

LANDLORD/TENANT SUBROGATION IN ALL 50 STATES

The ability of a landlord's property insurer to subrogate against a tenant for property damage caused by the negligence of the tenant depends on which state the loss occurs in and the nature and language of the lease involved. There are generally three different approaches:

- (1) A minority of courts hold that, absent a clear contractual expression to the contrary, the insurance carrier will be permitted to sue a tenant in subrogation.
- (2) Seeking to avoid a *per se* rule, in some states the ability to subrogate must be assessed on a case-by-case basis and governed by the intent and reasonable expectations of the parties under the terms of the lease and the facts of case.
- (3) Known as the "*Sutton Rule*", some states hold that, absent a clearly expressed agreement to the contrary, the tenant is presumed to be a co-insured on the landlord's insurance policy, and therefore the landlord's insurance carrier has no right of subrogation against the negligent tenant. The rule of subrogation known as the "*Sutton Rule*" states that a tenant and landlord are automatically considered "co-insureds" under a fire insurance policy as a matter of law and, therefore, the insurer of the landlord who pays for the fire damage caused by the negligence of a tenant may not sue the tenant in subrogation because it would be tantamount to suing its own insured.

The "*Sutton Rule*" is derived from an Oklahoma Court of Appeals decision styled *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975) and is the benchmark against which the landlord/tenant subrogation laws of most states are measured. It is the modern rule and the rule more and more states are moving toward.

There are three approaches used by trial courts in the country to resolve the implied co-insured "*Sutton Rule*" approach. These approaches include:

- (1) the no-subrogation (or implied co-insured) approach, in which, absent an express agreement to the contrary, a landlord's insurer is precluded from filing a subrogation claim against a negligent tenant because the tenant is presumed to be a co-insured under the landlord's insurance policy;
- (2) the pro-subrogation approach, in which a landlord's insurer can bring a subrogation claim against a negligent tenant absent an express term to the contrary; and
- (3) the case-by-case approach, in which courts determine the availability of subrogation based on the reasonable expectations of the parties under the facts of each case.

The following is a summary of the law in all 50 states with regard to the subrogation of a landlord's insurance carrier against a negligent tenant whose careless acts cause damage to or destruction of the leased premises.

ALABAMA

If a lease clearly and unambiguously states that each party agrees to cause any fire insurance policy on the property to contain a waiver of subrogation or endorsement under which the insurance company waives its right of subrogation against any party to the lease agreement in the case of destruction or damage by fire, each party waives any cause of action against the other in case their property is damaged by fire as the result of other's negligence. *McCay v. Big Town, Inc.*, 293 Ala. 582, 307 So.2d 695 (Ala. 1975).

ALASKA

A fire insurer is not entitled, as subrogee, to bring an action against a tenant to recover for amounts paid to landlord for fire damage to rental premises caused by the tenant's negligence in absence of an express agreement between the landlord and tenant to the contrary. This is because the landlord and tenant are considered co-insureds under our fire policy. *Alaska Ins. Co. v. RCA Alaska Communications, Inc.*, 623 P.2d 1216, 1218 (Alaska 1981). However, later case law indicates that the tenant is a co-insured under the lease only if the lease expressly provides for same. *Great American Ins. Co. v. Bar Club, Inc.*, 921 P.2d 626 (Alaska 1996). However, in that case, the tenant's insurer was suing the landlord for causing the fire and the Court held that since the policy was purchased by the tenant and named only the tenant as insured, equitable principles underlying "Implied Insured Doctrine" did not apply.

ARIZONA

Arizona has avoided *per se* rules and has taken a more flexible case-by-case approach, holding that 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. *General Accident Fire & Life Assurance Corp. v. Traders Furniture Co.*, 401 P.2d 157 (Ariz. App. 1981).

ARKANSAS

Arkansas has avoided *per se* rules and taken a more flexible case-by-case approach, holding that a tenant's liability to the landlord's insurer for negligently causing a fire will depend on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole. *Page v. Scott*, 567 S.W.2d 101, 103 (Ark. 1978).

CALIFORNIA

California has avoided *per se* rules with regard to the "Sutton Rule" (see Oklahoma) and taken a more flexible case-by-case approach, holding that 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. *Fire Ins. Exch. v. Hammond*, 83 Cal. App.4th 313, 99 Cal. Rptr.2d 596, 602 (Cal. 2000).

California has generally held that a lessee is not responsible for damages where the lessor and lessee intend the lessor's fire policy to be for their mutual benefit. *Hammond*, *supra*. The import of this rule is that an insurer may not seek subrogation against an insured's lessee in such cases for a fire he or she negligently causes, even when the elements necessary for subrogation have otherwise been met.

California prohibits a subrogation action by the fire insurance company of a lessor against a lessee where a lessee's negligence causes a fire, but the policy is intended to benefit the lessee. In such cases, the lessee is treated as an insured, despite the lessee not being a named insured on the policy. Because the insurance company could not seek subrogation against its own named insured (the lessor), it cannot seek subrogation against the lessee. *Western Heritage Ins. Co. v. Frances Todd, Inc.*, 2019 WL 1011104 (Cal. App. 2019). This comes into play via the doctrine of superior equities, which prevents an insurer from recovering against a party whose equities are equal or superior to those of the insurer. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 49 Cal. Rptr.3d 785 (Cal. App. 2006).

In *Fred A. Chapin Lumber Co. v. Lumber Bargains, Inc.*, 189 Cal.App.2d 613 (Cal. App. 1961), a lessor's policy was held to be for the mutual benefit of the lessor and lessee where the lease expressly required the lessor to maintain fire insurance. This rule was followed in *Gordon v. J.C. Penney Co.*, 7 Cal.App.3d 280 (Cal. App. 1970). That court affirmed a judgment in favor of the lessee following a court trial, stating, "A fire insurance policy which does not cover fires caused or contributed to by the insured would be an oddity indeed. ... Otherwise, few insured fire claims would be paid without controversy and most would require litigation." For that reason, courts do not deem that a policy "for the benefit" of a lessee excludes coverage for fires caused by his negligence.

In *Liberty Mutual Fire Ins. Co. v. Auto Spring Supply Co.*, 59 Cal.App.3d 860 (Cal. App. 1976), the lessee's insurer was denied subrogation against the sub-lessee where the sub-lessee's rent covered the premium on the lessee's fire policy and proceeds of the policy were to be used to repair fire damages. The court held it was quite obvious from these provisions that the parties to the lease and the sublease all intended that the proceeds of [the insurance company's] fire insurance policy, maintained by the lessee at [the sub-lessee's] expense, were to constitute the

protection of all parties to the lease documents against fire loss[.] This was the commercial expectation of these parties. Stated otherwise, under the facts of this case, we regard the subtenant ... as an implied in law co-insured of [the lessee], absent an express agreement between them to the contrary.” (*Id.* at p. 865.)

A lessor can shift to the lessee the burden of insuring against the lessee’s negligence. However, where the lease agreement adverts to the possibility of fire and there is no clear language or other admissible evidence showing an agreement to the contrary, a lease agreement should be read to place on the lessor the burden of insuring the premises (as distinguished from the lessee’s personal property) against lessor *and lessee* negligence.” *Parsons Mfg. Corp. v. Superior Court*, 203 Cal. Rptr. 419 (Cal. App. 1984).

In *Western Heritage Ins. Co. v. Frances Todd, Inc.*, 2019 WL 1011104 (Cal. App. 2019), the lease required the tenant to obtain only liability insurance and not fire insurance. The implication of this is that fire insurance would be carried by the lessor. Lessors were also prohibited from purchasing fire insurance under the covenants and conditions of the condominium association. Therefore, there was no way to protect themselves from fire. Finally, the yield-up clause in the lease provided that lessees agreed to “surrender the Premises at the termination of the tenancy herein created, in substantially the same condition as they were on the Commencement Date, reasonable wear and tear, *casualty*, and any alterations, improvements, and/or additions which are the property of the Lessor under Paragraph 7 excepted.” “Casualty” includes damage from fire. The clause is similar to the one in *Parsons*. Where the lease agreement “adverts to the possibility of fire and there is no clear language or other admissible evidence showing an agreement to the contrary, a lease agreement should be read to place on the lessor the burden of insuring the premises (as distinguished from the lessee’s personal property) against lessor and lessee negligence.” Therefore, the tenant was an implied co-insured of the landlord and subrogation against it was barred because there was no express agreement that tenant would obtain his own fire insurance.

COLORADO

A landlord’s insurer may recover against a tenant only if the landlord has the right to recover against the tenant. *Employers Cas. Co. v. D.M. Wainwright*, 473 P.2d 181 (Colo. 1970). The ultimate question presented is whether provisions of the written lease between the tenant and its landlord have circumscribed the landlord’s right of recovery under the circumstances of the case. *U.S. Fidelity & Guar. Co. v. Let’s Frame It, Inc.*, 759 P.2d 819 (Colo. App. 1988) (redelivery clause in lease has applicability only to premises subject to lease and cannot affect tenant’s liability for damage done to landlord’s other property).

