

INSURANCE FOR REAL ESTATE LAWYERS

Drafting insurance requirements can pose pitfalls for the unwary real estate lawyer. This article is intended to help real estate practitioners avoid some of those pitfalls. It explains the characteristics and contents of standard form liability and property insurance policies. This article aims at assisting real estate lawyers in understanding basic insurance concepts and spotting issues. When transactions warrant special expertise, real estate lawyers should utilize competent insurance industry professionals to help advise their clients.

I. INTRODUCTION

TWO KEY CATEGORIES—LIABILITY AND PROPERTY

The real estate lawyer should become familiar with two general categories of insurance: liability insurance and property insurance. They are mutually exclusive. The liability insurance policy covers the insured's liability to others for losses and injury. Commercial property insurance, on the other hand, covers direct losses to the insured's real estate and personal property. It also provides limited coverage for some indirect losses, such as income produced from that property.

Other types of commercial policies exist. The most prevalent cover automobiles, worker's compensation, fidelity, and damages resulting from crime. Frequently some or all of these coverages are issued under a single commercial package policy. Whether the coverages are issued separately (known as a "monopart") or under a package policy, the governing insurance concepts and coverage parameters are the same.

II. LIABILITY INSURANCE

A. INTRODUCTION TO STANDARD FORM POLICIES

Agreements which real estate lawyers must review may be the product of multiple cuttings and pastings by non-lawyers over a span of years. Knowing how to identify outdated

drafts is useful. For example, an agreement that calls for “Comprehensive General Liability” coverage should set off an alarm bell. After all, “Comprehensive General Liability” coverage hasn’t been issued since 1986.

Since 1986 the “C” in “CGL” coverage has not meant “commercial,” not “comprehensive.” When a client or an opposing party tenders an agreement requiring “Comprehensive General Liability” coverage or an “All-Risks” policy, the agreement bears close attention, probably not only to insurance issues but to other matters as well. After all, the “All-Risks” policy is another historical anachronism. Such a policy has been known since 1983 as Special Extended Coverage or simply Special Form Coverage. (The current form most leases should require today is known ISO form **CP 10 30**.)

B. STANDARDIZATION

Fortunately for the real estate lawyer not deeply versed in insurance law, liability insurance policies are the product of substantial standardization. This standardization results from an insurance industry organization known as the ISO (Insurance Services Office). The ISO promulgates insurance policy forms. The ISO not only develops those forms but also works to have them approved by state insurance commissioners. It is unusual to find liability insurance policies on forms other than those promulgated by the ISO.

Occasionally, in a unique transaction or when the premiums are very large, a specific insurance company or agent will write its own coverage form. When representing the party requiring insurance coverage, it is wise to require coverage “at least as broad” as a specified ISO form. The client’s insurance professional can analyze the resulting special policy (often called a “manuscript” form policy) to ascertain whether it is “at least as broad” as the specified ISO form.

III. THE CGL FORM

1. “Occurrence” vs. “Claims-Made”

As mentioned above, the CGL form (“Commercial General Liability” form) was first promulgated in 1986. Since then it has gone through multiple iterations. Its current version was promulgated in 2007 and became effective in July of that year (although its “date code” reads “12 04”). The CGL form consists of a “coverage form,” which is supplemented and amended by various “endorsements”. As discussed below, the complete liability policy also includes a “Declarations Page” and a “Common Policy Condition Form.” The coverage form comes in two versions: “Occurrence Basis” and “Claims-Made Basis.” Form **CG 00 01** is the Occurrence Basis form. Form **CG 00 02** is the Claims-Made Basis form.

2. Triggering Coverage

Other than what triggers coverage – that is, either the date at which the covered event occurs or when the claim is made – the two forms are the same. “Trigger of coverage” refers to circumstances that activate coverage under a CGL policy and is determined by the language of the policy.” *Village Homes of Colorado, Inc. v. Travelers Cas. and Sur. Co.*, 148 P.3d 293, 296 (Colo. App. 2006).

Just because a policy is triggered does not mean the claim is covered. That a policy is triggered means there may be liability. However, the policy terms and sometimes exclusions and exceptions to exclusions will determine whether a policy that has been triggered provides coverage under the circumstances. See *Public Service Co. of Colorado v. Wallis and Companies*, 986 P.2d 924 (Colo. 1999).

