Insurance Gaps: In The Eye of the Beholder

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I. Scope Of Article

This paper discusses selected current indemnity and insurance issues that are of importance to construction lawyers and provides practical advice for their handling. It is intended to be a practical tool for understanding of those matters addressed and is not intended to be an exhaustive analysis. The comments and observations are not intended to be legal opinions nor the practice of law.

Gaps are in eye of beholder, usually the plaintiff. There are a multitude of potential gaps in insurance coverages to which unwary insureds and their legal counsel could fall victim. The purpose of this paper is to assist in the prevention of adding a new designation after your name – defendant.

This paper will address a few of the more critical gaps and provide guidance on how to handle them. The ultimate purpose of this paper is to keep your professional liability coverage from becoming the insurer of last resort.

While many of the recommendations are phrased in the context of Landlord to Tenant, the exact same theories may apply in a Tenant to Landlord context or in a Tenant to Subtenant relationship. Those involved in a Tenant to Subtenant relationship will clearly be in a more difficult position, but this paper should still help bring awareness of the issues that must be confronted.

II. Gaps in General

A. Who Is Covered

Most lease agreements consistently fail to be consistent with regard to the protection required to be provided to the upstream party. Such inconsistencies work to the insurance company's (and only the insurance company's) favor.

To avoid this, carefully define "Landlord Parties", then required that Landlord Parties be indemnified, Landlord Parties be named as additional insureds, Landlord Parties be provided waivers of subrogation, primary and noncontributory liability, and so on.

Recommended:

> "Landlord Parties" means (a) _____ ("Landlord"), (b) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors, and assigns, and (c) any directors, officers, employees or agent of such person or entities.

B. Waiver of Subrogation

An insured cannot waive subrogation. Only the insurance company can do that.

An insured can waive its rights of recovery, thereby triggering a waiver of the insurance company's right of subrogation under some but not all policies.

An insurance company's waiver of subrogation, by itself, does not waive an insured's right of recovery. An insured's waiver of its right of recovery does not necessarily waive an insurance company's right of subrogation. Properly handled, it's a two step process.

An endorsement waiving the carrier's right of subrogation is always required on a workers' compensation policy, frequently required on builder's risk policies, and sometimes on equipment floaters.

Contractual requirements for waivers are frequently insufficiently broad, identifying only specific exposures, even though the upstream party should be protected against subrogation in all cases. Note that the following applies to both liability and property issues.

Recommended:

> Tenant agrees to waive its rights of recovery and to obtain a waiver of subrogation in favor of Landlord Parties on all insurance coverage carried by Tenant, whether required herein or not.

C. The Additional Insured Issue With Regard to Professional Liability

Owners and Landlords often have a need to engage the services of an engineer, architect or other professional. The agreements utilized for such engagement have historically included the following provision: "Additional insured status shall be provided on all coverages except for Workers' Compensation and Employer's Liability."

Then requirements for professional liability were added but this provision was not changed. The unfortunate effect is that coverage is eliminated by this contractual requirement.

Professional liability policies include an "Insured vs. Insured" exclusion, which commonly reads as follows: "This insurance does not apply to any Claim made by an Insured against any other Insured."

An additional insured on a professional liability policy is, obviously, an insured. Therefore, application of this exclusion eliminates insurance coverage when the additional insured chooses to litigate against the named insured.

Recommended:

Additional insured status shall be provided on all coverages except for Workers' Compensation, Employer's Liability, and Professional Liability.

III. Property Gaps

A. Covered Property

Property insurance policies include two important parts – a Covered Property form (CP 00 10 10 12) and a Covered Cause of Loss form.

The Covered Property Form states that coverage provided includes:

1. The building or structure described in the Declarations, including completed additions, fixtures, and permanently installed machinery and equipment, unattached personal property used to service the building, and additions under construction; and

2. The business personal property on or within 100 feet of the insured building or structure, including the insured's use interest as tenant in improvements if the improvements are part of a building that the insured does not own and if the tenant acquired or made these improvements at the tenant's expense but the tenant cannot legally remove them.

B. Covered Causes of Loss

There are three types of basic commercial property Cause of Loss forms:

1. Basic form covers the common risks that are listed expressly in the policy, including fire, lightening, vehicles, aircraft, and civil commotion (CP 10 10).