CONNECTICUT

Tenants are co-insureds under a landlord’s fire insurance policy and may not be sued for their negligence as they are an insured under the policy. *St. Paul Fire & Marine Ins. Co. v. Durr*, 2001 WL 984782 (Conn. Super. 2001) (*not reported in A.2d*). This holding was first adopted in *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975) (“*Sutton Rule*”). An exception to this rule exists where there is a lease that addresses the subrogation rights of the landlord. In the absence of a specific agreement to the contrary, there is no subrogation. The reasoning behind this is that the tenant is deemed to be a *co-insured* of the landlord because: (1) both parties have an insurable interest in the premises, the landlord as owner, and the tenant as possessor, of the fee; and (2) the tenant’s rent presumably includes some calculation of the landlord’s fire insurance premium.

In *DiLullo v. Joseph*, 792 A.2d 819 (Conn. 2002), the Connecticut Supreme Court established a “default rule of law” where there is no agreement between landlord and tenant as to who bears the risk of loss. The “default” is that, unless the lease refers to a right of subrogation on the part of the landlord or its insurer, no right of subrogation exists. The *DiLullo* Court specifically noted that “*tenants and landlords are always free to allocate their risks and coverages by specific agreements, in their leases and otherwise.*” *Id.*

In *Middlesex Mutual Assurance Co. v. Vaszil*, 279 Conn. 28 (2006), the Connecticut Supreme Court held that the lease in question did “*not remotely inform the defendant that they would be liable to their landlord’s insurer*” for fire damages to the landlord’s building, nor did it inform the defendant of the need to obtain fire insurance “*to cover the value of the entire multi-unit apartment building.*” One of the reasons *DiLullo* established a “default” rule was to avoid the economic waste of forcing *each* individual tenant in a multi-unit apartment to insure the whole building.

The lease in Middlesex was ambiguous about whether the defendant's liability was limited to loss of the security deposit, so no subrogation was allowed. However, in *Amica Mut. Ins. Co. v. Andresky*, 2012 WL 527678 (Conn. Super. Ct. 2012), the lease provided:

(1) that tenant (defendants) would obtain public liability and fire insurance for the benefit of the landlord and the tenant in the amount of \$500,000 for liability and \$500,000 for fire, and (2) the tenant would pay all costs if repair is required because of misuse or neglect by tenant, his family or anyone else on the premises.

The Superior Court in *Andresky* said that this language was "far more clear" and informed the defendant/tenant that they would be liable to their landlord's insurer. The following year, another Superior Court decision stated that a lease must mention subrogation and/or inform the defendant that he may be liable to the landlord's insurer for any casualty fire damages to the landlord's building. *State Farm Fire & Cas. Ins. Co. v. Rodriguez*, 2013 WL 5879514 (Conn. Super. 2013). Like the lease agreement involved in *Vaszil*, the lease in *Rodriguez* made no mention of subrogation and did not remotely inform the defendant of liability to the landlord's insurer for any casualty fire damages to the landlord's building.

In *Amica Mut. Ins. Co. v. Muldowney*, 180 A.3d 950 (Conn. 2018), the Connecticut Supreme Court took a fresh look at the issue of a landlord's property insurer subrogating against tenants. The landlord's carrier paid for water damage caused by frozen pipes of a tenant who was on vacation. The issue was what sort of "specific agreement" (see *DiLullo*) was required to expressly state that a landlord's carrier has a right of subrogation and overcome the *DiLullo* presumption against subrogation (more precisely, overcomes that "the tenant's rent presumably includes some calculation of the landlord's fire insurance premium). The Supreme Court loosened the prohibitions against subrogating against a tenant by stating that the lease doesn't have to expressly state that a landlord's insurer has a right of subrogation against the tenant in order for subrogation to be allowed. It is sufficient for the lease to notify the tenant explicitly that he is responsible for any damage to the leased property and to allocate to the tenant the responsibility to provide liability and property damage insurance. Under the lease in that case, the tenants were required to take certain actions designed to guard against frozen pipes and subsequent water damage. The lease also stated that if they breached the lease, the tenant had to pay for repairs if their actions made the premises unfit or unlivable and to hold the landlord harmless for any loss arising out of their use or occupancy of the premises. As a result, subrogation was allowed. The Supreme Court held that (1) the landlord and tenant had a "specific agreement" sufficient to overcome the default presumption that the landlord's insurer had no right of subrogation against the tenants; and (2) the landlord's carrier was allowed to pursue subrogation against the tenants and this was fair and consistent with the doctrine of equitable subrogation.

All fire insurance policies issued in Connecticut must conform to C.G.S.A. § 38a-308. In regard to the insurer's subrogation rights, the standard form includes a subrogation provision stating: "This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by this Company." The subrogation clause set forth in C.G.S.A. § 38a-307 fails to provide an insurer with a direct, and inviolate, right of subrogation. It merely provides that an insurer "may require" an insured to assign any rights they have to the insurer. Thus, under this clear language, the right of recovery belongs to the insured, and the insurer can only obtain that right when the insured grants it. *Wasko v. Manella*, 849 A.2d 777 (Conn. 2004). The policy must contain specific subrogation language.

DELAWARE

A fire insurer is not entitled, as subrogee, to bring a subrogation action against a tenant to recover amounts paid to the landlord for fire damage to rental premises caused by the tenant's negligence in absence of an express agreement between the landlord and tenant to contrary. The landlord and tenant are co-insureds under the fire policy. *Lexington Ins. Co. v. Raboin*, 712 A.2d 1011, 1016 (Del. Super. Ct. 1998). The *Lexington* decision surveyed the law of multiple jurisdictions in holding that the "trend of modern jurisprudence holds that fire insurance secured by the landlord has been obtained for the mutual benefit of landlord and lessee." In *Deloach v. Houser*, 2018 WL 5899080 (Del. Super. 2018), the insurer for an apartment complex joined a suit filed by two tenants against a third tenant who caused a fire. The court affirmed that the *Sutton* Rule is the rule followed in Delaware.

In a 2013 federal court decision, a residential lease where the landlord could have but did not allocate the burden of a loss due to fire on her property to the tenant, and the landlord did not impose liability on the tenant for

negligence in causing a fire or impose an obligation to purchase insurance. *State Farm Fire and Casualty Company v. Lauzon*, 2023 WL 1991827 (D. Del. 2023). The court dismissed the subrogation action against the tenant because the landlord did not impose liability on the tenant for negligence in causing a fire nor impose an obligation to purchase insurance. The insurer, instead, agreed to insure for fire loss, and argued the court should construe missing language in the lease to infer the tenant should be obligated to pay the insurer in subrogation when the landlord and tenant never agreed to the tenant being obligated to pay the landlord for negligence causing a fire in the leased property. The federal court followed Delaware law in holding that a tenant is assumed to be a co-insured under the landlord's home insurance policy absent contrary language in the lease with the tenant.

DISTRICT OF COLUMBIA

Not applicable.

FLORIDA

Florida has avoided *per se* rules with regard to the “*Sutton Rule*” (see Oklahoma) and taken a more flexible case-by-case approach, holding that 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. *Continental Ins. Co. v. Kennerson*, 661 So.2d 325, 327 (Fla. App. 1995) (denied subrogation because the lease provided that damage caused by fire “*shall be repaired by and at the expense of Lessor*”); *State Farm Florida Ins. Co. v. Loo*, 2010 WL 445945 (Fla. App. 2010) (rejected presumptions against or for subrogation under the *Sutton* “Implied Co-Insured Doctrine” or its opposite, the anti-*Sutton* approach).

In *Zurich Am. Ins. Co. v. Puccini, LLC*, 271 So.2d 1079 (Fla. App. 2019), a commercial restaurant tenant caused a fire for which Zurich paid over \$ 2.1 million dollars. Zurich subrogated against the tenant, who argued he was an implied co-insured under the Zurich policy. The trial court agreed and dismissed the case. The Court of Appeals noted that the lease provisions were very different from those in *Kennerson*. Although the tenants in *Kennerson* paid a pro-rata share of the fire insurance, the court did not rely on that fact alone. Instead, the court considered the lease as a whole. The lease in *Kennerson* provided that “damage caused by fire ‘shall be repaired by and at the expense of [landlord].’ ” *Kennerson*, 661 So.2d at 328. Moreover, the parties in *Kennerson* agreed that the tenant “would be excused even from paying rent for damaged premises while [the landlord] applied insurance proceeds ... to effect repairs.” Finally, the lease in *Kennerson* had “no provision making [tenant] liable for damages its negligence might cause.” In *Puccini*, the parties agreed that the tenant would be “fully responsible” for damage caused by fire, and the landlord had no obligation to make repairs “occasioned by any intentional or negligent act of Tenant, its agents, or its employees.” Further, the lease provided that Tenant would be liable for damages caused by its negligence, that it would maintain its own fire insurance for damage claims, “arising out of accidents occurring in or around the Premises[,]” and that Landlord would be held harmless for such damage claims. Thus, unlike in *Kennerson*, the risk-allocating provisions in *Puccini* did not show an intent to shift the risk of loss from a negligent tenant to the landlord’s insurer. Instead, the clear intent of the parties was that the tenant would bear the risk of loss due to damage resulting from Tenant’s negligence. Therefore, the court in *Puccini* found that the tenant was not an implied co-insured under Zurich’s policy and, therefore, Zurich could proceed with its subrogation action against the tenant.

