

# SPECIAL REPORT

## PROPERTY AND CASUALTY PITFALLS FOR REAL ESTATE ATTORNEYS

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This Special Report was written by Daniel P. Hale, J.D., CPCU, ARM, CRM, LIC, AIC, AIS, API of Marsh & McLennan Agency LLC. Mr. Dan Hale can be contacted at 734-525-2429 or dhale@mma-mi.com. More Special Reports are available at [www.mma-mi.com](http://www.mma-mi.com).

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### OBJECTIVES:

This outline covers some of the major issues related to insurance and risk management for attorneys and their clients. The following is an overview of the issues that will be discussed.

- I. Independent insurance agent duties and obligations
- II. Insurance carrier strength, performance and trends
- III. Policy terms, conditions and “gotchas”
- IV. Certificates of insurance
- V. Contractual risk transfer: Insurance and risk of loss provisions within leases and license agreements

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### OBJECTIVE 1: INSURANCE AGENT DUTIES AND OBLIGATIONS

#### 1. Agents generally have no duty to advise the insured

**GENERALLY, INDEPENDENT INSURANCE AGENTS HAVE  
NO DUTY TO ADVISE THEIR CLIENTS OF ANYTHING.**

The general rule is that the agent has no duty to advise of the adequacy of a policy's coverage. The exception is where the agent has a so-called special relationship with the insured. *Harts v Farmers Ins Exch*, 461 Mich 1, 597 NW2d 47 (1999).

## **Special Relationship Test**

A special relationship between the agent and the insured may be found where:

1. The agent misrepresented the nature or extent of coverage offered or provided;
2. An ambiguous request that requires clarification is made by the policyholder;
3. An inquiry is made by the policyholder, and though the agent need not, he or she gives advice that is inaccurate; or
4. The agent assumes an additional duty by express agreement with a promise to the insured.

**INSURANCE AGENTS ARE MERE ORDER-TAKERS.**

***Order takers are for fast food...not complex insurance policies.***

### **2. Agent of the insured, not agent of the insurer**

In *Mayer v Auto-Owners Ins Co*, 127 Mich App 23, 338 NW2d 407 (1983), the court held that an independent insurance agent or insurance broker is ordinarily the agent of the insured, not the insurer.

Statements made to or by an independent agent are not binding on the insurance company.

Examples:

- An insured's notice of a claim to their insurance agent does not constitute notice to the insurance company.
- An insurance agent's statement that an insured is "fully covered" is not binding on the insurance company.
- An insurance agent's written representations such as certificates of insurance are not binding on the insurance company.

### **3. Michigan does not recognize the doctrine of reasonable expectations**

Michigan has rejected the doctrine of reasonable expectations. Courts are to enforce the agreement as written absent some highly unusual

circumstance, such as a contract in violation of law or public policy. *Wilkie v Auto-Owners Ins Co* 469 Mich 41, 664 NW2d 776 (2003)

The doctrine of reasonable expectations states that the objectively reasonable expectation of applicants and intended beneficiaries regarding the terms of an insurance contracts will be honored even though the plain language of the policy provisions would have negated those expectations.

#### **4. Policies are interpreted solely on their plain language**

Insurance policies are subject to the same contract construction principles that apply to any other species of contract. Unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. In ascertaining the meaning of a contract, courts give to the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. *Rory v Continental Ins Co* 473 Mich 457, 491, 703 NW2d 23, 43 (2005)

Statements made outside the context of the policy are generally not considered when interpreting the intent of an insurance policy. This includes statements made by the underwriter, claims adjusters, appraisers, or insurance agents.

#### **5. Insured has a duty to read and understand the policy**

Policyholders have an affirmative duty to read and understand their policy and ask questions if necessary. *Zaremba Equipment, Inc v Harco National Insurance Co*, 280 Mich App 16, 761 NW2d 151 (2008)

- Zaremba was insured with Harco for 17 years.
- Fire destroyed the commercial building occupied by Zaremba.
- Building was insured for \$525,000 but had a replacement cost of \$1,192,000.
- Agent had previously told Zaremba that they were “fully insured.”
- Insured sued the insurance company and the insurance agent.
- The Court of Appeals dismissed the case and held that Zaremba had a duty to read and understand their policy even if they had a special relationship with their agent.

In *Zaremba*, the insured had not read a renewal policy that had not yet been issued at the time of the loss, although the policyholder had received a written quotation. One of its negligence claims was based on the allegation that the agent had failed to procure the requested coverage or to advise the insured on the scope of coverage provided under the renewal policy.

The court concluded that the scope of coverage could have been easily ascertained if the insured had read the materials in its possession. Therefore, the jury should have been instructed and allowed to determine whether the insured's failure to read the materials provided was a proximate cause of the damages.

However, the court limited the application of the "failure to read" comparative negligence instruction in also holding that the failure to read the insurance documents does not constitute a basis for a finding of comparative negligence when the insured's claim is that the agent was negligent in setting adequate coverage limits.

