Thursday, October 24, 2019
8:00 AM – 9:15 AM

Peer to Peer 4

Before a Claim Happens: Designing Leases and Construction Contracts to Properly Allocate Risk

Presented to

2019 U.S. Shopping Center Law Conference
Marriott Marquis San Diego Marina
San Diego, CA
October 23-25, 2019

by:

Bryant Eaton
Senior Vice President
Alliant Insurance Services, Inc.
1301 Dove Street, Suite 200
Newport Beach, CA 92660
beaton@alliant.com

Jo-Ann M. Marzullo, Esq.
Regnante Sterio LLP
401 Edgewater Place
Suite 630
Wakefield, MA 01880
jmarzullo@regnante.com

Before a Claim Happens: Designing Leases and Construction Contracts to Properly Allocate Risk

Introduction

Reusing a tried and true insurance provision can create unintended problems, unlike most provisions in leases and construction contracts without considering whether that provision is correct or appropriate at the time of negotiation or properly allocates the risk. 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to be confronted with insurance requirements that may have been correct when the lease was executed but that are now outdated. "Comprehensive General Liability" insurance became "Commercial General Liability" insurance more than 30 years ago.

Although types of losses may differ and their contractual underpinnings may vary, insurance company adjusters generally ask three questions to determine whether insurance coverage is available. These key questions are:

- Is the entity seeking insurance coverage, or from whom coverage is sought, listed on the insurance policy?
- Is the location at which the loss or damage occurred listed in the insurance policy?
- Is the person or entity against whom the claim is made contractually responsible for the location or claim?

Avoid "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 term 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.

Avoid "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. Avoid "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."

I. The Menu of Insurance Options. While "forms" often include standard insurance requirements, actual risk is determined by the type of agreement and the nature of the operations and activities to be performed under the agreement.

A. Preliminary terms:

(1) Coverage Limit**:** The location and type of risk, and the cost of coverage in current dollars, should each be considered in determining required coverage limits. As an example of a time-based calculation, $1,000,000 in 1990 equals $2,000,000 today, so longer term agreements will typically include a right to adjust coverage requirements over time. Insurance advisors can assist in developing a limit matrix recommending different limits for different sized risks and/or different types of operations.

(2) Accessing Broader Coverage if afforded in the policy: Parties may wish to consider language similar to the following, although parties with high limits or providing self-insurance will typically resist such inroads: "If the Lessee maintains broader coverage and/or higher limits than the minimum shown above, the Lessor requires and shall be

entitled to the broader coverage and/or higher limits maintained. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the Lessor."

(3) Deductible vs. Self-Insured Retention**:** While both a deductible and a self-insured retention represent risk to be paid for and retained by the Insured, the responsibility of the insurance company varies with each.

(a) With a deductible, the insurer is responsible for the claim regardless of whether the deductible is collected from the insured or not.

(b) In contrast, the insurer is not responsible for payment until the insured satisfies the self-insured retention. Because of this, a landlord may want to satisfy a self-insured retention on behalf of a financially challenged tenant as a means of accessing otherwise unavailable insurance.

(4) Per location aggregate limit**:**

(a) A tenant or landlord operating at multiple locations will require a per location aggregate limit of insurance. The per location aggregate limit prevents the insured's limit of insurance from being diluted by the number of locations it operates.

(b) The requirement of a per location aggregate limit also applies to contractors and others providing services that operate at multiple locations. The aggregate limit should apply on a per project basis and the policy limits should not be spread among all locations; were the per location aggregate limit not in effect, a large loss and claim at one location could exhaust coverage otherwise available at the subject property location.

(5) Whose insurance is primary? Each party will want the other party's insurance to be the first to cover any claim, with the objective of having one's coverage applicable only if the other party's insurance is exhausted. An endorsement to assure that the standard Business Auto policy is primary is not generally required, as primary insurance language is written into the standard policy form. Such an endorsement is recommended for commercial general liability insurance policies, especially for high risk operations or activities. Lease agreements, services contracts and other agreements will frequently clarify which party's insurance is primary; such primacy may vary based on, for example, whether the loss occurs in common areas or in a tenant's premises.

B. A Menu of Policy Options:

(1) Commercial General Liability - To insure the covered risks of bodily injury (including death) and damage to the property of a third party. "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.