2. Broad form provides basic form coverage as well as coverage for listed additional perils, such as structural collapse, sprinkler leakage, and losses caused by ice, sleet or snow weight (CP 10 20).

Important Consideration: Basic form and Broad form policies are "named peril", covering only damage caused by the expressly listed causes of loss.

3. A Special Causes of Loss form covers "risks of direct physical loss" (hence the former name of this policy: "All Risk") except those perils that are specifically excluded (CP 10 30 10 12).

Important Consideration: It is no longer called "all risk" insurance. Additionally, flood and earthquake are not covered by a Special Causes of Loss form..

Recommended:

Property coverage shall be provided on an ISO Special Causes of Loss Form, including theft. Flood and earthquake coverage shall also be provided.

C. Property Valuation

1. Actual Cash Value (ACV)

Actual Cash Value represents replacement cost at the time of the loss less physical depreciation. Depreciation is based on the degree and quality of ongoing improvements. For example, a building may be 50 years old but have a 2-year-old roof.

2. Replacement Cost

Replacement cost represents the cost to rebuild damaged or destroyed improvements or replace business personal property with property of comparable material and quality, used for the same purpose, and at the same location (although the insured can use the money to replace at a different location).

Important Considerations:

a. Demolition and disposition costs (generally estimated as 13% of the value of the improvements) must be included in the determination of the Replacement Cost insured amount both (i) to permit recovery of those costs, and (ii) to avoid creating a co-insurance issue.

b. Costs of replacement may be dramatically increased if the damage is due to a casualty that affects an entire area. A surge in the costs of labor and materials usually results.

c. Even if the Replacement Cost is insured, the insurer will pay the Actual Cash Value instead of Replacement Cost unless the lost or damaged property is actually repaired and replaced; AND the repairs or replacement are made as soon as reasonably possible after the loss or damage (the replacement need not be at the same location). After a loss, the insurance company will generally pay the Actual Cash Value initially and when the construction is complete, pay the additional amount that was required to cover the Replacement Cost.

3. Coinsurance

Coinsurance is a warranty that the Named Insured provides to the insurance company that the amount of insurance coverage being purchased equals at least a stated percentage of the actual reconstruction or replacement cost of the damaged property.

Coinsurance penalizes the insured for under-insuring its property by the percentage stated in the policy, which can be 80% (minimum for single buildings), 90% (minimum for blanket policies), or 100% (to reduce premiums if there is an agreed value).

For example, (i) an insured building has a reconstruction cost of $2,000,000, (ii) the insured purchased coverage in the amount of $1,000,000, (iii) the coverage is subject to an 80% co-insurance percentage, (iv) a deductible of $10,000 also applies, (v) a covered cause of loss ensues that results in damage of $500,000, then:

80% of $2,000,000 = $1,600,000
$1,600,000 / $1,000,000 = 62.5%
62.5% of $500,000 = $312,500.00
Less deductible = $302,500.00
Total Recovery = $302,500.00

4. Agreed Value

An Agreed Value endorsement stipulates that the insurance company agrees that the amount of coverage being carried is adequate to meet the coinsurance requirements of the policy and suspends the operation of the coinsurance clause.

Important Considerations:

a. Agreed Value can apply to all covered property or to just one type of property at one location.

b. Another alternative is to obtain a policy that has no coinsurance provision, but that is not common.

5. Blanket Coverage

A "blanket" policy covers two or more of the insured party's properties. This can be buildings or inventory that moves from insured location to location. The total blanket amount is available to the insured to pay a covered loss.

For example, (i) an insured owns buildings with an estimated reconstruction cost of $3,000,000, $7,000,000 and $10,000,000, (ii) the building are insured for a cumulative blanket amount of $18,000,000 ($20,000,000 times 90% coinsurance, so the coinsurance requirement is met), (iii) coverage is provided on an Agreed Value basis, (iv) a covered cause of loss ensues that totally destroys the $7,000,000 building, and (v) after the loss it is determined that the actual reconstruction cost of that building is $9,000,000, then the full $18,000,000 limit is available to pay the loss. The insurance company will pay the $9,000,000 claim, not the $7,000,000 that would have been paid if the building were not insured on a blanket basis.

