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Traps for the Unwary with Property and Liability Insurance

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TRAPS FOR THE UNWARY WITH PROPERTY AND LIABILITY INSURANCE

Unlike most provisions in leases, loan documents and construction contracts, reusing a tried and true insurance provision without considering whether that provision is correct or appropriate at the time of negotiation can create unintended problems. In these materials, we will first outline the types of insurance and insurance concepts that are important for real estate owners, operators, and those with whom they contract, then explain liability insurance, property insurance, and the real problem of obtaining proof of insurance. Finally we will provide a glossary of insurance terms to aid your drafting and negotiation of insurance provisions.

I. A Few Basics.

A. Types of Policies.

First, what types of insurance are important in a contract dealing with real estate or its use? The most important types are:

(a) Liability Insurance – "Third party coverage" that pays defense costs and insured liability amounts that the insured property or business owner – or the Additional Insured – becomes obligated to pay to a third party if there is an accident on the property.

(b) Property Insurance – "First party coverage" that reimburses the Named Insured, generally the property owner, for the replacement cost (or actual cash value) of its insured property if that property is damaged or destroyed by a "Covered Cause of Loss." This coverage can also include reimbursement for the insured's loss of business income and loss of rental value if the insured obtains those additional coverages.

(c) Workers' Compensation Insurance – Insurance that covers an employee in the statutory amount if the employee is injured in the scope of its employment. Generally this coverage benefits only the employer. But when a tenant is occupying an owner's property or a contractor is performing work on another party's property, the party owning or leasing the property needs to be sure that the tenant or contractor has a policy of workers' compensation insurance in place and that this policy includes a waiver by the insurer of its right to make claims against the property owner or operator for amounts that the insurer must pay to an injured worker if the worker is injured by reason of defects in the property – this waiver is called a waiver of the insurer's rights of subrogation.

There are other policy types that may be need in some situations (e.g., auto, liquor liability, umbrella), but these are the basic types that every lease, construction, or other contract dealing with real estate should cover. These materials will deal with general liability and property policies.

B. ISO.

In these materials, we will use the provisions of published, standard insurance forms developed by the Insurance Services Office, Inc. ("ISO"). ISO is an entity that reflects the views of insurance companies and provides the forms that most insurers consider "standard" forms. These forms are identified by their number and edition date. For example, the most common ISO Commercial General Liability Form currently bears the designation CG 00 01 04 13: (i) CG 00 01 means it's a policy of commercial general (CG) liability insurance, on an occurrence basis, and (ii) the 04 13 at the end of the designation indicate the edition's date, which in this case is April 2013. Of course, insurance companies may customize the ISO forms to suit their own objectives. In addition, a large insured party may require a "manuscript," or specially worded, policy. However, the coverages and exclusions in these customized or manuscript policies are often based on the most recent ISO forms.

C. Terms You Need/Terms You Must Banish.

The insurance industry uses a number of specialized terms. A Glossary of many of these terms is attached to these materials. Unfortunately for lawyers that must understand these terms, they change periodically as the policy forms change.

Often lawyers must understand the terms used in an old lease, loan documents, or other contract. With the changes in insurance terms in the past 30 or so years, it is not uncommon to be confronted with insurance requirements that may have been correct when the lease was executed but that are now outdated. For example, "Comprehensive General Liability" insurance became "Commercial General Liability" insurance more than 30 years ago.

Worse, quite a number of current lease and loan document forms require insurance coverages that have not been available for a very, very long time because those were the types of insurance coverages that existed in 1950 or so when the form was originally prepared. Lawyers must be vigilant in updating their documents to banish these outmoded terms and no-longer-available coverages. No client will benefit from coverage requirements that can no longer be satisfied, particularly if the client is the one that must obtain the coverage.

Banish "all risk" – "All-risk" property insurance has not been sold for decades, but is still being required in current leases and loan documents. "Special Causes of Loss" coverage is the most comprehensive type of property insurance coverage, and that term should be substituted for the old references to "all risk" coverage.

Banish "comprehensive public liability insurance" – "comprehensive general liability insurance" has not been sold for decades. What is now available is "commercial general liability insurance." Replace all references

to “comprehensive general liability insurance” with “commercial general liability insurance” – also known as “CGL” coverage.

Banish “casualty insurance” when describing the insurance that will pay the owner for replacement of a building if it is damaged or destroyed by a risk covered by the policy. The correct terms is “property insurance.” Using “casualty insurance” to refer to “property insurance” creates ambiguity because insurance professionals often use “casualty insurance” to refer to insurance that will pay for the defense and liability arising from third party accidents – in other words, to refer to “liability insurance.” Certainly, a “casualty” may trigger a claim under a property policy, but it also refers to accidents such as slips and falls on the property. Be careful when using the term “casualty,” and don’t refer to a “casualty policy” in a document since it could mean either a “liability policy” or a “property policy,” depending on the sophistication of the court.

Banish “co-insured” when referring to another party that will receive the benefits of a property policy or liability policy. This term does not mean an additional named insured, an additional loss payee, or an Additional Insured. Technically, the term “coinsurance” is used to describe penalties in property policies that will cause the insured to share the loss with the insurer under certain circumstances.

Banish “personal injury” unless you intend it to mean personal injury which includes false arrest, detention, or imprisonment; malicious prosecution; wrongful eviction; slander; libel; and invasion of privacy. The risk that is likely intended is “bodily injury.”

When in doubt, look up the term. Even your insurance professional may not have it right.

II. General Liability Insurance.

The most common type of liability insurance is “Commercial General Liability Insurance,” often abbreviated as “CGL” insurance.

A. The Liability Coverage Provided to the Named Insured.

The entity that obtains the CGL policy is the “Named Insured.” This CGL policy protects the “Named Insured” from claims made by third parties for injuries or losses suffered by these third parties arising out of a covered occurrence (hence, “third party coverage”). In the ISO form CG 00 01 04 13 CGL policy, the insurer agrees both (i) to pay “those sums that the insured becomes legally obligated to pay as damage because of ‘bodily injury’ or ‘property damage’” described in the policy as being covered, and (ii) that it has the “right and duty to defend the insured against any ‘suit’ seeking those damages.”

The remaining 15 pages of ISO form CG 00 01 04 13 set out exclusions, obligations to notify the insurer, and other contract terms. Among the exclusions is the Named Insured's contractual liability, but there is an "exception to this exclusion" for allegations of bodily injury or physical injury to tangible property under which the policy does not exclude liability that the insured would have had in the absence of agreement or liability for most "bodily injury" or "property damage" assumed in an "insured contract," including a lease. By reason of this exception to the contractual liability exclusion, the insurer agrees to cover the reasonable attorneys' fees and necessary litigation expenses incurred for a party other than an insured if the insured assumed that obligation to pay these costs of defense in the insured contract and the costs are for defense of a claim that is covered by the policy. This exception to the contractual liability exclusion generally satisfies a Landlord's lease requirement that the Tenant maintain contractual liability insurance. Of course, the CGL policy will not cover damages for breach of contract or other non-tort claims. It will also not apply to agreements by the Tenant to indemnify the Landlord against damage to the premises caused by fire.

There are other exclusions, including auto, watercraft and aircraft liabilities, obligations under worker's compensation laws, employer's liability, liquor liability, pollution,[1] damage to property owned by the insured, and damage to electronic data. The insured can cover most of these excluded types of damage through separate policies or endorsements with separate premiums. For example, the insured must maintain property insurance to cover damage to its own property.

B. Liability Limits.

Some lease provisions still require that the Tenant carry CGL insurance with limits of liability such as "$1,000,000 for bodily injury, $1,000,000 for property damage, $1,000,000 for contractual liability and $1,000,000 for completed operations." But for almost 30 years, insurance limits have not been expressed this way.

CGL insurance limits are instead expressed as being per occurrence, with two different annual aggregates. The per-occurrence limit caps the insurer's liability for any occurrence that is covered by the policy. The aggregate limits are the maximum amount that the insurer is obligated to pay during the policy period for all occurrences together. The insurer will also stipulate a general aggregate limit that applies to all covered claims other than those

[1] Because CGL policies provide coverage for occurrences during the policy period, claims can be made under these types of policies many years after the event that gave rise to the claim. Consequently, many claims have been made under old forms of CGL policies for pollution damage that occurred in the past, before CGL policies excluded pollution damage.

that are brought in a products-completed operations matter and a separate limit that caps only product-completed operations claims amounts.

All ongoing operations are covered under the general aggregate limit, but what if the Tenant has widespread operations? How can the Landlord know that the general aggregate limit has not been eroded or exhausted by accidents elsewhere, leaving little to no protection for the Landlord's location? The Landlord cannot. But the Landlord can require that the Tenant provide the full amount of the general aggregate separately – just to the Landlord's leased location - through use of a Designated Location(s) General Aggregate Limit (ISO form CG 23 04 05 09). However, there is no similar extension available for the products-completed operations aggregate limit.

If the Tenant, perhaps a subsidiary of a large company, is unable to provide a Designated Location(s) General Aggregate Limit, a reasonable alternative is to require a higher excess liability limit.

C. What is an Additional Insured, and Who Needs to be One?

(i) Named Insured or Additional Insured?

An "Additional Insured" is a party covered under the policy by reason of a contract obligating the Named Insured to add that party as an "Additional Insured." Landlords should require their Tenants to maintain CGL coverage with specified limits of coverage; however, to really benefit from that coverage, Landlords need to require their Tenants to name them as "Additional Insureds" on the required policies.

No, the Landlord should not ask to be a "Named Insured." First, the Landlord cannot be a "Named Insured" because that category is restricted to the Tenant and its family of affiliates that maintain the policy. Second, even if the Landlord could be a Named Insured, it should understand that the insurer has the right to deny coverage to a Named Insured if the policy provisions are breached – the Landlord would not want to be deprived of coverage if the Tenant breaches the insurance contract.

A Landlord should also require that its Tenants cause the Landlord's property manager and its upstream and downstream affiliates to be "Additional Insureds" on the Tenant's CGL policies – just as it requires the Tenant to indemnify those parties for claims arising from accidents on the leased premises.

(ii) The Additional Insured Endorsement.

