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Current Issues in Property and Liability Insurance: Mind the Gaps

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Current Issues in Property and Liability Insurance: Mind the Gaps

Property and liability insurance, the two basic types of coverage for real estate owners and tenants, has always had gaps – areas of property damage or liability that were not covered by the customarily required policies. During the last decade, however, those gaps have widened. In these presentation materials, we will discuss the common property and liability coverages that are available, the gaps in this coverage, and how to close these gaps.[1]

I. Property Insurance.

If there's a tornado, fire, storm, flood, or other loss event, the landlord and the tenant need to be able to recover for their property damage and business losses quickly so that they can re-open without losing tenants or customers. This coverage is provided by property insurance.[2]

A. The Property That Is Insured ("Covered Property").

The types of property that are covered in base form policies (ISO CP 00 10 10) include (1) the real property and items related to the real property, 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) "Business Personal Property." 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 is obligated to insure this leased property). For tenants, Business Personal Property will also include the tenant's use interest in fixtures, alterations, installations, and additions made as part of a building or structure that the tenant occupies but does not own and those that the tenant acquires or makes at its expense but cannot legally remove.

The exclusions to Covered Property are numerous and include foundations below the lowest basement floor or the surface of the ground if there is no basement, trees, shrubs, and lawns (other than as part of a vegetated roof), bulkheads, pilings, piers, wharves, docks, 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 (with exclusions for certain inventory items other than autos and detached trailers), fences, and antennas and satellite dishes.

Business income losses and loss of rental value are not covered unless a separate endorsement is added.

B. The Causes of Loss.

"Causes of Loss" are the types of events causing the damage or loss that will trigger the insurer's obligation to pay under the property policy; in other words, damage to or loss of Covered Property will be reimbursable under the policy only if the damage or loss was caused by a covered "Cause of Loss" described in the policy. There are three generally types of "Causes of Loss" policies:

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

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[1] These materials will be based on published, standard insurance forms. Who develops form policies and coverages? The Insurance Services Office, Inc. ("ISO") is the insurance industry organization that publishes most forms that are considered "standard" forms. These forms are identified by their number and edition date. For example, the most common Commercial General Liability Form is an ISO form that starts with the designation, CG 00 01, which indicates that it provides occurrence-based commercial general (in other words, CG) liability coverage. Two numbers generally follow this form number – they indicate the edition's date. For example, the current commonly used CGL coverage form is ISO form CG 00 01 04 13 – the last two numbers show that this form was last revised by ISO in April 2013. Of course, policies may be written on other forms, insurance companies may customize the ISO forms to suit their own objectives, and "manuscript," or specially worded, policies can also be issued, but the coverage and exclusion principles and language in manuscript policies are often based on the most recent ISO forms. For purposes of this presentation, we'll consider the ISO forms since they tend to establish the industry standards.

[2] Leases often lump such events under the term "casualty." However, the term "casualty" is misleading. Damage to a building can be caused by a "casualty," but a "casualty" can also be an event giving rise to a claim under a commercial general liability or "CGL" policy. Adding to the confusion, under standard insurance industry usage, a "casualty" policy generally refers to CGL insurance, not property damage insurance.

> 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).

> Special Causes of Loss (or Special Form) adds some listed perils and also covers "direct physical loss" (this policy was in the distant past called an "All Risk" policy) except those perils that are specifically excluded (generally ISO form CP 10 30).

A Special Causes of Loss policy is best. This is the type of property policy that landlords and tenants should maintain for their own property and the type of policy that each of them should require the other to maintain. Requiring this Special Causes of Loss type of policy – the broadest type – is particularly important for a landlord that requires (permits) its tenant to maintain the property insurance on leased improvements owned by the landlord.

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. These forms also exclude loss or damage caused by various events, such boiler explosions, and defective design, construction, materials, or maintenance.

C. What Amount Is Insured?

The limits of insurance set out on the policy's declarations page are the most that an insurer will pay in any single occurrence. If there is a loss, the insurer's liability will be limited to 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?

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

b. The Actual Cash Value: The Replacement Cost minus physical depreciation – actual physical depreciation. Each component of the improvement may be subject to its own depreciation schedule.

Demolition and disposition costs (generally estimated at $20 per square foot of improvements unless in a congested area such as a CBD) should be included in the Replacement Cost. Various components may also have sublimits.

