TENANT as IMPLIED COINSURED on LANDLORD'S FIRE POLICY - EXONERATION FROM NEGLIGENCE OR RATIONAL PUBLIC POLICY?

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I. Introduction

When a tenant negligently causes a fire or explosion at leased premises, the tenant is ordinarily liable to the landlord and other injured third parties by operation of law under general principles of negligence. The tenant may also be contractually liable to the landlord under the relevant language of the governing lease. For example a lease may commonly provide in its "yield up" clause or otherwise that at the conclusion of the leasehold term, a tenant will restore the premises to the same condition the premises were in at commencement, reasonable wear and tear, and damage by the elements only excepted.

When either or both parties to the tenancy arrangement have insurance, the courts in many jurisdictions have varied the above reasonably predictable result, by providing the negligent tenant with an additional affirmative defense, implied coinsured status on a landlord's fire policy, thus preventing a landlord's insurer from suing the tenant under subrogation principles.[1] These judge made rules may override equitable principles or basic tenets of insurance law, or otherwise violate the actual intent of the parties or ignore strong public policy and rules of construction which do not lightly infer a party being

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[1] "Subrogation is the transfer of the insured's right to the insurer, consistent with equitable concepts and subject to contract." Zoppi v. Taurig, 598 A.2d 19, 21 (N.J. Super.L.1990). Subrogation is an equitable doctrine; and therefore, equitable principles apply in determining whether subrogation is available. By definition, subrogation can arise only with respect to the rights of an insured against third persons to whom the insurer owes no duty. Keystone Paper Converters, Inc. v. Neemar, Inc. 562 F.Supp. 1046 (E.D.PA. 1983). An insurer cannot recover by means of subrogation against its own insured. Turner Const. Co. v. John B. Kelly Co., 442 F.Supp.551 (E.D.Pa.1976). *See also* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW, A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 219 (1988) ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 602 (1996).

absolved in advance from their own negligence, a circumstance which creates "moral hazard."[2]

This paper will examine the implied co-insured status of tenants in those jurisdictions that follow the "Sutton doctrine"[3] including its rationale and evolution. Thereafter, cases from other jurisdictions, criticizing or otherwise not following the doctrine will be reviewed. Finally several Massachusetts Supreme Judicial Court cases are analyzed revealing that state's approach, which now creates different rules in residential and commercial tenancies.

II. The *Sutton* Doctrine - Judge Brightmire's Bright Line - When Will a Tenant be Absolved From its Negligence Merely Because the Landlord has Insurance?

The Jondahl family leased a single family dwelling from Sutton. On January 11, 1970, 11 year old John Jondahl, Jr. utilized the family electric popcorn popper in his bedroom to heat some chemicals from the chemistry set he had received from his father for Christmas. The volatile chemicals erupted in flame, igniting nearby curtains and causing some $2,382.57 of property damage, which was paid by the Sutton's insurer. Sutton's suit against John Jondahl Sr. and Jr. resulted in a verdict for the substituted plaintiff, landlord's insurer, against Jondahl Sr., but the Oklahoma Appellate Court

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[2] "The term moral hazard originated in insurance law as a description of the risk that an insured or insurance beneficiary would deliberately destroy the subject matter insured in order to obtain payment of an insurance benefit. The term now often refers more generally to the tendency of any insured party to exercise less care to avoid an insured loss than would be exercised if the loss were not insured." KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 4 (2000). Adverse selection, a related problem discussed by ABRAHAM is considered *infra* at note 22.*See also* Jerry *supra* note 1, at p.4 Section 10(c).

[3] Chief Judge Torres of the Federal District Court for the District of Rhode Island termed the holding of Judge Brightmire in Sutton v. Jondahl 532 P.2d 478, 481 (Ct. App. Okl. 1975) and the courts that have followed it the *Sutton* doctrine in his decision criticizing the doctrine. 56 Associates v. Frieband 89 F. Supp. 2d 189 (D.R.I. 2000).

reversed.[4] The court found that the landlord's insurer was barred from bringing a subrogation action against the tenant "because the law considers the tenant as co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive user feature of automobile insurance."[5] The *Sutton* court noted that both landlord and tenant have an insurable interest in the premises because the landlord has the fee, and the tenant has a possessory interest.[6]