How does a Landlord or another contract party become an Additional Insured on the other party's CGL policy? A party does not become an Additional Insured merely by being a certificate holder on a certificate of insurance. Just because a party is a certificate holder on a certificate of insurance does not mean that it is an Additional Insured. Instead, the Landlord or other party that wishes to be an Additional Insured must require the

party maintaining the CGL insurance to obtain an endorsement to its policy naming the Landlord or other party as an Additional Insured. Although some policies provide that if the Named Insured agrees to cause another party to be an "Additional Insured" in a lease, then the other party will automatically be an "Additional Insured," but it's hard for a Landlord to obtain proof of this policy provision – the Landlord would have to review the entire policy. An endorsement is easier to obtain and to review.

Over the last 30 years, the Additional Insured endorsements have increasingly limited the coverage provided to the Additional Insured. The most recent limitations were included in the 2013 form endorsements for (i) Additional Insured – Managers or Lessors of Premises, ISO form CG 20 11 04 13 (used when the Landlord or the Manager is the Additional Insured) (ii) Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization, ISO form CG 20 10 04 13 (used for ongoing construction activities and when a Landlord names a Tenant as an Additional Insured) and ISO form CG 20 37 04 13 for completed operations construction exposures.

Endorsement form ISO form CG 20 11 04 13 for Lessors and managers that are named as Additional Insureds provides as follows:

> **A.** **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:
>
> This insurance does not apply to:
>
> 1. Any "occurrence" which takes place after you cease to be a Tenant in that premises.
>
> 2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.
>
> However:
>
> 1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
>
> 2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.
>
> **B.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits of Insurance**:
>
> If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of the insurance:
>
> 1. Required by the contract or agreement; or
>
> 2. Available under the applicable Limits of Insurance shown in the Declarations;
>
> Whichever is less.

This endorsement does provide coverage to the Landlord for "liability arising out of the ownership, maintenance or use" of the premises leased to the Tenant, but it also contains limitations – (i) it limits the coverage provided to the Landlord to the coverage that the lease requires the Tenant to provide to the Landlord and (ii) it limits the amount that the insurer will be required to pay on behalf of the Landlord to the amount of coverage required in the Lease. As a result, if (i) a Tenant agrees to indemnify the Landlord for all accidents occurring in the leased space and agrees to maintain $500,000 of CGL coverage naming Landlord as an Additional Insured, (ii) the Tenant actually maintains $3,000,000 of CGL coverage, and (iii) there is an accident in the leased premises causing $2,000,000 of liability to Landlord, then will the Tenant's insurer be required to pay for the Landlord's liability that exceeds $500,000? Maybe not. The Landlord should consider adding language in its leases similar to the following to address this concern and perhaps give the Landlord, if properly named as an Additional Insured, the full benefit of the coverage limits available to the Named Insured:

> If Tenant carries insurance coverage of one or more of the types required hereunder with limits higher than the limits required in this Lease, the full amount of the insurance coverage actually carried by Tenant will be available to respond to a covered loss or occurrence, and the coverage afforded to Landlord as loss payee, named insured, or additional insured, as the case may be, under this policy or these policies will not be limited by the minimum coverage limits specified in this Lease but will be deemed increased to the amounts carried by Tenant.

Even with this language, Landlords and Managers should not rely completely on their Tenants and Owners to keep them fully insured. First, reliable proof of insurance is hard to obtain as provided below, and second, the insurance company may cite this exclusion in the endorsement to deny coverage beyond a low amount of coverage provided in the Lease.

The situation is worse for Owners, Lessees, and Contractors that wish to rely on the liability insurance carried by their Landlords or contracting Owners. The form CG 20 10 04 13 endorsement (for construction contracts and situations in which the Landlord names the Tenant as an Additional Insured) provides the Additional Insured with coverage only for liability caused in whole or in part by the Named Insured's acts or omissions – it does not cover loss wholly caused by the Additional Insured or a third party. And like the endorsements for Landlords and Managers as Additional Insureds, it limits this coverage as follows:

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

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

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

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

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

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

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

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

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

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

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

Whichever is less.

These days, insurers are reluctant to name a Tenant as an Additional Insured on the Owner's liability insurance policy – Landlords should resist having to provide Tenants with this Additional Insured coverage. Even if a Tenant persuades the Landlord to name the Tenant as an Additional Insured, it does not mean that the Tenant should rely on this coverage and not obtain its own liability insurance coverage. This endorsement does not cover the Tenant if the act or omission allegedly giving rise to the damage suffered by the Tenant was not caused, at least in part, by the Landlord or someone acting on the Landlord's behalf. If an accident that injures Tenant's employee occurs in the common areas but was wholly caused by a customer or another tenant and not by Landlord, the Landlord's insurance will not cover the Tenant. If the Tenant wants coverage for third party acts, it should require the Landlord to expressly agree to indemnify and defend the Tenant for those acts – then it can assert that the exclusion to the

contractual liability coverage will cover its defense costs and liabilities. This endorsement also provides no coverage to an Owner for its Contractor's completed operations.

(iii) Primary and Noncontributory – Other Insurance Condition.

Most insurance policies and Additional Insured coverages permit the insurer to share the liability arising from an occurrence with any other insurer that also insured that occurrence. Most accidents in leased space are (or should be) covered by a liability insurance policy maintained by the Landlord and a liability insurance policy maintained by the Tenant. If an accident occurs in the leased Premises, the Landlord generally wants the Tenant's liability insurance to pay first – without contribution or resort to the Landlord's policy. This means that the Tenant's CGL policy must be "primary" and "noncontributory" with respect to the Additional Insured's own coverage as to accidents in the leased space. A simple Additional Insured endorsement will not ensure this result.

As of 2013, there is a CGL policy endorsement (ISO form CG 20 01 04 13) that extends primary and noncontributory coverages to an Additional Insured under a CGL policy, but only to the extent that the Additional Insured is also a Named Insured on the other insurance. It also requires that there be a written agreement in which the Named Insured in the primary policy has agreed with the Additional Insured that the Named Insured's insurance will be primary and will not seek contribution from other insurance available to the Additional Insured. Below is recommended lease language that requires the Tenant to obtain this type of primary and non-contributory coverage:

> It is the intent of the parties to this Lease that all insurance coverage that Tenant is required to maintain in this Lease will be primary to and that this insurance will not seek contribution from any other insurance held by Landlord Parties and that Landlord Parties' insurance will be excess, secondary and non-contributing. The general liability and excess/umbrella liability policies will be so endorsed.

D. Possible Problems with Excess/Umbrella Liability Coverage.

Excess liability policies are policies that cover insured liability amounts to the extent that they exceed the limits of coverage provided by an underlying policy. Most policies called "umbrella" are really just excess policies. The problem with most excess and umbrella policies is that they do not provide the exact same coverage as the underlying coverage (the term "follow form" means that the excess policy provides the same coverage as the underlying policy). There can be substantial differences, and these differences can have serious results.

Also most excess/umbrella liability policies require that the full limits of the underlying policy be available at the beginning of the excess or umbrella policy. If the underlying policies that contain an aggregate limit (*e.g.*, CGL, liquor liability and employer's liability) do not have the same inception dates as the excess/umbrella policy, the

aggregate limit may have been reduced by claims that arose before the inception of the excess/umbrella policy. This can also create a gap in coverage.

To avoid these problems, the Lease should provide as follows:

> All excess/umbrella coverage will have the same inception date as the underling policies and will be excess over and no less broad than all coverages and conditions described above.

E. The Importance of a Contractual Indemnity Provision.

Even if the Tenant did not maintain the required liability insurance or did not actually name Landlord as an Additional Insured, that Tenant must be obligated to indemnify the Landlord under a well-crafted indemnity provision. Certainly, if the Tenant injures a customer while that customer is in the Premises, the Landlord will be able to make a claim against the Tenant for the liability without an express indemnification agreement. But will the Tenant be obligated to pay Landlord's attorneys' fees and defense costs arising from that accident? No, not without an expressly agreement by the Tenant to indemnify the Landlord for these attorneys' fees and costs.

In addition, even if the Tenant did maintain the required CGL insurance and did name Landlord as an Additional Insured, that policy will still not cover all of the Landlord's potential liability. The Additional Insured endorsement will cover only "liability arising out of the ownership, maintenance or use of that part of the premises" leased to Tenant. It will not cover liability arising out of the use of common areas or other parts of the building or center – even if a customer or invitee of the Tenant is injured. Also it will not cover an accident caused by Tenant's construction or demolition activities or by a defective condition left by Tenant if this accident occurs after the Tenant has vacated the space. In addition, Tenant's CGL insurance will not cover Landlord's liability amounts that exceed the limits of Tenant's coverage, or based on the 2013, the liability amounts that exceed the amount of CGL coverage that the Tenant is required to maintain under the Lease.

For these reasons, Landlords should include in their leases a broad indemnity provision like the following:

> Tenant will indemnify, defend, and hold harmless Landlord and its property manager [INCLUDE PARENTS AND AFFILIATES IF APPROPRIATE], and their respective owners, officers, directors, agents, employees, and representatives from and against any and all loss or damage sustained by, liability or charges imposed on, and claims or causes of action asserted against, Landlord or its property manager [INCLUDE PARENTS AND AFFILIATES IF APPROPRIATE], or any of their respective owners, officers, directors, directors, agents, employees, or representatives to the extent arising out of (i) any accident or occurrence in or on the Premises, any use of or business conducted in or on the Premises, or any hidden or apparent defect in the Premises; or (ii) any damage to or loss of any property of Tenant or any person occupying the Premises or any of their respective agents, employees, or contractors, whether this damage to or loss of property occurs on the Premises or on any other part of the Property; or (iii) any act, negligence, or fault of Tenant or any person occupying the Premises or any of their respective agents, employees, or contractors, whether occurring on the Premises or on any other part of the Property. Tenant's indemnity obligations will include, but not be limited to, any and all penalties, assessments, fines, damages, interest, settlement amounts, judgments, losses, reasonable attorneys' fees, and other expenses, and will survive the expiration or other termination of this Lease.