Most property owners insure their property for its Replacement Cost, most lenders require Replacement Cost coverage, and if the tenant is insuring a building owned by the landlord, the landlord should require that the tenant maintain full Replacement Cost coverage (under a "Special Causes of Loss" policy). However, if the property is not actually repaired or replaced in accordance with the policy terms, the insurer will pay only the Actual Cash Value, and until the property is restored, the insurance company will generally pay only the Actual Cash Value under construction is complete and the Replacement Cost has been determined.

D. Coinsurance, Agreed Values, and Blanket Policies.

Form property policies contain provisions stating that if the party maintaining the insurance underinsures the property by too great a percentage (often 80% or 90%), the insured's recovery will be reduced by a "coinsurance" penalty. This coinsurance penalty can reduce a loss recovery significantly (the reduction is much greater than the value of the uninsured percentage of the damaged property) – and is meant encourage property owners to purchase limits that approximate the actual amount that can be insured. Clearly, property owners want to avoid the application of coinsurance, but how (other than assuring that the insured limits of coverage keep up with the insurable value of the property)?

Most sophisticated property owners avoid a coinsurance penalty by having their policies written with an Agreed Value Endorsement that stipulates an agreed value for the insured property and suspends the operation of the coinsurance clause – but these owners must be sure that a Schedule of Values for the property is agreed to by the insurer and incorporated into the policy. Often this will require periodic appraisals and corresponding adjustments to the property's Agreed Value.

E. Loss of Leasehold Interest.

A tenant can obtain a special Loss of Leasehold Interest endorsement (ISO form CP 00 60 06 95) to protect against the termination of a favorable lease (for example, one in which the rent is substantially below market value or one in which the tenant has prepaid a great deal of rent) by reason of a covered Cause of Loss. Under this endorsement, if the property is damaged by an insured Cause of Loss, then the insurer will pay (a) the "Net Leasehold Interest," defined as the present value of the (I) monthly rental value of the premises minus (II) the actual monthly rent and other amounts payable by the tenant (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 and Betterments that will be lost by reason of the termination of the lease (if these Improvements and Betterments are not damaged, but if due to the extent of damage elsewhere in the building, the landlord terminates the tenant's lease), and (c) the amount of any prepaid rent (amortized by the number of months remaining in the lease).

F. Loss of Business Income and Rents.

Property owners operating their own businesses at the insured real property, as well as tenants operating businesses, need coverage for their business income losses. Landlords also need coverage for their loss of rents (loss of rental value). Both need coverage for the extra expenses they incur by reason of loss event. Of course, not all events that cause a business to suffer or a tenant to stop paying rent will be covered by loss of business income or rental loss insurance – only a Covered Cause of Loss that caused physical damage to real or personal property at the insured location. None of this coverage is provided automatically in a property policy; instead, the property owner or tenant must obtain an endorsement to the property policy providing this coverage.

The ISO endorsement form setting out the coverage for lost Business Income (without Extra Expenses) is ISO form CP 00 32 10 12, and the form describing coverage for lost Business Income (with Extra Expenses) is ISO form CP 00 30 10 12. Lost Business Income is calculated as (i) the Net Income (net profit or loss before taxes) that would have been earned or incurred but for the insured peril and (ii) the "continuing normal operating expenses," including payroll.

Similarly, the ISO endorsement forms define loss of "Rental Value" 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, and (ii) continuing normal operating expenses in connection with the premises. Although loss of rents is a subset of loss of Business Income, but the landlord must select coverage for loss of Rental Value expressly.

Loss of Business Income and loss of Rental Value policies not only contain a maximum insured amount coverage limit, but also limit the time of the loss to the "period of restoration," which is defined as (a) the period during which the tenant'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. The insured can obtain an additional coverage period of up to 90 to 120 days or longer, but it must expressly elect this additional coverage period.

What are Extra Expenses, and why does a landlord or tenant need coverage for them? "Extra Expenses" are the necessary expenses the insured party incurs during its "period of restoration" that it would not have incurred if there had been no loss or damage, including the relocation and other costs of continuing its operations at a temporary location to avoid or minimize business losses.

Like the recovery amount for loss of physical property, the recovery amount for loss of Business Income/Rental Value will be reduced by a coinsurance penalty if the insured underinsures its loss by too great a percentage. The insured can avoid this penalty by electing optional Agreed Value coverage, but this usually requires submission of a business income worksheet calculating the estimated Business Income or Rental Value.

