

C. ISO CG 20 11 Additional Insured – Managers or Lessors of Premises

Endorsement to tenant's CGL insurance to name landlord as an additional insured.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 11 01 96

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED—MANAGERS OR LESSORS OF
PREMISES**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of Premises ¹ (Part Leased to You*): _____

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

2. Name of Person or Organization (Additional Insured): _____ ²

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

3. Additional Premium: _____

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

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of ³ the ownership, maintenance or use ⁴ of that part of the premises ⁵ leased to you* and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to ⁶:

1. Any occurrence which takes place after you* cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule. ⁷

CG 20 11 01 96

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

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

² **What Persons in Addition to Landlord to be Additional Insureds?** If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then each of these persons by category and the most important of these persons by name be identified and listed in the Schedule provided in the additional insured endorsement form to identify the additional insureds.

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

⁴ **"Out of Ownership, Maintenance or Use of Premises."** Coverage also is broad as it covers the additional insured's liability for injuries arising out of its "ownership, maintenance or use of that part of the premises leased to you (the named insured, the tenant)." This language is broad. It applies clearly to the landlord's vicarious liability for acts of the tenant (i.e., the "use" of the premises). The language is also expansive and general enough to apply directly to the landlord's own negligence. It covers liability

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

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

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

Cases Finding No Coverage.

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

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

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

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

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

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

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

See also cases construing the scope of indemnities as to injuries arising out of the use of the "premises" as not extending to injuries not occurring in the premises (but note courts follow a strict construction rule limiting private parties contracts not employed in construing insurance contracts): *Rensselaer Polytechnic Inst. v. Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598

(N.Y. 3rd Dept. 1991). The court was not persuaded that a duty to indemnify existed by the argument that, although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co. v. Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)—finding no duty to indemnify where the cause of the damage occurred outside the leased premises.

Cases Finding Coverage.

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

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

Franklin Mut. Ins. v. Security Indem. Ins., 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). Also see *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)—court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that named insured's CGL policy provided coverage to the named insured for garage operations including

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

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

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

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

⁷ **Crafting an Additional Insured Endorsement.** A good contract drafting practice is to attach to the parties insurance specifications an example of the ISO additional insured endorsement referenced in the insurance specifications. An even better

drafting practice is to attach the ISO form with all information inserted. This practice may assure the issuance of the required endorsement.

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

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

Additional insured's name and address: _____

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

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

D. ISO CG 20 26 Additional Insured – Designated Person or Organization

Endorsement to landlord's CGL insurance policy to name tenant as an additional insured.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED-DESIGNATED
PERSON OR ORGANIZATION ¹**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

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

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

- A. In the performance of your* ongoing operations; or
- B. In connection with your premises owned by or rented to you*.³

CG 20 26 07 04

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

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

² **No Express Exclusions - Except Limited to Injuries "Caused by" Named Insured.** This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability bodily injury, property damage and personal and advertising injury caused, in whole or in part, by the named insured's (in this case the

Landlord) acts or omissions "in connection with your premises owned by ... you." This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages. For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence. The injury must occur in connection with premises owned by the named insured. The term "premises" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the tenant as an additional insured on the landlord's CGL policy as covering more than merely the "Premises" leased to the tenant, but also the common areas.

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

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

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

Additional insured's name and address: _____.

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

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

E. ISO CG 20 33 Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement

Likely endorsement already a part of contractor's CGL insurance policy automatically providing the landowner and its tenant additional insured status, if the lease or construction contract requires additional insured coverage.

COMMERCIAL GENERAL LIABILITY
CG 20 33 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – AUTOMATIC STATUS WHEN
REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU**

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
 2. The acts or omissions of those acting on your behalf;
- In the performance of your ongoing operations for the 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 survey 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. 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.

F. ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations

Endorsement to be added to contractor's CGL insurance policy if the construction contract requires coverage for liabilities of the additional insured arising after completion of the contractor's work and if this ISO form is specified.

COMMERCIAL GENERAL LIABILITY
CG 20 37 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

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

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organizations 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."

G. ISO CG 24 26 Amendment of "Insured Contract" Definition

This endorsement promulgated by ISO in 2004 is now routinely added by insurers to ISO form CGL policies to add the requirement that the named insured's indemnity of another's tort liability for "bodily injury" or "property damage" will be covered by the CGL policy provided the liability is caused, in whole or in part, by the named insured, or by persons acting on the named insured's behalf. This requirement is effected by replacing the CGL policy's definition of an "insured contract" contained in Section IV, Paragraph 9 of the policy.

COMMERCIAL GENERAL LIABILITY
CG 24 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

9. "Insured contract" means:

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

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

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

H. ISO CG 02 05 Amendment to Liability Policy to Provide Additional Insured Notice of Cancellation or Material Change

This endorsement is used to require the insurer to give the additional insured notice of cancellation or material change to the named insured's liability policy.

COMMERCIAL GENERAL LIABILITY
CG 20 05 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**TEXAS CHANGES – AMENDMENT OF CANCELLATION
PROVISIONS OR COVERAGE CHANGE**

This endorsement modifies insurance provided under the following:

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

CG 02 05 12 04

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I. TE 99 01B Additional Insured – Texas Business Auto Policy

Endorsement to a person as an additional insured to another person's business auto policy. For example, this endorsement form may be used to add the landlord and the tenant to the tenant's contractor's business auto policy or to add the landlord to the tenant's business auto policy.

TE 99 01B (BAP TEXAS) ADDITIONAL INSURED

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM GARAGE COVERAGE FORM TRUCKERS COVERAGE FORM
--

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

Endorsement Effective:	Policy Number:
Name Insured:	Countersigned by: (Authorized Representative)

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

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

[Enter Name and Address of Additional Insured.]

(a) _____, and its successors and assigns (the landlord), and its directors and employees, (b) _____ (the property manager), and (c) _____ (the landlord's lender)

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

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

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

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

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

FORM TE 99 01B - ADDITIONAL INSURED

Texas Standard Automobile Endorsement Prescribed March 18, 1992 [Emphasis added]

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

J. ISO CA 02 44 06 94 Texas Cancellation Provision or Coverage Change Endorsement

This endorsement is used to require the insurer to give the additional insured notice of cancellation or material change to the named insured's liability policy.

POLICY NUMBER:
COMMERCIAL AUTO
CA 02 44 06 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**TEXAS CANCELLATION PROVISION OR
COVERAGE CHANGE ENDORSEMENT**

This endorsement modifies insurance provided under the following:

**BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM**

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

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

Endorsement Effective:	Countersigned By: _____ (Authorized Representative)
Named Insured:	

SCHEDULE

Number of Days' Notice
Name of Person Or Organization
Address

If this policy is cancelled or materially changed to reduce or restrict coverage, we will mail notice of cancellation or change to the person or organization named in the Schedule. We will give the number of day's notice indicated in the Schedule

K. TEXAS REAL ESTATE FORMS MANUAL Insurance Addendum to Lease

The following form is an insurance specifications addendum contained in the TEXAS REAL ESTATE FORMS MANUAL (1999 and Supp. 2007), a practice forms manual published by the State Bar of Texas for use by Texas lawyers (aka the "Forms Manual"). It is Form 11-34 to Chapter 11 Leases. Following the Insurance Addendum is a Supplement to Insurance Addendum. The Supplement is not a form included in the Forms Manual. The Supplement is a form prepared by this author. These form have been annotated by the author of this article. The annotations appear following the Supplement to Insurance Addendum.

Insurance Addendum to Lease

Lease

Date: _____
 Landlord: _____
 Tenant: _____

This insurance addendum is part of the lease. ¹

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below ² (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***Liability Insurance Policies Required of Tenant:*

☒	Commercial general liability ³ (occurrence basis) ⁴	Per occurrence: ⁵	\$ _____
		General Aggregate: ⁶	\$ _____
<i>Or</i>			
☐	Business owner's policy ⁷	Per occurrence	\$ _____
		General Aggregate: ⁶	\$ _____

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

☒	Designated location(s) general aggregate limit ⁸	\$ _____
☐	_____	\$ _____

Additional Liability Insurance Policies Required of Tenant:

☒	Workers' compensation ⁹	\$ 500,000
☒	Employer's liability ¹⁰	\$ _____
☒	Business automobile liability ¹¹	\$ _____
☐	Excess liability ¹²	\$ _____
<i>Or</i>		
☒	Umbrella liability ¹³ (occurrence basis) ⁴	\$ _____

[Include any other desired endorsements. See chapter 18 of the Forms Manual.]

Property Insurance Policies:☒ Causes of loss—special form ¹⁴100 percent of replacement cost ¹⁵ 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 ¹⁶ located in the Premises.

Or

☐ Business owner's policy ⁷100 percent of replacement cost ¹⁵ 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 ¹⁶ located in the Premises.*Required Endorsements:* ¹⁷☒ Business income and additional expense: ¹⁸

Sufficient limits to address reasonably anticipated business interruption losses for a period of _____ months

☐ Boiler and machinery ¹⁹

\$ _____

☐ Flood ²⁰

\$ _____

☐ Earth movement ²¹

\$ _____

☐ Ordinance or law coverage ²²

\$ _____

☐ Glass ²³

Sufficient limits to cover plate glass

☐ Signs ²⁴

Sufficient limits to cover exterior signage

[Include any other desired endorsements.]

