Subrogating Against a Tenant
A Discussion of the Implied Co-Insurance Doctrine in the Northwest

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A. Introduction

Carriers that provide property insurance to landlords routinely handle losses determined to have been caused by the negligence of their insured landlord's tenant. Almost always the negligent tenant is not a named insured on the policy, had never written a check to the insurer to pay the premiums on the policy, and likely had no relationship with the landlord's insurer whatsoever. Occasionally, the tenant even has a renters insurance policy that provides liability coverage for the loss. Despite these facts, in many circumstances the landlord's carrier is legally prevented from subrogating against the negligent tenant.

Historically, the landlord's insurance carrier would be subrogated to the landlord's rights and would be entitled to recover the amount of the loss from the negligent tenant or the tenant's insurance policy. In today's world, however, many jurisdictions will consider the tenant an "implied" insured on the landlord's policy for the limited purpose of subrogation. As an "implied" insured, the tenant is legally immune from the landlord's property carrier's subrogation action under the same principle that prevents that carrier from subrogating against its named insured landlord. This theory is referred to as the implied coinsurance doctrine.

B. Background on the Implied Co-Insurance Doctrine

In a landlord-tenant relationship, a tenant is normally liable to a landlord in damages for any injury to the premises resulting from the tenant's own wrongful acts or negligence.[1] Adding the landlord's property insurer to this relationship, however, adds a new wrinkle. In some cases, the property insurer may be precluded from filing a

[1] See 49 Am.Jur.2d, Landlord and Tenant 934, 935 (1970).

subrogation claim against a tenant even if the tenant is negligent. This potential scenario is rooted in the "anti-subrogation" rule that provides an insurer cannot subrogate against its own insured.[2] The "anti-subrogation" rule is extended from the landlord as named insured to the unnamed tenant through the "implied co-insurance" doctrine.

The policy behind the implied coinsurance doctrine is rooted in the special relationship that exists between a tenant and landlord. This special relationship is recognized because: (1) both parties have a shared interest in the use, enjoyment and benefit of the leased premises; (2) both parties have an insurable interest in the leased premises, and (3) both parties have shared contractual duties to each other in the form of a lease agreement. Another driving force behind the implied coinsurance doctrine is the idea that a portion of the landlord's insurance premiums are passed on to the tenant in the form of rent. By paying rent, it is argued that tenants are actually purchasing their status as a co-insured under the landlord's policy.

The courts that apply the implied coinsurance doctrine further argue that "basic equity and fundamental justice" requires that the landlord's insurance policy also protect the landlord's tenant(s). These courts reason that an insurer understands the risk involved in insuring a rental property and can increase its premiums to reflect these risks. Landlords, in turn, are the parties in the best position to pass on these premiums in the form of rent and to undertake safety standards that may minimize the risk of tenant negligence. As the argument goes, it is inefficient and unnecessary for both the landlord and tenant to insure the same property.

It is a ten-year old and his experimentation with an inexpensive chemistry set that is often cited as the genesis of the implied coinsurance doctrine. In *Sutton v. Jondahl,*

[2] Couch on Insurance 3d §224:1 (2000).

532 P.2d 478 (Ok.Civ.App. 1975), the budding ten-year old chemist of a tenant took an electric popcorn popper to his bedroom to heat up some chemicals. Predictably, his experiment went awry and he accidentally caught the curtains on fire causing $2,382.57 in damage. When the landlord's fire insurance carrier sued the tenant claiming subrogation rights, the court revisited the "basic equity and fundamental justice upon which the equitable doctrine of subrogation is established." *Id.* at 482. The court held that, "when 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." *Id.* at 482. To the *Sutton* court, the special relationship between the landlord and tenant placed the tenant in a substantially different position than a fire-causing third party. While the court recognized that the carrier could have subrogated against a third-party, it held that the carrier should not be able to shift the insurable risk to the negligent tenant. *Id.* at 482.

Since *Sutton*, several courts[3] have adopted its strict rationale that unless the lease agreement expressly requires a tenant to procure fire insurance, the tenant is an implied co-insured of the landlord's policy. Other courts, however, have allowed a subrogation claim to survive despite the absence of an express agreement in the lease requiring the tenant to procure property insurance.[4] While these courts also look to the lease agreement, instead of focusing on the absence of an express agreement they focus on the

[3] *Parsons Manufacturing Corp. v. Superior Court*, 156 Cal. App. 3d 1151, 203 Cal.Rptr. 419 (Cal.Ct.App. 1984); *Continental Ins. Co. v. Kennerson*, 661 So.2d 325 (Fla.App. 1995); *United Fire & Casualty Co. v. Bruggeman*, 505 N.W.2d 87 (Minn.Ct.App. 1993); *Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (Wash.Ct.App. 1988).