**SEE OUR SPECIAL REPORT**  
"Court of Appeals to policyholders: Read your policies"

**Conclusion 1:** Choose your agent wisely and develop a special relationship.

**OBJECTIVE 2: INSURANCE CARRIER STRENGTH AND RATINGS**

Typical lease language regarding carrier qualifications:

**"ALL INSURANCE CARRIERS SHALL HAVE A RATING OF A- OR BETTER AND A FINANCIAL SIZE OF CATEGORY IX OR GREATER BY BEST'S KEY RATING GUIDE."**

## Understanding Best's Financial Strength Ratings

A Best's FSR can be assigned to an insurance company on an interactive or non-interactive basis. In both cases, the rating scale and descriptors are:

Secure	Vulnerable
A++, A+ (Superior)	B, B- (Fair)
A, A- (Excellent)	C++, C+ (Marginal)
B++, B+ (Good)	C, C- (Weak)
	D (Poor)
	E (Under Regulatory Supervision)
	F (In Liquidation)
	S (Suspended)

## Financial Size Category

Class	Adj. PHS (\$ Millions)	Class	Adj. PHS (\$ Millions)
I	Less than 1	IX	250 to 500
II	1 to 2	X	500 to 750
III	2 to 5	XI	750 to 1,000
IV	5 to 10	XII	1,000 to 1,250
V	10 to 25	XIII	1,250 to 1,500
VI	25 to 50	XIV	1,500 to 2,000
VII	50 to 100	XV	2,000 or greater
VIII	100 to 250		

Ratings are available for free at [www.ambest.com](http://www.ambest.com)

## Admitted vs Non-admitted Carriers (The Surplus Lines Issue)

An admitted carrier is one that follows guidelines set forth by the state, and is therefore licensed in the state or country in which the insured's exposure is located. Of course, these guidelines vary from state to state, and some are more stringent than others. The obligation to follow state regulations and submit rates to a state's department of insurance limits the flexibility of the insurer. If an admitted carrier becomes insolvent, the state guarantee fund steps in to pay out claims and premium remuneration where applicable.

It is a common misconception that “non-admitted” is synonymous with “non-licensed.” In reality, non-admitted carriers do not have rates filed with the state and therefore are not as highly regulated, but this also means they are not protected by state funds. Because of this, they are sometimes able to offer better rates because these carriers can base their price on specific exposures. Further, certain complex risks require the use of non-admitted carriers because the conventional insurance marketplace fails to provide adequate coverage. However, in the case of insolvency, the state will not pay the carrier’s outstanding claims and premium remuneration.

Michigan law requires that this language appear in red on any coverage document involving a non-admitted carrier.

**THIS INSURANCE HAS BEEN PLACED  
WITH AN INSURER THAT IS NOT  
LICENSED BY THE STATE OF MICHIGAN.**

**IN CASE OF INSOLVENCY, PAYMENT OF  
CLAIMS MAY NOT BE GUARANTEED.**

**OBJECTIVE 3: POLICY TYPES, TERMS, CONDITIONS, COVERAGE  
GAPS AND “GOTCHAS”**

The following are some of the main policy types that you should consider when drafting insurance requirements under a lease agreement.

- Property
- Liability
- Excess/Umbrella Liability
- Workers’ Compensation
- Employers Liability
- Auto Liability
- Liquor
- Windstorm
- Flood
- Earthquake
- Environmental

The primary object of any insurance company is to earn dividends for its shareholders.

Policies are drafted in such a way that the insurance carrier is only obligated to pay for known exposures for which the insurance company has received a premium. All policies include exclusions and other limitations which have the effect of reducing or eliminating coverage for certain types of losses.

The following are some of the major policy provisions that insurance companies will often include in order to reduce or eliminate coverage. In many cases, these provisions can be negotiated prior to the loss.

## **1. Coinsurance**

The insured is agreeing to become a co-insurer of the property.

The insured is promising that the insurance limits that they selected are 100% accurate and would cover the cost to rebuild the property. The insurance company will test your limits after a loss.

Example: Assume Zaremba had an 80% co-insurance provision and suffered a \$100,000 loss. The insurance company tests the limits after the loss by conducting an appraisal and determines that the actual replacement cost was \$1,192,000. Since \$525,000 was not at least 80% of the \$1,192,000, the insured is penalized in proportion to the amount they were underinsured. ( $\$525,000 / \$1,192,000 = 44\%$ ). The most that the insurance company would pay for a \$100,000 loss is \$44,000.

The solution is to negotiate agreed value coverage. This means that the insurance company will test your values before the loss and will waive their right to contest the values later.

**SEE OUR SPECIAL REPORT**  
"100 Gotchas"

## **2. Failure to Offer Blanket Limits**

Rather than individual limits at each location, the policy should be written with one blanket limit which can be used at any location.

### **3. Margin Clause**

The insurance company offers a combined blanket limit of coverage but caps the maximum payout for any one location at 125% of the insurance limit selected for that location.

### **4. Protective Safeguards**

The insurance company will deny all coverage for a loss if the protective system did not operate adequately at the time of a loss.

### **5. Vacancy Limitations**

The insurance company will reduce or deny coverage if the building was not sufficiently occupied at the time of a loss. (usually at least 31% occupied)

### **6. Vacancy**

#### **a. Description Of Terms**

(1)As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a)When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b)When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct customary operations.



(2) Buildings under construction or renovation are not considered vacant.

### **b. Vacancy Provisions**

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following, even if they are Covered Causes of Loss:

- |  |                     |
|--|---------------------|
| (a) Vandalism  | (d) Water damage    |
| (b) Sprinkler leakage, unless you have protected the system against freezing | (e) Theft           |
| (c) Building glass breakage  | (f) Attempted theft |

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

*Randall Johnson v State Farm Fire & Cas Co*, 2008 WL 4724322 (Mich App 2008)

- State Farm issued a policy for Plaintiff's rental home.
- Vandals set the home on fire.
- State Farm successfully denied all coverage because the policy excluded vandalism losses where the home was vacant for more than 30 days prior to the loss.

### **6. Misrepresentation in the Application or Claim**

Allows the insurance company to deny all coverage and declare the policy void *ab initio*.

### **A. CONCEALMENT, MISREPRESENTATION OR FRAUD**

This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

- 1) This Coverage Part;
- 2) The Covered Property;
- 3) Your interest in the Covered Property; or
- 4) A claim under this Coverage Part.

