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Drafting Waivers of Subrogation in Commercial Leases: Why Are They So Important Particularly for Lawyers Negotiating Leases for Property Outside the Jurisdiction in Which They Are Admitted to Practice?

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Many property and liability insurance policies (but not all) allow the insured to prevent its insurer from exercising its contractual subrogation right if the insured waives its right to recover damages or losses caused by a third party from that third party (often called a "waiver of subrogation" but really a "waiver of right of recovery" or "waiver of claims") if the waiver is in writing and generally only if it is made prior to the occurrence of the loss. The Insurance Service Office, Inc. ("ISO") Form CP 00 90 07 88 Commercial Property Conditions portion of the ISO form policies also permits certain waivers to be made *after* a loss, including permitting an insured Landlord to waive its right of recovery against a Tenant for damage to its covered property or covered income *after* a loss.[1] However, the Tenant is not permitted to waive its right of recovery against the Landlord after a loss.

The Lease may contain a provision stating that the insurer will have no right of subrogation, or stated differently, the right of subrogation of the insurer is waived. Technically, the parties to a Lease do not have the right to waive an insurer's right of subrogation, as the insurer is not a party to the Lease. The better approach (if waiver of subrogation is the objective) is for the parties to waive their respective rights of recovery or claims against each other, and their agents and employees, thereby essentially waiving the insurer's rights of subrogation (or more correctly stated, nullifying the insurer's right of recovery as against a potentially responsible third party) with respect to the matters waived by the parties. Parties and courts have long confused the waiver of the right of subrogation with a waiver of the right of recovery or claims.

The Lease may also provide that the party obtaining the insurance will obtain an endorsement to that party's property or commercial general liability insurance policy whereby the insurer waives its right of subrogation (*i.e.*, the right to recover the insurance proceeds paid to its insured from the negligent party). Such an endorsement may not be necessary if the insured's policies include the standard form ISO Commercial Property Conditions noted above or the Standard form ISO Commercial General Liability Coverage Form (CG 00 01 04 13), but if either of the insured parties (the Landlord or the Tenant) have obtained manuscripted or blanket policies written on a form different than the ISO forms, an endorsement may be necessary. Also, where the Tenant will be entering into a contract for construction of tenant improvements, the contractor's insurance coverage under its commercial general liability policy may not technically include a waiver of the right of recovery as against the Landlord, as the Landlord is not in privity of contract with the Tenant's contractor.[2]

If an endorsement to the insurance policy is required in order to effectuate the waiver of subrogation provision in the Lease, the Lease may also require the indemnifying party to pay any additional cost or premium required to obtain that endorsement.[3] However, many insurers do not

charge an additional premium (other than a nominal fee to issue the endorsement) for the increased risk to the insurer of the insured waiving its right of recovery/subrogation.[4]

What Happens If a Lease Is Silent on Waivers of Subrogation?

If the Lease is silent as to the insurer's right of subrogation to recoup the proceeds it has paid to cover the insured's property damage or liabilities, the court may as a matter of the common law in the applicable jurisdiction either find that the insurer has *no* right of subrogation (despite its contractual right of subrogation in the insurance policy) or has an *equitable* right of subrogation. In some states, such as Florida, Illinois and Indiana, there is no hard and fast rule, and the court will make its determination as to whether the insurance company may enforce a right of subrogation on a case-by-case basis, based on the court's judgment as to the intent and reasonable expectations of the parties under the terms of the Lease and the facts of the case. Given the differences among the states as to whether the insurance company has or doesn't have an equitable right of subrogation, the better practice is to address this issue in the Lease.[5]

Majority Common Law Rule

A majority of courts follow a common law rule that a Landlord's property insurer may not subrogate against a Tenant whose negligence has caused damage to the Landlord's property. These courts have found that the Tenant is an implied coinsured.[6] These courts have concluded that the Landlord's agreement to procure property insurance covering the building implies an obligation by the Landlord to insure the building for the benefit of both the Landlord and the Tenant. This is the so-called "Sutton's Rule" named after the case *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975), which involved the Lease of a home that was damaged by a fire caused by a mishap involving Tenant's son's chemistry set and an electric popcorn popper the son was using to heat some chemicals. The court articulated the rule as follows:

> Under the facts and circumstances in this record the subrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest. 532 P.2d at 482.

In the *Sutton* case, the court went on to state:

> as a matter of sound business practice the premium paid [by the landlord for the fire insurance policy it procured] had to be considered in establishing the rental rate on the rental unit. Such premium was chargeable against the rent as an overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental. 532 P.2d at 482.

Other courts that have followed the so-called *Sutton* rule have likewise reasoned that the Tenant has indirectly paid for the insurance, either through rent or through an expense pass through.

Minority Common Law Rule

The minority rule (sometimes referred to as the "Anti-Sutton Rule"), which is followed in a number of jurisdictions, including New York and Texas, is based on the common-law presumption that a Tenant is liable for the Tenant's own negligence and subject to the equitable principle of subrogation. Upon payment by the Landlord's insurer for an insured property loss, the Landlord's insurer is subrogated to the Landlord's rights and claim against its Tenant and can sue the Tenant to recoup the insurance proceeds, absent an express agreement to the contrary in the Lease.[7] The covenant requiring the Landlord to insure its own property is not equivalent to a waiver of recovery or a waiver of subrogation.

In *Galante v. Hathaway Bakeries, Inc.*, 6 A.D.2d 142, 176 N.Y.S.2d 87, 92 (N.Y. 1958), which was based partly on common law, a lack of explicit language in the Lease to the effect that the Tenant was to make all necessary repairs to the interior of the demised premises reasonable wear and tear and damage by fire and unavoidable casualty excepted, and partly on Section 227 of the New York Real Property Law,[8] the Tenant was relieved of its responsibility to make repairs to the premises and the building following a fire only when the damage was not caused by Tenant's fault. As a result, the Tenant was not protected from liability for its own negligent acts when the entire interior of premises was destroyed by a fire claimed to be the result of Tenant's negligence. Likewise, in *Phoenix Ins. Co. v. Stamell*, 21 A.D.3d 118, 127, 796 N.Y.S.2d 772 (N.Y. App. Div. 2005), a college's insurer was entitled to bring a subrogation action against student who negligently set fire to her residence hall when she lit a candle in her room and fell asleep, and the resulting fire that started in her room spread to other parts of the residence hall. This was because "the law as well as public policy considerations in New York support the right of Phoenix to maintain this subrogation action against defendant . . . . It is . . . well established in New York that 'contracts may not be construed to exempt parties from the consequences of their own negligence in the absence of express language to that effect.'" The court had also noted in the *Phoenix* opinion that there were various provisions in the student's residence hall contract and the Handbook of Community Standards addressing student liability for damage to residence halls and furniture. 21 A.D.3d at 120.