GEORGIA

Georgia has avoided *per se* rules and taken a more flexible case-by-case approach, holding that 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. *Tuxedo Plumbing & Heating Co. v. Lie-Nielsen*, 262 S.E.2d 794 (Ga. 1980).

HAWAII

Hawaii has not directly addressed this issue.

IDAHO

Idaho has avoided *per se* rules with regard to the “*Sutton Rule*” (see Oklahoma) and taken a more flexible case-by-case fire approach, holding that 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. *Bannock Bldg. Co. v. Sahlberg*, 887 P.2d 1052 (Idaho 1994).

ILLINOIS

Residential Lease. Illinois has until recently avoided *per se* rules with regard to the “*Sutton Rule*” (see Oklahoma) and taken a more flexible case-by-case approach, holding that 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. *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622 (Ill. 1992). *Dix* was a case involving a residential lease. The Supreme Court said that although a tenant is generally liable for fire damage caused to the leased premises by his negligence, if the parties intended to exculpate the tenant from the negligently caused fire damage, their intent - as expressed in the lease agreement - will be enforced. To make this determination, the lease must be interpreted as a whole so as to give effect to the intent of the parties. *Stein v. Yarnall-Todd Chevrolet, Inc.*, 241 N.E.2d 439 (Ill. 1968).

The court in *Dix* noted that the residential lease did not contain a provision expressly apportioning fault in the case of a negligently caused fire, so the Court construed the lease as a whole and concluded that it did not reflect any intent that the tenant would be responsible for fire damage. Absent any such intent, the court—applying equitable principles (because subrogation is an equitable doctrine)—held that a tenant is considered a co-insured with the landlord by virtue of having paid rent which contributed to the insurance premiums, and the subrogated insurer could not sue its own insured for subrogation.

The rule, therefore, appears to be that a tenant will be an implied co-insured and cannot be sued by the landlord’s subrogee for fire or other damage unless a contrary intent can be gleaned from the four corners of the lease itself. *Auto Owners Ins. Co. a/s/o John Ellis v. Thomas Callaghan*, 952 N.E.2d 119 (Ill. App. 2011). Where a lease reflects the parties’ intent to place the responsibility for water damage on the tenants, they will not be considered implied co-insureds. *Pekin Ins. Co. v. Murphy*, 2014 WL 6092187 (Ill. App. 2014).

In *Sheckler v. Auto-Owners Ins. Co.*, 2022 WL 17245548 (Ill. 2022), the Shecklers leased a house from Ronald McIntosh. The lease agreement required the landlord to “maintain fire and other hazard insurance on the premises only” and required the tenant to “be responsible for any insurance they desire on their possessions contained in the leased premises.” The lease also contained an indemnification clause, which further exculpated McIntosh from any damages or injury occurring on the premises. Auto-Owners insured the landlord with a policy which included (1) first-party dwelling coverage and (2) third-party landlord liability coverage. The first-party dwelling coverage provided, in relevant part, coverage for fire damage to the premises. The third-party landlord liability coverage provided coverage for claims brought by third parties that the insured “becomes legally obligated to pay as damages because of or arising out of bodily injury or property damage.” The third-party landlord liability coverage also provided a duty to defend any claim or suit for damages covered by the policy. However, the third-party landlord liability coverage excluded from coverage “property damage to property occupied or used by an insured or rented to or in the care of, any insured.” The policy declarations listed McIntosh and his wife as the only named insureds. The landlord paid the premiums for the Auto-Owners policy out of the rent payments he received.

The rental property had a traditional gas stove and range. In late August 2015, the tenant notified the landlord that the oven and burner on the gas stove were not working. On August 26, 2015, the landlord hired Wayne Workman, an appliance service technician. Workman inspected the appliance and left the property to obtain a repair part. After Workman left, the tenants smelled gas and attempted to mask the odor by spraying a deodorizer before they then turned on the stove, which ignited, resulting in a fire that caused substantial property damage. As a result of the fire damage, Auto-Owners paid the landlord for damages and subrogated against Workman. Workman filed a contribution action against the tenants, who, in turn, tendered their defense to Auto-Owners. Auto-Owners rejected the tenant’s tender of defense based on the fact that the tenants were co-insureds under their policy. The tenants filed a declaratory judgment action in which the trial court ruled in favor of the carrier and found that it did not need to defend the tenants. On appeal, the tenants argued that they were “co-insureds” under Insurer’s policy because their rent payment had been used by the landlord to purchase his insurance. The lease also stated that the landlord would buy fire insurance for the entire building. The Court of Appeals agreed and reversed the trial court, finding that the *tenants were co-insureds under the landlord’s policy*. It held that Auto-Owners had a duty to defend the

tenants from the worker's third-party claim. The court said, "It is inequitable to find that there is no duty to defend in this case ... On the facts of this case, finding that the insurer has a duty to defend its co-insured is a natural and necessary extension of *Dix* (see above) to prevent a subversion of its ruling." The Court of Appeals held that carriers pursuing subrogation for damage to rental property will need to defend tenants from contribution claims just as they would have to defend contribution claims filed against the landlord. Auto-Owners appealed to the Illinois Supreme Court.

On November 28, 2022, the Illinois Supreme Court reversed the Court of Appeals, holding that the tenants were not insureds and, therefore, were not entitled to defense or indemnity. It rejected the Court of Appeals' interpretation of *Dix* to mean that tenants are *always* "implied co-insureds" under a landlord's property insurance policy. The Supreme Court distinguished *Dix* because it was a subrogation action that did not apply in this case because no "equitable principles" were at issue. The court in *Dix* applied equitable principles (because subrogation is an equitable doctrine) in order to arrive at the conclusion that a tenant is considered a co-insured with the landlord by virtue of having paid rent which contributed to the insurance premiums, and the subrogated insurer could not sue its own insured for subrogation.

This new ruling in *Sheckler v. Auto-Owners* confirms that the "implied co-insured" fiction which is created in cases in which a landlord's property carrier attempts to subrogate property damage against one of the landlord's tenants does not apply outside of the subrogation contest. It should be noted also that the Auto-Owners policy in question did not specifically list the tenants as "additional insureds" or "named insureds."

Oral Lease. The same outcome results from an oral lease which contains only basic terms such as rent and duration of the lease. *Cincinnati Ins. Co. v. DuPlessis*, 848 N.E.2d 220 (Ill. App. 2006).

Commercial Lease. The same Anti-Subrogation Rule which applies to residential leases applies to commercial leases. *Nationwide Mut. Fire Ins. Co. v. T & N Master Builder & Renovators*, 959 N.E.2d 201 (Ill. App. 2011). In *Nationwide*, a provision of the commercial lease agreement provided that commercial tenants that held over were liable for all damages sustained to property while in the tenants' possession. However, this clause did not render the tenants liable for damages caused by fire, because the lease specifically excepted losses caused by fire.

INDIANA

An Indiana Court of Appeals decision in *LBM Realty, LLC v. Mannia*, 19 N.E.3d 379 (Ind. App. 2014) changed the landscape of landlord/tenant subrogation in the Hoosier State. For years, Indiana allowed an insurer to bring a subrogation claim against a tenant. *LBM Realty, LLC v. Mannia*, 981 N.E.2d 569 (Ind. App. 2012) (first appeal before remand). A 1996 Court of Appeals decision appeared to announce that Indiana had avoided an inflexible application of the "Sutton Rule" and taken a more flexible case-by-case approach, holding that a tenant's liability to the landlord's insurer for negligently causing a claim depends on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole. *United Farm Bureau Mut. Ins. Co. v. Owen*, 660 N.E.2d 616 (Ind. App. 1996).

