

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT — LAW DIVISION

GREAT LAKES REINSURANCE, as subrogee  
of SRI Monroe Street  
Venture, LLC and CERTAIN  
UNDERWRITERS AT LLOYD'S as subrogee  
of SRI Monroe Street Venture, LLC

Judge Kathy M. Flanagan

Case No.: 2010 L 007165

Plaintiff,

Courtroom: 2210

v.

CROWN ENERGY SERVICES, INC. d/b/a  
Able Engineering Services

Defendant.

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO  
DISMISS FOURTH AMENDED SUBROGATION COMPLAINT AT LAW**

NOW COMES Plaintiffs GREAT LAKES REINSURANCE, as subrogee of SRI

Monroe Street Venture, LLC and CERTAIN UNDERWRITERS AT LLOYD'S as  
subrogee of SRI Monroe Street Venture, LLC, by and through their attorneys,

and for their Brief in  
Opposition to Defendant CROWN ENERGY SERVICES, INC., d/b/a Able Engineering  
Services' Motion to Dismiss Fourth Amended Subrogation Complaint at Law, hereby  
state as follows:

**I. FACTUAL BACKGROUND**

At all relevant times, SRI Monroe Street Venture, LLC (hereinafter "SRI"), was a  
named insured for the commercial building located at 500 West Monroe Street in  
Chicago, Illinois. Plaintiffs Great Lakes Reinsurance and Certain Underwriters At

Lloyd's (hereinafter "GREAT LAKES/LLOYD'S"), provided three of SRI's four layers of insurance for this particular property. Intervening Plaintiff, Lexington Insurance Company provided the other layer. The Policies are attached hereto as **Exhibit 1**.

Prior to March 28, 2007, Crown Energy Services d/b/a Able Engineering Services (hereinafter "Crown") entered into a written contract (hereinafter "the Contract") with Shorenstein Realty Services, L.P. (hereinafter "Shorenstein Realty") to provide professional engineering services relating to the maintenance of 500 West Monroe Street's mechanical systems. The Contract identifies Shorenstein Realty as the "Owner's Agent." Schedule 1 to the Contract identifies the "Owner" of 500 West Monroe Street to be SRI. The Contract is attached hereto as **Exhibit 2**.

On or about March 28, 2007, a fire occurred at the 500 West Monroe Street property. The fire was determined to have originated within a rooftop cooling tower (CT4) that was undergoing maintenance performed by Crown's employees prior to the incident. Crown's breach of contract with respect to the fire loss is further explained in paragraphs 51-57 of Great Lakes/Lloyd's Fourth Amended Complaint, attached hereto as Exhibit 3.

SRI dissolved on August 31, 2009. The Dissolution Certification is attached hereto as **Exhibit 4**. On June 18, 2010, Great Lakes/Lloyd's, as subrogees of Shorenstein, filed suit against Crown premised in Breach of Contract and Negligence for damages arising from the fire referenced above. Lexington filed its Intervenor-Complaint on October 10, 2010, also alleging Breach of Contract and Negligence against Crown. Great Lakes/Lloyd's filed their First Amended Complaint on October 23, 2010. Subsequently, on October 27, 2010, Crown filed Motions to Dismiss both the Amended

Complaint and Intervenor-Complaint, respectively. On January 31, 2011, this court granted Crown's Motions to Dismiss and also granted Plaintiffs Great Lakes/Lloyd's and Lexington leave to file amended complaints by February 21, 2011. Great Lakes/Lloyd's filed their second amended pleadings. Crown again filed Motions to Dismiss Great Lakes/Lloyd's Second Amended Complaint and Lexington's First Amended Intervenor-Complaint on March 14, 2011. On June 10, 2011, this court granted Crown's Motions to Dismiss and also granted Plaintiffs Great Lakes/Lloyd's and Lexington leave to file amended complaints by July 22, 2011. On June 23, 2011, Plaintiffs Great Lakes/Lloyd's and Lexington filed a Joint Motion for Reconsideration, Clarification and Extension of Time to File Amended Pleadings. On July 25, 2011, this court denied Plaintiffs Motion, but granted an extension to file amended complaints by August 15, 2011. Plaintiffs filed their amended pleadings on August 15, 2011. Crown again filed Motions to Dismiss Great Lakes/Lloyd's Third Amended Complaint and Lexington's Second Amended Intervenor-Complaint on August 29, 2011.

This same process repeated and Crown's motions were granted once again. Plaintiffs were also again granted leave to amend their respective pleadings. However, this Court provided direction when granting Plaintiffs leave to amend. Specifically, this Court instructed the Plaintiffs to "**[plead] factual allegations necessary to show that SRI assigned any rights against Able to the Plaintiffs or to the Intervening Plaintiff or otherwise show-how the subrogation claims arise** in this situation." Order granting Mot. Summ. J. Nov 28, 2011. (emphasis added)

In their Fourth Amended Complaint, Great Lakes/Lloyd's directly addressed these deficiencies by amending their complaint and alleging specific facts demonstrating how

the subrogation claim arose, and how SKI assigned its rights against Crown to Great Lakes/Lloyd's. By way of further proof in support of their rights of subrogation and assignment of claims, Great Lakes/Lloyd's attached the following to their Fourth Amended Complaint: (1) Great Lakes/Lloyd's and SRI's insurance policies providing for subrogation; (2) Crown-SRI maintenance contract; (3) subrogation receipts for SRI's actionable rights against Crown issued to Great Lakes/Lloyd's; (4) SRI's dissolution and all-inclusive transfer to Fund Six; and (5) affidavit of Ronnie E. Ragoff, Vice President of Shorenstein Realty Services, L.P, confirming the transfer of SRI's actionable rights against Crown to Great Lakes/Lloyd's.

In response to Great Lakes/Lloyd's Fourth Amended Complaint, Crown—without taking depositions or conducting discovery—challenges the factual integrity and legality of Great Lakes/Lloyd's Fourth Amended Complaint and supporting documentation in its present motion. Now, for the reasons set forth herein, Great Lakes/Lloyd's requests that Crown's motion to dismiss Great Lakes/Lloyd's Fourth Amended Complaint be denied.

## **II. LEGAL STANDARD**

Public policy in Illinois strongly favors an adequate and appropriate hearing of a litigant's claim on the merits. *Bowe v. Abbott Laboratories, Inc.*, 240 M. App.3d 382, 608 N.E.2d 223, 227 (1st Dist. 1992). A motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure tests the legal sufficiency of the plaintiff's complaint. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 723, 873 N.E.2d 436, 440 (2007). "In determining the legal sufficiency of a complaint, all well-pleaded facts are taken as **being true and all reasonable inferences** from those facts are drawn in favor of the **plaintiff.**" *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053

(2006) (emphasis added). The relevant inquiry is whether the pleadings contain sufficient facts which, if proved, would entitle a plaintiff to relief. *Chicago City Day School v. Wade*, 297 Ill. App. 3d 465, 697 N.E.2d 389, 392 (1st Dist. 1998). Therefore, this Court must accept all well-pleaded facts in Great Lakes/Lloyd's Fourth Amended Complaint as true and draw all reasonable inferences from those facts in their favor. *Gerwin v. Livingston County Bd.*, 345 Ill. App. 3d 352, 802 N.E.2d 410, 411 (4th Dist. 2003). Taking the facts alleged in their Fourth Amended Complaint as true, Great Lakes/Lloyd's are clearly entitled to relief on their claim.

### **III. ARGUMENT**

In Crown's previous 2-615 motion, this Court gave Great Lakes/Lloyd's leave to amend in order to cure their pleading deficiencies in one of two ways: 1) plead factual allegations as to how Great Lakes/Lloyd's subrogation claims arise in this case; or 2) plead factual allegations that show SRI assigned its right to bring a breach of contract action against Crown. Great Lakes/Lloyd's Fourth Amended Complaint fulfills both of the Court's requirements. First, Great Lakes/Lloyd's provided factual allegations with supporting documentation that fulfills the legal requirements for a subrogation breach of contract claim against Crown. Second, Great Lakes/Lloyd's provided documentation demonstrating SRI assigned all rights to Fund Six which Fund Six then assigned to Great Lakes/Lloyd' s.

#### **1. GREAT LAKES/LLOYD'S SECURED ITS CONTRACTUAL SUBROGATION RIGHTS BY WAY OF ITS POLICY PAYMENTS TO SRI FOR CROWN'S BREACH OF CONTRACT**

Subrogation is an equitable remedy that imposes ultimate responsibility for a wrong or loss on the party who, in equity, ought to bear it. *Bost v. Pulsen Enterprises*

*Inc.*, 36 Ill.App.3d 135, 343 N.E.2d 168, 171-720 (1976). Illinois recognizes the doctrine of subrogation as a broad, flexible tool for the accomplishment of justice. *Id.* "This legal concept originated in equity, but is presently an integral part of the common law, and is designed to place the ultimate responsibility for a loss upon the one whom in good conscious it ought to fall, and to reimburse the innocent party who is compelled to pay. Under this doctrine an insurance company that, pursuant to a legal liability, has paid for a loss or injury resulting from the negligence or wrongful act of another, is subrogated to the rights of the injured party against such a wrongdoer." *Geneva Const. Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 283, 122 N.E.2d 540, 546 (1954).

While often applied in tort, insurance subrogation is equally applicable in contract. *Jewelers Mut. Ins. Co. v. Firststar Bank Illinois*, 213 Ill. 2d 58, 68, 820 N.E.2d 411, 417 (2004). For example, in *Jewelers Mutual*, the Illinois Supreme Court held an insurance company was subrogated to its insured's breach of contract rights against defendant Firststar Bank. *Id.* at 68, 820 N.E.2d 411 at 417. There, Jewelers Mutual Insurance maintained an insurance policy on its insured's property stored in Firststar Bank's safety deposit box. *Id.* at 59, 820 N.E.2d 411 at 412. The insured's property was stolen after Firststar Bank allowed unauthorized access into the insured's safety deposit box. *Id.* Jewelers Mutual Insurance paid its insured's property-loss claim, then brought a subrogation breach of contract action against Firststar Bank. *Id.* The Court found, by way of policy payment,-that Jewelers Mutual Insurance was subrogated to its insured's breach of contract claims against Firststar Bank. *Id.* 68, 820 N.E.2d 411 at 417. Specifically, the Court said "it would be highly inequitable [to] allow [a] defendant to escape all

responsibility when the loss is alleged to be a direct result of defendant's breach of its contractual obligations." *Id.*

Great Lakes/Lloyd's allegations here are analogous to the plaintiffs in *Jewelers Mutual*. Like the insured's contract with Firststar Bank in *Jewelers Mutual*, SRI contracted with Crown to perform specific duties—properly maintain the HVAC units and cover losses caused by failure to perform contractual duties. The fire and subsequent damage resulting from Crown's failure to properly discharge the HVAC units as well as their failure to pay for these damages was a clear breach Crown's contractual obligations. Great Lakes/Lloyd's insurance policies, like the plaintiff in *Jewelers Mutual*, covered SRI's damaged property interest as a result of Crown's breach. Finally, Great Lakes/Lloyd's —exactly like the plaintiff in *Jewelers Mutual*—paid SRI's property loss claim that was caused by Crown's breach and now seeks to enforce its legal subrogation rights against Crown.

As Great Lakes/Lloyd has outlined, Illinois law allows Great Lakes/Lloyd's to "step into the shoes" of SRI and pursue its claim against the wrongdoer, Crown. *Dix Mut. Ins. Co. v. LaFramboise*, 149 Ill. 2d 314, 319, 597 N.E.2d 622, 624 (1992). In an attempt to confuse the issues and skirt liability under contract law, Crown complains no assignment of SRI's rights was made. To accept the Crown's position would require overturning a long line of Illinois Appellate and Supreme Court cases defining and upholding the concept of subrogation. *In re Estate of Scott*, 208 Ill.App.3d 846, 849-50, 567 N.E.2d 605, 607 (1991) (distinguishing the difference between subrogation and assignment). If subrogation is prohibited, then liable parties would have little incentive to fulfill their duties under contract law so long as their victims have insurance.

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**2. GREAT LAKES/LLOYD'S WAS ASSIGNED SRI'S ACTIONABLE  
BREACH OF CONTRACT RIGHT AGAINST CROWN BY WAY OF  
ASSIGNMENT FROM FUND SIX.**

The Business Corporation Act of 1983 (805 ILCS 5/12.80 (West 2002)) holds that any action against or on behalf of a dissolved corporation that has dissolved survives for five years after the date of the corporation's dissolution. *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 401, 946 N.E.2d 957, 964 (2011), as modified on denial of reh'g (Apr. 5, 2011). Upon dissolution, a corporation may assign its claims against an individual to another party. *Grunloh v. Effingham Equity, Inc.*, 174 Ill. App. 3d 508, 518, 528 N.E.2d 1031, 1037 (1988). The creation of an assignment is determined according to the parties' intentions. *Brandon Apparel Group v. Kirkland & Ellis*, 382 Ill. App. 3d 273, 286, 887 N.E.2d 748, 758 (2008). These intentions are a question of fact derived from the instruments executed and the surrounding circumstances. *Id.*

Where a dissolving company transfers all its corporate assets and liabilities, the dissolving company's actionable rights may also transfer. *Grunloh, supra.*, at 520, 528 N.E.2d 1031 at 1039. In *Grunloh v. Effingham Equity, Inc.*, for example, a dissolving company's actionable rights were included in an all-inclusive transfer of the company's assets and liabilities. *Id.* There, Grunloh Corporation ("G Corp") owned and operated a golf course that suffered property damage by the defendant Effingham Equity, Inc. ("Effingham"). *Id.* at 510-11, 528 N.E.2d 1031 at 1032-33. While G Corp owned the golf course, Effingham caused toxic chemicals to enter into a shared water supply and damage the property. *Id.* Later, G Corp dissolved transferring all its assets and liabilities to the Grunlohs. *Id.* The Grunlohs then filed suit against Effingham for property damage



to the golf course sustained under G Corp ownership. *Id.* Defendants asserted that the

