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# INSURANCE COVENANTS IN A COMMERCIAL LEASE

## Presented to Continuing Legal Education BC

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This paper is intended to review the different types of insurance which commercial leases typically require and some of the types of insurance clauses often stipulated as part of the required insurance coverage. Although the sample lease clauses deal with insurance covenants in shopping centre leases, the comments and advice apply to all types of commercial leases.

### I. TENANT'S INSURANCE

#### A. Types of Insurance Which Landlords Typically Require Tenants to Obtain

**1. All Risks (including sewer damage, flood and earthquake) insurance on merchandise, stock, furniture, fixtures, equipment and leasehold improvements**

Despite its name, "All Risks" policies do not actually protect an insured against every type of risk. Rather what they do is cover loss caused by all risks or perils which are not specifically excluded. Some common exclusions include earthquake, flood, volcanic eruption, tidal waves, and nuclear contamination. The premiums charged to remove these exclusions in flood or earthquake zones are often quite substantial. However, flood and earthquake, which usually encompass tidal waves and volcanic eruptions, are two exclusions which the Landlord should not permit the Tenant to have in their all risks policy, whatever the effect on the Tenant's premiums. Coverage for nuclear contamination (except contamination for commercial isotopes) is for all practical purposes, unavailable.

The coverage should be on a replacement cost basis (i.e. the cost to replace with new materials of like kind and quality), and the coverage should not be subject to co-insurance. In addition, many Tenants do not understand the concept of tenant's improvements. It is a common perception, even among otherwise sophisticated Tenants, that tenant's improvements means only improvements actually installed by the



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Tenant.

The Tenant's All Risks policy should also include business interruption coverage (i.e. profits insurance). Such coverage will compensate the Tenant in the event of a loss of earnings during an interruption of the Tenant's business resulting from damage to, and subsequent restoring of, the premises. Business interruption coverage will help the Tenant maintain a constant flow of earnings during the period of time it takes to restore the premises. A Tenant's business interruption coverage is important to the Landlord to ensure the Tenant can afford to stay in business and avoid bankruptcy. The nature of the Tenant's business will determine the type of coverage that is suitable. For example, in the case of an office occupancy, if office space is readily available, the business interruption exposure may be minimized. The Tenant would incur extra expense to relocate and possibly not much else. A retail Tenant and a manufacturer, on the other hand, would have a definite business interruption exposure.

It is also important that the Landlord be named as an additional insured and a loss payee under the Tenant's All Risks policy, principally with respect to tenant's improvements, to ensure that any insurance proceeds payable under the policy for the Landlord's interest in tenant's improvements are paid jointly to the Landlord and the Tenant. The benefits of being named as an additional insured are discussed in more detail below, in section I, B, 2. In this manner the Landlord has some assurance that the insurance proceeds of any claim will be used to restore the damage to the premises.

Finally, the Landlord should require that the Tenant obtain a "by-laws endorsement" or "law and ordinance coverage" with respect to tenant's improvements in its All Risks policy. Such an endorsement will ensure that the Tenant is compensated for additional or increased repair costs, including the cost to replace or upgrade undamaged property, that arise as a result of a change in bylaws or building codes. By-laws coverage would have no application on contents per se but does have application with respects to tenant's improvements. For example, the building materials used in constructing the tenant's improvements may contain asbestos or may have a fire rating that is no longer allowed by the building codes. When building codes are changed, existing deficiencies are often grandfathered. Upgrading is not required until a building permit is needed for renovation or to repair or rebuild following a fire or other casualty.

**2. "Comprehensive Form" Boiler and Machinery insurance on mechanical equipment in the premises controlled by the Tenant**

The Landlord should require that the Tenant have this type of insurance to protect against situations in which machinery within the Tenant's space explodes, breaks down or fails. Coverage is only required, and available if the Tenant's premises contain mechanical or electrical machinery or pressure vessels.



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As in the case of the Tenant's All Risks insurance, the Landlord should be named as an additional insured under the Tenant's Comprehensive Form Boiler and Machinery insurance if the objects insured qualify as tenant's improvements. This is to ensure that insurance proceeds payable under the Tenant's policy will be paid out jointly to the Tenant and Landlord and used to restore the machinery in the premises. For a more detailed discussion of the benefits and implications of being named as an additional insured see the discussion below in Section I, B, 2.

**3. Auto Liability Insurance on Tenant's vehicles which are used in connection with the business which is carried on, in and from the premises**

It is important to note, when considering this type of insurance that there is a distinction between auto liability insurance "on an owner's form", and auto liability insurance "on a non-owned form". If auto liability insurance on an owner's form is taken out, the Tenant is covered for liability arising out of the operation of vehicles owned or leased by the Tenant. However, a Landlord may consider requiring a Tenant to carry auto liability insurance on a non-owned form, including contractual liability. This additional coverage would cover the Tenant for liability arising out of the operation of motor vehicles which are not registered in the Tenant's name but are otherwise used in the business, such as employee's vehicles.

Any obligation placed on the Tenant to secure auto liability insurance should also stipulate the minimum limits of liability coverage to be obtained by the Tenant in this regard. It should be noted that automobile liability insurance is often specified for an amount much less than that shown for commercial general liability insurance. This should be approached with caution. Most of the large awards involving crippling injuries result from the use of automobiles.

**4. Commercial General Liability (CGL) insurance for bodily injury or property damage applying to the operations of the Tenant carried on, in and from the premises**

This type of coverage was previously known as comprehensive general liability insurance until courts in the U.S. ruled that the term "comprehensive" was more extensive than that contemplated by insurance companies.[1] This type of insurance covers amounts that the Tenant is legally obligated to pay, or that the insurer has agreed to pay, as damages for the insured's negligence and may protect the Tenant and consequently the Landlord from hazards like:

(a) the contingent liability arising from work performed by independent contractors on behalf of the Tenant (referred to as "owners' protective");

(b) the liability arising out of goods sold by the Tenant (referred to as "products liability



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insurance");

(c) the liability arising out of services performed by the Tenant (referred to as "completed operations insurance");

(d) the liability arising from personal injuries including non-bodily injuries like false arrest and wrongful eviction; and

(e) the liability arising out of the maintenance of and the operations performed on the premises. This includes slip and fall injuries and injuries suffered when display items fall onto customers as well as damage to adjoining businesses caused by fire or leakage of water originating in the leased premises.

A Tenant's CGL coverage should be written on an "occurrence" form rather than a "claims made" form. In an occurrence form coverage is crystallized when the injury or damage takes place regardless of when the claim is made. As such, even if an insurance policy is not renewed following an accident, the policy continues to cover claims arising out of that accident. In a claims made form, the policy covers claims first made during the policy period, regardless of when the accident or the injury or damage occurred. However, once the policy expires, if no claim was made, and the insurance company was not notified of a claim or of an incident that could result in a claim, the insurance company has no liability. However, there are types of industries where claims made coverage is the norm.

Any clause in the Lease obligating the Tenant to secure CGL coverage should stipulate the minimum level of insurance required in this regard both per occurrence and on an aggregate basis. Limits of under $5,000,000 should be avoided. The Lease should also be clear to stipulate any coverage extensions required under the CGL such as:

(a) "blanket contractual" which protects against the liability voluntarily assumed by contract (e.g. under a lease);

(b) "contingent employers liability" which protects against the liability of an employer for injuries sustained by its employees other than the liability imposed by workers' compensation laws;

(c) "cross liability" or "severability of interests" which ensures that each insured is offered protection as if a separate policy had been issued to each and as if that party were the only party named as the insured (For a more detailed discussion of "cross liability" or "severability of interest" clauses see the discussion below in Section I, B, 4.);

(d) adding the Landlord as an additional insured for liability arising out of the tenant's operations



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and use of the premises; and

(e) providing at a minimum, limited pollution coverage for claims resulting from heat or smoke from a hostile fire. In most cases, a broader coverage will be available that provides coverage for sudden and accidental pollution subject to the polluting event being discovered within 120 hours and being reported to the insurance company within 120 hours of discovery.

Modern CGL policies, such as the Insurance Bureau of Canada's form IBC 2100, automatically incorporate these coverages.

**5. Pollution and Remediation Legal Liability Insurance**

Depending on the type of Tenant and the anticipated use of the premises this type of insurance may or may not be appropriate. For the average retail or office occupancy, there is little need for this type of insurance. For other occupancies such as dry cleaners, manufacturers, paint stores, service stations, garden centres and the like, the potential for an incident resulting in contamination is very real and this coverage should be given serious consideration.

Large Tenants may request the right to self insure some aspect of the insurance that they are required to maintain. This request should be approached with caution. First, the financial capability of the Tenant to assume large risks should be assessed. Second, the right to self insure should be specific to the Tenant and not be automatically transferable in the event of an assignment or sublease. Finally, rather than deleting the insurance clauses, they should be left in the lease as is and a clause added permitting self insurance but making it clear that the Tenant's obligations as a self insured remain the same as they would have been had insurance been purchased. The reason for this is that the law governing insurance transactions is different from the law dealing with indemnity agreements.

