

# Definitions and Comparisons of Commonly Used Titles

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Insurance policies contain two general categories of insureds: named insureds and additional insureds. Named insureds are entities or individuals specifically listed as insureds in the policy (i.e., those to whom the policy is issued). Additional insureds consist of two categories: “automatic insureds” or “additional insureds.” Automatic insureds automatically obtain insured status due to a special relationship with the named insured(s). Additional insureds are often added to another’s insurance policy in connection with a business relationship.

Aside from named insured and additional insured status, entities or individuals can sometimes obtain coverage due to their status as the named insured’s loss payee or mortgagee. Whereas loss payees and mortgagees are not insureds, they have certain protections under the policy and may receive payment after a loss.

This chapter will explain and compare the commonly used titles of “named insured,” “additional named insured,” “first named insured,” “automatic insured,” “additional insured,” “loss payee,” and “mortgagee.” It is necessary to know the differences and similarities between these different types of insureds before fully understanding the implications of additional insured status.

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## I. Named Insureds

Named insureds are those persons or organizations specifically named in the policy.<sup>1</sup> Named insureds may be individuals, corporations, partnerships, joint ventures, or limited liability companies (or any other type of legal entity).

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1. *Kohly v. Royal Indem. Co.*, 190 So. 2d 819, 821 (Fla. Dist. Ct. App. 1966); *see also* *Tobin v. Mich. Mut. Ins. Co.*, 948 So. 2d 692, 698 (Fla. 2006); *Alexander v. Nat’l Fire Ins.*, 454 F.3d 214, 227 (3d Cir. 2006) (“Simply put, Named Insured means Named Insured.”); *Botti v. CNA Ins. Co.*, 824 A.2d 1120, 1125 (N.J. Super. Ct. App. Div. 2003) (citations omitted) (“[T]he term “named insured” is self-defining . . . [and] refers only to the names so appearing in the declaration.”); *D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.*, 39 P.3d 1205, 1207 (Colo. App. 2001) (“Because the identification of the named insured is of paramount

Several different types of policy provisions may provide named insured status. The declarations page lists the primary named insured and may include other named insureds. “Named insured” or “additional named insured” endorsements also may add specific entities and/or individuals as named insureds. Finally, some policies include a broad form named insured endorsement. These endorsements do not identify the exact entities or individuals who qualify for named insured status. Instead, they provide coverage for anyone who satisfies certain requirements. Exhibit 1 is an example of a broad form named insured endorsement.

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#### EXHIBIT 1—BROAD FORM NAMED INSURED ENDORSEMENT

It is agreed that:

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations and any business entity incorporated or organized under the laws of the United States of America (including any State thereof), its territories or possessions of Canada (including any Province thereof) in which the Named Insured shown in the Declarations owns, during the policy period, an interest of more than 50 percent. If other valid and collectible insurance is available to any business entity covered by this policy solely by reason of ownership by the Named Insured shown in the Declarations in excess of 50 percent, this insurance is excess over the other insurance, whether primary, excess, contingent, or on any other basis.

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Two types of named insureds exist in post-1986 editions of Commercial General Liability (“CGL”) forms: (1) the “first named insured,” and (2) “additional named insureds.”<sup>2</sup> The first named insured—also termed primary named insured—is the “individual or entity whose name appears first in the declarations of an insurance policy.”<sup>3</sup>

Additional named insureds (not to be confused with additional insureds) are all the named insureds other than the first named insured. Although some courts

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interest to the insurer, in interpreting insurance policies, courts have held that the term ‘named insured’ has a restricted meaning and does not apply to any persons other than those named in the policy.”). Black’s Law Dictionary defines the term “named insured” as “[a] person designated in an insurance policy as the one covered by the policy.” BLACK’S LAW DICTIONARY 1899 (10th ed. 2014). *Wright-Ryan Const., Inc. v. AIG Ins. Co. of Canada*, 647 F.3d 411, 417–18 (1st Cir. 2011) (“The mainstream of opinions interpreting this or similar definitions has held ‘you’ to be unambiguous and to refer solely to the individual or organization identified as the ‘Named Insured’ in the policy Declarations.”).