## **7. Inaccurate or Omitted Names**

### **SEE OUR SPECIAL REPORT:**

“Missing Or Inaccurately Listed Entity Names On Property And Liability Insurance Policies – An Epidemic In The Insurance Industry”

## **8. Ordinance and Law Coverage Not Offered**

Pays for the increased cost of construction associated with changes in building codes.

EXAMPLE: Hurricane Wilma in 2005 – Building glass

## **9. Pollution Exclusion**

Most policies begin with the Total Pollution Exclusion.

Some carriers will allow an exception for:

- Smoke heat or fumes from a hostile fire
- Fumes from systems used to heat a building
- Fumes from systems used to humidify a building
- Air condition systems are not always included (Legionnaires Disease)

The pollution exclusion has been applied to the following claims:

- Family was injured from chemical fumes in a hotel pool
- Independent contractor injured from a discharge of a muriatic acid while repairing an iodizing line at a manufacturing plant

- Independent contractor was killed when steam discharged from within a furnace
- Food contamination
- Air quality

## **10. Bacteria and Fungi Exclusion**

- Food contamination
- Bacteria growing on plants

## **11. Cross Suits Exclusion**

No coverage applies if one insured sues another insured. This becomes an issue for claims brought by any entity that you have agreed to name as an additional insured. (This is sometimes the downside of being an additional insured)

## **12. Contractual Liability Exclusion or Limitation**

Contractual liability coverage is essential to most lease agreements due to the indemnification obligations between the parties. Most policies will cover liability that you have agreed to assume in a written contract. Some carriers will attempt to revise this language in order to exclude contractual liability for some types of business such as nurses, architects or other high risk operations.

## **13. Professional Services Exclusion**

If the insured is providing a professional service, the insurance company will generally try to eliminate coverage for certain classes of exposure arising out of that service.

Doctors, lawyers, consultants, etc.

EXAMPLE: Tonsorial Exclusion – “of or relating to barbering or a barber.”

## **14. Miscellaneous Exclusions Which Insurers Can Add to a Policy**

The following is a list of some of the exclusions which an insurance carrier can be added to their general liability insurance policies to carve back coverage. (21 is a bad number)

CG 01 80 10 93-Michigan  
Changes-Exclusion of Specific  
Accidents, Products, Work or  
Locations  
CG 21 00 07 98-Exclusion-All  
Hazards in Connection With  
Designated Premises  
CG 21 01 11 85-Exclusion-Athletic  
or Sports Participants  
CG 21 04 11 85-Exclusion-  
Products-Completed Operations  
Hazard  
CG 21 16 07 98-Exclusion-  
Designated Professional Services  
CG 21 17 07 98-Exclusion-  
Movement of Buildings or  
Structures  
CG 21 31 05 09-Limited  
Exclusion-Designated Operations  
Covered by a Consolidated (Wrap-  
Up) Insurance Program  
CG 21 32 05 09-Communicable  
Disease Exclusion  
CG 21 33 11 85-Exclusion-  
Designated Products  
CG 21 34 01 87-Exclusion-  
Designated Work  
CG 21 35 10 01-Exclusion-  
Coverage C-Medical Payments  
CG 21 36 03 05-Exclusion-New  
Entities  
CG 21 37 10 01-Exclusion-  
Employees & Volunteer Workers  
as Insureds  
CG 21 38 11 85-Exclusion-  
Personal & Advertising Injury  
CG 21 39 10 93-Contractual  
Liability Limitation

CG 21 41 11 85-Exclusion-  
Intercompany Product Suits  
CG 21 42 12 04-Exclusion-  
Explosion, Collapse &  
Underground Property Damage  
Hazard-Specified Operations  
CG 21 43 12 04-Exclusion-  
Explosion, Collapse &  
Underground Property Damage  
Hazard-Specified Operations  
Excepted  
CG 21 44 07 98-Limitation of  
Coverage to Designated Premises  
or Project  
CG 21 45 07 98-Exclusion-  
Damage to Premises Rented to  
You  
CG 21 46 07 98-Abuse or  
Molestation Exclusion  
CG 21 47 12 07-Employment-  
Related Practices Exclusion  
CG 21 49 09 99-Total Pollution  
Exclusion Endorsement  
CG 21 50 09 89-Amendment of  
Liquor Liability Exclusion  
CG 21 51 09 89-Amendment of  
Liquor Liability Exclusion  
CG 21 52 07 98-Exclusion-  
Financial Services  
CG 21 53 01 96-Exclusion-  
Designated Ongoing Operations  
CG 21 54 01 96-Exclusion-  
Designated Operations Covered  
by a Consolidated Insurance  
Program  
CG 21 55 09 99-Total Pollution  
Exclusion With a Hostile Fire  
Exception

CG 21 56 07 98-Exclusion-Funeral Services  
CG 21 57 07 98-Exclusion-Counseling Services  
CG 21 58 07 98-Exclusion-Professional Veterinarian Services  
CG 21 59 07 98-Exclusion-Diagnostic Testing Laboratories  
CG 21 60 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems  
CG 21 61 04 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems-Products/Completed Operations  
CG 21 62 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems  
CG 21 63 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems  
CG 21 64 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems  
CG 21 65 12 04-Total Pollution Exclusion With a Building Heating, Cooling & Dehumidifying Equipment Exception  
CG 21 66 12 04-Exclusion-Volunteer Workers  
CG 21 67 12 04-Fungi or Bacteria Exclusion  
CG 21 70 01 08-Cap on Losses From Certified Acts of Terrorism  
CG 21 71 06 08-Exclusion of Other Acts of Terrorism Committed Outside The United States; Cap on Losses From Certified Acts of Terrorism