3. “Occurrence” Defined

Most policies currently in use are occurrence policies. When representing a party who is seeking to require another to obtain and maintain CGL coverage, it is wise to require coverage to

be written on an occurrence, not a claims-made basis. At times the party acquiring insurance to cover another's risk may benefit if it is only required to purchase only claims-made coverage. Occurrence coverage is generally triggered by an event causing damage during the policy period. Occurrence policies cover all "occurrences" taking place within a policy period. *Ballow v. PHICO Ins. Co.*, 875 P.2d 1354, 1357 (Colo. 1993). Thus, an insured need not continue purchasing policies as a hedge against damage which may have occurred during a previous policy period but for which no claim has been made. Note, an occurrence need not be sudden, and a long-term exposure to a harmful condition resulting in damage may be an occurrence. *Hoang v. Assurance Co. of America*, 149 P.2d 798, 802 (Colo. 2007).

B. THE FOUR COMPONENTS OF A LIABILITY POLICY

A complete liability policy has four components: (1) the selected CGL coverage form; (2) the selected endorsements; (3) a Declarations Page; and (4) ISO's Common Policy Condition Form. The CGL policy also defines who is an "insured," which this article discusses in some depth below at Section E. At times, the resulting CGL policy is combined with other coverages, such as property insurance, and marketed as a commercial insurance policy or a business insurance policy.

1. The Coverage Form

a. The Four Part Form

The CGL Coverage Form has four parts:

COVERAGE A – bodily injury and property damage liability

COVERAGE B – personal and advertising insurance liability

COVERAGE C – medical payments

SUPPLEMENTARY PAYMENTS – Coverage A and B.

Of most concern to real estate lawyers is Coverage A, and to a lesser extent the Supplementary Payments. The CGL Coverage Form broadly expresses coverage, and then lists exclusions from that coverage.

b. The Insuring Agreement

The key in analyzing coverage under a policy is to look at the primary promise of insurance in the “Insuring Agreement.” That Insuring Agreement for the CGL Coverage Form reads as follows:

We will pay those sums that the Insured becomes **legally obligated to pay** as **damages** because of “**bodily injury**” or “**property damage**” to which this insurance applies. We will have the right and duty to defend the Insured against any “**suit**” seeking those damages. However we will have no duty to defend the Insured against any “**suit**” seeking damages for “**bodily injury**” or “**property damage**” to which this insurance does not apply.

[Emphasis supplied.]

The term “**legally obligated to pay**” indicates that a CGL-based insurance policy is not an indemnification policy requiring an insured to be reimbursed for what it pays to another.

Coverage only requires that the insured have an obligation to pay, not actually make payments.

The term “**damages**” is not defined within the policy. “Damages” has been defined as a measure of loss or harm resulting from an injury suffered because of an unlawful act, omission or negligence of another, generally in the form of pecuniary compensation. *Wilcox v. Clark*, 42 P.3d 29, 30 (Colo. App. 2001). “Damages” under a CGL policy are not limited to awards ordered by courts of law. *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 622-3 (Colo.

1999). Based on Colorado's public policy, awards of exemplary or punitive damages¹, damages from intentional injuries², and claims to indemnify against criminal acts³ are not covered.

“**Bodily injury**” is a defined term. It means “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” “**Property damage**” is also defined, albeit in much more complicated language, as follows:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Electronic data, being information, facts or programs, whether on tangible media or not, is expressly excluded from the definition of tangible property. Note the distinction between parts **a.** and **b.** Property of another that an insured loses is not covered, because, in such a case there is no physical injury to the property. But, loss of its use, even in the absence of it being physically injured, is covered. Watch, however, for exclusions for loss of currency, certificates or tangible property of similar character.

Under the current CGL coverage form, a “**suit**” is not limited to civil actions. It includes arbitrations, other alternate dispute resolution proceedings, and even an EPA action under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”). An enforcement action under CERCLA is sufficiently coercive to constitute a “section” which an insurer has a contractual duty to defend. *Compass Ins. Co., supra*, 984 P.2d at 622.

¹ *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 517 (Colo. 1996).

² *American Family Mutual Ins. Co. v. Johnson*, 816 P.2d 952, 957 (Colo. 1991).

³ *Metro. Life Ins. Co. v. Roma*, 97 Colo. 493, 496, 50 P.2d 1142, 1143 (1935).

c. Locational and Temporal Limitations

(i) Locational Limitations

The “Insuring Agreement” section of CGL Coverage A (Bodily Injury and Property Damage Liability) has limitations on time and place. The covered injury or damage must be “caused by an ‘occurrence’ that takes place in the ‘coverage territory’” (by definition, the U.S. including territories and possessions, Puerto Rico, and Canada). The coverage territory also includes international waters or airspace if traveling or transporting between places in those countries. It also includes the rest of the world for certain activities and products originating in the defined countries. By endorsement, the coverage territory can be made worldwide.