**B. Types of Clauses Which Landlords Typically Require Tenants to Include in Policies**

**1. Waiver of any subrogation rights which the Tenant's insurer may have against the Landlord and the Landlord's agents**

Sample Clause:

*Tenant to Insure*

*The Tenant covenants with the Landlord that it will take out and keep in force during the Term, owned and non-owned automobile insurance with respect to all motor vehicles owned and/or operated by the Tenant in*



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*its business from the Leased Premises, insurance upon all glass and plate glass in the Leased Premises, whether installed by the Landlord or the Tenant, boiler and pressure vessel insurance, and a commercial all-risk insurance policy that will cover damage to the stock-in-trade, furniture, fixtures, improvements (including leasehold improvements), and all other contents of the Leased Premises to the full replacement cost of them, and comprehensive general liability insurance in an amount not less than $5,000,000, and tenant's fire legal liability insurance to the replacement cost of the Leased Premises, and with policies and insurers acceptable to the Landlord. Each policy will name the Landlord as an additional insured as its interest may appear, and in the case of such public liability insurance will contain a provision for cross-liability insurance as between the Landlord and Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance. The cost or premium for each and every such policy will be paid by the Tenant. The Tenant will obtain from the insurers under such policies undertakings to notify the Landlord in writing at least 30 days prior to any cancellation thereof or any material change therein. The Tenant will, at the request of the Landlord, provide the Landlord with written evidence satisfactory to the Landlord of the existence of the insurance policies described in this clause 10.1.*[2]

Subrogation is a concept specific to insurance law which enables an insurer who has paid out a claim, to attempt to recover that payment from negligent parties by suing in the name of the insured. Generally, when an insurer reimburses the insured for its loss, the insurer is then afforded the opportunity to "step into the shoes" of the insured and seek recovery for the insured's loss from any negligent third party against whom the insured would be entitled at law to recover. As the Supreme Court of Canada has explained, the policy rational for the principle of subrogation is to avoid overpayment of the insured [*Ledingham v. Ontario (Hospital Services Commission)*, [1975] 1 S.C.R. 332] by preventing the insured from recovering from negligent third parties after having already been compensated by their insurer.

Correspondingly, an insurer cannot use its rights of subrogation as a means of recovering money from an insured [*Mark Rowlands v. Berni Inns,* [1986] 1 Q.B. 211, (C.A.)]. For an interesting, but unsuccessful attempt to create an exception to this principle of subrogation see *Condominium Corporation No. 9813678 v. Statesman Corp.,* 2007 ABCA 216. That case involved a situation in which an insurer provided multi-party property insurance to unit owners, and various other parties, involved in a condominium development. One of the unit owners, Statesman, had been involved in the construction of the complex and as such was not only a unit owner but also a contractor. After making a payment on a fire loss claim, purportedly caused or contributed to by a negligent sub-contractor, the insurer attempted to bring an action, in the name of



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various insureds other than Statesman, against Statesman in its capacity as contractor, vicariously liable for the negligence of its sub-contractor. The Alberta Court of Queen's Bench permitted the insurer to subrogate against Statesman, even though Statesman was an insured, for two reasons:

(a) although Statesman was a named insured in its capacity as a unit owner, it was not a named insured in its capacity as contractor; and

(b) since this situation involved multi-party insurance, the insurer could subrogate against Statesman without having to bring the action in Statesman's own name as plaintiff.

However, on appeal the Alberta Court of Appeal held that the insurer could not subrogate against Statesman because an insurer can not subrogate against an insured.

Still, an insurer can subrogate against negligent third parties, and thus in theory could subrogate against a Landlord after having paid out policy proceeds to an insured Tenant. Obviously, it would be of little benefit to a Landlord to require a Tenant to insure against particular perils if the Tenant's insurer could simply step into the shoes of the Tenant and recover the money paid out under those claims from the Landlord. Thus, a Landlord should require that the Tenant's insurance policies include a waiver of this right of subrogation as against the Landlord.

In the sample lease clause quoted above there is an exception from the required waiver of subrogation for CGL policies. The reason for this exception is that insurance companies are far more willing to agree to providing a waiver of subrogation in property and boiler & machinery policies than they are in a CGL policy. This does not mean that the Landlord is to be subject to subrogation from CGL insurers. If the Landlord is added as an insured, then under Canadian common law, there is no longer a right of subrogation based on the principle that an insurance company cannot subrogate against its own insured.

A second item in the sample lease clause quoted above that may cause problems is the waiver required for automobile insurance. In common law provinces the automobile insurance policy is a statutory document. It can only be amended by forms that have been approved by the provincial governments. In most provinces there is no approved form for waiving subrogation rights. In practical terms this poses few problems because the party responsible for injuries or damage arising out of the use of an automobile is more often than not the party who has control of that automobile.

A Landlord should also consider additional lease language to protect against situations in which the Tenant fails to satisfy its obligations to secure waivers of subrogation in its various insurance policies. One way to address this problem is to have the Tenant agree to a general release and waiver of claims such as that



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discussed below in Section II, C, 4. A general release would be of assistance because an insurer, as subrogator in the Tenant's "shoes", cannot acquire any better right than the Tenant has in its own right against the Landlord.

Another way to protect a Landlord from a situation in which a Tenant fails to obtain a waiver of subrogation, is to include a clause whereby the Tenant agrees to indemnify the Landlord for any damages and costs payable as a result of the Tenant's failing to obtain such a waiver(s) of subrogation. Harvey M. Haber, Q.C. suggests the following language in this respect:

*...(but if Tenant fails to procure such waiver, Tenant will pay to Landlord as liquidated damages payable as Additional rent on demand all moneys to which any subrogator hereunder becomes entitled and the cost of any legal defence of any claim for subrogation)...*[3]

Even if a Landlord does not explicitly require its Tenants to arrange a waiver of subrogation rights in the Lease, it remains possible that the Landlord may still be insulated from a subrogation action by the Tenant's insurer as a result of the Tenant's covenants to insure against specific perils [*Majestic Theatres Ltd. v. N.A. Properties Ltd.* (1985), 57 A.R. 210 (C.A.); *Orange Julius Canada Ltd. v. Surrey (City),* 2000 BCCA 467] . In *Orange Julius* the Landlord leased retail units in a mall to Tenants, who entered lease agreements requiring the Tenant to obtain property insurance that included coverage for loss by fire, in the joint names of the Landlord and Tenant. In a common area of the mall, a display owned by a third party not subject to a lease, caught fire and caused damage to the surrounding tenants. The court held that the lease covenants protected the Landlord against the Tenants' claims of breach of contract and negligence arising out of the damage caused by the fire started by the third party. Although this case did not specifically address subrogation, as discussed above, if the Landlord is protected against a claim by its Tenant, then the Landlord is also protected from a subrogated claim by the Tenant's insurer. Nevertheless, it remains advisable for the Landlord to ensure that a commercial lease expressly obligates the Tenant to secure a waiver of subrogation in each of its insurance polices.

a) Reciprocal Waiver

Notwithstanding the protection provided to the Tenant by the Landlord's covenant to insure the building, Haber advises that a Tenant should request a reciprocal waiver of subrogation from the Landlord but also that a Landlord should not be too quick to grant this request.[4] If the Landlord does agree to secure such a waiver of subrogation in favour of its Tenants and due to the negligence of Tenants the premises are damaged and the Landlord's insurers are not reimbursed, then the Landlord's insurance cost will likely increase. In a competitive market, increases would not be expected for one or two claims over a number of



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years but if there is a frequency of claims, increases would be expected. Of course, the Landlord would pass this increased insurance cost on to the Tenants in the form of higher operating costs but most Landlords prefer to avoid significant increases in operating costs. If it is the Landlord's intent to permit its insurers to subrogate against Tenants then the lease must be amended to remove the covenant to insure and the lease must contain clear language to the effect that the Tenant has no protection whatever from the Landlord's insurance.

Large Tenants will invariably demand a waiver of subrogation from the Landlord's insurer and failure to provide such a waiver, particularly in a competitive leasing market, will be seen as a deal breaker.

Another alternative is for the Landlord to agree to a limited waiver of subrogation in excess of the public liability and property damage insurance requirement. To explain: if the Tenant is required, as is the case in the CLE precedent lease referred to throughout this paper, to place commercial and general liability insurance with a limit of at least $5,000,000, and the Tenant's insurers pay out that full $5,000,000 limit to the Landlord for a $6,000,000 damage claim, then the Landlord's insurers would have to pay the excess $1,000,000. At this point the limited waiver of subrogation would kick in such that the Landlord's could not then proceed against the Tenant to recover that excess $1,000,000 paid under the Landlord's liability insurance.

b) Implied Reciprocal Waiver

Even if the Landlord does not agree to put a waiver of subrogation in place with its insurer, there remains the possibility that a court could imply a waiver of subrogation to be in place, for the benefit of the Tenant, as a result of either the:

(a) Tenant's obligation to pay its cost of the insurance premiums; or

(b) particular covenants to insure contained within the lease.

The Tenant's obligation to pay its proportionate share of the Landlord's insurance premiums in a net lease arrangement has been held by the Supreme Court of Canada to imply a waiver of subrogation [*Ross Southward Tire v. Pyrotech Productions*, [1976] 2 S.C.R. 35]. To attempt to avoid this implied waiver, Haber recommends that the Landlord should insist upon wording that makes the Tenant liable for its own negligence whether the Tenant has contributed to the Landlord's insurance premiums or not.[5] However, Haber recognizes that it is unclear whether a court will uphold this language. Such sample wording may be as follows:

*The Tenant expressly acknowledges and agrees that the Tenant is not relieved of any liability arising from or*



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*contributed to by its negligence or its wilful acts or omissions, notwithstanding any contribution by the Tenant to the Landlord's insurance premiums.**[6]***

Additionally, the language and covenants contained in the Lease can affect the ability of the Landlord's insurer to pursue a Tenant through subrogation. For example, where the Landlord covenants to insure the premises against fire, the Landlord cannot sue the Tenant for a loss by fire caused by the Tenant's negligence because this covenant operates as an assumption that the Landlord will bear the risk of loss or damage caused by the peril they covenanted to insure the premises against [*Madison Developments Ltd. v. Plan Electric Co.,* (1998), 36 O.R. (3d) 80 (C.A.)]. Such a covenant has also been held to preclude a subrogation action by the Landlord's insurer against the Tenant whose employee negligently caused the fire [*T. Eaton Co v. Smith*, [1978] 2 S.C.R. 749]. However, in the above situation, the Landlord or its insurer may be able to go after the negligent employee directly [*Greenwood Shopping Plaza v. Beattie et al*. [1980], 2 S.C.R. 228]. In *Greenwood* it was held that because the negligent employees were not party to the lease contract between their employer and the Landlord, the employees were not protected by the Landlord's covenant to insure.