CG 21 73 01 08-Exclusion of Certified Acts of Terrorism  
CG 21 75 06 08-Exclusion of Certified Acts of Terrorism & Exclusion of Other Acts of Terrorism Committed Outside The United States  
CG 21 76 01 08-Exclusion of Punitive Damages Related to a Certified Act of Terrorism  
CG 21 77 11 02-Exception to Terrorism Exclusion For Certified Acts of Terrorism; Cap on Losses From Certified Acts of Terrorism  
CG 21 78 11 02-Removal of Terrorism Exclusion; Cap on Losses From Certified Acts of Terrorism  
CG 21 80 01 08-Certified Acts of Terrorism Aggregate Limit; Cap on Losses From Certified Acts of Terrorism  
CG 21 82 01 08-Certified Acts of Terrorism Aggregate Limit; Cap on Losses From Certified Acts of Terrorism  
CG 21 84 01 08-Exclusion of Certified Acts of Nuclear, Biological or Chemical Acts of Terrorism; Cap on Losses From Certified Acts of Terrorism  
CG 21 86 12 04-Exclusion-Exterior Insulation & Finish Systems  
CG 21 87 01 07-Conditional Exclusion of Terrorism  
CG 21 88 01 07-Conditional Exclusion of Terrorism Involving Nuclear, Biological or Chemical Terrorism

CG 21 89 01 07-Conditional  
Limitation of Coverage For  
Terrorism on an Annual Aggregate  
Basis

CG 21 90 01 06-Exclusion of  
Terrorism

CG 21 91 01 06-Exclusion of  
Terrorism Involving Nuclear,  
Biological or Chemical Terrorism

CG 21 93 07 04-Extended  
Reporting Period For Terrorism  
Coverage

CG 21 96 03 05-Silica or Silica-  
Related Dust Exclusion

CG 21 97 12 07-Abuse or  
Molestation Exclusion-Specified  
Professional Services

CG 21 98 12 07-Total Pollution  
Exclusion Endorsement

CG 22 24 07 98-Exclusion-  
Inspection, Appraisal & Survey  
Companies

CG 22 27 11 85-Exclusion-Bodily  
Injury to Railroad Passengers

CG 22 29 11 85-Exclusion-  
Property Entrusted

CG 22 30 07 98-Exclusion-  
Corporal Punishment

CG 22 31 07 98-Exclusion-Riot,  
Civil Commotion or Mob Action

CG 22 32 07 98-Exclusion-  
Professional Services-Blood  
Banks

CG 22 33 07 98-Exclusion-Testing  
or Consulting Errors & Omissions

CG 22 34 07 98-Exclusion-  
Construction Management Errors  
& Omissions

CG 22 36 07 98-Exclusion-  
Products & Professional Services

CG 22 37 07 98-Exclusion-  
Products & Professional Services

CG 22 38 07 98-Exclusion-  
Fiduciary or Representative  
Liability of Financial Institutions

CG 22 39 07 98-Exclusion-Camps  
or Campgrounds

CG 22 40 01 96-Exclusion-  
Medical Payments to Children Day  
Care Centers

CG 22 41 10 01-Exclusion-  
Housing Projects Sites

CG 22 42 11 85-Existence or  
Maintenance of Streets, Roads,  
Highways or Bridges

CG 22 43 07 98-Exclusion-  
Engineers, Architects or Surveyors  
Professional Liability

CG 22 44 07 98-Exclusion-  
Services Furnished by Health  
Care Providers

CG 22 45 07 98-Exclusion-  
Specified Therapeutic or Cosmetic  
Services

CG 22 46 11 85-Exclusion-Rolling  
Stock-Railroad Construction

CG 22 47 11 85-Exclusion-Saline  
Substances Contamination

CG 22 48 03 05-Exclusion-  
Insurance & Related Operations

CG 22 50 11 88-Exclusion-Failure  
to Supply

CG 22 51 07 98-Exclusions-Law  
Enforcement Activities

CG 22 52 10 93-Exclusion-  
Medical Payments Coverage

CG 22 53 11 85-Exclusion-  
Laundry & Dry Cleaning Damage

CG 22 54 11 85-Exclusion-  
Logging & Lumbering Operations

CG 22 56 07 98-Exclusion-Injury to Volunteer Firefighters  
CG 22 57 01 96-Exclusion-Underground Resources & Equipment  
CG 22 58 11 85-Exclusion-Described Hazards  
CG 22 60 12 07-Limitation of Coverage-Real Estate Operations  
CG 22 75 07 98-Professional Liability Exclusion-Computer Software  
CG 22 76 07 98-Professional Liability Exclusion-Health or Exercise Clubs  
CG 22 77 07 98-Professional Liability Exclusion-Computer Data Processing  
CG 22 78 07 98-Hazardous Material Contractors  
CG 22 79 07 98-Exclusion-Contractors-Professional Liability  
CG 22 80 07 98-Limited Exclusion-Contractors-Professional Liability  
CG 22 81 01 96-Exclusion-Erroneous Delivery or Mixture  
CG 22 87 07 98-Exclusion-Adult Day Care Centers  
CG 22 88 07 98-Professional Liability Exclusion-Electronic Data Processing Services & Computer Consulting or Programming Services  
CG 22 90 07 98-Liability Exclusion-Spas or Personal Enhancement Facilities  
CG 22 91 07 98-Exclusion-Telecommunication Equipment or

Service Providers Errors & Omissions  
CG 22 94 10 01-Exclusion-Damage to Work by Subcontractors  
CG 22 95 10 01-Exclusion-Damage to Work by Subcontractors-Sites or Operations  
CG 22 96 10 01-Limited Exclusion-Personal & Advertising Injury-Lawyers  
CG 22 98 12 04-Exclusion-ISP & Internet Access Providers Errors & Omissions  
CG 22 99 12 04-Professional Liability Exclusion-Web-Site Designers  
CG 23 01 12 04-Exclusion-Real Estate Agents or Brokers Errors or Omissions  
CG 24 01 12 04-Non-Binding Arbitration  
CG 24 02 12 04-Binding Arbitration  
CG 29 51 12 07-Employment-Related Practices Exclusion  
CG 29 52 09 89-Amendment of Liquor Liability Exclusion  
CG 29 53 09 89-Amendment of Liquor Liability Exclusion-Exception For Scheduled Activities  
CG 29 78 11 94-Exclusion-Underground Storage Tank Incidents  
CG 29 91 10 93-Michigan Changes-Exclusion of Specific Accidents, Products, Work or Locations