2. Comply with the following additional insurance requirements:

- a. The commercial general liability (or business owner's property policy) must be endorsed ²⁵ to name Landlord ²⁶ and Lienholder as "additional insureds" ²⁷ and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract." ²⁸
- b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence ²⁹ of Landlord or Lienholder. ³⁰
- c. Property insurance policies must contain waivers of subrogation of claims against Landlord and Lienholder. ³¹
- d. Certificates of insurance ³² and copies of any additional insured ³³ and waiver of subrogation endorsements ³⁴ 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 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 ³⁵ amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance. ³⁶

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term: ³⁷

Type of Insurance

Minimum Policy Limit

☒ Commercial general liability ³
(occurrence basis) ⁴

Per occurrence: ⁵ \$ _____
Aggregate: ⁶ \$ _____

☒ Causes of loss—special form ¹⁴
property

100 percent of replacement cost ¹⁵ of the [Shopping Center/Building] exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees ¹⁶

Author's Supplement

Supplement to Insurance Addendum ¹

Lease

Date: _____

Landlord: _____

Tenant: _____

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

A. Policies.

1. **Qualifications of Issuer.** All policies must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* of A-, or better, and admitted to engage in the business of insurance in the State of Texas. ²

2. **Liability Policies.**

a. **CGL Policies.** Commercial general liability policies must be on the most current ISO CG 00 01 or equivalent. ³ The commercial general liability policy shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). ⁴ The separation of insured language must not be modified. If the named insured's liability policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, it shall be endorsed to provide cross-liability coverage. ⁵ Defense will be provided as an additional benefit and not included within the limit of liability. ⁶ The policy limits may be written on a combination of primary and umbrella coverage, and if written with an umbrella policy, it shall meet the requirements specified in Paragraph 6 below. ⁷ If the CGL policy contains a general aggregate limit, it shall apply separately to this location pursuant to the most current ISO form CG 25 04 Designated Location General Aggregate Limit. ⁸ Each party's CGL policy shall be endorsed to waive the insurance carrier's right of subrogation against the other party and such party's officers, directors and employees. Attached to this supplement as an **Exhibit** is the waiver form to be used. ⁹

b. **Workers Compensation.** Tenant's workers compensation policy shall be endorsed

to waive the insurance carrier's right of subrogation against Landlord.

- c. **Business Auto Policy.** Tenant's business auto policy shall be endorsed to list Landlord as an additional insured. Tenant's business auto policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached to this supplement as an **Exhibit** is the waiver form to be used. (See **Form I** to this article.)

3. **Additional Insurance Coverage.**¹⁰ With respects to the additional insured status:

- a. **Landlord as Additional Insured on Tenant's CGL Policy.** Under Tenant's commercial general liability policy, Landlord and its officers, directors and employees, Landlord's lender and Landlord's management company shall be included as additional insureds using an ISO CG 20 11 endorsement¹¹ in the form attached hereto as an **Exhibit**, or equivalent, and under the commercial umbrella, if any. During construction of the leasehold improvements by Tenant and its contractor, Landlord shall be included as an additional insured on Tenant's commercial general liability policy using an ISO CG 20 10 endorsement¹² or equivalent. (See **Form C** to this article.)

[Optional:

- b. **Tenant as Additional Insured on Landlord's CGL Policy.** Under Landlord's commercial general liability policy, Tenant and its officers, directors and employees shall be included as an additional insured using an ISO CG 20 26 endorsement¹⁴ in the form attached hereto as an **Exhibit**, or equivalent, and under the commercial umbrella. (See **Form D** to this article. Also, see discussion of manuscripting endorsements at **Form L**.)]

4. **Notification Provisions.** The liability insurances contain a provision for 30 days' prior written notice by insurance carrier to the additional insured as a requirement for cancellation, non-renewal, or substantial modification. The commercial general liability insurance is to be endorsed by an ISO CG 02 05 in the form attached hereto as an **Exhibit**, or equivalent (See **Form H** to this article.) The business auto policy is to be endorsed by an ISO CA 02 44 in the form attached hereto as an Exhibit, or equivalent. (See **Form J** to this article.)

5. **Primary and Noncontributory.** The named insured's liability policies, including the commercial general liability and umbrella policy will be primary and noncontributory. The additional insured's other insurance will be excess coverage and not contribute to the primary coverage provided by the named insured's policies.¹⁶

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

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

8. **Approved Deductibles and Self Insured Retentions.** No deductible or self insured retention in excess of \$_____ shall be made without the prior written approval of the other party.

9. **Superseding or Discontinued Forms.** If the forms of policies, endorsements, certificates, or evidence of insurance required by this Insurance Addendum and Supplement are superseded or discontinued, the party to be protected will have the right to require other equivalent forms.

10. **Approval Required for Different Forms.** Any policy or endorsement form other than a form specified in this Addendum as hereby supplemented must be approved in advance by the party to be protected.

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

1. **Liability Insurance.** ACORD™ Form 25 *Certificates of Liability Insurance* for liability coverages in the form attached hereto as an **Exhibit** to this Addendum. (See **Form A** to this article.)
2. **Property Insurance.** ACORD™ Form 28 *Certificate of Property Insurance* for property coverages in the form attached hereto as an **Exhibit** to this Addendum.
3. **Time to Be Provided.** Evidence to be delivered to the party to be protected prior to Tenant's occupancy of the Premises and at least 30 days prior to the expiration of current policies.
4. **Certificate of Insurance** Certificates must—
 - a. **Certificate Holder.** Show the party to be protected as certificate holder (with the party to be protected's mailing address).
 - b. **Issuers.** Show the insurance companies producing each coverage and the policy number and policy date of each coverage.
 - c. **Producer.** Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer.
 - d. **Endorsements.** Specify the additional insured status and/or waivers of subrogation and be accompanied by copies of all required endorsements.
 - e. **Deductibles and SIRs.** State the amounts of all deductibles and self-insured retentions.
 - f. **Primary Status and Aggregate Limits.** Show the primary status and aggregate limit per project or location where required.
 - g. **Revisions to ACORD™ Printed Form.** The phrases "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon Company, its agents or representatives" must be deleted from the cancellation provision of the ACORD™ 25 certificate and the following express provision added: "This is to certify that the policies of insurance described herein have been issued to the Insured for whom this certificate is executed and are in force at this time. In the event of cancellation, non-renewal, or material reduction in coverage affecting the certificate holder, 30 days' prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested."

- C. **Contractors.** Tenant shall also require its contractor performing the Work for the Tenant Improvements to carry liability insurance meeting the above requirements and minimum limits, including if contractor's CGL policy contains a general aggregate limit, it shall be endorsed to apply separately to this location, except that the Landlord and Lienholder will be listed as additional insureds on an ISO form CG 20 10¹⁷, unmodified and in the form attached as an **Exhibit** to this Addendum. (See **Form B** to this article.) If requested in writing by Landlord, Tenant will provide to Landlord a certified copy of any or all insurance policies or endorsements required by this lease.

- D. **Disclaimer.** By requiring insurance coverage herein, a party does not represent to the other party that coverage and limits will necessarily be adequate to protect the named

insured or the additional insured or any other person, and such coverage and limits shall not be deemed as a limitation on the Indemnifying Person's liability under the indemnity granted to the Indemnified Person.

Forms Manual Lease

The following is an extract from the Retail Lease contained in the TEXAS REAL ESTATE FORMS MANUAL (1999 and Supp. 2007) (aka the "Forms Manual"). It is Form 11-2 to Chapter 11 Leases. In addition to being the Insurance Addendum for use with the Retail Lease, the Insurance Addendum is also used with the following additional lease forms in the Forms Manual: Lease (Basic), Office Lease, Industrial Lease.

RETAIL LEASE

Basic Terms

..... Premises

Approximate square feet: _____ sq. ft.
 Name of Shopping Center: _____
 Street address/suite: _____
 City, state, zip: _____, TX 78____

.....
Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

..... Definitions

"Common Areas" means all facilities and areas of the Shopping Center 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, including parking lots. Landlord has the exclusive control over and right to manage the Common Areas.

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

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

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

.....
"Taxes and Insurance" means all ad valorem taxes and all insurance costs incurred by Landlord with respect to the Shopping Center.

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

..... Clauses and Covenants

A. Tenant agrees to—

.....
 6. Pay Tenant's Pro Rata Share of the monthly CAM Charge and monthly Taxes and Insurance on or before the first day of each month....

18. INDEMNIFY, DEFEND, AND HOLD LANDLORD HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING

ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.

....
C. Landlord agrees to—

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

....
E. Landlord and Tenant agree to the following:

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

4. *Release of Claims/Subrogation.* LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE SHOPPING CENTER, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY.**

Annotations to Insurance Addendum

¹ **Geographic Indemnity But Different Approach for Insurance.** The Insurance Addendum specifies the types of insurance to be maintained by Tenant and Landlord, but utilizes different means to identify the geographic responsibilities for Landlord and Tenant as to property insurance versus liability insurance. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "the replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations...." Landlord's property insurance is to cover "the replacement cost of the Building exclusive of ... the rebuilding requirements of all lessees." The Lease does not similarly state the geographic area to be covered by the Tenant's and the Landlord's liability insurance but relies on the geographic coverage terms and definitions of the parties' liability policies.

