INSURANCE 201

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State Bar of Texas
ESSENTIALS OF BUSINESS LAW:
PROTECTING YOUR BUSINESS
March 8-9, 2018
Houston

CHAPTER 13.2

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INSURANCE 201

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 success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria:

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

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

B. Risk of Property Loss and Injuries in Leased Premises

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

- Upon casualty loss, what happens to the lease, does it terminate or does it continue?
- If due to a casualty loss the premises become untenantable, what happens to the rent?
- Who is responsible for the restoration of the premises?
- Is the premises located in special hazard areas, such as flood zones, hurricane or earthquake areas?
- Are there tenant improvements and betterments to the premises?
- Does the tenant's operations at the premises result in invitees coming to the premises or the use of contractors, business autos, or high pressured boilers at the premises?

- Are there special environmental hazards or other extraordinary risks associated with tenant's use of the premises?
- Who is responsible for injuries occurring on the premises?
- Is the protecting party financially capable of funding the loss or injury without insurance?
- If rent and income by the parties is interrupted due to the occurrence of the peril, will the financial stability of either or both of the lease parties be materially adversely affected?
- Is insurance available to fund protection against these risks at a commercially affordable rate? What minimum coverage limits are reasonable? What deductibles are acceptable? What coverage exclusions and limitations are acceptable?

C. Appendix of Forms

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

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

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

D. Common Law

The common law allocates risks in the absence of contractual risk allocation. The common law addresses landlords' and tenants' responsibility for injuries and property damage on leased premises based on factors of care, custody and control of the premises, and common law allocation of responsibility for repair, maintenance, replacement and security. A responsible party may seek protection through insurance.

1. Landlord and Tenant Relationship Generally.

a. Maintenance

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

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

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

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

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

Thus, at common law, a landlord generally had no implied duty to tenant (in contract or implied from the parties' relationship) or to third parties (in tort for premises liability) to keep the premises in good condition, absent either the express obligation to do so in the lease or landlord's exercise of control of conditions within the premises. *See Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285 (Tex. 1996) holding that a landlord has no duty to tenant or its invitees for dangerous conditions on the leased premises, unless the landlord: (1) makes negligent repairs; (2) conceals defects in premises of which landlord is aware; or (3) retains control over that portion of premises where a defect or unsafe condition causes injury. Thus, it has been said "[a]bsent a covenant, or evidence of concealment or misrepresentation, the landlord [is] not liable for a latent structural defect…within premises that causes damage to tenant's property." *American Exch. Nat'l Bank v. Swope & Mangold*, 101 S.W. 872, 873 (Tex. Civ. App. 1907, no writ).

Repairs Gratuitously Made by Landlord

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

Implied Warranty of Suitability

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

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

(2) If Landlord Retains Control of Portion of Premises

When the landlord retains possession or control of a portion of the leased premises, the landlord, in absence of any agreement to contrary, has an implied duty to the tenant to maintain the retained portion of the premises "so as not to damage the tenant." *McCreless Props., Ltd. v. F. W. Woolworth Co.*, 533 S.W.2d 863, 866 (Tex. Civ. App.–San Antonio 1976, writ ref'd n.r.e.). A landlord has an implied contractual duty – even when a lease is silent – to its tenant, as well as a legal duty to third parties sounding in tort, to keep common areas and other facilities within the

landlord's control in good repair and condition. The Texas Supreme Court in *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299, 303 (Tex. 1963) held that when a landlord retains possession or control of a portion of the leased premises, the landlord is charged with a duty of ordinary care in maintaining the portion retained so as not to damage the tenant.

(3) Multi-Tenant Building

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

> consisting of a number of different apartments… divided among several tenants, each one of whom takes a distinct portion and none of [whom] rent the entire building, the rule must then be applied so as to make each tenant responsible only for so much [of the building] as his lease includes, leaving the landlord liable for every part of the building not included in the actual holding of any one tenant. *O'Connor v. Andrews*, 16 S.W. 628, 629 (Tex. 1891).

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

In the absence of express repair and surrender covenants, a tenant has an implied obligation not to commit waste. The Texas Supreme Court in *R. C. Bowen Estate v. Continental Trailways, Inc.*, 256 S.W.2d 71, 72-73 (Tex. 1953) held that the implied covenant against waste arises from the landlord-tenant relationship, and unless superseded by an express covenant, obligates the tenant "to make such repairs as are necessary to preserve the property in the condition in which it was when rented, reasonable wear and tear excepted[.]" The court in *King's Court Racquetball v. Dawkins*, 62 S.W.3d 229, 233 (Tex. App.—Amarillo 2001, no pet.) noted that a covenant against waste is "the implicit duty of a tenant to exercise reasonable care to protect the leased premises from injury other than by ordinary wear and tear". *See generally* C. R. McCorkle, Annot., *Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect*, 10 A.L.R.2d 1012 covering cases in which landlord seeks to recover damages for specific injuries to property due to a tenant's own acts or negligence as distinguished from cases in which tenant's liability is predicated upon breach of duty to keep property in repair or to return it in good condition; and C. Jhong, Annot, *Measure of Damages in Landlord's Action for Waste Against Tenant*, 82 A.L.R.2d 1106 covering cases dealing with landlord's measure of damages resulting from a tenant's violation of its implied duty to care for leased property as distinguished from cases concerned with damages resulting from violation of an express covenant to keep property in repair, to use it for a certain specific purpose, or to return it in good condition.

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

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

b. Casualty Loss

(1) Tenant Takes the Risk

At common law, the destruction of the improvements on leased property did not relieve the tenant of its obligation to pay rent or give the tenant the right to terminate the lease. *Mitchell's Inc. v. Nelms,* 454 S.W.2d 809, 813 (Tex. Civ. App.—Dallas 1970, writ ref d n.r.e.).

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

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

(3) Tenant Liable for Negligently Caused Damage

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

2. Common Law Indemnity.

a. In "Pari Delicto"

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

b. Statutory Abrogation of Common Law Indemnity

In 1917 Texas enacted its first statutory contribution scheme for tort actions, which survives today in Chapter 32 of the Texas Civil Practice and Remedies Code (the "**1917 Statute**" and as amended "**Chapter 32**"). In 1973, Texas adopted the Comparative Negligence and Contribution Statute that governed contribution in pure negligence cases. Later enactments and amendments extend the comparative responsibility scheme, including contribution claims, to virtually all tort actions (the "**1973 Statute**" and as amended "**Chapter 33**"). In 1980 the Texas Supreme Court in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980) held that there could not be common law indemnity due to the adoption of the Comparative Negligence and Contribution Statute in 1973. Texas courts have held that Texas' comparative negligence statutes abolished the common-law doctrine of indemnity between negligent tortfeasors. In 1984 the Texas Supreme Court felt compelled, due to continued inaction of the Texas legislature, to enact by judicial fiat in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex**.** 1984) its own comparative contribution scheme to compare the fault or causation of defendants where one or more of the defendants were held liable on theories of negligence, strict liability and breach of contact. In 1987, the Texas legislature enacted "**tort reform**" amendments to the Civil Practice and Remedies Code (the "**1987 Statute**"), the genesis of today's Comparative Responsibility and Apportionment legislative risk allocation scheme. The common law principle of joint and several liability for the damages resulting from an "indivisible wrong or tort" was replaced under the 1987 Statute with the "tort reform" concept that a defendant is generally liable

> only for the percentage of the damages found by the trier of fact equal to that defendant's **percentage of responsibility** with respect to the personal injury, property damage, death, or other harm for which the damages are allowed. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a).

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

c. Only Remaining Vestige of Common Law Indemnity: Vicarious Liability

The only remaining vestige of common law indemnity involves liability of a purely vicarious nature. An example of pure vicarious liability is a case where an employer, without independent fault, is held responsible for the torts of its employees that were committed within the scope of their employment. Under this circumstance, the employer has a right to bring an action against its employee to recover the full amount of damages that the employer paid as a result of the employee's conduct. *South Austin Drive-In Theatre v. Thompson*, 421 S.W.2d 933, 348 (Tex. Civ. App. – Austin 1967, writ ref'd n.r.e.).[1]

3. Common Law Waiver of Subrogation.

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

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

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

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

II. CONTRACTUAL INDEMNITY BY PARTY

A. Elements

A contractual indemnity is comprised of the following elements: (1) the duty to indemnify;[2] (2) possibly the duty to defend;[3] (3) an "indemnitor", the indemnifying party (referred to in this article as the "**Protecting Party**"); (4)

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[1] **Vicarious Liability.** BALLENTINE'S LAW DICTIONARY: "Substituted or indirect responsibility, *e.g.,* the responsibility of an employer for the torts committed by his employee within the scope of his employment." THE LAW DICTIONARY: "Vicarious liability by definition is 'liability that a supervisor party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." *MacArthur v. O'Connor Corp.*, 635 F. Supp.2d 112, 116 (D.R.I. 2009) citing to BLACK'S LAW DICTIONARY 934 (8TH ED. 2004).

[2] **Indemnity.** An "**indemnity**" is, "I agree to be liable for your wrongs." Indemnity is a shifting of the risk of a loss from a liable person to another. The risk of loss may be contractual or tortious. Many times scriveners use an indemnity provision when they do not know whether the Protected Party is a potentially liable person. Sometimes, an indemnity provision is no more than a restatement of existing duties, "I will

an "indemnitee", the indemnified persons (the referred to in this article as the "**Protected Party**");[4] (5) the events, acts or omissions triggering the indemnity (the "**Indemnified Matters**");[5] (6) the liabilities indemnified (the

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indemnify you for my wrongs;" "You will indemnify me for your wrongs." Indemnity agreements are strictly construed in favor of the Protecting Party. However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR.3d Contribution and Indemnification § 14 Form; 26 TEX. JUR.2d Statute of Frauds § 29. A defining characteristic of an indemnity agreement is that it "does not apply to claims between the parties to the agreement." *Wallerstein v. Spirt*, 8 S.W.3d 774, 780 (Tex. App. – Austin 1999, no pet.). The Texas Supreme Court in *Dresser Indus., Inc. v. Page Petroleum, Inc.* 821 S.W.2d 359, 362 - 363 (Tex. App. - Waco 1991), *rev'd in part, aff'd in part*, S.W.2d (Tex. 1993):

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

[3] **Possibly Duty to Defend.** There is a distinction between the duty to defend and the duty to indemnify. Indemnification will not ordinarily arise until the Protected Party has been found liable. The duty to defend arises prior to a determination of liability, and is, therefore suitable to a declaratory judgment action. This distinction has played out many times in insured's demanding defense from its insurers. For example, the following insurance cases: *D. R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 773, 781 (Tex. App. – Hou. [14th Dist.] 2006), order withdrawn and judgment aff'd in part, rev'd in part, 300 S.W.3d 740 (Tex. 2009) (noting distinction between duty to defend and duty to indemnify); *English v. BGP Intern., Inc.*, 174 S.W.3d 366, 371 (Tex. App. – Hou [14th Dist.] 2005); *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997); *Lancer Ins. Co. v. Perez*, 308 S.W.3d 35, 40 (Tex. App. – San Antonio 2009), judgment rev'd, 345 S.W.3d 50 (Tex. 2011).

[4] **Protected Party.** Indemnification clauses typically name a primary party and secondary persons, some not even parties to the Insured Contract, as being a Protected Party. For example, an owner may be named as the primary Protected Party in a construction contract requiring the contractor to indemnify the owner for liabilities arising out of the contractor's construction activities. In addition to naming the owner as the primary Protected Party, the owner may also require that the scope of the indemnity include liabilities of other persons by listing them as "additional" Protected Parties. The importance of specifically designating in the indemnity clause all of the persons intended to be Protected Parties is emphasized by *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907 (Tex. App. - Amarillo 1997, no writ) where the court found that a **consultant** was **not** a Protected Party within the listing of Protected Parties in a indemnity covering the "**Operator, its officers, directors, employees and joint owners**". Questions concerning the context of "who" and "when" should be resolved. For instance, assume an indemnity provision generally refers to a company's "**officers and directors**" as Protected Parties. **Question:** What would happen if a claim were to be made against a party who, at the time the indemnification provision was signed, was an officer or director, but was not an officer or director at the time the claims were made?

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

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

(2) "Caused By". *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir. 1993) holding the Protecting Party (indemnitor) was not obligated to defend the indemnitee against all claims and suits, or for costs incurred in defense of baseless claims, since the indemnity clause required only that the indemnitor indemnify for injuries "**caused by**" acts or omissions of the Protected Person (indemnitee). The Beaumont Court of Appeals, in *Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App.-Beaumont 1995, *writ denied*), upheld a provision as covering injuries to an employer's employees caused by the sole negligence of the Protected Party (premises owner) even though injuries to the contractor/employer's employees was not specifically mentioned, and the indemnity provision was worded in terms of injuries "caused by the (contractor/employer)" (the Protecting Party) and did not expressly mention that it covered injuries "caused by" the Protected Party.

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

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

The court in *Sieber & Callicutt, Inc. v. La Gloria*, 66 S.W.3d. 340 (Tex. App.–Tyler 2001, no writ) found, in a case where the negligence of the Protected Party (La Gloria) and the negligence of the Protecting Party (Sieber & Callicutt) was determined to be equal, that the negligence of the Protecting Party was a "substantial factor" and "a proximate cause" of the liability although not the only factor in causing the Indemnified Liability (liability to the estate of a deceased employee of the Protected Party, La Gloria). La Gloria settled the wrongful death action and sued Sieber & Callicutt on Sieber & Callicutt's indemnity in its maintenance contract with La Gloria. The trial court found that there was a reasonable

"**Indemnified Liabilities**");[6] and (7) possibly a specification of excluded matters or excluded liabilities (the "**Excluded Liabilities**").[7]

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risk that La Gloria would have been found grossly negligent (the man-way cover was in extreme disrepair), Sieber & Callicutt also was negligent (by running a hot water line into the tank and not advising La Gloria), and La Gloria and Sieber were equally negligent. The Protecting Party (Sieber & Callicutt) urged the court to find that the "**arising in any manner**" language in the indemnity did not "provide a lower causal connection than proximate cause" and thus it should not be required to indemnify La Gloria, even for Sieber's proportion of causation. The court rejected Sieber's argument noting that the trial court found that Sieber was negligent and that a component of negligence is proximate cause. Since the indemnity provision expressly provided for Sieber to indemnify La Gloria for Sieber's proportionate share of liability, Sieber was liable to La Gloria for one-half of the settlement.

"Arising Out of Premises". Some courts have found that the addition of a geographic term to the broad term "arising out of" reflects the intent to limit the Indemnified Liabilities to occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts). In *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; also see *Commerce & Indus. Ins. Co.* v. *Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990) finding no duty to indemnify where the cause of the damage occurred outside the leased premises.

(4) "In Connection With". Indemnified Liabilities may be contractually limited to such injuries occurring "in connection with" the work being performed by the Protecting Party. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Protected Party that are unrelated to the performance of the scope of the work by the Protecting Party. *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 70 71 (Tex. App. — Tyler 1978, writ ref'd n.r.e.); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806, 832 (Tex. App. — Ft. Worth 1961, writ ref'd); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), cert. denied, 397 U.S. 1022 (1970). The court in Westinghouse Electric Corp. v. Childs-Bellows, 352 S.W.2d 806 (Tex. Civ. App. — Ft. Worth 1961, writ ref'd) found that the indemnity agreement of a subcontractor did not include injuries to the subcontractor's employees who had been injured through the negligence of employees of the contractor engaged in work unrelated to the subcontract. However, this result might also be explained as being an attempt by pre-Ethyl courts to limit indemnity agreements with the "clear and unequivocal" test. See *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993). In another case, the court held that the subcontractor's indemnity did not extend to the death of the subcontractor's employee caused by the negligent acts of the contractor's employees. *Brown & Root, Inc. v. Service Painting Co.*, 437 S.W.2d 630 (Tex. Civ. App. — Beaumont 1969, writ ref'd). The death of the employee of the subcontractor did not "occur in connection with" the subcontracted work, notwithstanding the fact that the employee was engaged in sublet work at the time of the employee's death. The work being performed by the employee of the general contractor was not connected to the work being performed by the employee of the subcontractor.

[6] **Indemnified Liabilities.** Indemnities have sometimes been classified as an "**indemnity against liability**." *Russell v. Lemons,* 205 S.W.2d 629, 631 (Tex. Civ. App. - Amarillo 1947, writ ref'd n.r.e.). In the case of a promise to indemnify against liability, a cause of action accrues to the Protected Party only when the liability has become fixed and certain, as by rendition of a judgment. Possibility that liability triggering indemnity will be incurred in pending action is a "future hypothetical event" within meaning of rule that Uniform Declaratory Judgments Acts gives court no power to pass upon hypothetical or contingent situations. *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.,* 884 S.W.2d 530 (Tex. App. - Texarkana 1994, no writ); § 37.001 TEX. CIV. PRAC. & REM. CODE ANN. Alternatively, an indemnity may be an "**indemnity against damages**." With respect to a promise to indemnify against damages, a right to bring suit does not accrue until the Protected Party has suffered damage or injury by being compelled to pay the judgment or debt. *Holland v. Fidelity & Deposit Co, of Maryland*, 623 S.W.2d 469, 470 (Tex. App. - Corpus Christi 1981, no writ). Indemnity agreements may cover contractual obligations of others or torts committed by others.

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

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

(2) Torts. Indemnity against "**one's own negligence**" has long been recognized in Texas. *See* the discussion of the "express negligence test" as a rule of contract construction below. *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 624 (Tex. 1963); *Ethyl Corp. v. Daniel Const. Co.,* 725 S.W.2d 705 (Tex. 1987). In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.,* 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court held that the language of the contractual indemnity provision satisfied the express negligence test even though it did not differentiate between "**degrees of negligence**." Certain "magic" words like "**active**," "**passive**," "**sole**," "**joint**," or "**concurrent**" to describe the degrees of negligence covered were not necessary.

(3) Strict Liability. In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a Protected Party's statutory strict liability to expressly state that it covers such strict liability. The court found that fairness dictates that such an "extraordinary shifting of risk" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced. Some subsequent court of appeals have been unwilling to extend the express negligence doctrine to non-negligence claims.

[7] **Excluded Liabilities.** The court of appeals' reliance in *Crown Central Petroleum Corp. v. Jennings* upon its opinion in *Singleton v. Crown Central Petroleum Corp*., 713 S.W.2d 115 (Tex. App. - Hou. [1st Dist.] 1985, writ ref'd n.r.e) was misplaced since, after citing the *Singleton* writ history of "writ ref'd n.r.e," the Texas Supreme Court withdrew its opinion and reversed the court of appeals in Singleton at 729 S.W.2d 690 (Tex. 1987). The court of appeals both in Jennings and Singleton erroneously concluded that the language "**excepting ...**" was an express statement that the concurrent negligence of the Protected Party was indemnified by the Protecting Party. As noted in the discussion of the Texas Supreme Court cases construing *Ethyl*, the Texas Supreme Court held that this type language states what is not to be indemnified, and not what is indemnified.

Express Negligence and Contractual Comparative Negligence. (a) The Protected Party's Negligence. In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement.[7] In *Ethyl*, the court observed

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

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

> Contractor (Daniel) (the Protecting Party) shall indemnify and hold Owner (Ethyl) (the Protected Party) harmless against **any loss** or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor (the Protecting Party), Contractor's employees, subcontractors and agents or licensees.
>
> (Emphasis and parenthetical references added by author).

Id. at 708. This provision does not identify the Protected Party's (Owner's, Ethyl's) negligence, as a cause of the liability; it identifies only the negligence of the Protecting Party (Daniel, the Contractor), as the cause of the liability being indemnified. The court termed this claim as one for "**comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect even though the indemnity provision expressly refers to the Protecting Party's (Contractor's) negligence! The court stated

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

(**Bold** added by author.) If a Protected Party wants to be indemnified for 100% of the liabilities caused jointly by the Protected Party and the Protecting Party and so be indemnified both for its share and the contributory share of the Protecting Party, the indemnity must expressly so state it.

B. State Bar of Texas Real Estate Forms Manual – Retail Lease

The following lease form is a Retail Lease prepared by the Real Estate Legal Forms Committee of the State Bar of Texas for use by Texas lawyers. It appears in the TEXAS REAL ESTATE FORMS MANUAL, Chapter 25 Leases along with a Basic Lease, an Office Lease, and an Industrial Lease. The author of this article has added underlining to the Retail Lease in order to highlight certain words, terms and provisions that are discussed in the accompanying footnotes.

RETAIL LEASE

Basic Information

Premises

Approximate square feet:	____ sq. ft.
Name of Shopping Center:	_____
Street address/suite:	_____
City, state, zip:	_____

…

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements: _____.[8]

A. Definitions

…

A.1. "Agent" means agents, contractors, employees, licensees, and to the extent under the control of principal, invitees.[9]

A.3. "Common Areas" means all facilities and areas of the [Shopping Center/Building] and Parking Facilities that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the [Shopping Center/Building], including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

…

A.6. "Injury" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.[10]

B. Tenant's Obligations

B.1. **Tenant agrees to—**

…

---

[8] **"Tenant's Rebuilding Obligation".** See Retail Lease ¶ *D.5* – Casualty/Total or Partial Destruction.

[9] **"Agent".** The Definitions include a defined term "Agent" setting out a laundry list of other persons that are not parties to the Lease. The purpose for this laundry list is to define the Protected Persons (the person who are protected by the indemnity) as including the Agents of the Landlord and its Lienholder. To some extent it is included to narrow the scope of the Tenant's indemnity to exclude an indemnification of Landlord to the extent the Injury is caused in whole or in part by the gross negligence or willful misconduct of Agents of the Landlord and its Lienholder. See Retail Lease ¶ *B.1.q.*

[10] **Indemnification for Injuries.** The defined term "**Injury**" is used in the indemnity provisions of the Retail Lease ¶ *B.1.q.* and ¶ *C.1.f.* Retail Lease ¶ *B.1.q.* provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." Retail Lease ¶ *C.1.f.* provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas." "Injury" is defined in the Manual's Lease forms as meaning 3 types of occurrences and the associated liability arising out of such occurrence: property damage, injuries to persons including their death, and "personal and advertising injury." This last form of liability incorporates by reference the definition of such term as contained in Tenant's liability insurance.

B.1.k. Repair, replace, and maintain any part of the Premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.

B.1.q.[11] INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING [12] IN ANY PORTION OF THE PREMISES.[13] **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF TENANT'S INSURANCE,[14] (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT [15] OR SIMILAR EMPLOYEE BENEFIT ACTS,[16] (iii) WILL SURVIVE THE END OF**

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[11] **Manual's Approach to Reciprocal Indemnities in the Lease.** The Texas Real Estate Forms Manual's Basic Lease, Retail Lease and Office Lease contain mutual indemnities. In Retail Lease ¶ ***B.1.q*** Tenant indemnifies Landlord. In Retail Lease ¶ ***C1.f*** Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Protected Person for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Protected Person. The Tenant's indemnity is for Injuries "occurring in the Premises". The Landlord's indemnity is for Injuries "occurring in the Common Areas". Each indemnity complies with the express negligence and fair notice requirements which are imposed by the court on provisions shifting liability for negligently caused injuries from one liable person to another. Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Protecting Person for Injuries caused in whole or in part by the sole or concurrent negligence of the Protected Person.

The following is a quoted portion of the commentary in chapter 25 Leases, p. 25-2 of the TEXAS REAL ESTATE FORMS MANUAL (3 ed.) § 25.1:4 Cautions: Risk Allocation:

> **Indemnities and Waivers:** The indemnity provisions of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not gross negligence or willful misconduct) on a **geographic basis**; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease form releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

[12] **"Occurring".** The "**occurring**" language does not expressly address the time of the occurrence. Injuries can occur after the end of the Term of a lease due to acts or omissions occurring during the Term of a lease. The indemnity does state that the indemnity survives the end of the Term of the Lease, but this may address the survivability of the indemnity as to Injuries occurring during the Term of the Lease. The timing issue is addressed by adding after the words "occurring in any portion of the Premises" the words: "**either before or after the end of the Term**". Note that this trigger language is not the broad form used in the standard ISO liability insurance policy in defining the scope of additional insured coverage for Injuries "**arising out of** that part leased to (the tenant)."

[13] **"Premises".** "**Premises**" is defined in the Basic Terms section of the Retail Lease. The risk allocation scheme adopted in the Texas Real Estate Forms Manual for Leases is to allocate responsibility to the Tenant for all Injuries occurring in the Premises and to allocate to the Landlord responsibility for all Injuries occurring in the Common Areas. The Retail Lease contains reciprocal indemnities with the Tenant indemnifying the Landlord for all Injuries occurring in the Premises and with the Landlord indemnifying Tenant for all Injuries occurring in the Common Areas.

[14] **"Independent of Tenant's Insurance".** This language is added to address those cases in which the court has sought to interpret the Protecting Person's indemnity in cases of ambiguity by examining the scope of a Protecting Person's insurance covenant and the risks covered thereby to determine the intended breadth of the indemnity to scope and limits of the insurance.

[15] **The Texas Workers' Compensation Act.** The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004, repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04, formerly Art. 8306, § 3(d). See next Footnote 16 discussing limits on a negligent employer's or a negligent person's liability absent a contra contractual indemnity.

[16] **Not Be Limited by Comparative Negligence Statutes or Worker's Compensation Insurance.** This language notes that the indemnity is intended by the parties not to be limited by the statutory risk allocation schemes set up in the Comparative Negligence and Proportionate Responsibility Statutes and the Workers' Compensation Act. A contractual indemnity by the employer of the injured employee is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility which otherwise would be borne by the Protected Person absent the indemnity (See Footnote 15 above). 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

THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART [17] BY THE ORDINARY NEGLIGENCE[18] OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY [19] TO THE EXTENT AN INJURY IS

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accident was attributable as follows: plant owner's negligence (Petrofina) – 43%, employer's negligence (Hydrocarbon Construction) – 42%, and employee's negligence (Varela) – 15%. The supreme court reversed the trial court's reduction of the damage award from $606,800 to $243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute and disallowed contribution from the employer. The enforceability of a contractual indemnity passing back to the employer a third party's negligence over the "Worker Compensation Bar" has been upheld as the means of passing back to the employer the proportion of the negligently caused injury caused by the employer. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990).

[17] **"In Whole or In Part." Comparative Indemnity-Indemnifying for One's Own Share of Injury Caused by the Concurrent Negligence of the Protected Person and the Protecting Person**. The "***in whole ... by ... Landlord***" language expressly addresses the issue as to whether the Protecting Person's indemnity covers an Injury caused "solely" by the negligence of the Protected Person. The "***in part ... by ... Landlord***" language expressly addresses the issue as to whether the Tenant's (the Protecting Person's) indemnity is only as to Injuries caused solely by the acts or omissions of the Landlord (the Protected Person) or also covers Injuries caused in part by other persons. However, This language may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence. The indemnity provisions do not expressly state that the Protected Person is indemnified for the liability it has due to the negligence of the Protecting Person! Admittedly (by the author) a concept seemingly at odds with the common understanding of the scope of a Protecting Party's indemnity, this wording may result in the Protected Person being indemnified by the Protecting Person for the portion of the liability attributable to the Protected Person's negligence but not for the portion attributable to the Protecting Person's negligence. For example, if an employee of the Tenant is injured in the Premises and suit results. Under the facts of the case, the employee's injuries are the result of the joint negligence of "Landlord" and "Tenant." The injured employee is barred from suing its employer (the Tenant) by the Workers' Comp Bar and thus sues the Landlord. Landlord calls on Tenant to defend Landlord from suit relying on Tenant's indemnity in the Texas Real Estate Form Manual's Retail Lease ¶ ***B.1.q***. Tenant defends. The jury determines that Landlord was 20% negligent and Tenant was 80% negligent. Jury determines damages to the employee are $1,000,000. Landlord seeks indemnity and contribution from Tenant. Tenant pays the 20% allocable to Landlord's 20% share of the award = $200,000. Tenant does not pay the $800,000 attributable to its negligence. Tenant argues that it did not indemnify Landlord for the share of the liability attributable to Tenant's share of the negligence! The Texas Supreme Court in *Ethyl* held that, if indemnity is sought by the Protected Party for the concurrent negligence of the Protecting Party, the indemnity has to so expressly state. The court termed this claim as one for "**contractual comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> After settling his claim for worker's compensation benefits, Metcalf sued Ethyl who in turn sued Daniel seeking indemnity. The jury found Ethyl negligent in failing to purge the existing lines and in failing to provide Metcalf with a safe place to work. The jury also found Daniel negligent in failing to remove the valve handles. The jury apportioned the negligence 90% to Ethyl and 10% to Daniel. The contract between Ethyl and Daniel contained the following indemnity provision:
>
> > Contractor shall indemnify and hold Owner harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, Subcontractors, and agents or licensees.
>
> … The contract between Daniel and Ethyl speaks to "any loss ... as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor...." Ethyl emphasizes the "any loss" and "as a result of operations" language to argue an intent to cover its own negligence. We do not find such meaning in those words. The indemnity provision in question fails to meet the express negligence test.
>
> Ethyl next contends it is entitled to comparative indemnity to the extent of Daniel's negligence which the jury found to be 10%. However, the contract in question contains no provision for **contractual comparative indemnity**. Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. Because the contract in question does not meet that test, Ethyl is relegated to arguing for comparative indemnity under the common law. Common law indemnity shifts the entire burden of loss from one party to another. In Texas, there exists no right to indemnity on a comparative basis under the common law... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein. *Ethyl Corp. v. Daniel Const. Co*., 725 S.W.2d 705, 708 (Tex. 1987).

[18] **Texas Anti-Indemnity Act.** With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under Texas Insurance Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of a contract the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. The definition of a "construction contract" contained in § 151.102 of the Texas Insurance Code is extremely broad, and includes

> Any contract, subcontract, or agreement … made by an owner … for the design, construction, **alteration**, renovation, remodeling, **repair**, or **maintenance** of … a building, structure, appurtenance, or other improvement to or on … real property."

The following comment is made in the TEXAS REAL ESTATE FORMS MANUAL in Chapter 17 Risk Allocation: Indemnity, Waiver, and Insurance at p. 17-3 (3d ed. 2017):

CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS.

…

C. Landlord's Obligations

C.1. **Landlord agrees to—**

…

C.1.d. Repair, replace, and maintain the (i) roof, (ii) foundation, (iii) Common Areas, and (iv) structural soundness of the exterior walls, excluding windows, store fronts, and doors.

…

C.1.f.[20] INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS, OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (i) IS INDEPENDENT OF LANDLORD'S INSURANCE, (ii) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (iii) WILL SURVIVE THE END OF THE TERM, AND (iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

…

D. General Provisions - Landlord and Tenant agree to the following:

D.1. Alterations. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord.[21] Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations, and restore the Premises to the condition existing at the Commencement Date, normal wear excepted.

…

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

D.4. Release of Claims[22]*/Subrogation.*[23] LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS,[24] FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR

Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

[19] **"But Will Not Apply To." "Except Sole Negligence of the Protected Person"**. The drafter of an indemnity clause cannot use the exclusion clause as a means of impliedly including within the coverage clause by implication items not excluded. In *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the Texas Supreme Court found that the following provision **failed** the express negligence standard since the provision stated what was not to be indemnified claims resulting from the sole negligence of the premises owner rather than expressly stating that the premises owner was to be indemnified from its own negligence.

> Contractor agrees to ... indemnify ... owner from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... ***excepting only*** claims arising out of accidents resulting from the ***sole negligence*** of owner. (Emphasis added by author.)

Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App.—Ft. Worth 1988, writ denied). *Texas Utilities Electric Co. v. Babcock & Wilcox,* 893 S.W.2d 739 (Tex. App.—Texarkana 1995, no writ).

[20] **Landlord's Indemnity.** See analysis of the mutual indemnity by the Tenant above. Landlord's indemnity is for all Injuries occurring in any portion of the Common Areas, even if the Injury is caused in whole or in part by the negligence of the Tenant.

[21] **Ownership of Tenant Improvements.** The Texas Real Estate Form Manual's Retail Lease provides that tenant made alterations "will become the property of Landlord." This statement does not identify the point in time as of when the Landlord "owns" the improvements. If ownership transfers at the point of alteration, does the Tenant have an insurable interest in the improvements?

[22] **"Release of Claims"**. The waiver of subrogation provision (Texas Real Estate Form Retail Lease ¶ ***D.4***) is both a release of claims between the parties as to property damages by "that are covered by the Releasing Party's property insurance or that would have been covered by the

SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE [25] OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS**

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required insurance if the party fails to maintain the property coverage required by this lease" and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release. This provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test. The release is written in conspicuous type and meets the requirements of the fair notice test. The Insurance Addendum supplements this contractual waiver of the property insurance carrier's right of subrogation only as to the Tenant's property insurance. **Insurance Addendum ¶ A.2c** provides that the Tenant's property insurance policies must contain waivers of subrogation of claims against Landlord and Lienholder. The Insurance Addendum does not contain a reciprocal provision requiring that the Landlord's property insurance policies contain a waiver of subrogation claims against Tenant.

[23] **Waiver of Subrogation.** See **Appendix of Forms** Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us – The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss. Most leases, including the leases in the Texas Real Estate Forms Manual, contain a provision addressing the rights between the parties in the event that the property is damaged by the negligence of the other party. The lease, such as the leases in the Texas Real Estate Forms Manual, may provide that the party whose property is damaged waives claims against the other negligent party and that the damaged party will look to the property insurance for recovery. Further the lease may provide that the right of subrogation of the insurer is waived or that the party obtaining the insurance will also obtain an endorsement to the property policy whereby the insurer waives its rights of subrogation to recovery its insurance proceeds against the negligent party. In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, ***equitable subrogation***. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an ***implied coinsured***. Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. The better practice is to address this risk in the lease. See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

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

Waiver of Subrogation Endorsement. Since there is no recognized standard property policy form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer.

Waiver of Subrogation from Subtenant's Insurers. Landlord may appropriately require subtenants to secure a waiver of subrogation from their insurers.

[24] **"Each Other"**. Use of the phrases "**each other**" and the "**releasing party's property insurance**" indicate that the terms "Landlord" and "Tenant" are the named parties to the lease as opposed to the additional persons listed in the mutual indemnities. If so, does the "releasing party" release the other party's "agents, contractors, employees, invitees, licensees, or visitors if the property damage or loss of business or revenues is caused in whole or in part by their negligence? Texas courts strictly construe releases and will not extend them to unnamed persons. In *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), the court held that a release discharges only those tortfeasors that it specifically names or otherwise specifically indemnifies. The Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) approved the decisions in *McMillen*, and in *Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) and *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. Civ. App.—Texarkana 1978, no writ) holding that the mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortuous event is not in doubt. *Also see Angus Chemical Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997) where the court held that the release by an injured party of a tortfeasor does not release the tortfeasor's insurer; *Illinois Nat. Ins. Co. v. Pereez*, 794 S.W.2d 373 (Tex. App.—Corpus Christi 1990, writ den'd).

[25] **Limited to Property Damages**. Note the release is only as to claims or liabilities for damage that are covered by the releasing party's property insurance (or that would have been covered by the required insurance if the party fails to maintain the property coverage required by the lease). The parties are not releasing each other for the (b) and (c) portion of "Injuries" as defined in the Definitions. Also, there is no companion contractual waiver of the liability insurance carrier's right of subrogation against the party causing the non-property damage Injury.

PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY OR ITS AGENTS.[26]

D.5. Casualty/Total or Partial Destruction[27]

D.5.a. If the Premises are damaged by casualty and can be restored within ninety days, Landlord will, at its expense, restore the roof, foundation, Common Areas, and structural soundness of the exterior walls of the Premises and any leasehold improvements within the Premises that are not within Tenant's Rebuilding Obligations to substantially the same condition that existed before the casualty and Tenant will, at its expense, be responsible for replacing any of its damaged furniture, fixtures, and personal property and performing Tenant's Rebuilding Obligations. If Landlord fails to complete the portion of the restoration for which Landlord is responsible within ninety days from the date of written notification by Tenant to Landlord of the casualty, Tenant may terminate this lease by written notice delivered to Landlord before Landlord completes Landlord's restoration obligations.

D.5.b. If Landlord cannot complete the portion of the restoration for which Landlord is responsible within ninety days, Landlord has an option to restore the Premises. If Landlord chooses not to restore, this lease will terminate. If Landlord chooses to restore, Landlord will notify Tenant in writing of the estimated time to restore and give Tenant an option to terminate this lease by notifying Landlord in writing within ten days from receipt of Landlord's estimate. If Tenant does not notify Landlord timely of Tenant's election to terminate this lease, the lease will continue and Landlord will restore the Premises as provided in D.5.a. above.

D.5.c. To the extent the Premises are untenantable after the casualty, the Rent will be adjusted as may be fair and reasonable.[28]

III. CONTRACTUAL INDEMNITY BY THIRD PARTY: AKA INSURANCE

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[26] **Exclusion from Waiver of Claims of Gross Negligence.** The waiver of claims language excludes from the waiver claims arising out the gross negligence of the Released Party. With regard to property insurance, gross negligence or intentional misconduct of a party other than the named insured may not be a defense to coverage, so consideration should be given to making an exception to the exclusion to the extent these risks are covered by the property policy of the Releasing Party.

[27] **Background.** The typical lease will assign responsibility for the maintenance of property insurance covering the building and other improvements to one party or the other. Under a long-term lease, especially when a single tenant occupies the entire premises, the lease allocates this obligation to the tenant. In multitenant situations, the lease typically specifies that the landlord is to maintain the property insurance or is silent. In cases where the landlord is to maintain the insurance, the lease may state that the insurance is maintained for the benefit of the landlord, or for the benefit of landlord and tenant, or may be silent on the subject of insurance and/or for whose benefit the insurance is to be maintained.

Manual's Commentary. The following is a quoted portion of the commentary in chapter 25 Leases, p. 25-2 of the TEXAS REAL ESTATE FORMS MANUAL (2 ed.) §25.1:4 Cautions: Risk Allocation:

> **Rebuilding Obligations:** The restoration obligations of the parties after a casualty are tied to the description of "Tenant's Rebuilding Obligations" contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in "Tenant's Rebuilding Obligations" in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 25-10-8, 25-10-9, and 25-10-10. The landlord's restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.
>
> For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improvements. The parties may decide that the tenant will restore all of the leasehold improvements inside the shell if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously, the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.

[28] **"Fair and Reasonable" Rent Abatement.** Does rent abatement extend to cover the period that the Tenant is performing the Tenant's Rebuilding Obligation? Should the Tenant's Rebuilding Obligations or the Landlord's rebuilding obligation include the improvements to the Tenant's space to restore it to a condition it can open for business (carpet, interior partitioning, lighting, HVAC)?

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

A. Liability Insurance

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

It is the author's opinion and experience that lawyers drafting transactional documents are resistant to undertaking the effort required to understand the insurance provisions they include in their documents and to following up with their clients to assure that the drafted insurance provisions are fulfilled by the parties and their insurance brokers.[29] On occasion this resistance has risen to heated rhetoric to the effect "I only draft the provisions. I am not an insurance person. It is up to the client to understand and implement the provisions."

Perhaps this choice arises out of concern that professing some knowledge as to one's craft exposes the practitioner to a greater likelihood of being held accountable in cases where "things go wrong" than being silent. The insurance industry's forms promote taking this position. The standard certificates of insurance are simple appearing one page documents.[30] Industry forms are not readily accessible to the practitioner. Once obtained, they appear complicated.[31] They are identified by a seemingly complicated numbering system.[32] These circumstances led the author to write this article. It is the author's hope that exposure to these "traps for the unwary" will result in change in your approach to drafting insurance provisions and will lead to your more active involvement in implementing the insurance program contemplated thereby.[33]

2. Certificates of Insurance Are Not Certificates.

a. An All Too Typical Specification

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

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

Is this sufficient? Unfortunately, **no**. Prior to 2006, the ACORD form of certificate of insurance appeared to be evidence of insurance and appeared to give rights against the insurer (including independent rights to notice upon cancellation). When ACORD changed its certificate forms in 2006 to clearly state that they conferred no rights on the certificate holder, insureds and their attorneys attempted to negotiate with insurers and agents to restore some enforceability to insurance certificates. Unfortunately, these efforts did not succeed. In response to these efforts the

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[29] **Confession.** "I confess that I fell into the camp that it is better to be ignorant than take the responsibility of education," Bill Locke. However, he has changed this aspect of his practice due to his unwillingness to continue drafting and providing clients with documents containing provisions neither understood by the client nor himself.

[30] **ACORD Certificates.** See the ACORD certificates attached in the Appendix of Forms.

[31] **Industry Forms.** The liability insurance forms published by the Insurance Services Office ("ISO") are recognized nationally as "the industry standard". However, they are not freely available to the public or the practitioner. These forms are prepared by an industry trade organization for use by its members. Copies may be purchased by contacting ISO. Neither ISO's property insurance forms nor the forms promulgated by any other industry trade organization have gained recognition as the industry standard. Also, insurers including some of the leading insurers craft their own liability and property insurance and these forms are not readily available to the public or practitioner in advance of their employment.

[32] **ISO Form Numbering System.** See Endnote 1 (ISO) to the Commentary on Insurance Forms in the Appendix to this Article for an explanation of the ISO form numbering system.

[33] **Pogo.** "We have met the enemy and he is us." Pogo by Walt Kelly (1913 - 1973).

insurance industry approached state insurance commissioners and legislatures to gain support for their position that a certificate of insurance could not vary the underlying policy or grant rights that did not exist under the applicable policy. At last count, 42 states have either insurance regulations or statutes on this point.

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

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

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

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

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

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

Many courts have held that these disclaimers effectively negate reliance by certificate holders.[34] See *e.g.,* the following statements by courts: *Prudential Property and Casualty Ins. Co. v. Anderson*, 922 A.2d 236 (Conn. 2007):

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

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

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

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

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[34] **Not Reasonable to Rely Upon an ACORD Certificate.** Macbeth, "It is a tale, told by an idiot, full of sound and fury, signifying nothing." W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

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

A certificate of insurance, if incorrect, may provide a claim against the agent who issued the incorrect certificate, but it does not obligate the underwriter under the policy.[35] A claim against the agent may be of small consolation under the circumstances.

3. Antiquated, Problematic and Just Plain Wrong Terminology.

Even after almost 27 years since the insurance industry changed their policy forms in 1986, leases, construction contracts and other forms drafted by many lawyers still employ "antiquated, problematic and just plain wrong" terminology.

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

(1) "Comprehensive General Liability Policy"

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

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

Since 1986, "blanket" or "broad form contractual liability coverage" has not existed. The current commercial general liability definition of contractual liability in the standard CGL policy achieves the same result.[36]

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

> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." A certificate representing that there is additional insured coverage would be false, but the holder may not be aware of that fact. Because of the disclaimers saying that the certificate conveys no rights upon the holder other than what are granted in the underlying policy, courts usually conclude that the holder is out of luck in this situation …. Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

The ADDITIONAL INSURED BOOK 5th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 361-362 (International Risk Management Institute, Inc. www.IRMI.com 2004).

[36] **Contractual Liability Coverage – An Exception to an Exclusion From Coverage.** See Endnote 27 (Contractual Liability Coverage – An Exception to an Exclusion From Coverage) in the Commentary on Insurance Forms.

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

The same thing is true of "broad form property damage," "broad form CGL endorsement," and "deletion of the personal injury employee exclusion." Use of such terminology is indicative of lack of awareness of changes that occurred almost 27 years ago.[37]

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

Requiring a "cross liability endorsement" is even more problematic. A cross liability endorsement in today's vernacular is an exclusion, not a provision or extension of coverage, the purpose of which is to prevent one insured from being provided coverage when sued by another insured. A "separation of insureds endorsement" or "severability of interests provision" states that each insured against whom claim is made or suit is brought will be provided a separate defense. This protection is automatically included in today's standard form commercial general liability policy.[38]

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

A requirement that coverage be provided for a specified number of years following substantial completion of a construction job is not a requirement that can be met by any standard insurance program, as all such programs expire annually. A requirement for the continued provision of coverage is instead a performance requirement being placed on the insured.[39]

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

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

The standard ISO CGL policy provides that notice of cancellation will be provided to the first Named Insured.[40] Similarly, the ISO Common Policy Conditions, which is a component of the ISO property policy, provides that notice of cancellation is to be given only to the first Named Insured.[41] Neither the **ISO CP 12 18 06 07** Loss Payable Provisions nor the **ISO CP 12 19 06 07** Additional Insured – Building Owner endorsement issued to tenants insuring a building on leased premises provides for notice of cancellation to be given to the landlord.[42] Additional insureds are not first; they are "additional" and, therefore, the standard policy without endorsement does not commit

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[37] **Commercial General Liability Insurance (CGL).** See Endnote 21 (Commercial General Liability Insurance (CGL) in the Commentary on Insurance Forms.

[38] **Separation of Insureds.** See Endnote 28 (Separation of Insureds) in the Commentary on Insurance Forms.

[39] **Products-Completed Operations.** See Endnote 69 (Products-Completed Operations) in the Commentary on Insurance Forms.

[40] **Notice of Nonrenewal to Only to First Named Insured in ISO CGL Policy.** See in **Appendix of Forms,** Section IV – Common Policy Conditions, Par. 9 When We Do Not Renew providing that the CGL policy issuer is to give notice of nonrenewal only to the first Named Insured.

[41] **Notice Only to First Named Insured in ISO Property Policy.** See **Par. A** Cancellation in the ISO IL 00 17 11 98 Common Policy Conditions attached in the Appendix of Forms at p. 146 setting out the notices to be given by the insurer to the First Named Insured. See Endnote 15 in the Commentary on Forms for a discussion of the change in 2006 to the ACORD Certificate of Insurance deleting the statement that the insurer is to endeavor to give notice of policy cancellation to the certificate holder.

[42] **No Notice to Landlord.** See ISO **CP 12 18 06 07** Loss Payable Provisions and ISO **CP 12 19 06 07** Additional Insured – Building Owner attached in the **Appendix of Forms**.

the insurer to give notice to the additional insured if the insurer cancels the policy for nonpayment of premium or for any other reason.[43]

Some but not all states permit policies to be endorsed with a "notice of cancellation" endorsement obligating the insurer to give Named Insureds other than the first Named Insured or additional insureds advance notice of policy cancellation.[44] Even in states where some form of notice endorsement has been approved by the state insurance industry regulatory body, it is difficult to get insurers to commit to give notice of cancellation to persons that are not the first Named Insured. Further, insurance companies will not provide a "notice of nonrenewal" endorsement. When any term, condition or verbiage is changed in a policy at time of renewal, that policy is technically no longer a renewal. Hence, every time there is even a minor change (and something is almost always changed), a nonrenewal notice would have to be sent. Insurance companies are unwilling to commit to such a burden and expense.

5. Not All Indemnified Liabilities Are Insured

a. An Indemnitor is a Private Insurer

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

b. Applying Contractual Liability Coverage to the Indemnification Agreement

What portion of this transferred risk is insured, or even insurable? Contractual liability insurance is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. This insurance coverage is provided in the standard CGL policy as (1) a series of definitions to (2) an exception to (3) an exclusion to (4) the coverage provision for bodily injury and property damage liability only.[45] In other words, contractual liability insurance applies to allegations of bodily injury and physical injury to tangible property, and nothing else.

Problematic Insurance Spec:

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

[43] **The Risk of Failing to Confirm Insured Status.** If you want to find out how bad it can be when you do not insist on confirming the issuance of the requisite additional insured and notice of cancellation endorsements to the tenant's property policy, read *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex.) – landlord of the Taste of Katy restaurant failed to obtain endorsements on its tenant's property policy designating it as an additional insured and the insurer's agreement to give the landlord notice of policy cancellation. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found, "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". The landlord sustained a catastrophic uninsured loss.

[44] **Texas: Better Than Most.** The Texas Department of Insurance ("**TDI**") currently permits a "notice of cancellation or material change" endorsement. See ISO **CG 02 05 12 04** Texas Changes – Amendment of Cancellation Provisions or Coverage Change. TDI has not defined what constitutes a "material change".

[45] **Contractual Liability Coverage.** See Endnote 27 (Contractual Liability Coverage – An Exception to an Exclusion From Coverage) in the Commentary to Forms in the Appendix for the ISO CGL policy provision granting contractual liability coverage for bodily injury and property damage to the policy's Named Insured for its contractual indemnities.

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

Revised Insurance Spec:

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

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

Hypothetical:

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

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

a. Complementary Risk Management Tools

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

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

b. Additional Insured Advantages

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

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

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

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

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

Returning to the Hypothetical:

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

c. Most Common Drafting Error

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

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

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

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

d. What to Look For In An Additional Insured Endorsement

The most common and well recognized additional insured endorsements are drafted for use by the insurance industry by ISO, or Insurance Services Office. ISO endorsements will include a footer that reads "© ISO Properties, Inc., 20__" or © Insurance Services Office, Inc., 20__".[46]

[46] **ISO and ACORD Forms.** Following the Appendix of Forms is a Commentary on Insurance Forms which sets out by Endnotes a discussion of various provisions in the Forms. See Endnote 1 in the Commentary on Insurance Forms for a discussion of ISO and the ISO insurance form numbering system. See Endnotes 8-11 and 15 - 18 for a discussion of the ACORD certificate forms. Many insurance companies utilize manuscript additional insured endorsements. A manuscript endorsement is one that an insurance company makes up, which may or may not include some ISO wording. Beware of any endorsement that includes a footer reading "Includes Copyrighted Material of Insurance Services Office, Inc. With Its Permission". All manuscript endorsements require careful scrutiny. They frequently:

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

- Who? Who is being added as an additional insured?
- What? What scope of negligence is being transferred? What activity is covered (*e.g.,* operations, work, ownership, use, maintenance)?
- When? Is there a time period covered?
- Where? Is there a location covered?
- Exclusions? Are there exclusions to coverage?
- Limitations?[47]

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

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

ISO amended most of its additional insured endorsements effective April, 2013, so the new endorsements will reflect a 04 13 edition date. These revised endorsements provide that the insurance afforded to the additional insured (the "**2013 Additional Limitations**"):[48]

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

> A. Section II - Who is An Insured …. However:
> **1.** The insurance afforded to such additional insured only **applies to the extent permitted by law**;[49] and

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- Limit the parties being added as an additional insured;
- Limit the scope of coverage being provided;
- Limit the operations being covered; and
- May add new exclusions.

An example of a new exclusion is "No coverage is provided for damages because of bodily injury to employees of the insured". This obviously adversely affects the risk transfer allowed even under many of the anti-indemnification statutes recently adopted across the nation.

[47] **Limitations.** Note, some manuscripted additional insured endorsements specify a sublimit for additional insured coverage that is less than the policy limits applicable to the Named Insured. See MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005, Vol. 14. No. 10, pp. 1-8) which reviews the following manuscripted endorsement to a CGL policy that specified on its Declaration Page a sublimit for additional insured coverage an amount less than the policy limits applicable to the Named Insured:

> The Limits of Insurance applicable to the additional insured are those specified in the written contract or written agreement, if any between you and the additional insured regarding the work described above, or in the Declarations of this policy, whichever is less. The coverage provided to the additional insured by this endorsement and by paragraph f. of the definition of "insured contract" under Definitions (Section V), as amended by this endorsement, does not apply to "bodily injury" or "property damage" beyond: … d. The effective date of any deletion of, any removal of, or any non-continuance of, this additional insured endorsement from this policy.

Note that this manuscripted language provides that the additional insured coverage can be terminated by the insurer's unilateral issuance of a deletion endorsement. Unless the policy is endorsed to provide the additional insured notice of the insurer's issuance of an endorsement deleting additional insured coverage, the additional insured may never learn of the termination of its coverage.

[48] **2013 Additional Limitations.** See this language appearing in the ISO Additional Insured Endorsements in the **Appendix of Forms**.

[49] **To the Extent Permitted by Law.** This change was brought about by the wave of anti-indemnification sweeping the country and the many different manners in which the legislation is drafted. Anti-indemnity statutes in some states are silent or unclear as to whether the statute's

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will **not be broader than** that which you are **required by the contract or agreement** to provide for such additional insured.[50]

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

The most we will pay on behalf of the additional insured is the amount of insurance:

1. **Required by the contract or agreement** you have entered into with the additional insured; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.[51] This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations. (Underlining added by author.)

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prohibitions apply to insurance as well as indemnification. Most of ISO's additional insured endorsements provide coverage to the additional insured for negligence shared with the named insured. In those states, like Texas, where the statute expressly prohibits additional insured coverage for another party's negligence (except in specified exceptions), this language is to make clear that despite the wording extending coverage to an additional insured for its concurrent negligence (or even sole negligence), coverage applies only to the extent permitted by law. See Endnote 77 (Additional Insured Coverage in the Construction Context - Anti-Indemnity Statutes). This change permitted the use of a uniform endorsement throughout the United States in lieu of the tailored state-by-state endorsements that ISO had previously promulgated for states with varying anti-indemnity statutes.

[50] **Coverage Not Broader Than Required by Contract or Agreement.** This change was made to make it clear that additional insured coverage will be no broader than "required" in the underlying contract or agreement. This is to avoid giving an additional insured coverage *broader* than the coverage specified in the contract or agreement. The "required" language stresses the importance of insurance specification drafting.

Questions will abound.

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

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

> To the fullest extent permitted by law the Contractor shall indemnify, defend and hold harmless Owner … but only to the caused by the negligent acts or omissions of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder ….

This language creates a "limited" form indemnity, since it does not involve the contractor's assumption of the owner's tort liability. Is it the intent of the parties to limit the additional insured coverage by this limitation to the indemnity? The Texas Anti-Indemnity Act, TEX. INSURANCE CODE Chapter 151 has the following significant express exceptions to the Act's elimination of broad-form indemnity: (1) bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (§ 151.103); (2) claims arising from single-family residential construction (§ 151.105(10)(A)); and (3) claims arising from construction projects insured through CIPs, controlled insured programs (§ 151.105(1)).

[51] **Dollar Limit Required by Contract or Agreement, Whichever is Less.** This change was made to limit the dollar limits of coverage afforded the additional insured to the lesser of the policy limits or the limit required in the underlying contract or agreement that specified additional insured coverage. For example, if the contract requires the contractor to maintain CGL limits of $1,000,000 per occurrence, but the contractor obtains coverage for $2,000,000 per occurrence, the additional insured owner in insured only to the extent of $1,000,000.

More questions abound.

- What constitutes "the amount of insurance … required by the contract"?

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

f. Frequently Used Additional Insured Endorsements

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

The most common ISO additional insured endorsement used for the construction industry is the **ISO CG 20 10 04 13**.[52] A copy of this additional insured endorsement is found in the **Appendix of Forms**. This additional insured endorsement provides the following coverage:

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

What? Coverage is afforded "but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' **caused in whole or in part by your** (the Named Insured's) **acts or omissions**; or the acts or omission of those acting on your (the Named Insured's) behalf …."[53]

- What happens in cases where the named insured/indemnitor's indemnity is not capped by a specific dollar amount, but the insurance specification provides for a specific dollar amount of coverage, and the named insured actually has greater limits? (In such case, the dollar amount of the additional insured coverage is limited to the amount specified for the liability policy, but the additional insured/indemnitee can claim against the named insured/indemnitor for amounts greater than the contract specified CGL limit. The named insured/indemnitor can then make a claim against its CGL policy for the limits within its actual policy. But what if the named insured/indemnitor does not pursue its claim on its CGL policy as it has no assets?) A court addressing a manuscripted additional insured endorsement held the limits for the additional insured were capped at the amount specified in the contract as the dollar coverage amount. *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140 (N.Y. App. Div. [1st Dept.] 2008).
- What if the contract calls for coverage to be provided in an amount "**of at least**" or "**shall be no less than**" a stated amount? See *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552 (1997) - court held that the additional insured's coverage under the CGL policy and excess layer policies was not limited by contract language that the insured was required to procure "at least $250,000" of coverage, but extended to the full face value of the policies. Other cases construing similar language are cited at footnote 8 to *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. [Tex.] 1991] in which the court found that an underlying contract's "with limits of not less than" a specified amount did not limit the additional insured's coverage to the contractually specified "not less than amount" and also held the primary insurer was not entitled to subrogate as to its insured against the excess insurer for a claim settled by the primary insurer above the "not less than amount" but below the actual limits of the primary coverage.

