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LEASE COVENANTS: EXCULPATION BY IMPLICATION?

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THE SURRENDER CLAUSE—COVENANT OF GOOD REPAIR

At common law it was firmly established that a covenant to repair or to leave the premises in good repair bound the tenant to rebuild the buildings even though destroyed by fire or other accident without fault or negligence on the part of the tenant. If he desired to relieve himself from this liability he had to do so by excepting such liability from the operation of his covenant.[1] To counter the harsh effects of the common law rule there came to appear in the typical lease language to the effect that the leased premises would be surrendered in good condition, "reasonable wear and tear and damage by fire or other casualty excepted." This boiler plate language persists in most leases to this date. In many jurisdictions the common law doctrine, because it was deemed a harsh if not unreasonable rule, has been changed by statute so as to relieve the tenant of liability in those instances where the leased premises are destroyed by fire or other casualty without fault or negligence on the part of the tenant.[2] Accordingly, either by the boiler plate exceptions to the tenant's covenants or by statute, it is generally held today that the tenant is liable to the landlord only when the loss or damage is caused by the tenant's negligence.

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1. Willis v. Wrenn, 141 Va. 385, 127 S.E. 312 (1925); Vaughan v. Mayo Milling Company, 127 Va. 148, 102 S.E. 597 (1920); Ross v. Overton, 3 Call (7 Va.) 309 (1802).

2. *See, e.g.*, VA. CODE § 55-226 (1950), which reads:

> Buildings destroyed or lessee deprived of possession; covenant to pay rent or repair; reduction of rent.—No covenant or promise by a lessee to pay the rent, or that he will keep or lease the premises in good repair, shall have the effect, if the buildings thereon be destroyed by fire or otherwise, in whole or in part, without fault or negligence on his part, or if he be deprived of the possession of the premises by the public enemy, of binding him to make such payment or repair or erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound. But in case of such destruction there shall be a reasonable reduction of the rent for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed; and, in case of such deprivation of possession, a like reduction until possession of the premises be restored to him.

In recent years leases have become more sophisticated and precise in such collateral matters as the burden of carrying insurance. It is not uncommon, for example, for the parties to agree that the landlord shall carry insurance against loss by fire or other casualty. Also a lease may provide for waiver of claims between landlord and tenant regarding losses covered by such insurance. If, in addition, a waiver of the subrogation rights of the insurance carrier is obtained, the tenant is in effect relieved of liability for his own negligence, and the loss falls solely upon the insurer. However, where there are no such waivers, the question arises as to whether the surrender clause—the covenant to return the premises in good repair, damage by fire or other casualty excepted—along with the stipulation that the landlord will carry the fire insurance, can be construed to relieve the tenant of liability for damage by fire caused by his own negligence. On this question the authorities differ.

View Denying Exculpation

The older view, constituting the numerical majority, holds that the tenant is not exculpated. It is best exemplified by *Winkler* v. *Appalachian Amusement Co.*[3] where, in a theater lease, the tenant promised to surrender the premises in as good order as at the beginning, "ordinary wear and tear excepted, and damage by fire or other casualty excepted." The tenant also promised to make repairs "excepting in case of destruction or damage by fire or other casualty." The landlord agreed to keep the premises insured and, if damaged by fire, to repair and restore them. In a suit for damages based on the tenant's negligence in causing a fire, the tenant defended on the ground that the lease terms relieved it from liability even where the tenant was negligent. After reviewing the authorities, the Supreme Court of North Carolina rejected the tenant's contentions and held for the landlord, saying:

> Contracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it. The contract will never be so interpreted in the absence of clear and explicit words that such was the intent of the parties.[4]

3. 238 N.C. 589, 79 S.E.2d 185 (1953).

4. *Id.* at 596, 79 S.E.2d at 190. The Supreme Court of North Carolina recently has reaffirmed *Winkler* in Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

Similarly, in *Sears, Roebuck & Co.* v. *Poling*,[5] the landlord counterclaimed for destruction of his building by fire caused by the tenant's negligence in cutting a hole in the fire wall. The tenant defended on the ground that the lease relieved him from liability. In the lease the landlord agreed to insure the building against "fire or tornado", and promised to rebuild the premises if rendered unfit "by fire, tornado, earthquake, or any casualty" or, if the landlord did not rebuild, the tenant had the option to use the insurance proceeds or be paid therefor by the landlord. The lease contained the customary surrender clause, i.e., that the premises be in substantially as good condition as received, "loss by fire, tornado, earthquake or any unavoidable casualty and ordinary wear and tear excepted." The tenant argued that the insurance clause and surrender clause together spelled out relief from liability, but the Supreme Court of Iowa held for the landlord, observing:

> From these two clauses [insurance requirement and application of insurance to expense of rebuilding] it appears the insurance was to constitute a fund for reconstructing the building, if either party desired to do so in the event of its destruction by fire.[6]

This view of strict construction of exculpation provisions which rejects tenant's contentions based on the phraseology of various lease provisions also has been followed in California,[7] District of Columbia,[8] Georgia,[9] Nebraska,[10] New York,[11] Pennsylvania,[12] Tennessee,[13] Texas,[14] Virginia,[15] and Washington.[16]

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5. 248 Iowa 582, 81 N.W.2d 462 (1957).

6. *Id.* at 591, 81 N.W.2d at 467.

7. Morris v. Warner, 207 Cal. 498, 279 Pac. 152 (1929).

8. Maiatico v. Hot Shoppes, Inc., 287 F.2d 349 (D.C. Cir. 1961).

9. Taylor v. ROA Motors, Inc., 114 Ga. App. 671, 152 S.E.2d 631 (1966); Stone Mountain Industries, Inc. v. Bennett, 112 Ga. App. 466, 145 S.E.2d 591 (1965).

10. Brophy v. Fairmont Creamery Co., 98 Neb. 307, 152 N.W. 557 (1915).

11. Galante v. Hathaway Bakeries, Inc., 6 App. Div. 2d 142, 176 N.Y.S.2d 87 (1958).

12. Dilks v. Flohr Chevrolet, Inc., 411 Pa. 425, 192 A.2d 682 (1963).

13. Bishop v. Associated Transport, Inc., 46 Tenn. App. 644, 332 S.W.2d 696 (1960); *see* Chazen v. Trailmobile, Inc., 215 Tenn. 87, 384 S.W.2d 1 (1964).

14. Wichita City Lines, Inc. v. Puckett, 156 Tex. 456, 295 S.W.2d 894 (1956).

15. National Motels. Inc. v. Howard Johnson Inc. of Washington, 373 F.2d 375 (4th Cir. 1967), in which exculpation was denied under the terms of a lease which, in addition to the surrender and fire clauses above discussed, also provided:

> TWENTY-THIRD: The LESSEE covenants that it will, at all times during the term of this lease, protect, indemnify and save harmless the LESSOR from and against any and all loss, damage, or liability incurred by any act or neglect of the LESSEE, or any of its agents, servants or em-

The rationale of the view denying exculpation of the tenant generally falls within the following categories:

(a) Exculpation must be spelled out clearly and unequivocally.[17]

(b) It is and would be unnatural for the landlord to release the tenant for its own negligence in the absence of express agreement covering this.[18]

(c) The insurance proceeds constitute merely a fund guaranteeing the fiscal responsibility of the landlord and have absolutely nothing to do with the liability of the tenant.[19]

(d) Agreements or undertakings dealing with who shall carry the insurance, whether landlord or tenant, cannot and should not determine the liability of the tenant for his own negligence.[20]

(e) To read into a lease exculpation provisions which are not clearly and specifically set forth may well constitute an "advance release" of subrogation rights thereby causing the

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ployees, in, on or about the demised premises; and that it will at all times, at its own cost, and for the benefit of the LESSOR, protect the LESSOR with public liability insurance, issued in the name of the LESSEE and the LESSOR, as their interest may appear; and in such company and in such form as may be reasonably satisfactory to the LESSOR, in amounts of not less than Fifty Thousand Dollars ($50,000) in case of damage or injury to one person, not less than One Hundred Thousand Dollars ($100,000) in case of damage or injury to more than one person; and that it will within thirty (30) days from the date of the beginning of the term of this lease, deposit with LESSOR a certificate showing such insurance to be then in force; and that it will keep such insurance in full force and effect during the term of this lease.

16. Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 252 Pac. 939 (1927).

17. Dilks v. Flohr Chevrolet, Inc., 411 Pa. 425, 434-36, 192 A.2d 682, 687-88 (1963); Maiatico v. Hot Shoppes, Inc., 287 F.2d 349, 351 (D.C. App. 1961); Sears, Roebuck & Co. v. Poling, 248 Iowa 582, 588-92, 81 N.W.2d 462, 465-66 (1957); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 596, 79 S.E.2d 185, 190 (1953); Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279, 283 (1965); Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 265, 252 P.A.C. 939, 941 (1927).

18. Winkler v. Appalachian Amusement Co., 238 N.C. 589, 596, 79 S.E.2d 185, 191 (1953); Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 265, 252 P.A.C. 939, 941 (1927).

19. Sears, Roebuck & Co., Inc. v. Poling, 248 Iowa 582, 592, 81 N.W.2d 462, 467 (1957); Cerny-Pickas & Company v. C. R. Jahn Company, 7 Ill.2d 393, 402, 131 N.E.2d 100, 105 (1955) (dissenting opinion).

20. Maiatico v. Hot Shoppes, Inc., 287 F.2d 349, 352 (D.C. App. 1961); Dilks v. Flohr Chevrolet, Inc., 411 Pa. 425, 437, 192 A.2d 682, 688 (1963).

landlord, in those instances where the landlord maintains insurance, to lose all insurance protection.[21]

(f) A fundamental distinction must be drawn between contract obligations as specified under the lease and tort obligations which arise by operation of law, these obligations being separate and distinct.[22]

View Favoring Exculpation

Another line of authorities exculpates the tenant. Typical of these is *Cerny-Pickas & Company* v. *C. R. Jahn Company*.[23] Cerny-Pickas & Company was tenant of an industrial building which was destroyed by fire caused by its negligence. The lease contained a conventional surrender clause to the effect that the tenant would yield up the premises to the landlord in good condition and repair, loss by fire and ordinary wear excepted. There also was a provision that the landlord would pay for fire insurance on the building, equipment and machinery. The landlord's insurance carrier brought suit as subrogee under the landlord's insurance policy to recover damages by reason of the tenant's negligence. The Supreme Court of Illinois concluded that all the lease provisions had to be considered together, reasoning:

> Under the construction urged by the lessor it would be necessary for both parties to the lease to carry fire insurance if they are to be protected. The lessee would have to insure against fires due to his negligence, and the lessor against fires due to other causes. Whether the kind of policy the lessee would have needed was commercially available when the present lease was entered into is at best dubious. . . . In the present lease the lessor agrees in clause 14 to pay for fire insurance upon the leased building, equipment and machinery. The parties contemplated that the risk by loss by fire should be insured against and we see no reason to suppose that they did not contemplate the customary insurance policy which covers both accidental and negligent fires. . . . From the lease as a whole we conclude that the lessee was not to be liable for loss by fire regardless of the cause of the fire, and that the

21. Maiatico v. Hot Shoppes, Inc., 287 F.2d 349, 352 (D.C. App. 1961); *see* United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 93, 139 N.E.2d 330, 335-36 (1956) (dissenting opinion).

22. Galante v. Hathaway Bakeries, Inc., 6 App. Div. 2d 142, 146, 176 N.Y.S.2d 87, 91 (1958); *see* General Mills, Inc. v. Goldman, 184 F.2d 359, 370 (8th Cir. 1950) (dissenting opinion).

23. 7 Ill.2d 393, 131 N.E.2d 100 (1955).