² **Required Insurance.** 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 ¶ A.3 as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant. Insurance Addendum ¶ A.3 provides that Tenant is to obtain Landlord's approval of the form of Tenant's insurance policies, endorsements and certificates.

³ **General Liability Insurance.** Probably the most common error encountered in specifying CGL coverage is the use of outdated descriptive language. The **commercial general liability** form replaced the **comprehensive general liability** form in all states during the mid 1980s. However, many contracts will specify "*comprehensive* general liability insurance." Along with that, these contracts will often require a number of endorsements that were needed on this old form, but which were incorporated into the commercial general liability form. These include the following:

- Contractual liability endorsement (See endnote 28 for a discussion of "indemnity insurance").
- Broad form property damage endorsement.
- Personal and advertising injury liability endorsement.
- Host liquor liability endorsement.

This old terminology should be avoided in modern contracts. Commercial general liability policies typically and the ISO general liability policy form, which is an industry standard, is divided into Sections, Coverages, Exclusions, Definitions and Endorsements. The ISO CG policy is set up in the following parts:

Declarations.

Section I - Coverages

Coverage A. Bodily Injury and Property Damage Liability. (Note "Bodily Injury" and "Personal Injury" are different terms)

1. Insuring Agreement
2. Exclusions

Coverage B. Personal and Advertising Injury Liability

1. Insuring Agreement
2. Exclusions

Coverage C. Medical Payments

1. Insuring Agreement
2. Exclusions

Supplementary Payments - Coverages A and B

Section II - Who Is An Insured

Section III - Limits of Insurance

Section IV - Commercial General Liability Conditions

Section V - Definitions

Endorsements

The ISO commercial general liability policy categorizes liabilities into three categories: Coverage A for "Bodily Injury" and "Property Damage", Coverage B for "Personal and Advertising Injury Liability" and Coverage C for "Medical Payments." ISO defines each of these terms in the policy as follows:

"**Bodily Injury**" is "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

"**Property Damage**" is "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured."

"**Personal and Advertising Injury**" is injury, including consequential bodily injury, arising out of one or more of the following offenses: false arrest, detention or imprisonment; malicious prosecution; wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organizations good, products or services; oral or written publication, in any manner, of material that violates a person's right of privacy; the use of another's advertising idea in the insured's advertisement; infringing upon another's copyright, trade dress or slogan in the insured's advertisement.

"**Medical Payments**" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations.

⁴ **Occurrence Basis.** Occurrence basis liability policies cover injuries or damages caused by an "occurrence" that takes place within the "coverage territory," but only if the injuries or damages "occur" during the policy period, regardless of when the claim is actually made. ISO defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Claims-made" liability policies cover claims actually made while the policies are in effect, regardless of when the injuries occurred. Typically, claims-made policies exclude coverage for occurrences prior to the policy's inception date. Some issuers of claims-made policies will amend their policy for an additional premium to cover "full prior acts." Coverage under a claims-made policy ends when the policy expires, unless renewed with retroactive coverage or with a coverage extension known as "extended reporting period" or "tail" coverage.

⁵ **Per Occurrence.** Another 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.

Antiquated Terminology	Current Terminology
Comprehensive general liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability and umbrella liability insurance
Manufacturers and contractors ("M&C") liability insurance	Commercial general liability insurance
Owners, landlords and tenants ("OL&T") liability insurance	Commercial general liability insurance
Contractual liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability insurance
Independent contractors (protective) coverage	Commercial general liability insurance
Additional named insured, named insured, coinsured	Insured status using ISO endorsement CG 20 XX or equivalent (Use CG 20 10 for construction contracts, CG 20 11 for premises leases, CG 20 28 for equipment leases.)
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Broad form comprehensive general liability endorsement	Commercial general liability insurance
Broad form property damage endorsement	Commercial general liability insurance
Combined single limit ("CSL")	Per-occurrence limit, general aggregate limit, and products-completed operations aggregate limit
Fire damage legal liability	Damage to premises rented to you.

⁶ **General Aggregate.** "General Aggregate Limit" is the maximum amount the insurer is required to pay during the policy period for Coverage A damages ("Bodily Injury" and "Property Damage Liability"), except bodily injury or property damage included within products-completed operations hazard, Coverage B damages ("Personal and Advertising Injury Liability"), and Coverage C expenses ("Medical Payments"). The General Aggregate Limit operates independently of the Products-Completed Operations Aggregate Limit. "Products-Completed Operations Limit" is the maximum amount the insurer is required to pay during the policy period for "products-completed operations" hazard. The products-completed operations hazard includes bodily injury and property damage occurring away from premises owned or rented by the named insured and arising out of the named insured's products or work, excluding products in the possession of the named insured, work not yet completed or abandoned, or products in transit.

⁷ **Business Owner's Policies.** A Business owner's policy is a package policy (covering commercial liability and commercial property insurance) and is a less costly alternative to separate commercial liability insurance and commercial property insurance policies. It is generally available to smaller non-manufacturing business. Large businesses that do not qualify for a business owner's policy purchase "commercial package policies" which combine into a single policy commercial property insurance, commercial liability insurance and lines such as employee dishonesty, crime and fidelity coverage, ordinance or law coverage, boiler and machinery insurance, liquor liability and hired and non-owned auto liability insurance.

⁸ **Designated Location Endorsement.** If the liability policy covers multiple locations or projects, its limits may be exhausted by claims at the other locations or projects. 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.

⁹ **Worker's Compensation Insurance.** Worker's compensation insurance is a statutory program that imposes strict liability on employers for injuries to employees occurring while the employees are acting in the scope of employment but limits the maximum recovery against the employer to a schedule of maximum recoveries. If an employer does not participate in the program, the employer is denied the common-law defenses of assumed risk, negligence of fellow employees, and contributory negligence. TEX. LABOR CODE ANN. § 406.033(a). If the employer is not a subscriber to the worker's compensation insurance system, there is no statutory limit on recovery by the injured employee against the employer.

Although an Indemnifying Person's (tenant's, contractor's or subcontractor's) workers' compensation insurance will not eliminate the potential liability of the Indemnified Person (the landlord, owner or contractor in the above parenthetical examples), it may provide a buffer against potential claims and make it less likely that the Indemnified Person will be sued by an injured employee of the Indemnifying Person. Because workers' compensation statutes limit the recovery by an injured employee from the employer, an indemnification provision is appropriate so as to ensure that the employer remains ultimately liable for damages in excess of the statutory workers' compensation limits.

¹⁰ **Employer's Liability Coverage.** Employer's liability insurance provides additional coverages to the employer not contained in the state-specified form of worker's compensation insurance.

¹¹ **Business Automobile Liability Policy.** Business automobile liability policy terminology:

Antiquated Terminology	Current Terminology
Comprehensive auto liability insurance	Business auto coverage form
Additional insured or coinsured status (unless a vehicle lease)	Insured status
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Combined single limit	Each accident limit

¹² **Excess Liability Policy.** Excess liability insurance provides coverage in excess of scheduled underlying primary liability policies and payment is made only after payment has been made under the scheduled primary layer policy. The schedule both to excess liability policies and umbrella policies state the amount of underlying coverage required. Excess liability policies rely on the underlying primary policy for the terms of the insuring agreement and exclusions.

¹³ **Umbrella Policy.** Umbrella liability insurance, unlike an excess liability policy, has its own insurance agreement and exclusions and provides "drop down" coverage upon exhaustion of the limits of the underlying primary policy. An umbrella policy may provide coverage for claims not covered by the primary liability policy, subject to a self-insured retention. Differences may arise between coverages in a primary policy and an umbrella policy.

¹⁴ **Property Insurance Policy.** Outdated terminology requiring that the policy provide "fire and extended coverage" is often used in contracts. "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 this endorsement is no longer used, a better approach to requiring this coverage would be 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.

AVOID OUTDATED AND MISLEADING PROPERTY INSURANCE TERMINOLOGY	
Antiquated Terminology	Current Terminology
Fire and extended coverage or extended coverage endorsement	Basic causes of loss form
Additional named insured	Additional insured, loss payee, or mortgagee clause.

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

The ISO commercial property insurance is a form comprised of the following documents combined to make the policy: the ISO form CP 00 10, Building and Personal Property Coverage Form; declarations (ISO form IL 00 19, or a variation); one of the 3 forms of causes of loss forms (CP 10 10, 10 20 or 10 30); commercial property conditions (CP 10 90); common policy conditions (IL 00 17); endorsements describing property covered, additional limits and optional coverages.

Commercial property insurance covers “Buildings” and “Business Personal Property.” In this context, “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. See **Endnote 16** for a discussion of “Business Personal Property”. “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; electronic data.

¹⁵ **Replacement Cost.** “Replacement cost” is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation. 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. “Actual cash value” means 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. 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. “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.

¹⁶ **Business Personal Property Coverage.** “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; electronic data.