Although the landlord was not there required to carry fire insurance, the *Sutton* Court found that the amount of premium paid by a landlord would be "considered in establishing the rental rate on the rental unit."[7] The fire insurance premium "was chargeable against the rent as an overhead or operation expense, … and … it follows then that the tenant actually paid the premium as part of the monthly rental."[8] The court chose not to "ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty… absent an express agreement otherwise."[9] The court found "it would not likely occur to a *reasonably* prudent tenant[10] that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and

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[4] Sutton v. Jondahl 532 P.2d at 481
[5] *Id* at 482.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* (emphasis added). There are extant in the case law several doctrines assisting insureds against their insurer. Most famous is *contra proferentem* "against the drafter." That general principle of contract law construction has reached an elevated status when an insurance company drafts an insurance policy. The *reasonable expectations* doctrine goes beyond *contra proferentem* to assist a policy holder when the clear language of the policy does not admit of coverage or an exclusion prevents recovery. Professor Keeton's treatise defines the reasonable expectation doctrine as follows: "In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer." KEETON & WIDISS, supra note 1, at 633. A tenant whose name does not appear as an insured on his landlord's policy apparently, according to Judge

that he would need to take out another *fire* policy to protect himself…."[11]

The *Sutton* holding, shielding a sympathetic residential tenant, evolved to a central underpinning of many commercial tenancy cases. The commercial tenant, Richard Capri, in *Safeco Insurance Company v. Capri,*[12] was welding rebar to a fence on the leased premises when a piece of hot slag dropped off, caught fire, and blew into an accumulation of trash causing damage to the landlady's building in the amount of $16,546.60. The landlady's lease with Capri required her to maintain fire insurance.[13] The Nevada Supreme Court affirmed a summary judgment granted by the trial court in favor of tenant Capri.[14] The Nevada court cited persuasive precedent from Washington, Alaska, California, and the *Sutton* Case.[15] In *Safeco,* the Nevada court reviewed the reasonable expectations of the insured doctrine[16] as set forth in that state court's decision *National Union Fire Insurance v. Reno's Executive Air.*[17]

The Nevada Court also relied upon *Rock Springs Realty, Inc v. Waid*,[18] where the

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Brightmire, gets the benefit of this rule nonetheless. Sutton v. Jondahl, 532 P.2d at 482.

[11] *Id*; (emphasis added). The notion of a second fire policy purchased by the tenant has been a stalking horse which several courts have seized upon in their analysis. A tenant wouldn't buy a second fire policy for the building. The tenant's commercial general liability (CGL) policy, or in the case of a residential tenant, his apartment dweller's policy contains insurance provisions whereby the insurance company indemnifies the tenant against negligence claims of third party patrons, visitors, or invitees as well as claims of a landlord for fire damage caused by the negligence of the tenant or the negligence of the tenant's customer, invitee, employee. It is not uncommon for the landlord to bargain for the tenant obtaining such coverage or for the tenant to have such coverage without request, direction or obligation to the landlord. When obtained the coverage does not result in a situation where there is a redundancy of coverage and the insurance companies are collecting a premium for risks upon which they will not have to pay. It is somewhat analogous to an automobile collision where usually both cars have insurance, and only one may be at fault. The company that pays is the tortfeasor's insurer. If the tortfeasor has no insurance and innocent parties recover under another operator's uninsured motorist coverage, that insurance company subrogates to its operator's rights and pursues the uninsured tortfeasor's assets.

[12] 101 Nev. 429, 705 P.2d 659 (1985).

[13] *Id*. 705 P 2d at 660.

[14] *Id*. at 662.

[15] Rizzuto v. Morris, 592 P.2d 688, 690 (Wash. App. 1979). Alaska Insurance Company v. RCA Alaska Commun., 623 P.2d 1216 (Alaska 1981). Liberty Mutual Fire Insurance Co. v. Auto Spring Supply Co.,131 Cal. Rptr. 211 (App. 1976). Sutton v. Jondahl, 532 P.2d 478 (Ok.App.1975).

[16] *See* discussion *supra note 10*.

[17] 100 Nev. 360, 682 P. 2d 1380 (1984).

[18] 392 S.W. 2d, 270, 278 (Mo. 1965).