If the landlord insures the leased premises and maintains loss of Rental Value coverage, then in its lease, it should (i) abate the rent and (ii) delete the common provision stating that the tenant's rent will not abate if the loss is caused by the tenant's negligence. It's far better for the landlord to seek recovery of the rent during restoration from its insurer than have to sue the tenant – which is not in possession – for it.

On the other hand, if the tenant insures the leased premises, then the rent during restoration will be covered by the tenant's Loss of Business Income policy as part of the "continuing normal operating expenses"; consequently, tenant's rent should remain payable during a casualty restoration.

G. Covering Gaps: Additional Coverages to Add (and Coverage Limitations to Avoid).

(i) Flood.

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) are not covered by the standard property damage policy. The National Flood Insurance Program (NFIP) is a Federal Emergency Management Agency (FEMA) program that provides flood coverage; however, for commercial buildings an NFIP policy of flood insurance policy (i) contains low limits of $500,000 for the building and $500,000 for its contents, (ii) only Actual Cash Value is covered (Replacement Cost is not covered), and (iii) Business Income/Rental Value loss is not covered. Congress must re-authorize this valuable coverage periodically.

(ii) Terrorism.

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 of 2019 (Pub. L. 116-94, 133 Stat. 2534), which extended the program to December 31, 2027 ("TRIA"). This legislation provides a process for shared public and private compensation for insured losses suffered in an act of terrorism. 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 property and casualty losses exceed $5,000,000.

(iii) Building Ordinance.

A standard Replacement Cost property damage policy covers replacement with like kind and quality (will not cover added costs of complying with some laws and ordinances); for example, it will not cover the cost of (1) tearing down a damaged building when demolition is required by governmental authorities, as is often the case where the building is damaged to the extent of more than 50% of its value (this may be the case when the building is "non-conforming" – meaning it no longer complies with the current zoning code requirements with respect to setbacks, size, height, etc.); (2) tearing down the undamaged portion of the building; or (3) adding features to a damaged building, sometimes including undamaged portions (for example, sprinklers, upgrades to electrical systems due to new code requirements, or new energy use reduction components) when the building was not previously required to contain these features (perhaps because it was grandfathered). A property owner can obtain coverage for these exposures by obtaining Ordinance or Law Coverage or a similar type of endorsement. As always, the damage must be from a loss that is caused by a Covered Cause of Loss – separate coverage must be obtained (if available) for building ordinance coverage if the loss is from a flood or earthquake.

(iv) Increase in Rebuilding Expenses Following Disaster.

If a disaster affects the entire area in which the property is located, then it is likely that materials suppliers and contractors will be scarce and will increase their charges. An endorsement covering "Increase in Rebuilding Expenses Following Disaster (Additional Expense Coverage on Annual Aggregate Basis)," provides coverage for additional expenses up to a specified additional expense percentage when (1) the covered cause of loss results in a declaration of a state of disaster by state or federal officials or occurs in close temporal proximity to a declared disaster, (2) the expense of labor or materials increases as a result of the disaster and the total cost exceeds the applicable limit of expenses, (3) the insured owner repairs or replaces the damaged building, and (4) the insured owner notifies the insurer within 30 days of completion of any work to the insured building that increased the replacement cost by 5% or more.

(v) Protective Safeguard Endorsement.

Many insurers add an endorsement requiring that the insured maintain in place at all times 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, then the insurer may deny coverage unless the insured had previously notified the insurer that the sprinkler system was not working and obtained assurance that the property would be covered during this period.

(vi) Vacancy.

Many forms provide that if a building has been vacant for longer than a certain period – generally 60 days – the insurer will not pay for losses caused by vandalism, water damage, theft, or other types of vacancy-related losses and the recovery on other types of covered losses will be reduced, typically by 15%. This vacancy

requirement will not be satisfied by the mere placement of furniture in the space. Generally, at least 31% an insured building's total square footage must be used by a tenant or by the building owner to conduct customary operations. If an owner knows that a substantial portion of its property will be vacant (for example, before the property has been leased), it should notify its insurer and obtain a vacancy permit.

(vii) Mechanical Breakdown.

Mechanical breakdowns (this might include HVAC systems destroyed by a power surge) are excluded from the Covered Causes of Loss in the ISO form and other typical property damage policies. However, this coverage, formerly known as boiler and machinery coverage, can be obtained through a separate policy or endorsement covering "Equipment Breakdown Cause of Loss."