In *Publix Theatres Corp. v. Powell*, 71 S.W.2d 237 (Tex. Comm. App. 1934), a Tenant agreed in the Lease to carry fire insurance on the leased theatre building, at the Tenant's expense, naming the Landlord as the insured. After the theatre was completely destroyed by fire, the insurer paid, but the Landlord still sued the Tenant for the loss. The Texas court declared that to permit the Landlord to keep the insurance money and also to collect from the Tenant would be to allow the lessor a double recovery, not allowed by law. *Id.* at 241.

Case-by-Case Common Law Rule

In still other jurisdictions, as noted above, where the Lease does not explicitly address the right of subrogation, a number of courts have attempted to ascertain the intent of the parties as to whether the Tenant should be considered a coinsured under the Landlord's policy on a case-by-case basis by considering

> the lease as a whole, the reasonable expectations of the parties, and the principles of equity and good conscience.

Dix Mutual Ins. Co. v. LaFramboise, 597 N.E.2d 622, 626, 149 Ill. 2d 314 (Ill. 1992).

In the *Dix* case, the Illinois Supreme Court reviewed the provisions of the Lease for a farm and farmhouse. It noted that the Lease clearly exempted the Landlord from liability for damage to the Tenant's personal property and provided the Tenant assumed all risk with respect to it. Although the Lease did not address property insurance on the leased premises, the fact that the Lease stated the Landlord was not liable for damage to the Tenant's personal property and the Landlord took out a fire insurance policy covering the leased premises meant the parties intended each would be responsible for its own property. Therefore, the Tenant was not liable for fire damage to the premises, and the Landlord would be obligated to look solely to its insurance as compensation. Furthermore, the insurance company was prohibited from pursuing a subrogation claim against its own insured or any person or entity who has the status of a coinsured under the insurance policy. Because the Tenant was essentially paying for the Landlord's insurance policy through his rent payments, the Tenant gained the status of a coinsured under the Landlord's insurance policy, and both parties "intended that policy would cover any fire damage to the premises no matter who caused it." *Id.* Accordingly, the Landlord's insurance company was not permitted to maintain a subrogation action against the Tenant.

This same rule has been held applicable in Illinois to commercial leases in a number of cases. For example, *see Stein v. Yarnell-Todd Chevrolet, Inc.*, 241 N.E.2d 439, 41 Ill. 2d 32 (Ill. 1968). The *Stein* case Lease obligated the Tenant to procure and maintain certain types of insurance (*e.g.*, plate glass damage, damage by boiler or boiler explosion, public liability and "damage or injury to employees of the lessee"). 241 N.E.2d 442. The Lease was silent on whether the Landlord was obligated to carry any insurance, but did obligate Tenant to reimburse the Landlord for any premium increases for the Landlord's insurance policy and to cease any activity that would "invalidate any insurance policy maintained on the building or leased premises" which the court held meant the parties intended the Landlord would carry insurance on the real estate. *Id.* In addition, the Lease specified the Tenant was to "return the premises and all leasehold improvements and fixtures therein in as good condition as when lessee took possession, ordinary wear and tear or damage by fire or other casualty beyond lessee's control excepted." *Id.* at 440. Accordingly, based on "the lease as a whole, we judge that the parties manifested a pervading intention that the lessee was not to be liable for damage through fire resulting through the lessee's negligence." *Id.* at 443. *See also Nationwide Mut. Fire Ins. Co. v. T&N Master Builder & Renovators*, 959 N.E.2d 201, 355 Ill. Dec. 173, 2011 IL App (2d) 101143 (Ill. App. 2011) (same anti-subrogation rule applicable to residential leases applies to commercial lease where clause holding commercial holdover Tenant was liable for damages sustained to premises while in Tenant's possession did not apply to damages caused by fire because lease surrender clause specifically excepted losses by fire).

California, Florida and Indiana also have employed the case-by-case approach.[9] The most recent Florida case as compared to the most recent Indiana case illustrate how difficult it is to predict what the results will be where the Lease is silent on whether their insureds were entitled to a right of subrogation and the courts in the state employ the case-by-case approach to determine whether an insurer is entitled to exercise its right of subrogation to recover from a party to a Lease causing damage to the property of the other party to that Lease. In the Florida case, the Landlord's insurance company was entitled to pursue a subrogation claim against the Tenant, but in the Indiana case, the Landlord's insurance company was prohibited from pursuing a subrogation claim against the Tenant.

The Florida Court of Appeals decided the *Zurich American Ins. Co. v. Puccini, LLC d/b/a 5 Napkin Burger*, 2019 WL 454222 (Fla. App. 2019), case in February 2019. The subrogation claim by the Landlord's insurer (Zurich American Ins. Co.) involved a $2.1 million loss paid by that insurer against a restaurant tenant (5 Napkin Burger) following a fire started in the Tenant's restaurant. The Tenant argued it was an implied coinsured under the Landlord's property insurance policy. Applying the case-by-case rule adopted in Florida, and based on the language of the Lease, the court held the parties intended the Tenant should bear the risk of loss due to damage to the premises caused by its negligence, the Tenant was not an implied coinsured under the Landlord's property policy, and the Landlord's insurance company could proceed with its subrogation action against the Tenant. The court found that it was clear from the following Lease provisions that the parties did not intend to shift the risk of loss for damage caused by the Tenant's negligence to Zurich:

(1) Rent Not Abated for Tenant Negligently Caused Fires. Paragraph 41 provided that "rent shall not be abated and Tenant shall be fully responsible for all repairs and damages if Premises are partially or totally destroyed by fire or any other casualty caused by Tenant or its agents." The court noted "Not only does Paragraph 41 not exculpate Tenant for its own negligence, it expressly holds it liable."

(2) Exception to Landlord's Structural Repair Obligation for Repairs Due to Tenant's Negligence. Paragraph 33 eliminated the Landlord's duty to make repairs to the "structural aspects and elements of the Building," if such repairs were "occasioned by any intentional or negligent act of Tenant, its agents, or its employees."