Some Landlords may use a provision expressly requiring the Tenant to indemnify them for accidents on the premises caused by the Landlord's own negligence, but Landlords should not rely on this obligation in states like Illinois that will not give effect to a provision exempting a Landlord from liability for personal injury (and from property damage in residential leases) caused by the Landlord's own negligence. *See* 765 ILCS 705/1.

In any case, to the extent that the indemnity agreement is enforceable in the state, an indemnity agreement that requires the Tenant to pay the Landlord's defense costs in specified circumstances will give the Landlord the right to claim these defense costs from the insurer under the Tenant's CGL policy's exception to the contractual liability exclusion – by virtue of that exception, the Tenant and its insurer will cover the reasonable attorneys' fees and expenses that the Tenant agreed to pay in the lease to the extent that the costs are for defense of a claim that is covered by the policy. However, the defense provided in behalf of an indemnitee will erodes the Named Insured's limits of liability, whereas the defense provided to an Additional Insured should not erode these liability limits (depending on whether defense costs would erode the limits if provided to the Named Insured).

F. Issues for Tenants.

No Tenant should rely on the Landlord's CGL policy to provide the Tenant with coverage for its own negligence, even if it has been able to persuade Landlord and its insurer to endorse Landlord's policy to make it an Additional Insured. The form CG 20 10 04 13 endorsement (for construction contracts and situations in which the Landlord names the Tenant as an Additional Insured) is not as favorable to the Additional Insured as the endorsement that protects Landlords – it will not protect the Tenant against accidents that are not caused in whole or in part by Landlord. If the Tenant or another party has caused the accident, the Tenant may not be covered. The Tenant must maintain its own coverage to get this protection.

The Tenant should also know that it may not be able to obtain an endorsement in which the insurer agrees to give the Landlord a certain number of days' notice of the modification or cancellation of the policy, and it should agree to obtain this endorsement only if commercially obtainable. It should certainly not agree to provide a certificate of insurance that stipulates that a certain amount of notice will be given – the ACORD forms no longer contain this provision.

III. Property Insurance.

When a tornado, fire, storm, flood, or other event damages the leased property and its contents, the Landlord and the Tenant need to be able to recover quickly for their loss of property and business income losses so that they can resume business without losing tenants or customers. The coverage that will reimburse the Named Insured for the damage to or loss of its property and its loss of business/loss of rents is called "property insurance" – no it's not "casualty insurance."

A. The Two Base Forms Necessary for Property Coverage.

(i) First: The Form That Stipulates the Property That Is Covered (the "Covered Property").

First, there is the Building and Personal Property Coverage Form, currently CP 00 10 10 12. This form describes the categories of property that the insurer will pay to restore or replace, generally (1) the real property and related items, including the building, fixtures (including outdoor fixtures), permanently installed machinery and equipment, and the materials and equipment used to maintain or service the real property, and (2) the "Business Personal Property." This Business Personal Property includes the insured's furniture and fixtures, machinery and equipment, "stock," and other personal property used in its business located on the real property or to a limited extent, on the property of others (including leasehold improvements owned by the Tenant and leased property if the Tenant has the obligation to insure this leased property). A Tenant's Business Personal Property includes its use interest in fixtures, alterations, installations, and additions made as part of a building or structure that the Tenant occupies but does not own as well as those that the Tenant acquired or made at its expense but cannot legally remove. Covered property also includes property in the Named Insured's care, custody or control. This Business Personal Property must in or on the insured real property or within 100 feet of it (if the insured is a Tenant in a shopping center, the covered property can be within 100 feet of the shopping center).

There are a great many exclusions to this coverage, including money and evidences of debt, animals (other than those owned by others and boarded with the insured and if owned by the insured, only as "stock" while inside a building), roadways and other paved surfaces, foundations below the lowest basement floor or the surface of the ground if there is no basement, land, growing crops, lawns (other than as part of a vegetated roof), bulkheads, pilings, piers, wharves, docks, property specifically described as covered by another policy (other than for the excess of the amount due under that policy), retaining walls that are not part of a building, underground pipes, flues, or drains, electronic data except to the extent specifically described as covered, the cost of replacing or restoring the information on valuable papers and records, vehicles or self-propelled machines that are licensed for use on a public road or operated principally away from the premises (with exclusions for certain inventory items other than

autos and other than some detached trailers), fences, antennas and satellite dishes, and trees, shrubs, or plants (unless covered by the extended coverage).

(ii) Second: The Form That Describes (and Limits) the Events Causing Loss That Will Be Covered.

This separate "Causes of Loss" form provides sets out the events that will trigger the insurer's obligation to pay for the insured property. There are three basic types of commercial property "Causes of Loss" policies:

> Basic Form covers only listed risks, including fire, lightning, vehicles, aircraft, and civil commotion (generally ISO form CP 10 10 10 12).

> Broad Form provides Basic Form coverage as well as coverage for additional listed perils, such as structural collapse, sprinkler leakage, and losses caused by ice, sleet, or snow weight (generally ISO form CP 10 20 10 12).

> Special Form adds some listed perils and also covers "risks of direct physical loss" (this is the policy formerly called an "All Risk" policy) except those perils that are specifically excluded (generally ISO form CP 10 30 10 12).

A Causes of Loss – Special Form policy covers the most types of loss event. For that reason, it is the type of property policy that Landlords and Tenants should maintain for their own property. If the Landlord is letting the Tenant insure the Landlord's building, it is particularly important that the Lease require the Tenant to carry this insurance under a Special Causes of Loss policy.

The exclusions to the Special Causes of Loss policy (and the Basic Form and Broad Form policies) include ordinance or law, earth movement (earthquake, landslide, and earth sinking other than sinkhole collapse), governmental action, nuclear hazard, utility services, war and military action, water (flood and other water-related occurrences), and fungus (mold), wet rot, dry rot, and bacteria, as well as boiler explosions, and defective design, construction, materials, or maintenance.

B. The Insured Amount.

The policy's declarations page sets out the insurer's liability limits. These limits are the most that an insurer will pay in any single occurrence – they cap the insurer's liability at the lesser of the policy limits or the replacement cost or actual cash value, depending on which was selected by the insured.

What's the difference between replacement cost and actual cash value?

a. Replacement Cost: The cost of repairing or replacing the damaged property with property of comparable material and quality, used for the same purpose, and at the same location (though once this amount is determined, the proceeds can be used to reconstruct at a different location).

b. Actual Cash Value: Replacement Cost minus physical depreciation. Each component of the improvement may be subject to its own depreciation schedule, depending on the nature of the component, the degree to which it was maintained, and whether it was replaced recently (*e.g.*, a 50-year old building with a 2-year old roof).

The insured should include demolition and disposition costs (as a common example, $20 per square foot of improvements) when setting the Replacement Cost limits of its coverage because it needs limits that are high enough to cover these costs, with no coinsurance penalty for underinsuring. For example, when an insured purchases $10,000,000 coverage on a building, the insured expects to be able to reconstruct that building with those proceeds. In reality, a significant portion of that amount may have to be used for these additional costs.

Replacement Cost is the coverage most often required by lenders. In addition, if a Tenant is insuring a building owned by the Landlord, the Landlord should require that the Tenant insure for the full Replacement Cost of this property.

Even with Replacement Cost coverage, if the property is not actually repaired or replaced, the insurer will pay only the Actual Cash Value, and during the restoration work, the insurance company will generally pay the Actual Cash Value until the restoration is complete. Only when the restoration is complete will the insurance company will pay the additional amount that is required to cover the Replacement Cost. And of course, the insurer will not be required to pay more than the specified coverage limits. There may also be sublimits for different types of covered causes of loss.

C. The Coinsurance Penalty for Underinsurance, and How to Avoid It.

Coinsurance is a warranty to the insurance company that the amount of coverage being carried is equal to or greater than a stipulated percentage of the actual value at risk. ISO and other property insurance forms state that if the party maintaining the coverage underinsures the property by too great a percentage, the insured's recovery will be reduced by a coinsurance penalty calculated by a coinsurance percentage set out on the policy's declaration page. A typical coinsurance percentage is 80% or 90% (*see* ISO CP 00 10 12). This coinsurance penalty can reduce a loss recovery geometrically – and serves to encourage property owners to purchase limits that approximate the Actual Cash Value or Replacement Cost, as applicable.

As an example, if the Replacement Cost of the insured property is $5,000,000, the coinsurance percentage is 80%, the policy limits are $3,000,000, the loss is $100,000, and the deductible is $10,000, then the coinsurance

penalty will be triggered because the insured owner has insured its property for less than 80% of its insurable value (the $5,000,000 value that could have been insured, multiplied by the 80% coinsurance percentage, equals $4,000,000, an amount greater than the $3,000,000 coverage limits that were purchased). Because the coinsurance penalty has been triggered, the following will occur:

(i) The value of the property at the time of the loss ($5,000,000), will be multiplied by the co-insurance percentage ($5,000,000 X .80 = $4,000,000),

(ii) The stated limits of the coverage ($3,000,000) will be divided by the figure in (i), ($3,000,000 divided by $4,000,000 = .75),

(iii) The amount of the loss ($1,000,000) before the application of the deductible will be multiplied by the figure calculated in (ii) ($1,000,000 X .75 = $750,000),

(iv) The deductible will be subtracted from the figure in (iii) ($750,000 - $10,000 = $740,000), and

(v) The insurer will pay the result ($740,000).

The remainder of the loss amount ($260,000) will not be covered.

One way for an insured to avoid the application of the coinsurance penalty is to be sure that the property is insured for its full insurable value at all times – or at least for the coinsurance percentage of this full insurable value.

But sophisticated property owners avoid the coinsurance penalty by having their policies written with an Agreed Value Endorsement. In an Agreed Value Endorsement, the insurer stipulates an agreed value for the insured property and suspends the operation of the coinsurance clause – the key here to be sure that a Schedule of Values for the property is actually agreed to by the insurer and incorporated into the policy. This may require periodic appraisals and corresponding adjustments to the property's Agreed Value.

