



## Current Articles 2008 – May

### Tenants Legal Liability

Should a tenant or a tenant's employee damage the premises occupied by the tenant, the tenant could be held responsible for such damages. If the building owner insures the building and the owner's insurer repairs the damages, the owner's insurer may subrogate for the damages paid from the tenant. The tenant's Premises Liability will not respond because these premises are in his care, custody and control. Such a loss would be covered if the tenant has a Tenant's Legal Liability coverage.

Tenant's Legal Liability may be written on a restricted form which will only cover losses caused by the tenant and caused by the perils of fire, smoke, explosion (limited) and leakage from fire protection equipment. Coverage can be obtained on a Broad Form (All Risk) but subject to a deductible. The latest IBC Commercial General Liability includes the Broad Form Tenant's Legal Liability but may be subject to a low limit.

This may be another one of the coverages considered to be a "frill" coverage that is not reviewed with the client. Since it may be included with the liability wording or in some other package form, it is often overlooked in the review of insurance requirements with the insured. When the loss occurs and the Tenant's Legal Liability limit is inadequate, another claim for underinsurance may haunt the broker!

Tenants must be told that just because they have liability insurance and may pay as an adjustable operating cost a proportionate share of the landlord's insurance, that may not be enough to protect the tenant against claims by the landlord's insurer. If the landlord's insurer subrogates back to the negligent tenant and the Tenant's Legal Liability limit is inadequate, the tenant may be held personally responsible for the damages that exceed the limit of his Tenant's Legal Liability. It therefore makes the broker responsible to make sure that the limit is adequate considering the square footage of the area occupied by the tenant, construction cost of the building, etc. to establish an adequate limit.

In some cases, a tenant may lease a building on a net-net basis and is required to insure the building in the name of the owner. Some tenants believe that since they are paying for the insurance that they do not need Tenant's Legal Liability. In this case it would be a good idea to obtain a Waiver of Subrogation by both the owner and the insurer. Many times the waiver is placed on the insurance policy only. With this scenario, if the building limit is inadequate, the OWNER may commence an action for the deficiency and which may not be covered because of the lack of Tenant's Legal Liability.

There have been numerous court decisions regarding contracts that may bar subrogation and avoid liability. The courts vary their decisions based on the terms of the lease. Did you review the lease? Are you qualified to give advice regarding the lease or should you refer the matter to your client's lawyer? These decisions vary by the various covenant's in the lease such as the landlord's covenant to pay the cost of insurance, landlord's covenant to insure, tenant's covenant to pay for insurance, tenant's covenant to insure.

Many tenants make a dangerous assumption that because they are effectively paying for the building insurance (through their prorated share of operating costs including insurance) that if

they negligently damage the building, the landlord's insurer will compensate the landlord and make no claim against the tenant. That may not be the case. One lawyer stated the best protection in this case is for the tenant to get waivers of subrogation from landlords and for landlords to get waivers from their insurers! Good luck!

The best practice is to review the limits for Tenant's Legal Liability with your client and to make sure that the limit is appropriate for the area occupied by the tenant.

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