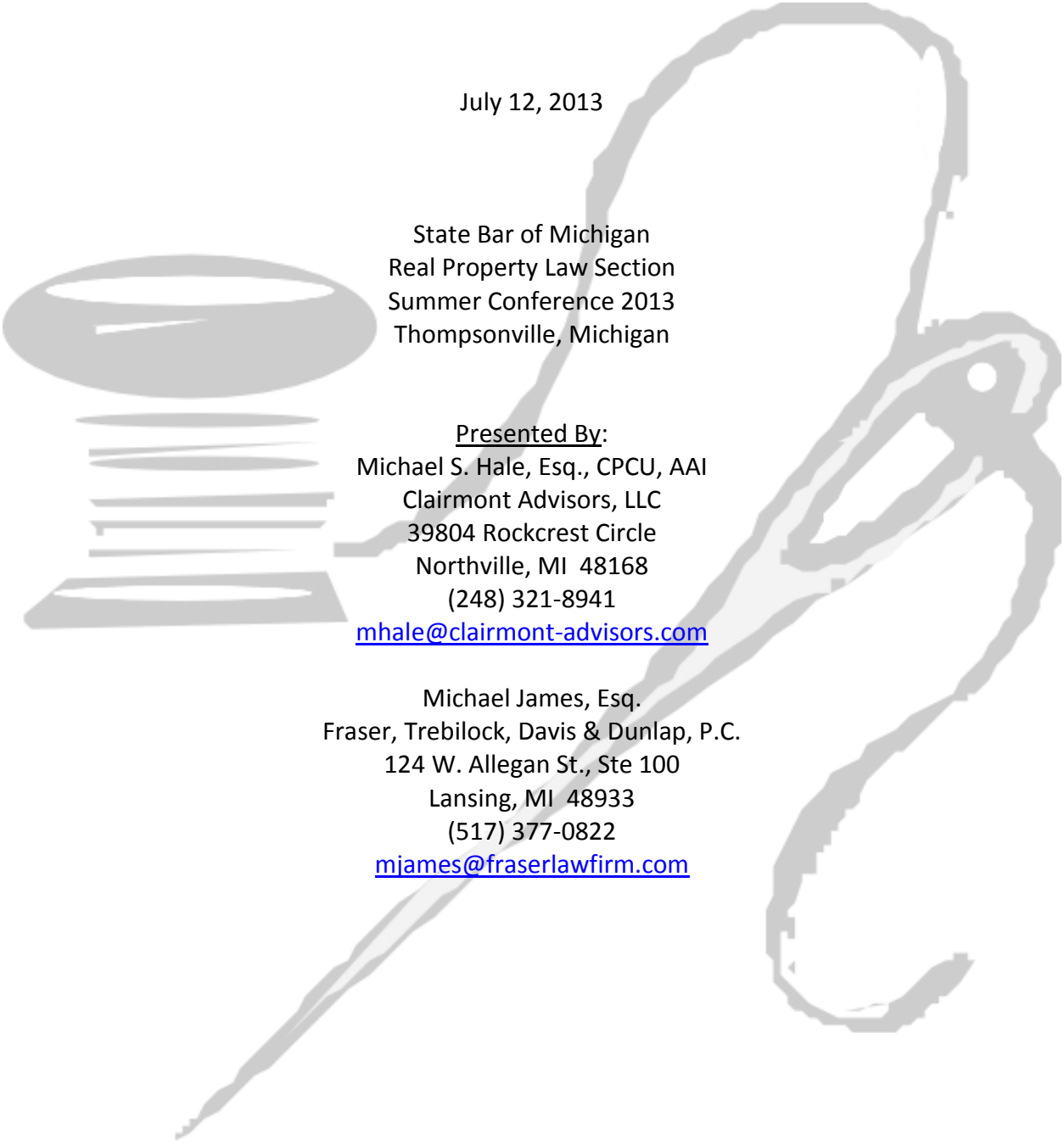
Threading the Needle:

Negotiating and Drafting Insurance Requirements Provisions in Leases, Mortgage Documents and Other Real Estate Contracts



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Introduction & Theme

We titled this as "Threading the Needle" because that is in many ways what the process of negotiating insurance provisions involves. To do an effective job at the drafting and negotiating of insurance clauses, it requires an analysis of more than just commercial general liability coverages and also extends to include property, workers' compensation, professional liability and automobile exposures. This session will provide direction to attorneys on what to include and what to avoid in negotiating insurance and casualty provisions in real estate contracts. Sample clauses are provided as well as an update on certificates of insurance. Also included are checklists on common gaps in property insurance coverage that could put your client (and you) at risk of an uninsured or underinsured loss.

