

IF THE SHOE FITS WEAR IT - SHOEHORNING WAIVERS OF SUBROGATION INTO COMMERCIAL LEASES

Janet M. Johnson

Schiff Hardin, LLP

William H. Locke, Jr., Austin

Graves, Dougherty, Hearon & Moody, P.C.

I. INTRODUCTION TO RISK MANAGEMENT

JJ
2

p. 1-2

A. Risk of Personal Injuries and Property Damage

1. Personal Injuries
2. Property Damage
3. Leased Premises

I. INTRODUCTION TO RISK MANAGEMENT

BL
3

p. 3

B. Contractual Risk Allocation

C. Common Contractual Means of Allocating Risk

1. Protecting Party and Protected Party

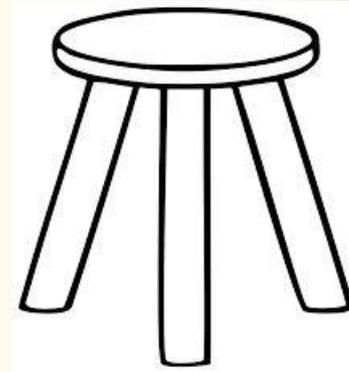
C. Common Contractual Means of Allocating Risk

BL
4

p. 3

2. Three-Legged Stool

- Indemnity
- Insurance
- Release of Claims
Waiver of Subrogation



C. Common Contractual Means of Allocating Risk

BL
5

p. 3

3. Three Legs

a. Indemnity by Protecting Party

Terminology Used in Relationship of Indemnity to Insurance

- Indemnifying Party = Protecting Party (the Insured)
- Indemnified Party = Protected Party (the Additional Insured)
- Indemnity = Party as Risk Insurer
- Insurance = Third Party Indemnity
- Contractual Liability = Exclusion unless Insured Contract
- Naked Party = Party with Uninsured Liability

Elements of an Indemnity

BL
6

p. 3

Risk Shifting:

- “I agree to be liable for your wrongs.”

Versus Restatement of Existing Duties:

- “I agree to indemnify you for my wrongs.”
- “You agree to indemnify me for your wrongs.”
- “I agree to indemnify you for my wrongs, even though you are also wrong.”

Indemnity – Contractual Insurance By a Party

BL
7

p. 3

\$

A Blank Check

Exposure (any and all liabilities)

Not All Indemnified Liabilities are Insured

BL
8

p. 4

\$

Uninsured

Bodily Injury and Physical Injury to
Tangible Property + Loss of Use

Exposure (any and all liabilities)

Indemnity by Protecting Party

JJ
9

p. 4

Illinois – Statutory Prohibition on Landlord Indemnity

3. Three Legs

JJ
10

p. 4

b. Insurance for Protected Party

- (1) Property Insurance
- (2) Liability Insurance

“Additional Insureds”

3. Three Legs

JJ
11

p. 5

b. Insurance for Protected Party

Right of Subrogation -“Conventional” – “Equitable”

Statutory Subrogation

3. Three Legs

BL
12

p. 5

- c. Waiver of Recovery (Release) by Protected Party
- d. Waiver of Insurer's Right of Subrogation

II. COMMON LAW

BL
13

p. 6

- A. Majority Rule: Implied Coinsured Status Negates Equitable Subordination
 - 1. Landlord's Agreement to Obtain Property Insurance
 - 2. Tenant Impliedly Paid for Insurance

II. COMMON LAW

JJ
14

p. 7

B. Case-by-Case Approach

Illinois: *Dix Mutual Ins. Co. v. LaFramboise*

Stein v. Yarnell-Todd Chevrolet, Inc.

Nationwide Fire Ins. Co. v. T&N Master Builder

Florida: *Zurich American Ins. Co. v. Puccini, LLC*

Indiana: *LBM Realty, LLC v. Mannia*

II. COMMON LAW

BL
15

pp. 7-8

C. Minority Rule: No Implication of Coinsured Status

D. Covenant Requiring Tenant to Pay for Insurance

II. COMMON LAW

JJ
16

p. 8

E. Exception for Casualty Loss to Return of Premises

General Mills v. Goldman

Cerny-Pickas & Co. v. C.R. Jahn Co.

