leased or under the control of the Landlord, the Tenant shall defend, indemnify and be liable to the Landlord Parties for any and all loss or damage which may arise from such use.

9. **Release and Waiver.**

The Tenant hereby releases, and shall cause its subtenants to release, the Landlord Parties from any and all claims or causes of action whatsoever which the Tenant and/or its subtenants might otherwise now or hereafter possess resulting in or from or in any way connected with any loss covered by insurance, whether required herein or not, or which should have been covered by insurance required herein, including the deductible and/or uninsured portion thereof, maintained and/or required to be maintained by the Tenant and/or its subtenants pursuant to this Lease.[26]

10. **Self-Insurance, Large Deductibles and/or Retentions.**[27]

a. **Continued Liability of Tenant.** If Tenant elects to self-insure or to maintain insurance required herein subject to deductibles and/or retentions exceeding $25,000, Landlord and Tenant shall maintain all rights and obligations between themselves as if Tenant maintained the insurance with a commercial insurer including any additional insured status, primary liability, waivers of rights of recovery, other insurance clauses, and any other extensions of coverage required herein. Tenant shall pay from its assets the costs, expenses, damages, claims, losses and liabilities, including attorney's fees and necessary litigation expenses at least to the extent that an insurance company would have been obligated to pay those amounts if Tenant had maintained the insurance pursuant to this Exhibit.

b. **Deductibles, Retentions and Uninsured Losses.** All deductibles, retentions, and/or uninsured amounts shall be paid by, assumed by, for the account of, and at Tenant's sole risk. Landlord shall not be responsible for payment of any deductible or self-insured retention or uninsured amount.

c. **Financial Test.** The Tenant's right to self-insure shall terminate at any time (a) Tenant's net worth, as reported in its latest annual report, or audited financial statement prepared in accordance with GAAP, drops below $250,000,000, (b) Tenant's Moody's rating on its long-term debt drops below investment grade, or (c) Tenant fails to maintain adequate loss reserves to fund its self-insurance obligations.

B. Specific Insurance Requirements[28]

1. Policies To Be Provided by Tenant. Subject to review and revision by Landlord from time to time, in Landlord's good faith judgment, the following insurance shall be maintained by Tenant with limits not less than those set forth below at all times during the term of this Lease and thereafter as required:

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
a. Liability			
(1)	**Commercial General Liability** ("CGL")[29] (Occurrence basis)[30]	**1. Minimum Limits.** Amount subject to approval by Landlord, but not to be less than the following amounts as of the Delivery Date of the Leased Premises: \$1,000,000 per Occurrence.[31] \$2,000,000 General Aggregate.[32] \$1,000,000 Personal and Advertising Injury Limit.[33] **2. General Aggregate.** If the CGL insurance contains a General Aggregate limit, it shall apply separately to this Shopping Center.[34]	**1. Form.** ISO form CG 00 01, or a substitute providing equivalent coverage. **2. Insured Contracts.** Coverage shall apply to but not be limited to liability assumed by Tenant under the Lease (including the tort liability of another assumed in a business contract).[35] **3. Additional Insureds.**[36] ISO form CG 20 11 01 96, or equivalent form, Additional Insured Endorsement listing Landlord Parties as additional insureds.[37] No exclusion for the acts or omissions of the additional insured. **4. Primary.** This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory.[38] **5. Waiver of Subrogation.** ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Landlord Parties.[39] **6. Deletion of Personal Injury Exclusion to Contractual Liability Coverage**. The personal injury contractual liability exclusion shall be deleted.[40] **7. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.[41] **8. Prohibited Endorsements.** The following exclusions/limitations (or their equivalents) are not permitted: (a) Contractual Liability Limitation, CG 21 39 or its equivalent.[42] (b) Amendment Of Insured Contract Definition, CG 24 26 or its equivalent.[43] (c) Limitation of Coverage to Designated Premises or Project, CG 21 44.[44] (d) Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
			(e) Any "Insured vs. Insured" exclusion.[45] (f) Any type of punitive, exemplary or multiplied damages exclusion. 9. **Certificate of Insurance.**[46] A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant to Landlord.[47]
(2)	**Business Auto Liability**[48]	$1,000,000 per Accident.	**1. Form.** Current ISO edition of CA 00 01. **2. Scope.** Arising out of any auto (Symbol 1), including owned, hired and nonowned.[49] **3. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.[50] **4. Waiver of Subrogation.** Include a waiver of subrogation by insurer as to the Landlord Parties.
(3)	**Workers' Compensation**[51] **and Employer's Liability**[52]	**1. WC Limits.** Statutory limits. **2. EL Limits.** $1,000,000 each accident[53] and disease.[54] **3. USL&H.** USL&H must be provided where such exposure exists.[55]	**1. Territory.** State where work is to be performed must be listed under Item 3.A. on the Information Page. **2. Scope.** Such insurance shall cover liability arising out of the Tenant's employment of workers and anyone for whom the Tenant may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted. **3. Leased Employees.** Where a Professional Employer Organization ("PEO") or "leased employees" are utilized, Tenant shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord. **4. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or substantial modification.[56] **5. Waiver of Subrogation.** Include a waiver of subrogation by insurer as to the Landlord Parties.

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
(4)	**Liquor Liability**[57] (occurrence basis)[58]	$1,000,000 each Occurrence. $2,000,000 Annual Aggregate.	**1. Scope.** Such insurance shall cover operation of Tenant at the Leased Premises described by the Lease. **2. Defense Coverage.** Defense shall be provided outside of the limit of liability. **3. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.[59] **4. Waiver of Subrogation.** Include a waiver of subrogation by insurer as to the Landlord Parties.
(5)	**Excess/Umbrella Liability** (occurrence basis)[60]	$5,000,000 each Occurrence. $5,000,000 Annual Aggregate.	**1. Scope.** Such insurance shall be excess over and be no less broad than all coverages described above. The policy limits for the primary and excess/umbrella policy may be allocated between the primary and excess/umbrella as selected by the named insured.[61] **2. Primary.** This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory. **3. Drop-down Coverage.** Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits. **4. Defense Costs.** Policy shall include a duty to defend any insured. **5. Additional Insureds.** Listing the Landlord Parties as additional insureds. **6. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.[62] **7. Waiver of Subrogation.** Include a waiver of subrogation by insurer as to the Landlord Parties.
(6)	**Environmental Liability**	$1,000,000 each Occurrence. $2,000,000 Annual Aggregate.	**1. Scope.** Such insurance shall cover any environmental loss to the premises or adjoining properties; shall include coverage for mold, fungus and related bacteria. **2. Defense Costs.** Defense shall be provided outside of the limit of liability. **3. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal, or substantial modification.[63]

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
			4. Waiver of Subrogation. Include a waiver of subrogation by insurer as to the Landlord Parties.
b. Property[64]			
(1)	**Property Insurance:**[65] **Causes of Loss - Special Form** (formerly known as "all risk")[66]	100% Replacement Cost[67], on an Agreed Value Basis,[68] and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease, for the Tenant's improvements[69] and betterments, including all the items included in Tenant's Work, and all equipment and other property used in connection therewith, including Tenant's business personal property, HVAC, trade fixtures and signs from time to time in, on, adjacent to or upon the Leased Premises, and all alterations, additions, or changes made by Tenant pursuant to the terms of this Lease,[70] and shall not be subject to coinsurance.[71]	**1. Form.** ISO form CP 10 30, or equivalent.[72] **2. Insureds.** Landlord.[73] **3. Required Endorsements or Coverages.** As determined by Landlord, which at Landlord's option may include coverage for Theft, Earthquake, Flood,[74] Glass;[75] Law and Ordinance;[76] Terrorism;[77] Signs[78] and Debris Removal with an increased coverage of $_____.[79] **4. Waiver of Subrogation.** Waiver of subrogation by insurer as to the Landlord Parties.[80]
(2)	**Business Income and Extra Expense**[81]	**1. Scope.** Coverage shall be provided on all operations at the Leased Premises. **2. Income Coverage Limit.** Coverage shall be provided in an amount of not less than 80% of Tenant's gross annual income at the Leased Premises less non-continuing expenses.	**1. Form.** ISO Special Form, and coverage for income and extra expense loss arising out of theft and flood. **2. Valuation Basis.** Agreed Value basis.[82] **3. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.[83] **4. Waiver of Subrogation.** Include a waiver of subrogation by insurer as to the Landlord Parties.
(3)	**Boiler & Machinery**[84]	Coverage shall be provided on all operations at the described Leased Premises.	**1. Form.** Comprehensive Form or its equivalent, including Business Income.[85] **2. Valuation Basis.** Replacement Cost, Agreed Value basis.[86]
c. Other Insurance[87] **-** Such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.			

2. <u>Policies To Be Provided By Tenant's Contractors</u>. Subject to review and revision by Landlord from time to time, in Landlord's good faith judgment, the following insurance shall be maintained by Tenant's construction contractors with limits not less than those set forth below at all times during the term of this Lease and thereafter as required:

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
a. Liability			
(1)	**Commercial General Liability** ("<u>CGL</u>")[88] (occurrence basis)[89]	**1. Minimum Limits.** Amount subject to approval by Landlord, but not to be less than the following amounts as of the Delivery Date of the Leased Premises:	**1. Form.** ISO form CG 00 01, or a substitute providing equivalent coverage, and shall and shall cover liability arising from premises,

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
		| $1,000,000 | per Occurrence.[90] | | $2,000,000 | General Aggregate.[91] | | $2,000,000 | Products/Completed Operations Aggregate[92] | | $1,000,000 | Personal and Advertising Injury Limit.[93] | **2. General Aggregate.** If the CGL insurance contains a General Aggregate Limit, it shall apply separately to this Shopping Center.[94] **3. Post-Completion Coverage.** Contractor to maintain this CGL coverage for a period of __ years after final completion of the construction of the Improvements.[95]	operations, Owner's & Contractor's Protective Liability for contractor's liability arising out of the hire of subcontractors (independent contractors coverage),[96] incidental design liability arising from the contractor's construction means and methods. **2. Insured Contracts.** Coverage shall include but not be limited to liability assumed by Tenant's contractor under the construction contract (including the tort liability of another assumed in a business contract).[97] **3. Additional Insureds.**[98] ISO form CG 20 10 10 01, or equivalent form, Additional Insured Endorsement listing the Landlord Parties as additional insureds. No exclusion for the acts or omissions of the additional insured.[99] **4. Primary.** This insurance shall be endorsed to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory.[100] **5. Waiver of Subrogation.** ISO form CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to the Landlord Parties. **6. Deletion of Personal Injury Exclusion to Contractual Liability Coverage**. The personal injury contractual liability exclusion shall be deleted.[101] **7. Notice.** Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.[102] **8. Prohibited Endorsements.** The following exclusions/limitations (or their equivalents) are not permitted: a. Contractual Liability Limitation, CG 21 39 or its equivalent.[103] b. Amendment Of Insured Contract Definition, CG 24 26 or its equivalent.[104] c. Limitation of Coverage to Designated Premises or Project, CG 21 44.[105] d. Any endorsement modifying or deleting the exception to the Employer's Liability exclusion. e. Any "Insured vs. Insured" exclusion.[106] f. Any type of punitive, exemplary or

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
			multiplied damages exclusion. 9. **Certificate of Insurance.**[107] A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant's contractor to Landlord.[108]
(2)	**Business Auto Liability**[109]	$1,000,000 per accident.	1. **Form.** Current ISO edition of CA 00 01. 2. **Scope.** Arising out of any auto (Symbol 1), including owned, hired and nonowned. 3. **Waiver of Subrogation.** Include a waiver of subrogation by insurer as to the Landlord Parties.
b. Property			
(1)	**Builder's Risk Insurance**[110]	1. **Amount.** Initial Contract Sum, plus an amount to be acceptable to Landlord, to increase by amount of subsequent modification of Contract Sum. Coverage shall be provided in amount equal at all times to the full replacement value and costs of debris removal for any single occurrence. Shall include Contractor's overhead and profit. 2. **Covered Property.** The following property is to be insured: a. All structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling. b. All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site. c. All property including materials and supplies on site for installation. d. All property including materials and supplies at other locations but intended for use at the site. e. All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit. f. Other Work at the site identified in the Lease. g. Other property for which an insured is liable regarding the project.	1. **Deductibles.** Deductibles shall not exceed an amount acceptable to Landlord. 2. **Insureds.** Insureds shall include:[111] a. **Named Insureds.** Landlord, Contractor and all Loss Payees and Mortgagees as Named Insureds. b. **Additional Insureds.** Tenant, and other tenants designated by Landlord to Contractor to be Additional Insureds. c. **Subcontractors.** Subcontractors of all tiers in the Work as additional insureds, but not limited "to their interests as they may appear". 3. **Form.** Coverage shall be at least as broad as an unmodified ISO special causes of loss form, with collapse added as a cause of loss. Policy shall be written to cover all risks of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Landlord and Contractor, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below. a. **Completed Value Basis.** Written on a completed-value, Non-reporting form basis. b. **Insureds Other Insurance Excess and Noncontributing.** Builder's Risk shall be primary to any other

INSURANCE	COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS

insurance coverage available to the named insured parties, with that other insurance being excess, secondary and non-contributing.

c. Prohibited. No protective safeguard warranty permitted.

d. Required Endorsements as to Coverage/Limits. To include

Coverage	Minimum Sublimit
Additional expenses due to delay in completion of project and contract penalties	Amount subject to approval by Landlord.
Agreed Value	Included without sublimit.
Business income/rental value	Amount subject to approval by Landlord.
Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse	Included without sublimit.
Debris removal including demolition as may be made legally necessary by operation of any law, ordinance, or regulation.	Included without sublimit.
Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse	To be included.
Mechanical breakdown, including hot & cold testing	Amount subject to approval by Landlord.

INSURANCE		COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
			<table><tr><td>Occupancy clause</td><td>To be included.</td></tr><tr><td>Ordinance or law</td><td>To be included without sublimit.</td></tr><tr><td>Replacement cost</td><td>To be included.</td></tr><tr><td>Soft costs[112]</td><td>Amount subject to approval by Landlord.</td></tr><tr><td>Terrorism</td><td>Amount subject to approval by Landlord.</td></tr></table> **4. Termination.** The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed . This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of the following dates: a. The date on which all persons and organizations who are insureds under the policy agree that it shall be terminated; b. The date of final payment, as provided for in the Contract Documents; or c. The date on which the insurable interests in the Covered Property of all insureds other than Tenant's Contractor have ceased.
(2)	**Boiler and Machinery Insurance**		May be included in builder's risk policy.
[(3)	**Contractor's Pollution Liability**	**1. Coverage.** Contractor shall provide Contractor's Pollution Liability ("CPL") insurance providing third party liability coverage for bodily injury, property damage, clean up expenses, and defense arising from the operations of the Contractor. Coverage provided in the policy shall apply to operations and completed operations of the Contractor without separate restrictions for either of these time frames. Mold, microbial matter, fungus and biological substances shall be specifically included within the definition of "pollutants" in the Policy. **2. Limits.** Coverage shall be provided with a limit of not less than $1,000,000.	**1. Form.** This insurance shall include prior acts coverage sufficient to cover all services rendered by the Contractor and by its consultants. This coverage may be provided on a claims-made basis. **2. Endorsements.** Landlord shall be listed as an additional insured. There shall be no separate limitation for the time period of this additional insured status within the additional insured endorsement. **3. Notice.** Policy shall be endorsed to give Landlord at least 30 days advance notice of cancellation or material reduction in coverage provided by this policy. **4. Waiver of Subrogation.** Policy shall be endorsed to waive subrogation against the Landlord Parties.

