

INSURERS' RIGHTS OF SUBROGATION AGAINST TENANTS: THE BEGOTTEN UNION BETWEEN EQUITY AND HER BELOVED

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I. INTRODUCTION

Landlords and tenants enter into thousands of lease agreements every day. Undoubtedly, some of the risks, such as damages to the leased premises, are not thoroughly covered in these lease agreements. Additionally, insurance's interplay in the landlord-tenant relationship is often not considered. Likewise, insurers do not make plain in their policies that they will sue a tenant for damages caused. In fact, advertising regarding a tenant's liability for damage to the leased premises is misleading at best. So, what happens if a tenant negligently damages the lease premises, the lease is silent on liability, and the landlord has insurance to cover such damage? By insuring the premises, the question becomes whether the landlord took on the obligation of covering the tenant's negligence under his insurance policy—shielding the tenant from liability to the landlord's insurer—or whether the tenant should be liable for his negligence to the landlord's insurer. Surprisingly, the outcome is left to chance, depending on the law in the jurisdiction. Like the protagonist in the movie *Groundhog Day*, many landlords, tenants, and insurers are waking up to the nightmare of repeating the same calamitous

cycle over and over again: tenants being sued by their landlord's insurer with varied results.¹ One thing is certain—something must change, and that something is the framework within which the issue of subrogation is examined in the landlord-tenant context.

The question addressed in this Article is whether equity is served by permitting a landlord's insurer to have a right of subrogation against a tenant when a tenant negligently causes damage to the leased premises. This Article aims to answer this question by taking into account the parties' intent, either expressed or implied, the nature of insurance, the insurance industry's interaction with tenants, and its creation of expectations. This Article argues that unless the parties otherwise agree, tenants should be considered co-insureds and not be held liable for damages caused to the leased premises, regardless of whether the damages were negligently caused by the tenant or the tenant's invitees. This co-insured status serves the sole purpose of barring an insurer's right of subrogation against a tenant for damages paid to a landlord.

The extension of subrogation into landlord-tenant cases has produced mixed results. Courts have decided cases involving subrogation, landlords, and tenants under one of three different theories. First, some courts have ruled that unless the landlord and tenant agree otherwise, an insurer has a right of subrogation against the tenant for damages to the leased premises caused by the tenant's negligence.² These courts deny recognition of a tenant's co-insured status under a landlord's insurance policy. This viewpoint is primarily centered on the belief that tenants should be liable for their own negligence.³ Second, a large number of courts have ruled that

1. GROUNDHOG DAY (Columbia Pictures 1993).

2. See *Fire Ins. Exch. v. Geekie*, 534 N.E.2d 1061 (Ill. App. Ct. 1989). But see *Neubauer v. Hostetter*, 485 N.W.2d 87, 89–90 (Iowa 1992) (rejecting the implied co-insured rationale); *Zoppi v. Traurig*, 598 A.2d 19, 21 (N.J. Super. Ct. Law Div. 1990) (same); *Phoenix Ins. Co. v. Stamell*, 796 N.Y.S.2d 772, 775 (App. Div. 2005) (same); *Galante v. Hathaway Bakeries, Inc.*, 176 N.Y.S.2d 87, 94–95 (App. Div. 1958) (same); *Winkler v. Appalachian Amusement Co.*, 79 S.E.2d 185, 191–92 (N.C. 1953) (same).

3. C.R. McCorkle, Annotation, *Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect*, 10 A.L.R.2d 1012, 1014 (1950).

It may be stated as a basic proposition in the law of landlord and tenant that it is the duty of the tenant to exercise ordinary care, in the use of the leased premises or property, not to cause any material and permanent injury thereto over and above the ordinary wear and tear, and that he is liable to the landlord in damages for any such injury unnecessarily resulting from his wrongful acts or his failure to exercise such care.

there is no steadfast rule in determining subrogation claims against tenants. Under this approach to subrogation, courts engage in a case-by-case analysis to determine the parties' expectations by reviewing the lease agreement.⁴ Third, the modern trend, also known as the "*Sutton* rule," prohibits an insurer from recovering against a negligent tenant in a subrogation claim unless the rental agreement expresses contrary intent.⁵ Within each theory, there are assorted rationales for the end result.

This Article will examine the issue of subrogation from several perspectives and attempt to set up a framework for decisionmakers to follow. Part II of the Article generally defines subrogation, reviewing how courts have grappled with this issue in the landlord-tenant context. Part III reviews the implied co-insured doctrine. Part IV briefly discusses tenants' general tortious or contractual liability. Part V canvasses the legal landscape of the application of the implied co-insured doctrine. Part VI reviews the nature of insurance. Lastly, Part VII presents the cataclysmic effects of subrogation against tenants, analyzing whether these results are consistent with the intent of landlords, tenants, and insurers. Ultimately, because subrogation is an equitable doctrine, only invoked if equity is

Id.

4. See, e.g., 56 Assocs. v. Frieband, 89 F. Supp. 2d 189, 194 (D.R.I. 2000); Tate v. Trialco Scrap, Inc., 745 F. Supp. 458, 462 (M.D. Tenn. 1989); Page v. Scott, 567 S.W.2d 101, 103–04 (Ark. 1978); Fire Ins. Exch. v. Hammond, 99 Cal. Rptr. 2d 596, 601 (Ct. App. 2000); DiLullo v. Joseph, 792 A.2d 819, 822 (Conn. 2002); Middlesex Mut. Assurance Co. v. Vaszil, 873 A.2d 1030, 1032 (Conn. App. Ct. 2005); Cont'l Ins. Co. v. Kennerson, 661 So. 2d 325, 330 (Fla. Dist. Ct. App. 1995); Bannock Bldg. Co. v. Sahlberg, 887 P.2d 1052, 1056 (Idaho 1994); Dix Mut. Ins. Co. v. LaFramboise, 597 N.E.2d 622, 624 (Ill. 1992); Britton v. Wooten, 817 S.W.2d 443, 445 (Ky. 1991); Rausch v. Allstate Ins. Co., 882 A.2d 801, 814 (Md. 2005); Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270, 278 (Mo. 1965); U.S. Fire Ins. Co. v. Phil-Mar Corp., 139 N.E.2d 330, 333 (Ohio 1956); Union Mut. Fire Ins. Co. v. Joerg, 824 A.2d 586, 590–91 (Vt. 2003); Monterey Corp. v. Hart, 224 S.E.2d 142, 144 (Va. 1976); Rizzuto v. Morris, 592 P.2d 688, 691–92 (Wash. Ct. App. 1979).

5. See, e.g., Alaska Ins. Co. v. RCA Alaska Commc'ns, Inc., 623 P.2d 1216, 1220 (Alaska 1981) (adopting the modern view); Lexington Ins. Co. v. Raboin, 712 A.2d 1011, 1016 (Del. Super. Ct. 1998) (same); N. River Ins. Co. v. Snyder, 804 A.2d 399, 403–04 (Me. 2002) (same); Peterson v. Silva, 704 N.E.2d 1163, 1164–65 (Mass. 1999) (same); United Fire & Cas. Co. v. Bruggeman, 505 N.W.2d 87, 89 (Minn. Ct. App. 1993) (same); Tri-Par Invs., L.L.C. v. Sousa, 680 N.W.2d 190, 198–99 (Neb. 2004) (same); Safeco Ins. Co. v. Capri, 705 P.2d 659, 660 (Nev. 1985) (same); Cmty. Credit Union v. Homelvig, 487 N.W.2d 602, 603–04 (N.D. 1992) (same); Sutton v. Jondahl, 532 P.2d 478, 482 (Okla. Civ. App. 1975) (same); GNS P'ship v. Fullmer, 873 P.2d 1157, 1163 (Utah Ct. App. 1994) (same). See generally 16 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 224:6 (2005).

served, this Article concludes that subrogation produces inequitable results in the landlord-tenant context and is thus improper.

II. SUBROGATION DEFINED

Subrogation has been defined as the “begotten of a union between equity and her beloved—the natural justice of placing the burden of bearing a loss where it *ought to be*.”⁶ Subrogation, which is born of equity, is a fluid concept only applicable if equity is served.⁷ It “is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.”⁸

Subrogation is essentially the substitution of one party for another in the exercise of a legal right.⁹ There are two types of subrogation: conventional and legal.¹⁰ “The distinction relates to the facts giving rise to the substitution of rights.”¹¹ “Conventional subrogation, as the term implies, is founded upon some understanding or agreement, express or implied, and without which there is no ‘convention.’”¹² “Legal or equitable subrogation, on the other hand, is a creature of equity, and not dependent upon contract, but rather dependent upon the equities of the parties.”¹³ It arises by operation of law.¹⁴ Under some circumstances, subrogation may be deemed improper.¹⁵

6. *Sutton*, 532 P.2d at 481–82.

7. *See, e.g., Home Owners' Loan Corp. v. Parker*, 73 P.2d 170, 171 (Okla. 1937) (citing *Richardson v. Am. Sur. Co.*, 223 P. 389, 392 (Okla. 1924) (stating that subrogation “does not flow from any fixed rule of law, but rather from principles of justice, equity, and benevolence”)).

8. *Auto-Owners Ins. Co. v. Amoco Prod. Co.*, 658 N.W.2d 460, 463 (Mich. 2003) (quoting *Commercial Union Ins. Co. v. Med. Protective Co.*, 393 N.W.2d 479, 482 (Mich. 1986)).

9. BLACK'S LAW DICTIONARY 1467 (8th ed. 2004).

10. *Welch Foods, Inc. v. Chi. Title Ins. Co.*, 17 S.W.3d 467, 470 (Ark. 2000).

11. *Id.*

12. *Id.* (internal quotation marks omitted) (quoting *Courtney v. Birdsong*, 437 S.W.2d 238, 241 (Ark. 1969)).

13. *Id.*

14. *Id.*

15. *See Richardson v. Am. Sur. Co.*, 223 P. 389, 392 (Okla. 1924) (stating that subrogation “is a purely equitable result, depending . . . upon the facts and circumstances of each particular case to call it forth”).

However, whether by agreement or by operation of law, the notion of subrogation is of state law origin.¹⁶ Subrogation, an amorphous equitable principle, has been engineered by courts to limit unjust enrichment, double recovery, and injustice.¹⁷ “This equity arises when one not primarily bound to pay a debt . . . nevertheless does so”¹⁸ Thus, subrogation is a doctrine steeped in equity and should be governed by equitable principles.¹⁹ Because the doctrine is judicially created, its availability and application may differ from state to state or may not exist at all.²⁰

In modern times, subrogation clauses in insurance policies are not exceptional. There are three general cases where courts allow insurers to utilize subrogation. The first is subrogation against a third party. A classic example is when a person commits a tort against an insured’s property. If the insurance company is required to pay its insured for a loss, then it may sue the tortfeasor to recover the amount paid. The second case is subrogation against an insured. For example, if a driver is driving under the influence and causes harm to another person’s property, an insurer will be required to pay the innocent person, but may then sue its own insured to recover any money paid (as this would likely be an exception to coverage). The third case is subrogation between insurers. For instance, suppose an employee is injured at work and needs medical attention. The employee is likely to use his health insurance to pay for treatment until his employer’s workers’ compensation insurer pays for treatment. Under these circumstances, the employee’s health insurer may bring a subrogation claim against the employer’s workers’ compensation insurer.

While subrogation is an equitable principle, it has also been likened

16. *S. Cotton Oil Co. v. Napoleon Hill Cotton Co.*, 158 S.W. 1082, 1083–84 (Ark. 1913) (“The doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties without regard to form, and its purpose and object is the prevention of injustice.”).

17. *Zoppi v. Taurig*, 598 A.2d 19, 21 (N.J. Super. Ct. Law Div. 1990) (“[S]ubrogation is the transfer of the insured’s rights to the insurer, consistent with equitable concepts and subject to contract.”).

18. *S. Cotton Oil Co.*, 158 S.W. at 1084 (quoting *Chaffe & Bros. v. Oliver*, 39 Ark. 531, 542 (1882)).

19. *See, e.g., Cooper Tire & Rubber Co. v. Nw. Nat’l Cas. Co.*, 595 S.W.2d 938, 939 (Ark. 1980); *S. Cotton Oil Co.*, 158 S.W. at 1083.

20. Though the specific factors may vary, the doctrine of equitable subrogation is applied only for the purpose of achieving equity and is therefore governed by equitable principles. *See In re Bevlan*, 327 F.3d 994, 997 (9th Cir. 2003); *Rinn v. First Union Nat’l Bank of Md.*, 176 B.R. 401, 407 (D. Md. 1995).

to opening Pandora's Box.²¹ This comparison is certainly true regarding landlord-tenant cases where subrogation creates an array of problems and conflicts. Under subrogation, insurers may pursue actions against otherwise liable third parties "by 'standing in the shoes' of the insured."²² If the insured (landlord) may bring an action against the tortfeasor (tenant), then the insurer may bring a subrogation action against the tortfeasor.²³

Subrogation usually comes into play under the theory that the tenant is a third party to whom the insurer owes no duty.²⁴ When an insurer pays the landlord-insured for a claim, subrogation allows the insurer to coerce a tortfeasor who has caused the loss to bear the burden.²⁵ Subrogation permits an insurer to sue on behalf of its landlord-insured for a loss caused by the tenant. It allows an insurer to pursue an action to reimburse itself for payment of losses to its insured created by a third party.²⁶

Nonetheless, subrogation is not allowed against an insurer's own insured, or co-insured.²⁷ In the landlord-tenant context, if a landlord has

21. See generally Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237 (1996).

22. Union Mut. Fire Ins. Co. v. Joerg, 824 A.2d 586, 589 (Vt. 2003); see also McAllen State Bank v. Linbeck Constr. Corp., 695 S.W.2d 10, 24 n.5 (Tex. App. 1985) (noting that the subrogee stands in the shoes of the one whose rights it claims, and the extent of the subrogee's remedy and the measure of its rights are controlled by those possessed by the subrogor).

23. See, e.g., Mt. Hawley Ins. Co. v. Lexington Ins. Co., 110 F. App'x 371, 374 (5th Cir. 2004) ("Under Texas law, an insurer's right to subrogation derives from the rights of its insured, and is limited to those rights; there can be no subrogation where the insured has no cause of action against the defendant."); Guillot v. Hix, 838 S.W.2d 230, 232 (Tex. 1992).

24. Third parties are defined as those "to whom the insurer owes no duty under the insurance policy." Pa. Gen. Ins. Co. v. Austin Powder Co., 502 N.E.2d 982, 985 (N.Y. 1986).

25. Powell v. Blue Cross & Blue Shield, 581 So. 2d 772, 775 (Ala. 1990) (acknowledging that responsibility for one's actions under subrogation is "the moralistic basis of tort law as it has developed in our system" (quoting Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 841 (1962))).

26. See Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 106 (2d Cir. 1992); Blue Cross & Blue Shield of Ala. v. Sanders, 974 F. Supp. 1416, 1420 (N.D. Ala. 1997), *aff'd*, 138 F.3d 1347 (11th Cir. 1998).