¹⁷ **Endorsements Not Listed in Insurance Addendum.** In addition to the endorsement choices listed in the Insurance Addendum, there are other endorsement which might be appropriate, for example, an endorsement to increase the coverage available under the property insurance policy for debris removal. "**Debris removal**" is usually included as part of the covered expense. The ISO commercial property form limits coverage to up to \$10,000 if (a) 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 (b) the cost of debris removal exceeds 25% of the sum of the paid loss plus deductible. An increase to these limits may be purchased by using ISO CP 04 15 Debris Removal Additional Limit of Insurance.

¹⁸ **Business income and additional expenses.** This type of insurance covers two types of loss: loss of earnings (formerly called "business interruption insurance") and extraordinary additional expenses. Frequently recovery is limited to the length of time required to rebuild or repair the damaged property, plus an additional 30 days to recover business that may have been lost to competitors. ISO CP 0030 or ISO CP 00 32 (excludes extra expense coverage). "**Business Income Rental Value**" may be added to either of these forms insurance. 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.

¹⁹ **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 form CP 12 72 Joint or Disputed Loss Agreement.

²⁰ **Flood Insurance.** Flood losses are commonly excluded from property insurance policies. Flood losses are losses caused by rising waters, back up of storm sewers and storm surges. The Flood Disaster protection Act of 1973 mandated that federally regulated lending institutions could not "make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified ... as an area having special flood hazards and in which flood insurance has been made available under the national Flood Insurance Act of 1968 without flood insurance in an amount equal to the lesser of the loan amount or the available coverage. 42 U.S.C.A. § 4012a(b)(1). Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59-78 (2006). See also TEX. LOC. GOV'T CODE ANN. 240.901; TEX WATER CODE ANN. §§ 16.311-324. Coverage can be obtained for these losses through flood insurance, a difference in conditions policy, or as an endorsement to a property policy.

²¹ **Earth Movement.** Earth movement losses, including loss due earthquake shocks, mud slides and volcanic eruptions is typically excluded from property insurance coverage. Coverage for these events can be affected through earthquake insurance (ISO form CP 10 40), a difference in conditions policy, or by an endorsement.

²² **Ordinance or Law Coverage.** 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.

²³ **Glass Insurance.** 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.

²⁴ **Signs Insurance.** 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.

²⁵ **Standard Form Endorsements.** General liability insurance such as that provided in the standard commercial general liability (CGL) coverage form developed by Insurance Services Office, Inc. (ISO), is the basic source of contractual liability coverage for most of the loss exposures created by hold harmless agreements. For this reason, it is also the policy with respect to which additional insured status is most often requested as a complement to or reinforcement of the hold harmless agreement. A number of standard endorsements have been developed by ISO to address the coverage requirements of various categories of additional insureds.

Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1985 *endorsement* forms for use in connection with its commercial general liability policy. *Endorsement* is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction.

Each ISO designation is composed of four elements. The following is an example for the Endorsement Form appearing as **Form D** to this article called "CG 20 26 07 04":

CG	20	26	07 04
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its <i>comprehensive</i> 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." A copy of Endorsement CG 20 26 07 04 is found in this article as <u>Form D</u> .	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "07 04" or July 2004. November 1985 is the initial date of all ISO forms for the "CG" system. The <i>coverage</i> forms have been revised a number of times since then and currently bear an edition date of 10 01. Many of the <i>endorsement</i> forms were revised at the same time as the coverage forms and also bear a similar edition date.

The following is the ISO CGL Form Categories grouped by function:

Category Name	Category Number
Coverage Forms and Amendatory Endorsements	0
State Amendatory Endorsements	01 and 26
Termination and Suspension Endorsements	2
Deductible Endorsements	3
Additional Coverage Endorsements	4
Additional Insured Endorsements	20
Exclusion Endorsements	21
Special Provisions for Certain Types of Risks Endorsements	22
Coverage Amendment Endorsements	24
Amendment of Limits Endorsements	25
Claims-Made Only Endorsements	27
Miscellaneous Coverage Forms Endorsements	28 and 29
Underground Storage Tank Endorsements	30
Miscellaneous Endorsements	99

The following is a listing of all of the ISO Additional Insured Endorsements-Category 20.

Additional Insured-Club Members	CG 20 02
Additional Insured-Concessionaires Trading Under Your Name	CG 20 03
Additional Insured-Condominium Unit Owners	CG 20 04
Additional Insured-Controlling Interest	CG 20 05
Additional Insured-Engineers, Architects or Surveyors	CG 20 07
Additional Insured-Users of Golfmobiles	CG 20 08
Additional Insured-Owners/Lessees/Contractors (A)	CG 20 09
Additional Insured-Owners/Lessees/Contractors (B)	CG 20 10
Additional Insured-Managers or Lessors of Premises	CG 20 11
Additional Insured-State or Political Subdivisions-Permits	CG 20 12
Additional Insured-State or Political Subdivisions-Permits Relating to Premises	CG 20 13
Additional Insured-Users of Teams, Draft or Saddle Animals	CG 20 14
Additional Insured-Vendors	CG 20 15
Additional Insured-Townhouse Associations	CG 20 17
Additional Insured-Mortgagee, Assignee or Receiver	CG 20 18
Additional Insured-Charitable Institutions	CG 20 20
Additional Insured-Volunteers	CG 20 21
Additional Insured-Church Members, Officers and Volunteer Workers	CG 20 22
Additional Insured-Executors, Administrators, Trustees/Beneficiaries	CG 20 23
Additional Insured-Owners or Other Interests from Whom Land Has Been Leased	CG 20 24
Additional Insured-Elective or Appointive Executive Officers of Public Corporations	CG 20 25
Additional Insured-Designated Person or Organization	CG 20 26
Additional Insured-Co-owner of Premises	CG 20 27
Additional Insured-Lessor of Leased Equipment	CG 20 28
Additional Insured-Grantor of Franchise	CG 20 29
Additional Insured-Oil/Gas Operations-Non-Operator, Working Interests	CG 20 30
Additional Insured-Engineers, Architects or Surveyors Not Engaged by the Named Insured	CG 20 32
Additional Insured-Owners, Lessees or Contractors-Automatic Status When Required in Construction Agreement with You	CG 20 33
Additional Insured-Lessor of Leased Equipment-Automatic Status When Required in Lease Agreement with You	CG 20 34
Additional Insured-Grantor of Licenses-Automatic Status When Required by Licensor	CG 20 35
Additional Insured-Grantor of Licenses	CG 20 36
Additional Insured-Owners, Lessees or Contractors-Completed Operations	CG 20 37

²⁶ **Naming "Landlord" as an Additional Insured.** ¶ A.2a provides for "Landlord" and Lienholder to be named as "additional insureds." The term "Landlord" is given broad meaning in the Definitions section of the Lease in the Forms Manual. "Landlord" is defined as meaning "Landlord and its agents, employees, invitees, licensees, or visitors." If it is intended that persons in addition to the named Landlord is to be listed as an additional insured as being protected by the additional insured endorsement, then consideration should be given to specifically listing the most important of these persons in the Schedule to the additional insured endorsement form where additional insureds are to be identified.

²⁷ **Coverage Afforded to an Additional Insured.** Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (2005); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. See the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

Express negligence test not applicable to insurance covenant.

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), cert. den'd, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring Getty to be listed as an additional insured on NL Industries' liability policies in a case where the indemnity provision excluded indemnity for Getty's negligence but the insurance provision did not expressly state that the insurance was to cover injuries due to Getty's negligence. The court reviewed the following provision:

Seller (NL Industries-the chemical supplier) agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser (Getty - the chemical buyer):

...	
Workmen's Compensation	\$500,000
Statutory Employer's Liability	
General Liability:	\$500,000
Bodily Injury	
...	
Automobile Liability:	\$500,000
Bodily Injury	
...	

All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co- owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.

Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations or other damages resulting from injury to any person ... arising out of or incident to the performance of the terms of this Order by Seller ... Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller. (Emphasis added by author.)

Previously, in a 1986 case ("*Getty Round 1*"), Getty had been unsuccessful in seeking indemnity against NL Industries. *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.--Corpus Christi 1986, writ *ref'd n.r.e.*). Getty lost *Getty Round 1* when the court determined that the contractual indemnity provision meant what it said: "Seller shall not be responsible for any losses ... solely caused by the negligence of Purchaser." The facts giving rise to *Getty Round 1* are as follows. Getty purchased various chemicals from NL Industries for Getty's oil production and exploration operations in the Midland, Texas area. A barrel of chemical demulsifier delivered by NL Industries to Getty exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty. Duncan's estate and survivors brought wrongful death and survival actions against Getty and NL Industries (*Getty Round 1*). The jury found Getty 100% negligent. The jury also found that NL Industries was not negligent and that it placed adequate warnings on its chemicals. There was, however, no finding that the accident did not arise out of or was not incident to NL Industries' performance of its purchase order.