(2) Umbrella insurance– Provides excess liability coverage above the limits of the insured's underlying coverages for, by way of example, general liability, automobile and employer's liability.

(3) Non-Owned Auto Insurance**:** The requirement of non-owned auto insurance is often hotly debated, although insurance advisors frequently note that it is inexpensive to purchase. Non-owned auto insurance affords a source of funds for loss and damage caused when, for example, a tenant employee or principal causes an accident when using a personal vehicle in the common areas of a shopping center.

(4) Commercial Automobile Liability –Owned, Hired and Non-Owned: Provides bodily injury and property damage coverage associated with an automobile accident or other vehicle damage.

(5) Property Insurance - To insure covered damage to owned property or leased property, and still at times referred to as "casualty insurance", although this term is ambiguous and can be confusing since it is often applied broadly to describe liability 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."

(6) Builder's Risk Insurance – Similar to Property coverage but used during the course of construction or renovation.

(7) Business Income Insurance. This form of insurance provides a source of funds to keep a business alive during the period of restoration after a casualty, and provides the tenant with the ability to continue paying rent to the landlord.

(8) Liquor liability insurance coverage. Most states require that establishments that serve alcoholic beverages carry liquor liability insurance. This requirement, whether or not the beverages are served in a jurisdiction that requires such insurance, should be included in any lease or license as a condition of the service of alcoholic beverages. The service provider itself has a material interest in carrying such insurance as a source of funds for liability claims arising from alcoholic beverage service. If the tenant serves alcoholic beverages, it has an independent interest in maintaining appropriate insurance. Claims arising from alcoholic beverage service can arise from incidents (such as a car accident) arising far from the location of service. The parties should note that liquor liability insurance does not typically provide coverage for beverages that are served illegally – for example, to a minor. A prudent landlord will require, and a prudent tenant or user will maintain liquor liability insurance coverage when a business sells, distributes or manufacturers liquor. A lease will also prohibit the service, sale and distribution of alcoholic beverages in contravention of applicable legal requirements.

(9) Worker's compensation insurance**:** Worker's compensation insurance is required by statute in most jurisdictions, but such requirements may not apply to small businesses. The insurance provides compensation for medical expenses and lost wages due to an employee's work related injury. Without worker's compensation insurance, any bodily injury that an employee suffers in the common area may end up resulting in a claim against the landlord's insurance policy. A commercial general liability insurance policy will typically contain an exclusion for claims covered by worker's compensation insurance.

(10) Employer's liability insurance: A second typical commercial general liability insurance exclusion is for claims that would be covered by employer's liability insurance; such insurance provides coverage for liability arising out of an employee's work-related injury that is not covered by worker's compensation insurance – for example, for litigation and third party claims.

(11) Pollution. Although not frequently considered in the retail context, operations that may pose an environmental risk should have pollution/environmental liability insurance. For example, a business that sells chemicals, paints and solvents, a gas station, and big box and hardware stores will typically carry merchandise that carries pollution risks. In addition, a location's heavy sanitation requirements increase environmental risk, as does a requirement to use and dispose of environmentally sensitive materials, including medical materials and medical waste. In addition to requiring pollution insurance, a lease agreement will often also include specific protocols to manage risk. Maintenance of coverage should be required for at least two years after termination of the lease (and possibly more) if written as a claims-made policy.

(12) Specialty insurance in general. The construction, renovation and operation of a location should all be considered in determining requirements for specialty insurance. Specialty insurance would generally be required, and property and liability policies would generally exclude coverage for, jewelry, art work, special events and entertainment, certain construction activities such as the use of cranes. While the requirement for specialty insurance is often an afterthought, the risks and costs that would otherwise be without coverage can be substantial.

II. A Menu of Insurance Requirements. While many forms include standard insurance requirements, actual risk is determined, among other things, by the type use and activity. Appropriate insurance requirements can best be considered when understanding the certain options. One option to including insurance requirements in the document itself is to include the requirements in a separate exhibit. Some examples of regularly employed and currently applicable requirements follow:

Lease Agreements: Each of the following merely provide examples, and each should be tailored to the specific actual use and any needs for specialty insurance, liquor liability insurance, etc. 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.