6. Margin Clause

A margin clause is an endorsement in a blanket policy that limits the amount of recovery to a percentage of the stipulated value, usually ranging from 1.05% to 1.20% (CP 12 32 – see exhibit). A margin clause voids much of the benefit of a blanket limit.

For example, using the same $7,000,000 building, coverage and loss as described above, but adding a margin clause of 1.10%, the insured would now collect $7,700,000 instead of the $9,000,000 that would have been collected without the margin clause. The margin clause causes the insured to have an uncovered loss of $1,300,000.

D. Important Property Endorsements

1. **Ordinance or Law** (CP 04 05 10 12 – see exhibit)

A standard ISO property policy will pay to reconstruct a building with like kind and quality of construction as it existed prior to the loss. It will not pay for reconstruction costs arising from improvements to the building required by law or ordinance when the damaged building did not previously comply with these laws or ordinances (for example, by reason of grandfathering). Examples: Compliance with the ADA, laws requiring sprinklers, new electrical codes, or laws requiring that a building be raised.

Building Ordinance Coverage is available, with three Coverage Options:

Coverage A = loss to the undamaged portion of the building,

Coverage B = the cost to demolish the undamaged portion of the building, and

Coverage C = the increased cost of construction to comply with current laws or ordinances.

Of course, the damage must be from a loss that is otherwise covered (flood or earthquake will not be covered without a separate endorsement or policy).

2. **Leasehold Interest** (CP 00 60 06 95 – see exhibit)

Leasehold interest coverage protects against the termination of a favorable lease due to an insured cause of loss. Four aspects of net leasehold interest can be covered:

a. Tenant's lease interest, meaning the difference between the rent you pay at the described premises and the rental value of the described premises that you lease.

b. Bonus payments, meaning the unamortized portion of a cash bonus that will not be refunded to you. A cash bonus is money you paid to acquire your lease other than rent or security.

c. Improvements and betterments, meaning the unamortized portion of payment made by the Tenant for improvements and betterments. For example, a fire occurs elsewhere in a building. The Tenant's owned improvements and betterments are not damaged, but due to the extent of damage incurred the Landlord is able to cancel the lease. The undamaged improvements and betterments insured by this endorsement would otherwise be lost.

d. Prepaid rent, meaning the unamortized portion of any amount of advance rent you paid that will not be refunded.

3. **Increase in Rebuilding Expenses Following Disaster** (CP 04 09 10 12- see exhibit)

This endorsement provides additional expenses when the costs of labor and materials increase as a result of a disaster and the total cost for repair or replacement exceeds the limit of insurance. For example, according to ISO the cost per square foot for housing construction was estimated to have quadrupled in the first six months following hurricanes Rita and Katrina. Coverage applies to damage resulting from an event declared to be a disaster.

4. **Limitations for Roof Surfacing** (CP 10 36 10 12 – see exhibit)

Beware this endorsement! It stipulates that a roof is covered for its actual cash value only, even if the remainder of the property is covered for its replacement cost, and it further excludes cosmetic damage to the roof surface.

5. **Loss of Business Income and Rents.**

A Special Causes of Loss Property Policy covers only the physical damage, it does not cover (i) the business losses suffered by a business operator, (ii) the rental loss suffered by a landlord, or (iii) the extra expenses incurred by either of them. The loss of business and rental loss coverage is generally provided through an endorsement to the property damage policy or a separate loss of business income and loss of rental value policy.

Only lost profits (net income) and "continuing normal operating expenses" can be recovered. If a business was not operating at a profit before the casualty, then no business interruption proceeds will generally be payable for the lost profits, but the salaries and other normal operating expenses will still be recoverable.

The policy will not only contain a maximum insured amount, but it will also include a maximum period of time for which business losses will be payable. The ISO form states that this period

will be 30 days after repairs should have been completed, but a business operator or landlord may want to cover a possible extended period of 90 or 120 days since it may take time for the business to re-establish its full income stream.

A coinsurance percentage will also be stipulated for the loss of business income/loss of rental value. Again, an Agreed Value is best.

