

**PROTECTING AGAINST CALAMITY:
INSURANCE PROVISIONS
(February 7, 2001)**

I. **Introduction.**

- A. Insurance provisions have been adopted, re-adopted and revised piecemeal over many years; often nonsensical and/or incomprehensible.
- B. Not enough to just say “have your risk manager/insurance agent look at it”. Why? May not have expertise. May not have sufficient E&O coverage. Typically, insurers are not bound by “quick & dirty” mistakes of agents.
- C. Large entities (*e.g.* giant landlords, property management firms, credit tenants) usually have provisions drafted by corporate counsel with input from risk department. Often overkill – assume malicious intent, huge damages, hazardous activities, etc. – especially for a small leasehold or minor transaction. Small operators get squeezed; have to rely upon escape through bankruptcy or adhesion claims.
- D. Important Note: there are no standard forms. The Insurance Services Office, Inc. (“ISO”) is an industry group that promulgates various forms, but a wide variety of other forms are used.

II. **Commercial General Liability Insurance (“CGL”).**

- A. Old, now-outdated terms: “comprehensive general liability insurance” and “public liability insurance”. These terms now have a more narrow meaning than CGL, since modern CGL coverage includes many of the items that used to be separate endorsements.
- B. CGL includes the following coverages:
 - 1. **Bodily Injury:** this is different from “personal injury” in insurance parlance. It means physical injury to a person, such as sickness, disease, physical injury and injuries recoverable by law as equivalent to physical injury (*e.g.*, emotional distress), death, loss of services or consortium. There are important, specific exclusions, discussed *infra*.
 - 2. **Property Damage:** this is NOT casualty coverage. Instead, it insures for physical injury to tangible property belonging to parties other than the insured, including loss of use. Important, specific exclusions include: (a) property of the insured, (b) property loaned to insured and (c) property in care/custody/control of insured.
 - 3. **Personal Injury and Advertising Injury:** “personal injury” has a special meaning in an insurance context; it means injuries such as slander, libel, invasion of privacy, wrongful imprisonment, damage to reputation or credit and advertising injury (torts resulting from insured’s advertising of its business, such as copyright infringement. Important exclusions: intentional acts, pollution and contractually-assumed liability.
 - 4. **Contractual Liability:** this provides coverage for the liability of others assumed by the insured in a contract, such as a real property lease where the landlord’s simple negligence is indemnified by the tenant.
 - 5. **“Per Occurrence” vs. “Claims Made”:** important distinctions here; occurrence based is preferred, since it continues after the expiration date of the policy for liabilities that arose during the coverage terms, even if not asserted until after expiration. Conversely, if a claims-made policy lapses without a claim being made, then there is no further coverage even if a later claim arose from events occurring during the policy term. Most forms of CGL insurance are per occurrence policies.

6. **Policy Limits**: modern CGL policies are quoted in terms of combined aggregate limits for bodily injury and property damage, although you do sometimes see separate limits for automobile coverage and other endorsements. Old-school provisions that require separate limits for injuries per-person per-occurrence and property damage per-occurrence are antiquated and should no longer be used. A modern per-occurrence policy has a combined limit “per-incident”. NOTE: most policies also have an annual aggregate limit, so one incident can eat up an entire year’s worth of coverage.

III. Coverages Necessitated by CGL Exclusions.

- A. As noted above, the typical CGL policy has a number of important exclusions, which give rise to certain standard endorsements, to wit:
- B. **Automobile Liability**: needed for an insured that uses automobiles or other vehicles in the conduct of its business. Related: aircraft and watercraft coverage.
- C. **Umbrella (Excess) Liability Coverage**: no standardized forms or treatment whatsoever. Belt and suspenders. Typically covers the same liabilities as in a CGL policy and as in Automobile Liability policy; also, backstop for insured’s employer’s liability/workers’ compensation coverage, discussed *infra*.
- D. **Liquor Liability/Dram Shop**: absolutely necessary for commercial operator selling alcoholic beverages. CGL excludes coverage for a commercial setting but does include “social host” coverage (think: office parties).
- E. **Workers’ Compensation/Employer’s Liability**: CGL excludes injuries to employees of the insured. Ordinarily, in Texas, employers participate in the statutory workers’ compensation insurance program, as follows: by participating, employer purchases a standard state-approved insurance policy, agrees to provide a limited set of statutorily-prescribed benefits and submits to a streamlined claims system. Usually, the concept of fault does not enter the picture; the employee is entitled to insurance benefits if injured in the course and scope of her work, and the employer is shielded from liability. Non-participants may “opt out” of the Texas scheme to save costs, but this is risky and can ultimately prove more expensive, as employer is without the statutory shield.