(ii) Time Limitations

Also the “bodily injury or “property damage” must occur during the policy period. For there to be coverage in a particular policy period, prior to that policy period, (1) no person or entity listed in the policy’s Declaration; (2) no party to whom the policy attributes coverage; and (3) and no employee charged with receiving notices can have known that the injury or damage had occurred. The date at which the insured discovers the occurrence is not relevant. What matters is when the injury or damage took place or “occurred.”

d. The Duty to Defend

As noted above, the insurer’s primary promise is the duty (and right) to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which coverage applies. This is broader than the substantive insurance coverage. It covers even baseless “suits.” The duty is triggered upon an allegation of any covered “bodily injury” or “property damage.” Some insurers try to allocate defense costs among covered and non-covered claims. However, under Colorado law if coverage arguably exists for any claim, the insurer must defend all claims. *Carl’s Italian Restaurant v. Truck Ins. Exchange*, 183 P.3d 636, 639 (Colo.

App. 2007). The duty to defend is broader than the duty to indemnify. *Compass Ins. Co., supra*, 984 P.2d at 613.

Also, the cost of a direct defense on behalf of an insured is over and above the stated policy limit. Its cost does not reduce the amount of coverage. This applies to the costs directly defending an insured, not for paying to defend claims against a party whom the insured has contractually agreed to indemnify. The latter is covered only to the stated policy limit.

e. Exclusions

The 2007 CGL Coverage Form lists fifteen express exclusions to coverage. There are fifteen Exclusions to 45 Coverage Part A (Bodily Injury and Property Damage Liability). Not all of the exclusions need concern real estate lawyers. This article will discuss only six exclusions: **a. Expected or Intended Injury; b. Contractual Liability; c. Liquor Liability; f. Pollution; j. Damage to Property; and m. Damage to Impaired Property or Property Not Physically Damaged.**

(i) Expected or Intended Injury (Exclusion “a”)

Exclusion **a.** is an overriding exclusion. It excludes “‘bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured.” (An exception to exclusion **a.** provides coverage where reasonable force has been used to protect persons or property.) The CGL form does not deny coverage where the insured performed an intentional act, but did not intend to cause the injury. The phrase “‘expected or intended’” in a CGL policy exclusion only excludes damages the “insured knew would flow directly and immediately from its intentional act.” *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1088 (Colo. 1991).

(ii) Contractual Liability (Exclusion “b”)

Practitioners should know there is an ongoing dispute in this area. Insurers routinely say this exclusion precludes coverage for all breach of contract claims. In Colorado an exclusion

stating: “This insurance does not apply: (a) to liability by the Insured under any contract or agreement except in incidental contracts” has been held to exclude claims of negligence by a contractor which amounted to “nothing more than a breach of contract.” *Gerrity Co., Inc. v. CIGNA Prop. & Cas. Ins. Co.*, 860 P.2d 606, 608 (Colo. App. 1993). However, there are cases to the contrary where the insured’s contractual liability is coextensive with its liability imposed by law. See, 63 A.L.R.2d 1114, 1123 (1959).

Exclusion **b.** contains two “carve outs.” Absent these “carve outs” the exclusion would deny coverage for obligations to pay damages by reason of assumption of liability under a contract. The first “carve out” says that there will be coverage if, even without the insured’s contractual obligation, the insured would have been obligated to pay. The second “carve out” says that, even in face of exclusion **b.**, CGL coverage applies where the liability arises out of an “insured contract.” Under the exclusion, an “insured contract” includes: (1) a contract for a lease of premises (not including a provision indemnifying another for fire damage to premises the insured rents); (2) a sidetrack agreement; (3) any easement or license agreement (with certain exceptions); (4) an elevator maintenance agreement; and (5) any contractual provision pertaining to the insured’s business under which it assumes the tort liability of another to pay damages because of “bodily damage” to a third person.

The coverage afforded for liability under “insured contracts” does not require the contracts to be in writing. The contract must only have been executed before the injury or damage took place. The coverage afforded does not include liability resulting from a breach of the “insured contract,” but does include coverage for indemnification obligations under the “insured contract”. The standard CGL policy form does not afford coverage for damages arising from the insured’s failure to name the other party to the contract as an additional insured under

the insured's insurance policy. But, if the insured would have been liable to the other party under a tort theory, coverage still applies. If the "insured contract" requires the insured to indemnify another for attorneys' fees and litigation expenses, this is covered. Such expenses are payable up to the policy's face amount.