[4] *Remy v. Michael D's Carpet Outlets*, 391 Pa.Super. 436, 571 A.2d 446 (1990) aff'd, 637 A.2d 603 (Pa. 1993); *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994).

reasonable expectations of the parties as expressed in the lease. Accordingly, these courts apply the doctrine on a case-by-case basis.

The courts that have strayed from *Sutton* do not accept the "fiction" that tenants actually pay for insurance through their rent.[5] In fact, some courts will allow subrogation even in the case where the tenant has directly contributed to the policy's premium.[6] Still other courts look to state statutes that impose responsibility on a tenant for destruction or damages to leased premises. Where these statutes exists, courts use them as a basis for allowing a subrogation claim against a negligent tenant.[7]

C. Understanding How Lease Provisions and Oral Agreements May Affect Subrogation Rights

It is clear from the case law that the answer to whether a subrogation claim against a tenant exists or not depends considerably on the lease agreement. Even the courts that follow the *Sutton* line of cases provide for the possibility of subrogating against a tenant if the lease agreement expressly provides that it is the tenant's responsibility to procure insurance for the premises. Accordingly, when analyzing a subrogation claim against a tenant the first step is to review the written lease agreement. Look for clauses that discuss which party is responsible for purchasing insurance, clauses discussing tenant negligence, subrogation waivers, and even clauses (called "yield-up clauses") that require the tenant to return the property to the landlord in as good a condition as received. Obviously, your analysis will change depending upon the

[5] *See e.g. Page v. Scott*, 263 Ark. 684, 567 S.W.2d 101, 103-04 (1978).
[6] *Finger v. Southern Refrigeration Services, Inc.*, 881 S.W.2d 890 (Tex.App. 1994).
[7] *Bennett v. West Bend Mut. Ins. Co.*, 546 N.W.204 (Wis.Ct.App. 1996); *New Hampshire Ins. Co. v. Jeffrey L. Hewins*, 627 P.2d 1159 (Kan. 1981).

jurisdiction and some jurisdictions are more favorable from a subrogating insurer's perspective than others.

If no written lease agreement exists, you must analyze what remains – an oral lease. The oral agreement should be interpreted using the same principles as a written agreement. Ask the parties if they had any discussions regarding property insurance and/or the possibility of a fire caused by the tenant's negligence. It is the "intent of the parties" that typically controls this analysis and so having a firm grasp of the parties agreement, whether written or oral, is important. The key issue will be whether the landlord expressly indicated to the tenant that the tenant is responsible for insuring the premises.

To avoid this issue altogether, it is possible for a property insurer to require the landlords it insures to put language into their leases that allow for future subrogation against a negligent tenant. Generally speaking, however, these requirements can be difficult to enforce and difficult to "sell" to a prospective insured who may not face this requirement with a competing insurer. Although recovery personnel find these to be entirely appropriate, insurance professionals who work in other areas of the business do not always agree. First party property insurance is expensive and so landlords who require their tenants to purchase it must be prepared to take those costs into account when setting the rent amount.

The following lease provisions are designed to circumvent the implied coinsurance defense and pave the way for successful subrogation against a tenant:

1. Example of an Insurance Provision

> Tenant shall purchase property insurance covering the premises rented for all risks of peril including, but not limited to, fire, flood and windstorm. Landlord has the right to purchase, at his own expense or for his own protection, property insurance on the entire premises owned by the landlord. In no event will landlord's property insurance be held for the protection of tenant. Tenants' purchase of property insurance is not to be considered a portion of its rent payment to landlord, but is in fulfillment of independent clauses to this agreement to protect the landlord. Tenant shall also purchase liability insurance for the full insurable value of the premises, naming landlord as an additional insured, protecting the property from risks of harm by third-parties. Tenant further agrees to indemnify and hold landlord harmless from any such risks of harm. Tenant is not to be considered an insured, implied or otherwise, on any of landlord's insurance policies unless expressly stated thereon.

2. Example of a Non-Waiver of Subrogation Provision

> Tenant and landlord do not waive rights of recovery against each other, or against the officers, employees, agents and representatives of the other for loss of or damage to its property or the property of others under its control. Tenant specifically agrees to remain liable to landlord and landlord's subrogating insurance carrier for any and all damages caused by his own negligence or the negligence of his guests, invitees, or licensees.

D. The Implied Co-Insurance Doctrine in the Northwest

The following summary outlines the leading implied co-insurance cases in Alaska, Idaho, Montana, Oregon, and Washington. The case law in each state should be reviewed for guidance when performing an implied coinsurance analysis.