2. The 1973 version of the ISO CGL form did not differentiate between named insureds.

3. BLACK’S LAW DICTIONARY 1948 (10th ed. 2014); *Health Care Indem., Inc. v. King*, No. 2:05-0913, 2007 U.S. Dist. LEXIS 11306, at \*10 (S.D.W. Va. Feb. 14, 2007) (policy at issue defined “first named insured” as “the organization named in Item 1 of the Declarations of this policy”); *Edmondson v. Motorists Mut. Ins. Co.*, No. C-74652, 1976 Ohio App. LEXIS 7059, at \*7 (Ohio Ct. App. 1976) (“The term ‘first-named insured’ means the individual first named in the declarations. . .”).

define additional named insured as “a person or entity whose name is specifically added to the policy as an insured after the issuance of the original policy,”<sup>4</sup> multiple definitions are found throughout the insurance industry. This is because CGL policies do not define the term and there is no standard “additional named insured” endorsement.<sup>5</sup>

## A. First Named Insured v. Additional Named Insured

Certain policy provisions create responsibilities and privileges that apply only to the first named insured. When more than one named insured exists, the additional named insureds should consider these provisions in order to protect their interests, particularly as regards the premium, cancellation, and amendment provisions discussed in the following sections.

### 1. Premium Payments

Before 1986, it was unclear whether additional named insureds could be held responsible for payment of premium. However, an ISO form amendment in 1986 resolved this issue. Policies issued after 1986 now specifically hold the first named insured responsible for paying the premium.

### 2. Policy Cancellation

The standard CGL cancellation provision states that “[t]he first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.”<sup>6</sup> Thus, when the policy has more than one named insured, cancellation is only effective if done by the “first named insured.” Because the first named insured can cancel the policy without the additional named insureds’ approval, additional named insureds (and additional insureds) may become uninsured without warning.

### 3. Amendments to the Policy

Only the “first named insured” may agree to policy changes. Additional named insureds must obtain approval from the “primary named insured” (and the insurer) before modifying the policy. Thus, additional named insureds need to be aware that the policy can change without their approval.

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4. *W. Indem. Ins. Co. v. Am. Physicians Ins. Exch.*, 950 S.W.2d 185, 188–89 (Tex. App. 1997); *Westview Drive Investments, LLC v. Landmark Am. Ins. Co.*, 14-15-00574-CV, 2017 WL 830510, at \*6 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017) (“An ‘additional named insured’ is one who is specifically identified as a named insured to an already-existing policy.”).

5. Because there is no standard endorsement, additional named insured endorsements vary from policy to policy.

6. Insurance Services Office, Inc. (“ISO”), Commercial General Liability Coverage Form, CG 02 00 07 05; *see also* CG 00 01 12 07. Many ISO Forms are available for review on LEXIS as forms under the area of law “Insurance.” Hereinafter, ISO Forms will be cited only by their alphanumeric ISO Form number.

**a. “You” and “Your”**

Certain policy provisions apply only to named insureds. To locate these provisions, it is helpful to remember that CGL policies also use the terms “you” and “your” to refer to named insureds.<sup>7</sup> When a CGL policy refers to “insured” it is referring to “named insured” and “additional insureds.”

## II. Additional Insured Status

Additional Insureds consist of two categories: (1) automatic insureds and (2) individuals or entities who obtain insured status by separate contract.

### A. Automatic Insureds

Automatic insureds are individuals or entities who have “insured status,” but not named insured status. Standard CGL policies and various endorsements grant automatic insured status.<sup>8</sup> Automatic insureds usually have a special relationship with the named insured(s). For example, if the named insured is a partnership, its members, partners, and their spouses are also automatic insureds, but only with respect to the conduct of its business. Exhibit 2 is an example of the standard “Who Is An Insured Provision” found in CGL policies.

#### EXHIBIT 2 SECTION II—WHO IS AN INSURED

1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds, 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 insureds, 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.

7. CGL policies state that “[t]hroughout this policy the words ‘you’ and ‘your’ refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” For an example, see ISO CG 00 01 04 13.