The *Greenwood* decision must now be viewed in the context of the later decision of the Supreme Court of Canada in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. In that case the court relaxed the doctrine of privity and held that employees can benefit from a contractual limitation of liability clause in place between their employer and a third party if (i) the clause either expressly or impliedly extends its benefits to the employees seeking to rely on it; and (ii) the employees seeking the benefit of the clause are acting in the course of their employment and performing the very services provided for in the contract when the loss occurrs. As a result, certain employees, who would have otherwise been liable to their employer's client for damage caused by their negligence, were protected from liability as third party beneficiaries of the limitation of liability clause in place between their employer and the client.

In *North Newton Warehouses Ltd. v. Alliance Woodcraft Manufacturing Inc.,* (2005) 44 B.C.L.R. (4th) 227 (C.A.), the Landlord's covenant to insure was amended to include the following clause:

*Notwithstanding any contribution by the Tenant to any Insurance Costs as provided for herein, no insurable interest shall be conferred upon the Tenant under policies carried by the Landlord.*

The lease also contained language to the effect that the Tenant was responsible for repairs of all damage caused by its negligence and for the negligence of those for whom it was in law responsible. The British Columbia Court of Appeal rejected the argument that the language quoted above was sufficient to allow the Landlord's insurer to subrogate against the Tenant. In addition, the court went even further in its



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comments:

*Ultimately, the policy rule underpinning the proposition that the insurer cannot pursue a tenant for damages in circumstances such as those present in the instant case is based on the proposition that it makes little business sense for a landlord to covenant to insure and for a tenant to pay the premiums if the tenant is not to derive some benefit from the insurance. One might properly say that there is something approaching a presumption in favour of a tenant benefiting from a landlord's covenant to insure. That is the legal principle that I take to be established from the trilogy of cases decided by the Supreme Court of Canada.*

**2. Adding the Landlord as an additional insured**

Sample Clause:

*Tenant to Insure*

*The Tenant covenants with the Landlord that it will take out and keep in force during the Term, owned and non-owned automobile insurance with respect to all motor vehicles owned and/or operated by the Tenant in its business from the Leased Premises, insurance upon all glass and plate glass in the Leased Premises, whether installed by the Landlord or the Tenant, boiler and pressure vessel insurance, and a commercial all-risk insurance policy that will cover damage to the stock-in-trade, furniture, fixtures, improvements (including leasehold improvements), and all other contents of the Leased Premises to the full replacement cost of them, and comprehensive general liability insurance in an amount not less than $5,000,000, and tenant's fire legal liability insurance to the replacement cost of the Leased Premises, and with policies and insurers acceptable to the Landlord. Each policy will name the Landlord as an additional insured as its interest may appear, and in the case of such public liability insurance will contain a provision for cross-liability insurance as between the Landlord and Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance. The cost or premium for each and every such policy will be paid by the Tenant. The Tenant will obtain from the insurers under such policies undertakings to notify the Landlord in writing at least 30 days prior to any cancellation thereof or any material change therein. The Tenant will, at the request of the Landlord, provide the Landlord with written evidence satisfactory to the Landlord of the existence of the insurance policies described in this clause 10.1.**[7]***

It would be helpful to start this discussion by distinguishing between Named Insureds, Additional Insureds, Additional Named Insureds, Loss Payees and Mortgagees under the Standard Mortgage Clause. There is



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some confusion as to the rights and obligations of each class of insured.

(a) Overview

To many people in the insurance industry there is a significant distinction in rights and obligations enjoyed by the various categories of "insured parties" that have developed over the last many years. For example, the "named insured" had privity of contract so he or she could enforce the policy in their own right but also bore the burden of paying premiums, being responsible for deductibles and having the responsibility of promptly notifying the insurance company of any claims and of any changes in risk insured.

In sharp contrast, the "additional insured" had no privity of contract, could not enforce the contract in his or her own right, from a liability insurance perspective, coverage was limited to vicarious liability but, on a positive note, the additional insured had no responsibilities to pay premiums.

Following this same line of reasoning, the "additional named insured" was a hybrid. Though not a direct party to the insurance contract the "additional named insured" was believed to have all of the rights and obligations of the named insured but because he or she did not have the same level of interest in the insured risk, the "additional named insured" was viewed as a loose cannon. From the perspective of the "named insured" the additional named insured could sabotage the insurance program by instructing the underwriter to make changes that were not necessarily to the benefit of the "named insured." These dastardly deeds could include cancelling the policy and pocketing the return premium, modifying the policy to provide the greater part of the protection to himself or herself or simply high jacking the policy and using it to insure a risk that the underwriter had neither expected nor charged for. To the "additional named insured," the ethical one, the risk was the default of the "named insured," leaving the "additional named insured" responsible for outstanding premiums and deductibles.

Although there are a few cases that have illustrated the risks associated with the concept of an "additional named insured" most of the case law is not at all as draconian as suggested. But even if it were, most policies today, be they property or liability insurance policies, contain a "first named insured" clause. This clause states that the first named insured is the only insured that has the right to cancel the policy or make any changes to the policy, and the first named insured is the only party responsible for payment of the premium and deductibles. This clause, in one stroke of the pen, has removed virtually all of the objections that have been raised with respect to the status of "additional named insureds." Nonetheless, insurance companies dislike this category of "insured" and try to avoid it if at all possible. In fact, in modern general liability policies there are only two classes of insured persons; the "first named insured" and any other "insured."



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The "privity of contract issue" still exists but the Supreme Court of Canada has done a lot to address the concerns of "additional insureds" in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 S.C.R. 108. Though this case addressed only the enforceability of a waiver of subrogation by an additional insured and not a claim for coverage *per se*, the court commented as follows:

*I must conclude that relaxing the doctrine of privity in these circumstances establishes a default rule that most closely corresponds to commercial reality as is evidenced by the inclusion of the waiver of subrogation clause within the contract itself.*

The case is a good read. Though the court specifically addressed the issue of subrogation, the party attempting to enforce the subrogation waiver was included as an "additional insured" by category and not by specific reference to the company itself.

(b) First Named Insured v. Insured

As mentioned above, the "first named insured" has all of the rights and obligations with respects to the administration of the policy.

All other parties that qualify as an "insured" under a CGL policy enjoy the fruits of the coverage. But, the scope of the coverage is limited in that it is provided within the context of the operations of the "first named insured." If the scope of the coverage is not specifically qualified in that manner, however, the consequences may prove to be somewhat unexpected. Consider for example, the case *State of Alaska et al v. Underwriters at Lloyds London,* 755 P.2d 396 (Alaska 1988). In this case Japan Airlines had issued a certificate of insurance to the State of Alaska in compliance with a lease requirement involving counter space at the Anchorage International Airport. The certificate added the State of Alaska as an additional insured to Japan Airlines' insurance policy. Following a landing incident at the airport which resulted in $20,000,000 of damage to a Japan Airlines' jet, Japan Airlines' insurers subrogated against the State on the grounds that the runways were not maintained in a safe condition. The State forwarded the subrogation claim to Japan Airlines' liability insurer and demanded a defence based on its status as an additional insured. The court noted that the policy covered against liability for all operations usual or incidental to the operations of Japan Airlines, and as it made little sense to have a counter for processing passengers if planes did not land and take off, landing planes was an activity that was usual to the operations of the airline.

In a subsequent case with nearly identical facts, the certificate limited coverage to the liabilities assumed under the lease. In that case, the court ruled that the additional insured was not covered for damage to the aircraft caused by an unsafe runway.



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In a number of recent Canadian cases our courts have required a close proximity between the act causing the injury and the original insured before allowing coverage for the additional insured, however, the coverage allowed is not limited to vicarious liability. A case in point from British Columbia is *Cowichan Valley School District No. 79 v. Lloyd's Underwriters, Lloyd's, London,* 2003 BCSC 1303. In this case, a local hockey club received permission from the school board to use its baseball diamonds to hold a fundraising baseball tournament. As a requirement of allowing the use of the diamonds the school district required that the hockey team purchase liability insurance and that the insurance name the school district as an insured. This was done.

During the tournament one of the players stepped in a low spot while running the bases. He fell and broke his leg. He then sued all of the parties involved. The insurer denied liability to the school district on the grounds that:

*"...the allegations against the District are made against it as owner of the property, not as promoter of the tournament. It says that the allegations do not arise out of the operations of Appollo (the hockey team), but are founded instead on the District's obligations as an owner. Lloyd's says that the District would owe the same duty of care equally to a casual, uninvited user of the field when there was no tournament on, as to a player in the Appollo tournament.*

*That being so, Lloyd's says that the District's liability does not depend on or arise out of Appollo's operation of hosting the tournament, but rather as a result of the District's obligation as owner to keep its property in a safe condition.*

The court rejected the insurer's arguments based on the proximity of the cause of the injury to the insured event. Accordingly:

*There is some logic in the Lloyd's position, and it might have carried the day if Mr. Mayo's claim were not so closely associated with the very activity Lloyd's agreed to insure, vis playing baseball. Had Mr. Mayo's head been injured in the field's parking lot when a tile fell off the roof and struck him, then it would be no great feat to locate a distinction between Appollo's operation of hosting the tournament and the District's obligation to keep the grandstand roof in good repair.*

*However, the pleadings in this case clearly connect Mr. Mayo's injury closely to the very activity that Lloyd's agreed to insure. Mr. Mayo would not have injured his ankle but for Appollo's decision to put on the tournament.*

On similar facts in a non-insurance case, the Court of Appeal of British Columbia ruled that the liability of a



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property owner under the *Occupier's Liability Act* was distinct from that of a possibly negligent independent contractor. As such, the property owner was unable to avail itself of the protection of an indemnity agreement. The case is *Wallach v. Garside (*1993), 82 B.C.L.R. (2d) 236, (B.C.C.A.) The basic difference between indemnity agreements and insurance warrants the difference in results.

