ALLOCATING EXTRAORDINARY RISK IN LEASES:

Indemnity/Insurance/Releases and Exculpations/Condemnation

(Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)

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I. INTRODUCTION

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity, exculpation, release and limitation of liability provisions.

Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party to the other.

This Article concerns lease provisions dealing with the shifting of certain "extraordinary" risks from one party to the other including indemnities, exculpations and releases and supporting liability insurance. This Article does not address casualty loss of property or property insurance, which topic is being addressed by an Article at this seminar.

"***Indemnity***" [2] is, "I agree to be liable for your wrongs." Indemnity is a shifting of the risk of a loss from a liable person to another. However, many times scriveners use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, an indemnity provision is no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs."

"*Exculpation*" [76] is, "I am not liable to you for my wrongs." An exculpatory provision is designed to exclude, as between the parties to a contract, certain designated duties, liabilities or costs due to the occurrence or non-occurrence of events.

"*Release*" [76] is, "You are not liable to me for your wrongs." A release is an agreement in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved.

Each contracting party's risk-related goals are (1) to accept no more risk than it can reasonably bear or insure, and (2) to transfer the balance of the risk to the other party. The following factors are involved in the ultimate determination as to how much risk a party receives or transfers: (A) which party is in the best position to control the extent of the occurrence of the risk?; (B) does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?; (C) custom and practice in the particular industry (for example, sellers to buyers; landlords to tenants; owners to contractors; contractors to subcontractors); (D) the bargaining strength of the respective parties; and (E) statutory and common law public policies.

This Article examines how liability insurance can be used to protect an indemnifying party through coverage for its contractually assumed liabilities and to protect an indemnified party by being an additional insured on the indemnifying party's liability insurance. Generally, the indemnifying party is required by the indemnified party to carry commercial general liability ("***CGL***") insurance naming the indemnified party as an additional insured on the indemnifying party's CGL policy. In such case, the indemnifying party is the "***named insured***" and the indemnified party is the "***additional insured***." In this article the indemnifying party and the named insured are sometimes referred to in this article as the "***protecting party***" and the indemnified party and the additional insured are sometimes referred to as the "***protected party***." Insurance is also a form of indemnity. However, Texas courts on public policy grounds construe the same "arising out of" indemnity triggering language used in both types of indemnity strictly against coverage of an indemnified party's negligence by a contract and broadly in favor of coverage of an additional insured's negligence in additional insured endorsements issued pursuant to the same contract. [26 - 29] Indemnity agreements are strictly construed in favor of the indemnifying party. [14]

The most common method of risk management is through contractual provisions for insurance. The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria.

- Risks retained are appropriate and affordable.

- Risk as an element of the overall transaction and negotiation is incorporated at the onset.

- Indemnity, insurance, and other pertinent conditions are not so onerous that contact negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.

- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.

- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.

- Insurance and other support for the indemnity is in place when a loss occurs.

- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.

- The performance of the contract is monitored and regularly evaluated.

Criteria quoted from CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions (International Risk Management Institute, Inc. 2005).

This Article contains a discussion of certain risk management provisions in the lease forms contained in the *Texas Real Estate Forms Manual* of the State Bar of Texas. Accompanying each of these forms is a commentary noting the bias (the protected party) and a discussion of the risk allocations and the methods by which the risk is allocated. Also, included are the insurance endorsement forms commonly referenced in the risk management provisions and a commentary as to risk coverage and exclusions to coverage addressed by these insurance endorsements. Each of these forms has been annotated with footnotes identifying relevant case law and containing additional commentary explaining the risks being addressed by each form and certain gaps in coverage not addressed or possibly inadvertently being misaddressed.

II. INDEMNITY

A. Terminology

"**Indemnity**" [2] is, "*I agree to be liable for your wrongs.*" Indemnity is a shifting of the risk of a loss from a liable person to another. It is like insurance between the parties. Sometimes, an indemnity provision is no more than a restatement of existing duties, "*I will indemnify you for my wrongs*;" "*You will indemnify me for your wrongs*."

B. Requirements for Enforceability

The Texas Supreme Court has imposed certain contract drafting requirements in order for a negligent party to shift its liability to another person.

1. Fair Notice.

The concept of fair notice was introduced into Texas indemnity law in 1963 by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963). The fair notice requirement focuses on the appearance and placement of the provision as opposed to its "content." The supreme court in *Spence* reasoned that

> [t]he obvious purpose of this rule is to prevent injustice. A contracting party should be upon ***fair notice*** that under his agreement and through no fault of his own, a large and ruinous award of damages may be assessed against him solely by reason of negligence attributable to the opposite contracting party. *Id.* at 634.

2. Express Negligence.

In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. [6] In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine. The express negligence test replaced the "clear and unequivocal" test....

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994). The indemnity must expressly state that it indemnifies the indemnified person for liabilities caused in whole or in part by its negligence and not leave it to inference. For instance, "x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by

the gross negligence or willful misconduct of y" will not be enforced to indemnify y for loss caused by its negligence.

3. Overcoming the Worker's Compensation Bar.

Unless there is an enforceable written indemnity covering an employer's negligence, a landlord, tenant, and contractor can find itself liable to an employer's injured employee, not only for its own portion of the negligently caused injury but also for the proportionate part attributable to the employer's negligence without the ability to claim back against the employer for contribution. The Workers' Compensation Act bars contribution actions by third parties unless the employer has executed before the injury a written indemnity agreement for injuries to its employees arising out of the employer's negligence. Texas Workers' Compensation Act, TEX. LABOR. CODE ANN. § 417.004 (Vernon 1996). [20 - 22]

4. Comparative Indemnity.

The Texas Supreme Court in *Ethyl* found that the following indemnity provision did not protect an "indemnified" party either for its negligence or the indemnifying party negligence for injuries caused to the indemnifying party's employee:

> Contractor (Daniel) shall indemnify and hold Owner (Ethyl) harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, subcontractors and agents or licensees.

Id. at 708. [12] The court termed this claim as one for "**comparative indemnity**." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein.

5. Strict Liability.

In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a protected party's strict liability to expressly state that it covers such strict liability. [17 - 19]

III. INSURANCE

There are two insurance methods to effectuate protection: (1) directly, either by purchasing a CGL policy naming the protected party as the named insured or by the protecting party causing its insurer to list the protected party as an additional insured on the protecting party's CGL policy; and (2) indirectly, by the protecting party insuring its contractually assumed liability (its indemnity).

A. Contractually Assumed Liability Insurance: Coverage for the Protecting Party

1. Exception to an Exclusion.

Most but not all CGL policies cover the protecting party for liability for "Bodily Injury" and "Property Damage" arising under an "insured contract" (sometimes referred to as "**contractually assumed liability insurance**"). Coverage is accomplished through the addition to the CGL Policy of an **exception to an exclusion** from coverage. Standard form CGL policies (ISO CG 00 01) provide as to "Coverage A" the following exceptions to the exclusion from coverage of contractually assumed liability. [43]

Coverage A under standard form CGL policies is for loss arising out of "Bodily Injury" or "Property Damage." "Bodily Injury" is in such policies defined as "bodily injury, sickness or disease sustained by a person, including death resulting form any of these at any time." "Property Damage" in such policies is defined as "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." The exception to exclusion from Coverage A reads

> This **insurance does not apply to** "Bodily Injury" or "Property Damage" for which the insured is obligated to pay damages by reason of the **assumption liability in a contract** or agreement. This **exclusion does not apply to liability** for damages:
>
> 1. **assumed in** a contract or agreement that is an "**Insured Contract**", provided the "Bodily Injury" or "Property Damage" occurs subsequent to the execution of the contract or agreement; or
>
> 2. that the insured would have in the absence of the contract or agreement. (Emphasis added)

An "**Insured Contract**" is defined in the standard ISO CGL policy form as including

> that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work 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 [**2004 endorsement CG 24 26 , *provided the 'bodily injury' or 'property damage' is caused, in whole or in part, by you or by those acting on your behalf*'**]. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added)

Note that ISO has published the italicized language for inclusion in CGL policies by an endorsement CG 24 26. [43] This introduces into the "insured contract" definition a "contributory negligence" condition equivalent to the one contained in the 2005 revisions to ISO's additional insured endorsements discussed below in Section **III B5b(2)**. Inclusion of this type language into a CGL policy effectively eliminates coverage for the named insured's indemnification of a third party for its sole negligence. Care therefore must be taken by named insureds in coordinating and negotiating the terms of their CGL policies and indemnity agreements. It is possible for a named insured to be "uncovered" in such circumstances for an indemnity of another party's sole negligence. If this is coupled with an exclusion from additional insured coverage for an additional insured's sole negligence, the named insured may find itself acting as the insurer or in breach of its covenants to protect the additional insured/indemnified party!

2. <u>Named Insured Not Insured for all Contractually Assumed Liabilities - No Coverage for Indemnified Person's Sole Negligence</u>.

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for its indemnitee's sole negligence. [39] ISO issued in 2004 an endorsement, CG 24 26 07 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnitee. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence. See **<u>Forms E-G</u>** to this Article.

B. Additional Insurance: Coverage for the Protected Party

1. <u>Purpose</u>.

Another commonly employed risk transfer technique is to require the protecting party to arrange for its insurance to cover the protected party as an additional insured. [44-56] An additional insured endorsement is equivalent to an insurance policy written for the additional insured. The strongest rationale for this request is the perceived fairness of making the protecting party's insurance carrier responsible for the increased exposure to loss created for the additional insured due to the protecting party's operations, work or control of the premises. Issuance of additional insured endorsements is routine and inexpensive as compared to a separate policy being issued to cover the exposure of the party to be protected. The risk of loss has been factored into the named insured's premium.

An additional insured designation seeks to achieve the following results: It provides a limited form of primary coverage for the additional insured. It may remove the possibility of subrogation against the additional insured for covered liabilities. It provides the additional insured with direct policy rights within the primary insured's policy, including separate defense cost coverage for claims involving the additional insured. It provides a "safety net" should the indemnity provision be unenforceable or otherwise be deficient. Additional insured endorsements generally do not carve out from the

coverage afforded the additional insured loss due to "***Personal and Advertising Injury***." In these circumstances, protection for the protected party's Personal and Advertising Injury is covered whereas without specific endorsement to the named insured's CGL Coverage B, the named insured's indemnity for such liabilities is not reinsured and the named insured not carving out this type of liability is uninsured as to its contractually assumed liability. Additionally, additional insured status may automatically entitle the additional insured to the named insured's excess liability or umbrella coverage because such policies frequently cover all insureds (including the additional insureds) under the primary liability policy.

There are important considerations for a protected party to remember when evaluating whether to forgo a contractual indemnity by the protecting party and to rely solely on being an additional insured on the protecting party's CGL policy. The policy may be canceled with or without the protected party's knowledge; the insurer may become insolvent; and the additional insured's coverage under the protecting party's CGL policy is subject to the policy's limits and exclusions from coverage.

2. Automatic Coverage or by Endorsement.

Coverage may be accomplished (1) by endorsement of the protecting party's CGL insurance or (2) through blanket additional insured provisions in the protecting party's CGL policy, which provide automatic additional insured status for persons that a named insured is obligated by contract to provide such coverage.

3. Endorsements: ISO or Manuscripted Forms.

Additional insured endorsements can be divided into two categories: endorsement forms promulgated by the Insurance Services Office, Inc. ("***ISO***") and all other endorsement forms (referred to in the insurance industry as "***manuscripted***" forms). [39] There are four nationwide insurance advisory organizations that develop standard insurance forms. ISO is the largest national insurance advisory organization. Its forms are considered to be the industry's "standard" forms. 1 CONTRACTUAL RISK TRANSFER Strategies for Contract Indemnity and Insurance Provisions §XIII, p. XIII.B.2 (International Risk Management Institute, Inc. 2003).

ISO forms are identified by a two-letter prefix identifying the type of coverage, four digits identifying the form category and individual form number, and four digits identifying the edition date by month and year. For example, the CG 20 10 07 04 additional insured endorsement form is made up of "**CG**" to indicate that this is a CGL form; "**20**" indicates the category of CGL endorsement that this form belongs to, an additional insured endorsement; "**10**" is the number assigned to this particular CGL additional insured endorsement; and "**07 04**" indicates that this form is the July 2004 edition of the CG 20 10. [39]

ISO has promulgated 33 forms of additional insured endorsements, each tailored to a different risk transfer, including CG 20 10 07 04–Additional Insured–Owners, Lessees or Contractors–Schedule Person or Organization and CG 20 26 07 04–Additional Insured–Designated Person or Organization. [39]

4. Covered Matters.

Additional insured endorsements furnish coverage to an additional insured for liabilities "**arising out of**" the named insured's "**work**", "**operations**", or "**premises**" or some variation of these themes.

a. Ongoing Operations

ISO form CG 20 10 is ISO's standard endorsement for use in adding a project owner as an insured to a general contractor's CGL policy or a general contractor to a subcontractor's CGL policy (See **Form G** CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization). CG 20 10 provides coverage for the additional insured's liabilities arising out of the "***ongoing operations***" of the named insured. CG 20 10 has undergone changes from coverage for liabilities "*arising out of the work*" of the named insured in the November 1985 version (CG 20 10 11 85), to "*arising out of the ongoing operations*" of the named insured in the October 1993 version (CG 20 10 10 93), the March 1997 version (CG 20 10 03 97), and the October 2001 version (CG 20 10 10 01). ISO made this change to clarify that this particular form of additional insured endorsement is intended to cover liabilities arising out of the "ongoing operations" of the named insured as opposed to liabilities arising out of operations that have been completed. The October 2001 revision added an express exclusion from coverage for liabilities "*occurring after ... all work ... has been completed*" to further emphasize the "ongoing" operations requirement. The 2004

revision to CG 20 10 to eliminate coverage for the additional insured's sole negligence is discussed at **III B5b(2)** of this Article.

b. Completed Operations

The ISO CG 20 10 11 85 additional insured endorsement ("arising out of your work") was construed in *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr.2d 443 (Cal. App. 2000) to cover an additional insured contractor's liabilities arising out of the completed operations of its named insured subcontractor. In *Pardee* the CGL policy and additional insured endorsement were issued 4 years after completion of the subcontractor's work on the project in question and were held to cover injuries arising out of the earlier work of the subcontractor. The wording of the additional insured endorsement must be examined to determine if complete operations coverage is included (*e.g.,* by not limiting coverage to "*ongoing*" operations or by not expressly excluding coverage for completed operations). If completed operations coverage is desired and coverage is not afforded by the proffered endorsement form, coverage may be effected either by manuscripting the endorsement to extend to completed operations or by adding the coverage by a completed operations endorsement. ISO CG 20 37 Additional Insured – Owners, Lessees or Contractors – Completed Operations is designed to cover completed operations liabilities, first by stating that it covers liabilities "*arising out of your* (the named insured's) *work*" and stating that the liabilities covered are those liabilities arising out of the work that are "*included in the products-completed operations hazard.*"

c. Premises

There are two ISO endorsements used primarily to add as an additional insured the owner of premises or land leased to the named insured, CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises and CG 20 24 11 85 Additional Insured – Owners or Other Interests from Land Has Been Leased. Similarly, see **Form E** for CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises, which ISO additional insured endorsement adds designated persons as additional insureds as to designated "***premises***" and covers the Additional insured's liability:

> arising out of the ownership, maintenance or use of that part of the **premises** leased to you (the named insured) and **shown in the Schedule** subject to the following additional exclusions: ... Any "occurrence" which takes place after you cease to be a tenant in that premises. (and) Structural alterations, new construction or demolition operations performed by or on behalf of the (additional insured)....

An almost identical ISO endorsement is CG 20 24 11 85 Additional Insured – Owners or Other Interests from Land Has Been Leased. The sole and obvious difference being "land" versus "premises." The most common factually litigated scenario regarding these endorsements involves injuries occurring "**outside**" the "**part**" of the premises "shown in the schedule" leased to the tenant. This issue can also take on the nuance of whether coverage is effected if the schedule designates more or less than the "part of the premises" leased to the named insured.

Cases Finding No Coverage.

For example, in *General Accident, Fire and Life Assurance Corp. v. Travelers Ins. Co.,* 556 N.Y.2d 76 (1990), the court held that the AI endorsement did not cover a claim brought by the named insured's injured employee when the injury occurred outside the leased "premises." The court denied coverage even though tenant named insured's CGL policy was endorsed to name its landlord as an additional insured and designated the landlord's entire property as the "premises." The court reviewed the lease and found that it defined the term "premises" as a specific area and the "premises" was not where the injury occurred. New York follows a rule that these type endorsement designate the location ("the premises") where the injury must occur, and do not provide coverage when the injury occurs outside of the designated area even though the "occurrence" might be viewed as having "sprung" from the use of the landlord's facility. See *Greater N. Y. Mut. Ins. Co. v. Mut. Marine Office, Inc.* 3 A.D.3d 44, 769 N.Y.S.2d 234, 237 (2003), N. Y. App. Div. Lexis 13316 (2003)–injury occurred to a HVAC repairman who was injured while walking on roof of landlord's multi-tenant retail center to get to HVAC unit that tenant was obligated to maintain pursuant to lease of a retail space in the center. The additional insured endorsement form was an ISO CG 20 11 Additional Insured – Managers and Lessors of Premises (**Form E**). The injury neither occurred in the retail space leased to tenant or on the roof

directly above the space. See also *Rensselaer Polytechnic Inst. v. Zurich Am. Ins. Co.*, 176 A.D.2d 1156, 1157, 575 N.Y.S.2d 598 (N.Y. 3rd Dept. 1991)–stating that court was not persuaded that a duty to indemnify existed by the argument that although the accident did not occur within the leased premises, it did arise out of use of the leased premises; *Commerce & Indus. Ins. Co. v. Admon Realty, Inc.,* 168 A.D.2d 321, 323, 562 N.Y.S.2d 655 (1st Dept. 1990)–finding no duty to indemnity where the cause of the damage occurred outside the leased premises; *Northbrook Ins. Co. v. American Stats Ins. Co.*, 495 N.W.2d 450 (Minn. 1993)-additional insured endorsement held not to cover injuries occurring in alley behind named insured's bakery in a shopping center (in this case an employee of the bakery was injured when he slipped on ice while loading a truck parked in the alley behind the shopping center); *USF&G v. Drazic,* 877 S.W.2d 140 (Mo. 1994)-additional insured not covered for injuries to named insured tenant's employee who slipped and was injured on an icy parking lot.

Cases Finding Coverage.

An earlier New York case, *J. P. Realty Trust v. Public Serv.,* 476 N.Y.S.2d 325 (1984), found coverage for the additional insured for an injury occurring to the named insured's employee injured while using a freight elevator. The additional insured endorsement designated landlord's entire building as "that part leased to the insured;" however, the lease designated only two floors of the building as leased to the tenant as the "premises." The lease provided tenant use of the freight elevator. This court looked to the intent of the parties and construed the additional insured endorsement broadly in favor of coverage. Similarly, the court in *Harrah's Atlantic Inc. v. Harleysville Ins. Co.*, 288 N. J. Super. 152, 671 A.2d 1122 (1996) found coverage for the additional insured landlord for an injury occurring outside the premises leased to tenant (employee of NI tenant injured crossing street separating landlord's parking garage and landlord's building which housed tenant's retail space). The court noted

> However, the requirement that there be a causal link or connection between the accident and the leased premises does not mean that there must be any degree of physical proximity between the leased premises and the scene of the accident. The two concepts are quire different. Thus, we would expect the outcome in the *Franklin* case to have been the same had the tenant's business guest fell on the building's exterior steps even if they were some distance from the luncheonette. This so because the negotiating for such an endorsement in a lease the landlord is simply attempting to ensure against the risk of liability generated by the business about to be conducted by the tenant, and place the cost of insuring that risk on the tenant.

Franklin Mut. Ins. v. Security Indem. Ins., 275 N. J. Super. 335, 340, 646 A.2d 443, *cert denied* 139 N. J. 185, 652 A.2d 173 (1994). Also see *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 637 N.Y.S.2d 117 (N.Y. 1st Dept. 1996)–court required the insurer of the tenant of a garage to defend the owner of the garage in a personal injury suit even though the accident occurred on the sidewalk in front of the tenant's property. The additional insured endorsement was issued on an inapplicable form as it provided additional insured coverage as to injuries arising out of premises "leased to" the named insured. There were no leased premises as the named insured was a garage operator. The court noted that named insured's CGL policy provided coverage to the named insured for garage operations including "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations ...[; and] all operations necessary or incidental to a garage business." The court reasoned that "without traversing the sidewalk for access to and from the garage, there could be no use at all of the garage as a parking facility." *Id.* at 176. In *University of California Press v. G. A. Insurance Co. of New York*, 1995 U.S. Dist. Lexis 21442, 1995 WL 591307 (E.D.N.Y. 1995), the property damage and actual injury occurred within the leased premises. Books stored within the leased premises were damaged by leaking water from a sprinkler system malfunction one floor above the leased premises. The court found the language of the insurance agreement to be ambiguous and unclear as to whether

> the term "arising out of" referred to where the breach took place, where the accident occurred or where the damage occurred.

Unable to reconcile that ambiguity, the court followed a basic principle of contract law and construed the ambiguity against the insurer as the policy's drafter. Thus, because the damage occurred within the leased premises, the court found in favor of coverage. The court in *Hormel Foods Corp. v. Northbrook Property & Casualty*

Insurance Co., 938 F.Supp. 555 (D. Minn. 1996), *aff'd*, No. 97–1197, 1997 U.S. App. Lexis 34146 (8th Cir. 1997) upheld coverage for an additional insured landlord which leased a hog-processing facility to the employer (Quality Pork Products, "QPP") of a person who was killed using a machine designed and manufactured by Hormel, installed on the premises, and leased to QPP by Hormel. The Northbrook insurance policy AI endorsement covered losses "arising out of the ownership, maintenance or use, of the leased premiss." The court held that the machine was so intertwined with the facility's operations as to make injuries flowing from it attributable to the "ownership, maintenance, or use" of the facility. The machine was bolted to the floor walls and was "unambiguously part of the premises." How far some courts will extend additional insured coverage is illustrated by *SFH, Inc. v. Millard Refrigerated Services, Inc.*, 339 F.3d 738 (8th Cir. 2003). The warehouse lease required the lessee to carry CGL insurance and the lessor and its manager as additional insureds. Coverage was affected through a blanket additional insured endorsement covering all additional insured's required by named insured's contracts to be covered. The additional insured language was identical to the ISO CG 20 11 coverage as to "liability arising out of the ownership, maintenance or use of that part of the premises leased to you." The lessee's property was destroyed by a fire at the warehouse. It was determined that the one of the manager's employees had disabled the sprinkler system. The court found in favor of coverage, stating

> Construing the "arising out of" language broadly, we conclude that [the warehouse manager's] liability arose out of its maintenance of the leased premises. the fire started within the portion of the warehouse leased by [the lessee] and injured [the lessee's] property located in the leased premises. [The lessee's] loss was caused, or significantly increased, by the conduct of the [manager's] employee who shut off the water to the building's sprinkler system.

5. Covered Liabilities.

a. Negligence

(1) Additional Insured's Vicarious Liability for Named Insured's Negligence

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. [44] An additional's insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (1996); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. *See* the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

(2) Additional Insured's Own Negligence.

Depending on the language of the protecting party's insurance, the protected party may be covered for its own negligence, whether or not the protecting party is negligent. As such, it supplements the protection afforded by the protecting party's indemnity. [44]

b. Interpretation of Additional Insurance Covenants

(1) Express Negligence Test Not Applicable to Insurance Covenant

In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring the protected party (Getty) to be listed as an additional insured on the protecting party's (NL Industries') liability policies. [45] In *Getty* the injuries arose out of Getty's sole negligence; the indemnity provision excluded indemnity for Getty's negligence; the insurance covenant was silent as to whether the insurance was or was not to cover injuries due to Getty's negligence; the insurance covenant in the contract provided for NL Industries to maintain commercial general liability insurance and for such insurance was to "*extend to and protect Getty*." The court found that there was not a basis for preventing litigation as to whether Getty

was an additional insured under NL Industries' policies (*e.g.,* through an automatic blanket insured provision).

(2) 2004 Revision to ISO Forms

Recently, ISO issued revisions to its AI Endorsements, including the CG 20 26, CG 20 10 and CG 20 37 (attached hereto as **Forms F and G**) to eliminate coverage for an Additional insured's sole negligence. For example, the CG 20 10 form will exclude coverage for liabilities attributable to the additional insured's sole negligence as follows:

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

The 2004 revision seeks to limit the trigger for additional insured coverage to occurrences caused by the sole or partial negligence of the named insured.

c. Manuscript Additional Insured Endorsement to Limit Coverage to Indemnified Liabilities

One approach parties have used is have the protecting party's insurer issue a manuscripted additional insured endorsement that is limited to insurable indemnified liabilities. In *Certainteed Corp. v. Employers Ins. of Wausau,* 939 F. Supp. 826 (D. Kan. 1996). In *Certainteed* the additional insured endorsement issued by Wausau was a blanket automatic insured provision in the CGL policy it issued to its named insured contractor. This provision provided as follows:

> Section Two–Who Is an Insured:
>
> 5. Any person or organization ... for which you have agreed by written contract to procure .... liability insurance, but only for liability arising out of operations performed by you or on your behalf, provided that: ... (b) The insurance afforded to any person ... as an insured under this Paragraph 5 shall include only the insurance that is required to be provided by the terms of such agreement to procure insurance, and then only to the extent that such insurance is included within the scope of this policy.

The insurance provision of the construction contract, required the protecting party (the named insured contractor providing construction services to the plant owner) to provide insurance coverage for all "liability assumed" by the protecting party. The construction contract contained an indemnity agreement whereby the protecting party indemnified the protected party (the additional insured plant owner) for its negligence except if due to its sole negligence. The court construed the blanket addition insured provision as covering the additional insured's liability for injuries jointly caused by the protected party and by another contractor (a construction manager) to an employee of the named insured. The court thus held that the scope of the additional insured coverage was the same as the scope of the insurance that the named insured was to procure to protect the named insured on its indemnity.

6. Liability for Failure to List Other Party as Additional Insured.

A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages that would have fallen within the protection of the additional insured endorsement. [50] The court in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d. 119 (Tex. App.-Houston [14th Dist.] 2000, *writ denied*) found that Coastal failed to list Crown as an additional insured on Coastal's Trucker's Policy and was liable to Crown for the $4,816,549.28 judgment obtained by an employee of Coastal that was injured on Crown's premises. The insurance covenant did not refer to an additional insured designation but required Coastal to obtain

insurance "**protecting**" Crown. The insurance covenant in Coastal Transport reads as follows:

> Carrier agrees to purchase at Carrier's cost ... Comprehensive General Liability Insurance including care, custody and control coverage and liability assumed with $1,000,000 limit per occurrence for bodily injury and property damage combined. .... Such insurance shall ... fully extend to, defend and protect Crown.

7. Caveat.

Unfortunately, although additional insured covenants are the most common risk management technique, they are also the most commonly misunderstood, even by professionals in the field– risk managers, insurance agents, lawyers and courts that are called on to interpret them. The most common error is for the party's insurance covenant to fail to specify the terms of coverage and exclusions from coverage to be contained in the additional insured endorsement. See Commentary following **Form A2** discussing the Forms Manuals Office Lease. For example, a landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord and its management company and contractors as additional insureds on the tenant's and the tenant's contractors' CGL policies. A tenant may specify in its contract with its tenant-finish out contractor that the contractor shall cause its CGL insurer to list the tenant, its landlord, and the landlord's lender, management company and contractors as additional insureds on the tenant-finish out contractor's CGL policy. The tenant's contractor may specify in its subcontract that the subcontractors list the contractor as an additional insured on the subcontractors' CGL policies. In each of these cases, the person desiring protection as an additional insured has left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to letting the fox determine how, when, and if to protect the chicken! This mistake has been made because there is no commonly accepted definition of what it is to be an "additional insured." When a party fails to specify more than it be listed generically as an "additional insured," it has opened the door to the other party's insurer picking a form that effectively eliminates coverage for the additional insured. [44-56]

C. Protected Party's "*Other Insurance*"

1. Generally All Policies Are "*Primary*" and "*Contributory*" Unless Amended.

The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under the protecting party's policy rather than the protected party having to rely upon its own policy. By definition, a party that carries its own liability insurance and is also an additional insured under another's liability policy has multiple coverages which fall under the general heading of "***other insurance***" available to "contribute" towards satisfaction of the liability insured by both the protecting party's policy and the protected party's policy. [51]

A protected party ought to structure the joint insurance program with the protecting party so as to cause its own CGL policy not to be primary and contributory with the additional insurance coverage provided by the protecting party's CGL policy.

Assuming both the protecting party's CGL policy and the protected party's CGL policy are standard form policies, then both parties' policies by their standard terms, if not modified, declare themselves to be "***primary***" insurance and require any "other" insurance to which the additional insured has access to contribute proportionately to cover the liability. This risk of overlapping coverage may be addressed in advance of the loss either by amendment to the protected party's policy or to the protecting party's policy, or both.

The following are the "other insurance" provisions in the industry standard ISO CGL policy. These provisions are likely contained in both the protecting party's CGL policy and the protected party's CGL policy.

ISO CGL Policy:

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the **other insurance** is also primary. Then we will share with all that other insurance by the method described in c. below....

b. Excess Insurance.

This insurance is excess over: …

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of any endorsement.; …

c. Method of Sharing.

If all the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

2. Endorsing Named Insured's Policy to be Primary Not the Solution.

a. Primary vs. Sole Contributing

Endorsing the protecting party's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. Endorsing the protecting party's policy to be primary does not address the other insurance clause contained in the named insured's policy, which unamended provides for proportionate payment based on the limits of the additional insured's primary policy ("***contributory***"). This may be addressed by endorsing the named insured's policy to be the sole contributing policy, (i.e, not requiring contribution from the additional insured's policy). [51]

b. Endorsing the Additional Insured's Policy to Be Excess Coverage

The protected party should verify that its own policy provides that it is excess coverage to the insurance available to it as an additional insured under the protecting party's CGL policy and that in such case it is not primary and contributing as "other insurance". [51]

IV. RELEASES AND EXCULPATIONS

In 1993 the Texas Supreme Court in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) extended the fair notice principle and the express negligence doctrine to releases. This principle is likely to be extended to waivers,

exculpations and disclaimers seeking to exclude liability for one's own negligence, being merely a release worded in a different format. [76-82]

Many standard form waivers of subrogation are in the form of a release or waiver of either a landlord's or tenant's liability for its negligently caused injuries. These provisions are releases or waivers of claims and indirectly operate as a waiver of the party's insurance carrier's right of subrogation. If a wavier of subrogation is thus couched in terms of a waiver or release by one party of another party's liability for its negligence, then such provision is unenforceable unless it is written in a fashion that meets the express negligence test. [60-63]

V. CONDEMNATION

The risk that all or a portion of the leased premises or of the facilities supporting the leased premises, such as parking and means of access to parking, is a risk similar to acts of God ("special causes of loss") in that the parties did not cause the event to occur. Unlike that risk, however, the consequence is permanent. In both situations, the parties may have expended significant monies in making the leased premises ready for the lessee's occupancy that are not amortized as of the moment of taking and the lessee may incur significant consequential damages (such as moving costs, loss of good will, and lost profits due to business interruption). The parties can insure against the losses arising out of special causes of loss. The only means to address the losses arising out of condemnation is to contractually allocate in advance in the lease the condemnation award between the landlord and tenant. [83-100]

A. Allocation in the Event Lease is Silent

Texas follows the "***undivided fee***" or so-called "***unit rule***" in valuing property taken in condemnation. The condemned property is first valued as a whole, without consideration for how many parties own an interest in the property or the extent of their interest. The court determines the fair market value of the property. If the lease is silent as to how the award is allocated between landlord and tenant, the judge or jury first determines the market value of the entire property as though it belonged to one person, then the fact finder apportions market value as between lessee and owner of fee, with the value of the tenant's interest being first determined and awarded to the tenant and then the balance is awarded to the landlord. *Urban Renewal Agency v. Trammell*, 407 S.W.2d 772, 774 (Tex. 1966). The residual value after deduction of the value of the tenant's interest is the landlord's "***leased fee***" value.

1. Value of Tenant's Interest.

a. Loss of Tenant's "Leasehold Advantage"

In the absence of a provision in the lease to the contrary, tenants are entitled to a portion of the condemnation award equal to their lost "***leasehold advantage***", if any. The value of a tenant's leasehold interest is either positive or negative. If there is a positive value it is referred to as a "leasehold advantage." The value of a tenant's leasehold interest is calculated as the present market value of the use and occupancy of the leasehold for the remainder of the lease term, plus the market value of the right to renew if such right exists, less the agreed rent the tenant must pay for the use and occupancy of the property, such values to be determined by the usual "willing seller-buyer rule."

> For example, if the tenant pays $1000/month rent, but the premises could be leased for $1200/month, there is a $200/month leasehold advantage being lost by tenant on condemnation of its leased premises for which it is to be compensated out of the condemnation award.

b. No Award Allocated to Tenant for Its Lost Business or Personal Property

Texas common law presumes that a tenant's business is not taken in condemnation. The tenant is free to relocate. Thus, no award is given to the tenant due to the impact of the condemnation on the going concern value of the business so interrupted, its trade name, lost profits, or impact on its personal property. *Luby v. City of Dallas,* 396 S.W.2d 192, 199 (Tex. Civ. App.–Dallas 1965, writ ref'd n.r.e.); *Herndon v. Housing Authority of City of Dallas,* 261 S.W.2d 221, 223 (Tex. Civ. App.–Dallas 19 , writ ref'd).

c. Moving Expenses Compensable

A separate award is made to the tenant for reasonable moving expenses to move its personal property up to 50 miles, but not to exceed the value of the personal property itself. TEX. PROP. CODE § 21.043.

d. Tenant's Improvements and Fixtures Compensable

The value of the improvements, including fixtures taken or damaged, by condemnation is part of the undivided fee being condemned and is not separately valued in condemnation. Because fixtures are, by definition, part of realty, the condemning authority must pay compensation for the taking of, or damage or destruction to, fixtures caused by a condemnation.

In a lease silent as to allocation of a condemnation award, tenant paid for leasehold improvements, which as a practical matter can not be removed at the end of the lease term, are to be valued as part of the tenant's compensable interest.

In a case perhaps limited to its unique facts, the United States Supreme Court has found that a tenant's compensable interest for its leasehold improvements was to be measured by what a willing buyer would have paid for the improvements, which had a useful life exceeding the remainder of the lease term and which were subject to removal by the tenant, taking into account the possibility that the lease might be renewed as well as that it might not. *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973).

2. Interplay with Other Lease Clauses.

a. Permitted Use Clauses

The condemning authority must pay the market value of the property being condemned valued at its "highest and best use." *E.g., State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992). Absent a provision in the lease addressing allocation of the award on condemnation, even though a tenant's use is limited to a use that is not determined by the court to be the highest and best use of the property, a tenant might successfully argue that the landlord should not get the all of the balance of the award after deducting the value of the tenant's leasehold as its use is limited by the lease's permitted use clause. There is some authority for the proposition that the tenant should share in the balance of the award as without tenant's participation during the lease term, landlord can not realize the property's true value. *Irv-Ceil Realty Corp. V. State,* 43 A.D.2d 775, 350 N.Y.S2d 784 (1973). Whether such leverage is a compensable interest is not yet determined in Texas.

b. Renewal Clauses

In valuing a tenant's interest in condemnation, where the lease is silent as to allocation of the condemnation award, the law presumes that a tenant would exercise its renewal option absent a condemnation and in a case where a tenant has a leasehold advantage, it is measured over the term of the lease as if renewed and under the terms applicable to the existing and renewal term. *Fort Worth Concrete Co. v. State of Texas*, 416 S.W.23d 518 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.); and *Luby v. City of Dallas,* 396 S.W.2d 192, 199 (Tex. Civ. App.–Dallas 1965, writ ref'd n.r.e.).

3. Effect on Tenant's Obligation to Pay Rent.

a. Rent Abated on Total Condemnation

Tenant is relieved of its obligation to pay rent when its entire leased premises are condemned. *Elliott v. Joseph,* 351 S.W.2d 879, 881 (Tex. 1961).

b. Rent Not Proportionally Abated if a Portion of Leased Premises Taken

If the lease is silent as to partial abatement of rent on a partial condemnation of the leased premises, rent is not abated or partially abated, and tenant's remedy is to look to an apportionment of the damages assessed against the condemning authority based on the reduced value of his lease. *Elliott v. Joseph,* 351 S.W.2d 879, 881-882 (Tex. 1961). The following example of this allocation is given in Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What and How to Get What Your Client Wants*, ADVANCED REAL ESTATE DRAFTING COURSE 1, 3 (2003):

A partial condemnation may reduce a leasehold advantage to a leasehold disadvantage. The tenant holds a leasehold disadvantage when it has a continuing contract rental obligation that exceeds the market rent for the use and occupancy of the "after" condemnation premises. For example, if the market value of the use and occupancy of the premises before the condemnation was $100 per year and the tenant was only required to pay $90 per year under the lese, the tenant held a $10 leasehold advantage. If the condemning entity takes that advantage, it must compensate the tenant for the present value of that $10 for each of the years remaining in the lease, including the tenant's option to renew if there is one. But, if the condemning entity only takes part of the leased premises such that the tenant is still able to use the premises, but the market rent for the use and occupancy of the lease has been reduced to $70 per year, the condemning entity must compensate the tenant for the loss of its leasehold advantage plus the disadvantage that results from the condemnation. In total, under this scenario, the tenant is entitled to the present value of $30 per year ($10 for the loss of its leasehold advantage + $20 for the resulting leasehold disadvantage) for the duration of the lease.

B. Contractual Apportionment of Award

The parties are free to contractually apportion a future condemnation award contractually taking into account such future factors as they can contemplate.

1. Value of Tenant's Use is Less than Highest and Best Use at Time of Taking.

As opposed to being silent in the lease as to how the parties will allocate the award, the lease can address allocation of a portion of the award to either landlord or tenant in a case where tenant's use at the time of condemnation is not the compensable highest and best use of the property at the time of taking. For example tenant may be using the property for warehouse uses, but at the time of taking the highest and best use of the property, as a hotel, yields an award greater than the actual use taken. Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What and How to Get What Your Client Wants*, ADVANCED REAL ESTATE DRAFTING COURSE 1, 4 (2003):

> In that situation (where tenant's use is not the highest and best use), is the tenant's leasehold advantage calculated as leasehold advantage of a comparable warehouse property, or is the leasehold advantage valued with regard to the market ground rent for hotel tracts? The parties could agree on the answer in the lease, and avoid litigating the question, by providing that the tenant's leasehold interest is to be calculated using a market rental based either on the use the tenant is making of the premises or the highest and best use of the property as of the date of condemnation.

2. Value of Tenant's Improvements Not Fully Amortized at Time of Taking.

The parties can address in the lease the risk that at the time of condemnation the tenant will not have fully amortized the value of its tenant's leasehold improvement and apply a formula to how to compensate tenant for the ensuing loss on taking of the premises.

C. Contractual Allocation of Award to Landlord

Landlords incorporate into leases several types of clauses to assure that they receive the entire award or to minimize tenant's claim. These clauses include a provision that the lease terminates on condemnation, a disclaimer by the tenant of any right to an award for its taken interest other than the contractually agreed method of compensating it for its loss, and an assignment by tenant of all rights and awards to the landlord other than as expressly set forth in the allocation provision in the lease. Due to the perceived harshness of an automatic termination clause, courts will strictly construe such a clause to save the tenant's interest. *Norman's, Inc. V. Wise*, 747 S.W.2d 475, 477 (Tex. App.–Beaumont 1988, writ den'd).

1. "*Termination-on-Condemnation*" Clauses.

a. Automatic, Optional and Mixed

(1) Automatic termination clauses

A "termination-on-condemnation" clause provides that the tenant's interest terminates on condemnation of the leased premises (called an "**automatic termination clause**"). The result of such a clause is to terminate the tenant's interest in the property and extinguish any right of the tenant to share in the condemnation award.

See for example the following clause upheld in *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946):

> If the whole or any part of the demised premises shall be taken by Federal, State, county, city or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder, the tem hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

Termination of lease without termination of all rights leaves tenant right to some compensation.

The following clause in *Evans Prescription Pharmacy, Inc. v. County of Ector,* 535 S.W.2d 704, 706 (Tex. Civ. App.–El Paso 1976, writ ref'd) was construed as not terminating tenant's interest to the extent of tenant's right to compensation for its improvements taken by condemnation and its removal expenses:

> Should the leased property be taken by right of eminent domain the lease shall be terminated.

No termination on partial condemnation if clause fails to specify termination of lease on partial condemnation.

Sometimes strict construction against termination of tenant's interest can work to the tenant's disadvantage. In *Norman's, Inc. v. Wise*, 747 S.W.2d 475, 476 (Tex. App.–Beaumont 1988, writ den'd), the tenant's leasehold estate was held not to have been terminated by condemnation of a portion of the landlord's property (condemnation of a portion of the parking area) where the automatic termination clause was determined by the court to apply only in a case of the condemnation of the entire premises and not to a condemnation of "any part thereof." The *Wise* automatic termination clause reads as follows:

> It is specially understood and agreed by and between Lessor and lessee that in the event the demised premises are condemned for public use by any governmental agency, or other entity with the power of condemnation, this lease shall cease and terminate and be of no further force and effect, and Lessee shall have no claim or demand of any kind or character in and to any award made to Lessor by reason of such condemnation.

No termination if fail to state lease terminates as of condemnation.

A lease was held not to terminate automatically on condemnation where it terminated the "further liabilities" of the parties. 26 AM. JUR. 2d *Eminent Domain* § 264 (1996) citing *Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794 (Wis. Ct. App. 1980).

(2) Optional termination clause.

Optional termination on taking of entire premises.

Some clauses are drafted to provide an option in tenant or landlord to terminate the lease on condemnation of the leased premises or on condemnation of a part of the leased premises. The following clause was construed by the court to automatically terminate the lease as the court held the optional termination on condemnation of the entire leased premises was superfluous, no option applied :

> If the whole or any substantial part of the demised premises should be taken for any public or quasi-public use under any governmental law, ordinance or regulation, or by right of eminent domain, or should be sold to the condemning authority under threat of condemnation, this Lease shall, at the option of the landlord, terminate and the rent shall be abated during the unexpired

> portion of this lease effective when the physical taking of said premises shall occur.

J. R. Sillern, Inc. V. IeVison, 591 S.W.2d 598, 599-600 (Tex. Civ. App.–Eastland 1979, writ ref'd n.r.e.).

The tenant in *Texaco Refining and Marketing, Inc. V. Crown Plaza Group,* 845 S.W.2d 340, 342 (Tex. App.–Houston [1st Dist.] 1992, no writ) elected under the following optional termination clause not to exercise its option to terminate the lease due to a condemnation of a portion of the leased premises that effectively destroyed the use of the balance for its intended use as it wanted to preserve its right to be share in the award for the portion its leasehold interest taken in condemnation:

> If, during the term of this lease, a part only of said premises be taken for public use under right of eminent domain, and <u>if the remainder, in the opinion of the lessee, is not suitable for its purpose, lessee, at its option, may cancel and terminate its lease</u>, but if it shall not elect so to do, the monthly rental thereafter to be paid shall be reduced by an amount which bears the same ratio to that herein provided for as the area taken bears to the total area prior to such taking.

The court found that the condemnation took the tenant's interest thereby terminating the lease but tenant's interest was compensable and the award for partial condemnation was to be allocated between landlord and tenant. The court rejected landlord's complaint that the tenant acted in bad faith by continuing to renew the lease even though it was too small to be used as a gas station because, the court said, the tenant had no duty to the landlord to act in good faith in an ordinary commercial contract where there was no special relationship between the parties.

Optional termination on partial taking.

A court upheld tenant's termination of the lease on condemnation of a portion of the common areas of ancillary to the leased premises under the following clause in *Weingarten Realty Investors v. Albertsons, Inc.,* 66 F.Supp. 2d 825, 840 (S. D. Tex. 1999), *aff'd* 234 F.3d 28:

> Whether or not any portion of the Leased premises may be taken by ...[an authority having the power of eminent domain], either Landlord or Tenant may nevertheless elect to terminate this Lease or to continue this Lease in effect in the event any portion of any building in the portion of the Shopping Center outline in green, or more than twenty five percent (25%) of the Common Area of the Shopping Center be taken by such authority.

(3) Mixed termination clause.

A "**mixed termination clause**" provides for automatic termination in the event the entire leased premises is condemned and optional termination on a partial condemnation.

In *Houghton v. Wholesale Electronic Supply,* 435 S.W.2d 216, 218 (Tex. App.–Waco 1968, writ ref'd n.r.e.) the court upheld tenant's election not to terminate the lease due to a condemnation of a portion of the leased premises that destroyed tenant's use of the leased premises for the purpose for which it was originally leased, but was still useful to tenant for other purposes (condemning authority condemned tenant's building and 55% of the land but tenant wished to use the remaining 45% of the land not condemned to provide a driveway and access to adjoining land owned by tenant):

Condemnation clause:

> If the entire premises be taken in Eminent Domain proceedings, then the lease shall terminate. If any <u>taking of less than all the leased premises</u> ... is such as substantially to impair the usefulness of the property for lessee's purposes, then <u>at the lessee's option the lease may be terminated</u>; <u>but if</u> the taking of a portion which does <u>not substantially impair for lessee's purposes</u>, that is, any portion of the area, as for example, any condemnation for a sidewalk or alley way, or if any condemnation of the right to use for some definite or indefinite period shall occur, it is agreed .. that the rights, duties and obligations of the parties hereto under the terms of this instrument shall be modified fairly with such abatement of rent as shall fairly and equitable adjust the rights, duties and obligations of the parties hereto under the changed circumstances...

Use clause:

> Lessee is specifically permitted and authorized to use the leased premises for the storage, handling, shipping, display and sale of goods and merchandise (including

> without limitation electrical and electronic items) and related activities and for any other lawful business purpose or purposes. Provided, however, anything sated to the contrary notwithstanding, it is expressly understood and agreed that the leased premises shall not be used for any purpose which tends to substantially reduce the value of the leased property.

A different result would have occurred had the condemnation clause provided the lease terminated if tenant's use of the remainder of the premises after condemnation be the same use as the tenant was making of it at the time of the condemnation or to be one of a specified list of uses.

b. Coupling with a clause for rent abatement or partial rent adjustment or partial rent abatement

A corollary provision to the "termination-on-condemnation" clause is to couple it with a "**rent abatement clause**" or a "**partial rent adjustment clause**" or "**partial rent abatement clause**". If the lease provides for termination of the lease on condemnation in order to negate tenant sharing in the condemnation award, the lease should be drafted so as also to address the effect on tenant's obligation to pay rent. Why would a tenant give up its right to share in the condemnation award if it is not released from its obligation to pay rent? If the lease is silent as to rent abatement, the tenant may seek to participate in the condemnation award and argue that its right to share was not terminated as its obligation to pay rent was not expressly abated.

Total taking and total rent abatement.

An example of a coupled clause is

> The term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) fn 4; see also *J. R. Sillern, Inc. V. leVison*, 591 S.W.2d 598, 599-600 (Tex. Civ. App.–Eastland 1979, writ ref'd n.r.e.).

Partial taking and partial rent adjustment.

See *County of McLennan v. Shinault*, 302 S.W.2d 728, 730-732 (Tex. Civ. App.–Waco 1957, no writ) addressing the following clause in a case where the lease provided that in the event of partial condemnation, if the remaining portion was still capable of being used for the tenant's purpose, the lease would remain effect

> with a reduction in the rental price proportionate to the decreased utility to the land remaining.

See *Texaco Refining and Marketing, Inc. V. Crown Plaza Group,* 845 S.W.2d 340, 342 (Tex. App.–Houston [1st Dist.] 1992, no writ) where the lease provided that in the event of partial condemnation, the tenant held the option to terminate, but the tenant did not exercise its option,

> but if it shall not elect so to do, the monthly rental thereafter to be paid shall be reduced by an amount which bears the same ratio to that herein provided for as the area taken bears to the total area prior to such taking.