8. For an example of automatic insured language, see *Transcon. Pipe Line Corp. v. Nat’l Union Fire Ins. Co.*, 378 F. Supp. 2d 729, 738 (M.D. La. 2005) (Under this policy, an insured includes “any person or organization to whom you become obligated to include as an additional insured.” This language has been held to include such party as an “automatic insured,” despite the fact that the policy itself does not name that party.); *Travelers Indem. Co. v. Navigators Ins. Co.*, C 99-4509 CRB, 2000 WL 630859, at \*3 (N.D. Cal. May 8, 2000) (noting that “[i]n effect, automatic insureds are considered additional insureds as of the date the named insured was required by contract to purchase insurance for another party”); see also *Saavedra v. Murphy Oil U.S.A., Inc.*, 930 F.2d 1104 (5th Cir. 1991).

- 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.
2. Each of the following is also an insured:
- a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your “employees,” other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these “employees” or “volunteer workers” is insureds for:
    - (1) “Bodily injury” or “personal and advertising injury”:
      - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-“employee” while in the course of his or her employment or performing duties related to the conduct of your business, or to your other “volunteer workers” while performing duties related to the conduct of your business;
      - (b) To the spouse, child, parent, brother or sister of that co-“employee” or “volunteer worker” as a consequence of Paragraph (1)(a) above;
      - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
      - (d) Arising out of his or her providing or failing to provide professional health care services.
    - (2) “Property damage” to property:
      - (a) Owned, occupied or used by,
      - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your “employees,” “volunteer workers,” any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
  - b. Any person (other than your “employee” or “volunteer worker”), or any organization while acting as your real estate manager.
  - c. Any person or organization having proper temporary custody of your property if you die, but only:
    - (1) With respect to liability arising out of the maintenance or use of that property; and

- (2) Until your legal representative has been appointed.
- d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
- 3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
  - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - b. Coverage A does not apply to “bodily injury” or “property damage” that occurred before you acquired or formed the organization; and
  - c. Coverage B does not apply to “personal and advertising injury” arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

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## **B. Additional Insured by Separate Contract**

An additional insured is a person or entity that enjoys the privilege of being insured under a policy purchased by the named insured. Additional insureds usually seek protection because of their business relationship with the named insured. The main benefit of additional insured coverage is that the entity or individual enjoys protection under the policy while having no responsibility to pay premiums or deductibles.

Examples of additional insureds include:

1. Property owner on general contractor’s policy;
2. General contractor on subcontractor’s policy;
3. Owner of real estate on tenant’s policy;
4. Lessor of equipment on lessee’s policy; or
5. Product retailers on manufacturer’s policy.

### *1. Purpose of Additional Insured Status*

Parties often transfer potential liability arising from a contract’s performance. One reason for risk transfer is to make the party performing the work responsible for any potential liability arising from that work. Parties often use contractual indemnity or hold harmless provisions to accomplish this transfer of risk. These are discussed in detail in a later chapter.

When a named insured must indemnify another party, the contractual liability provision in the named insured's CGL policy may cover that liability. Certain courts have held that even an unenforceable indemnity provision may trigger contractual liability coverage.<sup>9</sup> Additional insured status may offer greater protections by creating a direct contractual relationship between the additional insured and the insurer, as opposed to an indirect relationship created through indemnity provisions.

There are several reasons for requiring additional insured status on another party's liability policy, including:

- It provides the same type of risk transfer as an indemnity provision, which may be held unenforceable by a court or statute.
- It may allow the transfer of a party's sole liability, even in states that prohibit such a transfer through indemnity provisions.
- The additional insured has a direct right against the named insured's insurer.
- The additional insured may have a direct right to an immediate defense, rather than having to wait for reimbursement.<sup>10</sup>
- Additional insured status should prohibit the insurer from subrogating against the additional insured if the additional insured's own negligence causes the loss.<sup>11</sup>

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9. See *Holden v. U.S. United Ocean Services, L.L.C.*, 582 F. App'x 271, 275 n.4 (5th Cir. 2014) (citing Fifth Circuit precedent that "[a]n unenforceable agreement to assume liability constitutes an insured contract . . .").