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

(1) A standard commercial lease for a lower risk tenant such as an apparel store may require that tenant maintain the following insurance:

(a) Workers' Compensation/Employer's Liability:

- Coverage A: (Worker's comp) Statutory Benefits
- Coverage B: (Employer's liability) $1,000,000 each accident
  $1,000,000 policy limit
  $1,000,000 each employee

(b) Commercial Automobile Liability – Owned, Hired and Non-Owned:
$1,000,000 combined limit

(c) Commercial General Liability:

- Each Occurrence: $1,000,000
- Personal & Advertising Injury: $1,000,000
- Products & Completed Operations: $2,000,000
- General Aggregate: $2,000,000

(d) Umbrella:

- Each Occurrence: $1,000,000
- Personal & Advertising Injury: $1,000,000
- Products & Completed Operations: $1,000,000
- Aggregate: $1,000,000

(e) Property Insurance:

- Special form in an amount equal to full replacement of t personal property, contents, inventory, improvements & betterments per contract, and 12 months Waiver of Subrogation included for losses payable under such property policy.

(f) Business Interruption Insurance.

- 6 months extended period of indemnity.

(g) Builder's Risk Insurance:

- With minimum limits in the amount that will cover full construction costs on a completed value basis.

(2) Standard Commercial Lease Agreement (Mid Risk Occupancy, e.g. restaurant/food service, warehouse, light industrial, etc.):

(a) An advisor would recommend, at a minimum, increasing umbrella liability limits to $5,000,000.00.

(3) Standard Commercial Lease Agreement (Higher Risk Occupancy, e.g. department store, supermarket, heavy industrial, etc.):

(a) An advisor would recommend, at a minimum, increasing umbrella liability limits to $5,000,000.00.

(4) Commercial Lease Agreement with Liquor Exposure:

(a) Add Liquor Liability

(b) No exclusions or limitations for Assault & Battery

(5) Commercial Lease Agreement with Liquor Exposure (Big Box):

(a) Add Liquor Liability

(b) No exclusions or limitations for Assault & Battery

(6) Commercial Lease Agreement with Pollution Exposure:

(a) Add Pollution Legal Liability Insurance

(b) Pre-Existing and New Conditions: $2,000,000 each occurrence

(c) Pre-Existing and New Conditions: $4,000,000 aggregate

(7) Ground Lease Agreement:

(a) Property coverage should be maintained for the Building structure in addition to the tenant's personal property, contents, inventory, improvements & betterments. Flood, if the property is located in a Special Hazard Flood Zone as defined by FEMA. Earthquake, if the property is located in an area with high seismic activity.

(b) During construction, Builder's Risk, with minimum limits in the amount that will cover full construction costs on a completed value basis. Flood, if the property is located in a Special Hazard Flood Zone as defined by FEMA. Earthquake, if the

property is located in an area with high seismic activity. Coverage should be included for business interruption/delay in opening.

(8) Additional Insureds. 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.

Landlord should not ask to be a "Named Insured." Landlord cannot be a "Named Insured" because that category is restricted to Tenant and its family of affiliates that maintain the policy. 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 – Landlord would not want to be deprived of coverage if 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 Tenant's CGL policies – just as it requires Tenant to indemnify those parties for claims arising from accidents on the leased premises.

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, Landlord or any 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 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 – 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.

Tenant should not rely on the Landlord's CGL policy to provide 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 Landlord names Tenant as an Additional Insured) is not as favorable to the Additional Insured as the endorsement that protects Landlords – it will not protect Tenant against accidents that are not caused in whole or in part by Landlord. If the Tenant or another party has caused the accident, Tenant may not be covered. Tenant must maintain its own coverage to get this protection.

B. Contractor/Vendor Agreements. Adopting the theory employed above with respect to lease agreements that one set of requirements does not actually fit all circumstances, following are sample insurance requirements for standard contractors and vendors:

(1) Standard Contractors/Vendors (Low Risk Exposure) (e.g. landscaping, food vendors, snow removal, telephone equipment, appliance repair, grease trap cleaner, etc.)

(a) Workers' Compensation

- Coverage A: Statutory Benefits
- Coverage B: $1,000,000 each accident
  $1,000,000 policy limit
  $1,000,000 each employee

(b) Commercial Automobile Liability

- Owned, Hired and Non-Owned: $1,000,000 combined limit

(c) Commercial General Liability -.

