IMPLIED CO-INSURED DOCTRINE
IN THE LANDLORD/TENANT CONTEXT

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I. RELEVANT LEASE PROVISIONS

A) Tenant required to maintain liability insurance - subrogation possible. Remy v. Michael D's Carpet Outlets, 571 A.2d 446 (Pa. Super. 1990), aff'd, 637 A.2d 603 (Pa. 1993); U.S. Fidelity & Guar. Co. v. Let's Frame It, Inc., 759 P.2d 819 (Col. Ct. App. 1988).

B) Landlord required to maintain property insurance.

1. Implied exculpatory agreement. General Cigar Co., Inc. v. Lancaster Leaf Tobacco Co., 323 F.Supp. 931 (D.Md. 1971); Mayfair Fabrics v. Henley, 244 A.2d 344 (N.J. Super. 1968).

2. Implied co-insured status prevents subrogation. Sutton v. Jondahl, 532 P.2d 478 (Okla. Ct. App. 1975); see also, Safeco Ins. Co. v. Weisgerber, 767 P.2d 271 (Idaho 1989).

C) "Yield Up" or other clauses placing responsibility on the tenant for its negligence may not be sufficient to render tenant liable for negligently caused fire damages. Tate v. Trailco Scrap, Inc., 745 F. Supp 458 (M.D. Tenn. 1989), aff'd, 908 F.2d 974 (6th Cir. 1990); Alaska Ins. Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216 (Alaska 1981).

II. REASONS FOR AND CRITICISMS OF THE IMPLIED CO-INSURED PRESUMPTION

A) The "reasonable expectations" of the parties concerning fire damage.

1. Generally, a party can expect to be liable for its negligent conduct. Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992); see also, Zoppi v. Traurig, 598 A.2d 19 (N.J. Super. 1990). Rather than looking for an exculpatory agreement concerning fire damages, the implied co-insured presumption reverses the inquiry, in some instances requiring an express and unequivocal agreement to be liable for negligently caused fire damages.

2. If parties reasonably expected that the landlord will bear the risk of the tenant's negligence causing fire damage, why is the tenant immunized only from subrogation actions? Why is the tenant not also immunized from direct liability to the landlord?

B) Tenant's estate is an included component of the landlord's estate and requiring tenant to insure its interest results in needless additional expense.

1. Distinction between property and liability insurance.

2. As an implied co-insured, tenant will still need liability insurance inasmuch as negligently caused fires may result in damages beyond the leased property. Antoon v. Community Emergency Medical Service, Inc., 476 N.W.2d 479 (Mich. Ct. App. 1991), app. denied, 483 N.W.2d 858 (Mich. 1992); Millican of Washington, Inc. v. Wienker Carpe Service, Inc., 722 P.2d 861 (Wash. Ct. App. 1986).

C) The tenant pays the landlord's insurance premium via rental payments.

1. Real estate market, and not landlord's insurance costs, establishes rental payments. Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992); Page v. Scott, 567 S.W.2d 101 (Ark. 1978).

2. Insurance company has evaluated the property risk and chosen to insure the landlord. Indeed, the insurer may consider subrogation potential in determining the cost of property insurance premium.

D) Public policy and equity require landlord's fire insurer to bear the risk of loss.

1. Public policy and equity require the party at fault to bear responsibility. Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992); see also, Zoppi v. Traurig, 598 A.2d 19 (N.J. Super. 1990).

2. Public policy concerns are not implicated when determining whether landlord's property insurer or tenant's liability insurer should bear risk of loss. Tate v. Trailco Scrap, Inc., 908 F.2d 974 (6th Cir. 1990) (J. Nelson, dissenting).

E) Emerging Trend is to presume tenant to be an implied co-insured.

1. Since 1980, seven of the twelve Courts to have considered this issue adopted the implied co-insured doctrine.

2. However, in 1990-1993, only two of the five Courts to have considered this issue adopted the implied co-insured doctrine.

III. SUMMARY

The particular facts of each loss, including the relevant lease provisions, the party's intentions, and the particular state law, must be reviewed. A landlord's insurer should not assume subrogation recovery cannot be obtained from a tenant.

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