INSURANCE	COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
c. Other Insurance[113] **-** Such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.		

3. Policies To Be Provided By Landlord. Subject to Landlord's judgment, Landlord is to provide the following insurance:

	INSURANCE	COVERAGES/ MINIMUM LIMITS	OTHER REQUIREMENTS
a. Liability			
(1)	**Commercial General Liability** ("CGL")[114] (Occurrence Basis)[115]	**1. Minimum Limits.** Amount subject to approval by Landlord, but not less than the following amounts as of the Delivery Date: $__,000,000 per Occurrence.[116] $__,000,000 General Aggregate.[117] $__,000,000 Product-Completed Operations[118] Aggregate Limit. $_____ Personal and Advertising Injury limit.[119] $_____ Damage to Premises Rented to You Limit. $_____ Medical Expense Limit.[120] **2. General Aggregate.** If the CGL insurance contains a General Aggregate limit, it shall apply separately to this Shopping Center.[121]	**1. Form.** ISO form CG 00 01, or a substitute providing equivalent coverage. **2. Waiver of Subrogation.** ISO form CG 24 04 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to Tenant and other persons as may be designated by Landlord.
b. Property			
(2)	**Causes of Loss - Special Form** (formerly known as "all risk")[122]	100% replacement cost[123], on an agreed value basis,[124] for the Project and all Landlord-owned equipment and other property used in connection therewith.[125]	**1. Form.** ISO form CP 10 30, or equivalent. **2. Insureds.** Landlord. **3. Required Endorsements as to Coverage/Limits.** As determined by Landlord, but may include Business Income and Extra Expense;[126] Rental Value; Glass;[127] Law and Ordinance;[128] Terrorism;[129] Signs.[130] **4. Waiver of Subrogation.** Waiver of subrogation by insurer as to the Landlord, Tenant and other persons as may be designated by Landlord.[131]

2. Form A.2. Insurance Specifications in Narrative Format.[132]

The following insurance and indemnity provisions are adapted from lease provisions drafted by American Bar Association, Section of Real Property Probate and Trust Law, Leasing Committee, July 2009. These provisions are

only samples and must be reviewed by an attorney and tailored for any particular situation. Substantive edits by the authors of this paper are indicated by underling or ~~strikethroughs~~.

A. Landlord's Insurance. Landlord shall take out and maintain, at its own cost and expense (subject, however to reimbursement as set forth herein below), (i) Workers' Compensation,[133] (ii) comprehensive automobile liability insurance;[134] (iii) general liability[135] for bodily injury and property damage arising from Landlord's ownership, management, use and/or operation of the Common Areas and/or the Shopping Center with coverage limits equal to those Tenant is required to maintain in accordance with Section B below; and (iv) insurance covering all ~~perils~~ causes of loss insurable under a "Causes of Loss - Special Form" policy,[136] ~~including, but not limited to, fire and such other risks as are from time to time included in standard extended coverage endorsements,~~[137] insuring in an amount, after completion of construction, of not less than 80% of the full insurable value[138] or such greater coverage as may be required by Landlord's mortgage.[139] Insurance provided for in this Section A may be carried by inclusion within the coverage of any blanket policy[140] or policies of insurance maintained by Landlord; provided, however, that the coverage afforded will not be reduced or diminished by reason of the use of such blanket policies of insurance. If the insurance policies maintained by Landlord with respect to the Shopping Center contain any nature of deductible feature, then Landlord shall be solely responsible for the payment of any such deductible in the event of a loss to the Leased Premises and/or the Shopping Center.[141]

B. Tenant's Insurance Payment. …

C. Tenant's Insurance. Tenant shall take out and maintain, at its own cost and expense, commercial general liability insurance[142] coverage of $1,000,000 ~~combined single limit~~,[143] which commercial general liability policy shall be on an ISO form CG 00 01, or a substitute providing equivalent coverage, and shall include (i) coverage for bodily injury and death, property damage and personal injury ~~products liability~~ coverage;[144] and (ii) contractual liability coverage[145] ~~insuring the obligations of Tenant under the terms of this Lease~~. Such policy shall name Landlord and Landlord's mortgagee~~, as their respective interests may appear,~~[146] as additional insureds.[147] , on an ISO form CG 20 11 01 96, or equivalent form. The liability policy shall be endorsed to include a waiver of subrogation by the insurer as to Landlord (the Landlord Parties). This insurance shall be endorsed to provide primary and not requiring contribution by any insurance maintained by the Landlord (or the Landlord Parties). It is the specific intent of the parties to this lease that all insurance held by Landlord (or the Landlord Parties) shall be excess above the insurance required to be obtained by Tenant by this lease. The personal injury contractual liability exclusion shall be deleted from the contractual liability coverage. The following exclusions/limitations (or their equivalents) are not permitted: (a) Contractual Liability Limitation, CG 21 39 or its equivalent; (b) Amendment of Insured Contract Definition, CG 24 26 or its equivalent; (c) Limitation of Coverage to Designated Premises or Project, CG 21 44; (d) any endorsement modifying or deleting the exception to the Employer's Liability exclusion; (e) any "insured vs. Insured" exclusion; and (f) any type of punitive, exemplary or multiplied damages exclusion. All such insurance required to be maintained by Tenant shall be with an insurance company qualified to do business in the state where the Leased Premises is located. Within 30 days following a written request therefore, Tenant shall provide Landlord with an ACORD certificate[148] of all policies required herein, including an endorsement providing that such insurance shall not be canceled ~~or not renewed~~[149] except after 30 days notice in writing to Landlord.[150] Should Tenant fail to maintain such policies as hereinabove provided, Tenant will be deemed to be in default of the provisions of this Section C. and shall, within 30 days following receipt of a written notice of such default, obtain such insurance. Tenant's obligation to carry the insurance provided for above may be satisfied by inclusion of the Leased Premises within the coverage of so-called "blanket" policies[151] of insurance carried and maintained by Tenant. Tenant shall be responsible for the safety and personal well-being of Tenant's agents, servants, employees, customers and invitees within the Leased Premises.[152] Tenant agrees that Landlord shall not be responsible or liable to Tenant or those claiming under Tenant (including, without limitation, Tenant's agents, servants, employees, customers and invitees) for (i) injury, death or damage or loss occasioned by the acts or omissions of persons occupying any other part of the Shopping Center; or (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof, whether or not such persons are present with the knowledge or consent of Landlord.[153] If Tenant is engaged in any way in the manufacture, sale or distribution of alcoholic beverages, either for consumption of alcoholic beverages on or off the Leased Premises, Tenant will also maintain liquor liability insurance on an occurrence basis with the limits of not less than $2,000,000 each common cause and $3,000,000 aggregate. If written on a separate policy from the commercial general liability policy, such policy shall name Landlord and Landlord's mortgagee~~, as their respective interests may appear,~~[154] as additional insured.[155] (To the extent relevant, insert the following additional insurance specifications for Tenant as set out in **Form A.1**: the General Insurance Requirements; Business Auto Liability, Workers' Compensation and Employer's Liability, and

Environmental Liability; Property Insurance, Business Income and Extra Expense, Boiler & Machinery coverage; Other Insurance; Tenant's Contractors specifications).

D. Indemnification Obligations of Tenant.[156] Tenant does hereby protect, indemnify, defend[157] and save harmless Landlord[158] against and from: (i) any penalty, fines, damages (including actual, consequential and punitive) or charges imposed or settlements thereof for any violation of any laws or ordinances occurring within the Leased Premises during the term hereof, or related to Tenant's use thereof, occasioned by acts of Tenant and/or Tenant's employees, agents, representatives, contractors and/or vendors; (ii) any and all claims, loss, costs, settlements, damages (including actual, consequential and punitive) or expenses, including attorneys' fees and expenses incurred by attorneys (such as postage, courier expenses, travel expenses, and copying costs, dispute resolution, litigation and court costs, costs of investigation and expert witnesses), in the defense of a claim or in to collect on this indemnity, arising during the term hereof out of or from any accident or other occurrence in the Leased Premises causing injury to any person or property;[159] [160] and (iii) any and all claims, loss, cost, settlement, damage (including actual, consequential and punitive) or expense, including attorneys' fees and expenses incurred by attorneys (such as postage, courier expenses, travel expenses, and copying costs, dispute resolution, litigation and court costs, costs of investigation and expert witnesses, in the defense of a claim or in to collect on this indemnity, arising out of any failure of Tenant to comply with or perform all of the requirements and provisions of this Lease. Tenant assumes responsibility for the condition of the Leased Premises and agrees to give Landlord written notice in the event of any damage, defect or disrepair therein. Tenant agrees to use and to occupy the Leased Premises and to place its fixtures, equipment, merchandise and other property therein at its own risk. Tenant's obligations pursuant to this Section D shall survive any expiration or earlier termination of this Lease for a period of one year[161] with respect to any acts and/or occurrences which took place prior to such termination or expiration.

E. Indemnification Obligations of Landlord.[162] Landlord does hereby protect, indemnify, defend and save harmless Tenant against and from: (i) any penalty, damage or charges imposed for any violation of any laws or ordinances occurring on or about the Shopping Center during the term hereof, or related to Landlord's ownership, management and/or the use thereof, whether occasioned by acts of Landlord and/or Landlord's employees, agents, representatives, contractors and/or vendors; (ii) any and all claims, loss, costs, damages or expenses arising during the term hereof out of or from any accident or other occurrence in, or about the Common Areas of the Shopping Center causing injury to any person or property whomsoever or whatsoever;[163] and (iii) any and all claims, loss, cost, damage or expense, including attorneys' fees, arising out of any failure of Landlord in any respect to comply with or perform all of the requirements and provisions of this Lease. Landlord assumes responsibility for the condition of the Common Areas of and the Shopping Center and agrees to give Tenant written notice in the event of any damage, defect or disrepair therein which in any manner affect the Leased Premises. Landlord's obligations pursuant to this Section E shall survive any expiration or earlier termination of this Lease for a period of one year with respect to any acts and/or occurrences which took place prior to such termination.

F. Mutual Waiver of Subrogation.[164] Each party to this Lease shall require each of the insurers under policies of insurance which such party procures or maintains in relation to the Leased Premises and/or the Shopping Center to waive in writing any and all rights of subrogation which such insurer might otherwise have against the other party to this Lease or its servants, representatives, agents, vendors and/or employees. The parties hereto do hereby waive any and all right of recovery against each other[165] for losses covered by such policies or required to be covered, providing the insurance companies issuing same shall waive subrogation rights. Notwithstanding the foregoing provisions of this Section, neither party shall be liable for any injuries, loss, liability, expense, claim or damage to the other's property or interest in respect to which and to the extent that said property or interest is covered by insurance, whether such loss or damage be occasioned by the negligence of such party, its servants, agents, employees or otherwise, unless same shall invalidate any insurance policy affecting the Leased Premises and/or the Shopping Center.[166] Tenant or Landlord, as the case may be, shall give the other written notice that such a waiver of subrogation is not available from its insurers. Notwithstanding any contrary provisions contained in this Section, this Section shall not apply to relieve either party of its obligation to maintain and/or repair, at their respective cost and expense, as required by any other sections of this Lease.

Form B.1

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION[167]

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*: _____(the Landlord), and its successors and assigns, and its officers, directors and employees,[168] _____ (the Landlord's management company), and _____ (the Landlord's lender), _____(the Tenant),[169] and its successors and assigns, and its members and employees, and _____ (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 , in whole or in part, by***:[170]

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:[171]

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.

Form B.2

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES[172]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of Premises (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):

[*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 the ownership, maintenance or use***[173] of ***that part of the premises leased to you***[174] and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to: [175]

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.

Form C.1

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.

• • • •

IL 00 17 11 98

Form C.2

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.

• • • •

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.

CP 00 90 (07/88)

Form C.3

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: **Loss Payee Name:** **Loss Payee Address:**					
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.					

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

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

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

C. Loss Payable Clause

For Covered Property in which both you and a L 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. **….**

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

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

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

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

E. Contract Of Sale Clause

….

F. Building Owner Loss Payable Clause

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

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

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

FORM C.4

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: **Building Owner Name:** **Building Owner Address:**			
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

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

Form D.1

ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

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

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

PRODUCER	CONTACT NAME:
	PHONE (A/C, No, Ext): / FAX (A/C, No):
	E-MAIL ADDRESS:

INSURER(S) AFFORDING COVERAGE	NAIC #
INSURER A :	
INSURER B :	
INSURER C :	
INSURER D :	
INSURER E :	
INSURER F :	

INSURED

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

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

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
	GENERAL LIABILITY						EACH OCCURRENCE	$
	☐ COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
	☐ CLAIMS-MADE ☐ OCCUR						MED EXP (Any one person)	$
							PERSONAL & ADV INJURY	$
							GENERAL AGGREGATE	$
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG	$
	☐ POLICY ☐ PRO-JECT ☐ LOC							$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	$
	☐ ANY AUTO						BODILY INJURY (Per person)	$
	☐ ALL OWNED AUTOS ☐ SCHEDULED AUTOS						BODILY INJURY (Per accident)	$
	☐ HIRED AUTOS ☐ NON-OWNED AUTOS						PROPERTY DAMAGE (Per accident)	$
								$
	☐ **UMBRELLA LIAB** ☐ OCCUR						EACH OCCURRENCE	$
	☐ **EXCESS LIAB** ☐ CLAIMS-MADE						AGGREGATE	$
	☐ DED ☐ RETENTION $							$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N						☐ WC STATU-TORY LIMITS ☐ OTH-ER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ **(Mandatory in NH)**	N / A					E.L. EACH ACCIDENT	$
	If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE	$
							E.L. DISEASE - POLICY LIMIT	$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

CERTIFICATE HOLDER

CANCELLATION

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

AUTHORIZED REPRESENTATIVE

Endnotes

[1] **Additional Resources.** You are referred to the following additional useful resources: A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC Law Conference; P. Wielinski, W. Woodward and J. Gibson, CONTRACTUAL RISK TRANSFER (International Risk Management Institute, Inc. 2012); Expert Commentary available at IRMI's website at http://www.irmi.com/ and the Glossary of Defined Terms at http://www.irmi.com/online/insurance-glossary/default.aspx; B. Locke and M. Maloney, THE PRACTICAL REAL ESTATE LAWYER Vol. 28, No. 3 May 2012, pp. 46-56 *Top 10 Insurance Tips for Lenders* (May, 2012) at www.ali-aba click on "Publications" and various risk management articles by Bill Locke appearing at http://gdhm.com/site/ourattorneys/william_h_locke/.