Also see *Houghton v. Wholesale Electronic Supply,* 435 S.W.2d 216, 218 (Tex. App.–Waco 1968, writ ref'd n.r.e.) where the lease provided for partial rent adjustment as follows:

> it is agreed .. that the rights, duties and obligations of the parties hereto under the terms of this instrument shall be modified fairly with such abatement of rent as shall fairly and equitable adjust the rights, duties and obligations of the parties hereto under the changed circumstances...

The court held that where the condemnation left only 45% of the leased premises remaining, the rent was reduced 45% from its original $450 per month to $202.68 per month and no appraisal was required.

c. Coupled with a Disclaimer of Claim or Assignment of Claim Clause.

Some termination on condemnation clauses are drafted to additionally include an assignment by tenant to landlord of tenant's rights, if any, to an award as a means of back stopping the termination clause. This is a wise tactic given court's disposition to strictly construe the language of a termination clause as not terminating a tenant's interest. Additionally, an assignment clause may broaden

interpretation of a termination clause to also pickup and assign to landlord tenant's right to compensation for its improvements.

See the following lease language:

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) fn 4:

> the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor...

County of McLennan v. Shinault, 302 S.W.2d 728, 730-732 (Tex. Civ. App.–Waco 1957, no writ)

> Lessee shall have no right or interest in the proceeds received by the lessor in such condemnation, for such property taken...

d. "Ownership of Improvements at End of Lease Term" Clauses

A termination of lease clause and an assignment of tenant's interest clause which is silent as to the tenant's right to compensation out of the condemnation award for its tenant improvements has been interpreted as only depriving the tenant of compensation for the value of the leasehold and not as depriving the tenant of compensation for its improvements. 26 AM. JUR. 2d *Eminent Domain* § 265 (1996). The court in *Evans Prescription Pharmacy, Inc. V. County of Ector*, 535 S.W.2d 704, 705 (Tex. Civ. App.–El Paso 1976, writ ref'd) held that the tenant could recover for its fixtures and improvements even though it was not entitled to recover for its leasehold interest (as noted in the discussion above, the lease contained a bare bones termination on condemnation clause merely stating that the lease terminated on condemnation and did not address compensation for tenant's improvements.).

2. Types of Allocation Clauses.

The following are approaches to address compensation for tenant improvements as opposed to remaining silent on the issue.

a. Allocation of Set Amount to Tenant or Establishing a Method of Valuation of Tenant's Interest in Tenant's Improvements

b. Assign Rights to Improvement Value to Landlord

Ervay, Inc. V. Wood, 373 S.W.2d 380, 382 (Tex. Civ. App.–Dallas 1963, writ ref'd n. r. e)*:*

> It is expressly understood and agreed that any and all damage and payment awarded or collected for such taking of the property for any public purpose shall belong to and be the property of the Lessor, whether such damage be awarded as compensation for diminution in value to the leasehold or to the fee of the premises herein leased and Less shall assert no right or claim to any damage as the result of any such taking.

c. Permit Removal of Improvements at End of Lease Term due to Condemnation

The termination clause in *Ervay, Inc. V. Wood,* 373 S.W.2d 380, 382 (Tex. Civ. App.–Dallas 1963, writ ref'd n. r. e) went on to state that tenant was entitled to remove its improvements from the leased premises in the event of condemnation. Also see *Fort Worth Concrete Co.,* 416 S.W.2d 518, 520, 522-523 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.).

d. State Landlord Owns Leasehold Improvements at End of Lease Term

If the lease provides that landlord owns tenant's leasehold improvements at the end of the lease and contains a termination on condemnation clause, then tenant has no compensable interest for its improvements on condemnation, even if it owns the improvements during the lease term.

e. Better to Recognize Tenant's Right to Improvement Value as Opposed to Being Silent

County of McLennan v. Shinault, 302 S.W.2d 728, 730-732 (Tex. Civ. App.–Waco 1957, no writ), the court held that tenant was bound to the measure of damages awarded in the condemnation proceeding, because the lease clause addressed such matter:

> no right or interest in the proceeds received by the lessor in such condemnation, for such property taken ... However, in the event any of the demised premises shall be taken as hereinabove mentioned and proceeds received for the removal of improvements thereon, or damages to such improvements, then and in that event such amount or amounts received as damages or for the removal of property shall belong to the lessee and paid directly to him.

3. Protecting Tenant's Lender.

Tenant's lender may require that landlord assign to tenant's lender all or a portion of the condemnation award attributable to tenant's interest under the lease as if the tenant's interest had not been terminated by the landlord required termination of lease clause which also is coupled with an assignment to landlord of tenant's right to compensation for tenant's improvements.

THE BASIC PRINCIPLES AS APPLIED TO A HYPOTHETICAL

I. HYPOTHETICAL

The forms attached to this Article beginning on page 25 have been completed to address the following hypothetical. The Office Lease (**Form A2**) is the standard form TEXAS REAL ESTATE FORMS MANUAL Office Lease Form **11-3** with **Form 11-34** Insurance Addendum and **Form 11-35** Tenant Improvements Rider to Lease or Work Letter attached.

DeBaker & Coolidge, L.L.P. ("**Tenant**") desires to lease a medical office suite (the "**Leased Premises**") in a multi-tenant medical office building known as "Fannin Center" (the "**Office Building**") from Crescent Real Estate, L.P. ("**Landlord**" or the "**Building Owner**"). The Office Building has been completed and is occupied by other tenants. The Leased Premises is an entire floor in the Office Building. The Leased Premises are approximately 20,000 square feet (Rentable Area). DeBaker & Coolidge, L.L.P. will be a prized tenant to the project. It has been offered a below-market rent as its presence will guarantee that the Building will be filled quickly. If DeBaker & Coolidge, L.L.P. were to seek comparable space in another property, it likely would have to pay rent greatly in excess of the rent at Fannin Center. It has negotiated a significant leasehold advantage at Fannin Center.

The Leased Premises have never been occupied by another tenant, and have not been finished-out, but are basically bare concrete shell space enclosed by exterior walls of the Office Building.

The Office Lease provides for the Tenant to build out the improvements to the Leased Premises, including certain improvements that would be considered Common Areas improvements, if located on other floors of the Office Building (for example, the bathrooms, HVAC handlers, and certain partitioning).

The Landlord is funding a tenant allowance of $30 per square foot ($600,000) to cover "building standard" improvements to the floor. The balance of the cost of the Tenant Improvements ($400,000 in upgrades a.k.a. betterments) will be paid for by Tenant.

Tenant has hired Joe AIA ("**Tenant's Architect**") to design and supervise the Tenant Improvements. Tenant has also hired ABC Construction, Inc. ("**Tenant's Contractor**") to construct the Tenant Improvements. Landlord has required Tenant to coordinate the construction of the Tenant Improvements with Constructors, Inc., the building contractor ("**Building Contractor**") and its architects and engineers, including the Building Design Architect ("**Landlord's Architect**") and the HVAC engineer for the Office Building ("**Office Building HVAC Contractor**"). Tenant's construction activities will have to be coordinated with various other contractors of the Landlord providing on-going operational services at the Office Building, including the management service ("**Project Manager**"), the security guard service ("**Security Contractor**") and the parking garage contractor ("**Parking Garage Operator**").

Landlord has tendered to Tenant to review Landlord's standard Office Lease (**Form A2**) and assures Tenant that it should have no problem complying with the requirements of the Office Lease and that since this is a standard deal, very little lawyer time should be involved. After all it is the State Bar's Office Lease form.

The Office Lease provides that Tenant, Drs. DeBaker and Coolidge (the "**Tenant's Principals**"), and the Tenant's Contractor are to indemnify Landlord and certain "**Landlord-Related Persons**" (the Project Manager, the Office Building Architect, the Building Contractor, the Office Building HVAC Contractor, the Security Contractor, the Parking Garage Contractor, and Landlord's Lender) from injuries occurring during construction and thereafter during the tenancy. The Office Lease contains provisions addressing property insurance covering the Tenant Improvements during construction and after their completion during the Lease Term. The Office Lease also requires Tenant to obtain Payment and Performance Bonds covering the construction of the Tenant Improvements.

(Form A2 - Office Lease ¶ A 15):

"**Tenant agrees to –** INDEMNIFY, DEFEND, AND HOLD LANDLORD HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.**"

(Form A2 - Office Lease - Insurance Addendum ¶ A 1, A 2 and B):

"**A. Tenant agrees to –**

1. Maintain the property and/or liability insurance policies required below and such other insurance coverages an/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises: *Liability Insurance Policies* Commercial general liability (occurrence basis) Per occurrence: $5,000,000, Aggregate: $5,000,000. *Property Insurance Policies* Causes of loss– special form 100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises ...

2. Comply with the following additional insurance requirements:

   a. The commercial general liability ... must be endorsed to name Landlord and Lienholder as "additional insureds" and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract."

   b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder.

B. Landlord agrees to maintain the property and/or liability insurance policies required below during the Term: Commercial general liability (occurrence basis or occurrence: $5,000,000, Aggregate: $5,000,000. Causes of loss–special form property 100 percent of replacement cost of the Building exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirement of all lessees.

Tenant asks you to review the indemnity and insurance provisions of the Office Lease and to assure it that it is "standard and not a problem."

Tenant's Architect has prepared and delivered to you a Construction Contract for the Tenant Improvements. You take comfort from the detailed indemnity and insurance provisions contained in the AIA form. You notice, however, that –

The AIA form identifies your tenant client as the "Owner."

The form provides that the Owner is to purchase and carry the "*Owner's usual liability insurance*." (**AIA A201 ¶11.2.1**).

The Contractor is to purchase "such insurance as will protect the Contractor from claims which may arise out of or result from the Contractors operations" (**AIA A201 ¶11.1.1**) and that the "Owner may require the Contractor to purchase and maintain Project Management

Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract." (**AIA A201 ¶11.3.1**). Further "the Owner (is to) reimburse the Contractor" for such insurance. (**AIA A201 ¶11.3.1**).

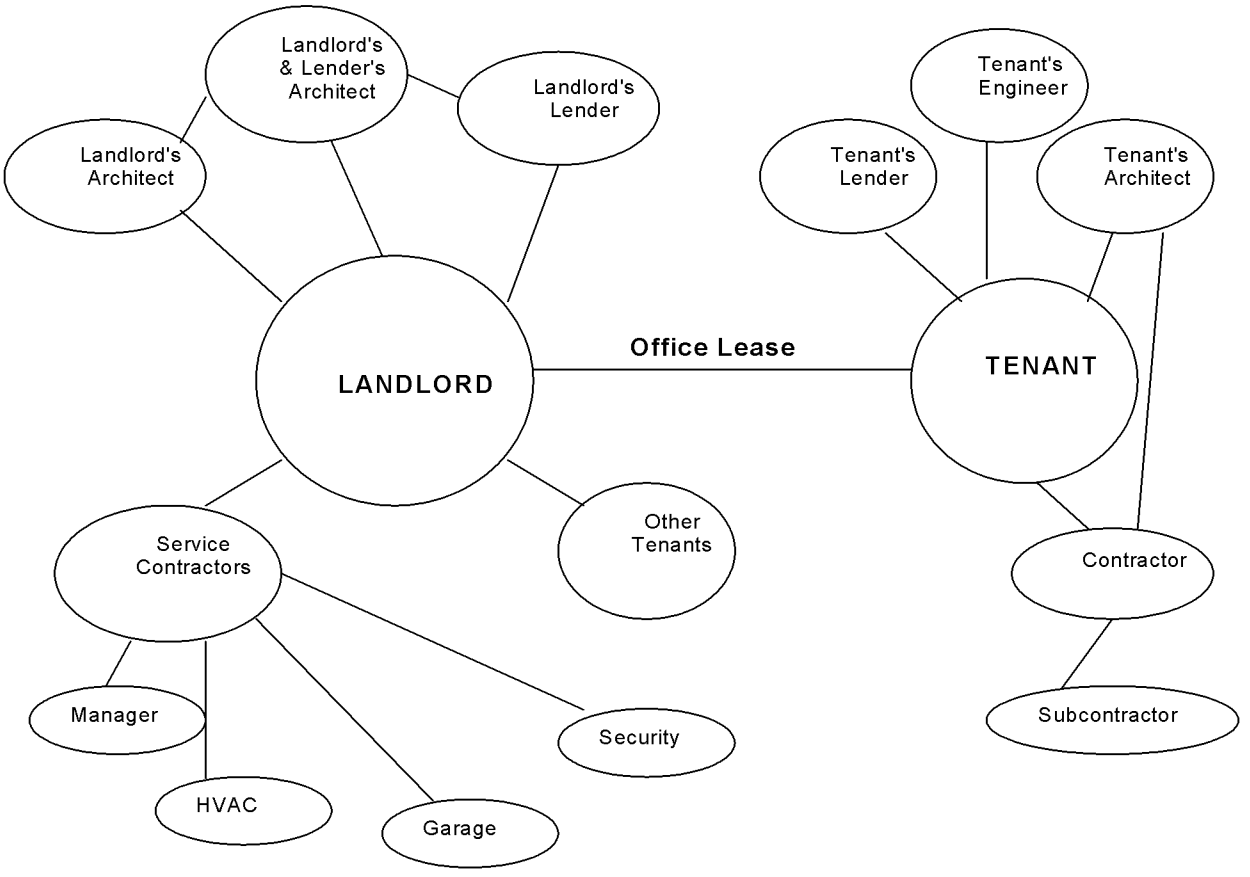
You note that the Contract provides that the "Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds...." (**AIA A201 ¶11.3.3**).

You further note that the Contract provides that "the Owner shall purchase and maintain ... property insurance written on a builder's risk 'all-risk' or equivalent policy form" and that "this insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the project." (**AIA A201 ¶11.4.1**).

You wonder if these provisions are consistent with the Office Lease.

The parties involved in this hypothetical have been requested to have their respective insurance agents issue Certificates of Insurance reflecting the contracted-for coverages. (Office Lease **¶A 2c**; Construction Contract **AIA A201 ¶11.1.3**).

You make a sketch of the various parties involved.



II. FORMS

Appendix A1
Texas Real Estate Forms Manual Ch. 11 Leases and Ch. 18 Risk Allocation: Indemnity, Waiver, and Insurance

The following is a quoted portion of the commentary in chapters 11 Leases and 18 Risk Allocation of the *Texas Real Estate Forms Manual* concerning the risk allocation provisions contained in the 8 forms of lease contained in the manual: Manual Form 11-1 Lease [Basic], Manual Form 11-2 Retail Lease, Manual Form 11-3 Office Lease, Manual Form 11-5 Residential Lease, Manual Form 11-6 Industrial Lease, Form 11-7 Hunting Lease, Manual Form 11-8 Agricultural Lease and Manual Form 11-9 Grazing Lease, the form of insurance addendum, Manual Form 11-34 Insurance Addendum to Lease, and the tenant improvement construction addendum, Manual Form 11-25 Tenant Improvements Rider to Lease or Work Letter.

Ch. 8 Leases

§ 11.1:4 Cautions: Risk Allocation

Indemnities and Waivers: The indemnity provision of the multitenant building or project lease forms are designed to protect the respective parties from their own ordinary negligence (but not gross negligence or willful misconduct) on a geographic basis; that is, the tenant indemnifies the landlord for any damage or injury occurring within the premises, whether or not the ordinary negligence of the landlord is a cause of the damage or injury, and the landlord indemnifies the tenant for any damage or injury occurring within the common areas, whether or not the ordinary negligence of the tenant is a cause of the damage or injury. The waiver of subrogation provision contained in the multitenant building or project lease from releases both parties from liability for property damage and loss of revenues up to the limits of the property insurance coverages required to be carried under the lease, notwithstanding the ordinary negligence of the party causing the property damage or loss of revenues. The indemnity and waiver provisions are designed to comply with the two-pronged "fair notice doctrine" under Texas case law: (1) the "express negligence rule" set forth in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), and (2) the "conspicuousness rule" enunciated in *Dresser Industries, Inc. V. Page petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993).

Insurance: The indemnity and casualty provisions of the lease are designed to mirror the insurance coverages required of landlord and tenant under the lease. Thus, it is critical that the parties consult with their insurance professionals to determine the exact insurance coverages to be included on the insurance addendum incorporated into the lease form or, if applicable, the separate insurance addendum (Manual Form 11-34) and that the attorneys tailor the indemnity and casualty provisions in response to the actual insurance policies that will be carried by the parties.

Rebuilding Obligations: The restoration obligations of the parties after a casualty are tied to the description of "Tenant's Rebuilding Obligations" contained in the Basic Terms of the lease. The tenant is expected to restore those leasehold improvements described in "Tenant's Rebuilding Obligations" in addition to replacing its personal property (including inventory, furniture, trade fixtures, and equipment). Because the tenant should carry property insurance to cover its restoration obligations, a detailed description is imperative. See clauses 11-10-9, 11-10-10, and 11-10-11 in Manual Form 11-10 in this chapter. The landlord's restoration obligations are defined in terms of the portions of the premises that the tenant is not required to rebuild.

For example, the tenant may be receiving the space in shell condition and be responsible for the initial construction of all leasehold improvements. The parties may decide that the tenant will restore all of the leasehold improvements inside the shall if the premises are destroyed. At the other extreme, the tenant may be receiving the premises with existing leasehold improvements, and the parties may decide that the landlord should restore all leasehold improvements after a casualty. Obviously, the possibilities are infinite and depend on the economic underpinnings of the transaction as well as the relative sophistication of the parties. However, the question must be asked at the outset of the transaction so that both parties are clear about the allocation of the risk for restoration and that adequate property insurance is obtained.

Ch. 18 Risk Allocation: Indemnity, Waiver, and Insurance

§ 18.5:3 Additional Insured Endorsement Forms

Additional insured forms contain a granting clause stating that the party listed in the endorsement is to be included a an insured under the policy followed by restrictions introduced by the phrase "but only with respect to." Additional insured endorsements do not cover partners, employees, agents, and other parties related to the party named as additional insured unless language to that effect is added. Many additional endorsements explicitly or by implication exclude coverage for the sole or contributory negligence of the additional insured. Hence, the type of additional insured endorsement to be used must be stipulated by name, form number, and date or, at a minimum described in terms of the desired coverage. The additional insured endorsements discussed below are standard forms promulgated by Insurance Services Office, Inc.…

Form A2

State Bar Form 11-3 Office Lease - Risk Management Provisions

Office Lease

Basic Terms

Date: June 30, 2006.

Landlord: Crescent Real Estate, L.P.

...

Tenant: DeBaker & Coolidge, L.L.P.

...

Premises

Approximate square feet: 20,000 sq. ft.

Name of Building: Fannin Center

Street address/suite: Suite 1, 909 Fannin

City, state, zip: Houston, TX 78768

Suite No. 1 on Floor 1, Building 1, shown on Exhibit 1 attached hereto and being located on the land described in Exhibit 2.

...

Term (months): 120 months.

...

Tenant's Pro Rata Share: 5%

...

Tenant's Insurance: As required by Insurance Addendum

Landlord's Insurance: As required by Insurance Addendum

Tenant's Rebuilding Obligations: If the Premises are damaged by fire or other elements, Tenant will be responsible for repairing or rebuilding the following leasehold improvements:

All improvements that are not building standard leasehold improvements. For purposes of this lease, building standard leasehold improvements are all partitions, walls, ceiling systems, wiring, light fixtures, floors, finishes, wall coverings, floor coverings, signs, doors, hardware, windows, window coverings, plumbing, heating, ventilating, and air-conditioning equipment, and other improvements preselected by Landlord for use throughout the Building.

Definitions

....

"**Common Areas**" means all facilities and areas of the Building and Parking Facilities and the related land that are intended and designated by Landlord from time to time for the common, general, and nonexclusive use of all tenants of the Building. Landlord has the exclusive control over and right to manage the Common Areas.

"**Essential Services**" means the following services: (a) air-conditioning and heating to the premises reasonable for the Permitted Use (exclusive of air-conditioning or heating for electronic data-processing or other specialized equipment) during Building Operating Hours and at such other times at such additional cost as Landlord and Tenant may agree on; (b) hot and cold water for lavatory and drinking purposes; (c) janitorial service and periodic window washing; (d) elevator service, if necessary, to provide access to and form the Premises; (e) electric current for normal office machines and the Building's standard lighting reasonable for the Permitted use; and (f) lighting in Common Areas and fluorescent lights in the Building's standard light fixtures on the premises.

"**Injury**" means (a) harm to or impairment or loss of property or its use, (b) harm to or death of a person, or (c) "personal and advertising injury" as defined in the form of liability insurance Tenant is required to maintain.

"**Landlord**" means Landlord and its agents, employees, invitees, licensees, or visitors.

"**Lienholder**" means the holder of a deed of trust covering the Premises.

"**Operating Expenses**" means all expenses that Landlord must reasonably pay in connection with the ownership, operation, and maintenance of the building, except principal and interest on any debt, expenditures classified as capital expenditures for federal income tax purposes, and expenses for which Tenant is required to reimburse Landlord.

"**Parking Facility**" means the facility or area described in the attached parking facility rider.
....

"**Tenant**" means Tenant and its agents, contractors, employees, invitees, licensees, or visitors.

....

Clauses and Covenants

A. Tenant agrees to—

7. Pay (a) monthly, in advance, Tenant's Pro Rata Share of the monthly estimated Operating Expenses and (b) annually, any difference between the estimated Operating Expenses and the actual Operating Expenses, within thirty days of receiving notice of such difference from the Landlord.

...

15. INDEMNIFY, DEFEND, AND HOLD LANDLORD HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) OCCURRING IN ANY PORTION OF THE PREMISES. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF TENANT'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION Act OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.**

....

C. Landlord agrees to—

3. Provide the Essential Services.

....

4. Repair, replace, and maintain the (a) roof, (b) foundation, (c) Common Areas, (d) structural soundness of the exterior walls, doors, corridors, and windows, and (e) other structures or equipment serving the Premises.
....

8. INDEMNIFY, DEFEND, AND HOLD TENANT HARMLESS FROM ANY INJURY AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS OCCURRING IN ANY PORTION OF THE COMMON AREAS. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH (A) IS INDEPENDENT OF LANDLORD'S INSURANCE, (B) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER THE WORKERS' COMPENSATION ACT OR SIMILAR EMPLOYEE BENEFIT ACTS, (C) WILL SURVIVE THE END OF THE TERM, AND (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT.**

....

E. Landlord and Tenant agree to the following:

3. *Insurance*. Tenant and Landlord will maintain the respective insurance coverages described in the attached Insurance Addendum.

4. *Release of Claims/Subrogation*. [62-66, 76, 78] LANDLORD AND TENANT RELEASE EACH OTHER AND LIENHOLDER FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR BUILDING, DAMAGE TO OR LOSS OF PERSONAL PROPERTY WITH THE BUILDING, AND LOSS OF BUSINESS OR REVENUES THAT ARE COVERED BY THE RELEASING PARTY'S PROPERTY INSURANCE OR THAT WOULD HAVE BEEN COVERED BY THE REQUIRED INSURANCE IF THE PARTY FAILS TO MAINTAIN THE PROPERTY COVERAGES REQUIRED BY THIS LEASE. THE PARTY INCURRING THE DAMAGE OR LOSS WILL BE RESPONSIBLE FOR ANY DEDUCTIBLE OR SELF-INSURED

RETENTION UNDER ITS PROPERTY INSURANCE. LANDLORD AND TENANT WILL NOTIFY THE ISSUING PROPERTY INSURANCE COMPANIES OF THE RELEASE SET FORTH IN THIS PARAGRAPH AND WILL HAVE THE PROPERTY INSURANCE POLICIES ENDORSED, IF NECESSARY, TO PREVENT INVALIDATION OF COVERAGE. THIS RELEASE WILL NOT APPLY IF IT INVALIDATES THE PROPERTY INSURANCE COVERAGE OF THE RELEASING PARTY. **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE RELEASED PARTY BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE RELEASED PARTY.**
...

6. *Condemnation/Substantial or Partial Taking*

a. If the Premises cannot be used for the purposes contemplated by this lease because of condemnation or purchase in lieu of condemnation, this lease will terminate.

b. If there is a condemnation or purchase in lieu of condemnation and this lease is not terminated, Landlord will, at Landlord's expense restore the Premises, and the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.

c. Tenant will have no claim to condemnation award or proceeds in lieu of condemnation.

Commentary

A brief commentary is provide in this column and a more detailed commentary on the risk allocation provisions of this form and the Insurance Addendum follows the Insurance Addendum.

"**Premises", "Building" and "Common Areas**". The Lease divides the geographic area subject to the Lease into 3 components: the "Building," the "Premises" and the "Common Areas." Each of these terms are defined in the Basic Terms and Definitions portion of the Lease.

The risk allocation provisions of the Lease allocate responsibilities and "risk" utilizing the geographic area terms. For example, the definition of "Common Areas" states that "Landlord has the exclusive control over and right to manage the Common Areas." The indemnity provisions allocate risk based on the geographic are of the occurrence of an Injury. **¶A 15** provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." **¶C 8** provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas."

The Insurance Addendum specifies the types of insurance to be maintained by Tenant and Landlord, but utilize different means to identify the geographic responsibilities for Landlord and Tenant as to property insurance versus liability insurance. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "the replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations...." Landlord's property insurance is to cover "the replacement cost of the Building exclusive of ... the rebuilding requirements of all lessees." However, the Lease does not similarly state the geographic area to be covered by the Tenant's and the Landlord's liability insurance but relies on the geographic coverage terms and definitions of the parties' liability policies.

Tenant's Rebuilding Obligations. The Manual provides 3 choices to identify the portion of the Building to be rebuilt by Tenant in the event of a casualty loss: **Clause 11-10-9**: if Tenant will rebuild everything other than the building shell; Clause **11-10-10**: if Tenant will rebuild everything installed by the tenant; and Clause **11-10-10**: the clause employed in the form completed in the left-hand column for the Hypothetical, where the Tenant will only be required to rebuild the $400,000 in Tenant-made upgrades or betterments made at the inception of the lease and any subsequent Tenant-made upgrades and betterments.

The Tenant improvements and upgrades are being constructed by Tenant by its contractor pursuant to **Form A4**, the **Manual Form 11-25 Tenant Improvements Rider to Lease or Work Letter**.

"**Injury**". The defined term "Injury" is used in the indemnity risk allocation provision. [20-22] **A**

15 provides that "Tenant agrees to ... indemnify ... Landlord from any Injury occurring in any portion of the Premises." **¶C 8** provides that "Landlord agrees to ... indemnify ... Tenant from any Injury occurring in any portion of the Common Areas." "Injury" is defined in the Manual Lease forms as meaning 3 types of occurrences and the associated liability arising out of such occurrence: property damage, injuries to persons including their death, and "personal and advertising injury." This last form of liability incorporates by reference the definition of such term as contained in Tenant's liability insurance.

"**Landlord" and "Tenant**". The terms "Landlord" and "Tenant" are used in the Basic Provisions to name the parties to the Lease and are defined in the Definitions as including a laundry list of other persons that are not parties to the Lease. The laundry list is not identical for each party to the Lease. The definition of "Tenant" additionally includes the Tenant's contractors as "Tenant."

The purpose for adding a laundry list of other persons not a party to the Lease as being within the defined term "Landlord" or "Tenant" is a risk allocation purpose, both to define the Indemnified Persons (the person who are protected by the indemnity) and to define the broad scope of the indemnity (the persons whose negligence caused the Injury and for which the Indemnified Persons are to be protected by the Indemnifying Person).[1] For example ,Tenant's indemnity of the Landlord in **¶A 15** is very broad in that "Tenant indemnifies ... Landlord ...from any Injury ... occurring in any portion of the Premises....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord...."

"**Tenant**". Tenant is defined as being persons other than the Tenant identified in the Basic Terms. As noted above, The purpose for adding a laundry list of other persons not a party to the Lease as being within the defined term "Tenant" is a risk allocation purpose for liabilities caused by "Tenant."

Indemnity by Tenant. Tenant's indemnity of the Landlord in **¶A 15** is very broad in that "Tenant indemnifies ... Landlord ...from any Injury ... occurring in any portion of the Premises....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord...." This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for "all liabilities arising out of use of the Premises", "such as the liability of the Landlord due to its negligence or strict liability [7-17] or for injuries to the Tenant's employees [20-22] arising out of the sole or concurrent negligence of the Landlord.

It thus indemnifies "Landlord" for the "Landlord's" sole and contributory negligence.

"Landlord" in this context is the laundry list of persons and this provision is an indemnity of Landlord, and Landlord's agents, employees, invitees, licensees, or visitors for the negligence of Landlord and Landlord's agents, employees, invitees, licensees, or visitors causing Injury in the Premises.

However, it may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence.[12] See discussion of indemnities covering the Indemnifying Person's share of negligence in Author's Commentary below following the Insurance Addendum.

Also as discussed below, in Author's opinion a fairer allocation of risk can be made based on the degree of causation in addition to the where the Injury occurs. Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent?

Indemnity by Landlord. Landlord's indemnity of the Tenant in **¶C 8** is very broad in that "Landlord indemnifies ... Tenant ...from any Injury ... occurring in any portion of the Common Areas....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Tenant...." This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Landlord for liabilities for Injuries arising out of the Common Areas, such as the liability of Tenant due to its negligence or strict liability [15-17, 24-26] or for injuries to the

Landlord's employees [27] arising out of the sole or concurrent negligence of the Tenant.

It thus indemnifies Tenant for the Tenant's sole and contributory negligence.

"Tenant" in this context is the laundry list of persons and is an indemnity of Tenant, and Tenant's and its agents, contractors, employees, invitees, licensees, or visitors for the negligence of Tenant and its agents, contractors, employees, invitees, licensees, or visitors causing Injury in the Common Areas.

However, it may not be effective as an indemnity of Tenant against Tenant's liability arising out of the Landlord's concurrent or comparative negligence.[22] See discussion of indemnities covering the Indemnifying Person's share of negligence in Author's Commentary below following the Insurance Addendum.

Insurance. Comments as to insurance follow Form 11-34 Insurance Addendum.

Waiver of Subrogation. The waiver of subrogation provision (**¶E.4**) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release.

The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test.[79] The release is written in conspicuous type and meets the requirements of the fair notice test.[79]

The lease forms in the Forms Manual do not contain other typical forms of releases and waivers common to landlord-oriented lease forms (for example, limiting landlord's liability for breaches of the lease to its equity in the Building; disclaimers of liability for interruption in Essential Services). Note that any provision of the lease that encompasses a release, waiver, disclaimer or exculpation for a party's negligence must comply with the requirements of the express negligence test in order to be enforceable as to such negligence. Most such provisions in common usage are not drafted in a fashion that comply with the express negligence test!

Condemnation. **¶E.6c** is a release by Tenant of any share of the condemnation award attributable to the condemnation in whole or in part of the Building, including the Premises and the Common Areas. By definition Common Areas include the Parking Facilities. As discussed in the Basic Principles portion of this Article at **V C1a** and **V C1c**, in the absence of **¶E.6** Tenant would be entitled to share in the condemnation award to the extent of the value of Tenant's leasehold estate taken in the condemnation. In a case where the Tenant has not released its right to share in the condemnation award, Tenant is entitled to be compensated for the following: (a) the value of its lost "***leasehold advantage***" and (b) the value of the improvements including fixtures taken or damaged by condemnation.

Applying **¶E.6c** to the Hypothetical, DeBaker & Coolidge will not be compensated either for the $200,000 in leasehold betterments they have expended or for the loss of the rent advantage it negotiated with Crescent Real Estate to move to Fannin Center.

¶E.6c is not a release of Tenant's right under TEX PROPERTY CODE § 21.043 for reasonable moving expenses to move its personal property up to 50 miles (but not to exceed the value of the personal property itself).

Form A3

Manual Form 11-35

Tenant Improvements Rider to Lease or Work Letter

Terms and Definitions

General Description of Work: Finish out of shell space as medical offices

Architect Preparing Plans: Joe AIA

Architect's Address: Penthouse A, Clover Leaf Towers, Houston, TX

Contractor: ABC Construction, Inc.

Contractor's Address: P. O. Box 666, Houston, TX 78768-666

Contractor's Insurance

Death/bodily injury: $5,000,000
Property/Builder's risk: 100% of replacement cost of improvements to be built pursuant hereto

Agreements

A. Preparation of Plans. ...

B. Performance of Work. ...

C. Schedules. ...

D. Changes in the Work. ...

E. Contractor's Insurance. Contractor must maintain insurance reasonably satisfactory to Landlord in the amounts specified in the terms and definitions.

Form A4

Manual Form 11-34

Insurance Addendum to Lease

Lease

Date: June 30, 2006

Landlord: Crescent Real Estate, L.P.

Tenant: DeBaker & Coolidge, L.L.P.

This insurance addendum is part of the lease.

A. Tenant agrees to—

1. Maintain the property and/or liability insurance policies required below (mark applicable boxes) and such other insurance coverages and/or higher policy limits as may be required by Lienholder during the Term and any period before or after the Term when Tenant is present on the Premises:

Type of Insurance	**Minimum Policy Limit**	
Liability Insurance Policies:		
☒ Commercial general liability [71] (occurrence basis)	Per occurrence: [71] Aggregate:	$ 1,000,000.00 $ 5,000,000.00
Or		
❑ Business owner's policy	Per occurrence: Aggregate:	$_____ $_____
Required Endorsements:		
☒ Designated location(s) general aggregate limit		
❑ _____		$ 5,000,000.00
☒ Workers' compensation [40-42]	$ 1,000,000	
☒ Employer's liability	$ 1,000,000	
☒ Business automobile liability [57,72]	$ 1,000,000	
❑ Excess liability	$_____	
Or		
❑ Umbrella liability (occurrence basis)	$_____	
[*Include any other desired endorsements. See chapter 18.*]		

Property Insurance Policies:

☒	Causes of loss—special form [74]	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises.
Or		
❑	Business owner's policy	100 percent of replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations and (b) all of Tenant's furniture, fixtures, equipment, and other business personal property located in the Premises.

Required Endorsements:

☒	Business income and additional expense:	Sufficient limits to address reasonably anticipated business interruption losses for a period of months
❑	Boiler and machinery	$_____
❑	Flood	$_____
❑	Earth movement	$_____
❑	Ordinance or law coverage	$_____
❑	Glass	
❑	Signs	

2. Comply with the following additional insurance requirements:

   a. The commercial general liability (or business owner's property policy) must be endorsed to name Landlord and Lienholder as "additional insureds" and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract." [43]

   b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder. [44]

   c. Property insurance policies must contain waivers of subrogation of claims against Landlord and Lienholder. [60-63]

   d. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Tenant to Landlord before entering the Premises and thereafter at least ten days before the expiration of the policies. [69]

3. Obtain the approval of Landlord and Lienholder with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates, and other evidence of Tenant's Insurance; the amounts of any deductibles or self-insured retentions amounts under Tenant's Insurance; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

B. Landlord agrees to maintain the property and/or liability insurance policies required below (mark applicable boxes) during the Term:

Type of Insurance	**Minimum Policy Limit**
☒ Commercial general liability [71] (occurrence basis)	Per occurrence: $ 5,000,000.00 Aggregate: $ 50,000,000.00
☒ Causes of loss—special form [74] Property	100 percent of replacement cost of the ~~Shopping Center~~ Building exclusive of foundation, footings, infrastructure, sitework, and the rebuilding requirements of all lessees

Form A5

Commentary on Lease and Insurance Addendum:

I. INDEMNITY.

A. Mutual Indemnities.

The Office Lease contains mutual indemnities. In **Lease ¶A 15** Tenant indemnifies Landlord. In **Lease ¶C 8** Landlord indemnifies Tenant. Each indemnity is a broad form indemnity, indemnifying the Indemnified Person for all liabilities due to the occurrence of an Injury, even if the cause is the sole or concurrent negligence of the Indemnified Person. The Tenant's indemnity is for Injuries occurring in the Premises. The Landlord's indemnity is for Injuries occurring in the Common Areas.

Each indemnity complies with the express negligence and fair notice requirements. [7-17] Therefore, each indemnity is enforceable as a means of shifting the risk of liability to the Indemnifying Person for Injuries caused in whole or in part by the sole or concurrent negligence of the Indemnified Person.

B. Indemnity by Tenant.

Tenant's indemnity of the Landlord in **Lease ¶A 15** is very broad in that "Tenant indemnifies ... Landlord ...from any Injury ... occurring in any portion of the Premises....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Landlord...." This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Tenant for "all liabilities arising out of use of the Premises", such as the liability of the Landlord due to its negligence or strict liability [7-17] or for injuries to the Tenant's employees [20-22] arising out of the sole or concurrent negligence of the Landlord.

It thus indemnifies "Landlord" for the "Landlord's" sole and contributory negligence.

"Landlord" in this context is the laundry list of persons and this provision is an indemnity of Landlord, and Landlord's agents, employees, invitees, licensees, or visitors for the negligence of Landlord and Landlord's agents, employees, invitees, licensees, or visitors causing Injury in the Premises.

However, it may not be effective as an indemnity of Landlord against liability of the Landlord arising out of the Tenant's concurrent or comparative negligence.[12] See below.

C. Indemnity by Landlord.

Landlord's indemnity of the Tenant in **Lease ¶C 8** is very broad in that "Landlord indemnifies ... Tenant ...from any Injury ... occurring in any portion of the Common Areas....and (d) will apply even if an Injury is caused in whole or in part by the ordinary negligence or strict liability of Tenant...." This indemnity complies with the express negligence and fair notice requirements. Therefore, this provision is enforceable as a means of shifting the risk of liability to the Landlord for liabilities for Injuries arising out of the Common Areas, such as the liability of Tenant due to its negligence or strict liability [7-17] or for injuries to the Landlord's employees [20-22] arising out of the sole or concurrent negligence of the Tenant.

It thus indemnifies Tenant for the Tenant's sole and contributory negligence.

"Tenant" in this context is the laundry list of persons and is an indemnity of Tenant, and Tenant's and its agents, contractors, employees, invitees, licensees, or visitors for the negligence of Tenant and its agents, contractors, employees, invitees, licensees, or visitors causing Injury in the Common Areas.

II. INSURANCE.

A. Manual.

The Manual's Lease forms rely on an Insurance Addendum to detail the insurance coverages required to be maintained by the parties. Manual Ch. 18 contains general explanations of the various insurance terms used and choices in the Addendum (for example, "***comprehensive general liability***" versus "***commercial general***

liability", "***business owner's policy***", "***employer's liability insurance***", "***excess liability insurance***", "***umbrella***") and a short commentary on portions of common additional insured endorsement forms applicable to the leases (for example, ISO Additional Insured Endorsement Forms CG 20 10 07 04 - Owners, Lessees or Contractors, CG 20 11 01 96 Managers or Lessors of Premises, and CG 20 26 07 04 - Designated Person or Organization). [39] These ISO Additional Insured Endorsement Forms are not contained in the Manual but are set forth in full in this Article as **Forms E - G.** Following each of these Forms is Author's Commentary on the Endorsement.

(**Insurance Addendum ¶ A.1**). The Insurance Addendum at **Insurance Addendum ¶ A.1** contains a "check the box" choice between a ❑ commercial general liability policy (occurrence basis) or ❑ business owner's policy and a "check the box" choice of the following designations and various lines of coverage added by endorsement to the standard coverage of the selected liability form: ❑ designated location general aggregate limit, ❑ workers' compensation, ❑ employer's liability, ❑ business automobile liability, ❑ excess liability or ❑ umbrella liability (occurrence basis).

(**Insurance Addendum ¶A. 2**). The Insurance Addendum provides at **Insurance Addendum ¶ A.2a** that the liability policy is to be endorsed to name the Landlord and its Lienholder as "additional insureds" and must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract;" at **Addendum ¶ A.2b** that the additional insured endorsement must not exclude coverage for the sole or contributory ordinary negligence of Landlord or Lienholder; at **Insurance Addendum ¶ A.2c** that the property insurance must contain waivers of subrogation of claims against Landlord and Lienholder; and at **Addendum ¶ A.2d** that Tenant is to deliver to Landlord copies of the certificate of insurance and copies of any additional insured and waiver of subrogation endorsements.

(**Insurance Addendum ¶ A.3**). The Insurance Addendum at **Insurance Addendum ¶ A.3** contains the further requirement that Landlord's approval is required with respect to the following: the forms of Tenant's insurance policies, endorsements and certificates; the amounts of any deductibles; and the creditworthiness and ratings of the insurance companies issuing Tenant's Insurance.

B. Waiver of Subrogation.

The waiver of subrogation provision (**Lease ¶E.4**) is both a release of claims between the parties as to property damages by reason of fire or the elements and a covenant to notify the insurance issuers of the release and to have the insurance companies endorse, if necessary, the policies so as to prevent invalidation of the policies because of the release. [76-82]

The waiver of subrogation provision expressly identifies negligence of the parties as being a Released Matter in compliance with the requirements of the express negligence test. [79] The release is written in conspicuous type and meets the requirements of the fair notice test. [79]

C. Property Insurance.

The Insurance Addendum specifies the types of insurance to be maintained by Tenant and Landlord, but utilize different means to identify the geographic responsibilities for Landlord and Tenant as to property insurance versus liability insurance. The Insurance Addendum identifies the portion of the Building to be covered by Tenant's property insurance as "the replacement cost of (a) all items included in the definition of Tenant's Rebuilding Obligations...." Landlord's property insurance is to cover "the replacement cost of the Building exclusive of ... the rebuilding requirements of all lessees." However, the Lease does not similarly state the geographic area to be covered by the Tenant's and the Landlord's liability insurance but relies on the geographic coverage terms and definitions of the parties' liability policies.

Author's Commentary.

I. INDEMNITY

A. Lease's Indemnity Failure to Address Comparative Negligence

The indemnity provisions may not be effective as an indemnity of Tenant against Tenant's liability arising out of the Landlord's concurrent or comparative negligence.[12]

The indemnity provisions do not expressly state that the Indemnified Person is indemnified for the liability it has due to the negligence of the Indemnifying Person. This may result in the Indemnified Person being indemnified by the Indemnifying Person for the portion of the liability attributable to the Indemnified Person's negligence but not for the portion attributable to the Indemnifying Person's negligence.

For example, if an employee of the Landlord is injured in the Common Areas and suit results. Under the facts of the case, the employee's injuries are the result of the joint negligence of "Landlord" and "Tenant." The injured employee is barred from suing its employer (the Landlord) by the Workers' Comp Bar and thus sues the Tenant. Tenant calls on Landlord to defend Tenant from suit relying on Landlord's indemnity in **Lease ¶C 8**. Landlord defends. The jury determines that Tenant was 20% negligent and Landlord was 80% negligent. Jury determines damages to the employee are $1,000,000. Tenant seeks indemnity and contribution from Landlord. Landlord pays the 20% allocable to Tenant's 20% share of the award = $200,000. Landlord does not pay the $800,000 attributable to its negligence. Landlord argues that it did not indemnify Tenant for the share of the liability attributable to Landlord's share of the negligence!

Lease ¶A 15. A similar example can be created for an injury to Tenant's employee occurring in Tenant's Premises and a resultant suit by Landlord against Tenant seeking Tenant's indemnity of the Landlord.

B. Author's Proposed Revision

This point may be addressed by inserting the following underlined language in **Lease ¶A 15** and (a similar revision would be made to **Lease ¶C 8** to address Landlord's indemnity):

> **A. Tenant agrees to–**
>
> 15. INDEMNIFY ... LANDLORD ...**THE INDEMNITY IN THIS PARAGRAPH ... (D) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LANDLORD OR TENANT BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD.** (Underlining solely to denote added language)

II. INSURANCE

A. Insurance Addendum's Approach to Liability Policies

1. Policy Form

The Insurance Addendum does not cover in detail the coverages required to be contained in the Tenant's and the Landlord's liability policies other than to provide that each is an occurrence basis policy and is to have the minimum coverage levels specified.

a. No Specification of Policy Terms

The Insurance Addendum relies on Landlord's approval authority in **Insurance Addendum ¶ A.3** as opposed to specifying in the Insurance Addendum minimum standards to be met in the policy to be furnished by Tenant.

b. Tenant Not Afforded Policy Review Authority

There is no corresponding provision in the Insurance Addendum providing Tenant with the authority to review and approve the form of Landlord's policies or specifying minimum standards to be addressed in the policies to be furnished by Landlord.

2. Additional Insured Form

a. Unavailable Coverage Specified

The general reference to the Landlord being listed as an additional insured on the Tenant's commercial general liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder. The industry standard additional insured endorsement forms issued by ISO do not expressly extend coverage to the additional insured's sole negligence. In 2004 ISO modified several of its endorsement forms to expressly exclude from coverage the sole negligence of the additional insured. Many insurers additional insured forms now contain express exclusions of the additional insured's sole negligence. An issue may exist as to whether ISO's standard endorsement form issued for use by tenants to list landlords as an additional insured on a tenant's CGL policy extends to cover the landlord's sole negligence. It is unlikely that a tenant can easily or economically provide an additional insured endorsement to its policy that expressly covers the Landlord's sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this requirement.

b. No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified

Insurance Addendum ¶ 2a does not specify or limit geographically the area of the Building to which Landlord's protection as additional insured is to extend. This is different from how the parties allocated liabilities by the indemnities. In the Lease's indemnity provisions the parties have carved up responsibility for liability based on geographic areas (Tenant is responsible for all Injuries occurring in the Premises; Landlord is responsible for all Injuries occurring in the Common Areas). This anomaly gives rise to a variance in coverage between a party's indemnity and its required insurance coverage. For example, if an Injury occurs in the Common Areas, Landlord is to indemnify Tenant. However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant's liability policy. Attached as **Form E** is the industry standard ISO CG 20 11 Additional Insured CGL Endorsement designating Landlord as an additional insured on Tenant's CGL policy. The standard form utilizes the term "**premises**" to define the geographic area giving rise to coverage. But as explained in **III B4c** of the Basic Principles portion of this Article such designation does not limit the Landlord's coverage to Injuries occurring "in" the Premises as such term is defined in the Lease. Coverage is for liabilities "arising out of" the premises leased to the Tenant. The definition of the term "premises" is not defined in the Tenant's CGL policy. Courts have construed the insurance coverage broadly against the insurer.

c. Persons to Be Listed as Additional Insureds on Tenant's CGL Policy

Insurance Addendum ¶ 2a provides for "Landlord" and Lienholder to be named as "additional insureds." The term "Landlord" is given broad meaning in the Definitions section of the Office Lease. "Landlord" is defined as meaning "Landlord and its agents, employees, invitees, licensees, or visitors." If it is intended that persons in addition to the named Landlord is to be listed as an additional insured as being protected by the additional insured endorsement, then consideration should be given to specifically listing the most important of these persons in the Schedule to the additional insured endorsement form where additional insureds are to be identified.

d. Indemnity Insurance

Insurance Addendum ¶ 2a provides that Tenant's CGL policy must not be endorsed to exclude the sole negligence of Landlord or Lienholder from the definition of "insured contract." This is required so that Tenant's CGL policy will insure Tenant for the full scope of its indemnity under **Lease ¶ A 15**. Tenant's indemnity in **Lease ¶ A 15** covers all Injuries occurring in the Premises "even if caused in whole or in part by the ordinary negligence of Landlord." However, standard CGL policies (including ISO's CGL policies since 07 04) exclude from insured contract coverage the sole negligence of an Indemnified Person. See discussion in this Article at **III B5b [2]**. Thus it is likely that Tenant will not comply or be able to comply with this covenant of

the Lease. In order to effect coverage Tenant's CGL carrier will have to issue a manuscripted endorsement to Tenant's CGL policy to cover Tenant's **Lease ¶ A 15**. If Tenant does not obtain such manuscripted endorsement, it will find itself in the position of indemnifying Landlord for a liability not reinsured by Tenant's CGL policy.

e. Tenant Not Covered on Landlord's Policy

The Insurance Addendum does not provide that Tenant is to be listed as an additional insured on Landlord's liability policy as to Injuries occurring in the Common Areas. Tenant should require that Landlord cause its insurance carrier to issue an endorsement to Landlord's CGL policy listing Tenant as an additional insured as to Tenant's liability for Injuries occurring in the Common Areas. After all, Tenant is paying for Landlord's CGL insurance as part of the Operating Expenses. **Lease ¶ A 7**. A form of additional insured endorsement to Landlord's CGL policy is standard form ISO CG 20 26 07 04 as **Form F**. As discussed in the Commentary following Form F, the ISO endorsement form can be tailored to limit Tenant's protection as an additional insured to Injuries occurring in the Common Areas. The ISO form as standardly issued does not make that distinction.

f. Other Insurance Issues

The Insurance Addendum is silent as to the effect of the additional insured having "other insurance" available to it for liabilities covered by the additional insured endorsement. In the event the additional insured does not require or do something more the named insured's carrier will require and be entitled to contribution by the additional insured's other insurance. See the discussion in this Article at Basic Principles at **III C** and at **Footnote [51]**.