Useful Overall Concepts

A. Legal Principles Relevant to Insurance Provisions

1. Michigan law requires that courts interpret the contract as a whole. *Auto-Owners Ins Co v. Churchman,* 440 Mich 560 (1992). However, when there is a conflict between a policy form and an endorsement, the endorsement controls. *Jones v. Atkins*, 143 Mich App 150 (1985).
2. Insurance policies are contracts and Michigan courts interpret them as such. *Citizens Ins Co v. Pro-Seal Service Group, Inc,* 477 Mich 75 (2007). The plain language of the policy will be enforced unless the term or phrase is defined in the policy. *Citizens, supra; Arco Ind Corp v. American Motorists Ins Co,* 448 Mich 395 (1995). Exclusions are strictly construed in the insured's favor. *Auto Owners v. Churchman,* 440 Mich 560 (1992). Dictionary definitions can be consulted but do not create ambiguities. *Cole v. Auto Owners Ins Co,* 272 Mich App 50 (2006).

3. Ambiguities in insurance requirements and indemnity provisions are ordinarily construed against the drafter. *Rory v. Continental Ins Co*, 473 Mich 457 (2005). However, some attorneys insert provisions in contracts or leases that the usual rule of *contra proferentum* does not apply and that the parties have jointly drafted the language. As to less sophisticated parties, the drafter should exercise particular caution to either define words with specific intended meaning or to be prepared to accept the plain and commonly understood meaning, particularly when dealing with insurance terms.

4. Attorneys should avoid holding themselves out as insurance experts. It is advisable to defer to the client's insurance agent to review such provisions before they are signed by the parties to the contract, or to recommend separate insurance counsel. Too often, insurance agents only receive copies of *executed* agreements when not much can usually be done to address the issues that may exist in the insurance requirements provision.

5. Policyholders are required by law to read their policies and raise any questions within a reasonable period of time. *Zaremba Equipment Inc v. Hartco Nat'l Ins Co,* 280 Mich App 16 (2008). Even if they do so, most policyholders would not understand much of the fine print or the endorsements available to deal with such gaps.

6. Insurance agents can be your client's worst nightmare.

    a) Under Michigan law, independent insurance agents, which represent multiple carrier, are legal agents of the policyholder, not the insurer. *Auto Owners v. Michigan Nat*, 223 Mich App 205 (1997); *Harwood v. Auto Owners Ins Co*, 211 Mich App 249 (1995). This means, in part, that certificates issued by such agents

are not technically binding upon the insurer. *West American v. Gutekunst*, 230 Mich App 305 (1998). Similarly, misrepresentations made by the insurance agent will not likely implicate the insurer. [Discussion of barbershop injury case].

b) As an ordinary rule, there is no duty of an insurance agent to advise of the adequacy of a policy's coverage. *Pressey Enterprises, Inc, v. Barnett France Insurance Agency*, 271 Mich App 685 (2006). *Harts v. Farmers Insurance Exchange*, 461 Mich 1 (1999). This general rule can be overridden where:

   (i) The agent misrepresents the nature or extent of coverage offered or provided;

   (ii) An ambiguous request is made by the insured which requires clarification;

   (iii) An inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate; or

   (iv) The agent assumes a duty to the insured through express agreement with or promise to the insured.

Harts, supra at 10-11.

Insurance is highly complex. See Exhibit A for a list of common gaps in commercial property insurance policies that could wreak havoc upon your real property client. Most policyholders are not insurance experts and instead rely upon the insurance agent to advise them. If your client has an agent who is an "order-taker" it is likely time for a new agent. See Exhibit B for some of the errors and omissions involving Michigan insurance agents in recent years.

7. Property insurance limits cases are one the most common causes of underinsured claims and E & O lawsuits against insurance agents. Some recommendations in this regard:

   a) Recommend that the client obtain a replacement cost appraisal and not rely upon market value or actual cash "book value."

   b) It is also important that clients with multiple locations have a blanket limit which combines the building and business personal property limits for all locations into a single limit. Many insurers will offer this.

   c) Clients should not have coinsurance provisions on their property insurance policies. This is a different concept than health insurance co-pays and actually could make the client a "co-insurer" of a property or business interruption loss if it did not insure enough as required by the policy.