- Each Occurrence: $1,000,000
- Personal & Advertising Injury: $1,000,000
- Products & Completed Operations: $2,000,000
- General Aggregate: $2,000,000

(d) Umbrella

- Each Occurrence: $1,000,000
- Personal & Advertising Injury: $1,000,000
- Products & Completed Operations: $1,000,000
- Aggregate: $1,000,000

(2) Standard Contractors/Vendors (Mid Risk Exposure) (e.g. window replacement (2 story or less), window washer (2 story or less), interior painting, surveying, janitorial/maintenance, signage (2 story or less), moving companies, etc.)

(a) Increase Umbrella limits to $3,000,000

(3) Standard Contractors/Vendors (High Risk Exposure) (e.g. carpentry, roofers, window replacement (over 2 stories), window washers (over 2 stories, plumbing, signage (2 or more stories), awning repair/replacement, masonry/sandblasting, asphalt repair/resurface, etc.)

(a) Increase Umbrella limits to $5,000,000

(4) Contractors with Pollution Exposure (e.g. sewer work, recycling services, extermination, environmental work (asbestos, lead paint), etc.)

(a) Add Pollution Legal Liability Insurance

- Pre-Existing and New Conditions: $2,000,000 each occurrence
- Pre-Existing and New Conditions: $4,000,000 aggregate

(5) Contractors with Professional Liability/Errors & Omissions Exposure (e.g. architectural, surveying, professional consultants, property management, etc.)

(a) Add Professional Liability/Errors & Omissions

- Each Occurrence: $2,000,000
- Aggregate: $2,000,000

(6) Special note re Property Management Contracts: Management companies may have their own master program and may also want to rely on the property owner's insurance. As with leases, special care should be taken to assure that the allocation of risk and liability for loss in the management agreement is consistent with its insurance requirements. Our insurance advisors experience claims dilemmas when boilerplate agreements allocate responsibility to one party when the insurance provisions require that the other party provide insurance.

III. Allocation of Risk.

A. Leases, management agreements, vendor contracts, construction agreements, joint venture agreements and agreements for professional services all allocate risks and typically require insurance as a source of funds when risk leads to loss. The following claims examples are illustrative.

- The Property Management Contract. Property management agreements will require the property manager to provide location liability insurance to their owner clients, and will typically provide location insurance to the owner through a master policy administered by

the management company. One management contract required the property manager to provide this coverage, and the property manager, as required, added Masterful Landlord to the property manager's master policy. The management agreement, however, identified Masterful Landlord as the responsible party for insuring the location. As a result, the insurance adjuster denied the claim on the basis that the property manager did not have insurable interest as Masterful Landlord was contractually responsible for insuring the location.

- Non-Owned Auto Insurance Coverage**.** A retail tenant sent its employee to the bank to make a deposit in time to make its next rent payment. When backing out of its parking space after making the deposit, the employee was also texting and hit a pedestrian. Tenant's lease did not require that it procure non-owned auto coverage; the employee's personal auto policy only provided minimum state required limits of coverage. As a result, the shopping center's general liability insurance policy had to respond for the additional damages.

- Waiver of Subrogation. The lease agreement included the following language: "Landlord and Tenant hereby mutually waive any claim against the other for any loss or damage to any of their property located on or about the Premises or the Shopping Center that is caused by or results from perils covered by property insurance carried by the respective parties, to the extent of the proceeds of such insurance actually received with respect to such loss or damage, whether or not due to the negligence of the other party." A fire occurred in the tenant's premises due to faulty wiring, resulting in substantial damage to tenant's inventory and personal property. The tenant self-insured its business personal property. Since the waiver of subrogation was limited to each party's insurer, and the tenant had no insurer, the tenant sued the landlord for damage to its personal property; under this circumstance the mutual waiver of subrogation did not shield the landlord from tenant's claim.

B. Every contract, lease and agreement presents different risks, and the character and severity of risks to property and persons requires analysis to underpin appropriate insurance requirements.

C. Each agreement should clearly identify the scope of work to performed, and which party is responsible for its performance. The scope of work should identify required outcomes and the agreement should identify consequences if those outcomes (or requirements for their performance) are not accomplished.

D. Both lawyers and their insurance advisors are trained to step back and ask key questions: What could go wrong? What are the critical steps in completing the client's objectives? Is each party qualified and are its contractor's qualified? How is qualification defined? Such questions are key to identifying risks and the management of risks and liabilities by appropriate insurance requirements.