27. Wager v. Providence Ins. Co., 150 U.S. 99, 109-10 (1893); Turner Constr. Co. v. John B. Kelly Co., 442 F. Supp. 551, 552 (E.D. Pa. 1976); see also ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 96[f], at 612 (2d ed. 1996); ROBERT E.

insurance which covers the leased premises, the question becomes whether a tenant is an insured under his landlord's insurance policy—even though the tenant is not a named insured. Of course insurers and tenants are at opposite ends of the spectrum. Insurers argue that tenants are not the intended beneficiaries of landlords' insurance, while tenants argue otherwise.

An insurer's right of subrogation against a tenant is based on the nature of action the insured would have.²⁸ Thus, an insurer seeking to enforce its subrogation rights must establish, *inter alia*, that the landlord has a claim of action against the tenant. If a court determines that the landlord intended to procure the insurance for the tenant's benefit as well, the tenant will be considered a co-insured and the insurer will have no right of subrogation.²⁹

III. IMPLIED CO-INSURED DOCTRINE (THE “*SUTTON* RULE”)

Like subrogation, the implied co-insured status has its basis in equity.³⁰ The implied co-insured principle in the landlord-tenant context is derived from the relationship between landlord and tenant—particularly their joint interest in the rental property.³¹ Courts consider a tenant an implied co-insured under a landlord's insurance policy upon finding that the landlord's insurance coverage was intended for both the landlord and tenant's mutual benefit.³² Even if a tenant is not named as an insured or additional insured, tenants may be implied co-insureds due to a finding that this was the parties' intent. The implied co-insured doctrine's sole purpose is to prevent subrogation.³³

KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 3.10(a), at 221 (student ed. 1988).

28. See, e.g., *Mt. Hawley Ins. Co.*, 110 F. App'x at 374; *Powell v. Brantly Helicopter Corp.*, 396 F. Supp. 646, 650 (E.D. Tex. 1975); *Guillot v. Hix*, 838 S.W.2d 230, 232 (Tex. 1992).

29. See, e.g., *Page v. Scott*, 567 S.W.2d 101, 103 (Ark. 1978); *W. Am. Ins. Co. v. Pic Way Shoes of Cent. Mich., Inc.*, 313 N.W.2d 187, 188 (Mich. Ct. App. 1981).

30. See, e.g., *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975) (“Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the interests of all [co-insureds] . . .”).

31. *Page*, 567 S.W.2d at 103.

32. *Id.*

33. *Royal Ins. Co. v. Saloomey*, No. CV 970572377, 1999 WL 1034737, at *2

The basis for applying the implied co-insured doctrine is that: (1) the parties' reasonable expectations do not include a subrogation claim against a tenant; (2) the parties' insurable interests overlap, so that multiple coverage results in economic waste; and (3) commercial realities are such that landlords consider costs of insurance and pass these costs on to tenants.³⁴ Implied co-insured status allows an unnamed party to be an insured under an insurance policy based on principles of equity.³⁵ In order to obtain co-insured status, a court must imply a waiver of subrogation or find that the landlord intended to obtain insurance for the benefit of himself and his tenant.³⁶ When denying subrogation, courts examine the issue of intent as a whole and acknowledge that if the parties had intended that tenants were to be sued by landlords' insurers, they would have been. Alternatively, they may find that because the harm caused by a tenant is intended to be covered by landlords' insurance policies, it is incongruent that insurers now have the right to sue.

The co-insured doctrine deviates from the common law tort principle that one should be held liable for his own negligence. This is primarily because courts find that a tenant's negligence is no different from an owner's negligence—they are both insureds. "Although an insurance company has the right to recover against a wrongdoer whose negligence has subjected the insurance company to liability, no right of subrogation

(Conn. Super. Ct. Nov. 3, 1999).

The modern trend of authority holds that the lessor's insurer cannot obtain subrogation against the lessee, in the *absence of an express agreement or lease provision establishing the lessee's liability*, because the lessee is considered a co-insured of the lessor for the purpose of preventing subrogation; the parties are co-insureds because of the reasonable expectation they derive from their privity under the lease, their insurable interests in the property, and the commercial realities under which lessors insure leased premises and pass on the premium cost in rent and under which insurers make reimbursement for fires negligently caused by their insureds' negligence

Id. (quoting 6A J. APPLEMAN ET AL., INSURANCE LAW AND PRACTICE 4055 (1969 & Supp. 1992) (emphasis added)).

34. See, e.g., *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87, 89 (Minn. Ct. App. 1993) ("[T]he party with the fee interest purchased fire insurance '[a]nd as a matter of sound business practice the premium had to be considered in establishing the rent rate on the rental unit.'" (quoting *Sutton*, 532 P.2d at 482))).

35. See, e.g., *Sutton*, 532 P.2d at 482.

36. See, e.g., *Woodruff v. Wilson Oil Co.*, 382 N.E.2d 1009, 1011 (Ind. Ct. App. 1978).

can arise in favor of an insurer against its own insured.”³⁷ This rule applies regardless of whether the lease agreement or specific provisions thereof are reduced to writing.³⁸

IV. TORTIOUS OR CONTRACTUAL LIABILITY OF TENANTS IN GENERAL

Under tort and contract law, there are three theories of liability under which a tenant may be held liable to his landlord for negligently damaging the leased premises. First, a tenant may be liable for breaching the covenant to surrender the leased premises in good condition.³⁹ Provided that a lease contains such a covenant which purports to indemnify a landlord from liability for tenant damages, this breach may be the foundation for a tenant’s liability.⁴⁰ Under this theory, a lease may

contractually impose liability on the tenant for damage to the leased premises resulting from the tenant’s negligent act or omission, either by a specific lease provision . . . or by a covenant on the part of the tenant to return the property, save for ordinary wear and tear, in the same condition as the tenant received it.⁴¹

37. *Jindra v. Clayton*, 529 N.W.2d 523, 526 (Neb. 1995); *see also* *Fellmer v. Gruber*, 261 N.W.2d 173, 174 (Iowa 1978) (holding that seller carried insurance for benefit of buyer and held proceeds in trust for buyer when seller agreed to maintain insurance until possession date but barn burned before buyer took possession); *Housing Inv. Corp. v. Carris*, 389 So. 2d 689, 690 (Fla. Dist. Ct. App. 1980) (indicating that a provision in a contractor’s contract that owner would carry casualty insurance shifted risk to insurer, and owner was limited to insurance proceeds, barring subrogation action); 16 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* 3D § 224:1, at 224-14 to 224-15 (2005) (finding that the anti-subrogation rule extends to prevent subrogation against persons who have obtained status of additional insured or co-insured pursuant to agreement requiring insured to carry insurance for benefit of another).

38. *See Bruggeman*, 505 N.W.2d at 89 (Minn. Ct. App. 1993) (holding that the Bruggemans were co-insureds and not subject to a subrogation claim despite the fact that “no written lease or contract between the parties, and no independent arrangement for provision of insurance coverage was discussed”).

39. *Taylor v. ROA Motors, Inc.*, 152 S.E.2d 631, 639 (Ga. Ct. App. 1966).

40. *Id.* The following is an example of a surrender clause typically used in lease agreements: “Surrender of Leased Premises. At the expiration of this Agreement, Tenant shall immediately surrender the Leased Premises in the same condition as the start of this Agreement, reasonable use, wear and tear, thereof and damages by the elements excepted.” Some surrender clauses also explicitly include an exception for loss by fire. These clauses may also be called yield-back or yield-up clauses.

41. *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 807 (Md. 2005).

A tenant is liable to his landlord if the lease provides that he is liable for returning the premises in a damaged condition caused by his default or negligence.⁴² On the other hand, a tenant “would not be liable where the damage or destruction of the premises resulted from an accident unmixed with any negligence or carelessness on the part of it or its agents and servants, or where such damage or destruction was caused solely by the [landlord] or by third parties.”⁴³

Many leases contain a phrase such as “loss by fire and reasonable wear and tear excluded” at the end of the surrender clause.⁴⁴ Inclusion of such a phrase may also negate tenant’s liability under the surrender clause for a negligently caused fire.⁴⁵ One court held that because of tenant’s surrender clause, which required the tenant to yield-up the premises in the same condition as it was at the inception of the lease and specifically excluded any damage due to fire or other casualty, landlord’s subrogee (the insurer) could not invoke its subrogation rights against the tenant.⁴⁶ Furthermore, a court may determine that such phrases do not make tenants liable for their own negligence.⁴⁷ Therefore, courts may find that the parties’ failure to impose liability on a tenant because of the tenant’s negligence would not be an exception to the surrender clause.

The key to a successful surrender clause is specificity. The parties must thoroughly cover how the surrender clause is to be applied. For instance, if the parties desire tenant’s negligence to negate liability under the surrender clause, they must provide for this in the clause.⁴⁸

42. *Taylor*, 152 S.E.2d at 639.

43. *Id.*

44. *See, e.g., id.* (describing a similar lease provision).

45. *See, e.g., Lexington Ins. Co. v. All Regions Chem. Labs, Inc.*, 647 N.E.2d 399, 400 (Mass. 1995).

46. *Id.*

47. *See One Hundred S. Wacker Drive, Inc. v. Szabo Food Serv., Inc.*, 326 N.E.2d 400, 402 (Ill. 1975) (“[T]he rule is that a clause exculpating a lessee from liability for loss by fire applies to fire damage attributable to the lessee’s negligence.”); *Ford v. Jennings*, 387 N.E.2d 1125, 1128 (Ill. App. Ct. 1979) (“In the absence of either the consent of the owner or privity of contract, the sublessee cannot rely upon an exculpatory provision in the original lease to bar liability for his negligence as against the owner of the leased property.”).

48. *See Stein v. Yarnall-Todd Chevrolet, Inc.*, 241 N.E.2d 439, 443 (Ill. 1968) (“[I]t is apparent that the lease as a whole reveals a like intention and the presence of the incongruous words will not supersede what to us are dominating expressions of intention.”). *But see Englehardt v. Triple X Chem. Labs., Inc.*, 369 N.E.2d 67, 69 (Ill.

Accordingly, the inclusion of an unconditional surrender clause may afford a tenant an affirmative defense. Thus, barring any supplementary reason to infer that a tenant is liable per the other lease provisions, the language of the surrender clause may defeat a landlord's action against a tenant, which would, in turn, hinder an insurer's right of subrogation.⁴⁹

Another theory by which a landlord may hold a tenant liable is under the basic theories of tort negligence.⁵⁰ Liability in tort is not based on any contractual covenant or provision. The relationship between landlord and tenant, however, may be the basis for the underlying tort.⁵¹ In *Antoon v. Community Emergency Medical Services*,⁵² the Michigan Court of Appeals held that "the contractual relationship merely brought the parties together and furnished the occasion of the tort. [Tenant] owed a duty to [landlord] under common law to use due care in not causing a fire in the building."⁵³ In *Antoon*, the court noted that actionable negligence presumes the existence of a legal relationship by which an injured party is owed a duty of care by the other.⁵⁴ The legal relationship underlying a duty of care may arise by contract, i.e., the contract creates the state of things that furnishes the occasion of the tort.⁵⁵ However, "there must be some active negligence or misfeasance to support a tort. There must be some breach of

App. Ct. 1977) (reading the clause to mean that the "language evidences the intent of the parties that lessee must yield-up the leased premises to the lessor in good condition and repair at the termination of the lease, including situations in which the lessee has caused a loss by fire to occur"). Alternatively, if a landlord intended to exclude negligently caused fires by the tenant from the lease, courts may have no sympathy for the landlord in that he could have inserted such a limitation, but chose not to do so. *Lexington Ins. Co.*, 647 N.E.2d at 400.

49. *Sheridan v. Comp-U-Motive, Inc.*, 522 N.E.2d 800, 803 (Ill. App. Ct. 1988).

50. *See* *Page v. Scott*, 567 S.W.2d 101, 104 (Ark. 1978); *Britton v. Wooten*, 817 S.W.2d 443, 447 (Ky. 1991); *Pearson v. Wilttrout*, 302 A.2d 678, 680 (Md. Ct. Spec. App. 1973); *see also* 1 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 9.9, at 568 (4th ed. 1997); McCorkle, *supra* note 3, at 1023.

51. *See, e.g., Antoon v. Cmty. Emergency Med. Servs.*, 476 N.W.2d 479, 481 (Mich. Ct. App. 1991) (indicating that for actionable negligence, "[t]he legal relationship underlying . . . a duty [of care] may arise by contract").

52. *Antoon v. Cmty. Emergency Med. Servs.*, 476 N.W.2d 479 (Mich. Ct. App. 1991).

53. *Id.* at 481; *see also* *Couyoumjian v. Brimage*, 33 N.W.2d 755, 757 (Mich. 1948); *Hale v. Cole*, 217 N.W. 898, 899 (Mich. 1928). *See generally* McCorkle, *supra* note 3, at 1023.

54. *Antoon*, 476 N.W.2d at 481.

55. *Clark v. Dalman*, 150 N.W.2d 755, 759–60 (Mich. 1967).

duty distinct from breach of contract.”⁵⁶ “[I]f a relation exists that would give rise to a legal duty without enforcing the contractual promise itself, the tort action will lie, otherwise not.”⁵⁷

Generally, in a tort action, a court finds a tortfeasor accountable for “all injuries resulting directly from his wrongful act, whether foreseeable or not.”⁵⁸ Courts find culpability “provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated.”⁵⁹ Damages for destruction of personal property and loss of profits have been recognized as being the legal and natural consequences of a party’s negligence in causing a fire.⁶⁰ A tortfeasor is excused from liability only for damages that are remote, contingent, or speculative.⁶¹

The general rule of tortfeasor liability, however, is not without its limits. In some jurisdictions, a tenant may not be liable for fire damage to the premises resulting from negligence absent an express provision in the lease agreement providing for such liability.⁶² When a lease agreement is silent regarding the duty of obtaining fire insurance, the tenant may reasonably expect that the rental payments will be used to cover the landlord’s ordinary and necessary expenses, including fire insurance premiums.⁶³ Additionally, where tenants have paid a substantial amount in insurance premiums, courts have found they are not liable.⁶⁴

56. Hart v. Ludwig, 79 N.W.2d 895 (Mich. 1956) (quoting Tuttle v. Gilbert Mfg. Co., 13 N.E. 465, 467 (Mass. 1887)); see also 74 AM. JUR. 2D *Torts* § 23 (2001).

57. Hart, 79 N.W.2d at 898 (quoting WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 205 (1st ed. 1941)); see also Freeman-Darling, Inc. v. Andries-Storen-Reynaert Multi Group, Inc., 382 N.W.2d 769, 772 (Mich. Ct. App. 1985) (holding that a “breach of . . . contractual obligations could not provide the basis for an action sounding in tort”).

58. See, e.g., Sutter v. Biggs, 139 N.W.2d 684, 686 (Mich. 1966).

59. *Id.*; see also Wendt v. Auto Owners Ins. Co., 401 N.W.2d 375, 378 (Mich. Ct. App. 1986).

60. See, e.g., Couyoumjian v. Brimage, 33 N.W.2d 755, 757 (Mich. 1948) (involving lost profits); Strzelecki v. Blaser’s Lakeside Indus., Inc., 348 N.W.2d 311, 313 (Mich. Ct. App. 1984) (concerning personal property).