[52] **Prior Editions of the 20 10.** ISO 20 10 11 85. The original CG 20 10 endorsement was CG 20 10 11 85, meaning that it was promulgated in November of 1985. Coverage Matrix: (1) Who? This endorsement "includes as an insured the person or organization shown in the Schedule." (2) What? Coverage is afforded "but only with respect to liability *arising out of* your [the named insured's] *work* for that insured by or for you." The "arising out of" language has been held to include the concurrent and sole negligence of the additional insured party, as that party ostensibly wouldn't be involved in the litigation but for its agreement with the named insured. (3) When? "*Work*" is defined including both ongoing and completed operations. (4) Where? The additional endorsement does not limit coverage to a specified location. (5) Exclusions? The additional endorsement does not contain exclusionary language. This endorsement is rarely possible to obtain as it offers quite broad coverage to the additional insured and it is quite old and a variety of more current endorsements are available.

ISO 20 10 10 01. (1) Who? This endorsement "includes as an insured the person or organization shown in the Schedule." (2) What? Coverage is afforded "but only with respect to liability *arising out of* your [the named insured's] *on-going* operations." (3) When? Coverage to the additional insured for exposures arising out of completed operations is lost. (4) Where? The additional endorsement does not limit coverage to a specified location. (5) Exclusions? The additional endorsement does not contain exclusionary language.

ISO 20 10 07 04. (1) Who? This endorsement "includes as an insured the person or organization shown in the Schedule." (2) What? Coverage is afforded "but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' *caused in whole or in part by your* [the Named Insured's] *acts or omissions*; or the acts or omission of those acting on your [the Named Insured's] behalf in the performance of *on-going operations*." Coverage to the additional insured for exposures arising out of completed operations is lost. (3) When? Not only is coverage to the additional insured for exposures arising out of completed operations lost, but so is coverage for the additional insured's sole negligence. (4) Where? The additional endorsement limits coverage to "ongoing operations *at the locations designated above*" (locations designated in the Schedule). (5) Exclusions? The additional endorsement does not contain exclusionary language.

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

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

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

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

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

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

Who? This endorsement "includes as an insured the person or organization shown **in the Schedule**."[54]

What and Where? Coverage is afforded "but only with respect to (1) "**liability arising out of the ownership, maintenance or use**" [55] of (2) "**that part of the premises leased to you**" (the named insured)…." [56]

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[53] **What – "Caused in Whole or In Part by Your Acts or Omissions.** See Endnote 134 (Caused by Your Acts or Omissions) for a discussion of the origins of this coverage language and its meaning.

[54] **Scheduled Additional Insureds.** If you desire that a person or persons or classes of persons be covered as additional insureds, you need to list them in the endorsement's Schedule (*e.g.*, name the primary additional insured; list as additional insureds the additional insured's "officers, directors, employees, and its successors and assigns"; list the project manager as an additional insured; list the primary additional insured's lender as an additional insured).

[55] **ISO CG 20 11 - "Arising Out of"; "Ownership, Maintenance"; or "Use" of Premises.**

Arising Out of "Use. Coverage also appears to be broad as it covers the additional insured's liability for Injuries arising out of its "… use of that part of the premises leased to (the named insured, tenant)." It applies clearly to the landlord's vicarious liability for acts of the tenant (i.e., the "**use**" of the premises).

Arising Out of "Ownership" and "Maintenance". The language is also expansive and general enough to apply directly to the landlord's own negligence. It covers liability arising out of the "**ownership**" and "**maintenance**" of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant. The ISO industry standard additional insured endorsement form does not expressly extend coverage to the additional insured's sole negligence. It also does not expressly exclude coverage of a landlord's sole negligence. In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover a landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers a landlord's sole negligence.

Vicarious Liability Only or Landlord's Negligence. Does the ISO additional insured endorsements insure the additional insured for anything more than the vicarious liability? This question has been addressed in the context of the "arising out of" language in additional insured endorsements issued in construction matters.

Certainly to the extent a landlord has vicarious liability for the acts or omissions of its tenant, the ISO additional insured endorsement extends protection to the landlord. For example, the court in *Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800, 803 (E.D. Pa. 1983) noted

> In the insurance industry, additional insured provisions have a well-established meaning. They are intended to protect parties who are not named insureds from exposure to vicarious liability for acts of the named insured. These provisions are

> employed in countless situations in the industry, including such simple circumstances as those involving landlord and tenant relations, where the landlord asks or requires the tenant to procure insurance for the landlord for liability resulting from the tenant's activities.

This concept was addressed by Menapace, Platto, Diemand, and Grasso in THE HANDBOOK ON ADDITIONAL INSUREDS p. 60 (ABA 2012) as follows:

> As a result of the intended limitation of coverage to vicarious liability, insurers expect to cover exposure under an additional insured provision for acts or omissions of the named insured but do not expect to have any additional coverage exposure for any independent acts or omissions of the additional insured. For this reason insurers charge a minimal premium to include additional insured coverage in a policy…. The majority of states, however, have broadly interpreted additional insured policy wordings to provide coverage far greater than the expected vicarious liability exposure.

And, *Id.* at 64:

> The vast majority of states do not interpret the "arising out of" wording to restrict coverage to vicarious liability. These states do not look to the intent; instead, they interpret the wording utilizing traditional contract rules of interpretation. Pursuant to the traditional contract rules of interpretation, these states find that the plain meaning of the "arising out of" is very broad or, alternatively, that it is ambiguous and, hence, requires an interpretation in favor of broad coverage for the additional insured.

[56] **ISO CG 20 11 - Arising Out of "the Premises".** This endorsement provides a blank line for the description of the "**Premises**." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "arising out of" ownership, maintenance or use of "that part of the premises leased" to the tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the common areas maintained by the landlord or in the alley behind the project). The most common factually litigated scenario regarding this endorsement involves injuries occurring "outside" the "part" of the premises "shown in the schedule" leased to the tenant.

This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. In *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the tenant's (which as the named insured) injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that this type of endorsement designates the covered location where the injury must occur, and does not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility.

Cases Finding Coverage. Some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. These courts have applied the following rationale.

Means of Access. In *Ambrosio v. Newburgh Enlarged City School District*, 774 N.Y.S.2d 153 (App. Div.2d Dep't 2004) the court found additional insured coverage of the landlord (a school) for an injured invitee of a one-day tenant (a kennel club). The invitee was injured on a raised sidewalk outside the front entrance to the school while on the invitee was on her way from a hospitality room in the school to the dog show on the school's grounds. The court found that the school district [the landlord] was entitled to coverage because

> [a]lthough the sidewalk where the injured plaintiff fell was not specifically named in the endorsement as leased premises, its use was incidental to the covered premises as a means of getting from the rooms within the School to the fields where the dog show was being held.

"But For" Test. Some courts follow the "but for" test, additional insured coverage exists, if the accident would not have occurred but for the tenant's use of the leased premises. In *Travelers Prop. Cas. Co. of Am. v. Farmers Exchange*, 240 P.3d 521, 523-24 (Colo. Ct. App. 2010) the court held that the "but for" test was not met as to an injury in a restaurant's parking lot. The court found

> [Visiting the restaurant] was not integrally related to her injury at the time of the accident. Her visit to the restaurant did not expose her to any increased risk of falling in the parking lot. It was not necessary for her to visit the restaurant in order to come in contact with the ice hazard….she could have visited another store, and never visited the restaurant, yet still have walked into the parking lot, encountered the ice hazard, and fallen. Moreover, the customer could have avoided the ice by taking a different path from the restaurant to her car. Thus, her visit to tenant's premises was not the "but-for" cause of injury…. While it may be true that she would not have visited the shopping center if she had not gone to eat at the restaurant, that circumstance alone is insufficient to trigger coverage…. The facts presented here do not indicate an unbroken causal chain between customer's use of the restaurant and her injury. Her fall did not occur inside the restaurant or immediately outside it. Nor was there any allegation that the restaurant contributed to the icy conditions in the parking lot. Maintenance of the common areas was the sole responsibility of [the landlord].

The court in *IMT Ins. v. West Bend Mutual Ins. Co.*, 2007 WL 4191933 (Ia. Ct. App. 2007) upheld coverage for the additional insured landlord under the "but for" test for injuries to a fitness club patron that occurred on the sidewalk leading from the parking lot to the club. The court found that the injuries

> appear to have arisen from the operation and use of the leased premises, since they would not have been sustained "but for" her plan to enter the club.

Also see *Liberty Village Associates v. West America Ins. Co.*, 308 N. J. Super. 393 (N.J. App. App. Div. 1998).

"Nexus" Test. Other courts have found coverage if a substantial nexus exists between the location of the injury outside of the premises and the leased premises. The court in *Franklin Mut. Ins. Co. v. Security Indem. Ins. Co.*, 275 N.J. Super. 335 (N.J. App. Div. 1994) found additional insured coverage for the landlord on tenant's liability policy as to an injury outside of the premises. The court stated

> The key phrase "arising out of the ... use" must be interpreted or construed in a broad and comprehensive sense to mean "originating from the use of" or "growing out of the use of" the [leased premises]. Thus, there need be shown only a substantial nexus between the occurrence and the use of the leased premises in order for the coverage to attach. The inquiry, therefore, is whether the occurrence which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the leased premises and, thus, a risk against which they may reasonably expect those insured under the policy would be protected.

Cases Finding No Coverage. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Sidewalk in Common Area. In *Gillis v. Demarkles*, 8 Mass. L. Rep. 271 (Super. Ct. 1998) the court found that the additional insured coverage of a landlord on the tenant's policy did not insure the landlord for an injury to a tenant's customer occurring on the sidewalk in the shopping center's common area. The court found that the injury did not arise out of the "use" of the leased premise, and held

> This clear language, reasonably interpreted, limits [the insurer's] coverage of [the landlord] to occurrences that took place on the leased premises. Any other interpretation is either unreasonably broad, arbitrary, or ambiguous. If, as [the landlord] contends, this provision gives coverage to accidents that occur outside the leased premises as long as the accident arose out of the business use of the premises, then there is no geographic limit to this provision; the insurer would just as surely be liable for a customer's fall that occurred at the far end of the parking lot, or across the street near her parked car, or on her way home. If one were to attempt to avoid this overbreadth by setting geographic limits, one would need either to be arbitrary (the common area outside the store) or ambiguous (the are immediately outside the front door).

The court also considered other factors. The court noted

> an objectively reasonable insured would reasonably have understood that there were sound business reasons for the Endorsement to limit coverage for the landlord to acts occurring within the leased premises, and reasonably would have understood the language of that Endorsement to fulfill those business reasons. It makes good sense, especially in the context of a shopping center, for there to be clear lines as to who is insuring what risk, so that all foreseeable risks are covered by insurance and premiums are not needlessly increased by redundant coverage. It also make good sense for the entity responsible for the maintenance of a property also to be responsible for insuring against risks resulting from the absence of proper maintenance of that property. It is not surprising that [the landlord] and [the tenant] followed these basic principles in allocating insurance for the shopping center: [the landlord] maintained and insured the common areas, [the tenant] to add it as an additional insured on its Policy to guard against vicarious liability, which [the tenant] could do at no additional cost. These clear lines are lost if one interprets the Additional Insured Endorsement to cover risks beyond the geographic scope of the leased premises. Such an interpretation would mean either that [the landlord] and [the tenant] both purchased insurance to cover some of the same risk …. In short, clear lines of insurance coverage make good business sense and only one interpretation permits these lines to be drawn clearly. Both of these businesses reasonably should have understood that.

The court in *Holmes v. Kimco Realty Corp.*, 598 F.3d 115 (3d Cir. 2010) offered the following analysis:

> While a Lowe's customer will undoubtedly park as close as possible to that store, he could park anywhere in the lot…. There is not one "defined route" from the lot to the store. [Citation omitted.] Therefore, while a reasonable invitee to the Shopping Center would expect safe passage from the parking lot to any of the stores benefitting from the lot, the invitee would not reasonably expect one tenant to be responsible for maintaining the entire lot…. While … Lowe's and the other tenants are located in stand-alone buildings instead of interconnected stores, this fact does not negate the shared nature of the parking lot.
>
> It is true both that Lowe's derives a benefit from the parking lot and that the imposition of a duty would incentivize Lowe's to prevent dangerous conditions. But countervailing policy considerations weigh more heavily against imposition of a duty. To oblige tenants to maintain common areas would result in substantially increased costs with little added benefit. Landlords already have great incentive to keep the parking areas of their shopping centers free of snow, ice, and other hazards. A well-maintained parking lot induces shoppers to patronize the center and motivates tenants to pay their common area maintenance fees. Given the landlord's snow removal program here, the risk of not imposing a duty on Lowe's is minimal. Moreover, the imposition of a duty on the tenants would result in duplicative effort and interference with the landlord's maintenance program. It is not hard to imagine the confusion, and perhaps danger, that could ensue if snow

When? This endorsement expressly sets out as a time of coverage limitation "This insurance does **not** apply to … (a)ny 'occurrence' which takes place after you cease to be a tenant in that premises."[57]

Exclusions? In addition to the time coverage limitation, this endorsement expressly sets out the following exclusion: "This insurance does **not** apply to …(s)tructural alterations, new **construction** or demolition operations performed by or on behalf of the person or organization shown in the Schedule."[58]

> plows and salt trucks hired by the landlord, Lowe's, Bally's Total Fitness, and Mattress Giant all attempted to maintain the parking lot at the same time. The thought of the same occurring in a shopping center with twenty or more tenants highlights the absurdity of such a shared duty.
>
> Imposition of a duty on tenants in a multi-tenant facility also would lead to uncertainty with respect to the areas of the parking lot for which each tenant is responsible. This uncertainty would encourage "shotgun" litigation… where the customer sued every store at which he had browsed or purchased an item prior to his fall.

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

Alley. In *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993) an additional insured endorsement was held not to cover injuries occurring in an alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center) and the additional insured endorsement described the "premises" as the 3,200 square feet of space occupied by the named insured tenant. The court stated:

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

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

Parking Lot. A similar conclusion was reached in *Minges Creek* v. *Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by landlord, and tenant as insured." The additional insured endorsement to the tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of premises owned or used by you (the tenant)." The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "**inextricably intertwined**" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"–the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured." Also see *USF&G* v. *Drazic*, 877 S.W.2d 140 (Mo. 1994)-additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot.

Damages Originating in Other Tenant's Premises. *Associated Wholesale Grocers v Americold Corp.*, 261 Kan. 806, 827-829 (Kan. 1997) (holding that a landlord was not insured under a tenant's additional insured endorsement for damages occurring on the tenant's premises caused by smoke from a fire on another tenant's premises.

[57] **Cease to be a Tenant in the Premises.** It is likely that this exclusion does not exclude liabilities incurred by a holdover tenant, even one holding over as a tenant at sufferance or a tenant at will.

[58] **Exclusion of "Structural Alteration", "New Construction" or "Demolition Operations".** The exclusionary terms "new construction," "demolition operations" and "structural alterations" are not defined in the ISO CGL policy. "**Maintenance**" may involve one or all of these activities. To the extent "maintenance" does not involve one of these three excluded activities, this endorsement likely insures against the injury occurring "in that part of the premises leased to the [tenant]". The court in *Hartford Cas. Ins. Co. v. Ribellino Family Ltd. P'ship*, 2005 WL 1006016 (E.D.N.Y. 2005) addressed determining coverage as follows:

> with respect to liability arising out of ... maintenance ... of that part of the land or premises leased to [the tenant] but not with respect to "[s]tructural alterations, new construction or demolition operations … the applicability of the policy depends on whether the work on the roof is most appropriately categorized as "maintenance" (in which case it would be

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

g. Recap and Practical Advice

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

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

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

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

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

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

h. Primary and Noncontributory Liability

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

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covered) or "structural alterations, new construction or demolition operations" (in which case it would not be covered)…

In considering the question of whether work done on a building should be considered a "structural alteration" or merely repair or maintenance, New York state courts have held that "[a] structural change or alteration is such a change as affects a vital and substantial portion of the premises, as changes its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated, or, a change of such a nature as affects the very realty itself-extraordinary in scope and effect, or unusual in expenditure." … Therefore, "what will constitute a structural alteration necessarily depends upon the facts of each case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself."

Similarly, in *Century Indem. Co. v. Hanover Ins. Co.,* 2007 WL 2742718 (D. Utah 2007) the court held that "the exclusion requires an alteration that affects a vital and substantial portion of a thing, that changes its characteristic appearance, the fundamental purpose of its erection, and the uses contemplated," that "is extgraordinary in scope of expenditure," and that denotes a "substantial" "change or substitution."

Example – Manuscript Wording:

> **Primary & Noncontributory Additional Insured Endorsement**
> Who Is An Insured is amended to include as an insured the person or organization shown in the schedule of this endorsement, but only with respect to liability arising out of "your work" for that insured by or for you.
>
> As respects additional insured as defined above, this insurance also applies to "bodily injury" or "property damage" **arising out of your negligence** when the following written requirements are applicable: Coverage available under this coverage part **shall apply as primary insurance**.

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

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

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

This new endorsement will resolve some problems, if the requirement for it is carefully drafted.[59]

Recommended Insurance Spec:

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

h. Umbrella and Excess Liability

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

Recommended Insurance Spec:

[59] **Primary Liability vs. Horizontal Exhaustion.** Neither the recommended insurance spec nor the new ISO endorsement resolves the horizontal exhaustion issue which is beyond the scope of this paper. See Endnote 29 (Primary and Noncontributing) for further discussion of the term "**primary and noncontributing**".

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

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

7. Completed Operations Coverage is Important.

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

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

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

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

They also contain the following exceptions to coverage:

This insurance does not apply to:
2. "Bodily injury" or "property damage" **occurring after**:
   a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
   b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

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

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

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

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

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

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

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

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

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

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

provided to it by its subcontractor listing FCL as an additional insured on the CGL policy of the sub-subcontractor. A tort action was brought by a severely injured employee of the sub-subcontractor against the general contractor. Unfortunately, although subcontractor's CGL policy was issued with an blanket additional insured endorsement, it extended additional insured coverage only to "persons for whom you are performing operations when you and such person have agreed in a written contract that such person be added as an additional insured." There was no written agreement between the sub-subcontractor and the general contractor. A similar circumstance exists between a landlord and a tenant's improvement contractor.[60]

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

In a case arising out of the infamous "British Petroleum" ("**BP**") oil spill in the Gulf of Mexico, the Texas Supreme Court held in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), in answer to questions certified to it by the Fifth Circuit,[61] that BP was not an additional insured on the liability insurance policies of Transocean, its drilling contractor. In the drilling contract, BP and Transocean agreed to a "knock-for-knock" allocation of risk that is standard in the oil and gas industry. Among other indemnity provisions, Transocean agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume, *i.e.*, subsurface pollution. The court interpreted the insurance policy's additional insured provision as incorporating the risk allocation provisions of the contract. The catastrophic damages resulted from subsurface pollution. The court found that the only reasonable construction of the additional insured provision in the BP drilling contract with Transocean was that

> BP is an additional insured only as to liabilities assumed by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an "Insured" for the same.[62]

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[60] **ISO Blanket Additional Insured Endorsements.** ISO has two forms of blanket additional insured endorsements for contractors and subcontractors: the **ISO CG 20 33 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You and the **ISO CG 20 38 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement. The **ISO CG 20 38** (unlike the ISO CG 20 33) provides that the following persons are additional insureds protected by the endorsement: "Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1 above". Paragraph 1 provides that the following person is an additional insured: "Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy". FCL would have been protected if its subcontractor had its sub-subcontractor's CGL policy endorsed with an **ISO CG 20 38** instead of with an **ISO CG 20 33**! See **Appendix of Forms**, **ISO CG 20 33 04 13** Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required in Construction Contract With You; and **ISO CG 20 38 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement.

[61] **Fifth Circuit.** *In re Deepwater Horizon*, 728 F.3d 491, 500 (5th Cir. 2013) certified questions to the Texas Supreme Court, including the following question:

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

This certified question came after the Fifth Circuit withdrew its prior opinion 710 F.3d 338 (5th Cir. 2013) where it held that BP was an additional insured covered by $750,000,000 in primary and umbrella policies.

[62] **Inexorably Linked.** *Id.* at 9. The additional insured provision in the drilling contract obligated Transocean to acquire various types and minimum limits of insurance, including CGL, workers' compensation, and employer's liability insurance. The additional-insured provision states

> [BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this contract. (Emphasis added.)

The court held that "It is immediately apparent from the plain language of this provision that BP's status as an insured is **inexorably linked**, at least in some respect, to the extent of Transocean's indemnity obligations. What is in dispute is the intended breadth of the limiting language in the emphasized portion of the provision." *Id.* at 10. (emphasis added.)

The court rejected BP's argument that the presence of a comma in the additional insured provision made the court's interpretation unreasonable.[63] The court also rejected BP's argument that the contract's provision to the effect that the indemnity and insurance provisions were separate and independent resulted in the insurance provisions not being limited by the scope of the indemnity.[64]

9. Commercial General Liability Insurance Coverage of Construction Defects!

a. Uninsurable Business Risk or Insurable Accident?

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

b. The Standard Policy Language

See the Appendix of Forms, **CG 00 01 04 13** Commercial General Liability Insurance Coverage Forms, and in particular the portions quoted below. [65] Upon examination of this language, a determination of what is covered and

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[63] **The $750,000,000 Comma.** BP asserted that the court's interpretation was unreasonable because there is a comma before, but not after, the phrase "except Workers' Compensation" and further contended that a comma cannot be inserted where it does not exist (after "Workers' Compensation") when it would alter the plain meaning of the contract. See 37 No. 2 INS. LITIGATION RPTR. 2 *The $750 Million Comma? Texas Supreme Court Rules BP Is Not Entitled to Coverage for the Gulf Oil Spill as Additional Insured Under Policies Issued to Transocean* (Feb. 2015).

[64] **Separate and Independent.** The drilling contract provides

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

The court held "But simply because the duties to indemnify and maintain insurance may be separate and independent does not prevent them from also being congruent; that is, a contract may reasonably be construed as extending the insured's additional-insured status only to the extent of the risk the insured agreed to assume." *Id.* at 12.

[65] **ISO CGL Policy.** ISO CG 00 01 04 13. See this form attached in the **Appendix of Forms**.

what is excluded is the product of the following definitions: "**property damage**"; an "**occurrence**"; "**your work**"; and "**products-completed operations hazard**". Assuming that the property damage is covered because it is the result of an occurrence, then coverage involves a determination as to whether any of the policy's exclusions exclude coverage, including the following exclusions discussed below: **2.a** Expected or Intended Injury-"property damage" expected or intended from the standpoint of the insured (the contractor); **2.b** Contractual Liability; **2.j(5)** Damage to Property - "property damage" to that particular part on which the insured (the contractor) or its contractors or subcontractors are performing operations, if the "property damage" arises out of those operations; **2.j(6)** Damage to Property - damage to that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it; or **2.l** Damage to Your Work - damage to your work and included in the "products-completed operations hazard". The standard policy definition of an "**occurrence**" is set out in Section V - Definitions, Paragraph **13** "Occurrence". The policy defines "occurrence" as an "**accident**". However, the term "accident" is not defined and its definition is left to the courts. This circumstance has led to a range of definitions and determinations of coverage. See Endnote 130 (Occurrence) for a list of jurisdiction holding that faulty workmanship is not an occurrence and a list of jurisdictions holding it is.

Texas. Texas courts are of the view that the term "occurrence" is ambiguous and does not provide a basis for limitation on coverage. In its 2007 decision the Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in answer to certified questions from the Fifth Circuit, 501 F.3d 435 (5th Cir. 2007), held that an insured builder's faulty workmanship in building a house foundation met the "occurrence" requirement of its CGL policy.[66]

SECTION I—COVERAGES
COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "**property damage**" to which this insurance applies.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "**occurrence**" …; (and)

(2) The "bodily injury" or "property damage" occurs during the policy period; ….

2. Exclusions. This insurance does not apply to: …

a. Expected or Intended Injury. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. ….

b. Contractual Liability. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This exclusion does not apply to liability for damages:

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

(2) Assumed in a contract or agreement that is an "Insured Contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement….

j. Damage to Property. "Property damage" to: …

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it. Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard"….

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

[66] ***Lamar Homes.*** The court analyzed the issue as follows:

> We begin with the question whether defective construction or faulty workmanship that damages only the work of the insured is an "occurrence." As previously mentioned, "occurrence" is defined, in part, as an accident, but accident is not otherwise defined in the policy. Terms that are not defined in a policy are given their generally accepted or commonly understood meaning.
>
> The insurance carrier submits that the damages alleged here for repairs to the home are direct economic damages flowing from Lamar's contractual undertaking and are conclusively presumed to have been foreseen by Lamar. [The homeowners alleged that Lamar was negligent in designing and constructing their home's foundation and that, as a result, the home's sheetrock and stone veneer cracked.] Thus, the carrier concludes that faulty workmanship is not an accident because injury to the general contractor's work is the expected and foreseeable consequence. … [Texas law], however, did not adopt foreseeability as the boundary between accidental and intentional conduct. Insurance is typically priced and purchased on the basis of foreseeable risks, and reading [Texas law] as the carrier urges would undermine the basis for most insurance coverage. Moreover, the carrier's argument includes a false assumption—that the failure to perform under a contract is always intentional (or stated differently "that an accident can never exist apart from a tort claim"). …
>
> An accident is generally understood to be a fortuitous, unexpected, and unintended event. … [A] claim does not involve an accident or occurrence when either direct allegations purport that the insured intended the injury (which is presumed in cases of intentional tort) or circumstances confirm that the resulting damage was the natural and expected result of the

10. Excess & Surplus Lines Insurance.

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

(1) The Admitted Market

Most people think of insurance as one large marketplace, but there are really two different marketplaces – the admitted market and the excess and surplus lines market ("**E & S market**"). Insurance companies that participate in the admitted market are licensed and regulated by the state's agency charged with regulating insurers providing insurance coverage in the state (generically called herein the "**State Agency**").[67] Coverage forms and rates that can be used must be approved by the State Agency.[68] Insurance agents representing admitted insurance companies commonly have authority to both issue binders and certificates of insurance for those carriers.[69] Carriers in the admitted market include those that most of us have heard of: Allstate, Amerisure, Bituminous, Chubb, CNA,

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> insured's actions, that is, was highly probable whether the insured was negligent or not. Applying our prior decisions, the Fifth Circuit has concluded that the terms "accident" and "occurrence" include damage that is the "unexpected, unforeseen or undesigned happening or consequence" of an insured's negligent behavior, including "claims for damage caused by an insured's defective performance or faulty workmanship." The federal district court here [question certified by the Fifth Circuit under appeal from the federal district court that ruled against the insured] distinguishes [prior Fifth Circuit case law finding poor workmanship meets the occurrence element] by drawing the distinction between faulty workmanship that damages the insured's work or product and faulty workmanship that damages a third party's property. … The CGL policy, however, does not define an "occurrence" in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident. … We … see no basis in the definition of "occurrence" for the district court's distinction.
>
> The determination of whether an insured's faulty workmanship was intended or accidental is dependent on the facts and circumstances of the particular case. For purposes of the duty to defend, those facts and circumstances must generally be gleaned from the plaintiffs' complaint. Here, the complaint alleges an "occurrence" because it asserts that Lamar's defective construction was a product of its negligence. No one alleges that Lamar intended or expected its work or its subcontractors' work to damage the DiMares' home. (citations omitted.)

[67] **The Business of Insurance as a State Matter.** Unlike other financial services, the regulation of insurance has been left to the states. As early as 1868, the United States Supreme Court proclaimed that each state has the power to regulate the insurance industry's activities within that state. *See Paul v Virginia*, 75 U.S. 168 (1868). Congress has also noted the state's role, 15 U.S.C. § 1011 (the McCarran-Ferguson Act: "[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest.") and § 1012(b) "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance … unless the Act specifically relates to the business of Insurance."). In *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) the United States Supreme Court acknowledged that Congress intended to defer insurance regulation to the states.

[68] **State Approval of Insurance Forms.** The goal in state regulation of insurers, including requiring state approval of insurer's forms to be used in the state is to assure consumer faith in the insurance business; providing public oversight of insurance form language, public notice of approved issuers, and premiums paid for real risk coverage. *See* Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 477 (1960-61). The National Association of Insurance Commissioners ("**NAIC**")-a voluntary association of commissioners from each state-has assured much uniformity in insurance regulation among the states. NAIC has formulated model codes governing insurance companies, brokers, agents, and adjusters. These codes form a template for state legislation, *e.g.*, the NAIC has promulgated the Unauthorized Insurance Process Act and the Non-admitted Insurance Act, which most states have adopted with local variations.

[69] **Authorized and Unauthorized Business of Insurance; What is Not the Business of Insurance.** The following is a brief discussion of Texas statutes. Similar legislation exists in most states. The Texas Insurance Code provides for civil and criminal penalties and the contractual rights of those who issue unauthorized insurance in Texas. An insurer may find itself subject to the "unauthorized practice of insurance" if it commits acts considered to be the "business of insurance" in the state of Texas. TEX. INS. CODE § 101.102(a) a "person, including an insurer, may not directly or indirectly do an act that constitutes the business of insurance under this chapter except as authorized by statute." Insurers selling insurance within the state must be "admitted" and subject themselves to regulation by the state as to rates, forms, capital requirements, as well as other requirements. TEX. INS. CODE §§ 31.002, 37.001. The Insurance Code contains a lengthy definition of what acts constitutes the "business of insurance" (*e.g.*, "making or proposing to make, as an insurer, an insurance contract" TEX. INS. CODE § 101.105(b)(1)). The Insurance Code lists several actions *not* constituting the "business of insurance", including the following:

> (1) the lawful transaction of surplus lines insurance under Chapter 981; …
> (4) a transaction:
> (A) that involves an insurance contract independently procured by the insured from an insurance company not authorized to do business in this state through negotiations occurring entirely outside this state;
> (B) that is reported; and
> (C) on which premium tax is paid in accordance with Chapter 226;

Farmers, Hartford, Liberty Mutual, State Farm, Travelers, Zurich and many more. Many of these companies have subsidiaries that operate in the E & S market for greater flexibility.

(2) The E & S Market

Insurance companies providing coverage through the E & S market in most states are not licensed by the State Agency but in most states must be authorized by the State Agency to operate in the state.[70] Insurance companies providing coverage through the E & S market ("**E & S carriers**") include some of the largest insurance companies in the nation but they are not required to file their rates and forms. As a result, manuscript forms abound arising in multitudinous coverage differences when compared to the coverage available through the admitted market.

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

It is generally easy to identify a policy written in an E & S carrier, as usually the State Agency requires that a disclosure statement be stamped on the policy's Declarations Page. For example, the disclosure statement in Texas the following:

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

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

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

- Adverse loss experience
- Higher risk that the premium warrants
- Limited experience in field of operations
- Small premium size.[71]

c. The Resulting Concern

There are a few admitted markets that attempt to limit their exposure in the above situations by using non-ISO, proprietary coverage policy and endorsement forms. More commonly, those businesses that do not qualify for the

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[70] **When a Surplus Lines Agent May Cause to be Issued a Surplus Lines Policy**. In Texas, the agent procuring the surplus lines insurance must possess a surplus lines licensed issued by the Texas Department of Insurance. TEX. INS. CODE § 981.202. Texas permits surplus lines insurance only when potential insureds have difficulty obtaining coverage from an admitted carrier. To ensure that the surplus lines insurance is only procured in this situation, a surplus lines agent must (1) make a "diligent effort" to obtain coverage from an insurer authorized to write and actually writing that kind and class of insurance in Teas, and (2) only procure insurance in an amount that exceeds the amount of insurance obtainable from authorized issuers. TEX. INS. CODE §§ 981.004(1), and (b). Further, the agent must make a "reasonable effort" to ascertain a surplus lines carrier's financing condition before placing the insurance and may not knowingly place the insurance with a "financially unsound" insurer. TEX. INS. CODE §§ 981.211.

[71] **Excess Policies Do Not Follow Form.** Excess policies may have their own exclusions excluding high risk coverages of the primary policy. *Mid-Continent Cas. Co. v. Circle S Feed Store*, 754 F.3d 1175 (10th Cir. 2014). The court found that under New Mexico law the insurer, which issued both primary and excess policies to the insured, excluded from the excess policies under an oil industries limitation endorsement coverage for the insured's negligence that caused subsidence to neighboring property due to the insured's solution mining. The court found that the large cavity created under the neighboring property was an "occurrence" insured by the insurer's primary policy and not excluded as an intention injury.

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

11. Exclusions May Be Invisible.

There is today a plethora of "**invisible exclusions**" and limitations being added to general liability coverage by endorsement by the insurance industry to minimize the carrier's exposures. These are invisible because they never show up on any certificate of insurance unless you are careful in your drafting of the insurance specifications. Some of these invisible exclusions are the following, some of which apply to construction contracts and others to leases.

a. ISO Limitations and Endorsements to an ISO CGL Policy

(1) ISO Exclusion 2.p - Electronic Data Liability Exclusion

Not an endorsement but a relatively new exclusion in all general liability policies is that of injury to or damage of electronic data. **Exclusion 2.p** in general liability policies states:

> 2. Exclusions. This insurance does not apply to:
> p. Electronic Data. Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data. As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment. [72]

Coverage is readily available to cover this gap through an Electronic Data Liability endorsement **CG 04 37 04 13** [73] and should be required. Be sure to specify the amount of coverage required, as this endorsement is frequently provided with only a minimal sublimit (*e.g.*, $25,000 coverage).

(2) CG 20 33 Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required in Construction Contract With You

This endorsement provides "blanket" additional insured status for ongoing operations but **privity of contract** is required for insured status. [74]

(3) CG 21 39 Contractual Liability Limitation

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[72] **Exclusion 2.p.** See **Appendix of Forms**, ISO CG 00 01 04 03 Commercial General Liability Coverage Form **Exclusion 2.p**.

[73] **ISO CG 04 37.** See **Appendix of Forms**, ISO CG 04 37 04 13 Electronic Data Liability endorsement.

[74] **Malpractice Alert.** It is essential to obtain a copy of the policy and read it as was learned by the general contractor in *Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115 (Ill. 2011). FCL, a general contractor, relied upon a certificate of insurance provided to it by its subcontractor listing FCL as an additional insured on the CGL policy of the sub-subcontractor. A tort action was brought by a severely injured employee of the sub-subcontractor against the general contractor. Unfortunately, although subcontractor's CGL policy was issued with an blanket additional insured endorsement, it extended additional insured coverage only to "persons for whom you are performing operations when you and such person have agreed in a written contract that such person be added as an additional insured." There was no written agreement between the sub-subcontractor and the general contractor. A similar circumstance exists between a landlord and a tenant's improvement contractor.

As stated above in addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. **ISO CG 21 39 10 93** Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry.[75] This form is contained in the Appendix of Forms. As stated above, the provision of contractual liability coverage includes a series of definitions of "insured contract". The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of "insured contract" is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (*e.g.*, indemnity for injuries to an employer's employees; indemnity for injuries to a subcontractor's employees). The CG 21 39 deletes this sixth definition in its entirety, deleting coverage for an indemnitor's indemnity of a third party for its negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined "insured contracts". Note as discussed in the Endnotes, the Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party's negligence, sole or even concurrent, except in statutorily limited circumstances.

(4) CG 24 26 Amendment of Insured Contract Definition

ISO CG 24 26 04 13 Amendment of Insured Contract Definition[76] modifies the sixth definition to eliminate coverage for the contractual assumption of another party's sole negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.

(5) CG 22 94 and CG 22 95 Exclusions – Damage to Work Performed by Subcontractors

Exclusion **2.l** in the standard CGL policy contains a significant exception (the subcontractor work performed exclusion) to its coverage exclusion. Exclusion 2.l states:

> **2. Exclusions.** This insurance does not apply to:
> **l. Damage To Your Work.** "Property damage" to "your work" arising out of and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was **performed on your behalf by a subcontractor**. (emphasis added.) [77]

Endorsements **ISO CG 22 94 10 11** Exclusion – Damage to Work Performed by Subcontractors[78] and **ISO CG 22 95 10 01** Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations[79] delete the exception to the exclusion, thereby eliminating the single most important coverage under which many construction defect claims have historically been paid.

(6) CG 21 42 12 04 and CG 21 43 12 04 Exclusions – Explosion, Collapse and Underground Property Damage Hazard

The standard CGL policy does not exclude "explosion, collapse and underground property damage" hazards (commonly referred to as "**XCU**"). However, XCU coverage is deleted by addition of endorsement **ISO CG 21 42**

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[75] **ISO CG 21 39.** See **Appendix of Forms**, ISO CG 21 39 10 93 Contractual Liability Limitation.

[76] **ISO CG 24 26.** See **Appendix of Forms**, ISO CG 24 26 04 13 Amendment of Insured Contract Definition.

[77] **Exclusion 2.l.** See **Appendix of Forms**, Exclusion 2.1 in ISO CG 00 01 04 13 Commercial General Liability Coverage Form.

[78] **ISO CG 22 94.** See **Appendix of Forms**, ISO CG 22 94 10 11 Exclusion – Damage to Work Performed by Subcontractors.

[79] **ISO CG 22 95.** See **Appendix of Forms**, ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations.

12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations)[80] and **CG 21 43 12 04** Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted).[81]

b. Manuscript Endorsements to CGL Policies

Admitted insurers generally issue on an ISO form, *e.g.*, CG 20 10. Some E & S companies issue on the ISO forms, but many issue on manuscripted endorsements. The following are examples of manuscript endorsements.

(1) Exclusions and Limitations on Negligence Coverage

The following are samples of egregious manuscript endorsements excluding coverage for the additional insured's negligence.[82] Some have taken this approach as far as excluding coverage for any liability of the additional insured![83]

Manuscript Endorsement # 1:

> The following persons or entities scheduled below are added as **additional insureds** under the Insuring Agreement indicated below, but only with respect to any damages payable as a result of the **additional insured's** vicarious liability for the acts of omissions of an **Insured** otherwise covered under the applicable Insuring Agreement. This insurance does not apply to **losses** arising from or in connection with liability for any acts or omissions alleged against the **additional insured**.

Manuscript Endorsement # 2:

> The **Company's** duty to defend and pay damages on behalf of an **Insured** shall extend to any **premises lessor** named in a **claim** solely as a result of the acts or omissions of an **Insured** in the maintenance, operation, or use of that part of a premises leased to an **insured business**. However, this extension of coverage shall only apply to a **claim** that arises from an **event** or offense that took place during the term of the lease and that is otherwise covered under the Commercial General Liability Insuring Agreement. In addition, under no circumstances shall the **Company** have any duty to defend or pay damages on behalf of a **premises lessor** with regard to any damages caused by, or allegedly caused by, the **premises lessor**. If a **premises lessor** is entitled to a defense and indemnity under this policy, all terms and conditions of the policy shall apply as if the **premises lessor** were an **Insured**.

Manuscript Endorsement # 3:

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[80] **ISO CG 21 42.** See **Appendix of Forms**, ISO CG 21 42 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations).

[81] **ISO CG 21 43.** See **Appendix of Forms**, ISO CG 21 43 12 04 Exclusion – Explosion, Collapse and Underground Property Damage Hazard (Specified Operations Excepted).

[82] **Negligence Exclusions.** The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) emphasizes why it is important to obtain and read a copy of the additional insured endorsement and not to rely either upon a statement in the certificate of insurance that "'x' is an additional insured for liabilities arising out of the work of 'y'" or upon a general statement in the contract that "x" is to be listed as an additional insured on "y's" commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded" and that the certificate of insurance stating that "x" was an additional insured and the contractual provision in the contract between "x" and "y" that "x" be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence. The additional insured endorsement provided "It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insureds".

[83] **Exclusions and Limitations on Coverage of Additional Insured's Negligence.** See **Appendix of Forms**, Samples of Manuscripted Endorsements for a discussion of Manuscript Endorsement #s 1 and 2.

This insurance applies only with respect to negligent act or omission of the Named Insured.

Manuscript Endorsement # 4:

We have no duty to indemnify the additional insured for damages, claims or any other liabilities arising from actions, inactions, errors or omissions of the additional insured. This endorsement does not create a duty on our part to defend the additional insured or to participate in, contribute to, or reimburse any person, organization or entity for any fees or expenses incurred in the defense of the additional insured.

Manuscript Endorsement # 5:

A person or organization's status as an insured under Additional Insured-Completed Operations continues only until the earlier of the end of the policy period; or the period of time required by the written contract or agreement. If no time period is required by the written contract or agreement, a person or organization's status as an additional insured under this endorsement will not apply beyond the lesser of the end of the policy period; or five years from the completion of "your work" on the project which is the subject of the written contract or agreement.

(2) Additional Insured Coverage to Be Primary - But Contributory!

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

Manuscript Endorsement # 1:

Primary & Noncontributory Additional Insured Endorsement

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

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

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

Manuscript Endorsement # 2:

This insurance shall be primary and non-contributory but only in the event of a named insured's sole negligence.

(3) Waiver of Subrogation - But Conflicting with Indemnity

Manuscript Endorsement # 1:

> This waiver shall not apply to "damages" resulting from the sole negligence of the person(s) or organization(s) indicated it the Schedule shown above.

Manuscript Endorsement # 2:

> This waiver shall only apply to "damages" resulting from the sole negligence of the Named Insured.

Manuscript Endorsement # 3:

> This waiver applies only if the designated construction project shown in the Schedule above is completed.

(4) Employer's Liability Manuscript Exclusion

Exclusion **2.e(1)** to the standard CGL policy states in part:

> **2. Exclusions.** This insurance does not apply to: …
> **e. Employer's Liability.** "Bodily injury" to:
> **(1)** An "employee" of the insured arising out of and in the course of:
> (a) Employment by the insured; or Performing duties related to the conduct of the insured's business…
> This exclusion does not apply to liability assumed by the insured under an "insured contract".[84]

Manuscript endorsements to this provision may change "Employment by **the** insured" to "Employment by an insured", may delete the exception altogether, or may modify this provision in some other manner. All of these changes are aimed at eliminating coverage for third-party over actions.

(5) Construction Defect - Completed Operations Manuscript Exclusion

One of the nation's leading providers of construction insurance sometimes includes the following endorsement:

> This insurance excludes coverage for the actual or alleged deficiency in new construction, conversion, reconstruction, rehabilitation, renovation, remodeling, repair, maintenance or demolition.

What's left? Only bodily injury and on-going operations.

[84] **Exclusion 2.e(1).** See **Appendix of Forms**, Exclusion 2.e(1) in ISO CG 00 01 04 13 Commercial General Liability Coverage Form.

Manuscript Endorsement # 1:

2. Exclusions. This insurance does not apply to: …
e. Employer's Liability. "Bodily injury" to:
(1) An "employee" of ~~the~~ an insured arising out of and in the course of:
(a) Employment by ~~the~~ an insured; or Performing duties related to the conduct of the insured's business…
This exclusion does not apply to liability assumed by the insured under an "insured contract".

Manuscript Endorsement # 2:

Throughout this policy, with the exception of Section II – Who Is An Insured, when the word "insured(s)" is used it shall mean "any insured".

Manuscript Endorsement # 3:

This insurance does not apply to any liability arising out of "Action Over" or Indemnity Over" suits involving United States Longshoremen and Harbor Workers' Act, Jones Act, Outer Continental Shelf Extension Act, Workers' Compensation law or acts of any of the various states, or any other similar Workers' Compensation or Employers Liability Laws or act or Employers Liability Maritime Laws or Acts.

Manuscript Endorsement # 4:

~~This exclusion does not apply to liability assume by the insured under an "insured contract".~~

(6) Punitive Damages Exclusion

Some punitive damage endorsements state that coverage is excluded except where permitted by law, but many are absolute exclusions.

This insurance does not apply to fines, penalties, punitive, exemplary, vindictive or other non-compensatory damages imposed upon the insured, or any multiplied portion of compensatory damages.

(7) "Residential" or "Habitational" Exclusion

The meaning of "residential" or "habitational" differs from insurance company to insurance company. If the work being performed is on a structure that could conceivably be considered to be a "residence" by an insurance company adjuster, proceed with caution.

Manuscript Endorsement # 1:

It is agreed this insurance does not apply to liability arising in whole or in part, either directly or indirectly, out of any past, present, or future "residential construction activities" performed by or on behalf of any insured or others.

Manuscript Endorsement #2:

For the purposes of this endorsement, "residential construction activities" means any work or operations related to any job or project involving the construction, repair, remodeling, renovation, maintenance, change or modification of single-family dwellings, multi-family dwellings, condominiums, townhomes, townhouses, time-share units, fractional-ownership units, cooperatives and/or any other structure or space used or intended to be used as a residence, whether full-time, part-time, live-work combination, vacation or temporary residence, and regardless of the actual use or occupancy of any such structure or space.

(8) Classification Limitation Manuscript Exclusions

Classification limitation endorsements can defy logic. Their intent is to state that coverage is provided only for exposures declared to an insurance company, and new types of undeclared operations are not automatically included.[85]

Manuscript Endorsement #1:

Coverage under this contract is strictly limited to the classification(s) and code(s) listed on the policy Declarations page. No coverage is provided for any classification(s) and codes(s) not specifically listed on the Declaration page of this policy.

Manuscript Endorsement #2:

This insurance does not apply to any "bodily injury", "property damage", "personal and advertising injury", medical expenses or other injury or damage that does not arise out of your operation described in the above Schedule and performed by you or on your behalf.

(9) Height Exclusion

A height exclusion deletes coverage for work on a building or structure in excess of a stated height. Note that the below example does not state that the work must be performed above that stated height to be excluded. All work is excluded. The following is a height exclusion manuscript endorsement:

Manuscript Endorsement:

This policy does not insure against loss or expense, including but not limited to the cost of defense, arising from or resulting, directly or indirectly, from:

1. "Your work" on the exterior of any building or structure in excess of fifty feet in height; or
2. "Your work" on the exterior of any building or structure that is proposed to be over fifty feet in height.

(10) Underground Utility Location Warranty

[85] **Important to Confirm Classification Scope of Work Covered.** See *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill. App.3d 543, 572 N.E.2d 1112 (Ill. 1991), where the court held that an insurer was not liable to an additional insured, a general contractor, for coverage of injuries suffered by an employee of the Named Insured, a roofing subcontractor, even though the Named Insured subcontractor provided the additional insured with a certificate of insurance reflecting that the additional insured was covered by the Named Insured's liability insurance as to a particular project. The insurance policy was endorsed to expressly exclude coverage to the subcontractor for bodily injury arising out of the subcontractor's roofing work!

In spite of one's best efforts to compile a listing of unacceptable endorsements, the insurance industry is quite imaginative in dreaming up exclusions and limitations and there's a new one around every corner. This is a good example. While contractors are very good at getting underground utilities marked, how often do they get "proof in writing"?

Manuscript Endorsement:

> It is a condition of coverage that before the Named Insured commences any digging, excavation, boring or similar underground work, a local locator service must come to the job site and mark all underground lines, pipes, cables, and underground utilities. The Named Insured must obtain proof in writing from the locator service. If the above procedure is not completed, coverage under this policy is voided for any claim, loss, costs or expenses arising out of such digging operations. Where there is no coverage, there is no duty to defend.

(11) Escape Clauses

Particularly egregious manuscripted exclusions are escape clauses and negligence exclusions.[86]

(12) Subsidence Manuscript Exclusion

This is truly a construction defect exclusion aimed at contractors engaged in any type of earth movement work, including but not limited to soil compaction, fill, or installation of storm or sewer drains.

(13) "Prior Work" or "Continuous and Progressive Injury and Damage" Exclusions

There are many versions of this exclusion being used. The first example shown below is an example where coverage is excluded for any progressive or continuing injury or damage that starts before the policy inception, regardless of whether any insured knew of the prior injury or damage. The second example shown below is one of the most abusive endorsements I have found. The insurer will argue that no coverage exists regardless of when the coverage is triggered. All that is required is an "allegation" that the loss was "caused" by a "condition" that existed before the policy took effect. Note that the "condition" is almost always in existence before a particular policy period begins. This begs the question: Does "condition" mean simply a condition from which injury or damage later results or latent injury or damage? Such an endorsement essentially turns the current coverage into a claims-made policy with no prior acts coverage and no extended reporting period (a/k/a "**tail**") if renewed with similar forms. Coverage is radically diminished in a way that most insureds and even their insurance agents do not understand. Contractors that regularly face exposures involving more than one policy period may face a bankrupting exposure.

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[86] **Escape Clauses.** The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E .D. Tex. 1994) illustrates the risk inherent in not reading the insurance policy of the party obligated to name the prospective additional insured as an additional insured. The court found that a fact issue existed defeating a summary judgment motion as to whether the proposed additional insured had accepted the defendant's insurance policy which contained an additional insured provision that included the plaintiff, but which provision was worded so as to exclude coverage in cases where the proposed additional insured was already insured (a so-called "**Escape Clause**"). The Named Insured's policy contained the following Escape Clause: "Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise." The party providing the insurance provided insurance naming the proposed additional insured as an additional insured and therefore did not violate the covenant to name the plaintiff as an additional insured, but the additional insured provision contained an Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

Manuscript Endorsement #1:

> This insurance does not apply to "bodily injury" or "property damage" within the "products-completed operations hazard" if the injury or damage first occurred prior to the effective date of this policy.

Manuscript Endorsement #2:

> This insurance does not apply to "Bodily injury" or "property damage":
>
> (1) which first existed, or is alleged to have first existed, prior to the inception date of this Policy, or
>
> (2) which are, or are alleged to be, in the process of taking place prior to the inception date of this Policy, even if the actual or alleged "bodily injury" or "property damage" continues during this policy period; or
>
> (3) which were caused, or are alleged to have been caused, by a condition that first existed prior to the inception date of this Policy.

(14) Insured vs. Insured Manuscript Exclusion

A "Named Insured vs. Named Insured Exclusion" is acceptable, as it is aimed at preventing coverage for claims between insureds within the same economic family. An "**Insured vs. Insured Exclusion**" should never be accepted (except in professional liability policies, where it is customary), as it excludes coverage when the additional insured desires to bring claim against the named insured.

(15) Controlled Insurance Program ("CIP") or "Wrap" Manuscript Exclusion

All CIP programs include coverage for product-completed operations, but some limit the period for which that coverage is provided to two or three years after completion of the work. The subcontractor working on that project, however still has a liability exposure after the CIP's completed operations coverage expires for the entire statute of repose.

12. Self-Insurance Is Not Insurance

a. What is Self-Insurance?

"**Self-insurance**" is not insurance.[87] Self-insurance is nothing more than a risk retention device (a method of "financing" certain risks), and an indemnity by the "self-insurer", the indemnifying party. Self-insurance and large self-insured retentions are a popular method for financing certain risks, particularly among very large commercial businesses[88] and public entities.[89] Self-insurance has the benefit of retaining dollars otherwise payable for insurance for cash flow purposes until needed to pay claims.

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[87] **A "Misnomer".** *Hertz Corp. v. Robineau*, 6 S.W.3d 332 1336 (Tex. App. - Austin 1999, no writ), J. Woodfin Jones, Justice:

> To understand why a self-insurer's coverage is not "other insurance," it is helpful to recognize that the term "self-insurance" is a misnomer; in effect, a self-insurer does not provide insurance at all. "To say that a self-insurer will pay the same judgments and in the same amounts as an insurance company would have had to pay is one thing; while it is obvious that to assume all the obligations that exist under a Standard Automobile Liability Policy is quite another thing."

[88] **Self-Insurance by Large Commercial Businesses.** *Hertz Corp. v. Robineau*, 6 S.W.3d 332 (Tex. App. - Austin 1999, no writ) (J. Woodfin Jones); *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5th Cir. 1998).

[89] **Self-Insurance by Public Entities.** *Green v. Alford*, 274 S.W.3d 5 (Tex. App. Hou. [14th Dist.] 2008, writ den'd) (City of Pasadena).

The term "self-insurance" is used to describe a range of risk retentions by the self-insurer. Self-insurance can range from no insurance ("going bare"), to a policy deductible, to insurance purchased over a large self-insured retention ("**SIR**"). A SIR is sometimes referred to as a "retained limit".[90] In the case of a deductible or SIR it may be designated as a dollar amount or a percentage. A deductible or SIR is the monetary threshold of the insurer's obligation to pay liabilities or losses covered by the policy.

b. Liability Risks: Deductibles, SIRs and Self-Insurance

(1) Deductibles

Deductibles on a liability policy are determined on a per claim or on a per occurrence basis. Generally, a liability policy's aggregate or occurrence limits are not reduced by deductibles. The industry standard liability policy (**ISO CG 00 01**) does not provide for a deductible, deductibles are added by an endorsement to the policy (*e.g.*, the ISO CG 03 00). The industry standard ISO deductible endorsement obligates the *named* insured to pay the deductible. Thus, an additional insured on an ISO deductible endorsement is not required to pay the deductible in order to trigger coverage. Manuscript endorsements may, however, require payment of the deductible by *the insureds*, which would include an additional insured.

(2) Deductibles v. SIRs [91]

There are four major differences between liability deductibles and SIRs:

		Deductibles	SIRs
1.	Defense Costs	The insurer pays all defense costs from the first dollar.	Insured usually is responsible for defense costs from the first dollar until the full amount of the retention is paid out.
2.	Policy Limits	Amount of the deductible is included in the policy limits.	Policy limits, including defense costs, are on top of the SIR amount. Once the SIR is paid, the insurer is obligated to pay costs above the SIR within the policy limits.[92]
3.	Payment to the Claimant	The insurer pays the full amount of a judgment against the insured up to policy limits, and then can seek reimbursement from the insured, if it can.	Insurer does not pay the portion of the judgment within the retention. The insured pays the SIR.[93]

[90] **Deductibles, SIRs and Self Insurance.** 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 11:11 *Deductibles and self-insured retentions* (2014); Windt, 3 INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS § 11:31 *Self-insured retention* (6th ed. 2014); Hermanson and Toren, *A Fact of Life - Retained Limits, Deductibles, and Self-Insurance* 55 No. 5 DRI FOR THE DEFENSE 64 (May, 2013); Hamilton and Murphy, *SIRs and Deductibles - Evolving Policies and Their Impact on Carrier Duties*, 78 DEFENSE COUNSEL JOURNAL 411 (Oct. 2011); CONTRACTUAL RISK TRANSFERS *Considerations for General Insurance Provisions* XIV.B.5 *Deductibles and Retentions*, and XIV.B.6 *Self-Insurance* (International Risk Management, Inc. 2017).

[91] **Deductibles v. SIRs.** Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 4:6 *Deductibles and Self-Insured Retentions* (2d ed. 2014).

[92] **Insurer Pays Above the SIR.** *Lexington Ins. Co. v. National Oil Well Nov, Inc.*, 355 S.W.3d 205 (Tex. App. - Hou. [1st Dist.] 2011, no writ) - once self-insured retention paid out in defense costs, insured not required to participate in costs of defense paid out by insurer.