In 2012, that same Court of Appeals in *LBM Realty, LLC v. Mannia*, 981 N.E.2d 569 (Ind. App. 2012) (first appeal before remand), had clarified that while Indiana law does not preclude a subrogation action by a landlord's insurer against a tenant, the Court in *Owen* did not adopt a case-by-case approach. Rather, *Owen* merely affirmed a trial court's entry of summary judgment in favor of a tenant and against an insurer who sought subrogation for a claim it paid to its insured (who was the tenant's landlord) because the specific language of a lease provision at issue released the tenant from property damage liability to the landlord, thereby precluding the insurer - who steps into the shoes of its insured - from raising a subrogation claim. *Mannia*, supra. The *Mannia* decision was reviewing a trial court order which declared that Indiana had adopted the "no subrogation" approach and noted, that in *Owen*, the Court of Appeals did not discuss or adopt any of the three subrogation approaches, and the question of whether Indiana would adopt a rule regarding subrogation claims by a landlord's insurer against a negligent tenant was never raised. The *Mannia* decision also noted that question had not been raised in other cases where an insurer brought a subrogation claim against an insured's tenant for property damage. *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915 (Ind. App. 2007); *St. Paul Fire & Marine Ins. Co. v. Pearson Construction Co.*, 547 N.E.2d 853 (Ind. App. 1989), *trans. denied*.

On October 28, 2014, Indiana for the first time officially announced that whether subrogation could be brought by a landlord's insurer against a negligent tenant was to be determined by a case-by-case approach based on the reasonable expectations of the parties as reflected in the lease agreement. *LBM Realty, LLC v. Mannia*, 19 N.E.3d 379 (Ind. App. 2014). The court held that whether a landlord's insurer may bring a subrogation action against a negligent tenant for damage to tenant's leased premises is determined under the case-by-case approach; a finding that a tenant's liability to the insurer for damage-causing negligence depends on the reasonable expectations of the parties to the lease as ascertained from the lease as a whole and any other admissible evidence. In determining the expectations of the parties as articulated in the lease, courts should look for evidence indicating which party agreed to bear the risk of loss for a particular type of damage in question.

In July 2010, a fire caused \$743,402.86 in damages at the Summer Place Apartments in Granger, Indiana, owned by LBM. Mannia was a tenant in the Apartments, having signed a one-year lease in March 2010. Included within the lease were several relevant lease provisions, condensed and paraphrased as follows:

- A provision titled "Insurance," which is silent as to LBM's obligation to maintain property insurance, but states in bold type: **"Owner recommends the Resident obtain renter's insurance."** This provision also states that in the event the leased premises are totally destroyed by some cause beyond the owner's control, the lease will terminate as of that date (and to the extent that the premises are only partially destroyed, there will be abatement in rent).
- A provision titled "Rules," which incorporates an attached list of "Rules and Regulations" into the lease, the most relevant of which reads as follows: *(7) Resident must pay repair costs for all damages to Resident's Apartment, Apartment Community facilities, and common areas caused by Resident or members of Resident's household or guests ...*
- A "Save Harmless Clause," which states: *"Resident shall indemnify and save harmless Owner from and against any and all claims or actions for damages to persons or property," including claims in which it is asserted that Owner has been negligent.*
- A provision stating that *"Premises' shall mean only that portion of Owner's property contained within the interior walls of the dwelling unit described herein ..."*
- Within "Miscellaneous Provisions": *At the end of the term, Resident shall return the Leased Premises to Owner in the same good condition, reasonable wear and tear excepted. Resident is and shall be responsible and liable for any injury or damage done to the Leased Premises, common areas or any property of Owner caused by [R]esident, any occupant, or any other person whom Resident permits to be in or about the Leased Premises. This section also states, "Resident shall permit no waste of the Leased Premises nor allow the same to be done, but Resident shall take good care of the same ..."*

After the fire at the Apartments, the insurer filed a subrogation action in LBM's name against Mannia, alleging in its complaint that Mannia breached her contract with LBM in "one or more of the following ways":

- (1) Carelessly and improperly disposed of smoking materials by placing same in a plastic bottle and in close proximity to the vinyl siding on the balcony patio wall of the leased premises; and/or
- (2) Carelessly and improperly allowed guests to dispose of smoking materials by placing same in a plastic bottle and in close proximity to the vinyl siding on the balcony patio wall of the leased premises; and/or
- (3) Otherwise failed to comply with her obligation to return the premises in the same condition as when she moved in, reasonable wear and tear excepted.

In regard to its negligence claim, LBM repeated (1) and (2) above and also alleged that Mannia had "otherwise acted carelessly and negligently." Mannia filed a motion to dismiss LBM's complaint, discussing the three different approaches used by courts around the country to address subrogation claims of landlord's insurers against negligent tenants, including:

- (1) The no-subrogation (or implied co-insured) approach (*i.e.*, the "Sutton Rule"), in which, absent an express agreement to the contrary, a landlord's insurer is precluded from filing a subrogation claim against a negligent tenant because the tenant is presumed to be a co-insured under the landlord's insurance policy;

- (2) The pro-subrogation approach, in which, absent an express term to the contrary, a landlord's insurer is allowed to bring a subrogation claim against a negligent tenant; and
- (3) The case-by-case approach, in which courts determine the availability of subrogation based on the reasonable expectations of the parties under the facts of each case.

Mannia convinced the trial court to apply approach number one, dismissing the case because Mannia was an "additional insured" under LBM's insurance policy. LBM appealed and, in 2012, the Court of Appeals reversed and remanded because the trial court did not test the complaint against the backdrop of the law that existed. Further discovery occurred, and it was agreed and stipulated that:

- (1) The money received from rent (including Mannia's rent from March 25, 2010 to July 3, 2010) was used to pay LBM's operating expenses, including, but not limited to, procurement and maintenance of insurance covering the apartment complex at 825 Summer Place Lane, Granger, IN 46530 and all units included therein. However, LBM's property insurance did not provide coverage to any of the belongings owned by Mannia.
- (2) Furthermore, pursuant to the terms of the insurance policy that LBM obtained, LBM's insurer has asserted a right of subrogation as to the claims asserted by LBM against Mannia based upon the insurer's payment to LBM for damages resulting from the fire that occurred on July 3, 2010, which is the subject of this lawsuit.

In 2013, Mannia filed a Motion for Summary Judgment, which the trial court granted, and LBM appealed again. This time, the Court of Appeals rejected the legal fiction of the *Sutton* Rule and specifically adopted the "middle-ground" case-by-case approach, which eschews presumptions that a tenant is or is not a co-insured of the landlord, and requires an examination of the lease as a whole to determine the parties' reasonable expectations as to who should bear the risk of loss when a tenant negligently damages the leased premises. Although it provides less predictability than either the pro- or no-subrogation approaches, the Court of Appeals found that this approach best effectuates the intent of the parties by simply enforcing the terms of their lease. It reversed the trial court again, allowing subrogation against Mannia, specifically because the lease in question permitted subrogation.

In 2018, the Court of Appeals said that if a lease obligates a tenant to procure insurance covering a particular type of loss, such a provision will provide evidence that the parties reasonably anticipated that the tenant would be liable for that particular loss, which would allow an insurer who pays the loss to bring a subrogation action against the tenant. *Hoosier Ins. Co. v. Riggs*, 92 N.E.3d 685 (Ind. App. 2018).

In *Youell v. Cincinnati Ins. Co.*, 117 N.E.3d 639 (Ind. App. 2018), a landlord and a tenant entered into a commercial lease that provided that the landlord would insure the building and the tenant would insure its personal property inside the building. When the property was later damaged by fire, the landlord's insurance subrogated and the tenant argued that the landlord's agreement to obtain property insurance was an agreement to provide both parties with the benefits of insurance and expressly allocated the risk of loss in case of fire to insurance, thereby barring a subrogation action. The Court of Appeals held that this case was distinguishable from *LBM Realty, LLC v. Mannia*. In *LBM Realty*, the lease did not require the landlord to maintain property insurance and only recommended that the tenant obtain renter's insurance; as a result, the parties' expectations with respect to liability for damage to the leased premises was unknown. In *Youell*, however, the lease unambiguously provided that the landlord would insure the building. Accordingly, the test set forth in *LBM Realty* (whether a landlord can subrogate depends on the case-by-case approach and a tenant's liability depends on the reasonable expectations of the parties to the lease as ascertained from the lease as a whole). Instead, *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284 (Ind. App. 1979) controlled (when lease requires that landlord will insure the building and tenant will insure its personal property, this was an agreement to provide both parties with the benefits of the insurance and expressly allocated the risk of loss in case of fire to insurance). The court in *Youell* reversed and remanded with instructions for the trial court to grant the tenant's motion to dismiss.

IOWA

Iowa has rejected the implied co-insured rationale and allowed the insurer to bring a subrogation claim against the tenant, absent an express agreement to the contrary. *Neubauer v. Hostetter*, 485 N.W.2d 87, 89-90 (Iowa 1992).