10. See Samir B. Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard*, 3 CONN. INS. L.J. 169, 178 (1996-97) ("Another advantage gleaned by additional insured is that the indemnitor's duty to defend them arises at the time a claim is made. The additionally insured party has the option of joint representation at the outset of the proceeding. By contrast, where an indemnitee is relying solely upon the protection of a contractual indemnification provision, the duty to defend may arise later in the proceeding, for instance upon a finding that the indemnitor was at fault."); *BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 8 N.Y.3d 708, 711, 871 N.E.2d 1128, 1129 (2007) ("We conclude that additional insured coverage is not contingent upon a liability finding and that the obligation of an insurer to provide a defense to an additional named insured under the policy exists to the same extent as it does to a named insured.").

11. "Generally, insurers have no right of subrogation against an insured or a party who has attained additional insured status." See *Mehta*, *supra* note 10, at 175; see also *Frank Briscoe Co. v. Georgia Sprinkler Co.*, 713 F.2d 1500, 1502 (11th Cir. 1983) ("Similarly, it has been held that where there are two co-insureds and the insurer pays one insured under the policy, no right of subrogation arises against the additional insured."); *Peterson v. Silva*, 704 N.E.2d 1163 (Mass. 1999) (same); *Curles v. United States Fid. & Guar. Co.*, 403 S.E.2d 458, 459 (Ga. Ct. App. 1991) (where there are two co-insured, and the insurer pays one insured the amount claimed as damages, no right of subrogation arises against a person who holds the status of an additional insured); *Miller v. Russell*, 674 S.W.2d 290, 291 (Tenn. Ct. App. 1983) (no right of subrogation exists where the wrongdoer is also an insured under the same policy); *Millennium Holdings LLC v. Glidden Co.*, 27 N.Y.3d 406, 415, 53 N.E.3d 723, 728 (2016) ("Insurers are barred under the antisubrogation rule from seeking subrogation from a named insured or additional insureds."). Issues concerning subrogation are discussed in Chapter 8.

## 2. *Types of Additional Insured Endorsements*

An entity or individual can qualify as an additional insured in two ways. First, an additional insured endorsement can expressly identify the specific entity or individual. Second, additional insured status may arise from a blanket additional insured endorsement. A blanket endorsement does not expressly name an additional insured, but instead provides coverage for any entity or individual who has a contract with the named insured that requires additional insured coverage. One common blanket endorsement amends the “Who Is an Insured” provision to include as an insured: “Any person or organization that the named insured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy and is approved by the company in writing within 30 days.”<sup>12</sup> Courts have held that blanket endorsements automatically extend additional insured status if a contract requires the named insured to procure insurance.<sup>13</sup> The blanket endorsement becomes effective when the parties sign the contract requiring insurance.

*Gulf Oil Corp. v. Mobile Drilling Barge*<sup>14</sup> typifies how many courts interpret these blanket endorsements. In *Gulf Oil Corp.*, Shell entered into a drilling contract with ODECO requiring Shell to be named as an additional insured on ODECO’s insurance policy.<sup>15</sup> The ODECO policy contained a blanket endorsement defining insureds to include “any person or organization to whom or to which the Named Insured is obligated by virtue of a written contract to provide insurance such as afforded by this policy . . .”<sup>16</sup> After a loss occurred, ODECO added an endorsement to its policy specifically naming Shell as an additional insured.<sup>17</sup> The court held that the policy automatically covered Shell as an additional insured on the contract’s effective date, even though the endorsement specifically adding Shell as an additional insured became effective after the loss.<sup>18</sup>

Chapter 2 also contains a discussion of blanket additional insured endorsements.

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12. For an example, see *Travelers Indem. Co. v. Navigators Ins. Co.*, No. C 99-4509 CRB, 2000 U.S. Dist. LEXIS 6702 (N.D. Cal. May 8, 2000).

