

# **DRAFTING TO AVOID LOSS**

***OCTOBER 25, 2002***  
***ICSC FALL LAW CONFERENCE***  
***BOCA RATON, FLORIDA***

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**KESSLER & COLLINS, P.C.**

## **INSURANCE AND INDEMNIFICATION HYPOTHETICAL**

### **Facts:**

1. Tenant agrees to maintain a commercial general liability policy having limits of \$2,000,000 with Owner named as an additional insured.
2. Tenant has a self-insured retention policy with a \$1,000,000 retention which includes defense costs. Tenant names Owner as an additional insured on such policy.
3. Tenant further agrees to indemnify Owner for all loss, damage or claims arising in connection with the use or occupancy of the Leased Premises. The indemnity clause is contained in the same section as the insurance obligations.
4. Owner has agreed to indemnify Tenant for any loss, damage or claims arising from the use of or occurring in a common area.
5. Tenant's employee is assaulted in the Leased Premises. The employee cannot sue Tenant because worker's compensation laws in the state prohibit such suits.
6. Tenant's employee, however, sues Owner for negligence in failing to provide adequate security.
7. Owner tenders the claim, including its defense, to the Tenant under its indemnity.
8. The state in which the shopping center is located requires indemnifications to satisfy the express negligence rule.

### **Possible Results:**

1. Tenant assumes the defense of the Owner and indemnifies the Owner for loss.
2. Tenant refuses to assume the defense based on the fact that the allegations involve Owner's negligence and refuses to defend.
3. Owner defends and sues Tenant for failing to maintain insurance and seeks its cost of defense and any indemnification payment as damages.
4. Owner and Tenant's insurance policies are deemed to be contributory and each now contributes 50% of defense cost and indemnity allocation.

**Actual Results:**

1. Tenant's indemnity in favor of Owner will fail because it does not satisfy the express negligence rule.
2. Tenant's agreement to maintain insurance is also declared void because it is not a "free-standing obligation" but merely supports the indemnity clause.
3. Since there was no provision in the Lease for determining what parties' policy would be primary versus excess, each policy will contribute 50% up to their respective limits.

## **TENANT DEFAULT AND LANDLORD'S REMEDIES HYPOTHETICAL**

### **Facts:**

1. In 1998, landlord leased a 15,000 square foot space to a cellular-phone retailer, CellCo, at \$22.00 per square foot. The lease is a net lease, for an initial term of sixty (60) months and two (2) one-year renewals.
2. In order to ensure CellCo's performance under the lease, at the commencement of the lease, landlord collects from CellCo a security deposit totaling two months base rent.
3. Four years later, due to struggles in the industry, CellCo is unable to meet its expenses and files for bankruptcy. At the time of filing, CellCo was current on its rent obligations, but stopped paying rent after filing.
4. Landlord locked CellCo out of the premises and relet the premises two months later. Landlord applied the security deposit to the pay for tenant finish out and brokerage commission for the new tenant.
5. The CellCo lease provided that landlord had a duty to mitigate damages in the event CellCo defaulted under the lease, and the filing of bankruptcy and failure to pay rent were "Events of Default" under the lease.

### **Possible Results:**

1. Landlord files a claim in the bankruptcy action for any amount due and owing from the tenant.
2. Bankruptcy trustee files "preferential-transfer claim" against landlord because the security deposit, although in the possession of landlord at the time tenant defaulted, is part of the bankruptcy estate.
3. Landlord files suit against tenant to recover for damages pursuant to the tenant's default under the lease.

### **Actual Results:**

1. Bankruptcy trustee files against landlord to get amount of security deposit back.
2. Landlord will have to go through the bankruptcy court in order to seek any monetary relief due to tenant's default
3. How could landlord have avoided this disaster?

## INDEMNIFICATION ISSUES

1. Background: Shopping-center landlords may often ask their tenants to indemnify them for negligent acts of the landlord. Tenants may object to such an indemnity, but from the landlord's perspective, however, the indemnity is reasonable, particularly when coupled with the typical insurance and subrogation language in a shopping-center lease. In some jurisdictions, the common law charges the tenant with liability for acts that occur within the leased premises, because the tenant has control of what occurs within the lease space, and the tenant can minimize and control its risk by insuring itself. On the other hand, the landlord will generally be liable for claims and losses, which occur in the common areas.
  
2. Key Issues:
  - a. How broad is the indemnity? In addition to the stand-alone indemnification language, landlord may want to consider adding additional language indemnification language. Does it cover liens and encumbrances that tenant may place on the premises or the shopping center? What about if landlord provides tenant with any construction finish out? Environmental? Uninsured risks?
  
  - b. Does indemnity meet minimum statutory requirements? Many jurisdictions have some type of "clear and conspicuous" or "express negligence" doctrines that require that the certain type – i.e. bold face, all caps, underlining, etc.
  
  - c. Location limitation. Should the indemnity be limited to location (the premises v. common area), or be based on fault regardless of location.
  
  - d. Who is being indemnified? Do the indemnification provisions in the lease cover officers, employees and agents of the landlord, what about the property manager?
  
  - e. Whose acts are you responsible for? Does the indemnity require you to be responsible to the other party for acts of invitees or independent contractors?
  
  - f. Settlement Authority. If the indemnifying party does not assume your defense, how far must you take the case - all the way to the Supreme Court? There generally is no common-law right to settle the case and bind a non-compliant indemnitor. Landlord should consider including a framework or mechanism for dispute resolution arising out of an indemnification.
  
  - g. Mutuality. While a mutual indemnification sound fair, it is often times not a fair trade and wholly increases risk for the landlord. The indemnification that is granted is basically backed by the liability insurance in place by the tenant and/or landlord up to the limits of the insurance. Beyond that, the backing of the indemnity is provided solely by the credit of the company that offers it.
  
  - h. Limited to third-party claims? Should the indemnity be limited to a true third-party claim (not the parties to the lease) and exclude claims by the landlord or the

tenant against the other for property loss? Does the indemnity except or include the negligent or intentional acts of the indemnitee?