In *Kocherkewych Greyhound Canada Transportation Corp.,* 2006 BCSC 534, Greyhound was an additional insured but its status as an insured was qualified to coverage required under the terms of a lease. The language in the insurance policy reads as follows:

*SECTION II – WHO IS AN INSURED*

*4. Each person, firm or government body for whom the Insured has contracted to provide insurance is an Insured but only with respect to liability which arises out of the operations of the Insured, and only to the extent required by such contract.*

The court concluded that the lease did not require coverage for Greyhound for its own negligence. As such, there was no coverage provided for the additional insured.

In Ontario there have been a number of decisions that track the rulings of the British Columbia courts. These include *Economical Mutual Insurance Co. v. 856742 Ontario Inc.*, [2001] O.J. No. 3235; *Waterloo (City) v. Economical Mutual Insurance Co.*, [2006] O.J. No. 5252; *D'Cruz v. B.P. Landscaping Ltd.*, [2007] O.J. No. 2704; and *RioCan Real Estate Investment Trust v. Lombard General Insurance Co.*, [2008] O.J. 1449.

In *Economical v. 856742 Ontario Inc.* the numbered company owned a strip mall in which Tim Horton's was a tenant. A Tim Horton customer was injured when she slipped on a wheel chair ramp upon leaving the Tim Horton store. She made identical allegations against both the mall owner and the Tim Horton store. The mall owner was an additional insured under the Tim Horton CGL policy. The court agreed that Allianz, Tim Horton's liability insurer, owed the additional insured a defense based on the allegations in the statement of claim. In this case, both the Mall owner's insurer and Allianz were required to defend as they each owed a duty to their common insured.

In *Waterloo (City), K-W Oktoberfest Inc*. had added the City of Waterloo as an additional insured with respect to the Oktoberfest parade. During the parade, some spectators were injured when struck by a locomotive. The certificate of insurance adding the City as an additional insured limited the coverage provided to the City only if "their legal liability arises vicariously out of the negligent operations of the Named Insured." According to the court report:

*The Statement of Claim refers to K-W Oktoberfest Inc. by name twice. It alleges that the Hepditches*



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*attended the K-W Oktoberfest Inc. annual Oktoberfest parade as spectators. And as to the negligence of the City it alleges at paragraph 14(2)(a) that the City permitted the scheduling of the K-W Oktoberfest parade at the same time and place as the scheduled crossing of King Street North by the train; and at paragraph 14(2)(d) that it permitted K-W Oktoberfest Inc. to operate the parade without taking reasonable or adequate steps to protect the crowds. It is precisely these latter two subparagraphs that the Applicant relies upon to make the conduct of the City derivative of the negligence of K-W Oktoberfest Inc.*

The court further noted that although the certificate limited the City's liability to "vicarious liability" the coverage provided by the insurance policy itself was not so limited. The policy provided coverage for the City "with respect to liability arising out of the operations of the named insured." The court ruled that the certificate language limiting coverage was of no effect as the certificate boldly stated that it did not change the scope of the coverage provided. It contained a standard disclaimer that states that the certificate is issued for information purposes only and confers no rights on the certificate holder. The certificate was therefore subordinate to the words of the policy. Nonetheless, the court ruled that the policy provided no coverage for the City:

*The key limitation of coverage is contained in the defining words of the endorsement, "but only with respect to liability arising out of the operations of the named insured."*

*In my view this is a common, clear and unambiguous limitation of coverage. The words "arising out of" have been interpreted in the cases to include such meanings as "originating from", "growing out of", "flowing from", "incident to", or "having connection with".*

*These words define the pertinent liability for which coverage is provided. The pleadings on their face do not allege facts in support of liability "flowing from" or "incident to" the operations of K-W Oktoberfest Inc. And the plaintiffs have not sued K-W Oktoberfest Inc.*

*The K-W Oktoberfest parade was merely the site or occasion of the Hepditches unfortunate accident with the train.*

As the injuries did not arise out of the operations of K-W Oktoberfest Inc. there was no coverage for the additional insured.

In *D'Cruz v. B.P. Landscaping*, Peel Housing sought coverage for an action claiming damages for a slip and fall on ice. B.P. Landscaping was the winter maintenance contractor. As a condition of the contract, B.P. Landscaping added Peel Housing as an additional insured on its CGL policy. The certificate of insurance provided to Peel Housing stated the following:



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*The Regional Municipality of Peel and/or Peel Housing Corporation – O/A Peel Living have been added as additional insured's, but only with respect to their interest in the operation of the named insured.*

The allegations against Peel Housing were that it had failed to "…discharge its duties under the Occupier's Liability Act which Peel Housing might owe to the plaintiff."

The court ruled that the allegations against Peel Housing were separate and distinct from the allegations against B.P. Landscaping, and as such, did not arise out of the operations of B.P. Landscaping. In short, the court refused to rule that the potential liability of Peel Housing was completely derivative of the negligence of B.P.

The opposite result, on similar facts, was reached in *RioCan Real Estate Investment Trust v. Lombard General Insurance Co.* In this case, two parties were injured as a result of falling in an icy parking lot. In both cases the allegations against both RioCan and the winter maintenance contractor included failing to adequately salt and sand the parking lot and, against RioCan, for failing to put in place an adequate winter maintenance program.

The coverage provided to RioCan under the winter maintenance contractor's policy was limited to liability "only with respect to the above noted contract and solely with respect to the operations performed by the original Named Insured." Lombard denied coverage to RioCan due to the allegations that RioCan had failed to meet its obligations under the Occupier's Liability Act, and that this failure was a separate act of negligence that was separate from the operations of the winter maintenance contractor.

The court considered the D'Cruz case and distinguished it based on a more recent Ontario Court of Appeal case which held that simply because the allegations included both insured and excluded allegations, this did not absolve a CGL insurer's obligations to defend.

More importantly, the court addressed the apparent superficial distinction between the negligence of the contractor in not properly salting and sanding and the alleged separate negligence of the landlord in not having compelled the contractor to do what had been contracted for. Accordingly:

*I am of the view that in most situations where there is a duty on an Insurer to defend some, or only one, of the claims made against an Insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises.*

(c) Loss Payee

The term "loss payee" has no application to a liability policy. In liability policies the loss payee is the injured



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party. In property and boiler & machinery insurance policies, however, a loss payee is the party designated to receive payment in the event of damage. When dealing with real property the lender is protected by a mortgage clause. In the case of chattel mortgages and assignments on title of non-real property unless there is a loss payable clause in favour of the lender, in the event of loss or damage the claim will be paid to the named insured. The loss payable clause protects the other party of interest. However, the protection provided to a loss payee is derivative in that it is not insured separately from the interest of the named insured. As such, an action by the named insured that would disentitle it to coverage will also disentitle the loss payee from coverage.

(d) Mortgagee Under The Standard Mortgage Clause

The Standard Mortgage Clause provides the mortgagee with significant protection in that it creates a separate contract between the insurance company and the mortgagee. Under the terms of this separate contract, default by the named insured that would disentitle it to coverage does not affect the rights of the mortgagee to collect. In addition, the mortgage clause acts as a loss payee clause so that claims will be paid, at least in part, to the mortgagee.

Haber recommends that any clause in the Lease requiring that the Landlord be named as additional insured should also require that every policy so naming the Landlord as additional insured must include a provision stipulating that the interests of the Landlord will not be invalidated with respect to any breach or violation of any warranties, representation, declarations or conditions by the named insured.[8] The purpose of such a provision is to ensure that a material misrepresentation by the Tenant on the application for insurance will not disentitle the innocent insured (i.e. the Landlord named as additional insured) from protection under the policy. As sample language Haber suggests:

*[The Policy must] contain a waiver in respect of the interests of the Landlord and the Mortgagee of any provision in any such insurance policies with respect to any breach or violation of any warranties, representations, declarations or conditions in such policies...*[9]

Such a clause would be beneficial but is virtually unavailable outside of a Mortgage Clause. Many insurers will grant severability for acts involving the property itself but this severability does not extend to a breach of representation in acquiring the policy itself. As such, misrepresentations and failures to disclose pertinent information would render the policy voidable to the additional insured even if the policy contained a severability provision.