61. Sutter, 139 N.W.2d at 686.

62. N.H. Ins. Group v. Labombard, 399 N.W.2d 527, 531 (Mich. Ct. App. 1986).

63. *Id.*

64. Precisionware, Inc. v. Madison County Tobacco Warehouse, Inc., 411

Third, courts may use indemnity as a basis to hold a tenant liable to a landlord. If the lease agreement states that the tenant indemnifies the landlord for any damage caused by fires, the tenant may be liable to the landlord for fire damage.⁶⁵ Upon finding liability to landlords under any of the three theories of liability, insurers argue that subrogation allows them to sue the landlords' tenants for reimbursement.⁶⁶ In jurisdictions that do not adhere to the implied co-insured theory, insurers may be more successful in bringing subrogation claims against tenants.⁶⁷

Understandably, insurance companies argue courts should reject the implied co-insured status.⁶⁸ Subrogation, which allows insurers to recoup losses, is diminished by the grant of co-insured status to tenants.⁶⁹ Because insurers are not permitted to recover costs paid to their insureds, they want to keep the definition of "insured" as limited as possible.⁷⁰

V. THE LEGAL LANDSCAPE: APPLICATION OF THE CO-INSURED DOCTRINE

A. *The Importance of Intent*

In deciding whether to apply the co-insured doctrine, courts typically begin with an examination of the parties' intent.⁷¹ Virtually all courts recognize that the language of a lease agreement is paramount in determining intent. Because leases are contracts, a court should scrutinize

F.2d 42, 48 (5th Cir. 1969) (finding that the tenant was excused from liability based on the fact that the lease agreement required the tenant to pay any increase in premiums occasioned by use); *see also* City of Deland v. Dri-Clime Lamp Corp., 348 So. 2d 1239, 1242 (Fla. Dist. Ct. App. 1977); Agra-By-Products, Inc. v. Agway, Inc., 347 N.W.2d 142, 152 (N.D. 1984).

65. FRIEDMAN, *supra* note 50, § 9.9, at 591 ("If the indemnity is broad enough to include damage or destruction of the premises by fire or other cause the tenant is liable for such damage, regardless of fault, as if he had insured the landlord against these matters.").

66. *See, e.g.,* Neubauer v. Hostetter, 485 N.W.2d 87, 88 (Iowa 1992).

67. *See, e.g.,* Zoppi v. Traurig, 598 A.2d 19, 21–22 (N.J. Super. Ct. Law Div. 1990).

68. *See, e.g.,* Neubauer, 485 N.W.2d at 88.

69. *See, e.g.,* Zoppi, 598 A.2d at 21.

70. *See, e.g.,* Fashion Place Inv., Ltd. v. Salt Lake County, 776 P.2d 941, 944–45 (Utah Ct. App. 1989).

71. *See, e.g.,* Dix Mut. Ins. Co. v. LaFramboise, 597 N.E.2d 622, 625 (Ill. 1992).

a lease under the well-established rules of contract interpretation.⁷² “The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract.”⁷³

When interpreting a contract, courts will first examine the language of the contract.⁷⁴ Courts should construe a contract “in such a way that no word or phrase is made meaningless by interpreting another word or phrase, because the interpretation should favor a valid and enforceable contract or lease rather than one of no force and effect.”⁷⁵ “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.”⁷⁶

Clearly, if the parties have decided that the tenant should be liable for damages beyond the amount of any security deposit required, a court should not interfere with that arrangement. The same should be true if the lease requires a tenant to carry insurance which protects the leased premises. Under these circumstances, a tenant should be obligated to perform and the court should not interfere. However, as in many situations, if the parties have not explicitly drafted language concerning liability or have ambiguously attempted to do so, intent may be manifested not only by words, but by conduct or silence.⁷⁷ The intent of the parties may also be manifested by implication from other conditions, including course of dealing, usage of trade, or course of performance.⁷⁸ Implied intent rests on the reasonable expectations of the parties, particularly what obligations each party undertakes.⁷⁹

Obligation may also be created by implication. Professor P.S. Atiyah stated that “whenever promises are implied from conduct, it is often,

72. See *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1144 (Utah 2002).

73. *Id.*

74. *Id.*

75. *Lexington Ins. Co. v. All Regions Chem. Labs., Inc.*, 647 N.E.2d 399, 400 (Mass. 1995).

76. *WebBank*, 54 P.3d at 1145 (quoting *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 40 P.3d 599, 605 (Utah 2002)).

77. RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

78. *Id.* cmt. a.

79. See *id.* cmt. b.

perhaps always, the case that the conduct itself justifies the creation of the obligation.”⁸⁰ Thus, if one party’s conduct leads another party to form reasonable expectations or conclusions about the first party’s obligations, the first party should not be allowed to modify this implied promise. For instance, a landlord who purchases insurance for the leased premises and fails to require the tenant to purchase insurance may cause a tenant to justifiably expect that any negligently caused damages are covered by landlord’s insurance. Further, the tenant may believe that he would not be held liable for any damages beyond the loss of his security deposit. Therefore, subrogation should be deemed inappropriate under the circumstances.

In addition to the landlord’s conduct, insurers, through their advertisements and efforts to convince tenants to purchase renter’s insurance, interestingly are partly responsible for creating tenants’ expectations of co-insurance. Through advertising, one major insurer has repeatedly stated, in both print and in television spots, that landlord’s insurance will cover the building, but not tenants’ personal belongings. This is partly true in that the insurer will pay the landlord for any damage to the building. However, the information missing from the advertisement is that the insurer will then subrogate the out-of-pocket expenses it paid to the landlord from the tenant. For example, a recent magazine advertisement by State Farm Fire and Casualty Company stated:

Even Renters are Owners. Think about it. The things you have around your apartment seem average, but if they’re damaged or stolen, replacing them will cost big time. Most renters believe their landlord’s insurance covers their things. It doesn’t, but State Farm® can help. Our renters insurance provides protection for pennies a day. So don’t delay. Call your local State Farm agent today or visit us at statefarm.com®.⁸¹

In this advertisement, the insurer is insinuating that tenants will risk losing their personal property because the landlord’s insurance protects the leased premises only. State Farm, through this advertisement, suggests that tenants need renter’s insurance to be fully protected, i.e., to protect their personal property. Similarly, State Farm, in both a recent televised advertisement and on its website under its “Renters Myths” section states

80. P.S. ATIYAH, PROMISES, MORALS, AND LAW 174 (1981).

81. State Farm Fire & Cas. Co., *Even Renters Are Owners*, EBONY, Dec. 2005, at 171 (Advertisement).

the following as a myth: “The landlord’s insurance covers me.”⁸² Its response is that: “Your landlord’s insurance generally only covers the building where you live—not your personal belongings and your liability.”⁸³

State Farm’s advertising efforts are similar to those of other insurers. These advertisements perpetuate the belief that landlords’ insurance will cover the rented space or the building, while tenants need insurance only to protect the contents. However, insurers fail to advise tenants that insurers may still sue them for damages to an apartment complex even if the landlords have coverage. Such omissions border on creative fiction. It is no wonder that tenants may be surprised upon receipt of a petition by their landlords’ insurers. Collectively, landlords and insurers are responsible for tenant expectations that they are protected by their landlords’ insurance policy. These expectations are reasonable in light of insurers’ mixed signals. Thus, as Professor P.S. Atiyah stated, these implied promises create an obligation, which in the landlord-tenant context is for insurers to include tenants as implied co-insureds under the landlords’ insurance policy.⁸⁴ Despite these reasonable expectations, a multitude of courts still refuse to acknowledge and apply the implied co-insured doctrine.

B. Rejection of the Implied Co-insured Doctrine

There are principally four grounds for rejecting the implied co-insured doctrine. First, some opponents believe that public policy is better served if tortfeasors are held liable for their negligent acts.⁸⁵ By granting implied co-insured status to negligent actors, those opposed to the *Sutton* rule believe that the status circumvents public policy.⁸⁶ Second, some challengers of the implied co-insured doctrine have found it difficult to determine intent beyond the specific language of the lease agreement.⁸⁷ Jurisdictions adhering to this belief determine intent via a literalistic approach; they do not venture into the realm of reasonable expectations,

82. State Farm Insurance, Renters Myths, http://www.statefarm.com/insurance/renters/renters_myths.asp (last visited Mar. 12, 2007).

83. *Id.*

84. *See supra* note 80 and accompanying text.

85. *See* Britton v. Wooten, 817 S.W.2d 443, 447 (Ky. 1991).

86. *Id.*

87. *See* State v. Am. Mfrs. Mut. Ins. Co., 593 N.Y.S.2d 885, 887 (App. Div. 1993).

and certainly not tacit assumptions.⁸⁸ Third, many of the anti-*Sutton* jurisdictions believe that the logic of *Sutton* is fallacious.⁸⁹ Finally, jurisdictions which fail to apply anti-subrogation rules may not address equitable issues, such as whether equity is served by subrogation or anti-subrogation; there may be statutory provisions prohibiting tenants from escaping culpability for their negligence.⁹⁰

1. *Overcoming Common Law Tort Liability*

Courts that reject the implied co-insured doctrine make it difficult for tenants to surmount common law tort liability. The elements required to establish negligence are: (a) a duty or obligation, recognized by the law, requiring a person to conform to a certain standard of conduct; (b) a breach of the duty: a failure to conform to the required standard; (c) a reasonably close causal connection between the conduct and resulting injury; and (d) actual loss or damage resulting to the interests of another.⁹¹ Negligence may embody both affirmative acts (misfeasance) or a failure or omission to act (nonfeasance).⁹² “An actor is negligent only if his conduct created an unreasonable risk of harm to others and the actor recognized, or as a reasonable person should have recognized that risk.”⁹³ As at least one commentator has noted:

[I]t is the duty of the tenant to exercise ordinary care, in the use of the leased premises or property, not to cause any material and permanent injury thereto over and above the ordinary wear and tear, and that he is liable to the landlord in damages for any such injury unnecessarily resulting from his wrongful acts or his failure to exercise such care.⁹⁴

Jurisdictions allowing subrogation claims against tenants find that tenants should be held responsible for damages to leased premises resulting from their own negligence.

88. *Id.*

89. *See, e.g.,* Rausch v. Allstate Ins. Co., 882 A.2d 801, 814 (Md. 2005).

90. *See id.* at 815–16.

91. *See, e.g.,* Smith v. Citibank, N.A., No. 00-0587-CV-W-1-ECF, 2001 WL 34079057, at *2 (W.D. Mo. Oct. 3, 2001).

92. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984); *see also* DAN B. DOBBS, THE LAW OF TORTS § 116, at 276 (2000).

93. DOBBS, *supra* note 92, at 334.

94. McCorkle, *supra* note 3, at 1014.

According to anti-*Sutton* courts, the only way to overcome this liability is by expressly exonerating a tenant from liability for loss caused by the tenant's negligence,⁹⁵ or by waiving a landlord's right to sue a tenant for damage negligently caused by the tenant.⁹⁶ If the lease agreement contains either of these provisions, the parties may effectively negate the tenant's common law tort liability. It is important to note that common law tort liability duties should be viewed separately from a tenant's covenant to contractual duties of repair and to keep the leased premises in good condition.

2. *Literal Intent*

*Words are the clothes that thoughts wear—only the clothes.*⁹⁷

In determining if a tenant is exonerated from liability, both landlord's and tenant's intent play a significant role.⁹⁸ "A lease is to be construed as any other contract."⁹⁹ In construing the parties' objective intent, the courts will look at the lease agreement.¹⁰⁰ The meaning of a contract is derived not only from "individual words, phrases, or paragraphs," but from the document as a whole.¹⁰¹ Thus, interpreting a lease agreement must harmonize the lease provisions.¹⁰² However, intent will not be implied due to a lack of empirical evidence. It is expressed intent that really matters in these jurisdictions.¹⁰³ Many courts embrace the principle that "[w]hen one party seeks to contract away liability for its own negligence in advance of any harm, the intent to do so must be 'clearly and unequivocally expressed.'"¹⁰⁴

95. Cerny-Pickas & Co. v. C.R. Jahn Co., 131 N.E.2d 100, 105 (Ill. 1955).

96. Rausch v. Allstate Ins. Co., 882 A.2d 801, 806 (Md. 2005).

97. THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS 288 (Robert Andrews ed., 1989) (emphasis added) (quoting English author Samuel Butler).

98. Burkett v. Am. Family Ins. Group, 737 N.E.2d 447, 452 (Ind. Ct. App. 2000).

99. Whiteco Indus., Inc. v. Nickolick, 571 N.E.2d 1337, 1339 (Ind. Ct. App. 1991).

100. *Id.* at 1339–40.

101. *Burkett*, 737 N.E.2d at 452.

102. *Id.*

103. *Id.*

104. Steele v. Mt. Hood Meadows Or., Ltd., 974 P.2d 794, 796 (Or. Ct. App. 1999) (internal quotation marks omitted) (quoting *Estey v. MacKenzie Eng'g Inc.*, 927 P.2d 86, 88 (Or. 1996)).

When a landlord obtains insurance on the leased premises, these courts believe that it is improper to assume that landlords intended to carry tenants as their co-insureds, especially if the leases are silent or there is no evidence that the parties discussed the matter.¹⁰⁵ In addition, some of these courts find no contractual obligation to maintain fire insurance on the premises.¹⁰⁶ In these cases, courts conclude that tenants did not bargain for insurance coverage nor did they pay for coverage through lease payments.¹⁰⁷ Other courts have concluded that a subrogation claim depends on the particular wording of the rental agreement and whether it suggests that the parties intended for the tenant to be free from liability for damage to the premises occasioned by the tenant's own negligence.¹⁰⁸

In *Continental Casualty Co. v. Polk Bros., Inc.*, the Illinois Court of Appeals found "that the key factor in determining whether the parties intended to exculpate lessee negligence is the allocation of insurance burdens as evidenced by the terms of the lease."¹⁰⁹ If the evidence shows that there was no mention of insurance or tenant's responsibility for his negligent liability for damage to the leased premises, a court may not find that insurance was obtained for tenant's benefit as well.¹¹⁰ Accordingly, opponents of the *Sutton* rule argue that the landlord did not "intend[] to exonerate the tenant from his own negligence or carry him as a co-insured

105. See, e.g., *Neubauer v. Hostetter*, 485 N.W.2d 87, 90 (Iowa 1992) (noting that the landlord's insurance policy does not automatically insure tenant's possessory interest in property). Recently, in *56 Assocs. v. Frieband*, 89 F. Supp. 2d 189, 193 (D.R.I. 2000), a court rejected the *Sutton* rule, holding, among other things, that "courts have no authority to insert the names of additional insureds."

106. *Page v. Scott*, 567 S.W.2d 101, 103 (Ark. 1978).

107. See, e.g., *id.* at 103–04 ("The fiction that by paying the rent, the [tenant] paid the insurance premium is not appropriate. There is no evidence that [the tenant] paid any greater rent because of the insurance than he would have paid had [the landlord] not taken insurance. . . . Such a fiction ignores the fact that more often than not the market, i.e., supply and demand, is the controlling factor in fixing and negotiating rents.").