3. Certificates of Insurance

The general reference to the Tenant providing the Landlord with a certificate of insurance does not specify the items to be covered in the certificate of insurance. (See the following forms of Insurance Certificates modified to specify details as to coverages required by Author pursuant to the Hypothetical and the Supplement to the Insurance Addendum **Forms B - D**). As discussed at **Footnote [69]** Certificates of insurance are not insurance, just evidence of insurance. Although it is typical to rely on a certificate of insurance as if it were insurance, a more prudent practice is to obtain and review the underlying policy and endorsements.

B. Author's Proposed Revision

The Author recommends that a Supplement be added to the Insurance Addendum to address the following points:

1. Policy Form

The Supplement to the Insurance Addendum can specify minimum acceptable insurance policy forms. This provides the parties with a common expectation and agreement as to insurance coverage prior to the expenditure of significant funds in designing space or making other lease arrangements. It also will permit the parties to involve their insurance advisors prior to signing the Lease.

2. Adding Tenant as an Additional Insured on Landlord's CGL Policy.

Adding Tenant as an additional insured on the Landlord's CGL policy is in line with the indemnities contained in the Lease. Additionally, adding Tenant as an additional insured is in line with the Tenant's expectations that it is insured by the "Building's" insurance for which it is paying through its Pro Rata Share of Operating Expenses for injuries occurring in the Common Areas and in the Parking Garage.

3. Additional Insured Form Specified with Specified Manuscripted Changes

Adding a Supplement to the Insurance Addendum to specify the additional insured endorsement form similarly adds clarity to the lease negotiation process. It will avoid misunderstanding as to the scope of the additional insured coverage. It hopefully will result in determining on the front end if there will be difficulty in producing the desired additional insurance coverage. The approach recommended by this Author is that sample additional insured endorsement forms for attachment to the Tenant's CGL policy and the Landlord's CGL policy be attached as Exhibits to the Supplement.

4. Certificate of Insurance Form Attached

Similarly, specifying the content of the certificate of insurance helps avoid future failure to produce an appropriately detailed certificate. The approach recommended by this Author is that a sample certificate of insurance be attached to the Supplement as an Exhibit.[69]

5. Sample Supplement

The following is a Supplement to the Insurance Addendum addressing many of the Author's Comments. This Supplement does not address revisions to the property insurance provisions of the Lease and Insurance Addendum. Property insurance is being addressed by a separate Article presented at this Seminar. In addition to addressing each of the above points, the Author also has proposed manuscript language to customize the additional insured endorsements to produce in the Author's opinion a "fairer" coverage result.

a. Applicable ISO Endorsement Forms

Attached as **Form E** is ISO CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises. This is ISO's endorsement form to add the Landlord and any other persons the parties have contracted to add as additional insureds on the Tenant's CGL policy.

Attached as **Form F** is ISO CG 20 26 07 04 Additional Insured – Designated Person or Organization. This is ISO's endorsement form to add the Tenant and any other persons the parties have contracted to add as additional insureds on the Landlord's CGL policy.

Attached as **Form G** is ISO CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization is ISO's endorsement to add the Landlord, Tenant or any other person the parties have contracted to add as additional insureds on the named insured's CGL policy. Form G has been completed to reflect Landlord and Tenant being added as additional insureds on the Tenant's contractors CGL policy. Additionally, an ISO CG 20 10 07 04 endorsement can be added to the Tenant's CGL policy to add the Landlord on Tenant's CGL policy to cover the exclusion from coverage for construction activities contained in **Form E** ISO CG 20 11 01 96.

b. Coverage if ISO Endorsement Forms are Used but Without Further Manuscripted Changes

In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage results. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

The CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises added to the Tenant's CGL policy listing Landlord as an additional insured will cover the Landlord as an additional insured on Tenant's CGL policy for all liability arising out of the ownership, maintenance or use of that part of the premises leased to Tenant, but not for any occurrence which takes place after the Tenant ceases to be a Tenant and not for any liabilities arising out of structural alterations, new construction or demolition operations performed by or on behalf of the Landlord.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to Tenant's contractor's CGL policy listing Landlord and Tenant as additional insureds will

cover Landlord and Tenant for bodily injury, property damage, and personal injury caused in whole or in part by the contractor's acts or omissions or the acts or omissions of those acting on the contractor's behalf in the performance of contractor's ongoing operations at the Building and related property.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's ongoing operations at the Building and related property, without exclusion for construction activities.

The CG 20 26 07 04 Additional Insured – Designated Person or Organization added to the Landlord's CGL policy will cover the Tenant as an additional insured on the Landlord's CGL insurance policy for bodily injury, property damage, and personal injury caused in whole or in part by Landlord or by the acts or omissions of those acting on Landlord's behalf in the performance of Landlord's ongoing operations or in connection with premises owned by the Landlord.

c. Author's Proposed Manuscript Changes to the ISO Endorsements

Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate via indemnity 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach is to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence.

In the Author's opinion a fairer allocation of risk can be made based on the degree of causation in addition to where the Injury occurs.

(1) Manuscript Change to the ISO form adding Landlord as an Additional Insured on Tenant's CGL Policy.

The additional insured endorsement can be modified to specify that it <u>includes</u> coverage of injuries or damage occurring <u>outside the Premises</u> only if the injury or damage is caused by the sole negligence of the Tenant.

The additional insured endorsement can be modified to specify that it <u>excludes</u> coverage for injuries or damage occurring <u>inside the Premises</u>, if the injury or damage is caused:

(a) <u>in whole</u> by the negligent acts or omissions or willful misconduct of the Landlord or

(b) <u>in part</u> by the negligent acts or omissions of Landlord if the aggregate of the Landlord's plus its contractors' percentage share of all negligence is 51% or greater.

(2) Manuscript Change to the ISO form adding Tenant as an Additional Insured on Landlord's CGL Policy.

The additional insured endorsement can be modified to specify that it <u>includes</u> coverage for injuries or damage <u>in the Common Areas or Parking Garage</u> provided the injury or damage is not caused by the sole negligence of the Tenant and provided the Landlord is negligent.

The additional insured endorsement can be modified to <u>exclude</u> from coverage liabilities to the extent they arise out of Tenant's acts or omissions <u>in the Premises</u>, if the liability is caused by the contributory negligence of the Tenant and if the Tenant's percentage share of all negligence is 51% or greater.

Form A5

Supplement to Insurance Addendum

Lease

Date: June 30, 2006

Landlord: Crescent Real Estate, L.P.

Tenant: DeBaker & Coolidge, L.L.P.

This supplement to insurance addendum is part of the lease. To the extent there is a conflict between the provisions of this supplement and the insurance addendum, this supplement controls.

A. Policies

1. Qualifications of Issuer

All policies must be issued by carriers having a Best's Rating of A or better, and a Best's Financial Size Category of VIII, or better, and/or *Standard & Poor Insurance Solvency Review* of A-, or better, and admitted to engage in the business of insurance in the State of Texas. [70]

2. Liability Policies

a. CGL Policies

Commercial general liability policies must be on the most current ISO CG 00 01 or equivalent. [39] Separation of insured language must not be modified. If the named insured's liability policy does not contain the standard ISO separation of insureds provision, or a substantially similar clause, it shall be endorsed to provide cross-liability coverage. Defense will be provided as an additional benefit and not included within the limit of liability. Tenant's CGL policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used. (See **Form H**).

b. Workers Compensation

Tenant's workers compensation policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used. (See **Form K**).

c. Business Auto Policy

Tenant's business auto policy shall be endorsed to list Landlord as an additional insured. Attached is the additional insured endorsement form to be used. (See **Form I**). Tenant's business auto policy shall be endorsed to waive the insurance carrier's right of subrogation against Landlord. Attached is the waiver form to be used. (See **Form J**).

3. Additional Insurance Coverage With respects to the additional insured status:

a. Landlord as Additional Insured on Tenant's CGL Policy

(1) Required Endorsement Form

Under Tenant's commercial general liability policy, Landlord shall be included as an additional insured using an ISO CG 20 11 01 96 endorsement or equivalent, and under the commercial umbrella, if any. During construction of the leasehold improvements by Tenant and its contractor, Landlord shall be included as an additional insured on Tenant's commercial general liability policy using an ISO CG 20 10 07 04 endorsement or equivalent.

(2) Modifications to Required Endorsement Form

The additional insured endorsement shall be modified to specify that it includes coverage of injuries or damage occurring outside the Premises only if the injury or damage is caused by the sole negligence of the Tenant.

The additional insured endorsement shall be modified to specify that it excludes coverage for injuries or damage occurring inside the Premises, if the injury or damage is caused:

(a) in whole by the negligent acts or omissions or willful misconduct of the Landlord or

(b) in part by the negligent acts or omissions of Landlord if the aggregate of the Landlord's plus its contractors' percentage share of all negligence is 51% or greater.

b. Tenant as Additional Insured on Landlord's CGL Policy

(1) Required Endorsement Form

Under Landlord's commercial general liability policy, Tenant shall be included as an additional insured using an ISO CG 20 26 07 04 endorsement or equivalent, and under the commercial umbrella.

(2) Required Modifications to Endorsement Form

The additional insured endorsement shall be modified to specify that it includes coverage for injuries or damage in the Common Areas or Parking Garage provided the injury or damage is not caused by the sole negligence of the Tenant and provided the Landlord is negligent.

The additional insured endorsement shall be modified to exclude from coverage liabilities to the extent they arise out of Tenant's acts or omissions in the Premises, if the liability is caused by the contributory negligence of the Tenant and if the Tenant's percentage share of all negligence is 51% or greater.

4. Notification Provisions

Contain a provision for 30 days' prior written notice by insurance carrier to the additional insured as a requirement for cancellation, non-renewal, or substantial modification.

5. Primary and Noncontributory

The named insured's liability policy will be primary and noncontributory. [51] The additional insured's other insurance will be excess coverage and not contribute to the primary coverage provided by the named insured's policy.

6. Umbrella and Excess Insurance Policies

The umbrella policy shall be written on an umbrella basis in excess over and no less broad than the liability coverage referenced herein. Inception and expiration dates will be the same as the CGL insurance. Coverage must "drop down" for exhausted aggregate limits under the liability coverage referenced herein. The policy shall be endorsed to provide aggregate limits on insurance for this location.

7. Approved Revisions

No policy may include an endorsement restricting, limiting or excluding coverage required herein in any manner without the prior written approval of the other party.

8. Approved Deductibles and Self Insured Retentions

No deductible or self insured retention in excess of $_____ shall be made without the prior written approval of the other party.

9. Superseding or Discontinued Forms

If the forms of policies, endorsements, certificates, or evidence of insurance required by this Exhibit are superseded or discontinued, the protected party will have the right to require other equivalent forms.

10. Approval Required for Different Forms

Any policy or endorsement form other than a form specified in this Addendum as hereby supplemented must be approved in advance by the protected party.

B. Evidence of Insurance. Insurance must be evidenced as follows:

1. Liability Insurance

ACORD Form 25 *Certificates of Liability Insurance* for liability coverages in the form attached hereto as an **Exhibit**. [69]

2. Property Insurance

ACORD Form 24 Certificate *of Property Insurance* for property coverages in the form attached hereto as an **Exhibit**. [69]

3. Time to Be Provided

Evidence to be delivered to the protected party prior to Tenant's occupancy of the Premises and at least 30 days prior to the expiration of current policies.

4. Certificate of Insurance Certificates must– [69]

a. Certificate Holder

Show the protected party as certificate holders (with the protected party's mailing address).

b. Issuers

Show the insurance companies producing each coverage and the policy number and policy date of each coverage.

c. Producer

Name the producer of the certificate (with correct address and telephone number) and have the signature of the authorized representative of the producer.

d. Endorsements

Specify the additional insured status and/or waivers of subrogation and be accompanied by copies of all required endorsements.

e. Deductibles and SIRs

State the amounts of all deductibles and self-insured retentions.

f. Primary Status and Aggregate Limits

Show the primary status and aggregate limit per project or location where required.

g. Revisions to Acord Printed Form

The phrases "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon Company, its agents or representatives" must be deleted from the cancellation provision of the ACORD 25 certificate and the following express provision added: "This is to certify that the policies of insurance described herein have been issued to the Insured for whom this certificate is executed and are in force at this time. In the event of cancellation, non-renewal, or material reduction in coverage affecting the certificate holder, 30 days' prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested."

C. Contractors

Tenant shall also require its Contractor performing the Work for the Tenant Improvements to carry liability insurance meeting the above requirements, except that the Landlord and Lienholder will be listed as additional insureds on an ISO form CG 20 10 07 04, unmodified and in the form attached as an **Exhibit**. (See **Form G** to this Article). If requested in writing by Landlord, Tenant will provide to Landlord a certified copy of any or all insurance policies or endorsements required by this lease. [71]

D. Disclaimer

By requiring insurance coverage herein, a party does not represent to the other party that coverage and limits will necessarily be adequate to protect the named insured or the additional insured or any other person, and such coverage and limits shall not be deemed as a limitation on the Indemnifying Person's liability under the indemnity granted to the Indemnified Person.

Forms B - D

Certificate of Insurance as to Coverage Furnished by Landlord, Tenant and Tenant's Contractor

The following are 3 sample certificates of liability and property insurance for the insurance required in the Hypothetical of the Landlord, the Tenant and the Tenant's Contractor. [69]

Form B **Tenant's Certificate of Liability and Property Insurance**

Form C **Landlord's Certificate of Liability and Property Insurance**

Form D **Contractor's Certificate of Liability and Property Insurance**

Form B

Tenant's Certificates of Liability and Property Insurance [69]

ACORD™ CERTIFICATE OF LIABILITY INSURANCE | Date MM/DD/YY) 03/01/06

PRODUCER
New York Medical
1 Rockefeller Plaza
New York, NY

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

NSURERS AFFORDING COVERAGE	NAIC #
INSURER A: No Pay Fidelity	
INSURER B: Fast Car Fidelity	
INSURER C:	
INSURER D:	
INSURER E:	

INSURED
DeBaker and Coolidge, L.L.P.
P. O. Box 1234
Houston, TX 78768-1234

INSURED

COVERAGES

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMTS	
A		**GENERAL LIABILITY** ☒ COMMERCIAL GENERAL LIABILITY □ □ CLAIMS MADE ☒ OCCUR □ _____ □ _____ GEN'L AGGREGATE LIMIT APPLIES PER: □ POLICY □ PROJECT ☒ LOC	**CLP1234567**	**08/01/05**	**08/01/06**	EACH OCCURRENCE	$1,000,000
						DAMAGE TO RENTED PREMISES (Ea occurrence)	$ 50,000
						MED EXP (Any one person)	$ 5,000
						PERSONAL & ADV INJURY	$1,000,000
						GENERAL AGGREGATE	$
						PRODUCT-COMP/OP AGG	$2,000,000
B		**AUTOMOBILE LIABILITY** ☒ ANY AUTO □ ALL OWNED AUTOS □ SCHEDULED AUTOS ☒ HIRED AUTOS ☒ NON-OWNED AUTOS □ _____ □	**CAP**	**08/01/05**	**08/01/06**	COMBINED SINGLE LIMIT (Ea accident)	$2,000,000
						BODILY INJURY (Per person)	$
						BODILY INJURY (Per accident)	$
						PROPERTY DAMAGE (Per accident)	$
		GARAGE LIABILITY □ ANY AUTO □				AUTO ONLY-EA ACCIDENT	$
						OTHER THAN EA ACC	$
						AUTO ONLY: AGG	$

A		**EXCESS LIABILITY** ☒ OCCUR □ CLAIMS MADE □ DEDUCTIBLE □ RETENTION $	**123456**	**08/01/05**	**08/01/06**	EACH OCCURRENCE	$5,000,000
						AGGREGATE	$5,000,000
							$
							$
							$
A		**WORKERS COMPENSATION AND EMPLOYERS' LIABILITY** ANY ROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	**ABCDE**	**08/01/05**	**08/01/06**	X WC STATU-TORY LIMITS / OTHER	$
						E.L. EACH ACCIDENT	$1,000,000
						E.L. DISEASE-EA EMPLOYEE	$1,000,000
						E.L. DISEASE-POLICY LIMIT	$1,000,000
		OTHER					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS **(See Attachment.)**

CERTIFICATE HOLDER	**CANCELLATION**
Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768 General Electric Commercial Credit 2 Rockefeller Plaza New York, NY	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ~~ENDEAVOR TO~~ MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES~~. AUTHORIZED REPRESENTATIVE **/s/ Joe Dirt**

ACORD 25 (2001/08) **© ACORD CORPORATION 1988**

IMPORTANT

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

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

DISCLAIMER

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

Commentary: The above provisions are contained on the reverse side of the ACORD certificate. Unless these provisions are struck from the certificate a conflict arises with the changes made to the printed-form language on the front side of the certificate.

Form B [69]

ACORD™ **CERTIFICATE OF LIABILITY INSURANCE** **Date** 03/01/06

PRODUCER

U. S. Casualty. & Property
1 Rockefeller Plaza
New York, NY

INSURED

DeBaker and Coolidge, L.L.P.
P. O. Box 1234
Houston, TX 78768-1234

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

COMPANIES AFFORDING COVERAGE

COMPANY **A** U. S. Casualty & Property
COMPANY **B**
COMPANY **C**
COMPANY **D**

COVERAGES

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.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION	COVERED PROPERTY	LIMITS
A	**PROPERTY**	CP12345	**08/01/05**	**08/01/06**	x BUILDING	$5,000,000
	CAUSES OF LOSS				x PERSONAL PROPERTY	$1,000,000
	BASIC				x BUSINESS INCOME	$1,000,000
	BROAD				x EXTRA EXPENSE	$ 500,000
	x SPECIAL				BLANKET BUILDING	
	EARTHQUAKE				BLANKET PERS PROP	
	FLOOD				BLANKET BLDG & PP	
	INLAND MARINE					$
	TYPE OF POLICY					
						$
						$
	CAUSES OF LOSS					$
	NAMED PERILS					$
	OTHER					$
	CRIME					$
	TYPE OF POLICY					$
						$
	BOILER & MACHINERY					$
						$
	OTHER					

LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See Attachment.)

SPECIAL CONDITIONS/OTHER COVERAGES

CERTIFICATE HOLDER	CANCELLATION
Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768 and General Electric Commercial Credit 2 Rockefeller Plaza New York, NY	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ~~ENDEAVOR~~ TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES~~. AUTHORIZED REPRESENTATIVE /s/ Joe Dirt
ACORD 24 (1/95)	© ACORD CORPORATION 1995

Commentary:

This standard ACORD form has been modified to strike out several provisions on the face of the form that otherwise state that the certificate does not confer any rights on the certificate holder. Certificates of insurance are generally signed by the local agent that has sold the policies. This agent is generally an independent contractor and not an employee of the insurers. Reliance only on the certificate of insurance for the coverages stated is perilous. Requiring the agent to produce the policies and their endorsements is important. These must be examined and approved and further endorsed, if necessary, prior to proceeding with work or occupancy.

Attachment To Tenant's Certificate Or Proof of Insurance

This Attachment is to Tenant's Certificate or Proof of Insurance that is:

Dated (MM/DD/YY): 03/06/06.

Issued By: U.S. Casualty & Property
1 Rockefeller Plaza
New York, NY

Insured: DeBaker & Coolidge, L.L.P. ("Tenant" or "Owner")

Certificate Holders: Crescent Real Estate, L.P. ("Building Owner")
General Electric Commercial Credit ("Building Owner's Lender")

Policy Types:
Liability Insurance:
A. Commercial General Liability
B. Automobile Liability
C. Workers Compensation and Employer's Liability
Property Insurance:
D. Causes of Loss – Special Form

As to Policies Issued By:

Company A: No Pay Fidelity
Company B: Fast Car Fidelity
Company C: No Pay Fidelity
Company D: U.S. Casualty & Property

Policy Nos.:

Company A:	CLP12345	(Commercial General Liability)
Company B:	CAP12345	(Automobile Liability)
Company C:	WC12345	(Worker's Compensation/Employer's Liability for Texas)
Company D:	CP12345	(Causes of Loss - Special Form)

1. In Force. The insurance policies are currently in force.

2. Notification. None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

3. Additional Insureds and Loss Payees. The following persons: (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender") ("**Additional Insureds**"), have been added as additional insured to each of the Liability Insurance policies listed herein.

4. Texas Licensees. The issuers of the described insurance policies are licensed to do business in Texas.

5. Waiver of Subrogation. The issuers of the insurance policies have waived subrogation against (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service") , (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender") (the **"Released Persons"**).

6. Severability of Interest. This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

7. Certificate Holders. This certificate is issued to Crescent Real Estate, L.P. and its successors and assigns as Building Owner and General Electric Credit Corporation (the "Building Owner's Lender") ("**Certificate Holders**").

8. Premises. For Policies A - D, the Premises is the Office Building, Parking Garage, tenants' leased premises, including the Tenant's Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2006 (copy attached)[the "**Office Lease**"]. For Policy D, the Premises is Suite 123 (including all tenant improvements thereto) under Construction Contract dated as of March 2, 2006 (copy attached), as amended from time to time (the "**Premises**").

9. Endorsements. Attached are the following Endorsements to the insurance policies:

Policy (Identify by Co. Ltr.)		Endorsement Form Nos.
A.	No Pay Fidelity (Commercial General Liability)	Additional Insured No. GL-2785-TX Waiver of Subrogation No. GL-2785-TX
B.	Fast Car Fidelity (Automobile Liability)	Additional Insured No. TE 99 01 B Waiver of Subrogation No. TE 20 46 A
C.	No Pay Fidelity (Worker's Compensation/ Employer's Liability for Texas only)	Additional Insured No. (not applicable) Waiver of Subrogation No. WC420304A
D.	U. S. Casualty & Property (Causes of Loss - Special Form)	Loss Payee No. _____(ordered)_____ Ordinance/Law Coverage No. _____

Copies of the Endorsements are attached hereto. (**See Forms E, H - K**)

Dated Issued: March 6, 2006.

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

_____
Authorized Representative
/S/ Joe Dirt
Typed Signature

Form C

Landlord's Certificates of Liability and Property Insurance

ACORD™	**CERTIFICATE OF LIABILITY INSURANCE**	Date (MM/DD/YY) 03/01/06

PRODUCER Crescent Captive 908 Fannin Houston, TX 78768	~~THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER~~. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW **EXCEPT AS SPECIFIED.**	
	INSURERS AFFORDING COVERAGE	**NAIC**
	INSURER A: U. S. Casualty	
INSURED Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768	INSURER B: U. S. Auto	
	INSURER C: U. S. Workers Casualty	
	INSURER D:	
	INSURER E:	

COVERAGES

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A		**GENERAL LIABILITY** □ COMMERCIAL GENERAL LIABILITY □ □ CLAIMS MADE ☒ OCCUR □ _____ □ _____ GEN'L AGGREGATE LIMIT APPLIES PER: □ POLICY □ PROJECT ☒ LOC	CLP12345	08/01/05	08/01/06	EACH OCCURRENCE	$5,000,000
						DAMAGE TO RENTED PREMISES (Ea occurrence)	$1,000,00\0
						MED EXP (Any one person)	$ 5,000
						PERSONAL & ADV INJURY	$5,000,000
						GENERAL AGGREGATE	$
						PRODUCT-COMP/OP AGG	$10,000,000
B		**AUTOMOBILE LIABILITY** □ ANY AUTO □ ALL OWNED AUTOS □ SCHEDULED AUTOS □ HIRED AUTOS □ NON-OWNED AUTOS □ _____ □	CAP12345	08/01/05	08/01/06	COMBINED SINGLE LIMIT (Ea accident)	$
						BODILY INJURY (Per person)	$
						BODILY INJURY (Per accident)	$
						PROPERTY DAMAGE (Per accident)	$
		GARAGE LIABILITY □ ANY AUTO □				AUTO ONLY-EA ACCIDENT	$
						OTHER THAN EA ACC	$
						AUTO ONLY: AGG	$
A		**EXCESS LIABILITY** ☒ OCCUR □ CLAIMS MADE □ DEDUCTIBLE □ RETENTION $	CUP12345	08/01/05	08/01/06	EACH OCCURRENCE	$
						AGGREGATE	$50,000,000
							$
							$
							$
C		**WORKERS COMPENSATION AND EMPLOYERS' LIABILITY** ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below				X WC STATU-TORY LIMITS | OTHER	$
						E.L. EACH ACCIDENT	$
			WC12345	08/01/06	08/01/06	E.L. DISEASE-EA EMPLOYEE	$
						E.L. DISEASE-POLICY LIMIT	$
		OTHER					

	DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS (See Attachment.)

CERTIFICATE HOLDER	**CANCELLATION**
DeBaker Coolidge, L.L.P. P. O. Box 1234 Houston, TX 78768-1234 **and** Bank of America, N.A. 3 Banking Center Charlotte, N.C.	SHOULD ANY OF THE ABOVE POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ~~ENDEAVOR TO~~ MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES~~. AUTHORIZED REPRESENTATIVE /s/ Joe Dirt

ACORD 25 (2001/08) **© ACORD CORPORATION**
1988

Commentary:

This standard ACORD form has been modified to strike out several provisions on the face of the form that otherwise state that the certificate does not confer any rights on the certificate holder. Certificates of insurance are generally signed by the local agent that has sold the policies. This agent is generally an independent contractor and not an employee of the insurers. Reliance only on the certificate of insurance for the coverages stated is perilous. Requiring the agent to produce the policies and their endorsements is important. These must be examined and approved and further endorsed, if necessary, prior to proceeding with work or occupancy.

Form C

ACORD	CERTIFICATE OF PROPERTY INSURANCE	Date 38776

PRODUCER

Crescent Captive
908 Fannin
Houston, TX 78768

INSURED

Crescent Real Estate, L.P.
909 Fannin
Houston, TX 78768

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

COMPANIES AFFORDING COVERAGE

COMPANY A Crescent Captive & Casualty

COMPANY B

COMPANY C

COMPANY D

COVERAGES

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.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE	POLICY EXPIRATION	COVERED PROPERTY		LIMITS
A	☐ PROPERTY	CP12344	08/01/05	08/01/06	☐	BUILDING	$
	CAUSES OF LOSS				☐	PERSONAL	$
	☐ BASIC				☐	BUSINESS INCOME	$
	☐ BROAD				☐	EXTRA EXPENSE	$
	☐ SPECIAL				☐	BLANKET BUILDING	$
	☐ EARTHQUAKE				☐	BLANKET PERS PROP	$
	☐ FLOOD				X	BLANKET BLDG & PP	$150,000,000
							$
							$
	☐ INLAND MARINE						$
	TYPE OF POLICY						
							$
							$
	CAUSES OF LOSS						$
	☐ NAMED PERILS						$
	☐ OTHER						$
	☐ CRIME						$
	TYPE OF POLICY						$
							$
	☐ BOILER & MACHINERY						$
							$
	☐ OTHER						

LOCATION OF PREMISES/DESCRIPTION OF PROPERTY **(See Attachment)**

SPECIAL CONDITIONS/OTHER COVERAGES

CERTIFICATE HOLDER	CANCELLATION
DeBaker & Coolidge, L.L.P. P.O. Box 1234 Houston, TX 78768-1234	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.
Bank of America, N.A. 3 Banking Center Charlotte, N.C.	AUTHORIZED REPRESENTATIVE /s/ John Barclay III
ACORD 24 (1/95)	© ACORD CORPORATION 1995

Commentary:

This standard ACORD form has been modified to strike out several provisions on the face of the form that otherwise state that the certificate does not confer any rights on the certificate holder. Certificates of insurance are generally signed by the local agent that has sold the policies. This agent is generally an independent contractor and not an employee of the insurers. Reliance only on the certificate of insurance for the coverages stated is perilous. Requiring the agent to produce the policies and their endorsements is important. These must be examined and approved and further endorsed, if necessary, prior to proceeding with work or occupancy.

Attachment To Landlord's Certificate Or Proof of Insurance

This Attachment is to Landlord's Certificate or Proof of Insurance that is:

Dated (MM/DD/YY): 03/01/06.

Issued By: Crescent Captive
908 Fannin
Houston, Texas 78768

Insured: Crescent Real Estate, L.P. (the "**Landlord**" or "**Building Owner**")

Certificate Holders: DeBaker & Coolidge, L.L.P. ("**Owner**" or "**Tenant**")
Bank of America, N.A. ("**Tenant's Lender**")

Policy Types: Liability Insurance: A. Commercial General Liability
B. Automobile Liability
C. Workers Compensation and Employer's Liability
Property Insurance: D. Causes of Loss - Special Form

As to Policies Issued By:

Company A: U. S. Casualty
Company B: U. S. Auto
Company C: U. S. Worker Casualty
Company D: Crescent Captive & Casualty

Policy Nos.:

Company A:	CLP12345	(Commercial General Liability)
Company B:	CAP12345	(Automobile Liability)
Company C:	WC12345	(Worker's Compensation/Employer's Liability for Texas)
Company D:	CP12345	(Causes of Loss - Special Form)

1. In Force. The insurance policies are currently in force.

2. Notification. None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

3. Additional Insureds and Loss Payees. The following persons: (a) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (b) Bank of America, N.A. ("Tenant's Lender"), (c) Joe AIA ("Tenant's Architect"), and (d) John Doe DeBaker, M.D., individually (collectively, "**Additional Insureds**") have been added as additional insureds to each of the Liability Insurance policies listed herein.

4. Texas Licensees. The issuers of the described insurance policies are licensed to do business in Texas.

5. Waiver of Subrogation. The issuers of the insurance policies have waived subrogation against (a) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (b) Bank of America, N.A. ("Tenant's Lender"), (c) Joe AIA ("Tenant's Architect"), and (d) John Doe DeBaker, M.D., individually (the "**Released Persons**").

6. Severability of Interest. This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

7. Certificate Holders. This certificate is issued to DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant of the Property and to Bank of America, N.A., Tenant's Lender ("**Certificate Holders**").

8. Premises. For Policies A - D, the Premises is the Office Building, Parking Garage, tenants' leased premises, including the Tenant's Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2006 (copy attached)[the "**Office Lease**"] (the "**Premises**").

9. Endorsements. Attached are the following Endorsements to the insurance policies:

Policy (Identify by Co. Ltr.)		Endorsement Form Nos.
A.	U. S. Casualty (Commercial General Liability)	Additional Insured No. GL-12345 -TX Waiver of Subrogation No. GL-12345 TX

B.	U. S. Auto (Automobile Liability)	Additional Insured No. TE 99 01 B Waiver of Subrogation No. TE 20 46 A
C.	U. S. Worker Casualty (Worker's Compensation/ Employer's Liability for Texas only)	Additional Insured No. (not applicable) Waiver of Subrogation No. WC420304A
D.	Crescent Captive & Casualty (Causes of Loss - Special Form)	Loss Payee No. (ordered) Ordinance/Law Coverage No.

Copies of the Endorsements are attached hereto. (**Appendices**)

Dated Issued: March 1, 2006.

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

Authorized Representative
/S/ John Barclay III
Typed Signature

Form D

Tenant's Contractor's Certificates of Liability and Property Insurance

ACORD™ **CERTIFICATE OF LIABILITY INSURANCE**	Date (MM/DD/YY) 03/06/06

PRODUCER SGP Commercial Insurance Summit Global Partners of TX P. O. Box 2291 Houston, TX 78768-2298	~~THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER.~~ THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW, **EXCEPT AS SPECIFIED**.
INSURED **NSURED** ABC Construction, Inc. P. O. Box 666 Houston, TX 78768-666	**INSURERS AFFORDING COVERAGE** — **NAIC #** INSURER A: Bituminous Fire & Marine Ins. INSURER B: American Mfgrs. Mutual Ins. Co. INSURER C: INSURER D: INSURER E:

COVERAGES

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

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMTS	
A		**GENERAL LIABILITY** ☒ COMMERCIAL GENERAL LIABILITY □ □ CLAIMS MADE ☒ OCCUR ☒ **Contractual** ☒ **XCU Included** GEN'L AGGREGATE LIMIT APPLIES PER: □ POLICY ☒ PROJECT □ LOC	**CLP3122976**	**08/01/05**	**08/01/06**	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCT-COMP/OP AGG	$1,000,000 $ 50,000 $ 5,000 $1,000,000 $ $2,000,000
B		**AUTOMOBILE LIABILITY** ☒ ANY AUTO □ ALL OWNED AUTOS □ SCHEDULED AUTOS ☒ HIRED AUTOS ☒ NON-OWNED AUTOS □_____	**CAP3122977**	**08/01/05**	**08/01/06**	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$1,000,000 $1,000,000 $1,000,000 $1,000,000
		GARAGE LIABILITY □ ANY AUTO □				AUTO ONLY-EA ACCIDENT OTHER THAN EA ACC AUTO ONLY: AGG	$ $ $
A		**EXCESS LIABILITY** ☒ OCCUR □ CLAIMS MADE □ DEDUCTIBLE ☒ RETENTION $	**CUP253520** **Umbrella Liability**	**38624**	**38974**	EACH OCCURRENCE AGGREGATE	$5,000,000 $5,000,000 $ $ $

A		**WORKERS COMPENSATION AND EMPLOYERS' LIABILITY** ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	**WC3122979**	**08/01/05**	**08/01/06**	X	WC STATUT-ORY LIMITS	OTHER	$
						E.L. EACH ACCIDENT			$1,000,000
						E.L. DISEASE-EA EMPLOYEE			$1,000,000
						E.L. DISEASE-POLICY LIMIT			$1,000,000
		OTHER							

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

(See Attached.)

CERTIFICATE HOLDER	**CANCELLATION**
Crescent Real Estate, L.P. **909 Fannin** **Houston, TX 78768 and** **DeBaker and Coolidge, L.L.P.** **P. O. Box 1234** **Houston, TX 78768-1234**	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ~~ENDEAVOR~~ TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO DO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES~~. AUTHORIZED REPRESENTATIVE /S/ Jimmy Balagia

ACORD 25 (2001/08) **© ACORD CORPORATION 1988**

Commentary:

This standard ACORD form has been modified to strike out several provisions on the face of the form that otherwise state that the certificate does not confer any rights on the certificate holder. Certificates of insurance are generally signed by the local agent that has sold the policies. This agent is generally an independent contractor and not an employee of the insurers. Reliance only on the certificate of insurance for the coverages stated is perilous. Requiring the agent to produce the policies and their endorsements is important. These must be examined and approved and further endorsed, if necessary, prior to proceeding with work or occupancy.

IMPORTANT

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

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

DISCLAIMER

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

Commentary: The above provisions are contained on the reverse side of the ACORD certificate. Unless these provisions are struck from the certificate a conflict arises with the changes made to the printed-form language on the front side of the certificate.

ACORD CERTIFICATE OF PROPERTY INSURANCE

Date (MM/DD/YY): 03/06/06

PRODUCER

SGP Commercial Insurance
P. O. Box 2291
Houston, TX 78768-2291

INSURED

ABC Constructors, Inc.
P. O. Box 666
Houston, TX 78768-666

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

COMPANIES AFFORDING COVERAGE

COMPANY **A** American Mfgrs. Mutual Ins. Co.
COMPANY **B**
COMPANY **C**
COMPANY **D**

COVERAGES

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~~.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/77)	POLICY EXPIRATION DATE (MM/DD/YY)	COVERED PROPERTY	LIMITS
A	[ ] **PROPERTY** Bldrs, Risk	3AE63673805	08/01/05	08/01/06	[X] BUILDING	$8,000,000
	CAUSES OF LOSS				[X] PERSONAL	$1,000,000
	[ ] BASIC				[X] BUSINESS INCOME	$1,000,000
	[ ] BROAD				[X] EXTRA EXPENSE	$1,000,000
	[X] SPECIAL				[ ] BLANKET BUILDING	$
	[ ] EARTHQUAKE				[ ] BLANKET PERS PROP	$
	[ ] FLOOD				[ ] BLANKET BLDG & PP	$
	[X] (See Attachment.)					$
						$
	[ ] **INLAND MARINE**					$
	TYPE OF POLICY					
						$
	CAUSES OF LOSS					$
	[ ] NAMED PERILS					$
	[ ] OTHER					$
	[ ] **CRIME**					
	TYPE OF POLICY					$
						$
	[ ] **BOILER & MACHINERY**					$
						$
	[ ] **OTHER**					

LOCATION OF PREMISES/DESCRIPTION OF PROPERTY (See attachment.)

SPECIAL CONDITIONS/OTHER COVERAGES

CERTIFICATE HOLDER	CANCELLATION
Crescent Real Estate, L.P. 909 Fannin Houston, TX 78768 DeBaker and Coolidge, L.L.P. P. O. Box 1234 Houston, TX 798768-1234 General Electric Commercial Credit 2 Rockefeller Center New York, NY Bank of America, N.A. 3 Banking Center Charlotte, N.C.	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ~~ENDEAVOR~~ TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES~~. AUTHORIZED REPRESENTATIVE /s/ Jimmy Balagia

ACORD 24 (1/95)

Attachment To Contractor's Certificate Or Proof of Insurance

This Attachment is to Contractor's Certificate or Proof of Insurance that is:

Dated (MM/DD/YY): 03/06/06.

Issued By: Summit Global Partners
P.O. Box 2291
Houston, Texas 78768 2291

Insured: ABC Construction, Inc. ("Tenant's Contractor")

Certificate Holders:
DeBaker & Coolidge, L.L.P. ("Tenant" or "Owner")
Bank of America, N.A. ("Tenant's Lender")
Crescent Real Estate, L.P. ("Building Owner")
General Electric Commercial Credit ("Building Owner's Lender")

Policy Types:
Liability Insurance:
A. Commercial General Liability
B. Automobile Liability
C. Workers Compensation and Employer's Liability
Property Insurance:
D. Builder's Risk - Causes of Loss - Special Form

As to Policies Issued By:

Company A: Bituminous Fire & Marine Insurance
Company B: Bituminous Fire & Marine Insurance
Company C: Bituminous Fire & Marine Insurance
Company D: American Manufacturers Insurance Company

Policy Nos.:

Company A: CLP3122976 (Commercial General Liability)

Company B: CAP3122977 (Automobile Liability)

Company C: WC3122979 (Worker's Compensation/Employer's Liability for Texas)

Company D: 3AE63673805 Builder's All Risk - Causes of Loss – Special Form)

1. In Force. The insurance policies are currently in force.

2. Notification. None of the described insurance policies shall be canceled before the expiration date set forth in this certificate, nor a determination be made not to renew any of the described insurance policies, nor a material change be made in the coverage of any of the described policies, by the issuing company unless 30 days' advanced written notice via certified mail of such cancellation or change shall be given to the certificate holders identified herein, or to such other persons of which the issuer of this Certificate is hereafter notified to give notice.

3. Additional Insureds and Loss Payees. The following persons: (a) Crescent Real Estate, L.P. and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant, and its members and employees, (c) Crescent Management, L.L.P. (the "Property Manager"), (d) _____ ("Building Owner HVAC Contractor"), (e) _____ ("Building Owner Security Service"), (f) _____ ("Parking Garage Operator"), (g) _____ ("Building Owner's Architect"), (h) General Electric Commercial Credit ("Building Owner's Lender"), (i) Bank of America, N.A. ("Tenant's Lender"), and (j) John Doe DeBaker, M.D., individually ("**Additional Insureds**"), have been added as additional insured to each of the Liability Insurance

policies listed herein, under Endorsements making the coverage available to the Additional Insureds primary over insurance available to the Additional Insureds or any self-insurance program of the Additional Insureds and as Loss Payees together with the Contractor and its subcontractors and sub-subcontractors as to the Builder's Risk Policy listed below.

4. Texas Licensees. The issuers of the described insurance policies are licensed to do business in Texas.

5. Waiver of Subrogation. The issuers of the insurance policies have waived subrogation against (a) Crescent Real Estate, and its successors and assigns as owner of the Property, and its directors and employees, (b) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, and (c) John Doe DeBaker, individually (the **"Released Persons"**).

6. Contribution Not Required. The Insurance program of the Additional Insureds shall be excess of this insurance and shall not contribute with it.

7. Severability of Interest. This insurance applies separately to each Insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an Insured shall not affect any right which such person or organization would have as a claimant if not so included.

8. Certificate Holders. This certificate is issued to DeBaker & Coolidge, L.L.P., and its successors and assigns as Tenant of the Property, Bank of America, N.A. ("Tenant's Lender"), Crescent Real Estate, L.P., and its successors and assigns as owner of the Property ("Building Owner"), and General Electric Commercial Credit ("Building Owner's Lender") (collectively, "**Certificate Holders**").

9. Premises. For Policies A - C, the Premises is the Office Building, Parking Garage, tenants' leased premises, including the Tenant's Leased Premises, supporting facilities and personal property of Landlord, Tenant and of other tenants of Landlord located at 909 Fannin, Houston, TX described in Lease dated as of March 1, 2006 (copy attached)[the "**Office Lease**"]. For Policy D, the Premises is Suite 123 (including all tenant improvements thereto) under Construction Contract dated as of March 2, 2006 (copy attached), as amended from time to time (the "**Premises**").

10. Endorsements. Attached are the following Endorsements to the insurance policies:

Policy (Identify by Co. Ltr.)		Endorsement Form Nos.
A.	Bituminous Fire & Marine Insurance Company (Commercial General Liability)	Additional Insured No. GL-2785-TX Waiver of Subrogation No. GL-2785-TX
B.	Bituminous Fire & Marine Insurance Company (Automobile Liability)	Additional Insured No. TE 99 01 B Waiver of Subrogation No. TE 20 46 A
C.	Bituminous Fire & Marine Insurance Company (Worker's Compensation/ Employer's Liability for Texas only)	Additional Insured No. (not applicable) Waiver of Subrogation No. WC420304A
D.	American Manufacturers Company (Builder's Risk - Causes of Loss - Special Form)	Loss Payee No. (ordered) Ordinance/Law Coverage No. _____

Copies of the Endorsements are attached hereto. (See **Form G**)

Dated Issued: March 6, 2006.

I, the undersigned, attest and warrant to the Certificate Holder and the Additional Insureds the existence of coverage as specified in this certificate and herewith provide acknowledgment of the insurer(s) listed in this certificate that I am legally authorized by that insurer or those insurers to so obligate them. Except as stated above nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements, or exclusions of the referenced policies.

Authorized Representative
/S/ Jimmy Balagia
Typed Signature

Form E

Endorsement to Tenant's CGL Insurance Making Landlord Additional Insured

CGL Endorsement - CG 20 11 01 96

Additional Insured–
Managers or Lessors of Premises

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of ***Premises*** (Part Leased to You*): Suite 1, Floor 1, Building 1, Fannin Center, 909 Fannin, Houston, Texas and the appurtenant use of the Common Areas and Parking Garage as defined in the Office Lease between DeBaker & Coolidge, L.L.P. as Tenant and Crescent Real Estate, L.P., as Landlord.

2. Name of Person or Organization (Additional Insured): (a) Crescent Real Estate, L.P., and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender").

3. Additional Premium: _____.

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section **II**) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability ***arising out of*** the ownership, maintenance or use of that part of the ***premises*** leased to you* and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any occurrence which takes place after you* cease to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

CG 20 11 01 96 [Copyright, Insurance Services Office, Inc., 1994] [***Emphasis added***] Page 1 of 1

* "You" and "your" refers to the named insured (the one to whose policy this endorsement is attached).

Commentary:

I. ISO FORM

A. Adding Landlord to Tenant's CGL Policy

This endorsement is used most commonly when a landlord is to be listed as an additional insured on the tenant's liability insurance policy.

B. Coverage

1. "Arising out of ownership, maintenance or use"

Coverage is broad as it covers the additional insured's liability for Injuries "***arising out of***" its "***ownership, maintenance or use of that part of the premises leased to you*** (the named insured, the tenant)." This language is broad. See discussion of the scope of coverage an additional insured's negligence "arising out of" at **Footnote** [44-46].

It applies clearly to the landlord's vicarious liability for acts of the tenant (*i.e.,* the "*use*" of the premises).

The language is also expansive and general enough to apply directly to the landlord's own negligence.

It covers liability arising out of the "*ownership*" and "*maintenance*" of the premises, areas in which the landlord could be held liable regardless of any involvement of the tenant.

2. "Premises"

This endorsement provides a blank line for the description of the "***Premises***." Care must be exercised in completing this blank. This endorsement has a major potential coverage issue. It extends coverage to the additional insured landlord for liability for bodily injury and property damage "arising out of" ownership, maintenance or use "of that **part of the premises** leased" to the Tenant. A coverage issue may occur if the bodily injury or property damage occurs outside of the "premises" as such term is defined in the lease (for example, in the Common Areas maintained by the Landlord or in the alley behind the project).

As explained in **III B4c** of the Basic Principles portion of this Article some courts have found that the reference to "premises" is not a geographic limitation of the additional insured's coverage. Such courts have construed the endorsement's use of "arising out of" the premises as meaning that the injury or damage does not have to actually occur in the premises. However, also as note in the discussion in the Basic Principles some courts have placed a literal meaning on the "premises" and have required the injury to occur in the premises leased to the Tenant.

3. Carveouts from coverage

a. No coverage for Injuries arising after lease ends

This endorsement contains two significant carve outs. The first is for liabilities for Injuries that "*take place after (the tenant) ceases to be a tenant in that premises.*" This carve out excludes coverage for liabilities for Injuries that technically occur after cessation of the tenancy but relate to acts or omissions during the tenancy. Coverage for liabilities for Injuries arising after expiration of the tenancy but attributable to the tenant's acts or omissions prior to completion may be added by requiring both this endorsement and the CG 29 37 endorsement.

b. No coverage for Injuries arising out of construction operations

The second carve out is for alterations, new construction or demolition operations "*by or on behalf of the (additional insured–e.g., the landlord).*" This carve out excludes protection for liabilities for Injuries associated with construction activities. If the tenant will be engaged in any construction activities (*e.g.,* tenant improvements), then another endorsement form should be used.

C. Manual's Insurance Addendum Insurance Requirement

1. Unavailable Coverage Specified

The general reference in the Manual's Insurance Addendum to the Landlord being listed as an additional insured on the Tenant's liability policy does not specify the scope of the matters to be covered by the additional insured endorsement other than to state that the additional insured endorsement form will not

exclude coverage for the sole or contributory ordinary negligence of the Landlord or Lienholder.[44-46] The ISO industry standard additional insured endorsement form above does not expressly extend coverage to the additional insured's sole negligence.

It also does not expressly exclude coverage of the Landlord's sole negligence.

In 2004 ISO modified several of its endorsement forms (but not this one) to expressly exclude from coverage the sole negligence of the additional insured. An issue may exist as to whether the above ISO endorsement form extends to cover the Landlord's sole negligence.

Many insurers additional insured forms now contain express exclusions of the additional insured's sole negligence.

It is unlikely that a Tenant can easily or economically provide an additional insured endorsement to its CGL policy that expressly covers the Landlord's sole negligence. As a result it is possible that the additional insured endorsement furnished by Tenant will not be in compliance with this insurance requirement of the Insurance Addendum.

2. No Geographic Limitation of Tenant's Additional Insured Endorsement Coverage Specified

Insurance Addendum ¶ 2a does not specify or limit geographically the area of the Building to which Landlord's protection as additional insured is to extend. **¶ 2a** states that Landlord is to be listed as an additional insured on Tenant's CGL policy. This specification in the Insurance Addendum does not state that Landlord's additional insured coverage is to be limited to its liability for bodily injury or property damage occurring in the Premises.

