POTENTIAL ROAD BLOCKS TO RECOVERY: WAIVER OF SUBROGATION, HOLD HARMLESS AND LIMITATION OF LIABILITY CLAUSES

Presented By:

Sarah Killeen

Jake Skaggs

COZEN O'CONNOR

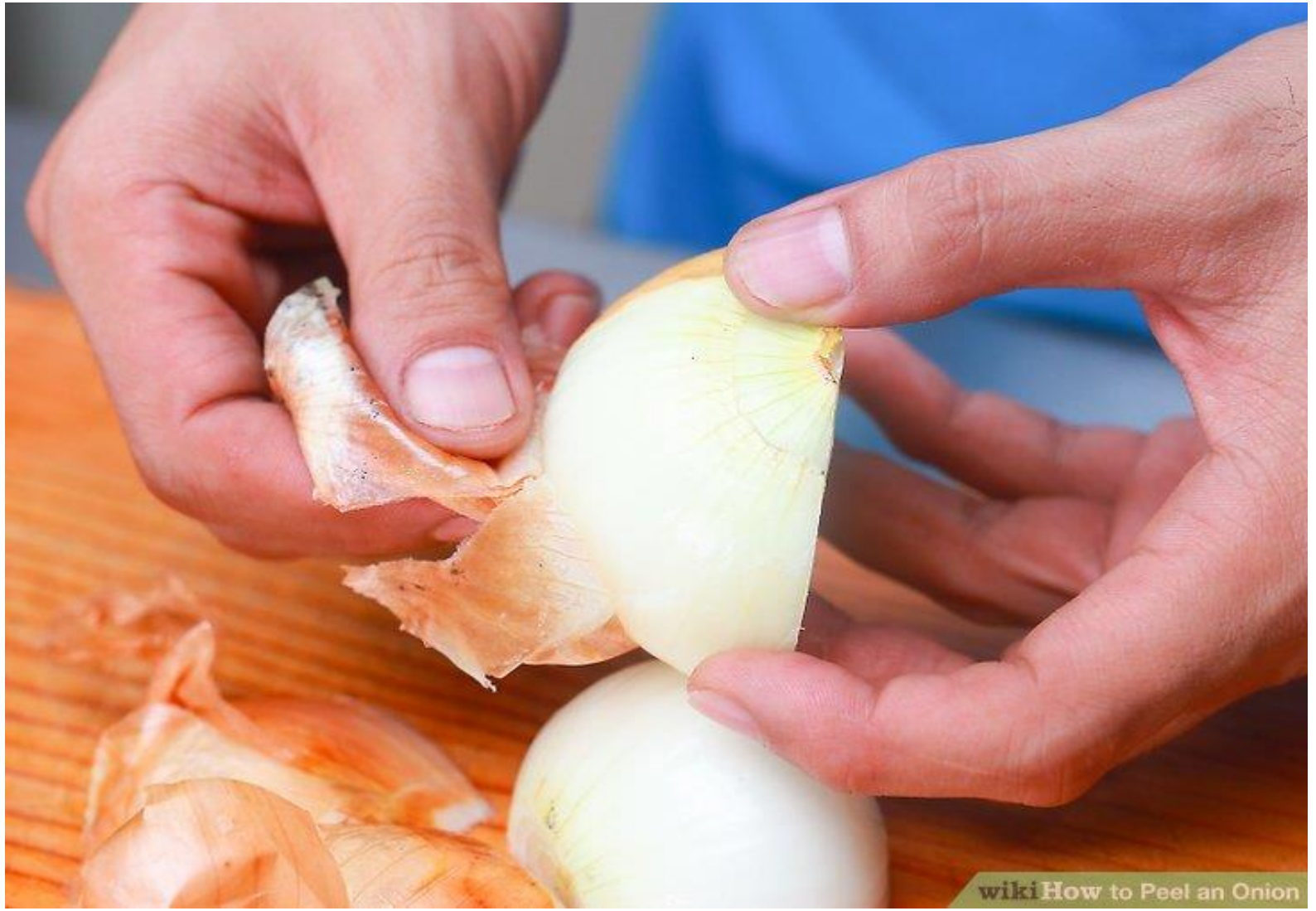
Contractual clauses that can prohibit recovery

- Waivers of Subrogation
- Express Co-Insureds Provision
- Hold Harmless Provisions
- Limitations of Liability

Documents to Gather to Evaluate:

- Construction Contracts (even if not with your insured)
- Lease Agreements
- Product Purchase Agreements
- Alarm and Inspection Records

SUBROGATION WAIVERS



The Many Different Layers of a Waiver

- ❑What is the insured waiving and who benefits from the waiver?
- ❑Can the insured waive the insurance company's subrogation rights?
- ❑Inconsistent contractual provisions
- ❑Are there ways to argue around the waiver?
- ❑Does the defendant know that there is a waiver?