- i. Do all indemnity clauses in the lease match up? Make sure that the general indemnity clause is aligned with the other indemnification provisions in the lease, which may appear in the compliance with law, hazardous materials, use or alteration sections.
- j. Is the indemnity obligation broader than the insurance coverage? Try to negotiate the lease to protect the landlord against a scenario where the indemnity obligation is generally not limited to the extent of liability insurance coverage that covers only claims arising from bodily injury, property damage, personal injury or advertising injury.
- k. Effect of Waiver of Subrogation. Under certain jurisdiction's common-law subrogation cases, if the tenant's or landlord's insurance company pays out on a loss, either caused by the other party or pursuant to an indemnity, then that insurer is subrogated to the legal rights of the party making the claim once the insurance company pays off the claim. Contrary to the common law, the lease should contain a waiver of subrogation clause that provides that landlord and tenant each waive their respective rights of recovery against each other to the extent that the loss is covered by insurance. Without a mutual waiver of subrogation, either the landlord or tenant could incur significant liability. For example, the tenant's insurance company could make a claim against the landlord for the value of the tenant's personal property within the premises if the shopping center burned down for a reason other than the tenant's own negligence. Likewise, a tenant could be liable to the landlord's insurance company for the replacement costs of the shopping center if the tenant negligently burned down the shopping center.
- l. Environmental Indemnity. Generally, the lease should provide that tenant is prohibited from permitting any hazardous or toxic materials from being brought onto the leased premises. If the tenant does introduce hazardous or toxic materials onto the leased premises, the tenant is responsible for the cleanup of those materials and for landlord's accompanying costs. The typical items to negotiate are:
  - i. Pre-existing contamination
  - ii. Migration
  - iii. Contamination caused by third parties during the term of the lease
  - iv. Inspection and reporting.
  - v. Extent and duration of obligation. Is it limited to remediation cost or all loss or damage?

## INSURANCE ISSUES-CERTIFICATES, ENDORSEMENTS AND CRITICAL TERMS

1. Evidence of Coverage: Does your property manager or lease administrator know what to ask for and can they get it if they ask? If you do not specify the actual ACCORD Form in the lease you cannot compel its use. ACCORD 25-S vs. ACCORD Form 27 modified to cover liability insurance. You can amend the ACCORD 25-S if you meet with resistance to the use of ACCORD 27.
2. Endorsements: Additional Insured to Commercial General Liability Policy
  - a. CG 20 11 11 85 -- Additional Insured –Managers or Lessors of Premises

This endorsement limits coverage to the premises as defined in the lease agreement. The broader the definition of the premises the broader the coverage. It will not cover acts committed in the common areas or parking lot. It also does not apply to acts following the tenant’s vacating the premises. It does cover the Landlord’s negligence.
  - b. CG- 20 26 11 85-Additional Insured – Designated Person or Organization

This is the suggested form for use.
  - c. CG 20 09 10 93—Additional Insured – Owners, Lessees or Contractors

This endorsement and the following are the forms most commonly obtained by tenants from owner’s carriers and by owners from contractor’s carriers. The form provides for only vicarious liability and will not cover allegations of partial or sole negligence.
  - d. CG 20-10 10 93 – Additional Insured- Owners, Lessees or Contractors Form B

This form can be used but should be modified as shown below.
3. Critical Terms:
  - a. Commercial General Liability:
    - i. Coverage A provides for Bodily injury and property damage but excludes those damages arising out of the assumption of liability in a contract unless that contract is an “insured contract”. Fortunately a lease is an insured contract and therefore there is coverage.
    - ii. Coverage B provides for coverage for advertising and personal injury coverage which includes false arrest, detention and imprisonment. This coverage also excludes assumed liabilities; however there is no exception

to the exclusion for insured contracts. There is no coverage if an owner contracts with a service provider such as a security company and agrees to indemnify it for such claims. You must either delete the exclusion or modify the indemnity in the vendor contract.

- iii. The lease should set forth whose policy is primary and whose policy is excess to avoid the policies being deemed contributory.

b. Workers Compensation:

- i. Obtain a waiver of subrogation which will prevent the carrier from seeking reimbursement for payments made to an injured employee.
- ii. Obtain an indemnity from the Tenant/Employer for claims made by an injured employee since the waiver of subrogation will not preclude such an action.

## INSURANCE ISSUES--SELF INSURANCE

1. Defined: Self Insurance can result from no coverage, large retentions, low limits of coverage or policy exclusions.
2. Key Issues:
  - a. Deductible vs. Self Insured Retention (“SIR”): In drafting a self-insurance clause this could be a critical distinction. In a policy where there is a large deductible versus a typical SIR policy the credit of the insurance carrier is available to pay the claim to a third party or the loss payee. In the SIR policy the insurance carrier is not liable for the retained amount. If the creditworthiness of the other party to the agreement is in question the former type of self-insurance is preferable. Basically in the deductible type of policy the insurance carrier has a “fronting” agreement with the insured.
  - b. Effect on Co- Insurance Provisions: You must make sure that the self insurance plan proposed by the other party is not going to cause you to be “under-insured” for purposes of Co-Insurance. Assume the building is insured by the owner which is expecting to have a reversionary interest in the tenant’s improvements. The building represents 60% of the value of the property and this is the amount of insurance that the owner purchases. The tenant’s improvements are self-insured. The value of the total is \$1,000,000 and the co-insurance factor is 80%. If the owner insures for \$600,000 and there is a total loss the insurer may argue that it is responsible for only \$400,000 based on a “total” value of \$1,000,000 depending on the language in the lease especially the restoration obligation.
  - c. Excess and Umbrella Coverage. In order to protect against catastrophic loss one of these types of policies should be required in the lease. Excess is different from umbrella in that the umbrella policy usually is symmetrical with the risks assumed in the underlying coverage.
  - d. What Losses should be allowed to be Self Insured: Many time business interruption and/or loss of rents insurance is required to be in place as a condition to rent abatement during a period following a casualty. A decision should be made as to whether this is a “risk” that the party with the financial burden wants to assume versus transfer to a carrier.
  - e. Evidence of Status
    - i. The party self insuring must maintain an adequate financial condition
    - ii. Certificates of insurance from any primary or excess carriers should be delivered specifying the types of coverage.

## WAIVER OF SUBROGATION

### 1. What is this beast?

The waiver of subrogation is a waiver of a party's insurance carrier to proceed on a subrogated basis against the other party to the agreement. It is not a release or waiver of recovery by one party to the agreement in favor of the other. A release is always a waiver of subrogation but not the other way around.