A mortgagee, as loss payee, would also typically have this protection if named as such under the Standard Mortgage Clause by virtue of the following language:



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*Breach of Conditions by Mortgagor, Owner or Occupant: This insurance and every documented renewal thereof – AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN – is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk;*

*PROVIDED ALWAYS that the Mortgagee shall notify forthwith the Insurer, (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO HIS KNOWLEDGE; and that every increase of hazard (not permitted by the policy) shall be paid for by the Mortgagee – on reasonable demand – from the date such hazard existed, according to the established scale of rates for the acceptance of such increased hazard, during the continuance of this insurance.*[10]

**3. Require undertakings from the Tenant's insurers to give 30 days' written notice of cancellation or non-renewal to the Landlord and the Landlord's Mortgagees**

Sample clause:

*Tenant to Insure*

*The Tenant covenants with the Landlord that it will take out and keep in force during the Term, owned and non-owned automobile insurance with respect to all motor vehicles owned and/or operated by the Tenant in its business from the Leased Premises, insurance upon all glass and plate glass in the Leased Premises, whether installed by the Landlord or the Tenant, boiler and pressure vessel insurance, and a commercial all-risk insurance policy that will cover damage to the stock-in-trade, furniture, fixtures, improvements (including leasehold improvements), and all other contents of the Leased Premises to the full replacement cost of them, and comprehensive general liability insurance in an amount not less than $5,000,000, and tenant's fire legal liability insurance to the replacement cost of the Leased Premises, and with policies and insurers acceptable to the Landlord. Each policy will name the Landlord as an additional insured as its interest may appear, and in the case of such public liability insurance will contain a provision for cross-liability insurance as between the Landlord and Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance. The cost or premium for each and every such policy will be paid by the Tenant. The Tenant will obtain from the insurers under such policies undertakings to notify the Landlord in writing at least 30 days prior to any cancellation*



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*thereof or any material change therein. The Tenant will, at the request of the Landlord, provide the Landlord with written evidence satisfactory to the Landlord of the existence of the insurance policies described in this clause 10.1.*[11]

As was identified above, one of the limitations of being named an additional insured is that generally, the policy can be cancelled or terminated without any notice to the additional insured. Obviously, this could have serious consequences and should be avoided by a Landlord. To compensate for this characteristic of being an additional insured the Landlord should require the Tenant to get an undertaking from their insurer to notify the Landlord before the policy is cancelled. This type of clause may also stipulate how the notice is to be delivered to the Landlord, for example by registered mail.

Haber advises that Tenants should attempt to reduce this notice period to 10 days as many insurers will not agree to a 30-day period.[12] In the last several years, however, insurers have generally adhered to the 30-day provision. Regardless, the Landlord should require this undertaking to prevent a policy being cancelled without its knowledge.

**4. Include "cross liability" or "severability of interest" clauses in all liability policies**

Sample Clause:

*Tenant to Insure*

*The Tenant covenants with the Landlord that it will take out and keep in force during the Term, owned and non-owned automobile insurance with respect to all motor vehicles owned and/or operated by the Tenant in its business from the Leased Premises, insurance upon all glass and plate glass in the Leased Premises, whether installed by the Landlord or the Tenant, boiler and pressure vessel insurance, and a commercial all-risk insurance policy that will cover damage to the stock-in-trade, furniture, fixtures, improvements (including leasehold improvements), and all other contents of the Leased Premises to the full replacement cost of them, and comprehensive general liability insurance in an amount not less than $5,000,000, and tenant's fire legal liability insurance to the replacement cost of the Leased Premises, and with policies and insurers acceptable to the Landlord. Each policy will name the Landlord as an additional insured as its interest may appear, and in the case of such public liability insurance will contain a provision for cross-liability insurance as between the Landlord and Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance. The cost or premium for each and every such policy will be paid by the Tenant. The Tenant will obtain from the insurers*



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*under such policies undertakings to notify the Landlord in writing at least 30 days prior to any cancellation thereof or any material change therein. The Tenant will, at the request of the Landlord, provide the Landlord with written evidence satisfactory to the Landlord of the existence of the insurance policies described in this clause 10.1.*[13]

This type of clause makes the policy operate as if a separate policy was issued to the Landlord and Tenant. These clauses, more often than not written as one clause, have been standard in CGL policies for the last thirty years. However, there are non-standard policy wordings, and we have seen, particularly in the United States, a proliferation of non-standard endorsements that reduce the scope of the coverage otherwise provided by a CGL policy.

Severability provisions are not available for automobile insurance policies and they are not standard in property insurance policies. Nonetheless, they are used in policies covering many of the larger Landlords and may be negotiable for more modest Landlords. This type of clause would be very desirable in leases where the Tenant has undertaken the responsibility for insuring the building on the Landlord's behalf.

**5. "Other Insurance" clauses stipulating that Tenant's policies are primary and Landlord's policies are excess**

Sample Clause:

*Tenant will cause each such insurance policy to be primary, non-contributing with, and not excess of, any other insurance available to Landlord or the Mortgagee.*[14]

This type of provision ensures that the Tenant's insurance is exhausted before any other insurance put in place by the Landlord is required to pay. This is most often seen with respects to liability insurance. The Landlord, as additional insured on the Tenant's policy expects the Tenant's policy to respond, however the Tenant's insurer may invoke the "other insurance clause in its policy to compel the Landlord's insurer to contribute. By requiring the Tenant's insurer to be primary it is intended that the "other insurance clause" will be neutralized. A similar issue can arise with respect to coverage for tenant's improvements.

## C. Clauses to Include in Lease

**1. Proof of insurance to be delivered to Landlord**

Sample Clause:

*Tenant to Insure*



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*The Tenant covenants with the Landlord that it will take out and keep in force during the Term, owned and non-owned automobile insurance with respect to all motor vehicles owned and/or operated by the Tenant in its business from the Leased Premises, insurance upon all glass and plate glass in the Leased Premises, whether installed by the Landlord or the Tenant, boiler and pressure vessel insurance, and a commercial all-risk insurance policy that will cover damage to the stock-in-trade, furniture, fixtures, improvements (including leasehold improvements), and all other contents of the Leased Premises to the full replacement cost of them, and comprehensive general liability insurance in an amount not less than $5,000,000, and tenant's fire legal liability insurance to the replacement cost of the Leased Premises, and with policies and insurers acceptable to the Landlord. Each policy will name the Landlord as an additional insured as its interest may appear, and in the case of such public liability insurance will contain a provision for cross-liability insurance as between the Landlord and Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance. The cost or premium for each and every such policy will be paid by the Tenant. The Tenant will obtain from the insurers under such policies undertakings to notify the Landlord in writing at least 30 days prior to any cancellation thereof or any material change therein. The Tenant will, at the request of the Landlord, provide the Landlord with written evidence satisfactory to the Landlord of the existence of the insurance policies described in this clause 10.1.*[15]

This clause may also stipulate that such written evidence be provided immediately (i.e. without any request by the Landlord) upon the placement, renewal, amendment or extension of all or any part of the policy. Further, the clause may stipulate the specific form of such evidence; e.g. certificates of insurance on the Landlord's standard form signed by the Tenant's insurers, or certified copies of the policies.

Although a Landlord may want to use its standard form certificate of insurance, insurance companies do not favour Landlord's certificates and often refuse to sign them. Often they are signed by the broker. Other times they are signed but offending language has been struck. Insurance companies prefer standardised certificates that contain disclaimers; i.e. "This Certificate is issued for information purposes only and confers no rights on the holder." Even without this language a certificate of insurance will always be subordinate to the insurance policy itself. This invariably leads to one conclusion, and that is: being added to the Tenant's insurance policies is a positive step. It should never, however, be considered a substitute for the Landlord's own well designed insurance program.

It is advisable for the Landlord to include a right of re-entry and a right to terminate the Lease if the Tenant fails to deliver the required proof of insurance.



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However, note that the court has specific discretion to grant the Tenant relief from forfeiture for the Tenant's breach of a covenant to insure against loss or damage by fire under section 26 of the B.C. *Law and Equity Act*:

*RELIEF AGAINST FORFEITURE FOR BREACH OF COVENANT TO INSURE*

*The court or any judge of it may, on terms the court or judge may think fit, relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire if no loss or damage by fire has happened and the breach has, in the opinion of the court, been committed through accident, mistake or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court or judge that conforms with the covenant to insure.*[16]

**2. Right of Landlord to place the insurance if Tenant fails to do so**

Sample Clause:

*If the Tenant does not provide or maintain in force the insurance required under this Lease or provide proof of the insurance when requested by the Landlord, the Landlord may take out the necessary insurance and pay the premiums, and the Tenant will pay to the Landlord as Additional Rent the amount of such premium on the next succeeding rental payment date.*[17]

The two most critical issues to address in this clause are first to ensure that the Landlord is not obligated to take out coverage when the Tenant fails to do so and second to include a right for the Landlord to recover any premiums and related insurance expenses from the Tenant as rent. Of course, a Landlord may distrain for any unpaid rent.

## II. LANDLORD'S INSURANCE

### A. Types of Insurance Which Landlords Should Obtain

Keeping in mind that the overriding principle when addressing the insurance provisions in a commercial Lease is to attempt to allocate all types of risk to one of the Landlord or Tenant, as the case may be, without duplication, the Landlord should secure insurance for areas and risks not covered by the Tenant's insurance. Duplication of insurance coverage can be both confusing, especially at a time of loss, and problematic. In fact, one writer warns that duplication of insurance can be as dangerous as omissions in coverage[18]. Though we sympathize with the writer's concerns, the principle issues with duplications in coverage are first, duplicate costs and, second, legal costs and delays while our courts decide which insurance company pays and how each company will contribute. From the perspective of the insurance



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ultimately responding, duplicate insurance is far preferable to inadequate insurance. But, the legal costs and the cost of financing repairs while the battle goes on may prove to be more than a company can financially handle. With that in mind the Landlord should obtain the following types of insurance.

**1. All Risks (including flood and earthquake) insurance on the building and the machinery, boilers and equipment contained in the building**

Many of the relevant issues that arise in relation to All Risks insurance have already been addressed above in Section I, A, 1. To avoid duplication, the Landlord's all risk policy should exclude any property which the Tenant is obliged to insure under the Lease. It may be desirable to purchase contingent coverage for the loss of tenants improvements. Such coverage would respond if the Tenant's insurance proved inadequate. Some Landlords purchase this form of coverage while many do not.