[93] **Payment of SIR as Trigger to Insurer's Payment.** Many policies with SIRs provide that the insurer's obligation to pay the policy amount is not triggered until the insured *actually* pays the portion of the settlement or judgment within the SIR amount. Some courts have held that there is no coverage where the insured does not or cannot pay the SIR amount, for example if the insured is bankrupt. *Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, 2005 WL 3487723 (W.D. Tex. 2005) - insured's bankruptcy and resultant non-payment of the SIR excused the insurer (policy did not include a "bankruptcy of the insured clause"). However, some other courts have held that the standard bankruptcy clause in most liability policies (bankruptcy of the insured does not excuse covered payments by the insurer) results in the insurer not being excused by the bankrupt's nonpayment of the SIR (bankruptcy clause: "Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part."). See *Seaman and Schulze,* ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 9:4 *The Impact of the Policyholder's Bankruptcy - Impact on self-insured retentions* (2013); *e.g.*, *Gulf Underwriters Ins. Co. v. McClain Indus., Inc.*, 2008 WL 3021134 (Mich. Ct. App. 2008). Some SIR provisions are drafted to permit payment of the SIR amount through other insurance available to the insured, such as when the another policy is primary and the policy with a SIR is excess to it.

4.	Certificates of Insurance	A deductible need not be divulged on a certificate of insurance.	An SIR must be divulged on a certificate of insurance, as the insurer has no responsibility to pay claims until the SIR is exhausted.

Unfortunately, courts and insurance industry personnel use the terms "deductible" and "self-insured retention" interchangeably and without care, and the four listed differences are not well understood. The actual operation of a deductible or SIR provision usually can only be determined through a review of the written policy and discussion with the insurer. The scope of a contract's indemnity and the financial ability of the indemnitor may reduce concern as to this distinction.[94]

(3) Settlement

Liability policies with deductibles sometimes contain provisions granting settlement authority to the insurer, even over an insured's objections, and permit the insurer to recover from the insured the portion of the settlement within the deductible. The same settlement right may be granted to the insurer by the SIR insured, but it is more common for an insured with a large self-insured retention to also retain settlement rights, even if the settlement exceeds the SIR amount.[95] In circumstances where the policy with a SIR grants settlement rights to the insurer, a conflict of interest can exist between the insurer and its insured.[96]

(4) Self-Insurance Specification Drafting.

If self-insurance is to be considered, consideration should be given to establishing financial means tests and monitoring procedures. See Exhibit A - Insurance Specifications, **Spec. A.10** Self-Insurance, Large Deductibles and/or Retentions. A self-insurance right should be limited to the named entity and care should be addressed in the permitted assignment or successor provisions so as to avoid assignment or succession by entities of lesser credit worthiness.

(5) Self-Insurance and Additional Insured Status

Being named as an "additional insured" on a self-insurance program, does not provide any additional insurance to the "additional insured", as the indemnitor is the sole funding entity.[97]

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[94] **SIRs May Apply on a Per Occurrence Basis.** Since SIRs may apply on a per occurrence basis under a liability policy, the financial strength of the insured financing risk through its SIR may need to be evaluated by a party permitting the other party to finance a portion of its risk through a SIR. See *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5th Cir. 1998) - court held that independent acts of sexual abuse by an H.E.B. employee of two children constituted two "occurrences" subject to separate $1,000,000 SIRs payable by H.E.B.

[95] **No Conflict of Interest Between Insured and its Insurer Where Settlement Rights Retained by SIR Insured.** *See generally, International Ins. Co. v. Dresser Industries, Inc.*, 841 S.W.2d 437 (Tex. App. - Dallas 1992) - insured, who agreed to take on additional role as primary insurer, owed no duty to excess insurer to settle underlying products liability case within limits of primary coverage.

[96] **Conflict of Interest Between Insured and its Insurer Where Settlement Rights Granted SIR Insured to Insurer.** As noted in *Roehl Transport, Inc. v. Liberty Mut. Ins. Co.,* 784 N.W.2d 542, 554 (Wis. 2010) "the insurance company might offer an unnecessarily high settlement within the deductible to avoid the expense of diligent investigation and adjustment. Or it might expend insufficient effort to investigate a claim unless and until the insurance company's own money is at risk when the value of the claim approaches or exceeds the deductible."

[97] **Self-Insurance is Not "Other Insurance" to Contribute as Primary Insurance.** Also, another question is sometimes raised concerning self-insurance. In a case where a loss is covered by another party's insurance, which insurance provides that it is primary coverage, and the self-insurer also is liable, is the self-insured required to share in the loss payment by the insurer? This question is sometimes stated, is self-insurance "other insurance"? If multiple policies cover a loss, the "other insurance" provisions of each the policies will dictate how the loss is allocated among the policies' proceeds. If both policies state they are primary, then the policies need to be consulted. The standard CGL policy states that its coverage is primary with respect to "other insurance" unless the other insurance is also primary, in which case the policy will pay a share of the loss. See discussion of "other insurance" at Endnote 29 (Primary and Noncontributing) at the end of this article. The majority rule, and the rule in Texas, is that self-insurance is not "other insurance" within the other insurance provision of a primary policy. See Holloway, Annot., Self-Insurance against Liability as Other Insurance with Meaning of Insurance Policy, 46 A.L.R. 4th 707 (1986). *Allstate Ins. Co. v. Zellars,* 462 S.W.2d 550, 552 (Tex. 1970); *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 335 (Tex. App. - Austin 1999, no writ).

(6) Funding Self-Insurance

Unless the parties have established a restricted and encumbered fund or a reinsurance program, all that you have is the unsecured indemnity of self-insurer. The term "self-insurance" does not, without further detail, specify what procedures are to be followed and what protection is available.

B. PROPERTY INSURANCE

1. Antiquated, Problematic and Just Plain Wrong Terminology

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

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

A "**basic causes of loss**" policy is extremely basic in the scope of coverage provided. A "**broad causes of loss**" policy is broader than a basic form, but is not very broad. A "**special causes of loss**" policy is what most lawyers, laymen and many insurance professionals think of as an "all risk" form and is by far the most common form of property insurance in use.[98]

2. Self-Insurance Is Not Insurance.

a. Deductibles

Under a property or builder's risk policy, the deductible is subtracted by the insurer from its loss payment. The insured who suffers the loss absorbs the deductible, unless the deductible is allocated between the parties in a different fashion. For example, if a builder's risk policy has a deductible, the party that owns the damaged property absorbs the deductible (absent a contractual provision reallocating the loss within the deductible).[99]

b. The Self-Insured Owner and "Waivers of Subrogation"

The concept of a waiver of subrogation is technically applicable only to an insurer. With a waiver of subrogation, the insurer waives its right to step in to the shoes of its insured and seek to recoup either from a specified person or all persons the policy proceeds paid out to the insured. A waiver of recovery by an insured often effectuates a waiver of an insurer's right of subrogation. In the self-insurance context, parties sometimes use the term "waiver of subrogation," but in reality what is meant is a "**waiver of recovery**;" the self-insured is waiving its right of recovery as to the other party. A self-insuring property owner may balk at waiving its right of recovery. However, when an owner elects to self-insure it likely has done so for sound economic reasons. By waiving recovery (aka granting a waiver of subrogation) against the other party, the waiving party assumes the risk of loss due to the negligence of the

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[98] **Property Insurance – "Causes of Loss".** See Endnote 48 (*Property Insurance – "Causes of Loss"*) in the Commentary on Insurance Forms.

[99] **Approaches to the Deductible.** One approach to the parties deductibles dealing with deductibles or SIR is to specify the maximum amount of the deductible or SIR. Another approach is to allow the purchaser of the insurance to choose the deductible, and to allocate the deductible to the insurance purchaser, in whole or in part. For example, an owner may purchase the builder's risk policy and choose a high deductible to manage insurance premiums, and allocate the first dollars up to a limit to the contractor, and agree to pick up all dollars above the amount allocated (e.g., $5,000 to the contractor, all dollars above $5,000 up to the $50,000 deductible allocated to owner).

other party. If this waiver is not granted, then the other party might condition doing the transaction on its obtaining property insurance covering the loss, and seeking to pass the premium cost back to the other party. For example, a contractor contracting with a self-insured owner, who does not waive recovery against the contractor, likely will pass the insurance cost back to the self-insuring owner, and will seek to limit its liability to collected insurance proceeds.

c. The Self-Insured Tenant

If an owner permits its tenant to self-insure losses to its building, in addition to the financial security concerns noted above, the lease should address the following concerns. Like an insurer, the self-insured tenant should be required to produce a "**certificate of self-insurance**" to the landlord and its mortgagee specifying the type of casualty coverage (*e.g.*, replacement cost with agreed value endorsement), the amount thereof and policy terms. The self-insurance coverage should name the mortgagee under a standard mortgagee clause providing that the mortgagee is not subject to defenses to coverage that the tenant may otherwise have with respect to payment. Of course, the self-insurance concept needs to be approved by the owner's mortgagee. The self-insured tenant will need to confirm to the owner and its mortgagee that it has waived its right of recovery (subrogation) against the landlord. If the casualty loss may result in lease termination, the lease should address disposition of "**self-insurance proceeds**," for example, requiring the self-insured tenant to deposit an amount equal to the insurance proceeds otherwise payable to the landlord under the terms of a property insurance policy that was to have been maintained absent self-insurance. The self-insurance provision should address rent loss coverage, while the premises are being restored.

3. Not all Builder's Risk Policies Are the Same

a. No Standard Builder's Risk Policy

There is no standard builder's risk policy, unlike liability insurance there is a commonly recognized standard ISO CGL policy. ISO has a builder's risk policy, but builder's risk policies are considered to be Inland Marine policies and there is a wide divergence in builder's risk coverages insurer to insurer. "**Inland Marine**" policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods needed to address the exposure. Construction is recognized as a special exposure. A commonly used Inland Marine policy for builder's risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

b. Common Errors and Problems

(1) Exclusions

An unendorsed builder's risk policy includes a long list of exclusions.[100]

(2) Early Occupancy

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

(3) Review of Policy Delayed Until After Construction Commencement

Like the other insurance products discussed in this article, the builder's risk insurance policy may not, and likely will not, be issued or available prior to commencement of construction! The policy in many cases is not issued and delivered for weeks or months after work has begun. As noted above in the discussion of the perils of reliance on an ACORD Certificate of Property Insurance, an ACORD Evidence of Commercial Property Insurance or even an ACORD Binder, the policy itself is the contract of insurance and contains extensive terms and conditions that should be reviewed and approved prior to commencement of work. A great level of "distress" can occur, if an assumed

[100] **Builder's Risk Policies.** See Endnote 81 (No Standard Builder's Risk Policy) and Endnote 87 (Typical Exclusions) for further discussion of builder's risk policies and a list of common exclusions.

coverage in fact is not included in the policy, despite the best written insurance specifications, and a loss occurs before issuance of the policy. If construction will commence before issuance and delivery of the policy, one avenue may be to have the insurer deliver a specimen policy and specimen endorsements.

(4) Coverage Amount

Builder's risk can be provided on either an Actual Cash Value or a Replacement Cost basis.[101] Normally, there is little to no difference between Actual Cash Value and Replacement Cost on a newly constructed structure but the potential exists that an adjuster could allege physical depreciation, especially when covering long-term construction projects. Replacement Cost is the preferred valuation method. Failure of the policy amount to reflect the full loss exposure is a common error. The contractor's contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor's contract sum could lead to a significant uninsured loss. Builder's risk policies will not insure the building envelope unless specifically added. When added, some builder's risk policies insure the envelope only on an Actual Cash Value basis.

(5) Deductibles

Builder's risk policies frequently include multiple deductibles. One may apply to most causes of loss, another to wind, yet another to flood, another to earthquake, and another to indirect (delayed completion) costs. A common requirement might be for a $10,000 deductible, but a wind deductible of 1% of the value in place (or even worse, the total insurable value) at the covered property location at the time of loss applies, subject to a flood deductible equal to the maximum amount of coverage available from the national Flood Insurance Program, an earthquake deductible (depending on the location of the insured property) of 5% of the value in place at the covered property location at the time of loss applies, subject to a $500,000 minimum, and a delayed completion deductible of 15 days.

(6) Coverage for Architect's Fees, Owner Supplied Materials, Debris Removal, Full Limit Coverage of Flood and Earthquakes, and Elimination of Ordinance or Law Exclusions.

Many commonly expected coverages are available only through policy endorsement and are not part of the issuer's standard policy form. Missing coverages likely may be owner's additional architect's fees arising out of an insured loss; owner supplied materials; costs of demolition of the intact portion of a building when a law or ordinance requires that the entire structure be torn down; full collapse coverage, including collapse resulting from design error.

(7) Soft Costs

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

(8) Delay Damages

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

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[101] **Actual Cash Value or Replacement Cost.** See Endnote 49 (Valuation Terminology - Replacement Cost or Actual Cash Value).

(9) Watch Out for Protective Safeguard Warranties

"**Protective safeguard warranties**" are conditions precedent to coverage sometimes built into a builder's risk policy to assure the insurance company of certain protections being provided at the job site. Their inclusion is justified by the insurer on grounds of reduced premium. However, a violation of a protective safeguard warranty voids coverage, potentially even if the loss is not tied to the violated protective safeguard warranty. Typical protective safeguard warranties address the following: emergency response protocols; fencing surrounding the project (*e.g.,* site must be fenced with a cyclone fence at least 6 foot high which must be locked during non-working hours); project lighting during night hours; site surveillance must be maintained by a licensed and bonded watchperson during non-construction hours; and water for fire suppression must be stored on site, or a working fire hydrant must be within 1,000 feet of the structure being constructed.

C. DRAFTING: SPECIFIC SPECIFICATIONS ARE BETTER THAN GENERAL

1. Two Approaches.

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

Narrative	Exhibit
General	Specific
Brief	Detailed
Paragraph Style	Checklist Style

The author encourages the use of the exhibit checklist approach. In the author's experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements. The checklist (aka "check the box") approach has now been adopted by AIA in a major revision to the AIA Documents system. See the **AIA Document A101 – 2017 Exhibit A *Insurance and Bonds*** set out below.

2. Remember Your Audience.

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

3. Recommendations.

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

Inform your client of the severity of the exclusions that are so widely and increasingly utilized by the insurance industry, yet are invisible to most certificate holders. Inform your client that a review of the coverage being provided must be performed, either by you, your client's insurance agent, or an independent consultant.

Protect your client contractually. Insert a prohibition in your insurance requirements similar to the following:

The following exclusions/limitations or their equivalents are prohibited from use in the Protecting Parties' general liability and excess liability insurance policies:

- Amendment of Insured Contract Definition ISO CG 24 26
- Classification or Business Description

- Construction Defect Completed Operations
- Contractual Liability Limitation ISO CG 21 39
- Damage to Work Performed by Subcontractors On Your Behalf ISOCG 22 94 or CG 22 95
- Endorsement modifying the Employer's Liability exclusion or deleting the exception to it
- Explosion, Collapse and Underground Property Damage Hazard, ISO CG 21 42 or CG 21 43
- Habitational or Residential
- "Insured vs. Insured" except Named Insured vs. Named Insured
- Limitation of Coverage to Designated Premises or Project ISO CG 21 44
- "Prior Work" or "Continuous or Progressive Injury or Damage"
- Punitive, Exemplary or Multiplied Damages
- Subsidence
- Work Height
- Any other exclusion or limitation reasonably unacceptable to the Protected Parties

IV. CONTRACTUAL WAIVER OF SUBROGATION

A. Covenant Requiring Party to Insure its Own Property Not Equivalent to Waiver Of Recovery or Waiver of Subrogation

Most leases contain a provision addressing the rights between the parties in the event that the property is damaged by the negligence of the other party. These 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.

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.

Since there is no recognized standard property policy form, like the ISO liability form, it is prudent to examine the property policy in connection with drafting the lease and to condition the lease, if necessary, on obtaining a subrogation waiver from the insurer.

The ISO property policy for leased premises allows the parties to waive the insurer's rights in advance by a waiver of claims in the lease. The ISO property policy also allows the landlord to waive the insurer's subrogation right even after a loss. See ISO Commercial Property Conditions ¶ I. Transfer of Rights of Recovery Against Others To Us.

B. Waivers of Subrogation

1. Waiver Of Recovery?

Waiver of recovery is the landlord or tenant waiving its rights or recovery for the acts of the other. Waiver of subrogation is the landlord or tenant or both waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery.

2. 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.

3. Valid Despite Negligence of Released Party.

In Texas, waiver of recovery and waiver of subrogation clauses are valid if properly drafted. *See International Co. v. Medical-Professional Building of Corpus Christi*, 405 S.W.2d 867 (Tex. Civ. App.— Corpus Christi 1966, writ ref'd n.r.e.)—lessee waived in advance any claims for damages caused by lessor's negligent failure to maintain boilers in the portion of the leased premises which was under landlord's control "to extent that lessee was compensated by insurance for such damages;" and *Williams v. Advanced Technology Ctr., Inc.*, 537 S.W.2d 531 (Tex. App.-- Eastland 1976, writ ref'd n.r.e.)—subrogation suit brought against lessee by lessor's fire insurance carrier was barred by lessor's waiver of subrogation clause contained in lease, notwithstanding lessee's breach of the lease by permitting the leased premises to be used for an extra hazardous operation.

In order for indemnity and waiver provisions to be enforceable in Texas they must be drafted to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

4. Conflicts - Return of Premises Covenant *vs.* Waiver of Recovery Provision.

A lease may be drafted to require the tenant at the termination of the lease to return the leased premises in its original condition except for "reasonable wear and tear and damage by casualty not occurring through the tenant's negligence". Such a clause is potentially in conflict with a waiver of subrogation clause, unless specifically excepted in the waiver clause.

APPENDIX OF FORMS AND COMMENTARY

A. Insurance Specifications

The following forms set out insurance specifications for landlords and tenants. The second form has a checklist-style set of insurance specifications, including insurance specifications tenant or its contractor to maintain during the tenant's construction of tenant improvements or alterations. The insurance specifications set out for the tenant improvements are adaptable for owner-contractor construction projects.

1. Lease - Narrative Insurance Specifications

The following insurance provisions are adapted from lease provisions drafted by American Bar Association, Section of Real Property Probate and Trust Law, Leasing Committee. These provisions are only samples and must be reviewed by an attorney and tailored for any particular situation. Substantive edits by the author of this paper are indicated by underlining or ~~strikethroughs~~.

LEASE

A. Landlord's Insurance. Landlord shall take out and maintain, at its own cost and expense (subject, however to reimbursement as set forth herein below), (i) Workers' Compensation, (ii) comprehensive automobile liability insurance; (iii) general liability for bodily injury and property damage arising from Landlord's ownership, management, use and/or operation of the Common Areas and/or the Shopping Center with coverage limits equal to those Tenant is required to maintain in accordance with Section B below; and (iv) insurance covering all ~~perils~~ causes of loss insurable under a "Causes of Loss - Special Form" policy, ~~including, but not limited to, fire and such other risks as are from time to time included in standard extended coverage endorsements,~~ insuring in an amount, after completion of construction, of not less than 80% of the full insurable value, or such greater coverage as may be required by Landlord's mortgage. Insurance provided for in this Section A may be carried by inclusion within the coverage of any blanket policy or policies of insurance maintained by Landlord; provided, however, that the coverage afforded will not be reduced or diminished by reason of the use of such blanket policies of insurance. If the insurance policies maintained by Landlord with respect to the Shopping Center contain any nature of deductible feature, then Landlord shall be solely responsible for the payment of any such deductible in the event of a loss to the Leased Premises and/or the Shopping Center.[102]

B. Tenant's Insurance Payment. …

C. Tenant's Insurance. Tenant shall take out and maintain, at its own cost and expense, commercial general liability insurance coverage of $1,000,000 ~~combined single limit~~,[103] 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~~;[104] and (ii) contractual liability coverage ~~insuring the obligations of Tenant under the terms of this Lease~~. Such policy shall name Landlord and

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[102] **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.

[103] **Combined Single Limit - Antiquated Terminology.** An antiquated term that is often used is "**Combined Single Limit**". Versions of the CGL form used prior to 1986, and many other types of liability policies, had what were called "split limits." Split limits applied different limits to property damage liability and bodily injury liability. There was a "combined single limit endorsement" that could be added to the policy to make both bodily injury and property damage liability coverage subject to the same occurrence limit. This has been incorporated into the commercial liability form but without the terminology "Combined Single Limit." Therefore, this term conveys no meaning and should generally be avoided.

[104] **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.

Landlord's mortgagee~~, as their respective interests may appear~~,[105] as additional insureds, on an ISO form CG 20 11 01 96, or equivalent form. The liability policy shall be endorsed to include a waiver of subrogation by the insurer as to Landlord (the Landlord Parties). This insurance shall be endorsed to provide primary and not requiring contribution by any insurance maintained by the Landlord (or the Landlord Parties). It is the specific intent of the parties to this Lease that all insurance held by Landlord (or the Landlord Parties) shall be excess above the insurance required to be obtained by Tenant by this Lease. The personal injury contractual liability exclusion shall be deleted from the contractual liability coverage. The following exclusions/limitations (or their equivalents) are not permitted: (a) Contractual Liability Limitation, **ISO CG 21 39** or its equivalent; (b) Amendment of Insured Contract Definition, **ISO CG 24 26** or its equivalent; (c) Limitation of Coverage to Designated Premises or Project, **ISO CG 21 44**; (d) any endorsement modifying or deleting the exception to the Employer's Liability exclusion; (e) any "insured vs. Insured" exclusion; and (f) any type of punitive, exemplary or multiplied damages exclusion. All such insurance required to be maintained by Tenant shall be with an insurance company qualified to do business in the state where the Leased Premises is located. Within 30 days following a written request therefore, Tenant shall provide Landlord with an ACORD certificate of all policies required herein, including an endorsement providing that such insurance shall not be canceled ~~or not renewed~~ [106] except after 30 days' notice in writing to Landlord. Should Tenant fail to maintain such policies as hereinabove provided, Tenant will be deemed to be in default of the provisions of this Section C, and shall, within 30 days following receipt of a written notice of such default, obtain such insurance. Tenant's obligation to carry the insurance provided for above may be satisfied by inclusion of the Leased Premises within the coverage of so-called "blanket" policies of insurance carried and maintained by Tenant. Tenant shall be responsible for the safety and personal well-being of Tenant's agents, servants, employees, customers and invitees within the Leased Premises. Tenant agrees that Landlord shall not be responsible or liable to Tenant or those claiming under Tenant (including, without limitation, Tenant's agents, servants, employees, customers and invitees) for (i) injury, death or damage or loss occasioned by the acts or omissions of persons occupying any other part of the Shopping Center; or (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof, whether or not such persons are present with the knowledge or consent of Landlord.[107] If Tenant is engaged in any way in the manufacture, sale or distribution of alcoholic beverages, either for consumption of alcoholic beverages on or off the Leased Premises, Tenant will also maintain liquor liability insurance on an occurrence basis with the limits of not less than $2,000,000 each common cause and $3,000,000 aggregate. If written on a separate policy from the commercial general liability policy, such policy shall name Landlord and Landlord's mortgagee~~, as their respective interests may appear~~, as additional insured.

(To the extent relevant, insert the following additional insurance specifications for Tenant as set out in **Checklist-Style Insurance Specifications**: the General Insurance Requirements; Business Auto Liability, Workers' Compensation and Employer's Liability, and Environmental Liability; Property Insurance, Business Income and Extra Expense, Boiler & Machinery coverage; Other Insurance; and Tenant's Contractors specifications).

2. State Bar of Texas Real Estate Forms Manual – Insurance Addendum.

The Texas Real Estate Form Manual's Lease forms rely on an **Insurance Addendum** to detail the insurance coverages required to be maintained by the parties. The Manual's Insurance Addendum to Lease is an attachment to the lease form. It can be given to the parties' insurance consultants and insurers as a ready checklist of required

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[105] **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.

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

[107] **Contractual Disclaimer – Exclusions from Landlord's Responsibility – Injuries or Damages Incurred by Occupants of the Shopping Center and Other Persons Present at the Shopping Center.** This broad form contractual disclaimer appears to eliminate Landlord's liability to tenants for injuries and damage at the Shopping Center. The disclaimer is for (i) all injuries, damages or loss occasioned by the acts or omission of persons occupying any other part of the Shopping Center; (ii) occasioned by the property of any other occupant of any part of the Shopping Center; or (iii) the acts or omissions of any other person or persons present at the Shopping Center who are not occupants of any part thereof. Questions: What is left? Does the disclaimer disclaim liability for injuries or property damage to the extent caused in part by the acts or omissions, including negligence, of the Landlord and the persons as to which it would have legal responsibility? Does this disclaimer conflict with the Landlord indemnity in Insurance Specifications in Narrative Format?

coverages. The Insurance Addendum specifies the types of insurance to be maintained by landlord and tenant, but utilizes different means to identify the geographic coverages for landlord and tenant for liability insurance coverage and property insurance coverage. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "all items included in the definition of Tenant's Rebuilding Obligations…." Landlord's property insurance is to cover "the Building exclusive of … the rebuilding requirements of all lessees." The Lease and its Insurance Addendum do not similarly state the geographic area to be covered by the Landlord and Tenant's liability insurance, but rely on the geographic coverage terms and definitions of the party's liability policy.

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

Insurance Addendum ¶ A.2a provides that the liability policy is to be endorsed to name the Landlord and its Lienholder as "additional insureds;" Insurance Addendum ¶ A.2b provides that the contractual liability coverage under Coverage A be sufficient to respond to a broad-form indemnity; Insurance Addendum ¶ A.2b provides that the property insurance must contain waivers of subrogation of claims against Landlord and Lienholder; and at Insurance Addendum ¶ A.2c that Tenant is to deliver to Landlord copies of the certificate of insurance and copies of any additional insured and waiver of subrogation endorsements.

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

Insurance Addendum to Lease

Lease

Date:

Landlord:

Tenant:

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies[108] required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance or Endorsement	**Minimum Policy or Endorsement Limit**	
General Liability Insurance Policies Required of Tenant:		
☐ Commercial general liability	Each occurrence:	$_____
	General aggregate:	$_____

[108] **Policy Forms.** The Insurance Addendum does not cover in detail the coverages required to be contained in the Tenant's and the Landlord's liability policies other than to provide that each is an occurrence basis policy and is to have the minimum coverage levels specified. The Insurance Addendum relies on Landlord's approval authority in **Insurance Addendum ¶ A.3** as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant. See Endnote 21 (Liability Policies) and Endnote 47 (Property Insurance).

Or

☐	Business owner's policy	Each occurrence:	$_____
		General aggregate:	$_____

Required Endorsements to Tenant's General Liability or Business Owner's Policy:

☐	Designated location(s) general aggregate limit	$_____
☐	_____	$_____

Additional Liability Insurance Policies Required of Tenant:

☐	Worker's compensation	Statutory limit
☐	Employer's liability	$_____ each accident for bodily injury by accident/each employee for bodily injury by disease/bodily injury by disease for entire policy
☐	Business auto liability	$_____
☐	Excess liability	$_____
	Or	
☐	Umbrella liability (occurrence basis)	$_____

Property Insurance Policy Required of Tenant:

☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form)[109]	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Or

[109] **Causes of Loss – Special Form.** 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.

☐	Business owner's policy	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises

Required Endorsements to Tenant's Causes of Loss—[Special Form/Business Owner's] Policy:

☐	Business income and additional expense	Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months
☐	Equipment breakdown (formerly boiler and machinery)	$_____
☐	Flood	$_____
☐	Earth movement	$_____
☐	Increased limits of ordinance or law coverage to cover increased cost of construction	$_____
☐	Increased limits of debris removal	$_____
☐	Plate Glass	Sufficient limits to cover plate glass
☐	Increased limits for signs	Sufficient limits to cover exterior signage

2. Comply with the following additional insurance requirements:

a. The commercial general liability (or business owner's property policy) must be (i) written on an occurrence basis, (ii) endorsed to name of Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "additional insureds,"[110] (iii) include

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[110] **Additional Insureds.** Consideration should be given to listing in the insurance specifications specific companies that are to be scheduled as additional insureds on the Tenant's CGL policy. Also, all parties referenced or identified in the Tenant's indemnity as an Protected Person should also be listed as an additional insured on Tenant's CGL policy. Nobody (except the insurer) wins when a party is an Protected Person but is not scheduled as an additional insured.

Scheduling Additional Insureds. If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then consideration should be given to specifically naming or listing the most important of these persons in the additional insured endorsement form. *E.g.*, see Schedule blank in ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Persons. See discussion at Endnotes 134 - 136. Standard additional insured endorsement forms do not extend coverage to the officers, directors and partners of the additional insured.

No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified. Insurance Addendum ¶ **2.a** does not specify or limit geographically the area of the Building to which Landlord's protection as additional insured is to extend. This is different from how the parties allocated liabilities by the indemnities. In the Lease's indemnity provisions the parties have carved up responsibility for liability based on geographic areas (Tenant is responsible for all Injuries occurring in the Premises; Landlord is responsible for all Injuries occurring in the Common Areas). This anomaly gives rise to a variance in coverage between a party's indemnity and its required insurance coverage. For example, if an Injury occurs in the Common Areas, Landlord is to indemnify Tenant. However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant's liability policy. Attached in the **Appendix of Forms** is the industry standard ISO CG 20 11 Additional Insured CGL Endorsement designating Landlord as an additional insured on Tenant's CGL policy. The standard form utilizes the term "***premises***" to define the geographic area giving rise to coverage. But as explained in the forgoing article and in the commentary following that form in the Appendix such designation does not limit the Landlord's coverage to Injuries occurring "in" the Premises as such term is defined in the Lease. Coverage is for liabilities "***arising out of***" the premises leased to the Tenant. The definition of the term "premises" is not defined in the Tenant's CGL policy. A majority of courts have construed the insurance coverage broadly against the insurer and extended coverage beyond merely "in" the premises.

contractual liability under Coverage A sufficient to respond to a broad-form indemnity,[111] (iv) if Tenant operates multiple locations, be endorsed with a Designated Location(s) General Aggregate Limit endorsement, and (v) be primary and noncontributory with Landlord's liability insurance coverage.

b. The commercial property insurance policies must contain (i) optional coverage for agreed value to eliminate the coinsurance clause, (ii) optional coverage for replacement cost, (iii) a waiver of subrogation clause in favor of the party not carrying the commercial property insurance, and (iv) waivers of subrogation of claims against Landlord and Lienholder.

c. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies.

3. Obtain the approval of Landlord[112] and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

Proposed Manuscript Changes to the ISO Endorsements. Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate via indemnity 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach is to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence. In the author's opinion a fairer allocation of risk can be made based on the degree of causation in addition to where the Injury occurs.

(1) Manuscript Change to the ISO form adding Landlord as an Additional Insured on Tenant's CGL Policy

The additional insured endorsement can be modified to specify that it includes coverage of injuries or damage occurring outside the Premises only if the injury or damage is caused by the sole negligence of the Tenant. The additional insured endorsement can be modified to specify that it excludes coverage for injuries or damage occurring inside the Premises, if the injury or damage is caused:

(a) in whole by the negligent acts or omissions or willful misconduct of the Landlord or

(b) in part by the negligent acts or omissions of Landlord if the aggregate of the Landlord's plus its contractors' percentage share of all negligence is 51% or greater.

Perhaps these changes can be facilitated in part by provision added to the Lease employing the concept adopted by ISO in its 2013 revision that "such additional insured coverage will not be broader than that to which you are required by the contract or agreement to provide such additional insured."

(2) Manuscript Change to the ISO form adding Tenant as an Additional Insured on Landlord's CGL Policy

The additional insured endorsement can be modified to specify that it includes coverage for injuries or damage in the Common Areas or Parking Garage provided the injury or damage is not caused by the sole negligence of the Tenant and provided the Landlord is negligent. The additional insured endorsement can be modified to exclude from coverage liabilities to the extent they arise out of Tenant's acts or omissions in the Premises, if the liability is caused by the contributory negligence of the Tenant and if the Tenant's percentage share of all negligence is 51% or greater.

[111] **Broad Form Indemnity Insurance?** Tenant's indemnity in Lease ¶ ***B.1.q.*** covers all Injuries occurring in the **Premises** "**even if** caused **in whole or in part** by the ordinary negligence of Landlord." Thus Tenant is **indemnifying Landlord for its sole negligence**. ISO issued a new CGL policy amendment form, CG 24 26 04 13 Amendment of Insured Contract Definition, a copy of which is attached in the **Appendix of Forms**. This amendment form amends the definition of "insured contracts" to limit assumed tort liability to injury or damage "**caused, in whole or in part**" by (the named insured). The CGL policy must be reviewed to determine if this amendment has been added to the policy. An argument exists as to whether this amendment excludes the sole negligence of the Landlord, as it does not expressly state that the additional insured's sole negligence is excluded from the definition of "insured contract."

[112] **Landlord's Approval.** This provision does not identify the deadline for seeking Landlord's approval. If approval is deferred past the execution date of the lease, the parties place themselves in the position of arguing over the forms at a time when construction may have commenced on tenant improvements.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:[113]

Type of Insurance		**Minimum Policy Limit**	
☐	Commercial general liability[114] (occurrence basis)	Each occurrence: General aggregate:	$_____ $_____
☐	Commercial property insurance written on a causes of loss—special form (formerly known as "all risks" form)	100 percent of replacement cost of the [Shopping Center/Building] exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees	

[113] **Tenant Not Afforded Policy Review Authority.** There is no provision in the Insurance Addendum providing Tenant with the authority to review and approve the form of Landlord's policies or specifying minimum standards to be addressed in the policies to be furnished by Landlord.

[114] **Tenant Not Designated as an Additional Insured.** The Insurance Addendum to Lease does not require that the Tenant be listed as an additional insured on the CGL policy obtained by the Landlord for the Project as to Injuries occurring in the Common Areas. Tenant should consider requiring that it be listed as an additional insured on the Project's CGL policy as to Tenant's liability for Injuries occurring in the Common Areas. Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the "Building's" insurance for which it is paying through its Pro Rata Share of Operating Expenses for injuries occurring in the Common Areas and in the Parking Garage. See in the **Appendix of Forms** CG 20 26 04 13 Additional Insured – Designated Person or Organization: a form of additional insured endorsement to Landlord's CGL policy. The ISO endorsement form can be tailored to limit Tenant's protection as an additional insured to Injuries occurring in the Common Areas. The standard ISO form issued does not make that distinction.

3. First Generation Space Office Lease - Checklist-Style Insurance Specifications as an Exhibit.

Attached are the waiver of subrogation, indemnification, insurance and casualty provisions of an office lease for a to-be-built office building (aka "first generation space") ("**First Generation Space Office Lease**"). These provisions serve as a road map for the issues that should be addressed in casualty loss provisions in leases, including for other types of leases, such as ground leases, build-to-suit leases, single tenant building leases, and leases of spaces in different type facilities, *e.g.*, retail, warehouse and industrial facilities. The insurance specifications have been crafted to be a standalone exhibit attachment to a lease. Inserted in brackets are variable specifications. One variable shown as a bracketed spec addresses allocation of property insurance on tenant improvements to the tenant. This variable allocation is appropriate for a ground lease where the tenant has constructed the building, a single tenant building where the tenant is responsible for reconstruction, or where the tenant is leasing shell space and is responsible at its sole expense to reconstruct the tenant improvements after a casualty loss.

FIRST GENERATION SPACE OFFICE LEASE

§ 11. WAIVER OF CLAIMS. TO THE EXTENT PERMITTED BY LAW, EACH OF TENANT AND LANDLORD (THE "RELEASING PARTY") RELEASES AND WAIVES ANY CLAIMS IT MAY HAVE AGAINST THE OTHER PARTY OR ITS OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS (THE "RELEASED PERSONS") FOR BUSINESS INTERRUPTION OR DAMAGE TO PROPERTY SUSTAINED BY THE RELEASING PARTY AS THE RESULT OF ANY ACT OR OMISSION OF THE RELEASED PERSON IN ANY WAY CONNECTED WITH ANY LOSS COVERED BY INSURANCE, WHETHER REQUIRED HEREIN OR NOT, OR WHICH SHOULD HAVE BEEN COVERED BY INSURANCE REQUIRED HEREIN, INCLUDING THE DEDUCTIBLE AND/OR UNINSURED PORTION THEREOF, MAINTAINED AND/OR REQUIRED TO BE MAINTAINED BY THE RELEASING PARTY PURSUANT TO THIS LEASE. THE WAIVER OF CLAIMS CONTAINED IN THIS SECTION WILL SURVIVE THE END OF THE TERM AND (B) WILL APPLY EVEN IF THE LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PERSONS BUT WILL NOT APPLY TO THE EXTENT A LOSS OF DAMAGE IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PERSONS (EXCEPT TO THE EXTENT THE LOSS OR DAMAGE IS INSURED BY THE PROPERTY INSURANCE OF A RELEASED PERSON).

§ 12. INDEMNIFICATION.

§ 12.1. Tenant. TO THE EXTENT PERMITTED BY LAW, TENANT SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE LANDLORD PARTIES AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING IN OR AROUND THE PROJECT EITHER BEFORE OR AFTER THE TERM AND ARISING FROM THE USE OR OCCUPANCY OF THE LEASED PREMISES OR IN WHOLE OR IN PART FROM ANY OTHER ACT OR OMISSION OR NEGLIGENCE OF TENANT OR SUBTENANTS OR ANY OF TENANT'S OR SUBTENANT'S OFFICERS, DIRECTORS, EMPLOYEES, CONTRACTORS OR AGENTS.

§ 12.2. Landlord. TO THE EXTENT PERMITTED BY LAW, LANDLORD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS TENANT AND ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS AGAINST ANY CLAIM BY ANY THIRD PARTY FOR INJURY TO ANY PERSON OR DAMAGE TO OR LOSS OF ANY PROPERTY OCCURRING EITHER BEFORE OR AFTER THE TERM IN THE PROJECT AND ARISING IN WHOLE OR IN PART FROM ANY ACT OR OMISSION OR NEGLIGENCE OF ANY OF THE LANDLORD PARTIES.

§ 12.3. Proportionate Responsibility. THE INDEMNITIES CONTAINED IN THIS SECTION ARE (A) INDEPENDENT OF TENANT'S AND LANDLORD'S INSURANCE (AS APPLICABLE), (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, AND (C) WILL SURVIVE THE END OF THE TERM. NOTWITHSTANDING ANYTHING IN THIS LEASE TO THE CONTRARY, TO THE EXTENT THE INDEMNIFIED LIABILITY, LOSS, COST, DAMAGE OR EXPENSE ARISES OUT OF THE JOINT, CONCURRENT OR COMPARATIVE NEGLIGENCE, CAUSATION, RESPONSIBILITY OR FAULT OF TENANT AND LANDLORD, WHETHER NEGLIGENCE, STRICT LIABILITY, BREACH OF WARRANTY, EXPRESS OR IMPLIED, PRODUCTS LIABILITY, BREACH OF THE TERMS OF THIS LEASE OR WILLFUL MISCONDUCT, THEN THE INDEMNIFYING PARTY'S OBLIGATION TO THE INDEMNIFIED PERSONS SHALL ONLY EXTEND TO THE PERCENTAGE OF TOTAL RESPONSIBILITY OF THE INDEMNIFYING PARTY IN CONTRIBUTING TO SUCH LIABILITY, LOSS, COST, DAMAGE OR EXPENSE OF THE INDEMNIFIED PERSONS.

§ 13. Insurance. The parties agree to maintain the property and liability insurance policies specified for the party to maintain in Exhibit A – Insurance Specifications.

§ 14. Destruction.[115]

[115] The following are questions and topics are addressed in the casualty loss provisions of the First Generation Space Office Lease:

- What constitutes a casualty loss?
- Who decides if the damaged property is to be rebuilt?
- The party responsible to rebuild in the event of a casualty loss.
- Damage to what portions of the property trigger the election to rebuild or terminate the lease (e.g., common areas, parking; damage that materially adversely affects the tenant's use or access)?
- What standard to be applied in determining if the degree of damage triggers an election or if rebuilding is mandatory (e.g., landlord's judgment; landlord's judgment that building cannot be operated economically as an integral unit; "substantial damage"; damage such that it will take greater than one year to rebuild if damage occurs prior to the last two years of the lease term, damage such that it will take greater than 60 days to rebuild if damage occurs during the last two years of the lease term)?
- Relevance of length of time involved in rebuilding (e.g., greater than a year; greater than 60 days if casualty occurs during the last 24 months of the lease term).
- Period during which casualty occurs as triggering elections (e.g., during last 24 months of lease term).
- Standards and process for rebuilding (e.g., issues similar to those addressed in the work letter; who builds which portion of the damaged improvement; who funds each portion rebuilt; how is rebuilding coordinated with other tenants and with landlord's work; insurance; contractor approval).
- How and when is determination/estimation made of the length of time that rebuilding will take (e.g., within 60 days after the date of the casualty)?
- Notice of election is to be given to other party within what period of time (e.g., by landlord within 60 days of the occurrence, by tenant within 65 days of the occurrence if damage occurs during the last two years of lease term)?
- What happens if rebuilding takes longer than the estimated period?
- Effect of force majeure if rebuilding takes longer than estimate period.
- Extension of rebuilding period if the other party's conduct affects rebuilding period (e.g., tenant delays).
- Conditions which must be satisfied in order for party to terminate (e.g., landlord must terminate all of the other leases in the project affected by such casualty in a like manner).
- What happens if no election is made or not made within a time period?
- What happens if insurance proceeds are not sufficient to rebuild or fully rebuild?
- Under what circumstances will rent abate or partially abate?
- If rent is to partially abate, what formula is used to determine the portion abated?
- Do other expenses abate (e.g., CAM, operating expense pass-through, taxes, insurance)?

§ 14.1. Reconstruction.

If the Leased Premises are damaged by fire or other casualty, the same shall be repaired or rebuilt as speedily as practical under the circumstances at the expense of the Landlord [subject to Section 14.3 (Extent of Landlord's Expense to Reconstruct)], unless this Lease is terminated as provided in this Section, and during the period required for restoration, a just and proportionate part of Base Rental shall be abated until the Leased Premises are repaired or rebuilt.

§ 14.2. Termination Rights.

a. Landlord's Termination Rights. If the Leased Premises and/or any portion of the Project which materially adversely affects Tenant's use of or access to the Leased Premises are (i) damaged to such an extent that repairs cannot, in Landlord's judgment (after consultation, as soon as reasonably practicable after the occurrence of the related damage, with an architect and general contractor of recognized good reputation selected by Landlord), be completed within one year after the date of the casualty or (ii) damaged or destroyed as a result of a risk which is not insured under an ISO causes of loss - special form insurance policy, or (iii) damaged or destroyed during the last 24 months of the Lease Term or the Renewal Term if Tenant exercised or exercises (within 30 days of the date of such casualty) its option to extend, or if the Building is damaged in whole or in part (whether or not the Leased Premises are damaged), to such an extent that the Building cannot, in Landlord's judgment, be operated economically as an integral unit, and Landlord terminates all of the other leases in the Project affected by such casualty in a like manner, then but only in such events, Landlord may at its option terminate this Lease by notice in writing to the Tenant within 60 days after the date of such occurrence.

b. Tenant's Termination Rights. If the Leased Premises are damaged to such an extent that repairs cannot, in Landlord's judgment, be completed within one year after the date of the casualty or if the Leased Premises are substantially damaged during the last 24 months of the Lease Term or the Renewal Term if Tenant exercised or exercises (within 30 days of the date of such casualty) its option to extend, then in any of such events, Tenant may elect to terminate this Lease by notice in writing to Landlord within 65 days after the date of such casualty. If the Leased Premises are not materially restored by Landlord to the extent required of Landlord hereunder on or before the date that is one year after the date of the related casualty (as extended because of Tenant Delays or Force Majeure), then Tenant shall have the right to terminate this Lease by giving written notice thereof to Landlord on or before the earlier to occur of (i) the date that is one year after the date of the related casualty (as extended because of Tenant Delays or Force Majeure), or (ii) the date that Landlord has substantially completed the restoration of the Leased Premises, as the case may be; provided, however, that if construction or reconstruction is delayed because of changes, deletions or additions in constructions requested by Tenant or other Tenant Delays or Force Majeure, the one year period for restoration, repair or rebuilding shall be extended for the amount of such delay.

c. Failure to Terminate. Unless Landlord or Tenant elects to terminate this Lease as hereinabove provided, this Lease will remain in full force and effect and Landlord shall repair or rebuild such damage at its expense to the extent required in this Section as expeditiously as possible under the circumstances substantially in accordance with the Base Building Plans and the Plans and Specifications for the Leased Premises [subject to the limitations in Section 14.3 (Extent of Landlord's Expense to Reconstruct)], except to the extent not possible under then applicable law.

§ 14.3. Extent of Landlord's Expense to Reconstruct.

If Landlord should elect or be obligated pursuant to Section 14.1 (Reconstruction) above to repair or rebuild because of any damage or destruction, Landlord's obligation shall be limited to the original Building and the leasehold improvements in the Leased Premises (to the extent such leasehold improvements can be restored for the amount of the Construction Allowance applicable thereto) and shall not extend to any furniture, equipment, supplies or other personal property owned or leased by Tenant, its employees, contractors, invitees or licensees. If the cost of performing such repairs and restoration exceeds the actual proceeds of insurance paid or payable to Landlord on

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• Does the rebuilding party's lender have the right to have the insurance proceeds applied to that party's loan? If so, will rebuilding still occur?

account of such casualty, or if Landlord's mortgagee or the lessor under a ground or underlying lease shall require that any insurance proceeds from a casualty loss be paid to it,[116] and if Landlord terminates all of the other leases, Landlord may terminate this Lease by giving written notice to Tenant not later than 120 days after the date of the casualty or other occurrence.

[116] **Lender's Concerns.**

a. Right to Insurance Proceeds. One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property. Joshua Stein, *What a Mortgage Lender Needs to Know about Property Insurance: The Basics*, THE REAL ESTATE FINANCE JOURNAL (Winter 2001); and *Benchmark Insurance Requirements for Commercial Real Estate Loans and Why They Say What They Say*, THE REAL ESTATE FINANCE JOURNAL (Winter 2004), each found at www.joshuastein.com. If the mortgagee does not carry its own insurance, but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There is more than one form of endorsement for this purpose and each provides widely different protection.

b. Insurable Interests. Both the mortgagor and mortgagee have insurable interests in mortgaged property. Either mortgagor or mortgagee can purchase a property insurance policy on the mortgaged property. A mortgagor may insure the mortgaged property in an amount equal to the property's value. A mortgagee does not have an insurable interest in the property in excess of its secured debt. *See Sportsmen's Park v. N. Y. Prop. Underwriting Ass'n*, 470 N.Y.S.2d 456, 459 (N.Y. 1983): "The extent of a mortgagee's interest is determined, in the first instance, by the total amount of its lien, including the outstanding principal amount of the debt plus interest, plus any amounts expended to protect its security (*i.e*., taxes, insurance premiums), all as of the date of the fire." 13 WILLISTON ON CONTRACTS § 37:51 *Mortgagee's Rights under Fire Insurance Policy* (4th ed. 2010). Absent a contractual undertaking to insure the mortgaged property and to insure the interest of the mortgagee, the mortgagor does not have an obligation to do so. However, it is customary in commercial financing to require the mortgagor to carry insurance for the joint interest of both mortgagor and mortgagee. At least three types of mortgagee clauses cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause. See the Commentary on Insurance Forms Endnote 167 discussing ISO CP 00 10 10 12 Building and Personal Property Coverage Form Section **F.2**, Additional Conditions – Mortgageholders of the, which is part of the ISO property insurance policy.

EXHIBIT A TO OFFICE LEASE - INSURANCE SPECIFICATIONS

A. General Insurance Requirements

1. Definitions. For purposes of this Lease:

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

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

c. ISO. "ISO" means Insurance Services Office. [1]

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,[2] and authorized to engage in the business of insurance in the State in which the Improvements are located.[3]

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 [4] and excess [5] 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 [6] or self-insured retention [7] shall exceed $ without prior written approval of the Landlord, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at the Tenant's sole risk. The Tenant shall not be reimbursed for same.

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

4. Forms.

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

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

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

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

a. Form. Liability insurance: **ACORD 25** (2014/01) *Certificates of Liability Insurance* for liability coverages. Property Insurance: **ACORD 28** (2014/01) *Evidence of Commercial Property Insurance* for property coverages.[8]

b. Delivery Deadlines. Evidence to be delivered to Landlord prior to entry on Leased Premises and thereafter at least 30 [9] 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. [10]

c. Certificate Requirements. [11] Certificates must:

(1) Insured. State the insured's name and address. [12]

(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 [13] status and waivers of subrogation as required by these specifications.

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

(5) Deductibles and Self-Insured Retentions Stated. State the amounts of all deductibles and self-insured retentions. [14]

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

(7) Notices. Be accompanied by insurer certified copy of notice of cancellation endorsement providing that 30 days' notice of cancellation [and material change] will be sent to the certificate holder. [15]

(8) Certificate Holder. [16] Be addressed to the Landlord as the certificate holder and show Landlord's correct address. A separate certificate is to be addressed and delivered to Landlord's lender.

(9) Producer. State the producer of the certificate with correct address and phone number listed. [17]

(10) Authorized Representative. Be executed by a duly authorized representative of the insurers. [18]

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. [19]

7. Insurance Requirements of Tenant's Subtenants.

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

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

8. Use of the Landlord's Property.

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

[Optional: 10. Self-Insurance, Large Deductibles and/or Retentions. [20]

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

company would have been obligated to pay those amounts if Tenant had maintained the insurance pursuant to this Exhibit.

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

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

B. Specific Insurance Requirements

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

No.	Specification	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1	**Commercial General Liability.** Tenant is to maintain commercial general liability insurance ("CGL")[21] issued on an Occurrence Basis[22] meeting at least the following specifications.		
§ 1.1	**Minimum Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than the following amounts:	
		$ 5,000,000	Per Occurrence.
		$ 5,000,000	General Aggregate.[23]
		$ 5,000,000	Products and Completed Operations Aggregate.
		$ 5,000,000	Personal and Advertising Injury Limit.
§ 1.2	**Deductible**	May not contain a SIR.[24] May not contain a deductible greater than $____, which deductible shall be borne by Tenant.	
§ 1.3	**General Aggregate**	If the CGL insurance contains a General Aggregate limit, it shall apply separately to the Leased Premises and Property[25] and shall be provided on ISO CG 25 04 05 09.	
§ 1.4	**Form**	This insurance is to be issued on an ISO form CG 00 01 [, or a substitute providing equivalent coverage][26] and shall cover bodily injury, property damage, and personal and advertising injury liability arising from ownership, use or occupancy of premises, ongoing and completed operations.	
§ 1.5	**Insured Contracts**	Coverage shall apply to but not be limited to liability assumed by Tenant under the Lease (including the tort liability of another assumed in a business contract).[27] Unmodified Separation of Insureds coverage shall be included.	
§ 1.6	**Additional Insureds**	This insurance is to be endorsed with an **ISO CG 20 11** [01 96] [04 13], Additional Insured Endorsement listing Landlord Parties as additional insureds.[28] No language excluding coverage for the acts or omissions of the additional insured shall be contained in the endorsement. The specification above of minimum limits does not limit the limits of coverage to be available to the Landlord Parties as additional insureds. If Tenant's insurance has limits greater than the above limits, the amount of coverage available to Landlord Parties is increased to the limits of Tenant's insurance, including limits under any umbrella or excess policies. Additional insured coverage of the Landlord Parties shall be maintained for the greater of the Term of the Lease, the holding over or possession of the Leased Premises by Tenant, or as long as Tenant is obligated to a Landlord Party for bodily injuries, property damage or other liabilities insurable by an **ISO CG 00 01** CGL policy.	

No.	Specification	Coverages, Limits & Other Requirements	
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed to provide primary and non-contributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to this Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Landlord Parties, with Landlord Parties' insurance being excess, secondary and non-contributing. [29]	
§ 1.8	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed with an **ISO CG 24 04 05 09** Waiver of Transfer of Rights of Recovery Against Others Endorsement to provide a waiver of subrogation by insurer in favor of Landlord Parties. [30]	
§ 1.9	**Deletion of Personal Injury Exclusion to Contractual Liability Coverage**	The personal injury contractual liability exclusion shall be deleted. [31]	
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change]. [32]	
§ 1.11	**Prohibited Endorsements**	The following exclusions/limitations (or their equivalents) are not permitted:	
		a.	**ISO CG 21 39** Contractual Liability Limitation. [33]
		b.	**ISO CG 24 26** Amendment Of Insured Contract Definition. [34]
		c.	**ISO CG 21 44** Limitation of Coverage to Designated Premises or Project. [35]
		d.	Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		e.	Any "Insured vs. Insured" exclusion except Named Insured v. Named Insured. [36]
		f.	Any type of punitive, exemplary or multiplied damages exclusion.
		g.	Classification or business description.
§ 1.12	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant to Landlord.	
§ 2	**Business Auto Liability.** [37] Tenant is to maintain business auto insurance, and, if necessary, commercial excess insurance, meeting at least the following specifications.		
§ 2.1	**Minimum Limit**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than $5,000,000 per Accident.	
§ 2.2	**Form**	This insurance is to be written on the current ISO edition of ISO CA 00 01.	
§ 2.3	**Scope**	This insurance shall cover damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use (1) of any auto, including owned, hired and nonowned autos, and (2) of any mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws. [38]	
§ 2.4	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 2.5	**Waiver of Right of Recovery and Subrogation; Additional Insureds**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties on ISO form CA 04 44 10 13. The Landlord Parties are to be additional insureds on the Business Auto Policy on ISO form CA 20 48 10 13.	