### 2. Common drafting issues

a. Validity. Compliance with "Fair Notice" provisions such as conspicuousness and express reference to waiver of recovery for one's own negligence.

b. Scope.

i. Should the waiver cover uninsured losses resulting from deductible or excess loss?

ii. Should it cover uncollected proceeds due to various failures by the carrier to pay?

iii. Do you exclude certain risks or limit to specified risks?

iv. Is it limited to the Premises or does it include personality?

v. Does it survive the lease termination?

vi. Does it include Worker's Compensation carriers?

### 3. Relationship to other provisions:

a. Construction Agreements. Be careful when using AIA forms that tend to protect Architects and Engineers. If you look at the 1997 AIA Waiver you will see that it exculpates the Architects and its consultants. Require the Architect to carry E & O coverage and except out such claims. Also make sure the Builder's Risk coverage is not compromised by such a waiver.

b. Indemnity. If the Tenant is indemnifying the Landlord for damages caused by its negligence and there is a waiver of subrogation and release, unless the indemnity excludes those claims covered by the waiver of subrogation and release there will be an ambiguity in the lease.

c. Return Condition of Premises. These typically exclude from the exceptions such as reasonable wear and tear damage caused by the Tenant's negligence. Again

this would be a conflict with the waiver and release unless the drafter excludes such damage covered by the waiver and release.

4. Who is benefiting:

- a. Are third parties being released and is our carrier waiving subrogation without those third parties releasing us and also waiving? For instance, does the Owner extend the Tenant's waiver to include its property management company without the property management joining?
- b. If the lease is assigned or there is a sublease is the Owner protected by the original waiver?

5. What is required from the carrier:

- a. Endorsement
- b. Notice

# ACCORD FORM 25-S

CERTIFICATE OF INSURANCE					DATE (MM/DD/YY)
PRODUCER	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW				
COMPANIES AFFORDING COVERAGE					
COMPANY A					
INSURED	COMPANY B				
COMPANY C					
COMPANY D					
<b>COVERAGES:</b>					
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.					
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFF. DATE (MM/DD/YY)	POLICY EXP. DATE (MM/DD/YY)	LIMITS
	<b>GENERAL LIABILITY</b> <input type="checkbox"/> COMM. GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS MADE <input type="checkbox"/> OCCUR <input type="checkbox"/> OWNER'S & CONTRACT'S PROT _____				GENERAL AGGREGATE PROD-COMP/OF AGG. PERS. & ADV. INJURY EACH OCCURRENCE FIRE DAMAGE (One Fire) MED EXP (Any one person)
	<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS _____				COMBINED SINGLE LIMIT BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE
	<b>GARAGE LIABILITY</b> <input type="checkbox"/> ANY AUTO _____				AUTO ONLY-EA ACCIDENT OTHER THAN AUTO ONLY: EACH ACCIDENT AGGREGATE
	<b>EXCESS LIABILITY</b> <input type="checkbox"/> UMBRELLA FORM <input type="checkbox"/> OTHER THAN UMBRELLA FORM				EACH OCCURRENCE AGGREGATE
	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> THE PROPRIETOR/ PARTNERS/EXECUTIVE OFFICERS ARE: <input type="checkbox"/> INCL <input type="checkbox"/> EXCL				STATUTORY LIMITS EACH ACCIDENT DISEASE-POLICY LIMIT DISEASE-EACH EMPL.
	OTHER				
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS					
<b>CERTIFICATE HOLDER</b>			<b>CANCELLATION</b>		
			SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL _____ DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.		
			AUTHORIZED REPRESENTATIVE		
ACORD 25-S (3/93)					

## MODIFIED ACCORD FORM 25-S

<b>ACORD™ CERTIFICATE OF LIABILITY INSURANCE</b>					DATE (MM/DD/YY) 01/08/02												
PRODUCER		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW EXCEPT AS SPECIFIED.															
		INSURERS AFFORDING COVERAGE															
INSURED		INSURER A: Bituminous Fire & Marine Insurance															
		INSURER B: American Mfgs. Mutual Ins. Co.															
		INSURER C:															
		INSURER D:															
		INSURER E:															
COVERAGES																	
THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.																	
INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS												
A	GENERAL LIABILITY : COMMERCIAL GENERAL LIABILITY G G CLAIMS MADE : OCCUR : Contractual : XCU Included  GEN'L AGGREGATE LIMIT APPLIES PER: G POLICY : PROJECT G LOC	Property Dmg Ded: \$500 per claim  Explosion, Collapse or underground	09/30/01	09/15/02	<table border="1" style="width: 100%; border-collapse: collapse; font-size: x-small;"> <tr><td>EACH OCCURRENCE</td><td style="text-align: right;">\$1,000,000</td></tr> <tr><td>FIRE DAMAGE (Any one fire)</td><td style="text-align: right;">\$100,000</td></tr> <tr><td>MED EXP (Any one person)</td><td style="text-align: right;">\$5,000</td></tr> <tr><td>PERSONAL &amp; ADV INJURY</td><td style="text-align: right;">\$1,000,000</td></tr> <tr><td>GENERAL AGGREGATE</td><td style="text-align: right;">\$2,000,000</td></tr> <tr><td>PRODUCTS-COMP/OP AGG</td><td style="text-align: right;">\$2,000,000</td></tr> </table>	EACH OCCURRENCE	\$1,000,000	FIRE DAMAGE (Any one fire)	\$100,000	MED EXP (Any one person)	\$5,000	PERSONAL & ADV INJURY	\$1,000,000	GENERAL AGGREGATE	\$2,000,000	PRODUCTS-COMP/OP AGG	\$2,000,000
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A	EXCESS LIABILITY : OCCUR G CLAIMS MADE G DEDUCTIBLE : RETENTION \$10,000	Umbrella Liability	09/30/01	09/15/02	<table border="1" style="width: 100%; border-collapse: collapse; font-size: x-small;"> <tr><td>EACH OCCURRENCE</td><td style="text-align: right;">\$3,000,000</td></tr> <tr><td>AGGREGATE</td><td style="text-align: right;">\$3,000,000</td></tr> <tr><td></td><td style="text-align: right;">\$</td></tr> <tr><td></td><td style="text-align: right;">\$</td></tr> </table>	EACH OCCURRENCE	\$3,000,000	AGGREGATE	\$3,000,000		\$		\$				
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A	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	Executive Officers Included	09/15/01	09/15/02	<table border="1" style="width: 100%; border-collapse: collapse; font-size: x-small;"> <tr><td><input checked="" type="checkbox"/> WC STATUTORY LIMITS</td><td><input type="checkbox"/> OTHER</td><td></td></tr> <tr><td>E.L. EACH ACCIDENT</td><td></td><td style="text-align: right;">\$500,000</td></tr> <tr><td>E.L. DISEASE-EA EMPLOYEE</td><td></td><td style="text-align: right;">\$500,000</td></tr> <tr><td>E.L. DISEASE-POLICY LIMIT</td><td></td><td style="text-align: right;">\$500,000</td></tr> </table>	<input checked="" type="checkbox"/> WC STATUTORY LIMITS	<input type="checkbox"/> OTHER		E.L. EACH ACCIDENT		\$500,000	E.L. DISEASE-EA EMPLOYEE		\$500,000	E.L. DISEASE-POLICY LIMIT		\$500,000
<input checked="" type="checkbox"/> WC STATUTORY LIMITS	<input type="checkbox"/> OTHER																
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E.L. DISEASE-EA EMPLOYEE		\$500,000															
E.L. DISEASE-POLICY LIMIT		\$500,000															
B	OTHER Builders' Risk Floater Deductible: \$1000		09/30/01	09/30/02	<table border="1" style="width: 100%; border-collapse: collapse; font-size: x-small;"> <tr><td>Frame</td><td style="text-align: right;">\$500,000 (Ea)</td></tr> <tr><td>Other</td><td style="text-align: right;">\$3,000,000 (Ea)</td></tr> <tr><td>Max Loss</td><td style="text-align: right;">\$8,000,000</td></tr> </table>	Frame	\$500,000 (Ea)	Other	\$3,000,000 (Ea)	Max Loss	\$8,000,000						
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Max Loss	\$8,000,000																