B. Insurance Provisions Common to All Real Estate Contracts

1. Missing or improperly listed named insureds are an epidemic. Be certain to include all names and entities which have an insurable interest in any property as named insureds as well as all operating entities.

2. Many insurance requirements provisions include outdated language such as "comprehensive general liability" or "public liability" which are, generally speaking, no longer used in the insurance industry. Instead, commercial general liability insurance ("CGL") is the modern terminology used to refer to liability insurance for bodily injury, property damage and defined personal and advertising injury.

3. The term "personal injury" in a CGL policy does not mean bodily injury as many attorneys otherwise have been trained to understand such a phrase. Instead, in liability insurance it means nonbodily injury such as slander, libel, defamation, invasion of privacy, wrongful eviction and sometimes nonemployment discrimination.
4. Contractual liability insurance coverage to protect the insured for, among other things, the indemnity obligations of a contract is often overlooked in insurance requirements provisions and this could mean real problems for the contracting parties. It is advisable to include a sentence in the insurance requirements provision which mandates contractual liability insurance in the commercial general liability insurance policy to cover the indemnity obligations of the contract. However, keep in mind when drafting the provision that such coverage is often less broad than the contractual indemnity provision itself.
5. Additional insureds do not have the same rights as named insureds. Additional insureds only have coverage which is derivative of the named insured. Thus, recommend that clients maintain their own separate CGL policy even if they are named as an additional insured on another policy.
6. Loss payees are inferior parties which typically have no rights to adjust the claim. They also can lose all coverage if the named insured voids the policy.
7. Using primary and noncontributory language can be helpful to the additional insured but does not always track with the policy language. If possible, obtain a complete copy of the policy of the party naming your client as an additional insured so that this can be carefully reviewed.

8. Requirements to name additional insureds should not apply to all of the listed policies. This is a common mistake. Workers' compensation, for example, is not a policy on which an additional insured can be listed.
9. If your client is agreeing to name a company and its "employees, officers, agents and members" as additional insureds in the contract, know that this may not be automatic. The insurer will typically only list the company without the other persons unless this is negotiated in advance.
10. Automobile exposures are often given inadequate attention in insurance requirements provisions. All businesses, including tenants, have automobile exposures, even if they do not own or lease vehicles. Parties such as landlords should be named as additional insureds on such policies also.
11. Workers' compensation exposures are often given inadequate attention in insurance requirements provisions. Attempt to negotiate a waiver of subrogation in favor of your client on the other party's workers' compensation policy. For example, if a tenant's employee suffers an injury on your client's premises, you would want to attempt to block the tenant's workers' compensation carrier from attempting to subrogate against your landlord client.
12. Be cautious of insured versus insured exclusions in certain types of policies. Professional liability policies, also known as errors and omissions policies, are often included in the insurance requirements provisions of professional service contracts such as when an IT or staffing company is hired. Be particularly cautious about requiring additional insured status of your client on such a policy because it usually means that coverage for suits by your client against the hired company would be

barred under the insured versus insured exclusion which is contained in such policies. The same concept applies to directors and officers insurance policies.

C) Certificates of Insurance

1. Certificates of insurance should, for most purposes, be assumed to have little effect. Such certificates not only say they are for information only and do not change the listed policies, they are almost always drafted by insurance agents who are legal agents of the policyholder and not the insurer. Thus, the certificates are not likely binding on many insurers, who are quick to ask agents not to even send them copies. See *West American v. Gutekunst,* 230 Mich App 305 (1998). Thus, treat certificates of insurance as suspect and obtain and review the actual policies and endorsements.
2. Under relatively recent changes, all state insurance departments have accepted the Acord 25 Certificate of Insurance which replaces an older version. Under previously used certificate of insurance forms, insurance agents agreed to endeavor to provide written notice to an additional insured in the event of cancellation. Such certificates are no longer used for the most part. The new certificate includes no representation at all that the insurer (or agent) will provide any notice to a listed additional insured. This presents major concerns when representing additional insureds such as landlords, owners, etc. who now also may receive no notice of cancellation or change in coverage. An endorsement is available from many insurers that would require that the insurer provide advanced notice of cancellation directly to the additional insured. Such a sample endorsement reads:

Endorsement IL 03

Cancellation Privilege Endorsement

Endorsement Effective:

Named Insured:

Schedule

Name and Address of Person to Receive Notice of Cancellation:

ABC Company, LLC
1234 Anywhere Street
All States, Everywhere 54321

A. If we cancel this policy, we will mail to the person or organization named in the Schedule of this endorsement, written notice of cancellation of at least _____ days before the effective date of cancellation.