No.	Specification	Coverages, Limits & Other Requirements	
§ 3	**Workers' Compensation and Employer's Liability.** Tenant is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.		
§ 3.1	**WC Limits**	The limits of this insurance shall be no less than the statutory limits. [39]	
§ 3.2	**EL Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than $5,000,000 each Accident [40] and Disease. [41]	
§ 3.3	**USL&H**	United States Longshoremen and Harbor Workers ("**USL&H**") coverage must be provided where such exposure exists [42] listing the state(s) in which occupancy is to be performed.	
§ 3.4	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.	
§ 3.5	**Scope**	This insurance is to cover liability arising out of the Tenant's employment of workers and anyone for whom the Tenant may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance is permitted.	
§ 3.6	**Leased Employees**	Where a Professional Employer Organization ("**PEO**") or "leased employees" are utilized, Tenant shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord.	
§ 3.7	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 3.8	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties on form WC 42 03 04 B.	
§ 4	**Liquor Liability.** [43] Tenant is to maintain liquor liability insurance issued on an Occurrence Basis on ISO Liquor Liability Coverage Form CG 00 33 04 13, and if necessary, commercial excess insurance, meeting at least the following specifications.		
§ 4.1	**Minimum Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than:	
		$5,000,000	Each Occurrence.
		$5,000,000	Annual Aggregate.
§ 4.2	**Aggregate Limit**	A Designated Location(s) Aggregate Limit shall be provided on ISO CG 25 14 04 13.	
§ 4.3	**Additional Insureds**	Additional insured status shall be provided in favor of Landlord Parties.	
§ 4.4	**Scope**	This insurance shall cover operations of Tenant at the Leased Premises described by the Lease.	
§ 4.5	**Defense Coverage**	Coverage of defense costs is to be provided outside of the limit of liability coverage.	
§ 4.6	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation or material change.	
§ 4.7	**Waiver of Right of Recovery and Subrogation**	Tenant agrees to waive its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
§ 5	**Excess/Umbrella Liability.** If any of the required coverages are to be maintained by and through an excess/umbrella policy, [44] they are to be by a policy issued on an Occurrence Basis meeting at least the following specifications.		
§ 5.1	**Scope**	This insurance shall follow form of the underlying coverages. It shall be excess over and be no less broad than all coverages described above, including but not limited to the required additional insured status, designated construction project(s) or locations(s) general aggregate, or both, waiver of subrogation, notice of cancellation, and prohibited exclusions or limitations. The policy limits required herein may be provided by a combination of primary and excess policies, but in no	

No.	Specification	Coverages, Limits & Other Requirements	
		event shall the total limits of liability available for any one occurrence or accident by less than the amount required herein.[45] The specification above of minimum limits does not limit the limits of coverage to be available to the Landlord Parties as additional insureds. If Tenant's insurance has limits greater than the above limits, the amount of coverage available to Landlord Parties is increased to the limits of Tenant's insurance, including limits under any umbrella or excess policies.	
§ 5.2	**Primary**	This insurance shall be endorsed to provide primary and non-contributing liability coverage an not seek contribution from any other insurance (primary, umbrella, contingent or excess) maintained by Landlord Parties. It is the specific intent of the parties to this Agreement that all insurance held by Landlord Parties shall be excess, secondary and non-contributory.	
§ 5.3	**Concurrency**	Such coverage shall have the same inception date as the commercial general liability and employer's liability coverages.	
§ 5.4	**Drop-Down Coverage**	Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits.	
§ 5.5	**Defense Costs**	This insurance is to include a duty to defend any insured.	
§ 5.6	**Additional Insureds**	The Landlord Parties are to be additional insureds on this policy.	
§ 5.7	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 5.8	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
§ 6	**Pollution/Environmental Liability.** Tenant is to maintain Pollution/Environmental Liability insurance issued on an Occurrence Basis and, if necessary, commercial excess insurance, meeting at least the following specifications.		
§ 6.1	**Minimum Limits**	The limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than:	
		$1,000,000	Each Occurrence.
		$2,000,000	Annual Aggregate.
§ 6.2	**Scope**	This insurance must provide third party liability coverage for bodily injury, property damage, clean up expenses, and defense arising from the operation of Tenant. Mold and/or microbial matter and/or fungus and/or biological substances shall be specifically included within the definition of "Pollutants" in the policy.	
§ 6.3	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Asbestos or lead.
		b.	Contractual assumption of liability.
		c.	Impaired property that has not been physically injured.
		d.	Materials supplied or handled by the named insured.
		e.	Punitive, exemplary or multiplied damages.
§ 6.4	**Defense Costs**	Coverage of defense costs is to be provided outside of the limit of liability coverage.	
§ 6.5	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation, non-renewal [or material change].	
§ 6.6	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.	
§ 6.7	**Additional Insureds**	Landlord Parties shall be provided coverage as additional insureds.	

No.	Specification	Coverages, Limits & Other Requirements
B. PROPERTY[46]		
§ 1	**Property Insurance on Causes of Loss Special Form.** Tenant is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as "all risk".	
§ 1.1	**Scope of Coverage**	This insurance is to be issued for 100% Replacement Cost, on an Agreed Value Basis, and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease for the [excess] value of the Tenant Improvements to the Leased Premises [over the Construction Allowance provided by Landlord for the initial Tenant Improvements], and all equipment and other property used in connection therewith, including Tenant's business personal property, HVAC, trade fixtures and signs from time to time in, on, adjacent to or upon the Leased Premises, [Tenant is not responsible to insure tenant improvements to the Leased Premises constructed by prior tenants], and all alterations, additions, or changes made by Tenant pursuant to the terms of this Lease and shall not be subject to coinsurance.
§ 1.2	**Form**	This insurance is to be issued on an **ISO CP 10 30**.
§ 1.3	**Insureds**	The insureds on this policy are to be Tenant and Landlord, as their interest may appear.
§ 1.4	**Endorsements or Coverages**	The scope of coverage, at Landlord's option, is to include coverage for Antennas, Earthquake, Flood, Glass, Ordinance or Law, Terrorism, Theft, Signs and Debris Removal with an increased coverage of $____. Tenant at its election may cover loss arising out of cancellation of this Lease, including loss of its undamaged improvements and betterments.
§ 1.5	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.
Alternative. The following specification allocates to the Tenant the responsibility for carrying property insurance for the tenant improvements.		
§ 1	**Property Insurance**[47] **on Causes of Loss - Special Form.** Tenant is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as "all risk".[48]	
§ 1.1	**Scope of Coverage**	This insurance is to be issued for 100% Replacement Cost,[49] on an Agreed Value Basis,[50] and in compliance with all laws, regulations or ordinances affecting such property at any time during the Lease, for the Tenant's improvements and betterments[51], 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,[52] and shall not be subject to coinsurance.[53]
§ 1.2	**Form**	This insurance is to be issued on an **ISO CP 10 30** [, or equivalent form].[54]
§ 1.3	**Insureds**	The insureds on this policy are to be Tenant and Landlord, as their interest may appear.[55]
§ 1.4	**Endorsements or Coverages**	The scope of coverage, at Landlord's option, is to include coverage for Antennas,[56] Earthquake, Flood,[57] Glass,[58] Ordinance or Law,[59] Terrorism,[60] Theft, Signs,[61] and Debris Removal with an increased coverage of $_____.[62] Tenant at its election may cover loss arising out of cancellation of this Lease, including loss of its undamaged improvements and betterments. (See ISO CP 00 60 06 95).
§ 1.5	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.[63]

No.	Specification	Coverages, Limits & Other Requirements
§ 2	**Business Income and Extra Expense.**[64] Tenant is to maintain business income and extra expense insurance on a Causes of Loss-Special Form meeting at least the following specifications.	
§ 2.1	**Scope**	Coverage is to be provided on all operations at the Leased Premises.
§ 2.2	**Income Coverage Limit**	Coverage is to be provided in an amount of not less than 80% of Tenant's gross annual income at the Leased Premises less non-continuing expenses.
§ 2.3	**Form**	This insurance is to be issued on an **ISO CP 00 30 10 12** Business Income (And Extra Expense Coverage) Form or equivalent form.
§ 2.4	**Valuation Basis**	Insurance is to be issued on an Agreed Value basis.[65]
§ 2.5	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].
§ 2.6	**Waiver of Right of Recovery and Subrogation**	Tenant waives its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation by insurer in favor of Landlord Parties.
§ 3	**Boiler & Machinery.**[66] Tenant is to maintain boiler and machinery insurance meeting at least the following specifications.	
§ 3.1	**Scope of Coverage**	Coverage is to be provided on all operations at the described Leased Premises.
§ 3.2	**Form**	This insurance is to be written on a Comprehensive Form, including Business Income and Extra Expense.[67]
§ 3.3	**Valuation Basis**	This insurance is to be issued on a Replacement Cost, Agreed Value basis.
§ 3.4	**Waiver of Right of Recovery and Subrogation**	Tenant agrees to waive its rights of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation in favor of Landlord Parties.
§ 3.5	**Notice of Cancellation**	This insurance shall be endorsed to provide a 30 day notice of cancellation to Landlord.

C. OTHER INSURANCE [68]

Such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.

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

No.	Specifications	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1	**Commercial General Liability.** Tenant's contractor is to maintain commercial general liability insurance ("CGL") issued on an Occurrence Basis meeting at least the following specifications, but only to the extent permitted by law.		
§ 1.1	**Minimum Limits** See AIA A201 § 11.1.1.2.	The minimum limits of coverage are subject to approval by Landlord, but not are not to be less than the following amounts:	
		$ 5,000,000	Per Occurrence.
		$ 5,000,000	General Aggregate.

No.	Specifications	Coverages, Limits & Other Requirements	
		$ 5,000,000	Products-Completed Operations Aggregate.[69]
		$ 5,000,000	Personal and Advertising Injury Limit.
§ 1.2	**General Aggregate**	If the CGL insurance contains a General Aggregate Limit, it shall apply separately to these Premises and Property pursuant to an **ISO CG 25 04 09** Designated Location(s) General Aggregate Limit. [70]	
§ 1.3	**Post-Completion Coverage** AIA A201 § 11.1.2.	Contractor agrees to maintain Products-Completed Operations coverage with respect to "Bodily Injury" and "Property Damage" caused, in whole or in part, by Contractor's work at the Premises and Property for a period of __ years after final completion of the construction of the Improvements. This insurance is to be endorsed with an **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations endorsement to schedule Landlord Parties for the entirety of this post-completion period. [71]	
§ 1.4	**Form**	This insurance is to be issued on an **ISO CG 00 01**, and shall cover liability arising from premises, ongoing and completed operations, Owner's & Contractor's Protective Liability for contractor's liability arising out of the hire of subcontractors (independent contractors coverage), [72] and incidental design liability arising from the contractor's construction means and methods. [73]	
§ 1.5	**Insured Contracts** See AIA A201 § 11.1.1.4.	Coverage shall include but not be limited to liability assumed by Tenant's contractor under the construction contract (including the tort liability of another assumed in a business contract). Unmodified Separation of Insureds coverage shall be included.	
§ 1.6	**Additional Insureds** [74] See AIA A201 § 11.1.1.4.	This insurance is to be endorsed with an **ISO CG 20 10** [07 04] [75] [04 13], [76] [or equivalent form], Additional Insured Endorsement listing the Landlord Parties as additional insureds. No exclusion for the acts or omissions of the additional insured.[77]	
§ 1.7	**Primary and Noncontributory**	This insurance shall be endorsed with an **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition endorsement for this insurance to provide primary and non-contributing liability coverage. It is the specific intent of the parties to this Agreement that all insurance required herein shall be primary to and shall seek no contribution from all insurance held by Landlord Parties, with Landlord Parties' insurance being excess, secondary and non-contributing.	
§ 1.8	**Waiver of Right of Recovery and Subrogation** See AIA A201 § 11.1.4.	Tenant's contractor is to agree to waive its rights of recovery and to cause this insurance to be endorsed with an ISO CG 29 88 10 93 Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer in favor of Landlord Parties.	
§ 1.9	**Deletion of Personal Injury Exclusion to Contractual Liability Coverage**	The personal injury contractual liability exclusion shall be deleted.	
§ 1.10	**Notice**	This insurance is to contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 1.11	**Prohibited Endorsements**	The following exclusions/limitations (or their equivalents) are not permitted:	
		a.	**ISO CG 21 39** Contractual Liability Limitation. [78]
		b.	**ISO CG 24 26** Amendment Of Insured Contract Definition. [79]
		c.	**ISO CG 21 44** Limitation of Coverage to Designated Premises or Project.
		d.	Any endorsement modifying or deleting the exception to the Employer's Liability exclusion.
		e.	Any "Insured vs. Insured" exclusion except Named Insured v. Named Insured.
		f.	Any type of punitive, exemplary or multiplied damages exclusion.

No.	Specifications	Coverages, Limits & Other Requirements	
		g.	**ISO CG 22 34 04 13** Exclusion – Construction Management Errors and Omissions.
		h.	**ISO CG 22 79 04 13** Exclusion – Contractors – Professional Liability.
§ 1.12	**Electronic Data Endorsement**	This insurance is to include an Electronic Data Liability endorsement, ISO CG 04 37 with coverage to the full limits of the policy.	
§ 1.13	**Certificate of Insurance**	A copy of the required Endorsements along with the Schedule of Forms and Endorsements page of the policy listing the required Endorsements as issued modifications to the policy shall be attached to the Certificate of Insurance provided by Tenant's contractor to Landlord.	
§ 2	**Business Auto Liability.** Tenant's contractor is to maintain a Business Auto Policy and, if necessary, commercial excess insurance, issued on an Occurrence Basis meeting at least the following specifications. See AIA A201 § 11.1.1.6.		
§ 2.1	**Minimum Limits**	Limits of coverage are to be not less than $1,000,000 per Accident.	
§ 2.2	**Form**	This insurance is to be issued on the current edition of the ISO CA 00 01.	
§ 2.3	**Scope**	This insurance is to cover damages because of bodily injury or property damages caused by an accident and resulting from the ownership, maintenance or use (1) of any auto, including owned, hired and nonowned autos, and (2) of any mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws.	
§ 2.4	**Waiver of Rights of Recovery and Subrogation; and Additional Insureds**	Tenant's contractor is to agree to waive its rights of recovery and to cause this insurance to be endorsed to waive subrogation by insurer in favor of Landlord Parties. The Landlord Parties are to be additional insureds on the Business Auto Policy.	
§ 3	**Workers' Compensation and Employer's Liability.** Tenant's contractor is to maintain workers' compensation and employer's liability insurance meeting at least the following specifications.		
§ 3.1	**WC Limits**	The minimum limits of this insurance shall be no less than the statutory limits.	
§ 3.2	**EL Limits**	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than $1,000,000 each Accident or Disease.	
§ 3.3	**USL&H**	USL&H coverage must be provided where such exposure exists.	
§ 3.4	**Territory**	The state in which the Work is to be performed must be listed under Item 3.A. on the Information Page of the policy.	
§ 3.5	**Scope** See AIA A201 § 11.1.1.1. See AIA A201 § 11.1.1.2.	This insurance is to cover liability arising out of the Tenant's contractor's employment of workers and anyone for whom the contractor may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance are permitted.	
§ 3.6	**Leased Employees**	Where a Professional Employer Organization ("**PEO**") or "leased employees" are utilized, Tenant's contractor shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of Landlord.	
§ 3.7	**Notice**	Contain a provision for 30 days' prior written notice by insurance carrier to the Landlord required for cancellation [or material change].	
§ 3.8	**Waiver of Subrogation** See AIA A201 § 11.1.4.	Include a waiver of subrogation by insurer as to the Landlord Parties.	
§ 4	**Professional Liability.** Tenant's contractor is to maintain Professional Liability insurance meeting at least the following specifications.		

No.	Specifications	Coverages, Limits & Other Requirements	
§ 4.1	**Minimum Limits**	Limits of coverage shall be no less than:	
		$1,000,000	Each Loss.
		$2,000,000	Annual Aggregate.
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $3,000,000 Each Loss and Aggregate.	
§ 4.2	**Scope**	Such insurance shall cover all services rendered by the Contractor and its subcontractors under the construction contract, including but not limited to design or design/build services.	
§ 4.3	**Retroactive Date**	Any retroactive date must be effective prior to beginning of services for the Tenant.	
§ 4.4	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors.
		b.	Habitational or residential operations.
		c.	Mold and/or microbial matter and/or fungus and/or biological substance.
		d.	punitive, exemplary or multiplied damages.
		A professional liability endorsement to a general liability policy is not acceptable.	
§ 4.5	**Term**	Policies written on a Claims-Made basis shall be maintained for at least two years beyond termination of the construction contract. The purchase of an extended discovery period or an extended reporting period on a Claims-Made policy will not be sufficient to meet the terms of this provision.	
§ 5	**Pollution Liability.**[80] Contractor is to maintain pollution liability insurance meeting at least the following specifications.		
§ 5.1	**Minimum Limits**	Limits of coverage shall be no less than:	
		$1,000,000	Each Loss.
		$2,000,000	Annual Aggregate.
		If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be $3,000,000 Each Loss and Aggregate.	
§ 5.2	**Form**	This insurance shall include prior acts coverage sufficient to cover all services rendered by the Contractor. This coverage may be provided on a claims-made basis.	
§ 5.3	**Scope**	The policy must provide coverage for:	
		a.	The full scope of the named insured's operations (on-going and completed) as described within the scope of work.
		b.	Loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall.
		c.	Third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations.
		d.	Diminution of value and Natural Resources damages.
		e.	Contractual liability.
		f.	Claims arising from owned and non-owned disposal sites utilized in the performance of the Work.

No.	Specifications	Coverages, Limits & Other Requirements	
		Coverage extensions to the General Liability insurance policy without a separate insurance agreement for Contractors Pollution Liability insurance will not fulfill this requirement.	
§ 5.4	**Additional Insured and Primary and Noncontributory**	The policy must insure contractual liability, name Landlord Parties as an Additional Insureds, and be primary and noncontributory to all coverage available to the Additional Insureds.	
§ 5.5	**Retroactive Date**	If coverage is provided on a Claims Made basis, coverage will at least be retroactive to the earlier of the date of the construction contract or the commencement of contractor services relation to the Work.	
§ 5.6	**Prohibitions**	This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from:	
		a.	Insured vs. insured actions. However exclusion for claims made between insured within the same economic family are acceptable.
		b.	Impaired property that has not been physically injured.
		c.	Materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.
		d.	Property damage to the work performed by the contractor.
		e.	Faulty workmanship as it relates to clean up costs.
		f.	Punitive, exemplary or multiplied damages.
		g.	Work performed by subcontractors.
		h.	Liability incurred as a result of an injury to an employee of the insured.
§ 5.7	**Term**	Completed operations coverage shall be maintained for a minimum of 7 years after the completion of work. (The extended reporting period on a claims made based policy does not fulfill this requirement) CPL insurance policies insuring a specific job shall have completed operations coverage for at least the duration of the work plus 7 years.	
§ 5.8	**Notice**	This insurance is to be endorsed to give Landlord at least 30 days' advance notice of cancellation of [or material change] in coverage.	
B. PROPERTY			
§ 1	**Builder's Risk Insurance.** [81] Tenant's contractor or Tenant is to maintain builder's risk insurance meeting at least the following specifications.		
§ 1.1	**Amount**	Limits of coverage are to be the Initial Contract Sum, plus an amount to be acceptable to Landlord, to increase by amount of subsequent modification of the Contract Sum. Coverage shall be provided in amount equal at all times to the full replacement value [82] and costs of debris removal for any single occurrence. Coverage is to include Contractor's overhead and profit.	
§ 1.2	**Covered Property**	The following property is to be insured:	
		a.	All structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, pilings, underground pipes and wiring, excavations, grading, backfilling or filling.
		b.	All temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary utilities and buildings) located at the site.

No.	Specifications	Coverages, Limits & Other Requirements	
		c.	All property including materials and supplies on site for installation.
		d.	All property including materials and supplies at other locations but intended for use at the site.
		e.	All property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit.
		f.	Other Work at the site identified in the Lease.
		g.	Other property for which an insured is liable regarding the project.
		h.	Sod, trees, shrubs and plants.
§ 1.3	**Deductibles**	Deductibles shall not exceed an amount acceptable to Landlord. [83]	
§ 1.4	**Insureds**	Insureds shall include: [84]	
		a.	Landlord, Contractor and all Loss Payees and Mortgagees as Named Insureds.
		b.	Tenant, and other tenants designated by Landlord to Contractor.
		c.	Subcontractors of all tiers. [85]
§ 1.5	**Form**	Causes of Loss – Special Form. [86] Coverage on this insurance is to be written to cover "all risks" of physical loss except those specifically excluded in the policy, and all exclusions must be pre-approved by Landlord and Contractor, and coverage shall be at least as broad as an unmodified ISO Causes of Loss – Special Form, and shall insure at least against the perils of fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, theft, vandalism, malicious mischief, and collapse and such additional perils and coverages as indicated below, with each of the perils as added as a cause of loss, if not otherwise listed in the policy as a cause of loss. [87]	
		a.	Completed Value Basis. [88] This insurance is to be written on a Completed-Value, Non-Reporting form basis. [89]
		b.	Insureds Other Insurance Excess and Noncontributing. Builder's Risk shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess, secondary and non-contributing.
§ 1.6	**Prohibition**	No protective safeguard warranty is permitted. [90]	
§ 1.7	**Coverage and Minimum Sublimits**	Required Endorsements as to Coverage & Limits. To include	
		Coverage	Minimum Sublimit [91]
		Additional expenses due to delay in completion of project and contract penalties	Amount subject to approval by Landlord.
		Agreed Value [92]	Included without sublimit.
		Business income/rental value	Amount subject to approval by Landlord.
		Collapse [93]	Included without sublimit.
		Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse and ensuing loss	Included without sublimit.
		Debris removal including demolition as may be made legally necessary by	[Included without sublimit.][$___.]

No.	Specifications	Coverages, Limits & Other Requirements	
		operation of any law, ordinance, or regulation [94]	
		Faulty or defective planning, designs, materials or maintenance resulting in damage to Covered Property, including collapse	Included without sublimit.
		Mechanical breakdown, including hot & cold testing	Amount subject to approval by Landlord.
		Occupancy pre-completion clause [95]	To be included.
		Ordinance or law [96]	Included without sublimit.
		Pollutant cleanup and removal	$___.
		Property in transit	$___.
		Preservation of property	Included without sublimit.
		Property off premises	$___.
		Replacement cost [97]	To be included.
		Soft costs [98]	Amount subject to approval by Landlord.
		Terrorism	Amount subject to approval by Landlord.
		Theft	Included without sublimit.
		Waiver of subrogation [99]	To be included.
		[Earthquake, earth movement	$___.]
		[Earthquake sprinkler leakage	$___.]
		[Flood [100]	$___.]
		[Landscaping	$___.]
		[Volcanic activity	$___.]
§ 1.8	**Waiver of Subrogation** See AIA A201 § 11.3.7	To the extent of insurance proceeds received, a waiver of subrogation by insurer as to Landlord Parties, Tenant, Tenant's Contractor, its subcontractors of all tiers, and other persons as may be designated by Landlord.	
§ 1.9	**Notices** See AIA A201 §§ 11.1.3 and 11.3.6.	30 days prior written notice to each insured of cancellation.	
§ 1.10	**Tenant Finish-Out** See AIA A201 § 11.3.1.5.	Builder's risk policy shall specifically permit partial occupancy by tenants in connection with construction of finish-out of Leased Premises.	
§ 1.11	**Term and Termination** [101]	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;

No.	Specifications	Coverages, Limits & Other Requirements	
		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.** This coverage may be included in the builder's risk policy or be by a separate policy.		
C. OTHER INSURANCE [102] Tenant is to maintain such other insurance against other insurable liabilities or hazards as Landlord may from time to time reasonably require.			

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

No.	Specifications	Coverages, Limits & Other Requirements	
A. LIABILITY			
§ 1	**Commercial General Liability.** Landlord is to maintain commercial general liability insurance ("CGL") issued on an Occurrence Basis meeting at least the following specifications.		
§ 1.1	**Minimum Limits**	The minimum limits of coverage are subject to the periodic review and approval by Landlord, but are not to be less than the following amounts:	
		$__,000,000	Per Occurrence.
		$__,000,000	General Aggregate.
		$__,000,000	Product-Completed Operations Aggregate Limit.
		$_____	Personal and Advertising Injury limit
		$_____	Damage to Premises Rented to You Limit.
		$_____	Medical Expense Limit.
§ 1.2	**General Aggregate**	If the CGL insurance contains a General Aggregate limit, it shall apply separately to this Property.	
§ 1.3	**Form**	This insurance is to be on the current edition of an **ISO CG 00 01**.	
§ 1.4	**Waiver of Subrogation**	This insurance is to be endorsed with an **ISO CG 24 04** Waiver of Transfer of Rights of Recovery Against Others Endorsement to include a waiver of subrogation by insurer as to the Landlord Parties and other persons as may be designated by Landlord.	
B. PROPERTY			
§ 1	**Property Insurance on Causes of Loss - Special Form.** Landlord is to maintain property insurance on a Causes of Loss – Special Form meeting at least the following specifications. This insurance is formerly known as "all risk". [103]		
§ 1.1	**Coverage**	This insurance is to be issued for 100% of Replacement Cost, [104] on an Agreed Value basis, for the Project including all Buildings [105] [including the leasehold improvements] [up to the amount of the Construction Allowance for the initial Tenant Improvements] [excluding Tenant Improvements and Betterments] [106] and all Landlord-owned equipment and other property used in connection therewith.	
§ 1.2	**Form**	This insurance is to be issued on an **ISO CP 10 30**[, or equivalent form].	
§ 1.3	**Insureds**	This insurance is to name as insureds Landlord and such other persons as may be designated by Landlord.	

§ 1.4	**Required Endorsements as to Coverage/Limits**	This insurance is to be endorsed to include coverages as shall be required by Landlord, but may include Business Income and Extra Expense; Rental Value; Glass; Ordinance or Law; Terrorism; Signs.
§ 1.5	**Waiver of Subrogation**	This insurance is to include a waiver of subrogation by insurer as to the Landlord, Tenant and other persons as may be designated by Landlord. [107]

4. AIA Document A101 – 2017 Exhibit A Insurance and Bonds.

a. AIA 2017 – 10 Year Revision Cycle

Every 10 years the core set of AIA Contract Documents are reviewed and updated based on industry trends and court decisions. In April 2017, AIA released 11 revised AIA forms and contracts and 18 forms and agreements will be released in late 2017. Once the 2017 documents are released, the 2007 editions of the documents can continue to be used for up to 18 months.

b. AIA Document 101 – 2017 Exhibit A *Insurance and Bonds*

One of the key changes in the AIA Contract Documents was the revision of the insurance provisions set out in the AIA A201 and the adoption of new AIA Document 101 – 2017 Exhibit A *Insurance and Bonds.* This Insurance Bonds Exhibit is intended to be used in conjunction with the review A201 – 2017 and is Exhibit A to the 2017 versions of the A101, A102 and A103. The modifications are sweeping, both in form and in substance. From a form standpoint, the documents look very different. In prior versions, the "guts" of the insurance requirements were contained in the very lengthy and complicated provisions of Article 11 of the A201. Article 11 has been "skinnied down", and the meat of the required insurance program has now been relocated and substantially rewritten in the new Exhibit A. That exhibit takes a different approach to insurance specifications. While it contains some of the boilerplate formerly of Article 11, it also contains a "**check-the-box**" feature for certain types of coverage requirements and limits. The more significant aspects of this new approach are set out below.

(1) Builder's Risk Insurance.

The Owner's obligation to procure Builders' Risk Insurance ("**BRI**"), unless placed on the Contractor, is revised to specify the following:

(a) **All Risks.** BRI is to be written on an "all-risks" completed value or equivalent policy form.

(b) **Replacement Costs.** The total value of the project on a replacement cost basis is to be covered

(c) **Through Correction Work.** BRI is to be maintained until Substantial Completion, then continued until the expiration of the period for correction of the Work,

(d) **All Parties as Insureds.** The Owner, Contractor, Subcontractors (and further tiers) would be all covered by the insurance.

(e) **Prohibition of Elimination of Key Coverages.** The insurance cannot exclude the risks of, among others, fire, vandalism, collapse, flood, or losses caused by professional error or defective workmanship. (See Subsections of § A.2.3.)

(f) **Existing Structure to be Covered along with Additions and Remodeling.** In the case of additions or remodeling projects, coverage is required for the already-existing structure. (§ A.2.3.3.)

(g) **Check the Box for Additional Optional Coverages.** The parties are to check boxes for the varying types of additional coverage (*i.e.*, business interruption, expediting costs) (§ A.2.4)

(h) **Sublimits to be Specified.** The parties are to specifically identify the submits required for each. (§A.2.3.1.2.)

(i) **Owner's Settlement Authority.** Section 11.5 of A201 now clarifies that the Owner has the sole responsibility to adjust and settle a BRI claim. In doing so, it acts as a fiduciary and the distribution of proceeds must be handled accordingly. Prior to such settlement, the Owner is required to "notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds." The Contractor has 14 days to object, and in the absence of timely objection, the Contractor is forever bound by the settlement and allocation. If timely objection is made, the Owner may proceed to settle, but the allocation may be subject to the dispute resolution procedures of A201's Article 15. Another important change is that, if the Owner fails to procure the required insurance, it is liable to the Contractor under Section 11.2.2 "for all reasonable costs and damages attributable thereto."

(2) Commercial General Liability.

Various types of coverage which the parties agree to be the Contractor's responsibility are separately and succinctly described in Article A.3 (Contractor's Insurance and Bonds). There is a blank to fill in to insert the limits of each, and a **check-the-box** listing for certain types of insurance. The one requiring the most focus is Commercial General Liability ("**CGL**"). While there are few changes in the basic types of CGL coverage, the following items are notable.

(a) **Through Correction Work.** CGL coverage is required to remain in place through the period for corrective work.

(b) **Completed Operations.** CGL is required to cover the Contractor's completed operations.

(c) **Prohibited Exclusions.** Numerous exclusions that have historically been commonplace in typical CGL policies are prohibited. For example, Section A.3.2.2.2 lists eleven different CGL exclusions or restrictions on coverages that, if left as is, would require procurement of a CGL policy that does not contain such exclusions or restrictions (*e.g.*, the Insured v. Insured exclusion and the subcontractor exception to the Your Work exclusion).

(d) **Insurance to Cover Contractor's Indemnity.** The Contractor is required to procure insurance to cover its indemnity obligations under A201's Section 3.18.1. Note, however, that the 2017 revisions did not change Section 3.18.1.

AIA Document A201 – 2017
General Conditions of the Contract for Construction

ARTICLE 11 INSURANCE AND BONDS

§ 11.1 Contractor's Insurance and Bonds

§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, and Architect's consultants shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents.

§ 11.1.2 The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by the Contract Documents. The Contractor shall purchase and maintain the required bonds from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located.

§ 11.1.3 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance. Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

§ 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Owner shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance

premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

§ 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance

The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, due to fire or other hazards however caused.

§11.5 Adjustment and Settlement of Insured Loss

§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2. The Owner shall pay the Architect and Contractor their just shares of insurance proceeds received by the Owner, and by appropriate agreements the Architect and Contractor shall make payments to their consultants and Subcontractors in similar manner.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object to the proposed settlement or allocation of the proceeds. If the Contractor does not object, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation. Upon receipt, the Owner shall deposit the insurance proceeds in a separate account and make the appropriate distributions. Thereafter, if no other agreement is made or the Owner does not terminate the Contract for convenience, the Owner and Contractor shall execute a Change Order for reconstruction of the damaged or destroyed Work in the amount allocated for that purpose. If the Contractor timely objects to either the terms of the proposed settlement or the allocation of the proceeds, the Owner may proceed to settle the insured loss, and any dispute between the Owner and Contractor arising out of the settlement or allocation of the proceeds shall be resolved pursuant to Article 15. Pending resolution of any dispute, the Owner may issue a Construction Change Directive for the reconstruction of the damaged or destroyed Work.

AIA Document A101 – 2017 Exhibit A

Insurance and Bonds

This Insurance and Bonds Exhibit is part of the Agreement, between the Owner and the Contractor, dated the __ day of ___ in the year _____

for the following

PROJECT: _____

THE OWNER: _____

THE CONTRACTOR: _____

TABLE OF ARTICLES

A.1 GENERAL

A.2 OWNER'S INSURANCE

A.3 CONTRACTOR'S INSURANCE AND BONDS

A.4 SPECIAL TERMS AND CONDITIONS

ARTICLE A.1 GENERAL

The Owner and Contractor shall purchase and maintain insurance, and provide bonds, as set forth in this Exhibit. As used in this Exhibit, the term General Conditions refers to AIA Document A201™–2017, General Conditions of the Contract for Construction.

ARTICLE A.2 OWNER'S INSURANCE

§ A.2.1 General

Prior to commencement of the Work, the Owner shall secure the insurance, and provide evidence of the coverage, required under this Article A.2 and, upon the Contractor's request, provide a copy of the property insurance policy or policies required by Section A.2.3. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.

§ A.2.2 Liability Insurance

The Owner shall be responsible for purchasing and maintaining the Owner's usual general liability insurance.

§ A.2.3 Required Property Insurance

§ A.2.3.1 Unless this obligation is placed on the Contractor pursuant to Section A.3.3.2.1, the Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Owner's property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section A.2.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees.

§ A.2.3.1.1 Causes of Loss. The insurance required by this Section A.2.3.1 shall provide coverage for direct physical loss or damage, and shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. Sub-limits, if any, are as follows:
(Indicate below the cause of loss and any applicable sub-limit.)

Causes of Loss	Sub-Limit

§ A.2.3.1.2 Specific Required Coverages. The insurance required by this Section A.2.3.1 shall provide coverage for loss or damage to falsework and other temporary structures, and to building systems from testing and startup. The insurance shall also cover debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and reasonable compensation for the Architect's and Contractor's services and expenses required as a result of such insured loss, including claim preparation expenses. Sub-limits, if any, are as follows:
(Indicate below type of coverage and any applicable sub-limit for specific required coverages.)

Coverage	Sub-Limit

§ A.2.3.1.3 Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Section A.2.3.1 or, if necessary, replace the insurance policy required under Section A.2.3.1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 12.2.2 of the General Conditions.

§ A.2.3.1.4 Deductibles and Self-Insured Retentions. If the insurance required by this Section A.2.3 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.

§ A.2.3.2 Occupancy or Use Prior to Substantial Completion. The Owner's occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company or companies providing the insurance under Section A.2.3.1 have consented in writing to the continuance of coverage. The Owner and the Contractor shall take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance, unless they agree otherwise in writing.

§ A.2.3.3 Insurance for Existing Structures
If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, "all-risks" property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage from the causes of loss identified in Section A.2.3.1, notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties.

§ A.2.4 Optional Extended Property Insurance.
The Owner shall purchase and maintain the insurance selected and described below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. For each type of insurance selected, indicate applicable limits of coverage or other conditions in the fill point below the selected item.)

[ ] **§ A.2.4.1 Loss of Use, Business Interruption, and Delay in Completion Insurance**, to reimburse the Owner for loss of use of the Owner's property, or the inability to conduct normal operations due to a covered cause of loss.

[ ] **§ A.2.4.2 Ordinance or Law Insurance**, for the reasonable and necessary costs to satisfy the minimum requirements of the enforcement of any law or ordinance regulating the demolition, construction, repair, replacement or use of the Project.

[ ] **§ A.2.4.3 Expediting Cost Insurance**, for the reasonable and necessary costs for the temporary repair of damage to insured property, and to expedite the permanent repair or replacement of the damaged property.

[ ] **§ A.2.4.4 Extra Expense Insurance**, to provide reimbursement of the reasonable and necessary excess costs incurred during the period of restoration or repair of the damaged property that are over and above the total costs that would normally have been incurred during the same period of time had no loss or damage occurred.

[ ] **§ A.2.4.5 Civil Authority Insurance**, for losses or costs arising from an order of a civil authority prohibiting access to the Project, provided such order is the direct result of physical damage covered under the required property insurance.

[ ] **§ A.2.4.6 Ingress/Egress Insurance**, for loss due to the necessary interruption of the insured's business due to physical prevention of ingress to, or egress from, the Project as a direct result of physical damage.

[ ] **§ A.2.4.7 Soft Costs Insurance**, to reimburse the Owner for costs due to the delay of completion of the Work, arising out of physical loss or damage covered by the required property insurance: including construction loan fees; leasing and marketing expenses; additional fees, including those of architects, engineers, consultants, attorneys and accountants, needed for the completion of the construction, repairs, or reconstruction; and carrying costs such as property taxes, building permits, additional interest on loans, realty taxes, and insurance premiums over and above normal expenses.

§ A.2.5 Other Optional Insurance.
The Owner shall purchase and maintain the insurance selected below.

(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance.)

[ ] **§ A.2.5.1 Cyber Security Insurance** for loss to the Owner due to data security and privacy breach, including costs of investigating a potential or actual breach of confidential or private information.
(Indicate applicable limits of coverage or other conditions in the fill point below.)

[ ] **§ A.2.5.2 Other Insurance**
(List below any other insurance coverage to be provided by the Owner and any applicable limits.)

Coverage	**Limits**

ARTICLE A.3 CONTRACTOR'S INSURANCE AND BONDS

§ A.3.1 General

§ A.3.1.1 Certificates of Insurance. The Contractor shall provide certificates of insurance acceptable to the Owner evidencing compliance with the requirements in this Article A.3 at the following times: (1) prior to commencement of the Work; (2) upon renewal or replacement of each required policy of insurance; and (3) upon the Owner's written request. An additional certificate evidencing continuation of commercial liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment and thereafter upon renewal or replacement of such coverage until the expiration of the periods required by Section A.3.2.1 and Section A.3.3.1. The certificates will show the Owner as an additional insured on the Contractor's Commercial General Liability and excess or umbrella liability policy or policies.

§ A.3.1.2 Deductibles and Self-Insured Retentions. The Contractor shall disclose to the Owner any deductible or self-insured retentions applicable to any insurance required to be provided by the Contractor.

§ A.3.1.3 Additional Insured Obligations. To the fullest extent permitted by law, the Contractor shall cause the commercial general liability coverage to include (1) the Owner, the Architect, and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04.

§ A.3.2 Contractor's Required Insurance Coverage

§ A.3.2.1 The Contractor shall purchase and maintain the following types and limits of insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:
(If the Contractor is required to maintain insurance for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.2.2 Commercial General Liability

§ A.3.2.2.1 Commercial General Liability insurance for the Project written on an occurrence form with policy limits of not less than ($_____) each occurrence, ($_____) general aggregate, and ($_____) aggregate for products-completed operations hazard, providing coverage for claims including

- **.1** damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;
- **.2** personal injury and advertising injury;
- **.3** damages because of physical damage to or destruction of tangible property, including the loss of use of such property;
- **.4** bodily injury or property damage arising out of completed operations; and
- **.5** the Contractor's indemnity obligations under Section 3.18 of the General Conditions.

§ A.3.2.2.2 The Contractor's Commercial General Liability policy under this Section A.3.2.2 shall not contain an exclusion or restriction of coverage for the following:

.1 Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.

.2 Claims for property damage to the Contractor's Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor.

.3 Claims for bodily injury other than to employees of the insured.

.4 Claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employees of the insured.

.5 Claims or loss excluded under a prior work endorsement or other similar exclusionary language.

.6 Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.

.7 Claims related to residential, multi-family, or other habitational projects, if the Work is to be performed on such a project.

.8 Claims related to roofing, if the Work involves roofing.

.9 Claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coatings or surfaces.

.10 Claims related to earth subsidence or movement, where the Work involves such hazards.

.11 Claims related to explosion, collapse and underground hazards, where the Work involves such hazards.

§ A.3.2.3 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Contractor, with policy limits of not less than ($_____) per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles along with any other statutorily required automobile coverage.

§ A.3.2.4 The Contractor may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Section A.3.2.2 and A.3.2.3, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§ A.3.2.5 Workers' Compensation at statutory limits.

§ A.3.2.6 Employers' Liability with policy limits not less than ($_____) each accident, ($_____) each employee, and ($_____) policy limit.

§ A.3.2.7 Jones Act, and the Longshore & Harbor Workers' Compensation Act, as required, if the Work involves hazards arising from work on or near navigable waterways, including vessels and docks

§ A.3.2.8 If the Contractor is required to furnish professional services as part of the Work, the Contractor shall procure Professional Liability insurance covering performance of the professional services, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.9 If the Work involves the transport, dissemination, use, or release of pollutants, the Contractor shall procure Pollution Liability insurance, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.10 Coverage under Sections A.3.2.8 and A.3.2.9 may be procured through a Combined Professional Liability and Pollution Liability insurance policy, with combined policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.11 Insurance for maritime liability risks associated with the operation of a vessel, if the Work requires such activities, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.2.12 Insurance for the use or operation of manned or unmanned aircraft, if the Work requires such activities, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate.

§ A.3.3 Contractor's Other Insurance Coverage

§ A.3.3.1 Insurance selected and described in this Section A.3.3 shall be purchased from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:
(If the Contractor is required to maintain any of the types of insurance selected below for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.3.2 The Contractor shall purchase and maintain the following types and limits of insurance in accordance with Section A.3.3.1.
(Select the types of insurance the Contractor is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. Where policy limits are provided, include the policy limit in the appropriate fill point.)

[ ] **§ A.3.3.2.1** Property insurance of the same type and scope satisfying the requirements identified in Section A.2.3, which, if selected in this section A.3.3.2.1, relieves the Owner of the responsibility to purchase and maintain such insurance except insurance required by Section A.2.3.1.3 and Section A.2.3.3. The Contractor shall comply with all obligations of the Owner under Section A.2.3 except to the extent provided below. The Contractor shall disclose to the Owner the amount of any deductible, and the Owner shall be responsible for losses within the deductible. Upon request, the Contractor shall provide the Owner with a copy of the property insurance policy or policies required. The Owner shall adjust and settle the loss with the insurer and be the trustee of the proceeds of the property insurance in accordance with Article 11 of the General Conditions unless otherwise set forth below:
(Where the Contractor's obligation to provide property insurance differs from the Owner's obligations as described under Section A.2.3, indicate such differences in the space below. Additionally, if a party other than the Owner will be responsible for adjusting and settling a loss with the insurer and acting as the trustee of the proceeds of property insurance in accordance with Article 11 of the General Conditions, indicate the responsible party below.)

[ ] **§ A.3.3.2.2 Railroad Protective Liability Insurance**, with policy limits of not less than ($_____) per claim and ($ _____) in the aggregate, for Work within fifty (50) feet of railroad property.

[ ] **§ A.3.3.2.3 Asbestos Abatement Liability Insurance**, with policy limits of not less than ($_____) per claim and ($_____) in the aggregate, for liability arising from the encapsulation, removal, handling, storage, transportation, and disposal of asbestos-containing materials.

[ ] **§ A.3.3.2.4** Insurance for physical damage to property while it is in storage and in transit to the construction site on an "all-risks" completed value form.

[ ] **§ A.3.3.2.5** Property insurance on an "all-risks" completed value form, covering property owned by the Contractor and used on the Project, including scaffolding and other equipment.

[ ] **§ A.3.3.2.6 Other Insurance**
(List below any other insurance coverage to be provided by the Contractor and any applicable limits.)

Coverage	**Limits**

§ A.3.4 Performance Bond and Payment Bond

The Contractor shall provide surety bonds, from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located, as follows:

(Specify type and penal sum of bonds.)

Type	Penal Sum ($0.00)
Payment Bond	
Performance Bond	

Payment and Performance Bonds shall be AIA Document A312™, Payment Bond and Performance Bond, or contain provisions identical to AIA Document A312™, current as of the date of this Agreement.

ARTICLE A.4 SPECIAL TERMS AND CONDITIONS

Special terms and conditions that modify this Insurance and Bonds Exhibit, if any, are as follows:

B. INSURANCE INDUSTRY FORMS

1. Standard Forms

a. Liability Insurance Forms

b. Property Insurance Forms

c. Certificates

2. Manuscript Liability Endorsements

COMMERCIAL GENERAL
CG DS 01 10 01

COMMERCIAL GENERAL LIABILITY DECLARATIONS

COMPANY NAME AREA	PRODUCER NAME AREA

NAMED INSURED: _____

MAILING ADDRESS: _____

_____

POLICY PERIOD: FROM _____ TO _____ AT 12:01 A.M. TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	$ _____	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	$ _____	Any one premises
MEDICAL EXPENSE LIMIT	$ _____	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	$ _____	Any one person or organization
GENERAL AGGREGATE LIMIT	$ _____	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	$ _____	

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE:[108] _____

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:[109]

☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ TRUST

☐ LIMITED LIABILITY COMPANY ☐ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY)

BUSINESS DESCRIPTION: _____

ALL PREMISES YOU OWN, RENT OR OCCUPY [110]	
LOCATION NUMBER	ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
			$	$	$	$	$

STATE TAX OR OTHER (if applicable) $ _____

TOTAL PREMIUM (SUBJECT TO AUDIT) $ _____

PREMIUM SHOWN IS PAYABLE:

AT INCEPTION $ _____

AT EACH ANNIVERSARY $ _____

(IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

AUDIT PERIOD (IF APPLICABLE)	☐ ANNUALLY	☐ SEMI-ANNUALLY	☐ QUARTERLY	☐ MONTHLY

ENDORSEMENTS
ENDORSEMENTS ATTACHED TO THIS POLICY: [111]
_____
_____
_____

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned:	By:
(Date)	(Authorized Representative)

NOTE

OFFICERS' FACSIMILE SIGNATURES MAY BE INSERTED HERE, ON THE POLICY COVER OR ELSEWHERE AT THE COMPANY'S OPTION.

CG DS 01 10 01

COMMERCIAL PROPERTY
CG 00 01 04 13

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

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

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** - Who Is An Insured.

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

SECTION I - COVERAGES

COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or

"property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability [112]

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

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

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "**insured contract**", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract" and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability [113]

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1), (2)** or **(3)** above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic

beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws [114]

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution [115]

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire"

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are

brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants" or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or

monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;[116]

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part[117] of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations,[118] if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.[119]

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to

premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** - Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3), (4), (5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".[120]

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.[121]

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work" or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product"

(2) "Your work" or

(3) "Impaired property"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data [122]

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law [123]

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the

Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** - Limits Of Insurance.

COVERAGE B - PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods - Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14. a., b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants" or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or

expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

COVERAGE C - MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations; provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit"

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit"

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit" and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation

expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II - WHO IS AN INSURED [124]

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or

any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

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

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C**;

b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" and

c. Damages under Coverage **B**.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage **A**; and

b. Medical expenses under Coverage **C**

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In

that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit"

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit" and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance [125]

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

a. Primary Insurance

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

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work"

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you

with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.[126]

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

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

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

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

c. Method Of Sharing

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

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

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds [127]

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part

to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us[128]

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew [129]

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

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

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph a. above;

(2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

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

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement;

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

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

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

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

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

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

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

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto"

b. While it is in or on an aircraft, watercraft or "auto" or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.[130]

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement" or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

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

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product" and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work" and

(2) The providing of or failure to provide warnings or instructions.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 02 05 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TEXAS CHANGES – AMENDMENT OF CANCELLATION PROVISIONS OR COVERAGE CHANGE[131]

This endorsement modifies insurance provided under the following:

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

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

SCHEDULE

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 04 37 04 13

ELECTRONIC DATA LIABILITY[132]

This endorsement modifies insurance provided under the following:

1. COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Loss Of Electronic Data Limit: $
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Exclusion **2.p.** of **Coverage A – Bodily Injury And Property Damage Liability** in **Section I – Coverages** is replaced by the following:

2. Exclusions

a. This insurance does not apply to:

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate "electronic data" that does not result from physical injury to tangible property.

However, this exclusion does not apply to liability for damages because of "bodily injury".

B. The following paragraph is added to **Section III – Limits Of Insurance:**

Subject to **5.** above, the Loss of Electronic Data Limit shown in the Schedule above is the most we will pay under Coverage **A** for "property damage" because of all loss of "electronic data" arising out of any one "occurrence".

C. The following definition is added to the **Definitions** section:
"Electronic data" means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

D. For the purposes of the coverage provided by this endorsement, the definition of "property damage" in the **Definitions** section is replaced by the following:

b. **17.** "Property damage" means:

c. **a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;

d. **b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it; or

e. **c.** Loss of, loss of use of, damage to, corruption of, inability to access, or inability to properly manipulate "electronic data", resulting from physical injury to tangible property. All such loss of "electronic data" shall be deemed to occur at the time of the "occurrence" that caused it.

f. For the purposes of this insurance, "electronic data" is not tangible property.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 01 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION[133]

This endorsement modifies insurance provided under the following:

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

The following is added to the **Other Insurance Condition** and supersedes any provision to the contrary:

Primary And Noncontributory Insurance

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

(1) The additional insured is a Named Insured under such other insurance; and

(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION[134]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

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

1. Your acts or omissions;[135] or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations[136] for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law;[137] and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

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

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

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

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

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

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 20 11 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES[138]

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designation of Premises (Part Leased to You):[139] **[*insert suite no., street address and other descriptive information as to what is the "premises" and add the following: and the appurtenant use of the "Common Areas" as defined in the Lease between _____ as Tenant and _____, as Landlord*]**
Name of Person or Organization (Additional Insured): [*insert name of additional insureds: (a) _____, and its successors and assigns (the owner/landlord), and its directors and employees, (b) _____, (property manager), and (c) _____ (owner's lender)*].
Additional Premium: $
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II - Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use[140] of that part of the premises leased to you[141] and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

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

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 20 24 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS OR OTHER INTERESTS FROM WHOM LAND HAS BEEN LEASED[142]

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Person(s) Or Organization(s)	Designation of Premises (Part Leased to You)[143]
[*insert name of additional insureds*: *(a) _____ (the primary additional insured), and its successors and assigns, and its members and employees and (b) _____ (the designated primary additional insured's lender.)*]	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the land leased to you[144] and shown in the Schedule.
However:
1. The insurance afforded to such additional insured only applies to the extent permitted by law;[145] and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:
This insurance does not apply to:
1. Any "occurrence" which takes place after you cease to lease that land;
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person(s) or organization(s) shown in the Schedule.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits of Insurance**:
If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:
1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

Whichever is less.
This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 20 26 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION[146]

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

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

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions[147] or the acts or omissions of those acting on your behalf:

1. In the performance of your ongoing operations;[148] or
2. In connection with your premises owned by or rented to you.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law;[149] and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

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

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 33 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU[150]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or[151]

2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law;[152] and

2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

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

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering, or surveying services, including:

a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any architectural, engineering or surveying services.

2. "Bodily injury" or "property damage" occurring after:

a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service,

maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

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

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

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement you have entered into with the additional insured; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS[153]

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

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

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

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER

COMMERCIAL GENERAL LIABILITY
CG 20 38 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT[154]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and

2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

a. Your acts or omissions;[155] or

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

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured described above:

a. Only applies to the extent permitted by law;[156] and

b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph **1.** above are completed.

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

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

2. "Bodily injury" or "property damage" occurring after:

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

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

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

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph **A.1.;** or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 39 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONTRACTUAL LIABILITY LIMITATION[157]

This endorsement modifies insurance provided under the following:

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

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

"Insured contract" means:

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

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 42 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – EXPLOSION, COLLAPSE AND UNDERGROUND PROPERTY DAMAGE HAZARD (SPECIFIED OPERATIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Location And Description Of Operations	Excluded Hazard(s)
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. The following exclusion is added to Paragraph **2. Exclusions** in **Section I – Coverages:**

This insurance does not apply to "property damage" included within the "explosion hazard", the "collapse hazard" or the "underground property damage hazard" if any of these hazards is entered as an excluded hazard on the Schedule.

This exclusion does not apply to:

a. Operations performed for you by others; or

b. "Property damage" included within the "products completed operations hazard".

B. The following definitions are added to the **Definitions** Section:

1. "Collapse hazard" includes "structural property damage" and any resulting "property damage" to any other property at any time.

2. "Explosion hazard" includes "property damage" arising out of blasting or explosion. The "explosion hazard" does not include "property damage" arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment.

3. "Structural property damage" means the collapse of or structural injury to any building or structure due to:

a. Grading of land, excavating, borrowing, filling, back-filling, tunneling, pile driving, cofferdam work or caisson work; or

b. Moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support of that building or structure.

4. "Underground property damage hazard" includes "underground property damage" and any resulting "property damage" to any other property at any time.

5. "Underground property damage" means "property damage" to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus used with them beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 43 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – EXPLOSION, COLLAPSE AND UNDERGROUND PROPERTY DAMAGE HAZARD (SPECIFIED OPERATIONS EXCEPTED)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Location And Description Of Operations	Covered Hazard(s)
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. The following exclusion is added to Paragraph **2. Exclusions** in **Section I – Coverages:**

This insurance does not apply to "property damage" arising out of the "explosion hazard", the "collapse hazard" or the "underground property damage hazard".

This exclusion does not apply to:

a. Operations performed for you by others;

b. "Property damage" included within the "products-completed operations hazard"; or

c. Any operation described in the Schedule above, if any of these hazards is entered as a covered hazard.

B. The following definitions are added to the **Definitions** Section:

1. "Collapse hazard" includes "structural property damage" and any resulting "property damage" to any other property at any time.

2. "Explosion hazard" includes "property damage" arising out of blasting or explosion. The "explosion hazard" does not include "property damage" arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment.

3. "Structural property damage" means the collapse of or structural injury to any building or structure due to:

a. Grading of land, excavating, borrowing, filling, back-filling, tunnelling, pile driving, cofferdam work or caisson work; or

b. Moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support of that building or structure.

4. "Underground property damage hazard" includes "underground property damage" and any resulting "property damage" to any other property at any time.

5. "Underground property damage" means "property damage" to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus used with them beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 44 07 98

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT[158]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Premises:
Project:

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

This insurance applies only to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

COMMERCIAL GENERAL LIABILITY
CG 22 34 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph **2. Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability:**

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications by any architect, engineer or surveyor performing services on a project on which you serve as construction manager; or

2. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved that which is described in Paragraph **1.** or **2.**

This exclusion does not apply to "bodily injury" or "property damage" due to construction or demolition work done by you, your "employees" or your subcontractors.

COMMERCIAL GENERAL LIABILITY
CG 22 43 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph **2. Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability:**

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

COMMERCIAL GENERAL LIABILITY
CG 22 70 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

REAL ESTATE PROPERTY MANAGED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following is added to Exclusion **j. Damage To Property** of Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

j. Damage To Property

"Property damage" to:

Property you operate or manage or as to which you act as agent for the collection of rents or in any other supervisory capacity.

B. The following is added to Paragraph **4.b.(1)** of **Other Insurance** of **Section IV – Commercial General Liability Conditions:**

4. Other Insurance

b. Excess Insurance

With respect to your liability arising out of your management of property for which you are acting as real estate manager, this insurance is excess over any other valid and collectible insurance available to you, whether such insurance is primary or excess.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 22 79 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CONTRACTORS – PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY
COVERAGE PART

The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph **2. Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability:**

1. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:

a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and

b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional services by you or on your behalf with respect to the operations described above.

2. Subject to Paragraph **3.** below, professional services include:

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

b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 22 94 10 01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF[159]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion **l.** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 22 95 10 01

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF – DESIGNATED SITES OR OPERATIONS[160]

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Designated Sites Or Operations

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

With respect to those sites or operations designated in the Schedule of this endorsement, Exclusion **I.** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

I. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 24 04 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US[161]

This endorsement modifies insurance provided under the following:

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

SCHEDULE

Name Of Person Or Organization:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The following is added to Paragraph **8. Transfer Of Rights Of Recovery Against Others To Us** of **Section IV – Conditions:**

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

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 24 26 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION[162]

This endorsement modifies insurance provided under the following:

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

The definition of "insured contract" in the **Definitions** section is replaced by the following:

"Insured contract" means:

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

b. A sidetrack agreement;

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

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

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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

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

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

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

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

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

POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY**
CG 25 04 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED LOCATION(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Location(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A,** and for all medical expenses caused by accidents under Section **I** – Coverage **C,** which can be attributed only to operations at a single designated "location" shown in the Schedule above:

1. A separate Designated Location General Aggregate Limit applies to each designated "location", and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.

2. The Designated Location General Aggregate Limit is the most we will pay for the sum of all damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under Coverage **C** regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

3. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the Designated Location General Aggregate Limit for that designated "location". Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Location General Aggregate Limit for any other designated "location" shown in the Schedule above.

4. The limits shown in the Declarations for Each Occurrence, Damage To Premises Rented To You and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Location General Aggregate Limit.

B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A,** and for all medical expenses caused by accidents under Section **I** – Coverage **C,** which cannot be attributed only to operations at a single designated "location" shown in the Scheduleabove:

1. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-completed Operations Aggregate Limit, whichever is applicable; and
2. Such payments shall not reduce any Designated Location General Aggregate Limit.

C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Location General Aggregate Limit.