CG 30 10 11 94-Michigan  
Changes-Cancellation &  
Nonrenewal  
CG 30 32 12 97-Michigan  
Changes-Underground Storage  
Tank Policy  
CG 30 57 11 94-Supplemental  
Extended Reporting Period  
CG 31 15 10 01-Construction  
Project Management Protective  
Liability Coverage  
CG 31 31 12 04-Fungi or Bacteria  
Exclusion  
CG 31 32 12 04-Limited Fungi or  
Bacteria Coverage  
CG 31 66 12 04-Exclusion-  
Exterior Insulation & Finish  
Systems  
CG 31 67 12 04-Exclusion-  
Exterior Insulation & Finish  
Systems  
CG 31 68 12 07-Exclusion-  
Coverage A-Product Withdrawal  
Expense

CG 31 69 12 04-Exclusion-  
Coverage B-Product Withdrawal  
Liability  
CG 31 70 12 04-Exclusion-  
Product Tampering  
CG 31 71 12 04-Exclusion-  
Product Replacement, Repair or  
Repurchase  
CG 31 72 12 04-Coverage  
Extension-Coverage A-Product  
Restoration Expense  
CG 31 73 12 04-Extended  
Reporting Period Endorsement  
For Electronic Data Liability  
Coverage  
CG 31 74 12 04-Exclusion of  
Newly Acquired Organization as  
Insureds  
CG 31 99 12 04-Nuclear Energy  
Liability Exclusion Endorsement  
CG 33 70 03 05-Silica or Silica-  
Related Dust Exclusion  
CG 33 71 03 05-Silica or Silica-  
Related Dust Exclusion  
CG 33 76 05 09-Communicable  
Disease Exclusion

**Conclusion 3:** Be aware of the maze of coverage provisions and that there is no such thing as being fully insured.

#### **OBJECTIVE 4: CERTIFICATES OF INSURANCE**

- Parties often rely upon a one-page certificate of insurance to evidence coverage required in a lease. This simply cannot detail the extent of coverage truly provided.
- Certificates do not amend coverage or bind an insurance company.
- Certificates may not disclose relevant endorsements, coverage limitations, or policy conditions.
- There is no guarantee that a certificate holder will receive notice of cancellation or coverage changes.



- **Certificate holder, first named insured, named insured, additional insured, and loss payee are each very different in terms of the coverage provided.**
- Certificates contain a number of disclaimers.
- Don't rely on them.

### **Status of Insureds: Be Careful What You Ask For:**

1. **First named insured** – The party that owns the policy and has the right to make changes or cancel coverage. Receives the status of “You” under the policy. Applies to all lines of coverage
2. **Named insured** – A commonly controlled entity with the first named insured. Also receives the status of “You” under the policy, but can't make changes or cancel coverage. Applies to all lines of coverage.
3. **Additional insured** – This status is limited to liability coverage and offers the party limited rights to coverage. Coverage is derivative of the named insureds, meaning that a claim must first be brought against a named insured in order to trigger coverage for an additional insured. Only applies to liability coverage.
4. **Mortgagee** – Applies to a party holding a mortgage interest in a building
5. **Loss payee** – Applies to a party with a secured interest in real or personal property, but not a mortgage.
6. **Lender loss payee** – Applies to a party with a secured interest in real or personal property but not a mortgage. This status elevates the rights of the holder to include a minimum notice requirement in the event of cancellation.
7. **Named insured Building Owner** – Policy form CP 12 19 06 07 allows building owners to be elevated to the status of named insured for the property coverage, even though they don't share common ownership with the other named insureds.

### **Certificate Forms:**

Acord Form 25 is used for proof of commercial liability insurance  
 Acord Form 28 is used for proof of commercial property insurance

#### **DISCLAIMER 1**

This certificate is issued as a matter of **information only** and **confers no rights** upon the certificate holder. This certificate **does not affirmatively**

**or negatively amend, extend or alter the coverage** afforded by the policies below. This certificate of insurance **does not constitute a contract** between the issuing insurer(s), authorized representative or producer, and the certificate holder. *[Emphasis added.]*

### **DISCLAIMER 2**

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). *[Emphasis added.]*

### **DISCLAIMER 3**

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.** *[Emphasis added.]*

In *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 565 NW2d 907 (1997), the question was whether the insurer was bound to coverage by a certificate of insurance issued by an independent agent with an incorrect inception date. The court determined that the insurer was not bound by the certificate issued by the agent, noting that the application provided that the agency was not acting as an agent of the company, but as an agent of the policyholder.

In *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 583 NW2d 548 (1998), the Michigan Court of Appeals went so far as to hold that an agent's mistakenly issued certificate of insurance was not binding on the insurer even if the insurer had received a copy of it and did not object.