3. Be very cautious about your client agreeing to language in any contract that requires notification of material change or cancellation to the other party. The above endorsement language does not refer to a material change in coverage – it only imposes an obligation on the insurer in the event of cancellation.

D) Lease Agreements

1. Commercial Leases

   a) Avoid allowing another party to provide the property insurance coverage for your client. For example, some landlords will require in a triple net lease that the tenant insure the landlord's building. This is a recipe for complete disaster from the perspective of both parties. Not only is the landlord, in this situation, allowing the tenant and its insurance agent to protect the assets of the landlord, it is also opening itself up to inferior coverage as a loss payee and potentially to not even being notified in the event of a cancellation.

b) Even though a landlord, for example, may be listed as an additional insured on the other party's liability insurance policy, such coverage is only derivative of the negligence of the named insured tenant. It is critical, therefore, that the landlord still continue to maintain its own liability coverage as lessor, regardless of the insurance maintained by the tenant.

c) Property damage coverage is different than premises damage legal liability coverage. This is missed in almost every lease. Property damage liability is for damaging a third party's property but it excludes property in the care, custody or control of the insured. Premises damage legal liability is coverage designed to protect the insured for liability for damaging the leased space in its care, custody or control. However, a separate sublimit of insurance applies in this area under most CGL policies and the covered perils may be limited to fire. The better policies will extended broader coverage in this area.

d) In indemnity agreements, lessors should always use the word "defend" and also include the phrase "actual or alleged." See *W.G. Wade Shows, Inc. v. Richard Haman Et Al,* (unpublished Michigan Court of Appeals No. 299987, March 1, 2012) [holding that where there was only alleged negligence of a carnival vendor, there was no obligation to indemnify the sponsor because the words "actual and alleged" were not used in the lease.]

Following is sample landlord favored indemnity language:

> ***INDEMNIFICATION.*** *Tenant agrees to indemnify, represent, defend and hold harmless the Landlord and its owners, members, employees and officers ("Indemnified Parties") of and from any and all actual or alleged claims, demands, expenses or liability for damages or injury to any person or property in, on or about said Leased Premises from any cause whatsoever.*

e) "On or about" indemnity language can be a problem for tenants. Such language could require contractual indemnity in the event of an injury in the parking lot involving another tenant's customer, for example.

f) Tenant's counsel should attempt to limit the indemnity obligation to injuries on the leased premises due to the negligence of the tenant. From the tenant's perspective, such indemnity should also be limited to claims made by third parties. Otherwise, the landlord may have an argument that the tenant has to indemnify and hold it harmless for damage to the space.

g) Waivers of subrogation are common in lease agreements but often are overbroad in scope. Such waivers are designed to legally block the other party's insurer from pursuing it in a reimbursement action but should be limited to waiving the rights of the insurer to subrogate for covered claims. Sample language is as follows:

> ***WAIVER OF SUBROGATION.*** *Each party hereto does hereby discharge the other party, of and from, any liability arising from loss, damage or injury caused by fire or other casualty for which insurance (permitting waiver of liability and containing a waiver of subrogation) is carried by the injured party at the time of such loss, damage or injury.*

h) If you do not put in the lease that the tenant is liable for fire or other damage, the tenant may not be liable. *New Hampshire Inc Group v. LaBombard* v. 155 Mich App 369 (1986). But see also *Laurel Woods Apartments v. Roumayah,* 274 Mich App 631 (2007).

i) Maintenance and repair provisions should exclude casualty losses. If this is not the case, it could be argued that that the tenant has an obligation to rebuild the building following a fire. Always include such exceptions for casualty losses and define that to include losses covered by the Insurance Services Office (ISO) Special Causes of Loss form.

j) Threading the Needle in Action – "What's Wrong With These Lease Insurance Provisions?" – See Exhibit C.

k) Sample Landlord Favored Insurance Requirements Provision – See Exhibit D.

2. Residential Leases

a) The Michigan Truth in Renting Act MCL 554.631 *et seq.* imposes unique responsibilities on parties, prohibits tenant contractual indemnity, etc.

b) There typically is no coverage for damage to space in care, custody of control of the tenant in rental policies. Thus, it is imperative that the landlord have adequate building insurance.

c) Be cautious about homeowners policies which require owner occupancy. Dwelling fire policies are usually required to insure rental dwellings.

d) Although this should be avoided if at all possible, if the tenant is insuring the house, be absolutely sure the landlord is an additional insured on the property coverage and not a loss payee. Further, the landlord should maintain its own liability insurance even if the tenant is naming the landlord as an additional insured.