If the Landlord or Tenant has many locations, it probably insures its property by means of a "blanket" policy covering more than one of its properties. The insured assumes that a fire or other peril will probably not affect more than one of the covered properties at a time, so the insured covers these properties in a bundle at a lower cost per property. Typically blanket policies include at least a 90% coinsurance requirement. To avoid the coinsurance penalty in a blanket policy, this policy should be an Agreed Value policy incorporating a Schedule of Values fixing an amount for each location.

Even if the insured obtains an Agreed Value policy and incorporates a Schedule of Values, the insured should be sure that the policy does not contain a Limitation on Loss Settlement – Blanket Insurance (Margin Clause),

CP 12 32 06 07 or equivalent. A “margin clause” is an endorsement in a blanket policy that limits the amount of recovery to a percentage of the stipulated value, usually ranging from 1.05% to 1.20%. It voids much of the benefit of a blanket limit.

D. The Tenant’s Coverage for Loss of its Leasehold Interest.

A Tenant with a lease that is under-market, or a Tenant that has pre-paid a great deal of its rent, or a Tenant that has made substantial tenant improvements should consider obtaining Loss of Leasehold Interest coverage by endorsement (ISO form CP 00 60 06 95). This ISO form CP 00 60 06 95 states that if the leased property is damaged by one of the Covered Causes of Loss, the insurer will pay:

(a) the “Net Leasehold Interest,” defined as the present value of the (I) monthly rental value of the leased premises minus (II) the actual monthly rent and other amounts payable under the Lease (the present value will be determined by the rate of interest set out on a Schedule), plus

(b) the unamortized portion of the Tenant’s improvements that will be lost by reason of the termination of the Lease (this is important if these Improvements and Betterments are not damaged, but if by reason of damage elsewhere in the building, the Landlord terminates the lease), and (c) the amount of any Prepaid Rent (amortized by the number of months remaining in the lease).

E. Loss of Rents and Loss of Business Income.

Property owners of leased property as well as Tenants operating businesses need coverage for their business losses if a fire or other event damages their property and causes their business to suffer. For property owners, these business losses generally take the form of loss of rents (loss of rental value). Both Tenants and Landlords also need coverage for the Extra Expenses they incur by reason of the fire or other loss event.

(i) How to Obtain Coverage for Loss of Business Income and Loss of Rental Value.

A property policy, even a Special Form policy, by itself, does not cover loss of business or loss of rental value. The property owner or tenant must have that policy endorsed to include this important coverage. But the coverage for these business and rental losses is still tied to the base property policy and its Covered Causes of Loss. Without additional special coverage by an additional endorsement, nothing will be payable under the policy unless the loss was caused by damage to the insured’s real or personal property caused by a Covered Cause of Loss as defined in the Basic Form, Broad Form, or Special Form portion of the policy.

ISO form CP 00 00 32 10 12 is the endorsement form for lost Business Income (without Extra Expenses), and ISO form CP 00 30 10 12 is the form describing coverage for lost Business Income (with Extra Expenses). Both forms will cover Rental Loss/Loss of Rental Value if that coverage is specifically selected and show on the declarations page – in other words, if the correct box is checked.

(ii) What is Lost Business Income and Rental Value?

Lost Business Income is (i) the Net Income (net profit or loss before taxes) that would have been earned or incurred but for the insured peril plus (ii) the continuing normal operating expenses, including payroll. Expenses incurred to avoid further loss (other than the cost of extinguishing a fire) may be covered, but only if the aggregate award including these expenses equal or are less than the loss that would have been payable had these expenses not been incurred.

Loss of Rental Value is a subset of this loss of Business Income and is calculated as (i) the net profit or loss (before income taxes) that would have been earned or incurred as rental income from occupancy of the premises by Tenants, including the fair rental value of any portion of the premises that is occupied by the insured, plus (ii) continuing normal operating expenses in connection with the premises.

Loss of Business Income and loss of Rental Value coverage not only has a maximum insured amount coverage limit, but the recovery will also be limited to the loss suffered during a maximum period of time. Generally, this time period is the "period of restoration": (a) the period during which the insured's business activities are slowed or stopped or a part of all of the premises are rendered untenantable, but not longer than (b) the period beginning 72 hours after the physical loss or damage caused by the Covered Cause of Loss and ending on the earlier of the date on which the property should have been repaired, replaced, or rebuilt with reasonable speed and similar quality or the date on which business is re-opened at a permanent location. This "period of restoration" will not be extended for delays caused by laws that place restrictions on the construction, use, or repair of the physical property or that require the insured or others to deal with pollutants. A business should consider obtaining an additional coverage period of up to 90 to 120 days or longer, but this additional period must be elected and shown on the Declarations.

As in the case of loss of physical property, an insured that underinsures its loss of Business Income/Rental Value by too great a percentage may be hit with the coinsurance penalty. The insured can avoid this penalty by obtaining Agreed Value coverage, but this usually requires submission of a business income

worksheet estimating the Business Income or Rental Value and it requires that the insurer make this estimate an agreed part of the policy.

(iii) Coverage for Extra Expenses.

Insured Tenants should cover their Extra Expenses as well as their loss of Business Income – ISO form CP 00 30 10 12 includes both coverage for loss of Business Income/Rental Value and these Extra Expenses. "Extra Expenses" are the necessary expenses the Tenant incurs during its "period of restoration" that it would not have incurred if there had been no loss or damage – it includes expenses like the cost of the insured's relocation and other costs of continuing its operations at a temporary location to avoid or minimize business losses.

Landlords also need coverage for their Extra Expenses, such as the cost of establishing a temporary leasing office or other steps they may take to minimize losses.

(iv) How Lease Provisions Tie Into Loss of Business Income/Rental Value Coverage.

If the Lease provides that the Tenant must continue paying its rent after a loss and during the restoration – a provision that should be included in a net lease in which the Tenant is insuring the physical building and is obligated to restore it – then the Tenant's Loss of Business Income coverage should provide proceeds for the rent payments as a "continuing normal operating expense."

If the Lease provides that the rent will abate after a loss and until the property is restored – a provision that should be included in a lease in which the Landlord is carrying the property insurance and in which the Landlord has the restoration obligations – then the Landlord's Loss of Rental Value insurance should reimburse Landlord for the abated rent.

Landlords and Tenants can get into trouble when the Landlord is insuring the building and carrying the rental loss insurance, but the Lease provides that in some circumstances, for example, if the damage is caused by the Tenant's negligence, the Tenant's rent won't abate. In that case, although the Landlord has been paying for Rental Loss insurance and thinks that it will be reimbursed by the insurer for its rental loss, the insurer may take the position that because the Tenant is obligated to continue to pay the rent, the insurer is not obligated to cover the last rent since the Tenant is still obligated to pay. In that situation, the Landlord may be left with only a breach of contract claim against the Tenant for the rent. This is not a desirable result, and it could be a significant risk if the Tenant has moved out and lacks the resources continue to pay the unabated rent. Landlord's should avoid these provisions – and understand that if there's a fire or other damage to its property, it's best remedy is to look to its Rental Loss insurer, not to its displaced tenant.

F. Coverages to Add (and Limitations to Avoid).

(i) Add Terrorism Coverage.

Terrorism insurance is required by lenders. Since the World Trade Center attacks in 2001 (and the resulting insurance-policy terrorism exclusions), Congress has enacted a series of laws designed to make terrorism coverage available – most recently the Terrorism Risk Insurance Program Reauthorization Act ("TRIA") of 2007, extended to December 31, 2020, by the Terrorism Risk Insurance Program Reauthorization Act of 2015 (H.R. 26).

Insureds that maintain terrorism coverage should realize the limited circumstances in which this coverage will actually pay for damage. Only acts certified as acts of terrorism by the Secretary of the Treasury after consultation with the Secretary of Homeland Security and the U.S. Attorney General trigger payment and then only if the aggregate losses exceed $5,000,000. The April 15, 2013 Boston Marathon bombings were a terrorist act, but not a "certified act of terrorism" under the TRIA, in part because the insured property losses did not reach the TRIA minimum of $5 million. Three people died and it was widely reported that 264 people were injured in the blasts. However, TRIA deals with insured losses to property, not injuries to human beings and death. The Massachusetts Division of Insurance in a study published in March 2014 stated that it had collected health insurance costs of 170 of the injured that had health insurance issued in Massachusetts and found the actual and projected health care claims of those victims to be $22.8 million. No data was collected as to any life insurance claims on the three fatalities at the bombings and the MIT police officer believed to have been killed by the Boston Marathon bombing suspects when they attempted to flee once photographs of them had been put out to the public. That same report stated that the five worker's compensation claims were not expected to exceed $200,000. The Insurance Journal published online an article on its interview with the Massachusetts Insurance Commissioner Joseph Murphy regarding this data and included the following chart in that article: that courtesy of the Massachusetts Division of Insurance:

	Claims Reported	Claims Closed with Payment	Claims Closed Without Payment	Paid Loss	Case Reserves	Case Incurred Loss (Loss + Reserves)	% Closed
Residential Property	38	29	9	109,788	-10,792	98,996	100.0%

Commercial Property	27	12	11	286,897	123,972	410,869	85.2%
Personal Auto	7	7	0	72,760	-10	72,750	100.0%
Commercial Auto	0	0	0	0	0	0	NA
Business Interruption	133	65	63	1,431,942	542,246	1,952,188	96.2%
All Other Lines	2	0	2	0	0	0	100.0%
Totals	207	113	85	1,901,387	633,415	2,534,802	95.7%

Nearly half of the commercial property and business interruption claims resulted in no payment to the insureds. Even if the full reserve for open commercial property claims were paid, the total proceeds would be less than $5,000,000. Most business interruption claims have been closed at the time of that article and were less than Two Million Dollars in the aggregate if the full reserve were paid. Posternak Blankstein & Lund LLP, along with many other firms in Boston, as part of a pro bono effort of the Boston Bar Association, helped some of the area businesses file insurance claims for the Boston Marathon bombing. Jon Cowen and the late Rosanna Sattler (of Posternak) described the claim process as follows in an April 1, 2014 Boston Bar Journal article:

> Although the terrorism exclusion has been largely a non-issue for businesses impacted by the Boston Marathon bombing, insurers have been cautious in making payments under another form of insurance known as the Civil Authority coverage. In an event like the Marathon bombing, this type of insurance coverage has much broader application than standard business interruption insurance because it is triggered whether or not there is physical damage at the insured's business premises. The Civil Authority coverage allows recovery of lost business income and expenses so long as the business was forcibly shut down as a result of the actions of state or local authorities. The Civil Authority coverage came into play here because a six block area surrounding the Marathon finish line was closed to the public for 10 days while the Boston police and federal law enforcement authorities conducted their investigation.