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS		
Addl insured (Gen Liab & Auto Liab) which are primary and noncontributory, waiver of subrogation (Gen Liab, Auto Liab & Work Comp) and loss payee (Bldr Risk): its successors and assigns as owner of (See attached descriptions)		
CERTIFICATE HOLDER	ADDITIONAL INSURED, INSURER LETTER _____	CANCELLATION
		SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE OR THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.
		AUTHORIZED REPRESENTATIVE
		/S/

ACORD 25-S (7/97)

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**IMPORTANT**

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

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

**DISCLAIMER**

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

# ACCORD FORM 27

EVIDENCE OF PROPERTY INSURANCE			DATE (MM/DD/YYYY)
THIS IS EVIDENCE THAT INSURANCE AS IDENTIFIED BELOW HAS BEEN ISSUED, IS IN FORCE, AND CONVEYS ALL THE RIGHTS AND PRIVILEGES AFFORDED UNDER THE POLICY.			
PRODUCER	PHONE (A/C, No., Ext):	COMPANY	
CODE:	SUB CODE:		
AGENCY CUSTOMER ID#			
INSURED	LOAN NUMBER	POLICY NUMBER	
	EFFECTIVE DATE	EXPIRATION DATE	CONTINUED UNTIL TERMINATED IF CHECKED. <input type="checkbox"/>
THIS REPLACES PRIOR EVIDENCE DATED:			
PROPERTY INFORMATION			
LOCATION: DESCRIPTION			
COVERAGE INFORMATION			
COVERAGE/PERILS/TORMS		AMOUNT OF INSURANCE	DEDUCTIBLE
REMARKS (Including Special Conditions)			
CANCELLATION			
THE POLICY IS SUBJECT TO THE PREMIUMS, FORMS, AND RULES IN EFFECT FOR EACH POLICY PERIOD. SHOULD THE POLICY BE TERMINATED, THE COMPANY WILL GIVE THE ADDITIONAL INTEREST IDENTIFIED BELOW ____ DAYS WRITTEN NOTICE, AND WILL SEND NOTIFICATION OF ANY CHANGES TO THE POLICY THAT WOULD AFFECT THAT INTEREST, IN ACCORDANCE WITH THE POLICY PROVISIONS OR AS REQUIRED BY LAW.			
ADDITIONAL INTEREST			
NAME AND ADDRESS	MORTGAGEE	ADDITIONAL INSURED	
	LOSS PAYEE		
LOAN#			
AUTHORIZED REPRESENTATIVE			
ACCORD 27 (3/93)			

CG-20-11-11-85

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

1. Designation of Premises (Part Leased to You);
2. Name of Person or Organization (Additional Insured);
3. Additional Premium;

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

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

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

**CG-20-26-11-85**

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED - DESIGNATED PERSON OR ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

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

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.

**CG 20-09-10-93**

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY  
CG 20 09 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS FORM A**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization (Additional Insured):

Location of Covered Operations

Bodily Injury and Property Damage Liability	Premium Basis Cost	Rates (Per \$1000 of cost)	Advance Premium \$
Total Advance Premium			\$

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

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization (called "additional insured") shown in the Schedule but only with respect to liability arising out of:
  - A. Your ongoing operations performed for the additional insured(s) at the location designated above; or
  - B. Acts or omissions of the additional insured(s) in connection with their general supervision of such operations.
2. With respect to the insurance afforded these additional insureds, the following additional provisions apply:
  - A. Exclusions b., c., g., h.(1), j., k., l. and n. under COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I - Coverages) do not apply.
  - B. Additional Exclusions. This insurance does not apply to:
    - (1) "Bodily injury" or "property damage" for which the additional insured(s) are obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the additional insured(s) would have in the absence of the contract or agreement.
    - (2) "Bodily injury" or "property damage" occurring after:
      - (a) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or
      - (b) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.
    - (3) "Bodily injury" or "property damage" arising out of any act or omission of the additional insured(s) or any of their "employees", other than the general supervision by the additional insured(s) of your ongoing operations performed for the additional insured(s).
    - (4) "Property damage" to:
      - (a) Property owned, used or occupied by or rented to the additional insured(s);

(b) Property in the care, custody, or control of the additional insured(s) or over which the additional insured(s) are for any purpose exercising physical control; or

(c) Any work, including materials, parts or equipment furnished in connection with such work, which is performed for the additional insured(s) by you.