108. See, e.g., *Fire Ins. Exch. v. Hammond*, 99 Cal. Rptr. 2d 596, 601 (Ct. App. 2000) ("[I]t appears the subrogation issue is generally resolved on a case-by-case basis, dependent on the parties' reasonable expectations in light of the particular lease terms.").

109. *Cont'l Cas. Co. v. Polk Bros., Inc.*, 457 N.E.2d 1271, 1276 (Ill. App. Ct. 1983).

110. See, e.g., *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622, 626 (Ill. 1992).

on the insurance policy.”¹¹¹

3. *The Purported Flawed Reasoning of Sutton*

Sutton rule opponents argue that the reasoning of *Sutton* is simply wrong. They assert that *Sutton*

is laced with lofty preachments about natural justice and equity. Properly defined, of course, everyone agrees with natural justice and equity. As used in *Sutton*, however, such pronouncements are a dodge and an evasion of the real issue which is a fundamental tenet of common law. That is, that people should be responsible for their own negligence.¹¹²

This assertion is ironic considering that subrogation is, itself, based on natural justice and equity.

Anti-*Sutton* jurisdictions find many shortcomings associated with the *Sutton* rule. First, they believe that a tenant should be liable for his own negligence, especially in light of exculpatory yield-up or surrender clauses.¹¹³ Because a tenant can shift the risk of loss via contract, these jurisdictions hold that if the parties fail to do so, “a court should not indulge in a legal fiction to create such a term and alter the parties’ contract.”¹¹⁴ Second, anti-*Sutton* advocates contend that there is no requirement in the law that an insured seek recovery from its insurer either first or solely; thus, a landlord may choose to sue its tenant first.¹¹⁵ Third, they argue that there is a failure of evidence demonstrating that tenants pay for insurance premiums via rent.¹¹⁶ Fourth, the pro-subrogation supporters allege that there can be no comparison between tenants and landlords and the permissive user feature of automobile insurance.¹¹⁷ Permissive users are regarded as insureds under such a policy because the policy expressly provides coverage for them, usually by including them in the definition of insured. Because tenants are not named insureds, a court

111. *Anderson v. Peters*, 491 N.E.2d 768, 772 (Ill. App. Ct. 1986) (Heiple, J., dissenting).

112. *Id.*

113. *See, e.g., Fire Ins. Exch.*, 534 N.E.2d at 1062.

114. *Id.*

115. *Dix Mut. Ins. Co.*, 597 N.E.2d at 629 (Heiple, J., dissenting).

116. *Page v. Scott*, 567 S.W.2d 101, 104 (Ark. 1978).

117. *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 815 (Md. 2005).

may not add insureds to an insurance policy.¹¹⁸

4. *Statutory Strictures*

In very few jurisdictions will the issue of implied co-insured be moot due to statutory strictures making tenants liable for their own negligence.¹¹⁹ Statutes requiring tenants to pay for damages to property caused by his or her negligence preclude tenants, in some instances, from claiming co-insured status. Statutes providing that a tenant is required to pay for damage to property caused by his or her negligence preclude a tenant from claiming co-insured status under the landlord's fire insurance policy to avoid a subrogation action by the landlord's insurer where the lease is silent as to fire insurance coverage. These statutes preclude a tenant from asserting that he is an implied insured under landlord's policy. However, there is no prohibition against contracting otherwise.

An example of such a statute is cited in *New Hampshire Insurance Co. v. Hewins*.¹²⁰ In *Hewins*, defendants had an oral, month-to-month lease with the insured landlord.¹²¹ One of the co-defendants set a can of Crisco on an electric stove, turned the burner to a medium-high setting and left the electric burner unattended.¹²² A fire started in the kitchen and caused approximately \$1,400 in damages.¹²³ Landlord's insurer then brought a subrogation claim against the co-tenants.

At issue before the Kansas Court of Appeals was a statutory provision providing that the tenant shall "be responsible for any destruction, defacement, damage, impairment or removal of any part of the premises caused by an act or omission of the tenant or by any person or animal or pet on the premises at any time with the express or implied

118. Neubauer v. Hostetter, 485 N.W.2d 87, 90 (Iowa 1992).

119. See, e.g., OR. REV. STAT. ANN. § 90.325(8) (West 2003) (providing that tenants may not "deliberately or negligently destroy" the premises); see also WIS. STAT. ANN. § 704.07(3)(a) (West 2001); Bennett v. W. Bend Mut. Ins. Co., 546 N.W.2d 204, 205 (Wis. Ct. App. 1996) (holding that Wisconsin Statutes Section 704.07(3)(a) "prevents a tenant from claiming co-insured status under the landlord's fire insurance policy for purposes of subrogation where the lease is silent as to fire insurance coverage").

120. N.H. Ins. Co. v. Hewins, 627 P.2d 1159 (Kan. Ct. App. 1981).

121. *Id.* at 1160.

122. *Id.*

123. *Id.*

permission or consent of the tenant.”¹²⁴ Because the case involved an oral lease agreement, the court found that this statutory provision became a part of the oral lease agreement between landlord and defendants.¹²⁵ Absent an express covenant to the contrary, the statute imposed liability on the co-tenants.¹²⁶ Thus, the defendants were negligent as a matter of law.¹²⁷

The court further noted:

Prior to adoption of the landlord-tenant act, Kansas permitted a tenant to contract to return property at the end of a lease in as good condition as when possession was given to the tenant and held a tenant liable for damages to the leased premises that occurred without negligence on the part of the tenant. The landlord-tenant act by analogy establishes a contract between landlords and tenants who have not provided to the contrary that the tenant will be responsible for the negligent acts or omissions of a person on the premises with the express or implied consent of the tenant. Parties to a residential lease are presumed to contract with reference to presently existing statutes, and the provisions of the statute will be read into and become a part of the contract by implication except when a contrary intention has been manifested and is permitted by the act.¹²⁸

C. Application on a Case-by-Case Basis

Between the anti-*Sutton* and pro-*Sutton* jurisdictions is a middle approach: the case-by-case approach. These jurisdictions adopt the basic underpinnings of the implied co-insured doctrine, but have rejected a per se rule of presumptive co-insured status.¹²⁹ Courts look to the language of

124. KAN. STAT. ANN. § 58-2555(f) (2005).

125. *Hewins*, 627 P.2d at 1161; *see also* KAN. STAT. ANN. § 58-2545 (stating that in the absence of a valid rental agreement to the contrary, the Kansas Landlord and Tenant Act provides gap-filling terms defining the landlord-tenant relationship).

126. *Hewins*, 627 P.2d at 1160 (“Independent of the statute in issue, and independent of an express covenant, Kansas law imposes an obligation on a tenant to return the premises to the landlord at the end of a rental term unimpaired by the negligence of the tenant.”).

127. *Id.* at 1161.

128. *Id.* (citation omitted).

129. *See generally* *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 814–15 (Md. 2005) (discussing the use by some courts of the middle approach).

the lease to determine the reasonable expectations of the parties.¹³⁰ Although there is no hard and fast rule, most courts adopting this analysis ultimately decide that tenants do have co-insured status.

Courts adopting this analysis look at the lease as a whole, along with any other relevant and admissible evidence, to determine whether it was reasonably anticipated by the landlord and tenant that the tenant would be liable to a subrogation claim by the landlord's insurer in the event of tenant's negligence.¹³¹ Courts adopting this approach have denied subrogation on the basis of specific provisions in the lease.¹³² Some provisions require the landlord to purchase fire insurance on the leased premises or include a clause exempting fire damage from tenant's responsibility to maintain or surrender the leased premises in good condition.¹³³ Although the logic for this approach is well-reasoned, unlike those jurisdictions adopting the implied co-insured doctrine, the case-by-case approach fails to provide legal certainty, and as a result the parties cannot plan in advance to protect themselves.¹³⁴

In *Union Mutual Fire Insurance Co. v. Joerg*, the court observed:

The majority of courts, however, have avoided per se rules and taken a more flexible case-by-case approach, holding that a tenant's liability to the landlord's insurer for negligently causing a fire depends on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole.¹³⁵

The Vermont Supreme Court further held that

where the lease requires the landlord to carry fire insurance on the leased premises, such insurance is for the mutual benefit of landlord and tenant, and, as a result, the tenant is deemed a coinsured under the landlord's insurance policy and is protected against subrogation claims by the landlord's insurer.¹³⁶

In *Rausch v. Allstate Insurance Co.*, the Maryland Court of Appeals

130. *Id.* at 814.

131. *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586, 589–90 (Vt. 2003).

132. *Id.* at 590.

133. *Id.* at 591.

134. *But see Rausch*, 882 A.2d at 815–16.

135. *Union Mut. Fire Ins. Co.*, 824 A.2d at 589–90.

136. *Id.* at 591.

explained the appeal of the case-by-case analysis:

We believe that this middle approach, of looking to the reasonable expectations of the parties to the lease, as determined from the lease itself and any other admissible evidence, is the appropriate one to follow. It avoids the court making assumptions and adopting fictions that are largely conjectural, if not patently illogical, and instead applies basic contract principles and gives proper credence to the equitable underpinning of the whole doctrine of subrogation.¹³⁷

In *Rausch*, a landlord owned a single-family residence as rental property.¹³⁸ The landlord hired a management company to lease and manage the rental property.¹³⁹ The parties agreed that the landlord would maintain fire insurance covering damages resulting from the occupancy or management of the house.¹⁴⁰ The management company leased the premises.¹⁴¹ The lease agreement included the following provisions:

(1) Prohibited the tenants from doing anything on the property in contravention of any hazard insurance policy in force or which would increase the premium on such a policy;

(2) Required the tenants to indemnify the owner for any liability for injury, death, property damage, or other loss arising within those portions of the property within the exclusive control of the tenants or occasioned by any act or omission of the tenants; [and]

(3) Required the tenants to surrender the property at the end of the lease in the same condition as when received, ordinary wear and tear excepted¹⁴²

The court in *Rausch* noted the five general principles that operate when a tenant negligently damages the leased premises.¹⁴³ First, “a tenant is liable in tort to the landlord if and to the extent that the tenant negligently damages the landlord’s property” absent any valid contractual

137. *Rausch*, 882 A.2d at 814–15.

138. *Id.* at 803.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 803–04.

143. *Id.* at 806.

provision to the contrary.¹⁴⁴ Second, although landlords are prohibited from drafting language excusing them from liability for losses caused by the landlord's negligence, "there is no flat prohibition against a clause exonerating a tenant from liability for loss caused by the tenant's negligence or a provision waiving a landlord's right to sue a tenant for damage negligently caused by the tenant."¹⁴⁵ Third, landlords may hold a tenant contractually liable for damage to the leased premises caused by the tenant's negligence via a lease provision (e.g., a surrender clause), which requires the tenant to return the leased premises in good or same condition, except for ordinary wear and tear.¹⁴⁶ Fourth, in a subrogation action, an insurer is not permitted to recover as a subrogee from its insured or co-insured.¹⁴⁷ Fifth, "equitable principles apply to subrogation."¹⁴⁸ The *Rausch* court further noted that subrogation claims against tenants "serve to avoid both a double recovery by the landlord and the prospect of a culpable tenant routinely escaping responsibility for his/her negligent conduct."¹⁴⁹ Lease provisions may either exonerate tenants or hold tenants liable. If the leased provisions are ambiguous, they must be construed against the drafter.¹⁵⁰ Likewise if a contract is found to be an adhesion contract, a court may declare it void.¹⁵¹

The type of leased premises may also be problematic in permitting subrogation claims against tenants.¹⁵² As the *Rausch* court pointed out, there is a unique problem in subrogation and tenants in a multi-unit structure.¹⁵³ The court stated:

144. *Id.* The court also noted that the legislature enacted Maryland Code Section 8-203 of the Real Property Article, which allows residential landlords to obtain security deposits as insurance for damage while tenants live on the premises and also protects the landlords when the lease is terminated because they can retain the deposit if there is excessive damage. *Id.*

145. *Id.*

146. *Id.* at 807.

147. *Id.*

148. *Id.* ("[S]ubrogation is founded on the equitable powers of the court and is intended 'to provide relief against loss and damage to a meritorious creditor who has paid the debt of another.'" (quoting *Bachmann v. Glazer*, 559 A.2d 365, 368 (Md. 1989))).

149. *Id.* at 815 (noting that "equitable principles . . . favor the enforcement of subrogation claims by insurers").

150. *Id.*

151. *Id.*

152. *Id.* at 816 (discussing assumptions unique to multi-unit structures).

153. *Id.*

If the leased premises is a unit within a multi-unit structure, absent a clear, enforceable provision to the contrary, a court may properly conclude that the parties anticipated and reasonably expected that the landlord would have in place adequate fire insurance covering the entire building and, with respect to damage caused by the tenant's negligence to parts of the building beyond the leased premises, would look only to the policy, to the extent of its coverage, for compensation. That expectation has a rational and practical basis. Whatever general common law liability a tenant may have for damage to another person's property caused by the tenant's negligence, it is not likely, unless faced with a very clear contractual obligation to the contrary, that the tenant is thinking beyond the leased premises or, as a practical matter, would be able to afford, or possibly even obtain, sufficient liability insurance to protect against such an extended loss. Nor should the law encourage the economic waste that would result from multiple layers of insurance by the individual tenants to cover the same loss.¹⁵⁴

It is also reasonable to extrapolate this reasoning to rental premises where the landlord converts his home into both his residence and rental property.

D. Recognition of the Implied Co-insured Doctrine

In most jurisdictions, landlords and tenants may agree to contractually absolve tenants of liability caused by the tenant's negligence. If a lease contains such a provision, expressly or impliedly, and is otherwise valid, that provision may effectively negate a tenant's common law tort liability. The modern view adopts this analysis.

The case often cited in support of this doctrine is *Sutton v. Jondahl*.¹⁵⁵ In *Sutton*, the Oklahoma Court of Appeals held that absent an express agreement to the contrary, a tenant should be found a co-insured under the landlord's fire insurance policy and, therefore, the insurer cannot bring a subrogation action against the tenant for a fire loss, even if caused by the tenant's negligence.¹⁵⁶ In *Sutton*, an insurer sued a tenant and his ten-year-old son on behalf of the landlord to recover money paid to the landlord

154. *Id.*

155. *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Civ. App. 1975). Though this case is generally accepted as the genesis of the anti-subrogation rule, the actual emergence of such actions has been traced to a 1950 case that inferentially involved, but did not turn on, a subrogation claim. *Gen. Mills v. Goldman*, 184 F.2d 359 (8th Cir. 1950); see also FRIEDMAN, *supra* note 50, § 9.9, at 572–73.

156. *Sutton*, 532 P.2d at 482.

due to fire.¹⁵⁷ The loss was caused by the son's use of an electric popcorn popper to heat chemicals.¹⁵⁸ The insurer alleged "that the father contributed to the cause of the fire by breaching a duty to prohibit his son from carrying on unsupervised chemical experiments."¹⁵⁹

Comparing the facts to permissive-user features of automobile insurance, the *Sutton* court held subrogation should not be permitted because the law treats the tenant as a co-insured of the landlord unless there is an express agreement to the contrary.¹⁶⁰ The court based its rationale for the holding on two findings. First, the court found that the tenants had essentially paid insurance premiums as a part of their monthly rent.¹⁶¹ Second, the court reasoned that "[p]rospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection of the realty . . . absent an express agreement otherwise."¹⁶² This belief is reasonable and is rooted in insurance industry advertisements.

