



CAMBRIDGE
PROPERTY & CASUALTY

WAIVERS OF SUBROGATION

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

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

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

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

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

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

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

Suggested Waiver of Subrogation Language

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

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