[2] **Deficient Insurance Specifications Excuse Certificates Which Incorrectly Certify Existence of Additional Insured Coverage.** In one case, *Public Administrator of Bronx County v. Equitable Life Assurance Society,* 198 A.D.2d 105, 603 N.Y.S.2d 830 (N.Y. 1993), 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. 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 subcontractor to be designated as an additional insured, but prior to execution of the contract, the subcontractor told the contractor that it would be an additional insured and produced a certificate of insurance designating the contractor as an additional insured. The court held that the subcontractor had no duty to cause the contractor to be an additional insured.

[3] **ISO.** "ISO" refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "***standard form***". Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1985 *endorsement* forms for use in connection with its commercial general liability policy. ***Endorsement*** is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the endorsement Form appearing in the Appendix as Form CG 20 26 07 04 Additional Insured–Designated Person or Organization:

CG	20	26	07 04
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization."	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "07 04" or July 2004. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 07 04. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 07 04 edition date.

[4] **Insurer Ratings.** BEST'S KEY RATING GUIDE published by A.M. Best Company assigns to insurance companies one of three types of rating opinions, a "*Best's Rating*," a "*Financial Performance Rating*" or a "*Qualified Rating.*" In addition Best's assigns all companies to "*Financial Size Categories*." More information concerning best's and its ratings is available at Best's website, http://www.ambest.com. Insurance specifications in real estate documents will typically specify both the minimum acceptable Best Rating and minimum Financial Size Category for the insurance issuer. For example, "the insurer will be at least a Best's A:VIII."

[5] **Admitted Insurer.** Many good insurer choices are "authorized" to do business but are not "admitted" in the state. Also, not every state requires an insurer to be licensed (aka admitted) in that state.

[6] **Primary Policy.** This specification permits the required minimum limit of liability to be insured either by a single policy of by a combination of a primary (first level) policy and an excess policy or policies. This leaves to the insured the opportunity to negotiate an efficient means of policy limit allocation. Sometimes specifications are written specifying that the primary policy shall be of a stated amount with the balance covered by the excess policy. That approach unduly limits the insured's flexibility.

[7] **Excess Policy.** An "excess policy" is an insurance policy covering the insured against certain liabilities or hazards and applying only to loss or damage in excess of a stated amount or specified primary or self-insurance.

[8] **Deductible.** A "deductible" eliminates coverage below a certain threshold dollar amount or expressed as a percentage. A deductible clause requires the insured to bear risk in each and every loss up to the deductible limit. In theory, deductible limit. In theory, deductibles reduce the price of insurance by eliminating numerous small claims that are relatively inexpensive to handle and also decrease moral hazard.

[9] **Self Insurance.** "Self insurance" is a system whereby a firm sets aside an amount of its monies to provide for any losses that occur - losses that could ordinarily be covered under an insurance program. The monies that would normally be used for premium payments are added to this special fund for payment of losses incurred. Self-insurance is, a means of capturing the cash flow benefits of unpaid loss reserves and also offers the possibility of reducing expenses typically incorporated within a traditional insurance program. It involves a formal decision to retain risk rather than insure it and is distinguished from noninsurance or retention of risks through deductibles, by a formalized plan or system to pay losses as they occur.

"Self-Insured Retention ('SIR')" - A dollar amount specified in an insurance policy (usually a liability insurance policy) that the insured elects to self-insure prior to the attachment of the limits of a liability insurance policy. An SIR is generally considerably larger than a deductible and may be utilized to moderate the costs of the purchase of insurance. SIRs generally create no obligation on the Insurer to respond to loss on the Insured's behalf until the SIR level has been paid. SIRs typically apply to both the amount of the loss and related costs (*e.g.*, defense costs), but some apply only to amounts payable in damages (*e.g.*, settlements, awards, and judgments). An SIR differs from a true deductible in at least two important ways. Most importantly, a liability policy's limit stacks on top of an SIR while the amount of a liability insurance deductible is subtracted from the policy's limit. As contrasted with its responsibility under a deductible, the insurer is not obligated to pay the SIR amount and then seek reimbursement from the insured; the insured pays the SIR directly to the claimant. While these are the theoretical differences between SIRs and deductibles, they are not well understood, and the actual policy provisions should be reviewed to ascertain the actual operation of specific provisions.

[10] **Certificates Of Insurance Are Not Insurance.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. See 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); Wielinski, Woodward and Gibson, CONTRACTUAL RISK TRANSFER (International Risk Management Institute, Inc. 2012) §15A-D Insurance Certificates; and 2 Insurance Claims and Disputes (5th ed. 2010) § 6:37A. Certificates of Insurance. Note that many states have adopted laws and the insurance commissioners of various states have issued prohibitions against parties altering ACORD certificates of insurance.

[11] **ACORD Certificates - Not Reasonable To Rely Upon.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. An ACORD Certificate of Insurance and ACORD Evidence of Insurance should not be relied on as being accurate or as properly defining coverages, exclusions, and deductibles. W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

Sample of Cases Finding Reliance Unreasonable. Alabama. *Alabama Elec. Co-Op Bailey*, 950 So.2d 280, 284 (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.

The ACORD 24, 25, 27 and 28 contain the following disclaimer 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*] 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*].**

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*] 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.

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).**

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).

[12] **Timing on Providing Evidence of Insurance.** Evidence of insurance is often stated as being required to be provided within 30 days prior to the expiration of the current policy. So stating likely creates a technical breach, as coverage is rarely procurable 30 days in advance of a policy's term end.

[13] **Certificates And Binders Are Sometimes Issued Prior To Policy Issuance.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. A certificate of insurance is only evidence of insurer's intent to provide insurance and is not a contract to insure. In *Kermanshah Oriental Rugs v. GO*, 47 A.D.3d 438 (N.Y. 2008) the court held that a certificate of insurance was merely evidence of a carrier's intent to provide coverage, but not a contract to insure the designated party; nor was the certificate conclusive proof, standing alone, that a contract for insurance existed; the claim that insurance was never procured remained unchallenged. In *Griffin v. DaVinci Development, LLC*, 845 N.Y.S.2d 97 (N.Y. 2007) the court found no privity of contract with insurer or insurance broker and no right to claim third party beneficiary status by premises owner in a suit against an insurer and contractor's insurance broker for broker having issued multiple certificates of insurance showing owner as an additional insured when in fact no insurance was subsequently issued. Certificates and binders are on many occasions issued prior to the issuance of the policy. This can result in situations where a subsequently issued policy excludes coverages expected by an additional insured shown in the certificate. In *American Country Ins. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (Ill. 1998) a general contractor, which as designated as an additional insured on subcontractor's insurance certificate, was bound by policy exclusions and conditions in a subsequently issued policy and additional insured endorsement limiting coverage to strict liability. The endorsement read: "This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured". The court noted

"Just because there are fewer strict liability claims than negligence claims does not make the coverage illusory". Even in the case of a renewal, additional insured status may be dropped and reliance on a certificate designating insured status may not be relied upon.

[14] **Benefits From Obtaining A Certificate.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate. Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate. There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (e.g., agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected; (3) 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.

[15] **Parties to Policy: "First Named Insured"; "Named Insured"; "An Insured"; "An Additional Insured".** Different "insured" terminology is used to define the insured in liability policies and property policies.

Commercial General Liability Policies. The following is terminology used in CGL Policies and their endorsements to describe various types of insured parties, each with varying rights and obligations under the CGL Policy:

Named Insureds. The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the named insured. If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the first named insured.

Automatic Insureds. Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are automatic insureds. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations.

Additional Insureds. An "additional insured" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (e.g., owners of property leased by the named insured -landlords). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue blanket endorsements specifying certain parties that are "automatic additional insureds" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. A common error in insurance specifications is to specify that a party is to be added to the named insured's policy as an additional named insured.

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

Insured. In a property policy, the insured is the party identified on the Declarations Page as having an ***insurable interest*** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed.

Additional Insured. Third parties may be designated by endorsement to the property policy as an ***additional insured*** to protect their ***additional interests***.

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

[16] **Additional Insureds.** See Endnote [167] – [175] for a discussion of **Form B.1** ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization and **Form B.2** ISO CG 20 11 Additional Insured – Manager or Lessors of Premises. An "additional insured" is a person or organization not automatically included as an insured under an insurance policy but for whom insured status is arranged, usually by endorsement. A named insured's impetus for providing additional insured status to others may be a desire to protect the other party because of a close relationship with that party (e.g., employees or members of an insured club) or to comply with a contractual agreement requiring the named insured to do so (e.g., customers or owners of property leased by the named insured).

[17] **Waiver of Subrogation.** See Endnote [80] for a discussion of contractual waivers of claims and waivers of subrogation in leases.

[18] **Primary and Noncontributing.** See Endnote [38] for a discussion of "primary and noncontributing" liability policies.

[19] **Self-Insured Retentions.** "Self-insured retention" or "SIR" is a dollar amount specified in an insurance policy (usually a liability insurance policy) that must be paid by the insured before the insurance policy will respond to a loss. SIRs typically apply to both the amount of the loss and related costs

(e.g., defense costs), but some apply only to amounts payable in damages (e.g., settlements, awards, and judgments). An SIR differs from a true deductible in at least two important ways. Most importantly, a liability policy's limit stacks on top of an SIR while the amount of a liability insurance deductible is subtracted from the policy's limit. As contrasted with its responsibility under a deductible, the insurer is not obligated to pay the SIR amount and then seek reimbursement from the insured; the insured pays the SIR directly to the claimant. While these are the theoretical differences between SIRs and deductibles, they are not well understood, and the actual policy provisions should be reviewed to ascertain the actual operation of specific provisions.

[20] **Certificates Which Correctly Certify Existence of Additional Insured Coverage, But Coverage Is Unsuitable.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. An Illinois court, *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill. App.3d 543, 572 N.E.2d 1112 (Ill. 1991), 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. 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.

[21] **Cancellation Notice Statement.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. The ACORD 24 Certificate of Property Insurance, ACORD 25 Certificate of Liability Insurance and ACORD 28 Evidence of Commercial Property Insurance were revised in late 2009 and early 2010 to change the Cancellation notice language to read as follows:

> should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

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

> should any of the above described policies be canceled before the expiration date thereof, the issuing insurer will endeavor to mail ___ days written notice to the [*certificate holder named to the left/additional interest named below*], but failure to mail such notice shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

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

> Charlew contends that it reasonably relied, to its detriment, upon the certificate of insurance which named it as an additional insured and, therefore, under our decision in [citation omitted], Merchants Mutual was equitably estopped from denying coverage. Notably, however, the situation presented herein is distinguishable because the Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. "Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage." (citations omitted). Furthermore, Charlew argues that the policy was not properly cancelled because it was not notified of such action, as an additional insured…. Even assuming that Merchants Mutual received the policy change request from Weller-Marcil, we disagree with that argument. Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in … (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled … (citation omitted), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance … (quotation of the ACORD language is omitted.). *Id.* at 753-54.

[22] **Status as a Certificate Holder Does Not Create Rights.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. As note below in the review of the disclaimers contained in the ACORD Certificate of Insurance, it "confers no rights upon the certificate holder" but is issued "as a matter of information only". See for example the case, *Bender Square Partners v. Factory Mutual Insurance Co.*, 2012 WL 208347 (S. D. Tex. – Hou. Div.) holding that the landlord was not entitled to its tenant's property insurance proceeds in a case where the lease did not provide that the landlord was an insured on the tenant's policy and did not provide for the landlord to be a loss payee. Prior to Hurricane Ike destroying the premises, a Big Lots retail store, tenant had provided its landlord with a certificate of insurance showing that the tenant had property insurance. The landlord was the certificate holder on the certificate of insurance, but was neither shown on the certificate of insurance as an insured or loss payee. The court rejected the landlord's argument that it was a either an intended or implied third-party beneficiary of the policy. The court noted that the property policy contained the following seemingly positive provision:

> Additional insured interests are automatically added to this Policy as their interest may appear when named as additional named insured, lender, mortgagee, and/or loss payee in the Certificates of Insurance on a schedule on file with the Company. Such interests become effective on the date shown in the Certificate of Insurance and will not amend, extend, or alter the terms, conditions, provisions, and limits of this Policy.

However, neither the policy nor the certificate of insurance named the landlord as an insured. Further, the court determined that the following interlineations following the liability insurance specification in the lease did not also apply to the property insurance specification:

> [s]uch policies of insurance shall be issued in the name of tenant and landlord and for the mutual and joint benefit and protection of said parties; and such policies of insurance or copies thereof, shall be delivered to the landlord.

[23] **Producer.** The "Producer" of a certificate of insurance typically is the broker for the named insured of the policies described in the certificate.

[24] **Signed By An "Authorized Representative"?** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance. 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". Other courts have held that the insurer is estopped from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate, especially if the certificate does not contain ACORD-type disclaimers. See discussion at 43 AM. JUR.2d (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).

Certificate Issued by "Soliciting Agent". In *TIG Ins. Co v. Sedgwick James of Washington,* 276 F.3d 754 (5th Cir. 2002) the Fifth Circuit agreed with the district court's determination that the issuing agent (Sedgwick) was a "soliciting agent" as opposed to a "recording agent", and thus did not have actual authority to amend the policy to add Safety Lights as an additional insured. The court noted that the agency agreement between Sedgwick and Lumbermens authorized Sedgwick to solicit insurance on behalf of Lumbermens but permitted Sedgwick to bind Lumbermens only "to the extent specific authority (was) granted in the schedule(s) attached". Sedgwick had the authority to issue certificates of insurance and binders but lacked the authority to modify the policy itself. Also see for example, *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 303 A.D.2d 245 (N.Y. – 1st Dept. 2003) where the court held that a tenant's insurance broker, which issued certificate of insurance to a landlord which erroneously stated that the tenant's insurance policy, naming landlord as an additional insured, contained rental coverage insurance for landlord's benefit, had no liability to landlord on ground that the broker and the landlord had no contractual relationship, privity, requisite to the imposition of liability for negligent misrepresentation.

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

Certificate Issued by Insurer. Another court, *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305 (7th Cir. 1993), faced with an insurer-issued certificate certifying to a certificate holder that the insured had business auto liability insurance, held that the certificate bound the insurer to cover an injury that occurred before the policy was issued, where the list of covered trucking companies did not include the certificate holder. The court concluded that as of the date of the accident, the certificate was the policy and the insurer could not rely on the policy's disclaimer that "the insurance afforded by the listed policy(ies) is subject to all their terms, exclusions, conditions" as there was no policy at the time of the certificate's issuance.