The court in the instant action ("*Getty Round 2*") was being requested by Getty to reverse the holding of the trial court and the court of appeals in a subsequent suit brought by Getty against NL Industries for its failure to name Getty as an "additional insured" on NL Industries' insurance policies and against NL Industries' insurers. Getty was suing on multiple theories: as to NL Industries—breach of contract to purchase insurance on its behalf; violation of § 1.203 of TEX. BUS. & COMM. CODE (Tex. UCC) (obligation of good faith and fair dealing); negligence; violation of the Texas Deceptive Trade Practices Act; and common law fraud; and as to the insurers—breach of contract to extend it insurance coverage; violation of TEX. INS. CODE Art. 3.62 (repealed) (failure to pay claim); breach of the duty of good faith and fair dealing; negligence; violation of the DTPA; and common law fraud. The trial court in *Getty*

Round 2 granted summary judgment against Getty on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, §§ 127.001-.007, TEX. CIV. PRAC. & REM. CODE ANN.; (2) the same contractual provision violated the common law express negligence rule; (3) the prior litigation of a related indemnity provision precluded the present suit under the doctrine of *res judicata* ("Claim Bar"); and (4) collateral estoppel prevented Getty from relitigating ultimate issues of fact and law litigated in *Getty Round 1* ("Issue Bar"). The court of appeals sustained the trial court's summary judgment on the basis that Getty was barred by *res judicata*, having already cross-claimed against NL Industries in *Getty Round 1* for contractual indemnity and having lost. In *dicta*, the court of appeals opined that the insurance provision would violate the Texas Oilfield Anti-Indemnity Statute by allowing Getty to avoid the consequences of its own negligence. The court of appeals also noted that Texas courts would "undoubtedly extend (the express negligence doctrine) to the insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence." 819 S.W.2d 908, 914. The supreme court found that Getty was not required to bring any of its cross-claims against NL Industries in the suit by Duncan. However, once Getty chose to cross-claim for indemnity, it was required under *res judicata* to bring all its actions in the same action. As to the claims against the insurers, the court held that Getty was not barred by either *res judicata* or collateral estoppel. *Res judicata* was not applicable even though as a general matter under Texas law a former judgment bars a second suit against all who were in "privity" with the parties to the first suit. Since NL Industries' insurance policies contained a "no-action" provision (suit against the insurer was specifically prohibited before the insured's liability was reduced to judgment), the court found that Getty could not have joined the insurers as defendants in *Getty Round 1* anyway. Collateral estoppel did not apply either since the court found that *Getty Round 2* was not a relitigation of either (1) an issue of fact—did Duncan's injuries arise out of NL's performance of the purchase order? (did the parties intend to limit the insurance to injuries caused by NL Industries' negligence?) or (2) an issue of law—did NL Industries' breach its insurance covenant? Finally, the court held that the express negligence doctrine would not be extended to contractual provisions, other than indemnity agreements, and therefore was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies. The court stated

We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists. *Id.* 806.

Prior to the adoption of the express negligence doctrine as the test to determine whether an indemnity provision extended to the indemnitee's negligence, the Texas Supreme Court followed the "clear and unequivocal" standard. *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972).

Rules of interpretation.

Cases Disregarding Exclusions of Negligence in Indemnity and Silence in Insurance Covenant in Construing Ambiguous Additional Insured Endorsement in Favor of Coverage of Additional Insured's Negligence.

Attempts by a protecting party's insurer to limit its additional insured coverage under an issued additional insured endorsement have been rejected in other jurisdictions even though the insurance covenant or indemnity in the contract between the named insured and the additional insured addressed only the negligence of the named insured. *J. A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. App. 1995) - the court declined to limit the coverage of an issued additional insured endorsement to the coverage required by the contract between the protecting party and the protected party; *also see Mobil Oil Co. v. Maryland Cas. Co.*, 681 N.E. 552 (Ill. App. 1997), court refused to limit additional insured to limits specified in contract between protecting party and the additional insured/protected party where protecting party's CGL policy limits exceed contracted for amount.

Cases Construing Ambiguous Additional Insured Endorsement in Favor of Coverage of Additional Insured for its Negligence.

In *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993), the federal court of appeals held that under Kansas law an additional insured endorsement did not limit the policy's coverage to cases where the additional insured is held vicariously liable for the named insured's negligence. In this case, the additional insured endorsement stated that the additional insured was included as an insured

but only with respect to liability arising out of operations performed by or on behalf of the named insured for the (additional) insured.

Applying rules of contract construction, the court held that at best, the phrase "but only with respect to liability arising out of operations" is ambiguous as to whose negligence is covered and whose negligence is excluded.

The court held in favor of a broad construction of coverage of the Additional Insured's own negligence since the insurance carrier crafted the language. This case involved a suit by a patron at a festival held on city property where the injured patron sued the city alleging the city failed to warn the patron of a dangerous condition. The patron fell over a retaining wall that separated the festival grounds on the city's property from an underground parking garage on the city's property. The city tendered defense to the named insured festival operator's insurance carrier on whose policy the city was an additional insured. The carrier declined defense arguing that the additional insured endorsement provided coverage only for the city's vicarious liability for the acts and operations performed by the named insured, not for the city's own negligence. The court found coverage as long as the additional insured's negligence had a close and direct connection with the named insured's operations.

Although a remote connection between (the named insured's) operations and the plaintiff's injuries would not suffice (to establish coverage for the additional insured) ... we conclude that the facts of this case clearly demonstrate the requisite causal connection. It is undisputed that (the plaintiff) was injured while walking from a dance sponsored by (the named insured) to the portable toilets set up by (the named insured). Under these circumstances, a reasonable insured in (the additional insured's) position would understand that (the plaintiff's) injuries, and (the additional insured's) liability, "arose out of" (the named insured's) operations.

Geographic Limit as to Place of Occurrence.

¶ A.2.a of the Insurance Addendum does not specify or limit geographically the area of the Shopping Center to which Landlord's protection as additional insured is to extend. This is different from how the parties allocated liabilities by the indemnities. In the Lease's indemnity provisions the parties have carved up responsibility for liability based on geographic areas (Tenant is responsible for all injuries occurring in the Premises; Landlord is responsible for all injuries occurring in the Common Areas). This anomaly gives rise to a variance in coverage between a party's indemnity and its required insurance coverage. For example, if an injury occurs in the Common Areas, Landlord is to indemnify Tenant. However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant's liability policy. Attached as **Form C** 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. This 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. The additional insured endorsement form provides a blank line to describe the premises. Whether the landlord is covered as broadly as it intends may turn on what words are inserted in this blank! Courts have construed the insurance coverage broadly against the insurer. The most common factually litigated scenario regarding these endorsements involves injuries occurring "outside" the "part" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is effected if the schedule designates more or less than the "part of the premises" leased to the named insured.

Cases Finding No Coverage.

For example, in *General Accident, Fire and Life Assurance Corp. v. Travelers Ins. Co.*, 556 N.Y.2d 76 (1990), the court held that the AI endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the location ("the premises") where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. See *Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.*, 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003)—injury occurred to a HVAC repairman who was injured while walking on roof of landlord's multi-tenant retail center to get to HVAC unit that tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was an ISO CG 20 11 Additional Insured – Managers and Lessors of Premises (**Form C**). The injury neither occurred in the retail space leased to tenant or on the roof directly above the space. See also *Rensselaer Polytechnic Inst. v. Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991)—stating that court was not persuaded that a duty to indemnify existed by the argument that although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co. v. Admon Realty, Inc.*, 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)—finding no duty to indemnify where the cause of the damage occurred outside the leased premises; *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)—additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center); *USF&G v. Drazic*, 877 S.W.2d 140 (Mo. 1994)—additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot. A similar conclusion was recently reached in *Minges Creek v. Royal Ins. Co. of Am.*, 442 F.3d 953 (6th Cir. 2006). This case arose out of injury to a customer of a card shop who slipped in the icy parking lot of the mall in which the shop was located. The customer sued both the card shop and the mall. The lease provided that the shop was required to maintain liability insurance "with respect to the leased premises and the business operated by the Tenant" and to "name landlord (i.e., the mall owner), any other parties in interest designated by Landlord, and Tenant as insured." The additional insured endorsement to Tenant's CGL policy provided coverage to the additional insured landlord "with respect to liability arising out of Premises owned or used by you (the tenant). The court held that the landlord was not insured against the liability by tenant's additional insured endorsement. The court viewed the lease and the additional insurance endorsement as "inextricably intertwined" and stated that they "should be interpreted in context with each other." The court concluded that the card shop was required by its lease to provide insured status for the mall only with respect to the "leased premises"—the limited square footage set out in the lease, 6,796 square feet of interior space as shown in the mall's site plan attached to the lease. The court found that although the parking lot was provided for the "use" of the card shop and other tenants, it was not part of the "premises" used by the card shop. The court found that the context of the lease agreement "requires that the definition of premises in the policy be coextensive with the card shop's obligation to name (the mall owner) as an additional insured."

Cases Finding Coverage.