The Lease employs geographic limits on the respective indemnity of Landlord and Tenant. Tenant is responsible for all Injuries occurring in the Premises; Landlord is responsible for all Injuries occurring in the Common Areas. This anomaly gives rise to a variance in coverage between a party's indemnity and its required insurance coverage. For example, if an Injury occurs in the Common Areas, Landlord is to indemnify Tenant.

However, Landlord has coverage for such liability to the extent it is a protected for that liability pursuant to the additional insured endorsement on Tenant's liability policy.

3. Persons to Be Listed as Additional Insureds on Tenant's CGL Policy

Insurance Addendum ¶ 2a provides for "Landlord" and Lienholder to be named as "additional insureds." The term "Landlord" is given broad meaning in the Definitions section of the Office Lease. "Landlord" is defined as meaning "Landlord and its agents, employees, invitees, licensees, or visitors." If it is intended that persons in addition to the named Landlord are to be listed as additional insureds, then each of these persons by category and the most important of these persons be identified and listed in the Schedule provided in the additional insured endorsement form to identify the additional insureds.

4. Coverage if ISO Endorsement Forms are Used but Without Further Manuscripted Changes

In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage results. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

The CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises added to the Tenant's CGL policy listing Landlord as an additional insured will cover the Landlord as an additional insured on Tenant's CGL policy for all liability arising out of the ownership, maintenance or use of that part of the premises leased to Tenant, but not for any occurrence which takes place after the Tenant ceases to be a Tenant and not for

any liabilities arising out of structural alterations, new construction or demolition operations performed by or on behalf of the Landlord.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to Tenant's contractor's CGL policy listing Landlord and Tenant as additional insureds will cover Landlord and Tenant for bodily injury, property damage, and personal injury caused in whole or in part by the contractor's acts or omissions or the acts or omissions of those acting on the contractor's behalf in the performance of contractor's ongoing operations at the Building and related property.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's ongoing operations at the Building and related property.

The CG 20 26 07 04 Additional Insured – Designated Person or Organization added to the Landlord's CGL policy will cover the Tenant as an additional insured on the Landlord's CGL insurance policy for bodily injury, property damage, and personal injury caused in whole or in part by Landlord or by the acts or omissions of those acting on Landlord's behalf in the performance of Landlord's ongoing operations or in connection with premises owned by the Landlord.

II. AUTHOR'S "FAIR FORM" MANUSCRIPT REVISION TO TENANT'S INSURANCE

Should Tenant indemnify Landlord for Injuries occurring either outside or in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. ISO's approach under the CG 20 11 is to allocate to the named insured Tenant all liability arising out of the use of the premises leased to Tenant without an express carve out for the additional insured Landlord's sole negligence or Landlord's negligence if it is the chief cause of the Injury or on a "inside" vs. "outside" formula as employed in the Forms Manual.

A "fairer" approach is to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the Premises, in the Common Areas or in the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence.

In order to effectuate the Author's recommendation, the following revisions to the ISO CG 20 11 form should be requested to be made to the Tenant's CGL carrier:

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term "**premises**" as used in this Endorsement means the "**Building**", including "**Common Areas**", of which a part is leased to you as Tenant and called herein the "**Leased Premises**, the Leased Premises itself and the "**Parking Garage**" and other "**Support Facilities**" (as such capitalized terms are defined in the Office Lease between you as Tenant and the additional insured identified above as Landlord).

The insurance does not apply to:

3. Any "bodily injury", "property damage" or "personal and advertising injury" caused:

   a. in whole by the negligent acts or omissions or willful misconduct of the Landlord, or

   b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord if the aggregate of the Landlord's plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

A further limitation might be considered to exclude from the additional insured coverage of the Landlord all occurrences outside of the Leased Premises, whether or not caused in part by Tenant or by persons acting on behalf of Tenant. This further limitation is along the lines of the Forms Manual's geographic division of liability.

Additionally, an argument may be made that an Injury occurring outside of the Leased Premises should be covered by the project's liability insurance since all tenants, including Tenant, are paying for such coverage as an Operating Expense. This approach would be reflected by a manuscripted additional insured endorsement to the Landlord's CGL policy (see the manuscripted endorsement language to Form F below).

The following is a manuscripted endorsement to the ISO CG 20 11 to the Tenant's CGL insurance to reflect both a geographic approach and a 51% negligence exclusion:

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term "**premises**" as used in this Endorsement means the "**Building**", including "**Common Areas**", of which a part is leased to you as Tenant and called herein the "**Leased Premises**, the Leased Premises itself and the "**Parking Garage**" and other "**Support Facilities**" (as such capitalized terms are defined in the Office Lease between you as Tenant and the additional insured identified above as Landlord).

3. The insurance does not apply to any "bodily injury" or "property damage" or "personal and advertising injury" caused:

   a. in whole by the negligent acts or omissions or willful misconduct of the Landlord or by persons acting on behalf of Landlord, or

   b. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **outside** of the Leased Premises, such as occurring in the Common Areas, the Parking Garage or the Support Facilities.

   c. in part by the negligent acts or omissions of Landlord or by those persons acting on behalf of Landlord occurring **inside** the Leased Premises, if the aggregate of the Landlord's plus those persons acting on behalf of Landlord percentage share of all negligence is 51% or greater.

Form F

Endorsements to Landlord's Insurance Making Tenant An Additional Insured

CGL Endorsement - CG 20 26 07 04

Additional Insured–Designated Person or Organization

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: (a) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees,(b) Bank of America, N.A. ("Tenant's Lender"), and (c) John Doe DeBaker, M.D., individually.

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

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 your* acts or omissions or the acts or omissions of those acting on your* behalf:

A. In the performance of your* ongoing operations; or

B. In connection with your premises owned by or rented to you*.

CG 20 26 07 04 [Copyright, Insurance Services Office, Inc., 2004] [***Emphasis added***] Page 1 of 1

* "You" and "your" refers to the named insured (the one to whose policy this endorsement is attached).

Commentary:

I. ISO FORM

A. Adding Tenant to Landlord's CGL Policy

This endorsement may be used when no other ISO form exists for the purpose or when the parties designate this form as the form to be used. This form is suitable for use to designate Tenant as an additional insured on Landlord's CGL policy. In a landlord-tenant context, it may be used to provide additional insured coverage to an owner on a tenant's CGL policy and *vice versa* to provide additional insured coverage to a tenant on a landlord's CGL policy.

B. Coverage

1. "*Caused, in whole or in part, by*" Landlord

This endorsement is the broadest of the ISO Additional Insured Endorsements. This endorsement provides additional insured coverage for liability bodily injury, property damage and personal and advertising injury caused, in whole or in part, by the named insured's (in this case the Landlord) acts or omissions in connection with Landlord's property.

2. No Carve Outs

This endorsement form does not contain any carve outs from coverage like other ISO additional insured endorsement forms. However, by its express coverage terms it eliminates certain coverages.

For example, the injury must be caused at least in part by the named insured. This eliminates coverage for the additional insured's sole negligence.

The injury must occur in connection with premises owned by the named insured. The term "premises" is not defined, but likely will be given a broad meaning by courts. In the context of a lease, courts will likely interpret this endorsement listing the Tenant as an additional insured on the Landlord's CGL policy as covering more than merely the "Premises" leased to Tenant, but also the Common Areas, Parking Garage and Support Facilities.

3. Coverage if ISO Endorsement Forms are Used but Without Further Manuscripted Changes

In the absence of implementing manuscript changes to the ISO endorsement forms, the following coverage results. Both Landlord and Tenant are additional insureds on the other party's CGL insurance. Assuming that Landlord's and Tenant's CGL policies are on the current ISO CGL policy form, including having been endorsed with the 1997 mandatory "other insurance" change in language endorsement, then each additional insured shall be covered for the risks identified in the additional insured endorsement on a primary coverage basis without the additional insured's other insurance being called on to contribute to cover the primary liability to the extent of the limits of the named insured's insurance.

The CG 20 11 01 96 Additional Insured – Managers or Lessors of Premises added to the Tenant's CGL policy listing Landlord as an additional insured will cover the Landlord as an additional insured on Tenant's CGL policy for all liability arising out of the ownership, maintenance or use of that part of the premises leased to Tenant, but not for any occurrence which takes place after the Tenant ceases to be a Tenant and not for any liabilities arising out of structural alterations, new construction or demolition operations performed by or on behalf of the Landlord.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to Tenant's contractor's CGL policy listing Landlord and Tenant as additional insureds will cover Landlord and Tenant for bodily injury, property damage, and personal injury caused in whole or in part by the contractor's acts or omissions or the acts or omissions of those acting on the contractor's behalf in the performance of contractor's ongoing operations at the Building and related property.

The CG 20 10 07 04 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization added to the Tenant's CGL policy listing Landlord as an additional insured will cover Landlord for bodily injury, property damage, and personal injury caused in whole or in part by the Tenant's acts or omissions or the acts or omissions of those acting on the Tenant's behalf in the performance of Tenant's ongoing operations at the Building and related property.

The CG 20 26 07 04 Additional Insured – Designated Person or Organization added to the Landlord's CGL policy will cover the Tenant as an additional insured on the Landlord's CGL insurance policy for bodily injury, property damage, and personal injury caused in whole or in part by Landlord or by the acts or omissions of those acting on Landlord's behalf in the performance of Landlord's ongoing operations or in connection with premises owned by the Landlord.

II. AUTHOR'S "FAIR FORM" MANUSCRIPT REVISION TO LANDLORD'S INSURANCE

Should Tenant indemnify Landlord for Injuries occurring in the Premises if the Landlord is greater than 50% negligent or even solely negligent? Should the Landlord indemnify Tenant for an Injury in the Common Areas if Tenant is solely negligent? The Forms Manual's approach is to allocate 100% of the risk of liability to Landlord for Injuries occurring in the Common Areas and 100% of the risk of liability to Tenant for Injuries occurring in the Premises. A "fairer" approach may be to provide each party with coverage on a primary basis on the other party's CGL policy for injuries occurring in a geographic area (e.g., inside or outside the

Premises; in the Common Areas and the Parking Garage) but exclude from such coverage (a) the additional insured's sole negligence and (b) the additional insured's negligence if it is 51% or greater than the named insured's negligence.

In order to effectuate the Author's recommendation, the following revisions to the ISO CG 20 26 form should be requested to be made to the Landlord's CGL carrier:

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term "**premises**" as used in this Endorsement means the "**Building**", including "**Common Areas**", of which a part is leased to the additional insured as Tenant and called herein the "**Leased Premises**, the Leased Premises itself and the "**Parking Garage**" and other "**Support Facilities**" (as such capitalized terms are defined in the Office Lease between the additional insured as Tenant and you as the named insured as Landlord).

The insurance does not apply to any "bodily injury" or "property damage" or "personal and advertising injury" caused:

(1) in whole by the negligent acts or omissions or willful misconduct of the Tenant or by persons acting on behalf of Tenant, or

(2) in part by the negligent acts or omissions of Tenant or by those persons acting on behalf of Tenant if the aggregate of Tenant's plus those persons acting on behalf of Tenant percentage share of all negligence is 51% or greater.

Additionally, an argument may be made that an Injury occurring outside of the Leased Premises should be covered by the project's liability insurance since all tenants, including Tenant, are paying for such coverage as an Operating Expense. This approach would be reflected by the following manuscripted additional insured endorsement to the Landlord's CGL policy:

Endorsement No. _____ is amended to add the underlined language and to delete the language shown as ~~struck out~~.

The term "**premises**" as used in this Endorsement means the "**Building**", including "**Common Areas**", of which a part is leased to the additional insured as Tenant and called herein the "**Leased Premises**, the Leased Premises itself and the "**Parking Garage**" and other "**Support Facilities**" (as such capitalized terms are defined in the Office Lease between the additional insured as Tenant and you as the named insured as Landlord). This insurance does apply to ''bodily Injury'' or ''property damage'' or ''personal and advertising injury'' caused in part by Landlord and by those persons acting on behalf of Landlord in the Building, including the Common Areas and the Leased Premises, and the Parking Garage, even if caused in part by the negligent acts or omissions of Tenant plus those persons acting on behalf of Tenant, except as excluded below.

The insurance does not apply to any "bodily injury" or "property damage" or "personal and advertising injury" caused:

(1) in whole by the negligent acts or omissions or willful misconduct of the Tenant or by persons acting on behalf of Tenant, or

(2) in part by the negligent acts or omissions of Tenant or by those persons acting on behalf of Tenant occurring **inside** the Leased Premises if the aggregate of Tenant's plus those persons acting on behalf of Tenant percentage share of all negligence is 51% or greater.

Form G

Endorsement to Contractor's Insurance Policy Making Tenant and Landlord Additional Insureds

CGL Endorsement - CG 20 10 07 04

Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization: (a) Crescent Real Estate, L.P., and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender"), (h) DeBaker & Coolidge, L.L.P., and its successors and assigns, as Tenant, and its members and employees, (i) Bank of America, N.A. ("Tenant's Lender"); and (j) John Doe DeBaker, M.D., individually

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. **Section II - Who Is An Insured** is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your* acts or omissions; or

2. The acts or omissions of those acting on your* behalf;

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

B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions

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

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

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

CG 20 10 10 04 [Copyright, ISO Properties, Inc., 2004] [***Emphasis added***] Page 1 of 1

Commentary:

Hypothetical: This endorsement has been completed as an endorsement to the Contractor's CGL insurance to list as additional insureds the persons in the Schedule (the Landlord-Related Persons and the Tenant-Related Persons).

Insurance. This endorsement provides additional coverage to the additional insured for an owner on the contractor's CGL policy (or for a contractor on a subcontractor's CGL policy) for "liability" "caused, in whole or in part, by" the acts or omissions or the acts of the CGL policy's insured (the contractor) and the acts or omissions on its behalf (those of its subcontractors, etc.).

This endorsement language was added by ISO to this endorsement form in 2004 replacing the prior endorsement language that triggered coverage for the additional insured when the liability "arose out of your (the named insured's) ongoing operations performed for that insured (the additional insured)." The pre-2004 endorsement language triggered numerous cases over the meaning of "arising out of" and "operations" and whether such terms meant that the additional insured would be insured against its liability in cases where the liability was the result of the additional insured's sole negligence or in cases where the named insured was not negligent and the additional insured and others were the negligent parties. Texas courts have been inclined to interpret insurance language broadly against the insurer and interpreted the "arising out of" language broadly against the insurer in favor of coverage for the additional insured, even in cases where the named insured was not negligent, the additional insured was the sole negligent party, but there was a causal connection between the liability and the operations of the named insured contractor. Prior to the 2004 revision to the CG 20 10, the CG 20 10 underwent various revisions seeking to limit the broad scope of the "arising out of" language, including a revision changing coverage for the additional insured from liability "arising out of the (named insured's) work" (CG 20 10 11 85) to "arising out of the (named insured's) operations." This type of language is still found in some non-ISO form endorsements and still gives rise to the same issue - is the additional insured covered for liabilities where the named insured is not negligent, but the additional insured is either concurrently negligent with person other than the named insured or is solely negligent.

The 2004 language triggers coverage for the additional insured for liabilities "caused by" an "act or omission" of the named insured (contractor) or by an entity acting on the named insured's behalf. This language, unlike prior ISO language, requires that the acts or omissions of the named insured be at least a partial cause of the liability. Thus, it is arguable that this new endorsement language does not cover the additional insured either for its sole negligence or cases where the additional insured is concurrently negligent with others, but the named insured is not negligent. However, it remains for courts to interpret this language and to determine the meaning of "caused by". This language as written is not qualified by typical Texas tort law concepts of "proximately caused by" or "directly caused by." Additionally, in cases where the liability is for injury to the named insured's employee, the "caused by" language may present coverage issues for an additional insured, as in such cases the named insured is barred by the workers' comp bar from suing its employer and is suing the additional insured without any allegations being raised by the injured employee as to acts or omissions of the named insured, employer.

Liabilities ***occurring after*** completion of the work are not covered.

Coverage for Liabilities arising after completion of the contractor's operations but attributable to the contractor's acts or omissions prior to completion may be added by requiring both this endorsement and a CG 20 37 Additional Insured-Owners, Lessees or Contractors–Completed Operations endorsement.

Form H

Endorsement to Tenant's CGL Insurance Waiving Tenant's Carrier's Right of Subrogation

CGL Waiver of Subrogation Endorsement - CG 24 04 10 92

Waiver of Transfer of Rights or Recovery Against Others To Us

This endorsement modifies insurance provided under the following:

SCHEDULE

Name of Person or Organization: (a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service"), (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), (g) General Electric Credit Corporation ("Building Owner's Lender").

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Condition (Section IV)–COMMERCIAL GENERAL LIABILITY CONDITIONS) is amended by the addition of the following:

We waive any rights of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage" ***arising out of your ongoing operations*** or "***your work***" done under a contract with that person or organization and included in the "products-completed operations hazard.". This waiver applies only to the person or organization shown in the Schedule above.

CG 24 04 10 92 [Copyright, Insurance Services Office, Inc., 1992] Page 1 of 1

Commentary:

Despite the fact that Condition 8 of ISO's CGL policy impliedly (though not expressly) allows an insured to waive recovery against a third party prior to loss, ISO nevertheless has promulgated this form. This form serves a purpose. It documents that the insurer is aware of the contractual agreement between its insured and the person named in the schedule. It also serves as evidence that the insured's waiver of its own recovery rights has not jeopardized its coverage under the policy. Since the other party will usually have a substantial interest in knowing that the endorsed policy is valid and in force, the reassurance provided by a formal subrogation waiver can be significant. However, it is generally thought that a waiver of subrogation in a contract benefiting a party who will be included as an additional insured under the named insured's policy is not required. The liability insurer is generally prohibited from subrogating against the additional insured. A reason one might include the waiver of subrogation endorsement and a contractual waiver of recovery in this situation is that the named insured (the contractor) might fail to effect the additional insured status on behalf of the additional insured-owner.

Form I

Endorsement to Tenant's Business Auto Policy Making Landlord Additional Insured

TE 99 01B (BAP Texas) Additional Insured

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
TRUCKERS COVERAGE FORM

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below:

Endorsement Effective: March 6, 2006	Policy Number: CAP 3 122 977
Name Insured: DeBaker & Coolidge, L.L.P.	Summit Global Partners Countersigned by /s/

(Authorized Representative)

The provisions and exclusions that apply to LIABILITY COVERAGE also apply to this endorsement.

Any person or organization for whom the insured has agreed by written contract to designate as an ***additional insured*** subject to all the provisions and limitations of this policy.

[Enter Name and Address of Additional Insured.]

(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service") , (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), and General Electric Credit Corporation ("Building Owner's Lender")

is an insured, ***but only*** with respect to legal responsibility for acts or omissions of a person for whom Liability Coverage is afforded under this policy.

The additional insured is not required to pay for any premiums stated in the policy or earned from the policy. Any return premium and any dividend, if applicable, declared by us shall be paid to you.

You are authorized to act for the additional insured in all matters pertaining to this insurance.

We will mail the additional insured notice of any cancellation of this policy. If the cancellation is by us, we will give ten days notice to the additional insured.

The **additional insured** will retain any right of recovery as a claimant under this policy.

FORM TE 99 01B - ADDITIONAL INSURED

Texas Standard Automobile Endorsement Prescribed March 18, 1992

Commentary:

Hypothetical: This endorsement is being required of the Contractor. It is not as common for this endorsement to be required of the Landlord-Related Persons or the other Tenant-Related Persons. Whether it is required of these other persons will depend on the circumstances.

Insurance: BAP policies [57-58] contain blanket additional insured provisions. This form is approved for use in Texas. This form can be used to either confirm the existence of a general "any person" additional insured provision in the BAP or to specifically designate persons to be additional insureds. This endorsement also contains a requirement that the insurer notify the additional insured in advance of insurance cancellation.

Form J

Endorsement to Tenant's Business Auto Policy Waiving Insurer's Subrogation Rights As to Claims Against Landlord

TE 20 46A (BAP Texas)
Changes In Transfer Of Rights
Of Recovery Against Others To Us
(Waiver Of Subrogation)

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
TRUCKERS COVERAGE FORM

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below:

Endorsement Effective: March 6, 2006	Policy Number: CAP 3 122 977
Name Insured: DeBaker & Coolidge, L.L.P.	Summit Global Partners Countersigned by /s/

(Authorized Representative)

The CONDITION entitled "TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US" does not apply to

(a) Crescent Real Estate, and its successors and assigns as owner of the Property (the "Building Owner"), and its directors and employees, (b) Crescent Management, L.L.P. (the "Property Manager"), (c) _____ (the "Building Owner HVAC Contractor"), (d) _____ (the "Building Owner Security Service") , (e) _____ ("Parking Garage Operator"), (f) _____ ("Building Owner's Architect"), and General Electric Credit Corporation ("Building Owner's Lender")

[*e.g.,* organizations for whom the named insured is operating under a written contract when such contract requires a waiver of subrogation].

Additional Premium $_____ will be retained by us regardless of any early termination of this endorsement or the policy.
Premium (included) (1% Blanket)

FORM TE 20 46A - CHANGES IN TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US (WAIVER OF SUBROGATION)
Texas Standard Automobile Endorsement

Prescribed March 18, 1992 (***Emphasis Added***)

Commentary:

Hypothetical: This endorsement is being required of the Contractor. It is not as common for this endorsement to be required of the Landlord-Related Persons or the other Tenant-Related Persons. Whether it is required of these other persons will depend on the circumstances.

Insurance: This form is approved for use in Texas. This form is an endorsement to the BAP waiving the insurer's subrogation rights. This form does not require the designation of the parties as to whom the insurer's rights are waived. Note that this form requires that the contract between the contractor and the tenant contain a waiver of subrogation provision.

Form K

Endorsement to Tenant's Workers Compensation Policy Waiving Insurer's Subrogation Rights as to Claims Against Landlord

WC 42 03 04 A Workers Compensation And Employers Liability Insurance Policy

(Ed. 1-00)

TEXAS WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT

This endorsement applies only to the insurance provided by the policy because Texas is shown in Item 3.A. of the Information Page.

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule, but this waiver applies only with respect to bodily injury arising out of the operations described in the Schedule where you are required by a written contract to obtain this waiver from us.

This endorsement shall not operate directly or indirectly to benefit anyone not named in the Schedule.

The premium for this endorsement is shown in the Schedule.

Schedule

1. ( ) Specific Waiver

Name of person or organization

(X) Blanket Waiver

Any person or organization for whom the Named Insured has agreed by written contract to furnish this waiver.

2. Operations. All Texas operations.

3. Premium: Incl._____.

The premium charge for this endorsement shall be ____ percent of the premium developed on payroll in connection with work performed for the above person(s) or organization(s) arising out of the operations described.

4. Advance Premium. Incl._____.

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 3/6/06 Policy No. WC3122979 Endorsement No. _____

Insured DeBaker & Coolidge, L.L.P._____ Premium _____-0-_____

Insurance Company Countersigned by /S/_____

WC 42 03 04 A (***Emphasis Added***)
(Ed. 1-00)

Commentary:

Hypothetical: This endorsement has been completed as to the Contractor. The Landlord and the other Landlord-Related Persons will require a similar endorsement to be issued by the Tenant's workers' comp. carrier in their favor. Similarly, the Tenant will wish a similar endorsement to be issued by the Landlord's workers' comp. carrier.

Insurance. This form is approved for use in Texas. It is an endorsement whereby the workers' compensation carrier waives its rights of subrogation. It requires that the contract between the contractor (employer) and the owner contain a provision requiring the waiver to be obtained.

Footnotes

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FN #

III. Releases and exculpations

IV. Condemnation

e. Better to recognize tenant's right to improvement value as opposed to being silent

FOOTNOTES

I. Indemnity.

A. Scope.

1. Elements of indemnity provisions.

[1] An indemnity is comprised of the following five components:

1. The "indemnitors" (the ***"Indemnifying Persons"***);
2. The "indemnitees" (the ***"Indemnified Persons"***);
3. The liabilities which are indemnified against resulting from the Indemnified Matters (the ***"Indemnified Liabilities"***);
4. The indemnified events, acts or omissions (the ***"Indemnified Matters"***); and
5. The excluded matters or excluded liabilities (the ***"Excluded Matters or Liabilities"***).

2. "Indemnity".

[2] ***"Indemnity"*** is a shifting of the risk of a loss from a liable person to another. However, many times scriveners use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, the indemnity provisions are no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs." However, it is not necessary that the words "indemnify" or "indemnity" be used or even that the promise be in writing. 14 TEX. JUR. 3d *Contribution and Indemnification* § 14 Form (1997); 26 TEX. JUR. 2d *Statute of Frauds* § 29. William H. Locke, Jr., *Annotated Risk Management Forms – Indemnity, Additional Insureds, Waiver of Subrogation, Exculpations and Releases*, 13TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2003); and Aaron Johnston, Jr., and Charles E. Comiskey, *Lease Risk Management and Insurance Concepts*, 15TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2004). As discussed in the foregoing referenced articles, care should be taken in crafting the scope of and exclusions from the liabilities indemnified, such as providing for the defense of the indemnified party by the indemnifying party ("indemnify, ***defend***, and hold harmless"), settlement authority, and choice of laws applicable.

B. Indemnified liabilities.

1. "Claims".

[3] **"*All Claims*."** The Texas Supreme Court in *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813 (Tex. 1994) found that the following language **did not** meet the express negligence test:

Provision:

> ...[t]o the fullest extent permitted by law, [Fisk] shall indemnify, hold harmless and defend [Constructors] ... from and against **all claims**, damages, losses, and expenses, including but not limited to attorney's fees [arising out of or resulting from the performance of Fisk's work].

Constructors brought a third party cause of action against Fisk seeking indemnification against the claim of Fisk's employee against Constructors. The court held that Fisk had no duty to indemnify Constructors, since the indemnity did not expressly cover Fisk indemnifying Constructors for Constructors' negligence. The court then found that since Fisk had no duty to indemnify Constructors, Fisk had no liability for Constructors' attorneys fees in defending against Fisk's employee's suit. *Id.* at 815.

2. Liabilities or damages.

a. "Liabilities" or "damages".

[4] Indemnities have sometimes been classified as an "indemnity against "**liability.**" *Russell v. Lemons*, 205 S.W.2d 629, 631 (Tex. Civ. App.--Amarillo 1947, *writ ref'd n.r.e.*). In the case of a promise to indemnify against liability, a cause of action accrues to the indemnified person only when the liability has become fixed and certain, as by rendition of a judgment. Possibility that liability triggering indemnity will be incurred in pending action is a "future hypothetical event" within meaning of rule that Uniform Declaratory Judgments Acts gives court no power to pass upon hypothetical or contingent situations. *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.*, 884 S.W.2d 530 (Tex. App.--Texarkana 1994, *no writ*); § 37.001 TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997).

b. "Punitive damages".

[5] In drafting the classes of liabilities covered by an indemnity care should be given to the scope of covered items. For example, are "**punitive damages**" of the Indemnified Person to be covered? Are the punitive damages of an employee or an agent covered, if the employer is not liable? For a discussion of "punitive damages" see *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) and TEX. CIV. PRAC. & REM. CODE §§ 41.001 *et seq.* (Vernon 1997).

3. Attorney's fees and costs.

[6] **a. Must first pass express negligence test to be indemnified for defense costs.**

In *Fisk Electric Co. v. Constructors & Assoc.s, Inc.*, 888 S.W.2d 813 (Tex. 1994), the supreme court found that the express negligence requirement for the enforcement of an indemnity agreement is not an affirmative defense to be alleged and proved by the defendant Indemnifying Person, but rather is a rule of contract construction. The court held that Fisk's obligation to pay attorney's fees arose out of its duty to indemnify. Absent a duty to indemnify, there is no obligation to pay attorney's fees. The supreme court declined to carve out an exception to the express negligence rule for contracts which although they did not expressly indemnify the Indemnified Person for its own negligence, clearly, expressly or broadly covered the Indemnified Person's defense costs. *Also see Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App.--Houston [1st Dist.] 1995, *writ denied*), holding no right to attorney's fees absent an enforceable indemnity provision.

b. Attorney's fees.

The expense of defending a liability suit and in subsequently enforcing the contractual indemnity are reimbursable when the Indemnified Person recovers contractual indemnification from the Indemnifying Person. An Indemnified Person's attorney's fees in defending a liability suit are recoverable from the Indemnifying Person as "indemnified damages" even though not expressly mentioned in the indemnity provision. Attorney's fees may be awarded to the Indemnified Person pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8) (Vernon 1997) in connection with a suit against the Indemnifying Person for its breach of its contract of indemnity. *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex.App.--Dallas 1999, *no writ*). The purpose of indemnification is to make the Indemnified Person whole. *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (Tex. App.--El Paso 1988, *writ denied*); *Continental Steel Co. v. H. A. Lott, Inc.*, 772 S.W.2d 513, 517 (Tex. App.-Dallas 1989, *writ denied*); *Texas Const. Assoc., Inc. v. Balli*, 558 S.W.2d 513 (Tex. Civ. App.--Corpus Christi 1977, *no writ*); *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App.--Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126 (1959) *and vacated on other grounds*, 326 S.W.2d 915 (Tex. Civ. App.-- Houston 1959); *Barnes v. Calgon Corp.*, 872 F. Supp. 349, 353 (E.D. Tex. 1994).

c. Costs.

However, a different rule may apply to "costs" and "expenses" beyond attorney's fees. In *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.-Dallas 1999, *no writ*) the court held that failure of the indemnity provision to expressly cover the Indemnified Person's litigation costs prevented recovery of the following expenses incurred by its attorney: filing fees, courier fees, postage, telephone expenses, long distance charges, and fax charges. The court considered these costs to be included within the hourly billing rates and reasonable fees of the attorney, unless the indemnity contract expressly covered these items as an Indemnified Matter.

d. Allocation of costs of defense defending indemnified person and persons not indemnified.

An example where an Indemnified Person was not fully protected is the case of *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex.App. [14th Dist.] 2000, *writ denied*). In *Hess* the court found that a portion of the attorney's fees Hess incurred in defending a suit brought by an injured employee of the Wood Group was not covered by the Wood Group's indemnity. Hess sought and obtained reimbursement from the Wood Group for the $200,000 it had paid to settle the claim, but was denied the right to recover 100% of the $141,743.75 in attorney's fees it incurred in defending the claim. The trial court's finding that the $200,000 settlement of the claim was reasonable was upheld by the court of appeals despite the fact that another defendant (Graham) was released in the settlement agreement. The court found that the settlement amount was reasonable as to the potential liability of Hess alone. However, Hess in defending the claim, also was defending a claim against Graham for Graham's negligence. Hess had agreed to indemnify Graham. The Wood Group had indemnified Hess. The trial court held that the Wood Group indemnity did not include Hess' contractual obligation to indemnify Graham; and thus did not include the portion of Hess' fees incurred in defending Graham.

e. Settlement by Indemnifying Person Negates Indemnity for Defense Costs Incurred by Indemnified Person.

No case has determined whether an Indemnified Person can recover against the Indemnifying Person under a contractual indemnity for its attorney's fees in defense of an Indemnified Liability, if the Indemnifying Person settles the claim. It has been held in an case involving common law indemnity that the Indemnifying Person's **settlement** of a third party's claim, which if proved would establish a common law right of indemnification by the Indemnified Person, **eliminates attorney's fees** incurred by the Indemnified Person in defending suit by the third party. In *Humana Hospital Corp. v. American Medical Systems, Inc.*, 785 S.W.2d 144 (Tex. 1990), quoting its holding in *Plas-Tex, , Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 446 (Tex. 1989), the Texas Supreme Court in *Humana Hospital* held that there is **no** right of indemnity against a defendant who is not liable to the plaintiff. The court found that since the settlement did not include a court determination that the Indemnifying Person, American Medical, was negligent, the Indemnified Person, Humana, could not obtain indemnity for its defense costs.

C. Indemnified matters.

1. Vicarious liability - common law exposure to vicarious liabilities.

[7] The common law imposed "vicarious" liability, sometimes called "imputed negligence", on persons in certain circumstances through the doctrine of respondeat *superior*, under which a master (employer) is liable for the torts of its servants. The *respondeat superior* doctrine imposes liability on the employer even though the employer did not contribute to the servant's negligent act. The independent contractor rule evolved as a means to combat the harshness of the general common law rule. Under the independent contractor exception a person is not liable for the negligence of its independent contractors.

However, numerous exceptions evolved to the independent contractor exception resulting in the risk of the reimposition of liability even though the work is performed by independent contractors. Some of these exceptions are the following:

(1) Employer-Employee v. Employer-Independent Contractor Relationships. As distinguished from the "employer-employee" relationship, the "employer-independent contractor" relationship exists in situations where the employer hires a third person to perform some act, but does not retain control of the means and methods used by the independent contractor to perform the act. Additionally, such independent contractors are generally specially skilled to perform the particular task. 44 TEX. JUR. 3d 227, *Independent Contractors* (1996).

(2) Exceptions to the Independent Contractor Rule. Numerous exceptions evolved to the independent contractor rule to the point that the "exceptions swallowed the rule." W. P. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, § 71 (5th Ed. 1984).

(a) Liability to Third Parties for Acts of an Independent Contractor. As codified in the RESTATEMENT (SECOND) OF TORTS, §§ 410-429, a person is not liable for the acts or omissions of the independent contractor unless such person has been independently negligent. The following exceptions to this non-liability rule are recognized in Texas:

(i) Negligent Hiring. A person is liable for the negligent hiring of the contractor. 44 TEX. JUR. 3d 283, *Independent contractors* §56 *In general, selection of Incompetent Contractor*(1996); *Simonton v. Perry*, 62 S.W. 1090 (Tex. Civ. App. 1901); *Webb v. Justice Life Ins. Co.*, 563 S.W.2d 347 (Tex. Civ. App.--Dallas, 1978, *no writ*).

(ii) Work Unlawful or Creates Nuisance. Where the performance of the work contracted for is unlawful, or creates a nuisance, the employer may be responsible for injuries to third parties caused by the contractor. 44 TEX. JUR. 3d 291, *Independent Contractors,* §56 *Unlawful Work* (1996).

(iii) Project Necessarily Causes Loss or Injury. The employer may not, to escape liability, contract for the project, the necessary or probable effect of which would be to injure others. 44 TEX. JUR. 3d, *Independent Contractors* § 68 *Project necessarily causes loss or injury* 293 (1996).

(iv) Duties Imposed by Statute. If the prosecution of a project involves or results in a violation of a duty imposed by statute on the employer, the mere fact that the work was performed by a contractor will not relieve the employer from liability. 44 TEX. JUR. 3d, *Independent Contractors* (1996). So for instance the court held in *Sanchez v. MBank of El Paso*, 836 S.W.2d 151 (Tex. 1992) that the bank could not escape liability for the breach of the peace and wrongful repossession actions of its independent contractor in repossessing plaintiff's bank financed automobile in violation of the requirements of TEX. BUS. & COMM. CODE § 9.503 (Vernon Supp. 2003).

(v) Exercise of Public Franchise. Where the work of a contractor involves the exercise of a franchise granted the employer, the latter must answer for the torts of the contractor and see to the proper execution of the granted power. 44 TEX. JUR. 3d 296, *Independent Contractors* §72 *Exercise of public franchise*(1996).

(iv) Inherently Dangerous Work. A person employing an independent contractor to do an inherently dangerous work should see to it that the work is performed with such degree of care as is appropriate to the circumstances, or that all reasonable precautions be taken during its performance, so that third persons may be effectually protected against injury. The employer cannot delegate his duty of care to an independent contractor so as to relieve himself of his duty and the liability for the nonperformance of the duty. Thus, the employer may be held responsible to third persons for injuries that are the proximate results of the inherently dangerous nature of the work contracted for, whether the contractor's act was done negligently or otherwise. 44 TEX. JUR. 3d 297, *Independent Contractors* § 73 *Inherently dangerous work* (1996).

(b) Liability for Injuries to Employees of an Independent Contractor. The most frequently encountered exceptions to the independent contractor rule are situations where the courts have imposed liability upon a person to the employees of an independent contractor. The following exceptions are recognized in Texas:

(i) Premises Liability--Safe Work Place. A person is liable if it "does not provide a safe work place". Actually, this statement of the rule is too broad. More accurately phrased, the rule requires the owner or occupier to exercise ordinary car to keep the premises in reasonably safe condition so that the employee of the independent contractor will not be injured. *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985); 59 TEX. JUR. 3d 168, *Premises Liability* §25 *Duty owed business invitee* and § 43 *Failure to provide safe place to work* 270 (1996).

See, for instance, *Stablein v. Dow Chemical Co.*, 885 S.W.2d 502 (Tex. App.--El Paso 1994, *no writ*) where the court found that the premises owner was not liable for injuries to an employee of a subcontractor (cafeteria worker employed by a cafeteria services contractor working at the Dow plant). The condition encountered by the employee (a crate in the food freezer) was not a dangerous condition peculiar to the work being performed by the contractor. The contract with the contractor recognized that Dow did not retain control over the method of the contractor performing its work. The injury arose out of an activity conducted by the employee in the course and scope of the employees employment by the contractor. Dow's duty to the employee was that owed by an occupier of land to a business invitee--to warn the contractor and its employees of any hidden dangers existing on the premises.

The court of appeals in *Schley v. Structural Metals, Inc.*, 595 S.W.2d 572 (Tex. Civ. App.--Waco 1979, *writ ref'd n.r.e.*) held that the abolition of the "no duty" rule in occupier-invitee cases, in light of the adoption of the Comparative Negligence and Contribution Statute in 1973 (discussed *infra*), necessarily set aside the rule that the knowledge of the independent contractor relieved the owner or occupier of land of any duty to protect or warn the employees of the independent contractor of dangers on the premises (even "open and obvious dangers").

An employer may be liable for injuries suffered by the employee of an independent contractor as a result of a defective appliance furnished by him. 44 TEX. JUR.3d, *Independent Contractors*, § 48 *Furnishing dangerous appliances* 275 (1996).

Similarly, a contractor in control of the premises owes a duty to the employees of its subcontractor similar to the duty owed by the owner to the contractor as to the premises. 44 TEX. JUR.3d 276, *Independent Contractors*, § 49 *General contractors* (1996).

Liability is imposed upon the employer of the contractor in cases where the independent contractor's work involves a dangerous condition on the owner's premises which causes injury to the contractor's employees. The exception is summarized in the RESTATEMENT (SECOND) OF TORTS (1966) as follows:

> 413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor. One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer:
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide some other manner for the taking of such precautions.
>
> 416. Work Dangerous in Absence of Special Precautions. One who employs an independent contractor to do work which the employer should recognize is likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.
>
> 4.22. Work on Buildings and Other Structures on Land. A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure:
>
> (a) While the possessor has retained possession of the land during the progress of the work, or
>
> (b) After he has resumed possession of the land upon its completion.
>
> 427. Negligence as to Danger Inherent in the Work. One who employs an independent contractor to do the work involving a special danger to others which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

The introductory comments to these rules offers the following rationale:

The rules stated in the following §§ 416-429, unlike those stated in the preceding §§ 410-415, do not rest upon any personal negligence of the employer. They are rules of **vicarious liability**, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of a servant.

(ii) Retention of Control by Employer. Liability is imposed on the employer of the contractor where the employer retains control of the manner and means of the independent contractor's performance of its work.

Section 414 of the RESTATEMENT (SECOND) OF TORTS (1966) states the common law rule as follows:

414. Negligence in Exercising Control Retained by Employer. One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise control with reasonable care.

Comment c. to § 414 notes that in order to succeed in a cause of action against an employer, the plaintiff must prove: (1) the owner- occupier retained control and supervision of the details of the work to the extent that the independent contractor was no longer free to do the job its own way, and (2) such retained control contributed to the incident.

Similarly, Comment c. states the following as to the liability of a contractor for injuries to employees of its subcontractor:

> It is not enough that (the employer) has merely a general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, to prescribe alterations or deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to his operative detail. There must be such retention of a right of supervision that the contractor was not free to work his own way.

(iii) Borrowed Servant Doctrine. Another exception is the "borrowed servant" doctrine. Under the borrowed servant doctrine the employer of the independent contractor becomes the employer of the independent contractor's employees. Sometimes the employer is called the "special employer" under these circumstances. The following factors have been used by the courts to find a "borrowed servant" relationship: (1) the right of the special employer to control the details of the employee's performance *USF & G v. Goodson*, 568 S.W.2d 443 (Tex. Civ. App.-- Texarkana 1978, *writ ref'd n.r.e.*), but a contractual retention of control is not necessary, if actual control is exercised *Exxon Corp. v. Perez*, 842 S.W.2d 629 (Tex. 1992); (2) if the "special employer" pays the amount of the premiums for workers compensation insurance to the employer *Marshal v. Toys-R-Us Ntyex, Inc.,* 825 S.W.2d 193 (Tex. App.--Houston [4th Dist.] 1992, *writ denied*); (3) the right to hire and discharge, the obligation to pay wages, the carrying of the worker on the social security and income tax withholding rolls of the special employer; and (4) the furnishing of tools to the employee.

2. Negligence–extraordinary shifting of risk.

a. Indemnified person's negligence.

[8] Indemnity against "one's own negligence" has long been recognized in Texas. *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 624 (Tex. 1963); *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987). In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.,* 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court held that the language of the contractual indemnity provision satisfied the express negligence test even though it did not differentiate between "degrees of negligence." Certain "magic" words like "***active***," "***passive***," "***sole***," "***joint***," or "***concurrent***" to describe the degrees of negligence covered were not necessary. The court determined that "any negligent act or omission of ARCO" was sufficient to define the parties' intent. *Id.* at 726. Perhaps what is more important is to determine what degree of negligence is excluded from the indemnity. *e.g.*, "but not injuries due to the sole negligence of the _____ (*e.g.*, landlord)."

b. Express negligence test: negligence of indemnified person must be expressly covered as an indemnified liability.

[9] The Texas Supreme Court in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987) held an indemnity provision to be unenforceable because it did not specifically state that the contractor (Daniel) would indemnify Ethyl for Ethyl's own negligence. The court overruled the clear and unequivocal standard as well as the three exceptions to the standard listed in *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972). In *Ethyl*, an employee of the contractor was injured while working on a construction project for the owner. After the employee settled his claim for workers' compensation benefits, the employee sued the owner who, in turn, sued the contractor (employer) seeking indemnity. The jury found the owner 90% negligent and the contractor 10% negligent. The owner sued the contractor for indemnification on the following indemnity provision:

> Contractor (Daniel) shall indemnify and hold Owner (Ethyl) harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, subcontractors and agents or licensees. (Emphasis added by author.)

In holding that Ethyl was **not entitled** to indemnification by the contractor, the court stated

> parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.

(1) "*Without regard*" or "*regardless of*".

[10] The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.--Dallas 1989), *aff'd* 817 S.W.2d 50, 56 (Tex. 1991) approved the following language as meeting the express negligence test:

> 14.9 Operator's Indemnification of Contractor: Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every kind ... without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ...
>
> 14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and without regard to the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive. (Underlining added.)

(2) *"Regardless of negligence" or "including, even if"*.

[11] In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), the Texas Supreme Court held the indemnity provision set out below **met** the express negligence test and required Christie, Inc. to indemnify Enserch for Enserch's negligent supervision of Christie, Inc.'s work as an independent contractor hired to service Enserch's pipeline. Parker, an employee of Christie, Inc., was asphyxiated when a gasket blew out causing a valve to leak natural gas into the concrete manhole vault where Parker was working. Parker's estate brought a wrongful death action against Enserch. The court first held that Enserch owed a duty of care to the employees of Christie, Inc., even though Christie, Inc. was an independent contractor, since Enserch had retained control of the manner that Christie, Inc. was to carry out its servicing contract. Enserch had furnished a procedures book for Christie's employees which outlined the procedures to be followed while working on the pipeline, and Enserch representatives frequently visited the job site and supervised Christie's employees. The supreme court followed the exception announced in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) to the general rule of *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976). The general rule adopted in *Abalos* is that an owner or occupier of land does not have a duty to see that an independent contractor performs work in a safe manner. However, the court in *Redinger* created an exception by holding that "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id.* at 418 [citing RESTATEMENT (SECOND) OF TORTS § 414 (1977)]. The court upheld the following provision as requiring Christie, Inc. to indemnify Enserch for Enserch's negligent supervision:

Provision:

> (Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by (Christie), its agents and employees, and its subcontractors, their agents and employees, ***regardless of whether*** such claims or actions are founded in whole or in part upon alleged negligence of (Enserch), (Enserch's) representative, or the employees, agents, invitees, or licensees thereof. (Christie) further agrees to indemnify and hold harmless (Enserch) and its representatives, and the employees, agents, invitees and licensee thereof in respect of any such matters and agrees to defend any claim or suit or action brought against (Enserch), (Enserch's) representative, and employees, agents, invitees, and licensees thereof ... . (Court's emphasis.)

The court found that it was clear that "any such matters" in the second sentence referred to the claims or actions described in the first sentence and the contract as a whole was sufficient to define the parties' intent that Christie indemnify Enserch for the consequences of Enserch's own negligence. Therefore, the indemnity language and the reference to Enserch's negligence did not need to be in the same sentence.

The Texas Supreme Court in *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358 (Tex. App.--Dallas 1989), *aff'd* 817 S.W.2d 50, 56 (Tex. 1991) approved the following language as meeting the express negligence test:

Provision:

> 14.9 Operator's Indemnification of Contractor: Operator (Diamond Shamrock n/k/a Maxus) agrees to ... indemnify ... Contractor (Moran Bros.) ... from and against all claims ... of every kind ... without limit and ***without regard to*** the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees... on account of bodily injury, death or damage to property. ...
>
> 14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under the terms of this Contract, including without limitation, paragraphs 14.1 ... be without limit and ***without regard to*** the cause or causes thereof ... strict liability, or the negligence of any party, whether such negligence be sole, joint or concurrent, active or passive. (Underlining added.)

Permian Corp. v. Union Texas Petroleum Corp., 770 S.W.2d 928 (Tex. App.--El Paso 1989, *no writ*). An employee of a subsidiary of Permian, the contractor, sued Union Texas for negligently causing the employee injuries while the employee was performing services for Union Texas. The El Paso Court of Appeals found the following indemnity by Permian expressly indemnified Union Texas against liabilities arising out of its negligence:

Provision:

> Contractor (Permian) hereby indemnifies and agrees to protect, hold and save Union Texas ... harmless from and against all claims ... including but not limited to injuries to employees of Contractor ... on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by Contractor ... and ***whether*** the same is caused or contributed to by the negligence of Union Texas, its agents or employees. (Emphasis added by the court.)

"***Whether***" was interpreted to mean "*including, even if* ... ." in *B- F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611 (Tex. App.--Ft. Worth 1988, *no writ*). The Fort Worth Court of Appeals held that the language "***regardless of*** any cause or of any fault or negligence of Contractor" expressly stated the intent of the parties that the subcontractor would indemnify the contractor against the contractor's negligence. The indemnity provision stated

Provision:

> Subcontractor (Garza Concrete) shall fully protect, indemnify and defend contractor (B-F-W) and hold it harmless from and against any and all claims, demands, causes of action, damages and liabilities for injury to or death of Subcontractor, or any one or more of Subcontractor's employees or agents, or any subcontractor or supplier of Subcontractor, or any employee or agent of any such subcontractor or supplier, arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any work or operations of Subcontractor or Contractor or any other contractor or subcontractor or party, or otherwise in the course and scope of their employment, and ***regardless of*** cause or of any fault or negligence of Contractor. (Emphasis added by author.)

c. "Contractual comparative negligence": negligence of indemnifying person must be expressly covered as an indemnified liability.

[12] The supreme court in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987) also rejected Ethyl's interpretation that the indemnity clause indemnified Ethyl against Daniel's 10% concurring negligence. After the court rejected Ethyl's claim for indemnification for Ethyl's 90% negligence, Ethyl sought contribution or indemnification for Daniel's 10%. The court termed this claim as one for "***comparative indemnity***." The court held that the indemnity provision did not meet the express negligence test in this respect. The court stated

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. ... Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein.