Missouri court found it would create an undue hardship to require a tenant to insure against his own negligence, since where the landlord had purchased fire insurance. The Nevada court also felt "[a]n insurer should not be allowed to treat a tenant, who is in privity with the insured Landlord, the same as a negligent third party when the insurer, could not collect against its own insured had the insured negligently caused the fire."[19] Besides quoting Judge Brightmire's bright line from *Sutton,* the *Safeco v. Capri court*[20] quoted Professor Keeton's treatise on Insurance Law.

> "Probably it is undesirable, from the point of view of public interest, that the risk of loss from a fire negligently caused by a lessee be upon the lessee rather than the lessor's insurer. Allowing the lessor's insurer to proceed against the lessee is surely contrary to expectations of persons other than those who have been exposed to this bit of law either during negotiations for a lease or else after a loss…[P]erhaps [the courts] should at least adopt a rule against allowing the lessor's insurer to proceed against the lessee when lease provisions are ambiguous in this regard and the insurance policy is silent or ambiguous."[21]

The Nevada court did provide that the tenant in circumstances such as these is an implied co-insured of the landlord for the *limited purpose* of defeating an insurer's subrogation claim.[22]

A 1981 Alaska Supreme Court case relied upon in *Safeco v. Capri*, *Alaska*

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[19] Monterey Court v. Harp, 224 S.E. 2[d] 142, 146 (1976).
[20] 705 P.2d at 661.
[21] ROBERT E. KEETON, INSURANCE LAW § 4.4(b) at 210 (1971).
[22] *Id.* at 661 (emphasis added). If an implied co-insured were allowed to make a claim under the landlord's policy, the insurer's freedom of contract and ability to underwrite and select its own insureds would be stood on its head. The problem of adverse selection would befoul the process. Adverse selection means "a party facing a high risk of loss is more likely to seek insurance than a party facing a lower risk. If potential policyholders know better than insurers whether they pose comparatively high or comparatively low risk, then adverse selection may occur: When insurers charge each party the same price for coverage, then high-risk parties elect to be insured in greater proportion than low risk parties, and insurers are forced to raise the price of coverage. As a result, some of the comparatively low-risk parties that had previously been insured decline to purchase coverage, the average degree of risk posed by the insurer's policyholders rises, and the insurer is forced to raise prices again, thus restarting the cycle of adverse selection." ABRAHAM, *supra note* 2, at 3. Adverse selection is closely related to the problem of moral hazard. *Id*.

Insurance Company v. RCA Alaska Communications, Inc,[23] had its result determined by the commercial landlord's obligation under its lease to have fire insurance. Other provisions in the relevant lease made it clear that the tenant would not be absolved from the tenant's direct negligence.[24] The yield up clause in the RCA Alaska Communication's lease required the tenant to return the premises "in as good condition as received excepting fair wear and tear and/or loss or damage caused by fire, explosion, earthquake or other casualty, provided that such casualty was *not caused by the negligence* of the lessee, it's employees or agents."[25] Furthermore the lessee agreed to indemnify the lessor from and against loss damage and liability arising from the negligent act of the lessee, its agents, employees, or clients. The majority in *Alaska Insurance Co.* recognized that a different result would flow if the court were required to find an express exemption for negligent liability before absolving a tenant. The court nonetheless chose to require a landlord's insurer to point to a clause in the lease where there was an express assumption by tenant of liability for his negligently started fire.[26] Judge Rabinowitz in dissent noted that while he in general favored implying a tenant's co-insured status merely from a landlord's obligation in a lease to provide fire insurance, he nonetheless felt that such rule should not apply in a case where within the same contract or lease the tenant assumed contractual liability for its negligent conduct.[27]

Professor Abraham[28] when considering the *Alaska Insurance Company* case posits the question of whether a landlord, who has made some insurance recovery from his insurer, might collect his deductible or an otherwise uninsured loss from a negligent

[23] 623 P.2d 1216 (1981).
[24] *Id*. at 1218.
[25] *Id*. (emphasis added).
[26] *Id*.

tenant when the *Sutton* doctrine prohibits the landlord's insurer from recovery against the negligent tenant.[29] In considering those two cases, *Reliance Insurance Company v. East-Lynd Heat Treat, Inc.*,[30] and *Agra-bi Inc., v. Agway Inc*,[31] start with the Michigan case, *Reliance Insurance Company.*[32] There the court found the parties had in their lease intended to absolve the tenant for negligence liability to the landlord for the uninsured portion of the loss because the landlord could have chosen higher insurance limits and the tenant would have been required to pay the entire premium, and because the Michigan court had enunciated a very broad rule in *Labombard.*[33]

