

Drafting Insurance Language: How to Draft to Trigger the Appropriate Coverage

Not Commit Malpractice

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The State of Insurance Language in Agreements



- x Mixes up Liability and Property Insurance Terminology
- x Uses Outdated or incorrect Language for required Insurance
- x Does Not Require Important Coverages (Auto, BI, etc)
- x Additional Insured Wording Does Not Contemplate ISO Form Changes
- x Missing Primary and Non-Contributory Language

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Liability Insurance

Covers the insured's defense costs and liability for third-party suits (up to the limits) (known as *third-person coverage*).

Use the right terms:

X Liability & property insurance are incorrectly referred to as "*casualty insurance*."

✓ Use "*bodily injury*" to refer to physical injury.
X In policies, "*personal injury*" means advertising and other economic injury.

✓ Call the required type of coverage "*Commercial General Liability Insurance*."
X Neither "*Public Liability Insurance*" nor "*Comprehensive Liability Insurance*" have been available for years or in the United States.

✓ Ask to be an "*additional insured*," not a "*named insured*," "*additional named insured*," or a "*co-insured*," on the Tenant's or another party's liability coverage.

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The Required Liability Insurance Limits

✓Increase the limits to accommodate modern judgments ($1,000,000 is never enough).

✓To avoid carriers trying to limit the coverage to the insurance amount required by contract, use escalation clauses such as (or similar):

- "no less than 1 million"
- "a minimum of 1 million"

X No separate limits for bodily injury and property damage. Instead, require:

✓$1 M per occurrence, with a general aggregate limit of $2 M and a products-completed operations aggregate limit of limit of $1 M.

✓Give Landlord the right to increase the limits from time to time.

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Bad Liability Insurance Language

Tenant, at its expense, shall maintain in effect a policy of comprehensive public liability and Broad Form/Extended Bodily Injury, Death and Property Damage, and Business Automobile Liability Insurance: $1,000,000.00 property damage insurance providing coverage for personal injury and property damage, with a "broad form" endorsement, with minimum limits of $1,000,000.00 for bodily injury, $1,000,000.00 for property damage, and $1,000,000.00 for completed operations.

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What Other Liability Coverages Should a Landlord Require a Tenant to Maintain?

- ✓Workers' Compensation Coverage (with a waiver of subrogation if available in the state)
- ✓Employer's Liability Insurance
- ✓Commercial Automobile Liability – Owned, Hired, and Non-Owned
- ✓Liquor Liability Insurance Coverage
- ✓Pollution Coverage (Depending on Exposure of Tenant)
- ✓Specialty Insurance
- ✓Umbrella or Excess Liability Insurance
- ✓Self Insurance on any of these should be discussed with your advisor

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Additional Insured Issues



Always require your Client to be an Additional Insured on the other party's Liability Coverage (including the Umbrella or Excess Liability Coverage), but consider the gaps in that coverage

The 2019 version of the Additional Insured endorsement for Landlords (i.e. ISO CG 20 11 12 19) states that the Additional Insured is **covered only for:**

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

If your client is an Additional Insured Landlord, require Tenant to provide the 2013 version of this endorsement, ISO CG 20 11 04 13 (or its equivalent.)

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Limitations of the 2013 Endorsement Form

The Additional Insured is covered only for the lesser of (i) the insurance amount required in the Lease, or (ii) the limits of the Named Insured's coverage, so:

Add Escalation Clauses such as:

If the [Named Insured] maintains broader coverage and/or higher limits than the minimum shown above, the [Additional Insured] 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 [Additional Insured].

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Make Sure That Tenant's Insurance Pays Liability Claims First & Tenant's Insurer Does Not Seek Recovery from the Landlord

- If both parties, the **Named Insured** and the **Additional Insured landlord**, have **Liability Policies**, then the Named Insured's insurer will seek "***contribution***" from the Additional Insured's policies.

- To **avoid this,** the **contract should require** that the **Named Insured's policy be primary** and **non-contributing** as **to the Additional insured**.

- To **keep the Named Insured's liability insurer from seeking to recover from the Additional Insured**, the **contract should** also **require** that the **liability policy include a waiver of subrogation in favor of the Additional Insured.**

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An Indemnity Provision Is Still Important!



Remember that the Tenant's indemnity will be enforceable only from the Tenant's assets – rather than the assets of a third-party insurer.

✓ It's best for the Landlord to be both an Additional Insured under the Tenant's liability policies and an indemnitee under the contract's indemnity provision.

X Don't Ask For A Contractual Liability Endorsement – They No Longer Exist!

An indemnity provision should **expressly include** an **obligation by the Indemnitor to indemnify for attorneys' fees and costs** to **permit** the **indemnified party** to **receive** some **defense costs benefit from** the **Named Insured policy** (through a standard CGL exception to the exclusion of Named Insured's contractual liability).

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Always Advise Your Client to Carry Its Own Liability Insurance!

- The Additional Insured endorsement will provide limited coverage. And no coverage at all for its own sole or gross negligence.
- Proof of the Tenant's insurance should include a review of the Tenant's policy.
- Insurers seldom agree to provide the Additional Insured with notice of cancellation or policy modification.
- The Additional Insured party will have no control over the policy deductible or possible self-insured status.

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Property Insurance

Covers the Named insured for the Actual Cash Value (depreciated value) OR the Replacement Cost (without depreciation) of an insured Property (known as "*first-person coverage*").

Remember: Not "Casualty Insurance" but "Property Insurance."

The Lease should allocate the Property Insurance responsibilities:

- Landlord should insure building.
- Tenant should insure its own property and tenant improvements.



