

So you want to be named as a Loss Payee? When To Tell your Landlord "No Means No"

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Insurance requirements are some of the most important and also heavily negotiated provisions of a lease...and for good reason. Insurance is the most widely used risk management tool for landlords and tenants alike, and it is crucial that both parties have access to liability protection and, if appropriate, insurance proceeds. A common method for ensuring such access is by being listed on another party's insurance policy, usually either as an "additional insured" or as a "loss payee". However, these two terms are often misunderstood and are periodically treated as if they are interchangeable. They are, in fact, very different.

Before discussing the difference between an additional insured and a loss payee it is important to understand what is meant by a "named insured?" A named insured is in very simple terms the owner of the insurance policy. A named insured is the only party able to cancel or modify a policy, is evaluated by the insurance provider to determine the coverage allowed and the premium amounts, and has certain obligations to the insurance provider. These obligations could include responsibility for payment of premiums.

Additional Insured. An additional insured is a party listed on a named insured's insurance policy to provide liability protection to the additional insured arising from the named insured's conduct. An additional insured can use its status as an additional insured to hedge against legal claims flowing from the named insured's activities, and this hedge usually works in harmony with the named insured's contractual indemnification obligations to the additional insured. While the additional insured has protection, it has no right to receive proceeds from the named insured's insurance policy.

With respect to who should be listed as an additional insured, it is common and reasonable for a landlord to require a tenant to list the landlord and other substantially-interested parties, such as lenders and/or property managers, as additional insureds. However, a landlord is probably overreaching if it requires that other less-interested parties, such as anchor tenants, be listed as additional insureds.

As for the types of policies a landlord might require to be listed as an additional insured, it is common and reasonable for a landlord to be listed as an additional insured on commercial general liability, automobile, and umbrella policies. In contrast, a tenant should usually not be expected to list a landlord on property or business interruption policies.

Loss Payee. A loss payee is a party entitled to all or a portion of the insurance proceeds from an insurance provider in the event of a loss – even though the loss payee is not a named insured. A loss payee needs to have an insurable or financial interest in the property and usually has a mortgage or security interest in the property being insured. It is commercially reasonable for a party with an insurable or financial interest in property to require a named insured to list such party as a loss payee. The classic example is a bank that holds a mortgage on a house. In such case, a bank often will require the homeowner to list the bank as a loss payee so that the bank will be entitled to the insurance proceeds to satisfy an outstanding mortgage in the event of loss to the house. If a landlord does not have an insurable or financial interest in a tenant's property, a landlord should not expect to be listed as a loss payee on any of a tenant's insurance policies.

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