The Michigan Court of Appeals in *New Hampshire Insurance Group v. Labombard*[34] had followed *Sutton* and *Safeco* in a case where a three year old playing with matches caused $20,000 worth of property damage.[35] The Michigan Court looked at the yield up clause and relied on 1883 precedent from Michigan which included damage by fire within the concept of damage by the elements.[36] Conversely the North Dakota Supreme Court found a tenant potentially liable for the landlord's uninsured portion of the loss, as well as losses suffered by third parties who were not governed by the lease.[37]

Two 1992 cases reflect relatively recent application of the *Sutton* doctrine. In *Dix Mutual Insurance Co v. LaFramboise*,[38] the parties' written lease was sparse. The tenant, removing paint from exterior shingles by a tool applying extreme heat, ignited the

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[27] *Id*. at 1220, (Rabinowitz, J. dissenting).
[28] ABRAHAM, *supra* note 2.
[29] *Id*. at 208.
[30] 175 Mich. App. 452, 438 N.W. 2d 648 (1948).
[31] 347 N.W. 2d 142 (N.D.1984).
[32] 175 Mich. App. 452, 438 N.W. 2d 648 (1948).
[33] New Hampshire Insurance Co. v Labombard 155 Mich. App. 369, 399 N.W. 2d 527 (1986).
[34] *Id.*
[35] *Id.*
[36] Van Wormer v. Crane 51 Mich. 363, 16 N.W. 686 (1883).
[37] Agra-bi Inc. v. Agway, Inc 347 N.W. 2d 142 (N.D. 1984).
[38] 149 Ill. 2d 314, 597 N.E. 2d 622 (1992).

building, causing some $40,000.00 in property loss.[39] Despite an apparent intent to hold the tenant liable for his negligence in the short lease, the majority of the Illinois appellate court found for the tenant, based on *Sutton*, thereby provoking a strong dissent. Finally, in a North Dakota case entitled *Commercial Credit v. Homelvig*,[40] involving a residential oral lease, where both parties had insurance, the court found for the tenant, citing both *Sutton* and Professor Keeton's treatise.[41]

The seminal case in this topical area is *General Mills v. Goldman*,[42] a 1950 Court of Appeals for the Eighth Circuit case. *Goldman* was a diversity case where a district court finding for the plaintiff landlord, and its insurer was supported by a jury verdict answering in the affirmative that the negligence of defendant tenant was a proximate cause of the fire. The Eighth Circuit applying Minnesota law in a 2-1 opinion with Judge Sanborn dissenting overturned the trial court.[43] The tenant's employee had placed a freshly cast aluminum pot in a sump containing kerosene.[44] The resulting fire caused $142,500.00 worth of damage, as stipulated to by the parties[45] and a general verdict in the amount of $198,678.00 was entered for the landlord.[46] General Mills' lease provided for a rental of $15,000.00 per year plus taxes.[47] The landlord was not specifically obligated to obtain fire insurance, but had obtained fire insurance.[48] The intervener, Indiana Lumberman's Mutual Insurance Co., landlord's insurer, had paid a sum in excess of the

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[39] *Id.*
[40] 487 N.W. 2d (N.D. 1992).
[41] *Id*. *See* Keeton, *supra* note 2, at ___ page.
[42] 184 F. 2d 1259 (8th 1950).
[43] *Id*. at 367.
[44] Id. at 363.
[45] *Id*.
[46] *Id*. at 360 (Sanborn, J. dissenting).
[47] *Id*. at 363.
[48] *Id*. at 360, 363.

owner's investment in the real estate under its policy with the landlord.[49] The District Court's determination had turned on the familiar proposition that the party would not be lightly relieved from its own negligence unless there was language evidencing a specific intent to do so. The majority of the Eighth Circuit found the language in the yield up clause relieving a tenant of an obligation to restore the premises when damaged by fire was a sufficient manifestation of the parties' specific intent to absolve the tenant from liability and viewed Minnesota law as requiring no more. The dissent viewed the yield up clause, first emphasized by Massachusetts in *Slocum v. Natural Products Co*.,[50] as not controlling or even persuasive.[51] The United States Supreme Court denied *certiorari*.[52]

California followed the West Coast and *Sutton* trend in the 1976 case *Liberty Mutual Fire Insurance Company v. Auto Springs Supply.*[53] There, lease language between a tenant and its subtenant reflected an intent that the prime tenant's insurance was for the benefit of both, and the California Court's opinion followed *Sutton's* principles.[54] However, California in the 2000 case of *Fire Insurance Exchange v. Hammond*,[55] retreated from this position in a residential case where the tenant placed his upholstered furniture over the heating register.

