

Subrogation Waiver Unconscionable in Residential Fuel Delivery Contract

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In a matter of first impression, the Superior Court of Connecticut (Superior Court), in *American Commerce Ins., Co. v. Eastern Fuel Corp.*, No. CV-206109168-S, 2024 Conn. Super. LEXIS 380, held that a waiver of subrogation provision in a consumer fuel service/delivery contract violated public policy. The Superior Court overruled the motion for summary judgment filed by Eastern Fuel Corporation (Eastern) and determined that the clause was impermissible as the contract was entered into by two parties with unequal bargaining power.

American Commerce Insurance Company (American) provided property insurance to Arlene and James Hillas (the Insureds) for their home in Woodbridge, Connecticut. The Insureds hired Eastern to service their heating system on or around October 25, 2018. The service work at the property included inspecting the oil filters and flushing the fuel lines. On November 1, 2018, when the Insureds turned the heating system on for the first time that season, the two oil tanks on the property were allegedly full. After a series of deliveries, claims that the oil levels were lower than expected, discovering oil staining on the floor and Eastern's replacement of the oil lines, Eastern delivered another 429 gallons. However, after the delivery, additional leaks were discovered relating to the oil line replacements. Ultimately, the Insureds submitted a claim to American and American paid in excess of \$59,000 for the damage incurred.

American filed a complaint Eastern alleging negligence and a breach of an implied warranty. American also sought reimbursement for the cost of cleanup under General Statute sec. 22a-452. Eastern denied the allegations. Eastern filed a motion for summary judgment on the sole ground that American's right of subrogation was waived by the Insureds by way of contract. American opposed the motion and argued primarily that the waiver of subrogation could not be enforced because it violated public policy.

Following oral argument, the Superior Court issued an opinion siding with American. The issue of first impression before the court was whether a waiver of subrogation provision within a consumer fuel service/delivery contract between homeowners and a fuel company violates public policy. The court noted that relevant Connecticut case law on waivers of subrogation only involved commercial contracts between contractors and subcontractors, not contracts between residential homeowners and fuel companies. Further, the Superior Court noted that Connecticut courts generally disfavor hold harmless provisions unless the parties were both commercial entities.

To analyze whether the clause violated public policy, the Superior Court considered the often cited "Tunkl factors" from *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963). The Superior Court noted that its analysis was guided, not controlled, by the considerations it discussed.

Discussing the Tunkl factors, the Superior Court found that the waiver clearly violated public policy because the:

- fuel company is a business type that would generally be suitable for public regulation;
- fuel company is engaged in performing a service of great importance to the public and is practically a necessity to anyone in Connecticut because nearly all homeowners have fuel contracts in place to heat their homes;

- fuel company holds itself out as willing to perform oil delivery for any member of the public;
- bargaining power is inherently unequal given that one party is a corporation and the other party is an average homeowner relying on the services of the corporation;
- fuel company presented the insured with a standard contract; one that the homeowners could hardly be expected to identify the waiver of subrogation within, or its negative implications; and
- homeowners were placed under the control of the fuel company and were subjected to their careless oil delivery and reliant on them to identify the source of the leak.

Eastern put forth several cases where waivers of subrogation were permissible. The Superior Court quickly distinguished the clauses in those cases as they involved contracts entered into by equal parties. Ultimately, the Superior Court explained that to allow the subrogation waiver would disadvantage average homeowners. The policy considerations that apply to commercial construction contracts are not the same as those that apply to average consumer contracts. Thus, the Superior Court did not allow Eastern to insulate itself from liability and transfer the risk to the Insureds.

The Superior Court's ruling is a positive one for subrogation professionals and homeowners in Connecticut. While fuel delivery/service contracts should still be reviewed prior to signing, the Superior Court acknowledged that homeowners are not on an even footing with oil delivery professionals. The Superior Court does not believe the average homeowner should be expected to understand waiver of subrogation provisions or be responsible for the occasional negligent work of oil delivery companies.

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