(3) Unilateral Provisions Expressly Waiving Landlord Liability. Paragraph 9 waived liability of the Landlord for "any loss or damage to any of Tenant's personal property or Premises unless directly caused by the gross negligence or willful misconduct of Landlord … nor shall Landlord be liable for … damages incurred or suffered by the Tenant … or others occasioned by … fire…." The court reasoned that by the "plain language" of Paragraph 9 of the Lease, the risk of loss was shifted from the Landlord to the Tenant, absent gross negligence or willful misconduct on the Landlord's part.

(4) Tenant Indemnified Landlord for all Damages Arising Out of Occurrences in the Premises. Paragraph 24 required the Tenant to indemnify the Landlord "from any and all … damages … arising from or out of any occurrence in or upon the Premises …."

(5) Tenant Indemnified Landlord for all Costs Resulting from Tenant's Failure to Properly Maintain the Premises. Paragraph 31 required the Tenant to be responsible for and to indemnify the Landlord for any "costs … relating to such damages … resulting from Tenant's failure to properly maintain the Premises …."

(6) Tenant Required to Insure or Self-Insure its Own Losses; Waiver of Recovery for Losses for Which Tenant Should Have Maintained Insurance. Paragraph 25 placed the burden on the Tenant to procure and maintain insurance

for its own benefit and to name the Landlord as an additional insured, rather than requiring the Landlord to maintain insurance for the benefit of the Tenant. Paragraph 25 provided:

> 25. INSURED LOSS OR DAMAGE: In any event of loss or damage to the Building, the Premises and/or any contents, each party shall first exhaust its own insurance coverage before making any claim against the other party. As Tenant is obligated to maintain insurance to fully cover all of its losses, in the event Tenant sustains a loss not fully covered by its own insurance, Tenant acknowledges that it is self-insured for any uncovered loss; Tenant expressly waives the right to make any claim against the Landlord or seek recovery of any damages from the Landlord or its insurance company arising out of any loss or incident for which the Tenant should have maintained its own insurance.

(7) Tenant Required to Maintain Property Insurance and Liability Insurance for Property Damage Naming Landlord as Additional Insured; Tenant Indemnifies Landlord for Claims for Which Tenant Insurable. Paragraph 26 required the Tenant to maintain (among others), the following coverages:

> (a) Fire/Windstorm/Property Insurance with extended coverage endorsement on Tenant's fixtures, equipment, furnishings and other contents of the Premises, for the full replacement cost of said items; and (b) Comprehensive Commercial / Public Liability Insurance … sufficient to protect against liability for damage claims … arising out of accidents occurring in or around the Premises in a minimum of … $1,000,000.00 for property damage…. Such insurance policies shall provide coverage for Landlord's contingent liability on such claims or losses, and shall name Landlord as an additional insured party…. Tenant shall maintain sufficient insurance to fully protect Tenant from all losses and damages; Tenant indemnifies and saves Landlord harmless for any claim for which Tenant was insurable.

(8) Operating Cost Rent Did Not Obligate Landlord to Insure Tenant. Paragraph 45 required the Tenant to pay as additional rent 70% of the Landlord's operating expenses, including insurance premiums. The court rejected the Tenant's argument that by paying the majority of the cost of the property insurance maintained by the Landlord, the Tenant was to be protected by that insurance, and that there was an implied waiver of subrogation. The court found that nothing in the lease explicitly required the Landlord to purchase property insurance or to name the Tenant as an insured under any insurance policy procured by the Landlord.

The lesson learned from a careful review of the Lease provisions relied on by the court in the *5 Napkin Burger* case, is that all of the Lease provisions have to be reviewed to be sure they are consistent with what the parties intend and with the insurance provisions, even when a waiver of

claims or right of recovery language is included in the Lease. There were a number of potential problems with the Lease clauses in the *5 Napkins Burger* case.

First, there was no waiver on the part of the Landlord, which left the Tenant exposed for the full cost to replace the Landlord's damaged building following a fire. We have no indication from the case whether the Tenant was able to pay the loss, replace or restore its own damaged property and resume occupancy, or even pay the rent, but if this was a single location small business operation (as opposed to a large restaurant chain), by not waiving its right of recovery the Landlord might end up with a replaced empty shell of a building and no tenant. Note that the Tenant's ability to pay rent that was not abated when the fire was caused by the Tenant's negligence might be dependent on whether the Tenant carried loss of business income insurance covering the period during which the restaurant was being restored. If the Tenant did not carry such insurance, the Landlord who may have thought it was getting the upper hand in the negotiation with its Tenant or justified in obligating the Tenant to continue to pay rent when the Tenant was the one who caused the fire, may have just "cut off its nose to spite its face." The Landlord's own rent loss insurance typically will not reimburse it when the Tenant's rent is not abated, and the Tenant simply fails to pay the rent because it can't pay for economic reasons (*e.g.*, being out of business), and has no loss of business income insurance.

Second, the Lease provided the Landlord was not obligated to rebuild or repair structural damage to the building caused by the Tenant's negligence. If the Landlord elected not to repair, even if it carried full replacement cost insurance, the most it could recover from its insurance company would be the actual cash value of the loss, not the full cost to repair or restore. There is no indication in the case whether the loss paid by the Landlord's insured was replacement cost or actual cash value, but the difference could be very significant.

Third, from the Tenant's perspective, it did agree in the Lease to waive its right of recovery against the Landlord, which would have been effective had the Landlord caused the fire or had the fire been due to causes other than the Tenant's negligence. Also, the Tenant's waiver extended to all losses for which it was "insurable" – not for amounts the Tenant was obligated to insure leaving it up to the Tenant to decide whether it needed more and different types of insurance above and beyond customarily obtained coverages. Under this language, if the Tenant failed to obtain a particular type or limits of insurance that could have covered a loss that later occurred, it would not be able to assert a claim against the Landlord. Despite all of these waivers by the Tenant, there was no reciprocal waiver from the Landlord. Moreover, to add "insult to injury," the Lease obligated the Tenant to pay 70% of the Landlord's insurance premiums as part of the operating expenses, but this factor alone was not enough for the court to find an implied waiver of subrogation on the part of the Landlord.

