

## **Waivers of Subrogation: Sometimes Beating A Dead Horse Can Bring It To Life**

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How many times must learned real estate leasing scholars expound upon a given topic before that topic is deemed the proverbial "dead horse?" In the case of waivers of subrogation, apparently the answer is: never.

On its face, a waiver of subrogation seems a fairly simple concept. It protects the recipient of the waiver from having another party's (the "Insured") insurance company step into the Insured's shoes and pursue recovery from the waiver recipient for payments made by an insurer to reimburse the Insured for a covered loss caused by the waiver recipient or others for whom it is responsible. In the context of a commercial lease, it obviously makes sense for the landlord and the tenant to mutually waive their rights of subrogation against one another for covered property losses and allow their respective insurance companies to bear the risk and cost of a covered loss. Thus, the beauty and (seeming) simplicity of a waiver of subrogation.

However, commercial leases are by their very nature complicated beasts. They contain a myriad of interrelated terms and provisions, which poses the risk of having critical lease provisions conflict with one another or otherwise invalidate the intent of the parties in some important respect. This is particularly true in the case of the (seemingly) simple waivers of subrogation.

In order for a waiver of subrogation to truly be effective, both landlord and tenant must contractually agree that they will insure their respective property interests (either real or personal) to the full replacement cost of those property interests. Unless the parties are required to, and do maintain insurance coverage for such full replacement cost, the waiver of subrogation could be rendered meaningless. If insurance is not obtained in the first place, there is no coverage and no subrogation to be waived. The uninsured party is then at risk of having the party suffering the loss pursue it for that loss. Moreover, if a party is not required to, or otherwise fails to insure its property to 100% of the replacement cost, that would leave a coverage "gap" representing the difference between the insurance maintained and the actual replacement cost of the damaged property. The party suffering a property loss (landlord or tenant) could then pursue the responsible party for "gap" – the difference between the amount paid by its insurance company and actual cost to replace the lost or damaged property.

It is also imperative that the lease provide that the landlord and tenant broadly release and waive any claims against each other with respect to insured property losses. Absent that waiver, a standard indemnification clause would require one party to indemnify the other party from any losses that may have been caused by such party to the other party's property. This would be at odds with, and subvert the concept of, the waiver of subrogation.

So to summarize, the concept of a waiver of subrogation in the context of the commercial lease is tremendously important. That said, the waiver must be carefully crafted and accompanied by appropriate contractual requirements that the parties insure their respective property to 100% of the replacement cost thereof. And finally, in order to close the loop and ensure that unanticipated recourse by one party (or its insurance company via subrogation) against the other is not left in place, an appropriate and broad-based release and waiver of claims for damages to the parties' respective property, to the extent such property is either insured or required to be insured pursuant to the provisions of the lease, is essential.

You have read (and will continue to read) about waivers of subrogation as long as retail and commercial leasing takes place. But caution must be exercised in order to ensure that the intent of the parties in releasing one another and waiving subrogation rights is not abrogated by virtue of other inconsistent provisions of the lease.

The "dead horse" lives on...

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