A loss of Business Income/Rental Value loss policy will cover the "continuing normal operating expenses" (i.e., the expenses that must be paid regardless of the casualty damage). But it will not cover "Extra Expenses" unless the insured obtains this additional coverage. "Extra Expenses" are the extraordinary additional expenses that were not incurred before the casualty but that are incurred after the casualty in normal operations to avoid or minimize business losses.

If a Lease requires a tenant to pay rent regardless of casualty damage, then this rent will be part of the "continuing normal operating expenses." However, if rent is payable regardless of casualty damage, then the landlord's loss of Rental Value insurer will expect the tenant to pay this rent, and it will not reimburse the landlord for the loss of this rent.

Important Consideration

Lease provisions stating that Tenant's rent will not abate if the loss is caused by Tenant's negligence may prevent the Landlord from recovering the lost rent from its own insurer if that insurer can show that the damage was caused by the Tenant. Landlord is left with only a breach of contract claim against the Tenant.

E. Vacancy

Vacancy can violate a policy's provisions and reduce the amount the insurance carrier is required to pay. A building is generally held to be vacant unless at least 31% of its total square footage is (i) rented to a lessee and used by the lessee to conduct its customary operations and/or (ii) used by the building owner to conduct customary operations.

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs, (i) vandalism, sprinkler leakage, building glass breakage, water damage and theft become excluded causes of loss; and (ii) all other covered causes of loss the amount that would otherwise be payable for the loss is reduced by 15%.

F. Triple Net Leases

The standard mortgagee clause states that the insurer will pay for the damage to covered buildings and structures. The insured and mortgagee can divide the proceeds between them based on the insurable interest held by each of them. This (i) creates a separate contract between the Lender and the insurer, (ii) means that the Lender will not be harmed by the insured's violation of the policy provisions (unless the Lender knew about them and failed to stop the violation. For example, if the insured has damaged the property deliberately, then the Lender should still have a right to payment.), (iii) generally requires that the insurer give prior notice of policy cancellation or non-renewal to the Lender and permits the Lender to take pay premium amounts. The Lender is usually required to notify the insurer of a change in ownership or occupancy or change in risk known to the lender.

So a Lender is well protected, right? But how is the building owner protected with regard to triple net leases in which the tenant is responsible for insuring the building? The available ISO options are:

1. A loss payable provision gives an insured little protection. Claims must be paid jointly. No protection is provided to owner against the policy being invalidated by actions of the tenant/insured & no notice of cancellation will be provided to owner. This form is really geared to miscellaneous machinery & equipment.

2. A lender's loss payable clause is quite similar to the mortgageholder provision. It can be used for buildings, machinery or equipment. Protection is provided to the owner for the policy being invalidated by actions of the tenant/insured & notice of cancellation and nonrenewal is provided. Note however that a carrier can offer renewal at ten times the expiring rate and no notice of nonrenewal is required. This provision is appropriate as the owner is a "creditor", but it fails to discuss handling of claim payment.

3. A building owner loss payable clause CP 12 18 establishes that a building claim will be adjusted with building owner only and an improvements & betterments claim will be adjusted with tenant, but no protection is provided to the owner against invalidation of the policy by actions of the

tenant/insured and no notice of cancellation will be provided to the owner.

4. Additional insured-building owner CP 12 19 makes the building owner a named insured for the building only. Loss is adjusted with both the tenant and building owner ATIMA, but no protection is provided against invalidation of the policy by actions of the tenant/insured and no notice of cancellation of cancellation will be provided to the owner.

In short, none of the available insurance forms accomplish the desired results of (1) protection against invalidation, (2) notice of cancellation to the owner, and (3) adjustment of building loss with the owner.

If an insurance company will agree to do so, a combination of lender's loss payable and additional insured-building owner seems to be the best insurance option if tenant is to insure the building. That said, there is no widespread agreement on proper handling of this type of exposure and this proposed solution, while logical, may not always be possible. There are also other increased risks for the owner when the tenant is required to insure the owners assets.

The best risk management option is to have the owner insure the building and charge the cost back to the tenant. In this manner the owner (1) controls the insurance placement, (2) meets its lender obligations, (3) doesn't have to worry about the tenant violating any policy conditions, (4) receives notice of cancellation, (5) is directly negotiating any claim adjustment, and (6) controls issues regarding the damage and destruction provisions in the lease agreement.