KANSAS

Absent an agreement by the landlord to allocate the risk of loss to the landlord and/or provide insurance for the tenant's benefit, subrogation against a tenant appears to be allowed. Under a lease agreement providing that lessor would purchase fire insurance for adequate protection of improvements on leased premises and lessee would maintain premises in good repair "damage by fire or other casualty being expressly excepted", lessor's obligation to insure premises inured to benefit of both parties. The exemption from "damage by fire or other casualty" included all fires except those which would be classified as arson, and the lessee was not liable for loss by fire resulting from its negligence. *New Hampshire Ins. Co. v. Fox Midwest Theaters, Inc.*, 457 P.2d 133 (Kan. 1969). The court noted that the insurance provisions in that case were for the benefit of both the landlord and the tenant, especially given how any insurance payment for fire loss was to be applied. The lease in that case also required the landlord to repair or rebuild the theater within 60 days after any fire damage. However, in *TMD Southglen II, LLC v. Parker*, 2014 WL 2589768 (Kan. App. 2014), the lease was mutually beneficial. The tenants were relieved of liability to the landlord for fire damage to the space they leased or other parts of the mall. The premiums for that insurance would amount to an expense in leasing from TMD over and above the monthly rent. Therefore, this case came within the *New Hampshire Insurance* decision to the extent the court's ruling required some mutual benefit to the fire-loss covenants. The lease requires the tenant to indemnify and to hold harmless the landlord for "all claims arising from the tenant's use of the premises" or "from any breach or default" of the obligations imposed by the agreement. The landlord contends it should be able to recover under the indemnification clause regardless of the provisions regarding fire insurance and fire loss. However, the protections flowing under the indemnification clause are against third-party claims based on the wrongful conduct of the tenants. *Id.* Indemnification clauses are not commonly understood to apply to direct claims between the parties as opposed to third-party claims against the party entitled to be indemnified. *Id.*

Kansas also has a statute which governs the liability of tenants:

K.S.A. § 58-2555. Duties of Tenant. (f) *be responsible for any destruction, defacement, damage, impairment or removal of any part of the premises caused by an act or omission of the tenant or by any person or animal or pet on the premises at any time with the express or implied permission or consent of the tenant.*

Independent of the above statute and an express agreement to insure the tenant, Kansas law imposes an obligation on a tenant to return the premises to the landlord at the end of a rental term unimpaired by the tenant's negligence. *Salina Coca-Cola Bottling Corp. v. Rogers*, 237 P.2d 218 (Kan. 1951).

A negotiated agreement to absolve a tenant from liability to the landlord for negligence for fire damage would seem to be no more or less compatible with public policy based on the number of entities leasing space on the premises. TMD's argument would create an inexplicable rift in what could be legally enforced in leases for single-use commercial properties and what could be enforced as to multi-tenant premises. Had TMD wanted some different arrangement, it should have negotiated a different deal and crafted the lease language accordingly.

KENTUCKY

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. *Britton v. Wooten*, 817 S.W.2d 443, 445-47 (Ky. 1991) (subrogation allowed because there was no clause requiring purchase of fire insurance by landlord). It must be determined on a case-by-case basis. A requirement in a lease agreement that the landlord must obtain fire insurance militates against the insurance carrier's right of subrogation. *Liberty Mut. Fire Ins. Co. v. Jefferson Family Fair, Inc.*, 521 S.W.2d 244 (Ky. 1975). The absence from the lease agreement of a requirement that the landlord provide fire insurance generally permits a right of subrogation.

LOUISIANA

Specific lease provisions will prohibit subrogation against a tenant. A lease provision, under which the lessor agreed to carry fire insurance on property and released and discharged lessee "from any and all claims and damages whatsoever from any cause resulting from or arising out of any fire" constituted release from fire damage acknowledged to have been caused by lessee's negligence and extinguished any subrogation recovery by lessor's

insurer. *Home Ins. Co. of Ill. v. National Tea Co.*, 588 So.2d 361 (La. 1991). The intent of the parties as determined from the terms of the lease is paramount.

MAINE

Fire insurer is not entitled, as subrogee, to bring action against tenant to recover for amounts paid to landlord for fire damage to rental premises caused by tenant's negligence in absence of express agreement between the landlord and tenant to contrary. The landlord and tenant are co-insureds under the fire policy. *N. River Ins. Co. v. Snyder*, 804 A.2d 399, 403-04 (Me. 2002).

MARYLAND

A tenant's liability for damage to the leased premises in a subrogation action brought by the landlord's insurer after paying the claim should be determined by the reasonable expectations of the parties to the lease, as determined from the lease itself and any other admissible evidence, on a case-by-case basis. Evidence outside the four corners of the lease may be relevant in some cases. Most generally, it clarified that a tenant's liability to the landlord's insurer depends on the reasonable expectations of the parties to the lease, "as determined from the lease itself and any other admissible evidence." *Rausch v. Allstate Ins. Co.*, 882 A.2d 801 (Md. 2005). A tenant's liability in a subrogation action is determined by examining "the lease as a whole, along with any other relevant and admissible evidence," to determine the reasonable expectations of parties to the lease. *Fowlkes v. Choudhry*, 248 A.3d 298, 311 (Md. 2021).

MASSACHUSETTS

Massachusetts follows the "Implied Co-Insured Doctrine". The term "insured" impliedly includes the tenant. *Peterson v. Silva*, 704 N.E.2d 1163 (Mass. 1999). Absent an express provision in a lease establishing a tenant's liability, the landlord's insurance is deemed held for the mutual benefit of both parties. When a residential landlord sues a tenant for damages to the landlord's, the Implied Co-Insured Doctrine presumes that the landlord's liability insurance is held "for the mutual benefit of both parties". This rule applies to residential leases but is generally inapplicable to commercial leases. *Federal Ins. Co. v. Commerce Ins. Co.*, 2010 WL 716412 (1st Cir. 2010). Massachusetts recognizes that while courts have not distinguished between commercial and residential tenancies in applying *Sutton* (see Oklahoma), commercial tenancies present different considerations, for "[c]ommercial tenants tend to be more sophisticated about the terms of their leases and, unlike residential tenants, commercial tenants generally purchase liability insurance"; thus, commercial tenants will be relieved of liability for negligently caused fire damage only if the lease reveals the parties so intended. *Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 950 (Mass. 2002).

MICHIGAN

Michigan follows "*Sutton Rule*" (see Oklahoma). The fire insurer is not entitled, as subrogee, to bring an action against the tenant to recover for amounts paid to landlord for fire damage to rental premises caused by the tenant's negligence in absence of an express agreement between the landlord and tenant to the contrary. The landlord and tenant are co-insureds under the fire policy. *N.H. Ins. Group v. Labombard*, 399 N.W.2d 527, 531 (Mich. App. 1986). However, more recent decisions indicate that the *Labombard* decision applies only to negligence cases - not to cases based on breach of contract. *Laurel Woods Apartments v. Roumayah*, 734 N.W.2d 217 (Mich. App. 2007). In *Roumayah*, the lease stated, "Tenant shall also be liable for any damages to the Premises...that is caused by the acts or omissions of Tenant or Tenant's guests." The Court held that the tenant was contractually liable for "any damage" caused by their acts, and that this was not limited to negligent acts. The landlord was allowed to pursue the tenant based on a breach of the lease agreement, notwithstanding *Labombard*. This was later extended to specifically include subrogation claims. *American States Ins. Co. v. Hampton*, 2008 WL 4724279 (Mich. App. 2008).

In *Westfield Inc. Co. v. Ritcher*, No. 20-CV-12692, 2021 U.S. Dist. Lexis 94926 (E.D. Mich. 2021), a federal court limited the scope of a tenant's protection from a subrogation suit by virtue of being an implied coinsured. The court held that the tenant was an implied coinsured—and thus shielded from a subrogation suit by the landlord's insurance company—but only with regard to the tenant's apartment. The implied coinsured doctrine did not shield the tenant

from a subrogation claim for damages to the rest of the buildings, the contents of other residents, and the landlord's loss of profits/rents.

MINNESOTA

Until recently, this general rule has been applied in Minnesota to prohibit a landlord's insurer from maintaining a subrogation action against the landlord's tenants because the tenant was a co-insured under the landlord's policy. *United Fire & Casualty Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. App. 1993). In 2012, the Supreme Court overruled the rule set forth in *Bruggeman* and adopted a "case-by-case approach" to ascertain whether an insurer may maintain a subrogation action against the negligent tenant of its insured, based on the reasonable expectations of landlord and tenant under the lease and the facts of case. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1 (Minn. 2012), rejecting *United Fire & Casualty Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. App. 1993), and abrogating *Bigos v. Kluender*, 611 N.W.2d 816 (Minn. App. 2000), *St. Paul Cos. v. Van Beek*, 609 N.W.2d 256 (Minn. App. 2000), *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. App. 1994). Based on the lease, along with any other relevant and admissible evidence, the court determines whether it was reasonably anticipated by the landlord and the tenant that the tenant would be liable, in the event of a tenant-caused property loss paid by the landlord's insurer, to a subrogation claim by the insurer. *Melrose Gates, LLC v. Moua*, 2015 WL 1608845 (Minn. App. 2015). Section 60A.41 provides:

§ 60A.41. Subrogation against insureds prohibited.