13. See *Sonat Exploration v. Falcon Drilling Co., Inc.*, No. CIV.A.98-2187, 2000 WL 144068, at \*1 (W.D. La. Jan. 26, 2000) (holding that because contract required Sonat to be named as an additional insured, Sonat was an insured under the blanket endorsement); *City of Cedar Rapids v. Ins. Co. of N. Am.*, 562 N.W.2d 156, 157 (Iowa 1997) (city was an additional insured by virtue of blanket endorsement and contract requiring insurance coverage); *Rosato v. Karl Koch Erecting Co. Inc.*, 865 F. Supp. 104, 106 (E.D.N.Y. 1994) (determining that because subcontract obligated subcontractor to insure contractor, contractor was an additional insured under the blanket additional insured endorsement); *Gulf Oil Corp. v. Mobile Drilling Barge*, 441 F. Supp. 1, 6 (E.D. La. 1975) (same); *Hunter Roberts Const. Grp., LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 408, 904 N.Y.S.2d 52, 57 (2010) (“Accordingly, Hunter, which had a written subcontract with Petrocelli that obligated Petrocelli to obtain comprehensive general liability coverage on Hunter’s behalf, was an additional insured under the Arch policy’s blanket endorsement, which covered the underlying claim.”).

14. *Gulf Oil Corp.*, 441 F. Supp. at 6.

15. See *id.* at 5.

16. *Id.* at 6.

17. See *id.*

18. *Id.*

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### III. Differences between Named Insureds and Additional Insureds

Though “additional named insureds” and “additional insureds” are often confused with one another, two primary differences exist: (1) certain exclusions apply only to named insureds (including additional named insureds), and (2) the notice and deductible provisions only apply to named insureds. This section summarizes these important differences, but they are treated more fully in later chapters.

#### A. Coverage for Employees, Executive Officers, and Directors

Additional insured status does not provide coverage for the additional insured’s employees, executive officers, and directors.

#### B. Deductible

CGL policies require that the named insured reimburse any deductible amount prepaid by the insurer in connection with a claim. The standard provision states:

We may pay any part or all of the deductible amount to effect settlement of any claim or “suit,” and upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.<sup>19</sup>

Thus, additional insureds are not required to reimburse any deductible amount paid by the insurer.

#### C. Exclusions

Some common policy exclusions only apply to named insureds, such as the following:

- Damage to Your Product
- Damage to Your Work
- Recall of Products, Work, or Impaired Property
- Damaged to Impaired Property or Property Not Physically Injured

#### D. Notice

Before 1986, the standard CGL form required that only the first named insured give notice of an occurrence, claim, or suit. In 1986, the standard CGL policy form changed, requiring that “you” give notice of an occurrence, suit, or claim. The term “you” refers to all named insureds. Technically then, the notice provision only applies to named insureds. However, some courts have found that additional insureds have an implied duty to provide notice even where the policy does not

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19. See CG 03 01 09 91.

require it.<sup>20</sup> Moreover, additional insureds still may have an obligation to forward suit papers in a timely fashion to the insurer.<sup>21</sup>

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## IV. Standard Mortgage and Loss Payable Clauses

Lenders commonly require borrowers to include standard mortgage or loss payable clauses in their property insurance policies as a means to protect the lender's interest in the subject property.<sup>22</sup> Mortgagee or loss payee status gives the lender claim to insurance proceeds that would otherwise belong solely to the insured. While the two clauses are often used interchangeably, they differ significantly.

### A. Standard Mortgage Clause

Lenders typically require standard mortgage clauses when they lend money for real property transactions. Standard mortgage clauses entitle the lender or mortgagee named on the policy's declaration page to receive direct payment of insurance proceeds after a covered loss. They also require that the mortgagee receive advance written notice of policy cancellation. Standard mortgage clauses also protect mortgagees against any act or neglect of the insured that may compromise coverage or invalidate the policy altogether.<sup>23</sup> For example, an insured's failure to provide

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20. *Liberty Ins. Underwriters, Inc. v. Great Am. Ins. Co.*, No. 09 Civ. 4912 (DLC), 2010 U.S. Dist. LEXIS 97722, at \*15 (S.D.N.Y. Sept. 17, 2010) (holding that “[u]nder New York law, even if an insurance policy does not require that an additional insured provide notice to the insurer from whom it seeks coverage, an additional insured nonetheless has an implied duty, independent of the named insured, to provide the insurer with the notice required under the policy”); *Spoleta Const., LLC v. Aspen Ins. UK Ltd.*, 119 A.D.3d 1391, 1394, 991 N.Y.S.2d 183, 186 (2014), *aff’d*, 27 N.Y.3d 933, 50 N.E.3d 222 (2016) (“As an additional insured under the policy issued by defendant, plaintiff had, in the absence of an express duty, an implied duty, independent of the named insured’s obligation, to provide defendant with timely notice of the occurrence for which it seeks coverage.”).

