**UPDATE ON FLORIDA'S IMPLIED WAIVER DOCTRINE IN LANDLORD-TENANT CASES**

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Subrogation, in the landlord-tenant context, lives or dies based on whether the jurisdiction follows what is called the Sutton rule. Not all jurisdictions have taken a stance on the Sutton rule. Florida was such an unsettled jurisdiction—until the recent case of *State Farm of Florida Ins. Co. v. Loo*, 2010 WL 445945 (Fla. 3d DCA Feb. 10, 2010).

**WHAT IS THE SUTTON RULE?**

When a landlord’s insurer brings a subrogation case against the tenant, courts take three approaches to determine whether subrogation is allowed. The three approaches have a majority rule, a minority rule, and a middle ground approach. The Sutton rule is the majority rule, which takes a bright line approach. It generally bars a landlord’s insurer from bringing a subrogation case on the ground the tenant is deemed an “implied co-insured” and an insurer cannot subrogate against its own insured. The rationale is that “[w]hen fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary.” *Sutton v. Jondahl*, 532 P.2d 478, 482 (Ct. App. Ok. 1975). The Sutton rule is also called the anti-subrogation rule because it presumes the tenant’s implied co-insured status, absent an express agreement to the contrary. The minority rule applies the converse of Sutton and presumes subrogation is permissible, absent an express or implied agreement to the contrary. This approach is commonly referred to as the “anti-Sutton rule.” The third approach takes a middle road—the “case-by-case approach.” Until recently, Florida’s approach was not certain.

**FLORIDA: SUTTON, ANTI-SUTTON, OR CASE-BY-CASE?**

The recent case of *State Farm of Florida Ins. Co. v. Loo*, 2010 WL 445945 (Fla. 3d DCA Feb. 10, 2010) brings us closer to clarity on Florida’s approach to when a landlord’s insurer can sue a tenant. Prior to the decision, no case had taken a strong stance on which rule Florida followed. Of the three previous significant decisions on the issue, one case from 1980 allowed subrogation to proceed and found no implied waiver, but the trend from two subsequent cases was to imply a waiver and bar subrogation.

The 1980 case was *Tout v. Hartford Accident & Indem. Co.*, 390 So. 2d 155 (Fla. 3d DCA 1980), finding no waiver. There, a buyer of land was residing on the premises as a monthly tenant leading up to the closing. Before the closing, the premises were destroyed by an accidental cooking fire by tenant. The contract for sale contained a clause which stated, “Seller assumes risk of loss from fire or otherwise until closing.” *Id.* at 155. The tenant raised this language as an affirmative defense, but the trial court struck that defense. This ruling was affirmed on appeal on the basis that “a limitation of liability for one’s negligent acts cannot be inferred unless such intention is expressed in unequivocal terms.” *Id.* at 156.

Note the phrase “unequivocal terms.” It will appear again.

In the meantime, however, the next case would deviate in result from Tout without ever mentioning the case. That case was *U.S. Fire Ins. Co. v. Norlin Industries, Inc.*, 428 So. 2d 325 (Fla 1st DCA 1983), affirming dismissal of a subrogation action filed by the landlord’s subrogated insurer against an allegedly negligent tenant where the lease required that the landlord maintain fire insurance on the leased premises. Specifically, paragraph 7 of the lease obligated the lessor to maintain fire insurance on the building; paragraph 11 provided for options on the part of the lessor and lessee in the event of fire damage; and paragraph 10 read as follows:

The lessee agrees to indemnify the lessor from any damage to the property or that may be sustained by individuals as the result of injuries on the premises due to the negligence of the lessee. The lessee further agrees to carry liability insurance with minimum limits
of $100,000 per person, $300,000 per accident with the
said lessor being named as a co-insured on the policy.

Id. at 325-326. The court viewed all of these provisions
together and concluded that “the obvious intent of the
parties was to shift the risk of damages caused by fire to an
insurer.” Accordingly, the tenant was deemed an implied
co-insured and subrogation was not allowed.

Subrogation was barred again in the next significant case,
that of Continental Ins. Co. v. Kennerson, 661 So. 2d 325, 330
(Fla. 1st DCA 1995). Kennerson was a subrogation case by the
landlord’s insurer against an allegedly negligent tenant in a
shopping center. The lease terms provided that the landlord
would provide property insurance on the shopping center,
that a portion of the tenant’s monthly payments would go
toward the premiums for such insurance, and that the tenant
“at its own cost and expense, maintain and provide general
liability insurance for the benefit of and protection of Lessor
and Lessee (said policy to name Lessor as a co-insured).”