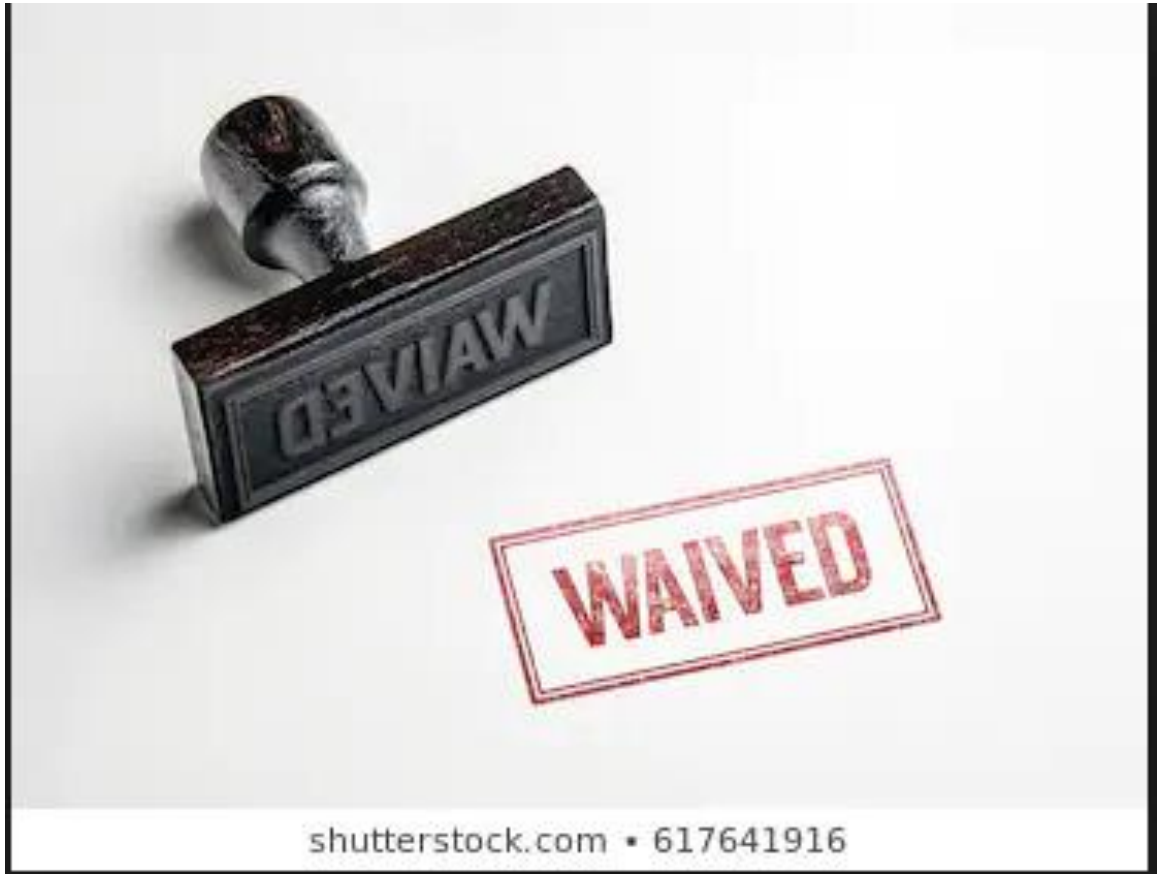
Who benefits from the waiver?

11.5 Waiver of Subrogation. **Landlord and Tenant each waive and shall cause their respective insurance carriers to waive any and all rights to recover against the other or against the Agents of such other party for any loss or damage to such waiving party (including deductible amounts) arising from any cause covered by any property insurance required to be carried by such party pursuant to this Article XI or any other property insurance actually carried by such party to the extent of the limits of such policy.** Tenant, from time to time, will cause its respective insurers to issue appropriate waiver of subrogation rights endorsements to all property insurance policies carried in connection with the Property or the Premises or the contents of the Property or the Premises. Tenant agrees to cause all other occupants of the Premises claiming by, under or through Tenant, to execute and deliver to Landlord and Landlord's management company such a waiver of claims and to obtain such waiver of subrogation rights endorsements.

1.20 Agents. Officers, partners, directors, employees, agents, licensees, contractors, customers and invitees; to the extent customers and invitees are under the principal's control or direction.