III. CASES RESISTING THE *SUTTON* TREND

[49] *Id*. at 367 (Sanborn, J. dissenting).
[50] 292 Mass. 452, 198 N.E. 747 (1945).
[51] *Goldman* 184 F. 2d at 366.
[52] 340 U.S. 947, 71 S. Ct. 532, 95 L. Ed 683 (1951).
[53] 59 Cal. App. 3d 860 131 Cal. Rpt. 211 (1976).
[54] *Id*.
[55] 83 Cal. App. 4th 313,99 Cal. Rpt. 596 (2000).

Page v. Scott[56] involved a residential lease where the parties stipulated that damages were $8,000.00 and the landlord had already recovered the $8,000.00. The Arkansas Court ignored *Sutton* and the indemnity principle[57] and found for the landlord and its insurer, declining to follow *Sutton*.

In *New Hampshire Insurance Company v. Hewins*,[58] a residential tenant, wife, caused $1,400.00 worth in property damage paid by landlord's insurer, when she came outside to see her husband, leaving recycled Crisco for her french-fries heating on the stove. Kansas had adopted the Uniform Residential Landlord and Tenant Act[59] which provided basic terms including obligations of a tenant to refrain from negligence in the leasehold. Both the Kansas statute, which governed this oral lease, and prior Kansas case law, *Mayall Hotel Co. v. Atchison Hotel Co.*,[60] provide that a tenant will be responsible for the negligent acts or omissions of a person on the premises with the express or implied consent of the tenant, and hence, both the tenant, husband and wife were found liable.[61]

In *Britton v. Wooten*,[62] the roof of the structure caught fire from a pile of rubbish

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[56] 263 Ark. 684,567 S.W. 2d 101 (1978).
[57] Professor Jerry elucidates the indemnity principle: "Property insurance is a contract of indemnity. The goal of indemnity is to reimburse the insured for the loss sustained — and no more. The objective is to put the insured in the position the insured would have occupied had no loss occurred. The insured is not entitled to recover more than the damaged property is worth or more than its decline in value as a result of the damage." Jerry, *supra* note 1, at 570. KEETON & WIDISS elaborate: "One of the fundamental characteristics of any insurance system is the use of contracts that are in the form of an agreement for the transfer of a loss by obligating an insurer to confer an offsetting benefit to an insured. Conceptualizing insurance in terms of either a "transfer of a *loss*" or the conferring of an "*offsetting* benefit" is implicitly to indicate that the amount of insurance benefits paid when a loss is sustained by an insured is not to exceed the economic measure of the loss." KEETON & WIDISS, *supra* note 1 §3.1(a) at 134-135.
[58] 6 Kan. App. 2d 259, 627 P.2d 1159, (1981).
[59] New Hampshire Insurance Co. v. Hewins, 627 P.2d at 1160.
[60] 192 Kan. 566, 38 P.2d 84 3 (1964).
[61] New Hapshire Insurance v. Hewins, 627 P 2d at .
[62] 817 S.W. 2d 443 (Ky. 1991).

and debris stacked up under the roof's overhang.[63] The Kentucky court considered the Tort Law treatise of Professors Prosser and Keeton stating that public policy disapproves of agreements exculpating a defendant from his tort liability.[64] An agreement should only be so interpreted, if it quite explicitly, clearly, and unequivocally excuses a defendant from negligence liability, "…as by using the word negligence itself."[65] The tenant in the *Britton* case complained the evidence was inadequate on proximate cause, and that possible arson by a third party was a superseding intervening cause.[66] The Kentucky court reviewed the Restatement (Second) of Torts, sections 448 and 449, which lists some one hundred cases wherein criminal conduct of a third party does not cut off the causation chain in a situation when a party is under a duty to reasonably guard against the risk of fire including fire caused by design as well as accident, and found the tenant liable.[67]