[25] **Survival of Insurance Covenant After Lease Term.** The insurance covenants call for certain liability insurance coverages to be maintained after the expiration or termination of the Lease. This provision is included to further confirm that these covenants continue independently of the expiration or termination of the lease. The parties' risk managers need to be aware of the post-lease insurance requirements and monitor compliance.

[26] **Waiver of Claims; Waiver of Subrogation.** See Endnote [80] for a discussion of waivers of claims and waivers of subrogation. Note this provision in **Form A.1** is a waiver by Tenant. See **Form A.2** Section F for a mutual waiver of claims and subrogation. A tenant should negotiate a waiver of claims and subrogation and exclude landlord insured losses from its indemnity.

[27] **Self Insurance; Self Insured Retentions.** See Endnote [19] for a definition of a "Self Insured Retention".

[28] **Geographic Allocation of Insurance Coverage.** The Insurance Specifications set out a **Form A.1** as well as the Insurance Covenants set out as **Form A.2** specify the types of insurance to be maintained by Landlord and Tenant, but utilizes different means to identify the geographic coverages for Landlord and Tenant for liability insurance coverage and property insurance coverage. Both Forms identify the portion of the Project to be covered by Tenant's property insurance as the Leased Premises and the area to covered by Landlord's property insurance as the Common Areas and/or Shopping Center. The Forms do not similarly state the geographic area to be covered by the Landlord and Tenant's liability insurance, but rely on the geographic coverage terms and definitions of the party's liability policy. Each party's mutual indemnity in **Form A.2** follows the geographic risk allocation formula.

[29] **Commercial General Liability Insurance (CGL).** CGL insurance is termed "third party coverage" insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (e.g., it excludes coverage for damage to property "owned, occupied or controlled by the named insured." Covered liabilities or damages arise from an "occurrence" during the policy period which is not excluded by the Exclusions of the policy. See Endnote [31] for a definition of "Occurrence".

CGL Insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured's products, premises, or operations, and can be offered as a package policy with other coverages. CGL policies also provide coverage for the cost to defend and settle claims. Commercial general liability policies typically and the ISO general liability policy form, which is the industry standard, is divided into Sections, Coverages, Exclusions, Definitions and Endorsements. The ISO CG policy is set up in the following parts:

Declarations.
Section I - Coverages
Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)
1. Insuring Agreement
2. Exclusions
Coverage B. Personal and Advertising Injury Liability
1. Insuring Agreement
2. Exclusions
Coverage C. Medical Payments
1. Insuring Agreement
2. Exclusions
Supplementary Payments - Coverages A and B
Section II - Who Is An Insured
Section III - Limits of Insurance
Section IV - Commercial General Liability Conditions
Section V - Definitions
Endorsements

The ISO commercial general liability policy categorizes liabilities into three categories: Coverage A for "Bodily Injury" and "Property Damage", Coverage B for "Personal and Advertising Injury Liability" and Coverage C for "Medical Payments." ISO defines each of these terms in the policy as follows: "Bodily Injury" is "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "Property Damage" is "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." "Personal and Advertising Injury" is injury, including consequential bodily injury, arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organizations good, products or services; oral or written publication, in any manner, of material that violates a person's right of privacy; the use of another's advertising idea in the insured's advertisement; infringing upon another's copyright, trade dress or slogan in the insured's advertisement. "Medical Payments" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations.

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

[31] **Occurrence.** An "Occurrence" in a commercial general liability policy is an accident, and includes a continuous or repeated exposure to substantially the same general harmful conditions.

[32] **General Aggregate.** See ISO CG 21 44 Limitation of Coverage to Designated Premises or Project. "General Aggregate" is the maximum limit of insurance payable during any given annual policy period for all losses other than those arising under the products and completed operation hazard. "Aggregate" is a limit in an insurance policy stipulating the most it will pay for all covered losses sustained during a specified period of time, usually a year. Aggregates are commonly included in liability policies. They are also sometimes used in property policies with respect to catastrophic exposures, such as earthquake and flood.

[33] **Personal and Advertising Injury.** See Endnote [29] for a discussion of Personal and Advertising Injury coverage in CGL policies. "Personal and Advertising Injury" is a defined term in the standard CGL since 1998, it combines elements of the earlier separate categories of "Personal Injury" (PI) and "Advertising Injury." a category of insurable offenses that produce harm other than bodily injury. "Personal Injury" includes false arrest, detention, or

imprisonment; malicious prosecution; wrongful eviction; slander; libel; and invasion of privacy. "Advertising Injury" covers the following offenses in connection with the insured's advertising of its goods or services: libel, slander, invasion of privacy, copyright infringement, and misappropriation of advertising ideas.

[34] **General Aggregate Per Project.** See Endnote [32] for a definition of a "General Aggregate". If the liability policy covers multiple locations, its limits may be exhausted by claims at the other locations. If the limits have been negotiated between the parties as the minimum coverages for this transaction, the policies will need to be endorsed to make them applicable in full to this location or a separate policy purchased for this location.

[35] **Contractual Liability Coverage - An Exception To A Exclusion From Coverage.** "Contractual Liability Coverage"(referred to by this author as "*indemnity insurance*" is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

> This insurance does not apply to:
>
> b. Contractual Liability
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This ***exclusion does not apply*** to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "***Insured Contract***", provided the "Bodily Injury" or "property Damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
>
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

An "Insured Contract" is defined in the standard CGL policy as:

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

See CG 24 26 07 04 Amendment of Insured Contract Definition, which when added to the standard CGL policy amends definition "**f**" to add the following qualifier at the end of the first clause:

> , provided the "bodily injury" or "property damage" is ***caused, in whole or in part, by*** you or by those acting on your behalf.

Also see Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract.

Coverage For Named Insured As Indemnifying Party. Contractual liability coverage does not make the indemnified person an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co*., 8 Cal. App. 4th 338, 10 Cal. Rptr.2d 165 (1992); *Jefferson v. Sinclair Ref.g Co*., 10 N.Y.2d 422, 223 N.Y.S2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co*., 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal - Globe Co*., 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. *See e.g., Gibson & Associates, Inc. v. Home Ins. Co*., 966 F.Supp. 468, 475-77 (N. D. Tex. 1997).

Named Insured Not Insured For All Contractually Assumed Liabilities. CGL policies place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person's CGL policy. For example, the ISO CGL standard policy form provides

> If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:
>
> a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
>
> b. This insurance applies to such liability assumed by the insured;
>
> c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract".

The insured contract provisions of ISO's CG 00 01 requires as a condition to providing the indemnified person a defense under the contractually assumed liability coverage that the indemnified person and the named insured - indemnifying person are parties to the same suit. An example of a common suit in which this is not the case is suit by an injured employee of the indemnifying party against the indemnified party.

Under the 1996 and later editions of the standard ISO form CGL policy, the cost to defend an indemnified person under the indemnifying person's CGL policy will be provided within the limit of the proceeds available under the policy as opposed to being on top of the limits as a supplementary payment, unless the indemnified person complies with a lengthy list of conditions precedent.

Named Insured Not Insured For All Contractually Assumed Liabilities. Indemnity insurance does not expand the scope of the liability policy beyond the coverage provided, nor does it extend the limits of liability. Coverage is limited by the policy's other exclusions (*e.g.*, pollution liability, insured's breach of contract, and breach of product warranty). Indemnity insurance does not insure the performance of the business aspects of the contract. *Musgrove v. Southland Corp*., 898 F.2d 1041 (5th Cir. 1990). The court held

> Contractual liability has a definite meaning. It is coverage of the insured's contractual assumption of the liability of another party. It typically is in the form of an indemnity agreement.... The assumption by contract of the liability of another is distinct conceptually from the breach of one's contract with another.... Liability on the part of the insured for the former is triggered by contractual performance; for the latter liability is triggered by contractual breach....CITGO (the owner) concedes that LCE (the contractor) made no indemnification agreement applicable to the loss herein; rather, it complains of LCE's breach of contract. LCE's contractual liability insurance is thus not applicable. LCE did not insure its commitment to secure insurance coverage for CITGO. *Id*. at 1044.

Contractually assumed liability coverage under the standard policy covers "bodily injury" and "property damage" but does not cover "personal injury or advertising injury" liability, unless such coverage is endorsed as additional coverage on to the insured's CGL policy. "Personal and Advertising Injury" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

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

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

No Coverage For Indemnified Person's Sole Negligence. Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for the indemnified person's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 06 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnified person. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

[36] **Additional Insureds.** See Endnote [16] for a definition of an "Additional Insured". See Endnote [167] – [175] for a discussion of **Form B.1** ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization and **Form B.2** ISO CG 20 11 Additional Insured – Manager or Lessors of Premises.

[37] **Separation of Insureds.** Another feature of some requests for additional insured status is the stipulation that the indemnifying person's policy, to which the indemnified person is being added as an additional insured, be modified to provide "cross-liability" coverage. Cross-liability refers to the loss exposure created when one insured under a policy sues another. Standard general liability policies in use today provide "cross-liability" coverage–without the need for any modification–by virtue of the "separation of insureds" condition. This condition of the policy states that coverage will apply "separately to each insured against whom claim is made or suit is brought." For this reason, it may be a legitimate precaution to include in contract language a stipulation that liability insurance as required by the contract provide cross-liability coverage, but not a demand for a cross-liability endorsement, which is unnecessary when the standard CGL form is being used. This severability of interests clause, as it is also known, establishes separate coverage for each insured under the policy, except as respects the policy limits. Policies containing this provision do not require a separate endorsement to effect cross-liability coverage, and ISO has no "cross-liability endorsements" in its forms portfolio because they are not needed with ISO policy forms. For this reason, contracts should generally not require cross-liability endorsements. Most endorsements that go by that name exclude liability of one insured to another. To handle the unlikely, but possible, contingency that a policy does not include a severability of interests clause, it is

prudent to specify that the required liability policies provide cross-liability coverage as would by achieved under the standard ISO separation of insureds clause.

[38] **Primary and Noncontributing.** The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under someone else's policy rather than having to rely upon on one's own policy. Additional insured Indemnified persons must verify that any "other insurance" coverage to which they have access will not interfere with payment by the indemnifying person's policy on a primary and noncontributing basis. This is the interplay of the indemnifying person's CGL policy with the additional insured's own CGL policy. Assuming both the Indemnifying person's CGL policy and the additional insured/Indemnified person's policies are standard from policies, then both will declare themselves to be primary insurance unless some modification is effected to eliminate this dual coverage. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange,* 444 S.W.2d 583 (Tex. 1969); *Texas Employers Ins. v. Underwriting Members,* 836 F.Supp. 398, 404 (S. D. Tex. 1993). Note that endorsing the indemnifying person's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for ***proration*** when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange,* 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured's desire to have the named insured's policy respond prior to the additional insured's own policy is thwarted.

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

(1) Endorse the protected party's policy to be primary. The above stated approach of endorsing the protecting party's CGL policy to state that it is primary with respect to other insurance maintained by the additional insured (as noted above most standard CGL policies state they are primary).

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

(3) Endorse the protected party's policy to be excess. The third approach is for the protected party (the additional insured) to have its own carrier endorse the protected party's CGL policy to state that coverage under the protected party's policy is excess to coverage available to the protected party as an additional insured on another person's policy. This works unless the additional insured endorsement has also been issued on a excess liability basis. Because of this possibility, option (3) is not recommended.

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

> 4. Other Insurance
>
> b. Excess Insurance
>
> This insurance is excess over: ...
>
> (2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured *by attachment of an endorsement*.

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In such cases, it is still necessary to endorse the additional insured's own policy to make it excess over a protecting party's policy in order to avoid both policies being primary and co-contributing. This should be an easy sell to the protected party's carrier as the result is to make its policy excess coverage. Also remember the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution. The following are traps to be avoided by the party seeking protection:

(1) Do not assume that the protecting party's insurance contains standard wording. It might not contain the standard wording that the policy affords primary coverage over other insurance available to the additional insured. In such case reliance on the 1997 ISO language or other endorsement to

the additional insured's own policy to state that it is excess over other coverage available to the additional insured may be misplaced. Some policies maintained by protecting party's provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protecting party's policy to provide that it is excess coverage creates a case where both policies declare them to be excess.

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

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

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

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

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

[39] **Waiver of Subrogation Endorsement.** See Endnote [80] for a discussion of waivers of claims and waivers of subrogation in leases. There generally is no premium charged by the insurer to issue this endorsement. The endorsement waives the insurers right or reimbursement for its paid claims as to persons scheduled in the endorsement.

[40] **Personal Injury Exclusion to Contractual Liability Coverage.** Unless endorsed, the standard CGL policy excludes from contractual liability coverage indemnification by the insured for "Personal Injuries". See Endnotes [29] and [33] for the definition of "Personal Injuries".

[41] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See Endnote [167] for a discussion of ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[42] **Contractual Liability Limitation.** See Endnote [35] for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See ISO CG 21 39 Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes paragraph "**f**" (assumption of tort liability of another) from altogether from the definition of an insured contract.

[43] **Amendment of Insured Contract Definition.** See Endnote [35] for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See ISO CG 24 26 Amendment of Insured Contract Definition amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

[44] **Limitation of Coverage to Designated Premises or Project.** See Endnote [34]. See ISO CG 21 44 Limitation of Coverage to Designated Premises or Project. See Endnote [32] for a discussion of General Aggregates.

[45] **Severability of Interest Clause.** A "severability of interest clause" is a policy provision clarifying that, except with respect to the coverage limits, the insurance applies to each insured as though a separate policy were issued to each. Thus, a policy containing such a clause will cover a claim made by one insured against another insured.

[46] **Certificate of Insurance.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance.

[47] **Certificate of Insurance – Attachment and Modifying Amendments.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance.

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

[49] **"Any Auto".** If the insured does not own an auto, the insurer may not agree to cover liability from "any auto", but limit coverage to hired and nonowned autos.

[50] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[51] **Workers Compensation.** See Endnote [52] for a definition of "employer's liability coverage". "Workers Compensation" insurance is the system by which no-fault statutory benefits prescribed by state law are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. The standard workers compensation and employers liability policy used in most states was substantially revised in 1984 and again to a lesser extent in 1992. As compared to the previous 1954 policy, these revisions included some slight changes in terminology and coverage approaches that should be reflected in contract insurance requirements. One of these was a change in the name from "workmen's compensation" to "Workers Compensation." Another more important change was the inclusion of "other states coverage" in the basic Form and the elimination of the "broad Form all states" endorsement, which was previously used to provide this coverage. Workers compensation coverage is usually written in tandem with an employers liability coverage policy. A "Workers Compensation and Employers Liability Policy" is an insurance policy that provides coverage for an employer's two key exposures arising out of injuries sustained by employees. Part One of the policy covers the employer's statutory liabilities under workers compensation laws, and Part Two of the policy covers liability arising out of employees' work-related injuries that do not fall under the workers compensation statute. In most states, the standard workers compensation and employers liability policy published by the National Council on Compensation Insurance (NCCI) is the required policy form.