Viewing the entirety of the lease, the court deemed the
tenant an implied co-insured and thus barred the subrogation
claim: “We conclude that a landlord’s insurer cannot exercise
any right of subrogation against a merely negligent tenant to
recover money paid to the landlord under a fire insurance
policy, where the landlord has agreed to bear the expense of
repairing fire damage and has assumed responsibility for
procuring fire insurance, the cost of which the tenant has
agreed to bear and has in fact borne.” Kennerson went so far as
to state that its holding was “clearly in keeping with the
modern trend of authority,” id. at 330, which it identified as
the approach set forth in Sutton. In footnote 1, the court
questioned Tout, stating:

The decision in Tout represents a minority view. The
majority view has been traced to Sutton v. Jondahl, 532
P.2d 478 (Okla.Ct.App.1975), where the court held that
a tenant should be deemed a landlord’s co-insured in
the absence of a lease provision to the contrary. Nine
other jurisdictions have followed the Oklahoma Court
of Appeals decision in Sutton.

The Norlin and Kennerson cases trended toward finding waivers
and against allowing subrogation. It appeared the trend was
toward the Sutton rule, even though neither case went so far
as to expressly adopt Sutton or expressly reject other two
approaches. Armed with these cases, the defendant in the
recent case of State Farm v. Loo was likely confident it would
get out on summary judgment based on these decisions.

And it did. Loo was a subrogation case by landlord’s insurer
against tenant for alleged causing a dwelling fire. When the
tenant filed a motion for summary judgment, the court
granted it on the basis of Norlin and Kennerson. On appeal,
however, the Third District Court of Appeal reversed.

The reversal emphasized that Florida does not apply the
Sutton rule. The court examined Tout, Norlin, and Kennerson
and found that in each case the court examined the specific
terms of the leases. The court noted that each case reached a
different result based in the actual language in the lease, not
based on a bright line rule. The court acknowledged
Kennerson’s nod to Sutton, but then stated that actual
approach in Kennerson was a case-by-case approach:

In reality, however, the [Kennerson] opinion reflects that
the First District’s holding was actually based on the
application of the case-by-case analysis because the
court considered several provisions in the parties’ lease
to determine their intent as to who should bear the risk
of loss for damage to the leased premises caused by
the tenant’s negligence. 661 So. 2d at 327-28. In
concluding that the trial court correctly entered final
summary judgment in favor of the tenant, thereby
concluding that Continental Insurance did not have a
right of subrogation against the tenant, the First
District relied on lease provisions requiring the landlord
to bear the expense of repairing any fire damage and
to procure fire insurance on the property, “the cost of
which the tenant has agreed to bear and has in fact
borne.” Id. at 330.

The appellate court in Loo, then applied the case-by-case
analysis, looking at the lease language itself and finding
nothing that deemed the tenant an implied co-insured. To the
contrary, the lease contemplated liability of the tenant. For
example, the lease stated, “If the demised premises… shall be
partially damaged by fire… not due to Lessee’s negligence…,
the premises shall be promptly repaired by Lessor…” The
court noted that this left open a claim against the tenant for
its negligence. The lease also required the tenant to refrain
from keeping “any article or thing of a dangerous,
inflammable, or explosive character that might unreasonably
increase the danger of fire on the leased premises or that
might be considered hazardous or extra hazardous by any
responsible insurance company.” The court then stated:

Further, there is no provision in the parties’ lease that (1)
exculpates the Tenant from liability for her own negligence;
(2) requires the Landlord to maintain insurance for the benefit of the Tenant; or (3) shifts any loss incurred as a result of the Tenant’s negligence to the Landlord.

Based on the terms of the lease, the court held that “because the parties did not in ‘unequivocal terms’ intend to limit the Tenant’s liability for negligent acts,” subrogation could proceed.

CONCLUSION

For subrogation to be barred, Norlin and Kennerson require “obvious intent” in the language to deem a tenant co-insured. Tout and Loo look to “unequivocal terms” to establish that intent. Taking these cases together, if the lease does not contain “unequivocal terms” by which a court can find obvious intent that the tenant is co-insured, the case against the tenant proceeds. Loo provides guidance on what would constitute unequivocal terms: those that (1) exculpate the tenant from liability for its own negligence; (2) require the landlord to maintain insurance for the benefit of the tenant; or (3) shift any loss incurred as a result of the tenant’s negligence to the landlord. Notice the word “or” that precedes item three: not all three prongs need be in the lease and one prong may be sufficient to deem a tenant an implied co-insured depending on the actual language. There may be future cases containing lease language different from those in Tout, Norlin, Kennerson, and Loo. How a court will view that language remains an open issue. Indeed, the Florida Supreme Court has not yet weighed in on the matter and could decide to adopt the Sutton rule or the anti-Sutton rule and reject the case-by-case approach. Until then, the survival of a landlord-tenant subrogation claim in Florida depends on the intent of the parties as expressed in the particular language in the lease.