Sieber & Calicutt, Inc. v. La Gloria, 66 S.W.3d 340 (Tex. App.-Tyler 2001, *no writ*) where the court found that Sieber & Calicutt was at least equally negligent as was La Gloria and therefore La Gloria was entitled to recover indemnity of one-half of the amount it paid in settlement of a wrongful death suit brought on behalf of one of its deceased employees. The indemnity provision limited Sieber & Calicutt's indemnity to it proportionate share of liability if its liability was equal to or less than La Gloria's liability. The La Gloria indemnity provision reads as follows:

Provision:

> Contractor (Sieber & Calicutt) agrees to hold harmless and unconditionally indemnify La Gloria, its directors, officers, agents, representatives and employees against and for all liability, costs and expenses, claims and damages which La Gloria at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons or property or both, of Contractor, its subcontractors and suppliers, or to the persons or property of La Gloria, its subcontractors and suppliers, arising in any manner from the Work performed hereunder, including but not limited to any negligent act or omission of La Gloria, its directors, officers, agents, representatives or employees, provided however, that if the negligence of La Gloria shall be found to be greater than or equal to the comparative negligence of the Contractor, then the Contractor shall only be liable to La Gloria to the extent of the Contractor's own negligence.

Monsanto Co. v. Owens-Corning Fiberglass Corp., 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, *no writ*). The employee of the subcontractor (Owens-Corning) sued the contractor (Monsanto) for personal injuries suffered on the job site. The employee had already collected workers' compensation benefits from the subcontractor. The contractor filed a third party action against its subcontractor seeking contractual indemnity. The court held the following provision in the subcontract **did not meet** the express negligence standard since it did not expressly indemnify the contractor for its own negligence:

Provision:

> (Sub)Contractor (Owens-Corning) agrees to indemnify and save Monsanto (Contractor) and its employees harmless against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out ... as a result of bodily injuries ... to any person or damage ... to any property occurring to or caused in whole or in part by, (Subcontractor) (or any of his employees), any of his (Sub)Subcontractors (or any employee thereof) directly or indirectly employed or engaged by either (Subcontractor) or any of his (Sub-subcontractors). (Emphasis and parenthetical designations added by author.)

The court noted that the term "negligence" is not found in the indemnity agreement. The indemnity did not mention indemnifying against the negligence of the contractor. Also, it did not mention indemnifying against the concurrent negligence of the subcontractor

(the indemnifying party). Therefore, the court noted that the agreement did not provide for contractual comparative negligence. The indemnity contract neither covered the negligence of the contractor nor the subcontractor. *Id.* at 295. The indemnity also does not expressly require the employer (Indemnifying Person) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

d. Fair notice test.

[13]

(1) Conspicuous provision.

An indemnity provision indemnifying the Indemnified Person against his own negligence must be conspicuous enough to give the Indemnifying Person "fair notice" of its existence. The concept of "fair notice" was introduced into Texas indemnity law by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 634 (Tex. 1963). The fair notice principle focuses on the appearance and placement of the provision as opposed to its "content." In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the supreme court adopted the conspicuousness standard of § 1.201(10) of the Texas UCC, applicable to the sale of goods, and applied it to indemnities and releases in a case involving the sale of services. Section 1.201(10) of the Texas UCC provides

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: A NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if its is in larger or other contrasting type or color. But in a telegram any term is "conspicuous."

TEX. BUS. COMM. CODE § 1.201(10) (Vernon 1994). *Also see Banzhaf v. ADT Sec. Sys.*, 28 S.W.3d 180 (Tex. App.– Eastland [11th Dist.] 2000, *writ ref'd*) finding an indemnity to be conspicuous that was set forth in enlarged, all capital lettering. The lettering is dark, boldface type so that it contrasts with the lighter, smaller type of the remaining contractual paragraphs ... The indemnity provision ... is directly above the signature line. A reasonable person's attention is attracted to the indemnity provision when looking at the contract... The indemnity provision is on the back page (of a 1 page document), but the contract itself specifically directs the reader's attention to the paragraph in which is it contained. On the front of the contract, just above the signature line for Herman's is the directive: "**ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON REVERSE SIDE**."

See Greer and Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SO. TEX. L. REV. 243 (1994). *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978) **upheld** a provision on reverse side of purchase order where front side contained reference in large red print, partly in bold, incorporating provisions on reverse side; *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990) upheld an indemnity provision contained on front of one page contract in separate paragraph; *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) **struck down** indemnity located on back of work order, in a series of uniformly numbered paragraphs, with no heading and with no contrasting type; *K & S Oil Well Service, Inc. v. Cabot Corp., Inc.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App.–Corpus Christi 1973, *writ ref'd n.r.e.*) struck down indemnity hidden on reverse of contract in paragraph headed "warranty;" *Rourke v. Garza*, 511 S.W.2d 331, 334 (Tex. Civ. App.--Houston [1st Dist.] 1974), *aff'd* 530 S.W.2d 794 (Tex. 1975); *Safeway Scaffold Co. of Houston, Inc. v. Safeway Steel Products, Inc.*, 570 S.W.2d 225, 228 (Tex. Civ. App.--Houston [1st Dist.] 1978, *writ ref'd n.r.e.*); *Griffin Indus. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. App.– Houston [14th Dist.] 2000, *writ ref'd*)- indemnity not conspicuous if in same size and type as the balance of a 1 page document; *Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503 (Tex. App.–Texarkana 1999, *writ denied*)-indemnity provision not conspicuous if in same size and type and without a separate heading identifying the paragraph was an indemnity in a 22 paragraph, 13 page document, also court not persuaded that the conspicuousness requirement applied only to **"forms."** An indemnity provision was held **not** to meet the conspicuousness requirement in *U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789 (Tex. App.--Houston [14th Dist.] 1995, *writ denied*) when it was buried on the back of a rental contract with all provisions printed in the same respective type and sizes, and the heading did not alert the reader that it created an indemnity obligation ("LIABILITY FOR DAMAGE TO EQUIPMENT, PERSONS AND PROPERTY"). The Supreme Court in *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex.1997), found that a release was **not** conspicuous when it was set in a type font too small to read even though the heading was in larger font (heading was 4 point font 4 point font and the terms of the release were in smaller font); the release was outlined in a box; the heading was all caps, in bold type and read **"RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT"**; and above the signature line appeared the caption in all caps, bold-faced centered and underlined type the following statement **"I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE."** The court did not accept the argument that the release was conspicuous because of its small contrasting type.

(2) Actual notice.

The conspicuousness requirement is not applicable when the Indemnified Person establishes that the Indemnifying Person possesses actual notice or knowledge of the indemnity agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993), *citing generally Cate v. Dover Corp.*, 790 S.W.2d 550, 561 (Tex. 1990). *See McGehee v. Certainteed Corp.*, 101 F.3d 1078 (5th Cir. (Tex.) 1996) remanding case for trial on actual knowledge of inclusion of an inconspicuous indemnity; *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119 (Tex. App.-Houston [14th Dist.] 2000, *no writ*)-admission that signing party read the agreement sufficient to establish actual notice; *Goodyear Tire & Rubber Co. v. Jefferson Constr. Co.*, 565 S.W.2d 916, 919 (Tex. 1978), *overruled on other grounds by Dresser Indus., Inc.*, 853 S.W.2d at 509; *Douglas Cablevision v. SWEPCO*, 992 S.W. 2d 503 (Tex. App.–Texarkana 1999, *no writ*).

(3) Failure to read no excuse.

It has been held that the failure of an owner to call the attention of the contractor to an indemnity provision in a construction contract did not excuse the contractor from the indemnity provision absent proof of fraud, overreaching or mutual mistake. *Gulf Oil Corp. v. Spence & Howe Constr. Co.*, 356 S.W.2d 382 (Tex. Civ. App.--Houston 1962, *writ ref'd n.r.e.*), *aff'd* 365 S.W.2d 631 (Tex. 1963).

e. Strict construction.

[14]

After the court has determined that an indemnity is intended, the doctrine of *strictissimi juris* or strict construction is used to prevent liability under the indemnity contract from being extended beyond the terms of the contract. Courts have stated that the Indemnifying

Person is entitled to have the indemnity contract strictly construed in the Indemnifying Person's favor. *Smith v. Scott*, 261 S.W. 1089 (Tex. Civ. App.-- Amarillo 1924, *no writ*); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963); and other cases discussed below. Courts examine the "event" to determine whether it is within the scope of Indemnified Matters. Many times a contract containing an indemnity provision will also contain a duty provision or other covenant which conflicts with the indemnity provision. In such cases, the indemnity is strictly construed and effect is first given to the conflicting provision. In *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208 (Tex. 1980), the supreme court found that there were conflicting provisions in the contract containing an indemnification provision. Damages resulted from an explosion of a pipe line that transported propane to Kodak's facility. The contract contained both a provision requiring the Indemnifying Person to hold the oil company harmless from the oil company's own negligence, and a provision which placed responsibility for pipe line breakages on the oil company.

3. Gross negligence.

[15] Gross negligence is more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997). The test for gross negligence contains both an objective and a subjective component. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 21, 22 (Tex. 1994). Objectively, the defendant's conduct must involve an extreme degree of risk, which is a function of both the magnitude and the probability of the anticipated injury to the plaintiff. *Also see Wal-Mart Stores, Inc. v. Alexander,* 878 S.W.2d 322, 325-26 (Tex. 1993). Subjectively, there must be evidence that the defendant had actual, subject awareness of the risk involved, but nevertheless was consciously indifferent to the extreme risk. The defendant knew about the peril, but its acts or omissions demonstrated that it did not care. *Moriel*, at 21; *Alexander* at 326; *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998). *Also see Universal Services Co., Inc. v. UNG*, 904 S.W.2d 638 (Tex. 1995) for a case arising under the common law definition of "gross negligence." The fact that a defendant exercises "some care" does not insulate the defendant from gross negligence liability. *See Moriel*, 879 S.W.2d at 20 (discussing cases before *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921-22 (Tex. 1981) that erroneously focused on "entire want of care" part of the gross negligence definition in reasoning that "some care" defeated a gross negligence finding. In 1995 the Legislature substituted "malice" for gross negligence as the prerequisite for punitive damages. However, the Legislature also defined "malice" with a definition mirroring the definition of "gross negligence" in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994). TEX. CIV. PRAC. & REM. CODE § 41.001(7) (Vernon 1997).

Gross negligence included within term "***negligence***". In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court observed, in a footnote to the opinion, that it was **not deciding** whether indemnity for one's own gross negligence or intentional injury may be contracted for or awarded by Texas courts. The court stated that "[p]ublic policy concerns are presented by such an issue ... ." *Id.* at 726 n.2. Texas allows insurance coverage for punitive damages derivative of gross negligence. *American Home Assur. Co. v. Safway Steel Products Co.*, 743 S.W.2d 693 (Tex. App.--Austin 1987, *writ denied*); *Home Indemnity Co. v. Tyler,* 522 S.W.2d 594 (Tex. App.--Houston [14th Dist.] 1975, *writ ref'd n.r.e.*). Recently, the San Antonio court of appeals held that an indemnity for one's own negligence also **included** all shades and degrees of negligence, including one's own gross negligence. *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457 (Tex. App.--San Antonio 1995, *writ dism'd by agreement*). *Also see Sieber & Calicutt v. La Gloria*, 66 S.W.3d 340 (Tex. App. [12th Dist.] 2001, *no writ*) where the court assumed without discussion that negligence of the Indemnified Party included its gross negligence.

4. Intentional torts.

[16] The issue of the enforceability of an indemnity for an intentional tort (Tenneco's misappropriation and improper use of confidential information obtained in bidding process) was raised in *Tenneco Oil Co. v. Gulsby Engineering, Inc.*, 846 S.W.2d 599 (Tex. App.--Houston [14th Dist.] 1993, *writ denied*). However, the court of appeals was able to sustain the trial court's summary judgment in favor of Tenneco on the grounds that the indemnity provision in the contract with Gulsby Engineering specifically covered patent infringement suits, and therefore included Tenneco's and Gulsby's joint and several liability for having infringed the unsuccessful bidder's patent.

5. Strict liability.

a. Indemnified matter.

[17] The fair notice doctrine has been extended to cases involving strict liability. The Texas Supreme Court held in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) that an indemnity agreement will include indemnification for strict statutory liability only if the agreement expressly states that the Indemnifying Person is to be liable for the Indemnified Person's strict liability. The court found that fairness dictates that such an "extraordinary shifting of risk" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced.

b. Product liability.

[18] The court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) in passing recognized that indemnity provisions shifting liability arising out of strict products liability are similarly enforceable, if fair notice has been given. *Citing Rourke v.* Garza, 511 S.W.2d 331, 333 (Tex. Civ. App.--Houston [1st Dist.] 1974), *aff'd*, 530 S.W.2d 794 (Tex. 1975)--in which the indemnity clause was held not to have been worded sufficiently so as to include strict products liability; *Dorchester Gas Corp. v. American Petrofina, Inc.* 710 S.W.2d 541, 543 (Tex. 1986)--also, which held that the indemnity clause in question did not clearly require the indemnitor to indemnify the indemnitee against strict products liability. The Dallas court in *Arthur's Garage v. Racal-Chubb*, 997 S.W.2d 803 (Tex. App.-Dallas 1999, *no writ*)[an alarm security products liability case where the tenant indemnified the alarm company from claims by third parties, which included the claim of the landlord] found that the following provision clearly and specifically covered the Indemnified Person's negligence, breach of warranty, and strict product liability:

Provision:

> When purchaser (Arthur's Garage), in the ordinary course of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall

> indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than the parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or non-operation of the system, whether based upon negligence, active or passive, warranty, or strict product liability on the part of seller, its employees or agents, but this provision shall not apply to claims for loss or damage solely and directly caused by an employee of seller while on purchaser's premises.

c. Environmental liability.

[19] The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3D 266 (5th Cir. 2000). In *Fina* the court had to determine the enforceability of two indemnity provisions, the first in a 1969 sales contract between ARCO and BP Oil Company (the *"ARCO/BP Agreement"*) as to a refinery located in Port Arthur, Texas being acquired by BP from ARCO, and the second in a 1973 sales contract between BP and Fina (the *"BP/Fina Agreement"*) whereby Fina acquired the refinery from BP. Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred after it discovered contamination at the refinery in 1989. Fina sought contribution from BP and ARCO under CERCLA. BP counterclaimed that the liability was covered in Fina's indemnity of BP in the BP/Fina Agreement. ARCO counterclaimed that the liability was covered by the indemnity in the ARCO/BP Agreement was assumed by Fina by the BP/Fina Agreement. The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. The ARCO/BP Agreement was silent as to applicable law. The indemnity provisions are the following:

> ARCO/BP Agreement. BP shall indemnify, defend, and hold harmless ARCO ... against all claims, actions, demands, losses or liabilities arising from the ownership or the operation of the Assets ... and accruing from and after Closing ... except to the extent that any such claim, action, demand, loss or liability shall arise from the gross negligence of ARCO.
>
> BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

As to the BP/Fina Agreement the court first determined that it would uphold the parties choice of Delaware law as the court could not discern a fundamental public policy of the State of Texas that would be violated by applying the "clear and unequivocal" test applicable to the enforceability of indemnity provisions covering the Indemnified Person's negligence. The court then held that the "all claims" language in the BP/Fina Agreement clearly covered liabilities arising under CERCLA, even though CERCLA was not enacted until 1980. The court noted that unlike Texas no Delaware case had addressed the applicability of the clear and unequivocal test to claims based on strict liability. The court found that the same policy reasons that existed in Texas' extension of the express negligence doctrine to strict liability cases also existed in Delaware to extend the clear and unequivocal test to strict liability claims in interpreting indemnities.

The court rejected BP's argument that normal contract rules of interpretation should apply to interpreting the indemnity. BP argued that the clear and unequivocal test should not apply to indemnification for ***prior* acts** giving rise to ***potential future liability*** (with "past" and "future" being determined by reference to the time at which the indemnity provision was signed). The court rejected BP's argument that under Texas law the express negligence doctrine is inapplicable to indemnities for past conduct giving rise to potential future liability and therefore similarly the court should find that Delaware would not apply the clear and unequivocal test to potential future liability for past acts. The court stated,

> Even as to Texas law, it is not at all clear that BP's conclusion is correct. The language used by the Texas courts is ambiguous: "Future negligence" might refer to ***future negligent conduct***, but it also might refer to ***future claims based on negligence***. True, the Texas rule does clearly distinguish between (1) indemnification for past conduct for which claims have already been filed at the time the indemnity provision is signed and (2) indemnification for future conduct for which claims could not possibly have been filed at the time the indemnity provision was signed. Still, no Texas case has addressed the applicability of the rule to the rare situation in which a party attempts to invoke the protection of an indemnity agreement against a claim filed *after* the indemnity was signed but arising from conduct that occurred *prior* to signing of the indemnity.

The court held that under Delaware law the indemnity in the BP/Fina Agreement did not clearly and unequivocally require Fina to indemnify BP for its strict liability under CERCLA that arose after the indemnity agreement (the *"future claim"*) for conduct prior to the indemnity agreement. As to ARCO's "circuitous indemnity obligation" being enforceable against Fina, the court held that the ARCO/BP Agreement did **not** pass the fair notice test under Texas law and would not pick up strict liability claims for ARCO's future strict liability for its past conduct. The court noted that Fina's claims under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and § 361.344 of the Texas Solid Waste Disposal Act similarly would not be barred by the indemnity.

6. Injuries.

a. Injuries to employees - workers comp bar.

[20] A contractual indemnity by the employer of the injured person is necessary to overcome the Workers' Compensation Bar so as at least to pass back to the employer the employer's percentage of responsibility (if not all of the employee's damages in excess of the statutory workers' compensation limits to the employer's liability) which might otherwise be borne by the Indemnified Person absent the indemnity. The contractual indemnity should also be drafted to pass back to the employer the costs of defense of the employee's claim.

In *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) the Texas Supreme Court held that an employer's negligence could not be considered in a third-party negligence action bought by an employee arising out of an accidental injury covered by workers' compensation insurance. The jury had determined that the accident was attributable as follows: plant owner's

negligence (Petrofina)--43%, employer's negligence (Hydrocarbon Construction)--42%, and employee's negligence (Varela)--15%. The supreme court reversed the trial court's reduction of the damage award from $606,800 to $243,924, or 43% of total damages. The supreme court held that the Workers' Compensation Act is an exception to the Comparative Negligence Statute [then Article 2212a, § 2(b)] and disallowed contribution from the employer. The court concluded:

> We hold that Article 8306, § 3 (the Texas Workers' Compensation Act) is an exception to Article 2212a, § 2(b) (the Comparative Negligence Statute). When read together those two Articles indicate the intent of the Legislature that where the third party defendant's negligence is greater than that of the employee, the employee shall recover the total amount of damages as found by the jury diminished only in proportion to the amount of the negligence attributed to the employee.
> ...
> Further, a defendant's claim of contribution is derivative of the plaintiff's right to recover from the joint defendant against whom contribution is sought. (citing authorities) The Workers' Compensation Act, Article 8306, § 3, precludes any right by Varela to a cause of action against Hydrocarbon for common law negligence. (omitted authority) Since Varela had no cause of action against Hydrocarbon, Petrofina had no claim for contribution from Hydrocarbon. Since Petrofina had no claim for contribution, § 2(e) of Art. 2212a has no application to this case. *Id.* at 562-63.

The enforceability of a contractual indemnity passing back to the employer a third-party's negligence over the "Worker Compensation Bar" has been upheld. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990). The Texas Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold another person harmless for a judgment or settlement resulting from injury or death of an employee "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." Texas Workers' Compensation Act, TEX. LABOR CODE § 417.004 (Vernon 1996), repealing TEX. REV. CIV. STAT. ANN. Art. 8308-4.04 (Vernon 1996), formerly Art. 8306, § 3(d) (Vernon 1986). § 417.004 of the Texas Labor Code provides as follows:

> In an action for damages brought by an injured employee, a legal beneficiary, or an insurance carrier against a third party liable to pay damages for the injury or death under this Chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement *unless the employer executed, before the injury or death occurred, a written agreement with a third party to assume the liability*. (Emphasis added.)

Suits brought by the indemnitee (the Indemnified Person) under an indemnity agreement against the indemnitor (the Indemnifying Person) in the context of an employer having indemnified a third party for injuries occurring to the employer's employees due in part to the negligence of the employer are commonly referred to as "third-party- over actions". The "written agreement" requirement in the Workers' Compensation Act for overcoming the "Workers' Compensation Bar" prevents oral indemnity agreements from being enforced against an employer for employee injuries.

However, as noted *infra* in the discussion of the Texas Supreme Court's holding in *Ethyl Corp. v. Daniel Const. Co.*, care has to be used in drafting a contractual indemnity to overcome both the "express negligence" test of the Texas Supreme Court and the Workers' Compensation Bar. The court in *Ethyl* held that the contractual indemnity in the contract between Ethyl (the property owner) and Daniel (the contractor/employer) requiring Daniel to indemnify Ethyl for all injuries to persons "caused by the negligence or carelessness of Contractor" was not adequate either to indemnify Ethyl against an injury to Daniel's employee caused by the concurring negligence of Ethyl (90%) and Daniel (10%) or even against the portion of the negligence attributable to Daniel.

The indemnity provision did not expressly state that it covered injuries occurring as a result of the negligence of the indemnified person (Ethyl) and as to the portion attributable to Daniel, it did not expressly state that it covered cases where Daniel was concurrently negligent. "Ethyl next contends it is entitled to comparative indemnity to the extent of Daniel's negligence which the jury found to be 10%. However, the contract in question contains no provision for contractual comparative indemnity." *Ethyl* at 708. *Also see B-F-W Const. Co., Inc. v. Garza*, 748 S.W.2d 611 (Tex. App.--Ft. Worth 1988, *no writ*).

Monsanto Co. v. Owens-Corning Fiberglass Corp., 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, *no writ*). The employee of the subcontractor (Owens-Corning) sued the contractor (Monsanto) for personal injuries suffered on the job site. The employee had already collected workers' compensation benefits from the subcontractor. The contractor filed a third party action against its subcontractor seeking contractual indemnity. The court held the following provision in the subcontract **did not meet** the express negligence standard since it did not expressly indemnify the contractor for its own negligence:

Provision:

> (Sub)Contractor (Owens-Corning) agrees to indemnify and save Monsanto (Contractor) and its employees harmless against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out ... as a result of bodily injuries ... to any person or damage ... to any property occurring to or caused in whole or in part by, (Subcontractor) (or any of his employees), any of his (Sub)Subcontractors (or any employee thereof) directly or indirectly employed or engaged by either (Subcontractor) or any of his (Sub-subcontractors). (Emphasis and parenthetical designations added by author.)

The court noted that the term "negligence" is not found in the indemnity agreement. The indemnity did not mention indemnifying against the negligence of the contractor. Also, it did not mention indemnifying against the concurrent negligence of the subcontractor (the indemnifying party). Therefore, the court noted that the agreement did not provide for contractual comparative negligence. The indemnity contract neither covered the negligence of the contractor nor the subcontractor. *Id.* at 295. The indemnity also does not expressly require the employer (Indemnifying Person) to assume liability for injuries to its employees thereby overcoming the Workers' Compensation Bar.

b. Silence as to coverage of "*injuries*" may mean no indemnity.

[21] The failure of the indemnity provision to specifically cover "**personal injuries**" was held to be fatal, even though the indemnity provision otherwise would meet the express negligence test, in *Ard v. Gemini Exploration Co.*, 894 S.W.2d 11 (Tex. Civ. App.--Houston [14th Dist.] 1994, *writ denied*).

c. Indemnified matter - indemnity as to injuries to "indemnifying person's employees" - overcoming the workers comp bar.

[22] The Texas Supreme Court in *Enserch Corp. v. Parker*, 794 S.W.2d 2, 7 (Tex. 1990) construed the following reference to injuries or deaths "***to persons***" to be specific enough to overcome the Workers' Compensation Bar in holding that an employer had contractually assumed liability to indemnify a third party (Enserch) for liabilities arising out of the concurrent negligence of the third party (the third party's negligent supervision of the employer's work):

Provision:

> (Christie) assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death ***to persons*** ... incidental to the performance of this contract by (Christie)... (Court's emphasis in bold.)

The supreme court found that this language was sufficient to refer to employees of the Indemnifying Person (Christie) and therefore met the requirements of the Texas Workers' Compensation Act that permits "an express agreement in writing assuming liability" by an employer for injuries to its employees. The court cited with approval the court of appeals' decision in *Verson Allsteel Press Co. v. Carrier Corp.*, 718 S.W.2d 300 (Tex. App.--Tyler 1985, *writ ref'd n.r.e.*) which held the following similar language sufficient to overcome the Workers' Compensation Bar:

Provision:

> (Carrier) ... covenants to indemnify and hold harmless Version ... from and against any and all loss, damage, expense, claims, suits or liability which Version or any of its employees may sustain or incur ... for or by reason of any injury to or death of ***any person or persons*** or damage to any property, arising out of ... any claimed inadequate or insufficient safeguards or safety devices. (*Enserch* court's emphasis.) *Id.* at 301.

The supreme court in *Enserch* distinguished the following provision in *Port Royal Dev. v. Braselton Constr. Co.*, 716 S.W.2d 630, 632 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*) on the grounds that the language expressly stated that the Indemnifying Person would not indemnify the Indemnified Person for the Indemnified Person's own negligence:

Provision:

> The subcontractor agreed to indemnify the contractor from liability for or on account of injury to or death of person or persons ... occurring by reason of or arising out of the act or (negligence) of Subcontractor ... except the act or (negligence) of the Contractor in connection with performance of this Contract. (Emphasis added by *Enserch* court.)

The Indemnified Matters did not include injuries to an employee of the Indemnifying Person due to the negligence of the Indemnified Person.

In *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200, 210 (Tex. Civ. App.--Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126 (Tex. 1959), *and vacated on other grounds*, 326 S.W.2d 915 (Tex. Civ. App.--Houston 1959, *no writ*), the court of appeals found that a subcontractor was required to indemnify a contractor for contractor's negligent acts that injured the subcontractor's employees pursuant to indemnity which specifically included injuries to subcontractor's employees; the subcontractor's employees were considered to be "business invitees" in the portion of the construction site where injury occurred.

The Texarkana Court of Appeals in *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex. App.--Texarkana 1995, *no writ*) found that the following indemnity provision did **not** cover injuries to an employee of Flour Daniel, a contractor employed by Texas Utilities, the Indemnified Person. The first indemnity does not cover injuries to employees of a contractor of Texas Utilities. The second indemnity does not cover Texas Utilities' concurrent negligence. The exception for Texas Utilities' sole negligence from the broad indemnity is not equivalent to an express inclusion of Texas Utilities' concurrent negligence.

Provision:

> [Babcock & Wilcox agree to indemnify Texas Utilities for claims against Texas Utilities for damages arising from] personal injury or death or damage to property of Company's [Babcock's] agents, servants and ***employees***, as well as the agents, servants, and employees of Company's [Babcock's] subcontractor, whether or not arising from sole or concurrent negligence or fault of Purchaser [Texas Utilities].
>
> [Babcock & Wilcox] shall defend ... indemnify ... Purchaser [TU] and its ... agents ... from and against any and all claims ... of every kind and character whatsoever arising in favor of any person or entity (other than the agents, servants, and employees or [*sic]* [of?] Company [Babcock] or of Company's subcontractor, as provided in the paragraph immediately above), including ... claims ... on account of personal injuries or death, or damage to property arising out of or incident to the work performed hereunder .... with the only exception being that, as to claims arising in favor of persons or entities other than for injury, death, or damage to the agents, servants, and employees of Company [Babcock] or Company's subcontractor,

> Purchaser [TU] shall not be entitled to indemnification for claims, demands, expenses, judgments, and causes of action resulting from Purchaser's [TU] sole negligence.

Indemnity as to "indemnifying person's employees" does not cover injuries to indemnifying person's independent contractors.

It has been held that an indemnity provision which clearly limited a contractor's obligation to indemnify the property owner for injuries sustained by the contractor's and its subcontractor's "*employees*" did **not** cover an injury sustained by a person while serving as an independent contractor, notwithstanding that the individual was hired, as well as paid, by the contractor. *Ideal Lease Service, Inc. v. Amoco Production Co.*, 662 S.W.2d 951 (Tex. 1983).

Indemnity as to injuries to "indemnifying person's agents and contractors" does not cover injuries to indemnifying person.

An indemnity provision whereby a contractor indemnified a railroad against liability for injuries to the contractor's agents and employees, but did not mention injuries to the contractor, did not indemnify against injuries to the contractor. The Indemnified Matters did not include injuries to the Indemnifying Person, the contractor. *International G.N.R. Co. v. Lucas*, 70 S.W.2d 226 (Tex. Civ. App.--Texarkana 1934), *rev'd on other grounds* 99 S.W.2d 297 (Tex. Comm. 1936), *later app*, 123 S.W.2d 760 (Tex. Civ. App.--Eastland 1938, *writ ref'd*), *cert. denied* 308 U.S. 573 (1939) *and aff'd in part and rev'd in part on other grounds* 100 S.W.2d 97 (Tex. Comm. 1937).

Indemnity as to injuries to "indemnified person's employees".

In one case, an indemnity provision in a lease whereby the lessee undertook to indemnify the lessor against liabilities arising out of injuries to "***persons whomsoever***" has been construed broadly by a court to include the employees of the indemnified lessor. *Gulf, C. & S. F. R. Co. v. McBride*, 309 S.W.2d 846, *rev'd on other grounds*, 322 S.W.2d 492 (Tex. 1958). *Also see Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App.--Beaumont 1995, *writ denied*).

7. "*Acts or omissions*" or "*caused by*" or "*arising out of*".

a. "*Caused by*".

[23] *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir. 1993) holding the indemnitor was not obligated to defend the indemnitee against all claims and suits, or for costs incurred in defense of baseless claims, since the indemnity clause required only that the indemnitor indemnify for injuries "**caused**" by acts or omissions of the indemnitee.

b. "*Acts or omissions*".

[24] *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987 *per curiam*). In a *per curiam* opinion, and without hearing oral argument, the Texas Supreme Court upheld the trial court's granting summary judgment to the Indemnifying Person (the contractor) on the basis that the indemnity provision was unenforceable as a matter of law. The court found the following provision failed expressly to indemnify the plant owner for injuries to employees of the contractor due to either party's negligence.

Provision:

> Contractor (Gulf Coast) agrees to indemnify and save owner (Owens-Illinois) harmless from any and all loss sustained by owner ... from any liability or expense on account of property damage or personal injury ... sustained by any person or persons, including but not limited to employees of ... contractor ... arising out of ... the performance or non-performance of work hereunder by contractor ... or by ***any act or omission*** of contractor, its subcontractor(s), and their respective employees and agents while on owner's premises .... (Emphasis added by author.)

Although the agreement specifies the contractor's duty to indemnify the owner for claims resulting from the contractor's acts, it fails to state, with equal specificity, the obligation to indemnify for claims resulting from acts of other parties (*i.e.*, owner) and does not expressly refer to the negligence of either the owner or the contractor as an Indemnified Matter.

Atlantic Richfield Co. v. Petroleum Personnel, Inc., 758 S.W.2d 843, 844 (Tex. App.--Corpus Christi 1988), *rev'd*, 768 S.W.2d 724 (Tex. 1989). In this case, the employee of the contractor (PPI) sued the owner (ARCO) for injuries sustained while working on the owner's drilling platform. ARCO impleaded the contractor seeking indemnification from the contractor under the indemnification provision in the contract between ARCO and the contractor. The court held the language "any negligent act of ARCO" was sufficient to define the parties' intent. The court found the following provision **met** the express negligence standard:

Provision:

> Contractor (PPI) agrees to hold harmless and unconditionally indemnify company (ARCO) against and for all liability, costs, expenses, claims and damages which (ARCO) may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons, or property or both of (PPI), or of the workmen of either party, or of any other parties, or to the property of (ARCO) in any matter arising from the work performed hereunder, including but not limited to ***any negligent act or omission*** of (ARCO), its officers, agents or employees. ... (Emphasis added by author.)

c. "*Acts or omissions of employees or agents*".

[25] Adding "***employees***" or "***agents***" to the list of Indemnified Persons may capture damages not otherwise awarded against the Indemnified Person in its capacity as employer. *See Fort Worth Elevators, Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), *overruled on other grounds by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex. 1987)-a corporation may be liable in punitive damages for gross negligence only if the corporation itself commits gross negligence. Because a corporation can "act only through agents of some

character," *Fort Worth Elevators*, 70 S.W.2d 402, courts have developed tests for distinguishing between acts that are solely attributable to agents or employees and acts that are directly attributable to the corporation. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex. 1997). A corporation is liable for punitive damages if it authorizes or ratifies an agent's gross negligence or if it is grossly negligent in hiring an unfit agent; *See King v. McGuff*, 234 S.W.2d 403 (Tex. 1950)-adopting RESTATEMENT OF TORTS § 909; *Purvis v. Prattco, Inc.*, 595 S.W.2d 103, 104 (Tex. 1980)-citing the RESTATEMENT (SECOND) OF TORTS § 909, which is unchanged form the original RESTATEMENT OF TORTS § 909; or if it commits gross negligence through the acts or omissions of a "vice principal" *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 389 (Tex. 1997). A "vice principal" encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business. *Hamerly Oaks*, 958 S.W.2d 391.

d. "*Arising out of*".

(1) "*Arising out of*".

[26] The phrase "***arising out of***" has been the subject of recent cases. In *General Agents v. Arredondo*, 52 S.W.3d 762 (Tex. App.-San Antonio [4th Dist.] 2001, *no writ*) the court broadly construed the exclusion for "injuries **arising out of** a contractor's and subcontractor's operations" contained in a contractor's commercial general liability policy as not being limited to injuries caused by an act of the contractor or subcontractor. The court found that "all that is required is a "causal connection". The court cited the following authorities for this conclusion:

> Cf. Mid-Century Ins. Co. v. Lindsey, 997 S.W.2d 153, 156- 57 (Tex. 1999)("For liability to 'arise out of' in the context of an 'additional insured' endorsement does not require that named insured's act caused accident.") Indeed, in more recent cases, the Fifth Circuit has recognized that the phrase "arising out of" is "understood to mean '***originating from***,' '***having its origin in***,' '***growing out of***,' or '***flowing from***.'" *American States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998)(quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951)). Thus, a "claim need only bear an 'incidental relationship' to the excluded injury for the policy's exclusion to apply." *Bailey*, 13 F.3d at 370 (quoting *Continental Cas. Co. v. Richmond*, 763 F.2d 1076, 1080-81 (9th Cir. 1985).

The court in *Sieber & Callicutt, Inc. v. La Gloria*, 66 S.W.3d. 340 (Tex. App.–Tyler 2001, *no writ*) found, in a case where the negligence of the Indemnified Party (La Gloria) and the negligence of the Indemnifying Party (Sieber & Callicutt) was determined to be equal, that the negligence of the Indemnifying Party was a "substantial factor" and "a proximate cause" of the liability although not the only factor in causing the Indemnified Matter (liability to the estate of a deceased employee of the Indemnified Party, La Gloria). La Gloria settled the wrongful death action and sued Sieber & Callicutt on Sieber & Callicutt's indemnity in its maintenance contract with La Gloria. The trial court found that there was a reasonable risk that La Gloria would have been found grossly negligent (the manway cover was in extreme disrepair), Sieber & Callicutt also was negligent (by running a hot water line into the tank and not advising La Gloria), and La Gloria and Sieber were equally negligent. The Indemnifying Party (Sieber & Callicutt) urged the court to find that the "***arising in any manner***" language in the indemnity did not "provide a lower causal connection than proximate cause" and thus it should not be required to indemnify La Gloria, even for Sieber's proportion of causation. The court rejected Sieber's argument noting that the trial court found that Sieber was negligent and that a component of negligence is proximate cause. Since the indemnity provision expressly provided for Sieber to indemnify La Gloria for Sieber's proportionate share of liability, Sieber was liable to La Gloria for one-half of the settlement.

The Beaumont Court of Appeals, in *Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App.--Beaumont 1995, *writ denied*), upheld the following provision as covering injuries to an employer's employees caused by the sole negligence of the Indemnified Person (premises owner) even though injuries to the contractor/employer's employees was not specifically mentioned, and the indemnity provision was worded in terms of injuries "caused by the (contractor/employer)" and did not expressly mention that it covered injuries "caused by" the Indemnified Person

Provision:

> By signing the below statement, the seller (meaning Faulk Management as the "seller" of janitorial services) agrees to ... indemnify ... Lufkin Industries, Inc. against loss ... caused by the seller, its employees, agents or any subcontractor arising out of or in consequence of the performance of this contract.
>
> It is the intention of the Seller and/or Contractor to indemnify Lufkin Industries, Inc. even in the event that any such claims, demands, actions or liability arises *in whole* or in part from warranties, express or implied, defects in materials, workmanship or design, condition of property or its premises and/or *negligence* of Lufkin Industries, Inc. or any other fault claims as a basis of liability for Lufkin Industries, Inc.

(2) "*In connection with*".

[27] Indemnified liabilities may be contractually limited to such injuries as **"*arise out of*"** or are **"*in connection with*"** the work being performed by the Indemnifying Person. If the indemnity is so limited, then it might be held not to cover the negligent acts of the Indemnified Person that are unrelated to the performance of the scope of the work by the Indemnifying Person. *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 70-71 (Tex. App.--Tyler 1978, *writ ref'd n.r.e.*); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806, 832 (Tex. App.--Ft. Worth 1961, *writ ref'd*); and *Martin Wright Electric Co. v. W.R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied*, 397 U.S. 1022 (1970). The court in *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App.--Ft. Worth 1961, *writ ref'd*) found that the indemnity agreement of a subcontractor did not include injuries to the subcontractor's employees who had been injured through the negligence of employees of the contractor engaged in work unrelated to the subcontract. However, this result might also be explained as being an attempt by pre-*Ethyl* courts to limit indemnity agreements with the "clear and unequivocal" test. *See Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 479 (5th Cir. 1993). In another case, the court held that the subcontractor's indemnity did not extend to the death of the subcontractor's employee caused by the

negligent acts of the contractor's employees. *Brown & Root, Inc. v. Service Painting Co.*, 437 S.W.2d 630 (Tex. Civ. App.--Beaumont 1969, *writ ref'd*). The death of the employee of the subcontractor did not "occur in connection with" the subcontracted work, notwithstanding the fact that the employee was engaged in sublet work at the time of the employee's death. The work being performed by the employee of the general contractor was not connected to the work being performed by the employee of the subcontractor. The *Brown & Root* indemnity clause reads:

Provision:

> Subcontractor agrees to indemnify and to save General Contractor ... harmless from and against all claims ... which may be caused or alleged to have been caused in whole or in part by, or which may occur or be alleged to have occurred ***in connection with***, the performance of the Sublet Work.

See also Westinghouse Electric Corp. v. Childs-Bellows, 352 S.W.2d 806 (Tex. Civ. App.--Ft. Worth 1961, *writ ref'd*); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963); *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963); and *Alamo Lumber Co. v. Warren*, 316 F.2d 287 (5th Cir. 1963).

(3) "*Arising out of the work*".

[28] Indemnity provisions seek to tie the indemnified liability in some fashion to relationship between the Indemnified Person and the Indemnifying Person. The most common means of connection is to state that the liabilities indemnified "***arise out of***" some aspect of the relationship, such as indemnifying an owner, as the Indemnified Party, for bodily injuries or deaths "***arising out of the Work***"of a contractor.

(4) "*Arising out of the job site*".

[29] In *Sun Oil Co. v. Renshaw Well Service, Inc.*, 571 S.W.2d 64 (Tex. Civ. App.--Tyler 1978, *writ ref'd n.r.e.*), the court found that the indemnified person was not entitled to indemnification against injury to a worker injured while driving from the work site after completion of the work. In *Martin* Wright *Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969), *cert. denied* 397 U.S. 1022 (1970), the court refused to extend the subcontractor's indemnity to include the death of a subcontractor's employee killed while leaving work after putting his tools away where the death was caused solely by the contractor's negligence.

e. Occurrence.

(1) Time of occurrence of act or omission.

[30] Indemnity provisions have been strictly construed to limit the time of the occurrence of the Indemnified Matters. In *Manges v. Willoughby*, 505 S.W.2d 379 (Tex. Civ. App.--San Antonio 1974, *writ ref'd n.r.e.*), the court construed an indemnity by a sublessee to the sublessor, which had "assumed all obligations" under the lease, as not covering damages to the leased premises which occurred prior to the sublease.

(2) Future claim for conduct legal at time of occurrence.

[31] The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3D 266 (5th Cir. 2000). In *Fina* the court had to determine the enforceability of two indemnity provisions, the first in a 1969 sales contract between ARCO and BP Oil Company (the "ARCO/BP Agreement") as to a refinery located in Port Arthur, Texas being acquired by BP from ARCO, and the second in a 1973 sales contract between BP and Fina (the "BP/Fina Agreement") whereby Fina acquired the refinery from BP. Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred after it discovered contamination at the refinery in 1989. Fina sought contribution from BP and ARCO under CERCLA. BP counterclaimed that the liability was covered in Fina's indemnity of BP in the BP/Fina Agreement. ARCO counterclaimed that the liability was covered by the indemnity in the ARCO/BP Agreement was assumed by Fina by the BP/Fina Agreement. The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. The ARCO/BP Agreement was silent as to applicable law. The indemnity provisions are the following:

> ARCO/BP Agreement. BP shall indemnify, defend, and hold harmless ARCO ... against all claims, actions, demands, losses or liabilities arising from the ownership or the operation of the Assets ... and accruing from and after Closing ... except to the extent that any such claim, action, demand, loss or liability shall arise from the gross negligence of ARCO.
>
> BP/Fina Agreement. Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

As to the BP/Fina Agreement the court first determined that it would uphold the parties choice of Delaware law as the court could not discern a fundamental public policy of the State of Texas that would be violated by applying the "clear and unequivocal" test applicable to the enforceability of indemnity provisions covering the Indemnified Person's negligence. The court then held that the "all claims" language in the BP/Fina Agreement clearly covered liabilities arising under CERCLA, even though CERCLA was not enacted until 1980. The court noted that unlike Texas no Delaware case had addressed the applicability of the clear and unequivocal test to claims based on strict liability. The court found that the same policy reasons that existed in Texas' extension of the express negligence doctrine to strict liability cases also existed in Delaware to extend the clear and unequivocal test to strict liability claims in interpreting indemnities.

The court rejected BP's argument that normal contract rules of interpretation should apply to interpreting the indemnity. BP argued that the clear and unequivocal test should not apply to indemnification for *prior* acts giving rise to *potential future* liability (with "past" and "future" being determined by reference to the time at which the indemnity provision was signed). The court rejected BP's argument that under Texas law the express negligence doctrine is inapplicable to indemnities for past conduct giving rise to potential

future liability and therefore similarly the court should find that Delaware would not apply the clear and unequivocal test to potential future liability for past acts. The court stated,

> Even as to Texas law, it is not at all clear that BP's conclusion is correct. The language used by the Texas courts is ambiguous: "Future negligence" might refer to ***future negligent conduct***, but it also might refer to ***future claims based on negligence***. True, the Texas rule does clearly distinguish between (1) indemnification for past conduct for which claims have already been filed at the time the indemnity provision is signed and (2) indemnification for future conduct for which claims could not possibly have been filed at the time the indemnity provision was signed. Still, no Texas case has addressed the applicability of the rule to the rare situation in which a party attempts to invoke the protection of an indemnity agreement against a claim filed ***after*** the indemnity was signed but arising from conduct that occurred ***prior*** to signing of the indemnity.

The court held that under Delaware law the indemnity in the BP/Fina Agreement did not clearly and unequivocally require Fina to indemnify BP for its strict liability under CERCLA that arose after the indemnity agreement (the "***future claim***") for conduct prior to the indemnity agreement. As to ARCO's "circuitous indemnity obligation" being enforceable against Fina, the court held that the ARCO/BP Agreement did **not** pass the fair notice test under Texas law and would not pick up strict liability claims for ARCO's future strict liability for its past conduct. The court noted that Fina's claims under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and § 361.344 of the Texas Solid Waste Disposal Act similarly would not be barred by the indemnity.

D. Excluded matters or liabilities.

1. "*Except gross negligence*".

[32] *Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App.--San Antonio 1989, *no writ*). In this case involving a wrongful death action, the San Antonio Court of Appeals held the following provision did not meet the express negligence test since the negligence of the alleged indemnified person (oil and gas lessee) is not mentioned. The provision is worded as a disclaimer by the operator as to any liability except for gross negligence, and not as an indemnification by the operator for the operator's "disclaimed" but not expressly disclaimed negligence.

Provision:

> [Operator (Bay Rock Corp.)] shall have no liability to owners of interests in said wells and leases (Haring) for losses sustained, or liabilities incurred, ***except*** such as may result from ***gross negligence*** or from breach of the provisions of this agreement.

2. "*Except sole negligence*".

[33] In *Singleton v. Crown Central Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987), the Texas Supreme Court found that the following provision **failed** the express negligence standard since the provision stated what was not to be indemnified--claims resulting from the sole negligence of the premises owner--rather than expressly stating that the premises owner was to be indemnified from its own negligence.

Provision:

> Contractor agrees to ... indemnify ... owner from and against any and all claims ... of every kind and character whatsoever, ... for or in connection with loss of life or personal injury ... directly or indirectly arising out of ... the activities of contractor ... ***excepting only*** claims arising out of accidents resulting from the ***sole negligence*** of owner. (Emphasis added by author.)

Linden- Alimak, Inc. v. McDonald, 745 S.W.2d 82 (Tex. App.--Ft. Worth 1988, *writ denied*). The Fort Worth Court of Appeals reviewed an indemnity provision in an equipment rental agreement. An employee (McDonald) of the equipment lessee (Thomas S. Byrne, Inc.) filed suit against the equipment lessor (Linden-Alimak) to recover damages for personal injuries sustained while the leased crane was being erected. The equipment lessor filed a third party action against the lessee for indemnification. The court held that the following indemnity provision in the equipment lease agreement suffered the same defect as the provision in *Crown Central Petroleum*. The court found the indemnity language to be inadequate to indemnify the equipment lessor against its concurrent negligence. The indemnity, by excluding the lessor's sole negligence, did not include a case of lessor's concurrent negligence. Situations involving lessor's concurrent negligence were not mentioned (*i.e.*, "in part" not mentioned).

Provision:

> It is expressly understood and agreed that Lessor shall not be liable for damages, losses and injuries of any kind whatsoever, whether to persons or property, or for any other loss arising from the operation, handling, use of, transportation of, or in any way connected with the said equipment or any part thereof from whatsoever cause arising, ***except*** direct damages, losses or injuries caused by Lessor's ***sole negligence***. Lessee shall indemnify and save Lessor harmless from any and all claims, demands, liabilities, judgments, actions or causes of action of any nature whatsoever (***except if*** caused by Lessor's ***sole negligence***) arising out of the selection, possession, leasing, operation, control, use, maintenance, repair, adjustment or return of the equipment. (Emphasis added by author.)

The Texarkana Court of Appeals in *Texas Utilities Electric Co. v. Babcock & Wilcox*, 893 S.W.2d 739 (Tex. App.--Texarkana 1995, *no writ*) found that neither of the following indemnity provisions expressly covered the Indemnified Person's (Texas Utilities') concurrent negligence in causing injuries to an employee of Flour Daniel, a contractor employed by Texas Utilities.

