LIABILITY AND PROPERTY INSURANCE: THE BASICS AND HOT ISSUES, INCLUDING THE INSURANCE CERTIFICATE PROBLEM

MODERATOR:

MARIE A. MOORE, ESQ.
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.
909 Poydras Street, Suite 2800
New Orleans, Louisiana 70112

PANELISTS:

MARILYN C. MALONEY, ESQ.
Liskow & Lewis
1001 Fannin Street, Suite 1800
Houston, Texas 77002

JO-ANN M. MARZULLO, ESQ.
Posternak Blankstein & Lund LLP
The Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199

GRACE H. I. TATE, ESQ.
Butler Snow
Renaissance at Colony Park
1020 Highland Colony Parkway, Suite 1400
Ridgeland, Mississippi 39157

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Insurance can provide landlords, tenants, and lenders with assurance that a well-funded insurer will minimize their risk of loss and liability. Even before the current recession, most landlords, tenants, and borrowers did not have the money needed to restore a damaged leased or mortgaged property or to fund the defense of a major lawsuit arising from the property or its condition or use. Under a properly drafted and administered lease or mortgage, all parties can count on a solvent insurer to provide these funds.

A lease or mortgage that requires a party to provide third party insurance must set out clearly the types and amounts of insurance required by the party that is relying on this insurance protection. However, insurers change their policy coverages, language, and protocols periodically, often in an attempt to limit their policy liability. During the last 25 years, the insurance industry has completely overhauled its entire vocabulary and available products. Yet many lease and mortgage forms retain historic insurance language that bears no relation to current insurance practices. The historic terms appear in both documents executed decades ago, but still in effect, and documents executed recently. Lawyers representing landlords, tenants, and lenders must stay abreast of the changes in the insurance industry and must make the changes in their provisions that are needed to be sure that their clients' insurance goals (even of the insurance coverages and terms change further) are satisfied and that the insurance obligations undertaken by their clients can be satisfied at a reasonable cost.

I. LIABILITY INSURANCE.

A. What is Liability Insurance?

Liability insurance is designed to protect a property owner and its tenants, as well as its lender, from lawsuits and claims resulting from accidents on the property. This type of insurance does not pay for loss or damage to the insured's own property – the property insurance described in II below covers this risk.

The technical name for the type of liability insurance carried by mortgagees, landlords, and tenants is Commercial General Liability Insurance, often abbreviated as "CGL" insurance. Many lease forms (and mortgages) speak of "Comprehensive" general liability coverage, but the name of the policy was changed to "Commercial General Liability" in 1986, because case law was determined in part by the term "comprehensive" defining the insurance coverage provided. The term "Commercial" differentiates insurance covering the risks incurred in a business's operation from the liability risks insured by a homeowner.

The Insurance Services Office, Inc. ("ISO") is the insurance industry organization that establishes these names and coverages. Most forms that are considered "standard" forms are published by the ISO. These forms can be identified by their number. ISO Form #CG 00 01 is the most common "Commercial General Liability Form." The two numbers that may follow this form number indicate the edition's date. For example, the current commonly used Commercial General Liability Form is ISO Form #CG 00 01 12 04.

Although ISO Form #CG 00 01 is the most common CGL form, policies may be written on other forms (for example, American Association of Insurance Services, or AAIS, forms) or on a brokerage firm's form. An insurer can also issue "Manuscript," or specially worded, policies. The forms filed by an insurer with a state's insurance commission may also govern its language.

A CGL policy should cover claims for property damage, bodily injury, medical expenses, personal injury (including defamation), and advertising injury. When an insured party files a claim covered by the policy, the insurer should pay the insured party's defense costs, even if the insured party is not at fault, the medical costs of the claimant (if the claim is for personal injury), the damages caused by the operation of the covered business, and the tort liability of the landlord to its tenants (in the case of the landlord's liability policy). Coverage for the insured's defense costs alone is often worth the premiums for the policy.

An insurer may issue a CGL policy either on an "occurrence" or on a "claims made" basis. An "occurrence" policy covers accidents that occur during the policy period, even if the claims based on these accidents are not reported until after the policy period has ended. A "claims made" policy does not cover claims made after the policy period has ended, even if the claims arise from incidents that occurred during the policy period; however, a "claims made" policy should cover claims made during the policy period arising from accidents that occurred before the date of the policy (although the policy is likely to limit this period). CGL insurance covering business and property risks should be "occurrence" form coverage. If a "claims made" policy is used, then "tail" coverage should be provided to extend the time to bring the claim beyond the policy period.

Property owners should carry CGL insurance that covers all accidents that occur on the property; after all, even if a tenant is actually occupying the property, the landlord property owner is likely to be joined in all suits filed by reason of anything that happens on the property. A tenant should carry liability insurance for incidents that occur within its leased premises as well as accidents that occur outside the leased space but that are caused by the tenant, its operations, or its employees. A landlord should require that its tenants carry "occurrence" CGL insurance so that their policies will cover claims filed after the lease has ended but based on occurrences during the term of the policy.

B. The Landlord's Requirements.

Landlords need to require that their tenants carry CGL insurance that is issued on an occurrence basis, that has limits that are high enough to protect the landlord, and that has a low deductible.

To benefit from this tenant insurance, the tenant must name the landlord as an "additional" insured on this policy, or in some limited circumstances, a "named" insured, and the lease needs to include this requirement. Being a "named" insured gives the landlord comfort that its rights will not be impaired by changes in the policy or endorsement language. It also limits arguments by the insurance company that coverage is not provided if landlord's own negligence in the leased space caused the accident (although this is not generally a tremendous concern in an endorsement covering a landlord's interest in leased space). However, a "named" insured must comply with all of the policy requirements, the risk history of each "named" insured is factored into the premium calculation, and each "named" insured is liable to pay the premium. Few landlords wish to incur these obligations. Consequently, most landlords require only that the tenant have them named as an "additional insured" in the tenant's CGL policy. An "additional insured" is covered by the policy even though it is not the person that actually obtains and pays for the insurance policy.

In most states, an "additional insured" will also have the right to proceed against the insurer directly for penalties arising from the insurer's bad faith failure to pay. However, state laws vary, and the landlord should consult the penalty statutes of the state in which the property is located if it wants to be sure that as an "additional insured," it will have the right to proceed against the insurer for penalties if the insurer fails to provide a defense or pay a claim when it is required to do so by the policy.

An "additional insured" is added to another party's CGL policy by an endorsement issued by the insurer. ISO form CG 20 11 is generally used to provide a landlord with additional insured coverage with respect to its tenant's business operations. It generally states that coverage is provided to the "additional insured" parties only for liability arising out of the ownership, maintenance, or use of the leased premises (of course, ISO forms are subject to periodic change). This endorsement will provide an additional insured landlord with coverage under the tenant's policy for liability arising out of the ownership, maintenance, or use of the leased space, but it will not cover either an accident that happens after the named insured is no longer a tenant or any construction or demolition activities performed by or for the additional insured landlord. The ISO form for mortgagees is CG 20 18, and it contains language similar to the landlord form.