IV. General Liability Gaps

A. Limits of Liability

It is not unusual to still find limits of liability be required in a manner 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". Insurance limits have not been provided in this manner for almost 30 years.

General liability limits are provided per occurrence and are subject to two different annual aggregates. The per occurrence limit is applicable to any occurrence that is covered by the policy. The aggregate limits reflect the maximum amount that the insurance company is obligated to pay during the policy period regardless of the number of occurrences. There is a general aggregate, meaning is it applicable to all covered claims except those that are brought in a products-completed operations context, and a separate aggregate applicable only to product-completed operations claims.

B. **Designated Location(s) General Aggregate Limit** (CG 25 04 05 09 – see exhibit)

As stated previously, one of the aggregate limits is referred to as the general aggregate. All ongoing operations are covered under the general aggregate. When dealing with a Tenant who has widespread operations, how can you know that the general aggregate limit has not been eroded or exhausted by claims elsewhere, leaving little to no protection for your location? You cannot.

But you can require that the full amount of the general aggregate limit be provided separately just to your leased location through use of a Designated Location(s) General Aggregate Limit. Please note that this extension of coverage is available only for the general aggregate limit. There is no similar extension available for the products-completed operations aggregate limit.

Should a downstream party be unable to provide a Designated Location(s) General Aggregate Limit, a reasonable alternative is to request a higher excess liability limit.

Recommended:

Amounts of coverage shall be no less than:
$1,000,000 Per Occurrence
$2,000,000 General Aggregate, including Designated Location(s) General Aggregate Limit
$2,000,000 Products-Completed Operations Aggregate
$1,000,000 Personal and Advertising Injury
$ 100,000 Damage to Premises Leased to You
$ 5,000 Medical Payments

For construction purposes, a Designated Construction Project(s) General Aggregate Limit endorsement should be used. (CG 25 03 05 09 – see exhibit)

The coverage for Damage to Premises Leased to You is not needed if a mutual waiver of subrogation is included in the lease agreement, and the Medical Payments coverage should never hold up getting a deal done as it is not truly a contractual transfer provision.

C. Primary and Noncontributory – Other Insurance Condition – CG 20 01 04 13

The insurance industry has at long last issued a general liability endorsement that provides for consistent treatment of the primary and noncontributory issues. This endorsement extends primary and noncontributory coverage to an additional insured under a policy but only to the extent that the additional insured is a named insured under other insurance. In other words, this coverage is not primary to additional insured status that might be provided to that named insured by other Tenants.

This endorsement further requires that there be a written agreement in which the insured extending coverage has agreed that this insurance would be primary and would not seek contribution from other insurance available to the additional insured. Simply requiring that the downstream Tenant's insurance be primary will not suffice.

Recommended:

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

D. Cross Liability

Cross liability, or a severability of interests clause as it is also known, is an antiquated term. Current use of the term "cross liability" is not a coverage provision, but represents an Insured vs. Insured exclusion. It eliminates an additional insured's opportunity to bring suit against the named insured.

An unmodified general liability policy provides the desired protection through a Separation of Insureds clause, which reads:

> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
> b. Separately to each insured against whom claim is made or "suit" is brought.

Recommended:

> The General Liability coverage shall include an unmodified Separation of Insureds provision.

E. Undesirable Endorsements

To fully understand the impact of the first two undesirable endorsements, one must first understand "contractual liability coverage" and the manner in which it is provided.

Indemnification is an agreement between the indemnitor and the indemnitee. Insurance plays no role whatsoever in that agreement. An obligation to defend, indemnify and hold harmless another party for risks other than those prescribed by law is a voluntary assumption of those risks by the indemnitor. The indemnitor has ***agreed to be liable*** for those risks.