(a) An insurance company providing insurance coverage or its reinsurer for that underlying insurance coverage may not proceed against its insured in a subrogation action where the loss was caused by the nonintentional acts of the insured.

(b) An insurance company providing insurance coverage or its reinsurer for that underlying insurance coverage may not subrogate itself to the rights of its insured to proceed against another person if that other person is insured for the same loss, by the same company. This provision applies only if the loss was caused by the nonintentional acts of the person against whom subrogation is sought.

(c) This provision does not apply to or affect claims of a surety against its principal.

(d) Nothing in this section prevents an insurer from allocating the loss internally to the at-fault insured for purposes of underwriting, agency, and claims information.

MISSISSIPPI

There do not appear to be any restrictions on the ability of a landlord's insurer to pursue the tenant for subrogation as a result of damages paid by the insurer which were caused by the tenant. *Paramount Ins. Co. v. Parker*, 112 So.2d 560 (Miss. 1959).

MISSOURI

A tenant may be considered a "co-insured" under the insurance policy obtained by the lessor where it was clear that the parties intended to look only to insurance, rather than at each other, to pay damages caused by negligence. This intent must be determined from the four corners of the lease. *Jos. A. Bank Clothiers, Inc. v. Brodsky*, 950 S.W.2d 297, 303 (Mo. App. 1997). The *Brodsky* Court found such intent from a surrender clause of the lease. That clause provided that the lessee would surrender possession of the leased premises to lessor in good condition, "loss by fire, casualty, providence and deterioration excepted." Where a lease requires the landlord to carry insurance and provides there is to be no subrogation right between the parties, it may be determined that the parties intended to look only to insurance, rather than each other, for any loss or damage to the premises. *Rock Springs Realty, Inc. v. Waid*, 392 S.W.2d 270, 274 (Mo. 1965). An insurer cannot subrogate against its own insured, since, by definition, subrogation arises only with respect to the insured's rights against third persons to whom the insurer owes no duty. Therefore, no right of subrogation arises against a person who holds the status of an additional insured, or against a tenant who is determined from the intent of the parties to be an implied "co-insured." *Brodsky*, *supra*. Where a party is required by contract to carry insurance for the benefit of another, that party will be treated as a co-insured. *Id.*

MONTANA

Montana adheres to the rule that no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of insurer against third persons to whom insurer owes no duty. *Home Ins. Co. v. Pinski Bros., Inc.*, 500 P.2d 945 (Mont. 1972). However, there have been no cases addressing whether a tenant is considered an implied co-insured.

NEBRASKA

Absent an express agreement to the contrary in a lease, a tenant and his/her landlord are implied co-insureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant. *Tri-Par Investments, L.L.C. v. Sousa*, 680 N.W.2d 190 (Neb. 2004); *Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc.*, 2022 WL 2788950 (D. Neb. 2022). This is true even when subrogating for portions of the building/complex which the tenant did not lease or live in. *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463 (2012). To subrogate against a tenant in Nebraska, it is necessary to show that the provisions of the lease and the expectations of the parties overcome the presumption that the tenant is an implied co-insured.

In *Beveridge v. Savage*, 830 N.W.2d 482 (Neb. 2013), the lease provided: "Renter's insurance is a 'contents' policy which covers tenant's possessions, such as furniture, appliances, personal belongings, and household goods'." However, renter's insurance does not typically cover the structure of the leased premises. The lease also required Savage to obtain a "liability and renter['s] insurance [policy] (\$100,000) at Tenant's expense." However, the lease did not state what "liability" was to be covered. Therefore, it was not clear as to the tenant's obligations and what liability the tenant was to insure. Finally, there is no lease provision stating that Beveridge or his insurer had a right of subrogation against the Savages for damages caused by fire as a result of negligence. There was no provision which gave the tenant notice that he must obtain insurance coverage for the realty in the event his negligence caused damage to the house by fire. The court said that the tenants reasonably expected that the owner of the building would provide fire insurance protection for the premises on behalf of both the tenant and landlord, and the provisions of the lease were insufficient to overcome the presumption that the Savages were co-insureds under Beveridge's fire insurance policy. Because the Savages were co-insureds, no subrogation was allowed.

In *SFI, Ltd. P'ship 8 v. Carroll*, 851 N.W.2d 82 (Neb. 2014), the Nebraska Supreme Court held that the implied co-insured rule does not apply to uninsured losses. SFI owned an apartment complex and Michelle Carroll was a tenant under a residential lease agreement requiring Carroll to pay for repairs caused by her use of the unit and to maintain renter's insurance including "a personal liability coverage to a minimum of \$100,000.00." A fire occurred, and both the apartment and the surrounding building were damaged. SFI had \$10 million of coverage with a deductible of \$250,000. Still, SFI had over \$100,000 in uninsured losses. But, neither the total amount of damages nor the amount of any insurance recovery by SFI was included in the evidence. Carroll had renter's insurance and submitted a claim to her insurer, which paid \$1,500 for her damages under "Loss of Use Coverage." The court declined to extend the anti-subrogation rule to a landlord's uninsured losses caused by a tenant's negligence.

NEVADA

It is not uncommon for the lessor to provide fire insurance on leased property. As a matter of sound business practice, the premium to be paid had to be considered in establishing the rental rate. Such premiums would be chargeable against the rent as an overhead or operating expense. Accordingly, the tenant paid the premium as part of the monthly rental. Courts consider it an undue hardship to require a tenant to insure against his own negligence, when he is paying, through his rent, for the fire insurance which covers the premises. A fire insurer is not entitled, as subrogee, to bring an action against a tenant to recover for amounts paid to the landlord for fire damage to rental premises caused by the tenant's negligence in absence of express agreement between the landlord and tenant to the contrary. The landlord and tenant are co-insureds under fire policy. *Safeco Ins. Co. v. Capri*, 705 P.2d 659, 661 (Nev. 1985). Absent an express provision in the lease establishing the tenant's liability for loss from negligently started fires, courts find that the premises insurance was obtained for the mutual benefit of both parties and that the tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim. In short, they are an "implied co-insured." *Rizzuto v. Morris*, 592 P.2d 688 (Wash. App. 1979); *Liberty Mutual Fire Ins. Co. v. Auto Spring Sup. Co.*, 59 Cal.App.3d 860 (1976).

NEW HAMPSHIRE

New Hampshire follows the “*Sutton Rule*” (see Oklahoma). A landlord’s insurer may not pursue a tenant for any damages caused by the tenant’s negligence because the tenant is considered an implied co-insured. *Cambridge Mut. Fire Ins. Co. v. Crete*, 846 A.2d 521 (N.H. 2004). In addition, a landlord may not pursue the tenant for uninsured losses it sustains. The implied coinsured fiction was recently extended to apply to students living in a dorm at Dartmouth College.

In *Ro v. Factory Mut. Ins. Co. as Trustees of Dartmouth College*, 260 A.3d 811 (N.H. 2021), the plaintiffs lived in separate dormitories on campus, and each paid room and board in addition to tuition. Prior to being assigned a dormitory room, each of the plaintiffs was required to sign a form acknowledging receipt and understanding of the college’s student handbook. Included in the handbook were prohibitions on: (1) possessing charcoal grills in student housing; (2) lighting and burning of any item with an open flame in residence halls; and (3) placing items on, and the use of, “the roof, portico, fire escape, or any other architectural feature not designed for recreational or functional use, except in cases of emergency.” The handbook noted that violation of the open flame policy “may” result in liability for damage due to fire. In addition, the handbook placed responsibility on students for claims arising from damage to college property. It provided that student residents “assume any and all liability for damage or claims that result from their own negligence,” or that of their visitors or guests, and that student residents who damage or vandalize Dartmouth property “will typically be expected to pay restitution.” Students set up a charcoal grill and a fire resulted in over \$4.5 million in damages to university property, which was paid by their carrier, Factory Mutual, who attempted to subrogate against the students. The students preemptively filed a declaratory judgment action seeking a declaration that they were “implied co-insureds” under the Factory Mutual policy. The trial court agreed with the students and Factor Mutual appealed. On appeal, Factory Mutual argued that the trial court erred in: (1) concluding that the plaintiffs held a possessory interest in their dormitory rooms; (2) failing to conclude that the plaintiffs were licensees “with a revocable personal privilege to occupy Dartmouth College residence halls” and that, therefore, the anti-subrogation rule set forth in *Crete* did not apply; and (3) failing to conclude that policies in the student handbook negated any presumption that the plaintiffs are implied co-insureds under the fire insurance policy. In short, Factory Mutual argues that the *Crete* doctrine does not apply under the circumstances of this case and that, in any event, the parties contracted out of the doctrine through the student handbook. The court held that the *Sutton* doctrine has not been confined by strict property law distinctions. As the Nebraska Supreme Court noted, “A shared insurable interest and privity between the landlord and tenant are part of the backdrop to the development of the per se rule in *Sutton* and similar cases, but those concepts do not form a bright line for the rule’s applicability.” *Buckeye State Mut. Ins. Co. v. Humlicek*, 822 N.W.2d 351 (Neb. 2012). In determining whether to apply the *Crete* anti-subrogation doctrine to a college/residential student situation, it looked at the contractual relationship between the parties more broadly than whether it was “technically a lease in the traditional sense.” The trial court decision was affirmed.