The effect of these exclusions is that "damage to premises rented to" the insured is not fully covered by the CGL policy (absent an endorsement). As a result, there is a separate, lower coverage limit when the insured causes fire damage to rented premises. That coverage limit is stated on the Declaration Page. "Fire damage" or "fire legal liability" coverage for damage to rented property is normally very low under a standard CGL policy form. Thus, Landlords should require a stated higher coverage limit in their leases. Exclusion **b.** results in limited coverage for fire damage to real property items within leased premises. However, not only fire damage to real property, but also damage to personal property in the insured's care, custody or control (under exclusion **j.**) is limited.

(iii) Liquor Liability (Exclusion "c")

Exclusion **c** is relevant if an insured is in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. Owners of premises where liquor is sold, etc., but who are not in the business, are covered under their own CGL policies. Such property owners need not rely on tenants obtaining separate liquor liability coverage. Social organizations can obtain a policy endorsement, **CG 21 51**, granting coverage on an event-by-event basis.

(iv) Pollution (Exclusion "f")

Exclusion **f.**, the pollution exclusion, is very broad. The current form of CGL policy is intended to protect the insurer from any obligation to pay damages that arise out of pollution. Various CGL policy endorsements can extend coverage, but they have limited availability. Stand-alone pollution policies insure against perils arising from pollution hazards.

(v) Damage to Property (Exclusion “j”)

Exclusion **j.**, Damage to Property, eliminates liability insurance coverage for real and personal property owned, rented or occupied by the insured. This exclusion does not apply to property and contents rented to the insured for seven days or less (except for damage caused by fire). As mentioned above, exclusion **j.** also denies coverage for property of others in the care, custody or control of the insured (as well as some other similar property). Property belonging to others is insured by purchasing a property insurance policy. Once a property is sold or otherwise disposed of, liability coverage for later damage caused by defects in the property at the time of sale or disposition expires. One must purchase separate coverage against damage (such as that resulting from fire) caused, after sale, by a pre-existing defect.

(vi) Damage to Impaired Property (Exclusion “m”)

Exclusion **m.** excludes coverage for the repair or replacement of certain claims for “loss of use” damage caused by a defective product made or service provided by the insured. For example, if the insured installed an HVAC system and its pipes ruptured, the physical damage to the premises caused by the rupture, but not to the HVAC system, would be covered. The loss of the building’s use during repair would also be covered. On the other hand, if the HVAC system failed to operate, but had not exploded, ruptured or failed in a similar manner, loss of the building’s use while the system is repaired or replaced would not be covered.

f. Note: The Carve-Out for Fire Damage to Rental Property

This carve-out provision follows the list of exclusions in the Bodily Injury and Property Damage Liability part of the CGL policy form:

Exclusions **c.** through **n.** do not apply to fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits of Coverage.

This provision does not impact Exclusion **b.**, which excludes certain contractual indemnification obligations. Risk of damage to leased or owned premises otherwise occupied by the insured should be covered by property insurance.

2. Endorsements

The Declaration Page is the key to understanding the Endorsements. This is true for Exclusions, Extensions or Amendments. For an Endorsement or other coverage form to apply, it must be listed on the Declaration Page. Look for the form number (e.g., CG 25 01) and the publication date of that form (e.g., CG 25 01 12 04, i.e., December 2004). Then, read the form. It is not always attached to the policy copy you may be given, so make sure you obtain it.

3. The Declarations Page

All CGL coverage forms contain a “Limits of Insurance” section on the Declarations Page. The “General Aggregate Limit” is the greatest amount the insurer will pay in any given policy year for all insured events, related or unrelated. Products-completed operations claims are subject to a separate aggregate limit of their own. By endorsement, the general aggregate limit can be made to apply on a location-by-location basis. This results in each location having its own general aggregate limit.

The CGL policy includes six other coverage limits. The most relevant of these to a real estate lawyer is: “Damages to Premises Rented to You Limit.” This establishes a separate, lower limit for damages occurring to rented or temporarily occupied property. Tenants should carry commercial property coverage or require their landlords to do so (with a waiver of subrogation).

4. Conditions

a. Overview

The CGL coverage form contains nine Conditions to which each of the three coverage forms (Bodily Injury and Property Damage Liability; Personal and Advertising Injury Liability; and Medical Payments) is subject. They are administrative in nature. They treat topics such as the coverage continuing even if the insured becomes bankrupt and the duties of cooperation and prompt notice. Conditions of particular interest to real estate lawyers are those which explain how a particular CGL insurance policy coordinates with other insurance coverages; how various named insureds are treated; non-renewal and cancellation; and who is authorized to make changes to the policy.

