

SPECIAL REPORT

WAIVERS OF SUBROGATION

(05-14-13)

This Special Report was written by Kenneth R. Hale, J.D., CPCU, AAI, LIC of Marsh & McLennan Agency LLC. Mr. Ken Hale can be contacted at 734-525-2412 or khale@mma-mi.com. More Special Reports are available at www.mma-mi.com.

When an insurance carrier for an insured pays a claim, it is assigned the right to sue (or subrogate) against any party that may be liable for the claim. The insurance carrier is assigned the rights of its insured. If its insured does not have the right to recover from another party, neither does the insurance carrier.

Subrogation claims can be typically made against tenants, customers, landlords, and other parties. When a subrogation claim is made, it is a lawsuit that is filed in the name of the insured. Therefore, it is conceivable that an insured may be suing its own customer or its own tenant under the subrogation provisions of insurance policies.

More importantly, as respects landlord-tenant relations, if a tenant is liable for a fire (for example) which destroys a landlord's building, it is subject to a recovery action by the landlord's insurance company unless the lease releases the tenant from this action.

It is critical that tenants understand that insurance on the typical tenant's liability policy provides minimal protection for claims by the landlord or the landlord's insurance company for damage to the landlord's building caused by tenant negligence.

The standard tenant liability policy only provides coverage for up to \$100,000 of fire damage to a landlord's building. Claims for explosion, water damage, vehicle damage and other claims would not be covered. A 30,000 square foot leased building could cost \$3,000,000 to replace, and the \$100,000 in fire coverage provided to a tenant would not be sufficient. That same office building could be extensively damaged by water that overflows from a blocked toilet. This type of claim would not be covered at all under the typical tenant liability policy.

Property insurance policies for landlords and tenants usually allow for a waiver of subrogation without notice to the insurance company and without any additional charge. The standard ISO property insurance policy also allows a waiver of subrogation to be executed after a loss as respects a tenant.

There are many variations of waivers of subrogation language in leases. The typical clause waives the right of either the landlord or the tenant to the extent they have insurance. The problem with this language is that if either party does not have sufficient insurance, has substantial deductibles, or is subject to coinsurance or protective safeguards penalty clauses, the other party will not be protected by the waiver of subrogation clause. In other words, the waiver of subrogation applies only to the extent that the other party has a quality insurance program with a minimal deductible.

Release and Waiver of Subrogation – SAMPLE #1

Landlord and Tenant will each look to its own insurance for recovery of any loss resulting from fire or other casualty. Landlord and Tenant release one another from such claims. Landlord and Tenant waive any right of recovery of insured claims by anyone claiming through them, by way of subrogation or otherwise, including their respective insurers. This release and waiver remains effective despite either party's failure to obtain insurance. If either party fails to obtain insurance, it bears the full risk of its own loss.

Release and Waiver of Subrogation – SAMPLE #2

Landlord and Tenant mutually agree to release one another from any and all claims with respect to any loss covered by (or which should have been covered) the insurance coverages which were required and/or recommended within the "INSURANCE" provisions of this Lease. For purposes of this Section, all deductibles shall be considered insured losses. They further mutually agree that their respective insurance companies shall have no right of subrogation against the other on account thereof. Except for Landlord's negligence or willful misconduct, Landlord shall have no responsibility or liability for any loss of or damage to improvements, furniture, fixtures, equipment, merchandise or other personal property of Tenant. With the exception of Landlord's negligence or willful misconduct, Tenant agrees that Landlord shall not be liable to Tenant or those claiming

under Tenant for injury, death or damage or loss occasioned by the acts or omissions of any third party or the condition of the Facility, the acts or omissions of any other person present at the Facility, whether or not such persons are present with the knowledge or consent of Landlord. Except for Landlord's negligence or willful misconduct, Tenant agrees that Landlord shall not be responsible or liable to Tenant, or to those claiming by, through or under Tenant, for any loss or damage that may arise (i) by or through the acts or omissions of other Facility occupants, or otherwise, or (ii) loss or damage from the bursting, stopping or leaking of water, gas, sewer or steam pipes.

Release and Waiver of Subrogation – SAMPLE #3

Landlord and Tenant agree to have all property and liability insurance which may be carried or is required to be carried by either of them endorsed, unless policy language has already been provided, with a clause providing that any release from liability of or waiver of claim for recovery from the other party or any of the parties named in this Lease entered into in writing by the insured thereunder prior to any loss or damage shall not affect the validity of said policy or the right of the insured to recover thereunder, and providing further that the insurer waives all rights of subrogation which such insurer might have against the other party or any of the parties named in this Lease.

Without limiting any release or waiver of liability or recovery contained in any other provision of this Lease but rather in confirmation and furtherance thereof, Landlord and any beneficiaries of Landlord waive all claims for recovery from Tenant, and Tenant and any beneficiaries of Tenant waive all claims for recovery from Landlord, any beneficiaries of Landlord and the managing agent for the Premises and their respective agents, partners, members, managers and employees, for any loss or damage to any of its property, resultant loss of income or extra expenses, or liability claims occurring on the premises.

This document is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Marsh & McLennan Agency LLC shall have no obligation to update this publication and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting or legal matters are based solely on our experience as consultants and are not to be relied upon as actuarial, accounting, tax or legal advice, for which you should consult your own professional advisors. Any modeling analytics or projections are subject to inherent uncertainty and the analysis could be materially affected if any underlying assumptions, conditions, information or factors are inaccurate or incomplete or should change.