In evaluating the tenant's coverage, a landlord should ask to ask to see a copy of the policy itself and the endorsement adding it to the policy as an "additional insured." The landlord should actually read the policy and this endorsement or have them reviewed by its insurance advisor to determine whether it excludes coverage of the landlord for accidents in the leased space caused by the landlord's own negligence (or its "sole" negligence). Also, even without this exclusion, under some state laws, the insurer may have an argument that if a party is prohibited from obtain a waiver of claims or indemnification for matters arising out of its own negligence (or its "sole" negligence), then it is also prohibited from receiving the benefit of another party's insurance for this negligence. If the policy language or state law raises an issue whether the tenant's insurance will cover the landlord for its own negligence, the landlord should be sure that its own CGL coverage has limits high enough to fill the gap that may not be covered by the tenant's insurance.

The lease should also require that the tenant's coverage be "primary" and "non-contributing" with the insurance maintained by the landlord. When the tenant's coverage is "primary" and "non-contributing," then the tenant's insurance will be depleted before the claimant (or the tenant's insurer) can seek recovery from the landlord's coverage.

Landlord leases frequently require the tenant to obtain a waiver of its insurer's rights of subrogation (the waiver of subrogation concept is discussed below). However, a landlord that is an "additional insured" probably does not need a waiver of subrogation in its favor. This waiver is frequently part of the "additional insured" endorsement language, and the insurer is already agreeing to cover claims against the landlord as an "additional insured."

The lease should also require that the tenant's insurer be licensed in the state in which the property is located, and that it satisfy certain financial solvency requirements to be sure that the insurer has sufficient total assets to cover its policy risks. Contract solvency requirements generally take the form of a requirement that tenant's insurer satisfy certain Financing Strength and Financial Size ratings published by A.M. Best Company. Financial Strength Ratings start at A++ and A+ (superior) to A and A- (excellent) to B++ and B+ (good) and continue downward. Landlords generally won't accept ratings lower than A- to B+. A.M. Best Company also rates the Financial Size of insurance companies, with these ratings ranging from Class XV ($2,000,000,000 in adjusted policyholders surplus or greater) to Class I (less than $1,000,000). Most landlords require that the insurer be at least in the Class VII ($50,000,000 to $100,000,000) to Class IX ($250,000,000 to $500,000,000) range, though for larger properties, higher net worth may be required. Moody's and Standard and Poor's also rate insurers.

In all types of leases, the landlord should require that the tenant maintain workers' compensation insurance and employers' liability insurance that covers its employees' claims. A landlord cannot be an additional insured on a workers' compensation policy, but it might be possible for the tenant to obtain a waiver of the insurer's rights of subrogation against the landlord (although insurance companies often balk at waivers of subrogation with respect to workers' compensation policies).

Particular tenant uses may require special coverages. For example, if the tenant operates a restaurant selling alcoholic beverages, the landlord should require that the tenant maintain "dram shop" coverage for liability arising from the sale of these alcoholic beverages. In restaurant leases, the landlord should consider requiring the tenant to maintain products liability coverage. A landlord may wish to require automobile liability coverage in industrial leases or in other circumstances in which goods will be transported to or from the leased space by the tenant.

Finally, the lease should require that the tenant's insurance include coverage for the tenant's contractual liability under the lease's indemnification provisions. Of course, an insurer will not cover breach of contract claims (such as the tenant's failure to pay rent) or claims by a governmental body that the tenant has violated a law, even if the tenant has agreed to indemnify the landlord for these claims. Generally, the only parts of the tenant's indemnification agreements that can be insured are those in which the tenant agrees to indemnify the landlord for tort-type liability. Consequently, a knowledgeable tenant will limit its obligation to provide contractual liability coverage to an obligation to provide coverage for those contractual liabilities that are able to be covered by a CGL policy.

C. How Much Liability Insurance is Enough?

Naturally insurers are not willing to take on unlimited amounts of risk. The dollar amount of the insurer's risks – known as the "limits" of the policy – is determined by the type of policy and on the amount of the premiums that the insured party is willing to pay. The insurer can contract for "single" limits per occurrence or "aggregate" limits. An "occurrence" limit is the total maximum amount that the insurer will pay for all claims arising from a single incident. An "aggregate" limit is the total maximum amount that the insurer will pay for all claims made during or arising from incidents that occur during a certain time period. These "Aggregate" limits can be annual limits that apply only to claim amounts per year, or they can limit the insurer's maximum aggregate risk over the life of the policy.

If the insured party obtains "excess liability" or "umbrella" coverage, then the insurer issuing this "excess liability" or "umbrella" policy will provide additional amounts when the insured's liability exceeds the "occurrence" and "aggregate" limits. Frequently, the "excess liability" or "umbrella" insurer will not be the same insurance company that issued the "occurrence" or "aggregate" policy.

A property owner needs to carry CGL insurance with limits high enough to cover all foreseeable liability amounts. The owner will have to pay all liability amounts beyond the limits of its insurance. Consequently, owners of large properties should consult with their insurance and financial advisors when fixing these limits and should weigh the costs of additional coverage limits against the liability risks. Of course, one of the factors that a landlord should consider is the type of risks that will be covered by its tenant's insurance – assuming that its tenant's insurance names the landlord as an "additional insured."

Although defense costs can be extremely high, in most CGL occurrence policy forms, the costs of defending insured claims do not apply against the limits of the policy. This is an important point, and a property owner should review the actual policy language to be sure that the defense costs will be paid in addition to the limits of the coverage, and that only settlement amounts or judgments for the bodily injury or property loss or damage will apply against the limits.

A landlord should also consider these factors when it sets its tenant's required CGL policy limits. It should remember that all liability amounts that exceed these limits as well as the tenant's deductibles are actually self insured amounts and must be paid by the insured, not its insurance company. The landlord may therefore wish to limit deductible amounts to a low, specified amount, and state clearly in the lease that the tenant is responsible for all deductible amounts.

The landlord should also require both occurrence limits and aggregate limits that are realistic in light of the size and scope of the tenant's operations. If the tenant is a small business, its costs of maintaining CGL coverage may be high, and if the landlord can obtain CGL insurance with high limits at a lower cost, it may wish to factor the additional cost (if any) of this insurance into the rent, and permit the tenant to maintain lower insurance limits.

The property owner or tenant may also be able to maintain some of its coverage by means of "umbrella" coverage, which is frequently less expensive.

II. PROPERTY INSURANCE.

A. What is Property Insurance?

Property insurance protects an owner of tangible real or personal property from the cost of loss of or damage to that property or its ability to produce income. In the case of leased real estate, the insurance policy covering loss of or damage to that property should include coverage for the rents that will be lost if the property is damaged or destroyed. An insured party and its attorney should read the policy carefully to assure that the assets and income stream that matter most to the insured are covered for all risks that can reasonably be anticipated.

