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SUBROGATION CLAIMS AGAINST TENANTS IN MICHIGAN: THE CO-INSURED DOCTRINE REVISITED

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The *Sutton Doctrine* was established in 1975 by the Oklahoma Court of Appeals in *Sutton v. Jondahl*[1] recognizing a tenant as a co-insured of the landlord with respect to fire damage to leased residential premises. The landlord, and its insurer, are therefore, precluded from suing the tenant. The *Sutton Doctrine* has been generally adopted, but states differ on whether a tenant's co-insured status is implied in every lease, or must be expressly stated.

The seminal case in Michigan is *New Hampshire Insurance Group v. Labombard*[2], wherein the court indicated that a tenant is an implied co-insured in every lease, unless "expressly and unequivocal' stated otherwise. The Michigan judiciary rarely has found a subrogation right to exist, precluding the majority of subrogation claims against tenants.

Recent decisions have resurrected recovery opportunities, and *Labombard* has been deemed limited to tort claims.

In L*aurel Woods Apartments v. Roumayah*[3], the owner sued a tenant for a kitchen fire. The Court held that the trial court erred when it granted the defendant's motion for summary disposition based on the *Labombard* decision, because the defendant was contractually liable for the damages. The lease was found to have shifted the burden to the tenant for property damage caused to the premises. The Court also rejected the argument that the lease's failure to require the tenant to insure the premises precluded the landlord's recovery. The Court of Appeals distinguished between negligence and contract claims:

> *Labombard* does not apply to this case. *Labombard* was a negligence action, *whereas this is a breach of contract action.* The holding in Labombard makes plain that the Court was limiting negligence claims against tenants for fire damage to circumstances in which there is an express agreement allowing such liability. Thus, although the *Labombard* Court considered the parties' lease agreement, *the holding in Labombard has no applicability here.*[4]

The court further held that the lease agreement was "clear and unambiguous":

> Tenant shall also be liable for any damage to the Premises . . . that is caused by the acts or omissions of Tenant or Tenant's guests." Accordingly, defendants, who are defined as "Tenant," are liable for "any damage" caused by their act or omission. Fire damage is clearly encompassed by the broad term "any damage." *And defendants' liability is not limited to damage caused by their negligence, but rather, it extends to any damage that they cause, negligently or otherwise."*[5]

On October 28, 2008, the Michigan Court of Appeals extended this decision to subrogation claims arising out of losses paid to landlords. In an unpublished decision, *American States*

1. *Sutton v. Jondahl,* 532 P.2d 478 (Okla.App. 1975).
2. *New Hampshire Insurance Group v. Labombard,* 155 Mich. App 369, 375 (1986)
3. *Laurel Woods Apartments v. Roumayah,* 274 Mich. App. 631 (2007)
4. *Id.* at 637 (emphasis added).
5. *Id* (emphasis added).
6. *American States Insurance Company v. Hampton,* 2008 W.L. 4724279 (Mich. Ct. App. 10/28/08) (unpublished).

Insurance Company v. Hampton[6], the subrogee's contact claims were deemed to be unaffected by *Labombard.* Citing to *Laurel Woods,* the court found the lease had similar language, establishing a contractual right of recovery.

The Laurel Woods decision was reaffirmed in May 28, 2009 in *American State Insurance v. Ratcliff* [7]. The commercial lease agreement required the tenant to pay the landlord for property insurance premiums. After a fire damaged the premises, the insurer paid the landlord for the damage and brought a subrogation action against the tenant for negligence. The landlord subsequently joined the suit seeking damages for its uninsured loss. The critical question was whether the landlord or tenant bore the risk for any damage in excess of the policy limit. The Court of Appeals ruled that the lease contained an express agreement requiring the tenant to bear responsibility for negligence, and that these lease terms were consistent with *Laurel Woods.* While this decision didn't address the subrogation action, the trend continues of allowing recovery against tenants where the contract establishes the risk of loss against the tenant.

Because *Laurel Woods* is the only published decision, and doesn't directly address subrogation, some courts may still apply the reasoning of *Labombard.* The subsequent unpublished decisions, while not binding, provide a strong basis for applying *Laurel Woods* where the lease terms establish responsibility for property damage.

Cozen O'Connor has prepared a 50-state jurisdiction comparative chart, surveying the laws of every state regarding the implied co-insured doctrine. Should you need assistance in analyzing these claims for any pending or prospective loss, please feel free to contact the author, or any attorney in Cozen O'Connor's National and International Subrogation and Recovery Department.

7. *American State Insurance v. Ratcliff,* May 28, 2009, Wayne Circuit Court, LC No. 05-522975-NZ (unpublished). See Exhibit B.