

## Insurer Doomed in Delaware by the Sutton Rule

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In *Donegal Mut. Ins. Co. v. Thangavel*, No. 379, 2022, 2023 Del. LEXIS 227, the Supreme Court of Delaware (Supreme Court) considered whether the Sutton Rule prevented the plaintiff from pursuing subrogation against the defendants. As applied in Delaware, the Sutton Rule explains that landlords and tenants are co-insureds under the landlord's fire insurance policy unless a tenant's lease *clearly expresses* an intent to the contrary. If the Sutton Rule applies, the landlord's insurer cannot pursue the tenant for the landlord's damages by way of subrogation. Here, the Supreme Court affirmed the trial court's decision that the Sutton Rule applied because the lease did not clearly express an intent to hold the tenants liable for the landlord's damages.

In *Thangavel*, the plaintiff, Donegal Mutual Insurance Company (Insurer), provided property insurance to Seaford Apartment Ventures, LLC (Landlord) for a residential property in Delaware. Sathiyaselvam Thangavel and Sasikala Muthusamy (Tenants) leased an apartment (the Premises) from Landlord and signed a lease. Insurer alleged that Tenants hit a sprinkler head while flying a drone inside the Premises which caused water to spray from the damaged sprinkler head, resulting in property damage to the Premises. Landlord filed an insurance claim with Insurer, who paid Landlord \$77,704.06 to repair the damage. Insurer then sought to recover the repair costs from Tenants via subrogation.

Insurer filed suit against Tenants alleging that they were negligent and breached the property's rules and regulations. Tenants moved for summary judgment, arguing that the Sutton Rule prohibited Insurer from pursuing subrogation against them. More specifically, Tenants explained that the law considers them co-insureds under Landlord's fire insurance policy because their lease *did not* contain an express agreement to the contrary. The Superior Court of Delaware (Superior Court) agreed and granted Tenants' motion for summary judgment. Insurer then appealed.

Insurer contended on appeal that the Superior Court erred because the lease between Landlord and Tenants contained an express agreement to the contrary and cited the following lease language:

1. Tenants agree to be solely responsible for all loss or damages to Tenants or their property or to any other person which may be situated in the Rental Unit and storage area; gross negligence of Landlord, its servant, agents or employees excepted...
2. Tenants agree to indemnify and save Landlord harmless from any and all loss occasioned by the tenant's breach of any of the covenants, terms and conditions of the Agreement, or caused by the tenant(s) family, guests, visitors, agents or employees.
3. Tenant agrees to procure and maintain adequate content and liability insurance in an amount not less than \$300,000.00 to afford protection against the risks herein assumed...
4. Tenant by accepting this agreement covenants and agrees that tenant will be responsible for all damages accidentally, maliciously, intentionally, or negligently caused by the tenant, tenant's family, guests or invitees to any of the property of the landlord.

The Supreme Court disagreed, explaining that the provisions above do not support a specific intent to require Tenants to obtain fire insurance to cover the landlord's property or that Tenants would be liable if they were negligent in causing a fire. As the court noted, residential landlords control the terms of a lease and if they so desire, they can clearly express a requirement that the tenants obtain fire insurance or notify them that they would not benefit from the landlord's fire insurance policy. As such, the Supreme Court affirmed the Superior Court's decision granting Tenants' motion for summary judgment.

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Subrogation professionals practicing in Delaware should be mindful of how the state applies the Sutton Rule. If a lease between a landlord and tenant does not contain a clear and unequivocal risk shifting provision pertaining to the tenant's negligence, the Sutton Rule will likely prevent any subrogation recovery efforts on behalf of the landlord's insurer.

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