E) Mortgages and Lien Documents

1. Lender's Counsel Suggestions

   a) Use "mortgagee" not "loss payee" label in insurance requirements.

   b) If the lender holds a security interest in business personal property, require a lender's loss payable endorsement on the borrower's property insurance policy. Do not accept loss payee status.

   c) Terrorism coverage is important and usually is required by mortgage documents.

   d) Vacancy can create serious gaps in coverage. This needs to be carefully monitored by the lender.

   e) Obtain a complete copy of mortgagor's property insurance policy before the closing.

2. Borrower's Counsel Suggestions

   a) Provide the client's insurance agent with all documents (mortgage, leases, purchase agreement) as soon as possible.

   b) Be cautious as to who is listed as named insured on the borrower's policies and in particular, who is listed as first named insured which is the only entity that has the obligation to pay the premiums and is the only entity which can make changes in coverage, cancel the policy, etc.

   c) If the borrower is leasing the property to others, be sure that the lessee has appropriate business interruption coverage but also require that the borrower maintain such coverage on its own for loss of rents and for an additional period after rebuilt (called an extended period of indemnity endorsement). This is an often missed extension.

F) Construction Agreements

1. Construction agreements involve multiple parties with varying interests, exposures and insurance coverage. The key is not to solely rely upon another's insurance but instead to require such coverage as a safety net.
2. Wrap-up programs can be dangerous. Wrap-up programs involve the owner buying coverage for itself and all contractors and subcontractors. Given that the contractor would have to rely upon the owner's insurance agent and coverages, this arrangement should be avoided where possible.
3. Be cautious as to builder's risk policies. Many attorneys think this is coverage for liability risks. Actually, builder's risk policies provide first party property coverage. These policies vary widely. One of the most serious issues is the extent to which coverage automatically terminates prior to the client moving into the newly constructed building.
4. Professional liability insurance can be important. If there is a fire caused by the faulty work of an electrician subcontractor, that sub's general liability policy will likely not cover it for the costs of replacing the previously installed wire. A contractor's professional liability policy could address this exposure.
5. Pollution policies can be critical. A contractor's negligence in piercing a gas line which causes injuries to third parties may not be covered and would require a separate contractor's pollution policy. Sometimes this can be included on a professional liability insurance policy as well.

6. Indemnity provisions are important but are prohibited in construction agreements for sole negligence per Michigan statute. MCL 691.991. Further, this anti-indemnification statute was amended March 1, 2013 under HB 5466 to prohibit public entities from requiring contractual indemnity or defense from professional engineers, surveyors, Michigan licensed architects, landscape architects or contractors beyond their own degree of fault.
7. Sample Construction Agreement Provisions on Indemnity and Insurance Requirements. See Exhibit E.

EXHIBIT A

Checklist of Common Gaps in Commercial Property Insurance

This checklist of common coverage gaps is based upon many years of experience as an expert witness in insurance related matters and in managing the commercial insurance programs for many clients.

Commercial Property Insurance

	Coverage Issue	Comments
1.	Coinsurance penalty provision in building or contents coverage	Coinsurance could make the client a "co-insurer" of a property loss if inadequate insurance was maintained. This should be avoided through negotiation with the insurer prior to the issuance of the policy.
2.	Inadequate limits for replacement cost for building and/or contents and failure to include leasehold improvements in values.	One of the most significant underinsured property losses is in the area of inadequate limits for building and/or contents. It is important to base limits on replacement cost and not market value and to revisit these limits each year. Debris removal costs should be taken into account.
3.	Failure to blanket building and/or contents amounts between various locations.	Where there are multiple locations, the agent should attempt to negotiate a single overall blanket limit which combines the limits for the various buildings and contents. This is a safety net in the event of inadequate limits at any one location.
4.	Inadequate coverage for debris removal costs.	Most policies give you only 10% of the building limit to pay for costs to remove debris plus a small additional sum like $10,000. Attempt to negotiate higher limits.
5.	Inadequate business interruption coverage for lost income and extra expenses.	Business interruption coverage is not often given the attention it deserves. Many companies only insure a year of lost revenue and extra expenses. This is often inadequate.