NEW JERSEY

Absent a clear contractual expression to the contrary, the insurance carrier will be permitted to sue a tenant in subrogation. *Zoppi v. Traurig*, 598 A.2d 19 (N.J. Super. 1990). If the landlord has a claim against the tenant, existence of insurance obtained by the landlord, paid by the landlord, for the benefit of the landlord, does not exculpate the tenant from consequences of negligent conduct, absent express agreement to that effect. *Id.*

NEW MEXICO

Where the lease indicated that the parties failed to agree that one, or both, of them would carry fire insurance, and where there was no specific exculpatory language relieving the tenant from liability for negligence, the tenant was liable for negligently having caused a fire in the leased premises. *Acquisto v. Joe R. Hahn Enterprises, Inc.*, 619 P.2d 1237 (N.M. 1980).

NEW YORK

New York has rejected the implied co-insured rationale set forth in the “*Sutton Rule*” and has allowed the insurer to bring a subrogation claim against the tenant, absent an express agreement to the contrary. *Galante v. Hathaway Bakeries, Inc.*, 6 A.D.2d 142, 176 N.Y.S.2d 87, 92 (N.Y. 1958). The principles underlying the Subrogation Doctrine and

Anti-Subrogation Rule in New York does not support the fiction that the tenant is an implied co-insured of the landlord, and subrogation is therefore allowed. *Phoenix Ins. Co. v. Stamell*, 21 A.D.3d 118, 796 N.Y.S.2d 772 (N.Y.A.D. 4 Dept. 2005).

NORTH CAROLINA

North Carolina has rejected the implied co-insured rationale set forth in the “*Sutton Rule*” that allows the landlord’s insurer to bring a subrogation claim against the tenant, absent an express agreement to the contrary contained in the lease. *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185, 190 (N.C. 1953). Upon paying a loss by fire, the insurer is entitled to subrogation to the rights of insured against the third-party tortfeasor causing the loss, to the extent of the amount paid. In *William F. Freeman, Inc. v. Alderman Photo Co.*, 365 S.E.2d 183 (N.C. App. 1988), the court held that a lease that only addresses insurance coverage and subrogation rights will not extend to exempt the parties from liability for negligence. There, the lease required the parties to insure their own property, and the court concluded the parties included the subrogation clause to ensure each party would only be required to pay for damages to his own property. The court reasoned because the lease contained “no clear, explicit words waiving liability for negligence[,]” it would not infer the parties intended to do so. In *Morrell v. Hardin Creek, Inc.*, 2017 WL 3480543 (N.C. App. 2017), even though the lease stated the parties “agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance,” the court ruled the lease did not explicitly state the parties contemplated waiving claims stemming from negligence.

NORTH DAKOTA

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. *Agra-By-Products, Inc. v. Agway, Inc.*, 347 N.W.2d 142 (N.D. 1984) (subrogation denied because lease required lessor to keep insurance and lessee to reimburse lessor for premiums).

OHIO

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. *U.S. Fire Ins. Co. v. Phil-Mar Corp.*, 166 Ohio St. 85, 139 N.E.2d 330, 332 (Ohio 1956) (denied subrogation because lease provided that tenant would pay possible increase in fire insurance premiums due to tenant’s activities). In *Phil-Mar*, the court looked at the words expressed in the totality of the lease agreement to ascertain the intent of the parties. The court found that where a lease agreement contained (1) a surrender clause requiring the lessee to return possession of the leased premises to the lessor upon the expiration or termination of the lease, with said premises being “in as good condition and repair as the same shall be at the commencement of said term (loss by fire * * * excepted),” and (2) a provision requiring the lessee to pay the lessor any additional premium charged for the fire insurance on the premises that resulted from the lessee’s occupancy, the lessor had relieved the lessee of liability for fire caused by the lessee’s negligence, and thus the lessor had no right of recovery against the lessee. The court, after “considering the lease as a whole,” found that it was apparent under the circumstances of the case that “the parties intended to relieve the lessee from its common-law liability to the lessor for loss by fire.” In *Cincinnati Ins. Co. v. Control Service Technology, Inc.*, 677 N.E.2d 388 (Ohio App. 2011), the lease provided that the lessor agreed to restore the leased premises under certain conditions in the event of a fire or other casualty. The trial court found that this lease provision constituted “a waiver of any negligence on the part of CST.” The Court of Appeals disagreed, finding that the provision was ambiguous and was not the type of waiver ordinarily relied upon to excuse a party from the results of the party’s own negligence. The Court of Appeals also found that the parties’ lease did not contain a surrender clause similar to the “rather explicit” surrender clauses in *Phil-Mar*. It must be clear and apparent from the terms of the lease agreement, looked at as a whole, that the parties intended to relieve tenant from her common-law liability to landlord for negligence. If the landlord cannot sue, its insurer cannot sue. *Cincinnati Ins. Co. v. Getter*, 958 N.E.2d 202 (Ohio App. 2011).

OKLAHOMA

The fire insurer is not entitled, as subrogee, to bring an action against the tenant to recover for amounts paid to the landlord for fire damage to rental premises caused by the tenant's negligence in absence of express agreement between the landlord and tenant to the contrary. Landlord and tenant are co-insureds under the fire policy. *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975) (known as the "Sutton Rule").

OREGON

Oregon rejects blanket following of the "Sutton Rule" (see Oklahoma) which holds the tenant is an implied co-insured. Whether the landlord's insurer can subrogate against the tenant depends on the facts of the case and the language of the lease. *Koch v. Spann*, 92 P.3d 146 (Or. App. 2004). Where the lease provides that the landlord will provide "full fire insurance coverage on all of the leased property for all of the parties and that the premiums therefore were included in the monthly lease payments" or "OWNER TO FURNISH FREE OF CHARGE '[f]ire insurance in the amount equal to the value of the equipment'", the Court recognized as a complete defense to either a direct action or a subrogation claim the landlord's contractual obligation to maintain fire insurance. Permitting the owner or lessor to proceed against the tenant or lessee would deprive the latter of the benefit of what it bargained for: insurance against liability for its own negligence.

PENNSYLVANIA

Until recently, Pennsylvania had only one case speaking to this issue. If the lease requires the landlord to provide fire insurance, the landlord's carrier cannot subrogate against the tenant. If the lease requires the tenant to obtain fire insurance, the landlord's carrier can subrogate. *Remy v. Michael D's Carpet Outlets*, 571 A.2d 446 (Pa. Super. 1990). It depended on the lease language.

In the 2019 Superior Court decision of *Joella v. Cole*, 221 A.3d 674 (Pa. Super. 2019), the landlord's (Joella) insurance company (Erie Insurance Exchange) filed a subrogation suit against a tenant (Cole) to recover for damages from a fire caused when Cole ran an extension cord across metal hinges to a microwave. Joella who carried insurance through Cole responded by arguing that the lease required Joella to maintain fire insurance and, therefore, she was an implied co-insured. The lease provided that the tenant had the right to maintain fire insurance to cover property not covered by the landlord's policy. Until this decision, *Remy* had been the only case discussing the issue. The trial court held that the reasonable expectation of the tenant was that she was an implied co-insured under the policy. On appeal, however, the Superior Court noted that while the Erie policy did not mention the tenant, it did say that the landlord would secure insurance for the building and the tenant had a right to get her own policy. Therefore, where the lease required the landlord to maintain insurance on the building, the reasonable expectations of the parties was that the tenant is an implied co-insured under the Erie policy and Erie cannot pursue the tenant in subrogation.

To determine whether a tenant is a co-insured under his landlord's lease and, therefore, immune for a subrogation action by the landlord's insurance company, Pennsylvania applies "the case-by-case approach..." *Joella*, 221 A.3d at 678. Under this approach "courts determine the availability of subrogation based on the reasonable expectations of the parties as expressed in the lease under the facts of each case." *Id.* To make that assessment "the court will look to the lease agreement between the landlord and the tenant." *Thomas v. Jones*, 2021 WL 462025 (Pa. Super. 2021).

RHODE ISLAND

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. *56 Assocs. v. Frieband*, 89 F.Supp.2d 189, 194 (D. R.I. 2000) (subrogation allowed where lease did not address question of fire insurance).