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

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

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

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

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

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

²⁸ **Insured Contracts - "Indemnity Insurance."** The Insurance Addendum at Paragraph A.2.a specifies that the Tenant's CGL policy must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract." This specification addresses a fundamental risk management tool, the coordination of the indemnity and the insurance between the protecting party and the protected party. The specification in Paragraph A.2.a of the Insurance Addendum seeks to assure the Landlord that the contractually required CGL insurance provided by the Tenant insures the Tenant for its contractual undertaking to indemnify the Landlord. In addition to CGL policies providing direct coverage of the Named Insured and additional insured's for covered liabilities, coverage may be afforded to the Named Insured for certain indemnities. Most but not all CGL policies cover the protecting party for liability for "Bodily Injury" and "Property Damage" arising under an "insured contract" (sometimes referred to as "contractually assumed liability insurance"). Coverage is accomplished through the addition to the CGL Policy of an exception to an exclusion from coverage. Standard form CGL policies (like ISO CG 00 01) provide as to "Coverage A" the following exceptions to the exclusion from coverage of contractually assumed liability. Coverage A under standard form CGL policies is for loss arising out of "Bodily Injury" or "Property Damage." "Bodily Injury" is in such policies defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "Property Damage" in such policies is defined as "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." The exception to exclusion from Coverage A reads

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

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

An "Insured Contract" is defined in the standard ISO CGL policy form as including

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

Note that ISO has published the italicized language for inclusion in CGL policies by an endorsement CG 24 26. This introduces into the "insured contract" definition a "contributory negligence" condition equivalent to the one contained in the 2004 revisions to ISO's additional insured endorsements. Inclusion of this type language into a CGL policy effectively eliminates coverage for the named insured's indemnification of a third party for its sole negligence. Care therefore must be taken by named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be "uncovered" in such circumstances for an indemnity of another party's sole negligence. If this is coupled with an exclusion from additional insured coverage for an additional insured's sole negligence, the named insured may find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

Recall that the Tenant's indemnity obligation at Paragraph A.18 in the Forms Manual's Retail Lease expressly states that Tenant's indemnity "WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD" and thus is an indemnity by Tenant of Landlord for injuries caused solely by Landlord. The Forms Manual's indemnity requirement and the insurance requirement at Paragraph A.2.a of the Insurance Addendum conflict with the current insurance provisions contained in ISO based forms.

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractual assumption of liability for its indemnitee's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 07 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnitee. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

Contractual Liability coverage excludes coverage for "**Personal Injury**" liability assumed by contract or agreement, unless such coverage is endorsed on to the insured's CGL policy. A similar exception to the exclusions from Coverage B (coverage for "**Personal and Advertising Injury**") is generally not contained in standard form CGL policies. Thus, in such cases, the named insured's liability policy will not protect it against its contractually assumed liability for Personal and Advertising Injury, unless it obtains a special endorsement to its policy adding an exception to the exclusion in Coverage B. "**Personal and Advertising Injury**" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

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

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

²⁹ **Coverage for Additional Insured's Sole Negligence?** The general reference to the Landlord being listed as an additional insured on the Tenant's commercial general liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder. The industry standard additional insured endorsement forms issued by ISO do not expressly extend coverage to the additional insured's sole negligence. In 2004 ISO modified several of its endorsement forms to expressly exclude from coverage the sole negligence of the additional insured. Many insurers additional insured forms now contain express exclusions of the additional insured's sole negligence. An issue may exist as to whether ISO's standard endorsement form issued for use by tenants to list landlords as an additional insured on a tenant's CGL policy extends to cover the landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its policy that expressly covers the Landlord's sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this requirement.

³⁰ **"Other Insurance."** The Insurance Addendum is silent as to the effect of the additional insured having "other insurance" available to it for liabilities covered by the additional insured endorsement. In the event the additional insured does not require or do something more the named insured's carrier will require and be entitled to contribution by the additional insured's other insurance. See the author's suggested Supplement to Insurance Addendum for provisions requiring the additional insured's own liability policy to be non-contributing as to the primary layer of coverage afforded by the additional insured endorsement. See discussion in article at I.D.

³¹ **Waiver of Subrogation in Property Insurance Policies.** In the landlord-tenant relationship, the tenant is liable to the landlord if the tenant negligently destroys the premises (e.g., 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*).

Covenant Requiring Party to Insure its Own Property Not Equivalent to Waiver of Recovery or Waiver of Subrogation. Upon payment by the landlord's insurer for the insured property loss, the landlord's insurer is subrogated to the landlord's claim 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 insurers were not precluded from obtaining a subrogated cause of action from payment of damages 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 was built into the rent) was to exculpate the tenant for its own negligence.

Covenant Requiring Other Party to Pay for Insurance Equivalent to Waiver of Recovery by Insured Against Insurance Purchaser. In *Publix Theatres Corp. v. Powell*, 71 S.W.2d 237 (Tex. Comm. App. 1934), the lessee agreed in the lease to carry the 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 supreme 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. First Tape, therefore, was able to retain the protection of the waiver of subrogation clause even after the lease was assigned.

Waivers of Subrogation or 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.

Valid Despite Negligence of Released Party. In Texas, waiver of recovery and waiver of subrogation clauses are valid. 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 portion of premises 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.

Conflicts - Return of Premises Covenant vs. Waiver of Recovery Provision. A lease may 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.

Many commercial property policies and inland marine policies include subrogation clauses that imply permission to grant pre-loss waiver. However, some forms may specifically deny the insured the right to waive subrogation. The ISO form expressly recognizes the right of the insured to waive subrogation. Since the landlord's primary interest is insuring the landlord's improvements, and the tenant's primary interest is in insuring the tenant's property, why make the other party liable for a risk that is already insured? Because both parties can be protected by insurance, neither is particularly interested in imposing liability on the other. The issue is how to allocate the risk of loss—or, more precisely, which party should pay the property insurance premiums.

Avoids Double Coverage. To require each party to carry coverage for negligently causing damage to another party's property forces the landlord and the tenant to insure both the landlord's and the tenant's property, which results in each insuring its own and the other party's property. To avoid this need for double coverage each party can agree to look to its own insurance carrier for property loss caused by the acts or omissions of the other party and waive rights of recovery and subrogation against each other. If both landlord and tenant are to be liable for the risk of negligently caused loss to the property of the other, then the landlord and every tenant in a multi-tenant project must not only be sure to have a policy for its own property but must be sure that their liability insurance is sufficient to cover the replacement cost of the entire building and all of tenants' property therein. A more sensible approach is to have the landlord take out a casualty policy and have the premium costs paid by the tenants in the building under an operating cost pass-through provision in the lease.

Allocates Risk to Property Insurer. A waiver of subrogation clause assures that the insurance carrier for the property owner pays for the property loss as opposed to the other party's (the negligent landlord's or tenant's, as the case may be) liability insurance carrier. See Hagan, *Using Waivers and Indemnities in Commercial Leases*, THE PRACTICAL REAL ESTATE LAWYER 11 (1993), also repeated at ALI-ABA'S PRACTICE CHECKLIST MANUAL FOR DRAFTING LEASES: Checklists, Forms, and Drafting Advice from *The Practical Lawyer* and *The Practical Real Estate Lawyer* 149 (1994), for the rationale that the appropriate allocation of risk is to require each party to insure its own property and waive recovery, and waive subrogation against the other for damages to each other's property due to the negligence of either party.

Usually Inadequate Liability Insurance to Cover Risk. Why is this the best approach? This question incorrectly assumes that there is adequate liability insurance to cover the loss. Many times there will be no liability insurance because the party self-insures. The more likely situation is that the liability insurance policy of the negligent party will have limits far short of the loss involved (for example, where a negligent employee of the tenant leaves the coffee pot on at night which results in a large office building burning down). In a large multi-tenant building, the loss could easily exceed the liability insurance coverage of a small tenant. Even if there is sufficient property loss coverage under the liability policy, there usually is a large deductible and dissipation of the time and energy in a contest between the insurance companies and the parties over the issue of who negligently caused the fire.

Risk Already Factored in to Property Insurance Premium. Also, more importantly, is the fact that claims against property insurance are much less likely to result in higher premiums or loss of coverage than claims against the liability insurance. The property insurance carrier has more than likely already calculated its premium based on the assumption that it will not be able to recoup its costs via subrogation against a negligent tenant.

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

³² **Certificates of Insurance.** The general reference to the Tenant providing the Landlord with a certificate of insurance does not specify the items to be covered in the certificate of insurance. Certificates of insurance are not insurance, just evidence of insurance. Although it is typical to rely on a certificate of insurance as if it were insurance, a more prudent practice is to obtain and review the underlying policy and endorsements. As a general rule, certificates of insurance do not govern the insurance policy's coverage. A certificate of insurance can be misleading in several ways and provide a false sense of security that the policy matches the certificate. Common problems with certificates of insurance include the possibility that certificates issued by agents contain errors and the possibility that the certificates fail to reveal special limitations applicable to the coverage afforded. Some courts take the position, based on language similar to the above-quoted language from the ACORD™ 25, that a certificate of insurance does not create coverage. See discussion in article I.B.

³³ **Why It Is Important to Read the Endorsement.** The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E.D. Tex. 1994) also illustrates the risk inherent in not reading the insurance policy of the 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**").

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 as Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) in which the 6th Circuit applied Texas law 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 "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 be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence. The following are the provisions in the contract, the certificate of insurance and the endorsement.

Contract. Contractor [Bath] shall have a comprehensive general liability policy in the amount of at least \$1,000,000 with an Additional Insured Endorsement naming Owner [BP Chemical] as an additional insured.