21. *Nat’l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008); *Pa. Nat’l Mut. Cas. Ins. Co. v. J.F. Morgan Gen. Contractors, Inc.*, 79 F. Supp. 3d 1245, 1255 (N.D. Ala. 2015) (noting that in some cases an “insurer must cover additional insureds, even when they failed to forward suit papers, *because no requirement existed in the insurance policy for “additional insureds” to forward suit papers* []. Here, however, the Penn National policy *equally* requires *either* Anniston Concrete or J.F. Morgan to send suit papers and, unfortunately, neither party forwarded the suit papers for 13 months.”) (emphasis in original).

22. Note that standard mortgage clauses have historically been referred to as “New York” or “union” mortgage clauses, whereas loss payable clauses have been referred to as “simple” or “open” mortgage clauses.

23. *Seafirst Commercial Corp. v. U.S. Fid. & Guar. Co.*, 780 F.2d 1290, 1293 n.4 (5th Cir. 1986) (distinguishing between standard mortgage clauses that provide that the interest of a mortgagee “shall not be invalidated by any act or neglect of the mortgagor” and loss payable clauses that simply state that policy proceeds will be paid to a mortgagee “as his interest may appear”); *Standard Fed. Sav. Bank v. State Farm Fire & Cas. Co.*, 537 N.W.2d 333, 337 (Neb. 1995) (same); *Secured Realty Inv. Fund v. Highlands Ins. Co.*, 678 So. 2d 852, 854 (Fla. Dist. Ct. App. 1996) (same); *Midland Mortg. Co. v. State Farm Fire & Cas. Co.*, CIV.A. 07-4910, 2009 WL 1789419, at \*2 (E.D. La. June 23, 2009) (“When the policy contains a simple or open loss payee clause, the contract remains one between the insurer and the insured. On the other hand, a union or standard mortgage clause is more specific in that it also creates a separate contract of insurance between

timely notice will not prevent a mortgagee from recovering under the policy.<sup>24</sup> A standard mortgage clause ensures that a mortgagee will be subject to defenses based only on its own breaches of the policy, rather than those of the insured.<sup>25</sup> In effect, the standard mortgage clause creates a separate contract between the insurer and mortgagee.<sup>26</sup>

## B. Loss Payable Clause

Lenders commonly require loss payable clauses as security for the purchase of personal property. Owners also may require loss payable clauses before leasing their property or equipment. Like a standard mortgage clause, a loss payable clause provides that payment will be made to a person or entity other than the insured after a covered loss. Loss payable clauses ordinarily contain language stating that the loss will be paid to the loss payee “as its interest may appear.”<sup>27</sup> Courts interpret this phrase to mean that the loss payee is simply an appointee to receive insurance proceeds whose right of recovery is no greater than the insured.<sup>28</sup> In contrast to a standard mortgage clause, a loss payee’s right to receive payment is derivative of the

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the insurer and the mortgagee to ensure that the mortgagee shall be protected from any loss resulting from the acts or neglect of the mortgagor or owner.”) (internal citations omitted).

24. *Ingersoll-Rand Fin. Corp. v. Employers Ins. of Wausau*, 771 F.2d 910, 913 (5th Cir. 1985) (holding that even though the risk may be excluded from the policy coverage, a mortgagee under a standard mortgage clause may recover from the insurer for a loss sustained by the mortgaged property if any act of the mortgagor has caused or contributed to the loss as resulting from an excluded risk); *Wells Fargo Bank, N.A. v. Null*, 304 Mich. App. 508, 532, 847 N.W.2d 657, 674 (2014) (same).