D. For the purposes of this endorsement, the **Definitions** Section is amended by the addition of the following definition:

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

E. The provisions of Section **III** – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP DS 00 10 00

COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS PAGE[163]

POLICY NO. **EFFECTIVE DATE** ____/ ____/ ____ ☐ **"X" If Supplemental Declarations Is Attached**

NAMED INSURED

DESCRIPTION OF PREMISES

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

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

Prem. No.	Bldg. No.	Coverage	Limit Of Insurance	Covered Causes Of Loss[164]	Coinsurance*	Rates

*If Extra Expense Coverage, Limits On Loss Payment

OPTIONAL COVERAGES **Applicable Only When Entries Are Made In The Schedule Below**

Prem. No.	Bldg. No.	Agreed Value[165] Expiration Date	Cov.	Amount	Replacement Cost (X)[166] Building	Pers. Prop.	Including "Stock"

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

*Applies to Business Income Only

MORTGAGEHOLDERS[167]

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

DEDUCTIBLE

$500. Exceptions:

FORMS APPLICABLE[168]

To All Coverages:

To Specific Premises/Coverages:

Prem. No.	Bldg. No.	Coverages	Form Number

CP DS 00 10 00

POLICY NUMBER:

COMMERCIAL PROPERTY
IL 00 17 11 98

COMMON POLICY CONDITIONS[169]

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.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 00 10 10 12

BUILDING AND PERSONAL PROPERTY COVERAGE FORM[170]

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

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

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

A. Coverage

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

1. Covered Property

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

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

(1) Completed additions;

(2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery; and

(b) Equipment;

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

(a) Fire-extinguishing equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

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

(5) If not covered by other insurance:

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

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

b. Your Business Personal Property consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater:

(1) Furniture and fixtures;

(2) Machinery and equipment;

(3) "Stock"

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

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

(6) Your use interest as tenant in improvements and betterments.

Improvements and betterments are fixtures, alterations, installations or additions:

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

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

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

c. Personal Property Of Others that is:

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

(2) Located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater.

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

2. Property Not Covered

Covered Property does not include:

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

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

c. Automobiles held for sale;

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

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

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

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

(1) The lowest basement floor; or

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

h. Land (including land on which the property is located), water, growing crops or lawns (other than lawns which are part of a vegetated roof);

i. Personal property while airborne or waterborne;

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

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

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

m. Underground pipes, flues or drains;

n. Electronic data, except as provided under the Additional Coverage[171], Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, n., does not apply to your "stock" of prepackaged software, or to electronic data which is integrated in and operates or

controls the building's elevator, lighting, heating, ventilation, air conditioning or security system;

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

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

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

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

This paragraph does not apply to:

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

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

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

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

q. The following property while outside of buildings:

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

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

3. Covered Causes Of Loss[172]

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

4. Additional Coverages

a. Debris Removal [173]

(1) Subject to Paragraphs **(2)**, **(3)** and **(4)**, we will pay your expense to remove debris of Covered Property and other debris that is on the described premises, when such debris is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

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

(a) Remove debris of property of yours that is not insured under this policy, or property in your possession that is not Covered Property;

(b) Remove debris of property owned by or leased to the landlord of the building where your described premises are located, unless you have a contractual responsibility to insure such property and it is insured under this policy;

(c) Remove any property that is Property Not Covered, including property addressed under the Outdoor Property Coverage Extension;

(d) Remove property of others of a type that would not be Covered Property under this Coverage Form;

(e) Remove deposits of mud or earth from the grounds of the described premises;

(f) Extract "pollutants" from land or water; or

(g) Remove, restore or replace polluted land or water.

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

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

(b) Subject to **(a)** above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage. However, if no Covered Property has sustained direct physical loss or damage, the most we will pay for removal of debris of other property (if such removal is covered under this Additional Coverage) is $5,000 at each location.

(4) We will pay up to an additional $25,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:

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

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

Therefore, if **(4)(a)** and/or **(4)(b)** applies, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus $25,000.

(5) Examples

The following examples assume that there is no Coinsurance penalty.

EXAMPLE 1

Limit of Insurance:	$ 90,000
Amount of Deductible:	$ 500
Amount of Loss:	$ 50,000
Amount of Loss Payable:	$ 49,500
	($50,000 - $500)
Debris Removal Expense:	$ 10,000
Debris Removal Expense Payable:	$ 10,000

($10,000 is 20% of $50,000.)

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

EXAMPLE 2

Limit of Insurance:	$ 90,000
Amount of Deductible:	$ 500
Amount of Loss:	$ 80,000
Amount of Loss Payable:	$ 79,500
	($80,000 - $500)
Debris Removal Expense:	$ 40,000
Debris Removal Expense Payable	
Basic Amount:	$ 10,500
Additional Amount:	$ 25,000

The basic amount payable for debris removal expense under the terms of Paragraph **(3)** is

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

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph **(4)**, because the debris removal expense ($40,000) exceeds 25% of the loss payable plus the deductible ($40,000 is 50% of $80,000), and because the sum of the loss payable and debris removal expense ($79,500 + $40,000 = $119,500) would exceed the Limit of Insurance ($90,000). The additional amount of covered debris removal expense is $25,000, the maximum payable under Paragraph **(4).** Thus, the total payable for debris removal expense in this example is $35,500; $4,500 of the debris removal expense is not covered.

b. Preservation Of Property

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

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

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

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to $1,000 for service at each premises described in the Declarations, unless a higher limit is shown in the Declarations. Such limit is the most we will pay regardless of the number of responding fire departments or fire units, and regardless of the number or type of services performed. This Additional Coverage applies to your liability for fire department service charges:

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

(2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

d. Pollutant Clean-up And Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs. This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water. The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

e. Increased Cost Of Construction [174]

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

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

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

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

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

(b) You failed to comply with.

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

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

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

(6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is $10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of $10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

(7) With respect to this Additional Coverage:

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

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

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

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

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

increased cost of construction at the new premises.

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

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

f. Electronic Data [175]

(1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data. This Additional Coverage does not apply to your "stock" of prepackaged software, or to electronic data which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.

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

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

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

(b) If the Causes Of Loss - Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that form.

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

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

(4) The most we will pay under this Additional Coverage, Electronic Data, is $2,500 (unless a higher

limit is shown in the Declarations) for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises. If a Coinsurance percentage of 80% or more, or a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

a. Newly Acquired Or Constructed Property

(1) Buildings

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

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

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

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

(ii) Use as a warehouse.

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

(2) Your Business Personal Property

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

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

(ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations. The most we will pay for loss or damage under this Extension is $100,000 at each building.

(b) This Extension does not apply to:

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

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

(3) Period Of Coverage

With respect to insurance provided under this Coverage Extension for Newly Acquired Or Constructed Property, coverage will end when any of the following first occurs:

(a) This policy expires;

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

(c) You report values to us.

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

b. Personal Effects And Property Of Others

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

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

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

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

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

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

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

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

d. Property Off-premises

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

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

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

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

(2) This Extension does not apply to property:

(a) In or on a vehicle; or

(b) In the care, custody or control of your salespersons, unless the

property is in such care, custody or control at a fair, trade show or exhibition.

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

e. Outdoor Property

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

(1) Fire;

(2) Lightning;

(3) Explosion;

(4) Riot or Civil Commotion; or

(5) Aircraft.

The most we will pay for loss or damage under this Extension is $1,000, but not more than $250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence. Subject to all aforementioned terms and limitations of coverage, this Coverage Extension includes the expense of removing from the described premises the debris of trees, shrubs and plants which are the property of others, except in the situation in which you are a tenant and such property is owned by the landlord of the described premises.

f. Non-owned Detached Trailers

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

(a) The trailer is used in your business;

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

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

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

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

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

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

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

g. Business Personal Property Temporarily In Portable Storage Units

(1) You may extend the insurance that applies to Your Business Personal Property to apply to such property while temporarily stored in a portable storage unit (including a detached trailer) located within 100 feet of the building or structure described in the Declarations or within 100 feet of the premises described in the Declarations, whichever distance is greater.

(2) If the applicable Covered Causes of Loss form or endorsement contains a limitation or exclusion concerning loss or damage from sand, dust, sleet, snow, ice or rain to property in a structure, such limitation or exclusion also

applies to property in a portable storage unit.

(3) Coverage under this Extension:

(a) Will end 90 days after the business personal property has been placed in the storage unit;

(b) Does not apply if the storage unit itself has been in use at the described premises for more than 90 consecutive days, even if the business personal property has been stored there for 90 or fewer days as of the time of loss or damage.

(4) Under this Extension, the most we will pay for the total of all loss or damage to business personal property is $10,000 (unless a higher limit is indicated in the Declarations for such Extension) regardless of the number of storage units. Such limit is part of, not in addition to, the applicable Limit of Insurance on Your Business Personal Property. Therefore, payment under this Extension will not increase the applicable Limit of Insurance on Your Business Personal Property.

(5) This Extension does not apply to loss or damage otherwise covered under this Coverage Form or any endorsement to this Coverage Form or policy, and does not apply to loss or damage to the storage unit itself. Each of these Extensions is additional insurance unless otherwise indicated. The Additional Condition, Coinsurance, does not apply to these Extensions.

B. Exclusions And Limitations

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

C. Limits Of Insurance

The most we will pay for loss or damage in any one occurrence is the applicable Limit Of Insurance shown in the Declarations. The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is $2,500 per sign in any one occurrence. The amounts of insurance stated in the following Additional Coverages apply in accordance with the terms of such coverages and are separate from the Limit(s) Of Insurance shown in the Declarations for any other coverage:

1. Fire Department Service Charge;

2. Pollutant Clean-up And Removal;

3. Increased Cost Of Construction; and

4. Electronic Data.

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

D. Deductible

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss and will pay the resulting amount or the Limit of Insurance, whichever is less. When the occurrence involves loss to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

EXAMPLE 1

(This example assumes there is no Coinsurance penalty.)

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

The amount of loss to Building 1 ($60,100) is less than the sum ($60,250) of the Limit of

Insurance applicable to Building 1 plus the Deductible.

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

$ 60,100
- 250
$ 59,850 Loss Payable - Building 1

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

Total amount of loss payable:

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

EXAMPLE 2

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

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

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

E. Loss Conditions

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

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

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

a. Pay its chosen appraiser; and

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

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

3. Duties In The Event Of Loss Or Damage

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

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

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

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

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

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

(6) As often as may be reasonably required, permit us to inspect the property proving the loss or

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

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

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

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

4. Loss Payment

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

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

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

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

(4) Repair, rebuild or replace the property with other property of like kind and quality, subject to **b.** below. We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

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

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

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

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

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

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

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

(2) An appraisal award has been made.

h. A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the loss to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the loss to the party wall, subject to all applicable policy provisions including Limits of Insurance, the Valuation and Coinsurance

Conditions and all other provisions of this Loss Payment Condition. Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of the Transfer Of Rights Of Recovery Against Others To Us Condition in this policy.

5. Recovered Property

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

6. Vacancy [176]

a. Description Of Terms

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

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

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant[177] unless at least 31% of its total square footage is:

(i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations;[178] and/or

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

(2) Buildings under construction or renovation are not considered vacant.[179]

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days[180] before that loss or damage occurs:

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

(a) Vandalism;

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

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in **b.(1)(a)** through **b.(1)(f)** above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.[181]

7. Valuation

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

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

b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is $2,500 or less, we will pay the cost of building repairs or replacement. The cost of building repairs or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use

or repair of any property. However, the following property will be valued at the actual cash value, even when attached to the building:

(1) Awnings or floor coverings;

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

(3) Outdoor equipment or furniture.

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

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

e. Tenants' Improvements and Betterments at:

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

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

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

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

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

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

F. Additional Conditions

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

1. Coinsurance

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

a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property. Instead, we will determine the most we will pay using the following steps:

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

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

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

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

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

EXAMPLE 1 (UNDERINSURANCE)

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

Step **(1)**: $250,000 x 80% = $200,000

(the minimum amount of insurance to meet your Coinsurance requirements)

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

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

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

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

EXAMPLE 2 (ADEQUATE INSURANCE)

When: The value of the property is: $ 250,000
The Coinsurance percentage for it is: 80%
The Limit of Insurance for it is: $ 200,000

The Deductible is: $ 250
The amount of loss is: $ 40,000

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

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

EXAMPLE 3

When: The value of the property is:

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

Step **(1):** $250,000 x 90% = $225,000

(the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)

Step **(2):** $180,000 $225,000 = .80

Step **(3):** $50,000 x .80 = $40,000

Step **(4):** $40,000 - $1,000 = $39,000

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

2. Mortgageholders[182]

a. The term mortgageholder includes trustee.

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

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

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

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

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

(3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder. All of the terms of this Coverage Part will then apply directly to the mortgageholder.

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

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

(2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired. At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

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

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

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

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

G. Optional Coverages

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

1. Agreed Value [183]

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

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

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

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

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

2. Inflation Guard [184]

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

b. The amount of increase will be:

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

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

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

EXAMPLE

If: The applicable Limit of Insurance is: $100,000

The annual percentage increase is: 8%

The number of days since the beginning of the policy year (or last policy change) is: 146

The amount of increase is: $100,000 x .08 x 146 365 = $ 3,200

3. Replacement Cost [185]

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

b. This Optional Coverage does not apply to:

(1) Personal property of others;

(2) Contents of a residence;

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

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

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

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

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

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

(2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage. With respect to tenants' improvements and betterments, the following also apply:

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

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

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

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

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

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount actually spent that is necessary to repair or replace the lost or damaged property. If a building is rebuilt at a new premises, the cost described in **e.(2)** above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

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

4. Extension Of Replacement Cost To Personal Property Of Others

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

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

H. Definitions

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

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

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

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 00 30 10 12

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM[186]

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

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

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

A. Coverage

1. Business Income

Business Income means the:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit Of Insurance is shown in the Declarations:

(1) Business Income Including "Rental Value".

(2) Business Income Other Than "Rental Value".

(3) "Rental Value".

If option **(1)** above is selected, the term Business Income will include "Rental Value". If option **(3)** above is selected, the term Business Income will mean "Rental Value" only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of a building, your premises means:

(a) The portion of the building which you rent, lease or occupy;

(b) The area within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater (with

respect to loss of or damage to personal property in the open or personal property in a vehicle); and

(c) Any area within the building or at the described premises, if that area services, or is used to gain access to, the portion of the building which you rent, lease or occupy.

2. Extra Expense

a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.

b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

(2) Minimize the "Suspension" of business if you cannot continue "operations".

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

3. Covered Causes Of Loss, Exclusions And Limitations

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

4. Additional Limitation - Interruption Of Computer Operations

a. Coverage for Business Income does not apply when a "suspension" of "operations" is caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption Of Computer Operations.

b. Coverage for Extra Expense does not apply when action is taken to avoid or minimize a "suspension" of "operations" caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption Of Computer Operations.

c. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

d. This Additional Limitation does not apply when loss or damage to electronic data involves only electronic data which is integrated in and operates or controls a building's elevator, lighting, heating, ventilation, air conditioning or security system.

5. Additional Coverages

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after time of the first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends; whichever is later.

b. Alterations And New Buildings

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense you incur due to direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss to:

(1) New buildings or structures, whether complete or under construction;

(2) Alterations or additions to existing buildings or structures; and

(3) Machinery, equipment, supplies or building materials located on or within 100 feet of the described premises and:

(a) Used in the construction, alterations or additions; or

(b) Incidental to the occupancy of new buildings.

If such direct physical loss or damage delays the start of "operations", the "period of restoration" for Business Income Coverage will begin on the date "operations" would have begun if the direct physical loss or damage had not occurred.

c. Extended Business Income

(1) Business Income Other Than "Rental Value"

If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

(a) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and

(b) Ends on the earlier of:

(i) The date you could restore your "operations", with reasonable speed, to

the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

(ii) 60 consecutive days after the date determined in **(1)(a)** above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

(2) "Rental Value"

If the necessary "suspension" of your "operations" produces a "Rental Value" loss payable under this policy, we will pay for the actual loss of "Rental Value" you incur during the period that:

(a) Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and

(b) Ends on the earlier of:

(i) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the "Rental Value" that would have existed if no direct physical loss or damage had occurred; or

(ii) 60 consecutive days after the date determined in **(2)(a)** above.

However, Extended Business Income does not apply to loss of "Rental Value" incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of "Rental Value" must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

d. Interruption Of Computer Operations

(1) Under this Additional Coverage, electronic data has the meaning described under Additional Limitation - Interruption Of Computer Operations.

(2) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a "suspension" of "operations" caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss. However, we will not provide coverage under this Additional Coverage when the Additional Limitation - Interruption Of Computer Operations does not apply based on Paragraph **A.3.c.** therein.

(3) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:

(a) If the Causes Of Loss - Special Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, is limited to the "specified causes of loss" as defined in that form and

Collapse as set forth in that form.

(b) If the Causes Of Loss - Broad Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, includes Collapse as set forth in that form.

(c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Interruption Of Computer Operations.

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

(4) The most we will pay under this Additional Coverage, Interruption Of Computer Operations, is $2,500 (unless a higher limit is shown in the Declarations) for all loss sustained and expense incurred in any one policy year, regardless of the number of interruptions or the number of premises, locations or computer systems involved. If loss payment relating to the first interruption does not exhaust this amount, then the balance is available for loss or expense sustained or incurred as a result of subsequent interruptions in that policy year. A balance remaining at the end of a policy year does not increase the amount of insurance in the next policy year. With respect to any interruption which begins in one policy year and continues or results in additional loss in a subsequent policy year(s), all loss and expense is deemed to be sustained or incurred in the policy year in which the interruption began.

(5) This Additional Coverage, Interruption Of Computer Operations, does not apply to loss sustained or loss incurred after the end of the "period of restoration", even if the amount of insurance stated in (4) above has not been exhausted.

6. Coverage Extension

If a Coinsurance percentage of 50% or more is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

NEWLY ACQUIRED LOCATIONS

a. You may extend your Business Income and Extra Expense Coverages to apply to property at any location you acquire other than fairs or exhibitions.

b. The most we will pay under this Extension, for the sum of Business Income loss and Extra Expense incurred, is $100,000 at each location, unless a higher limit is shown in the Declarations.

c. Insurance under this Extension for each newly acquired location will end when any of the following first occurs:

(1) This policy expires;

(2) 30 days expire after you acquire or begin to construct the property; or

(3) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property.

The Additional Condition, Coinsurance, does not apply to this Extension.

B. Limits Of Insurance

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

Payments under the following Additional Coverages will not increase the applicable Limit of Insurance:

1. Alterations And New Buildings;

2. Civil Authority;

3. Extra Expense; or

4. Extended Business Income.

The amounts of insurance stated in the Interruption Of Computer Operations Additional Coverage and the Newly Acquired Locations Coverage Extension apply in accordance with the terms of those coverages and are separate from the Limit(s) Of Insurance shown in the Declarations for any other coverage.

C. Loss Conditions

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

1. Appraisal

If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.

The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

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

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

2. Duties In The Event Of Loss

a. You must see that the following are done in the event of loss:

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

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

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

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

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

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

(6) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our

request. We will supply you with the necessary forms.

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

(8) If you intend to continue your business, you must resume all or part of your "operations" as quickly as possible.

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

3. Loss Determination

a. The amount of Business Income loss will be determined based on:

(1) The Net Income of the business before the direct physical loss or damage occurred;

(2) The likely Net Income of the business if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;

(3) The operating expenses, including payroll expenses, necessary to resume "operations" with the same quality of service that existed just before the direct physical loss or damage; and

(4) Other relevant sources of information, including:

(a) Your financial records and accounting procedures;

(b) Bills, invoices and other vouchers; and

(c) Deeds, liens or contracts.

b. The amount of Extra Expense will be determined based on:

(1) All expenses that exceed the normal operating expenses that would have been incurred by "operations" during the "period of restoration" if no direct physical loss or damage had occurred. We will deduct from the total of such expenses:

(a) The salvage value that remains of any property bought for temporary use during the "period of restoration", once "operations" are resumed; and

(b) Any Extra Expense that is paid for by other insurance, except for insurance that is written subject to the same plan, terms, conditions and provisions as this insurance; and

(2) Necessary expenses that reduce the Business Income loss that otherwise would have been incurred.

c. Resumption Of Operations

We will reduce the amount of your:

(1) Business Income loss, other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.

(2) Extra Expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense.

d. If you do not resume "operations", or do not resume "operations" as quickly as possible, we will pay based on the length of time it would have taken to resume "operations" as quickly as possible.

4. Loss Payment

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

a. We have reached agreement with you on the amount of loss; or

b. An appraisal award has been made.

D. Additional Condition

COINSURANCE

If a Coinsurance percentage is shown in the Declarations, the following condition applies in addition to the Common Policy Conditions and the Commercial Property Conditions.

We will not pay the full amount of any Business Income loss if the Limit of Insurance for Business Income is less than:

1. The Coinsurance percentage shown for Business Income in the Declarations; times

2. The sum of:

a. The Net Income (Net Profit or Loss before income taxes); and

b. Operating expenses, including payroll expenses;

that would have been earned or incurred (had no loss occurred) by your "operations" at the described premises for the 12 months following the inception, or last previous anniversary date, of this policy (whichever is later).

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

Step **(1):** Multiply the Net Income and operating expense for the 12 months following the inception, or last previous anniversary date, of this policy by the Coinsurance percentage;

Step **(2):** Divide the Limit of Insurance for the described premises by the figure determined in Step **(1)**; and

Step **(3):** Multiply the total amount of loss by the figure determined in Step **(2)**.

We will pay the amount determined in Step **(3)** or the Limit of Insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

In determining operating expenses for the purpose of applying the Coinsurance condition, the following expenses, if applicable, shall be deducted from the total of all operating expenses:

(1) Prepaid freight - outgoing;

(2) Returns and allowances;

(3) Discounts;

(4) Bad debts;

(5) Collection expenses;

(6) Cost of raw stock and factory supplies consumed (including transportation charges);

(7) Cost of merchandise sold (including transportation charges);

(8) Cost of other supplies consumed (including transportation charges);

(9) Cost of services purchased from outsiders (not employees) to resell, that do not continue under contract;

(10) Power, heat and refrigeration expenses that do not continue under contract (if Form CP 15 11 is attached);

(11) All payroll expenses or the amount of payroll expense excluded (if Form CP 15 10 is attached); and

(12) Special deductions for mining properties (royalties unless specifically included in coverage; actual depletion commonly known as unit or cost depletion - not percentage depletion; welfare and retirement fund charges based on tonnage; hired trucks).

Example 1 (Underinsurance)

When:	The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been:	$ 400,000
	The Coinsurance percentage is:	50%
	The Limit of Insurance is:	$ 150,000

The amount of loss is:	$ 80,000

Step **(1):** $400,000 x 50% = $200,000

(the minimum amount of insurance to meet your Coinsurance requirements)

Step **(2)** $150,000 ÷ $200,000 = .75

Step **(3)** $80,000 x .75 = $60,000

We will pay no more than $60,000. The remaining $20,000 is not covered.

Example 2 (Adequate Insurance)

When: The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date, of this policy at the described premises would have been:	$ 400,000
The Coinsurance percentage is:	50%
The Limit of Insurance is:	$ 200,000
The amount of loss is:	$ 80,000

Step **(1):** $400,000 x 50% = $200,000

(the minimum amount of insurance to meet your Coinsurance requirements)

Step **(2)** $150,000 ÷ $200,000 = .75

Step **(3)** $80,000 x .75 = $60,000

The minimum amount of insurance to meet your Coinsurance requirement is $200,000 ($400,000 x 50%). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than $80,000 (amount of loss).

E. Optional Coverages

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

1. Maximum Period Of Indemnity

a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.

b. The most we will pay for the total of Business Income loss and Extra Expense is the lesser of:

(1) The amount of loss sustained and expenses incurred during the 120 days immediately following the beginning of the "period of restoration" or

(2) The Limit Of Insurance shown in the Declarations.

2. Monthly Limit Of Indemnity

a. The Additional Condition, Coinsurance, does not apply to this Coverage Form at the described premises to which this Optional Coverage applies.

b. The most we will pay for loss of Business Income in each period of 30 consecutive days after the beginning of the "period of restoration" is:

(1) The Limit of Insurance, multiplied by

(2) The fraction shown in the Declarations for this Optional Coverage.

Example

When: The Limit of Insurance is:	$120,000
The fraction shown in the Declarations for this Optional Coverage is:	1/4
The most we will pay for loss in each period of 30 consecutive days is:	$30,000

($120,000 x 1/4 = $30,000)

If, in this example, the actual amount of loss is:

Days 1-30	$ 40,000
Days 31-60	$ 20,000
Days 61-90	$ 30,000
	$ 90,000
We will pay:	
Days 1-30	$ 30,000
Days 31-60	$ 20,000
Days 61-90	$ 30,000
	$ 80,000

The remaining $10,000 is not covered.

3. Business Income Agreed Value

a. To activate this Optional Coverage:

(1) A Business Income Report/Work Sheet must be submitted to us and must show financial data for your "operations":

(a) During the 12 months prior to the date of the Work Sheet; and

(b) Estimated for the 12 months immediately following the inception of this Optional Coverage.

(2) The Declarations must indicate that the Business Income Agreed Value Optional Coverage applies, and an Agreed Value must be shown in the Declarations. The Agreed Value should be at least equal to:

(a) The Coinsurance percentage shown in the Declarations; multiplied by

(b) The amount of Net Income and operating expenses for the following 12 months you report on the Work Sheet.

b. The Additional Condition, Coinsurance, is suspended until:

(1) 12 months after the effective date of this Optional Coverage; or

(2) The expiration date of this policy;

whichever occurs first.

c. We will reinstate the Additional Condition, Coinsurance, automatically if you do not submit a new Work Sheet and Agreed Value:

(1) Within 12 months of the effective date of this Optional Coverage; or

(2) When you request a change in your Business Income Limit of Insurance.

d. If the Business Income Limit of Insurance is less than the Agreed Value, we will not pay more of any loss than the amount of loss multiplied by:

(1) The Business Income Limit of Insurance; divided by

(2) The Agreed Value.

Example

When:	The Limit of Insurance is:	$ 100,000
	The Agreed Value is:	$ 200,000
	The amount of loss is:	$ 80,000

Step **(1):** $100,000 ÷ $200,000 = .50

Step **(2)** .50 x $80,000 = $ 40,000

We will pay $40,000. The remaining $40,000 is not covered.

4. Extended Period Of Indemnity

Under Paragraph **A.4.d., Extended Business Income,** the number 60 in Subparagraphs **(1)(b)** and **(2)(b)** is replaced by the number shown in the Declarations for this Optional Coverage.

F. Definitions

1. "Finished stock" means stock you have manufactured.

"Finished stock" also includes whiskey and alcoholic products being aged, unless there is a Coinsurance percentage shown for Business Income in the Declarations.

"Finished stock" does not include stock you have manufactured that is held for sale on the premises of any retail outlet insured under this Coverage Part.

2. "Operations" means:

a. Your business activities occurring at the described premises; and

b. The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

3. "Period of restoration" means the period of time that:

a. Begins 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

b. Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

"Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:

(1) Regulates the construction, use or repair, or requires the tearing down, of any property; or

(2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

The expiration date of this policy will not cut short the "period of restoration".

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

5. "Rental Value" means Business Income that consists of:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you; and

b. Continuing normal operating expenses incurred in connection with that premises, including:

(1) Payroll; and

(2) The amount of charges which are the legal obligation of the tenant(s) but would otherwise be your obligations.

6. "Suspension" means:

a. The slowdown or cessation of your business activities; or

b. That a part or all of the described premises is rendered untenantable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

POLICY NUMBER: **COMMERCIAL PROPERTY**
CP 00 90 07 88

COMMERCIAL PROPERTY CONDITIONS[187]

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

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

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

1. This coverage part;

2. The covered property

3. Your interest in the covered property; or

4. A claim under this coverage part.

B. CONTROL OF PROPERTY

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

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

. . . .

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

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

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

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

a. Someone insured by this insurance;

b. A business firm:

(1) Owned or controlled by you; or

(2) That owns or controls you; or

c. Your tenant.

This will not restrict your insurance.

POLICY NUMBER: COMMERCIAL PROPERTY
CP 04 05 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ORDINANCE OR LAW COVERAGE[188]

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverage B And C Combined Limit Of Insurance
/	☐	$	$	$ *
/	☐	$	$	$ *
/	☐	$	$	$ *

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.
*Do **not** enter a Blanket Limit of Insurance if individual Limits of Insurance are selected for Coverages **B** and **C,** or if one of these Coverages is not applicable.

A. Each Coverage - Coverage **A**, Coverage **B** and Coverage **C** - is provided under this endorsement only if that Coverage(s) is chosen by entry in the above Schedule and then only with respect to the building identified for that Coverage(s) in the Schedule.

B. Application Of Coverage(s)

The Coverage(s) provided by this endorsement applies only if both **B.1.** and **B.2.** are satisfied and are then subject to the qualifications set forth in **B.3.**

1. The ordinance or law:

a. Regulates the demolition, construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and

b. Is in force at the time of loss.

But coverage under this endorsement applies only in response to the minimum requirements of the ordinance or law. Losses and costs incurred in complying with recommended actions or standards that exceed actual requirements are not covered under this endorsement.

2. a. The building sustains direct physical damage that is covered under this policy and as a result of such damage, you are required to comply with the ordinance or law; or

b. The building sustains both direct physical damage that is covered under this policy and direct physical damage that is not covered under this policy, and as a result of the building damage in its entirety, you are required to comply with the ordinance or law.

c. But if the building sustains direct physical damage that is not covered under this policy, and such damage is the subject of the ordinance or law, then there is no coverage under this endorsement even if the building has also sustained covered direct physical damage.

3. In the situation described in **B.2.b.** above, we will not pay the full amount of

loss otherwise payable under the terms of Coverages **A**, **B**, and/or **C** of this endorsement. Instead, we will pay a proportion of such loss, meaning the proportion that the covered direct physical damage bears to the total direct physical damage.

(Section **H.** of this endorsement provides an example of this procedure.)

However, if the covered direct physical damage, alone, would have resulted in a requirement to comply with the ordinance or law, then we will pay the full amount of loss otherwise payable under the terms of Coverages **A, B** and/or **C** of this endorsement.

C. We will not pay under Coverage **A**, **B** or **C** of this endorsement for:

1. Enforcement of or compliance with any ordinance or law which requires the demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or

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

D. Coverage

1. Coverage A - Coverage For Loss To The Undamaged Portion Of The Building

With respect to the building that has sustained covered direct physical damage, we will pay under Coverage **A** for the loss in value of the undamaged portion of the building as a consequence of a requirement to comply with an ordinance or law that requires demolition of undamaged parts of the same building.

Coverage **A** is included within the Limit Of Insurance shown in the Declarations as applicable to the covered building. Coverage **A** does not increase the Limit of Insurance.

2. Coverage B - Demolition Cost Coverage

With respect to the building that has sustained covered direct physical damage, we will pay the cost to demolish and clear the site of undamaged parts of the same building as a consequence of a requirement to comply with an ordinance or law that requires demolition of such undamaged property.

The Coinsurance Additional Condition does not apply to Demolition Cost Coverage.

3. Coverage C - Increased Cost Of Construction Coverage

a. With respect to the building that has sustained covered direct physical damage, we will pay the increased cost to:

(1) Repair or reconstruct damaged portions of that building; and/or

(2) Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;

when the increased cost is a consequence of a requirement to comply with the minimum standards of the ordinance or law.

However:

(1) This coverage applies only if the restored or remodeled property is intended for similar occupancy as the current property, unless such occupancy is not permitted by zoning or land use ordinance or law.

(2) We will not pay for the increased cost of construction if the building is not repaired, reconstructed or remodeled.

The Coinsurance Additional Condition does not apply to Increased Cost of Construction Coverage.

b. When a building is damaged or destroyed and Coverage **C** applies

to that building in accordance with 3.a. above, coverage for the increased cost of construction also applies to repair or reconstruction of the following, subject to the same conditions stated in **3.a.**:

(1) The cost of excavations, grading, backfilling and filling;

(2) Foundation of the building;

(3) Pilings; and

(4) Underground pipes, flues and drains.

The items listed in **b.(1)** through **b.(4)** above are deleted from Property Not Covered, but only with respect to the coverage described in this provision, **3.b.**

E. Loss Payment

1. All following loss payment provisions, **E.2.** through **E.5.**, are subject to the apportionment procedures set forth in Section **B.3.** of this endorsement.

2. When there is a loss in value of an undamaged portion of a building to which Coverage **A** applies, the loss payment for that building, including damaged and undamaged portions, will be determined as follows:

a. If the Replacement Cost Coverage Option applies and the property is being repaired or replaced, on the same or another premises, we will not pay more than the lesser of:

(1) The amount you would actually spend to repair, rebuild or reconstruct the building, but not for more than the amount it would cost to restore the building on the same premises and to the same height, floor area, style and comparable quality of the original property insured; or

(2) The Limit Of Insurance shown in the Declarations as applicable to the covered building.

b. If the Replacement Cost Coverage Option applies and the property is not repaired or replaced, or if the Replacement Cost Coverage Option does not apply, we will not pay more than the lesser of:

(1) The actual cash value of the building at the time of loss; or

(2) The Limit Of Insurance shown in the Declarations as applicable to the covered building.

3. Unless Paragraph **E.5.** applies, loss payment under Coverage **B** - Demolition Cost Coverage will be determined as follows:

We will not pay more than the lesser of the following:

a. The amount you actually spend to demolish and clear the site of the described premises; or

b. The applicable Limit Of Insurance shown for Coverage **B** in the Schedule above.

4. Unless Paragraph **E.5.** applies, loss payment under Coverage **C** - Increased Cost Of Construction Coverage will be determined as follows:

a. We will not pay under Coverage **C**:

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

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

b. If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay under Coverage **C** is the lesser of:

(1) The increased cost of construction at the same premises; or

(2) The applicable Limit Of Insurance shown for Coverage **C** in the Schedule above.

c. If the ordinance or law requires relocation to another premises, the most we will pay under Coverage **C** is the lesser of:

(1) The increased cost of construction at the new premises; or

(2) The applicable Limit Of Insurance shown for Coverage **C** in the Schedule above.

5. If a Combined Limit Of Insurance is shown for Coverages **B** and **C** in the Schedule above, Paragraphs **E.3.** and **E.4.** of this endorsement do not apply with respect to the building that is subject to the Combined Limit, and the following loss payment provisions apply instead:

The most we will pay, for the total of all covered losses for Demolition Cost and Increased Cost of Construction, is the Combined Limit Of Insurance shown for Coverages **B** and **C** in the Schedule above. Subject to this Combined Limit of Insurance, the following loss payment provisions apply:

a. For Demolition Cost, we will not pay more than the amount you actually spend to demolish and clear the site of the described premises.

b. With respect to the Increased Cost of Construction:

(1) We will not pay for the increased cost of construction:

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

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

(2) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the increased cost of construction is the increased cost of construction at the same premises.

(3) If the ordinance or law requires relocation to another premises, the most we will pay for the increased cost of construction at the new premises.

F. The terms of this endorsement apply separately to each building to which this endorsement applies.

G. Under this endorsement we will not pay for loss due to any ordinance or law that:

1. You were required to comply with before the loss, even if the building was undamaged; and

2. You failed to comply with.

H. Example of proportionate loss payment for Ordinance Or Law Coverage Losses (procedure as set forth in Section **B.3.** of this endorsement).

Assume:

- Wind is a Covered Cause of Loss; Flood is an excluded Cause of Loss
- The building has a value of $200,000
- Total direct physical damage to building: $100,000
- The ordinance or law in this jurisdiction is enforced when building damage equals or exceeds 50% of the building's value
- Portion of direct physical damage that is covered (caused by wind): $30,000
- Portion of direct physical damage that is not covered (caused by flood): $70,000
- Loss under Ordinance Or Law Coverage **C** of this endorsement: $60,000

Step 1: Determine the proportion that the covered direct physical damage bears to the total direct physical damage.

$30,000 ÷ $100,000 = .30

Step 2: Apply that proportion to the Ordinance or Law loss.

$60,000 x .30 = $18,000

In this example, the most we will pay under this endorsement for the Coverage **C** loss is $18,000, subject to the applicable Limit of Insurance and any other applicable provisions.

Note**:** The same procedure applies to losses under Coverages **A** and **B** of this endorsement.

1. The following definition is added:

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

POLICY NUMBER: **COMMERCIAL PROPERTY**
CP 04 15 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEBRIS REMOVAL ADDITIONAL INSURANCE

This endorsement modifies insurance provided under the following:

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

SCHEDULE

Premises Number	Building Number	Debris Removal Amount	Additional Premium
		$	$
		$	$
		$	$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

The additional amount of $25,000 for debris removal in the **Debris Removal** Additional Coverages section is replaced by the higher amount shown in the Schedule.

COMMERCIAL PROPERTY
CP 10 30 09 17

CAUSES OF LOSS - SPECIAL FORM[189]

Words and phrases that appear in quotation marks have special meaning. Refer to Section **G.** Definitions.

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law[190]

The enforcement of or compliance with any ordinance or law:

(1) Regulating the construction, use or repair of any property; or

(2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

b. Earth Movement

(1) Earthquake, including tremors and aftershocks and any earth sinking, rising or shifting related to such event;

(2) Landslide, including any earth sinking, rising or shifting related to such event;

(3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;

(4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in **b.(1)** through**(4)** above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

(5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.

Volcanic Action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

(a) Airborne volcanic blast or airborne shock waves;

(b) Ash, dust or particulate matter; or

(c) Lava flow.

With respect to coverage for Volcanic Action as set forth in **(5)(a), (5)(b)** and **(5)(c),** all volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic Action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

This exclusion applies regardless of whether any of the above, in Paragraphs **(1)** through **(5),** is caused by an act of nature or is otherwise caused.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

e. Utility Services

The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure:

(1) Originates away from the described premises; or

(2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from the described premises.

Failure of any utility service includes lack of sufficient capacity and reduction in supply.

Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

But if the failure or surge of power, or the failure of communication, water or other utility service, results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

Communication services include but are not limited to service relating to Internet access or access to any electronic, cellular or satellite network.

f. War And Military Action

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

g. Water [191]

(1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

(2) Mudslide or mudflow;

(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings; or

(5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph **(1)**, **(3)** or **(4)**, or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs **(1)** through **(5),** is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

But if any of the above, in Paragraphs **(1)** through **(5),** results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss).

h. "Fungus", Wet Rot, Dry Rot And Bacteria

Presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria.

But if "fungus", wet or dry rot or bacteria result in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion does not apply:

(1) When "fungus", wet or dry rot or bacteria result from fire or lightning; or

(2) To the extent that coverage is provided in the Additional Coverage, Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria, with respect to loss or damage by a cause of loss other than fire or lightning.

Exclusions **B.1.a.** through **B.1.h.** apply whether or not the loss event results in widespread damage or affects a substantial area.

2. We will not pay for loss or damage caused by or resulting from any of the following:

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any:

(1) Electrical or electronic wire, device, appliance, system or network; or

(2) Device, appliance, system or network utilizing cellular or satellite technology.

For the purpose of this exclusion, electrical, magnetic or electromagnetic energy includes but is not limited to:

(a) Electrical current, including arcing;

(b) Electrical charge produced or conducted by a magnetic or electromagnetic field;

(c) Pulse of electromagnetic energy; or

(d) Electromagnetic waves or microwaves.

But if fire results, we will pay for the loss or damage caused by that fire.

b. Delay, loss of use or loss of market.

c. Smoke, vapor or gas from agricultural smudging or industrial operations.

d. **(1)** Wear and tear;

(2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

(3) Smog;

(4) Settling, cracking, shrinking or expansion;

(5) Nesting or infestation, or discharge or release of waste products or secretions, by

insects, birds, rodents or other animals.

(6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay for the loss or damage caused by that elevator collision.

(7) The following causes of loss to personal property:

(a) Dampness or dryness of atmosphere;

(b) Changes in or extremes of temperature; or

(c) Marring or scratching.

But if an excluded cause of loss that is listed in **2.d.(1)** through **(7)** results in a "specified cause of loss" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.

e. Explosion of steam boilers,[192] steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion. We will also pay for loss or damage caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.

g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:

(1) You do your best to maintain heat in the building or structure; or

(2) You drain the equipment and shut off the supply if the heat is not maintained.

h. Dishonest or criminal act (including theft) by you, any of your partners, members, officers, managers, employees (including temporary employees and leased workers), directors, trustees or authorized representatives, whether acting alone or in collusion with each other or with any other party; or theft by any person to whom you entrust the property for any purpose, whether acting alone or in collusion with any other party.

This exclusion:

(1) Applies whether or not an act occurs during your normal hours of operation;

(2) Does not apply to acts of destruction by your employees (including temporary employees and leased workers) or authorized representatives; but theft by your employees (including temporary employees and leased workers) or authorized representatives is not covered.

i. Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

j. Rain, snow, ice or sleet to personal property in the open.

k. Collapse, including any of the following conditions of property or any part of the property:

(1) An abrupt falling down or caving in;

(2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or

(3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to **(1)** or **(2)** above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, **k.,** does not apply:

(a) To the extent that coverage is provided under the Additional Coverage, Collapse; or

(b) To collapse caused by one or more of the following:

(i) The "specified causes of loss"

(ii) Breakage of building glass;

(iii) Weight of rain that collects on a roof; or

(iv) Weight of people or personal property.

l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion, **l.,** does not apply to damage to glass caused by chemicals applied to the glass.

m. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

3. We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph **1.** above to produce the loss or damage.

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

c. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance; of part or all of any property on or off the described premises.

4. Special Exclusions

The following provisions apply only to the specified Coverage Forms:

a. Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form

We will not pay for:

(1) Any loss caused by or resulting from:

(a) Damage or destruction of "finished stock" or

(b) The time required to reproduce "finished stock".

This exclusion does not apply to Extra Expense.

(2) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

(3) Any increase of loss caused by or resulting from:

(a) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or

(b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such loss that affects your Business Income during the "period of restoration" and any extension of the "period of restoration" in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period Of Indemnity Optional Coverage or any variation of these.

(4) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration".

(5) Any other consequential loss.

b. Leasehold Interest Coverage Form

(1) Paragraph **B.1.a.**, Ordinance Or Law, does not apply to insurance under this Coverage Form.

(2) We will not pay for any loss caused by:

(a) Your cancelling the lease;

(b) The suspension, lapse or cancellation of any license; or

(c) Any other consequential loss.

c. Legal Liability Coverage Form

(1) The following exclusions do not apply to insurance under this Coverage Form:

(a) Paragraph **B.1.a.** Ordinance Or Law;

(b) Paragraph **B.1.c.** Governmental Action;

(c) Paragraph **B.1.d.** Nuclear Hazard;

(d) Paragraph **B.1.e.** Utility Services; and

(e) Paragraph **B.1.f.** War And Military Action.

(2) The following additional exclusions apply to insurance under this Coverage Form:

(a) Contractual Liability

We will not defend any claim or "suit", or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement [193]. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

(i) Your assumption of liability was executed prior to the accident; and

(ii) The building is Covered Property under this Coverage Form.

(b) Nuclear Hazard

We will not defend any claim or "suit", or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

5. Additional Exclusion

The following provisions apply only to the specified property:

Loss Or Damage To Products

We will not pay for loss or damage to any merchandise, goods or other product caused by or resulting from error or omission by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion applies to any effect that compromises the form, substance or quality of the product. But if such error or omission results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

C. Limitations

The following limitations apply to all policy forms and endorsements, unless otherwise stated:

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

a. Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

b. Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.

c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

(1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or

(2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

d. Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

(1) Building materials and supplies held for sale by you, unless they are insured under the Builders Risk Coverage Form; or

(2) Business Income Coverage or Extra Expense Coverage.

e. Property that is missing, where the only evidence of the loss or damage is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

f. Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.

g. Lawns, trees, shrubs or plants which are part of a vegetated roof, caused by or resulting from:

(1) Dampness or dryness of atmosphere or of soil supporting the vegetation;

(2) Changes in or extremes of temperature;

(3) Disease;

(4) Frost or hail; or

(5) Rain, snow, ice or sleet.

2. We will not pay for loss of or damage to the following types of property unless caused by the "specified causes of loss" or building glass breakage:

a. Animals, and then only if they are killed or their destruction is made necessary.

b. Fragile articles such as statuary, marbles, chinaware and porcelains, if broken. This restriction does not apply to:

(1) Glass; or

(2) Containers of property held for sale.

c. Builders' machinery, tools and equipment owned by you or entrusted to you, provided such property is Covered Property.

However, this limitation does not apply:

(1) If the property is located on or within 100 feet of the described premises, unless the premises is insured under the Builders Risk Coverage Form; or

(2) To Business Income Coverage or to Extra Expense Coverage.

3. The special limit shown for each category, **a.** through **d.**, is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are (unless a higher limit is shown in the Declarations):

a. $2,500 for furs, fur garments and garments trimmed with fur.

b. $2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semiprecious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth $100 or less per item.

c. $2,500 for patterns, dies, molds and forms.

d. $250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

This limitation, **C.3.,** does not apply to Business Income Coverage or to Extra Expense Coverage.

4. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire-extinguishing equipment if the damage:

a. Results in discharge of any substance from an automatic fire protection system; or

b. Is directly caused by freezing.

However, this limitation does not apply to Business Income Coverage or to Extra Expense Coverage.

D. Additional Coverage - Collapse

The coverage provided under this Additional Coverage, Collapse, applies only to an abrupt collapse as described and limited in **D.1.** through **D.7.**

1. For the purpose of this Additional Coverage, Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

b. Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;

c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.

d. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction,

remodeling or renovation is complete, but only if the collapse is caused in part by:

(1) A cause of loss listed in **2.a.** or **2.b.**;

(2) One or more of the "specified causes of loss"

(3) Breakage of building glass;

(4) Weight of people or personal property; or

(5) Weight of rain that collects on a roof.

3. This Additional Coverage - Collapse does not apply to:

a. A building or any part of a building that is in danger of falling down or caving in;

b. A part of a building that is standing, even if it has separated from another part of the building; or

c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

4. With respect to the following property:

a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;

b. Awnings, gutters and downspouts;

c. Yard fixtures;

d. Outdoor swimming pools;

e. Fences;

f. Piers, wharves and docks;

g. Beach or diving platforms or appurtenances;

h. Retaining walls; and

i. Walks, roadways and other paved surfaces;

if an abrupt collapse is caused by a cause of loss listed in **2.a.** through **2.d.,** we will pay for loss or damage to that property only if:

(1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and

(2) The property is Covered Property under this Coverage Form.

5. If personal property abruptly falls down or caves in and such collapse is not the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:

a. The collapse of personal property was caused by a cause of loss listed in **2.a.** through **2.d.**;

b. The personal property which collapses is inside a building; and

c. The property which collapses is not of a kind listed in 4., regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph **5.** does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

6. This Additional Coverage, Collapse, does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

7. This Additional Coverage, Collapse, will not increase the Limits of Insurance provided in this Coverage Part.

8. The term Covered Cause of Loss includes the Additional Coverage, Collapse, as described and limited in **D.1.** through **D.7.**

E. Additional Coverage - Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria

1. The coverage described in **E.2.** and **E.6.** only applies when the "fungus", wet or dry rot or bacteria are the result of one or more of the following causes that occur during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence:

a. A "specified cause of loss" other than fire or lightning; or

b. Flood, if the Flood Coverage Endorsement applies to the affected premises.

This Additional Coverage does not apply to lawns, trees, shrubs or plants which are part of a vegetated roof.

2. We will pay for loss or damage by "fungus", wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:

a. Direct physical loss or damage to Covered Property caused by "fungus", wet or dry rot or bacteria, including the cost of removal of the "fungus", wet or dry rot or bacteria;

b. The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet or dry rot or bacteria; and

c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", wet or dry rot or bacteria are present.

3. The coverage described under **E.2.** of this Limited Coverage is limited to $15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of "specified causes of loss" (other than fire or lightning) and Flood which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet or dry rot or bacteria, we will not pay more than a total of $15,000 even if the "fungus", wet or dry rot or bacteria continue to be present or active, or recur, in a later policy period.

4. The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

If there is covered loss or damage to Covered Property, not caused by "fungus", wet or dry rot or bacteria, loss payment will not be limited by the terms of this Limited Coverage, except to the extent that "fungus", wet or dry rot or bacteria cause an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited Coverage.

5. The terms of this Limited Coverage do not increase or reduce the coverage provided under Paragraph **F.2.** (Water Damage, Other Liquids, Powder Or Molten Material Damage) of this Causes Of Loss form or under the Additional Coverage, Collapse.

6. The following, **6.a.** or **6.b.**, applies only if Business Income and/or Extra Expense Coverage applies to the described premises and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable Business Income and/or Extra Expense Coverage Form:

a. If the loss which resulted in "fungus", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to loss or damage to property caused by "fungus", wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.

b. If a covered "suspension" of "operations" was caused by loss or damage other than "fungus", wet or dry rot or bacteria but remediation of "fungus", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

F. Additional Coverage Extensions

1. Property In Transit

This Extension applies only to your personal property to which this form applies.

a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.

b. Loss or damage must be caused by or result from one of the following causes of loss:

(1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.

(2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the roadbed.

(3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.

c. The most we will pay for loss or damage under this Extension is $5,000.

This Coverage Extension is additional insurance. The Additional Condition, Coinsurance, does not apply to this Extension.

2. Water Damage, Other Liquids, Powder Or Molten Material Damage

If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes. This Coverage Extension does not increase the Limit of Insurance.

3. Glass

a. We will pay for expenses incurred to put up temporary plates or board up openings if repair or replacement of damaged glass is delayed.

b. We will pay for expenses incurred to remove or replace obstructions when repairing or replacing glass that is part of a building. This does not include removing or replacing window displays.

This Coverage Extension **F.3.** does not increase the Limit of Insurance.

G. Definitions

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

2. "Specified causes of loss" means the following: fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:

(1) The cost of filling sinkholes; or

(2) Sinking or collapse of land into man-made underground cavities.

b. Falling objects does not include loss or damage to:

(1) Personal property in the open; or

(2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.

c. Water damage means:

(1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or

cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam; and

(2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe caused by wear and tear, when the pipe is located off the described premises and is part of a potable water supply system or sanitary sewer system operated by a public or private utility service provide pursuant to authority granted by the state of governmental subdivision where the described premises are located.

But water damage does not include loss or damage otherwise excluded under the terms of the Water Exclusion. Therefore, for example, there is no coverage under this policy in the situation in which discharge or leakage of water results from the breaking apart or cracking of a pipe which was caused by or related to weather-induced flooding, even if wear and tear contributed to the breakage or cracking. As another example, and also in accordance with the terms of the Water Exclusion, there is no coverage for loss or damage caused by or related to weather-induced flooding which follows or is exacerbated by pipe breakage or cracking attributable to wear and tear.

To the extent that accidental discharge or leakage of water falls within the criteria set forth in **c.(1)** or **c.(2)** of this definition of "specified causes of loss," such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 12 18 06 07

LOSS PAYABLE PROVISIONS[194]

This endorsement modifies insurance provided under the following:

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

SCHEDULE

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

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

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

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

C. Loss Payable Clause

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

1. Adjust losses with you; and

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

D. Lender's Loss Payable Clause

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

a. Warehouse receipts;

b. A contract for deed;

c. Bills of lading;

d. Financing statements; or

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Contract Of Sale Clause

….

F. Building Owner Loss Payable Clause

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

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

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

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 14 01 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SCHEDULED BUILDING PROPERTY TENANT'S POLICY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Of Building:	
Causes of Loss Form (and related endorsements, if any):	
Valuation Condition: Actual Cash Value ☐ Or Replacement Cost ☐	
Coinsurance (if applicable): **%**	
Deductible On Building Glass (if any): **$**	
Deductible On Building Property Other Than Glass **$**	
Description Of Building Glass	**Limit Of Insurance**
	$
Description Of Other Building Property	**Limit Of Insurance**
	$
	$
	$
	$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Under this endorsement, building property means the building glass, building fixtures and permanently installed machinery and equipment described in the Schedule, which are part of the building shown in the Schedule.

B. We will pay for direct physical loss of or damage to the described building property at the building shown in the Schedule caused by or resulting from a Covered Cause of Loss shown in the Schedule, provided that:

1. You are a tenant of the building shown in the Schedule; and

2. You have a contractual responsibility to insure such property, or a contractual responsibility to pay for loss or damage to such property.

C. The value of building property covered under this endorsement will be determined in accordance with the terms of the Valuation Condition indicated in the Schedule, or at the amount for which you are liable under contract, whichever is less. If required by law, glass is covered at the cost of replacement with safety glazing material. However, the most we will pay for the coverage provided under this endorsement is the applicable Limit Of Insurance shown in the Schedule.

D. The Coinsurance Condition applies to the property described in the Schedule only if a Coinsurance percentage is shown in the Schedule.

E. Any coverage provided under this Coverage Form or Policy for Your Business Personal Property or Personal Property Of Others does not apply to the property described in the Schedule.

POLICY NUMBER: **COMMERCIAL PROPERTY**
CP 14 02 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNSCHEDULED BUILDING PROPERTY TENANT'S POLICY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Of Building:	
Causes Of Loss Form (and related endorsements, if any):	
Valuation Condition: Actual Cash Value ☐ Or Replacement Cost ☐	
Coinsurance (if applicable):	**%**
Deductible On Building Glass (if any):	**$**
Limit Of Insurance On Building Glass:	**$**
Deductible On Building Property Other Than Glass:	**$**
Limit Of Insurance On Building Property Other Than Glass:	**$**
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. If a Limit Of Insurance is shown in the Schedule for Building Glass, building property means building glass that is part of the building shown in the Schedule.

B. If a Limit Of Insurance is shown in the Schedule for Building Property Other Than Glass, building property means building fixtures and permanently installed machinery and equipment that are part of the building shown in the Schedule.

C. We will pay for direct physical loss of or damage to building property at the building shown in the Schedule caused by or resulting from a Covered Cause of Loss shown in the Schedule, provided that:

1. You are a tenant of the building shown in the Schedule; and
2. You have a contractual responsibility to insure such property, or a contractual responsibility to pay for loss or damage to such property.

D. The value of building property covered under this endorsement will be determined in accordance with the terms of the Valuation Condition indicated in the Schedule, or at the amount for which you are liable under contract, whichever is less. If required by law, glass is covered at the cost of replacement with safety glazing material. However, the most we will pay for the coverage provided under this endorsement is the applicable Limit Of Insurance shown in the Schedule.

E. The Coinsurance Condition applies to the property covered under this endorsement only if a Coinsurance percentage is shown in the Schedule.

F. Any coverage provided under this Coverage Form or Policy for Your Business Personal Property or Personal Property Of Others does not apply to the property covered under this endorsement.

ADDITIONAL INSURED – BUILDING OWNER[195]

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.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 00 60 06 95

LEASEHOLD INTEREST COVERAGE FORM[196]

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

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION **F.** – DEFINITIONS.

A. COVERAGE

We will pay for loss of Covered Leasehold Interest you sustain due to the cancellation of your lease. The cancellation must result from direct physical loss of or damage to property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Leasehold Interest

Covered Leasehold Interest means the following for which an amount of "net leasehold interest" at inception is shown in the Leasehold Interest Coverage Schedule:

a. Tenants' Lease Interest, meaning the difference between the:

(1) Rent you pay at the described premises; and

(2) Rental value of the described premises that you lease.

b. Bonus Payments, meaning the unamortized portion of a cash bonus that will not be refunded to you. A cash bonus is money you paid to acquire your lease. It does not include:

(1) Rent, whether or not prepaid; or

(2) Security.

c. Improvements and Betterments, meaning the unamortized portion of payments made by you for improvements and betterments. It does not include the value of improvements and betterments recoverable under any other insurance, but only to the extent of such other insurance.