Contractor hereby indemnifies and agrees to defend and save Owner and its affiliated Corporations, their agents, servants and employees harmless from any and all losses, expenses, demands and claims that may be claimed or for which suit is brought for any actual or alleged bodily injury or death occurring to any person whatsoever, in any manner arising out of or in connection with, or resulting in whole or in part out of the acts of omissions of Contractor, or any subcontractors employed by or under the direct control of the Contractor, and their respective officers, agents and employees in the performance of the Work in accordance with this Agreement, and agrees to pay all damages, costs and expenses, including attorneys' fees, arising in connection therewith. Such obligation shall not apply when the liability arises solely from the negligence of Owner, its employees or agents. Such obligation shall also be limited, in a case involving or alleging joint negligence between Contractor and Owner, its employees or agents, to Contractor's actual percentage of comparative negligence, if any, found by the trier of fact in a cause of action brought against Contractor arising out of the performance of the Work or alleged negligence in accordance with this Agreement. This indemnity obligation of Contractor shall not be applicable to the extent that Owner is provided coverage as an additional insured under Contractor's insurance policies as specified in Exhibit A to this Contract, or to the extent that the right of indemnity is prohibited or limited by the laws of the state in which the Work is located.

Certificate of Insurance. Owner is an additional insured thereunder as respects liability arising out of or from the Work performed by Contractor for Owner.

Endorsement. 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.

³⁴ **Waiver of Subrogation Form.** See ISO CG 24 04 10 92 Waiver of Transfer of Rights or Recovery Against Other To US for the industry standard endorsement for a waiver of subrogation and related commentary.

³⁶ **Deductibles or Self-Insured Retentions.** Forms Manual § 18.8: "Both a deductible and a self-insured retention, or SIR, require the insured to pay the first dollars of a loss. However, the potential that a third-party claimant will not be compensated under a liability policy with an SIR is substantially greater than that under a policy with a deductible. When a deductible exists under a liability policy, the insurance company keeps control of the adjustment process, defends the insured, pays the claim to the third party, and thereafter charges the insured for the deductible. If an SIR exists, the insured controls the adjustment process to the extent of its SIR (unless the insured has contracted with a third party to administer the process) and the liability insurer has no duty to defend the insured or pay the claim to the third party until the SIR is exhausted.

³⁶ **Criteria as to Acceptable Insurer.** The Insurance Addendum does not give Tenant guidance as to what level of creditworthiness and rating for the insurance company will be acceptable to the Landlord. As set out in the Supplement to Insurance Addendum, another approach is to specify the level that will be acceptable by reference to one of the industry standard rating services, such as Best's Key Rating Guide. See endnote 2 to the Supplement to Insurance Addendum.

³⁷ **No Provision for Review of Landlord's Insurance by Tenant.** Note that the Insurance Addendum does not provide 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. The Insurance Addendum does not provide that Tenant is to be listed as an additional insured on Landlord's liability policy as to Injuries occurring in the Common Areas. Tenant should require that Landlord cause its insurance carrier to issue an endorsement to Landlord's CGL policy listing Tenant as an additional insured as to Tenant's liability for Injuries occurring in the Common Areas. After all, Tenant is paying for Landlord's CGL insurance as part of the Operating Expenses. Lease ¶ **A.7**. A form of additional insured endorsement to Landlord's CGL policy is standard form ISO CG 20 26 07 04 as **Form D**. As discussed in the Commentary following **Form D**, the ISO endorsement form can be tailored to limit Tenant's protection as an additional insured to Injuries occurring in the Common Areas. The ISO form as standardly issued does not make that distinction.

Annotations to Supplement to Insurance Addendum

¹ **Why Supplement the Insurance Addendum.** This article's author recommends that a Supplement be added to the Insurance Addendum to address the following points:

1. Policy Form. The Supplement to the Insurance Addendum can specify minimum acceptable insurance policy forms. This provides the parties with a common expectation and agreement as to insurance coverage prior to the expenditure of significant funds in designing space or making other lease arrangements. It also will permit the parties to involve their insurance advisors prior to signing the Lease.
2. Adding Tenant as an Additional Insured on Landlord's CGL Policy. Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the "Shopping Center's" insurance for which it is paying through its Pro Rata Share of CAM for injuries occurring in the Common Areas.
3. Additional Insured Form Specified with Specified Manuscripted Changes. Adding a Supplement to the Insurance Addendum to specify the additional insured endorsement form similarly adds clarity to the lease negotiation process. It will avoid misunderstanding as to the scope of the additional insured coverage. It hopefully will result in determining on the front end if there will be difficulty in producing the desired additional insurance coverage. The approach recommended by this author is that sample additional insured endorsement forms for attachment to the Tenant's CGL policy and the Landlord's CGL policy be attached as Exhibits to the Supplement.
4. Certificate of Insurance Form Attached. Similarly, specifying the content of the certificate of insurance helps avoid future failure to produce an appropriately detailed certificate. The approach recommended by this Author is that a sample certificate of insurance be attached to the Supplement as an Exhibit.

² **Qualifications of Insurer.** 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." A/VIII is considered a minimum acceptable rating in many leases.

Secure Best's Ratings	
A++, A+	Superior
A, A-	Excellent
B++, B+	Very Good
Vulnerable Best's Ratings	
B, B-	Fair
C++, C+	Marginal
D	Poor
E	Under Regulatory Supervision
F	In Liquidation
S	Rating Suspended

Financial Size Category	Policy Holders' Surplus (\$ millions)
I	Up to 1
II	1 to 2
III	2 to 5

IV	5 to 10
V	10 to 25
VI	25 to 50
VII	50 to 100
VII	100 to 250
IX	250 to 500
X	500 to 750
XI	750 to 1000
XII	1000 to 1250
XIII	1250 to 1500
XIV	1500 to 2000
XV	2000 or more

Rating modifiers of "u" for "Under Review" or "q" for "Qualified" sometimes appear with a Best's Rating. For companies that are not rated are designated "NR-1" for "insufficient data" and "NR-2" for "insufficient size and/or operating experience." Other rating agencies are Standard & Poors Insurance Rating Services <http://www.standardandpoors.com/ratings/>, Moody's Investor Services <http://www.moodys.com/insurance>, Fitch, Inc. <http://www.fitchratings.com>, Demotech, Inc. www.demotech.com and Weiss Ratings, Inc. <http://www.weissratings.com>

³ **ISO Forms Are Standard.** See endnote 8 to the Insurance Addendum for a discussion of ISO and ISO forms.

⁴ **Specification of Coverage Lines Acts as a Checklist.** The ISO CGL policy form covers each of these lines of coverage. The inclusion of this list serves as a checklist to confirm coverages upon receipt of the policy if a non-ISO form is tendered. Of particular interest from a risk management standpoint is the specification that the policy include coverage for "liability assumed under an insured contract [(including the tort liability of another assumed in a business contract)]." As noted in endnote 11 to the Forms Manual's Insurance Addendum to Lease discussing the requirement in Paragraph B2a thereof, the Insurance Addendum to Lease requires the "insured contract" definition contained in the Tenant's CGL policy not be endorsed to exclude the sole negligence of Landlord or Lienholder. Tenant may have difficulty obtaining insurance meeting that requirement as current ISO CGL forms exclude from the Named Insured's coverage of its insured contracts indemnities of another's sole negligence.

⁵ **"Cross-Liability Coverage."** The Supplement to Insurance Addendum specifies that the Landlord and Tenant's CGL policies are to be on the most current ISO CGL policy form or equivalent. The Supplement also specifies that the CGL policy is not to have its "separation of insured" language modified (a/k/a the "severability of interests clause"). Additionally, the Supplement to Insurance Addendum stipulates that if the CGL policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, the CGL policy shall be endorsed to provide cross-liability coverage. The ISO CGL policy contains the following separation of liability clause providing "cross-liability coverage":

SEPARATION OF INSURED CONDITIONS

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured in this Coverage Part, 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.

ISO, 2003©

By virtue of adding one party to another party's insurance policy as an additional insured there results 2 insureds on the same policy. "Cross liability coverage" is coverage added to the Named Insured's policy to assure the insureds that adding the additional insured will not invalidate the Named Insured's coverage for any liability it may have to the additional insured. The liability of one insured to another is called "cross-liability." The separation of insured language establishes separate coverage for each insured under the policy, except as respects the policy limits. Separation of insured language is generally provided in non-ISO CGL policy forms and in business auto policy and umbrella liability policy forms. Since the separation of insured language is contained in the ISO CGL policy form, ISO does not have an endorsement form to add separation of insured language to a CGL policy. It is prudent

to specify that the required liability policies provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause. If you are tendered a non-ISO CGL or other liability policy, you should examine it to confirm that it contains separation of insured language protective of the insured and the additional insured.

⁶ **Defense of Additional Insured.** Subject to the scope of liability coverage set out in the additional insured endorsement, the Named Insured's CGL policy provides the additional insured with the same rights to a defense as it provides a right to defense to the Named Insured. The various duties of an insurer to its insured are illustrated by *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103 (Tex. App.—Texarkana 1994, *no writ*) where Monsanto was awarded \$71,048,070.22 for actual and treble damages, prejudgment interest and attorney's fees arising out of the insurer's obtaining a financial interest in, and control of, litigation against its insured in an attempt to defeat the insured's reimbursement rights under an environmental impairment liability policy. INS. CODE Art. 21.21 § 16(a) violation.