b. Notices of Non-Renewal

Where there is more than one named insured, notices need only go to the *first* named insured. The insurer must send notices of non-renewal at least thirty days before the policy expiration date. The insurer must give its notice of cancellation for non-payment at least ten days in advance, and for other reasons, on at least thirty days. By the policy's terms, the first named insured is authorized to make changes that affect all other insureds.

c. Separation of Interests

Another important Condition is the "Separation of Interests" provision. This Condition does not affect the aggregate limit, but does treat each named insured as if it were the only insured under the policy. Consequently, a disqualifying misrepresentation made by one insured will not invalidate the coverage afforded to the other, non-misrepresenting insureds. Similarly, a claim need not be applicable to all insureds for the policy to cover fewer than all of the insureds. By its terms, the CGL coverage applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or “suit” is brought.

d. The “Other Insurance” Condition

A final Condition of special interest to the real estate lawyer is that dealing with Other Insurance. The CGL coverage is “excess over” any other insurance. For instance, if a tenant has liability insurance for rented property, the rental liability insurance will answer first for any claims. Thus when a landlord requires a tenant to name landlord as an “additional insured”, the landlord should require that its status be primary and that the policy be written on a non-contributing basis. The covered party’s “additional insured” coverage should be exhausted first. Then that party’s own CGL coverage would answer for the claim. Only after that policy’s coverage is exhausted would the insured’s umbrella policy step in. The primary policy insurer provides the defense.

C. WHO IS AN INSURED?

1. The Definition

Section **II** of the CGL coverage form covers “Who Is An Insured.” It reads as follows:

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insured, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insured, but only with respect to the conduct of your business.

- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your “executive officers” and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
- e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

In addition to the foregoing, some volunteers, personal representatives, and newly-formed or acquired businesses (for up to thirty days) are also “named insureds”. Persons and organizations acting as an insured’s “real estate managers” are also “named insureds”.

2. Additional Insureds

An “additional named insured” and an “additional insured” are distinct and different. “Additional named insureds” are usually related to the first named insured. They are typically liable for paying premiums. Some policy exclusions affect additional named insureds, but not persons or entities who are only “additional insureds.”

A person not designated as a “named insured” can be added as an “additional insured”. This is commonly done by a Certificate of Insurance. Certificates are normally issued by the insurance agent. A better way to afford “additional insured” status is by an Endorsement to the

named insured's CGL coverage. The term "additional insured" is used for liability insurance. The term "interest holder" is used for property insurance.

There are more than thirty different ISO promulgated Endorsements that name a person or organization as an "additional insured". Some, such as the following, are easily understood by their title. Examples are those entitled Additional Insured – "Club Members" or "Concessionaires Trading Under Your Name" or "Condominium Unit Owners." There is an Endorsement that extends coverage to persons or organizations that have financial control over the named insured and also covers premises controlled by that "parent" where those premises are used by the named insured.

Endorsements naming persons as "additional insureds" most relevant to real estate lawyers are the **CG 20 11** Additional Insured – Managers or Lessors of Premises Endorsement and the **CG 20 18** Additional Insured – Mortgagee, Assignee, or Receiver Endorsement. The first covers property managers and landlords for liability arising out of the ownership, maintenance or use of the leased premises. To be covered, those persons must be listed in a schedule of the named insured's CGL insurance policy. The second covers mortgagees, assignees or receivers. Another Endorsement to note is **CG 20 24** Additional Insured – Owners or Other Interests From Whom Land Has Been Leased. An insured should consider bargaining for a blanket additional insured provision providing automatic coverage for any person whom the insured is contractually obligated to name as an "additional insured."

The broad coverage afforded under a CGL coverage part can be restricted or limited by Exclusions. Some Exclusions eliminate coverage for certain risks, such as the "Fungi or Bacteria Exclusion" or the "Explosion, Collapse, and Underground Property Damage (Specified Operations)" form. Others treat certain behavior, such as the "Abuse or Molestation Exclusion."

Yet others treat particular businesses or business activities, such as “Funeral Services” or “Logging and Lumbering Operations.”

Also, a CGL policy may include Coverage Amendment Endorsements. Such an endorsement might require arbitration, set forth separate aggregate limits on a location-by-location basis, or delete the liquor liability exclusion.

D. CERTIFICATES OF INSURANCE

Parties seeking status as an “additional insured” under another’s liability insurance policy very often ask for a “certificate of insurance.” Such a certificate is neither a policy nor a part of the policy. A certificate of insurance is not a contract between the insurer and the certificate holder. An insurer, by certifying to a third party that insurance is in effect covering the insured, does not make that third party an intended direct third-party beneficiary of the pertinent insurance policy. *All Around Transport, Inc. v. Continental Western Ins. Co.*, 931 P.2d 552, 555 (Colo. App. 1996). A certificate of insurance provides evidence that a particular insurance policy or policies existed at the time the certificate was issued. But, a certificate is only an informational document which is wholly subject to policy terms. It creates no beneficial contract relationship for the certificate holder. *Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.*, 794 P.2d 264, 266 (Colo. App. 1990).