[52] **Employers Liability Coverage.** See Endnote [51] for a definition of "Workers Compensation". "Employers Liability Coverage" provides coverage against common law liability of an employer for accidents to employees, as distinguished from liability imposed by a worker's compensation law. This is provided by Part 2 of the basic workers compensation policy and pays on behalf of the insured (employer) all sums the insured becomes legally obligated to pay as damages because of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment by the insured. Typically triggered by a third party after the insured's employee (who is barred by worker's compensation laws from suing his or her employer) sues a third party for bodily injury suffered while performing duties of his or her employment (e.g., contractor's employee injured on the premises of that third party).

[53] **Bodily Injury by Accident Limit (Workers' Compensation)** - The most the insurer will pay under Part Two, Employers Liability, for all claims arising out of anyone accident, regardless of how many employee claims or how many related claims (such as a loss of consortium suit brought by the injured worker's spouse) arise out of the accident.

[54] **Bodily Injury by Disease.** "Bodily Injury by Disease, Each Employee" - A policy limit within Part Two, Employers Liability, establishing the most the insurer will pay for damages due to bodily injury by disease to anyone employee. "Bodily Injury by Disease, Policy Limit" - An aggregate limit of Part Two, Employers Liability, stipulating the most the insurer will pay for employee bodily injury by disease claims during the policy period (normally a year) regardless of the number of employees who make such claims. In the event the policy is for a period longer than 1 year, the limit is reinstated for each subsequent 12-month period.

[55] **USL&H.** The United States Longshore and Harbor Workers' Compensation Act (USL&H) of 1927 is a federal law that provides no-fault workers compensation benefits to employees other than masters or crew members of a vessel injured in maritime employment—generally, in loading, unloading, repairing, or building a vessel. Employers can obtain coverage under a standard workers compensation policy by purchasing an USL&H coverage endorsement. The USL&H law applies to persons working on, over, or adjacent to a navigable waterway. The term "adjacent to" has been ruled to have widely variant definitions.

[56] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[57] **Liquor Law Liability (Dram Shop).** - Common law liability imposed on those selling alcoholic beverages, as we as statutory liability established in some states, which is excluded from commercial general liability policies. For coverage, requires liquor legal liability policy that special provides coverage for bodily injury or property damage for which the insured may become legally liable as a result of contributing to a person's intoxication. This policy only covers insureds '*in the business of*' manufacturing, selling, distributing, serving alcoholic beverages for charge or no charge if a license is required for the activity.

[58] **Occurrence Policy.** See Endnote [30] for a definition of an "Occurrence Policy".

[59] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[60] **Occurrence Policy.** See Endnote [30] for a definition of an "Occurrence Policy".

[61] **Allocation of Limits Between Primary and Excess/Umbrella Policy.** Permitting both primary and umbrella policies to satisfy the liability limits affords the insurance purchaser the opportunity to choose the most cost-effective combination of policies.

[62] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[63] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[64] **Landlord and Tenant Relationship – Risk of Loss to the Shopping Center and the Leased Premises.** At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damages unless it caused the damage; the lease continues in effect, and the rent is not reduced or abated. In order to use the premises, the tenant is put to the burden of restoring the premises to useful condition. Absent a tenant's fault in causing damage to the premises or provision in the lease, the tenant's common law obligation is not to commit waste. The tenant is liable to the landlord, if the tenant negligently destroys the premises (*e.g.*, a negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.—Galveston 1953, *no writ*). If the lease does not obligate the landlord or the tenant to restore the premises after a casualty loss, and the loss is not caused by the negligence of either party, the landlord bears the risk of the decline in value of the property if either it or the tenant does not restore the property.

As opposed to leaving the rebuilding obligation to common law rules, the parties customarily will address this topic in the lease. The lease may provide that the tenant is obligated to return the premises at the expiration of the lease term and make no exception for casualty losses; the lease may allocate the responsibility of rebuilding to landlord or to tenant, or parts to landlord and parts to tenant; and the lease will address funding of the rebuilding obligation by requiring one or the other of the parties to maintain property insurance, including setting out specifications for the property insurance.

[65] **Property Insurance.** ISO commercial property insurance is a form comprised of the following documents combined to make the policy: the Declarations Page (ISO form IL 00 19, or a variation); the Common Policy Conditions (IL 00 17) **Form C.1**; one of the 3 Causes of Loss Forms (CP 10 10, 10 20 or 10 30); the Commercial Property Conditions (CP 10 90) **Form C.2**; the Building and Personal Property Coverage Form; additional limits and optional coverages, endorsements describing property covered; loss payees endorsements **Form C.3** and **C.4**; and the ISO form CP 00 10.

[66] **Property Insurance – "Causes of Loss".** Outdated terminology requiring that the policy provide "all risks" or "fire and extended coverage" is often used in contracts. "All risks" denoted property insurance covering losses arising from any fortuitous cause except those that are specifically excluded and is currently called "Special Form" or "Special Causes of Loss Form." "Extended coverage" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's Basic Causes of Loss Form. Since the extended coverage endorsement is no longer used, a better approach to requiring this coverage is to refer to the ISO "Basic," "Broad," or "Special" Causes of Loss Form. Prior property insurance forms used the terms "risk" and "perils." Pre-"causes of loss" property insurance was written either on a "named peril" basis which insured property against loss or damage from causes of loss expressly enumerated in the policy or an "all risks" basis, which insured property against loss or damage from all causes of loss except those which were expressly excluded. "Fire and extended coverage" insurance was a named peril property insurance.

ISO Special Causes of Loss. The most comprehensive ISO property policy is called "Special Form" or "Special Causes of Loss Form." This is in contrast to "Named Perils Coverage" which applies only to loss arising out of causes that are listed as covered.

Exclusion from Causes of Loss. The following are excluded perils from Causes of Loss coverage, including from Special Causes of Loss: Ordinance or Law (see Endnote [76]); Earth Movement, Governmental Action; Nuclear Hazard; Utility Service; War and Military Action; Water (see below); Fungus, Wet Rot, Dry Rot, and Bacteria, Boiler and Machinery Failure; Wear and Tear or Lack of Maintenance; Continuous Seepage or Leakage Over a Period of 154 Days or More; Dishonest Acts; Pollutants; and Faulty Design or Workmanship. Also, in special hazard areas certain causes of loss may be excluded from coverage by endorsement with specialty insurance being required to cover the hazard (e.g., windstorm).

Water Exclusion. The Water exclusion excludes damage caused by: (1) flood, surface water, waves, tides; (2) mudslide or mudflow; (3) water that backs up or overflows from a sewer, drain, or sump; and (4) water underground pressing on, or flowing or seeping through foundations, walls, floors, or paved surfaces, basements, doors, windows, or other openings.

Windstorm. An interesting example of how a windstorm exclusion may come into play is illustrated in Case Study 3 "Pick Your Insurance Broker Wisely" discussed at B-3 and 4 of A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE discussing the case of *Great American Ins. Co. of N.Y. v. Lowry Dev., LLC*, 576 F.3d 251 (5th Cir. 2009). This case involved a builder's risk policy. Although the policy as originally issued did not exclude wind damage, subsequent to its issuance the issuer endorsed the policy with a windstorm exclusion and notified the developer's broker that the original policy was to have excluded wind damage. The developer's broker did not respond and did not notify the developer. The policy was reissued the next policy year and excluded wind damage. Of course, Hurricane Katrina demolished the project. The Fifth Circuit held that the developer's broker was the developer's agent with authority to handle the developer's insurance matters and therefore notice to the broker was notice to the developer.

Flood. See Endnote [74] for a discussion of flood insurance.

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

Coverage under Each Causes of Loss. The following are the perils covered by each of the "Causes of Loss" Forms:

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS

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

[67] **Valuation Terminology – Replacement Cost or Actual Cash Value.** Whether the policy is a "Replacement Cost" policy or an "Actual Cash Value" policy, the loss paid will be limited to the policy limits.

"Replacement Cost" is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation or age. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property. The policy proceeds are not paid until the property is actually repaired or replaced, and only if replacement occurs as soon as reasonably possible after the loss or damage. Notice of intent to replace must be given to the insurer within 180 days of loss. Replacement cost coverage does not prohibit recovery if the insured rebuilds at a new location, but the coverage is limited to what it would have cost to replace the improvements at the original premises. Replacement cost coverage does not cover the added costs of construction due to changes in laws and ordinances except if the policy is endorsed with an Ordinance or Law Coverage Endorsement (See Endnote [76]). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See ISO CP DS 10 00 Declarations Page at Optional Coverages.

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

and determine the amount the insurer will pay in the event of a loss. ACV coverage applies if Replacement Cost coverage is not affirmatively selected on the Declarations Page of the policy.

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

[68] **Valuation Terminology – Agreed Value Endorsement.** An "agreed value endorsement" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

[69] **Designation of Landlord as Additional Insured on Tenant's Property Policy.** See Endnote [73] for a discussion of the designation of the Landlord as an additional insured on Tenant's property insurance.

[70] **Risk Allocation – Tenant's Property Losses Allocated to Tenant's Property Insurance.** This provision coupled with the waiver of subrogation provision whereby Tenant waives claims against Landlord in addition to waiving its insurer's subrogation rights protects Landlord against claims by Tenant for damage to the Tenant's property, even if the damage arises out of the Landlord's negligence.

[71] **Coinsurance.** "Coinsurance" is a property insurance provision that penalizes the insured's loss recovery if the limit of insurance purchased by the insured is not at least equal to a specified percentage (commonly 80%) of the value of the insured property. A business income coverage coinsurance provision penalizes the insured's loss recovery if the business income limit of insurance is not at least equal to a specified percentage of the business income that would have been earned during the 12-month policy period. The coinsurance provision specifies that the insured will recover no more than the following: the amount of the loss multiplied by the ratio of the amount of insurance purchased (the limit of insurance) to the amount of insurance required (the value of the property on the date of loss multiplied by the coinsurance percentage), less the deductible. Coinsurance requirements protect the insurer against an insured's deliberate underinsurance of the Covered Property. To avoid the penalty of coinsurance, the insured is forced to insure at above this minimum level of value and pay its premium on the insured value. See Declarations Page – If higher than 80% coinsurance is applicable, such higher percentage is to be set out in the space provided on the Declarations Page. See Endnote [68] for a discussion of "Agreed Value Basis" coverage and see Declarations Page setting out space for designating the Agree Value of the Covered Property.

[72] **Property Insurance – Special Causes of Loss.** See Endnote [66] for a discussion of Causes of Loss Form property insurance policies, including Special Causes of Loss.

[73] **Designation of Landlord as Additional Insured on Tenant's Property Policy.** A landlord may take on the status of a "loss payee" or sometimes an "additional insured" on a tenant's property policy.

Loss Payable Clause. A "Loss Payable Clause" is an insurance provision authorizing payment in the event of loss to a person or entity (a "loss payee") other than the named insured having an insurable interest in the covered property. See **Form C.3** ISO CP 12 18 06 07 Loss Payable Provisions, Optional Clause F Building Owner Loss Payable Clause. 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 **Form C.3**, as an alternative to using the CP 12 19 **Form C.4**. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

Additional Insured. Generally, to be eligible for insured status under a property policy, the insured must have an insurable interest in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometime require the tenant to insure the improvements and to name the owner-lessor as an additional insured. Unlike the standard mortgagee coverage, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (e.g., landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for the additional insured. In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as a "Named Insured" for damage to the building on a tenant's property policy covering the building. It is the "insureds" who receive the loss payment under a property policy. Thus, it is unnecessary to specify that the building owner also be designated as a loss payee when it is designated as an insured.

ATIMA. The phrase "as their interests may appear" (an ATIMA clause) often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy 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 **Form C.4** does not provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in **Form C.1** 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.

Caveat: To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy. Additionally, note that the notification endorsement likely will not address notification as to cancellations by the tenant and will need to be manuscripted to include notice to the landlord of tenant cancellations. In *Scottsdale Ins. Co. v. Mason Park Partners, LP,* 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the

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

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

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

[76] **Law and Ordinance Coverage.** Law and Ordinance Coverage is available by endorsement to a standard property policy to insure against loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Many communities have building ordinances that require that a building that has been damaged to a specified extent (typically, 50 percent) be demolished and rebuilt in accordance with current building codes rather than simply repaired. Unendorsed, standard property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the building, or the increased cost of rebuilding the entire structure in accordance with current building codes. Ordinance or law coverage may be purchased using ISO CP 04 05 to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of $10,000 or 5% of the policy limits.

[77] **Terrorism.** Before 9/11/01 most property damage policies included coverage for terrorism. After 9/11/01 most were rewritten to exclude or significantly limit coverage for future acts of terrorism. Under the Terrorism Risk Insurance Program Reauthorization Act of 2007 ("TRIPRA"), an insured loss is one resulting from an "Act of Terrorism" that is covered by primary or excess property insurance. Definition of an "Act of Terrorism", which must be certified as such by the Secretary of the Treasury in concurrence with the Secretary of State and U.S. Attorney General is:

> (i) A violent act or an act dangerous to human life, property or infrastructure;
> (ii) That resulted in damage within the U.S. or outside the U.S. (in the case of an air carrier or outside the U.S. in the case of an air carrier or vessel or a U.S. mission); and
> (iii) Was committed by an individual or individuals, as part of an effort to coerce the civilian population of the U.S. or to influence the policy or affect the conduct of the U.S. Government by coercion.

No act can be certified as an Act of Terrorism (i) if it is committed in the course of a war, or (ii) if property insurance losses resulting from the act do not exceed $5 million in the aggregate. Excluded are chemical, nuclear, biological, and radiological events unless and until a study of the availability of insurance coverage for losses caused by terrorist attacks involving such materials is completed and recommendations regarding actions to expand the coverage to include these events are made. In exchange for the obligation to provide terrorism coverage, TRIPRA provides some financial relief to insurance companies paying claims exceeding a certain dollar value ($50 million in 2006, which was increased to $100 million in 2007). After a deductible for the insurer of 20% of the insurer's prior year's direct earned premiums, the Federal Government will pay 85% of the insured losses in excess of the deductible. Subject to an overall $100 billion cap (combined Federal and industry shared insured losses), which must be disclosed to policyholders. Provides for recoupment of any losses paid by the Federal government during 2011 by 9/30/12 and on or after 1/1/12 through policyholder surcharges by 9/30/17. Thus, once the loss is certified as an act of terrorism and the insurance companies and named insured pay the deductibles and losses, the federal government pays the excess up to the cap, but policyholder surcharges will repay the Federal government for the losses it pays. *See* David H. Fishman, When Your Insurance Policy is the Disaster! (THE ACREL PAPERS Spring 2006), pp. 7-8, and IRMI.com - Terrorism Risk Insurance Program Reauthorization Act ("TRIPRA").