VI. INSURANCE

A. *The Nature of Insurance*

The purpose of insurance is to allocate the risks associated with unexpected future events. One source traces the origins of insurance to Babylonian traders as long ago as the second millennium BCE.¹⁶³ Under Babylonian practice, a merchant would receive a loan to fund a shipment and pay a lender an additional sum in exchange for the lender's guarantee to cancel the loan should the shipment be stolen.¹⁶⁴ The Babylonians recorded this system in the Code of Hammurabi.¹⁶⁵ In addition, this practice was followed by early Mediterranean sailing merchants and fourteenth century European mariners.¹⁶⁶

157. *Id.* at 479.

158. *Id.*

159. *Id.*

160. *Id.* at 482.

161. *Id.*

162. *Id.*

163. THE COLUMBIA ENCYCLOPEDIA *Insurance* 1393 (Paul Lagassé ed., 6th ed. 2000).

164. *See id.*

165. *Id.*

166. *Id.* at 1394.

In general, insurance is a type of risk management device used to circumvent financial loss.¹⁶⁷ For a fee, an insurer contracts to indemnify or guarantee another against loss by a specified contingency or peril.¹⁶⁸ Thus, the potential risk of loss is equitably transferred from the insured to the insurer.¹⁶⁹ In exchange for the transfer of the risk of loss, the insured pays the insurer premiums over a period of time.¹⁷⁰

The insurance company's chief operations are underwriting and rate making.¹⁷¹ Underwriting is defined as "the determination of which risks the insurer can take on," while rate making involves "the decisions regarding necessary prices for such risks."¹⁷² The underwriter selects the risks to be solicited or rates the acceptability of risks solicited. "In preventing adverse selection, the underwriter must consider physical, psychological, and moral hazards in relation to applicants."¹⁷³ To further protect the insurance company, premiums are "determined by the operation of the law of averages as calculated by actuaries."¹⁷⁴

The insurance business is quite lucrative.¹⁷⁵ An insurance company receives many premiums from multiple insureds at various times. These premiums do not sit idly in the insurance company's coffers waiting for an insured to make a claim. Generally, insurers invest the premium payments, a practice called "floating."¹⁷⁶ "By investing premium payments in a wide

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1393.

172. *Id.*

173. *Id.*

174. *Id.*

175. The property/casualty insurance industry had an after-tax net income of \$43 billion in 2005, up from \$38.7 billion in 2004. INSURANCE INFORMATION INSTITUTE, COMMENTARY ON FULL-YEAR 2005 RESULTS (Apr. 2006), http://server.iii.org/yy_obj_data/binary/753200_1_0/Year%20End%202005%20Commentary.pdf (discussing 2005 figures); Robert P. Hartwig, Insurance Information Institute, 2004-Year End Results, <http://www.iii.org/media/industry/financials/2004yearend/> (last visited Mar. 12, 2007) (showing 2004 financial results for the insurance industry).

176. "Floating" occurs when insurance premiums are collected up front and claims are paid over time, sometimes up to ten years or more. Insurance companies are able to collect investment income on the money they have reserved for claims that have not yet occurred or have not yet been paid. Over time, this interest is compounded into significant dollars.

range of revenue-producing projects, insurance companies have become major suppliers of capital, and they rank among the nation's largest institutional investors."¹⁷⁷ Insureds only receive payment upon the occurrence of a triggering event under the insurance contract, by which time the insurance company has made a tremendous profit.¹⁷⁸

B. Homeowner's Insurance

Homeowner's insurance is a particular brand of insurance comprised of insurance protections against physical damage to a home and its contents.¹⁷⁹ Costs associated with this type of insurance depend on the type of coverage the homeowner selects.¹⁸⁰ Because mortgage companies typically require, as a condition of the loan, insurance equal to the replacement cost to guarantee their security interest, it is likely that a homeowner will at least seek coverage for replacement of the home.¹⁸¹ There does not seem to be an apparent difference between investment residential property and regular residential property.¹⁸²

Rates are determined by studies in which an actuary attempts to quantify the risks assumed.¹⁸³ These studies fairly and accurately approximate future claims based on the law of averages.¹⁸⁴ Statistical data is used to determine the probability of risks associated with the covered

177. THE COLUMBIA ENCYCLOPEDIA *Insurance* 1393 (Paul Lagassé ed., 6th ed. 2000).

178. The following illustrates the insurance industry's recent success. World insurance premiums (property/casualty and life/health) totaled \$3.4 trillion in 2005. Insurance Information Institute, Facts and Statistics, Industry Overview: Insurance Industry at a Glance, <http://iii.org/media/facts/statsbyissue/industry/> (last visited March 12, 2007). U.S. insurance premiums totaled \$955.6 billion in 2005, property/casualty sector equaled \$427.4 billion (excluding state funds) according to Highline/National Association of Insurance Commissioners. *Id.* The property/casualty insurance industry's rate of return on a statutory basis was 10.4% in 2005. *Id.*

179. Jerry, *supra* note 27, § 60B[b], at 341.

180. *See id.* (describing the various types of homeowner's policies).

181. *See id.* § 93[d][5][ii] (describing incentives for buying replacement cost coverage).

182. *See id.* ("Replacement cost coverage is important not only to homeowners but also to the owners of business buildings, equipment, and machinery.").

183. F. Daniel Perkins, *Can "Sound Actuarial Principles" Be Found in Life Insurance Underwriting?*, 38 TORT TRIAL & INS. PRAC. L.J. 125, 130 (2002) (describing the process of actuarial risk assessment for life insurance underwriters).

184. *See id.* at 132.

hazards to set the coverage rates.¹⁸⁵ Insurers may also have other factors which they use in order to set the rate structures.

For example, many individuals purchase homeowner's insurance. If a covered loss occurs, the insurer is obliged by the terms of the contract to honor the insured's claim. For some policyholders, the amount of insurance benefits received will significantly exceed the expense of premiums paid. This is because some homeowners may never make a claim or receive any benefit other than the peace of mind rendered by the security of an insurance policy. When averaged, the total amount of claims paid by an insurer should be less than the total premiums paid by the policyholders, with the difference allocated to overhead and profit.

In the landlord-tenant context, if a landlord secures insurance on the leased premises, there is usually no question that any damage (not intentionally caused by the landlord) to the building or landlord's contents will be covered. The query becomes: Who else may be considered a co-insured of the landlord? Generally, tenants do not have a sufficient stake to insure the leased premises. As such, insurers target tenants with another brand of insurance.

C. Renter's Insurance

Insurance companies have directed their energies toward convincing tenants to carry renter's insurance.¹⁸⁶ Renter's insurance is a "contents" policy which covers tenant's possessions, such as furniture, appliances, personal belongings, and household goods.¹⁸⁷ Implicit in this arrangement is the recognition by landlords, tenants, and insurers that the landowner will protect the premises, but not tenant's personal property.¹⁸⁸ Likewise, tenants believe that they are responsible for protecting their personal

185. See *id.* (describing what factors an actuary may consider in assessing risk on life insurance and how insurance underwriters use this assessment to set rates on life insurance).

186. See Allstate Insurance, *Renters Insurance: What Should I Consider?*, <http://home-insurance.allstate.com/renters-insurance.aspx> (last visited Mar. 12, 2007) ("[E]ven though your landlord probably has an insurance policy on your building, you'll need to protect your personal interests too. And . . . it only costs a little to protect a lot.").

187. Insurance Information Institute, *Homeowners Insurance Information, What is Renters Insurance?*, <http://www.iii.org/individuals/homei/hbasics/renters/> (last visited Mar. 12, 2007).

188. See State Farm Insurance, *supra* note 82.

property, not the real property.¹⁸⁹

When tenants seek to rent property, absent a directive otherwise, insurance is not typically considered. In fact, most tenants assume that the landlord has insurance to cover damage to their property.¹⁹⁰ Because the landlord's insurance covers the loss of the structure itself, tenants risk losing their belongings. To shift the risk of loss for tenant's belongings from tenants to insurers, renter's insurance has emerged.

Renter's insurance is available for apartments, rented houses, condominiums, cooperatives, dormitories, and roommate arrangements. However, renter's insurance does not typically cover the structure of the leased premises.¹⁹¹ If landlords do not require tenants to obtain this insurance coverage, tenants usually do not acquire it.¹⁹² Generally, tenants do not have a long-term interest in the premises or the pressures of guaranteeing the security of another (e.g., mortgagors from mortgage companies). Therefore, landlords should bear the responsibility of protecting the leased premises, either themselves or by requesting the tenant to do so.

Renter's insurance may also provide for liability protection, though it is possible that the coverage may only be available for an additional fee.¹⁹³ However, because tenants believe damages to the leased premises are covered by their landlord's insurance, they frequently do not seek this type of coverage.¹⁹⁴ Another benefit is the duty to defend that is concomitant with liability protection.¹⁹⁵ The liability protection covers losses due to a visitor's physical injury (up to a liability limit).¹⁹⁶

189. *See id.*

190. *Id.*

191. Insurance Information Institute, *supra* note 187.

192. *Cf.* State Farm Insurance, *supra* note 82 (one renter's myth is that "their landlord's insurance covers their things").

193. *See, e.g.*, State Farm Insurance: What Affects the Price of Renter's Insurance?, http://www.statefarm.com/insurance/renters/ins_home_rent_price.asp (last visited Mar. 12, 2007).

194. *See Survey Says Two-Thirds of U.S. Renters Live Without Insurance*, INS. J., Aug. 25, 2003, <http://www.insurancejournal.com/news/national/2003/08/25/31731.htm> (discussing the results of a consumer poll about renter's insurance).

195. *See* Renters Insurance Select, Sample Renter's Insurance Policy, <http://www.rentersinsuranceselect.com/ris/samplePolicy.html> (last visited Mar. 12, 2007) (providing an example of a typical renter's insurance policy).

196. *See, e.g., id.*

Insurance companies do not anticipate liability from tenants *ex ante*. Only in hindsight do insurance companies seek to recoup losses. Insurers do not make it a practice to target tenants for realty coverage.¹⁹⁷ Their marketing toward tenants is for renter's insurance which covers personal property, not realty.¹⁹⁸ In addition, the nature of insurance assesses the risks of negligence for the real estate; insurers are in the business of protecting interests against negligence. However, fire insurance springs into action when an insurable loss to the realty occurs. Subrogation could potentially harm landlords by hurting tenants' ability to perform under the lease agreement by creating conflicting interests.

VII. THE PROPER FRAMEWORK IN THE LANDLORD-TENANT CONTEXT:
SUTTON AND ITS PROGENY

The *Sutton* rule provides a better framework for analyzing subrogation cases between tenants and landlords for eight reasons. First, intent should reflect the reasonable expectations of the parties, which include tacit assumptions.¹⁹⁹ Second, if the landlord drafted the lease, any ambiguity in the lease should be construed against the landlord.²⁰⁰ It can be presumed that landlords, as drafters, have inserted all the protective language from which they intended to draw. Third, one must consider the role of security deposits and the limitations that these may impose on an insurer's right of subrogation.²⁰¹ Fourth, it is important to consider that landlords have the greatest interest in the premises—fee and reversionary interests—and thus, it should be imperative that they ensure the premises are protected.²⁰² Fifth, requiring both tenants and landlords to insure the

197. See, e.g., GEICO—Renter's Coverage Explained, <http://www.geico.com/home/renters/coverage-htm> (last visited Mar. 12, 2006) (stating landlord's policies cover the physical property, not the tenant's personal property).

198. See *id.* (stating that renters need insurance because “[t]he homeowner’s or commercial property insurance policy that covers the physical dwelling you live in does not cover your possessions inside the building”).

199. See, e.g., *Cascade Trailer Court v. Beeson*, 749 P.2d 761, 766 (Wash. Ct. App. 1988) (“Where the landlord has secured fire insurance covering the leased premises, the tenant can reasonably expect the insurance to cover him as well, unless the parties have specifically agreed otherwise.”).

200. See, e.g., *Turner v. Appel*, No. 031034, 2005 WL 1683733, at *3 (Mass. Super. Ct. June 3, 2005) (rejecting plaintiff landlord’s attempt to ambiguously transfer liability to defendant tenant).

201. See *infra* Part VII.C.

202. See *infra* Part VII.D.

same premises constitutes economic waste.²⁰³ Sixth, it is irrational to say that landlords do not consider the costs of insurance and other overhead operating costs in determining rent.²⁰⁴ Thus, tenants are effectively paying for premiums under the lease agreement. Seventh, permitting subrogation claims against tenants places tenants in the role of reinsurers.²⁰⁵ Finally, in the battle of equity versus equity, providing for subrogation as a rigid rule changes the fluid nature of subrogation and may end in an unfair and unjust result: windfalls to insurers at tenants' expense.²⁰⁶

A. *The Reasonable Expectations of the Parties*

Words like "intention," "assumption," "expectation," and "understanding" all seem to imply a *conscious* state involving an awareness of alternatives and a deliberate choice among them.²⁰⁷

In most instances, when a tenant signs a residential lease, insurance coverage of the leased premises is not considered. A tenant generally does not recognize his potential liability in a subrogation claim. Similarly, landlords do not consider this fact either. Absent a mandate requiring tenants to obtain insurance coverage, it is unlikely that tenants will get the coverage, especially if both landlords and insurers fail to inform tenants of the likelihood of this exposure.

As Professors Keeton and Widiss pointed out,

The possibility that a lessor's insurer may proceed against a lessee almost certainly is not within the expectations of most landlords and tenants unless they have been forewarned by expert counseling. When lease provisions are either silent or ambiguous in this regard—and especially when a lessor's insurance policy is also silent or ambiguous—courts should adopt a rule against allowing the lessor's insurer to proceed against the tenant.²⁰⁸

Under the doctrine of reasonable expectations, courts need not

203. See *infra* Part VII.E.

204. See *infra* Part VII.F.

205. See *infra* Part VII.G.

206. See *infra* Part VIII.B.2.

207. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 744 (7th ed. 2001).

208. KEETON & WIDISS, *supra* note 27, § 4.4(b), at 340–41.

examine the actual language of the lease agreement.²⁰⁹ Because the parties may not have specifically addressed the issue, courts will look to the parties' conduct and infer what the parties could have reasonably expected.

In determining the implied intent or reasonable expectations of the parties, courts should be mindful of the nature of the contract and the relationship of the parties. A landlord and tenant have a unique relationship because both have insurable interests in the leased premises.²¹⁰ The landlord's insurable interest rests on the fact that he owns a fee and reversionary interest.²¹¹ On the other hand, the tenant's insurable interest is caused by his possessory interest in the premises.²¹² Courts may find that these insurable interests are distinct.²¹³

Allowing a tenant to circumvent a subrogation claim based on the implied co-insured status is logical for the following reasons. First, in most instances, a residential tenant does not understand the terms of the lease. Also, in most landlord-tenant negotiations, tenants lack the bargaining power to make any meaningful changes to the lease agreement.²¹⁴ Depending on the market, tenants' bargaining power may be quite minimal.²¹⁵ These lease agreements may be contracts of adhesion. In such circumstances, courts usually interpret such contracts in favor of the weaker party.²¹⁶ Therefore, the powerful dominance of landlords in lease negotiations should allow tenants implied co-insured status.