It is also important for the Landlord to keep track of, and regularly update, the replacement cost values of its property. In doing so it is a mistake to simply increase values based on inflation indices. Inflation may be increasing at 3% to 4% per year while the cost of construction is increasing at ten to eighteen per cent per year. This is particularly the case in today's construction environment in Alberta and British Columbia, but the impact is felt throughout Canada. In one situation, involving a construction project in British Columbia, the cost of rebuilding was some 30% to 40% greater than the original contract price and equally greater than the amount of insurance.

This phenomenon is not unique to today's construction climate. Even in a more moderate construction climate, we have seen very significant under-insurance result from misunderstanding the relationship between inflation in general and inflation in the field of construction.

In addition to rebuilding costs, there is the cost of debris removal and the cost of demolishing the still standing portions of a destroyed building. These costs should be factored in.

As in the case of a Tenant, the Landlord's all-risk policy should also include a by-laws endorsement for the same reasons as those discussed above in Section I, A, 1.

**2. Commercial General Liability (CGL) insurance for bodily injury and property damage applying to the Landlord's operations**

As already discussed in the context of the Tenant's insurance above in Section I, A, 4, this type of insurance would serve to protect the Landlord from public liability and property damage with respect to the Landlord's operations. The amount of insurance to be carried is generally determined by the Landlord or by the Landlord's lenders. It should be noted, however, that the Ontario Court of Appeal has recently upheld a



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$13,000,000 award against a Landlord for crippling injuries suffered by a five year old child. In another Ontario case, over $3,000,000 was awarded to a Tenant who suffered serious injuries as a result of a fire. This ruling is the tip of the iceberg. Some 40 tenants were hurt and six were killed. The judgment mentioned was the test case in establishing liability between the Landlord, the City building inspector and the management company.

**3. Business interruption/loss of rental income insurance**

Similar to the business interruption insurance that a Tenant would secure to protect its income stream in the case of an interruption of business, this type of insurance would protect a Landlord for the loss of rental income during the period that the Premises are being restored. As this insurance is intended to replace lost rental income for a specified period of time it is important that the Landlord considers the length of time it would take to completely rebuild the premises in the event of a total loss and take care to ensure that the period of indemnity is at least that long.

It is also important that the Landlord take out this type of insurance on the Gross Rental form rather than on the Standard Form. The Gross Rental Form will reimburse the Landlord for anticipated income loss from all sources whereas the standard form only reimburses for actual loss of rents. Thus, the Standard Form would not reimburse the Landlord for rent lost in relation to units which were vacant at the time of the damage.

**B. Insurance Clauses That Can Materially Impact the Amount of Insurance Available to Rebuild or Repair**

**1. Replacement cost values**

Replacement cost coverage provides replacement of property that has been destroyed with new property with no deduction for depreciation. The measure of recovery is the cost to rebuild new on the same or on an adjacent site. Additional cost to rebuild to comply with current building codes is not covered in the standard form. Some other important points to note:

(a) Replacement cost endorsements often include obligations to rebuild “with due diligence and dispatch” or other similar wording, or reconstruction must commence within two years. Any costs incurred due to a delay in reconstruction will not be covered by the insurance.

(b) Replacement cost coverage does not increase the limit of the policy. It simply removes the deduction for depreciation that is inherent in “actual cash value” insurance.

(c) Standard wordings require rebuilding on the same or on an adjacent site. This restriction can be



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readily removed.

(d) The additional costs incurred to rebuild in conformance with current building codes or by-laws can be significant. These costs can be readily insured.

(e) If a building did not conform to the prevailing building codes when it was constructed, coverage to meet the current codes and by-laws will not be provided.

(f) If the amount of insurance is less than the full replacement cost of the property, there will not be enough insurance recovery to fund the full cost of rebuilding. A case in point is the lengthy and costly dispute that followed the destruction of the World Trade Center.

**2. Co-insurance penalties**

Theoretically, one purpose of a co-insurance clause is to reduce the amount of the premium payable by the insured, and to reduce the liability of the insurer, by assigning a portion of the risk to the insured. This description of a co-insurance clause is taken from a decision of the Alberta Supreme Court in *McMurray Mobile Home Park Ltd. v. Halifax Insurance Co.*, [1979] A.J. No. 500 at paragraph 8:

*"In general terms, a co-insurance clause involves a relative division of risk between the insured and the insurer that depends upon the relationship between the amount of the policy coverage and the actual value of the property insured. The clause benefits both parties to a limited extent. Insofar as the insured is concerned, it obtains a reduced premium in return for its undertaking to the insurer to secure such additional insurance as would be required to increase the total insurance to the agreed percentage of actual cash value (or replacement cost). Insofar as the insurer is concerned, its benefit under a co-insurance clause is that the risk of loss is spread amongst one or more additional insurers. If the insured does not secure the appropriate minimum additional coverage through another insurer then the insured becomes an insurer to the extent of the additional amount required to increase the face value of the coverage to the agreed percentage of actual cash value, in this case being 90% of the actual replacement cost of $300,000."*

The more common purpose of a co-insurance clause is to encourage insurance to value and to penalize those who under insure.

When an owner deliberately under insures to save premium, the owner will have weighed the benefits and the risks. More commonly, co-insurance penalties are the result of failing to understand either or both the true cost of reconstruction and how the penalty is to be applied. In the case of a building with a replacement value of $1,000,000 and an insured sum of $500,000, in the case of a total loss the amount payable is $500,000. The building may have a value to the insured of only $500,000 so this amount of



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insurance appears adequate. However, in the case of a partial loss, say twenty five per cent of the building is damaged, if the co-insurance requirement is 100 % the amount of insurance available for repairing the damage will not be $250,000. It will be $125,000.

In the case of business interruption insurance, various co-insurance limits are available for gross earnings policies, and some forms have no co-insurance, The Gross Profits form, however, is subject to 100% co-insurance. This provision does not appear on the face of the policy but is effectively "buried" in the body of the wording.

Under the BC *Insurance Act*, a policy which contains a co-insurance clause is required to have printed or stamped on its face in large type, the words "this policy contains a clause that may limit the amount payable", failing which the clause is not binding on the Insured: *Insurance Act*, R.S.B.C. 1996, c. 226, section 128(b). One would think that this warning would draw attention to limitations such as co-insurance provisions; unfortunately, the stamped warning appears on virtually all property insurance policies.

Insurance companies do offer relief from co-insurance penalties in the form of "Stated Amount" clauses. In return for completing a form attesting to the replacement cost of the property and insuring to that amount, the co-insurance provisions of the policy are suspended. "Stated Amount Co-insurance" is a desirable feature. It does not, however, assist if the amount of the loss is greater than the declared values and if it can be shown that the declared values are knowingly deficient, coverage could be voidable by the insurance company.

Co-insurance clauses are often misunderstood, and sometimes they are not properly explained to the insured when the policy is purchased. An insurance agent who fails to warn the insured about the significance of a co-insurance clause is liable for the ensuing loss if such failure results in the insured not obtaining adequate insurance coverage: *Niagara Frontier Caterers Ltd. v. Continental Insurance Co. of Canada*, (1990) 74 O.R. (2d) 191, affirmed [1994] O.J. No. 3813 (C.A.).

**3. Breach of warranty clauses (providing coverage to an innocent Landlord when a Tenant breaches a policy condition)**

As already discussed above in Section I, B, 2, each clause requiring that the Landlord be named as additional insured should include a provision that every policy naming the Landlord as additional insured must contain a waiver such that the interests of the Landlord will not be invalidated with respect to any breach or violation of any warranties, representation, declarations or conditions by the named insured.

**C. Clauses to Include in the Lease**



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**1. Landlord not obligated to obtain insurance**

This clause is related to and works in unison with the clause allowing a Landlord to place insurance when a Tenant fails to do so (discussed above in Section I, C, 2). Combined, the two clauses operate to enable the Landlord to take out insurance when a Tenant fails to satisfy its obligation to do so, but they also preserve the Landlord's right not to do so.

**2. All insurance expenses incurred by the Landlord are recoverable as part of operating expenses charged to Tenant as rent**

Most net leases contain definitions of "operating expenses" or "common area maintenance costs" which include all insurance premiums paid by the Landlord, as part of the Additional Rent payable by the Tenant. Tenants will sometimes audit the operating costs that are charged back to them. When they do so they will avail themselves of any advantages that they can find. If the insurance clauses call for limited insurance, for example, $5,000,000 of CGL coverage or fail to mention boiler & machinery coverage, the Tenant's auditors will try to limit recovery of those insurances specifically mentioned. Yet, no self respecting Landlord would limit the amount of liability insurance it purchases to $5,000,000.

**3. Tenant's indemnity to Landlord**

Sample Clause:

*The Tenant will indemnify the Landlord and save it harmless from and against all claims, actions, damages, liabilities, costs, and expenses in connection with loss of life, personal injury, or damage to property arising from any occurrence on the Premises, or occupancy or use of the Premises, or occasioned wholly or in part by an act or omission of the Tenant, its officers, employees, agents, customers, contractors, or other invitees. The provisions of this clause will survive the expiry or sooner termination of this Lease.*[19]

This clause acts to obligate the Tenant to indemnify the Landlord from all claims arising out of acts or omissions of the Tenant or the Tenant's agents.