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

[79] **Debris Removal.** See ISO CO 00 10 06 07 Building and Personal Property Coverage Form ¶A.4.a Coverage – Additional Coverages – Debris Removal. The ISP Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the ISO CP 04 15 Debris Removal Additional Limit of Insurance endorsement.

[80] **Contractual Waivers Of Claims; Contractual Waivers of Insurer's Subrogation Rights. "**Waiver of claims" is the landlord or tenant waiving its rights or recovery for the acts of the other. "Waiver of subrogation" is the landlord or tenant or both waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery. Leases may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. Further the lease may provide that the right of subrogation of the insurer is waived or that the party obtaining the insurance will also obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovery its insurance proceeds against the negligent party.

Lease Silent on Waiver of Insurer's Right of Subrogation. In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, equitable subrogation.

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

Majority Rule. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an implied coinsured. Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. The better practice is to address this risk in the lease. See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

Minority Rule. Texas follows the minority rule. *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956); FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease. The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation.

Covenant Requiring Tenant To Pay For Insurance And Name Landlord As An Insured Equivalent To Waiver of Recovery By Landlord Against Tenant. In *Publix Theatres Corp. v. Powell*, 71 S.W.2d 237 (Tex. Comm. App. 1934), the lessee agreed in the lease to carry fire insurance on the leased building, at the lessee's expense, naming the landlord as the insured. The insurer paid, but the landlord still sued the tenant for the loss. The court declared that to permit the lessor to keep the insurance money and also to collect from the lessee would be a double recovery. In *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142 (Tex. App.— Houston [1st Dist.] 1991, *writ denied*), the court of appeals refused to limit the waiver of subrogation contained in the lease to claims against the current tenant so as to permit the otherwise subrogated insurer to pursue the former tenant after assignment. The assigning tenant, First Tape, therefore, was able to retain the protection of the waiver of subrogation clause even after it had assigned its lease.

No Standard Property Policy. Since there is no recognized standard property policy form, like the ISO liability form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer. The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss. See **Form C.2** Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us.

Rationale for a Waiver of Insurer's Right of Subrogation. Many commercial property policies and inland marine policies include subrogation clauses that imply permission to grant pre-loss waiver. However, some forms may specifically deny the insured the right to waive subrogation. The ISO form expressly recognizes the right of the insured to waive subrogation. Since the landlord's primary interest is insuring the landlord's improvements, and the tenant's primary interest is in insuring the tenant's property, why make the other party liable for a risk that is already insured? Because both parties can be protected by insurance, neither is particularly interested in imposing liability on the other. The issue is how to allocate the risk of loss or, more precisely, which party should pay the property insurance premiums. To require each party to carry coverage for negligently causing damage to another party's property forces the landlord and the tenant to insure both the landlord's and the tenant's property, which results in each insuring its own and the other party's property. To avoid this need for double coverage each party can agree to look to its own insurance carrier for property loss caused by the acts or omissions of the other party and waive rights of recovery and subrogation against each other. If both landlord and tenant are to be liable for the risk of negligently caused loss to the property of the other, then the landlord and every tenant in a multi-tenant project must not only be sure to have a policy for its own property but must be sure that their liability insurance is sufficient to cover the replacement cost of the entire building and all of tenants' property therein. A more sensible approach is to have the landlord take out a casualty policy and have the premium costs paid by the tenants in the building under an operating cost pass-through provision in the lease. A waiver of subrogation clause assures that the insurance carrier for the property owner pays for the property loss as opposed to the other party's (the negligent landlord's or tenant's, as the case may be) liability insurance carrier. *See* Hagan, *Using Waivers and Indemnities in Commercial Leases,* THE PRACTICAL REAL ESTATE LAWYER 11 (1993), also repeated at ALI-ABA'S PRACTICE CHECKLIST MANUAL FOR DRAFTING LEASES: Checklists, Forms, and Drafting Advice from *The Practical Lawyer* and *The Practical Real Estate Lawyer* 149 (1994), for the rationale that the appropriate allocation of risk is to require each party to insure its own property and waive recovery, and waive subrogation against the other for damages to each other's property due to the negligence of either party. Why is this the best approach? This question incorrectly assumes that there is adequate liability insurance to cover the loss. Many times there will be no liability insurance because the party self insures. The more likely situation is that the liability insurance policy of the negligent party will have limits far short of the loss involved (for example, where a negligent employee of the tenant leaves the coffee pot on at night which results in a large office building burning down). In a large multi-tenant building, the loss could easily exceed the liability insurance coverage of a small tenant. Even if there is sufficient property loss coverage under the liability policy, there usually is a large deductible and dissipation of the time and energy in a contest between the insurance companies and the parties over the issue of who negligently caused the fire. Also, more importantly, is the fact that claims against property insurance are much less likely to result in higher premiums or loss of coverage than claims against the liability insurance. The property insurance carrier has more than likely already calculated its premium based on the assumption that it will not be able to recoup its costs via subrogation against a negligent tenant.

Tenant's FF & E. Care should be taken in drafting the scope of the waiver of subrogation. A waiver of subrogation as to "the premises" does not include the tenant's furniture, equipment, machinery, goods or supplies which the tenant might bring on to the premises. *See International Medical Sales, Inc. v.* Prudential *Ins. Co. of America*, 690 S.W.2d 84 (Tex. Civ. App.-- Dallas 1985, *no writ*).

Verification of Effect of Waivers on Insurance Coverage and Cost of Insurance Coverage. Before the parties agree to waivers of recovery or subrogation, they should verify that their respective insurance policies will not be voided due to the waiver. Also, the parties should determine, in advance, if the waivers will impact the cost of coverage. Confirmation of endorsement reflecting contractual indemnity, waiver of subrogation and additional insured/loss payee should be verified as a condition of extending the waivers.

[81] **Business Income and Additional Expense.** This form of insurance (ISO form CP 00 30) covers two types of loss: (1) loss of business income/earnings - covers losses suffered by a business as a result of not being able to use property damaged by a covered cause of loss under a property insurance policy during the time required to repair or replace it (formerly called "business interruption insurance") and/or (2) extraordinary additional expenses ("Extra Expense Coverage") incurred due to a necessary suspension of operations during a period of restoration caused by direct physical loss of or damage to property at the premises described in the policy. This coverage is available with no co-insurance or monthly limitation. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days for recover business that may have been lost to competitors (typically limited to an aggregate of 120 days unless policy is endorsed to provide for extended time period coverage). Business income insurance may be purchased without the Extra Expense Coverage (ISO Form CP 00 32) and extra expense coverage can be purchased without business income insurance (ISO Form CP 00 50). Extraordinary Expense Coverage covers expenses in excess of normal operating expenses incurred by a business that remains in operation following a direct damage property loss. Extra Expense Coverage is appropriate for service businesses whose property is not essentially income-producing (attorneys, banks, insurance agencies, and doctors' offices), and for businesses that would find it imperative to continue operating regardless of cost (newspapers, dairies).

"Business Income Rental Value" is included under both forms of business income forms (ISO CP 00 30 and CP 00 32) if the attached declaration so provides. Rental value protects the landlord against loss of rents during reconstruction and abatement of rentals if the abatement results from a loss under a named cause of loss in the property insurance.

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

[82] **Agreed Value Basis.** "Agreed Value Basis" is coverage under a property insurance policy whereby the coinsurance clause is suspended until a specified expiration date. Insurers usually require a statement of property values signed by the insured as a condition of activating or including an agreed value provision in a commercial property policy.

[83] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[84] **Boiler and Machinery Coverage.** Boiler and machinery coverage is added by endorsement or by a separate policy. Property insurance typically excludes damages due to explosion of pressure vessels and sudden and accidental, mechanical or electrical breakdown of machinery. Boiler and machinery coverage includes damages arising out of pressure vessels, hot water heaters, air conditioning and heating equipment, and electrical switchgear. If a separate policy is to be written to cover boiler and machinery caused damages then there needs to be added to both the primary policy and the boiler and machinery policy an ISO CP 12 72 Joint or Disputed Loss Agreement.

[85] **Business Income.** If true boiler exposure exists, explosion of a boiler will level a building. Machinery coverage pays for a sudden and accidental, mechanical or electrical breakdown of covered property. Such a breakdown could cause significant disruption of certain tenant occupancies, such as retail. The business income exposure is excluded by property coverage.

[86] **Agreed Value Basis.** See Endnote [82] for a definition of "Agreed Value Basis".

[87] **Other Insurance.** E.g., the following specification is to added if there is a hazardous waste hauler:

> Pollution Liability. CA 99 48 pollution liability coverage at least as broad as that provided by the ISO pollution liability – broadened coverage for covered autos endorsement, and with the Motor Carrier Act endorsement (MCS 90) attached.

Other insurance can include such issues as flood, earthquake, earthquake sprinkler leakage, volcanic eruption, terrorism, sinkhole collapse, etc.

[88] **Commercial General Liability Insurance (CGL).** See Endnote [29] for a discussion of CGL policies.

[89] **Occurrence Policy.** See Endnote [30] for a definition of "Occurrence Policy".

[90] **Occurrence.** See Endnote [31] for a definition of "Occurrence".

[91] **General Aggregate.** See Endnote [32] for a definition of "General Aggregate".

[92] **Products/Completed Operations.** "Products/Completed Operation" coverage is a major general liability sub-line which provides coverage for an Insured against claims arising out of products sold, manufactured, handled or distributed, or operations which are complete. Claims are covered only after a product has been sold and possession relinquished, or operations have been completed or abandoned by the Named Insured. The coverage applies only to claims for bodily injury and/or property damage and not for the Insured's failure to complete a job or operation on time.

[93] **Personal and Advertising Injury.** See Endnotes [29] and [33]for a definition of "Personal and Advertising Injury".

[94] **General Aggregate Per Premises or Project.** See ISO CG 21 44 Limitation of Coverage to Designated Premises or Project. See Endnote [34] for a discussion of General Aggregates per Premises or Project.

[95] **Post-Completion Coverage.** Contractor should be required to maintain the required CGL policy in effect for up to the maximum time limit as to which a cause of action could be maintained against Contractor and the Landlord Parties for risks covered by the required form of CGL policy. "Completed operations" coverage only covers occurrences during the policy term. Thus on an occurrence policy, for "completed operations" coverage to continue, the Contractor must obtain a "completed operations extension endorsement" purchasing continuation of completed operations coverage after the original policy term. The insurer may be unwilling to issue a completed operations extension endorsement on the original policy after its term without their being also issued a current term CGL policy for the periods covered by the completed operations extension endorsement. The length of time the Contractor should be required to maintain Post-Completion Coverage can be, depending on the risk tolerance of the Landlord, between two years (a typical state's tort statute of limitations) and ten years (a typical state's statute of repose).

[96] **Owner's and Contractor's Protective Liability Policy ("OCP policy").** An OCP policy covers bodily injury and property damage liability arising out of an independent contractor's operations for another party. Although the contractor purchase the policy, the named insured is the party for whom it is performing operations. The OCP policy also responds to liability arising out of the acts or omissions of the insured in connection with the general supervision of the contractor's operations.

[97] **Contractual Liability Coverage - An Exception To A Exclusion From Coverage.** See Endnote [35] for a discussion of "Contractual Liability Coverage".

[98] **Additional Insureds on Contractor's CGL Policy.** Care should be taken in reviewing the additional insured coverage proffered on behalf of the Tenant's contractor. Agents may insist that the additional insured coverage requirement is met by the blanket automatic additional insured provisions in an blanket additional insured endorsement to the contractor's policy. The standard contractor's CGL policy endorsed with an ISO CG 71 57 09 10 Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract Primary And Non-Contributory provides

> **Commercial General Liability**
> CG 71 57 09 10
>
> **Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract Primary And Non-Contributory**
>
> **A. Section II - Who is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when ***you and such person or organization have agreed*** in a written contract that such person or organization be added as an addition insured on your policy.
>
> (Bold italics emphasis added.)

Since the landlord does not have a contract with the contractor, this language does not extend additional insured coverage to the landlord. In *Westfield Insurance Co. v. FCL Builders, Inc.,* 948 N.E.2d 115, 350 Ill. Dec. 46 (Ill. App. Ct. – First Dist., 2nd Div. 2011) an Illinois appellate court faced an analogous situation. A second tier subcontractor's commercial general liability (CGL) insurer brought a declaratory judgment action that it was not obligated to defend or indemnify a general contractor (FCL Builders, Inc.), in a tort action brought by an injured employee of a second tier subcontractor (JAK). FCL contracted with Suburban Ironworks, Inc., which in turn subcontracted with JAK. JAK erected steel on the job site. Unfortunately, about a month into the job, JAK's employee was severely injured when he fell off of a steel beam. The employee filed a tort suit against FCL and Suburban, alleging the breach of various duties of care regarding job site safety that they allegedly owed to the employee. FCL had been furnished with a certificate of insurance issued by JAK's insurance agent that listed FCL as an additional insured under JAK's policy with Westfield. The appellate court held that the general contract was not an additional insured under the CGL policy purchased by the second tier subcontractor. The Westfield CGL additional insured policy contained an endorsement that amended the definition of "insured" under the CGL policy to include as additional insureds "any person or organization for whom you are performing operations when you and such a person or organization have agreed in writing in a contractor or agreement that such person or organization be added as an additional insured on your policy". The court held

> Even assuming, without deciding, that JAK was "performing operations" for FCL within the meaning of the policy, there is no evidence in the record that JAK had agreed in writing with FCL for FCL to be an additional insured. The policy explicitly and unambiguously requires a direct, written agreement to that effect in order to cover anyone other than JAK under the policy. Because no such written agreement ever existed between FCL and JAK, FCL cannot be an additional insured under the policy and Westfield is not obligated to furnish FCL with a defense or indemnification …. The plain and ordinary meaning of the term "such person or organization" in this provision is that it refers back to the same person or organization for whom JAK is performing operations, which was mentioned earlier in the same provision, and it does not encompass any other entity….Notably, the provision does not refer to *any* person or organization. By repeatedly using the term "such" instead of "any," the provision necessarily requires that, in order to qualify as an additional insured, an entity must enter into a direct written agreement with JAK listing them as an additional insured.

Id. at 118-119. *But cf. Ryan Companies US, Inc. v. Secura Insurance Co.*, 2011 WL 2940985 which declined to follow the *FCL* case, concluding that there was an agreement other than the policy showing that the parties intended by some implication that the general contractor in *Ryan* be an additional insured.