**CG 20-10-10-93**

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY  
CG 20 10 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED - OWNERS, LESSEES OR  
CONTRACTORS FORM B**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Name of Person or Organization: SCHEDULE

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

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

↓  
and completed

## SECURING TENANT'S PERFORMANCE UNDER THE LEASE

1. Background. There are a few ways to secure a tenant's performance under a shopping-center lease. Three of the most common are security deposits, certificates of deposit, and standby letters of credit.
  
2. Letters of Credit. Rather than a security deposit, the tenant may request that it substitute a letter of credit or certificate of deposit as the Landlord's security vehicle for all or a portion of its security deposit. A letter of credit is typically not included in a tenant's bankruptcy estate, however, a landlord should not draw down on the letter of credit proceeds without first consulting with the landlord's counsel to ensure that the bankruptcy stay or any injunctions are not violated. Generally, a letter of credit is far preferable to a certificate of deposit.
  
3. Security Deposits. The security deposit protects against a tenant default, including those that are non-monetary in nature. In addition, the security deposit serves as financial leverage to ensure the tenant returns the space in adequate condition at the end of the lease term. Landlord and landlord's counsel should be aware that although a tenant may have good credit and pay its rent on time, a tenant's financial strength does not ensure that they will honor their obligation to return the space in good condition at the end of the lease. Having a deposit in the landlord's possession reduces the likelihood that a tenant will be unreasonable in the negotiation of the move-out punch-list. It also serves to protect the landlord from costly collection suits against tenants for unfinished punch-list items. Usually, good-credit tenants reliably pay their debts ... but if they don't agree that they owe the money, it's no easier to collect from them than from a credit with substandard or poor credit. From a practical standpoint, the landlord is more likely to successfully enforce move-out punch-list requirements when the Tenant's money is in the Landlord's possession.
  
4. Certificates of Deposit. Landlord should be careful when it agrees to accept a certificate of deposit in lieu of a cash security deposit. If a tenant delivers a certificate of deposit in the tenant's name, the tenant has pledged the certificate of deposit to the landlord who, if an event of default occurs, might have to conduct a foreclosure sale under some jurisdictions before it could obtain the certificate of deposit funds. In the rare instance that tenant insists on providing a certificate of deposit in tenant's name, then landlord must negotiate a separate agreement between the tenant, tenant's bank and the landlord that provides that the bank will disburse the certificate of deposit proceeds to landlord if an event of default occurs under the lease. Instead of accepting a certificate of deposit in the tenant's name, landlord should agree to invest tenant's cash in a certificate of deposit and pay the tenant all interest income accrued on the certificate of deposit, except if an event of default occurs. If the landlord agrees to invest the security deposit in a certificate of deposit, then the following clause should be added as an additional rider paragraph to the lease.

**AIA**

**Waiver of Recovery and Subrogation**

**AIA Document A201  
General Conditions of the Contract for Construction  
for attachment to AIA Document A101  
Standard Form of Agreement Between Owner and Contractor (1997 Ed.)**

11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and 92) the Architect, Architect's consultants, separate contractors, agents and employees described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification contractual or otherwise, did no pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. (Emphasis added)

## TENANT'S INSURANCE

**INSURANCE BY TENANT.** Tenant shall, during the lease Term, procure at its expense and keep in force the following insurance:

- A. Commercial general liability insurance naming the Landlord, the Property Manager and Landlord's Mortgagee as additional insureds against any and all claims for bodily injury and property damage occurring in, or about the Premises arising out of Tenant's use and occupancy of the Premises. Such insurance shall have a combined single limit of not less than One Million Dollars (\$1,000,000) per occurrence with a Two Million Dollar (\$2,000,000) aggregate limit and excess umbrella liability insurance in the amount of Two Million Dollars (\$2,000,000). Such liability insurance shall be primary and not contributing to any insurance available to Landlord and Landlord's insurance shall be in excess thereto. In no event shall the limits of such insurance be considered as limiting the liability of Tenant under this lease.
- B. Personal property insurance insuring all equipment, trade fixtures, inventory, fixtures and personal property located on or in the Premises for perils covered by the causes of loss – special form (all risk) and in addition, coverage for flood, earthquake and boiler and machinery (if applicable). Such insurance shall be written on a replacement cost basis in an amount equal to one hundred percent (100%) of the full replacement value of the aggregate of the foregoing.
- C. Workers' compensation insurance in accordance with statutory law and employers' liability insurance with a limit of not less than \$100,000 per accident, \$500,000 disease, policy limit and \$100,000 disease limit each employee.
- D. Such other insurance as landlord deems necessary and prudent or required by Landlord's beneficiaries or mortgagees of any deed of trust or mortgage encumbering the Premises.

The policies required to be maintained by Tenant shall be with companies rated A X or better in the most current issue of A.M. Best's Insurance Ratings Guide. Insurers shall be licensed to do business in the state in which the Premises are located and domiciled in the USA. Any deductible amounts under any insurance policies required hereunder shall not exceed \$1,000. Certificates of insurance (certified copies of the policies may be required) shall be delivered to Landlord prior to the Commencement Date and annually thereafter at least thirty (30) days prior to the policy expiration date. Tenant shall have the right to provide insurance coverage which it is obligated to carry pursuant to the terms hereof in a blanket policy, provided such blanket policy expressly affords coverage to the Premises and to Landlord as required by this Lease. Each policy of insurance shall provide notification to Landlord at least thirty (30) days prior to any cancellation or modification to reduce the insurance coverage.

In the event Tenant does not purchase the insurance required by this Lease or keep the same in full force and effect, Landlord may, but shall not be obligated to, purchase the necessary insurance and pay the premium. The Tenant shall repay to Landlord, as Additional Rent, the amount so paid promptly upon demand. In addition, Landlord may recover from Tenant and Tenant agrees to pay, as Additional Rent, any and all expenses (including attorneys' fees) and

damages which Landlord may sustain by reason of the failure to Tenant to obtain and maintain such insurance. Tenant's insurance obligations under this Section \_\_\_\_ are freestanding obligations which are not dependent on any other conditions or obligations under this Lease.