Can the policyholder waive subrogation?

33.2 Miscellaneous. All remedies are cumulative. Exercising one remedy won't constitute an election or waiver of other remedies. All provisions regarding our nonliability or non-duty apply to our employees, agents, and management companies. No employee, agent, or management company is personally liable for any of our contractual, statutory, or other obligations merely by virtue of acting on our behalf. This Lease binds subsequent owners. This Lease is subordinate to existing and future recorded mortgages, unless the owner's lender chooses otherwise. All Lease obligations must be performed in the county where the apartment is located. If you have insurance covering the apartment or your personal belongings at the time you or we suffer or allege a loss, you agree to waive any insurance subrogation rights. All notices and documents may be in English and, at our option, in any other language that you read or speak. The term "including" in this Lease should be interpreted to mean "including but not limited to."



What does the policy say?

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
   a. Someone insured by this insurance;
   b. A business firm:
      (1) Owned or controlled by you; or
      (2) That owns or controls you; or
   c. Your tenant.

This will not restrict your insurance.

What does the law say?

2018 Louisiana Laws
Revised Statutes
TITLE 22 - Insurance
RS 22:882 - Waiver of subrogation

Universal Citation: LA Rev Stat § 22:882 (2018)

§882. Waiver of subrogation

Under any policy of insurance which authorizes the insured to waive the right of recovery of the insured against any party prior to loss without additional premium, the insured shall also be entitled to waive in writing after loss without invalidating the policy the right of recovery against any of the following:

(1) Anyone insured under the same policy.

(2) A corporation, partnership or other entity in which the insured owns stock or has a proprietary interest.

(3) Anyone who owns stock or has a proprietary interest in the insured.

(4) An employee or employer of the insured.

(5) Anyone having an interest as owner, lessor, or lessee of the insured premises or the premises on which the loss occurred and the employees, partners, and stockholders of such owner, lessor, or lessee.

(6) Any relative by blood or marriage of the insured. The insurer shall be entitled to recover from the insured any compensation received by the insured for such waiver after loss not to exceed the amount paid to the insured for such loss by the insurer.

Does the defendant know there is a waiver?

ARTICLE 8 MISCELLANEOUS PROVISIONS

§ 8.1 Where reference is made in this Agreement to a provision of AIA Document A201–2007 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

ARTICLE 9 ENUMERATION OF CONTRACT DOCUMENTS

§ 9.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated in the sections below.

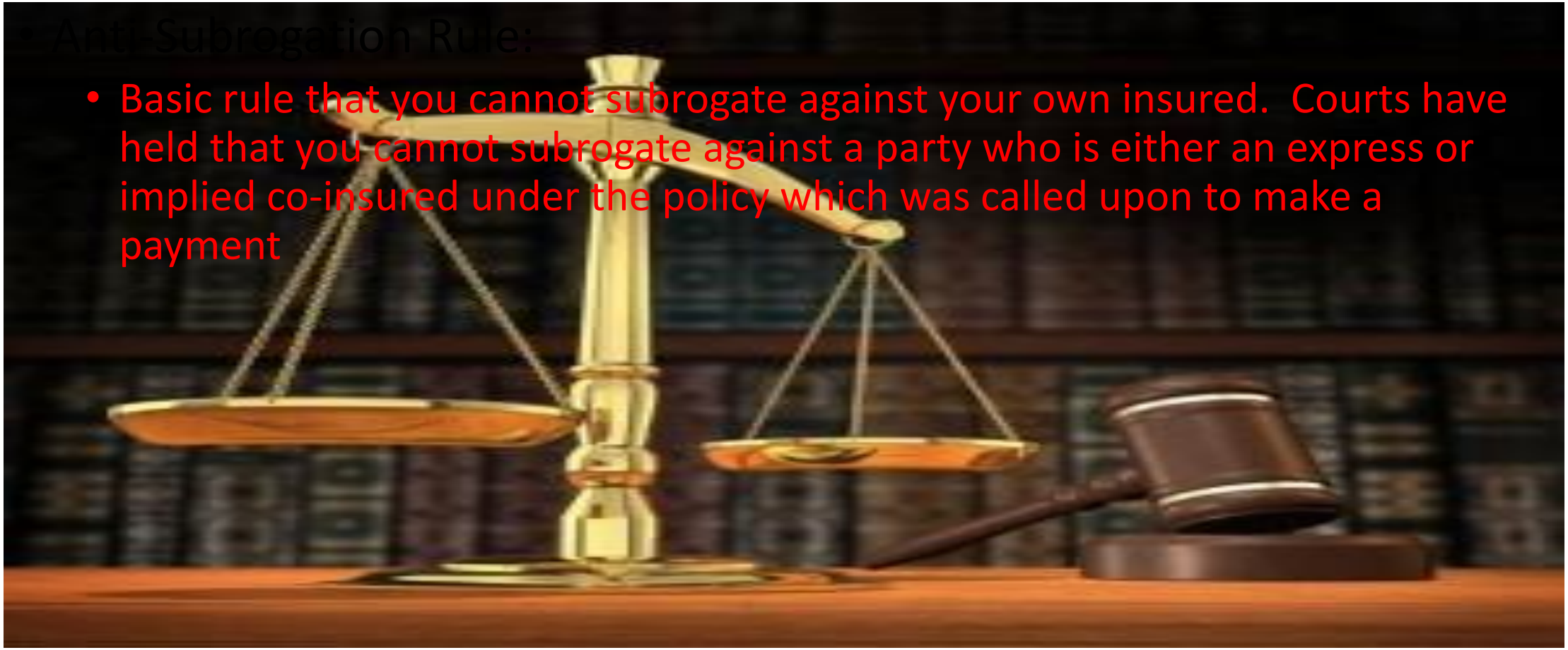
§ 9.1.1 The Agreement is this executed AIA Document A101–2007, Standard Form of Agreement Between Owner and Contractor.