Most certificates are on forms promulgated by ACORD, an organization of carriers and agents. Most persons lack the bargaining power to make changes to the ACORD forms. The most common forms are: ACORD 28 (2006/07) – “Evidence of Commercial Property Insurance” and ACORD 25 (2001/08) – “Certificates of Liability Insurance.” Both forms serve similar purposes and are “issued as a matter of information only.” They state they confer no rights on the “certificate holder” (a liability coverage term) or the “additional interest holder” (a property coverage term). Neither of the two forms amends, extends or alters policy coverage.

The certificates state the insurer “will endeavor” to give notice of cancellation to the certificate holder or additional insured. Failure to mail such notice imposes no obligation or liability on either the insurer or on its agents or representatives.

The certificates do not fully protect deed of trust holders, “loss payees, or other parties seeking to be named as ‘additional insureds’” under a CGL policy. Such persons should get policy endorsements. For example, a landlord or property manager needs a **CG 20 11** Additional Insured – Managers or Lessors of Premises endorsement. Lenders need a **CG 20 18** Additional Insured – Mortgagee, Assignee, or Receiver endorsement. If circumstances warrant, the deed of trust holder or lender should obtain its own CGL policy.

Deed of trust holders have a special provision of “Additional Condition” within the ISO Building and Personal Property Coverage policy form, Section **F.2**. It provides that the term mortgageholder includes “trustee” such as under a deed of trust. It allows a mortgageholder to file a proof of loss if the named insured fails to do so. It allows the mortgageholder to pay the premium. It also promises ten days’ notice of cancellation for nonpayment of premiums (thirty days for other reasons) and ten days’ notice of nonrenewal. The insurer reserves a right of subrogation when it pays any loss to the mortgageholder and reserves the right to buy the mortgage.

E. DEDUCTIBLES AND SELF-INSURED RETENTION AMOUNTS

The terms “deductible” and “self-insured retention” are frequently misunderstood. The “deductible” is the amount of loss absorbed by the insured. The insurer “deducts” that amount from the insured loss before paying a claim. A “self-insured retention” or “SIR” covers the loss up to the retained amount. Only then does the insurer have liability. Excess policies are typically issued in reference to an underlying “primary” policy, but may also be issued in

reference to and only be liable to pay upon exhaustion of self-insured retentions. See, e.g. *Wallis, supra*, 986 P.2d at 935.

Insureds frequently manage claims lower than the retained amount. To a “certificate holder”, however, the carrier assures coverage regardless of retention. Commonly insurers require insureds with a “self-insured retainage” to indemnify the insurer for exposure to certificate holders.

F. QUALITY OF THE INSURANCE CARRIER

Often additional insureds or interest holders require policies by insurers of a certain quality. A.M. Best with its Best’s rating system dominates the field of rating agencies. Best issues two types of ratings: a Best’s Rating (A++ to F) for large companies and a Financial Performance Rating (9 to 1) for smaller companies. It also identifies insurance companies by their Financial Size Category (FSC) ranging from an FSC class of I (less than one million dollars of capital, surplus, and conditional reserve funds) to FSC class XV (greater than two billion dollars).

A.M. Best classifies Best’s Ratings of A++ through B+ as “secure” and lower ratings as vulnerable. Commonly leases and deeds of trust require minimum ratings of A:X or stronger. An “A” rating is described by A.M. Best as “Excellent”. An FSC of X calls for capitalization exceeding five hundred million dollars.

IV. PROPERTY INSURANCE

A. INTRODUCTION

Commercial property insurance policies generally fall into three categories: (1) the basic form; (2) the broad form or “special perils” form; and (3) the special form. Basic form commercial property insurance policies cover common perils, such as damage caused by fire, lightning, windstorm, vehicles, aircraft, and civil commotion. Broad form commercial property

insurance policies include coverage for basic perils, plus others, such as water damage, structural collapse, glass breakage, weight of snow, ice or sleet, and sprinkler leakage. A special form commercial property insurance policy protects the business owner from all causes of loss – such as flood, earth movement, war, terrorism, nuclear disaster, wear and tear, insects, and vermin – except those causes specifically excluded in the policy.