### **Scenario 1- The agent never actually placed the coverage**

- Agent issued a certificate of insurance showing property coverage
- Insured issued a check to agent to bind coverage

- Insurance company refused to issue the policy
- Agent never secured coverage elsewhere
- Building burned down without insurance
- Insured sued agent for \$2,215,000 in damages
- Insurance company had no responsibility despite certificate
- It took six years to resolve the case
- Policyholder suffered personal bankruptcy

**Scenario 2 – The agent issued a certificate even though no coverage existed**

- Contractor requested a certificate of insurance from subcontractor
- Subcontractor's insurance agent provided a certificate of insurance showing workers' compensation in effect on the date the certificate was issued
- In fact, coverage had been cancelled 2 weeks prior
- Subcontractor's employee fell off a contractor's roof and broke his back
- Subcontractor did not have workers' compensation coverage
- Employee sought WC benefits from contractor based on MCL 418.171
- Contractor's carrier paid the loss then subrogated against subcontractor's insurance agent for issuing a certificate when no coverage existed

**Tips for handling certificates of insurance**

- Ask for a specimen copy of the policy.
- Evaluate the insurance company's financial rating history. A.M. Best.
- Obtain copies of additional insured language/endorsements so you can see what is covered and what is not.
- Where you are the owner of a building that has a triple net lease, avoid allowing the tenant to insure the building.
- Make sure that you have a corresponding indemnification agreement.
- Be sure that liability coverage applies on a primary and non-contributory basis.

## **Primary and Non-Contributory Coverage**

This is probably one of the most overlooked provisions in a lease agreement. When two or more carriers are liable for the same loss, both shall share equally in proportion to the amount of their limits. However, by mandating that the tenant's policy be primary and the landlord's policy be noncontributory, the landlord can rely solely on the tenant's insurance prior to make a claim with the landlord's insurance carrier. This is preferred but must be negotiated in the coverage terms and required by written contract.

### **Additional Insured Forms**

- CG 20 02 11 85-Additional Insured-Club Members
- CG 20 03 11 85-Additional Insured-Concessionaires Trading Under Your Name
- CG 20 04 11 85-Additional Insured-Condominium Unit Owners
- CG 20 05 11 85-Additional Insured-Controlling Interest
- CG 20 07 07 04-Additional Insured-Engineers, Architects, Surveyors
- CG 20 08 11 85-Additional Insured-Users of Golfmobiles
- CG 20 10 07 04-Additional Insured-Owners, Lessees or Contractors
- CG 20 11 01 96-Additional Insured-Managers or Lessors of Premises
- CG 20 12 05 09-Additional Insured-State or Governmental Agency or Subdivision or Political Subdivision-Permits or Authorizations
- CG 20 13 05 09-Additional Insured-State or Governmental Agency or Subdivision or Political Subdivision-Permits or Authorizations Relating to Premises
- CG 20 14 11 85-Additional Insured-Users of Teams, Draft or Saddle Animals
- CG 20 15 07 04-Additional Insured-Vendors
- CG 20 17 10 93-Additional Insured-Townhouse Associations
- CG 20 18 11 85-Additional Insured-Mortgagee, Assignee, or Receiver
- CG 20 20 11 85-Additional Insured-Charitable Institutions
- CG 20 22 10 01-Additional Insured-Church Members & Officers
- CG 20 23 10 93-Additional Insured-Executors, Administrators, Trustees or Beneficiaries
- CG 20 24 11 85-Additional Insured-Owners or Other Interests From Whom Land Has Been Leased

- CG 20 25 11 85-Additional Insured-Elective or Appointive Executive Officers of Public Corporations
- CG 20 26 07 04-Additional Insured-Designated Person or Organization
- CG 20 27 11 85-Additional Insured-Co-Owner of Insured Premises
- CG 20 28 07 04-Additional Insured-Lessor of Leased Equipment
- CG 20 29 11 85-Additional Insured-Grantor of Franchise
- CG 20 30 01 96-Who is an Insured - Oil or Gas Operations
- CG 20 31 07 04-Additional Insured-Engineers, Architects or Surveyors
- CG 20 32 07 04-Additional Insured-Engineers, Architects or Surveyors Not Engaged by The Named Insured
- CG 20 33 07 04-Additional Insured-Owners, Lessees or Contractors
- CG 20 34 07 04-Additional Insured-Lessor of Leased Equipment
- CG 20 35 10 01-Additional Insured-Grantor of Licenses-Automatic Status
- CG 20 36 10 01-Additional Insured-Grantor of Licenses
- CG 20 37 07 04-Additional Insured-Owners, Lessees or Contractors

**Conclusion 4:** Recognize that certificates are a necessity, but at the same time worthless. You should always look to see the details of the coverage represented on the certificate and be mindful of the differences in insured status available.

<b>OBJECTIVE 5: CONTRACTUAL RISK TRANSFER AND LEASE LANGUAGE</b>
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**RULE: Never trust someone else to insure your assets.**

**General Lease Issues**

1. Leases have varying insurance requirements.
2. There are typically no links between maintenance clauses in leases and insurance coverage.
3. Where the landlord allows the tenant to insure the building under a triple net lease, the landlord is usually asking for major problems.
4. The lease requirements that parties be listed as additional insureds can often be missed or misstated on certificates.
5. Depending on the words of the lease, the Additional insured status protecting the landlord can often be significantly limited according to the endorsement language.

6. Insurers A.M. Best rating. Should you accept a surplus lines carrier?
7. Landlords often fail to require coverage for tenant contractors under the lease agreements.
8. Waivers of subrogation not clearly drafted. They don't just apply to property insurance.

**SEE OUR SPECIAL REPORTS:**  
“Building a Better Lease Agreement”  
“Defective Tenant Lease Provisions”

### **Tenant Liability in Contract and Tort**

*Laurel Woods Apartments v Roumayah*, 274 Mich App 631 (2007) modified the law on ability of landlord to seek damages to leased space by the tenant. Apartment landlord brought action against tenants for breach of lease in connection with fire damage to apartment. The case held that where the lease required that tenant be responsible for any damage to the Premises or to Landlord's other property *caused by the acts or omissions of Tenant or Tenant's guests*” tenants were liable on a contract theory.