There are generally three types of commercial property policies:

1. Basic Form (ISO Form CP 10 10) policies normally cover common, listed risks, such as fire, lightening, windstorm, vehicles, aircraft, or civil commotion.

2. Broad Form (ISO Form CP 20 10) policies normally provide basic form coverage as well as coverage for listed additional perils, such as structural collapse, sprinkler leakage, and losses caused by ice, sleet or snow weight.

3. Special Form policies (ISO Form CP 10 30) cover all "risks of direct physical loss" (hence the former name of this policy: "All Risk") except for those perils that are specifically excluded. These standard exclusions may include losses from water, war and military action, earth movement (earthquake), governmental action, nuclear hazard, utility services, boiler and machine failure, dishonest acts, pollutants, terrorism, nuclear disaster, insects and vermin, mold, and wear and tear.

Note that the "water" exclusion addresses damage caused by: (1) flood, surface water, waves, tides; (2) mudslide or mudflow; (3) water that backs up or overflows from a sewer, drain, or sump; and (4) water underground pressing on, or flowing or seeping through foundations, walls, floors, or paved surfaces, basements, doors, windows, or other openings. Resulting damage from fire, explosion, or sprinkler leakage is covered if caused by water damage. Proximate cause triggers coverage.

Whether a policy covers windstorm loss depends on the wording of the policy. In the case of Basic Form and Broad Form policies, windstorm would need to be added as an included risk, and in the case of a Special Form policy, it may also be an exclusion. Property owners in coastal areas should be vigilant either in assuring that windstorm is covered, or if the coverage is unavailable or too expensive, in understanding their risks. There may be a sublimit providing lesser coverage for wind than for other perils in vulnerable areas.

Flood insurance is the most well-known exclusion from property insurance policies. At the time these materials are prepared, it can be obtained for both residential and commercial properties through policies issued by private commercial insurers that are sponsored by the National Flood Insurance Program, a FEMA program. In 1968, Congress enacted the National Flood Insurance Act ("NFIA"), which provided subsidized insurance through private insurers and was managed by the Federal Emergency Management Agency (FEMA). At the time these materials are prepared, with respect to commercial property, the National Flood Insurance Program policies have a $500,000 limit on the building and a $500,000 limit on the contents, and they do not cover business interruption loss. Replacement cost coverage is not available, as claims are settled for the actual cash value. By the time of the 2010 Spring Symposium, even this protection for commercial property may no longer be available. Coverages in addition to those proved through FEMA can be obtained from private insurers – for a price.

Earthquake coverage may also be needed in some regions, and generally can be obtained for a price.

Prior to 2001, conventional wisdom held that the risk of terrorism was so slight that it was included in most "all risk" policies and reinsurers did not exclude it. Congress reacted to the 9/11 attack and insurance industry response thereto by passing the Terrorism Risk Insurance Act of 2002 ("TRIA") as a temporary price stabilization measure. TRIA had a sunset date of December 31, 2005, and most recently the Terrorism Risk Insurance Program Reauthorization Act of 2007 ("2007 Reauthorization") extended the TRIA through December 31, 2014. Although structured differently than national flood insurance, TRIA effectively functions the same way over the long term because taxpayers ultimately bear substantial risk of loss but with recoupment by the U.S. Treasury over time with the 2005 and 2007 reauthorizations. The 2007 Reauthorization added coverage for domestic terrorism events not previously covered by the TRIA and added a requirement that there must be insured losses from a certified act of terrorism in the aggregate of $100 Million before the federal reimbursement under the TRIA is triggered.

Cleary, the best form of property insurance is Special Form property insurance with few and bearable exclusions. Separate flood insurance coverage should be obtained if it is possible that the property could be damaged by water. The property owner may want to carry other special coverages if they are needed in the area in which the property is located.

If the lease is a net lease under which the tenant will carry the property insurance or if the property is mortgaged property, the landlord or lender must clearly require this Special Form insurance form by name or clear description in the lease. If landlord or lender wishes flood insurance and other coverages, the lease should spell out these requirements. Similarly, if the leased space is in a multi-tenant building and tenant is concerned that the landlord have the assets needed to re-build, it may require that the landlord carry this Special Form coverage and additional coverage for other risks such as flood. The party that needs the insurance protection should also assess whether the insurance policy covers windstorm and add this coverage if necessary. Earthquake coverage should also be considered.

B. The Landlord's Requirements.

If the leased property is net leased stand alone property, then the landlord will require that the tenant carry a policy of Special Form property insurance as well as flood insurance and other insurance that is important in the area, insuring the property for its full replacement cost, with a low deductible, and with no risk of co-insurance. The landlord should also require the tenant to maintain loss of rents insurance for a specified period (at least twelve months).

It is important that the tenant give the landlord rights in this property policy and its proceeds. These rights are generally granted by the tenant's having the landlord named as a loss payee on the policy. A loss payee is a person or entity that will be paid if there is a loss. Traditionally, the tenant asked that the landlord and the tenant be named as loss payees as their interests might appear, and traditionally this was acceptable to landlords. Tenants also generally agreed to include a mortgagee loss payee provision in favor of the landlord's lender. Today, tenants have more leverage, they are more concerned about the landlord's solvency, and they are asking that the landlord only be an additional insured in the policy. Even when the tenant does not make this request, landlords are requiring that they be named as additional insureds as well as loss payees to be able to take advantage of State laws that give a right of action against the insurer for late payment penalties only to a named or additional insured.

The landlord should ask that the tenant maintain Special Form insurance on its improvements, furniture, fixtures, equipment, and inventory. Some landlords may also ask that they be named as additional insureds on this policy. Landlords generally give two reasons for the requirement that the tenant insure equipment and inventory in which the landlord does not have an interest. First, the landlord will require that the insurer waive all rights of subrogation against the landlord, and getting this third party waiver of subrogation is a valid reason for requiring insurance in some jurisdictions. Second, the landlord will claim that if the tenant has insurance and names the landlord as an additional insured on it, the tenant will have to use the proceeds to restore its improvements and re-stock its inventory. This second reason is not as persuasive since the landlord has no interest in the tenant's personal property, one or more lenders probably have a priority claim on the personal property insurance proceeds, and the fact that the tenant has insurance on its property will not ensure that the tenant will restore, restock and re-open after a casualty. The first issue should be the one that is of primary concern to the landlord.

It is very important to the landlord that neither the tenant nor its insurers have a claim against the landlord for damage to the tenant's property if there is a casualty. To accomplish this result when the tenant's property is fully covered by a property policy, the landlord should require that the tenant waive all rights and claims against the landlord arising from loss of or damage to the tenant's property and include a waiver of subrogation provision in its property policies.