Improvements and betterments are fixtures, alterations, installations or additions:

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

(2) You acquired or made at your expense but cannot legally remove.

d. Prepaid Rent, meaning the unamortized portion of any amount of advance rent you paid that will not be refunded to you. This does not include the customary rent due at:

(1) The beginning of each month; or

(2) Any other rental period.

2. Covered Causes Of Loss

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

B. EXCLUSIONS AND LIMITATIONS

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

C. LIMITS OF INSURANCE

1. Applicable to Tenants' Lease Interest

a. The most we will pay for loss because of the cancellation of any one lease is your "net leasehold interest" at the time of loss.

But, if your lease is cancelled and your landlord lets you continue to use your premises under a new lease or other arrangement, the most we will pay for loss because of the cancellation of any one lease is the lesser of:

(1) The difference between the rent you now pay and the rent you will pay under the new lease or other arrangement; or

(2) Your "net leasehold interest" at the time of loss.

b. Your "net leasehold interest" decreases automatically each month. The amount of "net leasehold interest" at any time is your "gross leasehold interest" times the leasehold interest factor for the remaining months of your lease. A proportionate share applies for any period of time less than a month.

Refer to the end of this form for a table of leasehold interest factors.

2. Applicable to Bonus Payments, Improvements and Betterments and Prepaid Rent

a. The most we will pay for loss because of the cancellation of any one lease is your "net leasehold interest" at the time of loss.

But, if your lease is cancelled and your landlord lets you continue to use your premises under a new lease or other arrangement, the most we will pay for loss because of the cancellation of any one lease is the lesser of:

(1) The loss sustained by you; or

(2) Your "net leasehold interest" at the time of loss.

b. Your "net leasehold interest" decreases automatically each month. The amount of each decrease is your "monthly leasehold interest". A proportionate share applies for any period of time less than a month.

D. LOSS CONDITIONS

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

1. Appraisal

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

a. Pay its chosen appraiser; and

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

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

2. Duties In The Event Of Loss Of Covered Leasehold Interest

a. You must see that the following are done in the event of loss of Covered Leasehold Interest:

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

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

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

(4) Take all reasonable steps to protect the property at the described premises from further damage by a Covered Cause of Loss. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

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

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

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

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

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

3. Loss Payment

We will pay for covered loss within 30 days after we receive the sworn proof of loss, if:

a. You have complied with all of the terms of this Coverage Part; and

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

(2) An appraisal award has been made.

4. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, with respect to the tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

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

b. Vacancy Provisions – Subleased Premises

The following provisions apply if the building where direct physical loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs, provided you have entered into an agreement to sublease the described premises as of the time of loss or damage:

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

(a) Vandalism;

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

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to a Covered Cause of Loss not listed in **(1)(a)** through **(1)(f)** above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

c. If you have not entered into an agreement to sublease the described premises as of the time of loss or damage, we will not pay for any loss of Covered Leasehold Interest.

E.ADDITIONAL CONDITION

The following condition replaces the Cancellation Common Policy Condition:

CANCELLATION

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

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

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

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

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

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

5. If this policy is cancelled, we will send the first Named Insured any premium refund due. The cancellation will be effective even if we have not made or offered a refund.

6. If this coverage is cancelled, we will calculate the earned premium by:

a. Computing the average of the "net leasehold interest" at the:

(1) Inception date, and

(2) Cancellation date,

of this coverage.

b. Multiplying the rate for the period of coverage by the average "net leasehold interest".

c. If we cancel, we will send you a premium refund based on the difference between the:

(1) Premium you originally paid us; and

(2) Proportion of the premium calculated by multiplying the amount in paragraph **a.** times the rate for the period of coverage for the expired term of the policy.

d. If you cancel, your refund may be less than the refund calculated in paragraph **c.**

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

F. DEFINITIONS

1. "Gross Leasehold Interest" means the difference between the:

a. Monthly rental value of the premises you lease; and

b. Actual monthly rent you pay including taxes, insurance, janitorial or other service that you pay for as part of the rent.

This amount is not changed:

(1) Whether you occupy all or part of the premises; or

(2) If you sublet the premises.

Example:

Rental value of your leased premises	$5,000
Monthly rent including taxes, insurance, janitorial or other service that you pay for as part of the rent	−4,000
"Gross Leasehold Interest"	$1,000

2. "Monthly Leasehold Interest" means the monthly portion of covered Bonus Payments, Improvements and Betterments and Prepaid Rent. To find your "monthly leasehold interest", divide your original costs of Bonus Payments, Improvements and Betterments or Prepaid Rent by the number of months left in your lease at the time of the expenditure.

Example:

Original cost of Bonus Payment	$12,000
With 24 months left in the lease at time of Bonus Payment	÷ 24
"Monthly Leasehold Interest"	$500

3."Net Leasehold Interest":

a. Applicable to Tenants' Lease Interest.

"Net Leasehold Interest" means the present value of your "gross leasehold interest" for each remaining month of the term of the lease at the rate of interest shown in the Leasehold Interest Coverage Schedule.

The "net leasehold interest" is the amount that, placed at the rate of interest shown in the Leasehold Interest Coverage Schedule, would be equivalent to your receiving the "Gross Leasehold Interest" for each separate month of the unexpired term of the lease.

To find your "net leasehold interest" at any time, multiply your "gross leasehold interest" by the leasehold interest factor found in the table of leasehold interest factors attached to this form.

Example:

(20 months left in lease, 10% effective annual rate of interest)

"Gross Leasehold Interest"	$ 1,000
Leasehold Interest Factor	× 18.419
"Net Leasehold Interest"	$18,419

b. Applicable to Bonus Payments, Improvements and Betterments or Prepaid Rent.

"Net Leasehold Interest" means the unamortized amount shown in the Schedule. Your "net leasehold interest" at any time is your "monthly leasehold interest" times the number of months left in your lease.

Example:

"Monthly Leasehold Interest"	$ 500
With 10 months left in lease	× 10
"Net Leasehold Interest"	$5,000

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.[197]

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[198]	CONTACT NAME:	
	PHONE (A/C, No, Ext): FAX (A/C, No):	
	E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	NAIC #
INSURED	INSURER A :	
	INSURER B :	
	INSURER C :	
	INSURER D :	
	INSURER E :	
	INSURER F :	

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

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

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
	COMMERCIAL GENERAL LIABILITY ☐ CLAIMS-MADE ☐ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☐ PROJECT[202] ☐ LOC ☐ OTHER						DAMAGE TO RENTED PREMISES (Ea occurrence) $ MED EXP (Any one person) $ PERSONAL & ADV INJURY[199] $ GENERAL AGGREGATE[200] $ PRODUCTS - COMP/OP AGG[201] $
	AUTOMOBILE LIABILITY[203] ☐ ANY AUTO[204] ☐ SCHEDULED AUTOS ☐ ALL OWNED AUTOS ☐ NON-OWNED AUTOS ☐ HIRED AUTOS ☐ ☐						COMBINED SINGLE LIMIT (Ea accident) $ BODILY INJURY (Per person) $ BODILY INJURY (Per accident) $ PROPERTY DAMAGE (Per accident) $ $
	UMBRELLA LIAB ☐ OCCUR EXCESS LIAB ☐ CLAIMS-MADE DED RETENTION $[205]						EACH OCCURRENCE $ AGGREGATE $ $
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	N / A					☐ PER STATUTE ☐ OTHER E.L. EACH ACCIDENT $ E.L. DISEASE - EA EMPLOYEE $ E.L. DISEASE - POLICY LIMIT $

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)[206]

CERTIFICATE HOLDER[207]

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.[208]

AUTHORIZED REPRESENTATIVE[209]

EVIDENCE OF COMMERCIAL PROPERTY INSURANCE

DATE (MM/DD/YYYY)

THIS EVIDENCE OF COMMERCIAL PROPERTY INSURANCE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE ADDITIONAL INTEREST NAMED BELOW. THIS EVIDENCE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS EVIDENCE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE ADDITIONAL INTEREST.[210]

PRODUCER NAME,[211] CONTACT PERSON AND ADDRESS / PHONE (A/C, No, Ext):	COMPANY NAME AND ADDRESS / NAIC NO:
FAX (A/C, No): / E-MAIL ADDRESS:	IF MULTIPLE COMPANIES, COMPLETE SEPARATE FORM FOR EACH
CODE: / SUB CODE: / AGENCY CUSTOMER ID #:	POLICY TYPE
NAMED INSURED AND ADDRESS	LOAN NUMBER / POLICY NUMBER
	EFFECTIVE DATE / EXPIRATION DATE / ☐ CONTINUED UNTIL TERMINATED IF CHECKED
ADDITIONAL NAMED INSURED(S)[212]	THIS REPLACES PRIOR EVIDENCE DATED:

PROPERTY INFORMATION (Use REMARKS on page 2, if more space is required) ☐ BUILDING OR ☐ BUSINESS PERSONAL PROPERTY

LOCATION/DESCRIPTION

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

COVERAGE INFORMATION

PERILS INSURED ☐ BASIC[213] ☐ BROAD[214] ☐ SPECIAL[215]

COMMERCIAL PROPERTY COVERAGE AMOUNT OF INSURANCE: $ DED:

	YES	NO	N/A	
☐ BUSINESS INCOME[216] ☐ RENTAL				If YES, LIMIT: Actual Loss Sustained; # of months:
BLANKET COVERAGE				If YES, indicate value(s) reported on property identified above: $
TERRORISM COVERAGE[217]				Attach Disclosure Notice / DEC
IS THERE A TERRORISM-SPECIFIC EXCLUSION?				
IS DOMESTIC TERRORISM EXCLUDED?				
LIMITED FUNGUS COVERAGE				If YES, LIMIT: DED:
FUNGUS EXCLUSION (If "YES", specify organization's form used)				
REPLACEMENT COST[218]				
AGREED VALUE[219]				
COINSURANCE[220]				If YES, %
EQUIPMENT BREAKDOWN (If Applicable)				If YES, LIMIT: DED:
ORDINANCE OR LAW[221] - Coverage for loss to undamaged portion of bldg				
- Demolition Costs				If YES, LIMIT: DED:
- Incr. Cost of Construction				If YES, LIMIT: DED:
EARTH MOVEMENT (If Applicable)				If YES, LIMIT: DED:
FLOOD (If Applicable)[222]				If YES, LIMIT: DED:
WIND / HAIL INCL ☐ YES ☐ NO Subject to Different Provisions:				If YES, LIMIT: DED:
NAMED STORM INCL ☐ YES ☐ NO Subject to Different Provisions:				If YES, LIMIT: DED:
PERMISSION TO WAIVE SUBROGATION IN FAVOR OF MORTGAGE HOLDER PRIOR TO LOSS				

CANCELLATION[223]

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

ADDITIONAL INTEREST

☐	MORTGAGEE[224]	☐	CONTRACT OF SALE
☐	LENDERS LOSS PAYABLE[225]	☐	

NAME AND ADDRESS

LENDER SERVICING AGENT NAME AND ADDRESS

AUTHORIZED REPRESENTATIVE[226]

COVERAGES

ACORD

INSURANCE BINDER

DATE (MM/DD/YYYY)

THIS BINDER IS A TEMPORARY INSURANCE CONTRACT, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS

AGENCY	COMPANY	BINDER #
	EFFECTIVE DATE / TIME	EXPIRATION DATE / TIME
	☐ AM ☐ PM	☐ 12:01 AM ☐ NOON
PHONE (A/C, No, Ext): / FAX (A/C, No):	☐ THIS BINDER IS ISSUED TO EXTEND COVERAGE IN THE ABOVE NAMED COMPANY PER EXPIRING POLICY #:	
CODE: / SUB CODE:		
AGENCY CUSTOMER ID:	DESCRIPTION OF OPERATIONS/VEHICLES/PROPERTY (Including Location)	
INSURED AND MAILING ADDRESS		

TYPE OF INSURANCE	COVERAGE/FORMS	DEDUCTIBLE	COINS %	AMOUNT
PROPERTY CAUSES OF LOSS[227]				
☐ BASIC[228] ☐ BROAD[229] ☐ SPEC[230]				
GENERAL LIABILITY		EACH OCCURRENCE		$
☐ COMMERCIAL GENERAL LIABILITY[231]		DAMAGE TO RENTED PREMISES		$
☐ CLAIMS MADE[232] ☐ OCCUR[233]		MED EXP (Any one person)		$
		PERSONAL & ADV INJURY[234]		$
		GENERAL AGGREGATE[235]		$
	RETRO DATE FOR CLAIMS MADE:	PRODUCTS - COMP/OP AGG[236]		$
VEHICLE LIABILITY[237]		COMBINED SINGLE LIMIT		$
ANY AUTO[238]		BODILY INJURY (Per person)		$
ALL OWNED AUTOS		BODILY INJURY (Per accident)		$
SCHEDULED AUTOS		PROPERTY DAMAGE		$
HIRED AUTOS		MEDICAL PAYMENTS		$
NON-OWNED AUTOS		PERSONAL INJURY PROT		$
		UNINSURED MOTORIST		$
				$
VEHICLE PHYSICAL DAMAGE DED	☐ ALL VEHICLES ☐ SCHEDULED VEHICLES	☐ ACTUAL CASH VALUE		
COLLISION: _____		☐ STATED AMOUNT		$
OTHER THAN COL:				
GARAGE LIABILITY		AUTO ONLY - EA ACCIDENT		$
☐ ANY AUTO		OTHER THAN AUTO ONLY:		
☐ _____		EACH ACCIDENT		$
		AGGREGATE		$
EXCESS LIABILITY		EACH OCCURRENCE		$
☐ UMBRELLA FORM		AGGREGATE		$
☐ OTHER THAN UMBRELLA FORM	RETRO DATE FOR CLAIMS MADE:	SELF-INSURED RETENTION[239]		$
WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY[240]		☐ WC STATUTORY LIMITS		
		E.L. EACH ACCIDENT		$
		E.L. DISEASE - EA EMPLOYEE		$
		E.L. DISEASE - POLICY LIMIT		$
SPECIAL CONDITIONS / OTHER COVERAGES		FEES		$
		TAXES		$
		ESTIMATED TOTAL PREMIUM		

NAME & ADDRESS

	☐ MORTGAGEE ☐ LOSS PAYEE[241]	☐ ADDITIONAL INSURED[242]
	LOAN #	
	AUTHORIZED REPRESENTATIVE[243]	

CONDITIONS

This Company binds the kind(s) of insurance stipulated on the reverse side. The Insurance is subject to the terms, conditions and limitations of the policy(ies) in current use by the Company.

This binder may be cancelled by the Insured by surrender of this binder or by written notice to the Company stating when cancellation will be effective. This binder may be cancelled by the Company by notice to the Insured in accordance with the policy conditions. This binder is cancelled when replaced by a policy. If this binder is not replaced by a policy, the Company is entitled to charge a premium for the binder according to the Rules and Rates in use by the Company.

Applicable in California

When this form is used to provide insurance in the amount of one million dollars ($1,000,000) or more, the title of the form is changed from "Insurance Binder" to "Cover Note".

Applicable in Colorado

With respect to binders issued to renters of residential premises, home owners, condo unit owners and mobile home owners, the insurer has thirty (30) business days, commencing from the effective date of coverage, to evaluate the issuance of the insurance policy.

Applicable in Delaware

The mortgagee or Obligee of any mortgage or other instrument given for the purpose of creating a lien on real property shall accept as evidence of insurance a written binder issued by an authorized insurer or its agent if the binder includes or is accompanied by: the name and address of the borrower; the name and address of the lender as loss payee; a description of the insured real property; a provision that the binder may not be canceled within the term of the binder unless the lender and the insured borrower receive written notice of the cancellation at least ten (10) days prior to the cancellation; except in the case of a renewal of a policy subsequent to the closing of the loan, a paid receipt of the full amount of the applicable premium, and the amount of insurance coverage.

Chapter 21 Title 25 Paragraph 2119

Applicable in Florida

Except for Auto Insurance coverage, no notice of cancellation or nonrenewal of a binder is required unless the duration of the binder exceeds 60 days. For auto insurance, the insurer must give 5 days prior notice, unless the binder is replaced by a policy or another binder in the same company.

Applicable in Maryland

The insurer has 45 business days, commencing from the effective date of coverage to confirm eligibility for coverage under the insurance policy.

Applicable in Michigan

The policy may be cancelled at any time at the request of the insured.

Applicable in Nevada

Any person who refuses to accept a binder which provides coverage of less than $1,000,000.00 when proof is required: (A) Shall be fined not more than $500.00, and (B) is liable to the party presenting the binder as proof of insurance for actual damages sustained therefrom.

Applicable in the Virgin Islands

This binder is effective for only ninety (90) days. Within thirty (30) days of receipt of this binder, you should request an insurance policy or certificate (if applicable) from your agent and/or insurance company.

2. Manuscripted Endorsements.

Commentary

The next two endorsement forms are manuscript endorsements. They were tendered by a subtenant to the landlord in connection with request for approval of the sublease. The tenant had sold its dental practice to the subtenant and vacated the leased premises by the time of the request for sublease and insurance approval. The lease contained the typical but problematic additional insured requirement "tenant shall insured landlord as an additional insured on tenant's liability insurance". Note the first endorsement provides

> The following persons or entities scheduled below are added as **additional insureds** under the Insuring Agreement indicated below, but only with respect to any damages payable as a result of the **additional insured's** vicarious liability for the acts of omissions of an **Insured** otherwise covered under the applicable Insuring Agreement. This insurance does not apply to **losses** arising from or in connection with liability for any acts or omissions alleged against the **additional insured**.

Upon objection by the landlord and explanation that the tendered additional insurance was inadequate, after much delay and argument that the above was industry standard provided the second additional insured endorsement. The second endorsement provides

> The **Company's** duty to defend and pay damages on behalf of an **Insured** shall extend to any **premises lessor** named in a **claim** solely as a result of the acts or omissions of an **Insured** in the maintenance, operation, or use of that part of a premises leased to an **insured business**. However, this extension of coverage shall only apply to a **claim** that arises from an **event** or offense that took place during the term of the lease and that is otherwise covered under the Commercial General Liability Insuring Agreement. In addition, under no circumstances shall the **Company** have any duty to defend or pay damages on behalf of a **premises lessor** with regard to any damages caused by, or allegedly caused by, the **premises lessor**. If a **premises lessor** is entitled to a defense and indemnity under this policy, all terms and conditions of the policy shall apply as if the **premises lessor** were an **Insured**.

The second proposed endorsement is as problematic as the first. In the second endorsement the insurer drops the "vicarious" liability coverage language and the exclusionary language and substitutes first seemingly beneficial language "acts or omissions of an Insured (which arguably would include the acts or omissions of an additional insured"), but expands the exclusionary language. The exclusionary language excludes both the duty to defend the premises lessor (the additional insured) and the duty to pay damages on behalf of the premises lessor (the additional insured) "with regard to any damages caused by, or allegedly caused by, the premises lessor". Thus, no defense or coverage for the additional insured for its acts or omissions or even for damages "allegedly caused by the premises lessor".

The subtenant argued "well I provided you with an endorsement insuring you as an additional insured"!

All effective dates are 12:01 a.m. Standard Time at the address of the First Named Insured.

Endorsement No.	Forming Part of Policy No.	First Named Insured
Effective Date of Endorsement		

SCHEDULED ADDITIONAL INSUREDS ENDORSEMENT WITH NOTICE OF CANCELLATION

In consideration of the payment of the additional premium due, if any, and in reliance upon the representations of all **Insureds**, the **Company** and the **Insureds** agree to amend the policy as follows:

The following persons or entities scheduled below are added as **additional insureds** under the Insuring Agreement indicated below, but only with respect to any damages payable as a result of the **additional insured's** vicarious liability for the acts of omissions of an **Insured** otherwise covered under the applicable Insuring Agreement. This insurance does not apply to **losses** arising from or in connection with liability for any acts or omissions alleged against the **additional insured**.

All **additional insureds** share the Limits of Liability applicable to any **claim** or **suit** with any **Insured** for which the additional insured is alleged to be vicariously liable with respect to that same **claim** or **suit**.

It is further agreed that in the event that the **Company** cancels this policy for any reasons other than either non-payment of premium before the expiration date of the **policy period**, or at the request of the **first named insured**, the **Company** shall provide prior notice of such cancellation to the **additional insured** listed on the schedule below at the same time notice is provided to the **first named insured**.

Al other terms and conditions of the policy remain unchanged

SCHEDULE OF ADDITIONAL INSUREDS

NFM-PCE-8104-00-01 Edition Date: 08/2014

All effective dates are 12:01 a.m. Standard Time at the address of the First Named Insured.

Endorsement No.	Forming Part of 4. Policy No.	First Named Insured
5. Effective Date of Endorsement		

ADDITIONAL INSURED ENDORSEMENT - LEASED PREMISES
COMMERCIAL GENERAL LIABILITY INSURING AGREEMENT

In consideration of the payment of the additional premium due, if any, and in reliance upon the representations of all **Insureds**, the **Company** and the **Insureds** agree to amend the Commercial General Liability Insuring Agreement as follows:

MODIFIED COVERAGES

The following provision is added to *ADDITIONAL CONDITIONS — ALL COMMERCIAL GENERAL LIABILITY COVERAGES*:

Additional Insureds – Premises Lessors.

The **Company's** duty to defend and pay damages on behalf of an **Insured** shall extend to any **premises lessor** named in a **claim** solely as a result of the acts or omissions of an **Insured** in the maintenance, operation, or use of that part of a premises leased to an **insured business**. However, this extension of coverage shall only apply to a **claim** that arises from an **event** or offense that took place during the term of the lease and that is otherwise covered under the Commercial General Liability Insuring Agreement. In addition, under no circumstances shall the **Company** have any duty to defend or pay damages on behalf of a **premises lessor** with regard to any damages caused by, or allegedly caused by, the **premises lessor**. If a **premises lessor** is entitled to a defense and indemnity under this policy, all terms and conditions of the policy shall apply as if the **premises lessor** were an **Insured**.

The following definition is added to *DEFINITIONS-ALL COMMERCIAL GENERAL LIABILITY COVERAGES*:

Premises lessor means any person or entity listed on the Schedule of Premises Lessors below.

It is further agreed that in the event that the **Company** cancels this policy for any reasons other than either non-payment of premium before the expiration date of the **policy period**, or at the request of the **first named insured**, the **Company** shall provide prior notice of such cancellation to the **premises lessor** listed on the schedule below at the same time notice is provided to the **first named insured**.

All other terms and conditions of the policy remain unchanged.

SCHEDULE OF PREMISES LESSORS	
PREMISES LESSOR	DESCRIPTION OF PROPERTY

Policy Number:	First Named Insured:

SCHEDULE OF PREMISES LESSORS	
PREMISES LESSOR	DESCRIPTION OF PROPERTY

NFM-PGE-9-00-01 Edition Date: 1/2011

C. COMMENTS ON INSURANCE INDUSTRY STANDARD FORMS

Endnotes.

165 ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Agreed Value
166 ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Replacement Cost
167 ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders
168 ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page – Forms Applicable
169 ISO IL 00 17 11 98 Common Property Conditions
170 ISO CP 00 10 10 12 Building and Personal Property Coverage Form
171 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Exclusions – Electronic Data
172 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Causes of Loss
173 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages - Debris Removal
174 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages - Increased Costs of Construction
175 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages – Electronic Data
176 Vacancy Clause – Standard Commercial Property Policy – ISO Form CP 00 10 – Section E.6 Loss Conditions - Vacancy
177 Vacancy Clause - ISO Form CP 00 10 – Definition of "Vacancy"
178 Vacancy Clause - ISO Form CP 00 10 – "Customary Operations"
179 Vacancy Clause - ISO Form CP 00 10 – Building Under Construction
180 Vacancy Clause - ISO Form CP 00 10 – 60 Consecutive Days Vacancy – 6 Excluded Causes Of Loss
181 Vacancy Clause - ISO Form CP 00 10 – 15% Reduction in Proceeds
182 The Standard Mortgage Clause – Standard Commercial Property Policy - ISO Form CP 00 10 – Section F.2 Additional Conditions – Mortgageholders
183 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Agreed Value
184 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Inflation Guard
185 ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Replacement Cost
186 ISO CP 00 30 10 12 Business Income (And Extra Expense) Coverage Form
187 ISO CP 00 90 07 88 Commercial Property Conditions
188 ISO CP 04 05 10 12 Ordinance or Law Coverage
189 ISO CP 10 30 10 12 Causes of Loss – Special Form
190 ISO CP 10 30 10 12 Causes of Loss – Special Form – Ordinance or Law
191 CP 10 30 10 12 Causes of Loss – Special Form – Exclusion - Water
192 CP 10 30 10 12 Causes of Loss – Special Form – Exclusion – Boiler Explosion
193 CP 10 30 10 12 Causes of Loss – Special Form – Special Exclusion – Contractual Liability
194 ISO CP 12 18 16 07 Loss Payable Provisions
195 ISO CP 12 19 06 07 Additional Insured – Building Owner
196 ISO CP 00 60 06 95 Leasehold Interest Coverage Form

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1. Insurance

[1] **ISO.** "ISO" refers to Insurance Service Office, Inc., a public company that acts as a source of information about property/casualty insurance risk. ISO provides statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies. ISO's forms are considered the standard form for most insurance forms and its liability policy and property policy and the endorsements thereto are referred to herein as the "**standard form**". Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1986 *endorsement* forms for use in connection with its commercial general liability policy. **Endorsement** is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction. Each ISO designation is composed of four elements. The following is an example for the additional insured endorsement form appearing in the Appendix as **ISO Form CG 20 26 04 13** Additional Insured–Designated Person or Organization:

CG	20	26	04 13
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization."	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "04 13" or April 2013. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 04 13. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 04 13 edition date.

[2] **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."

[3] **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.

[4] **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.

[5] **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.

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

[7] **Self-Insurance.** See discussion at **Item III.A.12**, *Self-Insurance is Not Insurance* at the beginning of this article. "Self-insurance" is a system whereby a firm sets aside an amount of its monies to provide for any losses that occur - losses that could ordinarily be covered under an insurance program. The monies that would normally be used for premium payments are added to this special fund for payment of losses incurred. Self-insurance is a means of capturing the cash flow benefits of unpaid loss reserves and also offers the possibility of reducing expenses typically incorporated within a traditional insurance program. It involves a formal decision to retain risk rather than insure it and is distinguished from noninsurance, or retention of risks through deductibles, by a formalized plan or system to pay losses as they occur.

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

2. Certificates of Insurance

[8] **ACORD Certificates - Not Reasonable To Rely Upon.** See discussion at **Item III.A.2**, *Certificates of Insurance Are Not Insurance* at the beginning of this article. An **ACORD 25** Certificate of Liability Insurance and **ACORD 28** Evidence of Commercial Property Insurance should not be relied on as being accurate or as properly defining coverages, exclusions, and deductibles. W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

Sample of Cases Finding Reliance Unreasonable. Alabama. *Alabama Elec. Co-Op Bailey*, 950 So.2d 280, 284 (Ala. 2006).

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

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

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

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

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

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

[9] **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.

[10] **Certificates And Binders Are Sometimes Issued Prior To Policy Issuance.** A certificate of insurance is only evidence of insurer's intent to provide insurance and is not a contract to insure. In *Kermanshah Oriental Rugs v. GO*, 47 A.D.3d 438 (N.Y. 2008) the court held that a certificate of insurance was merely evidence of a carrier's intent to provide coverage, but not a contract to insure the designated party; nor was the certificate

conclusive proof, standing alone, that a contract for insurance existed; the claim that insurance was never procured remained unchallenged. In *Griffin v. DaVinci Development, LLC*, 845 N.Y.S.2d 97 (N.Y. 2007) the court found no privity of contract with insurer or insurance broker and no right to claim third party beneficiary status by premises owner in a suit against an insurer and contractor's insurance broker for broker having issued multiple certificates of insurance showing owner as an additional insured when in fact no insurance was subsequently issued. Certificates and binders are on many occasions issued prior to the issuance of the policy. This can result in situations where a subsequently issued policy excludes coverages expected by an additional insured shown in the certificate. In *American Country Ins. v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (Ill. 1998) a general contractor, which as designated as an additional insured on subcontractor's insurance certificate, was bound by policy exclusions and conditions in a subsequently issued policy and additional insured endorsement limiting coverage to strict liability. The endorsement read: "This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured". The court noted "Just because there are fewer strict liability claims than negligence claims does not make the coverage illusory". Even in the case of a renewal, additional insured status may be dropped and reliance on a certificate designating insured status may not be relied upon.

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

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

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

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

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

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

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

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

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

Additional Named Insured. Unlike liability insurance policies, there may be "additional named insureds" on a property policy. The following definition of "additional named insured" is found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx. "(1) A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. (2) A person or organization added to a policy after the policy is written with the status of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization

added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties."

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

[13] **Additional Insureds.** An "additional insured" is a person or organization not automatically included as an insured under an insurance policy but for who insured status is arranged, usually by endorsement. A named insured's impetus for providing additional insured status to others may be a desire to protect the other party because of a close relationship with that party (*e.g.*, employees or members of an insured club) or to comply with a contractual agreement requiring the named insured to do so (e.g., customers or owners of property leased by the named insured).

[14] **Self-Insured Retentions.** See Endnote 7 (*Self-Insurance*).

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

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

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

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

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

> 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.

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

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

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

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

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

[18] **Signed By An "Authorized Representative"?.** ACORD Certificates or Evidences of Insurance are issued by a "*Producer*" and are signed by an "*Authorized Representative*". Neither of these terms is defined on the face of the standard ACORD form. Except for the multiple disclaimers of authority and accuracy, the ACORD Certificate of Insurance and the Evidence of Insurance are silent on the authority of the Authorized Representative to bind the listed Insurers. The ACORD Certificate of Insurance and Evidence of Insurance do not identify whether the Producer is the agent for the Insured, the agent for the Insurer, or a dual agent for both the Insured and the Insurer. Some courts in determining whether an ACORD form may be relied on despite the disclaimers have drawn a distinction on whether the Authorized Representative is a "broker"; a "soliciting agent"; a "recording agent"; a "dual agent"; a "special agent"; or an "insurer's agent". Other courts have held that the insurer is estopped from denying the coverage stated in the certificate or evidence of insurance, if the insurer or a person with apparent authority from the issuer issued the certificate, especially if the certificate does not contain ACORD-type disclaimers. See discussion at 43 AM. JUR.2d Insurance §§ 128 Brokers – Generally; 129 Brokers – Status While and After Procuring Policy. 4 BRUNER AND O'CONNOR ON CONSTRUCTION LAW §11:171 Certificates of Insurance – Generally; COUCH ON INSURANCE §§ 27:20 Act of Soliciting Agent – Insufficient to Justify Reformation; 45:1 Brokers Versus Agents; Definitions and Distinctions; 48:61 Soliciting and Collecting Agents; 48:62 Recording Agents.

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

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

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

[19] **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.

[20] **Self-Insurance.** See Endnote 7 (*Self-Insurance*).

3. Commercial General Liability

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

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

Declarations.
Section I - Coverages
Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)
1. Insuring Agreement
2. Exclusions
Coverage B. Personal and Advertising Injury Liability
1. Insuring Agreement
2. Exclusions
Coverage C. Medical Payments
1. Insuring Agreement
2. Exclusions

Supplementary Payments - Coverages A and B
Section II - Who Is An Insured
Section III - Limits of Insurance
Section IV - Commercial General Liability Conditions
Section V - Definitions
Endorsements

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

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

[23] **General Aggregate.** See ISO CG 25 04 05 09 Designated Location(s) General Aggregate Limit. "General Aggregate" is the maximum limit of insurance payable during any given annual policy period for all losses other than those arising under the products and completed operations hazard. "Aggregate" is a limit in an insurance policy stipulating the most it will pay for all covered losses sustained during a specified period of time, usually a year. Aggregates are commonly included in liability policies.

[24] **SIR.** See Endnote 7 - *Self-Insurance.*

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

[26] **"Or Equivalent".** If requiring a specific ISO form, specification drafters sometimes provide "or equivalent". What does that mean? What it does not mean is "identical." Make the insurance provider declare what in fact they do have. Get a copy and read it. Make sure it complies with your requirements.

[27] **Contractual Liability Coverage - An Exception To An Exclusion From Coverage.** See **ISO CG 00 01 04 13** Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. **2.b** Contractual Liability. "Contractual Liability Coverage" (referred to by this author as "*indemnity insurance*") is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

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

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

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

See **ISO CG 24 26 04 13** Amendment of Insured Contract Definition, which when added to the standard CGL policy amends definition "**f**" to add the following qualifier at the end of the first clause:

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

Also see ISO CG 21 39 Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract; and discussion in the article at **Item III.A.11** *Exclusions May Be Invisible*.

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

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

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

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

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

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

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

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

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

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

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

[28] **Separation of Insureds.** A feature of some requests for additional insured status is the stipulation that the indemnifying person's policy, to which the indemnified person is being added as an additional insured, be modified to provide "cross-liability" coverage. Cross-liability refers to the loss exposure created when one insured under a policy sues another. Standard general liability policies in use today provide "cross-liability" coverage– without the need for any modification by virtue of the "separation of insureds" condition. This condition of the policy states that coverage will apply "separately to each insured against whom claim is made or suit is brought." For this reason, it may be a legitimate precaution to include in contract language a stipulation that liability insurance as required by the contract provide cross-liability coverage, but not a demand for a cross-liability endorsement, which is unnecessary when the standard CGL form is being used. This severability of interests clause, as it is also known, establishes separate coverage for each insured under the policy, except as respects the policy limits. Policies containing this provision do not require a separate endorsement to effect cross-liability coverage, and ISO has no "cross-liability endorsements" in its forms portfolio because they are not needed with ISO policy forms. For this reason, contracts should generally not require cross-liability endorsements. Most endorsements that go by that name exclude liability of one insured to another. To handle the unlikely, but possible, contingency that a policy does not include a severability of interests clause, it is prudent to specify that the required liability policies provide cross-liability coverage as would by achieved under the standard ISO separation of insureds clause. See **Paragraph 7** Separation of Insureds to Section IV - Commercial General Liability Conditions to **ISO CG 00 01 04 13** Commercial General Liability Coverage Form. (Form attached to this article).

[29] **Primary and Noncontributing.** See Endnote 133 – (*ISO CG 20 10 04 13 Primary and Noncontributory -- The "Other Insurance" Condition)*. See the following: (1) Section IV, Paragraph 4.a Other Insurance – Primary Insurance and 4.b – Excess Insurance to the **ISO CG 00 01 04 13** Commercial General Liability Coverage Form for provisions in the standard CGL policy establishing that coverage to the Named Insured under the CGL is provided on a primary basis and co-contributing with other insurance available to the Named Insured but is excess under specified circumstances, including if the Named Insured's other insurance is an additional insured provided on a primary basis; and (2) **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition.

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

Whether the limits of the Named Insured's umbrella or excess policy contribute prior to calling upon the additional insured's "other insurance", is a question addressed by case law in each jurisdiction. The so-called "Horizontal Exhaustion" rule applies in some jurisdictions and declares a party's excess coverage to be excess over all "primary" coverages. See *e.g.*, *Kajima Constr. Servs. V. St. Paul Fire & Marine Ins. Co.*, 856 N.E.2d 452 (Ill. App. 2006) – court held that Illinois' horizontal exhaustion rule required the additional insured's (general contractor) CGL policy pay prior to the subcontractor's umbrella policy. Also, the courts of some jurisdictions (Alaska, Arizona, Delaware, Idaho, Indiana, Louisiana, Maine, Michigan, Missouri, Nevada, Oregon, Tennessee, Rhode Island and West Virginia) follow the so-called *Lamb-Weston* rule (named after the first case in which the rule was applied) and hold that all "other insurance" clauses are repugnant to each other. When more than one policy is triggered by a loss, all policies automatically share the loss on a pro rata basis.

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

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

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

ISO CG 20 01 04 13 Primary and Noncontributory – Other Insurance Condition has been introduced in 2013 by ISO to address this approach of endorsing the protecting parties policy to reiterate that it provides "primary" coverage and "will not seek contribution from any other insurance available to an additional insured"; but Provision (2) of this endorsement requires that the written agreement of the Additional Insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that ISO CG 20 01 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objective if the written agreement itself does not specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory.

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

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

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

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In 2013 the "by attachment of an endorsement" language was deleted. The 2013 revision thus ends concern under the standard CGL policy as to whether an additional insured's own CGL policy would be primary and co-contributing with automatic additional insured coverages. Note that the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution. The following are traps to be avoided by the party seeking protection:

(1) Do not assume that the protecting party's insurance contains standard wording. It might not contain the standard wording that the policy affords primary coverage over other insurance available to the additional insured. In such case reliance on the 1997 ISO language or other endorsement to the additional insured's own policy to state that it is excess over other coverage available to the additional insured may be misplaced. A policy maintained by a protecting party may provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protected party's policy to provide that it is excess coverage creates a case where both policies declare them to be excess.

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

(2) Do not assume that the protecting party's additional insured endorsement does not have a provision in it stating that the additional insured's coverage is on excess or contributory basis. Even though the protecting party's policy may have standard language to the effect that coverage for insureds is primary and noncontributory for other insurance coverage available to the insured, the additional insured endorsement may have overriding language. The protected party should require in the contract with the protected party that the additional insured coverage to be provided to the protected party will be on a primary, noncontributory basis. Failure of the protecting party to provide such coverage will be a breach of this insurance covenant. Note, some

CGL policies provide that they automatically provide primary coverage when required by the contract between the parties (a "**primary-when-required**" provision). For example the following is a "primary-when-required" provision contained in some CGL policies:

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

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

[30] **Waiver of Subrogation Endorsement.** There generally is no premium charged by the insurer to issue this endorsement. The endorsement waives the insurer's right or reimbursement for its paid claims as to persons scheduled in the endorsement.

[31] **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".

[32] **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.

[33] **Contractual Liability Limitation.** See **ISO CG 21 39** Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes paragraph "**f**" (assumption of tort liability of another) altogether from the definition of an insured contract.

[34] **Amendment of Insured Contract Definition.** See the **ISO CG 24 26** Amendment of Insured Contract Definition (form attached to this Article) amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

[35] **Limitation of Coverage to Designated Premises or Project.** See the **ISO CG 21 44** Limitation of Coverage to Designated Premises or Project.

[36] **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.

4. Automobile Liability Insurance

[37] **Business Auto Liability.** A "business auto policy" or "BAP" is a commercial auto policy that includes auto liability and auto physical damage coverages arising from "covered autos"; other coverages are available by endorsement. Except for auto-related businesses and motor carrier or trucking firms, the business auto policy (BAP) addresses the needs of most commercial entities as respects auto insurance. What autos are "covered autos" is identified by a designation on the BAP's Declaration page called a "symbol". There are the following 10 symbols:

Symbol 1	Any Auto
Symbol 2	Owned Autos Only
Symbol 3	Owned Private Passenger Autos Only
Symbol 4	Owned Autos Other Than Private Passenger Autos Only
Symbol 5	Owned Autos Subject to No Fault
Symbol 6	Owned Autos Subject to Compulsory UM Law
Symbol 7	Specifically Described Autos
Symbol 8	Hired Autos Only
Symbol 9	Nonowned Autos Only
Symbol 19	Mobile Equipment Subject to Motor Vehicle Insurance Law Only

[38] **"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.

5. Workers Compensation Insurance

[39] **Workers Compensation Limits Required by Law.** Leases and construction contracts frequently require that a party "maintain Workers Compensation and Employers Liability coverage *as required by law*." Does this verbiage really require coverage? With few exceptions, Texas does not

require an insured to carry Workers Compensation insurance. A statement that coverage shall be provided "as required by law" does not require that the coverage be provided.

"Workers Compensation" insurance is the system by which no-fault statutory benefits prescribed by state law are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. The standard workers compensation and employers liability policy used in most states was substantially revised in 1984 and again to a lesser extent in 1992. As compared to the previous 1954 policy, these revisions included some slight changes in terminology and coverage approaches that should be reflected in contract insurance requirements. One of these was a change in the name from "workmen's compensation" to "Workers Compensation." Another more important change was the inclusion of "other states coverage" in the basic Form and the elimination of the "broad Form all states" endorsement, which was previously used to provide this coverage. Workers compensation coverage is usually written in tandem with an 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.

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

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

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

[42] **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.

6. Liquor Liability Insurance

[43] **Liquor Law Liability (Dram Shop).** Liquor law liability (also called dram shop liability) is a common law liability imposed on those selling alcoholic beverages, as well as a statutory liability established in some states. The risk of liquor law liability is excluded from commercial general liability policies. For coverage, a party must specify that the other party obtain a liquor legal liability policy that specifically provides coverage for bodily injury or property damage for which the insured may become legally liable as a result of contributing to a person's intoxication. This type of special lines liability policy only covers insureds "*in the business of*" manufacturing, selling, distributing, serving alcoholic beverages for charge or no charge if a license is required for the activity." *e.g.*, typical taverns, liquor stores and other commercial establishments that serve alcoholic beverages (dram shop) to patrons.

See in the **Appendix of Forms** CG 00 01 04 13 Commercial General Liability Coverage Form Exclusion **2.c** Liquor Liability. Note that Exclusion 2.c provides that it excludes coverage for any injury or damage "for which *any insured* may be held liable by reason of causing or contributing to the intoxication of any person." But then qualifies this exclusion by stating that the exclusion applies "only if *you* are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." In other words, if the named insured is in an alcohol-related business, no insured has coverage for causing or contributing to any person's intoxication. If the *named insured* is not in such a business, the exclusion does not apply to *any insured*.

The standard policy was amended in 2013 to narrow coverage by adding clarifications expanding the exclusion. The 2013 revisions added the "**(a)** and **(b)** exclusions" (see **Appendix of Forms** CG 00 01 04 13 Commercial General Liability Coverage Form Exclusion **2.c** Liquor Liability "This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in (a) …; or (b) ….) addressing cases that had found certain conduct as falling outside of the exclusion and thus covered under the CGL policy (*e.g., Penn-America Insurance v. Peccadillos*, 27 A.3d 259 (Pa. Super. Ct. 2011) (en banc), petition for allowance of appeal denied by, *Penn–Am. Ins. Co. v. Peccadillos, Inc.*, 34 A.3d 832 (Pa. 2011) - failing to provide transportation to a drunk patron) and *McGuire v. Curry*, 766 N.W.2d 501 (S.D. 2009) - negligent supervision of an employee – underage employee of a race track - that while drunk injured a third party). The 2013 revisions also revised the Liquor Liability Exclusion to provide that a "BYO" establishment is not considered to be in the business of selling, serving or furnishing alcoholic beverages! Question 1: Is the Liquor Liability Exclusion applicable to a company's annual party if the company provides its employee and the employee's guest with two free drink tickets? The company would argue that it is not "in the business" of providing alcohol and that its CGL policy should cover its host liability. Advice: The better practice is to confirm with the insurer that the event and activity is covered or, if necessary, purchase special events coverage (aka laser coverage). Question 2: What if the business regularly furnishes free drinks as a draw to marketing events? Advice: Same as Question 1.

7. Umbrella And Excess Liability Insurance

[44] **Umbrella and Excess Policies.** The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx. "Umbrella policy": "A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR)." "Excess policy": "A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance."

[45] **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.

8. Property Insurance

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

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

[47] **Property Insurance.** ISO commercial property insurance is a form comprised of the following documents combined to make the policy: the Declarations Page (**ISO CP DS 00 10**, or a variation); the Common Policy Conditions (**IL 00 17**); the Building and Personal Property Coverage Form (form attached to this Article); the Commercial Property Conditions (**CP 00 90**) (form attached to this Article); optional coverage endorsements: *e.g.*, **ISO 00 30** Business Income (And Extra Expense) Coverage Form, the **ISO CP 04 05** Ordinance or Law Coverage endorsement, or **ISO 04 05** Debris Removal Additional Insurance endorsement; one of the 3 Causes of Loss Forms: (CP 10 10, 10 20 or **10 30**); and loss payee or additional insured endorsement: *e.g.*, **ISO 12 18** Loss Payable Provisions or **ISO CP 12 19** Additional Insured – Building Owner (form attached to this Article).

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

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

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

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

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

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

Windstorm. For an interesting example of how a windstorm exclusion may come into play is illustrated by *Great American Ins. Co. of N.Y. v. Lowry Dev., LLC*, 576 F.3d 251 (5th Cir. 2009). This case involved a builder's risk policy. Although the policy as originally issued did not exclude wind damage, subsequent to its issuance the issuer endorsed the policy with a windstorm exclusion and notified the developer's broker that the original policy was to have excluded wind damage. The developer's broker did not respond and did not notify the developer. The policy was reissued the next policy year and excluded wind damage. Of course, Hurricane Katrina demolished the project. The Fifth Circuit held that the developer's broker was the developer's agent with authority to handle the developer's insurance matters and therefore notice to the broker was notice to the developer.

Flood. See Endnote 57 (*Flood*) for a discussion of flood insurance.

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

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

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS

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

[49] **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 59). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See **ISO CP DS 10 00** Declarations Page at Optional Coverages.

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

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

[50] **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.

[51] **Designation of Landlord as Additional Insured on Tenant's Property Policy.** See Endnote 106 (*Tenant Betterments, Alterations and Improvements*). See **Insurance Spec. B.1.1** where insurance for Tenant Improvements and Betterments is placed on the landlord. Some commentators have questioned whether a tenant has an insurable interest in improvements and betterments installed at the landlord's expense. A similar issue arises if the lease provides that the tenant is to "insure all leasehold improvements" and there are significant leasehold improvements preexisting in the leased premises. Tenant may not have an insurable interest in improvements it did not install and pay for. But see **ISO CP 00 10 10 12** Building and Personal Property Coverage Form stating that coverage is provided the tenant for:

> (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
> (a) Made a part of the building or structure you occupy but do not own; and
> (b) You acquired or made at your expense but cannot legally remove;

[52] **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.

[53] **Coinsurance.** "Coinsurance" is a property insurance provision that penalizes the insured's loss recovery if the limit of insurance purchased by the insured is not at least equal to a specified percentage (commonly 80%) of the value of the insured property. A business income coverage coinsurance provision penalizes the insured's loss recovery if the business income limit of insurance is not at least equal to a specified percentage of the business income that would have been earned during the 12-month policy period. The coinsurance provision specifies that the insured will recover no more than the following: the amount of the loss multiplied by the ratio of the amount of insurance purchased (the limit of insurance) to the amount of insurance required (the value of the property on the date of loss multiplied by the coinsurance percentage), less the deductible. Coinsurance requirements protect the insurer against an insured's deliberate underinsurance of the Covered Property. To avoid the penalty of coinsurance, the insured is forced to insure at or above this minimum level of value and pay its premium on the insured value. See Declarations Page – If higher than 80% coinsurance is applicable, such higher percentage is to be set out in the space provided on the Declarations Page. See Endnote 65 for a discussion of "Agreed Value Basis" coverage and see Declarations Page setting out space for designating the Agreed Value of the Covered Property.

[54] **Property Insurance – Special Causes of Loss.** See Endnote 48 for a discussion of Causes of Loss Form property insurance policies, including Special Causes of Loss.

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

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

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

ATIMA. The phrase "**as their interests may appear**" (an ATIMA clause) often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy proceeds checks. Under the **CP 12 19** the building owner is an additional insured with respect to the coverage provided for direct physical damage to the building and covered loss is adjusted with and payable to both the tenant, as the "First Named Insured" (the insured whose name is listed first in the Declarations), and to the building owner, as additional insured. The **ISO CP 12 19** Building Owner Additional Insured Endorsement (form attached to this Article) does not provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO Common Policy Conditions (form attached to this Article) states that notice of cancellation is given only to the first Named Insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant.

Caveat: To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy. Additionally, note that the notification endorsement likely will not address notification as to cancellations by the tenant and will need to be manuscripted to include notice to the landlord of tenant cancellations. In *Scottsdale Ins. Co. v. Mason Park Partners, LP,* 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of

the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured.

[56] **Antennas.** See **ISO CP 00 10 10 12** Building and Personal Property Coverage Form, Paragraph **A.2.q(2)** Property Not Covered. Antennas (including satellite dishes) and their lead-in wiring, masts or towers are excluded from coverage under the ISO property policy, except as provided in a limited manner in the Coverage Extensions (fire, lightning, explosion, riot, civil commotion and aircraft). Coverage may be increased and extended by an ISO CP 14 50 endorsement.

[57] **Flood.** Flood losses are commonly excluded from property insurance policies. Flood losses are losses caused by rising waters, back up of storm sewers and storm surges. The Flood Disaster Protection Act of 1973 mandated that federally regulated lending institutions could not "make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified ... as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. The National Flood Insurance Program ("NFIP") created by the 1968 act was amended by the Biggert-Watters Flood Insurance Reform Act of 2012, and extended by the Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 112-89, 128 Stat. 1020. NFIP is codified at 42 U.S.C.A. § 4012a *et seq*.. Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

[58] **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.

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

[60] **Terrorism.** Before September 11, 2001 ("9-11") most property damage policies included coverage for terrorism. After 9-11 most were rewritten to exclude or significantly limit coverage for future acts of terrorism. After 9-11 it became apparent that insurers were not willing to take on the potential of high levels of terrorism risk. The Terrorism Risk Protection Act of 2002 ("TRIA") was enacted to provide a safety net for businesses to obtain terrorism insurance at reasonable prices. Thus, the backstop, as a government-supported pool to cover the most catastrophic losses, facilitated the development of the market for terrorism insurance. The Terrorism Risk Insurance Program Reauthorization Act of 2007 ("TRIPRA") extend the TRIA program through December 31, 2014 with some significant changes. Among other changes TRIPRA revised the definition of a "certified act of terrorism." TRIPRA was modified and renewed through December 31, 2020 by the Terrorism Risk Insurance Program Reauthorization Act of 2014, Pub. L. No. 114-1 (Jan. 12, 2015). The new act provides for the increase The Treasury Department still has to develop rules for the new law. Under TRIPRA an insured loss is one resulting from an "Act of Terrorism" that is covered by primary or excess property insurance. An "Act of Terrorism", which must be certified as such by the Secretary of the Treasury in consultation with the Secretary of Homeland Security and U.S. Attorney General is:

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

No act can be certified as an Act of Terrorism (i) if it is committed in the course of a war, or (ii) if property insurance losses resulting from the act do not exceed $5 million in the aggregate. Excluded are chemical, nuclear, biological, and radiological events unless and until a study of the availability of insurance coverage for losses caused by terrorist attacks involving such materials is completed and recommendations regarding actions to expand the coverage to include these events are made. To date there has not been a certified Act of Terrorism and no insurance proceeds have been paid out under this program.

[61] **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.

[62] **Debris Removal.** See the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form **¶A.4.a** Coverage – Additional Coverages – Debris Removal. The ISO Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the **ISO CP 04 15 10 12** Debris Removal Additional Limit of Insurance endorsement.

[63] **Waiver of Claims; Waiver of Subrogation.** See discussion in this article at **IV. Contractual Waiver of Subrogation.**

[64] **Business Income and Additional Expense.** This form of insurance (**ISO CP 00 30**) covers two types of loss: (1) loss of business income/earnings - covers losses suffered by a business as a result of not being able to use property damaged by a covered cause of loss under a property insurance policy

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

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

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

[65] **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.

[66] **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.

[67] **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.

[68] **Other Insurance.** For example, the following specification is to be added if there is a hazardous waste hauler:

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

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

9. Construction Liability Insurance

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

The following is an endorsement to a contractor controlled insurance program on a recently completed office tower that provided post-completion coverage to the contractor:

This endorsement, effective 12:01 A.M. 03/31/2015
Forms a part of Policy GL ____
Issued to (_____)
By AMERICAN HOME ASSURANCE COMPANY

COMPLETED OPERATIONS EXTENSION
CONTROLLED INSURANCE PROGRAM (MULTIPLE PROJECTS)
This Endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE:
All (_____) Projects with construction values $15,000,000 and above.

Coverage of the "products-completed operations hazard" is extended for the Projects described in the above Schedule for a period of TEN (10) years or the Statute of Repose, whichever is less ("Extended Completed Operations Period"). The Extended Completed Operations Period will commence when that portion of the project is put to its intended use, or a temporary or permanent certificate of occupancy is issued. The Extended Completed Operations limit of insurance is $4,000,000 per project and in the aggregate for all projects listed above, which includes the term of the Extended Completed Operations Period.

All terms and conditions remain unchanged.

[70] **General Aggregate Per Premises or Project.** See the **ISO CG 25 04 05 09** Designated Location(s) General Aggregate Limit.

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

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

[73] **Incidental Design Liability.** The list of prohibited endorsements includes the **ISO CG 22 34 04 13** Exclusion – Construction Management Errors and Omissions and the **ISO CG 22 79 04 13** Exclusion – Contractors – Professional Liability. These endorsements are designed to deflect from the CGL policy liabilities perhaps more properly covered by a professional liability policy. However, a contractor's service likely includes an element of professional services, including incidental design services. Before accepting the additions of these exclusions, consideration should be given to requiring the contractor to carry professional liability insurance or tailoring the exclusions to exclude known professional liability services being provided by the contractor in its scope of its work. The **ISO CG 22 79** states that scope of "professional services" excluded by the endorsement "do not include services within construction means, methods, techniques, sequences and procedures employed by (the contractor) in connection with (its) operations in (its) capacity as a construction contractor." Even though the ISO endorsement sets out this understanding of what is and is not excluded by the endorsement, the bounds of the exception are not bright lines. The limits of a CGL policy are generally greater than a professional liability policy and the time to submit claims is longer because CGL policies are generally occurrence-based, unlike professional liability policies.

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

Commercial General Liability
CG 71 57 09 10

Additional Insured – Owners, Lessees Or Contractors Automatic Status When Required In Construction Contract Primary And Non-Contributory

A. Section II - Who is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when ***you and such person or organization have agreed*** in a written contract that such person or organization be added as an additional insured on your policy. (Bold italics emphasis added.)

Since the landlord does not have a contract with the contractor, this language does not extend additional insured coverage to the landlord. In *Westfield Insurance Co. v. FCL Builders, Inc.,* 948 N.E.2d 115, 350 Ill. Dec. 46 (Ill. App. Ct. – First Dist., 2nd Div. 2011) an Illinois appellate court faced an analogous situation. A second tier subcontractor's commercial general liability (CGL) insurer brought a declaratory judgment action that it was not obligated to defend or indemnify a general contractor (FCL Builders, Inc.), in a tort action brought by an injured employee of a second tier subcontractor (JAK). FCL contracted with Suburban Ironworks, Inc., which in turn subcontracted with JAK. JAK erected steel on the job site. Unfortunately, about a

month into the job, JAK's employee was severely injured when he fell off of a steel beam. The employee filed a tort suit against FCL and Suburban, alleging the breach of various duties of care regarding job site safety that they allegedly owed to the employee. FCL had been furnished with a certificate of insurance issued by JAK's insurance agent that listed FCL as an additional insured under JAK's policy with Westfield. The appellate court held that the general contractor was not an additional insured under the CGL policy purchased by the second tier subcontractor. The Westfield CGL additional insured policy contained an endorsement that amended the definition of "insured" under the CGL policy to include as additional insureds "any person or organization for whom you are performing operations when you and such a person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy". The court held

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

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

[75] **Additional Insureds – ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** The July 2004 version of this CGL endorsement, ISO CG 20 10 07 04, which is the revision immediately preceding the most recent version of April 2013, "includes as an additional insured the person or organization shown in the Schedule, but only with respect to liability *caused in whole or in part by* [*the Named Insured's*] *acts or omissions*; or the acts or omission of those acting on [the Named Insured's] behalf in the performance of *on-going* operations." The July 2004 endorsement revision (1) carries forward the major change introduced by the October 2001 revision to this endorsement, the CG 20 10 10 01, that eliminated from the scope of additional insured coverage liabilities arising out of *completed operations*; and (2) changes from the previously used language "*arising out of the* [Named Insured's ongoing operations]" to the "*caused in whole or in part by* [the named insured's acts or omissions acts or omissions]", thus eliminating coverage for the additional insured's sole negligence.