[99] **Additional Insured Coverage in the Construction Context.** Some states, including Texas, have adopted statutes voiding as against public policy any indemnity by one person of another person's negligence in the context of construction and additionally voiding any insured coverage to the extent it provides insurance coverage the scope of which is prohibited for an indemnity agreement. For example, effective January 1, 2012, Texas adopted such prohibitions as INSURANCE CODE § 151.001 *et seq*. Care should be taken in drafting insurance specifications applicable to tenants and their contractors to avoid violating such prohibitions and to require additional insured endorsements in states that have adopted anti-indemnity or anti-additional insured endorsement law. The Texas statute defines applicable "construction contracts" in the broadest of senses, and likely includes lease covenants. The Texas statute permits indemnity and additional insured coverage for claims arising out of injuries or deaths to the of an "employee of the indemnitor, its agent, or its subcontractor of any tier."

[100] **Primary and Noncontributory.** See Endnote [38] for a discussion of primary and noncontributory requirements for liability insurance.

[101] **Personal Injury Liability Exclusion to Contractual Liability Coverage.** Unless endorsed to expand coverage, the standard CGL policy excludes from Contractual Liability Coverage coverage for indemnifications of "Personal Injuries". See Endnotes [29] and [33] for the definition of "Personal Injuries".

[102] **Amendment of Cancellation Provisions or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See Endnote [167] for a discussion of ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change. Insurers are now resisting giving notice of cancellation or material modification to persons other than the First Named Insured. Insurers sometimes put off issuing such endorsements through intentional delaying tactics or other approaches, such as directing other insureds to seek such notices from the First Named Insured. The very purpose of getting the insurer to give this notice to persons other than the First Named Insured is to avoid having to rely on notice from the First Named Insured, the person whose covenant with the other insureds is violated by cancellation or possibly material change of the policy. Not all states have state-approved material change endorsement forms for use by state-approved insurers.

[103] **Contractual Liability Limitation.** See Endnote [35] for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See **Form B.7** ISO CG 21 39 Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes paragraph "**f**" (assumption of tort liability of another) from altogether from the definition of an insured contract.

[104] **Amendment of Insured Contract Definition.** See Endnote [35] for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See **Form B.8** ISO CG 24 26 Amendment of Insured Contract Definition amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

[105] **Limitation of Coverage to Designated Premises or Project.** See ISO CG 21 44 Limitation of Coverage to Designated Premises or Project. See Endnote [32] for a discussion of General Aggregates per premises or project.

[106] **Severability of Interest Clause.** See Endnote [45] for a definition of severability of interest clauses.

[107] **Certificates of Insurance.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance.

[108] **Certificate of Insurance – Attachment and Modifying Amendments.** See Endnotes [11] – [14] and [20] – [24] for discussions of Certificates of Insurance.

[109] **Business Auto Liability.** See Endnote [48] for a discussion of business auto liability policies.

[110] **No Standard Builder's Risk Policy.** 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. "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).

Common Errors and Problems

Early Occupancy. Most projects have someone that occupies to some limited degree before substantial completion. Any degree of occupancy could invalidate the coverage if the policy isn't properly worded or endorsed.

Review of Policy Delayed Until After Construction Commencement. Like the other insurance products discussed in this article, the actual builder's risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The actual policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Insurance or even 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.

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.

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.

Delay Damages. See BRUNER AND O'CONNOR ON CONSTRUCTION LAW §§ 11:116 Builder's risk soft cost coverage; Delayed completion and force majeure insurance. Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. Another endorsement that may be available to insure against a financial distress risk is a delayed completion and force majeure endorsement. This endorsement supplements the risk of covered loss to cover consequential damage losses due to completion delays and force majeure events not otherwise covered. This endorsement extends coverage for losses due to strikes and labor disputes, changes in law (e.g., building codes, emission standards), acts of God, adverse weather conditions and off-site physical damage to materials or equipment.

[111] **Builder's Risk – Insureds.** The owner and all contractors and major subcontractors should be named as named insureds under a builder's risk policy. *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). Phrases like "as their interests may appear" should not be included either in contractual specifications, insurance certificates or the policy, as this qualification has been the source of subrogation claims by insurers against an insured under builder's risk policies in cases where there has not been an express waiver of subrogation. *Paul Tishman Co., Inc. v. Carney & Del Guidice, Inc.*, 320 N.Y.S.2d 396 (1971), aff'd 359 N.Y.S.2d 561 (N.Y. 1974); *Turner Constr. v. John B. Kelly Co.*, 442 F.Supp. 551 (Penn. 1976) subrogation against named insured subcontractor permitted even though policy contained a waiver of subrogation endorsement. *But see St. Paul Fire & Marine Ins. Co. v. F. D. Sprinkler, Inc.*, No. 119 021/06, N.Y. Sup. Ct. (Aug. 2009) where the court rejected the insurer's argument that ATIMA language limited the insurable interest of the sprinkler subcontractor to its work as opposed to the consequential damages to 21 floors of the building which arose out of an accidental discharge from a sprinkler head located in a temporary bathroom on the 21st floor.

[112] **Soft Costs Coverage Added to Builder's Risk Policy.** See Endnote [110] for a discussion of delay damages and builder's risk policy endorsements. Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. The following is a manuscripted soft cost endorsement to a builder's risk policy:

ADDITIONAL EXPENSE – SOFT COST COVERAGE

This endorsement modifies insurance under the following:

BUILDERS' RISK COVERAGE FORM

A. The following is added to Additional Coverages:

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

Coverage and Limits of Insurance

Rents and Rental Value Coverage. We will pay the actual "loss" of net rental income which results from delay beyond the projected completion date. But we will not pay more than the reduction in rental income less charges and expenses which do not necessarily continue.
Additional Advertising and Promotional Expenses. We will pay the necessary additional advertising and promotional expenses which you incur you incur as a result of a delay in the completion date of the Project.
Additional Insurance Expense. We will pay the necessary additional insurance expense for extending or renewing coverage which you incur as a result of a delay in the completion date of the Project.
Additional Interest Expense. We will pay the cost of necessary additional interest on money you borrow to finance construction or repair which you incur you incur as a result of a delay in the completion date of the Project. This expense may arise from obligations to the interim financier or from cancellation of the permanent financing arrangements, including loan closing costs and remarketing of bonds.
Additional Leasing/Commission Expenses. We will pay the necessary additional costs of renegotiating and pre-leasing of the Project, including costs of additional commissions incurred upon renegotiating leases that result from the renegotiation of leases which you incur as a result of a delay in the completion date of the Project.
Additional Legal and Accounting Fees. We will pay the necessary additional legal and accounting fees you incur as a result of a delay in the completion date of the Project.
Additional License, Building Inspection and Permit Fees. We will pay the necessary additional license, building inspection and permit fees which you incur as a result of a delay in the completion date of the Project.
Additional Real Estate Taxes/Ground Rents or Other Assessments. We will pay the necessary additional real estate taxes, ground rents or other assessments which you incur you incur as a result of a delay in the completion date of the Project.
Additional Professional Fees. We will pay the necessary additional architectural, engineering, and other professional fees which you incur you incur as a result of a delay in the completion date of the Project.
Additional Project Administration Expense/General Overhead. We will pay the necessary additional project administration expenses which you incur you incur as a result of a delay in the completion date of the Project.

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

[113] **Other Insurance.** The key exposures not listed above are workers' compensation and professional liability. Contractor's professional liability exposures arise out of the provision of shop drawings, "value engineering", failure to achieve LEED goals, design/build work, or construction management.

[114] **Commercial General Liability Insurance (CGL).** See Endnote [29] for a discussion of CGL policies.

[115] **Occurrence Policy.** See Endnote [30] for a discussion of Occurrence Policies.

[116] **Occurrence.** See Endnote [31] for definition of "Occurrence".

[117] **General Aggregate.** See Endnote [32] for definition of "General Aggregate".

[118] **Products-Completed Operations.** - A major general liability sub-line which provides coverage for an Insured against claims arising out of products sold, manufactured, handled or distributed, or operations which are complete. Claims are covered only after a product has been sold and possession relinquished, or operations have been completed or abandoned by the Named Insured. The coverage applies only to claims for bodily injury and/or property damage and not for the Insured's failure to complete a job or operation on time.

[119] **Personal Advertising and Injury.** See Endnotes [29] and [33]for a definition of "Personal Advertising and Injury" coverage.

[120] **Medical Expense.** See Endnote [29] for the scope of "Medical Expense" coverage.

[121] **General Aggregate Per Premises or Project.** See ISO CG 21 44 Limitation of Coverage to Designated Premises or Project. See Endnote [34] for a discussion of General Aggregates Per Premises or Project.

[122] **Property Insurance - Causes of Loss.** See Endnote [66] for an explanation of the coverages of the three forms of ISO Causes of Loss forms.

[123] **Valuation Terminology – Replacement Cost.** See Endnote [67] for a definition of "Replacement Cost" coverage. Note the different approaches taken by the "at least 80% of full insurable value" in the narrative form of insurance specifications in Section A of **Form A.2** to the "100% of replacement cost" approach taken at ¶3.b(2) of **Form A.1** and in its Endnotes [122] – [125]. The approach taken in the chart form insurance specifications is the result of a key tenant's requirements to assure adequate insurance proceeds are available to rebuild the leased structure.

[124] **Valuation Terminology – Agreed Value Basis.** See Endnote [82] for a definition of coverage on an "Agreed Value Basis".

[125] **Tenant Betterments, Alterations and Improvements.** Like most landlord drafted insurance specifications, this specification allocates to the Tenant responsibility for insurance of Tenant's improvements and betterments as opposed to specifying that they be covered under Landlord's property policy. However, some commentators argue that these components of the Shopping Center should be allocated to the Landlord's property insurance. See Staltz, *Insuring Tenant Alterations*, PROBATE & PROPERTY 45 (Jan./Feb. 2006) articulating the rationale supporting this allocation; Millea and Geyen, *Insurance Coverage For Tenant Improvements*, http://www.mondaq.com/unitedstates/article.asp?articleid=125396. Also see Nusbaum, *The "Three-Legged Stool": The Interplay Of Property Insurance, Mutual Waivers And Waivers Of Subrogation In Commercial Leases* (Feb. 3, 2011) http://www.mondaq.com/unitedstates/article.asp?articleid=121948 and Hannan, *Using Property Insurance, Mutual Waiver, and Waiver of Subrogation Clauses in Commercial Leases (with Model Clauses)*, THE PRACTICAL REAL ESTATE LAWYER (Mar. 2001), at p. 23. See ISO CP 00 10 06 07 Building And Commercial Property Coverage Form ¶ A.1.b(6) specifying that a tenant's "***use interest*** as tenant in improvements and betterments" are part of the Covered Property of an ISO property insurance policy. Further, the landlord's ownership interest in tenant improvements and betterments are part of the Landlord's Covered Property. ¶A.1.a(5). However, not all property policies are worded the same as the ISO property insurance policy. (1) A tenant's property policy may state that it covers tenant's personal property and be silent as to its use interest in tenant improvements that are owned by the landlord pursuant to a lease provision that transfers ownership of tenant alterations and improvements to the landlord. In cases of policy silence at to tenant improvements as to which tenant only has a "use interest", the insurer may deny coverage. A New York court held for the tenant under such circumstances in *Sigola Mf., Inc. v. Dairyland Ins. Co.*, 124 A.D.2d 654 (N. Y. App. Div. 1986). (2) A landlord's property policy may explicitly state that improvements and betterments are covered under the landlord's policy only if they are located within property occupied by the landlord and not within a tenant's premises. (3) Even if both landlord's and tenant's policies state that they cover tenant improvements (the landlord's ownership interest, and the tenant's use interest), the policies may provide that they do not cover except on an excess basis the property if there is "other insurance". The language in such "other insurance" provisions vary, but they typically require that in the event of a loss, any other applicable policy must respond first. The court in *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co,* 602 F.3d 677 (5th Cir. 2010) held that in such case both the tenant's insurer and the landlord's insurer must share the cost.

[126] **Business Income and Extra Expense.** Seen Endnote [81] for a discussion of Business Income and Extra Expense coverage.

[127] **Glass.** Seen Endnote [75] for a discussion of Glass Coverage.

[128] **Law and Ordinance Coverage.** Seen Endnote [76] for a discussion of Law and Ordinance Coverage.

[129] **Terrorism.** Seen Endnote [77] for a discussion of Terrorism Coverage.

[130] **Signs.** Seen Endnote [78] for a discussion of Signs Coverage.

[131] **Waiver of Claims; Waiver of Subrogation.** Seen Endnote [80] for a discussion of waivers of claims and waivers of subrogation. The tenant has an interest in setting out insurance specifications for the landlord's insurance. Tenants should insist that the landlord's property policy contain a waiver of subrogation. Tenants should also carve out of their indemnity risks covered by the insurance contractually required to be carried by their landlord. This issue was raised in *Travelers Indemnity Co. of Ill. a/s/o Partnership 1995 LLP v. F 7 S London Pub., Inc.*, 270 F. Supp. 330 (E.D. N.Y. 2003) discussed in

A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE as Case Study 4 "Casualty and Indemnification Provisions in Lease, but no Waiver of Subrogation." In this case the landlord's insurer sued the tenant on its broad form indemnity for a fire loss to the shopping center. The court held that although the tenant had broadly indemnified the landlord, since the cause of the fire was not determined, the court looked to the lease's fire damage provision and held that it controlled with the result that the loss was borne by landlord and its insurer. This litigation could have been avoided had the lease expressly excluded from the tenant's indemnity fire damage covered by the landlord's property policy.

[132] **Geographic Allocation of Insurance Coverage.** See Endnote [28] for a discussion of the use of location to allocate insurable risks.

[133] **Workers' Compensation.** See Endnotes [51] and [52] for a discussion of Workers Compensation and Employers Liability Insurance.

[134] **Business Auto Liability Policy.** See Endnote [48] for a discussion of Business Auto Liability Policies.

[135] **Commercial General Liability.** See Endnote [29] for a discussion of CGL polices.

[136] **Property Insurance – Special Causes of Loss.** See Endnote [66] for a discussion of Causes of Loss Form property insurance policies, including Special Causes of Loss .

[137] **Fire and Extended Coverage.** See Endnote [66] for a discussion of the replacement of "Extended Coverage" with "Causes of Loss" terminology under current standard property policy forms. Note that "extended coverage" ceased to exist in 1986 and this type terminology is no longer used in standard property policies.

[138] **Coinsurance.** See Endnote [71] for a discussion of coinsurance clauses. Note the different approaches taken by the "at least 80% of full insurable value" in the narrative form of insurance specifications in Section A of **Form A.2** to the "100% of replacement cost" approach taken at ¶3.b(2) of **Form A.1** and in its Endnotes [122] – [125] . The approach taken in the chart form insurance specifications is the result of a key tenant's requirements to assure adequate insurance proceeds are available to rebuild the leased structure.

[139] **Mortgagee Requirements.** See William H. Locke and Marilyn Maloney, *Top 10 Insurance Tips for Lenders*, THE PRACTICAL REAL ESTATE LAWYER Vol. 28, No. 3 May 2012 pp. 46 – 56 at www.ali-aba click on "Publications."