**SUBROGATION OF RIGHTS OF RECOVERY.** Landlord and Tenant hereby mutually waive their respective rights of recovery against each other for any loss of, or damage to, either parties' property, to the extent that such loss or damage is insured by an insurance policy required to be in effect at the time of such loss or damage. Each party shall obtain any special endorsements, if required by its insurer whereby the insurer waives its rights of subrogation against the other party. The provisions of this Section shall not apply in those instances in which waiver of subrogation would cause either party's insurance coverage to be voided or otherwise made uncollectible. Notwithstanding the foregoing, Landlord's waiver of liability under this Section \_\_\_\_ shall not apply to Landlord's right to seek compensation from Tenant or any Tenant Party for any deductible amounts under Landlord's insurance.

**INSURANCE.** (a) Landlord shall maintain all risk property insurance covering the full replacement cost of the Building (excluding foundations), less a commercially reasonable deductible if Landlord so chooses, and commercial general liability coverage with a minimum limit of \$1,000,000 per occurrence and a minimum umbrella limit of \$2,000,000 for a total minimum combined general liability and umbrella limit of \$3,000,000 for the common areas of the Project. Tenant will be named as an additional insured on the commercial general liability policy covering the common areas only. Landlord will maintain commercial liability insurance, flood insurance, and rent loss insurance in amounts which are customary for Shopping Centers in the greater Atlanta metropolitan area, that are similar in size and in their nature to the Project. The commercial liability policies shall insure on an occurrence and not a claims-made basis, not be cancelable unless thirty (30) days prior written notice shall have been given to Landlord, and cover or contain a contractual liability endorsement. Landlord's insurer shall be deemed acceptable if it has a Best's rating (or the equivalent thereto) of A-/VIII or better. All such insurance shall be included as part of the Operating Expenses charged to Tenant pursuant to Paragraph 6 hereof. The Shopping Center may be included in a blanket policy (in which case the cost of such insurance allocable to the Project or Building will be determined by Landlord based upon the insurer's cost calculations). Tenant shall also reimburse Landlord for any increased premiums or additional insurance which Landlord reasonably deems necessary as a result of Tenant's use of the Premises. The current deductible amounts of Landlord's property insurance are as follows: \$10,000 for all risk insurance; \$25,000 for flood insurance; and \$50,000 for earthquake insurance. Landlord agrees not to materially increase such deductibles without notifying Tenant.

(b) Tenant, at its expense, shall maintain during the Lease Term: (i) all risk property insurance covering the full replacement cost of all property and improvements installed or placed in the Premises by Tenant or for Tenant's benefit; (ii) worker's compensation insurance with no less than the minimum limits required by law; (iii) employer's liability insurance with such limits as required by law; and (iv) commercial liability insurance, with a minimum limit of \$1,000,000 per occurrence and a minimum umbrella limit of \$2,000,000, for a total minimum combined general liability and umbrella limit of \$3,000,000 for property damage, personal injuries, or deaths of persons occurring in or about the Premises. Landlord may from time to time require reasonable increases in any such limits after five (5) years of occupancy provided the increases are customary for Shopping Centers in the greater Atlanta metropolitan area, that are similar in size and in their nature to the Project. The commercial liability policies shall name Landlord and Landlord's agents (its owners, affiliates, subsidiaries and management company) as additional insureds, shall insure on an occurrence and not a claims-made basis, be issued by insurance companies which are reasonably acceptable to Landlord, not be cancelable unless thirty (30) days prior written notice shall have been given to Landlord, cover or contain a contractual liability endorsement and provide primary coverage to Landlord (any policy issued to Landlord providing duplicate or similar coverage shall be deemed excess over Tenant's policies). Certificates evidencing such coverage shall be on ACCORD form 27 modified to include liability coverage and shall be delivered to Landlord by Tenant at least ten (10) days prior to the Commencement Date and at least fifteen (15) days prior to each renewal of said insurance. If Tenant fails to comply with the foregoing insurance requirements within fifteen (15) days after written notice by Landlord to Tenant or to deliver to Landlord copies of such policies and certificates evidencing the coverage required herein, then Landlord, in addition to any remedy available pursuant to this Lease or otherwise, may, but shall not be obligated to, obtain such insurance and Tenant shall pay to Landlord on demand the premium costs thereof.

Notwithstanding anything to the contrary contained herein, Tenant's insurer shall be deemed acceptable if it has a Best's rating (or the equivalent thereto) of A/VIII or better, and, except as limited below, Tenant may elect to self-insure with respect to all or a substantial portion of the risks required to be insured against pursuant to the foregoing requirements for casualty insurance and as to all other risks required to be insured against for so long as Tenant's net worth is in excess of one hundred million (\$100,000,000.00) Dollars. Any insurance carried by Tenant may be carried pursuant to a blanket policy or policies. Notwithstanding the foregoing, if Tenant's net worth falls below one hundred million (\$100,000,000.00), Tenant must obtain and/or maintain in full force and effect at all time during which such net worth is less than one hundred million (\$100,000,000.00), an excess policy or primary policy above the self-insured portion with third party coverage for claims in excess of the amounts shown below for the insurances specified:

<u>Type of Insurance</u>	<u>Third Party Coverage For Claims in Excess of</u>
Commercial Liability	\$1,000,000
Casualty	\$1,000,000

(c) The all risk property insurance obtained by Landlord and Tenant shall include a waiver of subrogation by the insurers and all rights based upon an assignment from its insured, against Landlord or Tenant, their officers, directors, employees, managers, agents, invitees and contractors, in connection with any loss or damage thereby insured against. Neither party nor its officers, directors, employees, managers, agents, invitees or contractors shall be liable to the other for loss or damage caused by any risk insured against, or which would have been insured against had each party maintained the insurance required hereunder, and each party waives any claims against the other party, and its officers, directors, employees, managers, agents, invitees and contractors for such loss or damage to the extent insurance proceeds are received therefor, or would have been received, including deductibles, had the waiving party maintained the insurance coverages required hereunder, regardless of whether the negligence or fault of the other party caused such loss; however, Landlord's waiver shall not apply to any deductible amounts maintained by Landlord under its insurance. The failure of a party to insure its property shall not void this waiver.