H. Property Insurance and Damage Lease Issues.

(i) Waiver of Subrogation.

It does little good to allocate the property loss risks in a lease unless the insuring party protects the other party from a claim of subrogation by the insuring party's insurer. This protection can be provided by a waiver in the lease by the insuring party (not the insuring party's insurance company) of its right to make claims against the other party for loss of or damage to the insuring party's property. In a lease in which the landlord is insuring the leased premises, the tenant should require the landlord to waive its claims for damage to or loss of that property to the extent that it is or would have been insured by a "special form" property policy, and it should require the landlord to obtain a waiver of subrogation endorsement by its property insurer, if required (standard ISO policies permit this waiver without an endorsement). If the tenant is insuring the leased property, the landlord should not waive claims for loss of or damage to that property. In all leases, the landlord should also require the tenant to waive its claims for damage to or loss of the tenant's own property and, if required to effect the waiver of subrogation, should require the tenant to obtain a waiver of subrogation endorsement in the landlord's favor in all of its property policies.

(ii) 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 loss of or damage to the owner's property face a number of risks: (1) the tenant may have a high deductible or be self-insured (self- insurance is no insurance, and many tenants are poorly capitalized subsidiaries of larger national companies); (2) certificates of insurance are not reliable proof of coverage, and the landlord will have to review the tenant's policy to determine whether the tenant is carrying the right coverages in the right amount; (3) the tenant may have a blanket policy that is depleted in an area-wide casualty; (4) the landlord will find it much more difficult to negotiate with and enforce its rights against its tenant's insurer; and (5) the landlord may not receive notice of cancellation of the policy (lenders have a standard endorsement that requires that the insurer provide it with notice of cancellation, but this endorsement may not be available for landlords). For these reasons, most experts advise property owners to maintain their own property insurance coverage and price it into the lease (even if the lease is a net lease of a stand-alone building).

If a landlord must permit a tenant to insure the landlord's building, the lease should require the tenant to:

(a) Maintain a conventional policy of "Special Causes of Loss Form" property insurance for the property's full Replacement Cost, as well as flood insurance and other insurance important in the area, covering all buildings and other improvements;

(b) Name the landlord, its property manager, and all mortgagees as additional insureds and loss payees;

(c) Maintain Agreed Value coverage or limits that are high enough to avoid co-insurance;

(d) Maintain a low deductible;

(e) Continue to pay rent after a casualty (no abatement) – tenant's Loss of Business Income insurance will cover its rent during reconstruction; and

(f) Require an endorsement in which the insurer agrees to give landlord notice upon policy cancellation (although this endorsement may not be available or not contain mandatory language).

In addition, upon casualty, the tenant should not have the right to terminate, and any landlord restoration obligation should be conditioned on the tenant providing sufficient proceeds therefor.

II. Liability Insurance.

A. CGL Liability Insurance Basics.

In their leases, landlords should require their tenants to carry "Commercial General Liability Insurance," often abbreviated as “CGL” insurance.[3] The entity that obtains the CGL policy – the tenant in this discussion – is called the "named insured." In a standard ISO form CGL policy, the insurer agrees 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 assumes the duty “to defend the insured against any 'suit' seeking those damages."[4] This policy pays the defense costs for and liability incurred by the insured for injuries or damage suffered by third parties; it does not cover injuries or damages suffered by the named insured.[5] Covered claims can be limited to those asserted during the policy period (claims made policies) or those arising from occurrences during that period (occurrence policies).

In the lease, the landlord must specify the amount of coverage it requires, generally by requiring the tenant to maintain a policy or policies of CGL insurance with limits that are no less than $_____ per occurrence and $_____ in the aggregate. The general aggregate limit should be required to apply separately to the designated location. Because judgments and settlements have increased substantially in the last decade, the landlord should increase its requirements: $1,000,000 of primary coverage is no longer sufficient for any but the smallest retail tenants, and even with increased primary policy limits, required umbrella or excess coverage of $5,000,000 is advisable. Because most CGL policy programs include both primary and umbrella coverage, many tenants ask that the lease permit tenant’s required coverage to be provided by a combination of primary coverage and umbrella or excess coverage. If the lease if for an extended term, such as a ground lease, to prevent underinsurance, the landlord should include a provision for periodic increases in the liability insurance limits, based on a fixed percentage, increases in the Consumer Price Index or some other objective factor. Providing for “market increases” only leaves the matter open for debate.

