

UNDERSTANDING WAIVERS OF SUBROGATION IN COMMERCIAL LEASES

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When navigating the complexities of commercial leases, you might encounter the term "waiver of subrogation." Waiver of subrogation clauses are often accepted as boiler plate legalese in lease agreements. However, the wrong language in a waiver of subrogation clause can be a costly mistake. Waiver of subrogation clauses are a crucial concept that can significantly impact how losses are handled between landlords and tenants. Here's a straightforward guide to understanding what a waiver of subrogation is and why it matters in commercial leasing.

What is a Waiver of Subrogation?

A waiver of subrogation is a contractual agreement where one party agrees to relinquish the right to seek compensation from the other party for losses covered by insurance. The doctrine of subrogation allows an insurance company that pays a claim on behalf of an insured to succeed or be "subrogated" to any rights the insured may have against the party causing the loss. In simpler terms, it means that if one party's negligence causes damage, their insurance company will not

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pursue a claim against the other party, as long as the damage was covered by insurance.

Subrogation authorizes one party (a "subrogee") to act in place of another (a "subrogor"). When a party ("subrogee") is subrogated to the rights of another party ("subrogor"), it can "step into the shoes" of the subrogor and exercise the rights and remedies that otherwise belong to the subrogor against a third party.

Missouri has long held that waiver of subrogation clauses are valid and enforceable in commercial leases. *Disabled Veterans Trust v. Porterfield Const., Inc.*, 996 S.W.2d 548, 552 (Mo. Ct. App. 1999). See also, *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15 (Mo. banc 1995).

How Does It Work in Commercial Leases?

In the context of commercial leases, a waiver of subrogation typically involves two main parties: the landlord and the tenant. Here's how it generally operates:

1. **Insurance Coverage:** Both the landlord and the tenant should be required to carry insurance to cover their respective property and liabilities.
1. **Agreement to Waive:** In the lease agreement, both parties may agree to waive their rights to subrogation. This means that if a fire, flood, or another insured event damages the property, neither party's insurance company will pursue the other party for compensation.
1. **Protection and Cooperation:** By waiving subrogation rights, both parties acknowledge that they will not seek damages from each other through their insurance companies. Instead, they rely on their respective insurance policies to cover losses.
1. **Indemnification:** Landlord and tenant may (and often do) agree to indemnify each other for various actions (or inactions) that are enumerated in the lease. In most cases, such indemnifications will be subject to the waiver of subrogation and insurance provisions contained in the lease to ensure that such indemnifications do not interfere with insurance claims.

Why is it Important?

1. **Minimizes Legal Disputes:** A waiver of subrogation helps reduce the risk of lawsuits between the landlord and tenant. If damages occur, each party's insurance covers their losses without involving legal action against the other party.
1. **Promotes Good Relations:** This waiver fosters a cooperative relationship between the landlord and tenant. It ensures that both parties focus on mitigating risks and maintaining insurance, rather than blaming each other for damages.
1. **Insurance Requirements:** Commercial leases should require a waiver of subrogation to be included in insurance policies. This requirement ensures that both parties are protected and that their insurance arrangements align with the lease terms.

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1. **Avoiding Unnecessary Liability:** If a party has a duty to seek waiver of subrogation but fails to do so, they might find the liability boomeranging back to them. This is the type of detail that is easy to overlook. One way to help protect oneself in such circumstances is to be sure that qualified insurance agents review all leases to which one's client is a party to ensure that all insurance provisions are met. In analyzing a tenant's responsibility for fire damage, the tenant may consider possible liability for negligently caused damage to neighboring tenants. This is a liability that may require separate coverage.

Key Considerations

- **Insurance Policy Terms:** Make sure that the insurance policies of both the landlord and tenant explicitly include a waiver of subrogation clause. Not all policies automatically cover this, so it may need to be added as an endorsement.
- **Lease Negotiations:** During lease negotiations, discuss the waiver of subrogation and its implications with legal and insurance advisors. It's essential to understand how this clause impacts your rights and obligations.
- **Impact on Claims:** Be aware that waiving subrogation might affect how insurance claims are handled. A problem can arise if a tenant's insurance policy contains a clause prohibiting the insured (the tenant) from impairing the subrogation rights of its insurer to proceed against the landlord or the landlord's insurance company to recover amounts it paid to the tenant. The tenant's waiver of subrogation in favor of the landlord may prejudice the tenant's rights to recover under its own policy. Consult with your insurance provider to understand how this waiver will influence your coverage and claim processes.
- **Mutual Release:** Contracting parties typically include waivers of subrogation in their contracts, and they effectuate them through their insurance carriers by having the appropriate endorsement issue. Since both parties likely mutually agree to maintain various insurance policies, seeking mutual release can ensure all policies contemplated in a lease are predictable.
- **Check with local laws:** Landlord tenant law varies by state. While in Missouri subrogation clauses have a long history of enforceability, it is essential to consult with local counsel to ensure that provisions in your lease are enforceable by law.

Example

Here is an example of a waiver of subrogation clause from a commercial lease negotiated between a landlord and tenant:

Each party hereby waives and releases any rights or claims against the other party to recover for any loss of or damage to the Facility or the contents thereof caused by the fault or negligence of the other party and agrees to obtain a waiver of subrogation from its insurer.

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Conclusion

A waiver of subrogation in commercial leases is a valuable tool for managing risk and fostering a positive landlord-tenant relationship. By agreeing not to pursue claims against each other, both parties ensure that insurance policies cover losses without the need for litigation. If you're involved in a commercial lease, understanding and negotiating the terms of this waiver can help prevent disputes, ensure smoother operations, and protect you from financial disaster. Always consult with legal and insurance professionals to tailor these provisions to your specific situation.

For guidance on leasing issues and to ensure your interests are protected, contact us.

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