	Coverage Issue	Comments
6.	Coinsurance penalty provisions in business income coverage forms.	Similar to coinsurance with buildings and contents, this concept should be avoided with business interruption.
7.	Failure to negotiate an extended period of indemnity beyond 30 days.	Regardless of the limit of insurance for lost income, the insurer will stop paying when the building is rebuilt or with reasonable diligence should have been rebuilt plus 30 days. Many insurers will offer longer periods to cover you while you regain market share. This is particularly important in manufacturing and landlord type risks.
8.	Failure to negotiate away the protective safeguard endorsement.	Some insurers will require this endorsement where a discount is being provided for a fire suppression system or burglar alarm. The problem is that if the system does not work, the insurer has an argument to deny a claim.
9.	Absence of coverage for rebuilding in compliance with laws, ordinances and building codes.	Building codes change. Following a fire your client may be required to rebuild in a different, more costly manner such as adding an elevator, installing a sprinkler system, using more expensive metal trusses, etc.
10.	Inadequate or nonexistent coverage for loss of income due to ordinance or law delays.	Similar to the preceding item, business interruption coverage does not usually pay for delays in rebuilding associated with building codes and ordinances. Separate coverage can be purchased.
11.	Listing wrong names as named insureds.	One of the most serious issues is not listing the proper entity that owns the property. In this day of many limited liability companies, it is important to list all such entities to avoid insurable interest arguments at the time of a claim.

	Coverage Issue	Comments
12.	Allowing tenant to insure landlord property.	Many landlords require the tenant to insure the building. This is usually a major mistake. One reason is that the tenant will often only list the landlord as a loss payee which gives it no independent rights to coverage or even to negotiate with the insurer on a claim. Further, it presupposes that the tenant's insurance agent is competent to insure the landlord's assets.

EXHIBIT B

Representative Expert Witness Cases Involving Gaps in Insurance

- *Chem-Strip* [failure of agent to place correct property coverage resulting in the bankruptcy of the company and its owner].
- *Delau Fire & Safety* [Failure of proposing agency to advise on additional coverage general liability exclusions in policy quoted, resulting in numerous uncovered lawsuits].
- *Campbell's Collision* [inadequate business interruption coverage resulting in catastrophic underinsured loss to insured].
- *Richardson* [failure to offer or obtain adequate limits for personal auto liability, resulting in $500,000 personal payout by policyholder].
- *Middlebelt Hope* [failure to negotiate proper extended period of indemnity on business interruption coverage].
- *Crystal Homes* [improper writing of builder's risk coverage].
- *Historic New Center Limited* [failure to list all named insureds that had insurable interest].
- *Cogswell* [failure to address coinsurance penalty provision in property policy].
- *Truck Insurance Exchange* [inadequate coverage after agent moved client from commercial to personal policy with lower limits].
- *H & K Custom Cabinetry* [failure to blanket contents limits among contiguous buildings with separate addresses].
- *Interstate Mnft* [failure to blanket limits and/or obtain agreed amount to waive coinsurance].
- *Cedar Log and Lumber* [inadequate property limits].
- *Kinaia Investments* [misrepresentation issue relating to application].
- *Bahorski* [inadequate coverage for water damage claim].
- *Griffin* [failure of agent to properly insure de-attached structure and contents].
- *RLV Leasing* [failure of agent to list correct named insureds].
- *Wheaton* [failure of agent to obtain correct policy for non-owner occupied home].
- *Steven Michael Heika* [failure to secure nonowned auto coverage for pizza store].
- *Prus* [failure to notify on removal from named insured provision].
- *Custom Software* [failure to obtain proper coverage for computer loss caused by lightning].
- *Lehnen* [failure to negotiate adequate property limits for bar].
- *Harvey* [failure to negotiate water damage coverage].

- *Holman* [failure to negotiate proper coverage for rebuilding in accordance with ordinances].
- *L & M Brikho's Market* [failure to list entity as named insured and to secure coverage arising out of power failure / power surge].
- *Freemont* [pollution exclusion precluded coverage for lead paint claim].
- *Triangle Auto Sales* [inadequate crime coverages for auto dealer].
- *Quality Textures* [failure to obtain coverage for personal property of others].
- *Pitcher* [inadequacy of limits on homeowners insurance policy].
- *Schwartz* [inadequacy of homeowners coverage for dwelling, deck and stairway].
- *O'Neill* [failure to negotiate umbrella policy that would have covered boat accident].
- *Loudon Steel* [failure to obtain appropriate property coverage; failure to blanket limits].
- *Jewell* [driver not covered under auto insurance].
- *Triangle Business, LLC* [failure to correct business mailing address and provide notice of cancellation.]
- *ND Property, LLC* [failure to list landlord as additional insured or lender's loss payable on tenant's property policy.]