Maintenance Repairs and Damage of Premises. Tenant shall keep the Premises and all appliances in good condition and repair, and shall allow no waste of the Premises or any utilities. Tenant shall also be liable for any damage to the Premises or to Landlord's other property (i.e., other units, common facilities and equipment) *that is caused by the acts or omissions of Tenant or Tenant's guests*. Landlord shall perform all maintenance and repairs to the roof, walls and structural elements, all mechanical, plumbing and electrical systems at Landlord's cost and expense, unless such damage is caused by Tenant[']s acts or neglect, in which case such cost and expense incurred by Landlord shall be paid by Tenant. *[Emphasis added.]*

Id at 636:

- This is a departure from the 1986 Lombard case that held that no subrogation applies where tenant paid part of premiums by common area charges.
- Lesson from Laurel Woods Apartments is that if there are significant deductibles or the property is self-insured, the landlord should have

specific language in the lease about any damage to the premises caused by the tenant as resulting in tenant liability.

Tenant liability in contract is governed by: *Laurel Woods Apartments v Roumayah* 274 Mich App 631, 734 NW2d 217 (2007)

Tenant liability in tort is governed by: *New Hampshire Ins. Group v. Labombard*, 155 Mich App 369, 399 NW2d 527 (1986)

### **Important Lease Provisions When Representing the Landlord**

1. What additional insured coverages are required in favor of the landlord? Are they specific?
2. If liquor exposure of tenant, landlord should be listed on that policy also.
3. If auto exposure, landlord should be listed on that policy also.
4. The tenant's use of contractors presents issues. It should be required in the lease that the tenant's contractors also name the landlord as additional insured and that there be no termination of such coverage after the project is complete.
5. Additional insured endorsements do not give automatic coverage to any ancillary parties like the property manager of landlord or the landlord's employees.
6. Is there a cross-suits exclusion on the policy barring coverage where one insured sues another?
7. Is there an increased hazards provision in the lease that makes the tenant responsible for increased premiums from hazards?
8. Modified pollution exclusion for hostile fire and fumes from heating and cooling systems. The indemnity agreement likely passes this exposure through to the tenant but there would be no coverage unless this coverage was added to the tenant's policy. The landlord should require this on its own general liability policy also.
9. Does the lease use the words "comprehensive general liability"? There is no longer such a policy. It should read "commercial general liability ('CGL')."
10. Does lease require that the CGL include premises and operations, products and completed operations, personal and advertising injury and contractual liability coverages?
11. Landlord should always maintain its own CGL policy even if tenant lists landlord as additional insured.

12. What does the lease require regarding notification of material changes in coverage or cancellation? The problem is that the insurer has no direct obligation to notify any certificate holders even if they are listed as additional insureds. Agents routinely neglect to send the cancellation notices to the additional insureds. Thus, the only solution is to require that the landlord be specifically named as an additional insured on the policy with rights to receive notice.
13. Does the lease require workers' compensation? The landlord generally cannot be named as an additional insured on this policy. However, a waiver of subrogation should be requested to prevent the tenant's workers' compensation insurer from coming after the landlord following an employee injury on the premises.
14. What umbrella limit should be required? Is the landlord named on that policy also?
15. Should environmental coverage be required? Will it respond to the contractual indemnity provisions of the lease?
16. Will the liability coverage afforded to the landlord be coordinated with that of the tenant? Primary and noncontributory language should be required.

### **Important Lease Provisions When Representing the Tenant**

1. What is limit for fire legal liability? Is it all risk coverage?
2. Does "property damage" include damage to leased space?
3. What is amount of business personal property coverage?
4. Is there a coinsurance penalty provision on tenant-maintained property insurance?
5. Is the business income on an actual loss sustained 12 months basis? Would it pay after the tenant is rebuilt? For how long?
6. What is the maintenance responsibility of the tenant? If it includes roof, HVAC and windows, building coverage may not be automatic.
7. If possible, limit the contractual indemnity to that covered by insurance or cap at a dollar amount.
8. Is the tenant required to keep the premises in condition comparable to condition it was in at the time lease was executed? Try to negotiate exception for insured casualties.
9. Does lease require tenant to comply with statutes and ordinances relating to maintenance and repair? Coverage is not automatic in this area.



10. Is there a favorable lease of the tenant that would cause hardship if the lease was terminated following a casualty?
11. If destruction is caused by tenant, does rent abate? What is the loss of income coverage that protects the tenant in this area?
12. Is there an increased hazards premium pass-along provision? Try to negotiate a cap.
13. If possible, the waiver of subrogation should not be limited to insurable losses.
14. Give copies of leases to insurance agents for tenant.

### **Issues with Triple Net Leases**

1. The tenant should not incur liability for procuring insurance. Tenant would not be covered under CGL policies for mistakes in this area.
2. The landlord should not rely upon someone else insuring their property. Examples of problems: coinsurance, protective safeguards provisions, vacancy provisions, ordinance or law issues, inadequate limits.
3. Landlord rarely gets complete copy of tenant's policy and may not know what to even look for in that policy.
4. Key issue is that landlord may only be listed as loss payee and not as additional insured on the property policy and even if it is, loss draft will be payable to tenant, its machinery and equipment lien holders, and landlord which could delay rebuilding.
5. There are major business interruption issues to the landlord. Loss of rents coverage is not always automatic and also, rent abates if serious loss, meaning coverage is no longer triggered.
6. There are major notice issues, re: the tenant canceling coverage. Agent certificates and notice requirements are not binding upon insurers.
7. If tenant insists on insuring building, require a stand-alone policy.