[140] **Blanket Policy.** A "blanket policy" is a single insurance policy that covers more than one type of property in one location in one policy or form instead of under separate items, or one or more types of property at more than one location. Blanket policies provide a single limit of insurance that applies over all of the named locations and property types, and thus can act as a hedge against the possibility of an inaccurate property value estimate at any location. The coinsurance clause usually applies to the total value of all of the property covered by the blanket limit. All of the limits apply to all of the properties, which protects against coinsurance. To avoid underinsurance, the insurance company generally insists on a schedule of values listing a value for each property covered. A blanket policy as a practical matter provides more insurance at a lesser cost, since the policy limits are unlikely to be exceeded as it is unlikely that all properties will be damaged at the same time.

[141] **Deductible Allocated to Landlord.** Note the approach taken by this provision is to place the risk of loss within the deductible solely on the Landlord and thus without pass through to the Tenants of the Shopping Center. Ok? For example, windstorm deductibles can be quite high.

[142] **Commercial General Liability Coverage (CGL).** See Endnote [29] for a discussion of CGL policies.

[143] **Combined Single Limit - Antiquated Terminology.** An antiquated term that is often used is "Combined Single Limit". Versions of the CGL form used prior to 1986, and many other types of liability policies, had what were called "split limits." Split limits applied different limits to property damage liability and bodily injury liability. There was a "combined single limit endorsement" that could be added to the policy to make both bodily injury and property damage liability coverage subject to the same occurrence limit. This has been incorporated into the commercial liability form but without the terminology "Combined Single Limit." Therefore, this term conveys to meaning and should generally be avoided.

[144] **Deletion of Products Liability Coverage.** Except in the context of liabilities arising out of construction, there is little risk to a Tenant covered by "products liability" coverage. Some rationale may be found for requiring products liability coverage if the Tenant is a restaurant.

[145] **Contractual Liability Coverage.** See Endnote [35] for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See ISO CG 21 39 Contractual Liability Limitation, which when added to the standard CGL policy by endorsement deletes paragraph "**f**" (assumption of tort liability of another) from altogether from the definition of an insured contract.

[146] **ATIMA Language Not Applicable to Liability Policies**. The "as their interest may appear" language has been deleted in this reference to additional insured coverage for additional insureds under the Tenant's CGL policy as such language is solely applicable to multiple insureds under property policies.

[147] **Additional Insureds.** See Endnote [15] for a definition of "Additional Insured". See Endnotes [167] – [175] for a discussion of **Form B.1** ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization and **Form B.2** ISO CG 20 11 Additional Insured – Manager or Lessors of Premises.

[148] **ACORD Certificates – Not Reasonable to be Relied Upon.** See Endnote [11] – [14] and [20] – [24] for a discussion of certificates of insurance.

[149] **No Advance Notice of Non-Renewal.** Insurers will not agree to give other insureds advance notice of non-renewal of a policy.

[150] **Amendment of Cancellation Provision or Coverage Change.** See Endnote [21] for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. See ISO CG 02 05 Amendment of Cancellation Provisions or Coverage Change.

[151] **Blanket Policy.** See Endnote [140] for a definition of a "Blanket Policy".

[152] **"Contractual Assumption" by Tenant and "Contractual Disclaimer" by Landlord – Injuries Occurring in the Leased Premises.**

[153] **Contractual Disclaimer – Exclusions from Landlord's Responsibility – Injuries or Damages Incurred by Occupants of the Shopping Center and Other Persons Present at the Shopping Center.** This broad form contractual disclaimer appears to eliminate Landlord's liability to tenants for injuries and damage at the Shopping Center. The disclaimer is for (i) all injuries, damages or loss occasioned by the acts or omission of persons occupying any other part of the Shopping Center; (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof.

Questions: What is left? Does the disclaimer disclaim liability for injuries or property damage to the extent caused in part by the acts or omissions, including negligence, of the Landlord and the persons as to which it would have legal responsibility? Does this disclaimer conflict with the Landlord indemnity in **Form A.2** at Section E?

[154] **ATIMA Language Not Applicable to Liability Policies**. The "as their interest may appear" language has been deleted in this reference to additional insured coverage for additional insureds under the Tenant's CGL policy as such language is solely applicable to multiple insureds under property policies.

[155] **Additional Insured.** See Endnote [15] for a definition of "Additional Insured". See Endnote [167] – [175] for a discussion of **Form B.1** ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization and **Form B.2** ISO CG 20 11 Additional Insured – Manager or Lessors of Premises.

[156] **Indemnification Obligations of Tenant.** "Indemnity" is a shifting of the risk of a loss from a liable person to another.

Geographic Risk Allocation. The risk allocation scheme adopted in this form of lease is to allocate responsibility to the Tenant for "(ii) any and all claims, loss, costs, damages or expenses arising during the term hereof out of or from any accident or other occurrence in the Leased Premises causing injury to any person or property." Liability arising out of the negligence of the indemnified person is not expressly addressed except by the use of the broad form language "any and all". The reciprocal indemnity by the Landlord allocates responsibility to the Landlord for "(ii) any and all claims, loss, costs, damages or expenses arising during the term hereof out of or from any accident or other occurrence in, or about the Common Areas of the Shopping Center causing injury to any person or property whomsoever or whatsoever." These indemnities are broad form indemnities appearing to indemnify the indemnified person even for liabilities arising out of the indemnified person's negligence, and possibly caused by the indemnified person's sole negligence. In Texas this type of indemnity language would not pass either the common law fair notice requirement or the express negligence test. See *Spence & Howe Const. Co. v. Gulf Oil Corp.,* 365 S.W.2d 631, 634 (Tex. 1963) (fair notice requirement adopted); *Ethyl Corp. v. Daniel Const. Co.,* 725 S.W.2d 705 (Tex. 1987) (express negligence test adopted).

"During the Term". The indemnity language address the time of the occurrence of the event, act or omission triggering indemnity as being "during the term hereof." However, injuries can occur after the end of the term of a lease due to acts or omissions occurring during the term of a lease. The timing issue may be addressed by revising the trigger to cover occurrences "either before or after the end of the term."

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

Mutual Waiver of Recovery. Section F of **Form A.2** is a mutual waiver of recovery by each party against the other

> for losses covered by such policies, providing the insurance companies issuing same shall waive subrogation rights. Notwithstanding the foregoing provisions of this Section, neither party shall be liable for any injuries, loss, liability, expense, claim or damage to the other's property or interest in respect to which and to the extent that said property or interest is covered by insurance, whether such loss or damage be occasioned by the negligence of such party, its servants, agents, employees or otherwise, unless same shall invalidate any insurance policy affecting the Leased Premises and/or the Shopping Center.

This mutual waiver expressly covers losses caused by the released person's negligence. This mutual waiver of recovery appears to be as to losses covered by the respective party's property insurance and thus not a waiver of recovery as to claims arising out of injuries to persons or property damage to third parties.

Employee Injuries and Indemnity as Means of Overcoming the Workers' Comp Bar in Texas. A contractual indemnity by the employer of the injured person is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility (if not all of the employee's damages in excess of the statutory workers' compensation limits to the employer's liability) which might otherwise be borne by the Indemnified Person absent the indemnity. The contractual indemnity should also be drafted to pass back to the employer the costs of defense of the employee's claim. In *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) the Texas Supreme Court held that an employer's

negligence could not be considered in a third-party negligence action bought by an employee arising out of an accidental injury covered by workers' compensation insurance. The jury had determined that the accident was attributable as follows: plant owner's negligence (Petrofina) – 43%, employer's negligence (Hydrocarbon Construction) – 42%, and employee's negligence (Varela) – 15%. The supreme court reversed the trial court's reduction of the damage award from $606,800 to $243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute [then Article 2212a, § 2(b)] and disallowed contribution from the employer. The enforceability of a contractual indemnity passing back to the employer a third party's negligence over the "Worker Compensation Bar" has been upheld. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990). The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004, repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04, formerly Art. 8306, § 3(d).

[157] **Defense.** Some jurisdictions do not include "defense" within the scope of "indemnity". For this reason, defense is added to the litany of "indemnify and hold harmless."

[158] **Indemnitees.** The drafter should consider expanding the indemnitees from the defined term "Landlord" include the additional persons listed within the definition of "Landlord Parties" in **Form A.1**.

[159] **Sole or Concurrent Negligence of the Indemnitee.** If the indemnity is intended to indemnify the indemnitee for either the indemnitee's sole or concurrent negligence, then consideration should be given as to whether this language extends to such negligence under the laws of the particular jurisdiction governing this indemnity. For example, an indemnitee's sole or concurrent negligence would not be indemnified by this language in Texas, which requires negligence to be expressly addressed. Additionally, requires indemnities covering an indemnitee's negligence to be in "conspicuous" language as compared to other language in the lease in order to give fair notice of such an extraordinary risk shifting.

[160] **Anti-Indemnity Statutes.** See Endnote [99]. Some states have adopted limitation or prohibitions of indemnities, e.g., indemnities indemnifying another person for its sole or concurrent negligence in the construction context, subject in some cases to statutorily permitted indemnities for certain types of risks.

[161] **Period of Indemnity.** Note that the survival period is for a period of one year. Consideration should be given as to whether a greater survival period should be stated or whether the limit should be deleted so that the indemnity survives for the period of the statute of limitations for the underlying liability.

[162] **Indemnification Obligations of Landlord.** See Endnote [156] for a discussion of this form's indemnity provisions.

[163] **Landlord's Indemnity as to Injuries in Common Areas.** Landlord contracted to indemnify Tenant from all liabilities for accidents occurring in the Common Areas. Presumably, Landlord's indemnity obligation is covered by its insurance program. However, see the following case discussed as Case Study 1 at pp. B-1 and 2 of A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE *Sears, Roebuck & Co. v. Charwil Associates Limited partnership*, 371 Ill. App.3d 1071, 864 N.E.2d 869, 309 Ill. Dec. 628 (1st Dist. 2007). The Sears lease required the landlord to have $2,000,000 in CGL insurance including "insurance insuring the indemnity agreement". Further, Sears required the landlord to indemnify Sears from all liabilities arising out of claims occurring in the Common Areas by customers and employees of landlord, Sears and other tenants and occupants of the Shopping Center. Unfortunately, a Sears auto service center employee driving a customer's auto near the Sears auto service center hit another shopping center customer who was walking in the shopping center ring road. Sears recovered a $2,000,000 judgment against the shopping center owner on the shopping center owner's indemnity in the lease. However, equally unfortunate, the shopping center's CGL insurance excluded coverage for automobile accidents, which meant that landlord's indemnity was uninsured! See Endnote [35] for a discussion of contractual liability insurance and Endnotes [15] - [16] and [167] - [175] for a discussion of additional insured coverage under a CGL policy, including Endnote [174] for a discussion of cases finding a geographic limitation of additional insured coverage of liabilities arising out of a tenant's "premises" as not extending to the common areas of a shopping center.

[164] **Mutual Waiver of Subrogation.** See Endnote [88] for a discussion of waivers of subrogation. Should the waiver extend to specified risks or only to the extent of the proceeds actually recovered from the insurer? If the waiver is only as to the insurance proceeds, then the parties are exposed for the deductible or losses in excess of the other party's insurance coverage.

[165] **Released Persons.** The drafter should consider expanding the released parties to include the ancillary and additional "Parties" listed within the definition of "Landlord Parties" in **Form A.1**, both as to the Landlord and as applied to the Tenant.

[166] **Release of Negligence.** Releases by one party of another party's negligence are required by Texas law to be in "conspicuous" language in order to give fair notice of the release.

[167] **Form B.1 ISO CG 20 10 Additional Insured Endorsement. Form B.1**, the ISO CG 20 10 Addition Insured Endorsement, is used to schedule an owner (a landlord), a lessee or a contractor on a named insured's CGL policy. It is used to schedule a landlord on the tenant's CGL policy and on a tenant's contractor's CGL policy; to schedule a landlord on a tenant's CGL policy.

[168] **Officers, Directors and Employees of Additional Insureds.** A disadvantage of being an "additional insured" as opposed to a "named insured" is that additional insured status does not provide coverage for the officers, directors, and partners of the additional insured, unless specifically listed individually as additional insureds.

[169] **Tenant's Contractor's CGL – Landlord and Tenant as Additional Insureds.** The ISO CG 20 10 is appropriate for use as an additional insured endorsement to a contractor's CGL policy in the case of a Tenant contracting with a third party contractor for the construction of tenant improvements. **Form B.1** may be completed to schedule as additional insured's on Tenant's contractor's CGL policy as additional insureds the following persons: the

Landlord, the Landlord's management company, the Landlord's lender, the Tenant and the Tenant's lender. Also, see Endnote [170] for scheduling the officers, directors and employees of a scheduled additional insured.

[170] **Coverage for Injuries "Caused by" Named Insureds Acts or Omissions.** 2004 ISO Revision. 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 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (e.g., the tenant, the tenant's 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 2004 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 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.

Pre-2004 ISO Language. 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 for its liability in cases where the liability was the result of the additional insured's sole negligence or the additional insured was concurrent negligent with persons other than the named insured. 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 "arising out of operations" 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 a person other than the named insured or is solely negligent?

[171] **Exclusions to the ISO CG 20 10 Additional Insured Endorsement.** 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.

[172] **Form B.4: ISO CG 20 11 Additional Insured – Managers or Lessors of Premises.** This endorsement is used most commonly when a landlord is to be listed as an additional insured on the tenant's liability insurance policy.

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

[174] **"Arising Out of "Premises".** This endorsement provides a blank line for the description of the "Premises." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "arising out of" ownership, maintenance or use of "that part of the premises leased" to the Tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the common areas maintained by the landlord or in the alley behind the project). The most common factually litigated scenario regarding these endorsements involves injuries occurring "outside" the "part" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. Some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Cases Finding No Coverage. For example, in *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the covered location where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. *See Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.*, 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003) a case involving an injury that occurred to a HVAC repairman who was injured while walking on the roof of a landlord's multi-tenant retail center to get to a HVAC unit that the tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was the above ISO CG 20 11 Additional Insured – Managers and Lessors of Premises. The court found

that the additional insured endorsement did not insure the landlord for the injury as the injury neither occurred in the retail space leased to tenant or on the roof directly above the space. *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)-additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center) and the additional insured endorsement described the "premises" as the 3,200 square feet of space occupied by the named insured tenant. The court stated:

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

The court also reasoned that since the lease provided for the landlord to maintain the alley the parties did not intend to transfer to the tenant's insurer the risk of liabilities occurring in the alley. A similar conclusion was reached in *Minges Creek* v. *Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006) discussed in A. Glickman, J. Johnson and J. Marzullo, *What Did I Just Draft? Understanding How Insurance Really Works* 2011 ICSC LAW CONFERENCE B-5 and 6 as Case Study 5 "Sidewalk Slip and Fall". 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.

[175] **Exclusions to the ISO CG 20 11 Additional Insured – Managers or Lessors of Premises.** 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.