Indiana first adopted the case-by-case rule for determining whether a Landlord's insurer could bring subrogation action against a negligent Tenant for damage to the leased premises in 2014 in *LBM Realty, LLC v. Mannia*, 19 N.E.3d 379 (Ind. App. 2014). In that case, which contains an extensive summary of the so-called "*Sutton* Rule" (the majority rule) and the minority rule, the court concluded the Landlord's insurance company was entitled to bring a subrogation action against a residential apartment Tenant who had caused a fire for damages to the unit she leased. However, because the court concluded there was no clear and enforceable provision in the Lease that would have put the Tenant on notice she would be responsible for damage she caused to areas

of the multi-unit apartment building outside of her leased premises, the court determined the insurance company could not seek recovery for those amounts from the Tenant.

In a more recent commercial lease case, still applying the case-by-case approach, the Indiana Court of Appeals distinguished the holding in the *LBM Realty* case. *See Youell v. Cincinnati Insurance Co.*, 117 N.E.3d 639 (Ind. Ct. App. 2018). The *Youell* case involved a subrogation claim by a Landlord's insurer against a commercial Tenant. When the building was damaged by a fire, the Landlord's insurer paid $227,653 to repair the damage. The Tenant filed a motion for judgment on the pleadings on the insurer's subrogation claim, arguing the insurer had no right to a subrogation claim against the Tenant for the loss. The court agreed, holding:

> the Commercial Lease Agreement unambiguously provides that Landlord would insure the building and Tenant would insure its personal property inside the building. . . . Landlord and Tenant's agreement to insure was thus 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. 117 N.E.3d at 642.

The court was able to distinguish the *Youell* case from the *LBM Realty* case because in the *LBM Realty* case 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. 117 N.E.3d at 643.

If the tables are turned and the Landlord negligently damages the property of the Tenant, courts are more reluctant to recognize an implied waiver in the case of an insured Tenant and a negligent Landlord causing damage to a Tenant's property. The reason for the distinction is that there is no payment of the insurance through rent, no surrender clause applicability, and probably no reasonable expectation on the part of the Landlord to be free from liability.[10]

Multijurisdictional Practice Issues

With all of the conflicting common law in various jurisdictions as to whether a Lease that is silent on the question of whether the Landlord and Tenant intended to waive their rights of recovery, and thereby their respective insureds' rights of subrogation, any attorney negotiating a Lease for property in a jurisdiction other than one in which he or she is admitted to practice, should consider making sure the Lease does include an explicit waiver of such rights or a provision explicitly stating the insurer's right of subrogation is not waived. In most situations, it would be to both parties' benefit to have recovery for property losses limited to the insurance insuring the damaged property. Typically, that means the Landlord's property insurance policy would cover losses to the building and the Tenant's property insurance policy would cover losses to the Tenant's trade fixtures and personal property.

Even then, however, there are many other potentially unique local law issues to consider. First, what if there is a state statutory prohibition on the right to waive recovery against a negligent party? For example, in Illinois, a Landlord cannot be indemnified by a Tenant against its own negligence, and any provision in a Lease that purports to exempt the Landlord for its own negligence, or that of its "agents, servants or employees" is "void and against public policy and wholly unenforceable." 765 ILCS 705/1(a). On its face, the language in the statute might appear

to address "exculpatory" provisions (*i.e.*, those that seek to relieve Landlords from their own negligence (or that of their agents, servants or employees)) rather than "indemnity" provisions. However, the statute was applied to a void an entire lease indemnity provision in *Economy Mechanical Industries, Inc. v. T.J. Higgins Co.*, 689 N.E.2d 199, 294 Ill. App. 3d 150, 228 Ill. Dec. 327 (1st Dist. App. 1997). The lease provision, which was from a familiar form used by a number of smaller Landlords in Illinois at that time, read as follows:

> Lessee covenants and agrees that he will protect and save and keep the Lessor forever harmless and indemnified against and from any penalty or damages or charges imposed for any violation of any laws or ordinances, whether occasioned by the neglect of Lessee or those holding under Lessee, and that **Lessee will at all times protect, indemnify and save and keep harmless the Lessor against and from any and all loss, cost, damage or expense, arising out of or from any accident or other occurrence on or about the Premises, causing injury to any person or property whomsoever or whatsoever** and will protect, indemnify and save and keep harmless the Lessor against and from any and all claims and against and from any and all loss, costs, damage or expense arising out of any failure of Lessee in any respect to comply with and perform all the requirements and provisions hereof.

Relying on an earlier Illinois case, the *Economy* court held that the statute also prohibited a lease clause that sought to indemnify the Landlord for its own negligence. According to the court, the lease clause in question was sufficiently broad to include indemnification for the Landlord's own negligence and was therefore void for all purposes and could not be enforced. 689 N.E.2d at 203.

What is most troubling about the *Economy* case for drafters of Illinois Leases is that it involved a claim for indemnification brought by the Landlord arising out of a suit by one of the Landlord's employees who was injured while on the leased premises. According to the opinion, the complaint did not contain any detail on how the employee was injured or whose negligence caused the employee's injury. However, the court found it was not important as to whether the Landlord was seeking to be indemnified for its own negligence or that of the Tenant. *Id.* As a result of this case and the earlier one relied upon by the *Economy* court, Landlords in Illinois have had to make certain the exculpatory and indemnification provision in their Leases specifically provide they are not intended to exculpate or indemnify the Landlord against its own negligence or that of the Landlord's agents, servants or employees.

Lawyers in other jurisdictions sometimes draft clauses in their commercial leases to make the Landlord liable only for its gross negligence (in other words, thereby exculpating it from liability for damage to property of the Tenant or injury to persons caused by the Landlord's ordinary negligence) or obligating the Tenant to indemnify the Landlord from everything other than the Landlord's gross negligence or willful misconduct. As noted above, these types of provisions are not enforceable in Illinois, and if not carefully drafted, under the *Economy* case may negate an entire indemnity provision, including provisions in which the Tenant indemnifies the Landlord for the Tenant's negligence, gross negligence or willful misconduct.

Later cases in Illinois have drawn a distinction between an agreement to indemnify a Landlord for its own negligence, which would be void in Illinois, and an agreement to insure or

provide insurance for the benefit of the Landlord, such as by naming the Landlord as an additional insured on the Tenant's CGL policy. Such agreements are enforceable in Illinois,[11] although there still may be problems and issues lurking in those clauses. For example, what if one of the parties is self-insured? But, that is another can of worms that can't be covered in this short article, and will have to be addressed at a later date.