Provisions:

> [Babcock & Wilcox agree to indemnify Texas Utilities for claims against Texas Utilities for damages arising from] personal injury or death or damage to property of Company's [Babcock's] agents, servants and employees, as well as the agents, servants, and employees of Company's [Babcock's] subcontractor, whether or not arising from sole or concurrent negligence or fault of Purchaser [TU].
>
> [Babcock & Wilcox] shall defend ... indemnify ... Purchaser [TU] and its ... agents ... from and against any and all claims ... of every kind and character whatsoever arising in favor of any person or entity (other than the agents, servants, and employees or [*sic]* [of?] Company [Babcock] or of Company's subcontractor, as provided in the paragraph immediately above), including ... claims ... on account of personal injuries or death, or damage to property arising out of or incident to the work performed hereunder .... with the ***only exception*** being that, as to claims arising in favor of persons or entities other than for injury, death, or damage to the agents, servants, and employees of Company [Babcock] or Company's subcontractor, Purchaser [TU] shall not be entitled to indemnification for claims, demands, expenses, judgments, and causes of action resulting from Purchaser's [TU] sole negligence.

The first indemnity does not cover injuries to employees of a contractor of Texas Utilities. The second indemnity does not cover Texas Utilities' concurrent negligence. The exception for Texas Utilities' sole negligence from the broad indemnity is not equivalent to an express inclusion of Texas Utilities' concurrent negligence.

Similar language ("regardless of whether or not such claim ... is ***caused in part by a party indemnified hereunder***") does not meet the express negligence test: *Monsanto Co. v. Owens-Corning Fiberglass Corp.*, 764 S.W.2d 293 (Tex. App.--Houston [1st Dist.] 1988, no writ); *Glendale Construction Services, Inc. v. Accurate Air Systems, Inc.*, 902 S.W.2d 536 (Tex. App.--Houston [1st Dist.] 1995, *writ denied*).

3. ***"Except willful or knowing acts or omissions"***.

[34] The court in *Kenneth H. Hughes Interests v. Westrup*, 879 S.W.2d 229, 232-33 (Tex. App.--Houston [1st Dist.] 1994, *writ denied*) interpreted an exclusion from a contractor's indemnity contained in a construction contract between a commercial landlord and its contractor for "any claim aris(ing) out of the sole and gross negligence or willful misconduct of Owner (the commercial landlord, the Indemnified Person)"as including as an exclusion the landlord's "***knowing***" violation of the warranty of commercial habitability and/or "knowing deceptive trade practice" in its lease with the injured tenant. This case involved a shoe store that was put out of business in the landlord's shopping center by repeated flooding arising out of the action of a backhoe operator of a subcontractor of landlord's construction contractor. The case involved dual theories of recovery, the negligence of the contractor and the knowing deceptive trade practice and breach of warranty of the landlord. The backhoe operator accidentally broke a sewer line, and covered it up after he discovered his error instead of reporting the accident. The tenant reported to the landlord that water was seeping from a leak in the slab outside of its premises. The landlord, who was unaware of the backhoe operator's actions, repeatedly reassured the tenant after each of several floods, that it had corrected the problem when, in fact, it knew it had not. The court held that the intent of the parties by excluding gross negligence, also must have intended to exclude knowing conduct of the landlord, which is a "more culpable standard than gross negligence." The court noted that to hold otherwise would be to hold that the intent of the parties was that the indemnitees would not be entitled to indemnity for an act done with the mental state at the low end of the "continuum" of culpable mental states, but *would* be so entitled for an act done with a mental state that is higher on the scale, *i.e.,* an act that is *more* culpable than another for which they indisputably are not entitled to indemnity. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984).

4. ***"Except indemnified person's liability"***.

[35] In *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609 (Tex. 1950), 23 A.L.R.2d 1114 (1950), the court refused to extend the lessee's indemnity covering injuries to persons occurring on the leased premises from any cause to include liabilities arising out of defects in the premises where the indemnity contained an exception for "any liability which lessor would be liable." *Also accord Port Royal*.

E. Other provisions.

1. Settlement authority.

a. No right to indemnity when voluntarily settle an indemnified liability absent contractual settlement authority.

[36] Settlement by one joint tortfeasor extinguishes any common law and statutory contribution rights such person may have had. *Beech Aircraft Corp. v. Jinkins,* 739 S.W.2d 19 (Tex. 1987); *International Proteins Corp. v. Ralston- Purina Co.,* 744 S.W.2d 932 (Tex. 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(d) (Vernon 1997).In *MAN GHH Logistics GMBH v. Emscor, Inc.,* 858 S.W.2d 41 (Tex. App.--Houston [14th Dist.] 1993, no *writ*), the court of appeals denied both the seller and the buyer of a crane contribution and indemnity against the other after each had separately settled with the claimants for $3,000,000 for deaths and injuries sustained when a 152 foot tower crane fell over while being dismantled. The seller of the crane (Emscor) voluntarily settled two death claims in October, 1990. In November, 1990, the buyer of the crane (MAN GHH) agreed to a $3,000,000 judgment in favor of the two families. Additionally, the court denied both the seller and the buyer respectively any right to "contractual contribution" pursuant to the reciprocal indemnity agreements contained in the Asset Purchase Agreement between seller and buyer. The Asset Purchase Agreement provided as follows:

> *Indemnification by Sellers.* Sellers (Emscor), jointly and severally, hereby indemnify and hold harmless the Purchaser and its respective successors and assigns from and against any loss, damage, or expense (including reasonable attorney's fees) caused by or arising out of:
>
> (1) any breach or default in the performance by Sellers of any covenant or agreement of Sellers contained in this Agreement;

(2) any breach of warranty or inaccurate or erroneous representation made by Sellers herein, in any Exhibit hereto, or in any certificate or other instrument delivered by or on behalf of Sellers pursuant hereto;

(3) third party claims regarding Emscor's management of Purchaser's Wolff tower cranes prior to the Closing Date;

(4) third party claims regarding any matter relating to title to or Emscor's maintenance of the Purchase Assets prior to the Closing Date; or

(5) any liability arising out of any and all actions, suits, proceedings, claims, demands, judgments, costs, and expenses (including reasonable legal and accounting fees) incident to any of the foregoing.

The court dismissed each party's request for contractual indemnity and/or contribution from the other party. The court found that the quoted provision did not protect the buyer (and conversely the reciprocal provision did not protect the seller) because (1) it did not provide that the other party would reimburse the settling party for any voluntary settlements made with any plaintiffs; (2) the provisions did not mention "contribution" and failed to discuss any apportionment of fault; and (3) the provision did not express any intent by the parties for a claim for reimbursement. *Id.* at 43.

In *Liberty Steel Co. v. Guardian Title Co. of Houston, Inc.*, 713 S.W.2d 358, 360 (Tex. App.--Dallas 1986, *no writ*), the court held there did not exist an equitable right in the Indemnified Party (Guardian Title Co.) to settle a claim (an abstract of judgment bonded around) when the Indemnifying Person did not voluntarily step in and assume the defense against the adverse claimant. The Indemnified Person had sent a letter to the Indemnifying Person requesting the Indemnifying Person to "honor the terms" of the indemnity agreement. The court found that the indemnity contract did not contain a provision obligating the Indemnified Person to offer to undertake the defense of the claim and that the Indemnifying Person never made a "tender of the defense" to the Indemnified Person. Therefore, the Indemnified Person could not obtain reimbursement of the amount paid to settle the adverse claim when the Indemnified Person settled the claim in violation of the following contractual provision:

Provision:

> no payment, compromise, settlement, accord or satisfaction shall be made without the prior written approval of Liberty Steel (the Indemnifying Person)....

A court has upheld a provision in a contract that authorized a right-of-way owner to compromise and settle all claims for damage within the right-of-way in connection with an indemnity provision with a contractor. *Phillips Pipeline Co. v. McKown*, 580 S.W.2d 435 (Tex. Civ. App.--Tyler 1979, *writ ref'd n.r.e.*). *Also see Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.2d 340 (Tex. App.–Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex. App.–Houston [14th Dist.] 2000, *writ denied*) upholding settlement authority granted by an Indemnifying Person to an Indemnified Person.

b. Reasonable and prudent.

For a settling Indemnified Person to recover an amount of the settlement from this Indemnifying Person, the Indemnified Person must show the potential liability to a claimant and that the settlement was reasonable, prudent and made in good faith under the circumstances. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972);*overruled on other grounds by Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987); *Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.2d 340 12-00-001-00123-CV (Tex. App.-Tyler 2001, *no writ*) and *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex.App. [14th Dist.] 2000, *writ denied*); *Texas Property Casualty Ins. Gty. Ass'n v. BSA*, 947 S.W.2d 682 (Tex. App.-Austin 1997); *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475, 477 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*). Absent an unconditional contractual right to settle, an Indemnified Person who settles a claim without obtaining a judicial determination of his liability, assumes in his action for reimbursement, the burden of proving facts that might have rendered him liable to claimant, as well as the reasonableness of the amount he paid. *Aerospatiale Helicopter Corp. v. Universal Heath Services, Inc.*, 778 S.W.2d 492, 500 (Tex. App.--Dallas 1989), *cert. denied*, 498 U.S. 854, 111 S. CT. 149, 112 L.Ed.2d 115 (1990). Determining whether a settlement of a wrongful death case is reasonable involves experience and specialized knowledge. An attorney must review and analyze, among other things, the underlying facts, the identity of the defendant, the damage elements available to a plaintiff, the specific injuries or losses incurred by a plaintiff, the settlement amounts received in similar cases, the complexity of the case, as well as the strength and resources of the opposing counsel. *See Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). *Also see Sieber & Calicutt, Inc. v. La Gloria*, 66 S.W.3d 340 12-00-001-00123-CV (Tex. App.-Tyler 2001, *no writ*) where court found that La Gloria settlement was reasonable, prudent and made in good faith and thus was to be reimbursed by Sieber & Calicutt pursuant to the indemnity agreement between La Gloria and Sieber & Calicutt. The court in *Amerada Hess Corp. v. Wood Group Production Technology*, 30 S.W.3d 5 (Tex.App. [14th Dist.] 2000, *writ denied*) upheld a settlement as being reasonable and entirely covered by the indemnity agreement even though another defendant was also released because the expert's testimony supported the trial court's finding that the settlement amount was reasonable as to the Indemnified Person's potential liability independent of the other released defendant's potential liability; no apportionment of the settlement amount was required.

c. Good faith.

An Indemnified Person can not recover to reimburse himself for amounts paid in settlement, if the settlement was not made in good faith. *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 880 (Tex. App.--Corpus Christi 1996, *writ denied*). Additionally, even though an indemnity agreement vests settlement authority in the Indemnified Person, a contractual requirement of settling in "good faith" can lead to liability on the part of the settling Indemnified Person. The court in *H.S.M. Acquisitions, Inc.* found the terms of an agreed judgment between a claimant and the Indemnified Person to be collusive, in part because the settling parties agreed to keep the terms of the judgment confidential and not to file an abstract or other public notice of the judgment.

In *Associated Indemnity Corp. v. CAT Contracting, Inc.*, 918 S.W.2d 580 (Tex. App.--Corpus Christi 1966, *no writ*), the court found that an Indemnified Person breached a covenant of good faith contained in the settlement authorization provision of an indemnity

agreement supporting a performance bond when the bonding company (Surety) settled a bond claim without adequate investigation of the circumstances of the claim, and without advance notice to the principal and an opportunity for the principal to argue its case with the obligee. The court further found a common law duty of good faith and fair dealing under these circumstances, the breach of which gave rise to mental anguish damages on the part of the owners of the principal.

d. Express negligence prerequisite.

If the indemnity clause does not pass the express negligence test and the plaintiff's injuries arise from a negligence claim or through a strict liability claim against the Indemnified Person, then the Indemnifying Person is not liable for a settlement negotiated by the Indemnified Person, even though the indemnity agreement contains an absolute power to settle. *Coastal States Crude Gathering Co. v. Natural Gas Odorizing, Inc.*, 899 S.W.2d 289 (Tex. App.--Houston [15th Dist.] 1995, *no writ*)- -Coastal not able to collect back on $10,500,000 settlement paid to persons injured by fire and explosion fueled by propane gas odorized and sold by Coastal using odorizing chemicals supplied by Natural Gas Odorizing. Indemnity agreement failed to mention liability arising out of strict liability and was contained on back of purchaser order in inconspicuous fashion (same black ink as rest of order form).

2. Assignability.

[37] The ability to assign an indemnity or to include within the scope of an indemnity subsequent property owners is a valuable right that can add value to a property. A typical contract containing an indemnity may contain a standard "successor and assign" provision. Consideration should be given to whether this provision extends to the indemnity obligation. For example, an environmental indemnity from a major oil company in connection with the sale of the company's decommissioned oil refinery can be like an insurance policy against otherwise uninsurable environmental risks.

3. Conflicting provisions: waiver of subrogation - indemnity.

[38] A provision whereby a tenant indemnifies the landlord for loss arising out of the tenant's negligence is in conflict with the waiver of subrogation provision. The indemnity provision in such case needs to exclude the loss covered by the waiver of subrogation provision.

B. Insurance.

1. Standard policies including ISO policies and endorsements.

[39] Number designations for ISO's standard endorsements follow a pattern that classifies the endorsement according to the kind of change it effects and the edition date that differentiates earlier versions of an endorsement from later, revised versions. ISO introduced its *commercial* general liability policy in 1985 to replace its earlier policy form, the *comprehensive* general liability policy. ISO also introduced beginning in 1985 *endorsement* forms for use in connection with its commercial general liability policy. *Endorsement* is the term given to forms, either ISO or manuscripted forms, used to modify or add to the provisions of the policy to which they are attached. An endorsement supersedes a conflicting provision in the basic policy in most cases. Endorsements are identified under the ISO system, by four components, one of which is the endorsement's promulgation date. Since the ISO forms are intended for national use, the promulgation date is not the date the form was adopted in a particular jurisdiction.

Each ISO designation is composed of four elements. The following is an example for the Endorsement Form appearing as **Form F** to this article called "CG 20 26 07 04":

CG	20	26	07 04
The "CG" prefix in the endorsement's designation identifies it as part of the ISO commercial general liability form series, introduced in 1986. Prior to this time, ISO designated this series as "GL" in connection with its *comprehensive* general liability forms.	The first set of numbers identifies the "group" to which the endorsement form belongs. ISO endorsements are grouped according to their function. In this case the number "20" refers to group 20 which are all of the ISO endorsements that confer additional insured status on particular persons or organizations.	The second set of numbers identifies this endorsement within its group–in this case it indicates which additional insured endorsement is being dealt with. Endorsement 26 within Group 20 adds as additional insureds to the CGL policy a designated person or organization. For this reason, this Endorsement is titled "Additional Insured–Designated Person or Organization." A copy of Endorsement CG 20 26 07 04 is found in this article as **Appendix 6**.	The final four numbers in the endorsement designation identify the endorsement's edition date. ISO has revised most of its standard endorsements at one time or another. Endorsements with the same function and numerical designation may go through several editions. In the referenced endorsement, the edition date is "07 04" or July 2004. November 1985 is the initial date of all ISO forms for the "CG" system. The *coverage* forms have been revised a number of times since then and currently bear an edition date of 07 98. Many of the *endorsement* forms were revised at the same time as the coverage forms and also bear a 07 98 edition date.

The following is the ISO CGL Form Categories grouped by function:

Category Name	Category Number
Coverage Forms and Amendatory Endorsements	0
State Amendatory Endorsements	01 and 26
Termination and Suspension Endorsements	2
Deductible Endorsements	3
Additional Coverage Endorsements	4
Additional Insured Endorsements	20
Exclusion Endorsements	21
Special Provisions for Certain Types of Risks Endorsements	22
Coverage Amendment Endorsements	24
Amendment of Limits Endorsements	25
Claims-Made Only Endorsements	27
Miscellaneous Coverage Forms Endorsements	28 and 29
Underground Storage Tank Endorsements	30
Miscellaneous Endorsements	99

The following is a listing of all of the ISO Additional Insured Endorsements-Category 20.

Additional Insured–Club Members	CG 20 02
Additional Insured–Concessionaires Trading Under Your Name	CG 20 03
Additional Insured–Condominium Unit Owners	CG 20 04
Additional Insured–Controlling Interest	CG 20 05
Additional Insured–Engineers, Architects or Surveyors	CG 20 07
Additional Insured–Users of Golfmobiles	CG 20 08
Additional Insured–Owners/Lessees/Contractors (A)	CG 20 09
Additional Insured–Owners/Lessees/Contractors (B)	CG 20 10
Additional Insured–Managers or Lessors of Premises	CG 20 11
Additional Insured–State or Political Subdivisions–Permits	CG 20 12
Additional Insured–State or Political Subdivisions–Permits Relating to Premises	CG 20 13
Additional Insured–Users of Teams, Draft or Saddle Animals	CG 20 14
Additional Insured–Vendors	CG 20 15
Additional Insured–Townhouse Associations	CG 20 17
Additional Insured–Mortgagee, Assignee or Receiver	CG 20 18
Additional Insured–Charitable Institutions	CG 20 20
Additional Insured–Volunteers	CG 20 21
Additional Insured–Church Members, Officers and Volunteer Workers	CG 20 22
Additional Insured–Executors, Administrators, Trustees/Beneficiaries	CG 20 23
Additional Insured–Owners or Other Interests from Whom Land Has Been Leased	CG 20 24
Additional Insured–Elective or Appointive Executive Officers of Public Corporations	CG 20 25
Additional Insured–Designated Person or Organization	CG 20 26
Additional Insured–Co-owner of Premises	CG 20 27
Additional Insured–Lessor of Leased Equipment	CG 20 28
Additional Insured–Grantor of Franchise	CG 20 29
Additional Insured–Oil/Gas Operations–Non-Operator, Working Interests	CG 20 30
Additional Insured–Engineers, Architects or Surveyors Not Engaged by the Named Insured	CG 20 32
Additional Insured–Owners, Lessees or Contractors–Automatic Status When Required in Construction Agreement with You	CG 20 33
Additional Insured–Lessor of Leased Equipment–Automatic Status When Required in Lease Agreement with You	CG 20 34

Additional Insured–Grantor of Licenses–Automatic Status When Required by Licensor	CG 20 35
Additional Insured–Grantor of Licenses	CG 20 36
Additional Insured–Owners, Lessees or Contractors–Completed Operations	CG 20 37

B. Liability policies.

1. Workers compensation insurance.

a. Workers comp buffer.

[40] Although an Indemnifying Person's (tenant's, contractor's or subcontractor's) workers' compensation insurance will not eliminate the potential liability of the Indemnified Person (the landlord, owner or contractor in the above parenthetical examples), it may provide a buffer against potential claims and make it less likely that the Indemnified Person will be sued by an injured employee of the Indemnifying Person. Because workers' compensation statutes limit the recovery by an injured employee from the employer, an indemnification provision is appropriate so as to ensure that the employer remains ultimately liable for damages in excess of the statutory workers' compensation limits.

b. Waiver of subrogation.

[41] It is not generally appropriate (except in borrowed servant, dual employment or leased employee situations) for one party to a contract to require the other party to name the other party as an additional insured on its workers compensation and employers liability policy. This would result in the other party being covered for injuries to its employees under the insured's worker's compensation policy. As discussed elsewhere in this Article, the concern raised by the risk of third-party actions by an injured employee of an insured employer against a related party (*e.g,* suit by an injured employee of a contractor against the premises owner, or suit by an injured employee of a subcontractor against the contractor, or suit by an injured employee of a tenant against the landlord) can be addressed by indemnification by the employer and designation of the related party as an additional insured. In order to avoid the workers compensation carrier suing the Indemnified Person to obtain contribution and reimbursement for amounts paid by the carrier to the employee, the parties should obtain a waiver of subrogation endorsement in favor of the Indemnified Persons. The right of a workers compensation insurer to subrogate against a third party who may have caused an employee injury is recognized by statute. TEX. LABOR CODE § 417.001 (Vernon 1996). In most states, workers compensation insurance is written on the 1992 edition of the Workers Compensation and Employers Liability Insurance Policy form (**WC 00 00 01 A**) developed by the National Council on Compensation Insurance (**"*NCCI*"**). This form is *silent* with respect to a pre- loss waiver by employer. Therefore, a waiver of subrogation executed prior to a loss should prevent the insurer from subrogating against the third party, even without an endorsement to the policy.

c. Texas WC 42 03 04 A Waiver of Our Right to Recover from Others.

[42] This form is approved for use in Texas. It is an endorsement whereby the workers' compensation carrier waives its rights of subrogation. It requires that the contract between the contractor (employer) and the owner contain a provision requiring the waiver to be obtained.

2. CGL.

a. CGL indemnity coverage.

(1) Exception to an exclusion.

[43] " Contractual liability" coverage is contained in the CGL policy as an exception to an exclusion from coverage. The exclusion provides:

> This insurance does not apply to "***Bodily Injury***" or "***Property Damage***" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This exclusion does not apply to liability for damages: 1. assumed in a contract or agreement that is an "***Insured Contract***", provided the "Bodily Injury"or"property Damage" occurs subsequent to the execution of the contract or agreement; or 2. that the insured would have in the absence of the contract or agreement. An "***Insured Contract***" is defined as: ...6. that part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work 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.

Contractual Liability coverage excludes coverage for "***Personal Injury***" liability assumed by contract or agreement, unless such coverage is endorsed on to the insured's CGL policy. A similar exception to the exclusions from Coverage B (coverage for "Personal and Advertising Injury") is generally not contained in standard form CGL policies. Thus, in such cases, the named insured's liability policy will not protect it against its contractually assumed liability for Personal and Advertising Injury, unless it obtains a special endorsement to its policy adding an exception to the exclusion in Coverage B. "Personal and Advertising Injury" is defined in Coverage B to standard CGL policies as "injury, including consequential bodily injury, arising out of one or more of the following offenses:

> (i) false arrest, detention or imprisonment; (ii) malicious prosecution; (iii) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (iv) oral or written publication

> of material that slanders or libels a person or organization or disparages a person's or organization's good, products or services; (v) oral or written publication of material that violates a person's right of privacy; (vi) the use of another's advertising idea in your "advertisement'; or (vii) infringing upon another's copyright, trade dress or slogan in your "advertisement."

For example, guard service contracts typically contain a provision requiring the owner to indemnify the guard service from liability for the types of liabilities that are embraced by the term "***Personal Injury***" (libel, slander, defamation of character, false arrest, wrongful eviction, and evasion of privacy). In such case unless the owner has its CGL policy endorsed to cover this indemnity, the owner is uninsured for this contractually assumed liability. Alternatively, the owner could require that it be listed as an additional insured on the guard service's CGL policy.

(2) Coverage for named insured as indemnifying party.

(a) Indemnified party not the insured.

Contractually assumed liability insurance does not make the indemnified-protected party an insured under the policy. *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.*, 8 Cal. App. 4th 338, 10 Cal. Rptr.2d 165 (1992); *Jefferson v. Sinclair Ref.g Co.*, 10 N.Y.2d 422, 223 N.Y.S2d 863, 179 N.E.2d 706 (1961); *Davis Constructors & Engineers, Inc. v. Hartford Accident & Indemnity Co.*, 308 F. Supp. 792 (M.D. Ala. 1968); and *Hartford Ins. Group v. Royal-Globe Co.*, 21 Ariz. App. 224, 517 P.2d 1117 (1974). Instead it expands coverage for the named insured. *See e.g., Gibson & Associates, Inc. v. Home Ins. Co.*, 966 F.Supp. 468, 475-77 (N. D. Tex. 1997).

(b) Named insured not insured for all contractually assumed liabilities.

CGL policies will place conditions precedent that must be satisfied by an indemnified person prior to providing it defense under the indemnifying person's CGL policy. For example, the ISO CGL standard policy form provides

> If we defend an insured against a "suit" and an indemnitee of the insured is also named as a part to the "suit", we will defend that indemnitee if all of the following conditions are met:
>
> a. The "suit" against the indemnitee seeks damages for which the indemnitee has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
>
> b. This insurance applies to such liability assumed by the insured;
>
> c. The obligation to defend, or the cost of the defense of, that indemnitee, **has also been assumed** by the insured in the same "insured contract"; (Emphasis added)

[1] Indemnifying party and indemnified party must be defendants in same suit.

The insured contract provisions of ISO's CG 00 01 requires as a condition to providing the indemnitee a defense under the contractually assumed liability coverage that the indemnitee and the named insured-indemnitor are parties to the same suit. An example of a common suit in which this is not the case is suit by an injured employee of the indemnifying party against the indemnified party.

[2] Policy limits and exclusion still apply.

Contractual liability insurance does not expand the scope of the liability policy beyond the coverage provided, nor does it extend the limits of liability. Coverage is limited by the policy's other exclusions (*e.g.*, pollution liability, insured's breach of contract, and breach of product warranty). Contractual liability insurance does not insure the performance of the business aspects of the contract. *Musgrove v. Southland Corp.*, 898 F.2d 1041 (5th Cir. 1990). The court held

> Contractual liability has a definite meaning. It is coverage of the insured's contractual assumption of the liability of another party. It typically is in the form of an indemnity agreement.... The assumption by contract of the liability of another is distinct conceptually from the breach of one's contract with another.... Liability on the part of the insured for the former is triggered by contractual performance; for the latter liability is triggered by contractual breach....CITGO (the owner) concedes that LCE (the contractor) made no indemnification agreement applicable to the loss herein; rather, it complains of LCE's breach of contract. LCE's contractual liability insurance is thus not applicable. LCE did not insure its commitment to secure insurance coverage for CITGO. *Id.* at 1044.

Under the 1996 and later editions of the standard ISO form CGL policy, the cost to defend an indemnitee under the indemnitor's CGL policy will be provided within the limit of the proceeds available under the policy as opposed to being on top of the limits as a supplementary payment, unless the indemnitee complies with a lengthy list of conditions precedent.

[3] Limited by scope of indemnity.

An issue exists as to whether contractual liability coverage under a protecting party's CGL insurance extends to a protected party's negligence if the "insured contract" indemnity is expressly limited to the protecting party's negligence or expressly excludes the protected party's negligence. *Office Structures, Inc., v. Home Ins. Co.*, 503 A.2d 193 (Del. 1985); *but see United National Ins. Co. v. Dunbar & Sullivan Dredging Co.*, 953 F.2d 334 (7th Cir. 1992).

[4] Special exclusions.

Contractually assumed liability coverage covers "bodily injury" and "property damage" but not "personal injury or advertising injury" liability, which is defined as including false arrest, libel, slander, and copyright infringement.

[5] No coverage for indemnified person's sole negligence.

Until 2004, the standard CGL policy form published by ISO insured its named insured for its contractually assumption of liability for its indemnitee's sole negligence. ISO issued in 2004 an endorsement, CG 24 26 06 04, which modifies the definition of "insured contract" to eliminate coverage for the sole negligence of an indemnitee. Thus, an indemnifying person should review its CGL policy to determine whether it will extend to protect it should it decide to indemnify the other party to its contract for the other party's sole negligence.

b. Additional insured coverage.

(1) Negligence.

(a) Additional insured's vicarious liability for named insured's negligence.

Additional insured status affords the additional insured protection against vicarious liability arising out of the named insured's acts or omission. An additional's insured's vicarious liability for the acts or omissions of a named insured is an exceptional situation, for example, an owner's liability for its contractor's acts or omissions in the case of non-delegable duties and other exceptions to the independent contractor rule. 44 TEX. JUR. 3D, *Independent Contractors* (1996); and RESTATEMENT (SECOND) OF TORTS Introductory Comment to §§ 416-429 (1966). It has been urged that limiting additional insured coverage to the additional insured's vicarious liability is illusory and against public policy. *See* the dissent in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.*, 158 Ill.2d 116, 632 N.E.2d 1039 (Ill. 1994). As noted below, Texas courts have followed the majority rule that additional insured coverage is not limited to coverage of the additional insured's vicarious liability for the named insured's negligence, or even to cases where the named insured is concurrently negligent with the additional insured.

(b) Additional insured's own negligence.

[44] Additional insured status typically affords the additional insured protection against vicarious liability arising out of the named insured's acts but depending on the insurance covenant or the policy language may cover the additional insured's own negligence. As such, it supplements the protection afforded by the indemnity provisions. Richmond, *The Additional Problems of Additional Insureds*, 33 TORT & INS. L. J. 945 (1998); Richmond and Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 DRAKE L. REV. 781 (1996); Sigmier and Reilly, *Coverage for Independent Negligence of Additional Insureds*, FOR THE DEFENSE (Ap. 1995); Beck, *Ethical Issues in Joint Representation Under Subcontract Requirements for Defense and Additional Insured Status*, THE CONSTRUCTION LAWYER 25 (Jan. 1995). For example, listing the owner on the contractor's CGL Policy, or the contractor on its subcontractor's CGL Policy, will afford the owner liability protection. However, whether a covenant to list a person as an additional insured on the insured's liability policy or additional insured status provides coverage for the additional insured's negligence could well depend upon language of the insurance covenant and the insurance policy. When such language is silent or ambiguous, courts may look to the indemnity language and other language in the contract and custom and practice to determine the intention of the parties. Also, the language of the insurance policy, additional insured endorsement and certificate of insurance will be examined to determine the scope of the insurance coverage.

(2) Interpretation of additional insurance covenants.

(a) Express negligence test not applicable to insurance covenant.

[45] In *Getty Oil Co. v. Insurance Co. of North America, NL Industries, Inc., Youell and Companies*, 845 S.W.2d 794 (Tex. 1992), *cert. den'd*, 510 U.S. 820, 114 S. Ct. 76, 126 L. Ed. 2d 45 (1993), the Texas Supreme Court declined to extend the express negligence doctrine to invalidate contractual provisions requiring Getty to be listed as an additional insured on NL Industries' liability policies in a case where the indemnity provision excluded indemnity for Getty's negligence but the insurance provision did not expressly state that the insurance was to cover injuries due to Getty's negligence. The court reviewed the following provision:

> Seller (NL Industries-the chemical supplier) agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser (Getty - the chemical buyer):
>
> ...
>
> | | |
> |---|---|
> | Workmen's Compensation
Statutory Employer's Liability | $500,000 |
> | General Liability:
Bodily Injury | $500,000 |
> | ... | |
> | Automobile Liability:
Bodily Injury | $500,000 |
> | ... | |
>
> All insurance coverages carried by Seller, ***whether or not required hereby***, shall extend to and **protect** Purchaser, its co- owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.

> Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations or other damages resulting from injury to any person ... arising out of or incident to the performance of the terms of this Order by Seller ... Seller shall **not** be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, ***solely***, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller. (Emphasis added by author.)

Previously, in a 1986 case ("***Getty* Round 1**"), Getty had been unsuccessful in seeking indemnity against NL Industries. *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.--Corpus Christi 1986, *writ ref'd n.r.e.*). Getty lost *Getty* Round 1 when the court determined that the contractual indemnity provision meant what it said: "Seller shall not be responsible for any losses ... solely caused by the negligence of Purchaser." The facts giving rise to *Getty* Round 1 are as follows. Getty purchased various chemicals from NL Industries for Getty's oil production and exploration operations in the Midland, Texas area. A barrel of chemical demulsifier delivered by NL Industries to Getty exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty. Duncan's estate and survivors brought wrongful death and survival actions against Getty and NL Industries (*Getty* Round 1). The jury found Getty 100% negligent. The jury also found that NL Industries was not negligent and that it placed adequate warnings on its chemicals. There was, however, no finding that the accident did not arise out of or was not incident to NL Industries' performance of its purchase order.

The court in the instant action ("***Getty* Round 2**") was being requested by Getty to reverse the holding of the trial court and the court of appeals in a subsequent suit brought by Getty against NL Industries for its failure to name Getty as an "additional insured" on NL Industries' insurance policies and against NL Industries' insurers. Getty was suing on multiple theories: as to NL Industries--breach of contract to purchase insurance on its behalf; violation of § 1.203 of TEX. BUS. & COMM. CODE (Tex. UCC) (Vernon 1994) (obligation of good faith and fair dealing); negligence; violation of the Texas Deceptive Trade Practices Act; and common law fraud; and as to the insurers--breach of contract to extend it insurance coverage; violation of TEX. INS. CODE Art. 3.62 (Vernon 1981) (repealed) (failure to pay claim); breach of the duty of good faith and fair dealing; negligence; violation of the DTPA; and common law fraud. The trial court in *Getty* Round 2 granted summary judgment against Getty on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, §§ 127.001-.007, TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997); (2) the same contractual provision violated the common law express negligence rule; (3) the prior litigation of a related indemnity provision precluded the present suit under the doctrine of *res judicata* ("*Claim Bar*"); and (4) collateral estoppel prevented Getty from relitigating ultimate issues of fact and law litigated in *Getty* Round 1 ("*Issue Bar*"). The court of appeals sustained the trial court's summary judgment on the basis that Getty was barred by *res judicata*, having already cross-claimed against NL Industries in *Getty* Round 1 for contractual indemnity and having lost. In *dicta*, the court of appeals opined that the insurance provision would violate the Texas Oilfield Anti-Indemnity Statute by allowing Getty to avoid the consequences of its own negligence. The court of appeals also noted that Texas courts would "undoubtedly extend (the express negligence doctrine) to the insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence." 819 S.W.2d 908, 914. The supreme court found that Getty was not required to bring any of its cross-claims against NL Industries in the suit by Duncan. However, once Getty chose to cross-claim for indemnity, it was required under *res judicata* to bring all its actions in the same action. As to the claims against the insurers, the court held that Getty was not barred by either *res judicata* or collateral estoppel. *Res judicata* was not applicable even though as a general matter under Texas law a former judgment bars a second suit against all who were in "privity" with the parties to the first suit. Since NL Industries' insurance policies contained a "no-action" provision (suit against the insurer was specifically prohibited before the insured's liability was reduced to judgment), the court found that Getty could not have joined the insurers as defendants in *Getty* Round 1 anyway. Collateral estoppel did not apply either since the court found that *Getty* Round 2 was not a relitigation of either (1) an issue of fact--did Duncan's injuries arise out of NL's performance of the purchase order? (did the parties intend to limit the insurance to injuries caused by NL Industries' negligence?) or (2) an issue of law--did NL Industries' breach its insurance covenant? Finally, the court held that the express negligence doctrine would **not be extended** to contractual provisions, other than indemnity agreements, and therefore was not a basis for preventing litigation as to whether Getty was an additional insured under NL Industries' policies. The court stated

> We express no opinion regarding whether Getty is an additional insured under NL's insurance policies with INA or Youell, or the extent of such coverage, if it exists. *Id.* 806.

Prior to the adoption of the express negligence doctrine as the test to determine whether an indemnity provision extended to the indemnitee's negligence, the Texas Supreme Court followed the "clear and unequivocal" standard. *Fireman's Fund Insurance Co. v. Commercial Standard Indemnity Co.*, 490 S.W.2d 818 (Tex. 1972).

[46]

(b) Rules of interpretation.

If an additional insured endorsement is silent or ambiguous as to coverage of an additional insured's negligence, courts may look to the protecting party's indemnity language, other language in the contract, custom and practice, the language of the additional insured endorsement and certificate of insurance to interpret the endorsement's coverage.

[1] Ambiguous insurance covenant look to scope of indemnity clause.

In *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.--Houston [14th Dist.] 1996, *no writ*), the Houston Court of Appeals found that the protecting party's failure to cause its insurance carrier to endorse its CGL policy to add the protected party as an additional insured did not breach the protecting party's insurance covenant when the injury arose out of the protected party's sole negligence. The insurance covenant and indemnity clause read as follows:

Provision:

7. Contractor shall obtain and maintain at its own expense insurance in such forms and minimum amounts as set forth below naming Emery as an additional insured. Contractor shall furnish Emery certificates from all insurance carriers showing the dates of expiration, limits of liability thereunder and providing that said insurance will not be modified on less than thirty (30) days' prior written notice to Emery.

   Minimum Limits of Insurance:

A.	Worker's Compensation	--	Statutory
B.	General Liability Insurance	--	$1 Million Combined Single Limit
C.	Automobile Liability	--	$1 Million Combined Single Limit

   If Contractor fails to obtain and maintain the insurance coverage set forth above, Emery shall have the right, but not the obligation, to obtain and maintain such insurance at Contractor's cost or, at its option, to terminate this Agreement for cause as provided in Section 9 hereof.

8. Contractor shall be solely responsible and liable for any and all loss, damage or injury of any kind or nature whatever to all persons, whether employees or otherwise, and to all property, including Emery shipments while in the Contractor's custody and control, arising out of or in any way resulting from the provision of services hereunder, and Contractor agrees to defend, indemnify and hold harmless Emery, its agents, servants, and employees from and against any and all loss and expense, including legal costs, arising out of the provision of the services hereunder, by Contractor.

The court held that the contract between the parties did **not** require the protecting party to provide the protected party with insurance covering the protected party's **sole negligence**. *Id.* at 315. The court of appeals noted that the Texas Supreme Court had twice previously, in *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex. 1992) and *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972) dealt with the interaction of an indemnity clause and an insurance clause in a contract. Based on these cases, the court of appeals concluded it was required to undertake a two-step analysis. The court is to (1) first, determine if the indemnity clause expressly requires the protecting party to indemnify the protected party for the protected party's negligence; and (2) secondly, determine if the indemnity and the insurance clauses are stand alone covenants or whether the insurance covenant is supportive of and limited by the scope of the indemnity clause. *Emery Air Freight Corp. v. General Transport Systems, Inc.*, 933 S.W.2d 312 (Tex. App.–Houston [14th Dist.] 1996, *no writ*).

The court held that even though Emery was to be listed as an additional insured on GTS's liability insurance policy, the "'most reasonable construction' of the insurance provisions in the parties' contract 'is that they were to assure the performance of the indemnity agreement as entered into by the parties.'" *Id.* at 314.

The court based this determination on the following factors: (1) the indemnity provision did not have an internal provision requiring insurance to support the indemnity distinct from other provisions for insurance in the agreement; (2) the insurance covenant did not require coverage of the protected party's negligence "*whether or not required*" by other clauses in the contract; and (3) the insurance covenant did not expressly cover the protected party's negligence.

Several jurisdictions seem to follow the same approach. *See Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So.2d 336 (11th Dist. 1996) – manufacturer's agreement to provide insurance to franchisees as additional insureds did not require coverage beyond manufacturer's own liability where manufacturer had no duty to indemnify franchisee for franchisee's own negligence; *Transcontinental Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 662 N.E.2d 500 (Ill. 1996) – agreement to procure insurance to the extent of indemnitor's agreement to assume indemnitee's negligence held void under Illinois Indemnification Act and thus, no coverage was available to indemnitee as additional insured; *Shaeed v. Chicago Transit Auth.*, 484 N.E.2d 542 (Ill. 1985) – insurance clause and contract required that subcontractor maintain insurance "insuring all subcontractor's indemnity obligations," court rendered insurance provision unenforceable because it sought insurance against an invalid agreement to indemnity; *Posey v. Union Carbide Corp.*, 507 F.Supp 39 (M. D. Tenn. 1980) – agreement to indemnity owner from any claims for bodily injury sustained on premises resulting from construction work along with agreement to procure insurance to the same effect held unenforceable by virtue of an invalid indemnity agreement. On the other hand, courts have ruled that an invalid and unenforceable indemnity agreement does not necessarily render coverage for an additional insured null and void. *See Shell Oil Co. v. National Union Fire Ins. Co. of Pittsburgh*, 44 Cal. App.4th 1633, 52 Cal. Rptr.2d 580 (Cal. 1996); *Bosio v. Branigar Org., Inc.*, 154 Ill. App.3d 611, 506 N.E.2d 996 (2nd Dist. 1987); *McAbee Constr. Co. v. Georgia Craft Co.*, 343 S.E.2d 513 (Ga. App. 1986); *Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.*, 225 Cal. App. 740 (1986) – agreement to procure insurance for additional insured's sole negligence held enforceable despite state statute prohibiting risk transfers for sole liability.

[2] Ambiguous insurance policy construed in favor of coverage.

Cases Disregarding Exclusions of Negligence in Indemnity and Silence in Insurance Covenant in Construing Ambiguous AI Endorsement in Favor of Coverage of Additional Insured's Negligence.

Attempts by a protecting party's insurer to limit its additional insured coverage under an issued additional insured endorsement have been rejected in other jurisdictions even though the insurance covenant or indemnity in the contract between the named insured and the additional insured addressed only the negligence of the named insured. *J. A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980 (Ill. App. 1995) - the court declined to limit the coverage of an issued additional insured endorsement to the coverage required by the contract between the protecting party and the protected party; *also see Mobil Oil Co. v. Maryland Cas. Co.*, 681 N.E. 552 (Ill.App.

1997), court refused to limit additional insured to limits specified in contract between protecting party and the additional insured/protected party where protecting party's CGL policy limits exceed contracted for amount.

Cases Construing Ambiguous Additional Insured Endorsement in Favor of Additional Insured's Coverage for its Negligence.

In *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993), the federal court of appeals held that under Kansas law an additional insured endorsement did not limit the policy's coverage to cases where the additional insured is held vicariously liable for the named insured's negligence. In this case, the AI endorsement stated that the AI was included as an insured

> but only with respect to liability arising out of operations performed by or on behalf of the named insured for the (additional) insured.

Applying rules of contract construction, the court held that at best, the phrase "but only with respect to liability arising out of operations" is ambiguous as to whose negligence is covered and whose negligence is excluded.

The court held in favor of a broad construction of coverage of the Additional Insured's own negligence since the insurance carrier crafted the language. This case involved a suit by a patron at a festival held on city property where the injured patron sued the city alleging the city failed to warn the patron of a dangerous condition. The patron fell over a retaining wall that separated the festival grounds on the city's property from an underground parking garage on the city's property. The city tendered defense to the named insured festival operator's insurance carrier on whose policy the city was an AI. The carrier declined defense arguing that the AI endorsement provided coverage only for the city's vicarious liability for the acts and operations performed by the named insured, not for the city's own negligence. The court found coverage as long as the Additional Insured's negligence had a close and direct connection with the named insured's operations.

Although a remote connection between (the named insured's) operations and the plaintiff's injuries would not suffice (to establish coverage for the additional insured) ... we conclude that the facts of this case clearly demonstrate the requisite causal connection. It is undisputed that (the plaintiff) was injured while walking from a dance sponsored by (the named insured) to the portable toilets set up by (the named insured). Under these circumstances, a reasonable insured in (the additional insured's) position would understand that (the plaintiff's) injuries, and (the additional insured's) liability, **"arose out of"** (the named insured's) operations.

[3] Interpretation of additional insured endorsements.

[a] Liabilities arising out of named insured's operations or work.

Liability Did Not Arise Out of Named Insured's Operations.

In 1992 a court of appeals in *Granite Construction Co., Inc. v. Bituminous Ins. Cos.*, 832 S.W.2d 427 (Tex.App.-Amarillo 1992, *no writ*) found that the additional insured endorsement to the protecting party's CGL policy (Brown's CGL policy) did not cover the negligence of the additional insured (Granite Construction), but only the negligence of the named insured (Brown). Granite Construction had agreed by contract to load Brown's trucks and Brown's responsibility was to haul the asphalt after the trucks were loaded. Granite Construction was named as an additional insured on Brown's CGL policy. The additional insured endorsement provided coverage for liability "**arising out of operations performed for such insured** (the additional insured, Granite Construction) **by or on behalf of the named insured** (Brown)." Brown's injured employee alleged that Granite Construction had negligently loaded the truck. Granite Construction sought coverage under the additional insured endorsement, contending that Brown's employee's injuries "arose out of the **work**" done under Granite Construction's contract with Brown, and thus arose out of the "**operations**" performed for Granite Construction by Brown. The court disagreed, holding that the claim against Granite Construction "arose out of Granite Construction's loading operations" and not out of "operations performed by Brown," the only operations for which Granite Construction was insured as an additional insured. Under the *Granite Construction* court's view of additional insured coverage, the additional insured is covered only for its vicarious liability for the acts and omissions of the named insured, but not for its own acts or omissions.

Following the analysis of *Granite Construction*, the Northern District of Texas in *Northern Ins. Co. of N.Y. v. Austin Commercial, Inc. and Am. Airlines, Inc.*, 908 F. Supp. 436 (N. D. Tex. 1995) held in a "liability arising out of 'your **work**'"AI endorsement case where the named insured's employee was injured by the negligence of the AI that additional insurance protection is not triggered to cover the additional insured's contributory negligence absent joint negligence on the part of the named insured. One rationale for the *Granite Construction* and *Austin Commercial* decisions, although not stated by the courts, is that a named insured's CGL insurance is not an insurance product designed to cover injuries to employees of the named insured, but is designed to cover the named insured and the additional insured for liabilities arising out of injuries to third parties.

Majority View: Additional Insured's Liability Covered if Causally Connected to Named Insured's Work or Operations even if Named Insured is Not Negligent – "Arises Out Of" Broadly Construed Against Insurer.

The *Granite Construction* court's rationale was subsequently rejected by a California court construing the same additional insured language. A California court in *Acceptance Ins. Co. v. Syufy Enterprises*, 81 Cal.Rptr.2d 557, 562 (Cal.App. 1999) expressly rejected the rationale of *Granite* stating

We disagree with the Texas approach. It is inconsistent with the ordinary broad meaning of "**arising out of**," which as noted above has been regularly applied by California courts in insurance cases. This inconsistency leads to tortured results. In *Granite Construction*, the negligent loading of the named insured's truck caused no injury (and no liability) until the named insured's employee began hauling the load, in the course of which the truck overturned. It is difficult to understand how the driver's claim did not arise out of the hauling operation in the most direct way, unless one assumes that fault is a predicate for coverage. We do not believe such an assumption is justified by the policy term "liability arising out of operations."

Since the California case rejecting *Granite Construction*, state court of appeals and federal courts in Texas have issued a string of decisions distinguishing or abandoning *Granite Construction* and adopting the majority view from California and other jurisdictions. In 1999 a mere two months after the California case, a Texas court of appeals in *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451

(Tex.App. [1st Dist.] 1999, *writ den'd*). considered the breadth of "**arising out of**" in the context of an ISO CG 20 10-type additional insured endorsement covering liabilities arising out of the "**operations**" of the named insured. In *Admiral*, K-D Oilfield Services a company hired to service an oil and gas facility named the facility's owner, Trident NGL, as an additional insured for liability arising out of the service company's "operations." While one of the service company's (the named insured's) employees was unloading tools on the premises of the additional insured, the additional insured's compressor exploded. The servicing company's injured employee sued the facility's owner, Trident NGL, and the owner sought a declaration that it was covered as an additional insured.

The parties agreed that the named insured contractor (K-D Oilfield Services) was free from fault and did nothing to cause the explosion. The court of appeals followed what it considered to be the "**majority view**" construing similar endorsements:

[F]or liability to "arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured.... We hold that, because the accident in this case occurred to a KD employee while the employee was on the premises for the purpose of performing preventive maintenance on the compressor that exploded, the alleged liability for the employee's injuries "arose out of KD's operations," and, therefore, was covered by the "additional insured" provision. *Admiral* at 455.

Later in 1999 the Third Court of Appeals followed the rationale of *Admiral* in *McCarthy v. Cont. Lloyds*, 7 S.W.3d 725 (Tex. App.-Austin [3rd Dist.] 1999, *no writ*) and held that an additional insured's negligence is covered by an additional insured endorsement covering liabilities "*arising out of* (*the named insured's*) **work**." The endorsement form was the "11 85 " version of the ISO CG 20 10 additional insured endorsement. The insurance company argued that "*arising out of*" means only those liabilities coming *directly* from the negligence of the protecting party (in this case, Crouch, the contractor), and coverage could not arise in a case where only the protected party (in this case, McCarthy, the additional insured owner) was negligent. The court of appeals, however, found that coverage occurs where there is a "**causal connection**" between the liability and the named insured's work, even though only the additional insured is negligent. The *McCarthy* court described the coverage trigger as follows:

As he was walking down this incline to go to the equipment trailer, Wilson "fell on the muddy, slippery surface." These allegations show that walking down the incline to get tools to perform its job was an integral part of Crouch's work for McCarthy. Thus, the accident occurred while Wilson was on the construction site for the purpose of carrying out Crouch's contract with McCarthy. There was more than a mere locational relationship between the injury and Wilson's presence on the site. Wilson's injury occurred while he was carrying out a necessary part of his job for Crouch. Therefore, there is a causal connection between Wilson's injury and Crouch's performance of its work for McCarthy and the liability "arose out of" Crouch's work for McCarthy." ... The insurance companies offer a competing interpretation for the phrase "arising out of" that they claim is equally reasonable and thus creates an ambiguity. Their interpretation would limit the interpretation of "arising out of" to mean coming directly from; *i.e.*, for liability to arise out of Crouch's work for McCarthy, the liability must stem *directly* from Crouch's negligence and cannot extend to negligence caused solely by McCarthy. Post-*Lindsey*, however, such a restrictive interpretation no longer appears reasonable in Texas and cannot be used to create ambiguity. However, were we to consider the phrase "arising out of" ambiguous, we would apply the familiar rules that construe the policy against the insurer and reach the same result. *Id.* at 730. [Reference to *Lindsey* is to *Mid-Century Ins. Co. v. Lindsey,* 997 S.W.2d 153, 156 (Tex. 1999) which broadly construed the term "arising out of" to mean a causal connection in construing coverage under an auto liability insurance policy as covering accidental discharge of a shot gun in pick up.]