SOUTH CAROLINA

South Carolina statute provides as follows:

§ 38-75-60. Cause of action by insurer against tenant. Notwithstanding any other provision of law, no insurer has a cause of action against a tenant who causes damage to real or personal property leased by the landlord

to the tenant when the insurer is liable to the landlord for the damages under an insurance contract between the landlord and the insurer, unless the damage is caused by the tenant intentionally or in reckless disregard of the rights of others.

SOUTH DAKOTA

South Dakota rejects the blanket following of the “*Sutton Rule*” (see Oklahoma) which holds that the tenant is an “implied co-insured” of the landlord’s insurer. *American Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 2008 WL 4816666 (S.D. 2008). Instead, South Dakota adopts the case-by-case approach as a better reasoned rule that recognizes the intent of the parties under contract law and the equitable underpinning of subrogation. Subrogation may be denied under the case-by-case approach if the lease expressly requires the landlord to maintain fire insurance or the lease exonerates a tenant from losses caused by a fire.

TENNESSEE

According to a U.S. Federal District Court, 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. *Tate v. Trialco Scrap, Inc.*, 745 F.Supp. 458, 467 (M.D. Tenn. 1989) (subrogation was denied because the lease required the lessor to purchase insurance coverage on the building). In 2007, however, the Tennessee Court of Appeals decided that determining the intent and expectations of the parties is not the best approach and indicated that absent an express agreement to the contrary, a tenant should be considered a “co-insured” under the landlord’s property casualty insurance policy, and the insurance carrier should therefore be precluded from asserting subrogation rights against the tenant. *Dattel Family Limited Partnership v. Wintz*, 250 S.W.3d 883 (Tenn. App. 2007). Federal court decisions have followed suit, and confirmed that the “express-agreement exception” to the general rule that a tenant is an implied coinsured under landlord’s fire insurance policy only applies where the lease includes a clear expression of intent that insurance be for benefit of the lessor only. *Am. Reliable Ins. Co. v. Addington*, 559 F. Supp. 3d 656 (M.D. Tenn. 2021). In other words, the “Sutton Rule” prohibits subrogation actions against tenants whose leases are “silent” with regard to insurance. *Allstate Ins. Co. v. Watson*, 2005 WL 457846 (Tenn. App. 2005), *aff’d*, 195 S.W.3d 609 (Tenn. 2006). A lease silent regarding fire insurance coverage cannot “express[ly]” exclude tenants from that coverage. However, where the parties responsible for starting the fire were not the direct tenants of the landlord, the Sutton Rule will not apply. In *Am. Reliable Ins. Co. v. Addington*, 2022 WL 17413579 (M.D. Tenn. 2022), the court considered whether a tenant’s live-in partner and the partner’s adult son constituted a “family” in the underlying lease and, in turn, were to be considered “implied co-insureds: under the *Sutton Rule*. The District Court determined that the arrangement did constitute a “family” and that the Sutton Rule barred subrogation.

TEXAS

An insurer of leased premises has no subrogation claim against the tenant for losses paid to the landlord when the leased premises are destroyed by a fire and the lease agreement, signed by the landlord and tenant, contains a limitation of liability clause which provided that neither party is liable for the insurable casualty damage to the leased premises, even when the tenant assigns its lease to the third party prior to fire. *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142 (Tex. App. - Houston [1st Dist.] 1991). However, the application of the “*Sutton Rule*” has never been addressed in Texas. Landlords and tenants are free to contract between themselves that the tenant will pay for specific kinds of repair without a showing that the tenant caused the damage. Where a lease states that the tenant “must promptly pay or reimburse [landlord] for loss, damage, consequential damages, government fines or charges, or cost of repairs or service in the apartment community due to: a violation of the Lease Contract or rules; improper use; negligence; other conduct by you or your invitees, guests or occupants; or any other cause not due to [landlord’s] negligence or fault”, it is subject to only one interpretation: that the tenant is required to pay the landlord for *any* damages to the apartment complex as long as the apartment complex was not at fault. The provision in the lease agreement obligating the tenant to reimburse the landlord for all damage “not due to the landlord’s negligence or fault” was not unenforceable per se, even though the provision was overly broad and could have encompassed scenarios in which the landlord would have had a non-waivable duty to repair under the Property Code. A jury’s finding that the tenant’s negligence did not proximately cause damage from the fire did not support the finding that the tenant was not at fault or didn’t cause the damage, as required for the tenant to establish that the landlord had a non-waivable duty to repair a condition that was not “caused by” the tenant. If there is sufficient

evidence that the tenant's actions, even if not negligent, caused the fire, the lease provision is not unenforceable under the Code as applied. *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468 (Tex. 2016).

UTAH

Utah considers the tenant an implied co-insured for the “limited purpose” of subrogation. *GNS Partnership v. Fullmer*, 873 P.2d 1157, 1162 (Utah Ct. App. 1994).

VERMONT

Vermont finds the case-by-case approach to be the most consistent with Vermont law. In determining the rights of the parties to a lease, this court has consistently looked to the intent of the contracting parties as ascertained from the terms of the lease. *Fairchild Square Co. v. Green Mountain Bagel Bakery, Inc.*, 658 A.2d 31, 33 (Vt. 1995); *Lamoille Grain Co. v. St. Johnsbury & Lamoille Cty. R.R.*, 369 A.2d 1389, 1390 (Vt. 1976); *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586, 590 (Vt. 2003).

VIRGINIA

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, 147 (Va. 1976) (subrogation denied because the lease contained “except fire” provision).

WASHINGTON

A landlord is presumed to carry insurance for tenant’s benefit, as implied co-insured, absent express lease provision to the contrary. Therefore, without more, the landlord’s fire insurer has no subrogation rights against tenants for loss to leased premises. *Cascade Trailer Court v. Beeson*, 749 P.2d 761 (Wash. App.1988). A mutual understanding that a tenant will be relieved of liability for his own negligence may be inferred from provisions of the parties’ lease. For example, the lease may expressly require the lessor to carry fire insurance covering the leased building, or it may prohibit the tenant from performing any acts which would raise the cost of insurance. Other circumstances may also give rise to an inference that the parties have mutually understood that the lessor would provide the insurance. *Rizzuto v. Morris*, 592 P.2d 688 (Wash. App. 1979). In *Trinity Universal Ins. Co. v. Cook*, 276 P.3d 372 (Wash. App. 2012), the Court held that a tenant is a co-insured under its landlord’s policy for the entire building, not only the unit she occupies. It also held that a tenant’s spouse is a co-insured under the landlord’s insurance policy.

WEST VIRGINIA

In 2015, the Supreme Court of Appeals of West Virginia (the highest appellate court in that state) held that if the insurance contract unambiguously identifies the insured, then a court may not, by judicial construction, enlarge the coverage to include other individuals foreign to the insurer. To do so would be “patently unfair” since the insurer “has a right to choose whom it will or will not insure.” The Court ruled that a residential tenant is not an equitable “insured” under a landlord’s homeowners’ policy, unless specifically named in the policy. Therefore, a landlord’s insurer can maintain a subrogation action against a tenant for the damages the insurer pays to the landlord following a fire or other destruction of the leased premises caused by a negligent tenant. The tenant is neither a named nor a definitional insured of the landlord’s homeowners’ insurance policy and is not an “insured” under the landlord’s policy by the mere fact that the tenant may have an insurable interest in the leased property. *Farmers & Mechanics Mut. Ins. Co. v. Allen*, 778 S.E.2d 718 (W. Va. 2015).

WISCONSIN

Wis. Stat. § 704.07(3)(a) makes a tenant automatically liable to the landlord for damage to property caused by the tenant’s negligence. A tenant is precluded from claiming co-insured status under the landlord’s fire insurance policy so as to avoid subrogation where the lease is silent as to fire insurance coverage. *Bennett v. West Bend Mut. Ins. Co.*, 200 Wis.2d 313, 546 N.W.2d 204 (Wis. App.1996). The statute reads as follows:

§ 704.07 (3) Duty of Tenant. (a) *If the premises are damaged by the negligence or improper use of the premises by the tenant, the tenant must repair the damage and restore the appearance of the premises by redecorating.*

However, the landlord may elect to undertake the repair or redecoration, and in such case the tenant must reimburse the landlord for the reasonable cost thereof; the cost to the landlord is presumed reasonable unless proved otherwise by the tenant.

WYOMING

Although Wyoming has not directly addressed this issue, the Wyoming Supreme Court has intimated that it views a contractual provision to provide specific insurance as a waiver of subrogation rights with regard to the risk insured against. *Berger v. Teton Shadows, Inc.*, 820 P.2d 176 (Wyo. 1991).

If you have any questions regarding landlord/tenant subrogation, please contact Gary Wickert at gwickert@mwl-law.com.

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