E. A common assumption is that a contract with a low dollar value, a lease for small space, or a small scope of work carries with it a small risk of loss. Smaller contracts are not immune from larger risks.

F. Putting construction contracts aside for the moment, we will analyze the typical contractual and lease risk allocation provisions before addressing appropriate insurance coverage for typical shopping center agreements.

IV. Contractual Risk Allocation, a Summary

A. Indemnification and Hold Harmless Provisions. Insurance flows from indemnification language, and the indemnification language in a lease and its insurance requirements should be viewed together to assure that they establish a consistent risk allocation regime. Inconsistency is the enemy of an effective claims process.

(1) One definition of insurance in the Merriam Webster Dictionary is that insurance is "coverage by contract whereby one party undertakes to indemnify or guarantee another

against loss by a specified contingency or peril." Under the theory that an insurance policy is a contract of indemnity, the insurance policy provides a source of funds under which the indemnitor compensates the indemnitee. Insurance is simply the "collateral" for the indemnification and ensures that there are funds available to back up most of the indemnity provisions.

(2) An effective indemnification provision will contain several key elements, the extent of which will reflect the bargaining power and relative risks to the parties:

(a) an obligation to defend the other party (including employees, officers, agents, etc.); the indemnitee will want this obligation to include the requirement that it should be interpreted as broadly as possible.

(b) depending on state law, an express agreement that the indemnification agreement includes an indemnity against the other party's own negligence. The indemnity against negligence will cause the insurance of the indemnitor to provide coverage (as with the waiver of subrogation) without reference to the fault of the indemnitee; the indemnification will, however, also render the indemnitor responsible for uninsured losses. "Hold Harmless" language allows the indemnitee to tender the claim of the damaged third party to the indemnitor.

(c) An insurance advisor will look to certain key language in a contractual indemnification provision, reflected in bold in the following example:

To the fullest extent permitted by law, Contractor shall **hold harmless, defend** at its own expense, **and indemnify Entity** its officers, employees, agents, and volunteers, **against any and all** liability, **claims**, losses, damages, or expenses, including reasonable attorney's fees, **arising from all acts or omissions of contractor** or its officers, **agents**, or employees in rendering services under this contract; [**including loss caused by Entity's negligence but**] **excluding**, however, such liability, claims, losses, damages, or expenses **arising from Entity's sole [gross] negligence or willful acts.**

B. Additional Insured Status; the Certificate of Insurance is Not Enough**.** The contract should specifically address who can be an additional insured, and would typically include the entity, its officers, employees and agents. Additional insured status gives the claimant direct rights under the other party's (typically the tenant's or vendor's) insurance. As a result, additional insured status greatly increases the claimant's chance of recovery, especially recovery of legal fees for defense.

(1) Although 2013 endorsements promulgated by the Insurance Services Office (ISO) limited protections for third party additional insured, including the following, insurance advisors note that many insureds have not updated their agreements to ensure that insurance coverage will respond as expected and, as result, open issues will remain in a claim that would otherwise be addressed by updated endorsements.

(a) 2013 endorsements may only provide additional insured status for premises/ongoing operations liability and not for completed operations.

(b) 2013 endorsements limit coverage to what is specifically required in a contract. If there is a specific limit requirement in the contract, the additional insured endorsement will not provide coverage beyond this limit.

(c) Entities/parties that are not specifically identified in a contract to be an additional insured will not be named as an additional insured; specificity is required.

(d) If a contract fails to identify "bodily injury" or "property damage" or "completed operations" as a requirement for coverage, coverage may not apply to these (or

other) items. Attention is required to assure that all specific coverages/perils for which additional insured status is desired are clearly identified.

(2) Additional Insured Status Can be obtained under Commercial General Liability, Commercial Automobile Liability, Contractor's Pollution Liability and Umbrella / Excess Liability, but not under Workers' Compensation, Employer's Liability or Professional Liability insurance coverage.