Similarly, landlords are typically diligent in crafting the language of the lease agreement. If the lease agreement fails to explicitly state or imply

209. This theory adopts the best reasoned rule as it pertains to insurance policies. *See* *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 593 (Iowa 1990).

210. *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 810–11 (Md. 2005) (quoting *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975)).

211. *Id.* at 811 (quoting *Sutton*, 532 P.2d at 482).

212. *Id.* (quoting *Sutton*, 532 P.2d at 482).

213. *See* *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 397 F. Supp. 2d 674, 681 (M.D.N.C. 2005).

214. *See, e.g.,* *Calef v. West*, 652 N.W.2d 496, 502–03 (Mich. Ct. App. 2002) (discussing the public policy interests in regulating and supervising apartment buildings by the state, including the comparative bargaining power of landlords and tenants).

215. This is especially the case where tenant occupancy rates are close to 100%, such as in cities like San Francisco, New York City, and Los Angeles.

216. *See, e.g.,* *Kuzmiak v. Brookchester, Inc.*, 111 A.2d 425, 430 (N.J. Super. Ct. App. Div. 1955) (finding where a lessor and a lessee are not in equal bargaining positions, a court can hold exculpatory provisions to be contrary to public policy).

that tenants will be liable for negligent fires, then the absence must be seen as an acknowledgment that the landlord will look to its insurance company in such an event.²¹⁷ If a contract is silent on the issue, then it is likely that had the parties intended any other result, they would have agreed to it. Also, most lease agreements make the distinction between coverage of landlord's realty versus personal property of the tenant, which may be reflective of the overall interest of the parties.

Second, subrogation claims do not address the reasonable expectations of the landlord. Subrogation, in this context, only serves the purposes of the insurer, not the insured, tenant, or society. It is a legal fiction that subrogation prevents the insured from receiving double recovery. Subrogation as an equitable doctrine must produce an equitable result.

Third, if landlords obtain insurance on the leased premises, they do so to protect the leased premises knowing that tenants may cause the damage. Considering the inherent risks, losses under the insurance policy, such as loss of the premises by fire, will most likely result from a tenant's negligence. When drafting a lease agreement, the parties typically decide in advance how the risks will be allocated, regardless of whether a party could be found liable in tort.²¹⁸ The same can be said of insurers. Insurers insure leased premises, knowing that they are insuring investment or rental property. It follows that the insurer's own insured will most likely not be the perpetrator causing damages. Even knowing this, they agree to insure the premises.

By calculating insurance into the rent and receiving payment for the premiums via rent, co-insured status should be implied. In light of the parties' reasonable expectations and the inclusion of insurance premiums in the rent calculations, the concept of co-insured status is the most equitable assumption. Finding an implied co-insured status does not result in an injustice to the insurer because the insurer's risk is not increased; the risk is the same one the insurer agreed to cover.

The issue of subrogation rights would not exist if the risk was different from what the insurer had agreed to cover. Under those circumstances, an insurer would deny the landlord coverage. The landlord

217. See, e.g., *Parsons Mfg. Corp. v. Super. Ct. of San Mateo County*, 203 Cal. Rptr. 419, 424 (Ct. App. 1984).

218. Cathleen Devlin, Comment, *Indemnity and Exculpation: Circle of Confusion in the Courts*, 33 EMORY L.J. 135, 140 (1984).

would then have to pursue a claim against its tenant. Likewise, there is no harm to the insurer because the insured may waive or release subrogation rights under some insurance policies.

Anti-*Sutton* advocates argue that courts should permit subrogation claims against tenants because landlords do not have to file claims with their insurance and landlords have no duty to insure.²¹⁹ This is completely erroneous. The right of subrogation is only applicable if there is an insurer to invoke it against. If landlords have no insurance, then issues of subrogation and co-insured status are moot. An analogy to this is that of marriage and divorce. Divorce is only relevant if a married couple decides to part ways; if the couple is not married, divorce does not come into play.²²⁰

B. Ambiguity Construed Against Drafter

Because landlords typically draft lease agreements, a court may presume that they inserted protective language. If they do not insert protective language concerning fire damage (caused negligently or otherwise), then courts must presume that they have agreed to protect themselves in another way.²²¹ Thus, it is reasonable that tenants would also expect landlords to cover such damages and look solely to their insurance company for compensation.²²² This is especially true in the case where a landlord omits specific language concerning liability for fire damage or

219. See 56 Assocs. v. Friedband, 89 F. Supp. 2d 189, 193 (D.R.I. 2000) (explaining that the landlord does not have to provide insurance despite some negative legal consequences); see also Britton v. Wooten, 817 S.W.2d 443, 445 (Ky. 1991) (contending subrogation is proper where lease did not require landlord to provide insurance).

220. However, the point raised by anti-*Sutton* advocates is the question of whether a tenant may claim co-insured status and force a landlord to file a claim against its insurer. See, e.g., Rausch v. Allstate Ins. Co., 882 A.2d 801, 816 (Md. 2005). To date, no court has ruled on this issue. As a practical matter, this right may exist if a tenant is deemed a co-insured and if it is a covered harm; the landlord should be limited to the amount of the deductible in excess of the tenant's security deposit. Otherwise, if no insurance exists, it is clear that the landlord sought recovery from the tenant solely for damages the tenant caused to the leased premises.

221. See Sutton v. Jondahl, 532 P.2d 478, 482 (Okla. Civ. App. 1975) ("The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not.").

222. See *id.* (noting that a reasonable tenant would presume the premises were protected by fire insurance, and that the insurance also existed to benefit the tenant).

protective language, but procures fire insurance.²²³

The risk of gamesmanship is high when landlords draft lease agreements.²²⁴ If the language is ambiguous, a reasonable expectation analysis must be utilized to curb this advantage.²²⁵ As with any contract, any ambiguities must be construed against the drafter and in favor of the nondrafter.²²⁶ Applying a reasonable expectations analysis, the findings must be consistent with a tenant's reasonable expectations, even if it is contrary to the language of the lease agreement.²²⁷ The reasoning behind this is a lease may be too complex for a tenant to understand, tenants seldom read lease agreements, and most lease agreements are adhesion contracts.

C. *The Role of Security Deposits*

Typically, under state law, landlords have the right to demand security deposits to protect against damage to the leased premises.²²⁸ Upon termination of the lease agreement, landlords may retain the portion of the security deposit which corresponds to the level of damages beyond normal wear and tear.²²⁹ It is obvious that total destruction of the leased premises by fire is beyond normal wear and tear. Thus, if landlords had intended tenants to be liable for damages due to fire, they would request a greater assurance beyond the normal security deposit, which is typically equal to

223. See *Allstate Ins. Co. v. Watson*, No. M2003-01574-COA-R3, 2005 WL 457846, at *4 (Tenn. Ct. App. Feb. 25, 2005) (explaining the modern trend—where a lessor has fire insurance, “in the absence of an express agreement or lease provision establishing the lessee’s liability” and based on the lessee’s reasonable expectations, the lessee is deemed a co-insured (quoting 6A J. APPLEMAN ET AL., *INSURANCE LAW AND PRACTICE* 4055 (1969 & Supp. 1992))).

224. See *id.* at *5 (explaining that part of the appeal of the *Sutton* rule is that it “prevents landlords from engaging in gamesmanship when drafting leases”).

225. See *id.* at *4 (“[P]erhaps [the courts] should at least adopt a rule against the lessee when lease provisions are ambiguous . . . and the insurance policy is silent or ambiguous.” (quoting ROBERT E. KEATON, *INSURANCE LAW* § 4.4(b), at 201 (1971))).

226. E.g., *United Soc. & Mental Health Servs., Inc. v. Rodowicz*, 899 A.2d 85, 88 (Conn. App. Ct. 2006); *Daltex Inc. v. W. Oil & Fuel Co.*, 148 N.W.2d 377, 383 (Minn. 1967) (noting that the terms of the lease were construed strictly against the drafter); *Walters v. Nat’l Props., LLC*, 699 N.W.2d 71, 75–76 (Wis. 2005).

227. See *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 903 (3d Cir. 1997).

228. Stephen E. Kalish, *Residential Tenant Security Deposits: A Legislative Proposal*, 1974 U. ILL. L. REV. 569, 570 (1974).

229. See 49 AM. JUR. 2D *Landlord and Tenant* § 105 (2006).

one month's rent. Similarly, in most instances, neither landlords nor tenants expect that the landlord's insurer will pursue an action against a tenant, "unless they have been forewarned by expert counseling."²³⁰ If a court finds that the landlord has waived his claims against the tenant, then the insurer would have no subrogation claim against the landlord.

The receipt of security deposits may be viewed as a landlord's waiver of claims against a tenant. At a minimum, security deposits should be viewed as a partial waiver. Should a landlord have a claim for damages against a tenant, the amount retained from the tenant's security deposit will be deducted from the total amount of damages a tenant may owe. Because an "insurer's right of subrogation is derived from the rights of the insured, and is limited to those rights, . . . there can be no subrogation where the insured has no cause of action against the defendant."²³¹ The subrogee "stands in the shoes" of the one whose rights it claims, and the extent of the subrogee's remedy and the measure of his rights are controlled by those possessed by the subrogor.²³² Thus, insurers should be barred from recovering more than their insureds. Likewise, tenants should not lose their security deposits plus additional subrogation damages. A reduction of the security deposit should be included in the calculation of damages.

It is also important to note that some statutes prohibit or limit landlords from requiring tenants to provide both security deposits and damage insurance. An example of such limitation is the Virginia Residential Landlord and Tenant Act.²³³ It allows a landlord to require a tenant to pay for costs of insurance coverage premiums as a condition of

230. DiLullo v. Joseph, 792 A.2d 819, 822 (Conn. 2002) (quoting KEETON & WIDISS, *supra* note 27, § 4.4(b), at 340-41).

231. Powell v. Brantly Helicopter Corp., 396 F. Supp. 646, 650 (E.D. Tex. 1975) (quoting Int'l Ins. Co. v. Medical-Prof'l Bldg., 405 S.W.2d 867, 869 (Tex. Civ. App. 1966)).

232. McAllen State Bank v. Linbeck Constr. Corp., 695 S.W.2d 10, 24 n.5 (Tex. App. 1985).

233. See Virginia Residential Landlord and Tenant Act, VA. CODE ANN. §§ 55-248.2 to -248.9 (2003 & Supp. 2006). "A landlord may require as a condition of tenancy that a tenant pay for the cost of premiums for commercial insurance coverage, obtained by the landlord, to secure the performance by the tenant of the terms and conditions of the rental agreement, generally known as 'damage insurance.'" *Id.* § 55-248.7:2(A). As provided in section 55-248.4, such payments shall not be deemed a security deposit, but shall be rent. *Id.* § 55-248.4. However, as provided in section 55-248.9, the landlord cannot require a tenant to pay both security deposits and the cost of damage insurance premiums, if the amount of any security deposits and damage insurance premiums exceeds the amount of two months' periodic rent. *Id.* § 55-248.9.

tenancy.²³⁴ However, if the landlord also requires a security deposit, the cost of both insurance premiums and the security deposit cannot exceed two months rent.²³⁵ Thus, in these jurisdictions tenants' exposure is limited to out-of-pocket expenses of no greater than two months rent.

D. *Protectable Interests of the Parties*

A critical part of the court's analysis should be to consider the protectable interests of the parties and responsibility of the parties to protect those interests. Though the landlord and tenant have different interests, both are insurable.²³⁶ The tenant's interest is only a temporary possessory interest. The landlord's interest, however, is greater than the tenant's interest in that the landlord has both a reversionary and a fee interest.²³⁷ Therefore, it is crucial that the landlord allocate the risk of damages to the leased premises either to an insurer or tenant.

In *United Fire & Casualty Co. v. Bruggeman*, the Minnesota Court of Appeals concluded that because both the tenant and the landlord had an insurable interest in the building structure (i.e., the possessory interest of the tenant and the ownership interest of the landlord), the tenant was essentially a co-insured on the landlord's fire insurance policy with respect to the building structure.²³⁸ Because of this co-insured status under the landlord's policy, the court barred the insurer from pursuing a subrogation claim against the tenant.²³⁹ The court noted the rationale behind their decision:

If . . . each tenant is responsible for all damages arising from its negligence in causing a fire and if each tenant was therefore responsible for its own fire insurance, the same property would be insured many times over. While this may provide insurance companies a welcome windfall, it would be contrary to economic logic and common sense.²⁴⁰

234. *Id.* § 55-248.7:2(A) (Supp. 2006).

235. *Id.* § 55-248.9 (2003).

236. *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975).

237. *See id.*

238. *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87, 89-90 (Minn. Ct. App. 1993).

239. *Id.* at 90.

240. *Id.* at 89.

The court also noted that “the landlord is the party in the best position to assume such responsibilit[y]” for any safety and structural precautions imposed by the insurer in efforts to minimize risks.²⁴¹

Liability insurance essentially protects both landlords’ and tenants’ interests. There is no physical way to dissect these interests, even though they are legally distinct. Dividing these interests creates an erroneous and inequitable result in that it opens tenants up to unexpected liability. Tenants are not aware that their interests in the realty are distinct from landlords’. Thus, other than providing a windfall to the insurer, there are concomitant factors which make subrogation unjust in the landlord-tenant context.

First, the type of tenancy must be acknowledged and examined in determining the equity and applicability of subrogation. Longer tenancies may have more characteristics of a fee ownership. In these cases, landlords are more likely to negotiate that these long-term tenants have liability insurance. However, short term or at-will tenancies will not typically address the issue of liability insurance for many reasons, including the economic feasibility of a tenant obtaining coverage for one month. Second, oral leases do not have the opportunity to formulate all of the covenants, rights, and duties of the parties. Third, situations where the landlord agrees to accept services instead of rent pose a unique problem because, as with oral leases, there may not be a written agreement or the parties may not discuss liability issues. Thus, it is important to look at the conduct of the parties to determine their intent.

In *State Auto Insurance Co. v. Knuttila*, Knuttila served as a live-in caretaker for property owned by State Auto’s insured.²⁴² His “duties included performing normal maintenance on the property and forwarding mail to the insured’s overseas residence.”²⁴³ Knuttila “did not pay cash for rent and did not have a written lease with the insured.”²⁴⁴ “[A] fire occurred on the property, causing significant damage.”²⁴⁵ The insurer brought a subrogation action against Knuttila, alleging, among other things, that Knuttila was negligent in leaving a candle burning near

241. *Id.*

242. *State Auto Ins. Co. v. Knuttila*, 645 N.W.2d 475, 476 (Minn. Ct. App. 2002).