EXHIBIT C
What's Wrong With These Lease Insurance Provisions?

Page 3-4 of Lease

"INSURANCE
Tenant, at Tenant's expense, shall maintain plate glass and public liability insurance including bodily injury and property damage insuring Tenant and Landlord with minimum coverage as follows:

COMMERCIAL GENERAL LIABILITY
Each Occurrence - $1,000,000

BUSINESS OWNERS
Personal & Adv. Injury - $1,000,000
General Aggregate - $2,000,000
Products-Comp./Op. Agg. - $2,000,000

EXCESS LIABILITY
Each Occurrence - $1,000,000

UMBRELLA POLICY
Landlord to be named as owner - $1,000,000

WORKERS COMPENSATION & EMPLOYERS LIABILITY
Each Accident - $100,000.

Tenant shall provide Landlord with a Certificate of Insurance showing Landlord as additional insured. The Certificate shall provide for a thirty day written notice to Landlord in the event of cancellation or material change in coverage. Tenant shall also maintain business interruption during the term of this lease.

Page 9 of Lease

Tenant shall also, at its own expense, obtain insurance for all of the FF&E located at the leased premises for the amount of replacement value of the items. Landlord shall be the sole beneficiary of any proceeds under said policy…"

Summary Lessons From Above Exercise

1. Avoid insurance requirements in separate areas of a lease. It is asking for trouble.

2. Do not use phrases such as "public liability," or "comprehensive general liability."

3. Include requirements that aggregates apply per location and per project so as to avoid impaired aggregate limits from operations unrelated to the tenancy.

4. Use "umbrella" instead of "excess."

5. Avoid certificate of insurance language and instead require an endorsement from the tenant's insurer, a copy of which will be provided to the landlord, requiring 30 days notice in the event of cancellation.

6. Avoid allowing a tenant to insure any of the landlord's property. If necessary, obtain a separate policy in the landlord's name and have the tenant pay for it.

7. Do not require catch-all additional insured language because policies like workers' compensation and employers liability cannot name additional insureds.

8. Include primary and noncontributory language but be sure the tenant's policy tracks with that.

9. Include a requirement that tenant obtain contractual liability insurance for the indemnity obligations of the lease.

10. It is preferred to require additional insured status for the landlord entity and its members, employees, shareholders and officers. However, note that most policies do not automatically extend such coverage and it must be negotiated.

11. Always refer to premises damage liability coverage for damage to leased space in addition to standard property damage liability limits.

12. Include a requirement that the tenant's workers' compensation policy include a waiver of subrogation provision.

13. Require that the tenant maintain business automobile insurance with the landlord listed as additional insured.

14. There is no such classification as a "sole beneficiary" under a property insurance policy. Avoid allowing the tenant to insure any of the landlord's property. However, if this cannot be avoided, require additional insured status on the property insurance of the tenant.

EXHIBIT D
Sample Landlord Favored Insurance Requirements Provision

Commercial lease agreements often include inaccurate and incomplete insurance language. For example, the term "comprehensive general liability" is an outdated term and instead it should read "commercial general liability."

The following is sample language that might be considered generally:

> *"Tenant's Insurance. Tenant shall procure at its sole cost and expense and keep in effect during the entire term thereof, the following types and amounts of insurance coverage:*
>
> *a) Commercial general liability insurance with minimum limits of liability of one million ($1,000,000.00) dollars per occurrence and $2,000,000 aggregate with a project and per location aggregate endorsement, for bodily injury and property damage including premises and operations, products and completed operations, personal and advertising injury and contractual liability coverage for the indemnity obligations Tenant assumes in this Lease. Such coverage shall also include an exception to the pollution exclusion for fumes from heating, cooling and dehumidifying equipment and for hostile fires. Such coverage shall also include premises damage legal liability for fire, water and sprinkler leakage damage with limits of $1,000,000 per occurrence for damage to property in the care, custody or control of the Tenant. Such coverage shall be provided on an Insurance Services Office (ISO) form through an insurer admitted in the State of Michigan that is "A+" rated by A.M. Best and shall include the Landlord, its agents, employees, officers, lienholders and mortgagees and other indemnified parties included in the indemnification agreement of this Lease as additional insureds on a primary and noncontributory basis.*
>
> *b) Commercial automobile insurance for owned, nonowned, rented and/or hired motor vehicles with residual combined single liability limits of least $1,000,000 per occurrence. Such coverage shall name the Landlord and its officers, employees and members as well as other indemnified parties included in the indemnification agreement of this Lease as additional insureds.*