Haber suggests adding the following before the last sentence above:

*Landlord may, at its option and at Tenant's expense, participate in or assume carriage of any litigation or settlement discussions relating to the foregoing or any other matter for which Tenant is required to indemnify Landlord under this Lease. Alternatively, Landlord may require Tenant at Tenant's expense to assume carriage of and responsibility for all or any part of such litigation or discussions, subject to Tenant at all times keeping Landlord up to date in writing as to the status thereof.*[20]



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And also:

*Without limiting the generality of the foregoing, Tenant shall also pay Landlord, as Additional Rent, on demand, all costs and expenses, including, without limitation, any professional, consultant and legal fees (on a solicitor and his/her own client basis) that may be incurred or paid by or on behalf of Landlord in enforcing the terms, covenants and conditions in this Lease, interpreting or defining any terms or provisions contained in this Lease, or resulting from any requests for a Transfer.*[21]

**4. Release of liability by Tenant for Landlord's benefit**

Sample Clause

*It is agreed between the Landlord and Tenant that:*

*(a) Tenant's Property*

*The Landlord, its agents, servants, and employees will not be liable for damage or injury to any property of the Tenant that is entrusted to the care or control of the Landlord, its agents, servants, or employees.*

*(b) Personal or Consequential Damages*

*The Landlord, its agents, servants, and employees, will not be liable or responsible in any way for any personal or consequential injury of any nature whatsoever, including death, that may be suffered or sustained by the Tenant or any employee, agent, customer, invitee, or licensee of the Tenant or any other person who may be upon the Shopping Centre, or for any loss of or damage or injury to any property belonging to the Tenant or to its employees or to any other person while such property is in the Shopping Centre, and in particular, but without limiting the generality of the foregoing, the Landlord will not be liable for any damages of any nature whatsoever to any such person or property caused by the failure, by reason of a breakdown or other cause, to supply adequate drainage, electricity, or snow or ice removal, or by reason of the interruption of any public utility or service, any interruption in the heating, ventilating, and air-conditioning system, or in the event of steam, water, rain, or snow that may leak into, issue, or flow from any part of the Shopping Centre, or from the water, steam, sprinkler, or drainage pipes or plumbing works, or from any other place or quarter, or for any damage caused by anything done or omitted to be done by any tenant, but the Landlord will use all reasonable diligence to remedy such condition, failure, or interruption of service when not directly or indirectly attributable to the Tenant, after notice of same, when it is within its power and obligation so to do. The Tenant will not be entitled to any abatement of Rent in respect of any such condition, failure, or interruption of service.*



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*(c) Landlord Entering Leased Premises*

*Neither the Landlord nor its agents, servants, employees, or contractors will be liable for any damage suffered to the Leased Premises or the contents of the Leased Premises by reason of the Landlord, its agents, employees, or contractors entering upon the Leased Premises to undertake any examination of the Leased Premises or any work in them or in the case of any emergency.*[22]

The Landlord should require that the Tenant release the Landlord from liability for loss or damage resulting from the negligence of the Landlord or its agents. This would be considered a broad form of release because it allows the entire burden of liability, regardless of fault, to be carried by the Tenant and it is worth noting that this type of release attempts to transfer liabilities that at law may not be contracted away.

As is done in the above sample clause, it is a good idea for the Landlord to set out specifically that the Landlord is not responsible for any loss or damage to property resulting from an extensive list of specific hazards. This is important because courts are generally of the view that if the Landlord wanted to specifically exclude a specific type of event they should explicitly say so and not simply rely on general wording.[23]

## III. RENT ABATEMENTS AND DESTRUCTION OF PROPERTY

Commercial leases usually specify how lease payments are to be affected when the premises becomes unusable following a disaster. One such clause may be as follows:

*The Landlord and the Tenant agree that:*

*(a) Damage or Destruction*

*(i) Subject to the Landlord's right of termination contained in paragraph 7.3(a)(ii) and subject to subclause 7.3(d), if the Leased Premises or any part of them are at any time during the Term destroyed or damaged as a result of a casualty fully insured against by the Landlord, the Landlord will rebuild, repair, and make the Leased Premises fit for the purpose of the Tenant to the standard required in Schedule A—Landlord's Work. If as a result of such occurrence the Leased Premises are rendered unfit either in whole or in part for the business of the Tenant, then the Minimum Rent hereby reserved, or a proportionate share of it according to the nature and extent of the destruction or damage sustained, shall be suspended and abated until the Landlord has rebuilt, repaired, or made fit the Leased Premises for the purpose of the Tenant to the standard required in Schedule A—Landlord's Work.*

*(ii) In the event of damage to 50% or more of the area of the buildings forming part of the Shopping*



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*Centre apart from Department Store A, Department Store B, and the Food Store, or of the substantial destruction of the Shopping Centre (whether or not in either event the Leased Premises are damaged), the Landlord will, at its option to be exercised within 90 days after the occurrence of such damage or destruction, by notice in writing to the Tenant, have the right to terminate this Lease, and upon the giving of such notice the Term will immediately cease and terminate. If, in any of these events, the Leased Premises are unfit either in whole or in part for the business of the Tenant, then, provided such damage or destruction is as a result of a casualty fully insured against by the Landlord, the Minimum Rent hereby reserved, or a proportionate share of it according to the extent to which the Leased Premises cannot be used for the business of the Tenant, will be suspended and abated until the Landlord has rebuilt, repaired, or made fit the Leased Premises for the purpose of the Tenant, to the standard required in Schedule A—Landlord's Work, provided that the Landlord has not exercised its right of termination. If the Landlord has exercised its right of termination, the Tenant, after receipt of such notice of termination, will immediately deliver up possession of the Leased Premises to the Landlord and make payment of the Rent in the manner required by paragraphs 7.3(a)(i) and 7.3(a)(ii), depending on the circumstances of the damage and destruction. Any Minimum Rent that has continued unabated or partially abated, and all Percentage Rent and Additional Rent, will be apportioned to the date of such termination, provided that such termination will not affect the obligation of any Guarantor to or Indemnifier of the Landlord arising from obligations of the Tenant existing prior to the date of such notice of termination.**[24]***

The Landlord should take care to coordinate the period and type of rent abatement given to the Tenant under the Lease with the coverage available to the Landlord under its business interruption/loss of rental income insurance. Specifically, the Landlord should consider whose policy will cover the lost rental income for the Landlord and the lost business income for the Tenant. Additionally, the Landlord should consider the type of events that will trigger the rent abatement as the language used in a Lease will often differ from the language appearing in an insurance policy. The Landlord should ensure that the rent abatement provisions in the Lease are triggered concurrently with the insurance to cover the same. As added protection in this regard, the Landlord may also consider adding the following type of clause:

*Notwithstanding anything hereinbefore contained, all abatements of rent set out in this Article X shall be limited to an amount equal to the amount which the Landlord collects under any rental income insurance.*

## IV. SUMMARY

Although the examples used in this paper are in the context of shopping centre leases, the comments and advice apply to insurance covenants in all commercial leases. From the Landlord's point of view, the key points to note are:



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(a) be specific about the type of insurance you require your Tenant to obtain;

(b) understand the meaning of specific insurance clauses you require your Tenant's insurers to include in the Tenant's policies;

(c) follow up and review the specifics of the insurance your Tenant obtains; and

(d) protect yourself with lease language in the event the Tenant does not obtain all of the types of insurance, or specific insurance clauses, required.

From the Tenant's perspective:

(a) speak with your insurance broker about the Landlord's insurance requirements before you sign a lease which obligates you to obtain specific coverage;

(b) understand the impact and effect of specific insurance clauses; and

(c) don't assume that you can't negotiate changes to the insurance covenants in the lease.

**APPENDIX "A"**

**7.3 Damage or Destruction**

The Landlord and the Tenant agree that:

(a) Damage or Destruction

(i) Subject to the Landlord's right of termination contained in paragraph 7.3(a)(ii) and subject to subclause 7.3(d), if the Leased Premises or any part of them are at any time during the Term destroyed or damaged as a result of a casualty fully insured against by the Landlord, the Landlord will rebuild, repair, and make the Leased Premises fit for the purpose of the Tenant to the standard required in Schedule A—Landlord's Work. If as a result of such occurrence the Leased Premises are rendered unfit either in whole or in part for the business of the Tenant, then the Minimum Rent hereby reserved, or a proportionate share of it according to the nature and extent of the destruction or damage sustained, shall be suspended and abated until the Landlord has rebuilt, repaired, or made fit the Leased Premises for the purpose of the Tenant to the standard required in Schedule A—Landlord's Work.

(ii) In the event of damage to 50% or more of the area of the buildings forming part of the Shopping Centre apart from Department Store A, Department Store B, and the Food Store, or of the substantial destruction of the Shopping Centre (whether or not in either event the Leased Premises are



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damaged), the Landlord will, at its option to be exercised within 90 days after the occurrence of such damage or destruction, by notice in writing to the Tenant, have the right to terminate this Lease, and upon the giving of such notice the Term will immediately cease and terminate. If, in any of these events, the Leased Premises are unfit either in whole or in part for the business of the Tenant, then, provided such damage or destruction is as a result of a casualty fully insured against by the Landlord, the Minimum Rent hereby reserved, or a proportionate share of it according to the extent to which the Leased Premises cannot be used for the business of the Tenant, will be suspended and abated until the Landlord has rebuilt, repaired, or made fit the Leased Premises for the purpose of the Tenant, to the standard required in Schedule A—Landlord's Work, provided that the Landlord has not exercised its right of termination. If the Landlord has exercised its right of termination, the Tenant, after receipt of such notice of termination, will immediately deliver up possession of the Leased Premises to the Landlord and make payment of the Rent in the manner required by paragraphs 7.3(a)(i) and 7.3(a)(ii), depending on the circumstances of the damage and destruction. Any Minimum Rent that has continued unabated or partially abated, and all Percentage Rent and Additional Rent, will be apportioned to the date of such termination, provided that such termination will not affect the obligation of any Guarantor to or Indemnifier of the Landlord arising from obligations of the Tenant existing prior to the date of such notice of termination.