The Supplement to Insurance Addendum provides that the additional insured's defense will be provided as an additional benefit and not included within the limit of liability. The policy limits are available to cover insured liabilities of both the Named Insured and the additional insured.

Depending on the wording of the indemnity, the Indemnifying Person may have contractually agreed to provide the Indemnified Person with a defense. In this respect the Indemnify Person may be relying on its CGL policy insurer to cover this contractual undertaking. In the past there have been issues as to the scope of the defense obligations of a Named Insured's insurer to the Named Insured's indemnitee. Because of such issues, Indemnified Persons required that they also be additional insureds on the Indemnifying Person's liability policies.

⁷ **Permissive as to Umbrella Policies.** 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. See Paragraph A.6 of the Supplement for further requirements for the Umbrella Policy.

⁸ **Designate Location General Aggregate Limit.** If the liability policy covers multiple locations or projects, its limits may be exhausted by claims at the other locations or projects. 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.

⁹ **ISO Form of Waiver of Subrogation for Liability Policies.** ISO CG 24 04 10 92 Waiver of Transfer of Rights or Recovery Against Others To Us.

¹⁰ **ISO Additional Insured Endorsements.** See Forms B-F to this article. In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage obtains under the forms as promulgated. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

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

¹² **Additional Endorsement to Tenant's CGL Policy to Cover Construction Activities of Tenant.** See Form B to this article. The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's "ongoing operations" at the Shopping Center and related property, without exclusion for construction activities.

¹³ **Tenant as Additional Insured On Landlord's CGL Policy.** See Form D. The CG 20 26 07 04 Additional Insured – Designated Person or Organization added to the Landlord's CGL policy will cover the Tenant as an additional insured on the Landlord's CGL insurance policy for bodily injury, property damage, and personal injury caused in whole or in part by Landlord or by the acts or omissions of those acting on Landlord's behalf in the performance of Landlord's ongoing operations or in connection with premises owned by the Landlord.

¹⁴ **Primary and Noncontributory.** See discussion in article at I.D.

¹⁵ **Landlord and Tenant as Additional Insureds on Contractor's CGL Policy.** See Form B to this article. The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to Tenant's contractor's CGL policy listing Landlord and Tenant as additional insureds will cover Landlord and Tenant for bodily injury, property damage, and personal injury caused in whole or in part by the contractor's acts or omissions or the acts or omissions of those acting on the contractor's behalf in the performance of contractor's ongoing operations at the Building and related property.

L. Author's "Fair Form" Manuscripted Endorsements

The risk allocation approach taken in the Forms Manual is to allocate responsibility for the risk of Injuries on a geographic basis. The reciprocal indemnities allocate 100% of the risk of liability for Injuries occurring in the Common Areas to the Landlord and allocate to Tenant 100% of the risk of liability for Injuries occurring in the Premises. The Insurance Addendum in the Forms Manual provides for the Tenant to insure the Landlord as an additional insured on the Tenant's CGL policy under insurance endorsement forms acceptable to the Landlord, but without specification of the acceptable form, except to provide that the endorsement form must not expressly exclude the sole negligence of Landlord from the definition of "insured contract" and to provide that the additional insured endorsement must not exclude coverage for the sole or contributory ordinary negligence of Landlord.

The most likely CGL policy form and additional insured endorsement form to be tendered by the Tenant is the ISO CGL policy form and ISO's CG 20 11 form since ISO forms are the industry standard. As explained in the Endnotes following the indemnity provisions of the Retail Lease and the Insurance Addendum, ISO's insured contract language and additional insured endorsement form do not match up with the risk allocation made in the Forms Manual's Retail Lease. In 2004 ISO modified the insured contract language by issuing an endorsement CG 24 26 revising the definition of "insured contract" to be one in which the named insured

... assumes(s) 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.* (language added in 2004 in italics).

Although the endorsement has been provided by ISO to its members under as an optional tool, most insurers as a matter of practice have made it mandatory. As a result neither the Tenant's obligations under its broad indemnity of Landlord for Injuries occurring in the premises nor the Landlord's obligations under its broad indemnity of Tenant for Injuries occurring in the Common Areas is covered by the indemnifying party's CGL insurance if the Injury is caused solely by the negligence of the indemnified person. This constitutes a default by Tenant on its agreement in the Insurance Addendum since it agreed that its CGL insurance would not be endorsed to exclude the sole negligence of the Landlord from the definition of "insured contract." The Insurance Addendum does not place a similar obligation on the Landlord not to permit its CGL insurance to be endorsed to exclude the sole negligence of Tenant from the definition of "insured contract." However, Landlord may find itself in the unfortunate circumstance of having agreed to the broad form indemnity of Tenant for Injuries occurring in the Common Areas, only to learn that its indemnity of Tenant is not backed by its insurance in the case of an Injury occurring in the Common Areas caused by the Tenant's sole negligence.

ISO's approach under the CG 20 11 endorsement form, which is used to name the Landlord as an additional insured on the Tenant's CGL policy, is to insure the Landlord for all liability arising out of the use of that part of the premises to Tenant without express carve outs for either the additional insured Landlord's sole negligence or the Landlord's negligence even if it is the chief cause of the Injury. As discussed in the Endnotes to the ISO CG 20 11 endorsement form, courts are split as to whether the endorsement form as so worded covers the Landlord for Injuries occurring outside of the premises described in the lease. This issue has not been adjudicated in Texas. Assuming that a Texas court adopts the construction that this ISO endorsement form only covers Landlord for Injuries arising in the Premises (not in the Common Areas), the issue still exists whether the court would hold that the endorsement insured the Landlord for Injuries occurring in the Premises that are the result of Landlord's sole negligence.

ISO's approach under the CG 20 26, which can be used to name Tenant as an additional insured on Landlord's CGL policy, is to insure Tenant for all liability in connection with premises owned by Landlord provided the Injury is caused in part by Landlord or by those acting on Landlord's behalf. Thus, under this endorsement Tenant is not insured for Injuries occurring in the Shopping Center, including the Common Areas, caused by Tenant's sole negligence.

The following risk allocation questions arise from the risk allocation position taken in the Retail Lease:

Should Tenant indemnify Landlord for Injuries, occurring either outside or in the Premises, if Landlord is greater than 50% negligent or even solely negligent? Should Tenant insure Landlord for Injuries, occurring either outside or in the Premises, if 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 author urges that a "fairer" approach is to make manuscript changes to the standard ISO forms 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) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence.

In order to effectuate the author's recommendation, the following revisions to the ISO CG 20 11 form should be requested to be made by the Tenant's CGL insurance issuer:

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

The term "premises" as used in this Endorsement means the "Leased Premises" of (number) square feet described in the Retail Lease between you as Tenant and the additional insured identified above as Landlord, but does not include the "Common Areas" such as the parking areas and alleys.

The insurance does not apply to:

3. Any "bodily injury", "property damage" or "personal and advertising injury" caused:

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

A slightly different approach is to expressly allocate to Tenant CGL insurance liability for Injuries occurring outside the Premises if caused solely by Tenant or if inside the Premises if Landlord is not more than 51% negligent.

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

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

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

- a. in whole by the negligent acts or omissions or willful misconduct of the Landlord or by persons acting on behalf of Landlord, or
- b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **outside** of the Leased Premises, such as occurring in the Common Areas, the Parking Garage or the Support Facilities.
- c. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **inside** the Leased Premises, if the aggregate of the Landlord's plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

In order to effectuate the author's "fair form" recommendation, the following revisions to the ISO CG 20 26 form should be requested to be made by the Landlord's CGL insurer:

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

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

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

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

In support of this approach an argument may be made that Injuries occurring outside of the Leased Premises should be covered by the project's liability insurance, even if caused in part by the negligence of Tenant, since all tenants, including Tenant, are paying for such coverage as Common Area Maintenance, provided the Injury is caused in part by Landlord and by those persons acting on behalf of Landlord.

If the parties wish to contract for this type of "fair form" allocation of the mutual insurance to be obtained under the Lease, the following insurance specification would be added to the Supplement's Paragraph A.3.a Landlord as an Additional Insured on Tenant's CGL Policy:

Modifications to Required Endorsement Form. The additional insured endorsement shall be modified to specify that it includes coverage of Injuries occurring outside the Premises only if the Injury is caused by the sole negligence of the Tenant. The additional insured endorsement shall be modified to specify that it excludes coverage for Injuries 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.

and the following insurance specification would be added to the Supplement's Paragraph A.3.b Tenant as An Additional Insured on Landlord's CGL Policy:

Required Modifications to Endorsement Form. The additional insured endorsement shall be modified to specify that it includes coverage for Injuries in the Common Areas provided the Injury is not caused by the sole negligence of the Tenant and provided the Landlord is negligent and that it includes coverage for Injuries occurring in the Premises if the Injury is caused in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord and if the aggregate of the Landlord's plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater..