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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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PETERS, J., dissenting. This is a very hard case. As the old adage goes, hard cases make bad law.

The legal issue in this case is the proper allocation of a risk of loss. A building has suffered fire damage as the result of the negligence of an invited guest. Should the risk of loss be assigned to the negligent guest or to the insurance company that provided homeowners insurance coverage against the risk of loss with respect to the property that was severely damaged?

The answer to this question would be obvious if the homeowners insurance policy provided coverage for the insured property for the benefit of all comers. The undisputed fact is that it does not. The policy lists those who are covered insureds, and a guest is not one of them.

Perhaps, despite the unambiguous language of the insurance policy, it might be possible to shoehorn persons in the position of the negligent guest into the list of covered insureds. It is established law that, despite a subrogation clause in the insurance policy, the principle of equitable subrogation precludes an insurer from recovering for a loss arising out of the negligence of one of its own insureds. The insureds have paid for all property losses, including those arising out of their own negligence. 6A J. Appleman & J. Appleman, Insurance Law and Practice (Cum. Sup. 2002) § 4055. Courts in other jurisdictions have treated unlisted members of an extended family as if they were insureds by calling them coinsureds. See, e.g., *Continental Ins. Co.* v. *Bottomly*, 250 Mont. 66, 70, 817 P.2d 1162 (1991); *Reeder* v. *Reeder*, 217 Neb. 120, 126–27, 348 N.W.2d 832 (1984). In *Sutton* v. *Jondahl*, 532 P.2d 478, 482 (Okla. App. 1975), the court extended the category of coinsureds to include a tenant.[1]

The problem with going down that road is that our Supreme Court, in *DiLullo* v. *Joseph*, 259 Conn. 847, 792 A.2d 819 (2002), has held that a person in the position of a tenant, or inferentially a guest, is not a coinsured person. Id., 853. I am bound by that holding.

If a negligent guest is not a coinsured person, what is the basis for assigning the risk of loss to the insurer? Like other contracting parties, insurers have the right to determine whom they will insure.

In my view, it is anomalous to hold that, as a matter of equitable principles, an insurer may not exercise its contractual right of subrogation against a negligent guest who is not a coinsured. The underlying assumption seems to be that the negligent guest should never be responsible as long as his host has homeowners insurance. Why?

In at least two sets of circumstances, a negligent guest *would* be liable for the loss that he caused. If the homeowner had no insurance coverage, or inadequate insurance coverage, or had decided, perhaps to avoid premium increases, not to access his insurance coverage, a negligent guest would be liable to the homeowner. The same result would ensue if a negligent guest had some applicable insurance of his own that could be tapped either by the homeowner or the homeowner's insurer by way of its subrogation rights. The issue of economic waste would simply not arise in either of these sets of circumstances.

The assignment of the risk of loss to the insurer in this case seems to turn, therefore, on matters beyond the insurer's control. Why is it proper to assume that the homeowners' insurer was responsible for a risk of unknowable proportions to which the homeowners policy does not allude? If such a risk was not assumed, I am puzzled why it is unjust to permit the homeowners' insurer to enforce a subrogation clause against someone who is not a coinsured.

Despite my personal reservations, I recognize that our Supreme Court has held that an assignment of risk to an insurer rather than to a tortfeasor is appropriate in the landlord-tenant context. *DiLullo* v. *Joseph*, supra, 259 Conn. 853–55. That holding may be explained by the ability of an insurer of a landlord to foresee the possibility of negligence by the relevant legal actors. Landlords will have tenants and some tenants will be negligent. Who carries what insurance can be traded out, and the insurer of the landlord properly may be held to have assumed the risk of loss as a default position. With whom could the homeowners' insurer have traded it out in this case? Certainly not with the guest.

The problem with a straightforward answer in favor of the insurer is that it strikes us as unjust. Economically speaking, we presume that an insurer, having provided coverage for the damaged premises by means of a homeowners insurance policy, is better able to spread the risk of loss caused by negligent guests than is a single guest by himself.