In 2001 the Dallas Court of Appeals in *Highland Park v. Trinity Universal Ins. Co*., 36 S.W.3d 916 (Ct.App. [5th Dist.] Dallas, 2001, *no writ*) also was called upon to construe an "*arising out of 'your* **work**'" additional insured endorsement. Based on *McCarthy* and *Admiral*, the court found that the additional insured endorsement covered the additional insured's, Highland Park's, negligence because the injury to the named insured's employee arose out of the named insured's work on the additional insured's premises, even though Highland Park was solely negligent.

In 2000 the Fifth Circuit in two cases involving Mid-Continent Casualty Co. and different panels followed *Admiral* as opposed to *Granite Construction*. The first panel of the Fifth Circuit in *Mid-Continent Casualty Co. v. Chevron Pipe Line*, 205 F.3d 222 (5th Cir. 2000) construed an ISO CG 20 10 11 85 "*arising out of your work*" additional insured endorsement as covering injuries to a named insured's employee negligently caused by the additional insured. The court appears to have been willing to make a distinction between protection afforded to an additional insured on the basis of whether the injury arose out of the "operations" or the "work" of the protecting party. The court found that

The Mid-Continent endorsement and those in *Granite Construction* and *Admiral* are not identical. Mid-Continent uses "liability arising out of 'your (Power Machinery, Inc.'s) **work**'", defined by the policy as the named insured's [PMI's] work or operations, while the *Granite Construction* and *Admiral* endorsements, respectively, used "liability arising out of operations performed ... by or on behalf of the named insured", ... and "liability arising out of the named insured's operations" *Admiral*, 988 S.W.2d at 454 (emphasis added). On the other hand, the pertinent language in the two additional insured endorsements at issue in *McCarthy* is identical to that in Mid-Continent's. *See McCarthy*, 7 S.W.3d at 727 n. 4. .... To the extent that there is a conflict in the approach taken by *Granite* and *Admiral* in interpreting the endorsement, *e.g.*, fault-based versus activity-based, we agree with CPL(Chevron Pipe Line) that our affirming the coverage-for-CPL-ruling does not require us to resolve such conflict. We are persuaded that, in the light of *Granite Construction's* focus on the word "*operations*" in the endorsement, which it considered in conjunction with the parties' division of operations in its services contract, there is *no* need here to reach the same non-coverage holding. First, the word "operations" does *not* appear in the Mid-Continent endorsement; rather, it uses "your work", which, per its policy definition as *work or operations*, may indicate that broader coverage was intended; second, the underlying services contract does *not* divide responsibilities between CPL and PMI *vis-a-vis* PMI's work; and finally, based on the finding in the Fant action that PMI controlled Fant's work at CPL, his injury, at least in part, "arose out of" PMI's work for CPL.

The second panel in *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) struggled with the issue of whether an injury arising out of operations performed by a subcontractor for its contractor were covered by an additional insured endorsement to the subcontractor's CGL policy covering injuries arising out of operations for the additional insured premises owner. The additional insured endorsement to Air Equipment's policy provided that it covered

> any person or organization for whom the named insured (Air Equipment) has agreed by written 'insured contract' to designate as an additional insured ... but only with respect to liability "*arising out of your ongoing* ***operations*** *for that insured*."

Given the absence of language in the policy excluding from its coverage liabilities arising solely from the additional insured's negligence or excluding operations performed for another contractor while on the additional insured's premises, the court held that the policy would be broadly construed in favor of coverage for the additional insured. The court reasoned that a subcontractor's operations for its contractor are operations for the owner as well.

Each of these Fifth Circuit cases involved the ISO CG 20 10 additional insured endorsement form. The court found in each case that the employment relationship between the named insured and the injured plaintiff suing the additional insured satisfied the condition for coverage.

[b] Injuries to named insured's employees arise out of named insured's operations.

Courts in some jurisdictions have found that where the injured person to whom the additional insured is liable is the employee of the named insured, the additional insured's liability arises out of the named insured's operations as a matter of law by virtue of the employment. *Liberty Mutual Ins. Co. v. Westfield Ins. Co.*, 703 N.E.2d 439 (Ill. App. 1998); *Township of Springfield v. Ersek*, 660 A.2d 675 (Pa.App. 1995); and *Florida Power & Light Co. v. Penn. America Ins. Co.*, 654 So.2d 276 (Fla. App. 1995).

(3) Contractual exclusion if additional insured has insurance.

[47] The decision in *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386 (E.D. Tex. 1994) also illustrates the risk inherent in not reading the insurance policy of the party obligated to name the prospective additional insured as an additional insured. The court found that a fact issue existed defeating a summary judgment motion as to whether the proposed additional insured had accepted the defendant's insurance policy which contained an additional insured provision that included the plaintiff, but which provision was worded so as to exclude coverage in cases where the proposed additional insured was already insured (a so-called "***Escape Clause***").

Provision:

> Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

The party providing the insurance provided insurance naming the proposed additional insured as an additional insured and therefore did not violate the covenant to name the plaintiff as an additional insured, but the additional insured provision contained as Escape Clause. Timely review and objection may need to occur to defeat this waiver argument!

(4) Contractual exclusion of additional insured's negligence.

[48] The holding in *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000) in which the 6th Circuit applied Texas law emphasizes why it is important to obtain and read a copy of the Additional Insured Endorsement and not to rely either upon a statement in the Certificate of Insurance that "'x' is an additional insured for liabilities arising out of the work 'y'" or upon a general statement in the contract that "x" is to be listed as an additional insured on "y's" commercial general liability policy. The court in this case held that the additional insured endorsement meant exactly what it said "the negligence of the additional insured is excluded" and that the certificate of insurance stating that "x" was an additional insured and the contractual provision in the contract between "x" and "y" that be listed as an additional insured did not clearly provide for coverage of the additional insured's negligence. The following are the provisions in the contract, the certificate of insurance and the endorsement.

Provisions.

> Contract. Contractor [Bath] shall have a comprehensive general liability policy in the amount of at least $1,000,000 with an Additional Insured Endorsement naming Owner [BP Chemical] as an additional insured.
>
> Contractor hereby indemnifies and agrees to defend and save Owner and its affiliated Corporations, their agents, servants and employees harmless from any and all losses, expenses, demands and claims that may be claimed or for which suit is brought for any actual or alleged bodily injury or death occurring to any person whatsoever, in any manner arising out of or in connection with, or resulting in whole or in part out of the acts of omissions of Contractor, or any subcontractors employed by or under the direct control of the Contractor, and their respective officers, agents and employees in the performance of the Work in accordance with this Agreement, and agrees to pay all damages, costs and expenses, including attorneys' fees, arising in connection therewith. Such obligation shall not apply when the liability arises solely from the negligence of Owner, its employees or agents. Such obligation shall also be limited, in a case involving or alleging joint negligence between Contractor and Owner, its employees or agents, to Contractor's actual percentage of comparative negligence, if any, found by the trier of fact in a cause of action brought against Contractor arising out of the performance of the Work or alleged negligence in accordance with this Agreement. This indemnity obligation of Contractor shall not be applicable to the extent that Owner is provided coverage as an additional insured under Contractor's

> insurance policies as specified in Exhibit A to this Contract, or to the extent that the right of indemnity is prohibited or limited by the laws of the state in which the Work is located.
>
> Certificate of Insurance. Owner is an additional insured thereunder as respects liability arising out of or from the Work performed by Contractor for Owner.
>
> Endorsement. It is agreed that additional insureds are covered under this policy as required by written contract, but only with respect to liabilities arising out of their operations performed by or for the named insured, but excluding any negligent acts committed by such additional insureds.

(5) Listing as additional insured without indemnity agreement.

[49] There are important considerations to be remembered when evaluating relying solely upon listing a party as an additional insured without a backup contractual indemnity agreement. The policy may be canceled with or without the additional insured's knowledge; the insurer may become insolvent; and policy limits and exclusions from coverage may limit the protection.

(6) Cause of action against insurance purchaser for failure to list other party as additional insured.

[50] A party that breaches its contractual obligation to list the other party as an additional insured is liable for all damages suffered as a result by the non-listed party, including attorney's fees incurred by the non-listed party in defending a claim that would have fallen within the protection of the additional insured endorsement. The court in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d. 119 (Tex. App.-Houston [14th Dist.] 2000, *writ denied*) found that Coastal failed to list Crown as an additional insured on Coastal's Trucker's Policy and was liable to Crown for the $4,816,549.28 judgment obtained by an employee of Coastal that was injured on Crown's premises. Crown was sued by Coastal's employee, who was injured when the truck he was refueling on Crown's premises caught fire due to Crown's negligent maintenance of Crown's gas refueling equipment. The insurance provision did not refer to an additional insured designation but provided for Coastal to obtain insurance protecting Crown.

Provision:

> Carrier agrees to purchase at Carrier's cost ... Comprehensive General Liability Insurance including care, custody and control coverage and liability assumed with $1,000,000 limit per occurrence for bodily injury and property damage combined.

(7) Additional insured's "*other insurance*".

[51] The use of additional insured status as a risk transfer device is aimed at procuring insurance protection under someone else's policy rather than having to rely upon on one's own policy. Additional insured Indemnified Persons must verify that any "***other insurance***" coverage to which they have access will not interfere with payment by the Indemnifying Person's policy on a primary and non-contributory basis. This is the interplay of the Indemnifying Person's CGL policy with the additional insured's own CGL policy. Assuming both the Indemnifying Person's CGL policy and the additional insured/Indemnified Person's policies are standard from policies, then both will declare themselves to be **primary** insurance **unless** some modification is effected to eliminate this dual coverage. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969); *Texas Employers Ins. v. Underwriting Members*, 836 F.Supp. 398, 404 (S. D. Tex. 1993).

Note that endorsing the Indemnifying Person's policy to provide that it is primary does not solve the problem. In fact, most CGL policies already provide that they are primary in virtually all cases in which the additional insured would bring a claim on that CGL policy. The standard ISO form policy also provides for **proration** when other insurance is available to the additional insured. *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). Without more, in such cases the additional insured's desire to have the named insured's policy respond prior to the additional insured's own policy is thwarted.

The following are common means employed to avoid the protected party's own policy contributing to the loss covered to the extent of the additional insurance coverage afforded on the protecting party's policy:

(1) Endorse the protected party's policy to be primary. The above stated approach of endorsing the protecting party's CGL policy to state that it is primary with respect to other insurance maintained by the additional insured (as noted above most standard CGL policies state they are primary).

(2) Endorse the protected party's policy to be primary and noncontributory. In addition to requiring that the protecting party's insurance be endorsed to state that it is primary, also requiring that the protecting party's policy be endorsed to state that it is "noncontributory" (an example of this approach is to endorse the protecting party's policy with an endorsement reading "Coverage as provided by this endorsement shall apply on a primary and noncontributory basis with any other insurance available to the insured named above.") The meaning of the word "**noncontributory**" in this insurance context is not intuitive. "Noncontributory" does not mean that the coverage afforded by protecting party's CGL policy will not contribute to cover the additional insured's liability, but it means that the protecting party's CGL carrier will not seek contribution from any other "applicable" insurance (e.g., the additional insured's own CGL policy). What is being said is that the protecting party's CGL coverage is primary but contributory–it will respond on a primary basis to pay a covered claim, but will seek contribution from any other insurance structured to respond on a similar primary basis. Unfortunately, the phrase "primary and noncontributory" does not have an established legal meaning in many jurisdictions. Reliance on this approach opens the protected party to litigation with the protect party's carrier as to what was meant by this endorsement. A protecting party's carrier may balk at endorsing its named insured's policy to be "primary and noncontributory" due to concerns not that it is waiving contribution from the protected party's CGL policy but that it might be inadvertently be eliminating contribution by other carriers that have issued additional insurance coverage to additional insured on the protecting party's policy (for example, a general contractor with additional insured status

under multiple subcontractors' policies or a building owner that is an additional insured under each of its tenants' policies).

(3) Endorse the protected party's policy to be excess. The third approach is for the protected party (the additional insured) to have its own carrier endorse the protected party's CGL policy to state that coverage under the protected party's policy is excess to coverage available to the protected party as an additional insured on another person's policy.

In April 1997 ISO revised its "other insurance" clause in its standard CGL policy form to do just that. ISO add in Paragraph 4b(2) an exception to the declared primary coverage in Paragraph 4a for additional insurance coverage of the named insured. Thus, ISO revised its standard policy to provide that in a case where the protected party has both its own CGL policy and is an additional insured on the protecting party's CGL policy, then the protected party's CGL insurance states that its coverage is excess to the coverage available to through being covered under the additional insured endorsement on the protecting party's insurance.

4. Other Insurance

a.

b. Excess Insurance

This insurance is excess over: ...

(2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured *by attachment of an endorsement*.

Note, however, the 1997 language does not apply where additional insured status is not obtained by an endorsement to the protecting party's CGL policy. This provision is not triggered if the additional insured is automatically an additional insured on another insured's CGL policy. In such cases, it is still necessary to endorse the additional insured's own policy to make it excess over a protecting party's policy in order to avoid both policies being primary and co-contributing. This should be an easy sell to the protected party's carrier as the result is to make its policy excess coverage.

Also remember the protected party's policy may not contain the 1997 language. If this is the case then the protected party's policy should be endorsed to make it excess over all other coverage available to the protected party in order to achieve the elimination of overlapping coverage and contribution.

Alert: the following are traps to be avoided by the protected party:

(1) Do not assume that the protecting party's insurance contains standard wording. It might not contain the standard wording that the policy affords primary coverage over other insurance available to the additional insured. In such case reliance on the 1997 ISO language or other endorsement to the additional insured's own policy to state that it is excess over other coverage available to the additional insured may be misplaced. Some policies maintained by protecting party's provide that its coverage of the additional insured is not primary but on an excess basis. In such case, endorsing the protecting party's policy to provide that it is excess coverage creates a case where both policies declare them to be excess.

Also, if the protected party's own insurance does not provide (e.g., the pre-1997 ISO policies) for an exception to its contributing with all other policies available to the protected party, nonstandard language in the protecting party's to the effect that it provides excess coverage to an additional insured in cases where the additional insured has available insurance will result in the protected party's insurance being primary and the protecting party's coverage of the protected party as an additional insured being excess. If this is the situation, then the protecting party should insist on the protecting party's policy being endorsed to provide that it affords primary and noncontributory coverage with respect to the additional insured's own policy coverage.

(2) Do not assume that the protecting party's additional insured endorsement does not have a provision in it stating that the additional insured's coverage is on excess or contributory basis. Even though the protecting party's policy may have standard language to the effect that coverage for insureds is primary and noncontributory for other insurance coverage available to the insured, the additional insured endorsement may have overriding language.

The protected party should require in the contract with the protected party that the additional insured coverage to be provided to the protected party will be on a primary, noncontributory basis. Failure of the protecting party to provide such coverage will be a breach of this insurance covenant. Note, some CGL policies provide that they automatically provide primary coverage when required by the contract between the parties (a "**primary-when-required**" provision). For example the following is a "primary-when-required" provision contained in some CGL policies:

The insurance provided to the additional insured is excess over any other insurance naming the additional insured as an insured, whether primary, excess, contingent, or on any other basis; unless you have agreed in a written contract that such coverage will apply on a primary basis.

(3) Do not forget that umbrella insurance is not primary insurance and that to avoid the protected party's insurance becoming contributing with umbrella coverage or becoming primary to the umbrella policy some additional action is required. In order to ensure that the protected party's own CGL policy is excess and noncontributory to the protecting party's umbrella policy, the protected party should consider (a) having its own CGL policy endorsed to provide that it is not only excess to other primary coverage available to it as an additional insured but also excess over umbrella insurance provided by the protecting party (excess over any insurance available to it as an additional insured, whether primary, excess, contingent, or on any other basis") or (b) strking from the "other insurance" provision in the protected party's CGL policy the word "primary" from the 4b(2) exception to primary coverage of the protected party's own policy, or (c) having the protecting party's umbrella insurance endorsed to state that it afford primary and noncontributory coverage to the additional insured.

(8) Persons listed in endorsement as additional insureds.

[52] A disadvantage of being an "additional insured" as opposed to a "named insured" is that additional insured status does not provide coverage for the officers, directors, and partners of the additional insured, unless specifically listed individually as additional insureds. An additional insured provision covering "employees" of the additional insured does not cover a "volunteer" assisting the additional insured. *Sturgill v. Kubosh Ins. Co. of America*, __ S.W.2d __ (Tex. App.- -Houston [1st Dist.] Nov. 14, 1996) 1996 WL 665552.

(9) Additional insured's defense costs covered by named insured's insurance.

[53] Subject to scope of liability coverage set out in the Additional Insured Endorsement, the insured's CGL policy provides the additional insured with rights to a defense. The various duties of an insurer to its insured are illustrated by *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103 (Tex. App.--Texarkana 1994, *no writ*) where Monsanto was awarded $71,048,070.22 for actual and treble damages, prejudgment interest and attorney's fees arising out of the insurer's obtaining a financial interest in, and control of, litigation against its insured in an attempt to defeat the insured's reimbursement rights under an environmental impairment liability policy. INS. CODE Art. 21.21 § 16(a) (Vernon 1981) violation.

(10) Coverage of additional insured's risk of liability for "*personal injuries*".

[54] The ISO CGL Policy extends "personal injury" coverage to additional insureds.

(11) Coverage under named insured's umbrella policy.

[55] The wording of the excess liability or umbrella policy will need to be examined to determine if it covers an additional insured. Frequently, excess or umbrella policies provide automatic coverage of additional insureds as "insureds" under the primary policy.

[56] **(12) Providing both indemnity insurance and additional insured insurance.**

1st Tier Policy.

In *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co.*, 335 F.3d 429 (5th Cir. 2003), the Fifth Circuit dealt with the interplay between a protecting party's (Elite Masonry, the subcontractor's) CGL policy and a protected party's (Caddell, the general contractor's) CGL policy, where the protected party was also an additional insured on the protecting party's policy and the protecting party's CGL policy contained contractually assumed liability insurance supporting the protecting party's indemnity of the protected party's concurrent negligence. American Indemnity Lloyds (AIL), the CGL insurer of the protecting party and the insurer of the protected party by additional insured coverage of the indemnified protected party, sued Travelers, for contribution. The Fifth Circuit noted that, as AIL contended, the general rule is that where two liability policies issued by different carriers provide coverage to the same insured (Caddell), and both contain an "other" insurance clause that provides for sharing with other primary policies, the two insurers share the loss, and if one paid it and the other did not, the paying insurer may recover contribution form the non-paying insurer. AIL issued a CGL policy to Elite containing a blanket additional insured endorsement. Caddell was the named insured on a CGL policy issued by Travelers. Both the Travelers and AIL policies contained the ISO CG 0001 coverage form, pre-1998 version, which provided for sharing with other primary policies. AIL settled the suit brought by an injured employee of Elite that sued Caddell. AIL sought contribution from Travelers as both policies insured Caddell and both policies provided for sharing with other primary policies.

However, the court held there is an exception to this general rule where the insurer seeking contribution also insures the obligation of its named insured to indemnify the additional insured for the loss. *Id.* at 435-36, *citing Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002). *Also see* 15 COUCH ON INSURANCE (3rd Ed. 1999; Russ & Segalla) § 219.1 at 219-7 stating

> [a]n indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an "other insurance" clause in its policy.

To allow AIL to obtain contribution from Travelers would only result in Travelers, as Caddell's subrogee, asserting Caddell's right to be indemnified by Elite Masonry, and AIL. *Id.* at 433 citing in Footnote 4: *Rushing v. Int. Aviation Underwriters*, 604 S.W.2d 239, 243-44 (Tex. Civ. App.–Dallas 1980, *writ ref. n.r.e.*); *General Star Indem. Co. v. Vesta Fire Ins. Co.*, 173 F.3d 946, 949-50 (5th Cir. 1999); and *Sharp v. Johnson Bros. Co.*, 917 F.2d 885, 890 (5th Cir. 1990).

Texas courts have not yet been faced with determining whether an indemnity provision acts as an agreement establishing priorities between a protecting and protected parties' CGL insurance. It has been held in other jurisdictions that a protecting party's indemnity has the effect of making the additional insurance coverage primary without rights of contribution from the additional insured's other

insurance. *Rossmoor Sanitation Inc. v. Pylon Inc.*, 119 Cal. Rptr. 449, 13 Cal.3d 622, 532 P.2d 97 (Cal. 1975), *J. Walters Const. Inc. v. Gilman Paper Co.*, 620 So.2d 219 (Fla. App. 1993), and *Aetna Ins. Co. v. Fidelity & Cas. Co. of New York*, 483 F.2d 471 (5th Cir. 1973) discussed in *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co.*, 335 F.3d 429, 438 (5th Cir. 2003).

Umbrella Policy.

One court has found that the combination of indemnity, contractually assumed liability insurance and additional insurance coverage in an excess liability policy is an exception to the "other insurance" provision in the excess policy preventing contribution from the additional insured's other available primary insurance, even though the excess policy provided it was excess to unscheduled insurance of the additional insured. *Wal-Mart Stores Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588 (8th Cir. 2002).

3. Business auto policies.

a. BAP insurance.

[57] Business Auto Policies ("**BAP**") contain blanket additional insured provisions. This form is approved for use in Texas. This form can be used either to confirm the existence of a general "*any person*" additional insured provision in the BAP or specifically to designate persons to be additional insureds. This endorsement also contains a requirement that the insurer notify the additional insured in advance of insurance cancellation.

b. Waiver of subrogation.

[58] This form is approved for use in Texas. This form is an endorsement to the BAP waiving the insurer's subrogation rights. This form does not require the designation of the parties as to whom the insurer's rights are waived. Note that this form requires that the contract between the contractor and the owner contain a waiver of subrogation provision in order for the insurer to have waived its rights of subrogation. If the contract does not contain a contractual waiver of the insurer's right of subrogation, this form does not waive the insurer's right of subrogation.

C. Property Insurance.

1. Landlord and tenant relationship.

[59] In the landlord- tenant relationship, the tenant is liable to the landlord if the tenant negligently destroys the premises (*e.g.*, negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.--Galveston 1953, *no writ*).

Covenant Requiring Party to Insure its Own Property Not Equivalent to Waiver of Recovery or Waiver or Subrogation. Upon payment by the landlord's insurer for the insured property loss, the landlord's insurer is subrogated to the landlord's claim and can sue the tenant to recoup the insurance proceeds. In *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956), the Texas Supreme Court held that where the lease merely provided that the landlord agreed to carry fire and extended coverage insurance on the building, part of which was occupied by the landlord, there was no duty on the landlord to procure insurance for the benefit of the tenant, and the insurers were not precluded from obtaining a subrogated cause of action from payment of damages on account of fire caused by tenant's negligence. The court rejected the tenant's contention that the intent of the parties for including a covenant of the landlord to insure its own building (presumably the cost was built into the rent) was to exculpate the tenant for its own negligence.

Covenant Requiring Other Party to Pay for Insurance Equivalent to Waiver of Recovery by Insured Against Insurance Purchaser. In *Publix Theatres Corp. v. Powell*, 71 S.W.2d 237 (Tex. Comm.App. 1934), the lessee agreed in the lease to carry the fire insurance on the leased building, at the lessee's expense, naming the landlord as the insured. The insurer paid, but the landlord still sued the tenant for the loss. The supreme court declared that to permit the lessor to keep the insurance money and also to collect from the lessee would be a double recovery.

In *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142 (Tex. App.--Houston [1st Dist.] 1991, *writ denied*), the court of appeals refused to limit the waiver of subrogation contained in the lease to claims against the current tenant so as to permit the otherwise subrogated insurer to pursue the former tenant after assignment. First Tape, therefore, was able to retain the protection of the waiver of subrogation clause even after the lease was assigned.

Waivers of Subrogation or Waiver of Recovery? Waiver of recovery is the landlord or tenant waiving its rights or recovery for the acts of the other. Waiver of subrogation is the landlord or tenant or both waiving the right of its insurer to be subrogated to the landlord's or tenant's claim. While a waiver of recovery also is a waiver of subrogation (because the insurer has no rights left to which to be subrogated), a waiver of subrogation alone is not a waiver of recovery.

Valid Despite Negligence of Released Party. In Texas, waiver of recovery and waiver of subrogation clauses are valid. *See International Co. v. Medical-Professional Building of Corpus Christi*, 405 S.W.2d 867 (Tex. Civ. App.--Corpus Christi 1966, *writ ref'd n.r.e.*)-- lessee waived in advance any claims for damages caused by lessor's negligent failure to maintain boilers in portion of premises under landlord's control "to extent that lessee was compensated by insurance for such damages;" and *Williams v. Advanced Technology Ctr., Inc.*, 537 S.W.2d 531 (Tex. App.--Eastland 1976, *writ ref'd n.r.e.*)--subrogation suit brought against lessee by lessor's fire insurance carrier was barred by lessor's waiver of subrogation clause contained in lease, notwithstanding lessee's breach of the lease by permitting the leased premises to be used for an extra hazardous operation.

Conflicts - Return of Premises Covenant *vs.* Waiver of Recovery Provision. A lease may require the tenant at the termination of the lease to return the leased premises in its original condition except for "reasonable wear and tear and damage by casualty not occurring through the tenant's negligence". Such a clause is potentially in conflict with a waiver of subrogation clause.

2. Contractual waivers of subrogation.

a. Rationale.

[60] Many commercial property policies and inland marine policies include subrogation clauses that imply permission to grant pre-loss waiver. However, some forms may specifically deny the insured the right to waive subrogation. The ISO form expressly recognizes the right of the insured to waive subrogation. Since the landlord's primary interest is insuring the landlord's improvements, and the tenant's primary interest is in insuring the tenant's property, why make the other party liable for a risk that is already insured? Because both parties can be protected by insurance, neither is particularly interested in imposing liability on the other. The issue is how to allocate the risk of loss--or, more precisely, which party should pay the property insurance premiums.

Avoids Double Coverage. To require each party to carry coverage for negligently causing damage to another party's property forces the landlord and the tenant to insure both the landlord's and the tenant's property, which results in each insuring its own and the other party's property. To avoid this need for double coverage each party can agree to look to its own insurance carrier for property loss caused by the acts or omissions of the other party and waive rights of recovery and subrogation against each other. If both landlord and tenant are to be liable for the risk of negligently caused loss to the property of the other, then the landlord and every tenant in a multi-tenant project must not only be sure to have a policy for its own property but must be sure that their liability insurance is sufficient to cover the replacement cost of the entire building and all of tenants' property therein. A more sensible approach is to have the landlord take out a casualty policy and have the premium costs paid by the tenants in the building under an operating cost pass-through provision in the lease.

Allocates Risk to Property Insurer. A waiver of subrogation clause assures that the insurance carrier for the property owner pays for the property loss as opposed to the other party's (the negligent landlord's or tenant's, as the case may be) liability insurance carrier. *See* Hagan, *Using Waivers and Indemnities in Commercial Leases*, THE PRACTICAL REAL ESTATE LAWYER 11 (1993), also repeated at ALI- ABA'S PRACTICE CHECKLIST MANUAL FOR DRAFTING LEASES: Checklists, Forms, and Drafting Advice from *The Practical Lawyer* and *The Practical Real Estate Lawyer* 149 (1994), for the rationale that the appropriate allocation of risk is to require each party to insure its own property and waive recovery, and waive subrogation against the other for damages to each other's property due to the negligence of either party.

Usually Inadequate Liability Insurance to Cover Risk. Why is this the best approach? This question incorrectly assumes that there is adequate liability insurance to cover the loss. Many times there will be no liability insurance because the party self-insures. The more likely situation is that the liability insurance policy of the negligent party will have limits far short of the loss involved (for example, where a negligent employee of the tenant leaves the coffee pot on at night which results in a large office building burning down). In a large multi-tenant building, the loss could easily exceed the liability insurance coverage of a small tenant. Even if there is sufficient property loss coverage under the liability policy, there usually is a large deductible and dissipation of the time and energy in a contest between the insurance companies and the parties over the issue of who negligently caused the fire.

Risk Already Factored in to Property Insurance Premium. Also, more importantly, is the fact that claims against property insurance are much less likely to result in higher premiums or loss of coverage than claims against the liability insurance. The property insurance carrier has more than likely already calculated its premium based on the assumption that it will not be able to recoup its costs via subrogation against a negligent tenant.

b. Scope of insurer's claims waived.

[61] Care should be taken in drafting the scope of the waiver of subrogation. A waiver of subrogation as to "the premises" does not include the tenant's furniture, equipment, machinery, goods or supplies which the tenant might bring on to the premises. *See International Medical Sales, Inc. v.* Prudential *Ins. Co. of America*, 690 S.W.2d 84 (Tex. Civ. App.--Dallas 1985, *no writ*).

c. Waiver limited to insured risks or claims waived?

[62] Should the waiver extend to specified risks or only to the extent of the proceeds actually recovered from the insurer? If the waiver is only as to the insurance proceeds, then the parties are exposed for the deductible or losses in excess of the other party's insurance coverage.

d. Verification of effect of waivers on insurance coverage and cost of insurance coverage.

[63] Before the parties agree to waivers of recovery or subrogation, they should verify that their respective insurance policies will not be voided due to the waiver. Also, the parties should determine, in advance, if the waivers will impact the cost of coverage. Confirmation of endorsement reflecting contractual indemnity, waiver of subrogation and additional insured/loss payee should be verified as a condition of extending the waivers.

3. Builder's risk - risk of loss allocation.

1. AIA construction documents.

[64] **(1) AIA's insurance allocation.**

(2) AIA's waiver of subrogation.

[65] Waivers of subrogation in the AIA system are designed to shift to the owner and its property insurance carrier the risk of loss to the project during construction. Such provisions are a valid risk allocation for the following reasons: (1) They avoid disruption and disputes between the parties involved in the construction project; (2) They allow the parties to identify and allocate the risks associated with the project; and (3) They allow one party to contract to provide the property insurance for all risks associated with the project for all parties. Under the AIA documents, the owner is responsible for obtaining the type and amounts of property coverage. The form of waiver of subrogation contained in the AIA documents is a "**waiver of recovery**" between the parties (*e.g.*, the owner and the contractor in Paragraph 11.3.7 to the **AIA A201 General Conditions of the Contract for Construction**), but also is a waiver of

recovery by the parties against "any of their subcontractors, sub-subcontractors, agents and employees" and requires that these third parties similarly provide a waiver of recovery against all such parties to the project.

The waiver of subrogation contained in the AIA A201 waives recovery between the parties to the extent covered by property insurance applicable to the Work. This provision does not expressly address loss within the deductible, loss above the amount of property insurance or uninsured losses.

This provision does not waive claims or subrogation as to liabilities arising out of bodily or personal injuries.

Since releases are construed by courts narrowly, the AIA waiver of subrogation language has been interpreted narrowly. In *SSDW Co. v. Brisk Waterproofing Co.*, 556 N.E.2d 1097 (N.Y. 1990), a New York court held that the waiver clause found in the AIA Construction Projects of a Limited Scope form applied only to damages occurring to areas within the limits of the "**work**" and not to the parts of the building outside the "work". *Also see Public Employees Mutual Ins. Co. v. Sellen Constr. Co.*, 740 P.2d 913 (Wash. App. 1987).

The **time period covered** by the "waiver" has been the subject of litigation. In *Automobile Ins. Co. v. United H.R.B.*, 876 S.W.2d 791 (Mo. App. 1994) an insurer of the owner brought a subrogation action against a contractor for property damaged caused by a fire that occurred five months after final payment had been made to the contractor and after the owner had exclusive control of the premises. The court found an ambiguity between the AIA provisions. The contractor took the position that it had an insurable interest in the property as long as the owner maintained the insurance policy in effect at the time the work was being done. The court, however, held that the waiver of subrogation provision no longer applied after final payment because the contractor no longer had an insurable interest in "the work."

Provision: Par. 11.3.7 AIA Document A201

> The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub- subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein.

(a) Fails fair notice test.

[66] The AIA Waiver of Subrogation provision is drafted as a waiver of recovery. However, this provision does **not** meet the fair notice requirements for releases articulated in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) in order to release liabilities arising out of the Released Party's negligence. The provision is neither conspicuous nor does it expressly refer to the negligence of the party being released.

(b) Fails express negligence test.

[67] The waiver should expressly cover loss due to the negligence of the other party. Although no Texas case has yet addressed whether the waiver of subrogation clause must meet the fair notice requirements, such clauses are exculpation clauses identical in effect as those held unenforceable for failing to meet the fair notice requirements, including the express negligence test, in *Dresser Industries, Inc. v. Page Petroleum, Inc.* 853 S.W.2d 505 (Tex. 1993). If so, then **most waiver of subrogation clauses in standard use are not enforceable as written**!

b. Waiver of subrogation.

[68] Builders risk insurance is written on a variety of forms. Therefore, it is important to determine whether the policy prohibits waiver of subrogation. The typical mutual waiver of subrogation in the owner-contractor construction contract form may invalidate the builder's risk coverage. The following is the **ISO Builders Risk Coverage Form CP 00 20 10 91** provision:

> 4. Waiver of Recovery Against Others
>
> You may not waive your rights to recover damages from an architect, engineer or building trades contractor or subcontractor with respect to the described premises except as agreed to in writing by us. This provision supersedes any provision to the contrary in the TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Commercial Property Conditions.

D. Insurance provisions.

1. Certificates.

[69] As a general rule, certificates of insurance do not govern the insurance policy's coverage. A certificate of insurance can be misleading in several ways and provide a false sense of security that the policy matches the certificate. Common problems with certificates of insurance include the possibility that certificates issued by agents contain errors and the possibility that the certificates fail to reveal special limitations applicable to the coverage afforded. Some courts take the position, based on language similar to the above-quoted language from the ACORD 25-S Form, that a certificate of insurance does not create coverage. See *S.L.A. Property Management v. Angelina Casualty Co.*, 856 F.2d 69 (8th Cir. 1988) (certificate listing a different person as the additional insured did not control over actual listing on policy endorsement); and *Mercado v. Mitchell*, 264 N.W.2d 532 (Wis. 1978). Being designated as a Certificate Holder does not make the certificate holder an insured, additional insured, or a third party beneficiary covered by the policies insurance. *Gracida v. Tagle*, 946 S.W.2d 504 (Tex. App.--Corpus Christi 1997, *no writ*).

Provision: Certificate does not create coverage.

This certificate does **not** amend, extend or alter coverage afforded by the policies below.

Provision: Certificate does not state prior claims on limits.

Preservation of Policy Provisions. 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 of the terms, exclusions and conditions of such policies. Limits as shown may have been reduced by paid claims.

Provision: No duty to notify certificate holder.

Cancellation. Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will **endeavor** to mail ___ day's written notice to the certificate holder named to the left **but failure** to mail such notice shall impose no obligation of liability of any kind upon the company, its agents or representatives.

2. Insurer ratings.

[70] BEST'S KEY RATING GUIDE published by A.M. Best Company assigns to insurance companies one of three types of rating opinions, a "*Best's Rating*," a "*Financial Performance Rating*" or a "*Qualified Rating.*" In addition Best's assigns all companies to "*Financial Size Categories*." More information concerning best's and its ratings is available at Best's website, http://www.ambest.com. Insurance specifications in real estate documents will typically specify both the minimum acceptable Best Rating and minimum Financial Size Category for the insurance issuer. For example, "the insurer will be at least a Best's A/VIII."

Secure Best's Ratings	
A++, A+	Superior
A, A-	Excellent
B++, B+	Very Good
Vulnerable Best's Ratings	
B, B-	Fair
C++, C+	Marginal
D	Poor
E	Under Regulatory Supervision
F	In Liquidation
S	Rating Suspended

Financial Size Category	**Policy Holders' Surplus ($ millions)**
I	Up to 1
II	1 to 2
III	2 to 5
IV	5 to 10
V	10 to 25
VI	25 to 50
VII	50 to 100
VII	100 to 250

IX	250 to 500
X	500 to 750
XI	750 to 1000
XII	1000 to 1250
XIII	1250 to 1500
XIV	1500 to 2000
XV	2000 or more

Rating modifiers of "u" for "Under Review or "q" for Qualified sometimes appear with a Best's Rating. For companies that are not rated are designated "NR-1" for "insufficient data" and "NR-2" for "insufficient size and/or operating experience."

3. Common errors and problems.

[71] **a. CGL policies.**

(1) "*Commercial*" vs. "*comprehensive*" general liability.

Probably the most common error encountered in specifying CGL coverage is the use of outdated descriptive language. The ***commercial general liability*** form replaced the ***comprehensive general liability*** form in all states during the mid 1980s. However, many contracts will specify "*comprehensive* general liability insurance." Along with that, these contracts will often require a number of endorsements that were needed on this old form, but which were incorporated into the commercial general liability form. These include the following:

- Contractual liability endorsement
- Broad form property damage endorsement
- Personal and advertising injury liability endorsement
- Host liquor liability endorsement

This terminology should be avoided in modern contracts.

(2) "*Combined single limit*".

Another antiquated term that is often used is "***combined single limit***." Versions of the CGL form used prior to 1986, and many other types of liability policies, had what were called "split limits." Split limits applied different limits to property damage liability and bodily injury liability. There was a "combined single limit endorsement" that could be added to the policy to make both bodily injury and property damage liability coverage subject to the same occurrence limit. This has been incorporated into the commercial liability form but without the terminology "combined single limit." Therefore, this term conveys to meaning and should generally be avoided.

Antiquated Terminology	Current Terminology
Comprehensive general liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability and umbrella liability insurance
Manufacturers and contractors ("M&C") liability insurance	Commercial general liability insurance
Owners, landlords and tenants ("OL&T") liability insurance	Commercial general liability insurance
Contractual liability insurance	Commercial general liability insurance
Public liability insurance	Commercial general liability insurance
Independent contractors (protective) coverage	Commercial general liability insurance
Additional named insured, named insured, coinsured	Insured status using ISO endorsement CG 20 XX or equivalent (Use CG 20 10 for construction contracts, CG 20 11 for premises leases, CG 20 28 for equipment leases.)
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Broad form comprehensive general liability endorsement	Commercial general liability insurance
Broad form property damage endorsement	Commercial general liability insurance
Combined single limit ("CSL")	Per-occurrence limit, general aggregate limit, and products-completed operations aggregate limit
Fire damage legal liability	Damage to premises rented to you.

(3) "*Named insured*" vs. "*additional insured*" vs. "*first named insured*".

General liability insurance such as that provided in the standard commercial general liability (CGL) coverage form developed by Insurance Services Office, Inc. (ISO), is the basic source of contractual liability coverage for most of the loss exposures created by hold harmless agreements. For this reason, it is also the policy with respect to which additional insured status is most often requested as a complement to or reinforcement of the hold harmless agreement. A number of standard endorsements have been developed by ISO to address the coverage requirements of various categories of additional insureds.

"***Named Insured***" is not a defined coverage term of the CGL policy, nor is it extensively used in CGL policy language. The term appears only in the following four sections of the policy.

1. The policy condition pertaining to premium audit (where the "***first Named Insured***") is given specific rights and duties with respect to the payment and reimbursement of policy premiums)

2. The policy condition pertaining to separation of insureds (in which it is stipulated that insurance applies "as if each Named Insured were the only Named Insured")

3. The provision that newly acquired organizations may qualify as named insureds, and that past partnerships, joint ventures, and limited liability companies must be listed as named insureds in order for coverage to apply to them.

4. The provision of notice of cancellation and nonrenewal to the "first Named Insured"

Named insureds frequently are referred to in the CGL policy, however, under the title "***you***," as explained in the policy's introductory language.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.

Therefore, a CGL named insured is a person or organization listed as such in the policy declarations or qualifying otherwise for that status (as in the case of a newly acquired organization.) When more than one named insured is listed in the declarations, the first of those listed entities acquires certain rights and duties as the "first Named Insured."

Other parties having insured (but not *named* insured) status under the CGL policy include partners in a named insured partnership, members of a named insured joint venture; executive officers, directors, stockholders, and –with certain exceptions–employees of a named insured corporation; the named insured's legal representative if the named insured dies; the named insured's real estate

manager; and *any entity added to the policy as an insured by endorsement*. All of these insureds have slightly different rights and duties from those conferred on the policy's named insureds.

Additional insureds have less stringent obligations with respect to reporting occurrences that might give rise to a claim under the policy. Certain CGL policy exclusions apply only to the named insured. For instance, the policy's property damage exclusion applies to damage to property owned by, rented by, occupied by, or loaned to the *named* insured ("you"), but it applies to damage to personal property in the care, custody, or control of "the insured." That is, it applies with respect to *each* insured's liability for personal property in that insured's care, custody, or control. The *named* insured's officers, directors, and employees qualify as insureds themselves, but not the officers, directors, or employees of additional insureds.

Aside from these differences, basic general liability coverage depends upon the language of the CGL insuring agreement and its references to "the insured." The language reads as follow:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

An entity named as an additional insured in an endorsement to the CGL policy is as much "the insured" in the context of this insuring agreement as is the named insured who purchased the policy.

Occasionally one party to a contract will require that it be added as an ***additional named*** insured to the liability policy of another contracting party. Such requests often have their origins in a time when named insured status (but not all categories of insured status) carried with it a right to be notified if the policy was going to be canceled. (Cancellation of an indemnitor's insurance is obviously a matter of vital concern to an indemnitee.) Standard CGL forms currently in use guarantee notice of cancellation only to "the first named insured" identified in the policy declarations, not to all named insureds. Therefore, the most commonly perceived advantage of named insured status under a general liability policy no longer exists.

CGL POLICY PROVISIONS
NAMED INSURED VERSUS INSURED

Named Insured	Insured	Policy Provisions
		Insuring Agreement
	✓	Pay on behalf of
		Exclusions
	✓	Intentional injury from the standpoint of
	✓	Obligation to pay damages by reason of contractual liability[1]
	✓	Liquor liability[2]
	✓	Obligations under workers compensation and other laws
	✓	Employers liability
	✓	Except for liability assumed under contract by[3]
✓	✓	Environmental pollution by
	✓	Watercraft, aircraft and autos[4]
	✓	Transportation of mobile equipment by auto of
✓		Property damage to owned, rented or occupied property of
✓		Property sold, given away or abandoned of
✓		Property loaned to
	✓	Personal property in care, custody of control of[5]
✓		That particular part of any real property being worked on by

✓		That particular part of property to be restored because of the work of
✓		Property damage to product of
✓		Property damage to work of
		Property damage to impaired property detailing with:
✓		a product of
✓		a delay or failure to perform a contract by
		Damages incurred for the:
✓		recall of products of
✓		work

[1]The exception to this exclusion is an "insured contract" as defined. However, part f. of "insured contract" specifically applies to contracts pertaining to the named insured's (your) business and under which the named insured (you) assumes the tort liability of another.
[2]The policy makes the exclusion applicable to any insured, but the exception to the exclusion only applies if the named insured (you) manufactures, sells, serves, etc. alcoholic beverages.
[3]The employers liability exclusion provides an exception for liability assumed by the *insured* under any contract or agreement. However, contractual liability coverage as provided by the policy in subpart f. is specifically limited to liability assumed by the *named insured* (you). See (2) above. This presents a possible ambiguity.
[4]Three of the five exceptions to this exclusion apply specifically to the named insured (you).
[5]The 1986 CGL policy excluded personal property in the named insured's (your) care, custody, or control.

Source: *The Additional Insured Book*, 4th ed., International Risk Management Institute, Inc., 2000

INSURED AND NAMED INSURED DIFFERENCES	
1. The named insured (NI) has more stringent occurrence reporting requirements.	5. The *first* NI is required to pay premium.
2. The NI's employees, executive officers, and directors are insureds.	6. The *first* NI receives any premium return.
3. Certain exclusions apply only to the NI (e.g., property damage).	7. The *first* NI may cancel the policy.
4. The NI must reimburse the amount of any deductible paid by the insurer.	8. The *first* NI receives cancellation notice.
Source: *The Additional Insured Book*, 4th ed., International Risk Management Institute, Inc., 2000	

Another feature of some requests for additional insured status is the stipulation that the indemnitor's policy, to which the indemnitee is being added as an insured, be modified to provide "***cross-liability***" coverage. Cross-liability refers to the loss exposure created when one insured under a policy sues another. Standard general liability policies in use today provide "cross-liability" coverage–without the need for any modification–by virtue of the "***separation of insureds***" condition. This condition of the policy states that coverage will apply "separately to each insured against whom claim is made or suit is brought." For this reason, it may be a legitimate precaution to include in contract language a stipulation that liability insurance as required by the contract provide cross-liability *coverage*, but not a demand for a cross-liability *endorsement*, which is unnecessary when the standard CGL form is being used.

[72] **b. Business auto policies.**

Antiquated Terminology	Current Terminology
Comprehensive auto liability insurance	Business auto coverage form
Additional insured or coinsured status (unless a vehicle lease)	Insured status
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO forms' separation of insureds clause
Combined single limit	Each accident limit

[73] **c. Workers compensation.**

The standard workers compensation and employers liability policy used in most states was substantially revised in 1984 and again to a lesser extent in 1992. As compared to the previous 1954 policy, these revisions included some slight changes in terminology and coverage approaches that should be reflected in contract insurance requirements. One of these was a change in the name from "workmen's compensation" to "***workers compensation***." Another more important change was the inclusion of "other states coverage" in the basic form and the elimination of the "broad form all states" endorsement, which was previously used to provide this coverage.

Antiquated Terminology	Current Terminology
Workmen's compensation insurance Borrowed servant endorsement All states coverage/broad form all states coverage In rem endorsement	Workers compensation and employers liaiblity insurance Alternate employer endorsement Other states coverage Maritime coverage endorsement

A very problematic requirement sometimes included in contracts is one for additional insured status. The workers compensation policy covers injuries to its insured's employees. If additional insured status were to be provided to another party, the policy would cover injuries to that party's employees, and the insurer would be entitled to a commensurate additional premium.

[74]

d. Property Insurance.

(1) No such designation as "*additional named insured*".

A problem that sometimes arises is a requirement of ***additional named insured status***. There are no advantages provided to a party who is not an owner of the property to be a named insured on the policy, and commercial property insurance underwriters have no endorsements in their forms portfolios to comply with such a contractual requirement. For most contracting situations, additional insured status, a loss payee clause, a lenders loss payable endorsement, or a mortgage clause is quite sufficient for protecting the contracting party's interest in the property.

(2) "*Fire and extended coverage*" is antiquated terminology.

Outdated terminology requiring that the policy provide "***fire and extended coverage***" is often used in contracts. "***Extended coverage***" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's basic causes of loss form. Since this endorsement is no longer used, a better approach to requiring this coverage would be to refer to the ISO basic causes of loss form.

(3) Correct terminology - "*causes of loss*" coverage: basic, broad and special.

AVOID OUTDATED AND MISLEADING PROPERTY INSURANCE TERMINOLOGY	
Antiquated Terminology	**Current Terminology**
Fire and extended coverage or extended coverage endorsement Additional named insured	Basic causes of loss form Additional insured, loss payee, or mortgagee clause.