After the *Economy* case was decided, the Illinois statute was amended to specifically allow a Landlord under a non-residential lease to be exempted from liability for property damage. *See* 765 ILCS 705/1(b). Accordingly, provisions in a commercial lease that exempt or exculpate the Landlord for liability for damage to the Tenant's personal property are not void in Illinois.

Because the common law and statutory law in other jurisdictions may not be the same as that of an attorney's home state in which he or she is admitted to practice, even if the jurisdiction in which the leased premises are located has adopted a version similar to Model Rule 5.5 with respect to allowing a non-licensed attorney to practice law (*i.e.*, engage in a multijurisdictional practice) in that jurisdiction,[12] it may not be wise to act without consulting with local counsel.[13] Under Model Rule 5.5, a lawyer not admitted to practice in a jurisdiction is permitted to engage in the practice of law in that jurisdiction only under specified conditions. Not all states have adopted the same conditions, and there are different degrees to which the local bars or disciplinary authorities undertake to investigate the activities of lawyers from other jurisdictions. Thus, caution should be used and the rules of a local jurisdiction should be consulted before undertaking representation of a Tenant (or a Landlord) in a leasing matter involving premises located in a jurisdiction in which you are not admitted to practice. The American Bar Association's website includes a number of resources, including links to the Rules of Professional Conduct adopted in all jurisdictions, and summaries of the states' implementation of the ABA's multijurisdictional practice policies and Model Rules.

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[1] **ISO Form CP 00 90 07 88 Commercial Property Conditions Form.** The following provision, which is contained in the ISO form of Commercial Property Conditions, is the provision that grants the insurer a contractual right to recover amounts paid by the insurer to others under the policy from third persons that may be liable to the insured for such amounts (*i.e.*, a contractual right of subrogation) (highlighting and emphasis added by authors):

> **I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US**
>
> If any person or organization to or for whom we make payment under this coverage part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:
>
> **1.** **Prior** to a loss to your covered property or covered income.
>
> **2.** ***After*** a loss to your covered property or covered income only if, at time of loss, that party is one of the following:
>
> **a.** Someone insured by this insurance;
>
> **b.** A business firm:
>
> **(1)** Owned or controlled by you; or
>
> **(2)** That owns or controls you; or
>
> **c.** Your tenant.

This will not restrict your insurance.

[2] **ISO Additional Insured Forms For Contractor Insurance Policies.** For example, under certain ISO forms of Additional Insured endorsements (*see e.g.*, ISO **CG 20 33 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement with You and ISO **CG 20 37 04 13** Additional Insured – Owners, Lessees or Contractors – Completed Operations), the additional insured insurance only includes persons for whom the contractor is performing operations when the contractor and the named insured have entered into an agreement calling for the additional insured to be added as an additional insured or where the contractor's work is performed for the additional insured. If the Tenant hires a contractor, even if the construction contract calls for the Landlord to be named as an additional insured, the Landlord will not be covered under these forms of Additional Insured endorsements because the operations or work will not be performed for the Landlord or under an agreement with the Landlord. However, if the Tenant's contractor obtains an ISO **CG 20 38 04 13** Additional Insured – Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement form of additional insured endorsement, the Landlord would be considered an additional insured as long as the construction contract between the Tenant and the contractor specifically provides that the Landlord will be added as an additional insured on the contractor's CGL policy, subject to the other limitations in that endorsement form.

[3] **ISO Form of "Waiver of Subrogation" Endorsement.** ISO does issue a CGL policy endorsement ISO form **CG 24 04 10 93** – Waiver of Rights of Recovery Against Others to Us. This form specifically names the person or organization with respect to which the insurer waives its right of recovery, but it is limited to payments made for injury or damage arising out of the insureds "ongoing operations" or the insured's "work" done under a contract with the person or organization named and included in the "products and completed operations hazard." Thus, it appears to apply primarily to CGL policies issued to contractors and for the benefit of a property owner for whom the contractor is performing work or operations, and would not apply to a Landlord where the Tenant is contracting with the contractor to perform work and on the Landlord's property.

[4] **Waiver of Subrogation Factored in Advance into Insurer's Risk and Premium.** E. Patterson, ESSENTIALS OF INSURANCE LAW 122 (1935) made the following text book argument for this business practice:

> [Subrogation] plays no part in the rate schedules (or only a minor one), and no reduction is made in insuring interest, such as that of the secured creditor, whether the subrogation right will obviously be worth something. Hence, in such case, no reason appears for extending it. Even as to tortfeasors, it is arguable that since insurers take the risk of negligence losses, they should not shift the loss to another.

[5] **Fifty-State Survey on Landlord/Tenant Subrogation Rights.** For a comprehensive survey of the law in all fifty states as to whether they allow subrogation, deny subrogation or determine the right of an insurance company to exercise a right of subrogation on a case-by-case basis in the context of the Landlord/Tenant relationship, *see* Matthiesen, Wickert & Lehrer, S.C. ("**MWL**"), "Landlord/Tenant Subrogation in All 50 States" (last updated 5/20/19) available at https://www.mwl-law.com/wp-content/uploads/2013/03/landlord-tenant-subrogation-in-all-50-states.pdf (last visited April 6, 2019).

[6] **Majority Rule: Implied Coinsured Negates Equitable Subrogation.** In circumstances where the Lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, ***equitable subrogation***. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an ***implied coinsured*** under the insured's property insurance policy. Some of these courts have concluded that the Landlord's agreement to procure property insurance covering the building implies an obligation by the Landlord to insure the building for the benefit of both the Landlord and the Tenant. Others of these courts have reasoned that the Tenant has indirectly paid for the insurance, either through rent or through expense pass through.

See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11; and CONTRACTUAL RISK TRANSFER *Subrogation in Real Property Leases - The Implied Coinsured Approach ("Sutton Rule")* [International Risk Management, Inc. (IRMI) last visited on line April 6, 2019 https://www.irmi.com/online/crt/ch005/1l05f000/al05f010.aspx) discussing the following cases supporting the results of the *Sutton* Rule in addition to *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975): *Hanover Ins. Co. v. Honeywell, Inc.*, 200 F. Supp.2d 1305 (N.D. Okla. 2002); *Morris Zeligson Props., LLC. v. South E. Auto*

Trim, Inc., 99 P.3d 744 (Okla. Ct. Ap. 2004); *Tri-Par Invs. LLC. v. Sousa*, 680 N.W.2d 190 (Neb. 2004); *DiLullo v. Joseph*, 792 A.2d 819 (Conn. 2002); and *Dattel Family Ltd. P'ship v. Wintz*, 250 S.W.3d 883 (Tenn. Ct. App. 2007).