Real estate attorneys should become generally familiar with two other types of commercial property insurance: business interruption policies and extra expense policies. Coverage for business interruption reimburses the insured for income lost when the business is interrupted due to the loss of or damage to a building. “Extra expense” coverage reimburses for costs of resuming business operations following a discontinuation due to a covered peril. Many commercial property insurance policies include coverage for flood. However the federal government’s national flood insurance programs insure many properties nationwide. Business owners often purchase insurance for extreme glass breakage or crime through specialized policies, since many commercial property insurance policies do not cover such losses.

Commercial property policies provide either “replacement cost” coverage, “actual cash value” coverage, or a combination of both. Replacement cost coverage will pay to replace property with new property of like kind and quality, up to the policy’s dollar limit. An actual cash value policy will pay the replacement cost of the property minus depreciation due to age and normal wear and tear. An insured who neither rebuilds nor repairs generally is only entitled to the actual cash value of the loss, not additional higher replacement costs. *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1030 (Colo. App. 2002). Replacement coverage can result in the insured being in a better position after the covered loss than before. Actual cash value coverage is designed to prevent such a result. *Id.* Replacement cost coverage is more expensive than actual

cash value coverage. However, the higher coverage can help businesses recover in the event of a significant loss.

In general, commercial property policies are not standardized. Insurers must comply with minimum requirements established by the Colorado commissioner of insurance. But they do have great flexibility to develop their own policies. As a result, coverages and policy terms may vary significantly by insurer and by policy.

B. SPECIAL ENDORSEMENTS OR STAND-ALONE POLICY COVERAGE

Endorsements expand or amend a policy's coverages. Of course, they almost always increase premiums. Business owners can insure certain risks by purchasing stand-alone policies. The following is a non-exclusive list of many common stand-alone policy coverages or special endorsements which a business owner can purchase:

- **Building occupied by the insured coverage** insures a building regularly used but not owned by the insured. This coverage is important when the insured leases or uses another's building critical to the insured's business operations.
- **Newly acquired or constructed buildings coverage** insures a new building if added to a policy within a specified amount of time. If the insured does not notify the insurer within the time period – usually 30 days – the policy won't cover the new building.

(Commercial property policies generally only cover buildings named in the policy.)

Property owners commonly add work under construction to existing property policies.

See *Copper Mountain, Inc. v. Industrial Systems, Inc.*, _____ P.3d _____, 2009

WL 662072, FN8 and treatise cited therein.

- **Off-premises property coverage** (by endorsement or stand-alone) covers the business owner's off-site property. Some policies do not cover off-site property or provide only limited coverage.
- **Employees' personal property coverage** insures personal property belonging to the insured's employees against covered losses if the property is on the insured's premises. Coverage for such property beyond limited amounts must be obtained through special endorsements. Such coverage may be indicated where employees typically bring expensive electronic personal property on the work premises.
- **Valuable papers coverage** provides limited coverage of an insured's business records and other essential information. Professionals such as doctors, psychiatrists, lawyers, architects, engineers and accountants may need to purchase endorsements to increase the standard coverage.
- **Ordinance or law coverage** pays costs required to repair or rebuild a facility damaged by a covered peril in order to comply with current building codes. Many policies provide limited ordinance coverage, which can be increased with an endorsement.

C. ENDORSEMENT EXCLUSIONS

Endorsements are also used to create exclusions to coverage. Obviously, to understand fully which risks are covered and which are not, the entire policy and all endorsements must be reviewed. An example of a common endorsement exclusion is the Completed Operations Hazard or Products Hazard. Endorsement exclusions which conflict with exceptions to standard exclusions can result in policy interpretations favoring insureds and coverage. Thus, endorsement exclusions, like other policy provisions, cannot be read in isolation. See, *Simon v. Shelter General Ins. Co.*, 842 P.2d 236, 238-41 (Colo. 1992).

D. MULTI-PERIL POLICIES

Commercial multi-peril (CMP) policies combine multiple coverages, such as commercial property, liability, inland marine, and commercial auto, to ensure full protection within the convenience of a single policy. CMP policies typically have lower premiums than purchasing the coverages individually. Business owner program (BOP) policies are a common type of commercial multi-peril policy primarily for small businesses. BOP policies combine property and liability coverage in one policy.

E. CRIME COVERAGE

A business owner can buy several types of coverage to protect its business from crime. Common crime coverages include:

- **Loss of glass and money due to theft** pays for damage to glass and any loss of money resulting from a break-in.
- **Robbery and safe burglary, property other than money** is a more limited form of coverage that does not include money or securities.
- **Forgery or alteration** protects your business against forgery or alteration of checks, drafts, promissory notes, or other directions to pay.
- **Theft, disappearance, and destruction coverage** insures money, securities, and other property against losses, both on your premises or in the custody of an employee or messenger while off premises.