In a 1992 Iowa case, *Newbauer v. Hostetter*,[68] involving a rural residential lease, and where tenant had a rental policy, the court declined to follow the *Sutton* rule. The argument that the landlord and tenant both have an insurable interest in the damaged premises from *Sutton* disregards the fact that these are separate estates capable of being separately valued and separately insured. To the extent that defendant and her husband also had a property interest in the dwelling, it was not automatically insured under the landlord's policy. The court noted that there was nothing in the present record to suggest that the proceeds paid to the landlord by his insurer exceeded the value of the landlord's reversionary interest in the property. Even if such evidence existed, this would only

[63] *Id*. at 444.
[64] *Id*. at 447.
[65] *Id*.
[66] *Id*. at 448.

establish an overvaluation by the insurer of the landlord's loss. Further,

> [i]f the landlords had agreed to insure the tenants' interest in the property and failed to do so, the result might be different. Defendant does not assert, however, that the Neubauers, as her landlord, ever agreed to provide insurance covering her tenancy estate. We have considered all arguments presented, and conclude that the judgment of the district court should be affirmed.[69]

Hence, the landlord's insurer was allowed to collect from tenant.

In *Osborne v. Chapman*,[70] the landlord's coverage included, among other things, lost rent coverage. The Minnesota court could not imply any expectation that the tenant would benefit from the landlord's lost rent coverage. The California court reached the new millennium with the better reasoned view in *Fire Insurance Exchange v. Hammond*[71] which did not view prior California's precedent in *Liberty Mutual Fire Insurance Co, v. Auto Spring Supply*[72] as controlling.[73]

Finally, the Federal District Court for the District of Rhode Island predicted that Rhode Island would not follow the *Sutton* doctrine, based in part upon statutory Rhode Island law, in the case of *56 Associates v. Frieband*.[74] Where the landlord had a month to month lease with the residential tenant who allegedly caused a $135,656.57 fire loss, the court reviewed *Sutton* and its progeny including *Safeco v. Capri*, and determined it was reasonably clear that Rhode Island would not adopt *Sutton.* The tenant's summary judgment motion predicated upon the *Sutton* doctrine was accordingly denied.[75] Thus, the bases for those recent cases rejecting *Sutton* include pursuit of the actual intention of

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[67] *Id*. at 449.
[68] 485 N.W. 2d 87 (Sup. Ct. Iowa 1992).
[69] *Id*. at 91.
[70] 574 N.W.2d 64 (Minn. 1998).
[71] 83 Cal. App. 413, 99 Cal. Rpt. 596 (2000).
[72] 59 Cal. App. 3d 860, 131 Cal. Rpt. 211 (1976).
[73] 99 Cal. Rpt. at _____.
[74] 89 F. Supp. 2d 189 (D.R.I. 2000).
[75] *Id*.

the parties, as well as rejecting a default rule which can provide a tenant or its insurer a free ride.

IV. THE MASSACHUSETTS CASES: SEPARATE RULES FOR COMMERCIAL AND RESIDENTIAL TENANCIES

In 1995, the Massachusetts Supreme Judicial Court, in two cases decided the same day,[76] absolved allegedly negligent commercial tenants from liability to their landlord's insurer. These findings were based upon: language in the respective yield up clauses and in the lead case,[77] also based upon language in a letter that accompanied the landlord's transmission of the lease to the tenant, and other familiar factors.[78]

In *Lumber Mutual Insurance Company v. Zoltek*,[79] although under the lease neither party was required to carry insurance, the landlord in transmitting the lease to the tenant informed the tenant that it, the landlord, would be carrying fire insurance and hence the tenant ought to see to insurance coverage for its own tangible personal property.[80] Specifically stating "[h]ence, you need not obtain property hazard liability insurance."[81] The tenant in *Lumber* was paying, in addition to the base rent, his part of the Common Area Maintenance (CAM) which included a pro rata (56%) percentage of the landlord's operating expenses including insurance premiums.[82]

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[76] Lumber Mutual Insurance Co. v. Zoltek, 419 Mass. 704, 647 N.E. 2d 395 (1995) Lexington Insurance Company v. All Regions Chemical Labs, Inc., 419 Mass. 712, 647 N.E. 2d 399 (1995) The Massachusetts Supreme Judicial Court has changed its personnel since these decisions. Only Justice Greaney, who did not participate in *Lexington* and *Lumber,* remains on the court.
[77] *Lumber,* 419 Mass. at 706.
[78] *Id*. at 705, 706.
[79] 419 Mass. 704 647 N.E. 2d 395 (1995).
[80] *Id*. 419 Mass. at 706.
[81] *Id.*
[82] *Id*. at 705.