What is a right of subrogation? It is the right of the insurer to seek recovery from the person that caused the accident or property loss for which the insurance company must pay. For example, if a motorist loses control of his vehicle and runs into a house, the insurer would pay the home owner for the damage to the house, and the insurer would be "subrogated" to the rights of the insured homeowner against the motorist (both by the state law and by the provisions of the insurance contract). By virtue of this "subrogation," the insurer would be able to assert the homeowner's tort claims against the motorist to the extent of the amount paid by the insurer. In the context of property insurance, the negligence of an employee of the landlord or a defect in the base building could cause damage to the leased space and the property in it. In this circumstance, the tenant's property insurer would pay the tenant for the loss, then assert its right of subrogation against the landlord. However, if the insurer waives its subrogation rights, it cannot turn around and sue the landlord. It is therefore crucial that the landlord require this waiver of subrogation. Many insurance policies now permit the insured to waive the insurer's rights of subrogation as to its landlord (for example, the Commercial Property Conditions in ISO Form CP 00 90), but some may require an endorsement or other provision in which the insurer itself waives its rights of subrogation.

What if the tenant will not agree to carry third party insurance on its personal property? In that case, the landlord should be sure that the lease includes a good waiver by the tenant of all rights and claims that it has against the landlord for loss of or damage to the tenant's property. This waiver may not be enforceable in all states in all circumstances, but a waiver of subrogation by the insurer may not be good in all states and all circumstances either (though it is more likely to be given effect than the tenant's waiver if the damage is caused by the landlord's negligence).

C. The Tenant's Requirements.

Tenants that are occupying the entirety of a leased building and anchor tenants should require that the landlord carry Special Form insurance on the building or the shopping center in which the leased space is located. The tenant will have the same two arguments for requiring this insurance that the landlord has for requiring insurance on a tenant's equipment and inventory. If the tenant is the sole occupant of the building to be insured, then it will assert that it needs to be sure that the landlord has enough funds to rebuild. This is a strong and real argument, and it is even stronger if the tenant has the rebuilding obligation. Also, the tenant does not want to be sued for the damage to the landlord's property caused by the tenant's negligence in the leased space, so a third party waiver of subrogation is important.

Even the smallest tenants should request that the landlord waive all claims against the tenant for the loss of or damage to the building or shopping center in which the leased premises are located, and that it obtain for the tenant a waiver of the insurer's rights of subrogation against the tenant. Landlords may object to the inclusion of the deductible in the waiver of claims. If the landlord has not agreed in the lease to maintain a particular kind or level of insurance or to be in default if it does not maintain this insurance, the landlord should at least agree to a mutual waiver by the parties of all rights and claims against each other that could have been insured by a Special Form policy of property insurance, even if one is not maintained.

D. How Much Is Enough?

A Special Form policy covers the buildings and other structures described in the policy, and may cover the business personal property located in or on this described property. If the tenant maintains the policy only on its own property, the policy will generally cover the tenant's interest in the fixtures, alterations, additions, and improvements that the tenant constructs or installs, or that the tenant buys or has made at its expense but that it cannot legally remove. Property insurance does not generally cover foundations below the lowest basement floor or the surface of the ground if there is no basement, and it excludes a number of other items such as vehicles and electronic data, information on valuable papers and records, and satellite dishes and antennas, unless special coverage is obtained.

The dollar limits of coverage set out on the policy's declaration are the most that an insurer will pay in any single occurrence. If there is a loss, the insurer will generally be required to pay only the lesser of the amount that it would cost to repair, rebuild, or replace the property, less a fair and reasonable basis for physical depreciation (this is also referred to as the "actual cash value"), or the policy limits.

Most property owners ask that their insurance be issued on a "replacement cost" basis. If the "replacement cost" option is used, then if there is a loss, the insurer will be required to pay the cost to replace on the same premises the lost or damaged property with other comparable property, <u>with no deduction for depreciation</u> if the destroyed property is actually restored. If not restored, then despite paying extra premiums for the additional coverage, the insured (or the lender) will receive only the actual cash value. In general, a replacement cost policy ensures that a business can fully recover after a significant loss better than an "actual cash value" policy. Replacement cost policies are typically more expensive than actual cash value coverage because the policy limits will reflect the cost to replace damaged property with new property, even if the property, once replaced, will be worth less than it has cost to restore it. Consequently, landlords generally require "replacement cost" coverage as do most lenders. However, even with "replacement cost" coverage, there are agreed insurance limits, so whether "actual cash value" or "replacement cost" coverage is used, co-insurance may be a problem for the insured.

If the policy limits specified are too low, then the insured's recovery may be reduced by reason of co-insurance. A co-insurance percentage, generally 80% or 90%, will be shown in the policy declarations. For purposes of our example, assume that the value of the property at the time of the loss is $100,000, that the co-insurance percentage is 80%, that policy limits are $50,000, that the loss is $30,000, and that the deductible is $5,000. If the value of the covered property at the time of the loss times this co-insurance percentage is greater than the limits of the policy, then the following will occur: (i) the insurer will take the value of the property at the time of the loss ($100,000), and multiply it by the co-insurance percentage ($100,000 X .80 = $80,000), (ii) divide the Limit of Insurance ($50,000) by the figure in (i) $80,000 ($50,000 divided by $80,000 = .625), (iii) multiply the amount of the loss before the application of the deductible ($30,000) by the figure calculated in (ii) ($30,000 X .625 = $18,750), (iv) subtract the deductible from the figure in (iii) ($18,750 - $5,000 = $13,750), and (v) pay the result ($13,750) or the limit of the insurance, whichever is less. The remainder of the loss amount will not be covered. Clearly, this is not a desirable result.

The insurance limits must therefore be higher than the co-insurance percentage multiplied by the anticipated total value of the property insured, whether this value is calculated as the "actual cash value" or the "replacement cost."

To avoid the co-insurance trap, the policy can be written with an agreed amount stipulation. If there is an "agreed amount," both the insured and the insurer agree when the policy is issued that the insured property is worth a stipulated amount and that the co-insurance provisions will not apply to limit the insured's coverage.

A large landlord or tenant may insure its property by means of a "blanket" policy covering more than one property owned or leased by the landlord or the tenant. The theory behind a "blanket" policy is that it is unlikely that a fire or other casualty will affect more than one of the covered properties at a time, so these properties can be insured in a bundle at a lower cost per property. It benefits both the insured and the insurer to take the time and effort to create a Schedule of Values (a "SOV") that can be attached to the policy and accepted by both the insured and the insurer. An evaluation of anticipated increases needed during the year and an inflation guard factor should be developed before selecting the final limit and co-insurance percentage. Recent building and business personal property appraisals are good starting points to determine the limits. Additionally, all eligible covered property must be included when establishing limits. The insured should also try to persuade its insurer to agree that the values on the SOV will be "agreed amounts" that will void the application of co-insurance.