[7] **Minority Rule: No Implication of Coinsured Status.** See FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 *No Implication of Coinsured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease*; and CONTRACTUAL RISK TRANSFER *Subrogation in Real Property Leases - The Anti-Sutton Approach (Subrogation Permitted)* [International Risk Management, Inc. (IRMI) last visited on line April 6, 2019 https://www.irmi.com/online/crt/ch005/1l05f000/al05f010.aspx) discussing the following cases for the Anti-Sutton Rule: *56 Assocs. ex. rel. Paolino v. Friedband*, 89 F.Supp.2d 189 (D.R.I. 2000); *Koch v. Spann*, 92 P.3d 146 (Or. Ct. App. 2004); *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa 1992) and citing the following commentator's criticism of the *Sutton Rule*, J. Appleman, INSURANCE LAW AND PRACTICE § 4055, at 78 (1991 Supp.):

> *Sutton*, the leading modern case denying subrogation of lessees, cites no cases for the proposition that the lessee is a co-insured of the lessor, comparable to a permissive user under an auto insurance policy. Contrary to the court's statements, the fact both parties had insurable interests does not make them co-insureds. The insurer has a right to choose whom it will insure and it did not choose to insure the lessees, and under this holding the lessee could have sued the insurer for loss due to damage to the realty, e.g. loss of use if policy provides such coverage. Cases following *Sutton*, however, have at least impliedly restricted the co-insurance relationship to one limited solely to the purpose of prohibiting subrogation.

New Jersey. In *Ace American Ins. Co. v. American Medical Plumbing, Inc.* 2019 WL 1474065 (Superior Ct., App. Div. April 4, 2019) (construing the AIA A201 Waiver of Subrogation provisions), the court found in the AIA form a clear contractual waiver by the owner (Equinox Development Corporation of its insurer's (Ace American Ins. Co.) subrogation right. In doing so it focused on the waiver "to the extent **covered** by insurance" language of the contract. One of the contractor's (Grace Construction Management Company LLC) Work was for the "core and shell". Other contractors were performing work on the interior and furnishings. The core and shell contractor subcontracted the plumbing work to American Medical Plumbing, Inc. After the work under the American Medical Plumbing subcontract was completed, a water main failed and flooded the property (a health club). The Equinox's insurer paid $1.2 million for property damage to the property. Only $8,000 was for damage to the core and shell and the balance was apparently for damage to internal construction, furnishings and equipment. Ace sued American claiming it was at fault for the water-main break and sought recovery of its payments to Equinox. ACE argues that its claim against American is not the kind that A201 subjects to a subrogation waiver. ACE contends that the subrogation waiver under section 11.3.7 has a spatial limit, applying only to claims for damage to the Work itself but not adjacent property, as well as a temporal limit, applying only to claims arising before construction is complete. Since the bulk of the water damage affected not the health club's "core and shell" but its internal construction and furnishings, and since the claim here arose after the Work was completed, ACE concludes that section 11.3.7 does not restrict it from suing American.

The court was called on to construe the following AIA provisions (authors added underlining and bold emphasis):

> § 11.3 PROPERTY INSURANCE
>
> § 11.3.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be **covered**, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.
>
> § 11.3.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

§ 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss **covered** by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

§ 11.3.7 WAIVERS OF SUBROGATION

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent **covered** by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

The court held that Ace's rights of subrogation were waived by the AIA provisions. The court stated

> We are unpersuaded by these arguments. ACE misconstrues the basic structure of the two subrogation-waiver provisions. Section 11.3.7 applies the waiver to any insured damage, whether occurring during or after construction, whether to the Work, to the Project, or to other insured property – so long as the policy covering the damage falls within one of the two categories identified: "property insurance obtained pursuant to this Section 11.3" or "other property insurance applicable to the Work." Augmenting section 11.3.7, section 11.3.5 extends the waiver even to damage insured by a discrete policy. Thus, the waiver applies "[i]f during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project." (Emphasis added). The waiver also applies "if after final payment, property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period." (Emphasis added).
>
> ACE's blanket all-risk policy fell within both categories of coverage subject to section 11.3.7. Its builder's risk coverage constituted "property insurance obtained pursuant to this section 11.3" because it met the builder's risk insurance requirement. … Moreover, inasmuch as the ACE policy exceeded the coverage required by section 11.3.1, it was also "other property insurance applicable to the Work."
>
> Since the all-risk coverage both satisfied A201's insurance requirement and was "applicable to the Work," section 11.3.7 waived all claims for damages "to the extent covered" by the policy. … Thus, even where the damages are almost entirely non-Work-related, as they were here, the subrogation waiver applies, because the policy also covered the Work-related damages. Thus, even where the damages are almost entirely non-Work-related, as they were here, the subrogation waiver applies, because the policy also covered the Work-related damages.

Texas. Courts in Texas have not expressly addressed the *Sutton's* Rule or the Anti-*Sutton* Rule. However, in *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956), the Texas Supreme Court held that where the Lease merely provided that the Landlord agreed to carry fire and extended coverage insurance on the building, part of which was occupied by the Landlord, there was no duty on the Landlord to procure insurance for the benefit of the Tenant, and the Landlord's insurers were not precluded from obtaining a subrogated cause of action to recoup its policy proceeds on account of fire caused by the Tenant's negligence. The court rejected the Tenant's contention that the intent of the parties for including a covenant of the Landlord to insure its own building (presumably the cost of which was built into the rent) was to exculpate the Tenant for its own negligence.

[8] **Section 227 of the New York Property Law:**

§ 227. When tenant may surrender premises. Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender. Any rent paid in advance or which may have accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender.