In *Lexington Insurance Company v. All Regions Chemical Labs, Inc.*,[83] the yield up clause provided that the tenant was required to deliver the premises at the expiration of the tenancy "in the same condition and repair as the same were in at the commencement of the term….damage by fire or other casualty… only excepted."[84] The Massachusetts Supreme Judicial Court found the circumstances in *Lumber* and *Lexington* to constitute an agreement of the parties that the tenant would not be liable for fire damage negligently caused by the tenant.[85]

Judge O'Connor dissented in both *Lumber* and *Lexington*.[86] According to his dissents, the strong public policy in the Commonwealth is not to absolve a party from liability for his own negligence except where such a waiver is expressly made.[87] Judge O'Connor observed that the reliance of the majorities upon the yield up clauses was misplaced, predicated as they were on the court's holding in *Slocum v. Natural Products Co*.[88] wherein the tenant was absolved of contractual liability but not tort liability by the yield up clause in the lease. In 1935, civil practice precluded multifarious declarations. Under the pleading rules in 1935, a civil complaint, known as a Declaration, that at once sounded both in contract and in tort, was subject to dismissal. Thus, the dismissal of the contract claim in *Slocum* did not speak to the tenant's tort liability, as the *Slocum* court specifically noted.[89]

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[83] 419 Mass. 712, 647 N.E. 2d 395 (1995).
[84] 419 Mass. at 713.
[85] This is Judge Spina's view expressed in *Seaco Insurance Co. v Barbosa*, 435 Mass. 722, 761 N.E. 2d 946 (2002). This was tantamount to a waiver of subrogation but not necessarily a finding of co-insured status.
[86] 419 Mass. 704, 419 Mass. 714.
[87] *Lumber,* 419 Mass. at 709 (O'Connor, J. dissenting).
[88] 292 Mass. 455, 456, 457 (1935).
[89] *Id*. The dissent in *Goldman*, 184 F. 2d 1259, like Judge O'Connor, felt this rendered ***Slocum*** an insufficient underpinning for the majorities broad holding.

In *Seaco Insurance Company v. Barbosa*,[90] the Massachusetts Supreme Judicial Court, revisited and limited its 1999 holding in *Peterson v. Silva*.[91] The Massachusetts Supreme Judicial Court in *Peterson v. Silva* quoted Judge Brightmire's, "bright line" from *Sutton* concerning the "realities of apartment renting" and the "expectations of a reasonably prudent tenant."[92] Peterson held that a residential tenant who negligently caused a fire would be immune from a suit by his landlord's insurer unless under the lease the tenant expressly assumed liability for his negligently caused fires. The Peterson court further stated "it was not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy".[93]

The court in *Seaco* relied upon *56 Associates v. Frieband*,[94] which rejected *Sutton* and endorsed cases rejecting *Sutton* as the better reasoned view where the entire lease was examined to determine the intent of the parties.[95] The *Frieband* court rejected the notion that a tenant's possessory insurable interest, or the use of rental income to pay insurance premiums, or a tenant's expectation that the landlord will obtain fire insurance, could make a tenant a co-insured on the landlord's policy.[96] Frieband suggested that should not happen unless the insurer takes an application from the tenant, approves it, and

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[90] 435 Mass. 772, 761 N.E. 2d 946 (2002). The author was counsel for SEACO in the Superior and Supreme Judicial Court.
[91] 428 Mass. 751, 704 N.E. 2d 1163 (1999).
[92] *Id*. at 428 Mass. at 754.
[93] *Id*. The Connecticut Supreme Court in *DiLullo v. Joseph*, 259 Conn 847, 2002 W.L. 437166 (Conn.) decided 3/26/2002 endorsed criticisms of *Sutton* based upon general principles of contract and insurance law, but declined to follow *Seaco* relying on the policy "disfavoring economic waste," stating that the *Sutton* default rule would prevent possibly multiple tenants covering the building, albeit it with liability insurance, citing the above quoted language from *Peterson v. Silva*.
[94] 89 F. Supp. 2d 189 (D.R.I. 2000).
[95] *Id*. at 192.
[96] *Id*. at 193.

places the tenant's name on the policy.[97]