A landlord should also maintain loss of rents coverage in an amount adequate to cover the rental loss that it can expect to suffer if the property is damaged. Twelve months of the rent is a good measure, although if the premises are large and the casualty is major and area-wide, rebuilding (and remodeling and waiting for the area to recover) may take more than twelve months. The lease(s) must grant a rent abatement in the event of a casualty in order to collect the rent insurance. If the tenant is liable to pay rent despite the casualty, then rent insurance is not triggered. A tenant should also maintain business interruption insurance, but loss of rents is the coverage that benefits the landlord. Business interruption insurance compensates a tenant for loss of use of leased property while it is still paying rent along with other expenses incurred due to the interruption of business.

Finally, the insurance proceeds that a landlord or tenant will actually receive if there is a casualty will be diminished by the deductible amount in the policy. A high deductible amount will reduce the cost of the policy, so even more frequently than in the case of liability insurance, many national property owners and tenants are self-insuring in an amount that is greatly in excess of the amount of property insured. It is not uncommon for a large national tenant to be completely self insured with respect to its fixtures and inventory.

E. Burning Issues.

Even before businesses started self-insuring a great deal of their CGL risk, they frequently self-insured the risk of loss or damage to their property. This self insurance took and still takes the form of high deductibles, limited coverage amounts (for example, 80% of the "replacement cost" of the property, which should be just enough to avoid co-insurance), and blanket policies. The nation's casualty history in the last 10 years has shown the danger of self-insuring casualty risks.

If the lease requires one party to maintain the property insurance and the other party to restore the damage, the party with the obligation to restore has often found that it is not paid the money necessary to perform the restoration. If the lease doesn't provide that the restoration obligation is contingent on the receipt by the restoring party of sufficient insurance proceeds, then the party with the restoration obligations might be forced to provide its own funds to avoid a default.

The risk that a net lease landlord will not receive the amount necessary to restore its building is particularly great if the property was damaged in a disaster that affected many of the tenant's other locations. In this case, the tenant may maintain a blanket policy that covers all of these locations, and it may choose to apply the proceeds received (after subtraction of the high deductible) to some of these locations but not others. In this case, a landlord may be left with a damaged property, no proceeds, a defaulting tenant who may have filed for bankruptcy protection, and a loan that must still be paid.

Even if the tenant has conventional insurance, a landlord that is only a loss payee may not be able to take advantage of state laws that impose attorneys' fees and penalties on insurers that refuse to pay valid claims. The state's law may require that the claimant be an "additional insured" before it receives this statutory protection. Consequently, it is safest if the landlord is both the "loss payee" and the "additional insured."

Tenants of free standing locations have other concerns. They are concerned that if the landlord and its lender are named as loss payees (even if they are only loss payees as their interests may appear), the landlord's lender or the landlord will apply the proceeds to the debt, and no rebuilding funds will be available. Of course, the tenant will have an action against the landlord to rebuild or provide the funds to rebuild, but this process will take time, cost attorneys' fees, and result in a judgment against a landlord that may not have assets from which to satisfy the judgment.

Increasingly, these tenants are agreeing only to name the landlord as an additional insured on the property policy, even if the landlord has built or paid the tenant to build the insured building. If the landlord's lender insists that the tenant include a mortgagee loss payee provision in the policy, the tenant may insist that as part of its Non-Disturbance Agreement, the lender agree that the proceeds of the policy will be applied to restoration as required in the lease. If the landlord is named only as an additional insured on the tenant's property policy, its name might not be on the check pursuant to which the proceeds are paid, and it will be subject to the dealings between the tenant and the insurance company. As an additional insured, however, at least it should have rights under the policy to proceed for those proceeds to which it is entitled under the lease.

III. MATCHING INDEMNITY AND CASUALTY RESTORATION OBLIGATIONS WITH INSURANCE.

The insurance, indemnity, and casualty restoration requirements that should be included in the lease depend on the nature of the leased property and the degree to which the tenant will be in control of that property. In all types of leases, these provisions should be internally consistent so that the party who has the indemnity or casualty restoration obligation will have matching insurance to cover its obligations.

A. Net Lease Concerns.

If the lease is a net lease, the tenant should be required to indemnify the landlord for all liability arising from occurrences on the property during the term or until tenant ceases to occupy the property, whichever is earlier or later. In the lease, the landlord should require the tenant to maintain a CGL policy naming landlord as an additional insured as discussed in Section I. above. The landlord should also require contractual liability coverage, but should be aware that this endorsement will cover only claims in the nature of "tort" claims – it will not cover breach of contract-type claims even if these are included in the indemnity provision.

The tenant may also have the obligation to repair and restore the property if there is a fire or other casualty, or the landlord may have the repair obligations, but in either case, in a net lease, the tenant is generally required to maintain the property damage insurance – preferably a special form policy covering all risks of loss (except those that the party with the restoration obligations knows are excluded).

If the landlord has the restoration obligations and if the improvements were originally funded by the landlord, then the landlord should demand that it be a loss payee and additional insured, and that all insurance proceeds be paid to it if there is a casualty. If the tenant has the restoration obligations, the tenant may object to the landlord being named as a loss payee but will agree to name the landlord as an additional insured. The tenant will also want the lease to state that the proceeds of the insurance will be paid to the tenant unless the tenant terminates. If the tenant terminates, the lease generally states that the proceeds are paid to the landlord.

The party that does not have the restoration obligation should ask that, during the restoration process, the proceeds be placed in trust for the restoration with a third party escrow agent and paid in construction draws. This is more important for a landlord who has paid for the initial construction and is relying on the tenant to restore the building than it is for a tenant who has not paid for the building, but the tenant may also want the assurance provided by an escrow agent if the landlord is supposed to reconstruct. Even with an escrow requirement, there may be issues with respect to who owns the proceeds if one of the parties files for bankruptcy protection.

The party that has the restoration obligations generally limits those obligations to the insurance proceeds actually received. This can present a problem if the party that has the restoration obligations is also the party that is maintaining the insurance since that party could argue that its large deductible or failure to insure all risks relieves it from having to perform the restoration. Protective language needs to be added that states that the restoring and insuring party is not relieved of its obligation to pay deductible amounts or amounts that would have been paid if it had maintained the insurance required under the lease.

B. Concerns in a Lease of Space in a Building.

As in the case of a net lease, if the tenant is leasing only a portion of a building, as in the case of a tenant of in-line space, the tenant should be required to indemnify the landlord for all liability arising from occurrences on the property during the term or until tenant ceases to occupy the property. The tenant should also be required to carry primary CGL coverage naming landlord as an additional insured for this liability. Again, the landlord should not rely completely on the tenant's coverage with respect to accidents in the leased space caused by the landlord or its employees, agents, or contractors, but should maintain its own insurance to cover liability that is excluded from the tenant's additional insured endorsements or that it may not be permitted to cover by third party indemnity by state law (although the better view is that state law provisions prohibiting indemnity or waiver do not prohibit a shifting of the obligation to maintain insurance). Again, the landlord may include an obligation by the tenant to indemnify the landlord for claims arising from the tenant's breaches of the lease in its contractual liability language, but it should not expect the tenant's insurance to protect it from all types of breach of contract damages.