## MODEL SELF-INSURANCE LEASE PROVISIONS

1. Tenant shall pay for and maintain or cause to be paid for and maintained, from the date of commencement of the construction of the Leasehold Improvements through the end of the term, the following policies of insurance covering the premises, which insurance shall be obtained from companies currently rated "A-VIII" or better as defined in the then current edition of Best's Insurance Reports (or the equivalent thereof if Best's Insurance Reports is no longer published) and is licensed to do business in the State where the premises are located:

(a) Worker's Compensation Insurance covering tenant and its employees for all costs, statutory benefits and liabilities under State Worker's Compensation and similar laws for employees of landlord, and Employer's Liability Insurance with limits of Five Hundred Thousand Dollars (\$500,000.00) per accident or disease.

(b) Commercial General Liability Insurance covering the premises with combined single limits of not less than \_\_\_\_\_ Dollars (\$\_\_\_\_\_) per occurrence for death, bodily injury or property damage.

(c) "All Risk" Property Insurance (now known as Special Perils Insurance) upon all buildings, building improvements, personal property owned by tenant and alterations on the premises (i) against loss or damage by fire, lightning, windstorm, tornado, hail and such other further and additional hazards of whatever kind or nature as are now or hereafter may be covered by standard extended coverage, (ii) with "all risk" endorsements (including, but without limiting the generality of the foregoing, vandalism, malicious mischief and damage by water), (iii) against war risk as, when and to the extent such insurance is obtainable from the United States of America or an agency thereof, (iv) against flood disaster pursuant to the Flood Disaster Protection Act of 1973, 84. Stat. 572, 42 U.S.C. SS. 4001, if the premises is located in an area identified by the United States Department of Housing and Urban Development as a flood hazard area, (v) against earthquakes (including subsidence), (vi) against any other risk commonly insured against by persons operating properties similar to the premises and located in the vicinity of the premises or conducting operations similar to the operations conducted at the premises, (vii) containing demolition and increased cost of construction coverage; and (viii) if a sprinkler system is located in the buildings, sprinkler leakage insurance and all of which insurance shall be in the full replacement cost of the buildings, building improvements, personal property and alterations on the premises and with an "agreed value" endorsement and all other endorsements reasonably requested by landlord from time to time. The maximum "deductible" permitted under such insurance will be \$\_\_\_\_\_.

(d) Rental Interruption Insurance coverage, in adequate amounts to avoid co-insurance provisions, for an adequate period of time of not less than 12 months, taking into consideration the reasonable time period required to rebuild and/or replace the insured property; including coverage for, but not limited to, loss and loss of use of Tenant's leasehold improvements, business fixtures, stock-in-trade and for "extra expense" as well as all Rent and Additional Rent required of tenant under the lease.

2. The specified limits of insurance may be satisfied by any combination of primary or excess/umbrella liability insurance policies. At the end of each five (5) years of the initial term, and at the beginning of each extension period tenant shall review with landlord the coverages and limits of any or all of the policies required above and, at that time, shall cause such coverages and liability limits to be increased as reasonably required by landlord in view of inflation and other relevant factors.

3. Each policy shall expressly provide that it shall not be subject to cancellation, modification or change without at least thirty (30) days' prior written notice to landlord, that the coverage provided by such policy shall be deemed primary insurance and that any insurance provided by or on behalf of landlord shall be in excess of any insurance provided by such policy. Tenant shall furnish landlord, or cause to be furnished to landlord, currently with the execution of this lease, and prior to the inception of each successive policy period, insurance certificates and, upon request by landlord, copies of such policies required to be maintained hereunder naming landlord as an additional insured thereunder. Upon request of landlord, tenant shall also provide coverage under such insurance (or so much thereof as landlord may require) for the benefit of the landlord's mortgagee holding a lien on the premises and shall name such mortgagee under a standard mortgagee provision. All policies required to be provided by tenant hereunder shall include an endorsement or other provision whereby such insurance carrier acknowledges and accepts the waiver of subrogation in favor of landlord contained in paragraph \_\_\_ below.

4. [Subject to approval by the holder of any first mortgage on the premises] tenant shall have the right to self-insurance for the insurance required above, on the following terms and conditions and subject to:

(a) "Self-Insure" shall mean that tenant is itself acting as though it were the insurance company providing the insurance required under the provisions hereof and tenant shall pay any amounts due in lieu of insurance proceeds which would have been payable if the insurance policies had been carried, which amounts shall be treated as insurance proceeds for all purposes under this lease.

(b) All amounts which Tenant pays or is required to pay and all loss or damages resulting from risks for which Tenant has elected to self-insure shall be subject to the waiver of subrogation provisions of paragraph \_\_\_ hereof and shall not limit Tenant's indemnification obligations set forth in paragraph \_\_\_ hereof.

(c) Tenant's right to self-insure and to continue to self-insure is conditioned upon and subject to:

(1) The tenant now having and hereafter maintaining a tangible net worth of at least \_\_\_\_\_ Dollars (\$\_\_\_\_\_). The amount of Tenant's net worth requirement shall be increased by \_\_\_\_\_ Dollars (\$\_\_\_\_\_ ) at the end of each five (5) years of the initial term and at the beginning of each extension term of

the lease [or tenant maintaining a rating of “A” or better by Standard and Poor];

(2) The tenant providing an audited financial statement, prepared in accordance with generally accepted accounting principles, to landlord [and landlord’s mortgagee] by May 1 of every year which establishes and confirms that tenant has the required net worth;

(3) No events occurring that make it apparent that such net worth has been diminished below the required level (such as the bankruptcy of tenant); and

(4) The tenant maintaining appropriate loss reserves for the amount of its self-insurance obligations under the lease and otherwise which are actuarially derived in accordance with accepted standards of insurance industry and accrued (i.e., charged against earnings) or otherwise funded.

(d) In the event tenant fails to fulfill the requirements of 4(c), then tenant shall immediately lose the right to self-insure and shall be required to provide the insurance specified in paragraphs 1,2,3, provided, however that tenant’s self-insurance shall continue in full force and effect until the insurance specified in paragraphs 1,2, & 3 is issued by a qualifying insurance company.

