



LANDLORD/TENANT SUBROGATION IN ALL 50 STATES




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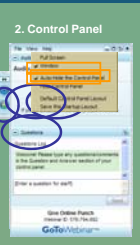
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THREE STEPS TO SUCCESSFUL SUBROGATION

1. Recognizing Subrogation
2. Prompt Action On Subrogation
3. Maximizing The Recovery





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LANDLORD/TENANT SUBROGATION ANALYSIS

- Answer The Following Questions For Every Claim:
 1. In Which Jurisdiction Was The Loss?
 2. Does The *Sutton* Rule Apply?
 3. Is There A Written Lease?
 4. How Does The Lease Address The Intention Of The Parties?
 5. What Are Your SUBROGATION RIGHTS?


**MUST KNOW ANSWERS TO MAXIMIZE RECOVERY
ANSWERS DEPEND ON WHICH STATE YOU ARE IN**



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THE *SUTTON* RULE

- *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975)
- Applicable In Many States
- Tenant Is Considered Co-insured With Landlord Under Landlord's Policy With Respect To Fire Damages To Residential Property
- Landlord's Insurer Cannot Sue The Tenant In Subrogation Because To Do So Would Be As If Suing Its Own Insured






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THE LOGIC BEHIND *SUTTON*

- Decided On Principles Of Basic Equity And Fundamental Justice
- Not Decided On The Language Of The Lease
- Exception: IF Lease Terms Establish Tenant's Liability
- Landlord's Insurance Is Liable For The Mutual Benefit Of Both



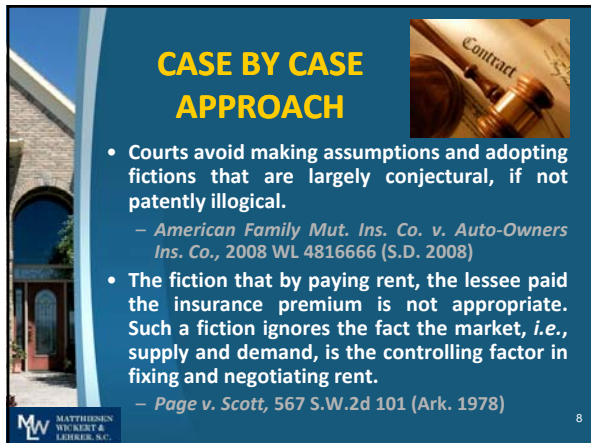

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SUTTON LOGIC CONTINUED....

- Both Landlord And Tenant Have Insurable Interest In Rented Property
 - Landlord Owns The Fee Interest
 - Tenant Own The Possessory Interest
- Paid Insurance Premium Is An Overhead Expense And Is Considered By Landlord When Fixing Rent
- Tenant Pays Premium As Part Of Monthly Rent
- Absent Express Language In Lease, Tenant May Rely On Landlord To Provide Insurance For Realty

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CASE BY CASE APPROACH

- Courts avoid making assumptions and adopting fictions that are largely conjectural, if not patently illogical.
 - *American Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 2008 WL 4816666 (S.D. 2008)
- The fiction that by paying rent, the lessee paid the insurance premium is not appropriate. Such a fiction ignores the fact the market, *i.e.*, supply and demand, is the controlling factor in fixing and negotiating rent.
 - *Page v. Scott*, 567 S.W.2d 101 (Ark. 1978)

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CASE BY CASE APPROACH CONTINUED....

- Some states have adopted more logical standards for determining when a tenant is exonerated from liability from negligent conduct.
- Iowa Supreme Court: Landlord and tenant have separate estates capable of being valued and insured separately.
 - *Neubauer v. Hostetter*, 485 N.W.2d 97 (Iowa 1992).
- Applies basic contract principles and the equitable underpinnings of subrogation.
 - Intent and reasonable expectations of the parties when negotiating the terms of the lease.

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STATUTORY REJECTION OF *SUTTON*

- Wisconsin Statutes § 704.07(3)(a)
 - Makes Tenant Automatically Liable To Landlord For Damage To Property Caused By Tenant's Negligence
 - Tenant Is Precluded From Claiming Co-Insured Status Under Landlord's Insurance Policy So As To Avoid Subrogation Where Lease Is Silent As To Fire Insurance Coverage
 - *Bennett v. West Bend Mut. Ins. Co.*, 200 Wis.2d 313 (Wis. App. 1996)




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CONTRACT/LEASE TERMS

- Clearly, when considering subrogation in the context of Landlord/Tenant cases, the application of *Sutton* is only the beginning.
- Subrogation can be denied if the lease specifically requires the landlord to maintain fire insurance and exonerates tenant from losses caused by fire.