## **EXHIBIT A**

### **SAMPLE LEASE PROVISION WHEN REPRESENTING THE LANDLORD**

Tenant shall, at no expense to Landlord, provide and keep in force the following types of insurance through insurer(s) which hold an A.M. Best

rating of "A" or better and which is / are licensed in the state where the premises is located:

- Commercial general liability insurance on an occurrence basis with limits of at least \$1,000,000 per occurrence and \$2,000,000 aggregate -- Such policy shall include coverage for bodily injury, property damage, premises and operations, products and completed operations, personal and advertising injury and contractual liability insurance that covers the indemnity obligations of this Lease. Defense costs shall be in addition to the limits required. Such policy or policies shall include Landlord, its members, managing agents, employees, officers and its lenders as additional insureds on a primary and noncontributory basis, as their interests appear. This policy shall include coverage for bodily injury or property damage liability arising out of fumes from heating or cooling systems or from hostile fires.
- Workers' compensation and employers liability coverage for the state that the premises is located in -- Such policy shall contain a waiver of subrogation in favor of the Landlord.
- Commercial automobile coverage for owned, leased, hired and non-owned motor vehicles -- Such policy shall include Landlord and its members, officers and employees as additional insureds.
- If there is any liquor served or sold by the Tenant on the premises, Tenant shall maintain liquor liability coverage with limits of at least \$1,000,000 that shall also include the Landlord as an additional insured.
- Commercial umbrella or excess liability coverage with limits of at least \$2,000,000 per occurrence and aggregate that provides excess coverage with at least as broad of terms and conditions as the primary commercial general liability, employers' liability and commercial automobile policies referred to above, including coverage for the Landlord, its managing agents and lenders as additional insureds on a primary and noncontributory basis.
- Tenant shall require any contractor of Tenant performing work in, on or about the Premises or Tenant's improvements to obtain and maintain insurance with provisions identical to those required above including listing the same parties as additional insureds and such additional

insured endorsement shall not limit coverage to occurrences prior to completion of the project.

- **[where Tenant IS insuring the building]** Commercial Property Insurance for Real and Personal Property -- Tenant shall also keep and maintain during the term of this Lease a separate commercial property policy for the described premises on a Special Causes of Loss form as published by the Insurance Services Office or better. Such coverage shall be written with limits of at least 100% of the replacement cost of all buildings (including foundations and underground supports), without coinsurance, for all improvements, alterations and betterments and other real and personal property owned or lease by the Tenant and shall name the Landlord as an additional insured and not a loss payee. Further, such coverage shall include at least \$250,000 in coverage for demolition, increased costs of construction or updates to undamaged portions of the building arising out of a covered cause of loss. As part of the commercial property policy, Tenant shall also maintain coverage for loss of rents in favor of Landlord as well as other loss of income plus continuing expenses of Tenant with a limit at least equal to 18 months of rental income lost by the Landlord. Such coverage shall not be limited by any termination of the Lease and instead shall extend coverage to Landlord independently for loss of rents suffered as a result of the covered cause of loss. Such coverage shall be written without coinsurance and shall include at least a 180 day extended period of indemnity endorsement in favor of the Landlord. Such coverage shall also include a limit of at least 90 days for loss of income arising out of ordinance or law delays.
- **[where Tenant is NOT insuring the building]** Commercial Property Insurance for Real and Personal Property -- Tenant shall also maintain during the term of this Lease a commercial property policy for the described premises on a Special Causes of Loss form as published by the Insurance Services Office or better. Such coverage shall be written with limits of at least 100% of the replacement cost of all business personal property (including Tenant's improvements and betterments) and property of others owned or leased by the Tenant, without coinsurance. Such coverage shall also include at least 12 months business interruption coverage on a loss of income and extra expense form.

- Tenant agrees to deliver certificates of all insurance required under this Section to Landlord prior to any entry upon the Premises, and not less than thirty (30) days before the expiration of any policy. Further, Tenant agrees to provide complete copies of all policies to the Landlord upon receipt. The receipt by Landlord of such policies, however, shall not be deemed by Landlord to be an acceptance of the coverage to the extent it conflicts with the requirements of this Lease. In the event of cancellation or material change in any of the above policies, Tenant and its insurer shall agree to provide to Landlord at least 30 days advanced notice of any such change or cancellation.

## **EXHIBIT B**

### **SAMPLE WAIVERS OF SUBROGATION**

#### **Limited Form**

Landlord and Tenant mutually waive any rights of subrogation which may exist for any claims and/or liabilities arising from or caused by any casualty or hazard but such waiver shall only apply to the extent covered by insurance. This release shall not operate in any case where the effect is to invalidate or increase the cost of such insurance coverage if the party whose insurance has been invalidated or the cost increased shall have given the other party written notice thereof; provided, that in the case of increased cost, the other party shall have the right, within thirty (30) days following written notice, to pay such increased cost, thereby keeping such release and waiver in full force and effect.

#### **Standard Form**

Landlord and Tenant and all parties claiming under them mutually release and discharge each other from all claims and liabilities arising from or caused by any casualty or hazard covered or required hereunder to be covered in whole or in part by insurance on the Leased Premises or in connection with property on, or activities conducted on, the Leased Premises, and waive any right of subrogation which might otherwise exist in or accrue to any person on account thereof; provided that such release

shall not operate in any case where the effect is to invalidate or increase the cost of such insurance coverage if the party whose insurance has been invalidated or the cost increased shall have given the other party written notice thereof; provided, that in the case of increased cost, the other party shall have the right, within thirty (30) days following written notice, to pay such increased cost, thereby keeping such release and waiver in full force and effect.

### **Broad Form**

Landlord and Tenant will each look to its own insurance for recovery of any loss resulting from fire or other casualty. Landlord and Tenant release one another from such claims. Landlord and Tenant waive any right of recovery of insured claims by anyone claiming through them, by way of subrogation or otherwise, including their respective insurers. This release and waiver remains effective despite either party's failure to obtain insurance. If either party fails to obtain insurance, it bears the full risk of its own loss.

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