

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

AUTO-OWNERS INSURANCE )  
COMPANY a/s/o DAVID M. BROWN, )  
 )  
Plaintiff, )  
 ) 4:08-cv-00160-SEB-WGH  
vs. )  
 )  
CAROLYN YOUNG d/b/a PEDDLERS )  
CORNER CAFÉ, )  
 )  
Defendant. )

**ORDER ADDRESSING PENDING MOTION**

This cause is before the Court on Defendant, Carolyn B. Young d/b/a Peddlers Corner Café’s (“Ms. Young”) Motion to Dismiss [Docket No. 15], filed on January 7, 2009.<sup>1</sup> Because the dispositive legal question presented in this case is a state law issue which has not yet been decided by either the Indiana Court of Appeals or Supreme Court, the question is hereby certified to the Supreme Court for resolution prior to any substantive ruling on Defendant’s motion by this Court.

**Factual Background**

Plaintiff, Auto-Owners Insurance Company (“Auto-Owners”), is a Michigan

---

<sup>1</sup>Although this Motion is styled a Motion to Dismiss, in their briefing the parties agree that, because numerous affidavits are cited by both parties, the Motion should be converted to a Motion for Summary Judgment.

corporation with its principal place of business in Ingham County, Michigan. Plaintiff is licensed to do business in the State of Indiana. Defendant, Carolyn Young, is an individual residing at 947 W. County Road 700 South, Paoli, Indiana. Compl. ¶¶ 1-2.

Plaintiff's insured, David Brown ("Mr. Brown"), is the owner of property located at 400 North Court Street, Paoli, Indiana. Id. at ¶6. This property is insured under a policy of insurance issued by Auto-Owners. Beginning in 2005, Ms. Young leased the property located at 400 North Court Street, Paoli, Indiana, from Mr. Brown, for the purpose of operating the business of Peddlers Corner Café. Id. at ¶7. Ms. Young and Mr. Brown are siblings. Aff. of Young ¶ 5. Although they discussed generally the terms of their lease agreement, Mr. Brown and Ms. Young did not execute a formal written lease agreement related to this property. Id.

According to Ms. Young, she asked Mr. Brown whether she would need to acquire insurance coverage related to the property, and Mr. Brown informed her that he maintained insurance on the building and that she needed coverage only for her personal property and assets. Id. at ¶¶ 5-6. According to Auto-Owners, Ms. Young and Mr. Brown never, in fact, discussed the procurement of insurance coverage related to the property. Aff. of Brown ¶¶ 3-5. Thereafter, Ms. Young obtained insurance coverage solely for the protection of her assets and personal property. Aff. of Young ¶ 7.

On September 27, 2006, a fire damaged the property rented by Ms. Young. As a result of this fire, Auto-Owners paid Mr. Brown \$83,886.84, pursuant to the terms of the insurance policy, for damages sustained to the property. Id. at ¶¶ 8-9. On September 26,

2008, Plaintiff, Auto-Owners, filed its Complaint in the present cause, alleging that the fire and resulting damage to the property were due to Ms. Young's negligence, and seeking recovery of the payments it made to Mr. Brown.

In her Motion to Dismiss, Ms. Young contends that Auto-Owners has no subrogation rights against her in the case at bar because her interests were insured under Mr. Brown's insurance policy.

### **Legal Analysis**

#### ***I. Defendant's Motion***

Defendant's Motion asserts that there are no material facts in dispute and that the issue of whether Plaintiff has any subrogation rights<sup>2</sup> as to her is easily resolved pursuant to the rule first expressed in Sutton v. Jondahl, 532 P.2d 478 (Ct.App.Okla. 1975).

According to Defendant, the rule in Sutton forecloses Plaintiff's claim entirely. Plaintiff disagrees, contending both that there are material facts in dispute and that Sutton does not apply in this case.