Alaska	**Authority –** *Alaska Ins. Co. v. RCA Alaska Communications Inc.,* 623 P.2d 1216 (Alaska 1981)
	Background Facts - A fire occurred in a structure rented by a commercial tenant. The central

	issue was whether the lease established tenant's liability for negligently caused fire damage.
	Holding – After reviewing the lease, the court held that, "if a landlord in a commercial lease covenants to maintain fire insurance on the leased premises, and the lease does not otherwise clearly establish the tenant's liability for fire loss caused by its own negligence…the tenant is an implied co-insured of its landlord."
	Case-by-Case Analysis – Look to the terms of the lease for language specifically holding the tenant liable for a fire loss caused by his/her own negligence. Absent such a clause, the court likely will consider the tenant an implied coinsured.

Idaho	*Bannock Building Company v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994).
	Background Facts – A fire occurred in a structure rented by a commercial tenant. The lease agreement was oral. The tenant claimed the landlord stated that they had already procured fire insurance for the building and that there was no agreement regarding return of the property to the original condition upon vacating the premises. The landlord disagreed. The tenant did procure fire and property damage coverage for its personal equipment located within the office space.
	Holding – The court rejected the adoption of *Sutton* and held, "that on a case-by-case basis, the trier of fact must focus on the terms of the lease agreement itself and the facts and surrounding circumstances to determine what the reasonable expectations of the parties were as to who should bear the risk of loss for fire damage to the leased premises."
	Case-by-Case Analysis – Look to the lease agreement and surrounding circumstances to determine the parties reasonable expectations with respect to who bears the risk of loss for fire damage. Surrounding circumstances can include whether insurance was actually purchased by each party and whether the tenant is unprotected by its own insurance.

Montana	Not directly on point. *Continental Ins. Co. v. Bottomly*, 250 Mont. 66, 817 P.2d 1162 (1991)

	Background Facts – A fire destroyed a cabin that was used as a family seasonal dwelling. The court analyzed whether the brother and nephew of the named insured were covered under a homeowner's policy as an insured for subrogation purposes.
	Holding – The court held that the brother and nephew were insured. In dicta, the court offers some hint as to Montana's approach to implied co-insurance. First, the court quotes *Sutton* for the proposition that "subrogation is a fluid concept depending upon the particular facts and circumstances of a given case…" Second, the court quotes an earlier Montana Supreme Court decision for the principle that "subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owns no duty." This suggests that a tenant that is in privity with an insured landlord may be considered an implied co-insured.
	Case-by-Case Analysis – Montana has not squarely addresses the issue and so it is difficult to determine. Analyze the lease and surrounding circumstances for evidence that the parties intended for the tenant to remain liable for its own negligent actions and to provide property insurance on the premises.

Oregon	*Koch v. Spahn*, 193 Or.App. 608, 92 P.3d 146 (2004)
	Background Facts – A fire caused by a residential tenant's Christmas tree damaged a duplex. The disputed issue was the meaning of the rental agreement and whether it expressly or implicitly precludes a subrogation claim against the tenant.
	Holding – In stating that Oregon courts are "squarely with those courts that have concluded that whether there is a waiver of subrogation depends on the facts of each case and the terms of each rental agreement," the court rejected the *Sutton* line of cases. Instead, the court held that there was no express contractual obligation to maintain fire insurance on the *premises* (italics added) and therefore no basis for concluding that landlord's insurer was barred from pursuing a claim against the tenant. The court stated that, "the agreement in effect left it to the parties to decide whether they wished to maintain insurance on the premises." The court also relied on the Oregon landlord-tenant law that expressly provides that tenants may not "deliberately or negligently destroy the premises."
	Case-by-Case Analysis – Look to the lease agreement and surrounding circumstances to determine

	the parties reasonable expectations with respect to who bears the risk of loss for fire damage to the premises. Also look for clauses holding the tenant liable for his own negligent actions. Finally, review Oregon law regarding a landlord/tenant disputes - ORS 90.325 and ORS 90.400.

Washington	*Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (Wash.Ct.App. 1988)
	Background Facts – A fire caused by a residential tenant's grease pan fire destroyed a single family dwelling. The central issue was whether the written lease contained an express agreement by the parties to limit the benefit of fire insurance to the landlord.
	Holding – The court adopted the *Sutton* line of cases and held that the landlord is presumed to carry its insurance for the tenant's benefit absent an express provision to the contrary. Notably, the lease in question contained language that the tenants were not to negligently destroy the premises. Despite this language, the court held that the parties did not intend to limit the benefit of the insurance to the landlord. Therefore, absent an express agreement between the parties that the tenant will procure its own insurance for the building, the tenant will be considered an implied coinsured.
	Case-by-Case Analysis – Review the lease for language specifically requiring the tenant to procure its own property insurance (as opposed to renter's insurance). If the lease is oral, find out if this issue was discussed. If the lease is silent on the issue, the tenant is considered an implied coinsured.