To avoid gaps between the primary policy and the excess or umbrella policy, landlords should require that the excess policy have the same exception date and that it provide coverage to the additional insured landlord that is no less broad than the coverages required to be provided in the primary policy (just saying that it must “follow form” may not be sufficient or accurate).

B. Additional Liability Coverages.

Because standard CGL policies contain a number of exclusions, including obligations under worker's compensation laws, employer's liability, construction-related liability, and pollution, in its lease, the landlord should also require the tenant to carry some or all of the following types of liability insurance:

(i) Commercial Automobile Liability – Owned, Hired and Non-Owned: Provides bodily injury and property damage coverage for liability arising from an automobile accident or other vehicle damage.

(ii) Non-Owned Auto Insurance: Provides a source of funds for loss and damage occasioned, for example, by an accident caused by a tenant’s employee or principal while using their personal vehicle on the premises or outside the premises, for example, in the common areas of a shopping center.

(iii) Liquor liability insurance coverage: Most states require establishments that serve alcoholic beverages to carry liquor liability insurance. Whether or not the beverages are served in a

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[3] Many lease forms require “Public Liability or “Comprehensive General Liability” coverage, but the name of the policy was changed by ISO to “Commercial General Liability” in 1986.

[4] Only “bodily injury,” “property damage,” and “personal and advertising injury” will be covered. “Personal injury” does not mean physical injury – instead, “bodily injury” means physical injury, sickness, or disease sustained by a person, including death. So in your leases and other contracts, require coverage for “bodily injury.”

[5] Property insurance is generally referred to as “first party” coverage because it pays the named insured for its own losses, whereas liability insurance is “third party” coverage because it covers only liability to third parties.

jurisdiction requiring such insurance, this coverage should be required in any lease or license as a condition of the insured tenant's or licensee's service of alcoholic beverages.

(iv) Workers' compensation insurance: Workers' compensation insurance is required by statute in most jurisdictions, although these requirements may not apply to small businesses. This insurance provides compensation for medical expenses and lost wages due to an employee's work-related injury. If state law permits the underwriter to waive its rights of subrogation, then the landlord should require its tenant or contractor to have its workers' compensation policy endorsed to waive the underwriter's rights of subrogation.

(v) Employer's liability insurance: This type of 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. Again, the landlord should require that the policy include an endorsement in which the insurer waives rights of subrogation as to the landlord.

(vi) Pollution: Although not frequently considered in the retail context, tenants that will engage in operations posing an environmental risk should be required to have pollution/environmental liability insurance. For example, a business that sells chemicals, paints and solvents, a gas station, a laundry, and big box and hardware stores will typically raise pollution risks. In addition, a location's heavy sanitation requirements will increase environmental risk, as will an operational need to use and dispose of environmentally sensitive materials, including medical materials and medical waste. Mold caused by a tenant's operation is a pollutant.

(vii) Construction-Related Insurance: All Leases should either describe the particular construction-related insurance that the tenant and its contractor should maintain if the tenant has construction or other such work performed in the leased premises or should permit the landlord to specify additional required coverage as a condition of its approval when this construction or other work is proposed.

Each of these coverages should have its own required minimum limits, and the landlord should require a specified minimum amount of excess or umbrella coverage above the limits of the insured's specified minimum CGL, automobile, and employer's liability minimum coverage limits.

C. Additional Insured Issues.

Because the landlord will receive benefit from the tenant's CGL policy only if is an "additional insured" under that policy,[6] the landlord should require that it as well as its property manager and their respective parents, owners, managers, members, directors, officers, agents, employees, representatives, agents, and perhaps mortgage lenders be named as additional insureds. The landlord and its specified related parties should require that they be made "additional insureds" by endorsement. Although many tenants have CGL policies that state that if the tenant agrees to name a person or entity as an additional insured in a contract, then that person or entity will automatically be an additional insured under that policy, it will be hard for the landlord to confirm that it and the other required additional insured parties do in fact have additional insured status under the tenant's policy. Simply requiring additional insured status, without further specificity, fails to inform about what operations are included, what kind of liabilities are covered, and may include additional exclusions. Many national tenants are unwilling to provide their full policies to the landlord, and statements in Certificates of Insurance are not binding on the insurer. For this reason, it's easier for the landlord to require that the tenant provide, along with the Certificate of Insurance, an endorsement specifying that the landlord and other required additional insured parties are additional insureds.