A policy may pay losses from crime on either a “loss sustained” or “discovery” basis. Loss sustained coverage pays for losses that occur during the policy period, while discovery coverage pays for losses that occur at any time. Both types of crime coverage require that losses be discovered during the policy period or extended reporting period.

F. PROPERTY FORM POLICIES

As outlined above, property insurance takes three basic forms: the “Basic Form”; the “Broad Form” (or “Specified Perils”); and the “Special Form” coverages. The first two forms enumerate, respectively, fourteen (14) and nineteen (19) covered losses. The latter is most commonly called for in commercial leases, and the Special Form coverage covers all direct damage except from enumerated excluded causes. Those excluded causes are: (1) ordinance or law; (2) earth movement; (3) governmental action; (4) nuclear hazard; (5) utility services; (6) war/military action; (7) water (including water and sewage backup); (8) boiler and machinery failure; (9) wear and tear or lack of maintenance; (10) continuous seepage (over 14 or more days); (11) dishonest acts; (12) pollutants; and (13) faulty design and workmanship. Parties cover these excluded causes by endorsements or supplemental policies.

G. ENDORSEMENTS

Property policies cover physical loss. Endorsements added to policies protect against certain other losses. The most notable endorsements for real estate lawyers are business income (ISO Form **CF 00 30**); utility services – time element (should be carried by tenants, unless rent is abated during outages, when landlords should carry the coverage); and rent loss coverage (to be carried by tenant or landlord, depending on whether rent is abated under the lease).

H. SUPPLEMENTAL INSURANCE

Supplemental policies can cover losses excluded from special form coverage. Typically useful supplemental property insurance policies to consider are flood insurance; boiler and machinery coverage; environmental insurance; ordinance or law coverage; leasehold interest coverage; and legal liability coverage.

I. PROPERTY INSURANCE DEDUCTIBLE AMOUNTS

The insured assumes the liability of paying the amount of the deductible specified in the coverage; large deductibles reduce premiums. The landlord's deductible may pass through to tenants as operating expenses, so tenants should be aware of landlords' deductible amounts. However, since deductibles reduce premiums, they reduce operating expenses, which are often passed through to tenants.

J. TENANT/LANDLORD ROLES

Typically landlords insure the building's core and shell and the plumbing, electrical and HVAC systems. Tenants insure their improvements, equipment, furniture and other personal property. In single-tenant buildings typically the landlord or the tenant will insure everything in one policy which reduces cost. But, the insured must have an insurable interest in both the building and the tenant improvements.

The lease determines insurable interests, *e.g.*, granting landlord a residual interest in improvements and requiring tenant to repair the building. The landlord risks that tenant will fail to property insure when it allows (or requires) tenant to obtain all the property insurance. The landlord can mitigate the risk by requiring tenants to deliver a certificate or policy copy and the insurer agrees to landlord notice in advance of lapse of coverage. Lenders sometimes refuse to accept tenant coverage and require landlords to obtain the insurance. Landlords generally should reserve the right to insure the property if tenants assume the duty but fail to perform.

K. SUBROGATION WAIVERS

Subrogation waivers, which are not uncommon, assure that insurers, landlords and tenants bear the risk of covered property losses regardless of the fault of one or another. See *May Dept. Stores Co. v. University Hills, Inc.*, 789 P.2d 434, 437-8 (Colo. App. 1989). Absent a waiver, an insurer could recover from a negligent tenant for a loss the tenant paid to insure

against. Both landlords and tenants should require a subrogation waiver from the other's insurer. Subrogation waivers apply only to property, not liability, insurance.

Subrogation generally is not allowed by an insurer against its own insured. The legal principle known as the "anti-subrogation rule" prohibits an insurer from seeking "recovery against its own insured for a claim arising from the risk for which the insured was covered." *Continental Divide Ins. Co. v. Western Skies Management, Inc.*, 107 P.3d 1145, 1148 (Colo. App. 2004). The rule has a dual purpose: (1) it prevents an insurer from avoiding coverage the policy-holder purchased and (2) it avoids a conflict between the insurer's duty to defend and its financial interests. *Id.* The anti-subrogation rule has an exception that arises when an insurer pays on behalf of one insured for damage caused by a second insured. *Id.*

V. CONCLUSION

Real estate lawyers can better serve their clients by understanding basic liability and property insurance concepts. By becoming more familiar with insurance provisions and requirements, real estate lawyers can save clients money and better protect their interests. Insurance professionals can provide key assistance in reviewing contract and instrument language, as well as in counseling the real estate lawyers' clients to make sound insurance and business decisions.