If the leased space is part of a larger operation, the landlord will ask the tenant to indemnify and insure it for accidents caused by tenant's operations or the acts, negligence, or intentional misconduct of its employees, contractors, or agents outside the leased space. Tenants generally agree to this indemnity and insurance (although questions may be raised about tenant's contractors and agents). However, if the landlord requests insurance for accidents outside of the leased space caused by the tenant's customers and other such invitees, the tenant should object because it has no control over its customers, and its customers are probably also the customers of other stores in the retail complex. Also, the liability caused by tenant's customers and other such invitees acting outside the leased space and not in connection with the tenant's operations will probably not be covered by the tenant's CGL policy.

A tenant with a lot of leverage may also ask that the landlord insure it for all accidents that occur in the common areas and name it as an additional insured on the landlord's liability policy. Landlords do not exercise sufficient control over the common areas to wish to indemnify the tenant for all accidents, regardless of the cause, although some landlords will agree to indemnify the tenant for liability arising from the negligence of the landlord's employees, agents and contractors. If the landlord agrees to indemnify for occurrences in the common areas, the landlord may also be willing to make the tenant an additional insured on the landlord's CGL policy. However, the tenant and the landlord should be clear on whether an accident partially caused by the tenant's negligence in the common areas will be covered first by the tenant's CGL policy or by the landlord's CGL policy.

The landlord will ask the tenant to waive all claims against landlord for and to indemnify the landlord against claims arising from damage to the tenant's property and improvements. Most landlord-form leases require the tenant to maintain property insurance covering the tenant's property and the property of others in the leased space and require that the insurer's rights of subrogation be waived either by the insurer or by the insured on the insurer's behalf. If the tenant is self-insured in whole or in substantial part, the landlord may be willing to delete the insurance requirement and rely on the tenant's waiver of claims against the landlord for property damage, but landlords should be aware that some states void waivers of claims arising from the negligence of the party benefiting from the waiver, even in commercial transactions.

Leases frequently provide that the landlord will maintain property damage insurance on the building in which the leased premises are located to cover the usual landlord obligation to restore the building if there's a casualty, particularly when the tenant is to pay a pro-rata share of the premiums for this insurance. Even if the lease does not specify the insurance that the landlord will maintain, leases frequently contain a mutual waiver of subrogation in which the landlord waives its insurer's subrogation rights against the tenant for damage to the shopping center building caused by the tenant's negligence in return for the tenant's reciprocal waiver with respect to the tenant's property. In each case, the party waiving its insurer's rights of subrogation should assure that this waiver is permitted by and will not void its insurance coverage.

IV. INSURANCE CERTIFICATES: WHAT ARE THEY WORTH AND WHAT ELSE DO YOU NEED?

After clients negotiate the insurance requirements under a lease, loan agreement, construction contract, or other contract, they must then verify that the required insurance is in place and remains in place during the contract term. Although many contracts require only the production of a certificate of insurance as evidence that the proper insurance has been placed, this is a risky procedure.

A. The Problem with Certificates.

The reason? Insurance certificates are not binding evidence of insurance. Prior to 2006 the form of certificate promulgated for property insurance by ACORD (a non-profit agency that supplies forms for the insurance industry) stated that it was evidence of insurance and that the insurer would give notice of cancellation to the certificate holder. The same favorable language did not appear in the certificate for liability insurance; rather, that certificate clearly stated that it was issued as a matter of information only and was not evidence of insurance. Further, the liability form provided only that the insurer would "endeavor" to provide notice of cancellation to the certificate holder.

Thus, prior to 2006 mortgagees could rely on an insurance certificate as evidence that their interest in the mortgaged property was protected. However, a party, such as a contractor, landlord, or other beneficiary of another's liability insurance, was clearly not protected by the ACORD form of liability insurance. As a result, parties often negotiated with insurance agents to provide evidence of liability insurance on the property insurance form, hoping to achieve greater protection from that form. Groups interested in this issue pressed ACORD to extend the same protection to the liability form of certificate.

However, in 2006 ACORD took the opposite action and modified the form of certificate for property insurance to correspond to the very limited form for liability insurance. As a result, both now state that the certificate is given as a matter of information only and that the insurer will only endeavor to give notice to the certificate holder if the insurance is cancelled.

B. Why are the Insurance Companies Unwilling to Provide Meaningful Certificates?

Lenders, owners, landlords, and tenants are rightfully concerned that they cannot obtain a meaningful certificate on which they can rely as evidence that necessary property insurance has been correctly issued. Those same parties, together with contractors, subcontractors, and others, have the same concerns regarding liability insurance policies. Insurance companies are taking money to issue the policies, so why is it so difficult to get evidence that the insurance has been placed?

The real problem is the system by which certificates of insurance are issued. They are *not* issued by the underwriter, but by a clerk or other administrative person employed by a local agent or broker. That agent or broker is not paid for issuance of the certificate and may not be careful in pulling the client's records in order to verify all coverages and all exceptions. The underwriter has carefully drafted a policy and endorsements and is not willing to allow those policy terms to be varied by actions of parties over whom they have little or no control. *See,* Bill Wilson, *Certificates of Insurance, Insurance Agents and Rolling Stone Syndrome,* CPCU eJournal, November 2009.

Underwriters have obtained rulings from the insurance commissioners of a number of states, including New York, Illinois, Minnesota, and Nebraska, that the issuance of a certificate could not vary the terms of the actual policy. Several states, including Louisiana, have adopted laws to that effect. La. R.S. 22:881.1. The Independent Insurance Agents and Brokers of America provide links to many of these statutes and bulletins at their website, together with extensive resources on the subject. While this site addresses the concerns of the agent, rather than the insured, these materials are helpful in understanding the issue. http://www.iiaba.net/eprise/main/VU/NonMember/WilsonCertLawsRegs.htm.

C. Are the Limitations in Certificates Upheld by the Courts?

Cases throughout the country have upheld the limitations of the insurance certificate. Since the limitations on the liability form have been in effect longer, most of the cases that address this issue deal with liability insurance. However, there is no reason to believe that they would not be recognized in the context of property insurance as well. *See, e.g.*, *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006); *American Country Insurance Company v. Kraemer Bros., Inc.*, 699 N.E.2d 1056 (1st Dist. Ill. 1998); *Camastro v. Cincinnati Insurance Company*, 484 S.E.2d 188 (Va. 1997). *See,* W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a "Worthless Document?" Probate and Property* (to be published May, 2010); Janet M. Johnson, *Certificates of Insurance: An Illusion of Protection*, The ACREL Papers, ALI/ABA (Fall 2008); Art Pape, *Certificates of Insurance: A Hot Tip and a Soup Sandwich*, The ACREL Papers, ALI/ABA at 373 (Fall 2007); Fred Joseph and Art Pape, *Certificates of Insurance: The Illusion of Protection, Probate and Property*, Jan/Feb 1995, 55. While the disappointed certificate holder may have a claim against the issuer of the certificate, an errors and omissions ("E&O") claim against a broker or agent is not the same as protection under the policy. *SMI Owen Steel Company, Inc. v. Marsh USA, Inc.*, 520 F3d 442 (5th Cir. 2008).