[76] **Additional Insureds – ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** See **ISO CG 20 10 04 13** Additional Insured – Owners, Lessees or Contractors – Scheduled Person Or Organization. This, the most recent revision to the CG 20 10 Additional Insured endorsement, introduces as additional limitation of coverage the following: "the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured." and "the most we will pay on behalf of the additional insured is the amount of insurance: 1. Required by the contract or agreement; or 2. Available under the applicable Limits of Insurance shown in the Declarations." Thus, in order to avoid the minimum limit becoming the maximum limit of coverage, the insurance specifications will need to clearly specify that the specification of the minimum limit does not result in capping the limit but that any additional limits provided by the policy will be fully available to respond to protect the additional insured.

[77] **Additional Insured Coverage in the Construction Context – Anti-Indemnity Statutes.** Most state anti-indemnity statutes apply exclusively in the construction context. Some states, have adopted statutes voiding as against public policy any indemnity by one person of another person's negligence in the context of construction and additionally voiding any insured coverage to the extent it provides insurance coverage the scope of which is prohibited for an indemnity agreement. Care should be taken in drafting insurance specifications applicable to tenants and their contractors to avoid violating such prohibitions and to require additional insured endorsements in states that have adopted anti-indemnity or anti-additional insured endorsement law.

The "Texas Anti-Indemnity Act", Chapter 151 of the Texas Insurance Code provides as to indemnification:

> §151.102 Agreement Void and Unenforceable. Except as provided by Section 151.103, a provision in a construction contract … is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.
>
> §151.103 Exception for Employee Claim. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier.

Also note that Chapter 151 of the Texas Insurance Code provides as to additional insured coverage:

> §151.104 Unenforceable Additional Insurance Provision. (a) Except as provided in Subsection (b), a provision in a construction contract that requires the purchase of additional insured coverage, or any coverage endorsement, or provision within in an insurance policy providing additional insured coverage, is void and unenforceable to the extent that it requires or provides coverage the scope of which is prohibited under this subchapter for an indemnity agreement to indemnify, hold harmless, or defend.
> (b) This section does not apply to a provision in an insurance policy, or an endorsement to an insurance policy, issued under a consolidated insurance program to the extent that the provision or endorsement lists, adds, or deletes named insureds to the policy.

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

[79] **Amendment of Insured Contract Definition.** See Endnote 27 (*Contractual Liability Coverage - An Exception To An Exclusion From Coverage*) for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy. See the **ISO CG 24 26** Amendment of Insured Contract Definition (form attached to this Article) amending the definition of "insured contract" in the CGL Policy to limit Contractual Liability Coverage to tort liability assumed by the Named Insured to bodily injury and property damage caused in whole or in part by the Named Insured.

[80] **Contractor's Pollution Liability.** See the ISO CG 00 01 04 13 Commercial General Liability Coverage Form, Section I, Coverage A, Par. **2.f** – Exclusions – Pollution. Par. 2.f is known as the "absolute pollution exclusion" and excludes environmental pollution claims from the CGL policy's coverage. See *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789, 793 (Ala. 2002) for a discussion of the history of CGL policy's absolute pollution exclusion.

10. Builder's Risk Insurance

[81] **No Standard Builder's Risk Policy.** There is no standard builder's risk policy, unlike liability insurance there is a commonly recognized standard ISO CGL policy. ISO has a builder's risk policy, but builder's risk policies are considered to be Inland Marine policies and there is a wide divergence in builder's risk coverages insurer to insurer. "Inland Marine" policies are policies that are customized to the loss sought to be insured, and are designed to provide coverage for special exposures typically associated with the type property at which they are directed and the special valuation methods needed to address the exposure. Construction is recognized as a special exposure. A commonly used Inland Marine policy for builder's risk coverage is the Commercial Inland Marine Conditions (Form CM 00 01 09 04).

Common Errors and Problems

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

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

Coverage Amount. Failure of the policy amount to reflect the full loss exposure is a common error. The contractor's contract sum is a guide in setting the coverage amount. In projects involving remodeling (especially if the structure is a historic structure) or improvement to an existing building, limiting the coverage amount to the contractor's contract sum could lead to a significant uninsured loss. Builder's risk policies will not insure the building envelope unless specifically added. When added, some builder's risk policies insure the envelope only on an actual cash value, or depreciated, basis.

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

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

[82] **Replacement Cost.** Builder's risk can be provided on either an Actual Cash Value basis or a Replacement Cost basis. Normally, there is little to no difference between ACV and Replacement Cost on a newly constructed structure but the potential exists that an adjuster could allege physical depreciation, especially when covering long-term construction projects. Replacement Cost is the preferred valuation method.

[83] **Builder's Risk – Deductibles.** Builder's risk policies frequently include multiple deductibles. One may apply to most causes of loss, another to wind, yet another to flood, another to earthquake, and another to indirect (delayed completion) costs. A common requirement might be for a $10,000 deductible, but a wind deductible of 1% of the value in place (or even worse, the total insurable value) at the covered property location at the time of loss applies subject to a $100,000 minimum, a flood deductible equal to the maximum amount of coverage available from the national Flood Insurance

Program, an earthquake deductible (depending on the location of the insured property) of 5% of the value in place at the covered property location at the time of loss applies subject to a $500,000 minimum, and a delayed completion deductible of 15 days.

[84] **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.

[85] **Insureds – Subcontractors.** While the author believes that subcontractors should be named insureds on the builder's risk policy along with the owner and contractor, some owners or general contractors decline to do so in order to protect their construction insurance program from loss that could be passed back onto the subcontractor. This stance contradicts the fundamental purposes of builder's risk insurance, which is first-party coverage and therefore not fault based. Although the general rule is that an insurer cannot sue its insured, some courts have made an exception in builder's risk policies where the words "as their interest may appear" follow designation of one of multiple insureds. In *OPI Int'l, Inc. v. Gan Minster Ins. Co.*, 1996 U.S. Dist. LEXIS 22959, 20-21 (S.D. Tex. 1996), the court stated:

> An insurer retains the right to subrogate against a subcontractor even where a subcontractor is an insured for a limited purpose, to the limited extent of his own property in the project or "as his interests may appear" in the project. The subcontractor is not protected from his negligence which causes loss to other property beyond his interest and covered by the policy…. The wavier of subrogation rights in the policy only applies to assureds "whose interests are covered by the policy," which was limited in the definition of "other assureds" to contractors and subcontractors with whom [Named Insureds] have entered into agreements or contracts "in connection with the subject matters of Insurance, as their interests may appear." This waiver does not protect [Plaintiff], as a subcontractor, for claims arising from its negligence in causing damage to property owned by the general contractor, unrelated to [Plaintiff's] contract work.

Installation Floaters. An "**installation floater**" usually covers only the work performed by a single contractor, providing protection on that contractor's work as it is being installed, in contrast to builder's risk which covers the project. It is most often utilized by subcontractors who are performing work where there is no builder's risk coverage in place. Even where builder's risk coverage is provided, however, an installation floater is recommended. Should a subcontractor be subrogated against by the builder's risk carrier, the subcontractor's liability insurance will not be responsive for the portion of the subrogated claim that arises out of the subcontractor's own work. Properly designed, an installation floater should be responsive to this exposure. Additionally, should the builder's risk have a large deductible, a well-designed installation floater will provide protection to the subcontractor for the difference between the builder's risk deductible and that of the installation floater.

[86] **Special Form.** See Endnote 48 (*Property Insurance – "Causes of Loss"*) and Endnote 49 (*Valuation Terminology – Replacement Cost or Actual Cash Value*). Most builder's risk policies are provided on an "all risk" basis. Of course, no policy truly covers all risks of loss. Like other insurance policies, builder's risk policies are subject to a variety of conditions, limitations, exclusions, and deductibles. This form does, however, cover all causes of loss not excluded in the policy. This has the advantage of transferring to the insurance company the burden to prove that a cause of loss was specifically excluded by the policy in order for them to deny coverage.

[87] **Typical Exclusions.** An unendorsed builder's risk policy includes a long list of excluded causes of loss, potentially but not limited to:

Exclusions Regarding Causes of Loss:

- Asbestos removal or other loss arising out of the presence of asbestos
- Changes required by ordinance or law
- Collapse
- Consequential loss, damage, or expenses of any kind
- Contaminants or pollutants
- Cost of making good any faulty or defective workmanship, supplies, or materials, or fault, defect, error, deficiency or omission in design, plan or specification
- Damage by rain, snow, sleet or ice to personal property in the open
- Delay, loss of use, loss of market, fines, penalties, and other consequential losses
- Demolition, increased cost of construction, repair, debris removal or loss of use necessitated by enforcement of law or ordinance regulating asbestos
- Earthquake, volcanic activity, and other earth movement
- Electrical or magnetic injury to or errors and omission in creating, processing or copying electronic records
- Erosion
- Flood, mudslide, sewer backup, and seepage of water
- Freezing
- Fungus, mold and bacteria
- Hostile or warlike actions in time of peace or war

- Infestation, disease, or damage caused by insects, vermin, rodents or animals
- Insurrection, rebellion, revolution, civil war, or commotion
- Loss or damage covered under any written or implied guarantee or warranty by any manufacturer or supplier
- Seizure or destruction of property by governmental authority
- Subsidence, shrinking, settling, cracking and expansion
- Terrorism
- Testing – both hot (introduction of feed stock, catalyst or similar media for processing and handling or commencement of supply to a system) and cold (hydrostatic, pneumatic, electrical, hydraulic or mechanical)
- Unexplained disappearance or shortage
- Wear and tear, gradual deterioration, inherent vice, latent defect, corrosion, rust, dampness or dryness of the atmosphere
- Weight of ice and snow

Exclusions Regarding Types of Property:

- Accounts, bills, currency, money and securities
- Contractor's tools, machinery, plant and equipment
- Existing property
- Land
- Landscaping
- Maps, plans, blueprints, drawings
- Property away from the project site
- Property in transit
- Prototype, developmental, used machinery or equipment
- Radio or television antennas, including lead-in wiring, masts and towers
- Signs
- Transmission and distribution lines upon energization at the completion of testing
- Vehicles or equipment licensed for highway use, rolling stock, aircraft or watercraft
- Water, animals, standing timber and growing crops
- Waterborne property

[88] **Completed Value Basis.** Builder's risk is most commonly issued on a "completed value" as opposed to a "reporting" form. A completed value form policy is issued for a specific construction project with the coverage limits and premium based on the expected value of the project as completed. The insured under a completed value basis form does not run the risk of under or misreporting and the associated contractual penalties that are involved with a reporting form basis policy. A completed value basis policy limit is based on the anticipated completed value of the project. Its premium is roughly 50% of the normal builder's risk rate in recognition of the fact that the average value exposed to loss during the project is approximately one-half of the completed value of the project.

[89] **Non-Reporting Form.** A "reporting form" policy is a single policy covering multiple projects. It is generally less costly than the multiple completed value form policies. A reporting form allows a developer to administer one insurance form as opposed to multiple completed value forms. The insured adds projects to a reporting form as it undertakes new projects. Under a reporting form, the insured is required to file periodic reports of the value of the covered projects. A reporting form increases the insured amount as the value of construction increases. A report is filed with the insurance company, usually on a monthly basis, updating values. Coverage and limit issues can arise if the reports are inaccurate, late or nonexistent. See *American Dream Homes, Inc. v. Insurance Co. of America*, 693 A.2d 517 (N.J. Super. Ct. App. Div. 1997) - the court upheld the insurer's denial of coverage of a project as to which the contractor late filed its monthly report.

[90] **Prohibition of Protective Safeguard Warranty.** "Protective safeguard warranties" are conditions precedent to coverage sometimes built into a builder's risk policy to assure the insurance company of certain protections being provided at the job site. Their inclusion is justified by the insurer on grounds of reduced premium. However, a violation of a protective safeguard warranty voids coverage, potentially even if the loss is not tied to the violated protective safeguard warranty. Typical protective safeguard warranties address the following: emergency response protocols; fencing surrounding the project (*e.g.,* site must be fenced with a cyclone fence at least 6 foot high which must be locked during non-working hours); project lighting during night hours; site surveillance must be maintained by a licensed and bonded watchperson during non-construction hours; and water for fire suppression must be stored on site, or a working fire hydrant must be within 1,000 feet of the structure being constructed. See David S. Gordon, *Insurance Redux: Reprise and Update on the Protective Safeguards Endorsement* ACREL NEWS Vol. 30, No. 1 pp. 10 – 12 (April 2012).

[91] **Minimum Sublimit.** The coverage of a builder's risk policy may be extended to cover various risks with each risk carrying a "sublimit" (limit less than the policy amount) or no sublimit. The insureds should consider eliminating as many sublimits as financially and practicably possible.

[92] **Agreed Value.** See Endnote 50 (*Valuation Terminology - Agreed Value Endorsement*).

[93] **Collapse Additional Coverage Endorsement.** The list of the causes of loss covered by the builder's risk policy should be examined. Many causes of loss are not included and have to be added by endorsement, *e.g.,* many policies exclude collapse and require a Collapses Additional Coverage Endorsement to extend coverage to this cause of loss. See the following cases for discussions of this cause of loss and coverage issues: *Malbco Holdings, LLC. v. Amco Ins. Co.*, 629 F.Supp. 2d 1195 (D. Or. 2009); *Hennessy v. Mutual of Enumclaw Ins. Co.*, 206 P.3d 1184 (Or. Ct. App. 2009)and *130 Slade Condominium Ass'n, Inc. v. Millers Capital Ins. Co.*, 2008 WL 2331048 (D. Md. 2008).

[94] **Debris Removal.** See the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form Paragraph **A.4.a** Coverage – Additional Coverages – Debris Removal. The ISO Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum

of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the ISO CP 04 15 10 12 Debris Removal Additional Limit of Insurance endorsement.

[95] **Occupancy Pre-Completion Clause.** If the property will be occupied, or arguably occupied (*e.g.,* a tenant building out its premises), the builder's risk policy should be reviewed to confirm that pre-completion occupancy is permitted and under what conditions. It may be necessary, to have the policy endorsed to permit pre-completion occupancy.

[96] **Ordinance or Law.** See Endnote 59 (*Ordinance or Law Coverage*).

[97] **Replacement Cost.** See Endnote 49 (*Valuation Terminology - Replacement Cost or Actual Cash Value*).

[98] **Soft Costs Coverage Added to Builder's Risk Policy.** See Endnote 81 (*No Standard Builder's Risk Policy*) for a discussion of delay damages and builder's risk policy endorsements. Builder's risk policies typically do not cover damages caused by delays arising out of a covered loss. These "soft costs" can be covered by an endorsement. A soft cost endorsement can be tailored to cover loss of expected revenue, additional interest expense, loan fees, property taxes, design fees, insurance premiums, legal and accounting costs and additional commissions arising from the renegotiation of leases. These are time element exposures, similar in many respects to business interruption exposures on a completed project, in that the extent of the loss is impacted by the length of the delay. Soft cost coverage responds to additional expenses made necessary by the delay in completion. Coverage is widely variable and it is incumbent upon the insured to describe what is needed. A thorough understanding of the project, contract documents, financing terms, materials and supply agreements, leasing agreements and construction regulations is needed. Coverage is provided on an actual loss sustained basis (*i.e.*, the insured can recover only for the actual loss of income or the actual additional expenses incurred regardless of the limit of coverage purchased). The period of indemnity usually begins a specified number of days after the date when construction is actually completed. The maximum time period commonly ranges up to 12 months. Typical exclusions contained in a soft cost endorsement are for cost to correct construction deficiencies, costs to comply with laws or ordinances, loss caused by adverse weather and loss caused by strikes. The following is a manuscripted soft cost endorsement to a builder's risk policy:

ADDITIONAL EXPENSE – SOFT COST COVERAGE

This endorsement modifies insurance under the following:

BUILDERS' RISK COVERAGE FORM

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

Coverage and Limits of Insurance

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

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

[99] **Waivers of Subrogation on a Builder's Risk Policy.** Subrogation can impact coverage and frustrate the objective of avoiding liability disputes between contractors, subcontractors and the owner. In *St. Paul Fire and Marine Ins. Co. v. Universal Bldg. Supply*, 409 F.3d 73, 84 (2d. Cir. 2005), the court said:

> A waiver of subrogation is useful because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits and yet protects the contracting parties from loss by bringing all property damage under the all risks builder's risk property insurance. … These "waiver of subrogation" provisions are intended to cut down the amount of litigation that might otherwise arise due to the existence of an insured loss.

Builder's risk policies include a provision entitled "Transfer of Rights of Recovery Against Others to Us" or similar wording. The most common language is:

> If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after the loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us.

Note that in this example, the insured is prohibited from relinquishing its rights after a loss. Beware: some builder's risk policies prohibit the insured from relinquishing its rights at any time. An endorsement to the builder's risk policy may be necessary to delete a pre-loss prohibition on the waiver of subrogation in the construction contract.

[100] **Flood.** See Endnote 57 - *Flood.*

[101] **When Does Coverage Begin and End?** Coverage should be purchased for more time than the construction is anticipated to take. It may be difficult and/or expensive to obtain an extension if coverage expires when the project is nearing completion. If, on the other hand, completion is accomplished prior to expiration, most builder's risk policy permit a pro-rata cancellation. Most builder's risk policies state that coverage ceases upon the first to occur of a variety of circumstances. A significant problem arises when one of those circumstances is occupancy. The typical builder's risk policy does not include an occupancy loading. That said, no definition of "occupancy" is provided. Preferably, the provision governing when coverage ceases should not include a reference to occupancy or there should be a specific grant for occupancy.

[102] **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.

11. Tenant's Property Insurance

[103] **Property Insurance - Causes of Loss.** See Endnote 48 – *Property Insurance - Causes of Loss* for an explanation of the coverages of the three forms of ISO Causes of Loss forms.

[104] **Valuation Terminology – Replacement Cost.** See Endnote 49 – *Valuation Terminology - Replacement Cost or Actual Cash Value* for a definition of "Replacement Cost" coverage. Note the different approaches taken by the "at least 80% of full insurable value" in the narrative form of insurance specifications in Section A of Insurance Specifications in Narrative Format to the "100% of replacement cost" approach taken in the Lease -Exhibit A Insurance Specifications at **Spec. 3.B § 1.1** *Policies to be Provided by Landlord*. The approach taken in the chart form insurance specifications is the result of a key tenant's requirements to assure adequate insurance proceeds are available to rebuild the leased structure.

[105] **Property Covered by Property Insurance.** Commercial property insurance covers "Buildings" and "Business Personal Property". "Buildings" means a building or structure and includes completed additions, fixtures, permanently installed machinery and equipment; and personal property owned by the named insured and used to maintain or service the Building (for example, fire extinguishers and floor coverings). The term "Buildings" does not cover land, water or lawns; foundations, machinery or boilers, if the foundations are below the lowest basement floor, or the surface of the ground, if there is no basement; bridges, roadways, walks, patios or other paved surfaces; bulkheads, pilings, piers, wharves or docks, underground pipes, flues or drains; retaining walls not part of the building; or costs of excavations, grading, backfilling or filling. "Business Personal Property" means personal property located within the Building and personal property out in the open within 100 feet of the Building. Business Personal Property includes furniture and fixtures; machinery and equipment; stock (merchandise held in storage or for sale, raw materials and in-process or finished goods), all other personal property owned by the named insured and used in its business; labor, materials, or services furnished by the named insured on the personal property for others; the named insured's use interest as tenant in improvements and betterments (for example, fixtures, alterations, installations or additions to a structure occupied but not owned by the named insured which are acquired or made at the expense of the named insured but are not legally removable by the named insured); leased personal property for which the named insured has a contractual responsibility to insure; and personal property of others that is under the care, custody or control of the named insured and located in or on the Premises. Business Personal Property does **not** cover accounts, bills, currency, money, notes, securities; automobiles held for sale; personal property while airborne or waterborne; or electronic data.

[106] **Tenant Betterments, Alterations and Improvements.** See Endnote 51 - *Designation of Landlord as Additional Insured on Tenant's Property Policy*, Endnote 54 - *Risk Allocation – Tenant's Property Losses Allocated to Tenant's Property Insurance*. See Staltz, *Insuring Tenant Alterations*, PROBATE & PROPERTY 45 (Jan./Feb. 2006) articulating the rationale supporting this allocation; Millea and Geyen, *Insurance Coverage For Tenant Improvements*, http://www.mondaq.com/unitedstates/article.asp?articleid=125396. Also see Nusbaum, *The "Three-Legged Stool": The Interplay Of Property Insurance, Mutual Waivers And Waivers Of Subrogation In Commercial Leases* (Feb. 3, 2011) http://www.mondaq.com/unitedstates/article.asp?articleid=121948 and Hannan, *Using Property Insurance, Mutual Waiver, and Waiver of Subrogation Clauses in Commercial Leases (with Model Clauses)*, THE PRACTICAL REAL ESTATE LAWYER (Mar. 2001), at p. 23.

See the **ISO CP 00 10 10 12** Building And Commercial Property Coverage Form ¶ A.1.b(6) specifying that a tenant's "***use interest*** as tenant in improvements and betterments" are part of the Covered Property of tenant's ISO property insurance policy. A landlord's ownership interest in tenant improvements and betterments are part of the Landlord's Covered Property. ¶A.1.a(5). See the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form stating that coverage is provided the tenant for:

> (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
> (a) Made a part of the building or structure you occupy but do not own; and
> (b) You acquired or made at your expense but cannot legally remove;

Some commentators have questioned whether a tenant has an insurable interest in Improvements and betterments installed at the landlord's expense. A similar issue arises if the lease provides that the tenant is to "insure all leasehold improvements" and there are significant leasehold improvements preexisting in the leased premises. Tenant may not have an insurable interest in improvements it did not install and pay for.

Not all property policies are worded the same as the ISO property insurance policy. (1) A tenant's property policy may state that it covers tenant's personal property and be silent as to its use interest in tenant improvements that are owned by the landlord pursuant to a lease provision that transfers ownership of tenant alterations and improvements to the landlord. In cases of policy silence as to tenant improvements as to which tenant only has a "use interest", the insurer may deny coverage. A New York court held for the tenant under such circumstances in *Sigola Mf., Inc. v. Dairyland Ins. Co.*, 124 A.D.2d 654 (N. Y. App. Div. 1986). (2) A landlord's property policy may explicitly state that improvements and betterments are covered under the landlord's policy only if they are located within property occupied by the landlord and not within a tenant's premises. (3) Even if both landlord's and tenant's policies state that they cover tenant improvements (the landlord's ownership interest and the tenant's use interest), the policies may provide that they do not cover except on an excess basis the property if there is "other insurance". The language in such "other insurance" provisions vary, but they typically require that in the event of a loss, any other applicable policy must respond first. The court in *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co,* 602 F.3d 677 (5th Cir. 2010) held that in such case both the tenant's insurer and the landlord's insurer must share the cost.

[107] **Waiver of Claims; Waiver of Subrogation.** See discussion at **Article IV. Contractual Waiver of Subrogation**. The tenant has an interest in setting out insurance specifications for the landlord's insurance. Tenants should insist that the landlord's property policy contain a waiver of subrogation. Tenants should also carve out of their indemnity risks covered by the insurance contractually required to be carried by their landlord. This issue was raised in *Travelers Indemnity Co. of Ill. a/s/o Partnership 1995 LLP v. F 7 S London Pub., Inc.*, 270 F. Supp. 330 (E.D. N.Y. 2003). In this case the landlord's insurer sued the tenant on its broad form indemnity for a fire loss to the shopping center. The court held that although the tenant had broadly indemnified the landlord, since the cause of the fire was not determined, the court looked to the lease's fire damage provision and held that it controlled with the result that the loss was borne by landlord and its insurer. This litigation could have been avoided had the lease expressly excluded from the tenant's indemnity fire damage covered by the landlord's property policy.

12. Liability Insurance Forms

[108] **ISO CG DS 01 10 01 Commercial General Liability Declarations – Retroactive Date.** The following definition of the "Retroactive Date" of a CGL policy is found in the online IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx. **"**A provision found in many (although not all) claims-made policies that eliminates coverage for claims produced by wrongful acts that took place prior to a specified date, even if the claim is first made during the policy period. For example, a January 1, 2015, retroactive date in a policy written with a January 1, 2015-2016, term, would bar coverage for claims resulting from wrongful acts that took place prior to January 1, 2015, even if claims (resulting from such acts) are made against the insured during the January 1, 2015-2016, policy period. There are two purposes of retroactive dates: (1) to eliminate coverage for situations or incidents known to insureds that have the potential to give rise to claims in the future and (2) to preclude coverage for "stale" claims that arise from events far in the past, even if such events are unknown to the insured. In the former case, the retroactive date preserves the principle of "fortuity"—that is, the insurer should not be called upon to cover the so-called burning building. In the latter instance, the retroactive date makes policies more affordable by precluding coverage for events that, while insurable, are remote in time."

[109] **ISO CG DS 01 10 01 Commercial General Liability Declarations – Form of Business.** See in the **Appendix of Forms** the **ISO CG 00 01 04 13** Commercial General Liability Coverage Form, Section II, Who Is An Insured, Par. 1 as to automatic insureds covered by the standard CGL policy based on the form of business. Following is a discussion of automatic insureds. Different "insured" terminology is used to define the insured in liability policies and property policies.

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

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

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

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

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

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

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

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

[110] **ISO CG DS 01 10 01 Commercial General Liability Declarations – Premises You Own, Rent or Occupy.** See Endnote 116 - ISO CG 00 01 04 13 Commercial General Liability – "Exclusion j" Damage To Property You Own, Rent Or Occupy.

[111] **ISO CG DS 01 10 01 Commercial General Liability Declarations – Endorsements To This Policy.** The various endorsements to the CGL policy are listed on the Declarations Page. If you are not provided with a copy of the policy, including its endorsements, in addition to obtaining a copy of the endorsement, you should obtain the Declarations Page, including this schedule, to confirm that the particular form of endorsement required by the insurance specifications has in fact been issued as part of the policy.

[112] **ISO CG 00 01 04 13 CGL – Contractual Liability Coverage.** See Endnote 27 - *Contractual Liability Coverage - An Exception to an Exclusion From Coverage.* The Texas Supreme Court in *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014) held that Exclusion 2.b, the "Contractual Liability" Exclusion, did not apply to negate coverage for a contractor where the "property damage" at issue is only to the property constructed. The supreme court was asked to answer questions posed to it by the Fifth Circuit. In 2008, Ewing Construction Company, Inc. (Ewing) entered into a standard AIA construction contract with a school district to build in a good and workmanlike manner additions to a school in Corpus Christi, including constructing tennis courts. Shortly after construction of the tennis courts was completed, the courts started flaking, crumbling, and cracking, rendering them unusable. Ewing tendered defense of the school district's suit to its insurer. The federal district court, and the Fifth Circuit initially held, that Ewing "assumed" the liability for its own performance under the contract. The Texas Supreme Court concluded that a contractor that agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract and thus does not "assume liability" for damages arising out of its defective work and does not trigger the contractual liability exclusion. The court found that the allegations that Ewing did not perform its work in a good and workmanlike manner were substantively the same as the allegations that it negligently performed its work under the contract. The court held that

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

[113] **Liquor Liability Exclusion to CGL – 2013 Revisions Both Narrow and Expand Coverage –ISO CG 00 01 – Coverage A, Exclusion 2.c.** See Endnote 43 - *Liquor Law Liability (Dram Shop)*.

[114] **ISO CG 00 01 04 13 Commercial General Liability – Workers Compensation and Employers Liability Exclusion.** The standard CGL Policy, CG 00 01 04 13 at Section I, Par. 2.d and 2.e excludes from coverage the insured's obligation under workers compensation, disability benefits or unemployment compensation law or any similar law and "bodily injury" to its employees and consequential damages to an employee's spouse, child, parent, brother or sister as a consequence of bodily injuries to the employee. The insured may protect itself for liabilities arising out injuries to its employees by becoming a subscriber under its state's workers compensation system. It can also obtain Employers Liability Insurance.

[115] **ISO CG 00 01 04 13 Commercial General Liability – Pollution Exclusion. ISO CG 00 01 04 13** Commercial General Liability Coverage Form, Section I, Coverage A, Par. 2.f – Exclusions – Pollution. Par. 2.f is known as the "absolute pollution exclusion" and excludes environmental pollution claims from the CGL policy's coverage. See *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789, 793 (Ala. 2002) for a discussion of the history of CGL policy's absolute pollution exclusion.

[116] **ISO CG 00 01 04 13 Commercial General Liability – "Exclusion j" Damage To Property You Own, Rent Or Occupy.** This portion of the "damage to property" exclusion, **Par. 2.j.** ("Exclusion j") does not apply to premises rented to the Named Insured for 7 or fewer consecutive days, or to the contents of such premises, *e.g.*, damages to a hotel room or its furnishings or to a conference room or special events facility rented to the Named

Insured for this short period. See the Fire Damage Legal Liability Exception to exclusion language at the end of Paragraph 2 Exclusions reading as follows (the "Fire Damage Legal Liability Exception"):

> Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III - Limits Of Insurance.

The Fire Damage Legal Liability Exception creates coverage for fire damage to premises rented to the Named Insured when the damage is caused by the Named Insured's negligence, sometimes called "fire damage legal liability". A separate limit of liability applies to this coverage and typically ranges $50,000 - $100,000. This limit can be increased by endorsement to the CGL policy or written for higher limits, but as limits increase they can approximate a property policy's premium.

[117] **Exclusion 2.j(5) - the "Operations" Exclusion (aka the "Property Being Worked On" Exclusion) - "That Particular Part"**. This exclusion reads as follows:

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

That the phrase "**that particular part**" is intended to limit the breadth of the exclusion from coverage is illustrated by the following analysis by the Missouri Supreme Court in *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 80 (Mo. 1998) when it was called on to decide whether this exclusion resulted in excluding coverage for all fire loss damages to a house or merely to the portion of the work from which the fire originated:

> Houses and buildings can be divided into so many parts that attempting to determine which part or parts are the subject of the insured's operations can produce several reasonable conclusions. For example, the "particular part of the real property on which [the insured] is performing operations" could mean, as Columbia Mutual contends, "the entire area of the real property that Schauf is scheduled to work." Under this interpretation, any damage the insured causes to property in the area which he was contracted to work would be excluded from coverage.
> Another possible definition of the instant exclusion is that the "particular part of real property on which [the insured] is performing operations" is only the part of the property that is the subject of the insured's work at the time of the damage. Under this interpretation, only the damage the insured causes to the particular part of the property that is actually the object of the insured's work where the damage occurs is excluded from coverage; any other damage would not be subject to the exclusion….
> In accordance with the relevant maxims of construction and the language and purpose of the instant exclusion, this Court upholds that the instant exclusion denies coverage for property damage to the particular part of real property that is the subject of the insured's work at the time of the damage, if the damage arises out of those operations.
> Applying the holding to the facts of this case compels the conclusion that the exclusion applies to any damage to the kitchen cabinets. When the damage in this case occurred, Schauf was cleaning from his spray equipment the lacquer he had applied to the kitchen cabinets. Because cleaning the lacquer was the last step in the job of lacquering the kitchen cabinets, the kitchen cabinets were the particular part of the real property that was the subject of Schauf's operations at the time of the damage. Consequently, the damage to the kitchen cabinets is excluded from coverage.

[118] **Exclusion 2.j(5) - the "Operations" Exclusion (aka the "Property Being Worked On" Exclusion) - "Are Performing Operations".** The phrase "**are performing operations**" is not defined. The vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations. This language is interpreted to exclude damages involving "works in progress", in other words the exclusion does not apply to "completed operations." The "arises out of operations" has caused confusion for some courts in interpreting the scope of the exclusion. However, the vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations. *See e.g., Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207, 215 (5th Cir. [Tex.] 2009). See Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES (2d ed.) § 31:5:

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

New Mexico. A federal district court in New Mexico in *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp.2d 1157, 1199 (D. N.M. 2012) held that water damage caused when a contractor intentionally diverted water onto plaintiff's property as not an "occurrence", even though the contractor did not intend to cause the water damage. However, the contractor's negligent misrepresentation to plaintiff that the contractor had the authority to construct the water diversion system on plaintiff's property was an occurrence because the contractor believed it had such authority. H. Brennenstuhl, Annot., *Negligent Misrepresentation as "Accident" or "Occurrence" Warranting Insurance Coverage*, 58 A.L.R. 483 (5th ed. 1998). Hartford Fire Ins. Co. v. Gandy Dancer, LLC, 864 F. Supp.2d 1157, 1200 (D. N.M. 2012):

> Here, the construction which Gandy Dancer and BNSF Railway performed is the property damage that Mercer LLC alleges. BNSF Railway made no arguments regarding the application of exclusion of j(5) to coverage of the negligent misrepresentation allegations. Because the damages, from the removal of materials and the construction, constitute property damage arising out of the work of the insured and its contractors, the Court finds that provision j(5) excludes these allegations from coverage.

[119] **Exclusion 2.j(6) - the "Incorrect Work" Exclusion and the "Products-Completed Operations Hazard" Exception.** This exclusion reads as follows:

> **2. Exclusions.** This insurance does not apply to: …
> **j. Damage to Property**. "**Property damage**" to: …
>
> **(6)** That particular part of any property that must be restored, repaired or replaced because *"***your work***"* ***was*** incorrectly performed **on it**.
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "**products-completed operations hazard**". (emphasis added.)

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

Exclusion 2. j(6) for "Property Damage" to That Particular Part. *Mid-Continent Casualty Co. v. Krolczyk*, 408 S.W.3d 896 (Tex. App. – Hou. [1st Dist.] 2013, pet. denied) - in a "duty to defend" issue case, a court construed a HOA's pleadings in a suit against a subdivision developer that the developer built a "totally inadequate" road as not excluding coverage of the developer under 2.j(6). The court found the HOA's pleadings had alleged that the asphalt laid on the surface of the road cracked, but no allegations were made that the surface work was defective. Accordingly, only the defectively performed work (*e.g.*, the road base) would not be covered by the CGL insurance, while the non-defectively performed work would be covered, such as the paving and repaving work.; also see *E & R Rubalcava Const., Inc. v. Burlington Ins. Co.,* 147 F. Supp.2d 523 (N. D. Tex. 2000) "[T]he *business risk* exclusion [2.j(6)] … only applies to the cost of repair of the foundation work itself, not to the cost of repair of any other damage to the homes in issue."; and *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987).

However, some courts have interpreted the exclusion to apply to the whole project. *See, e.g., E. H. Spencer & Company, LLC v. Essex Insurance Co.*, 2009 WL 2231222 (Mass. Super.) following the rationale in *Jet Line Servs., Inc. v. American Employers Ins. Co.*, 494 Mass 706 (Mass. 1989) where court stated "[w]here the insured was retained to perform work on an entire unit of property, and not just a portion of it, the applicability of the exclusion to damage of the entire unit is more apparent than in cases in which the insured was retained to work on only a part of the unit."

[120] **Exclusion 2.j(6) - the "Products-Completed Operations Hazard" Exception.** The purpose of exclusion 2.j(6) is to exclude coverage for the costs to repair or replace particular work discovered while the insured is still performing its work and to except from the Incorrect Work Exclusion property damage included in the "**product and completed operations hazard**". *American States Ins. Co. v. Powers*, 262 F. Supp.2d 1245, 1251-52 (D. Kan. 2003):

> Thus, when exclusion j(6) is read together with the "product-completed operations hazard" provision, the result is that exclusion j(6) does not apply to claims arising from 'defective work that is discovered after the contractor has completed its work.' The application of exclusion j(6), then, turns on whether Mr. Powers' work on the building was incomplete (in which case the exclusion would apply) or complete (in which case the exclusion would not apply). There is no evidence before the court suggesting that Mr. Powers' work on the building was incomplete at the time the Stouts discovered the allegedly defective work. Rather, the uncontroverted facts demonstrate that Mr. Powers completed the building on May 30, 2000 and that sometime thereafter the Stouts realized that the building allegedly did not meet the contract specifications, did not meet various building codes pertaining to structural design, and was not constructed in a workmanlike manner. While the work performed by Mr. Powers may have needed significant correction, repair or replacement, such work is nonetheless treated as "complete" for purposes of the policy. Thus, because Mr. Powers' work was complete at the time of the damage, the property damage falls within the 'property-completed operations hazard' exception to exclusion j(6) and, accordingly, exclusion j(6) does not apply here.

The function of the "products-completed operations hazard" ("PCOH") exception has been defined as follows:

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

Pursell Const., Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 69 (Iowa 1999). Note that the Iowa Supreme Court found in a case of first impression in Iowa that defective workmanship was not an "occurrence" to begin with and thus did not reach a decision as to whether an exclusion applied.

[121] **ISO CG 00 01 04 13 Commercial General Liability – Damage To "Your Work" Exclusion – "Subcontractor Exception" for Subcontractor's Work - Construction Defects Coverage**. This exclusion reads as follows:

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

The exclusion is limited to damages to "your work". Damage to other property (*i.e.*, others' non-defective work or personal property) is not encompassed by this exclusion. The Fifth Circuit in *Wilshire Insurance Co. v. RJT Construction Co.*, 581 F.3d 222, 226 (5th Cir. [Tex.] 2009) found that Exclusion 2.l precluded coverage only for the cost of repairing its insured's own work, the defective foundation, but did not exclude coverage of the damages caused to the balance of the home. The court noted that in *Travelers Insurance Co. v. Volentine*, 578 S.W.2d 501, 503 (Tex. Civ. App.—Texarkana 1979, no writ) the insured, an automobile mechanic, performed faulty work on an engine's valves which resulted in the destruction of the entire engine; the Texas court found that the exclusion 2.l precluded only the cost of replacing the valves themselves, but not the extent those other parts [of the engine] were damaged or destroyed. *Travelers* at 504.

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

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

> This insurance does not apply … to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of the materials, parts or equipment furnished in connection therewith.

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

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

[122] **Electronic Data Liability Exclusion to CGL Coverage – 2013 Revision - CG 00 01 – Coverage A, Exclusion 2.p. Exclusion 2.p** excludes from the standard CGL policy damages that "arise out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data". The standard CGL policy was revised in 2013 to broaden coverage by adding an exception to this exclusion for "bodily injury" (the "However, this exclusion does not apply …."). Coverage is readily available to cover this gap through an Electronic Data Liability endorsement, the ISO CG 04 37 04 13 and should be required. Be sure to specify the amount of coverage required, as this endorsement is frequently provided with only a minimal sublimit (e.g., $25,000 coverage). See the Electronic Data Liability endorsement.

[123] **Recording and Distribution of Material or Information in Violation of Law Exclusions – 2013 Revision - CG 00 01 – Coverage A, Exclusion 2.q.** The standard CGL policy was amended in 2013 to incorporate into the exclusions, this exclusion previously handled by a mandatory endorsement, the CG 00 68, excluding coverage for injuries and damages arising out of acts or omissions that violate certain consumer protection laws.

[124] **"Who Is An Insured" under the CGL Policy - CG 00 01 – Section II, Par. 1 - Entities.** Paragraph 1, Section II enumerates a number of persons and entities in addition to the Named Insured as insureds under the CGL policy with respect to the conduct of the Named Insured's business, e.g., partners and their spouses of a partnership; members and managers of a limited liability company; "executive officers," directors and shareholders of a corporation; and trustees of a trust.

[125] **Conditions to Coverage under the CGL Policy – "Other Insurance" - CG 00 01 – Section IV, Par. 4.** See Endnote 31 – *Primary and Noncontributing*. See the following: (1) Section IV, Paragraph 4.a Other Insurance – Primary Insurance and 4.b – Excess Insurance to **CG 00 01 04 13** Commercial General Liability Coverage Form for provisions in the standard CGL policy establishing that coverage to the Named Insured under the CGL is provided on a primary basis and co-contributing with other insurance available to the Named Insured but is excess under specified circumstances, including if the Named Insured's other insurance is an additional insured provided on a primary basis; (2) Endnote 126 - *2013 Revision to "Other Insurance" Provision*; and (3) **CG 20 01 04 13** Primary and Noncontributory - Other Insurance.

[126] **2013 Revision to "Other Insurance" Provision - CG 00 01 – Section IV, Par. 4(b)(1)(b).** Prior to the 2013 revision, the standard policy provided that the CGL coverage was excess over any primary insurance for which the named insured had been added as an additional insured "by attachment of an

endorsement". However, some insurers provide additional insured status directly in their policy as opposed to by endorsement. This raised concerns among commentators that the additional insured's own insurance was primary and co-contributing with the additional insured coverage if the additional insured coverage was not provided by an endorsement. The 2013 revisions deleted "by attachment of an endorsement". By this revision the additional insured's own insurance (its "other insurance") is revised to state that the additional insured's own insurance is excess insurance over the additional insurance coverage provided to the additional insured whether by endorsement or other means.

[127] **Separation of Insureds – CG 00 01 – Section IV, Par. 7.** See Endnote 28 – *Separation of Insureds*.

[128] **CGL Insurer's Contractual Right of Subrogation - CG 00 01 – Section IV, Par. 8.** The standard CGL policy contains a contractual transfer to the insurer of the Named Insured's right of recovery against third parties for payments made by the insurer. See in the Appendix of Forms the ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others To Us.

[129] **ISO CG 00 01 04 13 Commercial General Liability – Notice of Nonrenewal.** Notice that the notice is sent by the insurer to the "**first Named Insured**" as opposed to "all insureds".

[130] **"Occurrence".** What is an "Accident"?. There are multiple judicial views of this question. See the National Summary Chart (current as of February 2015) appearing in Wielinski, Patrick J., INSURANCE FOR DEFECTIVE CONSTRUCTION (IRMI 4th Ed. 2015) in the slides accompanying this article.

Decisions Finding Faulty Workmanship Not a Basis for an "Occurrence":

Ark. *Nabohlz Const., Corp. St. Paul Fire and Marine Ins. Co.,* 354 F.Supp. 2d 917 (E. D. Ark. 2005) – Suit to recover cost to repair faulty roof did not allege an "occurrence".
Illinois. *Viking Const. Management, Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 294, Ill. Dec. 478, 831 N.E.2d 1 (1st Dist. 2005) - wall collapse caused by defective construction not covered as complaint did not allege property damage caused by an occurrence; collapse of wall under natural and ordinary circumstances did not constitute "occurrence" within the meaning of CGL policy.
Indiana. *Amerisure, Inc. v. Wurster Const. Co., Inc.,* 181 N.E.2d 998 (Ind. Ct. App. 2004), decision clarified on reh'g, 822 N.E.2d 1115 (Ind. Ct. App. 2005) - defective exterior insulation finish system was not an "occurrence".
Ill. *Stoneridge Development Co., Inc. v. Essex Ins. Co.,* 888 N.E.2d 633 (Ill. 2d Dist.), app. denied 897 N.E.2d 264 (Ill. 2008) - cracks that developed in home "were not an unforeseen occurrence that would qualify as an 'accident' because they were the natural and ordinary consequences of defective workmanship"; *Cincinnati Ins. Co. v. Tayor-Morely, Inc.* 556 F. Supp.2d 908 (S.D. Ill. 2008) - developer's allegedly faulty construction of homes did not constitute an "accident" or "occurrence".
Md. *OneBeacon Ins. v. Metro Ready-Mix, Inc.,* 427 F. Supp. 2d 574 (D. Md. 2006) - concrete manufacturer's provision of defective grout that was insufficient to support pile caps did not involve an accident within the policy definition of "occurrence".
Mo. *Hartford Ins. Co. of the Midwest v. Wyllie*, 396 F. Supp. 2d 1033 (E. D. Mo. 2005) - suit against seller of condominium alleging intentional misrepresentation for failing to disclose problems and defects with roof and heating systems did not allege an "occurrence"; *Charles Hampton's A-1 Signs, Inc. v. American States Ins. Co.*, 225 S.W.3d 482 (Tenn. Ct. App. 2006 app. denied 2007) – applying Missouri law; *J. E. Jones Const. Co. v. Chubb & Sons, Inc.* 486 F.3d 337 (8th Cir. 2007) – applying Missouri law; *St. Paul Fire and Marine Ins. Co. v. Building Const. Enterprises, Inc.*, 484 F. Supp.2d (W.D. Mo. 2007).
N.D. *Century Sur. Co. v. Demolition & Dev., Ltd*, 2006 WL 163174 (N. D. Ill. 2006) - misidentifying building for demolition was not an "occurrence".
Oh. *Westfield Cos. v. Gibbs*, 2005 WL 1940305 (Oh. Ct. App. – 11th Dist. 2005) – property owner's action against contractor alleging fraud and trespass did not satisfy occurrence element; and later case at 2006 WL 120041 – damages resulting from contractor's delay was not an "accident" and therefore did not arise for an "occurrence".
Or. *Oak Crest Const. Co. v. Austin Mutual Ins. Co.*, 998 P.2d 1254 (Or. 2006).
Pa. *Millers Capital Ins. Co. v. Gambone Bros. Development Co., Inc.* 941 A.2d 706 (Pa. 2007), app. denied. 963 A.2d 471 (Pa. 2008) - defective drywall resulting in delamination, pealing and disfigurement, which compromised structural integrity, was not caused by an accident and, thus, the policy provided no coverage as there was no "occurrence" ; *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888 (Pa. 2006) - failure to construct coke oven battery properly such that oven walls spalled, rod housings bowed, and ovens cracked paver bricks was not an accident and, therefore, was not an "occurrence".
S.C. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (S. C. 2005) – poor workmanship resulting in roads that deteriorated much more quickly than normal did not amount to an "occurrence".
Wash. *Mid-Continent Cas. Co. v. Williamsburg Condominium Ass'n,* 2006 WL 2927664 (W. D. Wash. 2006) - property damage to condominiums caused by builder's breach of contract and/or breach of warranty could not be regarded as an "occurrence".
W. Va. *Webster County Solid Waste Authority v. Brackenrich & Associates, Inc.* 217 W.Va. 304, 617 S.E.2d 851 (W. Va. 2005) - defective workmanship by engineering firm hired to design and supervise the construction of upgrades to a county land fill was not an "occurrence".

Decisions Finding Faulty Work a Basis for an "Occurrence":

Ariz. *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538 (Ariz. Ct. App. Div. 1 2007).
Ark. *U.S. Fidelity & Guar. Co. v. Continental Cas. Co.*, 120 S.W.3d 556 (Ark. 2003) - "First, we must consider whether there was an occurrence. Appellants argue that the 'occurrence' that gave rise to the property damage was Ray's defective workmanship on the Wal-Mart projects. The policy defines an 'occurrence' as 'an accident.' We have defined an 'accident' as 'an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.' Because the policy has defined 'occurrence,' and because we have defined 'accident,' we conclude that the remaining fact question which must be resolved in this case before coverage can be determined is whether Ray's workmanship on the Wal-Mart projects constituted an 'accident.'" The court noted that there is a split of authority on whether defective workmanship is an accident and therefore an "occurrence" under a general liability policy.
Cal. *McGranahan v. Insurance Corp. of NY*, 544 F. Supp.2d 1052 (E.D. Call 2008) - "occurrence" alleged where complaint was neutral regarding whether insured intended to install moldy drywall, as it only asserted it installed moldy drywall.

Colo. *Hoang v. Monterra Homes (Powderhorn) LLC,*, 129 P.3d 1028 (Colo. Ct. App. 2005), as modified on denial of reh'g and cert. granted - claim that homebuilder was negligent in constructing homes on unsuitable site containing expansive soils alleged an "occurrence".
Fla. *U. S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007). See discussion in this Article.
Ga. *SawHorse, Inc. v. Southern Guar. Ins. Co. of Georgia*, 269 Ga. App. 493, 604 S.E.2d 541 (Ga. 2004) - "Southern Guaranty has cited no Georgia authority supporting its apparent claim that faulty workmanship cannot constitute an 'occurrence' under a general commercial liability policy. And this claim runs counter to case law finding that policies with similar 'occurrence' language provide coverage for 'the risk that. . . defective or faulty workmanship will cause injury to people or damage to other property.' Furthermore, Southern Guaranty has pointed to no evidence that SawHorse intended for the faulty workmanship to occur. Under these circumstances, Southern Guaranty is not entitled to summary judgment based on the "occurrence' language in the policy."
Ind. *Indiana Ins. Co. v. Alloyd Insulation Co.,* 2002 WL 1770491 (Ohio Ct. App. 2d Dist. Montgomery County 2002) - corrosion and consequential property damage from faulty roof due to defective workmanship constituted an "accident" and thus an "occurrence".
Kan. *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.,* 33 Kan. App.2d 504, 104 P.3d 997 (Kan. 2005) - damage that occurs over time as a result of defective materials or workmanship in the construction of a home and leads to structural damage is an "occurrence"; 281 Kan. 844, 137 P.3d 486 (Kan. 2006) - homeowners' claim for property damage from window leaks against general contractor constituted an "occurrence" as there is nothing in the basic coverage language of the CGL policy to support any definitive tort/contract line of demarcation for purposes of determining coverage.
Ky. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007) - intentional act of contractor's employee in demolishing part of home, allegedly because contractor had not communicated to employee that the project was limited to demolishing the home's carport, constituted an "accident" and therefore was an "occurrence," within the meaning of CGL policy.
La. *Broadmoor Anderson v. National Union Fire Ins. Co. of Louisiana*, 912 So.2d 400 (La. Ct. App.2d Cir. 2005) - defective ceramic tile and stone work resulting in water infiltration constituted an "occurrence"; *North American Treatment Systems, Inc. v. Scottsdale Ins. Co.,* 943 So.2d 429 (La. Ct. App. [1st Cir.] 2006), writ denied, 2007 WL 781850 and 2007 WL 781854 - claims of negligent work resulting in a collapse at a wastewater treatment plant clearly claimed damages by reason of an "occurrence".
Minn. *O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. Ct. App. 1996) abrogated on other grounds by *Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002).
Mo. *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667 (Mo. Ct. App. E.D. 2007) - defect in concrete purchased for house foundation was "accident" and, thus, "occurrence"; *American States Ins. Co. v. Herman C. Kempker Const. Co., Inc.,* 71 S.W.3d 232 (Mo. Ct. App. W.D. 2002) - developer's claim that insured contractor negligently misrepresented construction of street in development potentially was an "occurrence" and therefore, insurer had a duty to defend.
New Mexico. In *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869 (N. M. Ct. App. 2015) the N. M. Court of Appeals held that property damage to homes stucco emanating from incorrect work by Pulte's subcontractor in installing sliding glass doors and windows was an "accident" and thus an "occurrence" for which Pulte was entitled to defense and indemnity as an additional insured on the subcontractor's policy. This case involved two tenders by Pulte to the insurer, both of which the insurer rejected. The court found that the first tender was correctly rejected as it was as to property damage (replacement) to the work itself, whereas the second tender was as to resultant damage to property other than the work itself. The court determined that recent cases in which courts have found that incorrect (faulty) work is an accident, and therefore an occurrence, represented a "more reasoned approach to construing the meaning of the term occurrence." Therefore, because noting in the policy's language definition of "occurrence" explicitly stated that faulty workmanship can never be an accident and nothing limited the definition to particular classes of property damage, insured's faulty workmanship was an occurrence.
Oh. *Dublin Bldg. Sys. v. Selective Ins. Co. of South Carolina*, 874 N.E.2d 788 (Ohio Ct. App. 10th Dist. Franklin County 2007) - property damage, including mold contamination, caused by exterior stucco subcontractor, who failed to properly seal office building's exterior walls, constituted an insurable "occurrence"; *Erie Ins. Exchange v. Colony Dev. Corp.* 736 N.E.2d 941 (Ohio Ct. App. 10th Dist. Franklin County 2006); *Victoria's Secret Stores, Inc. v. Epstein Contracting, Inc.,* 2002 WL 723215 (Ohio Ct. App. 10th Dist. Franklin County 2002) - collapse of store's ceiling was an "accident" and, therefore, an "occurrence" within the meaning of contractor's CGL policy, but express contractual liability exclusion applied to shield insurers from liability.
Pa. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 2003 Pa Super 149, 825 A.2d 641, 654 (Pa. 2003) - "In the instant case, the damage at issue is not the absence of the grout or the size of the grout spaces but the deformation and deflection of the brick work, tie rods and roof of the battery which occurred after the battery was placed in use. Whether that damage was caused in whole or in part by the torrential rains of October 31st and November 1st, or by some other event during the heatup of the battery, we are not hesitant to conclude that the physical damage to the battery constituted an occurrence for which the policies provide coverage *UNLESS* otherwise precluded by one of the exclusions set forth in the policy."
N.D. *ACUITY v. Burd & Smith Const., Inc.,* 721 N.W.2d 33, 39-40 (N.D. 2006) - "We agree with the rationale of those courts holding that faulty workmanship causing damage to property other than the work product is an accidental occurrence for purposes of the CGL policy. . . . Here, the Kailliers allege damage to the interior of the apartment building. We conclude that claim is the type of risk covered by a CGL policy and constitutes an 'occurrence' under Acuity's policy."
Neb. *Auto-Owners Ins. Co. v. Home Pride Companies, Inc.*, 268 Neb. 528, 684 N.W.2d 571, 577-78 (Neb. 2004) - "Although it is clear that faulty workmanship, standing alone, is not covered under a standard CGL policy, it is important to realize that there are two different justifications for this rule. On the one hand, the rule has been justified on public policy grounds, primarily on the long-founded notion that the cost to repair and replace the damages caused by faulty workmanship is a business risk not covered under a CGL policy. Today, the business risk rule is part of standard CGL policies in the form of "your work" exceptions to coverage. Therefore, the business risk rule does not serve as an initial bar to coverage, but, rather, as a potential exclusion, via the "your work" exclusions, if an initial grant of coverage is founded. . . . Important here, although faulty workmanship, standing alone is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence. . . . In the instant case, [insureds' subcontractors] negligently installed shingles on a number of apartments, which caused the shingles to fall off. Additionally, the amended petition alleged that as a consequence of the faulty work, the roof structures and buildings have experienced substantial damage. This latter allegation represents an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product. Therefore, the amended petition properly alleged an occurrence within the meaning of the insurance policy."
S.C. *Auto Owners Ins. Co., Inc. v. Newman*, 2008 WL 648546 (S.C. 2008) - water intrusion and resulting damage was an "occurrence" covered under the policy; *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.* 350 S.C. 549, 567 S.E.2d 489 (S. C. Ct. App. 2002) - deterioration and failure of roads from repeated water runoff was an "accident" and, therefore, an "occurrence" and subcontractor exception to policy's business risk exclusion restored coverage otherwise excluded under the policy.
S.D. *Corner Const. Co. v. U. S. Fidelity and Guar. Co.,* 2002 S.D. 5, 638 N.W.2d 887 (S.D. 2002) - failure to fill voids between studs with insulation and

to securely attach the vapor barrier was an "accident" resulting in property damage.
Tenn. *Travelers Indem. Co. of America v. Moore & Associates, Inc.,* 216 S.W.3d 302, 308-09 (Tenn. 2007) – see discussion in this Article; and *State Farm Fire and Cas. Co. v. McGowan*, 421 F.3d 433, 2005 FED App. 0374P (6th Cir. 2005) - holding that an insured's negligence was an "occurrence" under an insurance policy because it was unintended and unforeseen.
Tex. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), answer to certified question conformed to, 501 F.3d 435 (5th Cir. 2007) – see discussion in this Article; and *CU Lloyd's of Texas v. Main Street Homes, Inc.,* 79 S.W.3d 687 (Tex. App.—Austin 2002) - homeowners' allegations that general contractor built homes after learning that foundation designs were inadequate for soil conditions and failed to disclose that knowledge to purchasers stated an "accident" and thus an "occurrence". *King v. Dallas Fire Ins. Co.* 45 Tex. Sup. Ct. J. 715, 2002 WL 1118438 (Tex. 2002), op. withdrawn and superseded on reh'g on other grounds, 85 S.W.3d 185 (Tex. 2002) - liability insurer owed duty to defend employer accused of negligently hiring and supervising employee accused of battery, because the employer's negligent hiring constituted an "occurrence"; *Lennar Corp. v. Great American Ins. Co.,* 2005 WL 1324833 (Tex. App.—Hou. [14th Dist.] 2005) - suit to recover costs paid to repair water damage and replace defective exterior insulation and finish systems on hundreds of homes built in the Houston area in the late 1990s alleged an "occurrence", and 200 S.W.3d 651 (Tex. App. Hou. [14th Dist.] 2006, writ granted) - homebuilder's negligent construction of homes using defective exterior insulation and finish system constituted an "occurrence" within scope of CGL and commercial umbrella liability policies; *Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 2009 WL 189886 (5th Cir. [Tex.] 2009) - faulty workmanship allegations against contractor in the construction of five condominiums that resulted in water leakage was an occurrence; *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, 2006 WL 1892669 (Tex. App.—Hou. [14th Dist.] 2006) - property damage caused by defective construction may constitute an "occurrence" if it is inadvertent and results in damage to the insured's own work, the result of which is unintended and unexpected, *rev'd on other grounds Pine Oak Builders' Inc. v. Great American Lloyds Ins. Co*., 279 S.W.3d 650 (Tex. 2009).
Utah. *Great American Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp.2d 1275 (D. Utah 2006) - subcontractor's faulty work causing cracks in building foundation, basement floor, and driveway involved an occurrence such that breach of warranty claim and breach of contract claim were potentially covered.
Wash. *Mid-Continent Cas. Co. v. Titan Const. Corp.* 281 Fed. Appx. 766 (9th Cir. 2008) - negligent construction of condominium that resulted in breach of contract and breach of warranty claims constituted "occurrence" under CGL policy.
Wisc. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 76 (Wis. 2004) - "American Family argues that because Pleasant's claim is for breach of contract/breach of warranty it cannot be an "occurrence," because the CGL is not intended to cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked and has resulted in some regrettably overbroad generalizations about CGL policies in our case law."; *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 284 Wis.2d 387, 2005 WI. App. 121, 701 N.W.2d 13 (Ct. App. 2005), review granted 2005 WI. 150, 286 Wis.2d 97, 705 N.W.2d 659 (Wis. 2005) - CM-at-risk failures that result in property damage and delays were an occurrence; *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, 721 N.W.2d 704 (Wis. Ct. App. 2006) - concluding, after a detailed discussion, that "occurrence" is not equivalent to faulty workmanship, but rather faulty workmanship may result in an "occurrence" and, in this case, where pleading alleges that the rubber mats that subcontractor improperly installed were damaged by a scraper that cleans manure from them is a claim for property damage caused by an occurrence in that the damage was not intended or anticipated and that it was also not intended or anticipated that using the scraper to clean the manure off the mats would damage the mats; *Stuart v. Weisflog's Showroom Gallery, Inc.,* 722 N.W.2d 766 (Wis. Ct. App. 2006, review granted), 727 N.W.2d 34 (Wis. 2006) - insured's misrepresentations that it was a licensed architect and familiar with building code requirements qualified as "occurrences" per its insurance policy because intent to deceive is not a necessary element of homeowners' cause of action.