The Civil Authority coverage has been implicated in past natural disasters and unlike the terrorism exclusion, there is at least some limited precedent for the handling of such claims. But for Boston Marathon-related claims, insurers have been inconsistent in making payments under this form of coverage. In one case Posternak Blankstein & Lund LLP handled, the carrier denied coverage entirely. In another, an insurer paid for lost business income but refused to reimburse our client for extra expenses that also fall within the scope of coverage. These differences cannot be explained by where the businesses are located – in both cases, the storefronts are on Newbury Street, outside of the area cordoned off for the crime scene investigation. Slight differences in the policy

language could be the explanation. For the business that was denied Civil Authority coverage, the policy required that access be prohibited to the area "immediately surrounding the damaged property." For the client that received payment of a portion of its lost business income, the policy required only that the loss be caused "by action of civil authority." However, that insurer has refused to pay for lost and spoiled inventory, denying that it constituted a "necessary Extra Expense" under the Civil Authority coverage." It is a common policy limitation that the business interruption is triggered only if the closure lasts more than 48 or 72 hours. The insured is self-insuring for the losses during that initial period and only purchasing coverage for extended closure orders by civil authority. For example, although Boylston Street in front of the Prudential Center was closed for the quite a few days, on the day after the bombing, one was able to enter the Prudential Center from Huntington Avenue entrances.

(ii) Add Flood Coverage.

A standard property policy – even a Special Form policy – excludes damage caused by flood, surface water, waves, tides, tidal water, overflow of a body of water, and spray from any of these (whether or not driven by wind). Flood coverage can be obtained through the National Flood Insurance Program (NFIP), which is administered by the Federal Emergency Management Agency (FEMA). However, the commercial property coverage limits for NFIP coverage are low: $500,000 for each building and $500,000 for its contents. In addition, only Actual Cash Value is covered – Replacement Cost is not covered. Loss of Business Income/Rental Value loss is not covered under NFIP.

Flood Zones A and V are the areas at the greatest risk of flooding. However, some lenders require flood insurance for properties not in these Flood Zones. In addition, property owners of high-value property generally wish to obtain flood insurance in an amount that exceeds the NFIP limits, commonly through purchase of a Difference-in-Conditions ("DIC") endorsement or policy. In either case, the owner may be able to obtain non-FEMA flood insurance for the property's full replacement cost and business income for a price. However, if the property is within Flood Zones A or V, the insured will need to maintain both the NFIP coverage and the additional coverage as excess coverage (with the NFIP coverage amount as a deductible).

Unfortunately for property owners in flood-prone communities, the NFIP is subject to periodic reauthorization by Congress. At the time of these materials, the authorization for the NFIP extends only to July 31, 2018. Congress will have to reauthorize it if it is to continue after that date.

(iii) Add Building Ordinance or Law Coverage.

A standard Replacement Cost property damage policy does not cover the added cost of complying

with laws and ordinances. For example, it does not cover the cost of (1) tearing a damaged building down when demolition is required by governmental authorities, (2) tearing down the undamaged portion of the building; or (3) adding features to a damaged building (for example, sprinklers) when the building was not previously required to contain these features (perhaps because it was grandfathered). A property owner can maintain coverage for these exposures obtaining an ISO form CP 04 05 09 17 endorsement. Of course, the damage must be from a loss that is caused by a Covered Cause of Loss – separate coverage will be required for building ordinance coverage if the loss is from a flood or earthquake.

(iv) Avoid the Protective Safeguard Endorsement.

Insurers often add an endorsement requiring that the insured maintain protective safeguards such as a sprinkler or burglar alarm system. If this endorsement is part of the policy and a fire occurs while the sprinkler system is not working, the insurer may deny coverage unless the insured previously notified the insurer that the sprinkler system was not working and obtained assurance that the property would be covered during this period.

(v) Watch Out For Vacancy.

Under many policies, if a building has been vacant for longer than 60 days or another stipulated period, the insurer will not pay for losses caused by vandalism, sprinkler leakage, building glass breakage, water damage, theft, or other types of vacancy-related losses, and the recovery for other types of covered losses will be reduced, typically by 15%. The placement of furniture in the building will not satisfy this requirement. These policies generally define a building as vacant unless at least 31% of its total square footage is (i) rented to a Tenant and used by the Tenant to conduct its customary operations or (ii) used by the building owner to conduct customary operations. A waiver by the insurer must be obtained to continue full coverage during periods of vacancy. Consequently, if an owner knows that a substantial portion of its property will be vacant (for example, if the policy is placed in effect before the property has been fully leased), it should notify its insurer and obtain a vacancy permit.

(vi) Add Mechanical Breakdown.

Explosion of boilers and the mechanical breakdowns (this might include HVAC systems destroyed by a power surge) are causes of loss that are excluded in the form property damage policy; however, this coverage can be obtained through a separate policy or endorsement.

(vii) More Exotic Types of Business Loss Coverage to Consider.

Utility Interruption – A property owner or business operator can obtain coverage for loss of business caused by loss of utility equipment outside the insured property by a special endorsement for utility interruption.

This endorsement provide coverage only if the off-site utility equipment is damaged by a Covered Cause of Loss. Transmission or distribution lines are generally excluded.

Contingent Business Income – A property owner or business operator can also obtain Contingent Business Income insurance that covers the business losses it suffers when a Covered Cause of Loss damages an anchor store or primary supplier that is crucial to the insured's business. (*See* ISO Forms CP 15 08 10 12 or CP 15 09 10 12, one of which also covers Extra Expenses and one of which does not).

G. Waiver of Claims/Waiver of Subrogation – Each Party Should be Responsible for its Own Property.

Most modern leases require each party to insure its own property – or at least permit each party to assume that the other party will insure its own property. For the risk of property damage to be truly allocated to each party's insurer, however, the party carrying the coverage must waive its right to sue the other party for an insured property loss (as well as a loss that could have been insured even if the policy is not carried) and its insurer's rights of subrogation.

(i) What is a Right of Subrogation and Why Should It Be Waived?

By law (equity) and most insurance contracts, insurers that pay for damage to their insureds' property are "subrogated" to the claims that their insureds have against the person that caused the damage. This means that they can step into their insureds' shoes and sue the person that damaged the property to recover the damage amounts paid by the insurer. By virtue of this "subrogation" right, a Tenant's property insurer is "subrogated" to the tenant's claims against its landlord and has the right to sue Landlord to recover the proceeds that it paid to the futon owner. *See, e.g., Allstate Ins. Co. v. Mazzola*, 175 F.3d 255 (2d Cir. 1999).

But if the insurer's rights of subrogation have been waived properly by the Tenant's waiver of claims against the Landlord in the Lease, then the insurer will not have the right to recover these proceeds from the Landlord, even if the Landlord negligently caused the fire and the loss. *See, e.g., Travelers Indemnity Co. v. AA Kitchen Cabinet & Stone Supply, Inc.*, 106 A.D.3d 812, 964 N.Y.S.2d 634 (2013).

Conversely, the Tenant can avoid being sued by the Landlord's building insurer for damage to the building caused by the Tenant by having the Landlord waive its claims against the Tenant for damage that could easily have been insured by the Landlord.

(ii) How Can an Insurer's Rights of Subrogation Be Waived?

Generally, a party can waive only its own rights, so of course, the insurer can waive its own right to make claims against another party. However, today, an insurer's rights of subrogation are customarily waived by

its insured's express waiver of claims expressly in the Lease or construction contract, and this waiver is generally binding on the insurer.

The best waivers of subrogation include two elements: (1) a waiver by each party of claims against the other party for all property damage that is insured by a Special Form Causes of Loss policy of property insurance (this is the most comprehensive form policy and the successor to the old "all risk" policy); and (ii) a waiver of each party's insurer's rights of subrogation against the other party. However, even Special Form Causes of Loss policies do not automatically include coverage for all types of property loss or damage; for example, without a special endorsement or policy, they do not include coverage for flood and water back-up from a sewer or drain or for loss of business income and rental loss. A waiver of subrogation should include these types of losses as well physical damage caused by fire and the other common risks.

As an example of a simple mutual waiver of subrogation provision that includes these elements:

> Notwithstanding anything to the contrary set out in this Lease, Tenant hereby assumes all responsibility for insuring, and waives its entire right of recovery against Landlord and its property manager for, any and all loss of or damage to Tenant's property, including, without limitation, its leasehold improvements, its furniture, fixtures, equipment, and other personal property and its loss of business income, caused by or arising out of a cause of loss insured or that could have been insured against by a Causes of Loss – Special Form policy of property insurance with additional flood and loss of business income coverage, even if this loss or damage is due to the negligence of Landlord or its property manager, agents, or contractors. In addition, notwithstanding anything to the contrary set out in this Lease, Landlord hereby assumes all responsibility for insuring, and waives its entire right of recovery against Tenant for, any loss of or damage to Landlord's property, including, without limitation, the premises, the building in which the premises are located, all of Landlord's other improvements, all of Landlord's furniture, fixtures, equipment, and other personal property, and Landlord's loss of business income and rents, caused by or arising out of perils insured against or that could have been insured against by a Causes of Loss – Special Form policy of property insurance with additional flood and loss of business income and rental value coverage, even if this loss or damage is due to the negligence of Tenant or its occupants, agents, or contractors. This waiver includes a waiver by each of Tenant and Landlord of all rights of subrogation that its property insurers may have against Landlord or its property manager or against Tenant, as the case may be.

(iii) Is an Endorsement to the Policy Necessary?