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CONTRACT/LEASE TERMS CONTINUED

- Obtain A Copy Of The Lease
 - Exculpatory Clauses And Mutual Releases
 - Terms Requiring Tenant To Obtain Fire Insurance To Cover Negligence Of Same
 - Whether Landlord Has Agreed To Carry Insurance For Benefit Of Both Parties
 - Landlord Is In Best Position To Negotiate With Insurance Carriers To Ensure That Realty Is Covered In Event Of Fire



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EXAMPLE OF LEASE TERMS: VA

- A tenant's liability to the landlord's insurer for negligently causing a fire depends on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole.
 - *Monterey Corp v. Hart*, 224 S.E.2d 142 (Va. 1976).

1. Damages to Premises, Etc. Resident shall maintain the premises and be financially responsible for all repairs to the Premises and fixtures beyond normal wear and tear. However, Management, not the Resident, shall make the repairs and charge the Resident for said repairs and Resident shall pay.

7. Renters Insurance - Personal Property of Resident: All personal property placed on the premises, storage, rooms, or in any other part of the Management's property, shall be at the sole risk of the Resident, or the parties owning same, and Management shall not be liable for the loss, destruction, theft of or damage to such property. MANAGEMENT REQUIRES THAT THE RESIDENT OBTAIN "RENTERS INSURANCE" FOR BOTH LIABILITY AND THEIR PERSONAL PROPERTY. All new and renewing leases must be accompanied by a current proof of insurance certificate showing minimum liability coverage \$300,000.00 and listing the apartment community as a certificate holder. If there are roommates on the lease, ALL roommates must provide proof of insurance. Unmarried couples are considered roommates.

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EXAMPLE OF LEASE TERMS: MD

- Tenant's liability for damage to the leased premises should be determined by the reasonable expectations of the parties to the lease itself and other admissible evidence.
 - *Rausch v. Allstate Ins. Co.*, 882 A.2d 801 (Md. 2005).

REPAIRS. 15. Landlord shall be responsible for repairs to the Premises, its equipment and appliances furnished by Landlord, except that Tenant agrees to pay the cost for all labor and material for repairs or replacement if the damage or malfunction to the Premises, its equipment or appliances or any other part of the apartment building, is due to the acts or omissions of Tenant, Tenant's family, guests, agents or employees. Tenant agrees to immediately pay the cost of same upon presentation of the bill to the Tenant by the Landlord.

DAMAGES TO PREMISES. 16. In case of injury to the Premises by fire or the elements (not caused by the fault, omission, negligence, or other misconduct of Tenant, Tenant's family, guest, agents or employees), the Landlord will repair the damage, the rent being suspended only for such time as the Premises, in the sole opinion of the Landlord, shall remain untenantable; but if the Premises are so damaged that the Landlord shall decide that it is not advisable to repair the Premises with the Tenant occupying same, this Lease shall terminate and the Tenant shall only be liable for rent to the date of injury.

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COMMERCIAL SETTINGS



- If commercial tenant were shielded from subrogation lawsuits, tenant's liability carrier would acquire windfall.
 - Lease exists between two sophisticated parties.
 - Receives premium from tenant to insure against tenant's negligent acts but escapes having to pay in event of fire caused by tenant's negligence.


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COMMERCIAL SETTINGS CONTINUED....

- Collateral Source Rule is undermined.
- If tenant is deemed co-insured without any intent of parties in lease, court would be re-writing landlord's fire insurance policy which provides that the landlord is the only insured.





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TIPS FOR THE SUBROGATION PROFESSIONAL



- Familiarity With Laws Of Particular Jurisdiction
 - MWL chart addressing property subrogation in landlord/tenant settings for all 50 states can be found at www.mwl-law.com.
- Determine Whether The *Sutton* Rule Applies
- Obtain Copy Of Lease And Review For Intent And Reasonable Expectations Of Parties
- We Want Recoveries Today....Not Tomorrow!



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