[9] **Case-by-Case Rule in Other States as to Whether Subrogation is Permitted.** See CONTRACTUAL RISK TRANSFER *Subrogation in Real Property Leases - The Case-by-Case Approach* [International Risk Management, Inc. (IRMI) last visited on line April 6, 2019 https://www.irmi.com/online/crt/ch005/1l05f000/al05f010.aspx) discussing a number of cases employing the Case-by-Case Approach. One of those recent cases was an unpublished opinion from California. *Western Heritage Ins. Co. v. Frances Todd, Inc.*, 2019 WL 1450731 (Ct. App., 1st Dist., Div. 5 March 4, 2019). In *Western Heritage*, the court was faced with determining whether a commercial condominium association insurer could subrogate against the unit owner's allegedly negligent tenant for losses paid by the insurer to cover damage to the unit and other nearby property due to a fire. The Tenant, which operated a furniture manufacturing business, allegedly knew about faulty wiring in the unit that apparently was the cause of the fire and kept flammable staining materials inside the unit. The property insurer issued property insurance to the condominium association pursuant to the following provisions in the condominium Declaration of Codes, Covenants and Restrictions (CC&Rs) referenced by the court:

> Article 13.1 of the CC&Rs applicable to the property requires the Association to "obtain and maintain a master or blanket policy of all risk property insurance coverage for all Improvements within the Project, insuring against loss or damage by fire or other casualty. ... The policy shall name as insured the Association, the Owners and all Mortgagees of record, as their respective interests may appear." Article 13.3 of the CC&Rs provides in part, "Any insurance maintained by the Association shall contain [a] 'waiver of subrogation' as to the Association, its officers, Owners and the occupants of the Units and Mortgagees. ..." Article 13.4 prohibits an individual owner from obtaining fire insurance while allowing an owner to obtain individual liability insurance. Article 3.1 requires that all "occupants and tenants" comply with the CC&Rs.

The court noted that the Lease between the condominium owner and the Tenant contained the following provisions:

> Paragraph 5 of the Lease provided, "Lessee shall not commit waste, nor carry on any activity which would destroy or impair the quiet enjoyment of other lessees in the building of which the Premises form a part." Paragraph 6 required the Lessee to keep the Premises in good repair. Paragraph 8(A) required the Lessee to "keep in force a public *liability* insurance policy covering the leased Premises, including parking areas, if any, included in this Lease, insuring Lessee and naming Lessor as an additional insured. ... Said insurance policy shall have minimum limits of coverage of $ 1,000,000 in the aggregate." (Italics added.) The Lease did not specify which party (Lessor or Lessee) would carry *fire* insurance.
>
> Paragraph 9(B) of the Lease, entitled "Lessor's Right to Recover Damage(s)," provided, "Such efforts as Lessor may make to mitigate damages caused by Lessee's breach of this Lease shall not constitute a waiver of Lessor's right to recover damages against Lessee hereunder. Nor shall anything herein contained affect Lessor's right to indemnification against Lessee for any liability arising prior to the termination of this Lease for personal injuries or property damage resulting from the acts or omissions of Lessee, and Lessee hereby agrees to indemnify and hold Lessor harmless from any such injuries or property damages ... except for damages occasioned by Lessor's intentional or grossly negligent acts."
>
> Paragraph 11 of the Lease provided in relevant part, "Lessee agrees 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 Lessor under Paragraph 7 excepted." Paragraph 19 allowed either party to terminate the lease when damage due to fire, other casualty or eminent domain rendered ten percent or more of the property "untenantable." In the event the fire, other casualty or taking rendered less than ten percent of the property untenantable, "the Lessor shall proceed to repair the Premises and/or the building and/or the property of which the Premises are a part to the extent of any insurance proceeds received on account of a Casualty. ..."

The court held:

In this case, we conclude the Western Heritage policy was maintained for defendants' benefit and that summary judgment was properly granted in their favor.

First, the Lease in this case required defendants to obtain only liability insurance, not fire insurance. The implication was that fire insurance would be carried by the lessor, de Carion. William R. de Carion was an additional named insured on the insurance policy purchased by the Association, as the CC&Rs governing the property required.

Second, owners such as de Carion were prohibited by the CC&Rs from purchasing an individual fire policy, as were "occupants" and "tenants" of the premises to whom the CC&Rs applied. (See Policy, [¶] [¶] 3.1, 13.4.) Defendants could not, therefore, purchase their own first-party fire insurance for the structure (a structure in which they held no ownership interest).

Third, the yield-up clause in this case provided that defendants, as 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." (Lease, [¶] 11, italics added.) "Casualty" includes damage from fire.

… But whether or not de Carion was named as an insured under the first party fire provisions, the CC&Rs, which formed a contract between de Carion and the Association (citations omitted), contemplated that he would be. They also provided that in any such policy, the Association secure a waiver of any right the insurance company might have to a subrogation action against the owners or tenants of the project. It would be inequitable under these circumstances to treat the Association as the sole insured for purposes of Western Heritage's right to bring a subrogation action to recover amounts paid under its fire policy.

[10] **Tenant Damaged by Landlord.** See Ann Peldo Cargile, *Implied Waivers of Subrogation in Leases*, 12 PROB. & PROP. 22, 27 (1998).

[11] **Obligation to Insure *vs.* Obligation to Indemnify.** *See, e.g., Clarendon America Ins. Co. v. Prime Group Realty Services, Inc.*, 907 N.E.2d 6, 389 Ill. App. 3d 724 (1st Dist. App. 2009). Consistent with the insurance requirements in the Lease, the Tenant procured an insurance policy from Clarendon America Insurance Company ("Clarendon") that listed the Landlord as an additional insured. However, the policy included an endorsement that excluded coverage for any additional insured for its own acts or omissions. The underlying claim that led to the opinion involved an injury suffered by an employee of the Tenant while that employee was on the rooftop of the Landlord's building after he repaired the HVAC system on the roof of the building. Clarendon agreed to defend the Landlord under a reservation of rights "to the extent that it determined that [the Tenant's employee's] injuries are the result of [Landlord's] negligence because the Landlord was named as an additional insured under the Tenant's CGL policy. The Landlord filed a third party complaint against the Tenant, claiming the Tenant had failed to procure the CGL insurance required under the Lease. The Landlord appealed a motion for summary judgment in favor of the Tenant on the issue of whether the Tenant had breached its obligations under the Lease because it had no obligation to insure or indemnify the Landlord against the Landlord's own negligence. The court noted that the obligation to insure is different from an obligation to indemnify because the obligation to indemnify requires the party agreeing to indemnify the other "to assume all responsibility for any injuries or damages" whereas a promise to insure requires that party to agree to "procure insurance and pay premiums" citing the *Sears* case discussed in Part V.C (Best Practice Tips - Importance of Reviewing Insurance Policies Against Indemnification Obligations). "A promise to insure relieves the promisor of responsibility" in the event of an injury or damages once the insurance is obtained." *Sears, Roebuck and Co. v. Charwil Associates Ltd. Partnership*, 864 N.E.2d 869, 875 (1st Dist. 2007).