D. Alternatives to Certificates.

What steps should a party take to insure the existence of proper insurance? One alternative is to require the other party's insurance advisor to certify that all of the insurance required by the contract is in place, that the client has been named additional insured or loss payee (when required) and that the terms of the policies (such as deductibles, limits, self-insured retention, and other clauses) are in place. Realistically, this gives the client only a claim against the insurance advisor's E&O policy if the certification is incorrect, but requiring an independent third party to examine the contract and the insurance for this purpose does give a layer of protection.

A second possibility is to require delivery of the actual insurance policy to allow the client's insurance advisor to verify coverage. This is an effective plan, subject to two caveats. First, the client must have an advisor that can review the policy and give the needed advice. In only very rare occasions would even a competent real estate or lending attorney possess the necessary experience to perform that review for a client, and this is not an area in which an attorney should dabble. Second, if the transaction involves the purchase or construction of a new project, the insurance may be "bound," but the actual policy may not yet be delivered. In cases such as this, only the binder, rather than the complete policy, would be available for review. Binders are subject to their own risks. A binder is temporary or preliminary insurance, often issued by a company during the period that it is carrying out its due diligence to determine whether a particular risk or a particular property will be accepted for permanent coverage.

Since the binder is only a temporary policy, it has a very short duration. The binder may contain an express expiration or termination date. Generally, this will be recited in the face of the binder and is often stated to be the earlier of a particular date or the issuance of a permanent policy. In addition, state law may provide limits to the duration of a binder. These range between forty-five (45) and one hundred fifty (150) days. Typically, at the end of the statutory time period, the binder is void. There is no general rule as to whether a mortgagee, landlord, or other person receiving a binder as evidence of insurance coverage will receive notice from the insurer prior to expiration of the binder.

In many instances a binder will specifically state that the terms and conditions of the standard policy issued by the insurer will govern the binder. In the absence of such an express adoption of policy terms, courts generally hold that a binder is deemed issued under the terms and conditions of the statutory standard policy issued by the company (if mandated by statute) or, if not, by the conditions of the policy customarily issued by the insurer. As a result, even if the binder does not specifically reference restrictions and limitations of the policy, those restrictions will be held applicable to the binder. For instance, if the standard form policy requires that suit be brought within a specific period after a loss, this limitation, even if not rejected in the binder, will be held applicable to the suit. On the other hand, if the binder does not contain or reference exclusions or limitations normally contained in policy endorsements, rather than the policy itself, the endorsement provisions may not be applicable unless recited in the binder. In addition, a binder can include the same special conditions as the final policy, such as "mortgagee" or "loss payee" or "additional insured."

It should be remembered that the claims arising from the World Trade Center are based upon disputes over the applicable policy form that was covered by the binders issued at the closing of the WTC acquisition. Further, most of the cases involving binders are E&O suits against local agents.

E. Practice Tips.

Many of our more sophisticated clients are aware of the limitations inherent in accepting insurance certificates. However, some clients may not be aware of this limitations. It would be prudent to maintain a record that the client was alerted as to the limitations inherent in certificates.

Clients may not be willing to spend the time and money necessary to retain an insurance advisor to examine the original policies to verify coverage. However, insurance requirements in leases or other contracts should at least require production of the original policy upon the request of the landlord, lender, or other interested party, rather than merely requiring a certificate as evidence of insurance.

Finally, unless a particular attorney is skilled in insurance matters, he or she should not attempt to advise the client as to whether the coverages covered, or purported to be covered, are adequately placed. One colleague (who is in fact very skilled in insurance matters) has advised that he has revised his engagement letters to disclaim any insurance advice.

V. THE GREEN BUILDING MOVEMENT: HAS INSURANCE KEPT PACE?

A. Property Insurance.

The growing interest in sustainable developments and LEED® certification for new and existing construction is providing the impetus for the development of new insurance products. One product now on the market is often referred to as "green" insurance. Offered by several of the major underwriters, this endorsement to a commercial property or builder's risk policy would provide coverage for costs incurred in restoring a green building or upgrading to green standards after a partial or total loss.

The first U.S. company to offer this product was Fireman's Fund with its October 2006 Green Gard℠ product (www.firemansfund.com). It also offers a green endorsement to its builders' risk coverage. Since then many other companies have offered comparable products:

> Zurich now offers its Better Green℠ endorsement to its property coverage (www.zurichna.com).
>
> Travelers has introduced its Green Building Additional Coverage℠ (www.travelers.com).
>
> ACE USA has added endorsements to its builder's risk insurance and property insurance for restoration to green standards under its ACE Green℠ line of products (www.aceusa.com).

Lexington, a subsidiary of AIG, has added its Upgrade to Green℠ coverage (www.aigpd.com).

Liberty Mutual Property offers its Green Select℠ package (www.libertymutualgroup.com).

Aon Corporation has instituted the Green Building Property Program (www.aon.com).

While these materials focus on commercial insurance products, many of these underwriters have developed products for homeowner's insurance as well.

While product details differ, they all address to some degree the additional costs that are typically associated with a green building, whether or not certified to LEED® standards. Certain of these products may cover the costs of qualified architects and engineers and LEED® certified advisors and will cover other soft costs, such as the record keeping and information gathering necessary to apply for LEED® certification. Others would pay for green building products, improved energy efficient appliances, fixtures, and equipment and water efficient plumbing systems. Although many property policies have a very low limit for plants and vegetation, many of these green products are intended to cover all or at least a substantial portion of the costs of vegetative roofs that are often a part of sustainable development. As some of the points awarded during LEED® certification relate to recycling of building materials rather than disposal in landfills, certain of these products would cover those additional costs. Others policies address loss of business income during part of the additional time required to obtain sustainable materials to incorporate into repairs or new construction. *The Green Built Environment in the United States, 2008 Year-End Update of the State of the Insurance Market,* available by request at http://global.marsh.com (hereinafter, "*2008 Update*") contains an overview of the products available as of the end of 2008. *See*, Edward J. Ozog, *Developments in Green Building Insurance*, The Practical Real Estate Lawyer (March, 2010) at 29.