§ 9.1.2 The General Conditions are AIA Document A201–2007, General Conditions of the Contract for Construction.

Potential Exceptions to Waivers of Subrogation

- Building Code Violation
- Gross Negligence
- Insured doesn’t have the right to waive subrogation

Express Co-Insured Provisions



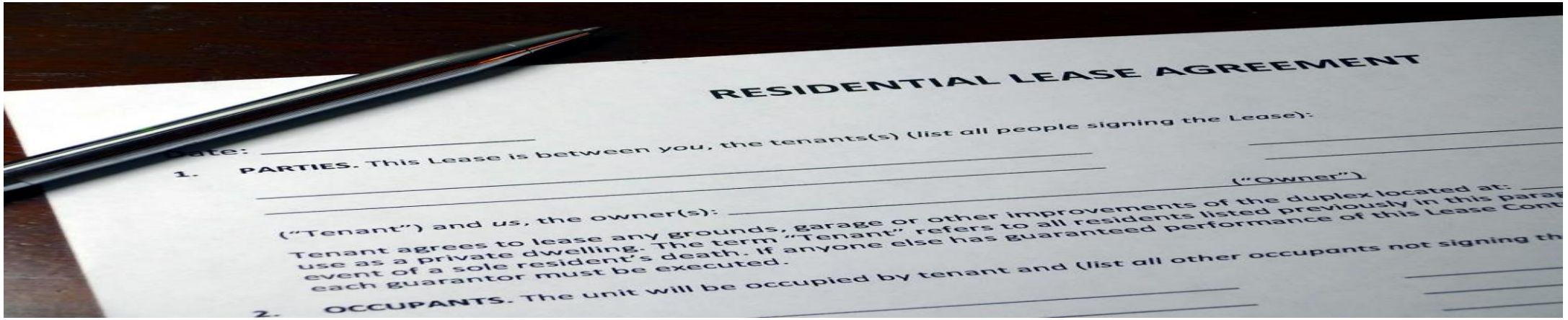
- Anti-Subrogation Rule:
  - Basic rule that you cannot subrogate against your own insured. Courts have held that you cannot subrogate against a party who is either an express or implied co-insured under the policy which was called upon to make a payment

AIA Contract requiring Builder's Risk Policy

§ 11.3 PROPERTY INSURANCE

§ 11.3.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

Implied Co-Insured



- Lease Terms to Consider:
  - Require tenant to provide public liability insurance for the leased premises and to include the landlord as a co-insured under such policy, and that authorize the landlord, in case of tenant's failure to acquire such insurance, to do so and to charge tenant therefor.
  - Make the tenant responsible to repair damage occasioned either to the leased premises or to the common areas "caused by tenant's negligence," and specify that tenant's failure to make such repairs, or to reimburse the landlord therefor, is a material breach of the lease.
  - Require tenant to indemnify the landlord from any damage resulting "to any person or property whomsoever or whatsoever," resulting from tenant's "use or neglect of the premises . . . ."
  - Cause the rent to abate, if the leased premises are damaged by a fire *not* arising from the fault or negligence of tenant.

United States Fid. & Guar. Co. v. Let's Frame It, Inc., 759 P.2d 819, 821 (Colo. App. 1988).