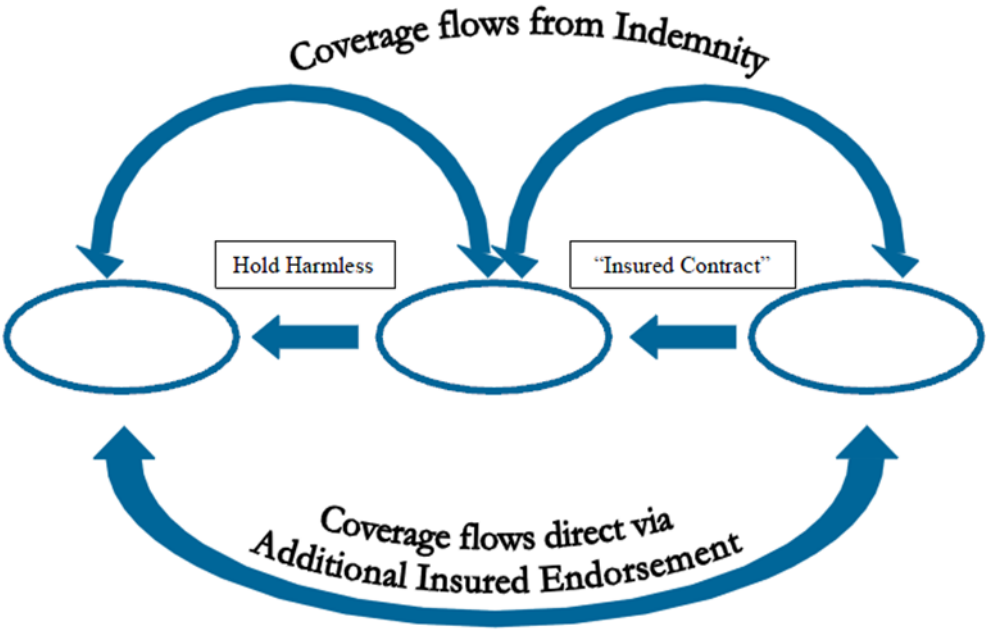
(a) An additional insured is not added to a policy when a certificate specifies that such entity is an additional insured.

(b) The Acord Certificate of Liability Insurance contains the following relevant language in bold type: "**If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed."**

(c) The certificate of insurance must include a copy of the additional insured endorsement attached to the policy(ies) to verify that the proposed additional insured has been added to the policy as an additional insured for ongoing and completed operations, as applicable.

C. <u>The Relationship between Coverage, Additional Insured Status, and the Contractual Indemnity</u>:

(1) As noted, insurance coverage follows the contractual indemnity, and additional insured status is granted under an additional insured endorsement, as illustrated by the following graphic:



D. Waiver of Subrogation: "Subrogation", the equitable assumption by a third party (typically an insurance company) of another party's legal right to collect a debt, occurs when an insurer pays a claim; upon this payment, any rights the insured may have to recover all or part of the payment from the party (or its insurer) responsible for the loss are transferred to the insurer. The right of subrogation is typically waived in a lease or other agreement to minimize litigation and cross-claims between insurers.

(1) The waiver of subrogation is typically a mutual waiver, but at times is a one-way waiver, and serves to waive the right of one party's insurance company to seek reimbursement from the other party's insurance company. The Acord Certificate of Liability Insurance specifically states "If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)."

(2) The waiver of subrogation can vary. The waiver of subrogation can be of all claims (including the deductible and excess amounts). The waiver of subrogation can be self-operative. At times the waiver of subrogation can require specific insurance clauses.

(3) Most leases limit waivers of subrogation to losses covered by property insurance, but waivers of subrogation may also include other insured losses, including those covered by commercial general liability policies and automobile policies.

(4) The right to waive subrogation rests with the insured and requires action on the insured's part by way of written consent prior to a loss – "Tenant shall waive, and shall cause its insurers to waive, any rights of subrogation as respects claims covered, or which should have been covered, by valid and collectible insurance…"

(5) In instances where one party to an agreement can suffer a loss that is disproportionate to the potential loss of the other party, the party with the most at stake may insist on a one-way waiver under which it does not itself waive the right to subrogate.

(6) The Acord Certificate of Liability Insurance specifically states "If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)."

E. Exculpation: An exculpation clause is a contractual provision under which the "waiving party" agrees to release the "exculpated party" from liability for loss arising from the exculpated party's fault and/or for which the exculpated party would normally be financially responsible is typically referred to as an exculpatory clause. The waiving party is, under the exculpatory clause, relinquishing its right to seek recovery for loss from the exculpated party.