Except for when subject to anti-indemnification legislation, the scope of risks that can be transferred are quite broad, potentially including the indemnitee's joint, concurrent, sole, strict and even gross negligence. It can further apply to "any and all liabilities including fines, penalties, and all other associated expenses". And most indemnification provisions are unlimited in amount. Such an indemnification may look something like this:

$ **BLANK CHECK**

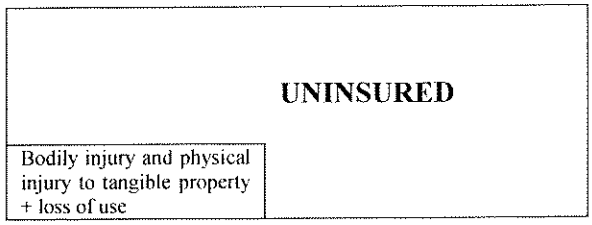
Exposure (any and all liabilities)

What portion of this transferred risk is insured, or even insurable? In spite of this many agreements call for the provision of "contractual liability insurance covering the liabilities assumed in the indemnification agreement." This is simply not possible.

There is no direct coverage provision, but rather coverage is found as a series of six definitions applicable to an exception to an exclusion to the provision of coverage for bodily injury and physical injury to tangible property – ***and nothing else***. And

when provided, contractual liability coverage is subject to the limits of liability stated in the policy.

The true scope of coverage looks like:



Exposure (any and all liabilities)

The first and sixth definitions of and "insured contract" are the most important ones for this discussion and read in part as follows:

An "insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the Landlord is not an "insured contract";

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

It must be kept in mind that, since insurance potentially covers so few of the exposures for which indemnification may be required, the indemnification provision is potentially bankrupting to the indemnitor. And that assumes that the standard contractual liability coverage has not been limited or even deleted by endorsement.

Furthermore, there is no duty to defend an indemnitee found in the commercial general policy. When defense is required is in the indemnification provision, a no-so-funny thing happens. Unlike the way cost of defense is provided in most liability coverages, costs of defense provided in behalf of an indemnitee are deemed to be damages, meaning that those costs are included in the limit of liability (not outside of or in addition to that limit) and therefore erode the limit. If $400,000 is paid for defending the indemnitee, only $600,000 is left for payment of settlement.

Who wins from this change? Not the indemnitee, who thought it was being provided $1,000,000 coverage by the downstream party. And certainly not the indemnitor (a/k/a named insured), who not only (1) paid dearly for the coverage but (2) is now having to share its limits of liability with the indemnitee and (3) is having those limits rapidly eroded by the indemnitee's defense costs.

1. **Contractual Liability Limitation** (CG 21 39 10 93 – see exhibit)

§f. of the definition of "insured contract" is the provision that is the funding mechanism for most indemnification other than five stipulated exceptions, including a lease of premises. A Contractual Liability Limitation endorsement completely deletes §f., thereby eliminating any coverage for the contractual assumption of bodily injury or property damage in an indemnification provision other than the stipulated exceptions.

2. **Amendment of Insured Contract Definition** (CG 24 26 04 13 – see exhibit)

This endorsement does not eliminate §f. of the series of "insured contract" definitions, but does modifies it to exclude the assumption of another party's sole negligence as follows:

> f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on you behalf. However, such part of a contract or agreement shall only be considered an

"insured contract" to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (emphasis added)

3. **Exclusion – Employer's Liability** (Manuscript)

This dangerous endorsement is written in many different ways by many different insurance companies. The unmodified provision in a commercial general liability policy reads:

> This insurance does not apply to:
> e. Employer's Liability
> "Bodily injury" to:
> (1) An "employee" of the insured arising out of and in the course of:
> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business; or
> (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.
> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an "insured contract".

The exception to this exclusion provides the funding mechanism for the contractual assumption of third party over actions. The deletion of this exception or other modifications such as simply changing "the insured" to "any insured" excludes all such coverage.

4. **Exclusion – Insured vs. Insured – Manuscript**

Commonplace in professional liability policies, this exclusion should never be accepted in a commercial general liability policy. A "Named Insured vs. Named Insured" exclusion, applicable only to parties within the same economic family, is acceptable but as an additional insured is an insured under the policy to which the additional insured has been added, an "Insured vs. Insured" exclusion would exclude much of the very coverage desired by an additional insured.

5. **Exclusion – Punitive, Exemplary or Multiplied Damages – Manuscript**

As Texas does not prohibit insurance coverage for punitive, exemplary or multiplied damages (Deceptive Trade Practices Act), this exclusion should not be permitted.