25. *Independent Fire Ins. Co. v. NCNB Nat’l Bank*, 517 So. 2d 59, 63 (Fla. Dist. Ct. App. 1987) (recognizing that a standard mortgage clause “characteristically provides . . . that the mortgagee’s coverage will not be invalidated by a foreclosure, a change in ownership, a more hazardous use of the property, or a loss caused by the neglect of the owner, provided that the mortgagee pays any premium demanded should the owner fail to do so”); *Westhaven Group, LLC v. Auto-Owners Ins. Co.*, 3:05 CV 7350, 2006 WL 2728649, at \*2 (N.D. Ohio Sept. 22, 2006) (noting that “[w]ith the standard form, the mortgagee may become liable to pay the premium to the insurance company, and in return, is freed from policy defenses which the company may have used against the insured”).

26. *United States v. Commercial Union Ins. Cos.*, 821 F.2d 164, 166 (2nd Cir. 1987) (recognizing that a standard mortgage clause “operates as a separate contract between the mortgagee and the insurer”); *United States v. Fishing Vessel Mary Ann*, 466 F.2d 63, 64 (5th Cir. 1972) (same); *Fireman’s Fund Mort. Corp. v. Allstate Ins. Co.*, 838 P.2d 790, 794 (Alaska 1992) (same); *Farmers Home Mut. Fire Ins. Co. v. Bank of Pochontas*, 355 Ark. 19, 24, 129 S.W.3d 832, 835 (2003) (stating that, “generally, a standard mortgage clause serves as a separate contract between the mortgagee and the insurer, as if the mortgagee had independently applied for insurance”).

27. *ISO Standard Loss Payable Provisions Endorsement (CP 12 18 06 07)* (providing that the insurer will “[p]ay any claim for loss or damage jointly to you and the loss payee, as interests may appear”).

28. *Business Dev. Corp. v. Hartford Fire Ins. Co.*, 747 F.2d 628, 630 (11th Cir. 1984) (instructing that “[w]here the loss is paid to the loss payee named as its interest may appear this constitutes a simple or open-mortgage clause [also called a “loss payable clause”] under which the mortgagee is a mere appointee of the fund whose right of recovery is not greater than that of the mortgagor.”).

insured's policy rights and obligations.<sup>29</sup> Unless the policy specifies otherwise, a loss payable clause does not protect the loss payee if the insured fails to pay the premium or provide timely notice of the loss. Said another way, a loss payable clause typically does not obligate the insurer to provide coverage to the loss payee if the carrier can deny coverage to the insured.<sup>30</sup> To overcome this shortcoming, some lenders have begun to demand a "lenders loss payable clause." This clause gives lenders the same rights that a standard mortgage clause gives a mortgagee.<sup>31</sup>

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29. *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1493 (6th Cir. 1991) (instructing that the rights of a loss payee are derived through the insured and whatever will defeat the insured's right of recovery must necessarily defeat any right of the loss payee"); *Jones v. Wesbanco Bank Parkersburg*, 460 S.E.2d 627, 632 (W. Va. 1995) (instructing that a loss payee is a "mere appointee to receive the proceeds to the extent of his interest . . . dependent upon the existence of an insurable interest in such appointee . . . it makes the policy subject to any act or omission of the insured which might void, terminate, or adversely affect the coverage; and if the policy is not collectible by the insured, the appointee, likewise, cannot recover thereunder"); *Argonaut Great Cent. Ins. Co. v. C&K Mkt., Inc.*, 6:15-CV-01466-MC, 2016 WL 2841207, at \*3 (D. Or. May 12, 2016) (noting that if "an insurance policy contains a loss-payable clause, the 'loss payee' does not claim as an assignee of the policy, but merely as an appointee to collect the insurance; consequently, he must claim in the right of the insured, and not in his own right").

30. But see *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 F. App'x 424, 430 (3d Cir. 2007), as an example of a loss payable clause that by its express terms extended greater rights to the loss payee than to the insured.

31. ISO Standard Loss Payable Provisions Endorsement (CP 12 18) (providing that the loss payee will still have the right to receive payment even if the named insured forfeits coverage).