Grunlohs lacked standing because the assets and liabilities transfer between G Corp and the Grunlohs did not specifically assign any of G Corp's actionable rights. *Id.* at 515, 528 N.E.2d 1031 at 1035. The court disagreed with Effingham, finding the all-inclusive nature of the transfer and Grunlohs accepting all of G Corp's assets and liabilities included assignment of G Corp's actionable rights against Effingham, regardless of specific language. *Id.* at 518, 520, 528 N.E.2d 1031 at 1037, 1039 (1988).

The circumstances and transfers in *Grunloh* are similar to those in the case at bar. In *Grunloh*, the dispositive language in the assumption agreement was as follows:

"[plaintiffs] [do] hereby assume and agree to pay for and on behalf of [the corporation] any and all liabilities of [the corporation]."

*Id.* at 513, 528 N.E.2d 1031, 1034.

In *Grunloh*, there was also a bill of sale describing property transferred as:

lain goods and chattels and personal and intangible property of every kind and description wheresoever the same may be situated, including, but not limited to, the following."

*Id.*

Similarly, the language in SRI's all-inclusive dissolution transfer to Fund Six states:

NOW THEREFORE, In consideration of the promises contained herein, and for other good and valuable consideration, the receipt and sufficient of which are hereby acknowledged, the [Fund Six] hereby undertakes as follows:

- 3. Distribution of Net Cash:** Following the settling of accounts on August 31, 2009 the remaining cash and cash equivalents of [SRI] will be distributed to [Fund Six] in accordance with the LLC agreement
- 4. Distribution in Kind of Non-Cash Assets:** On August 31, 2009, any non-cash assets of [SRI] shall be distributed in kind to [Fund Six] in accordance with the LLC agreement.

#### IV. CONCLUSION

This Court, in its prior order, gave Great Lakes/Lloyd's leave to amend to plead factual allegations necessary to show that SRI assigned any rights against Crown to Great Lakes/Lloyd's or otherwise show how Great Lakes/Lloyd's subrogation claims arise in this situation.

An adequate and proper insurance subrogation claim arises where: (1) a third party has caused a loss and is primarily liable to the insured for the loss, (2) the insurer is secondarily liable to the insured due to an insurance policy, and (3) the insurer pays the insured under that policy, thereby extinguishing the debt owed by the third party. *See Trogub v. Robinson*, 366 Ill. App. 3d 838, 842, 853 N.E.2d 59, 63 (2006). Great Lakes/Lloyd's Fourth Amended Complaint establishes: (1) breach of the Crown-SRI maintenance contract by Crown and resulting damages to SRI; (2) Great Lakes/Lloyd's and SRI's insurance contract providing for subrogation on policy payment; and (3) payment and subrogation receipts perfecting Great Lakes/Lloyd's subrogation of SRI's breach of contract cause of action against Crown.

While pleading facts to establish its subrogation right is sufficient to defeat a 2-615 motion, Great Lakes/Lloyd's also establishes an assignment of breach of contract rights against Crown from Fund Six by attaching: (1) the all-inclusive dissolution transfer from SRI to Fund Six; (2) the affidavit of Ronnie E. Ragoff confirming the all-inclusive transfer; and (3) a copy of the subrogation receipts assigning breach of contract claims from Fund Six to Great Lakes/Lloyd's. *See Grunloh*, 174 Ill. App. 3d 508, 518, 528 N.E.2d 1031, 1037 (1988).

Given legal standards for insurance subrogation as well as assignment of claims, Great Lakes/Lloyd's Fourth Amended Complaint pled sufficient facts that, if taken as being true, with all reasonable inferences drawn in favor of Great Lakes/Lloyd's, would clearly entitle Great Lakes/Lloyd's to relief. *See Marshall*, 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053 (2006) (defining 2-615 standard). Accordingly, Crown's 2-615 motion to dismiss should be denied.

WHEREFORE, GREAT LAKES REINSURANCE and CERTAIN UNDERWRITERS AT LLOYD'S as subrogees of SRI Monroe Street Venture, LLC, pray that this Court deny CROWN ENERGY SERVICES, INC.'S, Motion to Dismiss Great Lakes/Lloyd's Fourth Amended Complaint and grant such other and further relief as the Court may deem appropriate and just.

Respectfully submitted,