Recommended:

State in the General Liability insurance section of your requirements that the following exclusions/limitations or their equivalent(s) are prohibited:

- Contractual Liability Limitation CG 21 39
- Amendment of Insured Contract Definition CG 24 26
- Any endorsement modifying the Employer's Liability exclusion or deleting the exception to it
- Any "Insured vs. Insured" exclusion except Named Insured vs. Named Insured
- Any Punitive, Exemplary or Multiplied Damages exclusion

F. The New Additional Insured Endorsements

Essentially all general liability additional insured endorsements were modified effective April, 2013 and are limited in three ways:

1. Coverage afforded to such additional insured only applies to the extent permitted by law;

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

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

a. Required by the contract or agreement

b. Available under the applicable Limits of Insurance shown in the Declarations; which is less

The additional insured endorsement most commonly used in a real estate context (CG 20 11 04 13 – see exhibit) continues to include coverage for the joint, concurrent and sole negligence of the additional insured. This may create a problem for those entities that have carved out the transference of such exposures in the indemnity provision of their lease agreement.

The most current edition of additional insured endorsements used for essentially every other purpose no longer include coverage for the sole negligence of the additional insured. In a construction context:

> ***Recommended*** (if you represent the upstream party in a construction agreement):
>
> Additional insured status shall be provided in favor of Landlord Parties on a combination of ISO forms CG 20 10 10 01 and CG 20 37 10 01 (see exhibits)
>
> ***Recommended*** (if you represent the downstream party in a construction agreement):
>
> Additional insured status shall be provided in favor of Landlord Parties on a combination of ISO forms CG 20 10 04 13 or 20 38 04 13 and CG 20 37 04 13 (see exhibits)

V. Workers' Compensation

Lease agreements often fail to include a requirement that Tenant maintain Workers' Compensation coverage. If Workers' Compensation coverage is carried and Tenant's employee is injured when entering or leaving the premises, that coverage will be responsive. But what happens if Tenant's employee is injured when entering or leaving the premises and no Workers' Compensation is in force? The injured employee is obviously much more likely to bring suit against Landlord.

> ***Recommended:***
>
> Workers' Compensation shall be provided subject to statutory limits. The State in which work is to be performed must be listed under Item 3.A. on the Information Page. Employer's Liability shall be provided in amounts no less than $1,000,000 each accident and disease. Such insurance shall cover liability arising out of the Tenant's employment of workers and anyone for whom the Tenant may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted. USL&H must be provided where such exposure exists listing the state in which work is to be performed.

VI. Excess/Umbrella Liability Gaps

All excess/umbrella liability policies contain a condition that the full underlying limits must be intact upon inception of the excess or umbrella policy. Underlying policies that contain an aggregate limit (e.g., general liability and workers' compensation), if not using the same inception dates as the excess/umbrella policy, may have that aggregate limit eroded by claims that arose prior to the inception of the excess/umbrella policy, creating a gap in coverage.

Most policies with a title of "umbrella" are truly just excess policies, and most excess and umbrella policies do not follow form (i.e., provide the exact same coverage) as the underlying coverage. There can be substantial differences with catastrophic results.

> ***Recommended:***
>
> All excess/umbrella coverage shall have the same inception date as the underlying policies and shall be excess over and be no less broad than all coverages and conditions described above.

VII. Proof of Insurance

The ACORD 25 Certificate of Liability Insurance should be used to evidence liability insurance only – not property coverage. An ACORD 28 Evidence of Commercial Property Insurance should be required for such property purposes.

Both documents are replete with disclaimers and are not binding on the insurance company(ies) listed thereon.

VIII. The Biggest Gap of All

Unfortunately, this paper barely scratches of the surface of some of the shenanigans increasingly

prevalent in the insurance industry. Due diligence is required.

"Trust" that insurance requirements will be met with compliance is foolhardy, yet the feedback most often received from attorneys is that the client won't pay for counsel to perform this due diligence.

Don't let the beholder have their eye on you as the source of funding!

Recommended:

Tell your client that they can no longer merely hit the "accept" button. They can pay you a little bit more now, or pay insurance litigators a lot more later.