5. In the event that tenant elects to self-insure and an event or claim occurs for which a defense and/or coverage would have been available from the insurance company, tenant shall:

(a) undertake the defense of any such claim, including a defense of landlord, at tenant’s sole cost and expense, and

(b) use its own funds to pay any claim or replace any property or otherwise provide the funding which would have been available from insurance proceeds but for such election by tenant to self-insure.

6. In the event tenant has the right to and elects not to operate its business in the premises after reconstruction, or fails to commence reconstruction within \_\_\_ days after requested by landlord, landlord shall have the right to determine that the self-insurance proceeds either be paid to landlord:

(a) for restoration of the premises to such form and condition as landlord may reasonable require, and the tenant’s other obligations under the lease shall continue in full force and effect, or

(b) such proceeds be paid to landlord or landlord’s mortgagee and the lease shall thereupon terminate.

7. In the event that tenant elects to self-insure a deductible or self-insured retention, tenant shall provide landlord [and landlord's mortgagee] with certificates of insurance from the primary, umbrella and excess carriers specifying the extent of self-insurance coverage hereunder and containing a waiver of subrogation and/or release of right of recovery provision reasonably satisfactory to landlord. Any insurance coverage provided by tenant shall be for the benefit of tenant, landlord [and the first mortgagee], as their respective interests may appear [and, shall name the mortgagee under a standard mortgage provision].

8. The obligations of tenant under this [Insurance paragraph] are independent and shall remain in full force and effect notwithstanding any breach of provision of the lease by landlord.

## LETTERS OF CREDIT - DRAFTING CONSIDERATIONS

If the landlord agrees to a letter of credit, the following language should be inserted as an additional paragraph to the lease:

### Security Deposit – Letter Of Credit.

- A. Prior to the commencement date of the lease, but by no later than \_\_\_\_\_ (\_\_) days after the Landlord's delivery to tenant of a fully-executed copy of the lease, tenant shall deliver to landlord an executed original irrevocable standby letter of credit ("L.C.") in the amount of \$\_\_\_\_\_ in favor of landlord, such L.C. to have a term of \_\_\_\_\_ (\_\_) months [NOTE – make sure to account for any renewal or extension of the lease] from the commencement date of the lease. Prior to the execution of the L.C., tenant shall cause the Issuer (defined below) to deliver to landlord draft(s) of the L.C. for landlord's review and comments so that landlord and Issuer may negotiate the final terms of the L.C. The L.C. will not be issued until the landlord has approved the final draft of the L.C. If the L.C. is not timely delivered to the landlord, then an event of default shall immediately (notwithstanding any notice provisions of the lease) exist hereunder. The L.C. may be drawn upon and used upon each occurrence of an event of default, or tenant's failure to perform any covenant, condition or obligation required under the lease, or tenant's anticipatory breach of the lease; landlord may use all or part of the L.C. to pay past due rent or other payments due landlord under this lease, and the cost of any other damage, injury, expense or liability caused by such event of default without prejudice to any other remedy provided herein or provided by law. Such L.C. shall be issued in a form and by a National Banking Association (located within the continental United States of America with an office located in \_\_\_\_\_ [wherever location the Landlord is located in]) (hereinafter the "Issuer"), acceptable to landlord. With respect to any default occurring during the term of the lease, landlord shall have the right to proceed against the total L.C. at the sole discretion of landlord regarding items and the amounts to be drawn upon relating to any default by tenant. If tenant exercises either its renewal option or its right of first refusal under Sections \_\_\_\_\_ or \_\_\_\_\_ herein, then tenant agrees that the L.C. will be extended in the same amount and under the same terms for any additional term of this lease.
- B. Such L.C. shall contain the following terms and conditions:
1. The L.C. shall be deemed to be automatically extended without amendment from year to year, with renewal occurring annually, from the date of its issuance or any future expiration date unless at least 30 days prior to any future expiration date the bank notifies landlord, in writing, by certified mail, return receipt requested and via a nationally recognized overnight courier, that the Issuer intends not to renew the L.C. for an additional year.
  2. In the event the L.C. will not be extended and has or will expire by its terms and the lease, by and between tenant and landlord, including any or all extensions or

renewals, has not expired, then landlord shall be allowed to draft upon Issuer for the full amount of the L.C.

3. The L.C. shall be subject to the Uniform Customs and Practices for Documentary Credits (1993 Revision, as amended) fixed by the International Chamber of Commerce Publication No. 500 when not in conflict with the express terms of the L.C. or with the provisions of Article 5 of the Uniform Commercial Code, as amended.
4. The amount of the L.C. shall be payable at sight to landlord within three (3) days of presentation of the sight draft, in whole or partial drawings, upon presentation to the Issuer of only the following documents:
  - a. Landlord's written demand for payment making reference to the date and number of the L.C.;
  - b. Landlord's signed statement that the amount drawn is to meet any event of default as set forth in the lease by and between tenant and landlord; and
  - c. The original L.C. for endorsement of the amount paid, and, if the draft is for the full amount, the L.C. is to be surrendered to the Issuer. Amounts drawn upon the L.C. are to be endorsed on the reverse side of the L.C. by the Issuer.
5. It is a condition of this letter of credit that it shall be automatically extended for additional periods of one year from the present and each successive expiration date hereof, unless at least thirty (30) days prior to the then current expiration date, we shall notify you in writing sent by certified mail, return receipt requested.
6. Issuer shall be entitled and required to rely upon the statements contained in the landlord's written demand and landlord's signed statement described in subparagraph 4 herein, and Issuer will have no obligation to verify the truth of any statements set forth therein.
7. Issuer shall not have the right to assign the L.C. to any other person, entity, National Banking Association, or financial institution without Landlord's prior written consent, which shall not be unreasonably withheld.
8. Issuer hereby agrees with landlord and all drawers, endorsers, and bona fide holders of the L.C. that all drafts drawn by reason of the L.C. and in accordance with subparagraph 4 herein will meet with due honor when presented at the Issuer's office in \_\_\_\_\_.
9. Issuer shall not modify the L.C. without the prior written consent of landlord.

10. Landlord shall, at no expense to landlord, have the right to assign and transfer its right and interests in the L.C. to any other beneficiary/party acceptable to landlord.

The obligations of Issuer shall not be subject to any claim or defense by reason of the invalidity, illegality, or inability to enforce any of the provisions set forth in the lease by and between tenant and landlord.