The Supreme Judicial Court in *Seaco* declined to apply *Peterson v. Silva* (a residential case) to a commercial context. In *Seaco v. Barbosa*, the commercial tenant, a baker, had allegedly caused a $62,000.00 fire loss by carelessly disposing of a cigarette in a waste basket.[98] The basket was located in a restroom in an area where only the tenant had access. The lease had required the tenant to carry general liability insurance and name the landlord as an additional insured.[99] The tenant had carried a CGL policy but had not added the landlord as an insured. The plaintiff, landlord's insurer, *Seaco*, had suggested in the summary judgment record that General Liability Insurance covers fire losses caused by the tenant's negligence as well as those caused by negligent third parties.[100]

Massachusetts now has a more lenient default rule applying to residential tenants than to commercial tenants, but each rule can be overridden by specific language in a lease. In a residential case, the lease language must specifically obligate the tenant for a loss caused by his negligence, whereas in a commercial case, the court will look at numerous factors to determine the intent of the parties, and a tenants obligation to carry liability insurance or indemnification language by a tenant, supports a subrogation claim by a landlord's insurer.

V. DISCUSSION AND CONCLUSION

[97] A. J. APPLEMAN, INSURANCE LAW & PRACTICE, Sec. 4055, at 95,n.86.01 (West Supp. 1991) "The fact that both parties had insurable interests does not make them co-insureds. The insurer has a right to choose whom it will insure and it did not choose to insure the lessees, and under this holding the lessee could have sued the insurer for loss due to damage to the realty, e.g. loss of use if policy provides such coverage." *Id*.
[98] 435 Mass. at 774.
[99] *Id.*
[100] *Id*. at 780. Such a policy protects the insured also against claims by one who might trip on a tripping hazard negligently left by tenant in the demised premises, and that is often a predominating risk that drives

The cases following *Sutton*, like many insurance law cases, can in Professor Keeton's words "create an impression of unprincipled judicial prejudice against insurers and the insurance industry, and also produce confusion and uncertainty about the nature and the extent of judicial regulation of contract terms".[101]

Legislatures have regulated unconscionable aspects of the insurance relationship with bad faith statutes and regulations. For example, in Massachusetts, a violation of the bad faith statute[102] is often an unfair and deceptive act and practice rendering an insurance company for multiple damages under the consumer protection statute.[103] The courts will continue to fill in perceived gaps left by the legislature, the insurers, or the parties. For example, Judge Keeton's reconciliation of public policy with unambiguous coordination of benefits in a disability policy in *Kates v. St Paul Fire & Mauve Insurance Company* [104] is a masterful example of a court creating a remedy where the unambiguous document was effectively misleading and hence unenforceable as written.[105] Contrast that with the Connecticut Court's result in the very recent *DiLullo* decision,[106] predicated on economic waste concerns, where *Sutton*'s shortcomings were acknowledged, but the result followed *Sutton.*

Hence, parties to a lease, whether commercial or residential would be well

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the purchase of CGL Insurance.

[101] *See* KEETON & WIDISS, INSURANCE LAW, A GUIDE TO FUNDAMENTAL PRINCIPLES AND LEGAL DOCTRINE, AND COMMERCIAL PRACTICES 632 (1998).

[102] M.G.L. Ch. 176D. (1972).

[103] M.G.L. Ch. 93A (1967).

[104] 509 F. Supp. 477, 485 (D. Mass 1981).

[105] *Id*.

[106] *Supra* note 93. This economic waste argument, which is the underpinning for the *DiLullo* court's default rule. There is no support in the record for the Connecticut court's economic waste determination. A tenant who increases the liability limit from $100,000.00 to $300,000.00 usually pays about $10 additional premium and an additional $10 to increase the limit to $500,000.00. This "waste" would be offset by the savings when the landlord's fire insurers set their rates which are based upon net losses, i.e., losses net of subrogation recoveries. The absence of economic waste is more apparent in the auto collision discussion *supra* note 11. The auto insurers rates are based upon loss experience, i.e. where their insured is

advised to specifically set forth their intentions as to which party will carry what insurance and for whose benefit. Similarly, a lease ought to expressly provide whether a waiver of one party's negligence, express coinsured status, or a waiver of subrogation or express coinsured status is intended. Otherwise, the ever evolving case law in the several states provides a most uncertain result.

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at fault or there is otherwise no recovery.