Although the court acknowledged the premises may include areas in addition to leased areas, the *Clarendon* court held that the Tenant had satisfied its obligation to procure insurance for the premises as defined in the Lease, which included a specifically defined space in the plaza level and basement level of the building that was shown in a plan attached to the Lease. The court also noted that the insurance provision obligated the Tenant to procure insurance regardless of whether the Landlord or the Tenant was negligent. Nevertheless the provision was held to be valid and enforceable. Why? Because a waiver of claims coupled with an indemnity provision must prohibit the Landlord from being indemnified for its own negligence to be enforceable and is different from a promise by the Tenant to procure insurance covering the Landlord's negligent acts, which is valid even under circumstances where an agreement to indemnify the Landlord for its own negligence would not have been valid. However, the Tenant breached its

obligation to procure insurance covering the Landlord's own acts or omissions, which did not contain the same carve-out for the Landlord's negligent acts that the Lease indemnity provision contained.

The lessons to be learned here are to be sure the parties understand what areas each is to insure (here the Landlord was to have insured its activities in areas that were not a part of the premises, and the Tenant's obligation was to insure activities within the leased premises), and in the case of the Tenant, to make sure if it is to insure the Landlord against the Landlord's own negligent acts, it must obtain the proper additional insured endorsement to its policy. There are various forms of Additional Insured Endorsements for commercial general liability insurance policies that were last updated in April 2013. Who is included in the definition of additional insured and what liability is covered under each specific endorsement does vary to some extent, so the one that is appropriate for a given situation may not be the correct one for a different situation. The best thing to do is to insist on obtaining and reviewing the actual endorsement that is attached to the Tenant's policy.

[12] **Model Rule 5.5** and the version of the Model Rule 5.5 as adopted in various states are set forth below:

> **Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**
>
> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
>
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
>
> (4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
>
> (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
>
> (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.
>
> (e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

The version of **Rule 5.5 adopted in Illinois** reads as follows:

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or admitted or otherwise authorized to practice in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized ~~to provide~~ by federal ~~law~~ or other law or rule to provide in ~~of~~ this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

The **California version of Rule 5.5**, which was adopted effective November 1, 2018, and which are not as expansive as those adopted in Illinois or New York, reads as follows:

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction; or

(2) knowingly* assist a person* in the unauthorized practice of law in that jurisdiction.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Rule 9.48 of the California Rules of Court addresses non-litigating attorneys temporarily in California to provide legal services, and reads as follows:

Rule 9.48. Nonlitigating attorneys temporarily in California to provide legal services

(a) Definitions

The following definitions apply to terms used in this rule:

(1) "A transaction or other nonlitigation matter" includes any legal matter other than litigation, arbitration, mediation, or a legal action before an administrative decision-maker.

(2) "Active attorney in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who meets all of the following criteria:

(A) Is a licensee in good standing of the entity governing the practice of law in each jurisdiction in which the attorney is licensed to practice law;

(B) Remains an active attorney in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency other than California while practicing law under this rule; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

(Subd (a) amended effective January 1, 2019; adopted as subd (h) effective November 15, 2004; previously relettered effective January 1, 2007.)

(b) Requirements

For an attorney to practice law under this rule, the attorney must:

(1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a licensee of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active attorney in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

(Subd (b) amended effective January 1, 2019; adopted as subd (a) effective November 15, 2004; previously relettered effective January 1, 2007.)

(c) Permissible activities

An attorney who meets the requirements of this rule and who complies with all applicable rules, regulations, and statutes is not engaging in the unauthorized practice of law in California if the attorney:

(1) Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;

(2) Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California; or

(3) Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client's subsidiaries or organizational affiliates.

(Subd (c) relettered effective January 1, 2007; adopted as subd (b) effective November 15, 2004.)

(d) Restrictions

To qualify to practice law in California under this rule, an attorney must not:

(1) Hold out to the public or otherwise represent that he or she is admitted to practice law in California;

(2) Establish or maintain a resident office or other systematic or continuous presence in California for the practice of law;

(3) Be a resident of California;

(4) Be regularly employed in California;

(5) Regularly engage in substantial business or professional activities in California; or

(6) Have been disbarred, have resigned with charges pending, or be suspended from practicing law in any other jurisdiction.

(Subd (d) amended and relettered effective January 1, 2007; adopted as subd (c) effective November 15, 2004.)

(e) Conditions

By practicing law in California under this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a licensee of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

(Subd (e) amended effective January 1, 2019; adopted as subd (d) effective November 15, 2004; previously amended and relettered effective January 1, 2007.)

(f) Scope of practice

An attorney is permitted by this rule to provide legal assistance or legal services concerning only a transaction or other nonlitigation matter.

(Subd (f) relettered effective January 1, 2007; adopted as subd (e) effective November 15, 2004.)

(g) Inherent power of Supreme Court

Nothing in this rule may be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

(Subd (g) amended and relettered effective January 1, 2007; adopted as subd (f) effective November 15, 2004.)

(h) Effect of rule on multijurisdictional practice

Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not licensees of the State Bar of California.

(Subd (h) amended effective January 1, 2019; adopted as subd (g) effective November 15, 2004; previously relettered effective January 1,2007.)

Rule 9.48 amended effective January 1, 2019; adopted as rule 967 by the Supreme Court effective November 15, 2004; previously amended and renumbered effective January 1, 2007.

The **Indiana version of Rule 5.5** reads as follows:

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is not admitted to practice in this jurisdiction, but is admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires temporary admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer who is not admitted to practice in this jurisdiction, but is admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction if:

(1) the lawyer does not establish an office or other systematic and continuous presence in this jurisdiction for the practice of law and the legal services are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires temporary admission; or

(2) the services are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

The **Michigan version of Rule 5.5** reads as follows:

Rule: 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by law to provide in this jurisdiction.

The **Oregon version of Rule 5.5** reads as follows:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

(1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and

(2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer

(i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or

(ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding. Adopted 01/01/05 Amended 01/01/12: Paragraph (e) added. Amended 02/XX/15: Phrase "United States" deleted from paragraphs (c) and (d), to allow foreign-licensed lawyers to engage in temporary practice as provided in the rule.

[13] Competency is another requirement under the Model Rules and the rules adopted in every jurisdiction. See Model Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."