(iii) The terms "Shopping Centre" and "Leased Premises", for the purposes of this clause 7.3, will be deemed not to include the improvements installed in the Leased Premises under the provisions of Schedule A respecting Tenant's Work.

(b) Termination

If the Landlord fails to give notice of termination within the 90 days mentioned in subclause 7.3(a) and fails to complete the repair or reconstruction within 18 months after the occurrence of such damage to or destruction of the Leased Premises or the Shopping Centre, the Tenant will have the right to give to the Landlord notice of termination of this Lease and thereupon, subject to payment of any Rent then due by the Tenant to the Landlord, this Lease will immediately cease and determine, provided that if the Landlord's failure to complete the repair or reconstruction within the 18 months is due to some event, cause, or circumstance beyond the reasonable control of the Landlord, then the 18 months will be extended by the number of days as the Landlord will be delayed by such event, cause, or circumstance.

(c) Tenant's Obligation to Rebuild

Subject to subclauses 7.3(a) and 7.3(b), in the event of damage or destruction as contemplated by this Article 7, the Tenant will at its sole expense, at the request of the Landlord, repair and rebuild that part of



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the Leased Premises so damaged or destroyed, in accordance with the provisions of Schedule A and Schedule B with all due diligence, but without the benefit of any allowances, inducements, or rent-free periods.

(d) Landlord's Obligation to Rebuild

Nothing in this Article 7 will obligate the Landlord to rebuild the Shopping Centre or any part of it and if the Landlord elects to rebuild or repair the Shopping Centre, it may make such changes, alterations, modifications, adaptations, or extensions in, to, or of the original buildings or structures forming part of the Shopping Centre, including the location of the Leased Premises, as it in its unfettered discretion sees fit.

## 10. INSURANCE

### 10.1 Tenant to Insure

The Tenant covenants with the Landlord that it will take out and keep in force during the Term, owned and non-owned automobile insurance with respect to all motor vehicles owned and/or operated by the Tenant in its business from the Leased Premises, insurance upon all glass and plate glass in the Leased Premises, whether installed by the Landlord or the Tenant, boiler and pressure vessel insurance, and a commercial all-risk insurance policy that will cover damage to the stock-in-trade, furniture, fixtures, improvements (including leasehold improvements), and all other contents of the Leased Premises to the full replacement cost of them, and comprehensive general liability insurance in an amount not less than $5,000,000, and tenant's fire legal liability insurance to the replacement cost of the Leased Premises, and with policies and insurers acceptable to the Landlord. Each policy will name the Landlord as an additional insured as its interest may appear, and in the case of such public liability insurance will contain a provision for cross-liability insurance as between the Landlord and Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance. The cost or premium for each and every such policy will be paid by the Tenant. The Tenant will obtain from the insurers under such policies undertakings to notify the Landlord in writing at least 30 days prior to any cancellation thereof or any material change therein. The Tenant will, at the request of the Landlord, provide the Landlord with written evidence satisfactory to the Landlord of the existence of the insurance policies described in this clause 10.1.

### 10.2 Workers' Compensation



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If the nature of the Tenant's operations is such as to place all or any of its employees under the coverage of local workers' compensation or similar insurance, the Tenant will also keep in force at its expense, so long as this Lease remains in effect, workers' compensation or similar insurance affording statutory coverage and containing statutory limits.

**10.3 No Insurable Interest in Landlord's Insurance**

Notwithstanding any contribution by the Tenant to the Landlord's insurance premiums as provided in this Lease, no insurable interest is conferred upon the Tenant under policies carried by the Landlord. The Landlord will in no way be accountable to the Tenant regarding the use of any insurance proceeds arising from any claim and the Landlord will not be obliged on account of such contributions to apply such proceeds to the repair or restoration of that which was insured. Where the Tenant may desire to receive indemnity by way of insurance for any property, work, or thing whatsoever, the Tenant will insure it for the Tenant's own account and will not look to the Landlord for reimbursement or recovery in the event of loss or damage from any cause, whether or not the Landlord has insured the same and recovered therefor. *[The Tenant expressly acknowledges and agrees that the Tenant is not relieved of any liability arising from or contributed to by its negligence or its wilful acts or omissions, notwithstanding any contribution by the Tenant to the Landlord's insurance premiums.]*

**10.4 Landlord to Insure**

The Landlord will throughout the Term carry or cause to be carried insurance as described in the definition of Insurance Cost in respect of rentals and the buildings forming part of the Shopping Centre in an amount not less than their full replacement value less the cost of foundations and excavations; provided however that the Landlord will not be required to insure any of Department Store A, Department Store B, the Food Store, or other premises having a gross leasable area in excess of 10,000 square feet against damage from Insurable Hazards if the respective tenants of such stores have taken out insurance policies in respect of them which are satisfactory to the Landlord. *[Each policy will name the tenants of the Shopping Centre and their employees and agents as additional insureds as their interests may appear, and in the case of public liability insurance will contain a provision for cross-liability insurance as between the Landlord and the Tenant. Each policy (with the exception of the comprehensive liability insurance) will provide that the insurer will not have any right of subrogation against the Landlord on account of any loss or damage covered by such insurance or on account of payments made to discharge claims against or liabilities of the Landlord or Tenant covered by such insurance.]*

**13. EXCLUSION OF LIABILITY AND INDEMNITY**



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**13.1 It is agreed between the Landlord and Tenant that:**

(a) Tenant's Property

The Landlord, its agents, servants, and employees will not be liable for damage or injury to any property of the Tenant that is entrusted to the care or control of the Landlord, its agents, servants, or employees.

(b) Personal or Consequential Damages

The Landlord, its agents, servants, and employees, will not be liable or responsible in any way for any personal or consequential injury of any nature whatsoever, including death, that may be suffered or sustained by the Tenant or any employee, agent, customer, invitee, or licensee of the Tenant or any other person who may be upon the Shopping Centre, or for any loss of or damage or injury to any property belonging to the Tenant or to its employees or to any other person while such property is in the Shopping Centre, and in particular, but without limiting the generality of the foregoing, the Landlord will not be liable for any damages of any nature whatsoever to any such person or property caused by the failure, by reason of a breakdown or other cause, to supply adequate drainage, electricity, or snow or ice removal, or by reason of the interruption of any public utility or service, any interruption in the heating, ventilating, and air-conditioning system, or in the event of steam, water, rain, or snow that may leak into, issue, or flow from any part of the Shopping Centre, or from the water, steam, sprinkler, or drainage pipes or plumbing works, or from any other place or quarter, or for any damage caused by anything done or omitted to be done by any tenant, but the Landlord will use all reasonable diligence to remedy such condition, failure, or interruption of service when not directly or indirectly attributable to the Tenant, after notice of same, when it is within its power and obligation so to do. The Tenant will not be entitled to any abatement of Rent in respect of any such condition, failure, or interruption of service.

(c) Landlord Entering Leased Premises

Neither the Landlord nor its agents, servants, employees, or contractors will be liable for any damage suffered to the Leased Premises or the contents of the Leased Premises by reason of the Landlord, its agents, employees, or contractors entering upon the Leased Premises to undertake any examination of the Leased Premises or any work in them or in the case of any emergency.

**13.2 Indemnity**

The Tenant covenants with the Landlord to indemnify and save harmless the Landlord against and from any and all claims, including without limitation all claims for personal injury or property damage arising from the tenancy granted by this Lease or from any default by the Tenant in the observance or performance of the



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covenants and agreements on its part in this Lease to be observed and performed or from any act, or omission of the Tenant or any employee, agent, customer, invitee, or licensee of the Tenant, and against, and from all costs, legal and other fees, expenses, and liabilities incurred in respect of any such claim or any action or proceeding brought, and this indemnity will survive the expiration or sooner determination of the Term.

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[1] Harvey M. Haber, *The Commercial Lease: A Practical Guide*, 3rd ed., (Aurora: Canada Law Book, 1999) (hereinafter "Haber") at p. 202.

[2] This sample clause taken from subsection 10.1, "Shopping Centre Lease – General Form" *Commercial Leasing, Annotated Precedents 2007 Update,* Continuing Legal Education Society of British Columbia, updated March 2007 (hereinafter "General Form").

[3] Haber, at p 493.

[4] Haber, at p 199.

[5] Haber at p. 200.

[6] Subsection 10.3 General Form.

[7] Subsection 10.1 General Form.

[8] Haber at p. 197.

[9] Haber at p. 492-93.

[10] Insurance Bureau of Canada approved Standard Mortgage Clause.

[11] Subsection 10.1, General Form.

[12] Haber at p. 197.

[13] Subsection 10.1, General Form.

[14] Sample clause taken from Haber, at p. 492.



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[15] Subsection 10.1, General Form.

[16] Section 26, *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[17] This sample clause taken from subsection 12.5, "Shopping Centre Lease – Simpler Form" *Commercial Leasing, Annotated Precedents 2007 Update,* Continuing Legal Education Society of British Columbia, updated March 2007 (herein after cited as "Simpler Form").

[18] Philip J. Notopoulos, *A Review of Leases and Insurance*, Volume 2 Issue #4, 2002 at p. 2.

[19] Subsection 12.7, Simpler Form.

[20] Haber at p. 498.

[21] Haber at p. 498.

[22] Subsection 13.1, General Form.

[23] Haber at p. 208.

[24] Paragraph 7.3(a), General Form.

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