Unfortunately, there are coverage gaps for the landlord in most additional insured endorsements. The most recently issued additional insured endorsement (ISO CG 20 11 12 19) provides only limited coverage, particularly since ISO revised this form in December 2019:

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 [the Named Insured] or those acting on [the Named Insured's] behalf** in connection with the ownership,

[6] The landlord cannot be a "named insured" and would not want to be one if it could. The insurer has the right to deny coverage to named insureds if the policy provisions are breached; consequently, the landlord does not want to be in a category that would cause it to have its coverage denied by reason of the tenant's breaches.

maintenance, or use of that part of the premises leased to [the Named Insured] and shown in the Schedule . . .

The important 2019 changes made in this language are as follows: (i) "arising from" was replaced with "caused, in whole or in part, by," and (ii) additional insured coverage is now provided only if the damage or injury is caused "by [the Named Insured] or those acting on [the Named Insured's] behalf."

Even before 2019, however, the additional insured endorsement then current, which was ISO CG 20 11 04 13, provided that if the coverage was required by a written lease, the coverage would be no broader than that which the tenant was required to provide in that lease and that the most that the insurer would pay would be the amount required in the lease or available under the applicable coverage limits. If the lease requires only $1,000,000 of liability coverage but the tenant actually carries $5,000,000 of coverage, then is the landlord an additional insured only as to the $1,000,000 limits? For this reason, landlords should always describe the required limits of liability coverage as "minimum" limits and include in their leases a statement that if the tenant carries insurance with higher limits than those required in the lease, the additional insured coverage provided to landlord will be deemed increased to the amounts actually carried by tenant.

Finally, under normal additional liability policy language, the insurer has the right to seek contribution from the additional insured's own liability policy, even though the landlord expects that claim to be covered solely by the tenant's liability policy. To avoid this resort to the additional insured's own policy, landlord should require that tenant have its insurer endorse its liability policy to provide that landlord is an additional insured on a primary and non-contributory basis.

D. Differences Between CGL Policy Coverage and a Contractual Indemnity Provision.

Of course, the tenant's CGL coverage naming landlord as an additional insured will not cover all of the potential liability that it wishes to pass on to the tenant. The additional insured endorsement will cover only liability "in connection with the ownership, maintenance or use of that part of the premises" leased to tenant. Thus, it will not cover, for example, accidents arising out of tenant's use of loading areas. In addition, it may not cover accidents on the premises arising out of the landlord's sole negligence or liabilities that exceed the limits of tenant's insurance, or arguably, the limits that the tenant is required to maintain under the lease.

A broad indemnity provision can cover some of these gaps, though not all states permit the landlord to be indemnified for bodily injuries caused by landlord's own negligence. However, the indemnity provision in the lease is an agreement between the landlord and the tenant. The insurer is not a party to the lease and will not provide coverage greater that what is in its policy. Even when insurance is procured, it cannot "cover" the indemnity as contractual liability insurance provides coverage only for bodily injury and physical injury to tangible property (and nothing else) and that limited coverage is subject to the policy's limits, terms, conditions, and exclusion. A provision in a lease simply requiring a party to carry insurance for its indemnity obligations is not appropriate.

III. Proof of Insurance.

It is very difficult for a landlord to obtain reliable evidence that the tenant's insurance policy is in effect and satisfies landlord's requirements. Traditionally, landlords and tenants have relied on one-page form Certificates of Insurance with respect to liability insurance and Evidence of Insurance with respect property coverage to provide a snapshot of the coverages in effect. The most commonly used forms for these certificates or evidence are promulgated by ACORD (the Association for Cooperative Operations Research and Development), which serves insurance companies. Unfortunately, landlords and tenants can no longer rely on these certificates and evidence of insurance (if they ever could). The current ACORD form documents state on their face that they are not binding on the insurer, and they no longer even give comfort that the certificate holder will be given notice of coverage cancellation.

If a landlord is relying on insurance that the tenant is supposed to maintain, the landlord should require the tenant to provide, from time to time, not only a one-page certificate or evidence of coverage, but also a certified copy of the policy itself, or if the tenant will not give the landlord the whole policy, it should be required to deliver at least the Declarations pages, the Schedule of Forms and Endorsements comprising the policy, and all endorsements that are needed to provide the required coverage. At that point, it is up to the landlord to review the policy or the other information provided to assure that the documents provide the required coverage and do not contain the problematic endorsements discussed above.