With respect to most property policies, no. Under commonly used ISO form property insurance policies, the insured party has the right to waive its right to recover from third parties, both before and after a loss, as well as the right to bind its insurer to this waiver. *See, e.g.*, ISO Form CP 00 90 07 88 (Commercial Property Conditions). However, to cover situations in which the policy does not permit the insured to waive rights of subrogation, the lease should provide that if the policy does not permit this waiver, then the insured must obtain an endorsement in which the insurer agrees to waive its right of subrogation.

(iv) What is the Effect of Laws Limiting a Party's Right to Waive Claims?

Waivers of claims may be limited by state anti-indemnity laws, particularly with respect to damage caused by gross negligence or intentional misconduct or claims for personal injury. However, most laws permit a waiver to be effective against a compensated surety like an insurer. Even Illinois law, which prohibits a lease provision that indemnifies a landlord for its own negligence, indicates that public policy does not prohibit a waiver in a commercial lease of claims for property damage caused by the other party's ordinary negligence. *See* 765 ILL. COMP. STAT. 705/1. For a more complete discussion of the law regarding limited indemnity, *see* Marie A. Moore, *Indemnification Provisions in Leases: What We Ask For and What Really Matters*, 22 PROB. & PROP. 33 (Sept./Oct. 2008).

H. The Risks of Relying on the Tenant to Insure the Landlord's Property.

Property owners that rely on the Tenant to maintain the insurance covering damage to the owner's property face a number of risks. First, the Tenant may have a high deductible or self-insurance amount, and if the Tenant does not have the assets to cover the deductible or self-insured amount, the Landlord may not be able to recover these amounts. Second, with a blanket policy, if there is an area-wide fire, storm, or other peril and the Landlord permits the Tenant to deal directly with the blanket insurer, the Tenant may find a way to use the funds to restore other locations but not the one owned by the Landlord. Third, a Landlord will find it much more difficult to negotiate with and enforce its rights against its Tenant's insurer, whereas its rights with respect to insurance that it maintains directly are much more certain. Finally, as discussed below, it is very hard for a Landlord to confirm that its Tenant is actually carrying the required insurance now that certificates and evidence of insurance are clearly not proof of insurance. The Landlord must obtain and review the insurance policies – or the relevant parts of them – to be sure that the required coverage is being maintained.

For these reasons, property owners should maintain their own property insurance coverage and price it into the lease – even if the lease is a triple net lease. When the Landlord carries its own property insurance on its own building, the Landlord (1) controls the insurance placement and deductibles, (2) can satisfy its lender's property insurance obligations, (3) doesn't risk having the policy invalidated by the Tenant's violation of policy conditions, (4) will receive notice of cancellation, (5) will be able to directly negotiate claims adjustments, (6) can satisfy the reconstruction obligations it has under the Lease, and (7) does not have to obtain a copy of and review the Tenant's policy.

If the Lease is already in place and gives Tenant the right to maintain the property insurance, or if the Tenant is a national tenant that will not agree to Landlord maintaining the insurance, then the Landlord can take

steps to minimize its risk. The Landlord's lease should require that it be a loss payee and Additional Insured on all of the insurance covering Landlord's building. Neither is completely satisfactory on its own, and the Landlord should try to be both.

A standard loss payee endorsement (ISO form CP 12 18 10 12) requires that claims be paid jointly (the Tenant as well as the Landlord will be a payee of the proceeds), it provides no protection to the Landlord against the policy being invalidated by actions of the Tenant, and it provides the Landlord with no notice of cancellation. Similarly, a standard building owner's Additional Insured endorsement (ISO form CP 12 19 06 07) makes the building owner a Named Insured for the building only, but loss is adjusted with both the Tenant and the building owner as their interests may appear. In addition, as is the case when the Landlord is a loss payee, the policy may be invalidated by the Tenant's actions, and the insurer is not obligated to provide the Landlord with notice of cancellation. The Landlord should attempt to obtain an endorsement that requires the insurer to adjust the claims for damage to the building with the Landlord (the building owner) only, and for an endorsement in which the insurer agrees to give the Landlord notice of cancellation or modification.

I. The Lender's Rights and Protections.

Lenders have done a good job of persuading insurers and insurance commissions to protect their interests. A lender with whose loan is secured by a mortgage, deed of trust, or security interest can protect its interest by requiring a mortgagee endorsement on all property insurance covering the mortgaged property or a similar lender's loss payable endorsement.

A typical mortgagee endorsement creates a direct contract between the insurer and the lender that will survive violations of the policy by the insured party (unless the mortgagee knew of the violation and failed to stop it), it requires the insurer to give prior notice of policy cancellation or material modification to the mortgagee, it permits the mortgagee to pay any premium that is due, and it permits the mortgagee and the Named Insured to divide the proceeds between themselves based on the insurable interest held by each of them.

A mortgagee of real property or security interest holder of personal property may also be protected by a lender's loss payable endorsement such as ISO form CP 12 18, which gives the mortgagee or security interest holder protections similar to those provided in the mortgagee endorsement. In it, the insurer agrees to pay the loss payees as their interests may appear, even if a loss payee has started foreclosure with respect to the property. If the insured property owner has failed to comply with the policy, the lender will nevertheless have the right to receive its proceeds if it pays the premium when the borrower has failed to do so, if it submits a signed, sworn proof of loss

within 60 days after the insurer's notice of the insured's failure to submit this proof of loss, and if it has notified the insurer of any change in ownership, occupancy, or substantial change in risk of which the lender is aware. This form endorsement also requires the insurer to give the lender at least 10 days prior notice of a cancellation for nonpayment of premiums and 30 days prior notice of a cancellation for any other reason, and requires the insurer to provide the lender with at least 10 days prior notice of election not to renew on the expiration date.

To be sure that its Tenant is obligated to provide this coverage to its mortgagee, the Landlord should require the Tenant to name all of the owner's mortgage holders as loss payees pursuant to a lender loss payable endorsement like the ISO form CP 12 18 and to provide the owner's mortgage holders with the documents required by the mortgage holders, including the policy if required by the lender or if the lender does not require the entire policy, a certified copy of the Declarations page and the lender loss payable endorsement and other endorsements required by the lender.

J. Making Parties' Restoration Obligations Match Their Insurance.

The party owns the building should be the party that maintains the property insurance coverage on that building, and the party that maintains this property insurance coverage should be the party obligated to restore the building if it is damaged.

Problems arise for the party with the restoration obligations if that party does not also maintain the property insurance. If the Landlord maintains the insurance coverage but the Tenant has the restoration obligations, the Tenant needs to be sure that the Lease requires the Landlord to provide sufficient funds for restoration, at least in trust, before the Tenant must start work, limits the Tenant's restoration obligations to the insurance amounts provided by the Landlord, and limits the required time for restoration to a reasonable time after the se proceeds are provided. The Tenant should also require that the Landlord make it a loss payee as its interests may appear or an Additional Insured as its interest may appear on the Landlord's policy.

The same principles apply if the Tenant maintains the property insurance coverage on the Landlord's building but the Landlord has the obligation to restore. In this situation it is even more important for the Landlord to be the loss payee and Additional Insured on the Tenant's property insurance policy. In addition, the Landlord should obligate the Tenant to pay all deductible and self-insured amounts, it should limit its restoration obligations to the insurance proceeds and other amounts provided for this purpose by the Tenant, and it should assure that the period during which it must restore will not start until the Tenant provides the insurance proceeds for the restoration.

It is very important to the Landlord that the Tenant's rent not abate if the Tenant is maintaining the property insurance on the building. The Landlord probably cannot maintain independent loss of rents insurance if it is not maintaining the property insurance policy, and rather than relying on the Tenant to insure the Landlord's loss of rents (if the Tenant can even do that), the Landlord should require the Tenant to maintain loss of business insurance and to provide that the rent will not abate. If the rent does not abate, the rent will be part of the "continuing normal operating expenses" paid by the proceeds of Tenant's Loss of Business Income policy. If the Landlord is obligated to restore and maintains its own property insurance, then the Landlord's coverage should include loss of Rental Value, and rent should abate regardless of whether the Tenant's negligence caused the damage, though if Tenant is performing the restoration, the Landlord should limit the period of rent abatement.

IV. The Elephant in the Room: How Can Party Obtain Proof of the Other Party's Insurance?

When a party – whether Landlord or Tenant, Owner or Contractor – relies on insurance being maintained by the other party, the party relying on the coverage needs to be able to obtain proof that this coverage is in place, in the right amounts, and with the right coverages. In most Leases, the parties require the production of forms of certificates of insurance with respect to liability insurance and forms of evidence of insurance with respect to property coverage. These one-page forms are easy to read and easy to understand and administer, but they cannot be relied upon. The commonly used forms for these certificates or evidence are promulgated by ACORD (the Association for Cooperative Operations Research and Development), a nonprofit that serves the insurance industry by, among other things, developing standard forms. Because its members are primarily insurance underwriters, the ACORD forms reflect the concerns of the underwriters, and the underwriters do not want to be bound by a one-page form filled out by a clerk.

As a result, these certificates and evidence of insurance are not proof or evidence of anything; in fact, they state on their face that they are not binding on the insurer. The insurers have attorneys too, and they take the position that a one-page form cannot override a policy comprising pages and pages of coverages and limitations on coverages. W. Rodney Clement Jr., *Is a Certificate of Insurance a Worthless Document?*, 24 PROB. & PROP. 46 (May/June 2010). These forms no longer even say that the insurer will give – or endeavor to give – the certificate holder notice of coverage cancellation. If the certificate holder wants this notice, it needs to obtain an endorsement in which the insurer commits to give this notice. In addition, the certificate holder is not automatically an Additional Insured; the party that wishes to be an Additional Insured needs to obtain a copy of the actual endorsement.