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS	
Basic Causes of loss Form (CP 10 10) • Fire • Lightning • Explosion • Windstorm or hail • Smoke • Aircraft or vehicles • Riot or civil commotion • Vandalism • Sprinkler leakage • Sinkhole collapse • Volcanic action	**Broad Causes of Loss Form (CP 10 20)** Basic causes of loss form perils, plus: • Breakage of glass • Falling objects • Weight of snow, ice, or sleet • Water damage from leaking appliances • Collapse from specified causes **Special Causes of Loss Form (CP 10 30)** • All perils except as excluded • Collapse from specified causes

III. Releases.

[75] **Releases and Exculpation.** An example of a **"*release*"** is, "You are not liable ... " A release is an agreement in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved. *See Wallerstein v. Spirt*, 8 S.W.3d 774 (Tex. App.-Austin [3rd Dist.] 1999, *no writ*) - involving an indemnity by partners but not a release between partners. An example of an **"*exculpation*"** provision is, "I am not liable ... " An exculpatory provision is designed to exclude, as between the parties to a contract, certain designated duties, liabilities or costs due to the occurrence or non-occurrence of events. *See* Ikard, *Exculpatory Clauses and Their Effectiveness to Protect Drafters and Fiduciaries*, 18th ADVANCED ESTATE PLANNING AND PROBATE COURSE (STATE BAR OF TEXAS 1994); Annot., 49 A.L.R. 3d 321, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability* (1973); Annot., 30 A.L.R. 4th 971, *Applicability of Exculpatory Clause in Lease to Lessee's Damages Resulting From Defective Original Design or Construction* (1984); Annot., 8 A.L.R. 1393, *Validity, Construction and Effect of Agreement Exempting Operator of Amusement Facility from Liability for a Personal Injury or Death of Patron* (1966); Annot., 66 A.L.R. 4th 622, *Liability for Injury Incurred in Operation of Power Golf Cart* (1988); Annot., 88 A.L.R.3rd 1236 *Liability of Youth Camp, its Agents or Employees, or of Scouting Leader or Organization for Injury to Child Participant in Program* (1978); Annot., 73 A.L.R.4th 496, *Liability of Local Government Entity for Injury Resulting from Use of Outdoor Playground Equipment at Municipally Owned Park or Recreational Area* (1989). Springer, *Releases: An Added Measure of Protection from Liability*, 39 BAYLOR L.REV. 487 (1987); Smith, *Selected Topics in Lease Drafting: Indemnities, Waivers, Disclaimers and Remedies*, ADVANCED REAL ESTATE DRAFTING COURSE Q (STATE BAR OF TEXAS 1990).

A. Released persons.

1. Released persons - named specifically.

[76] In *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), the court held that a release discharges only those tortfeasors that it specifically names or otherwise specifically indemnifies. The Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) approved the *decisions* in *McMillen*, and in *Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. Civ. App.--San Antonio 1980, *writ ref'd n.r.e.*) and *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. Civ. App.-- Texarkana 1978, *no writ*) holding that the mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortious event is not in doubt.

Also see Angus Chemical Co. v. IMC Fertilizer, Inc., 939 S.W.2d 138 (Tex. 1997) where the court held that the release by an injured party of a tortfeasor does not release the tortfeasor's insurer; *Illinois Nat. Ins. Co. v. Pereez*, 794 S.W.2d 373 (Tex. App.--Corpus Christi 1990, *writ den'd*).

2. **"*Agents*" do not include "*contractors*"**.

[77] The release in *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.--Austin 1993, *writ granted*) releasing Quaker Oats and its "agents" was held not to *include* a drug testing laboratory that was hired by Quaker Oats to perform pre-employment drug screens. The court held that the lab was an independent contractor and was not covered by the employment application release form that released "Quaker Oats, its employees and its agents, from any liability based on the results of the drug screening." *See also Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508-09 (Tex. 1993); *Summers v. Skillern & Sons, Inc.*, 381 S.W.2d 352, 356 (Tex. Civ. App.--Waco 1964, *writ dism'd w.o.j.*); *but cf. Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 806 (Tex. 1992).

3. Third party beneficiaries.

[78] For example, in *Derr Constr. Co. v. City of Houston,* 846 S.W.2d 854 (Tex. App.--Houston [1st Dist.] 1992, *no writ*), the court held that a release/indemnity provision in a subcontract released the owner (the City of Houston) from liability for damages to the subcontractor's crane. The court held that the owner was a named third party beneficiary of the release in the subcontract. The court also held that the subcontractor's insurer could not assert any rights of subrogation to pursue the owner for the monies it had paid the subcontractor for damages to the crane. The provision in the subcontract reads as follows:

Provision:

> Subcontractor hereby assumes full responsibility and liability for the work to be performed hereunder, **and** hereby release, relinquishes and discharges **and** agrees to indemnify protect and save harmless Contractor, the City ... from all claims, demands and causes of action of every kind and character including the cost of defense thereof, for any injury to, including death of, person (**whether they be third person, contractor, or employees of either of the parties hereto**) and any loss of or damage to property (**whether the same be that either of the parties hereto or of third parties)** caused by or alleged to be caused, arising out of, or in connection with Subcontractor's work to be performed hereunder ... whether or not said claims, demands and causes of action in whole or in part are covered by insurance hereinbefore ... . (Court's emphasis in bold; author's emphasis underlined.)

Id. at 858. This case was decided after the court of appeals' decision in *Dresser Industries, Inc. v. Page Petroleum, Inc.* upholding the Houston Fishing Tool release provision, but before the supreme court's decision striking it down as not being conspicuous. The court did not address the conspicuousness of the provision in *Derr Construction*. Also, the court did not review the release in light of the express negligence test.

B. Released matters.

1. Negligence - fair notice and express negligence tests.

[79] In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the following provisions contained in work orders of Dresser and Houston Fishing Tools Company were examined by the Texas Supreme Court:

Dresser Provision:

> There are obviously many conditions in and about the well of which we can have no knowledge and over which we can have no control. Therefore, we (Dresser) accept this service order only on condition that we do not guarantee any particular result from services to be performed hereunder. Except where damage or injury caused by gross or willful negligence on our part, (Page) shall indemnify (Dresser) and hold (Dresser) free and harmless from all claims for personal injuries, including death and damage, including subsurface damage or injury to the well and damages attributable to pollution or contamination and cost of control and removal thereof, alleged to have been caused by our operations under this service order, including claims alleging that injuries or damages were caused by (Dresser's) negligence, whether such claims are made by (Page), were caused by (Dresser's) negligence, whether such claims are made by (Page), by (Page's) employees, or by third parties. (Emphasis added by author.)

Houston Fishing Tools Provision:

> (A) (Houston Fishing Tools) shall not be liable to (Page) on any theory of legal liability against which (Houston Fishing Tools) may legally contract for any injury or damage to persons ... or to property (whether subsurface or not, including reservoir loss) and any losses arising out of such damage where such damage is sustained in connection with, arising out of, or resulting from the service or material used in the service.
>
> (D) The theories of liability referred to in (paragraph (A) ... include, but are not limited to, breach of express or implied warranty and the sole or concurrent negligence of (Houston Fishing Tools). (Emphasis added by author.)

Page Petroleum drilled a well located in Colorado County to a depth of 11,000 feet and contracted with Dresser to conduct log tests. Houston Fishing Tools was called in to "fish" out Dresser's equipment that became stuck in the well bore. While Houston Fishing Tools was attempting to dislodge the equipment, it lost several thousand feet of wireline and drill pipe down the hole which could not be retrieved. Page attempted to clear the hole by performing a side procedure. This side procedure was not successful; therefore, Page plugged and abandoned the well and was forced to drill a new well. Page then brought suit against Dresser and Houston Fishing Tools alleging negligence and seeking compensation for damages to the original well. Both Dresser and Houston Fishing Tools defended the suit based on the contractual provisions recited above. The jury attributed liability 50% to Page, 40% to Houston Fishing Tools and 10% to Dresser. The court of appeals construed the Dresser provision as an "indemnity" and therefore could not exculpate Dresser from its own negligence. Since the Dresser provision was an indemnity, the court held that reference to Page indemnifying Dresser from claims by Page (*see* underlined language in Dresser provision) was clearly inadvertent and repugnant to the intent of the parties. Once the court of appeals determined the clause to be an indemnity, it found that as an indemnity it could not be an exculpation or release operating to extinguish a claim between the parties to a suit.

Conversely, the court of appeals found that the Houston Fishing Tools provision was a "release" which exculpated Houston Fishing Tools from liability to Page.

The supreme court held that compliance with the fair notice requirements is a question of law for the court, overruling *Goodyear Tire & Rubber Co. v. Jefferson Const. Co.*, 565 S.W.2d 916 (Tex. 1978). The supreme court then found that the Dresser and the Houston Fishing Tools provisions were both **not conspicuous as a matter of law**.

Indemnity, Releases, Exculpations: Effect the Same. Following the reasoning of the dissent in the court of appeals' decision, the supreme court found that, whether the provision was couched as an indemnity, a release or an exculpation provision, the effect was the same, to transfer the risk of liability for one's own negligence. The court stated its reasoning as follows:

> As Justice Vance stated in his dissenting opinion in the court of appeals, these agreements, whether labeled as indemnity agreements, releases, exculpatory agreements, or waivers, all operate to transfer risk. ... Although we recognized that most contractual provisions operate to transfer risk, these particular agreements are used to exculpate a party from the consequence of its own negligence. Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which apply to these types of agreements. The fair notice requirements include the express negligence doctrine and the conspicuous requirement. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990). ... the conspicuous requirement mandates "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 843 (Tex. 1972).
> ...
> [w]e can discern no reason to fail to afford the fair notice protections to a party entering into a release when the protections have been held to apply to indemnity agreements and both have the same effect. ... This is especially true because of the difficulty often inherent in distinguishing between these two similar provisions. *Id.* 508.

Adoption of UCC Standard. The supreme court in *Dresser Industries, Inc. v. Page Petroleum, Inc.* adopted the "conspicuous" standard set forth in § 1.201(10) of the Texas UCC applicable to contracts for the sale of goods in this case dealing with the sale of services. The court held that the UCC standard would be applicable both to indemnity and releases that relieve a party, in advance, of responsibility for its own negligence. Section 1.201(10) provides

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous."

TEX. BUS. COMM. CODE ANN. § 1.201(10) (Vernon 1994).

In both the Dresser and the Houston Fishing Tool contracts, the provisions are located on the back of a work order in a series of numbered paragraphs without headings or contrasting type. Furthermore, the contracts were found to be not so short that every term in the contracts must be considered conspicuous.

How "conspicuous" is conspicuous? *See* Greer and Collier, *The Conspicuous Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 SO. TEX. L. REV. 243 (1994). The supreme court in *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997), found that a release was **not** conspicuous when it was set in a type font too small to read even though the heading was in larger font (heading was in 4 point font **4 point font** and the terms of the release were in smaller font);the release was outlined in a box; the heading was all caps, in bold type and read **"RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMEN**T"; and above the signature line appeared the caption in all caps, bold-faced centered and underlined type the following statement "**I UNDERSTAND MOTORCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE.**" The court did not accept the argument that the release was conspicuous because of its small contrasting type. "Where a party is not able to know what the contract terms are because they are unreadable, as a matter of law the exculpatory clause will not be enforced."

In *In Re H. E. Butt Grocery Co.*, 17 S.W.3d 360 (Tex. App.-Houston [14th Dist.] 2000, *orig. proceeding*) the court of appeals determined that testimony from the injured employee to the effect that he was told not to read a waiver and release was inadmissible parole evidence. The court found that the following notice was unambiguous and supported the conclusion that the employee was aware of the agreement to arbitrate claims and releasing his common law right to sue H.E.B. as a non-subscriber to the state's workers compensation system. The court noted that the notice was in all caps and underlined.

Provision:

> ELECTION OF COMPREHENSIVE BENEFITS, RELEASE, WAIVER, INDEMNITY AND ARBITRATION AGREEMENT
>
> NOTICE: BY SIGNING THIS AGREEMENT, YOU AGREE TO RELEASE AND WAIVE CERTAIN RIGHTS TO SUE YOUR EMPLOYER, THE TRUST, THE TRUSTEE OF THE H. E. BUTT GROCERY COMPANY WELFARE BENEFIT TRUST, THE PLAN, AND THE PLAN ADMINISTRATOR IN EXCHANGE FOR THE AGREEMENT TO PROVIDE CERTAIN BENEFITS THROUGH THE TRUST. YOU AGREE TO INDEMNIFY YOUR EMPLOYER AND THE RELEASED PARTIES IN CERTAIN CIRCUMSTANCES AND YOU AGREE TO ARBITRATE ALL FUTURE DISPUTES. THIS AGREEMENT AFFECTS YOUR LEGAL RIGHTS! READ THIS AGREEMENT CAREFULLY AND MAKE SURE YOU UNDERSTAND IT BEFORE SIGNING IT!

To similar effect is the holding in *Lawrence v. CDB Serv.*, 1 S.W.3d 903 (Tex. App.-Amarillo [7th Dist.] 1999, *aff'd*) as to a waiver of the common law right to sue and election to participate in an employers that was in **bold** type in a 2 page election form.

Actual Notice. The court noted that the fair notice requirements are not applicable when the Indemnified Person (Released Person) establishes that the Indemnifying Person (Releasing Person) possesses actual notice or knowledge of the indemnity agreement, *citing generally Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990). *Dresser* at 508.

Express Negligence Requirement. For the same policy reasons that the supreme court in *Dresser* extended the conspicuous requirement to releases, it held that the companion express negligence doctrine also was to be applied to releases.

> ... we hold that the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and to releases in the circumstances before us; thus, we disapprove of the *Whitson* opinion. [referring to *Whitson v. Goodbodys, Inc.* , 773 S.W.2d 381, 383 (Tex. App.--Dallas 1989, *writ denied*)].

Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 509 (Tex. 1993); *Doe v. Smithkline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.--Austin 1993, *writ granted*).

The court of appeals in *Rickey v. Houston Health Club, Inc.*, 863 S.W.2d 148 (Tex. App.--Texarkana 1993, *writ granted*)--jogger alleged that indoor astroturf track not suitable as jogging track-- found the following release **failed** the express negligence test:

Provision:

> You agree that you are aware that you are engaging in physical exercise and the use of exercise equipment and club facilities which could cause injury to you. You are voluntarily participating in these activities and assume all risk of injury to you that might result. You hereby agree to waive any claims or rights you might otherwise have to sue the health club, its employees or agents for injury to you on account of these activities. You have carefully read this waiver and release and fully understand it is a release of liability. You further agree to release seller from any liability for loss or theft of personal property.

The court in *Polley v. Odom*, 957 S.W.2d 932 (Tex. App.-Waco 1997, *judgm't vacated*) held that the following "**risk of loss**" provision did not pass the express negligence test as it impliedly but did not expressly release the landlord from liability for its negligence.

Provision:

> Risk of Loss. Except where due to the willful neglect of Lessor all risk of loss to personal property or loss to business resulting from any cause whatsoever shall be born exclusively by Lessee.

2. Gross negligence.

[80] There is authority that pre-accident releases of gross negligence are not enforceable. 2006 WL 246520 Texas Moto-Plex, Inc. v. Phelps Texas Court of Appeals - Eastland (2/2006) citing Smith v. Golden Triangle Raceway, 708 S.W.2d 574, 576 (Tex. App.--Beaumont 1986, no writ) and citing as accord *Mem'l Med. Ctr. of East Texas v. Keszler, M.D.*, 943 S.W.2d 433 (Tex. 1997). The court in *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.--Beaumont 1986, *no writ*) **struck down** a portion of a release that released the "releasee" (the race track) from liability for its gross negligence. This is the position of the Restatement. RESTATEMENT OF CONTRACTS § 574 (1932). The court cited various decisions from other jurisdictions supporting this conclusion. The court upheld the release as to injuries due to the race track's negligence. The court found that this case did not involve an issue of unequal bargaining power. There is no public policy to protect a right to be a spectator on the infield of a race track. *Corpus Christi Speedway v. Morton*, 279 S.W.2d 903 (Tex. Civ. App.-- San Antonio 1955, *no writ*). The issue of whether a release can cover future gross negligence has not been yet been decided by the Texas Supreme Court. The Supreme Court in *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433 (Tex. 1997) upheld the "all claims" release as covering Keszler's claim for damages arising out of Memorial's alleged gross negligence by making a distinction for post-accident waivers of liability.

> The court of appeals held that such a release is against public policy. 931 S.W.2d at 63 (citing *Smith v. Golden Triangle Race*way, 708 S.W.2d 574, 576 (Tex. App.--Beaumont 1986, *no writ*)). However the court of appeals failed to distinguish a pre-accident waiver of liability from a post-injury release made in settlement of claims. In *Golden Triangle*, the issue was whether a pre-injury release could effectively dispense with a claim of gross negligence. *Id.* We have never held post-injury releases of gross negligence claims invalid. There is no logic in prohibiting people from settling existing claims. Significantly, such a rule would preclude settlement of many such claims. The court of appeals erred in holding that Keszler could not release his gross negligence claim against Memorial.

In *Franklin v. Marie Antoinette Condominium Owners Ass'n, Inc.*, No. B064293 Cal. App. Ct. 2nd App. Dist. (1993), a California appeals court held that a unit owner was not entitled to recover for water damage to her unit based upon an exculpatory clause in the condominium declaration. The clause barred the association from liability for property damage caused by a central plumbing leak unless the damage was caused by the gross negligence of the association or its directors. The unit owner sustained $74,000 in damages to her unit from water leaking into her unit through the HVAC vents. The court found that the exclusion from the exculpatory clause for "gross negligence" did not cover the omission of the association to prevent damage to the unit owner's unit. The court also held that enforcement of the clause was reasonable and fair to the condominium owners as a whole, since they had agreed to bear the risk of loss beyond what they could recover from the association's insurance policy.

3. Intentional torts.

[81] The court in *Sedona Contrg. v. Ford, Powell*, 995 S.W.2d 192 (Tex. App.-San Antonio 1999, *no writ*) noted that consent can constitute a defense for liability for an intentional tort, and thus reasoned that a waiver as to future intentional torts may be enforceable under certain circumstances. Ford, Powell recommended that a school district accept the bid of the second lowest bidder, Sedona was the lowest bidder. The bid documents contained the following waiver:

Provision:

> By submitting a bid, each bidder agrees to waive any claim it has or may have against the Owner [NEISD], the Architect/Engineer, and their respective employees, arising out of or in connection with the administration, evaluation, or recommendation of any bid; waiver of any requirements under the Bid Documents; or the Contract Documents; acceptance or rejection of any bids; and award of the Contract.

The court noted that it had previously found *Golden Triangle* to be too broad in its application of the RESTATEMENT (SECOND) OF TORTS. In *Smith v. Holley*, 827 S.W.2d 433, 438 (Tex. App.-San Antonio 1992, *writ denied*) the court was faced with the issue of whether a prospective employee could release a previous employer from liability resulting from the communication of information regarding their work history. In its analysis, the court recognized the holding of *Golden Triangle*, but concluded that its application to intentional conduct was too broad. The court in *Smith* stated, "that it is universally recognized that in the right circumstances one can consent to certain actions that otherwise would be intentional torts." In *Smith* the court held Holley effectively consented to the possibility of defamation by signing a release form authorizing the release of work history. The court also cited *Unocal Corp. v. Dickson Resources, Inc.*, 889 S.W.2d 604, 610 (Tex. App.-Houston [14th Dist.] 1994, *writ denied*) holding that waiver, concerning oil and gas information, to be effective which permitted for the general waiver of future intentional tort claims and extinguished plaintiff's right to sue.

Negligence" versus "Intentional Acts". "Negligence" does not include intentional acts. *Richker v. Georgandis*, 323 S.W.2d 90 (Tex. Civ. App.--Houston 1959, *writ ref'd n.r.e.*).

4. Unspecified or unknown matters.

[82] Since an exculpatory provision is drafted by the Released Party to release or carve out liabilities or contractual obligations from other expressed or implied duties, courts will strictly construe such provisions. Releases will be subject to the same rules of construction discussed above as to indemnity agreements. General categorical release clauses are narrowly construed. In *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984). *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199 (Tex. App.--San Antonio 1986, *writ ref'd n.r.e.*)--claims not clearly within subject matter of the release are not discharged, even if such claims existed at the time the release was executed. In *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991), the supreme court held that a release executed by a borrower in a settlement agreement releasing a bank "from any and all claims and causes of action ... directly or indirectly attributable to the described loan transaction" did not include the borrower's claim of tortious interference by the bank in the borrower's contract with a third party arising out of the borrower's sale of an asset as to which the bank erroneously asserted a security interest.

The court in *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433 (Tex. 1997) distinguished the release litigated in *Keszler* from the release litigated in *Victoria*. In *Keszler* Memorial and Keszler entered into a Compromise Settlement Agreement and a separate Release document concerning damage claims that Keszler asserted against Memorial due to Memorial's terminating staff privileges at the hospital. Keszler later sued the hospital for fraud, negligence, and gross negligence for injuries Keszler allegedly suffered due to exposure to ethylene dioxide, a toxic sterilizing agent the hospital used during his employment. The *Keszler* court found that the release language, releasing all as to "any other matter relating to [Keszler's] relations with [Memorial]", included "all" claims including claims of negligently caused injuries to Dr. Keszler. The court noted that the release in *Victoria* was limited to claims arising out of "the above described loan transaction", which loan transaction did not as it turned out include claims arising out of another loan transaction `with Victoria Bank & Trust. The court also upheld the release as being effective to release Keszler's claim for gross negligence.

Release of Unknown Claims. Release of future, unknown claims is permissible in Texas. *Sweeney v. Taco Bell, Inc.*, 824 S.W.2d 289, 292 (Tex. App.--Ft. Worth 1992, *writ denied*); *Pecorino v. Raymark Indus., Inc.*, 763 S.W.2d 561 (Tex. App.- -Beaumont 1988, *writ denied*)--release executed in settlement of claim by worker and wife against asbestos products manufacturers based on worker contracting asbestos released all claims, including those that might be discovered in the future, precluded subsequent action by worker's widow based on death of worker from mesothelioma.

IV. Condemnation.

A. Allocation in the event lease is silent.

[83] Texas follows the "***undivided fee***" or so-called "***unit rule***" in valuing property taken in condemnation. The condemned property is first valued as a *whole*, without consideration for how many parties own an interest in the property or the extent of their interest. The court determines the fair market value of the property. It is up to the parties to fight between themselves as to allocation of the award. If the lease is silent as to how the award is allocated between landlord and tenant, the judge or jury first determines the market value of the entire property as though it belonged to one person, then fact finder apportions market value as between lessee and owner of fee, with the value of the tenant's interest being first determined and then the balance is awarded to the landlord. *Urban Renewal Agency v. Trammell*, 407 S.W.2d 772, 774 (Tex. 1966). The residual value after deduction of the value of the tenant's interest is the landlord's "***leased fee***" value.

1. Value of tenant's interest.

a. Loss of tenant's "*leasehold advantage*".

[84] In the absence of a provision in the lease to the contrary, tenants are entitled to a portion of the condemnation award equal to their lost "***leasehold advantage***", if any. The value of a tenant's leasehold interest is either positive or negative. If there is a positive value it is referred to as a "leasehold advantage." The value of a tenant's leasehold interest is calculated as the present market value of the use and occupancy of the leasehold for the remainder of the lease term, plus the market value of the right to renew if such right exists, less the agreed rent the tenant must pay for the use and occupancy of the property, such values to be determined by the usual "willing seller-buyer rule." *Luby v. City of Dallas*, 396 S.W.2d 192, 199 (Tex. Civ. App.–Dallas 1965, writ ref'd n.r.e.); *Fort Worth Concrete Co. v. State of Texas*, 416 S.W.23d 518 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.). For example, if the tenant pays $1000/month rent, but the premises could be leased for $1200/month, there is a $200/month leasehold advantage being lost by tenant on

condemnation of its leased premises for which it is to be compensated out of the condemnation award. Texas courts are allowed flexibility in tailoring jury instructions defining what interests are compensable "leasehold advantage" of a tenant. *Urban Renewal Agency v. Trammell*, 407 S.W.2d 772, 777 (Tex. 1966) FN 2:

> We deem it preferable to allow the trial court with the benefit of counsel for all parties, to arrive at the definitions which best fit the particular case. Particular leasehold contracts and other circumstances in other cases may require particular treatment. Some of these problems are presented in 1 Orgel, Valuation Under Eminent Domain § 121 et seq. (2d ed. 1953).

See also, Purnell, *The Valuation* of the Leasehold Estate, SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON EMINENT DOMAIN 79, 92 (1959), Rayburn, TEXAS LAW OF CONDEMNATION 275 § 192(2) (1960).

b. No award allocated to tenant for its lost business or personal property.

[85] Texas common law presumes that a tenant's business is not taken in condemnation. The tenant is free to relocate. Thus, no award is given to the tenant due *to* the impact of the condemnation on the going concern value of the business so interrupted, its trade name, lost profits, or impact on its personal property. *Luby v. City of Dallas*, 396 S.W.2d 192, 199 (Tex. Civ. App.–Dallas 1965, writ ref'd n.r.e.); *Herndon v. Housing Authority of City of Dallas*, 261 S.W.2d 221, 223 (Tex. Civ. App.–Dallas 19 , writ ref'd).

c. Moving expenses are compensable.

[86] A separate award is made to the tenant for reasonable moving expenses to move its personal property up to 50 miles, but not to exceed the value of the personal property itself. TEX. PROP. CODE § 21.043.

d. Tenant's improvements and fixtures are compensable.

[87] The value of the improvements, including fixtures taken or damaged, by condemnation is part of the undivided fee being condemned and is not separately valued in condemnation. Because fixtures are, by definition, part of realty, the condemning authority must pay compensation for the taking of, or damage or destruction to, fixtures caused by a condemnation.

In a lease silent as to allocation of a condemnation award, tenant paid for leasehold improvements, which as a practical matter can not be removed at the end of the lease term, are to be valued as part of the tenant's compensable interest. The leasehold and the improvements should be viewed as a unit and not as separate items. In *Board of Regents of University of Texas System v Fischer,* a court of appeals approved the following special issue and jury instruction:

> 'What do you find from a preponderance of the evidence to have been the reasonable cash market value, if any, on or about December 11, 1970 (the date of taking), in Travis County, Texas, of the leasehold interest of the lessees ... in the leased land and improvements, considering only the lessees' exclusive right to use, occupy, and enjoy this land and improvements for the remainder of the primary term of their lease, less their obligation to pay rent and comply with the other terms and conditions of their lease?
>
> 'You are further instructed that by the term 'reasonable cash market value,' as used in the following Special Issue, is meant the cash price that the exclusive right to use, occupy, and enjoy the land and improvements, plus the reasonable fair market value on December 11, 1970 (the date of taking), of the improvements ..., for the length of time through July 31, 1973 (the scheduled end of the lease term) would bring if offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying, the lessees' interest.' .... In connection with the foregoing Special Issue, you are instructed that by the term 'leasehold interest of the lessees,' is meant the exclusive right to use, occupy, and enjoy the possession of the land and improvements described in the ... lease, for the term through July 31, 1973, taking into account such improvements which had been attached to the land by the lessees in order to enable them to properly carry on the trade or business contemplated by the lease agreement, which improvements were capable of being removed at the end of the lease period without material or permanent injury to the land, but only to the extent that such improvements added to or enhanced the value of such land, and only considering such improvements for which it would be economically impractical to the lessees to remove on or about December 11, 1970.'

In a case perhaps limited to its unique facts, the United States Supreme Court has found that a tenant's compensable interest for its leasehold improvements was to be measured by what a willing buyer would have paid for the improvements, which had a useful life exceeding the remainder of the lease term and which were subject to removal by the tenant, taking into account the possibility that the lease might be renewed as well as that it might not. In *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973) the court held

> By failing to value the improvements in place over their useful life-taking into account the possibility that the lease might be renewed as well as the possibility that it might not-the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements. If there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated for the buyer's ability to use the improvements in place over their useful life. As judge Friendly wrote for the Court of Appeals for the Second Circuit (*United States v. Certain Property, Borough of Manhattan*, 388 F.2d 596, 601-02
>
> 'Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons-avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords. Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive

> him of the opportunity to deal with the landlord or a new tenant-the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term.'

In a lease silent as to allocation of a condemnation award, a tenant's improvements or "fixtures," which the lease provides are removable by the tenant or must be removed at the end of the lease term, are not to be valued a part of the tenant's compensable interest, if the tenant elects to leave them in place as opposed to removing them prior to condemnation. In *Fort Worth Concrete Co. v. State of Texas*, 416 S.W.23d 518 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.) the court held the tenant was not entitled to compensation for the loss of a concrete brick building constructed by tenant during the term of its lease where the lease obligated the tenant to remove improvements at the end of the lease term and at time of the condemnation the tenant was under a month-to-month tenancy, and at condemnation tenant did not remove the building. The condemning authority is entitled to step into the shoes of the landlord on condemnation of the landlord's fee title and is not obligated to incur an expense that for which the landlord would not otherwise be liable, removal of the improvements as provided in the lease.

2. Interplay with other lease clauses.

a. Permitted use clauses.

[88] The condemning authority must pay the market value of the property being condemned valued at its "highest and best use." *E.g.*, *State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992). Absent a provision in the lease addressing allocation of the award on condemnation, even though a tenant's use is limited to a use that is not determined by the court to be the highest and best use of the property, a tenant might successfully argue that the landlord should not get the all of the balance of the award after deducting the value of the tenant's leasehold as its use is limited by the lease's permitted use clause. There is some authority for the proposition that the tenant should share in the balance of the award as without tenant's participation during the lease term, landlord can not realize the property's true value. *Irv-Ceil Realty Corp. V. State*, 43 A.D.2d 775, 350 N.Y.S2d 784 (1973). Whether such leverage is a compensable interest is not yet determined in Texas.

b. Renewal clauses.

[89] In valuing a tenant's interest in condemnation, where the lease is silent as to allocation of the condemnation award, the law presumes that a tenant would exercise its renewal option absent a condemnation and in a case where a tenant has a leasehold advantage, it is measured over the term of the lease as if renewed and under the terms applicable to the existing and renewal term. *Fort Worth Concrete Co. v. State of Texas*, 416 S.W.23d 518 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.); and *Luby v. City of Dallas*, 396 S.W.2d 192, 199 (Tex. Civ. App.–Dallas 1965, writ ref'd n.r.e.).

3. Effect on tenant's obligation to pay rent.

a. Rent abated on total condemnation.

[90] Tenant is relieved of its obligation to pay rent when its entire leased premises are condemned. *Elliott v. Joseph*, 351 S.W.2d 879, 881 (Tex. 1961).

b. Rent not proportionally abated if portion of leased premises taken.

[91] If the lease is silent as to partial abatement of rent on a partial condemnation of the leased premises, rent is not abated or partially abated, and tenant's remedy is to look to an apportionment of the damages assessed against the condemning authority based on the reduced value of his lease. *Elliott v. Joseph*, 351 S.W.2d 879, 881-882 (Tex. 1961). The following example of this allocation is given in Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What and How to Get What Your Client Wants*, ADVANCED REAL ESTATE DRAFTING COURSE 1, 3 (2003):

A partial condemnation may reduce a leasehold advantage to a leasehold disadvantage. The tenant holds a leasehold disadvantage when it has a continuing contract rental obligation that exceeds the market rent for the use and occupancy of the "after" condemnation premises. For example, if the market value of the use and occupancy of the premises before the condemnation was $100 per year and the tenant was only required to pay $90 per year under the lese, the tenant held a $10 leasehold advantage. If the condemning entity takes that advantage, it must compensate the tenant for the present value of that $10 for each of the years remaining in the lease, including the tenant's option to renew if there is one. But, if the condemning entity only takes part of the leased premises such that the tenant is still able to use the premises, but the market rent for the use and occupancy of the lease has been reduced to $70 per year, the condemning entity must compensate the tenant for the loss of its leasehold advantage plus the disadvantage that results from the condemnation. In total, under this scenario, the tenant is entitled to the present value of $30 per year ($10 for the loss of its leasehold advantage + $20 for the resulting leasehold disadvantage) for the duration of the lease.

B. Contractual allocation of award - lurking issues.

The parties are free to contractually apportion a future condemnation award contractually taking into account such future factors as they can contemplate.

1. Value of tenant's use is less than highest and best use at time of taking.

[92] As opposed to being silent in the lease as to how the parties will allocate the award, the lease can address allocation of a portion of the award to either landlord or tenant in a case where tenant's use at the time of condemnation is not the compensable highest and best use of the property at the time of taking. For example tenant may be using the property for warehouse uses, but at the time of taking the highest and best use of the property, as a hotel, yields an award greater than the actual use taken. Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What and How to Get What Your Client Wants*, ADVANCED REAL ESTATE DRAFTING COURSE 1, 4 (2003):

In that situation, is the tenant's leasehold advantage calculated as leasehold advantage of a comparable warehouse property, or is the leasehold advantage valued with regard to the market ground rent for hotel tracts? The parties could agree on the answer in the lease, and avoid litigating the question, by providing that the tenant's leasehold interest is to be calculated using a market rental based either on the use the tenant is making of the premises or the highest and best use of the property as of the date of condemnation.

2. Value of tenant's improvements not fully amortized at time of taking.

[93] The parties can address in the lease the risk that at the time of condemnation the tenant will not have fully amortized the value of its tenant's leasehold improvement and apply a formula to how to compensate tenant for the ensuing loss on taking of the premises. Adler and Shelton, *Condemnation Issues in Leasing: Who Gets What and How to Get What Your Client Wants*, ADVANCED REAL ESTATE DRAFTING COURSE 1, 4 (2003):

> The parties could provide for the appropriation of any future condemnation proceeds without reference to the leasehold value by providing that one party will receive the first $100,000 (for example) of any condemnation award and the other party will receive the remainder. The parties could also provide that the stipulated amount is reduced or increased by a certain percentage every year. This method has the potential problem that the party who is to receive the first $100,000 will want to settle with the condemning entity for that amount and the other party will not want to settle with the condemning entity agrees to a settlement far in excess of $100,000. ... The parties should provide whether the stipulated recovery for a tenant includes fixtures. In one case, where the lease provided that the landlord would receive the first $325,000 of any condemnation award and the tenant would receive the rest, the court did not permit the landlord to receive compensation for the tenant's fixtures in order to reach the stipulated amount because the court held the tenant had a paramount right to receive compensation for the appropriation of its fixtures, if under the terms of the lease, it reserved ownership and title to the fixtures. [Citing Zitter, Annot., Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property, 22 A.L.R.5th 327 § 60[a] (1994), citing *Arlow v. Vinyl Masters, Inc.*, 402 N.Y.S.2d 649 (2d App. Dep't 1978).

C. Contractual allocation of award to landlord.

Landlord's incorporate into leases several types of clauses to assure that they receive the entire award or to minimize tenant's claim. The clauses include a provision that the lease terminates on condemnation, a disclaimer by the tenant of any right to an award for its taken interest other than the contractually agreed method of compensating it for its loss, and an assignment by tenant of all rights and awards to the landlord other than as expressly set forth in the allocation provision in the lease.

1. "*Termination-on-condemnation*" clauses.

a. Automatic termination clauses.

[94] A "termination-on-condemnation" clauses provides that the tenant's interest terminates on condemnation of the leased premises (called an "**automatic termination clause**"). The result of such a clause is to terminate the tenant's interest in the property and extinguish any right of the tenant to share in the condemnation award. Landlord is able as a result to negotiate with the condemning authority without including the tenant in the negotiations. Zitter, Annot., Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property, 22 A.L.R.5th 327 (1994), *§ 8 fn 28.*

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946). *Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. V. Nikodem*, 859 S.W.2d 775, 780 (Mo. Ct. App. 1993):

> The issue is not *whether* the leasehold is terminated upon condemnation but *why*. Absent a termination clause, the lease terminates because the leasehold interest terminates and expires by the terms of the very contract that created the interest in the first place. Thus, no property interest of the lessee has been appropriated for public use and there is no *constitutional* right to compensation.

The automatic termination clause in *Petty* reads as follows:

> If the whole or any part of the demised premises shall be taken by Federal, State, county, city or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder, the tem hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

(1) Termination of lease without termination of all rights leaves tenant right to some compensation.

The following clause in *Evans Prescription Pharmacy, Inc. V. County of Ector*, 535 S.W.2d 704, 706 (Tex. Civ. App.–El Paso 1976, writ ref'd) was construed as not terminating tenant's interest to the extent of tenant's right to compensation for its improvements taken by condemnation and its removal expenses:

> Should the leased property be taken by right of eminent domain the lease shall be terminated.

Due to the perceived harshness of an automatic termination clause, courts will strictly construe such a clause to save the tenant's interest. *Norman's, Inc. V. Wise*, 747 S.W.2d 475, 477 (Tex. App.–Beaumont 1988, writ den'd).

(2) No termination on partial condemnation if clause fails to specify termination of lease on partial condemnation.

Sometimes strict construction against termination of tenant's interest can work to the tenant's disadvantage. In *Norman's, Inc. V. Wise*, 747 S.W.2d 475, 476 (Tex. App.–Beaumont 1988, writ den'd), the tenant's leasehold estate was held not to have been terminated by condemnation of a portion of the landlord's property (condemnation of a portion of the parking area) where the automatic termination clause was determined by the court to apply only in a case of the condemnation of the entire premises and not to a condemnation of "any part thereof." The *Wise* automatic termination clause reads as follows:

> It is specially understood and agreed by and between Lessor and lessee that in the event the demised premises are condemned for public use by any governmental agency, or other entity with the power of condemnation, this lease shall cease and terminate and be of no further force and effect, and Lessee shall have no claim or demand of any kind or character in and to any award made to Lessor by reason of such condemnation.

(3) Failure to state lease terminated as of condemnation.

A lease was held not to terminate automatically on condemnation where it terminated the "further liabilities" of the parties. 26 AM. JUR. 2d *Eminent Domain* § 264 (1996) citing *Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794 (Wis. Ct. App. 1980).

[95]

b. Optional termination clause.

(1) Optional termination on taking of entire premises.

Some clauses are drafted to provide an option in tenant or landlord to terminate the lease on condemnation of the leased premises or on condemnation of a part of the leased premises. The following clause was construed by the court to automatically terminate the lease as the court held the optional termination on condemnation of the entire leased premises was superfluous, no option applied :

> If the whole or any substantial part of the demised premises should be taken for any public or quasi-public use under any governmental law, ordinance or regulation, or by right of eminent domain, or should be sold to the condemning authority under threat of condemnation, this Lease shall, at the option of the landlord, terminate and the rent shall be abated during the unexpired portion of this lease effective when the physical taking of said premises shall occur.

J. R. Sillern, Inc. V. IeVison, 591 S.W.2d 598, 599-600 (Tex. Civ. App.–Eastland 1979, writ ref'd n.r.e.).

The tenant in *Texaco Refining and Marketing, Inc. V. Crown Plaza Group*, 845 S.W.2d 340, 342 (Tex. App.–Houston [1st Dist.] 1992, no writ) elected under the following optional termination clause not to exercise its option to terminate the lease due to a condemnation of a portion of the leased premises that effectively destroyed the use of the balance for its intended use as it wanted to preserve its right to be share in the award for the portion its leasehold interest taken in condemnation:

If, during the term of this lease, a part only of said premises be taken for public use under right of eminent domain, and if the remainder, in the opinion of the lessee, is not suitable for its purpose, lessee, at its option, may cancel and terminate its lease, but if it shall not elect so to do, the monthly rental thereafter to be paid shall be reduced by an amount which bears the same ratio to that herein provided for as the area taken bears to the total area prior to such taking.

The court found that the condemnation took the tenant's interest thereby terminating the lease but tenant's interest was compensable and the award for partial condemnation was to be allocated between landlord and tenant. The court rejected landlord's complaint that the tenant acted in bad faith by continuing to renew the lease even though it was too small to be used as a gas station because, the court said, the tenant had no duty to the landlord to act in good faith in an ordinary commercial contract where there was no special relationship between the parties.

(2) Optional termination on partial taking.

A court upheld tenant's termination of the lease on condemnation of a portion of the common areas of ancillary to the leased premises under the following clause in *Weingarten Realty Investors v. Albertsons, Inc.*, 66 F.Supp. 2d 825, 840 (S. D. Tex. 1999), *aff'd* 234 F.3d 28:

Whether or not any portion of the Leased premises may be taken by ...[an authority having the power of eminent domain], either Landlord or Tenant may nevertheless elect to terminate this Lease or to continue this Lease in effect in the event any portion of any building in the portion of the Shopping Center outline in green, or more than twenty five percent (25%) of the Common Area of the Shopping Center be taken by such authority.

c. Mixed termination clause.

[96]

A "**mixed termination clause**" provides for automatic termination in the event the entire leased premises is condemned and optional termination on a partial condemnation.

In *Houghton v. Wholesale Electronic Supply*, 435 S.W.2d 216, 218 (Tex. App.–Waco 1968, writ ref'd n.r.e.) the court upheld tenant's election not to terminate the lease due to a condemnation of a portion of the leased premises that destroyed tenant's use of the leased premises for the purpose for which it was originally leased, but was still useful to tenant for other purposes (condemning authority condemned tenant's building and 55% of the land but tenant wished to use the remaining 45% of the land not condemned to provide a driveway and access to adjoining land owned by tenant):

Condemnation clause:

> If the entire premises be taken in Eminent Domain proceedings, then the lease shall terminate. If any taking of less than all the leased premises ... is such as substantially to impair the usefulness of the property for lessee's purposes, then at the lessee's option the lease may be terminated; but if the taking of a portion which does not substantially impair for lessee's purposes, that is, any portion of the area, as for example, any condemnation for a sidewalk or alley way, or if any condemnation of the right to use for some definite or indefinite period shall occur, it is agreed .. that the rights, duties and obligations of the parties hereto under the terms of this instrument shall be modified fairly with such abatement of rent as shall fairly and equitable adjust the rights, duties and obligations of the parties hereto under the changed circumstances...

Use clause:

> Lessee is specifically permitted and authorized to use the leased premises for the storage, handling, shipping, display and sale of goods and merchandise (including without limitation electrical and electronic items) and related activities and for any other lawful business purpose or purposes. Provided, however, anything sated to the contrary notwithstanding, it is expressly understood and agreed that the leased premises shall not be used for any purpose which tends to substantially reduce the value of the leased property.

A different result would have occurred had the condemnation clause provided the lease terminated if tenant's use of the remainder of the premises after condemnation be the same use as the tenant was making of it at the time of the condemnation or to be one of a specified list of uses.

2. Coupling with a clause for rent abatement or rent adjustment.

[97] A corollary provision to the "termination-on-condemnation" clause is to couple it with a "**rent abatement clause**" or a "**partial rent adjustment clause**" or "**partial rent abatement clause**". If the lease provides for termination of the lease on condemnation in order to negate tenant sharing in the condemnation award, the lease should be drafted so as also to address the effect on tenant's obligation to pay rent. Why would a tenant give up its right to share in the condemnation award if it is not released from its obligation to pay rent? If the lease is silent as to rent abatement, the tenant may seek to participate in the condemnation award and argue that its right to share was not terminated as its obligation to pay rent was not expressly abated.

a. Total taking and total rent abatement.

An example of a coupled clause is

> The term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) fn 4; see also *J. R. Sillern, Inc. V. leVison*, 591 S.W.2d 598, 599-600 (Tex. Civ. App.–Eastland 1979, writ ref'd n.r.e.).

b. Partial taking and partial rent adjustment.

See *County of McLennan v. Shinault*, 302 S.W.2d 728, 730-732 (Tex. Civ. App.–Waco 1957, no writ) addressing the following clause in a case where the lease provided that in the event of partial condemnation, if the remaining portion was still capable of being used for the tenant's purpose, the lease would remain effect

> with a reduction in the rental price proportionate to the decreased utility to the land remaining.

See *Texaco Refining and Marketing, Inc. V. Crown Plaza Group*, 845 S.W.2d 340, 342 (Tex. App.–Houston [1st Dist.] 1992, no writ) where the lease provided that in the event of partial condemnation, the tenant held the option to terminate, but the tenant did not exercise its option,

> but if it shall not elect so to do, the monthly rental thereafter to be paid shall be reduced by an amount which bears the same ratio to that herein provided for as the area taken bears to the total area prior to such taking.

Also see *Houghton v. Wholesale Electronic Supply*, 435 S.W.2d 216, 218 (Tex. App.–Waco 1968, writ ref'd n.r.e.) where the lease provided for partial rent adjustment as follows:

> it is agreed .. that the rights, duties and obligations of the parties hereto under the terms of this instrument shall be modified fairly with such abatement of rent as shall fairly and equitable adjust the rights, duties and obligations of the parties hereto under the changed circumstances...

The court held that where the condemnation left only 45% of the leased premises remaining, the rent was reduced 45% from its original $450 per month to $202.68 per month and no appraisal was required.

3. Coupled with a disclaimer of claim or assignment of claim clause.

[98] Some termination on condemnation clauses are drafted to additionally include an assignment by tenant to landlord of tenant's rights, if any, to an award as a means of back stopping the termination clause. This is a wise tactic given court's disposition to strictly construe the language of a termination clause as not terminating a tenant's interest. Additionally, an assignment clause may broaden interpretation of a termination clause to also pickup and assign to landlord tenant's right to compensation for its improvements.

See the following lease language:

United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 599, 90 L.Ed. 729 (1946) fn 4:

> the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor...

County of McLennan v. Shinault, 302 S.W.2d 728, 730-732 (Tex. Civ. App.–Waco 1957, no writ)

> Lessee shall have no right or interest in the proceeds received by the lessor in such condemnation, for such property taken...

4. "*Ownership-of-improvements-at-end-of-lease-term*" clauses.

[99] A termination of lease clause and an assignment of tenant's interest clause which is silent as to the tenant's right to compensation out of the condemnation award for its tenant improvements has been interpreted as only depriving the tenant of compensation for the value of the leasehold and not as depriving the tenant of compensation for its improvements. 26 AM. JUR. 2d *Eminent Domain* § 265 (1996). The court in *Evans* Prescription *Pharmacy, Inc. V. County of Ector*, 535 S.W.2d 704, 705 (Tex. Civ. App.–El Paso 1976, writ ref'd) held that the tenant could recover for its fixtures and improvements even though it was not entitled to recover for its leasehold interest (as noted in the discussion above, the lease contained a bare bones termination on condemnation clause merely stating that the lease terminated on condemnation and did not address compensation for tenant's improvements.).

The following are approaches to address compensation for tenant improvements as opposed to remaining silent on the issue.

a. Allocation of set amount to tenant or establishing a method of valuation of tenant's interest in tenant's improvements.

b. Assign rights to improvement value to landlord.

Ervay, Inc. V. Wood, 373 S.W.2d 380, 382 (Tex. Civ. App.–Dallas 1963, writ ref'd n. r. e):

> It is expressly understood and agreed that any and all damage and payment awarded or collected for such taking of the property for any public purpose shall belong to and be the property of the Lessor, whether such damage be awarded as compensation for diminution in value to the leasehold or to the fee fo the premises herein leased and Less shall assert no right or claim to any damage as the result of any such taking.

c. Permit removal of improvements at end of lease term due to condemnation.

The termination clause in *Ervay, Inc. V. Wood*, 373 S.W.2d 380, 382 (Tex. Civ. App.–Dallas 1963, writ ref'd n. r. e) went on to state that tenant was entitled to remove its improvements from the leased premises in the event of condemnation. Also see *Fort Worth Concrete Co.*, 416 S.W.2d 518, 520, 522-523 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.).

d. State landlord owns leasehold improvements at end of lease term.

If the lease provides that landlord owns tenant's leasehold improvements at the end of the lease and contains a termination on condemnation clause, then tenant has no compensable interest for its improvements on condemnation, even if it owns the improvements during the lease term.

e. Better to recognize tenant's right to improvement value as opposed to being silent.

County of McLennan v. Shinault, 302 S.W.2d 728, 730-732 (Tex. Civ. App.–Waco 1957, no writ), the court held that tenant was bound to the measure of damages awarded in the condemnation proceeding, because the lease clause addressed such matter:

> no right or interest in the proceeds received by the lessor in such condemnation, for such property taken ... However, in the event any of the demised premises shall be taken as hereinabove mentioned and proceeds received for the removal of improvements thereon, or damages to such improvements, then and in that event such amount or amounts received as damages or for the removal of property shall belong to the lessee and paid directly to him.