I think one reason why the result seems unjust is that, in our mind's eye, we are led to look at this case in the way that we are accustomed to look at automobile insurance policies. For such policies, it has become standard practice to extend insurance coverage to a permissive user of a covered automobile. See, e.g., *Middlesex Ins. Co.* v. *Quinn*, 225 Conn. 257, 264 n.8, 622 A.2d 572 (1993). Indeed, the Oklahoma Court of Appeals, in *Sutton* v. *Jondahl*, supra, 532 P.2d 482, relied on this analogy as one of its reasons for providing coverage for a landlord's tenant.

It is fanciful to think that, if the homeowners had thought about it, they could have bargained for an addi-

tional clause in their property insurance policy to provide protection for negligent guests. People don't haggle with insurance agents about the standard provisions of insurance policies because insurance agents cannot change them.

It is because, in this sense, insurance contracts are different from ordinary contracts that the insurance business has become a regulated industry. See *Serrano* v. *Aetna Ins. Co.*, 233 Conn. 437, 453, 664 A.2d 279 (1995). As a regulated industry, insurers who sell insurance policies in this state must conform their policies to include certain designated essential terms. These terms differentiate between different types of insurance.

For automobile insurance, § 38a-334-5 (d) of the Regulations of Connecticut State Agencies requires automobile liability insurance to extend protection not only to the named insured but also to other persons using the automobile with the permission of the named insured. See also General Statutes § 38a-335. Although there are some exceptions, they are irrelevant for present purposes.

As best I can tell, there is no similar requirement with respect to homeowners insurance policies. The essential terms for such insurance are described in General Statutes §§ 38a-307 and 38a-308. See also General Statutes § 38a-689. I have been unable to find any regulation that mandates protection for guests who have permission to use the insured property. In sum, protection for negligent guests is not an essential term in a homeowners policy.

It is tempting for us to fill the gap to provide parallel coverage for both kinds of insurance. Prima facie, the need to protect permissive users is equally compelling for both kinds of insurance. Gap-filling is, after all, an accepted judicial practice in the construction of statutes; *Ahern* v. *Thomas*, 248 Conn. 708, 718, 733 A.2d 756 (1999); *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, 247 Conn. 95, 114, 717 A.2d 1276 (1998); *Renz* v. *Allstate Ins. Co.*, 61 Conn. App. 336, 345, 763 A.2d 1072, cert. denied, 255 Conn. 945, 769 A.2d 59 (2001); and of negotiated contracts. *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 844, 779 A.2d 174 (2001); 1 E. Farnsworth, Contracts (2d Ed. 1998) § 3.28, p. 398.

I am not persuaded, however, that this rule of construction applies to a standard contract in a regulated industry.[2] At least in the first instance, an insurer should be able to enforce the terms of an insurance contract that our insurance commissioner and our legislature have approved. The place for trading out the terms to be included in a homeowners insurance policy is in the commissioner's office.

I recognize that I am not on the side of the angels in

this case. Nonetheless, I would not extend the holding of *DiLullo* beyond its facts. Accordingly, I respectfully dissent.

[1] *Sutton* expressly noted that the tenant was in privity with the landlord. *Sutton* v. *Jondahl*, supra, 532 P.2d 482. The court's reasoning is not as persuasive with respect to a guest.

[2] For this reason, it is my view that the trial court properly excluded evidence about the homeowners' personal understanding of the terms of the insurance policy. The property owners have not made even a prima facie showing that their homeowners insurance policy was ambiguous or unconscionable in any way. They have not argued that the insurance agent misled them in any way about the terms of the policy or, indeed, that they discussed their interpretation of the policy with the agent. Private reservations, without more, do not trump the language of a contract. See *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 399, 757 A.2d 1074 (2000); *Bonito* v. *Cambridge Mutual Fire Ins. Co.*, 64 Conn. App. 487, 490, 780 A.2d 984, cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001).