One of the ways a party that is relying on insurance that the other party is maintaining can protect itself is

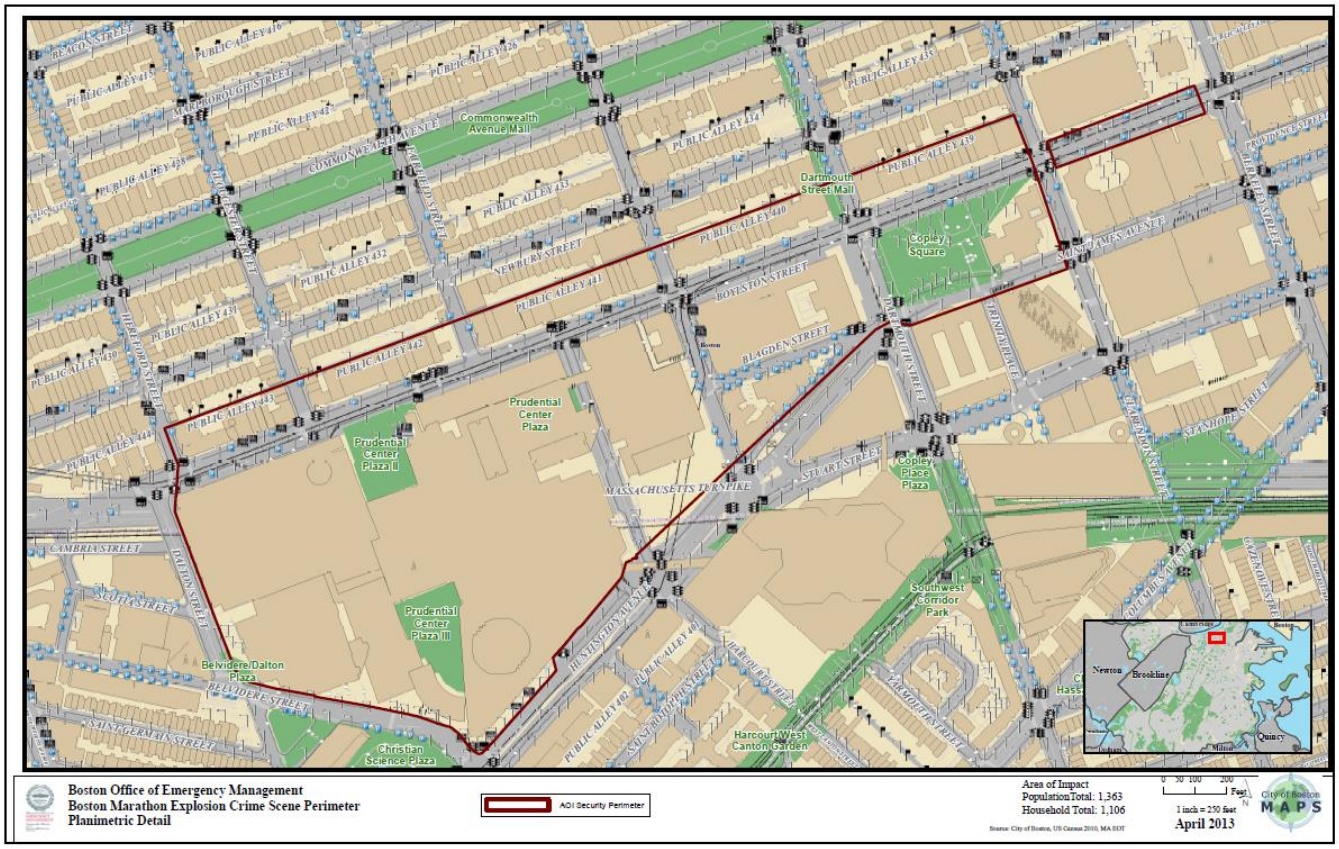
to require the insuring party to provide, from time to time, and in addition to a certificate of insurance, a certified copy of the policy itself, or at least the Declarations page, the Schedule of Forms and Endorsements comprising the policy, and all endorsements that are needed to provide the required coverage. And the party relying on the coverage must then review the policy or the other information provided to assure that the documents provide the required coverage and do not contain endorsements that diminish that coverage.

V. Conclusion.

Landlords, Tenants, and their lawyers need to understand basic insurance concepts, what is covered and not covered, and what endorsements should be requested and obtained. Because the wording in insurance policies changes frequently, and insurance policies are typically purchased for one-year policy periods, language in a long-term lease or other contract can easily become outdated over time, resulting in unexpected or unintended gaps. Each time a lease or contract is amended, the insurance and indemnification provisions should also be reviewed to see if they are still accurate and if the insurance obligations are current.

Most importantly, we need to remember that Landlords, Tenants, and owners under construction contracts are taking risks when they rely on the other party's insurance – or an obligation by the other party to procure this coverage. The safest course – and one all lawyers should recommend to their clients – is that each party carry its own insurance for its own property and at least back-up liability insurance that will provide coverage if the other party fails to comply with its contractual insurance obligations.

EXHIBIT A


Boston Office of Emergency Management
Boston Marathon Explosion Crime Scene Perimeter
Planimetric Detail
AOI Security Perimeter
Area of Impact
Population Total: 1,363
Household Total: 1,106
1 inch = 250 feet
April 2013
City of Boston MAPS
Commonwealth Avenue Mall
Dartmouth Street Mall
Copley Square
Prudential Center Plaza
Prudential center Plaza II
Prudential Center Plaza III
Copley Place Plaza
Southwest Corridor Park
Belvidere/Dalton Plaza
Christian Science Plaza
Harcourt/West Canton Garden
MASSACHUSETTS TURNPIKE
BOYLSTON STREET
NEWBURY STREET
BLAGDEN STREET
STUART STREET
CAMBRIA STREET
SCOTIA STREET
DALTON STREET
BELVIDERE STREET
SAINT GERMAIN STREET
HUNTINGTON AVENUE
SAINT JAMES AVENUE
Newton
Brookline
Quincy

Glossary of Insurance Terms

Actual Cash Value (ACV) – The Replacement Cost minus physical depreciation. Each component of the improvement may be subject to its own depreciation schedule, depending on the nature of the component, the degree to which it was maintained, and whether it was replaced recently (e.g., a 50-year old building with a 2-year old roof).

Additional Insured – A person or organization not automatically included as an insured under an insurance policy who is included or added as an insured under the policy at the request of the Named Insured. A person or organization can be an Additional Insured under a liability policy or a property policy. The protection provided to the Additional Insured will be determined by the endorsement or policy provision adding the person or organization as an Additional Insured, but it will be more limited than the protection afforded to the Named Insure..

Agreed Amount Endorsement – An endorsement to a property policy in which the insurance company waives the coinsurance clause on the specified property. It will also stipulate that a specified value is the replacement cost or actual cash value, as the case may be, of the property.

Aggregate – The maximum dollar amount or total amount of coverage payable for a single loss, or multiple losses, during a policy period, or on a single project.

All Risk Coverage – Outdated terminology under the ISO form policies, but formerly a term used for coverage for all risks of loss except those that were specifically excluded. Currently called “Special Form” or “Special Causes of Loss” coverage.

Basic Form – A property insurance policy form that covers specified named perils. The ISO Form CP 10 10 10 12 covers the following fourteen basic causes of loss: (1) Fire; (2) Lightening; (3) Explosion; (4) Windstorm or Hail; (5) Smoke; (6) Aircraft or Vehicles; (7) Riot or Civil Commotion; (8) Vandalism; (9) Sprinkler Leakage; (10) Sinkhole collapse; and (11) Volcanic Action; however, the definitions of these perils include limitations.

Binder – A legal agreement issued by either an agent or an insurer to provide temporary evidence of insurance until a policy can be issued. Binders should contain definite time limits, should be in writing, and should clearly designate the insurer with which the risk is bound. They should also indicate the amount of insurance, the type of policy, and (in the case of property insurance) the perils insured against.

Blanket Insurance – A type of business insurance policy covering multiple properties that are similar in nature but not at the same location. For example, a franchise restaurant owner who operates several sandwich stores around a city may purchase a single insurance policy covering all locations.

Bodily Injury – as defined in standard ISO CGL form, CG 00 01 04 13, bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time.

Boiler and Machinery Coverage – Coverage for loss caused by the breakdown of boilers, machinery, and other electrical equipment.

Broad Form – A property insurance policy form that provides coverage for the same named perils under the “Basic Form” plus additional named causes of loss. The ISO Form CP 10 20 10 12 provides coverage for the following additional causes of loss: (1) Falling Objects; (2) Weight of Snow, Ice or Sleet; and (3) Water Damage (in the form of sudden leakage from plumbing or appliances).

Builders Risk Policy – A property insurance policy that is designed to cover property in the course of construction. Coverage is usually written on an all risks basis and typically applies not only to property at the construction site, but also to property at off-site storage locations and in transit. Builders risk insurance can be written on either a completed value or a reporting form basis; in either case, the estimated completed value of the project is used as the limit of insurance.

Building and Personal Property Coverage Form – An ISO property insurance form (CP 00 10) that covers buildings, business personal property, and personal property of others for direct loss or damage, subject to the

limits shown in the declarations for each of these categories. Also provides additional coverages and coverage extensions, including: debris removal, pollutant cleanup, preservation of property, fire department service charges, increased cost of construction, electronic data, newly acquired or constructed property, personal effects and personal property of others, off-premises property, valuable papers and records, outdoor property, and nonowned detached trailers.

Building Ordinance Coverage – Coverage by endorsement for loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Older structures that are damaged may need upgraded electrical; heating, ventilating, and air-conditioning (HVAC); roofing materials; fences; and plumbing units based on city codes. Many communities have a building ordinance(s) requiring that a building that has been damaged to a specified extent (typically 50 percent) must be demolished and rebuilt in accordance with current building codes rather than simply repaired. Unendorsed, standard commercial property insurance forms do not cover the loss of the undamaged portion of the building, the cost of demolishing that undamaged portion of the building, or the increased cost of rebuilding the entire structure in accordance with current building codes.

Business Income Coverage – Commercial property insurance covering loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of its operations. Coverage applies to loss suffered during the time required to repair or replace the damaged property. It may also be extended to apply to loss suffered after completion of repairs for a specified number of days. See ISO form CP 00 30) and the business income coverage form without Extra Expense coverage (CP 00 32).

Business Interruption Insurance – Business Income Coverage, defined above.

Certificate of Insurance (COI) – A document that provides a snapshot of the Insured's then-current liability insurance (Evidence of Insurance is the form for property insurance). No coverage benefits are afforded the certificate holder and the COI says that the certificate holder cannot rely on it; the certificate merely provides information. The most typical COI is on the ACORD 25 form.