II. COMMON LAW

BL
17

p. 8

F. Valid Despite Negligent Released Party

G. Alternative – Both Parties as Named Insured?

III. DRAFTING

JJ
18

p. 9

A. Missing Provisions

1. Waiver of Subrogation; But No Waiver of Recovery
2. No Waiver of Recovery; and No Waiver of Subrogation
3. Contractual Waiver of Subrogation; But No Waiver of Subrogation by Insurer and No Waiver of Recovery

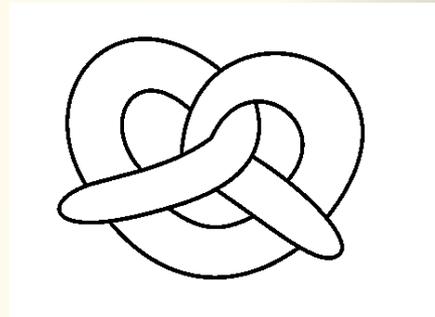
III. DRAFTING

BL
19

pp. 8-9

B. Drafting Conflicting Provisions – Pretzels*

Waiver of Subrogation with
Twisted Insurance and
Twisted Indemnity



* July/August 2018 PROBATE & PROPERTY

En 39
p. 60

III. DRAFTING

BL
20

pp. 9-10

B. Drafting Conflicting Provisions

1. Waiver of Claims vs. Return of Premises

2. Waiver of Recovery vs. Protecting Party's Negligence

III. DRAFTING

JJ
21

pp. 10-12

B. Drafting Conflicting Provisions

3. Waiver of Claims vs. Indemnity

4. Damage Liability Covenant vs. Waiver of Claims and Insured Risk

C. Deficiently Drafted Provisions

1. Waiver of Claims Limited to “Covered” Claims

III. DRAFTING

JJ
22

p. 11

C. Deficiently Drafted Provisions

2. Waiver of Claims vs. “Available Insurance” or “Collected Proceeds”

III. DRAFTING

BL
23

pp. 12-13

C. Deficiently Drafted Provisions

3. Tenant Indemnity vs. Landlord Property Insurance
4. Covenant to Obtain Waiver of Subrogation, But
5. Not Expanded to Derivative Persons

III. DRAFTING

JJ
24

p. 14

C. Deficiently Drafted Provisions

6. Overly Broad Indemnity May Invalidate Entire Indemnity Provision

Economy Mechanical Industries, Inc. v. T.J. Higgins Co.

IV. SELF-INSURANCE IS NOT INSURANCE

BL
25

pp. 14 -16



V. BEST DRAFTING TIPS

JJ
26

pp. 16 - 17

A. Drafting

1. Clear Language
2. Mutuality
3. Requirement to Maintain Sufficient Insurance
4. Waiver of Subrogation as to All Insurance
5. Extent of Waiver
6. Exclusion of Willful Misconduct
7. Self-Insurance and Deductibles

V. BEST DRAFTING TIPS

BL
27

p. 17

B. Review Subrogation Rights Provisions in the Insurance Policy

1. ISO Property Policy
2. Non-ISO Policies

V. BEST DRAFTING TIPS

JJ
28

pp. 17-19

C. Importance of Reviewing Insurance Policies Against Indemnification Obligations

Sears, Roebuck and Co. v. Charwil Associates Ltd.

STATE BAR OF TEXAS REAL ESTATE FORMS MANUAL – RETAIL LEASE AND INSURANCE ADDENDUM

BL
29

p. 21

Form 1

THREE-LEGGED STOOL: INDEMNITY

B.1. Tenant agrees to –

B.1.q. INDEMNIFY, DEFEND, AND HOLD LANDLORD AND LIENHOLDER, AND THEIR RESPECTIVE AGENTS, HARMLESS FROM ANY INJURY ... OCCURRING IN ANY PORTION OF THE **PREMISES** IF CAUSED IN WHOLE OR IN PART BY THE ACTS OR OMISSIONS OF TENANT **THE INDEMNITY CONTAINED IN THIS PARAGRAPH ...**
(iv) WILL APPLY EVEN IF AN INJURY IS CAUSED IN PART BY THE ORDINARY NEGLIGENCE ... OF LANDLORD BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD AND LIENHOLDER AND THEIR RESPECTIVE AGENTS....

C.1. Landlord agrees to –

C.1.f. INDEMNIFY ... OCCURRING IN ANY PORTION OF THE **COMMON AREAS**....

2. STATE BAR OF TEXAS REAL ESTATE FORMS MANUAL – RETAIL LEASE AND INSURANCE ADDENDUM

BL
30

p. 21
p. 25

Form 1

THREE-LEGGED STOOL: INSURANCE

A. Tenant agrees to –

1. Comply with the following additional insurance requirements:

a. The commercial general liability ... must be ... **(ii)** endorsed to name of Landlord, Landlord's property manager, if any, and Landlord's Lienholder, if any, as "**additional insureds**," **(iii)** include **contractual liability** under Coverage A sufficient to respond to a **broad-form indemnity**....

b. The commercial property insurance policies must contain ... (i) a **waiver of subrogation clause** in favor of the party not carrying the commercial property insurance