IV. Property Loss Insurance.

- A. Old, now-outdated terms: “casualty insurance”, “fire and extended coverage”, “all-risk coverage”, etc. The proper, modern term is “**property loss insurance**”.
- B. **Special Causes of Loss Form Coverage**: so-called “all-risk” or “special form” insurance. The most expansive form of coverage, although typically there are exclusions for nuclear accident, pollution, flood and earthquake, since these are obtainable by additional endorsement and premium.
- C. **Basic Property Loss Coverage for Fire and Other Named Perils**: more narrow coverage; only covers specifically-identified causes of property damage. The “**Basic Causes of Loss Form Coverage**” (FKA “fire and extended coverage”) is the most narrow. The “**Broad Cause of Loss Form Coverage**” adds additional named perils to the Basic Form Coverage.
- D. **Betterments & Improvements Coverage**: insures tenant improvements that technically are part of the real estate and therefore belong to landlord.
- E. **Builder’s Risk Insurance**: covers losses for improvements under construction. Can include coverage for off-site equipment. Covers interests of owner, contractor, subcontractors, suppliers, etc.

V. Other Coverages.

- A. **Flood Insurance and Earthquake Insurance**: excluded from standard property loss policies.
- B. **Boiler & Machinery Coverage**: excluded from standard property loss policies.
- C. **Rental Loss Insurance**: compensates owner for lost rent following damage or destruction. Usually limited to 6/12 months or during period of reconstruction. Deductibles are common.
- D. **Business Interruption Insurance**: compensates business owner for lost revenues. No standard forms. Usually capped at dollar maximum.
- E. **Pollution Coverage**: covers environmental liability. No standard forms/terms. Typically exclude intentional/knowing acts.
- F. **Professional Errors & Omissions Insurance**: covers professional malpractice for lawyers, doctors, architects, engineers, property managers, insurance agents and others giving professional advice. No standard forms/terms.

VI. **Endorsements.**

- A. These are simply addenda/amendments to a policy, whether at original issuance or subsequently. Available for an additional premium. There are form endorsements; but one can negotiate special endorsements when the circumstances so demand.
- B. **Additional Insured**: better than “co-insured” or “named insured”, which can imply that the other party is liable for the premiums. Most umbrella policies provide that any additional insured under CGL coverage is automatically an additional insured under the umbrella. Often, CGL language is broad enough that it covers parties not specifically named (e.g., a property manager agent is automatically an additional insured under landlord’s policy).
- C. **Replacement Cost**: typically, property loss insurance is required to cover the replacement cost of a lost improvement, as opposed to the cash or depreciated values. The policy must state that it covers replacement cost and it must have limits at least equal to the replacement cost.
- D. **Waiver of Subrogation**: to be discussed next session. For now, know that a waiver of subrogation is not necessary under a CGL policy where the other party is an additional insured, since the insurer cannot pursue a subrogation claim against its own insureds.
- E. **Per Location**: if a party has a blanket CGL policy, it must be endorsed to specify the covered property or premises.

VII. **Verification.**

- A. Two means: certified copy of policy or (more typically) original certificate of insurance from insurer, although this has pitfalls.
- B. **Certificates of Insurance**: usually on the so-called ACORD form. Sounds great, but problems include (1) issued by agent and expressly stated to be not binding on insurer; (2) does not modify existing coverage; (3) often faxed and therefore forged; (4) no actual undertaking to give notice of cancellation/modification, only to “endeavor” to do so; (5) often certified to the insured, not the party demanding evidence; (6) does not state form of policy, or exclusions/endorsements; (7) may not state parties as additional insureds; and so on.
- C. Best course: review the actual policy.

VIII. **Deductibles; Self-Insured Retention Limits; Self-Insurance.**

- A. **Deductible** : amount the insured must pay before insurer’s obligation to pay is triggered. Caution: relates to creditworthiness of insured.
- B. **Self-Insured Retention Limits**: limited form of self-insurance; a specified amount of claims that insured must handle itself before claim can be made on insurer.

- C. **Self-Insurance:** usually proposed by large companies who manage risks internally, perhaps with a set-aside pool, perhaps not. Really not any “insurance” at all; becomes a creditworthiness determination. At minimum, require (1) maintenance of minimum net worth, (2) periodic proof of self-insured claim pool and (3) self-insured must defend other party as an insurer would have done had there been insurance.

IX. **Primary vs. Secondary Coverage.**

- A. Often, CGL policies provide that if the insured (including additional insured) has primary coverage from another source, then the CGL policy is secondary, such that it only kicks in after the other insurer has paid, or that the two insurers will pay pro-rata.
- B. Issue: what if both policies provide that each is secondary? Which trumps? Answer: usually neither – standard language generally converts it to a pro-rata situation.
- C. Therefore, if you want your coverage to be secondary and have the other party’s insurance to be primary/pay first, obtain an endorsement from your insurer that provides that your coverage is excess of coverage under the policy where you’re the additional insured.