c) *Workers' compensation and employers' liability insurance which shall include a waiver of subrogation in favor of Landlord.*

d) *Commercial umbrella insurance with limits of at least $1,000,000 per occurrence. Such policy shall include the general liability, employers liability, business automobile liability policies as scheduled underlying policies and shall extend coverage for the Landlord and the indemnified parties as additional insureds.*[i]

e) *Property insurance for property of every description and kind owned by Tenant and located on the Premises or for which Tenant is legally liable including, without limitation, furniture, equipment and any other personal property, the Tenant improvements (with the exception of the Landlord's work) and any subsequent alterations thereto in an amount not less than the full replacement cost thereof. Such coverage shall include business income and extra expense coverage for at least twelve (12) months of tenant's annual estimated receipts plus 120 days extended period of indemnity.*

f) *(optional) Pollution / Environmental insurance. Tenant shall obtain and maintain pollution liability insurance including both first and third party coverage with limits of least $1,000,000 per occurrence. Landlord and its mortgagee shall be named as an additional insureds on such policy to the extent that there is no insured versus insured exclusion in that policy.*

g) *(optional) Professional liability insurance. Tenant shall obtain and maintain contractor's professional liability coverage with limits of at least $1,000,000 per occurrence and aggregate.*

Any insurance required to be procured and maintained by Tenant shall not be subject to cancellation except after ten (10) days prior written notice to Landlord and an endorsement shall be obtained on the Tenant's policy whereby the Tenant's insurer is required to provide notice directly to the Landlord. Certificates of insurance for such policies shall be provided to Landlord upon the signing of this Lease."

[i] Umbrella limits should be negotiated based upon the size, operations and other exposures of the tenant.

EXHIBIT E
Sample Construction Agreement Provisions on Indemnity and Insurance Requirements

1. Sample Subcontractor Indemnity Language:

Indemnification and Hold Harmless. Subcontractor shall indemnify, defend and hold harmless the General Contractor and the Owner and their respective officers, directors, members, shareholders and employees of and from any and all liability claims, demands or penalties arising out of or related to the actual or alleged negligence of Subcontractor even where there is an allegation of negligence by the General Contractor or another party. The only exceptions to this shall be for the sole negligence of the General Contractor or other indemnified party, or to the extent that the indemnitee is a public entity as defined by MCL 691.991 in which case such indemnity shall only extend as far as the degree of fault of the indemnitor and that of his or her respective subcontractors or subconsultants.

2. Sample Subcontractor Insurance Requirements Language:

A. Insurance. During the term of this Agreement and while providing any services related to the contract, Subcontractor hereby agrees to maintain the following insurance coverages, all through an insurer or insurers with at least an A.M. Best rating of "A":

1. *Commercial general liability insurance with limits of at least $1,000,000 per occurrence and $2,000,000 aggregate. Such policy shall include coverage for bodily injury and property damage liability, premises and operations, products and completed operations, personal and advertising injury liability and contractual liability for the indemnification obligations of this Agreement. It shall also include an exception to the exclusion for "your work" to include coverage for acts of your subcontractors.*
2. *Business automobile coverage for all owned, leased, rented or nonowned motor vehicles with limits of residual liability of at least $1,000,000.*
3. *Workers' compensation and employers' liability insurance with limits as required by statute and for employer's liability, limits of at least $500,000.*
4. *Umbrella liability with limits of at least $1,000,000 and shall apply as excess over the CGL, business automobile and employers' liability insurance.*
5. *Builder's risk and/or installation floater coverage for property loss to equipment and/or materials.*
6. *All such policies, except the workers' compensation and employers liability policy shall name Owner and General Contractor and their respective shareholders, members, officers and employees as additional insureds on a primary and noncontributory basis.*
7. *Subcontractor shall obtain waivers of subrogation provisions in favor of the owner and general contractor on all policies it obtains.*
8. *Subcontractor shall require the same coverages listed above (including naming the same additional insureds) of any subcontractors that it retains.*
9. *Subcontractor agrees to obtain and save certificates of workers' compensation and general liability for any of its subcontractors.*
10. *Subcontractor shall obtain an endorsement from its general liability insurer which requires that insurer provide thirty days advanced written notice to the General Contractor of a cancellation in coverage.*