Sutton addressed whether a landlord's fire insurance policy covered the interests of a residential tenant. The Sutton Court held that, absent an express agreement to the

---

<sup>2</sup>Subrogation is "the substitution of one person in place of another with reference to a lawful claim, demand or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." Farm Bureau Ins. Co. v. Allstate Ins. Co., 765 N.E.2d 651, 656 (Ind.Ct.App. 2002) (citation omitted). "Subrogation applies whenever a party, not acting as a volunteer, pays the debt of another that, in good conscience, should have been paid by the one primarily liable." Beam v. Wausau Ins. Co., 765 N.E.2d 524, 532 (Ind. 2002) (citation omitted).

contrary, a tenant should be deemed a co-insured under a landlord's fire insurance policy. Sutton, 532 P.2d at 482. A brief examination of decisions from other jurisdictions indicates that, although some courts favor the rule, E.g., North River Ins. Co. v. Snyder, 804 A.2d 399 (Me. 2002); DiLullo v. Joseph, 792 A.2d 819, 823 (Conn. 2002) (applying Sutton in the commercial context), others have chosen to reject it. E.g. American Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 757 N.W.2d 584 (S.D. 2008); Associates ex rel. Paolino v. Frieband, 89 F.Supp.2d 189 (D.R.I. Mar 30, 2000); Osborne v. Chapman, 574 N.W.2d 64, 68 (Minn. 1998); Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992). In her briefing, Defendant asks the Court to embrace the holding of Sutton and its progeny. Plaintiff, by contrast, requests that the Court reject Sutton.

The so-called “Sutton rule” obviously is not controlling in the present case, and our research discloses that the issue presented, as it relates to both commercial and residential landlord-tenant agreements, is a matter of first impression under Indiana law. Therefore, we must determine whether the question should be certified to the Indiana Supreme Court. Courts may decide, *sua sponte*, that certification to the state supreme court of certain legal questions is in order. See Elkins v. Moreno, 435 U.S. 647 (1978). “Through certification of novel or unsettled questions of state law for authoritative answers by a State’s highest court, a federal court may save time, energy, and resources, and build a cooperative judicial federalism.” Arizonans for Official English v. Arizona, 520 U.S. 43, 46 (1997).

The Seventh Circuit has directed that “certification is appropriate when the case

concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.” State Farm Mut. Auto. Ins. Co. v. Pate, 275 F.3d 666, 672 (7th Cir. 2001) (quoting In re Badger Lines, Inc., 140 F.3d 691, 698-99 (7th Cir. 1998)).

In the case at bar, resolution of the issue of whether Ms. Young should as a matter of law be deemed a co-insured under Mr. Brown’s fire insurance policy will likely be outcome determinative of the case. Both parties point to the existence, and substance, of a conversation between Mr. Brown and Ms. Young as establishing the terms of the lease agreement. It is true that the central question of whether this non-written “lease” did or did not contain an express agreement related to insurance coverage is a factual one. However, its significance with regard to the merits of this case will be determined solely with reference to Indiana principles of law concerning the existence and enforcement of such an agreement. In our judgment, this legal issue is best decided by the Indiana Supreme Court, making certification the favored course of action. See Todd v. Societe BIC, S.A., 9 F.3d 1216 (7th Cir. 1993) (holding that certification to “the only judges who can give definitive answers” on state law is preferable to a federal court’s “guess” on the question).

Moreover, although the issue arguably does not rise to the level of being a “matter of vital public concern,” it relates to insurance law which is uniquely a state law matter, and the parties’ monetary stakes are substantial. Further, the fact that this issue has been

presented in numerous other state and federal courts indicates that it is likely to recur. Finally, it is clear that Indiana courts have not heretofore had an opportunity to opine on this issue. The parties have not cited, nor has the Court discovered, any appellate decision in this state discussing or resolving the issue. Certification to the state supreme court is therefore appropriate, assuming the issue presented is in fact one of first impression. State Farm Mut. Auto. Ins. Co., 275 F.3d at 672 (citation omitted).

## ***II. Conclusion***

Accordingly, we respectfully request the Supreme Court of Indiana to resolve the following issue:

1. Whether, absent an express agreement to the contrary, a tenant should be deemed a co-insured under a fire insurance policy held by that tenant's landlord.

Until this issue is resolved, a decision on the Motion before the Court would be premature. Thus, Defendant's Motion to Dismiss is administratively closed pending resolution of the issue by the Indiana Supreme Court.

IT IS SO ORDERED.

Dated: 09/15/2009

Copies to:

Rebecca Kay Bethard  
KIGHTLINGER & GRAY, LLP  
rbethard@k-glaw.com



SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

Dustin L. Howard  
KIGHTLINGER & GRAY, LLP  
dhoward@k-glaw.com

Richard T. Mullineaux  
KIGHTLINGER & GRAY, LLP  
rmullineaux@k-glaw.com

Rodney Lee Scott  
Waters, Tyler, Scott, Hofmann & Doane, LLC  
rscott@wtshdlaw.com