STATE BAR OF TEXAS REAL ESTATE FORMS MANUAL – RETAIL LEASE AND INSURANCE ADDENDUM

BL
31

p. 22

Form 1

THREE-LEGGED STOOL: WAIVER OF SUBROGATION

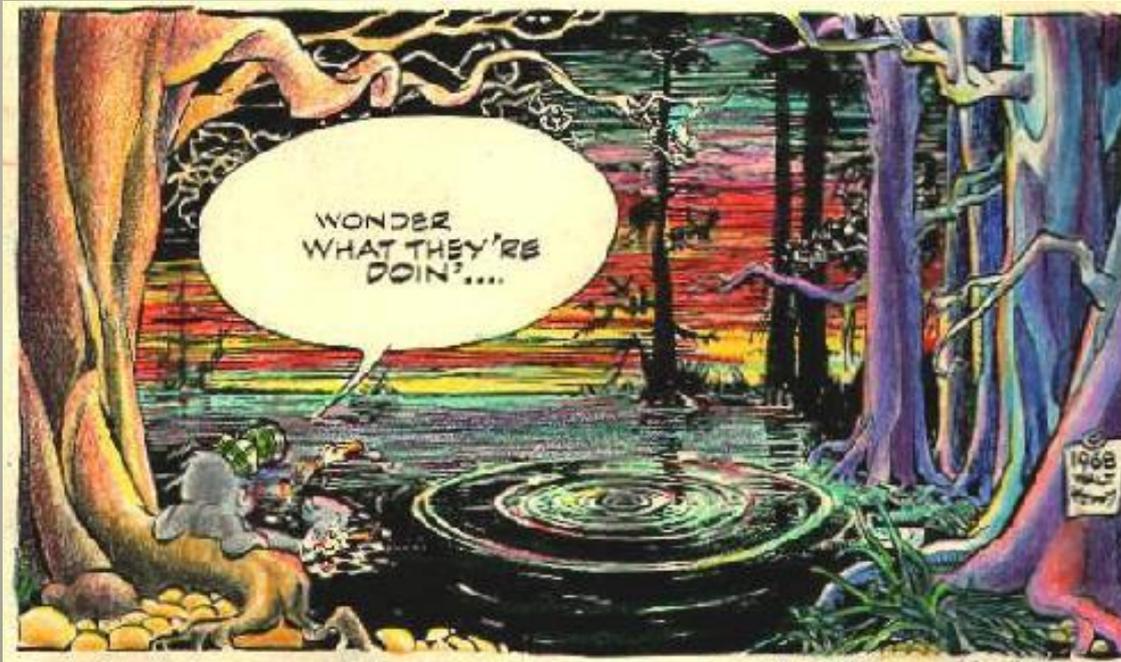
D.4. Release of Claims/Subrogation. LANDLORD AND TENANT RELEASE EACH OTHER ... FROM ALL CLAIMS OR LIABILITIES FOR DAMAGE TO THE PREMISES OR SHOPPING CENTER ... THAT ARE INSURED BY THE **RELEASING PARTY'S** PROPERTY INSURANCE OR THAT **WOULD HAVE BEEN INSURED** **THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE **RELEASED PARTY** OR ITS AGENTS **BUT WILL NOT APPLY** TO THE EXTENT THE DAMAGE OF LOSS IS CAUSED IN WHOLE OR IN PART BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE **RELEASED PARTY****

VI. CONCLUSION

JJ

BL

p. 19



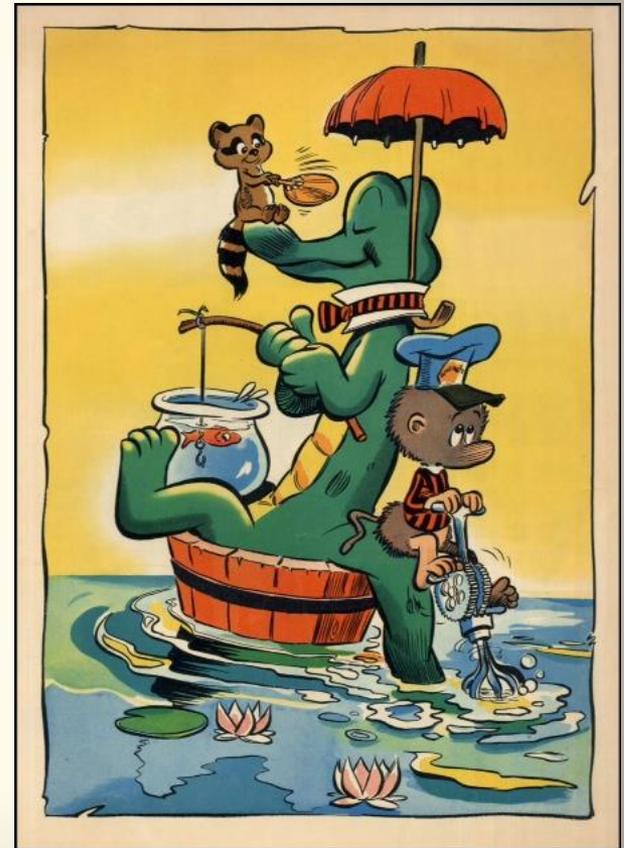
Indemnity

Insurance

Release and Waiver



or



ACRELive!