In a sense, the green endorsement is an offshoot of the "laws and ordinances" endorsement currently available on property policies. That endorsement would provide the funds to demolish improvements following a partial loss of the property if current laws or building ordinances would prohibit reconstruction. Without such an endorsement, the policy would not pay for demolition of otherwise undamaged property. Couch on Insurance § 148:51 (3d Ed. 2008). In other situations, the endorsement would provide funds for reconstruction to current code requirements. In the absence of such an endorsement, a replacement cost policy would provide funds only for rebuilding to the state in which the improvements existed prior to the loss. Couch on Insurance § 152:22 (3d Ed. 2008).

Since these products are so new to the market, it remains to be seen whether they will live up to the advertised benefits and whether the costs of the policies justify their use. However, it is worth monitoring this development and considering whether a product such as this would benefit a development or portfolio. Even if a client is not interested in the green building movement or does not contemplate applying for LEED® certification, it should consider whether future federal, state, or local regulation might require retrofits. A typical replacement value policy will replace the building and equipment as it existed prior to the loss but would likely not cover additional systems or supplies and materials that might be required under future state or municipal green regulations. The green insurance products should cover some of these additional costs.

B. Liability Insurance.

As landlords and tenants increasingly require sustainable buildings and LEED® certification of new or renovated construction, they will require representations and warranties from architect, engineer, and contractors. Failure to satisfy those requirements can be expected to lead to litigation. The *2008 Update* indicates growing concerns of carriers in this regard. Insurers are also concerned about possible product liability claims arising from the use of new materials and systems in sustainable developments. Further, the growth of the use of vegetative roofs, which are often part of LEED® certified buildings, may lead to mold and water intrusion cases if these systems fail. *See,* Kate Bowers and Leak Cohen*, The Green Building Revolution: Addressing and Managing Legal Risks and Liabilities,* Harvard Law School Environmental Law and Policy Clinic (March, 2010).

VI. CLIMATE CHANGE: WHAT DOES IT MEAN FOR YOUR INSURANCE?

The interest in climate change and what it portends for this country is growing exponentially. Clean energy, sustainable development, and renewable energy are main priorities of the current federal administration. The effects of climate change on real estate clients will include insurance ramifications.

A. Effects of Climate Change.

The United States Environmental Protection Agency ("EPA") provides information on climate change effects on the health and environment of the United States at www.epa.gov/climatechange/index.html. Certain of these effects have the potential to impact real estate development directly. For instance, the rise in sea levels along coastal areas, erosion of beaches, intensified flooding, and possible incursion of salt into rivers and groundwater tables would directly affect coastal areas. Additional water depth increases the possibility of greater storm surges during hurricanes and more catastrophic storms. *See*, *Maps of Lands Vulnerable to Sea Level Rise: Modeled Elevations Along the U.S., Atlantic and Gulf Coasts*, available at www.epa.gov/climatechange/effects/coastal/slrmaps.html. Certain other effects of climate change may have a less direct but equally significant effect on real estate projects. Water resources may be affected by changes in temperature and precipitation and this may slow development in certain parts of the country. Energy needs may increase during the summer as areas of the country demand more air conditioning services. The availability and cost of that power may affect different parts of the country unequally. Increased temperatures may reduce business at winter recreation areas as snow levels decrease.

B. Response to Climate Change.

Just as climate change itself may have an effect on real estate clients, so may responses to the threat of climate change. The U.S. House of Representatives has passed H.R. 2454, the American Clean Energy and Security Act of 2009, commonly referred to as the "Waxman Markey Bill," although it has not yet been acted upon by the Senate. The EPA has adopted regulations requiring reporting of greenhouse gas emissions from many sectors of the economy. 40 C.F.R. Parts 86, 87, 89, *et al.* Individual states have enacted or are considering other legislative or regulatory responses. All of these may affect power and transit costs and opportunities and real estate developments or redevelopments.

Another response is the current or potential future regulation of developments to promote energy efficiency, water conservation, and sustainable development. While the LEED® certification is currently a voluntary process, it or a similar system may become mandatory in the future.

C. Insurance.

Insurers are now beginning to address the effects of climate change on their customers and their business. In March, 2009, the National Association of Insurance Commissioners has announced a model rule that, if adopted by state regulators, would require insurers to report their exposure to increased risks due to climate change. These would include information regarding policies written on property within certain miles of coastlines or in other sensitive locations and would solicit information as to how their risk management and risk modeling is adapting to climate change (www.naic.org). *See also, From Risk to Opportunity, Insurer Responses to Climate Change* (April 2009), www.ceres.org/Document.Doc?id=417.

Coastal areas are an obvious focus of concern for insurers and for developers. The availability and cost of property and flood insurance and the ability to insure business income losses due to floods may have a direct effect on developments in coastal areas. Recent hurricanes have demonstrated the importance of carrying separate flood insurance, as this is an excluded risk from the standard property insurance policy. However, business income coverage is not included in coverage under the National Flood Insurance Program. Business income insurance is added by endorsement to a property policy to cover lost income and ongoing fixed expenses in the event the insured premises are damaged by a "covered event." Unfortunately, flood is not a covered event under a standard property policy, so business income insurance may not be available from that policy, either. In May 2008, the United States Senate passed S. 2284 extending the National Flood Insurance Program. However, unlike the version passed in 2007 in the House of Representatives (H.R. 3121), it would not include business income losses as an element of coverage and it would phase out subsidies for non-residential properties. The Senate and House bills have never been enacted into law, and numerous short-term extensions of the National Flood Insurance Program have been passed instead of comprehensive review of the Program. As of the preparation of these materials, the Program has been effectively extended only until March 28, 2010. A Senate bill would extend the Program through the remainder of 2010, while a House bill would extend only through the end of April.

This paper is derived in part from the following previously published materials:

1. Marilyn C. Maloney and Rachel M. Jenny, *Insurance Issues for Lenders*, Louisiana Bankers Association Annual Bank Counsel Conference, 2007.

2. Marilyn C. Maloney and David J. Weiner, *Do Your Documents Leave Any Gaps? Planning in Advance for Disasters*, State Bar of Texas 30th Annual Advanced Real Estate Law Course, Chapter 38, July, 2008.

3. Tanya D. Marsh and Jo-Ann M. Marzullo, *Critical Insurance Topics for Landlords and Tenants*, ICSC 2008 Shopping Center Law Conference, October 22, 2008.

4. Marie Moore and Marilyn C. Maloney, *Critical Insurance Tools for Landlords, Tenants, and Lenders (Certificates, Endorsements and More),* ICSC 2009 Shopping Center Law Conference, October 21 – 24, 2009.

5. Marilyn C. Maloney, *Green Insurance for Green Leases*, The ACREL Papers, Fall, 2009 at 203.

Recommended websites for insurance information:

http://www3.ambest.com

http://www.fema.gov

http://www.floodsmart.gov

http://www.irmi.com

http://www.moodys.com

http://www.standardandpoors.com

http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/