V. The Houdini Dilemma and the Certificate of Insurance.

A. The Anatomy of the Certificate: Parties often rely on certificates of insurance to confirm that required insurance is in place. Requirements to provide copies of a declaration page (even redacted) can be received with rejection and disbelief. An understanding of the limitations and anatomy of the Certificate of Insurance is therefore critical. The following discussion tracks the sample (blank) certificate of insurance on the following page:

Item 1 – This block identifies the Agent or Broker that wrote the insurance policies for the insured, and is required information for reporting of a claim.

Item 2 – The sample certificate confirms the provisions of the California Insurance Code, §384 and states that the policy, not the certificate, governs coverage. Other states have similar provisions. As a result, this language provides a warning that the Certificate cannot be relied upon.

Item 3 – Block 3 identifies the insurance underwriter. The insurer letter appears again near the left margin at 3a to show which insurer provides which coverage.

Item 4 – The name of the insured, to be stated here, contains the name of the person or entity for whom the insurance policy is written, and the name entered in this field must match the contractor, landlord, tenant, or other party named in the applicable lease or other agreement that is required to provide insurance.

Item 5 – Another warning; the notice again states that the policy supersedes the information in the certificate.

Item 6 – These sections identify the applicable insurance coverage and will identify insurance procured only by the named insurance brokers. If the insured uses more than one insurance broker, this certificate would need to be supplemented by other certificates from such other brokers. Claims made forms are not typically acceptable, and liability insurance should generally be written on an occurrence basis. As previously discussed the general aggregate limit should apply “per project” or “per location” if there are more than one project or one location covered by the policy.

Item 7 – These two columns show inception and expiration dates for policies identified; updated certificates should be provided by the contracted entity prior to any expiration date.

Item 8 – This column identifies limits per occurrence and aggregate for each type of coverage Losses on other jobs or locations may reduce General Liability coverage, unless the aggregate limit applies “per project” or “per location”.

Item 9 – This section will usually be used to restrict coverage to a specific job or lease. Special descriptions and requirements are included such as site codes, locations codes, additional insureds, waiver of subrogation, notice of cancellation, etc. Restrictions that would omit required coverage may be included.

Item 10 – The Certificate Holder box reflects the name and mailing address of the certificate holder. No rights, privileges or insurance coverages are extended to a certificate holder, unless specifically the certificate specifically states “Certificate Holder is an additional insured”.

Item 11 – The cancellation provision outlines the terms for providing notice about policy cancellation. Agreements typically require a minimum of 30 days’ written notice of a policy cancellation, except the typical notice period is 10 days if cancellation is for non-payment of premium.

SAMPLE

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

PRODUCER

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED

INSURERS AFFORDING COVERAGE	NAIC #
INSURER A:	
INSURER B:	
INSURER C:	
INSURER D:	
INSURER E:	

COVERAGES

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A		GENERAL LIABILITY COMMERICAL GENERAL LIABILITY CLAIMS MADE OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY PROJECT LOC				EACH OCCURENCE	$
						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
						MED EXP (Any one person)	$
						PERSONAL & ADV INJURY	$
						GENERAL AGGREGATE	$
						PRODUCTS - COMP/OP AGG	$
							$
		AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS				COMBINED SINGLE LIMIT (Each Occurrence)	$
						BODILY INJURY (Per person)	$
						BODILY INJURY (Per accident)	$
						PROPERTY DAMAGE (Per accident)	$
		GARAGE LIABILITY ANY AUTO				AUTO ONLY - EA ACCIDENT	$
						OTHER THAN AUTO ONLY: EA ACC	$
						AGG	$
		EXCESS/UMBRELLA LIABILITY OCCUR CLAIMS MADE DEDUCTIBLE RETENTION $				EACH OCCURRENCE	$
						AGGREGATE	$
							$
							$
							$
A		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below				WC STATU-TORY LIMITS OTH-ER	
						E.L. EACH ACCIDENT	$
						E.L. DISEASE - EA EMPLOYEE	$
						E.L. DISEASE - POLICY LIMIT	$
		OTHER					

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

CERTIFICATE HOLDER

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL ENDEAVOR TO MAIL DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

ACORD 25 (2001/08)

1 2 3 4 5 6 7 8 9 10 11 12 3a