- Exception and argument to make: waiver is limited to leasehold space

Hold Harmless / Limitations on Liability Clauses

- Alarm Monitoring Contracts

LIMITATION OF LIABILITY:
The Alarm Customer agrees that The Company, Install Co., their agents, employees, and sub-contractors are not insurers and are exempt from liability for any risk of any damage, loss or injury that may result upon the failure of the alarm system to operate or from the failure of any monitoring of alarm signals to respond to same, in both events, for any reason whatsoever. The Alarm Customer also agrees that the system can fail for reasons beyond the control of The Company and the Install Co. or response from the municipal authorities or designated contacts can be slow or ineffectual. As such this system is a deterrent and does not provide complete or unlimited protection or protection in lieu of insurance coverage. The Alarm Customer's payment to The Company is for monitoring service only and not for protection or insurance. In the event of any loss or damage for any reason whatsoever The Alarm Customer's sources of reimbursement are his/her own resources or property and liability insurers. The failure of the system to function or for the recipient of any alarm signal to react properly, for any reason whatsoever (including The Company's, or the Install Co., or their agents' or Contractors' negligence or gross negligence or substantial or fundamental breach of this agreement), shall not give rise to any liability, for breach of contract, tort or otherwise on The Company or Install Co.'s part except to return to The Alarm Customer payment of a reasonable value of its monitoring services not performed fixed at and limited to the return of $1,000.00 or not more than the annual monitoring service fee in the year in which any such loss occurs or in the case of any equipment failure to the return of the market value of such equipment at the time of loss which the parties agree constitutes a genuine pre-estimate of The Alarm Customer's potential damages and is therefore agreed by, The Company, the Install Co. and The Alarm Customer to be liquidated damages. Any action by the Alarm Customer against the Company or the Install Co. must be commenced within one year of the accrual of the cause of action or shall be barred.

THE COMPANY AND INSTALL CO. WILL NOT BE LIABLE UNDER ANY CIRCUMSTANCES, FOR ANY LOST PROFIT, ECONOMIC OR CONSEQUENTIAL DAMAGE OR FOR ANY CLAIM OR DEMAND AGAINST THE ALARM CUSTOMER BY ANY OTHER PERSON. THE ALARM CUSTOMER ACKNOWLEDGES THAT AT THE TIME OF MAKING OF THIS AGREEMENT OR PRIOR THERETO, THE COMPANY HAS NOT BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE OCCURRING.

Consequential Damages Exclusions

10. LIMITATION OF LIABILITY OF CINTAS; LIQUIDATED DAMAGES. Seller's service fees are based on the value of services provided and the limited liability provided under this contract, and not on the value of the Customer's premises or its contents, or the likelihood or potential extent or severity of injury (including death) to Customer or others. Seller cannot predict the potential amount, extent, or severity of any damages or injuries that Customer or others may incur which could be due to the failure of the system or services to work as intended. Seller is not an insurer. If Seller should be found liable for loss of damage due to a failure on the part of Seller or its systems or any fire suppression or alarm equipment, in any respect, its liability to Customer, its agents, officers, directors, employees, or invitees shall be limited to $1,000.00 as liquidated damages. The provisions of this paragraph apply in the event of loss or damage, irrespective of cause or origin, resulting directly or indirectly to person or property from the performance or non-performance of the obligations set forth by the terms of this contract, or from negligence, active, or otherwise, of Seller, its agents, or employees. If Customer wishes to increase the limitation of liability, Customer may, as of right, enter into a supplemental agreement with Seller and obtain a higher limit by paying an additional amount consistent with the increase in liability. As such (i) Customer hereby agrees that the limits on the liability of Cintas and Subcontractors, and the waivers and indemnities set forth in this contract are a fair allocation of risks and liabilities between Cintas, Customer, Subcontractors and any other affected third parties; (ii) except as provided in this agreement, Customer waives all rights and remedies against Cintas and Subcontractors including rights of subrogation, that Customer, any insurer, or other third party have due to the losses or injuries Customer or other incur. Customer agrees that were Cintas and its Subcontractors to have liability greater than that stated above, it would not provide the services. Neither party shall be liable to the other or any other person for any incidental, punitive, loss of business profits, speculative or consequential damages.

Limitations on Exculpatory Clauses

- Colorado Homeowners Protection Act: renders void against public policy contractual

Contact Information

Sarah Killeen
Cozen O'Connor
707 17th St
Suite 3100
Denver, CO 80202
(720) 479-3893
skilleen@cozen.com
www.cozen.com

Jake Skaggs
Cozen O'Connor
1221 McKinney Street
Suite 2900
Houston, TX 77010
(832) 214-3926
jskaggs@cozen.com
www.cozen.com

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