Claims-Made Coverage – A liability policy providing coverage that is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place. This policy is in contrast to the occurrence policy.

Commercial General Liability Insurance (CGL) – A standard insurance policy issued to business organizations to protect them against liability claims for bodily injury (BI) and property damage (PD) arising out of premises, operations, products, and completed operations; and advertising and personal injury (PI) liability. The CGL policy was introduced in 1986 and replaced the "comprehensive" general liability policy. See ISO form CG 00 01 04 13.

Contingent Business Interruption Insurance – an extension to other property insurance that reimburses lost profits and extra expenses resulting from an interruption of business at the premises of a customer, supplier, or leader location (a nearby business that attracts customers to the insured's business).

Deductible – A deductible eliminates coverage below a certain threshold dollar amount or expressed as a percentage. A deductible clause requires the insured to bear risk in each and every loss up to the deductible limit.

Endorsement – An insurance policy form that either changes or adds to the provisions included in one or more other forms used to construct the policy, such as the declarations page or the coverage form. Insurance policy endorsements may serve any number of functions, including broadening the scope of coverage, limiting or restricting the scope of coverage, clarifying the application of coverage to some unique loss exposure, adding other parties as insureds, or adding locations to the policy. They often effect these changes by modifying the existing insuring agreement, policy definitions, exclusions, or conditions in the coverage form or adding additional information, such as insured locations, to the declarations page.

Extended Period of Indemnity Endorsement or Option – Adds coverage under a business interruption policy for loss of income suffered during a specified period of time (e.g., 30, 60, 90 days) after the damaged property has been repaired. In the absence of this endorsement or option, business interruption coverage typically ends on the date the damaged property is repaired or replaced.

Extending Reporting Period (ERP) – A designated time period after a claims-made policy has expired during which a claim may be made and coverage triggered as if the claim had been made during the policy period.

Extra Expense Coverage – Commercial property insurance that pays for additional costs in excess of normal operating expenses that an organization incurs to continue operations while its property is being repaired or replaced after having been damaged by a covered cause of loss. Extra expense coverage can be purchased in addition to or instead of business income coverage, depending on the needs of the organization. There are two Insurance Services Office, Inc. (ISO), commercial property forms that provide extra expense coverage: the business income and extra expense coverage form (CP 00 30) and the extra expense coverage form (CP 00 50).

First Named Insured – The person or entity listed first on the policy declarations page as an insured. This primary or first Named Insured is granted certain rights and responsibilities that do not apply to the policy's other Named Insureds. Examples of additional rights of first Named Insureds are the receipt of cancellation notice and return premiums. Unique responsibilities include the notice of loss requirements and premium payment obligations.

General Aggregate Limit – The maximum limit of insurance payable during any given annual policy period for all losses other than those arising from specified exposures. Under the standard commercial general liability (CGL) policy, the general aggregate limit applies to all covered bodily injury (BI) and property damage (PD) (except for injury or damage arising out of the products-completed operations hazard) and all covered personal and advertising injury. When paid losses in these categories reach the specified aggregate limit, that limit is exhausted and no more losses in any of those categories will be paid under the policy. In other words, once the general aggregate limit is paid out, the only coverage remaining under the policy will be for products-completed operations claims—which are paid out of a separate aggregate.

Improvements and Betterments – Permanent additions or changes made to a building by a tenant at its own expense that may not legally be removed. Property policies vary as to whether tenants' improvements and betterments are covered under the building category or under the contents category, so the insured must be careful to assign these values to the proper category of covered property.

Insurable Interest – The interest by the insured in a subject of insurance, including any legal or financial relationship to it of such a nature that a covered cause of loss might cause monetary loss to the insured. An insurable interest usually results from property rights, contract rights, or potential legal liability.

Insurance to Value – Insurance written in an amount approximating the value of the subject of the insurance and that satisfies coinsurance requirements.

Insured – The party to an insurance arrangement to whom, or on behalf of whom, the insurance company agrees to indemnify for losses, provide benefits, or render service.

Insured Contract – A defined term common in liability policies that provide exceptions to the contractual liability exclusion, by stating that the exclusion does not apply to liability assumed in an "insured contract." As defined in ISO CG 00 01 04 13, an Insured Contract is a lease to which the Named Insured is a party and certain other specified types of contract.

ISO – Insurance Service Office, Inc., a company serving the insurance industry that acts as a source of information about insurance risks. ISO provides its clients with statistical, actuarial, underwriting, and claims information; policy language; information about specific locations; fraud-identification tools; and technical services for a broad spectrum of commercial and personal lines of insurance. The form policies and endorsements ISO produces are used in whole or in part by many insurers when preparing their form policies.

Limit of Liability – A provision limiting the maximum liability of an insurer for a series of losses in a given time period—for example, a year or for the entire period of the contract. Sometimes called "annual aggregate limit."

Loss Payable Clause – An insurance provision authorizing payment in the event of loss to a person or entity that is not the Named Insured, but that has an insurable interest in the covered property, or in some cases, jointly to the insured and the other person or entity.

Loss Payee – The party to whom money or insurance proceeds is to be paid in the event of loss, such as the lien holder on an automobile or the Mortgagee on real property.

Named Insured – Any person or entity (in the case of an entity, it may include a member of that entity's affiliated family of entities), specifically designated by name as insured(s) in a policy, as distinguished from the Additional Insured, additional loss payees, and others who, though unnamed, fall within the policy definition of an "insured."

Notice of Cancellation/Non-Renewal Clauses – Modifies an insurance policy to provide notice of cancellation beyond that stipulated in the policy. The endorsement typically stipulates an additional number of days' notice the insurer must provide of its intent to cancel the policy, additional parties that are to receive notice of cancellation, or both. Additional insureds, for example, sometimes request a notice of cancellation endorsement guaranteeing them a right to notice of cancellation. Insurers are increasingly unwilling to issue this endorsement to Additional Insureds and loss payees that are not covered by a lender or mortgagee loss payable provision.

Occurrence – In a commercial general liability policy coverage form, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Commercial general liability (CGL) policies insure liability for bodily injury or property damage that is caused by an occurrence.

Occurrence Policy – A liability policy covering claims that arise out of damage or injury that took place during the policy period, regardless of when claims are made. Most commercial general liability (CGL) insurance is written on an occurrence form. Contrast with Claims-made policy.

Personal and Advertising Injury – as defined in standard ISO CGL form, CG 00 01 04 13, injury, including consequential bodily injury, arising out of one or more of certain listed offenses.

Premises-Operations – One of the categories of hazards ordinarily insured by a general liability policy. Composed of those exposures to loss that fall outside the defined "products-completed operations hazard," it includes liability for injury or damage arising out of the insured's premises or out of the insured's business operations while such operations are in progress.

Product Liability – The liability for bodily injury or property damage incurred by a merchant or manufacturer as a consequence of some defect in the product sold or manufactured.

Products-Completed Operations – One of the hazards ordinarily insured by a general liability policy. It encompasses liability arising out of the insured's products or business operations conducted away from the insured's premises once those operations have been completed or abandoned. See definition in ISO form CG 00 01 04 13.

Professional Liability – Coverage designed to protect traditional professionals (e.g., physicians) and quasi-professionals (e.g., real estate brokers) against liability incurred as a result of errors and omissions in performing professional services.

Retention – (1) Assumption of risk of loss by means of noninsurance, self-insurance, or deductibles. Retention can be intentional or, when exposures are not identified, unintentional. (2) In reinsurance, the net amount of risk the ceding company keeps for its own account. *See* "Self-Insured Retention."

Retroactive Date –A provision found in many (although not all) claims-made policies that eliminates coverage for claims produced by wrongful acts that took place prior to a specified date, even if the claim is first made during the policy period.

Scheduled Limits – Separate property insurance limits applicable to each type of covered property interest (building, personal property, business interruption, etc.) at each covered location. This is in contrast to Blanket Insurance limits that apply over more than one covered property interest or more than one location or both.

Self-Insurance – A system whereby an insured entity sets aside a certain amount to provide for any losses that occur – losses that could ordinarily be covered under an insurance program. The funds that would normally be used for premium payments are added to this special fund for payment of losses incurred. Self-insurance is what results from a formal decision to retain risk rather than insure it and is distinguished from noninsurance or retention of risks through deductibles, by a formalized plan or system to pay losses as they occur.

Self-Insured Retention (SIR) – A dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss. Thus, under a policy written with a SIR provision, the insured (rather than the insurer) would pay defense and/or indemnity costs with respect to a claim until the SIR limit was reached. After that point, the insurer would make any additional payments for defense and indemnity that were covered by the policy. In contrast, under a policy written with a deductible provision, the insurer would pay the defense and indemnity costs associated with a claim on the insured's behalf and then seek reimbursement of the deductible payment from the insured.

Special Form (Special Causes of Loss Form) – Formerly known as “All Risks Form” or “All Risk Coverage”, property insurance covering losses from all causes not specifically excluded. See ISO form CP 10 30 10 12.

Sprinkler Leakage Coverage – Coverage for property damage caused by the accidental discharge or leakage of water or other substances from an automatic sprinkler systems. This coverage is included in most property insurance policy forms.

Subrogation – The right of an insurer, after payment of a loss, to exercise the rights of the insured to recover the amount of the loss from one legally liable for it.

Umbrella Liability Policy – A liability insurance policy that provides high limits of liability coverage to protect an insured against a catastrophic liability loss. This policy grants liability coverage that stacks on top of the primary liability coverage provided by the insured's homeowners, personal auto, watercraft, and any other scheduled underlying liability policies.

Waiting Period Deductible – A deductible provision sometimes used in Business Income and other time element policies, in lieu of a dollar amount deductible, that establishes that the insurer is not responsible for loss suffered during a specified period of time (such as 72 hours) immediately following a direct damage loss.

Waiver of Subrogation – Either (i) a waiver of claims by the Named Insured giving up any right of recovery against another party that has the effect of waiving the insurer’s rights of subrogation, or (ii) if the policy does not permit the Named Insured to waive the insurer’s rights of subrogation, an express waiver of subrogation by the insurer, generally in an endorsement.