243. *Id.*

244. *Id.*

245. *Id.*

combustibles while sleeping.²⁴⁶

The court first addressed whether Knuttila was a tenant. The insurer argued Knuttila could not be considered a tenant because he did not make cash rental payments.²⁴⁷ The court defined a residential tenant as “a ‘person who is occupying a dwelling . . . under a lease or contract, whether oral or written, that requires the payment of money *or exchange of services*.’”²⁴⁸ The court found that this was an at-will tenancy because “[a] tenancy at-will is created when a ‘tenant holds possession by permission of the landlord but without a fixed ending date.’”²⁴⁹

The second issue the court addressed was whether a subrogation claim was available to the insurer.²⁵⁰ Quoting the principles set forth in *Bruggeman*, the court blocked the subrogation action.²⁵¹ The court determined that because Knuttila was an at-will tenant paying in services, he had a possessory interest in the property.²⁵² As a holder of a possessory interest, Knuttila was an implied co-insured. Therefore, the court barred insurer’s subrogation claim.²⁵³ Thus, holding a joint interest in the leased premises, though a distinct interest from that of the landlord, was enough to convey a co-insured status upon the tenant.

Only one court has made a distinction between commercial and residential tenancies.²⁵⁴ It stated that the complexities of commercial leases warrant a rule for commercial tenancies requiring courts to look to the terms of the lease and other evidence to determine whether the parties intended that the tenant be relieved of liability for fire damage caused by its negligence.²⁵⁵ Arguably, because of the length of time a commercial tenant may possess the premises, they tend to have more bargaining power. Similarly, commercial landlords and tenants include lease provisions which allocate the risks of injury to person or damage to property between the contracting parties. At any rate, in the commercial setting, the parties

246. *Id.*

247. *Id.* at 477.

248. *Id.* (quoting MINN. STAT. § 504B.001(12) (2000) (emphasis added)).

249. *Id.* (quoting MINN. STAT. § 504B.001(13)).

250. *Id.* at 477–78.

251. *Id.* at 478.

252. *Id.*

253. *Id.*

254. *See Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 950 (Mass. 2002).

255. *Id.* at 951.

should agree to shift the burden from the landlord. If they do not agree, it should be assumed that the landlord has taken on the responsibility (outside of any security deposit). Finding otherwise promotes economic waste.

E. Economic Waste

From an economic point of view, the common law approach to handling losses based on fault makes no sense. To protect itself from possible liability for property damage to a large building in which the premises may be located, each tenant in the building would need to carry massive amounts of liability insurance. At the same time, the tenants are paying for the landlord's property insurance as part of their rent or as additional rent. Similarly, a landlord whose tenant has expensive personal property would need to carry substantial liability insurance to protect against claims by its tenants or their insurers.²⁵⁶

The theory of economic waste is centered on reasonableness and a more balanced look at costs and the allocation of risks.²⁵⁷ Under a landlord's fire insurance, the building is insured. Insurers do not insure the interest, but they insure negligent damage of the building. Any harm negligently caused by a tenant is exactly the type of risk the insurer agreed to insure.

Those opposed to the *Sutton* rule would essentially require tenants to maintain insurance to cover a subrogation claim by landlord's insurer, unless otherwise agreed.²⁵⁸ Economic waste occurs if more than one party has insurance coverage on a particular premise. Opponents of the *Sutton* rule would effectively require tenants to carry a sufficient amount of insurance, up to the replacement value of the building. If a tenant lives in a multi-unit building, every tenant would have this incentive and carry the same liability insurance. Similarly, because liability insurance may be acquired by the tenant prior to renting the leased premise, a landlord may also possess liability insurance on the same property, either through their own volition or as a part of their mortgagor's mandate. Though the

256. Sidney G. Saltz, *Allocation of Insurable Risks in Commercial Leases*, 37 REAL PROP. PROB. & TR. J. 479, 482–83 (2002).

257. R.I. Tpk. & Bridge Auth. v. Bethlehem Steel Corp., 379 A.2d 344, 356 (R.I. 1977).

258. See, e.g., Phoenix Ins. Co. v. Stamell, 796 N.Y.S.2d 772, 778–79 (App. Div. 2005).

policyholders are different, the insurable interest is the same. This situation is exactly what the policy against economic waste intends to avoid.²⁵⁹

Proponents of subrogation against tenants for their negligent acts focus mainly on the culpability or blameworthiness of the actors, the foundation of common law negligence claims. This focus is misplaced and unreasonable in light of the relationship between landlords and tenants. Insurance is necessary for negligent actors for any damage or injury caused. When an insured insures a piece of real property, he may insure it for damage he negligently causes. Though he is blameworthy, the insured has allocated the risk of his negligent acts upon another. In the landlord-tenant context, if the parties do not discuss a tenant's liability beyond a security deposit and the landlord procures insurance that covers the harm committed by the tenant, then it is a reasonable expectation that the tenant is a co-insured.

Allowing subrogation in the landlord-tenant arena may result in duplicate insurance. Though duplicate insurance coverage benefits both landlords and tenants in that both are protected for negligence, it favors neither of them. The loss insured is already covered under one policy, so the duplicate premiums are inefficient and constitute wasteful spending. The issue becomes murkier if both parties' insurers are different insurance companies. There may be a complicated issue of the insurer's subrogation action against a tenant or tenant's insurer.

The type of residential situation also plays an important role. It may be logical for a landlord to allocate the risk of insuring single-unit premises. However, allocating this risk in a multi-unit premise is more difficult and raises numerous questions. For instance: How does one divide the responsibility among a large number of tenants? Or, in a multiple unit building, how far do tenants' liabilities extend? As pointed out in *Rausch*, tenants may not "be able to afford, or possibly even obtain, sufficient liability insurance to protect against such an extended loss."²⁶⁰ Likewise, it is unreasonable to require each tenant to insure the entire premises, or even his pro rata share of the leased premises.

Economic waste exists when landlords require each tenant to obtain

259. See, e.g., *Peterson v. Silva*, 704 N.E.2d 1163, 1166 (Mass. 1999) ("It surely is not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy.").

260. *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 816 (Md. 2005).

liability insurance to protect against such extended loss. Besides the issue of economic waste, subrogation brings about other questions. There are two main questions concerning multi-unit premises: First, is subrogation limited to a tenant's particular unit or can the insurer get costs for all of the damaged premises? Second, on what theory is the extension of liability beyond tenant's leased premises based?

Most courts have policies which disfavor economic waste.²⁶¹ This policy is enough to overcome subrogation. In *DiLullo v. Joseph*, the Connecticut Supreme Court held that where parties do not discuss subrogation rights, no right of subrogation exists because of the "strong public policy against economic waste, and the likely lack of expectations regarding a tenant's obligation to subrogate his landlord's insurer."²⁶² The court also founded their decision on the principle that subrogation, as an equitable doctrine, invokes matters of policy and fairness.²⁶³ The court concluded that a contrary holding creates strong incentives for every tenant to carry high amounts of liability insurance.²⁶⁴ The amount required by a tenant would be the same value, or "replacement cost, of the entire building, irrespective of the portion of the building occupied by the tenant."²⁶⁵ This "is precisely the same value or replacement cost insured by the landlord under his [own] fire insurance policy."²⁶⁶ The court further recognized that "although the two forms of insurance would be different, the economic interest insured would be the same."²⁶⁷ "This duplication of insurance would . . . constitute economic waste . . ."²⁶⁸ Thus, according to the court, the "law would be better served by having the default rule of law embody this policy against economic waste, and by leaving it to the specific agreement of the parties if they wish a different rule to apply to their, or their insurers', relationship."²⁶⁹

261. See, e.g., *DiLullo v. Joseph*, 792 A.2d 819, 823 (Conn. 2002) (stating that the law is best served by a policy opposing economic waste).

262. *DiLullo v. Joseph*, 792 A.2d 819, 821 (Conn. 2002).

263. *Id.* at 822 ("Subrogation is a doctrine which equity borrowed from the civil law and administers so as to secure justice without regard to form or mere technicality." (quoting *Home Owners' Loan Corp. v. Sears, Roebuck & Co.*, 193 A. 769, 772 (Conn. 1937))).

264. *Id.* at 822–23.

265. *Id.* at 823.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

F. Realities of the Real Estate Market

[I] . . . shall never use profanity except when discussing house rent and taxes. Indeed, upon second thought, I will not use it then, for it is unchristian, inelegant, and degrading—though, to speak truly, I do not see how house rent and taxes are going to be discussed worth a cent without it.²⁷⁰

Although some landlords are not business-minded, most are. Landlords are in the rental business for many reasons, but mainly because it is lucrative. Good business practices incorporate all operating expenses, including taxes and insurance, into determining the rental amounts. Thus, tenants pay, though not always explicitly, for insurance coverage of the realty. It flows against wisdom to say that the realities of the real estate market and rent are based on supply and demand, when this is not necessarily so. The ultimate goal in owning rental property is to make a profit with as little effort as possible. Rental rates may be based on financial calculations, which determine the rate that will turn a profit after expenses. Thus, landlords will make sure their expenses (e.g., insurance, taxes, maintenance) are covered, and then may set the rental rate to insure their investment is profitable.

Courts have echoed this sentiment. As noted in *Tate v. Trialco Scrap, Inc.*:

Despite the fact that the lessor may actually send the premium check to the insurance company, the lessee ultimately pays for insurance through his rent checks, because the lessor takes his own costs into account when setting rent. If the lessee is ultimately the source of the insurance payment, simple equity would suggest that he be able to benefit from that payment unless he has clearly bargained away that benefit. Subrogation being an equitable doctrine, it is only appropriate to consider this equitable factor in determining whether or not subrogation is appropriate in this instance.²⁷¹

Further, in *Cerny-Pickas & Co. v. C.R. Jahn Co.*, the court found that “[t]he ancient law has been acquiesced in, and, consciously or unconsciously, the cost of insurance to the landlord, or the value of the

270. MARK TWAIN, *Two Mark Twain Editorials, in EUROPE AND ELSEWHERE* 14, 14–15 (1923).

271. *Tate v. Trialco Scrap, Inc.*, 745 F. Supp. 458, 473 (M.D. Tenn. 1989).

risk, enters into the amount of rent.”²⁷² The court stated that landlords “necessarily consciously figured on the rentals to be paid by the tenant as the source of the fire insurance premiums and intended that the cost of insurance was to come from the tenants. In practical effect the tenant paid the cost of the fire insurance.”²⁷³ It then flows that a tenant must be entitled to receive the insurance benefits for which he has already paid.²⁷⁴ Therefore, subrogation violates public policy and would not be served because it does not result in double recovery for the insured.²⁷⁵ Allowing subrogation deprives the insured of the coverage for which he had paid, and results in a windfall recovery for the insurer, making tenants reinsurers for risks already assumed by the insurer.

G. Using Tenants as Reinsurers

Additionally, insurers may purchase “insurance” for the insurance it issued. Reinsurance accords an insurer the opportunity to transfer or share its risk of loss with another insurer. Insurers purchase reinsurance to increase profits and balance losses. “Insurers don’t simply take premiums and hope you don’t collect. They insure themselves with other insurers. By doing so, they move risk and liabilities off their balance sheets and onto others.”²⁷⁶ Thus, if an insurer undertakes a bad risk, it has some relief from financial disaster.

Reinsurance serves four key functions. First, reinsurance enables the reinsured to limit its liability on specific risks. Second, the use of reinsurance can stabilize the loss experienced by the reinsured. Third, reinsurance provides protection against potentially catastrophic losses. Fourth, the use of reinsurance allows the reinsured to write more coverage than it would be able to in the absence of reinsurance.²⁷⁷

Allowing subrogation claims against tenants produces the nonsensical result of having tenants as reinsurers for landlords’ insurers. Subrogation

272. Cerny-Pickas & Co. v. C.R. Jahn Co., 131 N.E.2d 100, 104 (Ill. 1955) (quoting *Lothrop v. Thayer*, 138 Mass. 466, 475 (1885)).

273. *Id.* (quoting *Gen. Mills v. Goldman*, 184 F.2d 359, 366 (8th Cir. 1950)).

274. *See Tate*, 745 F. Supp. at 473.

275. *See also Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont. 1981) (holding medical payment subrogation clauses invalid as a matter of public policy).

276. Daniel Gross, *Is Buffett in Trouble?: Sorting Out the Insurance Scandal*, SLATE, Apr. 4, 2005, <http://www.slate.com/id/2116167/>.

277. HOLMES & SUTIN, *supra* note 32, § 102.2, at 8.

in the landlord-tenant context shifts the risks of insurance losses onto tenants, who are not in the business of assuming these risks. As a part of the underwriting process, the insurer has considered the physical, psychological, and moral hazards in relation to each applicant. This may include recognition of the type of property being insured, such as seasonal or investment/rental. When an insurer agrees to insure investment/rental property, it should recognize that the property will be used by persons other than the insured. Thus, when it agrees to insure the premises and accept premiums, it agrees to insure against the risks of tenants in general.

Tenants cannot adequately prepare to protect themselves against such catastrophic losses without insurance, which they never knew was necessary. The co-insured status permits courts to shift the burden of assuming risks back on insurers, where it rightfully belongs. Unlike reinsurers, tenants do not receive a premium to indemnify landlords' insurers against losses sustained under landlords' insurance policies.

H. *The Importance of Legal Certainty*

As an initial matter, a pure *Sutton* approach has the benefit of providing legal certainty and allowing the parties to plan against liabilities in advance.²⁷⁸ As observed in *Tri-Par Investments v. Sousa*:

The *Sutton* rule prevents landlords from engaging in gamesmanship when drafting leases by providing the necessary incentive for them, if they so desire, to place express subrogation provisions in their leases. If such a provision is placed in their lease, tenants will be on notice that they need to purchase liability insurance. If such a provision is not included in their lease, insurers will pass the increased risk along to landlords in the form of higher premiums, and landlords, in turn, will pass along the higher premiums to tenants in the form of increased rent.²⁷⁹

Likewise, not having a default rule may result in tenants of single occupancy dwellings, multiple unit buildings, and residence halls unwittingly becoming liable for fire damage to their leased premises. Courts may find tenants liable though their landlords: (1) did not apprise them of the potential liabilities beforehand; and (2) have obtained fire

278. See *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975).

279. *Tri-Par Invs., L.L.C. v. Sousa*, 680 N.W.2d 190, 199 (Neb. 2004).

insurance to cover the damages.²⁸⁰ In some instances, courts have permitted insurance companies to sue tenants using the equitable doctrine of subrogation, making tenants liable for millions of dollars in damages.²⁸¹

In *Peterson v. Silva*, the Massachusetts Supreme Judicial Court established tenant co-insured status for residential tenants by holding that, at least in the case of residential leases, the implied co-insured doctrine would be applicable “absent an express provision in a lease establishing a tenant’s liability for loss from a negligently started fire.”²⁸² More recently, in *Commercial Union Insurance Co. v. North American Paper Co.*, the U.S. district court applied the doctrine of implied co-insurance set forth in *Peterson* to circumstances in which a landlord fails to make it clear in a commercial lease that the tenant must obtain insurance to cover the landlord’s property in case of negligence, and where there is no express provision in the lease establishing the tenant’s liability for the loss.²⁸³

Massachusetts’ current default rule for residential tenants is more lenient than its default rule for commercial tenants.²⁸⁴ However, each rule can be overridden by specific language in a lease.²⁸⁵ In residential cases, one can deduce that the lease language must specifically obligate the tenant for a loss caused by his negligence. However, in a commercial case, the court will look at numerous factors to determine the intent of the parties and the tenant’s obligation to carry liability insurance; for instance, indemnification language by a tenant supports a subrogation claim by a landlord’s insurer.²⁸⁶ These results are quite reasonable and put landlords and tenants on notice before they enter the courthouse doors; this more fully serves the purposes of equity.