> parties intended that the lessor should look solely to insurance as compensation for damage caused by any kind of fire.[24]

More recently, this exculpation approach was adopted in *Rock Springs Realty, Inc.* v. *Waid*.[25] The Missouri Supreme Court observed that the lease assumed that landlord would maintain insurance on the building and forbade tenants from doing anything which would cause cancellation of insurance or premium increase. This convinced the Court that the intent of the parties was to exculpate the tenant. The Court reasoned that the exemption of "loss by fire" in the surrender clause included all fires except those classed as arson.

In addition to Illinois and Missouri, the tenant's exculpation has been approved in Arizona,[26] Mississippi[27] and Ohio.[28] Based on the interpretation placed on comparable provisions in building construction contracts, Minnesota[29] and Oregon[30] probably will be added to this list.

A similar result was reached in *General Mills, Inc.* v. *Goldman*[31] even where there was no specific undertaking in the lease by the landlord to carry fire insurance. There was an "understanding" that the landlord would carry insurance and, in fact, the landlord did carry it. Considering these circumstances the Court construed the surrender clause with the language "loss by fire and ordinary wear excepted," thusly:

> It is very clear in the light of all the provisions of the lease, the circumstances of its execution and the understanding about fire insurance coverage to which the lease was related that by the provision that on termination of the lease the tenant should return the property in good condition "loss by fire . . . excepted" the parties meant a loss by fire such as is always meant when men are talking about or figuring on the risk of it in business dealings —i.e., the "loss by fire" which always is insured against in ordi-

24. *Id.* at 396-98, 131 N.E.2d at 103.

25. 392 S.W.2d 270 (Mo. 1965). This ruling, as a practical matter, reverses Poslosky v. Firestone Tire & Rubber Co., 349 S.W.2d 847 (Mo. 1961).

26. General Accident, Fire & Life Assurance Corp. Ltd. v. Traders Furniture Co., 1 Ariz. 203, 401 P.2d 157 (1965).

27. Fry v. Jordan Auto Company, 80 So.2d 53 (Miss. 1955).

28. United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956).

29. Independent School District No. 877 v. Loberg Plumbing & Heating Co., 226 Minn. 426, 123 N.W.2d 793 (1963).

30. Waterway Terminals Co. v. P. S. Lord Mechanical Contractors, 241 Ore. 1, 406 P.2d 556 (1965).

31. 184 F.2d 359 (8th Cir. 1950).

> nary course and against which the landlords here intended to and did take out insurance in an amount greater than the owners' investment.[32]

SUMMARY

Some recent decisions have attempted to rationalize both views into one result,[33] emphasizing that while lease provisions may be similar each case must stand on its own facts. As a general proposition undoubtedly each case must stand on its own facts, but this notwithstanding, a substantial conflict does exist among the authorities and each court which faces this problem in the future will be obliged to consider these opposing views and make a choice.

Although the arguments in support of the tenant's exculpation are quite persuasive, it must be remembered that at the outset the courts are faced with the well-settled principle that exculpatory provisions are not favored by the law and will be construed strictly against the party relying upon them. Stated otherwise, contracts for exemption from liability on account of one's own negligence must be clear and explicit.[34] Therefore, the rule requiring strict construction of exculpatory provisions should result in a denial of exculpation based on the typical lease surrender clause alone or in company with an undertaking by the landlord to carry fire and casualty insurance. If the parties intend that the tenant is to be exculpated, the lease should so provide in unmistakable terms. The necessity of resorting to various separate lease provisions to determine the parties' intention would seem to negate the essential ingredients of clarity and explicitness.

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32. *Id.* at 366.

33. *See, e.g.*, Waterway Terminals Co. v. P S. Lord Mechanical Contractors Co., 241 Ore. 1, 406 P.2d 556 (1965); Chazen v. Trailmobile, Inc., 215 Tenn. 87, 384 S.W.2d 1 (1964).

34. 27 AM. JUR., *Indemnity* § 15 (1940); 42 C.J.S. *Indemnity* § 12 (1942); Annot., 175 A.L.R. 8, 18 (1948) As Judge Armistead Dobie observed, in Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939, 940 (4th Cir. 1945):

> The cases vary widely as to the power of a purely private contractor to stipulate by contract against liability for negligence. All of the cases seem to agree that such stipulations are not favored and are always to be strictly construed.