[131] **Amendment of Cancellation Provisions or Coverage Change.** The ACORD 24 Certificate of Property Insurance, **ACORD 25** Certificate of Liability Insurance and **ACORD 28** Evidence of Commercial Property Insurance were revised in late 2009 and early 2010 to change the Cancellation notice language to read as follows:

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

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

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

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

> Charlew contends that it reasonably relied, to its detriment, upon the certificate of insurance which named it as an additional insured and, therefore, under our decision in [citation omitted], Merchants Mutual was equitably estopped from denying coverage. Notably, however, the situation presented herein is distinguishable because the Merchants Mutual insurance policy was not in existence at the time of (the employee's) accident. "Where there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage." (citations omitted). Furthermore, Charlew

> argues that the policy was not properly cancelled because it was not notified of such action, as an additional insured…. Even assuming that Merchants Mutual received the policy change request from Weller-Marcil, we disagree with that argument. Since Merchants Mutual strictly complied with the notice of cancellation provisions set forth in … (reference to NY statute omitted) by mailing a timely notice of cancellation to the "first-named insured" (Regels) and "such insured's authorized agent or broker" (Weller-Mercil), the policy was effectively cancelled … (citation omitted), irrespective of its failure to comply with its "courtesy" policy of notifying additional insureds of a cancellation. Charlew's (the additional insured's) argument is further belied by the unambiguous disclaimer contained in the certificate of insurance … (quotation of the ACORD language is omitted.). *Wainwright v. Charlew Construction Co. Inc*., 755 N.Y.S.2d 751, 753-54 (NY [3rd Dept.] 2003).

for a discussion of the "notice" of cancellation disclosure in the ACORD Certificate of Insurance. ISO CG 02 05 12 04 Texas Changes - Amendment of Cancellation Provisions or Coverage Change provides for the insurer to give the designated person advance notice of cancellation or material change to the First Named Insured's CGL policy. Many but not all states have a similar form approved by the state's insurance commissioner for use in their state.

[132] **ISO CG 04 37 04 13 Electronic Data Liability.** See **Item A.11.l** *Exclusions May Be Invisible – Electronic Data Liability* in beginning of this article for a discussion of Exclusion 2.p - Electronic Data exclusion to the standard CGL policy's coverage. This endorsement to the CGL policy adds a definition for "electronic data" and amends the definition of "property damage" to incorporate the electronic data definition. **CG 04 37** was revised in 2013 to add to this exclusionary endorsement the "bodily injury" exception to the exclusion which also is included by the 2013 revisions in **Exclusion 2.p**. See **ISO CP 00 10 10 12** Building and Personal Property Coverage Form, Par. 4.f Additional Coverages – Electronic Data for property insurance coverage of loss or damage to electronic data.

[133] **ISO CG 20 10 04 13 Primary and Noncontributory – The "Other Insurance" Condition.** See Endnote 31 – *Primary and Noncontributing*. **ISO CG 20 01 04 13** Primary and Noncontributory – Other Insurance Condition has been introduced in 2013 by ISO to provide an endorsement form to be added to the Named Insured's policy (the protecting party's policy) to reiterate that it provides "primary" coverage and that its issuer "will not seek contribution from any other insurance available to an additional insured". Note, however, that Provision (2) of this endorsement requires that the written agreement of the additional insured (the protected party) and the Named Insured (the protecting party) must provide that the Named Insured's insurance is primary and will not seek contribution from the additional insured's other insurance. Requiring in the written agreement between the Named Insured and the Additional Insured that an ISO CG 20 10 endorsement be added to the Named Insured's policy may not achieve the Additional Insured's objectives, if the written agreement itself does not also specify that the additional insured coverage on the Named Insured's policy is "primary and noncontributory" plus contain language defining what is meant by primary and noncontributory. Note that this new endorsement is worded to apply only where the additional insured is a Named Insured. Many of the parties that require additional insured protection are not named insureds under a CGL policy, *e.g.*, officers, directors, and employees of a primary additional insured. Also note that this new endorsement provides that it applies only if the person or entity is named as an additional insured by an endorsement. Also, note this endorsement endorses the Named Insured's Commercial General Liability Policy and is not an endorsement to the Named Insured's umbrella or excess policy. This result might be avoided if the umbrella or excess policy provides that it is primary and does not require the additional insured's policy to contribute, and the additional insured's policy does not provide that it contributes along with other insurance above the primary contributing policies. This desired result of an additional insured is exacerbated by the standard policy's "other insurance" language that provides the policy is "Excess over: … (b) Any other primary insurance available to you covering liability … for which you have been added as an additional insured." The additional insured's policy does not state it is excess over umbrella policies of the Named Insured on which it has been added as an additional insured.

[134] **ISO CG 20 10 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.** The **ISO CG 20 10 04 13** Additional Insured Endorsement, is used to schedule an owner (a landlord), a lessee or a contractor on a named insured's CGL policy. It is used to schedule a landlord on the tenant's CGL policy and on a tenant's contractor's CGL policy to schedule a landlord on a tenant's CGL policy.

[135] **ISO CG 20 10 – "Caused by Your Acts or Omissions".** This endorsement provides coverage to the additional insured (*e.g.*, landlord and tenant) on the contractor's CGL policy for "liability" "***caused, in whole or in part, by***" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy). The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties.

The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent?

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least

a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured's employee is barred by the workers comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer. In *W & W Glass Sys., Inc. v. Admiral Ins. Co.,* 937 N.Y.S.2d 28 (N.Y. 2012) the New York court held that "caused by your ongoing operations performed for that insured" did not materially differ from "arising out of" and "the additional insured endorsement granting coverage does not require a negligence trigger". The court found that the fact that an employee of a subcontractor was injured while performing the named insured's work was sufficient to demonstrate that the injuries were "caused by" the named insured's operations.

[136] **ISO CG 20 10 – "Ongoing Operations".** This Additional Insured endorsement form was revised in 2001 by ISO to limit the time of the "acts or omissions" triggering liability to those occurring "in the performance of the ongoing operations" of the Named Insured. Previously, this Additional Insured endorsement applied to liabilities arising out of "your work" (language which did not address the time of the occurrence). A companion endorsement, **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the 'products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk.

[137] **2013 Revisions – Additional Limitations to the Additional Insured Endorsements.** ISO revised the Additional Insurance forms to add the following three additional limitations to their additional insured coverage:

(1) Coverage of the additional insured is provided "only to the extent provided by law". This limitation has been added to avoid violation of state anti-indemnification and anti-additional insured laws. Many states have "anti-indemnification" laws declaring void indemnity and additional insurance requirements requiring a party to indemnify and provide additional insurance protecting another party from the other party's negligence.

(2) Coverage of the additional insured is not broader than that which the Named Insured is required to provide the Additional Insured under their written agreement. This limitation thus imposes a limit on coverage otherwise provided in the policy.

(3) The limit of coverage is limited to the lesser of the coverage limit required in the parties' agreement or by the policy.

[138] **ISO CG 20 11 Additional Insured – Managers or Lessors of Premises.** This endorsement is used when a landlord or the property manager, or both, is to be listed as an additional insured on the tenant's liability insurance policy. A common risk transfer strategy is for a landlord to provide in its lease that its tenant indemnify and make the landlord and its property manager an additional insured on the tenant's CGL policy. These provisions recognize that the tenant's occupancy creates an additional liability exposure to the landlord for injuries and property damage resulting from a tenant's activities.

[139] **ISO CG 20 11 Additional Insured – Managers or Lessors of Premises - Designation of Premises.** See Endnote 141 - *ISO CG 20 11 - "Arising Out of 'Premises'"* for a discussion of the importance of the description of the "premises".

[140] **ISO CG 20 11 - "Arising Out of Ownership, Maintenance or Use" of Premises.** Coverage is broad as it covers the additional insured's liability for Injuries "**arising out of**" its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)" as opposed to using language employed in some of the other current ISO endorsement forms that were amended in 2004 to change from "arising out" to "caused by." Coverage also is broad as it covers the additional insured's liability for Injuries arising out of its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)." This language is broad. It applies clearly to the landlord's vicarious liability for acts of the tenant (i.e., the "**use**" of the premises). The language is also expansive and general enough to apply directly to the landlord's own negligence. It covers liability arising out of the "**ownership**" and "**maintenance**" of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant. The ISO industry standard additional insured endorsement form above does not expressly extend coverage to the additional insured's sole negligence. It also does not expressly exclude coverage of a landlord's sole negligence. In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover a landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers a landlord's sole negligence.

[141] **ISO CG 20 11 - "Arising Out of 'Premises'".** This endorsement provides a blank line for the description of the "Premises." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "arising out of" ownership, maintenance or use of "that part of the premises leased" to the Tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the common areas maintained by the landlord or in the alley behind the project). The most common factually litigated scenario regarding these endorsements involves injuries occurring "outside" the "part" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is affected if the schedule designates more or less than the "part of the premises" leased to the named insured. Some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. However, some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to a tenant.

Cases Finding No Coverage. For example, in *General Accident, Fire and Life Assurance Corp.* v. *Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the additional insured endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific

area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the covered location where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. *See Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.*, 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003) a case involving an injury that occurred to a HVAC repairman who was injured while walking on the roof of a landlord's multi-tenant retail center to get to a HVAC unit that the tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was the above ISO CG 20 11 Additional Insured – Managers and Lessors of Premises. The court found that the additional insured endorsement did not insure the landlord for the injury as the injury neither occurred in the retail space leased to tenant or on the roof directly above the space. *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)-additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center) and the additional insured endorsement described the "premises" as the 3,200 square feet of space occupied by the named insured tenant. The court stated:

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

The court also reasoned that since the lease provided for the landlord to maintain the alley the parties did not intend to transfer to the tenant's insurer the risk of liabilities occurring in the alley. A similar conclusion was reached in *Minges Creek* v. *Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by landlord, and tenant as insured." The additional insured endorsement to Tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of premises owned or used by you (the tenant)." The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "inextricably intertwined" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"–the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured." Also see *USF&G* v. *Drazic*, 877 S.W.2d 140 (Mo. 1994)-additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot. See also cases construing the scope of indemnities as to injuries arising out of the use of the "premises" as not extending to injuries not occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts): *Rensselaer Polytechnic Inst.* v. *Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991). The court was not persuaded that a duty to indemnify existed by the argument that, although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co.* v. *Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)–finding no duty to indemnify where the cause of the damage occurred outside the leased premises.

[142] **ISO CG 20 24 Additional Insured – Owners or Other Interests From Whom Land Has Been Leased.** This additional insured endorsement applies to a lease of "land", and **ISO CG 20 11** applies to a lease of "premises". Should **ISO CG 20 24** or **ISO 20 11** be used in a "ground lease"? The answer may be clearer if the land will be unimproved throughout the tenancy. Like the ISO CG 20 11 discussed in Endnote 130 above, the **ISO CG 20 24** has two carve outs: first, cessation of the lease, and second, alterations, new construction or demolition operations.

[143] **ISO CG 20 24 – Designation of Premises.** See Endnote 225 - *ISO CG 20 11 - "Arising Out of 'Premises'"* for a discussion of the importance of defining with care the "premises".

[144] **ISO CG 20 24 - "Arising Out of Ownership, Maintenance or Use" of Premises.** See Endnote 144 - *ISO CG 20 11 - "Arising Out of Ownership, Maintenance or Use" of Premises* for a discussion of the term "arising out of ownership, maintenance or use".

[145] **2013 Revisions – Additional Limitations to Additional Insured Endorsements.** See discussions in article at **Item A.6.e** *2013 Amendments to the ISO Additional Insured Endorsements – Not a Friend But a Foe?*.

[146] **ISO CG 20 26 04 13 Additional Insured – Designated Person or Organization.** This endorsement may be used when no other ISO form exists for the purpose or when the parties designate this Form as the form to be used. This form is suitable for use to designate a tenant as an additional insured on Landlord's CGL policy. In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy. In cases where the landlord is to be included as an additional insured on the tenant's CGL policy and the tenant is to be included on a landlord's CGL policy, the insurance specifications and the additional insured endorsements must be drafted to allocate on a geographic basis the areas where the landlord's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, the common areas) and the areas where the tenant's insurance is to afford primary and noncontributory coverage to the landlord and the tenant (for example, inside the suite or demised premises leased to the tenant, exclusive of common areas). This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability bodily injury, property damage and personal and advertising injury caused, in whole or in part, by the named insured's (in this case the Landlord) acts or omissions "in connection with your premises owned by ... you." This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages. For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence. The injury must occur in connection with premises owned by the named insured. The term "**premises**" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the tenant as an additional insured on the landlord's CGL policy as covering more than merely the "Premises" leased to the tenant, but also the common areas.

[147] **ISO CG 20 26 04 13 – "Your Acts or Omissions".** This endorsement provides coverage to the additional insured (*e.g.*, landlord and tenant) on the contractor's CGL policy for "liability" "**caused, in whole or in part, by**" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy). The "caused in whole or in part" language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties.

The 2004 revision to this additional insured endorsement was in part a response to holdings, such as *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App. – Austin [3rd Dist.] 1999, no writ), *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. [1st Dist.] 1999, writ denied) and *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) holding that the "arising out of" language was ambiguous and should be broadly interpreted as providing coverage for liabilities arising out of the concurrent and even the sole negligence of the additional insured. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent and the additional insured was the solely negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent?

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured's employee is barred by the workers comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer. In *W & W Glass Sys., Inc. v. Admiral Ins. Co.,* 937 N.Y.S.2d 28 (N.Y. 2012) the New York court held that "caused by your ongoing operations performed for that insured" did not materially differ from "arising out of" and "the additional insured endorsement granting coverage does not require a negligence trigger". The court found that the fact that an employee of a subcontractor was injured while performing the named insured's work was sufficient to demonstrate that the injuries were "caused by" the named insured's operations.

[148] **ISO CG 20 26 04 13 – Ongoing Operations.** This Additional Insured endorsement form was revised in 2001 by ISO to limit the time of the "acts or omissions" triggering liability to those occurring "in the performance of the ongoing operations" of the Named Insured. Previously, this Additional Insured endorsement applied to liabilities arising out of "your work" (language which did not address the time of the occurrence). A companion endorsement, **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the 'products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk.

[149] **2013 Revisions – Additional Limitations to the Additional Insured Endorsements.** See discussion in the article at **Item III.A.6e -** *The 2013 Revisions - Not a Friend But a Foe.* ISO revised the Additional Insurance forms, ISO CG Forms 20 10, CG 20 11, CG 20 24, CG 20 26, CG 20 33, CG 20 37, and CG 20 38 to add the following three additional limitations to their additional insured coverage:

(1) Coverage of the additional insured is provided "only to the extent provided by law". This limitation has been added to avoid violation of state anti-indemnification and anti-additional insured laws. Many states have "anti-indemnification" laws declaring void indemnity and additional insurance requirements requiring a party to indemnify and provide additional insurance protecting another party from the other party's negligence.

(2) Coverage of the additional insured is not broader than that which the Named Insured is required to provide the Additional Insured under their written agreement. This limitation thus imposes a limit on coverage otherwise provided in the policy.

(3) The limit of coverage is limited to the lesser of the coverage limit required in the parties' agreement or by the policy.

[150] **ISO CG 20 33 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement with You.** See discussion at this article's **Item A.8** *Additional Insureds May Not Be Covered by Automatic (Blanket) Additional Insured Coverage.* **ISO CG 20 33** endorsement amends the "Who Is An Insured" provision of the Named Insured's policy to add as an additional insured "any person or organization for whom you are performing operations when you and such person organization have agreed in writing … that such person … be added as an additional insured on your policy." It is commonplace for the agreement between contractors and subcontractors and landlords and tenants to provide that persons other than the parties to the agreement be afforded additional insured status. Under **ISO CG 20 33** "no agreement between the Named Insured and the Additional Insured, no additional insured coverage". **ISO CG 20 33** at **Par. B.2** excludes coverage for liabilities arising out of the products and completed operations hazard. Also, at **Par. B.1** the 2013 revision to this endorsement added an exclusion for professional services, including the additional insured's hiring, training or monitoring of employees who perform professional services themselves. See **ISO CG 20 38**. It provides for coverage even when there is no direct agreement between the Named Insured and the Additional Insured.

[151] **ISO CG 20 33 04 13 – "Your Acts or Omissions".** See Endnote 135 - *ISO CG 20 10 – "Caused by Your Acts or Omissions"* for a discussion of the meaning of "your acts or omissions".

[152] **2013 Revisions – Additional Limitations to Additional Insured Endorsements.** See Endnote 137 - *2013 Revisions – Additional Limitations to the Additional Insured Endorsements*. See discussion in the article at **Item III.A.6e -** *The 2013 Amendments to the ISO Additional Insured Endorsements - Not a Friend But a Foe*.

[153] **ISO CG 20 37 04 13 Additional Insured – Owners, Lessees or Contractors – Completed Operations.** This endorsement, **ISO CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations was introduced in 2001 (as subsequently modified) to cover liabilities caused, in whole or in part, by "your work" "at the location described in the Schedule" "performed for that additional insured" and "included in the products-completed operations hazard". Restricting the endorsement to locations and operations described in the ISO CG 20 37 permits insurers the opportunity to underwrite the coverage risk. It was introduced in 2001 as a companion to ISO CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization, which in 2001 was revised to limit its coverage to "ongoing operations" of the Named Insured at the location designated in the Schedule in the face of the form and to expressly exclude at Paragraph B injury and damages occurring after work completion. For further discussion of the importance of completed operations coverage for coverage up to the limits of the Statute of Repose, see the discussion in this Article at **Item A.7** *Completed Operations Coverages is Important*.

[154] **ISO CG 20 38 04 13 Additional Insured – Owners, Lessees or Contractors – Automatic Status For Other Parties When Required in Written Construction Agreement.** This form was added by ISO in 2013 to its list of additional insured endorsement forms. Paragraph **.2** extends additional insured coverage to "Any other person … you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above." Paragraph **.2** cures the malady discussed at this **Item III.A.8** *Additional Insureds May Not Be Covered by Blanket Additional Insured Coverage*. Thus, make sure that, if automatic additional insured status is being afforded and there is not a direct contract between the Named Insured and the Additional Insured, **ISO CG 20 38** is the appropriate endorsement form to attach to the Named Insured's policy. Your examination of the Certificate of Insurance will not confirm which automatic additional insured endorsement form is part of the Named Insured's policy. Many times the parties' written agreement has a laundry list of Additional Insureds. In such circumstances it is not assured that the Insurer will be willing to extend additional insured status to numerous entities with which the Named Insured does not have a contract. **CG 20 38** at Paragraph **B.2** excludes coverage for liabilities arising out of the products and completed operations hazard. Also, at Paragraph **B.1** the 2013 revision to this endorsement added an exclusion for professional services, including the additional insured's hiring, training or monitoring of employees who perform professional services themselves.

[155] **ISO CG 20 38 04 13 – "Caused By Your Acts or Omissions".** See Endnote 147 - *ISO CG 20 26 04 13 – "Your Acts or Omissions"*. This endorsement provides coverage to the additional insured (*e.g.*, landlord and tenant) on the contractor's CGL policy for "liability" "**caused, in whole or in part, by**" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, *etc.*). (This form is also used to provide additional insured coverage for a contractor on a subcontractor's CGL policy).

[156] **2013 Revisions – Additional Limitations to ISO Forms CG 20 10, CG 20 11, CG 20 24, CG 20 26, CG 20 33, CG 20 37, and CG 20 38 Additional Insured Endorsements.** ISO revised the Additional Insurance forms, CG 20 10, CG 20 11, CG 20 24, CG 20 26, CG 20 33, CG 20 37, and CG 20 38 to add the three additional limitations to their additional insured coverage listed at Endnote 223 *2013 Revisions – Additional Limitations to the Additional Insured Endorsements*. See discussion in the article at **Item III.A.6e –** *The 2013 Amendments to the ISO Additional Insured Endorsements –a Friend or a Foe?*.

[157] **ISO CG 21 39 10 93 Contractual Liability Limitation.** In addition to additional insured coverage, Contractual Liability Coverage is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. **ISO CG 21 39 10 93** Contractual Liability Limitation is one of the most egregious endorsements in the insurance industry. The provision of Contractual Liability Coverage includes a series of definitions of an "insured contract." The first five definitions are referred to as incidental provisions, but the sixth definition is the provision that provides for the contractual assumption of tort liability. The sixth type of "insured contract" is most frequently the basis of insurance of a Named Insured on its indemnity of third parties (*e.g.*, indemnity for injuries to an employer's employees; indemnity for injuries to a subcontractor's employees). The **CG 21 39** deletes this sixth definition in its entirety, deleting coverage for an indemnitor's indemnity of a third party for its negligence. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer, unless its indemnity falls within one of the five defined "insured contracts". Anti-Indemnity Statutes in many states preclude enforcement of indemnities as to a third party's negligence, sole or even concurrent, except in statutorily limited circumstances.

[158] **ISO CG 21 44 07 98 Limitation of Coverage to Designated Premises or Project. ISO CG 21 44** is added as an endorsement to the CGL policy to confirm and limit coverage to the designated premises or project. The danger of this form is if it confirms and limits the CGL policy's coverage to a location other than the Landlord's or Owner's premises or project. For this reason, the Insurance Specifications list it as a prohibited endorsement. So listing it as a prohibited endorsement hopefully will bring its existence to light.

[159] **ISO CG 22 94 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf.** See discussion of this egregious exclusion endorsement as **Item A.11.c** *Exclusions May Be Invisible* of this article. Liability insurers have sought to exclude from the coverage of CGL policies so-called "business risks", those risks thought generally to be under the control of the insured (contractor or subcontractor) and which are not regarded as fortuitous in nature. In crafting policy language (coverage and exclusions) insurers have struggled for decades to draft policy language that clearly and unambiguously covers "accidental" property damage but does not cover uninsurable business risks. The insurance industry has resisted insuring contractors for property damage caused by "business risks" within the contractor's control. This issue has been the subject of considerable litigation. Although the vast majority of cases involve interpretation of the same CGL policy language, there is a marked split of authority. As reviewed below, the recent focus has been on the "property damage" and "occurrence" requirements of the CGL policy, with some courts applying the legal theories of "business risk" and "economic loss" as a means to exclude coverage. In 2007 courts in Texas, Florida and Tennessee courts rejected negligence, foreseeability of damage and natural and probable consequences as grounds to exclude finding that damage to property arising out of a contractor's performance of work was an "occurrence" possibly triggering coverage under its CGL policy. See *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242

S.W.3d 1 (Tex. 2007); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007); and *Travelers Indem. Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, 308-09 (Tenn. 2007).

[160] **ISO CG 22 95 10 01 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations.** See discussion of this egregious exclusion endorsement at **Item III.A.11.a(5)** *Exclusions May Be Invisible* of this article.

[161] **ISO CG 24 04 05 09 Waiver of Transfer of Rights of Recovery Against Others To Us. ISO CG 24 04** waives the CGL insurer's right to step into the shoes of its insured to recover against a third party tortfeasor, that has been transferred by the insured to its insurer by Paragraph 8, to Section IV of the standard CGL Policy. See **ISO 00 01 04 13** Commercial General Liability Coverage Form, Section IV, Paragraph 8 Transfer of Rights Of Recovery Against Others To Us.

[162] **ISO CG 24 26 Amendment of Insured Contract Definition.** See the following: (1) the discussion in this Article at **A.12.a(3)** *Exclusions May Be Invisible*; (2) Endnote 27 - *Contractual Liability Coverage - An Exception to an Exclusion from Coverage* for a discussion of Contractual Liability Coverage of an "insured contract" under a CGL Policy; and (3) **ISO CG 24 26** Amendment of Insured Contract Definition. This endorsement amends the definition of "insured contract" to limit contractual liability coverage insuring the named insured's indemnities for the indemnified person's tort liability to bodily injury and property damage *caused in whole or in part by* the named insured (the indemnifying person). This causation language was added by ISO to eliminate from the Contractual Liability Coverage of "insured contracts" the sole negligence of the indemnified party. If the indemnifying party's indemnity is not similarly limited, then the indemnifying party has undertaken a risk beyond its insurance and is acting as naked insurer.

13. Property Insurance Forms

[163] **ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page.** The Declarations Page is likely the most important page of the Policy! Among other policy details it designates the name of the Named Insured, the Covered Causes of Loss category, the valuation method (Agreed Value, Replacement Cost), and the name of the Mortgageholders protected by the policy, and a listing of the endorsements to the Policy.

[164] **ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page – Covered Causes of Loss.** See Endnote 48 – *Property Insurance – "Causes of Loss".*

[165] **ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Agreed Value.** An "agreed value endorsement" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

[166] **ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Replacement Cost.** See Endnote 49 - *Valuation Terminology - Replacement Cost or Actual Cash Value.*

[167] **ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders.** One of the primary concerns of the lender is the right to claim insurance proceeds arising from destruction of the mortgaged property. Joshua Stein, *What a Mortgage Lender Needs to Know About Property Insurance: The Basics*, THE REAL ESTATE FINANCE JOURNAL Winter 2001; and *Benchmark Insurance Requirements for Commercial Real Estate Loans and Why They Say What They Say*, THE REAL ESTATE FINANCE JOURNAL Winter 2004, each found at www.joshuastein.com. If the mortgagee does not carry its own insurance, but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There is more than one form of endorsement for this purpose and they each provide widely different protection. There are at least three types of mortgagee clauses which cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause.

Simple Loss Payee/Open Mortgage Clause. Courts have held that a clause that simply provides that insurance proceeds will be payable to a mortgagee "as its interest may appear" links the mortgagee's recovery to the right of the mortgagor to recover and exposes the mortgagee to risks that the insurer will be afforded a defense to payment to the mortgagee based upon inequitable conduct of the mortgagor. An "open" mortgage clause provides that any loss is payable to the lender "as its interest may appear". This type clause exposes the lender to all the defenses and limitations that the insurer has against the insured mortgagor, such as failure to pay the premium or perform a condition for coverage under the policy. See cases and discussion at 48 A.L.R. 121 (1927) and 38 A.L.R. 367 (1925) and Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE 3d § 65:8 (2013). Examples of the effect of such a clause are *Commerce Bank & Trust Co. v. Centennial Ins. Co.*, 446 N.E.2d 73 (Mass. 1983) and *Pioneer Food Stores Coop., Inc. v. Fed. Ins. Co.*, 563 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991). In Commerce Bank the mortgagee claimed that it should receive the insurance proceeds regardless of whether the loss was caused by a fire set by the mortgagor. While the court did not determine the question of arson, it held that because the mortgagee was essentially merely a loss payee, it could recover only if the mortgagor would have been entitled to recover. Pioneer also involved suspected arson by the mortgagor; because the mortgagor would not provide financial information or submit sworn affidavits regarding the loss, the mortgagee was denied recovery. Not all borrowers facing financial difficulty consider insurance fraud as the way out of their problems, but the mortgagee of one who has taken this path will be unprotected if it is simply named as loss payee or is covered under an "open mortgage clause" type of endorsement.

Standard Mortgage Clause. See 4 COUCH ON INSURANCE 3d § 65:48 (2013) "Standard" or "Union" Mortgage Clause – General Rule That Mortgagee Unaffected. Standard commercial property policies (e.g., ISO's CP 00 10) automatically extend coverage to the mortgagee as an insured through the inclusion of the standard mortgage clause. Other property insurance forms that do not include a mortgage clause must be endorsed to provide coverage equivalent to that contained in CP 00 10.

The standard mortgage clause was developed to protect recovery by the mortgagee even though the insurance contract between the mortgagor and the mortgagee might be voided by the insurance company because of certain omissions or acts by the mortgagor (for example, neglect, arson, concealment). The most significant protections afforded by the standard mortgage clause are the following:

(1) insurance proceeds are paid to the mortgagee, not to the insured or to the mortgagee and the insured jointly (see Standard Mortgage Clause Section **F.2.b** in the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form);

(2) coverage applies for the benefit of the named mortgagee even if coverage is denied the insured because of some violation by the insured of the policy's conditions (see Standard Mortgage Clause Section **F.2.d** in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form);

(3) the mortgagee is to be given notice of policy cancellation by the insurer – 10 days' notice of cancellation for nonpayment of premium and 30 days' notice when cancellation is for other reasons (see Standard Mortgage Clause Section **F.2.f(1)** in the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form); and

(4) the mortgagee is to be given 10 days' notice on nonrenewal (see Standard Mortgage Clause Section **F.2.g** in the **ISO CP 00 10 10 12** Building and Personal Property Coverage Form).

Numerous cases exist upholding the standard mortgage clauses requirement that notice must be given. *E.g.*, *Firstbank Shinnston v. West Virginia Ins. Co.*, 408 S.E.2d 777 (W. Va. 1991) held that a fire insurance company could not remove the lender under a deed of trust from the owner's insurance policy without giving notice to the lender of the cancellation. In that case, a homeowner had agreed through a standard mortgage clause to maintain fire insurance on his home, which was subject to a deed of trust securing a loan from Firstbank Shinnston. After two items of correspondence sent to the bank were returned undelivered to the insurance company, the insurance company unilaterally deleted the bank as an additional insured under the policy. The house burned, and the homeowner collected $18,000 from the insurance company but did not rebuild. As a result, the insurance company canceled the policy. The homeowner also defaulted on his loan. Firstbank Shinnston sought to collect the insurance proceeds from the fire, and the insurance company refused coverage. This court held on those facts that cancellation of the policy was not effective as to Firstbank Shinnston, because the insurance company failed to notify the bank that its interest as mortgagee was being canceled.

Courts hold that a standard mortgage clause grants independent rights to the mortgagee from the insurer that can be enforced regardless of the actions of the mortgagor. A standard mortgage clause, like the open mortgage clause, provides that the loss will be payable to the mortgagee "as its interest may appear", but it goes further to provide that the insurance, as to the mortgagee, will not be invalidated by acts of the insured. Lee R. Russ and Thomas F. Segalla, COUCH ON INSURANCE § 65:9 (2013). Examples of cases that provided payments to the mortgagee under such clauses are *Nat. Comm. Bank & Trust Co. v. Jamestown Mut. Ins. Co.*, 334 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1972) and *Foremost Ins. Co. v Allstate Ins. Co.*, 460 N.W. 2d 242 (1990). In the National Commercial Bank case the insurer claimed that material misrepresentations of the insured voided the policy. However, the court found that the standard mortgage clause created a separate contract between insurer and mortgagee that was not affected by the actions of the insured. *Foremost* involved yet another case of arson by the insured, but because the policy named the mortgagee under the standard or union clause, it was entitled to recover despite the actions of the insured. See, John W. Steinmetz and Stephen E. Goldman, The Standard Mortgage Clause in Property Insurance Policies, 33 TORT & INS. L. J. 81 (1997).

[168] **ISO CP DS 00 10 00 Commercial Property Coverage Part Declarations Page – Forms Applicable.** The Declarations Page lists the endorsements, amendments, and forms comprising the Policy.

[169] **ISO IL 00 17 11 98 Common Property Conditions.** One of the components comprising the standard property policy is the Common Property Conditions. Note that the Cancellation notice provision is worded such that the insurer's obligation to give notice to the "first Named Insured". Thus, unless the policy is endorsed to give notice to an additional insured, no notice is given to the additional insured on policy cancellation.

[170] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form.** One of the components comprising the standard property policy is the Building and Personal Property Coverage Form. Among its provisions are provisions addressing the following topics: A. Coverage: Par. 1 – Covered Property; Par. 2 – Property Not Covered; Par. 3 – Covered Causes of Loss (incorporating by reference the Causes of Loss form as shown on the Declarations page); E. Loss Conditions: Par. 6 Vacancy; F. Additional Conditions: Par. 1 Coinsurance; Par. 2. Mortgageholders; and G. Optional Coverages: Par. 1 Agreed Value; Par. 2. Inflation Guard; Par. 3. Replacement Cost.

[171] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Exclusions – Electronic Data. Paragraph 4.f** Additional Coverages – Electronic Data as an exception to **Paragraph 2.n** Property Not Covered to **CP 00 10 10 12** Building And Personal Property Coverage Form provides coverage for the replacement or restoration of electronic data destroyed or corrupted by a Covered Cause of Loss, subject to the limitations set out in the Additional Coverage.

[172] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Causes of Loss.** The category of Causes of Loss for the policy is designated on the Declarations page and incorporated by reference into the policy by this reference at **Paragraph A.3** Coverage – Covered Causes of Loss **ISO CP 00 10 10 12** Building and Personal Property Coverage Form.

[173] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages - Debris Removal.** See **ISO CP 00 10 10 12** Building and Personal Property Coverage Form **Paragraph A.4.a** Coverage – Additional Coverages – Debris Removal. The ISO Commercial Property Policy provides coverage for debris removal as "additional coverage" and is limited to 25% of the sum of the paid loss plus the deductible. An additional limit of $10,000 is made available for debris removal if (1) the amount payable under the policy to reconstruct or repair plus the amount payable under the policy for debris removal exceeds the entire policy limit, or (2) the cost of debris removal exceeds 25% of the paid loss plus deductible. Higher limits for debris removal is provided by using the ISO CP 04 15 10 12 Debris Removal Additional Limit of Insurance endorsement.

[174] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages - Increased Costs of Construction.** Ordinance or Law Coverage is available by endorsement to a standard property policy to insure against loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Many communities have building ordinances that require that a building that has been damaged to a specified extent (typically, 50 percent) be demolished and rebuilt in accordance with current building codes rather than simply repaired. Unendorsed, standard property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the

building, or the increased cost of rebuilding the entire structure in accordance with current building codes. Ordinance or law coverage may be purchased using ISO CP 04 05 to cover the cost above the limit available under the ISO property insurance for cost of construction incurred to comply with an ordinance or law. The base form ISO property insurance limits such coverage to the lesser of $10,000 or 5% of the policy limits.

[175] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Additional Coverages – Electronic Data. Paragraph 4.f** Additional Coverages – Electronic Data as an exception to **Paragraph 2.n** Property Not Covered to **CP 00 10 10 12** Building And Personal Property Coverage Form provides coverage for the replacement or restoration of electronic data destroyed or corrupted by a Covered Cause of Loss, subject to the limitations set out in the Additional Coverage.

[176] **Vacancy Clause – Standard Commercial Property Policy – ISO Form CP 00 10 – Section E.6 Loss Conditions - Vacancy.** See 17 Am. Jur. Proof of Facts 2d 103 "Vacancy" of Insured Commercial Structure (2010); Annot., What constitutes "vacant or unoccupied" dwelling within exclusionary provision of fire insurance policy 47 A.L.R.3d 398 (1973); 45 C.J.S. Insurance § 999 Change in Use or Occupancy and §1002 What Constitutes Vacancy or Nonoccupancy.

Some Policies Provide for Cancellation or Suspension of Coverage. Unlike the standard commercial policy (ISO CP 00 10), some commercial property policies provide that the policy is cancelled and no proceeds are payable if the property is vacant for a specified period. In *Lynn v. USAA Casualty Ins. Co.*, 1997 WL 61485 (Tex. App. – San Antonio 1997, writ denied) a vacancy clause prevented coverage. In this case the vacant house did not contain any appliances, furniture or other contents, except for one metal desk, as all contents had been stolen during various break-ins and the owner had not spent a night at the house for more than a year as there was no bed. Also see *Carolina Ins. Co. of Wilmington, N.C. v. St. Charles*, 98 S.W.2d 1088 (Tenn. 1936); and *Republic Ins. Co. v. Dickson*, 69 S.W.2d 599 (Tex. Civ. App. – Beaumont 1938, writ dism'd). Some commercial property policies suspend coverage rather than void the policy where the insured property is vacant. *Barlow v. Allstate Texas Lloyds*, 214 Fed. Appx. 435 (5th Cir. 2007).

Policy Issued With Insurer's Knowledge Of Vacancy Or Partial Vacancy. Policies are sometimes written with knowledge of the insurer that a portion of the premises will be vacant and in such cases the insured will covenant to keep the vacant portion secure. In 730 J&J LLC v. Twin City Fire, 740 N.Y.S.2d 119 (NY 2002) the policy did not cover fire loss; insured breached warranty to keep vacant 3rd and 4th floors of building locked and secured.

Notice Provision. Also, some commercial property policy forms require the insured to notify the insurer that the premises have become vacant and permit the insurer to elect to continue coverage or cancel coverage unless a vacancy permit or rider issue issued and paid for. *National Mut. Fire Ins. Co. v. Duncan*, 98 P. 634 (Colo. 1908); *Corey v. Niagara Fire Ins. Co.*, 47 S.W.2d 955 (Ky. 1932); *Hartford Fire Ins. Co. v. Merrimack Mut. Fire Ins. Co.*, 457 A.2d 410 (Me. 1983); *Lumbermens Mut. Cas. Co. v. Thomas*, 555 So.2d 67 (Miss. 1989).

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

[177] **Vacancy Clause - ISO Form CP 00 10 – Definition of "Vacancy".** The standard commercial property policy (**ISO CP 00 10**) at **Section B.6** Exclusions and Limitations – Vacancy addresses the increased insurance risk arising out of the vacancy of the covered property. The standard commercial property policy states that a building is "vacant" unless

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

[178] **Vacancy Clause - ISO Form CP 00 10 – "Customary Operations".** The court in *Langill v. Vermont Mut. Ins. Co.*, 268 F.3d 46 (Ma. 2001) found that a property is vacant even though the owner sporadically spent time refurbishing an unoccupied rental property vacated by tenants three months prior to arson loss; in *Catalina Enterprises v. Hartford Ins.*, 67 F.3d 63, 64 (Md. 1995) the court held that an industrial storage warehouse was considered to be vacant even though scaffolding and a hand truck had remained in the premises after tenant vacated five months previously; and in *Schmidt v. Underwriters*, 82 P.3d 649 (Or. 2004) the court held that an intent to commence residency in premises that had been vacant for more than 60 days at time of fire was not sufficient to constitute use.

[179] **Vacancy Clause - ISO Form CP 00 10 – Building Under Construction.** A building under construction or renovation is not considered vacant under the standard commercial property policy. The court in *Myers v. Merrimack Mut. Fire Ins.*, 601 F.Supp. 620, 621 (Il. 1985), judgment aff'd, 788 F.2d 468 (7th Cir. 1986) interpreted a fire policy that contained a construction exception to the vacancy clause as not excepting repairs or renovations but only the construction of something which did not previously exist or the creation of something new.

[180] **Vacancy Clause - ISO Form CP 00 10 – 60 Consecutive Days Vacancy – 6 Excluded Causes Of Loss.** The Vacancy Clause in the standard property policy further provides that if the building has been vacant for more than 60 consecutive days losses or damages from the following six causes are not covered losses: (1) vandalism; (2) sprinkler leakage, unless the insured has protected the system against freezing; (3) building glass breakage; (4) water damage; (5) theft; or (6) attempted theft. In *Sorema N. Am. Reinsurance Co. v. Johnson*, 574 S.E.2d 377 (Ga. 2002) the vandalism exception

applied preventing a mortgagee, which acquired property through foreclosure, from coverage for damages caused post foreclosure by vandals; the fact that the former mortgagor's equipment was left on premises did not mean that the property was not vacant; in *MDW Enterprises v. CNA Ins. Co.*, 772 N.Y.S.2d 79 (NY 2004) the vandalism exception did not exclude coverage for arson destroying a building that had been vacant for the preceding 15 months while pending sale. In *Essex Ins. Co. v. Eldridge Land, L.L.C.*, 2010 WL 1992833 (Tex. App. – Hou. [14th Dist.] May, 2010) the court held that damage to the interior of an insured building inflicted by thieves incidentally to their theft of copper wiring and copper pipe fell within the theft exclusion to vacancy coverage under a standard commercial property policy. Also see *Nautilus Ins. Co. v. Steinberg*, 316 S.W.3d 752 (Tex. App. – Dallas 2010, no writ) similarly holding that damage to roof HVAC caused by thieves removing copper wiring is excluded from coverage under the standard policy.

[181] **Vacancy Clause - ISO Form CP 00 10 – 15% Reduction in Proceeds.** The standard commercial policy further provides that with respect to Covered Causes of Loss other than those listed as (1) – (6) above, the amount the insurer would otherwise pay for the loss or damage is reduced by 15%.

[182] **The Standard Mortgage Clause – Standard Commercial Property Policy - ISO Form CP 00 10 – Section F.2 Additional Conditions – Mortgageholders.** See Endnote 251 - *ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders*.

[183] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Agreed Value.** An "agreed value endorsement" is an optional endorsement used where the named insured and the insurer agree upon the actual cash value or the replacement cost of the covered property before the policy is written and agree that co-insurance will not apply.

[184] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Inflation Guard.** "Inflation guard" is an optional endorsement designed to offset potential inflation by specifying a percentage in the declarations by which the coverage will increase annually as to the portion of the covered property specified.

[185] **ISO CP 00 10 10 12 Building and Personal Property Coverage Form – Optional Coverages - Replacement Cost.** See Endnote 49 - *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.

[186] **ISO CP 00 30 10 12 Business Income (And Extra Expense) Coverage Form.** This form of insurance (**ISO CP 00 30**) covers two types of loss: (1) loss of business income/earnings - covers losses suffered by a business as a result of not being able to use property damaged by a covered cause of loss under a property insurance policy during the time required to repair or replace it (formerly called "business interruption insurance") and/or (2) extraordinary additional expenses ("Extra Expense Coverage") incurred due to a necessary suspension of operations during a period of restoration caused by direct physical loss of or damage to property at the premises described in the policy. This coverage is available with no co-insurance or monthly limitation. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days for recovering business that may have been lost to competitors (typically limited to an aggregate of 120 days unless policy is endorsed to provide for extended time period coverage). Business income insurance may be purchased without the Extra Expense Coverage (ISO Form CP 00 32) and extra expense coverage can be purchased without business income insurance (ISO Form CP 00 50). Extra Expense Coverage covers expenses in excess of normal operating expenses incurred by a business that remains in operation following a direct damage property loss. Extra Expense Coverage is appropriate for service businesses whose property is not essentially income-producing (attorneys, banks, insurance agencies, and doctors' offices), and for businesses that would find it imperative to continue operating regardless of cost (newspapers, dairies).

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

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

[187] **ISO CP 00 90 07 88 Commercial Property Conditions.** The Commercial Property Conditions set out conditions for maintenance of the policy, including the Named Insureds agreement to protect the insurer's right of subrogation unless it is waived by the insurer (see **Paragraph I, 1** permitting pre-loss waiver by the Named Insured of the insurer's subrogation right and **Paragraph I 2(c)** and post-loss waiver against the Named Insured's tenant).

[188] **ISO CP 04 05 10 12 Ordinance or Law Coverage.** See Endnote 59 - *Ordinance or Law Coverage*.

[189] **ISO CP 10 30 10 12 Causes of Loss – Special Form.** See Endnote 48 - *Property Insurance – "Causes of Loss"*.

[190] **CP 10 30 10 12 Causes of Loss – Special Form – Exclusion - Ordinance or Law.** See CP 04 05 10 12 Ordinance or Law Coverage endorsement to add coverage excluded by the **Par. B.1.a.** Exclusion – Ordinance or Law to the **ISO CP 10 30 10 12** Causes of Loss – Special Form.

[191] **CP 10 30 10 12 Causes of Loss – Special Form – Exclusion - Water. Par. B.1.g.** Exclusion –Water to the Causes of Loss – Special Form excludes certain water related causes of loss from coverage (*e.g.*, flood) under the **ISO CP 10 30 10 12** Causes of Loss – Special Form.

[192] **CP 10 30 10 12 Causes of Loss – Special Form – Exclusion – Boiler Explosion. Par. B.2.e.** Exclusion to the Causes of Loss – Special Form excludes damages to the property from the explosion of steam boilers and other similar apparatus from coverage. Coverage for damage due to boiler explosion is a special insurance line which can be covered by boiler and machinery insurance. See Endnote 66 - *Boiler and Machinery Coverage.*

[193] **CP 10 30 10 12 Causes of Loss – Special Form – Special Exclusion – Contractual Liability.** The **Paragraph 4.c.(2)(a)** Contractual Liability exclusion is in the Causes of Loss – Special Form to exclude from the coverage of the Named Insured's property insurance liability for loss due to the

Named Insured's indemnity except in the very limited circumstance that the indemnity is by the Named Insured under a written lease in which it has assumed the liability for building damage resulting from a robbery and provided the assumption was prior to the accident and the building is a Covered Property under the policy. This type of coverage is addressed as an insured contract under a CGL Policy.

[194] **ISO CP 12 18 16 07 Loss Payable Provisions.** In November 2008 ISO amended its **CP 12 18** Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

[195] **ISO CP 12 19 06 07 Additional Insured – Building Owner.** In November 2008 ISO amended its **CP 12 18** Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the CP 12 19. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner. The phrase "as their interests may appear" often is added in a property additional insured endorsement. This is done in order to limit the additional insured's recovery rights to covered property with respect to which the additional insured has an interest. Without these limiting words, if the policy covers multiple properties, the insurer could include the additional insured on all policy proceeds checks. Under the **CP 12 19** the building owner is an additional insured with respect to the coverage provided for direct physical damage to the building and covered loss is adjusted with and payable to both the tenant, as the first named insured (the insured whose name is listed first in the Declarations), and to the building owner, as additional insured. The **ISO CP 12 19** Building Owner Additional Insured Endorsement does **not** provide for notice of cancellation to be given to the landlord/additional insured. Further, the cancellation provision in the ISO common policy conditions states that notice of cancellation is given only to the first named insured. Thus, the tenant's property policy provides notice of cancellation will only be given to the tenant. In *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex. 2007) the landlord learned the hard way that it needed to follow up and obtain a corrected additional insured endorsement on the tenant's property policy. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". In addition to issuing the additional insured endorsement to the property policy, the landlord should also have obtained an endorsement to the property policy requiring notice of cancellation be given to it of policy cancellation. The standard property policy only requires notice of cancellation be sent to the first named insured.

Caveat: To assure notice of cancellation by the insurer, the landlord must obtain a notification endorsement to the policy. Additionally, note that the notification endorsement likely will not address notification as to cancellations by the tenant and will need to be manuscripted to include notice to the landlord of tenant cancellations.

[196] **ISO CP 00 60 06 95 Leasehold Interest Coverage Form. ISO CP 00 60 06 95** Leasehold Interest Coverage Form can be added as an endorsement to a tenant's ISO form property policy to extend coverage for losses resulting from cancellation of its lease, including loss of undamaged improvements and betterments. The cause of cancellation must result from direct physical loss of or damage to property (not necessarily the property of the insured tenant) at the leased premises. Damages are based on the difference in rental rates and the loss of use of improvements.

14. Certificates

[197] **ACORD 25 Certificate of Liability Insurance.** See Endnotes 8 – 11 and 15 – 18 for discussions of Certificates of Insurance.

[198] **Producer.** See Endnote 17 - Producer.

[199] **Personal and Advertising Injury.** See Endnote 21 – *Commercial General Liability Insurance (CGL) "Personal and Advertising Injury"*.

[200] **General Aggregate.** See Endnote 23 - *General Aggregate*.

[201] **Products – Completed Operations.** See Endnote 69 – *Products - Completed Operations*.

[202] **General Aggregate – Per Project.** See Endnote 25 - *General Aggregate Per Project*.

[203] **Auto Liability.** See Endnote 37 - *Business Auto Liability*.

[204] **Auto Liability – Any Auto.** See Endnote 38 - *Any Auto*.

[205] **Retention.** See Endnote 7 - *Self-Insurance* for a definition of "Self-Insured Retention". See **Item III.A.12** *Self Insurance is Not Insurance* at the beginning of this article.

[206] **Description of Operations/Locations/Vehicles.** This box and an attached schedule are typically used to identify at the request of the Certificate Holder endorsements to the listed policies and persons scheduled as protected parties, *e.g.*, additional insureds and persons as to which subrogation has been waived.

[207] **Certificate Holder.** See Endnote 16 - *Status as a Certificate Holder Does Not Create Rights*.

[208] **Notice - Cancellation.** See Endnote 15 - *Cancellation Notice Statement* and Endnote 32 *Amendment of Cancellation Provisions or Coverage Change*.

[209] **Authorized Representative.** See Endnote 18 - *Signed By An "Authorized Representative"?*

[210] **ACORD Certificates.** See Endnotes 8 – 11 and 15 – 18 for discussions of Certificates of Insurance.

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

[212] **Additional Named Insured(s).** See Endnote 12 - Parties to Policy" "First Named Insured"; "Named Insured"; "An Insured"; "An Additional Insured"; "Additional Named Insured".

[213] **Causes of Loss - Basic.** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[214] **Causes of Loss - Broad.** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[215] **Causes of Loss - Special.** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[216] **Business Income.** See Endnote 64 - *Business Income and Additional Expense.*

[217] **Terrorism Coverage.** See Endnote 60 - *Terrorism.*

[218] **Replacement Cost.** See Endnote 49 - *Valuation Terminology – Replacement Cost or Actual Cash Value.*

[219] **Agreed Value.** See Endnote 50 - *Valuation Terminology – Agreed Value Endorsement.*

[220] **Coinsurance.** See Endnote 53 - *Coinsurance.*

[221] **Ordinance or Law.** See Endnote 59 - *Ordinance or Law Coverage.*

[222] **Flood.** See Endnote 57 - *Flood.*

[223] **Notice - Cancellation.** See Endnote 15 - *Cancellation Notice Statement.*

[224] **Protections of Mortgagee.** See Endnote 167 - *ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders.* See ISO **CP 12 18 06 07** Loss Payable Provisions, Paragraphs **C** Loss Payable Clause and **D** Lender's Loss Payable Clause.

[225] **Lenders Loss Payable.** See Endnote 167 - *ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders.* See **ISO CP 10 10 12** Standard Commercial Property Policy - Section F.2 Additional Conditions – Mortgageholders. Also see **ISO CP 12 18 06 07** Loss Payable Provisions, **Paragraph C** Loss Payable Clause and **Paragraph D** Lender's Loss Payable Clause (forms attached to this Article).

[226] **Authorized Representative.** See Endnote 18 - *Signed By An "Authorized Representative"?*

[227] **Causes of Loss. Property Insurance – "Causes of Loss".** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[228] **Causes of Loss - Basic.** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[229] **Causes of Loss - Broad.** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[230] **Causes of Loss - Special.** See Endnote 48 - *Property Insurance – "Causes of Loss".*

[231] **Commercial General Liability Insurance (CGL).** See Endnote 21 - *Commercial General Liability Insurance (CGL).*

[232] **Commercial General Liability – Claims Made Policy.** See Endnote 24 - *Occurrence Policy vs. Claims Made Policy.*

[233] **Commercial General Liability – Occurrence Policy.** See Endnote 22 - *Occurrence Policy vs. Claims Made Policy.*

[234] **Commercial General Liability – Personal and Advertising Injury.** See Endnote 21 - *Commercial General Liability Insurance (CGL).*

[235] **Commercial General Liability – General Aggregate.** See Endnote 23 - *General Aggregate*; and Endnote 25 - *General Aggregate Per Project.*

[236] **Commercial General Liability – Products – Completed Operations.** See Endnote 69 - *Products – Completed Operations.*

[237] **Automobile Liability.** See Endnote 37 - *Business Auto Liability.*

[238] **Automobile Liability – Any Auto.** See Endnote 38 - *Any Auto.*

[239] **Self-Insured Retention.** See Endnote 7 - *Self- Insurance.*

[240] **Workers Compensation and Employers' Liability.** See Endnote 39 - *Workers Compensation Limits Required by Law.*

[241] **The Standard Mortgage Clause – Standard Commercial Property Policy – ISO Form CP 00 10 10 12 - Section F.2 Additional Conditions – Mortgageholders.** See Endnote 167 - *ISO CP DS 00 10 00 Commercial Property Coverage Part - Declarations Page – Mortgage Holders*.

[242] **Additional Insured.** See Endnotes 51 and 52 *Designation of Landlord as an Additional Insured on Tenant's Property Policy*.

[243] **Signed By An "Authorized Representative"?** See Endnotes 8 – 11 and 15 – 18 for discussions of Certificates of Insurance.