280. See, e.g., *Fed. Ins. Co. v. Paulk*, 325 S.E.2d 886, 887–88 (Ga. Ct. App. 1985).

281. See, e.g., *id.*

282. *Peterson v. Silva*, 704 N.E.2d 1163, 1165 (Mass. 1999).

283. *Commercial Union Ins. Co. v. N. Am. Paper Co.*, 138 F. Supp. 2d 222, 228–31 (D. Mass. 2001); see also *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975).

284. See *Commercial Union Ins. Co.*, 138 F. Supp. 2d at 228–29.

285. *Id.* at 227.

286. See, e.g., *id.* at 231.

VIII. EQUITY VERSUS EQUITY: AND THE WINNER IS?

A. *The Equitable Creation of Subrogation*

It is important to understand that *Sutton* and its descendants were not determined on the basis of whom, under the lease agreement, bears responsibility in negligence or otherwise for a fire loss to the premises. The right of subrogation must be founded upon equity according to general principles—an equity that will accomplish complete justice between the parties to the controversy. “The process is analogous to the creation of a constructive trust, the creditor being compelled to hold his rights against the principal debtor, and his securities, in trust for the subrogee.”²⁸⁷

Recovery under subrogation should be allowed only if “the cause is just, and its enforcement is consonant with right and justice.”²⁸⁸ Subrogation is an equitable “child of justice[;] [it is] without the form of a rigid rule of law.”²⁸⁹ “[I]t is a fluid concept depend[ent] upon the particular facts and circumstances of a given case for its applicability.”²⁹⁰

In *Dix Mutual Insurance Co. v. LaFramboise*, the Illinois Supreme Court found that “[t]here is no general rule which can be laid down to determine whether a right of subrogation exists since this right depends upon the equities of each particular case.”²⁹¹ Allowing subrogation unless the parties agree otherwise contradicts the function of subrogation being amorphous until the facts of the case prove otherwise. Anti-*Sutton* jurisdictions presume subrogation to exist instead of allowing an insurer to prove that subrogation is equitable in light of the other equities in the case. However, the converse should be true: subrogation should not be allowed unless the equities in the case prove otherwise.

Furthermore, the emphasis on negligence is misplaced. It is generally agreeable that one may shift his risk of loss via contract.²⁹² The implied co-insured doctrine stands for the notion that the landlord procured insurance intending to allocate the damages negligently caused by himself and/or his

287. Camden Trust Co. v. Cramer, 40 A.2d 601, 603 (N.J. 1945).

288. Bater v. Cleaver, 176 A. 889, 892 (N.J. 1935).

289. Sutton v. Jondahl, 532 P.2d 478, 482 (Okla. Civ. App. 1975).

290. *Id.*

291. Dix Mut. Ins. Co. v. LaFramboise, 597 N.E.2d 622, 624 (Ill. 1992).

292. See, e.g., Sutton, 532 P.2d at 482.

tenant.²⁹³ Therefore, even though tenant is negligent per se, landlord agreed to allocate the risk of tenant's negligence onto an insurer. It would be inequitable to permit an insurer to pass on the incidence of loss and avoid the coverage because it agreed to insure the landlord.²⁹⁴

B. *The Flawed Rationale of Subrogation*

1. *Double Recovery*

An insurer should enjoy the opportunity to stand in the shoes of the insured while pursuing a recovery of the amounts paid to the insured. Under principles of equity, subrogation is permitted "only when the insured has received, or would receive, a double payment by virtue of an insured's recovering payment of all or part of those same damages from the tort-feasor."²⁹⁵ To prevent an insured's double recovery and assure the tortfeasor compensates the insurance company for payments made to the insured, subrogation was created.²⁹⁶

For the most part, the double recovery rationale is flawed. In most cases, there would not be a double recovery for the insured if subrogation were denied.²⁹⁷ Rather, the great irony is that in the vast majority of cases, the insurer who asserts that the insured will receive an unwarranted double recovery is itself picking up a windfall recovery if subrogation is permitted.²⁹⁸ The only entity receiving a double recovery is the insurer, not the insured.²⁹⁹ Insurer's windfall is created by both receiving premiums from the insured and damages from the tenant. As one court noted:

[T]he insured is not entitled to receive a stipulated amount merely upon the happening of a specified event, but rather indemnification, within the limits of the policy, for his actual loss (i.e., medical expenses incurred). To effect this end and to minimize the risk of moral hazard

293. *Id.*

294. *Id.*

295. *Shelter Ins. Cos. v. Frohlich*, 498 N.W.2d 74, 81 (Neb. 1993).

296. *Wimberly v. Am. Cas. Co. of Reading Pa.*, 584 S.W.2d 200, 203 (Tenn. 1979).

297. See Roger M. Baron, *Subrogation on Medical Expense Claims: The "Double Recovery" Myth and the Feasibility of Anti-Subrogation Laws*, 96 DICK. L. REV. 581, 589 (1992).

298. *Id.* at 591.

299. See *id.*

or wager, various sanctions, such as subrogation, are taken to minimize the chances of the insured being allowed a recovery in excess of the actual loss.³⁰⁰

However, the idea that without subrogation the insured would enjoy a double recovery is simply not true. Subrogation actually results in a windfall recovery that is retained by the insurer, not a windfall to the insured.³⁰¹ Furthermore, the subrogated recovery is “not reflected in the computation of premium rates.”³⁰²

2. *Windfall to Insurer*

An insurer assumes no risk of loss if it is allowed to subrogate and recover the money it paid its insured on the claim.³⁰³ Not only does the insurer retain the premium, it gets damages from the tenant.³⁰⁴ Thus, the insurer received a windfall while the landlord does not receive the benefit it bargained for, and the insurer escapes the risk of loss.³⁰⁵

Moreover, should a loss occur, the insurer is simply paying for what it anticipated might happen. The anticipated loss has been

actuarially distributed over a pool of similarly-situated insureds. The setting of the insurance premium for the transfer of the risk from the insured to the insurer encompasses the insured's pro rata share of the total estimated losses for the pool, as well as the insured's pro rata share of the costs, expenses, and profit margin to be borne by the insurer for setting up and administering the insurance undertaking.³⁰⁶

In setting insurance premiums, insurers take the following factors into consideration:

(1) the proportionate part of the total predicted cost of meeting specified types of losses in the ventures that have been grouped by the insurer into a “pool of risks,” (2) appropriate amounts for a reserve

300. DeCespedes v. Prudence Mut. Cas. Co. of Chi., 193 So. 2d 224, 226 (Fla. Dist. Ct. App. 1966).

301. See *id.* at 227–28.

302. *Id.* at 228.

303. See Baron, *supra* note 297, at 588.

304. See *id.*

305. See *id.*

306. Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. Rev. 237, 244 (1996).

fund in the event the total risk was underestimated, (3) the administrative costs of the insurer, (4) other expenses of doing business (including fees for sales representatives such as agents and brokers), and (5) profits for companies engaging in insurance as a business enterprise.³⁰⁷

Further, insurers do not consider the likelihood of a successful subrogation collection in determining premiums.³⁰⁸ “In fact, the conjectural and remote nature of subrogation militates against its inclusion as a factor for consideration in the setting of premium rates.”³⁰⁹ Consequently, any recovery through subrogation for an insured risk is undoubtedly a windfall to the insurer.³¹⁰ Because of its nature, subrogation has been likened to a double-edged sword.³¹¹ Subrogation “has frequently become a source of windfall to insurers in that the anticipated recoveries under subrogation rights are generally not reflected in the computation of premium rates.”³¹² When examining the equities in the landlord-tenant context, subrogation does not serve those purposes. As such, subrogation should be barred absent an agreement to the contrary.

3. *Analogous Co-insured Situations*

Courts have barred subrogation and recognized the implied co-insured status in contexts other than the landlord-tenant context.³¹³ The rationale behind the recognition of the implied co-insured status is both well-reasoned and adaptable to the landlord-tenant. The emphasis is on whether subrogation would produce an equitable result. In these instances, the courts found that subrogation produced an inequitable result.³¹⁴

307. *Id.* at 244 n.44 (quoting KEETON & WIDISS, *supra* note 27, § 1.3(b)(2)).

308. *Id.* at 244 n.43.

309. *Id.* at 244.

310. *Id.*

311. *DeCespedes v. Prudence Mut. Cas. Co. of Chi.*, 193 So. 2d 224, 227 (Fla. Dist. Ct. App. 1966).

312. *Id.* at 227–28; *see also* *Aetna Ins. Co. v. Craftwall of Idaho, Inc.*, 757 F.2d 1030, 1034 (9th Cir. 1985) (“[I]f the tenant were shielded from a subrogation suit, the commercial tenant’s own liability insurer would also acquire a windfall, since it first receives a premium to insure the tenant for his own negligent acts, but then escapes having to pay for an anticipatable fire loss.”).

313. *See* *Cont’l Ins. Co. v. Bottomly*, 817 P.2d 1162, 1165 (Mont. 1991) (host-guest); *Reeder v. Reeder*, 348 N.W.2d 832, 837 (Neb. 1984) (same); *Fireman’s Ins. Co. v. Wheeler*, 566 N.Y.S.2d 692, 695 (App. Div. 1991) (corporation-president).

314. *See generally* *Bottomly*, 817 P.2d at 1165 (holding that a guest qualifies

Therefore, acknowledgment of the implied co-insured status was necessary.

For instance, in *St. Paul Fire and Marine Insurance Co. v. Murray Plumbing and Heating Corp.*, the court held that the trial court's conclusion that the parties stipulated that plaintiff was prohibited by law from suing and recovering from its insureds was fully supported by the record.³¹⁵ The court found that: (1) there was no showing that the procedure adopted by the court was prejudicial to the plaintiff; (2) the clear "intent of the policy was to cover all property, regardless of ownership, which was being used in construction of the building since it would thereby be under the custody or control of the insured prime contractor;"³¹⁶ (3) plaintiff "obligated itself for a substantial premium to pay [the] loss;"³¹⁷ and (4) "[h]aving accepted the premium and paid the loss, it would be inequitable to permit it to recoup under the guise of equitable subrogation in this case."³¹⁸ The court concluded that because the policy covered the contractor and subcontractors collectively for the same risks of loss, the policy was intended for the mutual benefit of all insureds, and the insurer assumed an obligation to the contractor *and to the subcontractors* for losses to the contractor's property.³¹⁹

4. *Shareholder-Corporation*

The Supreme Court of North Dakota in *American National Fire Insurance Co. v. Hughes* held that that the insurer was not entitled to subrogation from a corporation's director and vice president of its insured on the basis that he was a co-insured.³²⁰ Hughes, the director and vice president of the corporation, was using the corporate premises to work on his personal snowmobile.³²¹ The corporate insurance policy did not provide liability coverage for the property, nor did it name owners, officers, or employees as insureds.³²² The court found convincing the argument that "it

under a homeowner's policy covering a seasonal dwelling); *Reeder*, 348 N.W.2d at 837 (denying a subrogation claim by an insurer against a guest of the insured's home).

315. *St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp.*, 135 Cal. Rptr. 120, 127 (Ct. App. 1976).

316. *Id.* at 127.

317. *Id.* at 125.

318. *Id.*

319. *Id.* at 127.

320. *Am. Nat'l Fire Ins. Co. v. Hughes*, 658 N.W.2d 330, 337 (N.D. 2003).

321. *Id.* at 332.

322. *Id.*

would be inequitable to permit an insurer to pass the incidence of loss from itself to its own insured and avoid the coverage which its insured had purchased.”³²³

Similarly, the court agreed that “the insurer was presumed to know the closely held corporation’s relationship with its president and principal shareholder, and having agreed to insure a business enterprise in corporate form, the insurer was charged with knowledge that the insured entity could act only through its officers and employees.”³²⁴ The court found that “[a] corporation is an artificial entity that can act only through its agents.”³²⁵ Thus, upon insuring a corporation, an insurer is charged with the knowledge that the corporation can only act through its officers and employees.³²⁶ Further, the insurer insured the corporation for property damage to vehicles and equipment, which included the risk of loss caused by corporate officers and employees.³²⁷ Subrogation against an employee would result in an inequitable result in that the insurer would be suing for “the very risk that [it] insured.”³²⁸ Therefore, the court denied the insurer’s subrogation action.³²⁹

IX. CONCLUSION

Though many may be critical of the *Sutton* rule due to its highly paternalistic nature and clear tenant-rights proclivity, it serves to further unlimited freedom of contract. When examining the issue of subrogation in the landlord-tenant context, however, a court should strive to fill any gaps left by a landlord and tenant with a default rule that reflects the reasonable expectations of the parties and produces an equitable result. That default rule should be the recognition of tenants as co-insureds under landlords’ insurance policies unless the parties otherwise agree.

Recognition of co-insured status allows the parties to prepare against liability for which the parties may contract. Surprises are expensive, which is why insurers agree to take on the risks. The *Sutton* rule will eliminate surprise and make the parties fully aware of their respective rights and

323. *Id.* at 335.

324. *Id.*

325. *Id.* at 336.

326. *See id.*

327. *Id.*

328. *Id.*

329. *Id.* at 337.

duties.

Because the liability exposure of landlords and tenants is quite substantial, it is essential that both the landlord and tenant set forth who is responsible for insuring the premises in their lease agreement. Addressing these issues in the lease agreement serves to avoid the costs of duplication and eliminate economic waste. To accomplish this, tenants must be aware of the opportunity to request a waiver of claims against the landlord to the extent required by insurance and either request a waiver of subrogation from the insurer, or insure the premises. Any provisions added to the lease agreement must be reviewed in light of all of the other lease provisions to ensure both consistency and clarity.

When the parties fail to negotiate all of the terms of their agreement, the law may step in to fill the gaps. In landlord-tenant relations, the lease is the end product of the parties' agreed upon terms. Usually landlords and tenants insert terms in the agreement to protect their interests should the relationship sour or other contingencies occur making the relationship no longer as valuable. Landlords are generally motivated to insert provisions that protect the receipt of rent payments and the leased premises. Tenants, on the other hand, are interested in their ability to stay in the leased premises without interference by their landlord.

Without the *Sutton* rule as a default, there are no legal certainties or opportunities for parties to plan in advance against liabilities. The results could be cataclysmic for tenants because they could become liable for millions of dollars in fire damage to their leased premises. This issue boils down to who should bear the burden of the loss: the landlord, tenant, or insurer. Courts should not view situations involving tenants and insurers in isolation because the rulings they make impact thousands of similarly situated tenants. As such, equity requires that subrogation not be permitted absent an agreement stating otherwise.