If the client insists on a Net Lease in which Tenant carries the Property Insurance, warn your client and draft very carefully.

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Net Lease Drafting Essentials

- ✓ Require a "*Special Causes of Loss*" policy – NOT a "*Basic Form*" or "*Broad Form*" policy
- ✗ "*All Risk*" policies no longer exist
- ✓ Require flood insurance in flood zones
- ✓ Require full Replacement Cost coverage – NOT Actual Cash Value, which is depreciated
- ✓ Protect against Coinsurance Penalties – Require a Stipulated Value OR Agreed Value endorsement
- ✓ Require that the Landlord be named as an Additional Insured and Loss Payee
- ✓ Require a low deductible, and watch out for self insurance
- ✓ Require Business Interruption Coverage including rent continuation

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Deductible vs. Self-Insured Retention

Deductible:

The insurer is responsible for the claim, even if it doesn't collect the deductible from the Named Insured.



Self-Insured Retention (SIR):

No insurance. The insurer will not pay a claim until the insured has satisfied the self-insured retention.

Solution: Contingent coverage carried by the Additional Insured

The Risks of Letting Tenant Insure Landlord's Property

- ❑ Landlord might be subject to cancellation of its policy caused by Tenant violations of the warranties of the application or policy.
- ❑ Landlord does not control the insurance placement or compliance with its Lender's obligations.
- ❑ Landlord will not receive notice of cancellation without a special endorsement (which may not be available).
- ❑ Landlord may have difficulty adjusting a claim directly.
- ❑ Landlord will have to review Tenant's policy every year.
- ❑ If Landlord is not contractually required to be added as an additional insured-loss payee, its name will not be on the proceeds check.
- ❑ Tenant cannot directly cover Landlord's loss of rents.

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Landlord's Loss of Rents/Tenant's Loss of Business Coverage

Landlord's loss of rents coverage is provided by endorsement to the Property Policy for the Premises (or the building in which the Premises are located).

Tenant's loss of business coverage is provided by endorsement to its coverage of the Premises (if it's insuring the Premises) and its own improvements and personal property – and **should include coverage for its continuing normal operating expenses.**

Limitations: (1) covers only losses caused by a covered "*Cause of Loss*" – so not payable upon flood or other damage not covered by the property policy and (2) limited to losses during the period required for restoration, starting 72 hours after the casualty.

Coverage for COVID or another pandemic do not appear to be readily available (or available at all) at this time.

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Drafting Essentials When Representing Landlord

If the Lease provides that **rent abates**, then Landlord has a claim for rental loss under its own "**Loss of Rental Value**" coverage (but only if Landlord, not Tenant, is insuring Landlord's building).

If the Lease provides that **rent does not abate**, then (1) there is no recovery under Landlord's Loss of Rental Value coverage, but (2) Tenant will remain obligated to pay rent, and the continuing rent will be a "continuing normal operating expense" under Tenant's Loss of Business Income coverage.



If The Tenant Is Insuring Landlord's Building, Make Sure The Rent Does Not Abate – And That Tenant Cannot Terminate Upon Damage And Destruction.

The Importance Of Waivers Of Claims & Subrogation

- ❑ If representing Tenant (and the Tenant is not insuring the building), include a waiver of claims by Landlord for loss of or damage to its building and premises.
- ❑ If you represent Landlord, include a waiver by Tenant of claims for damage to or loss of Tenant's improvements, fixtures, equipment, and other property.
- ❑ In most cases, a mutual waiver is acceptable to both parties. **However, the Landlord should not waive its claims against the Tenant for damage to the leased property if the Tenant is insuring it.**

Is an endorsement needed?



"Most property policies permit the insured party to waive its insurer's rights of subrogation against another party by an express waiver of claims for property loss or damage by the insured party **but only if required in written agreement.**"

By reason of gaps in the Additional Insured coverage in Liability Policies, Landlord should require Tenant to provide a waiver of subrogation endorsement on all of its Liability Policies also.

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Proof of Insurance – and Why It's Hard to Obtain

ACORD provides **standard one-page forms** that a **party relying on another's insurance** should **require at least annually**:

✓Certificate of Liability Insurance (ACORD 25); and

✓Evidence of Commercial Property Insurance (ACORD 28).

THESE FORMS SAY THAT YOU CANNOT RELY ON THEM.

They no longer require the insurer to provide notice of modification or cancellation, unless endorsed to require this notice, then no notice.

Certificates of Insurance Contain Protective Language

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

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

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

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What Can the Loss Payee or Additional Insured Do?

- ✓ Require the party that is contractually required to maintain the coverage to notify the party relying on the coverage if the policy is modified or cancelled.
- ✓ Obtain an endorsement in which the underwriter agrees to give notice of cancellation to the additional insured or loss payee party (if commercially available).
- ✓ In the Lease, require the party obligated to maintain the coverage to provide originals of policies upon request. (Though Original policies are best, redacted copies are second best, and third best is the declarations page, the schedule of forms and endorsements, and the required endorsements or binder, if that is what is in effect)



Always Advise Your Clients To Maintain Their Own Insurance Covering Their Own Property & Liability!

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Flood Deductible Definitions Creating Issues

Definition of Deductible

D 2. Flood Deductible:

a) $250,000 Per occurrence, except as follows in Subparagraphs D.2.b. & D.2.c
b) As respects Location wholly or partially within special flood hazard Areas:
c) As respects Location wholly or partially with special flood hazard areas or Zones B, X500, or X-shaded

Maximum available limits with national flood insurance program (NFIP) per building whether purchased or not, plus $250,000.

Impact

1. Per building
2. NFIP = $500,000 per building
3. Plus $250,000 = $750,000

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Thank You



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