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The Innocent Co-Insured Doctrine - A Practical Guide for Practitioners

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Practitioners in the field of first-party insurance litigation (1) usually focus their analysis of an insurance claim on the rights of the named insured to reimbursement as a result of a loss which it has suffered. However, when there is more than one named insured on a policy, an analysis of the rights of the "Innocent co-insured," under a policy of insurance, must be considered. Typically, the "innocent co-insured" is a spouse or other family member, who played no role in the underlying wrongdoing or omission. However, depending upon the jurisdiction, his status as a co-insured may mean that he will receive no recovery even if he had nothing to do whatsoever in the underlying fraud, e.g. arson or other activity that caused the insurer to deny payment of any proceeds as a result of a loss.

1. INTRODUCTION

In the early 1980s, the majority rule shifted to favor recovery for innocent co-insureds. Courts emphasized that insurance contracts created several, as opposed to joint, obligations that enabled innocent co-insureds to recover proceeds under policies. Consequently, the acts of one insured would not automatically void recovery under a policy for innocent co-insureds.

Some courts, however, took a different approach, focusing on the drafting of the insurance contract rather than stressing rules of several liability or public policy rationales. This shift sent a strong and undoubtedly welcome signal to insurers that properly drafted policies could eliminate recovery for innocent co-insureds.

In *American Economy Insurance Co. v. Liggett,* 426 N.E.2d 136 (1981), for instance, the Indiana Appellate Court went so far as to provide insurers with model language, which, if adopted, would avoid the entire innocent co-insured issue.

"[T]here is no reason," the court advised, "why this implied exception cannot be made an express exception in the policy. It would be written in bold letters and red ink across the face of the policy. If you or any person insured by this policy deliberately causes a loss to property insured then this policy is void and we will not, reimburse you or anyone else for that lose."

Insurance carriers took this hint and altered the standard policy language. Consequently, the 1990 ISO form HO 003 policy reads as follows:

"'Insured' means you and residents of your household who are: a) your relatives; or b) other persons under the age of 21 and in the care of any person named above."

Further, the standard language states, "This policy is void in any case of fraud by you as it relates to this coverage at any time. It is also void if you or any other insured, at any time, intentionally conceals or misrepresents a material fact concerning: a) this policy; b) the covered property; c) our interest in the covered property; or d) a claim under this policy."

A MATTER OF CONTRACT INTERPRETATION

Responding to this language, courts began resolving the issue of the rights of innocent co-insureds as a matter of contract interpretation without reference to public policy considerations.

For instance, in *Vance v. Pekin Insurance Co.,* 457 N.W.2d 589 (1990) the Iowa Supreme Court faced the first impression issue of "whether arson by one co-insured spouse bars the innocent co-insured spouse from recovering under an insurance policy."

The court adopted the "best reasoned rule," which posits that "recovery depends---not on property rationales or marital relationships---but on a contract analysis of the insurance policy provisions."

The court stated that "the exclusion here clearly and unequivocally says that a loss caused by an intentional act of an insured party bars coverage. Donald Vance was clearly an insured so his arson bars recovery by any insured under the policy and than includes Susan Vance.

"We think a reasonable person in Susan's position would read the policy that way."

In recent years several jurisdictions have responded to the change in policy language.

Still seeking to do equity, they have sought to reform the insurance policy to get around the all encompassing "any insured" language.

Under this approach, courts look at the statutorily mandated basic fire-insurance policy language and then change the policies at issue to read "the insured" as opposed to "any" or "an insured", so as to comport with the statute.

This "reformation" approach is well-illustrated by a 1995 decision of the Georgia Court of Appeals in *Fireman's Fund Insurance Co. v. Dean,* 441 S.E.2d 436.

Given the existence of conflicting rules of law on innocent co-insureds, the ground is fertile for practitioners to advance arguments favoring or rejecting recovery for an innocent co-insured despite the case authority that exists in any particular jurisdiction.

Moreover, even a slight legislative change governing standard insurance-policy language can have profound consequences on the jurisprudence governing the innocent co-insured doctrine.

2. HOW COURTS ADDRESSED THE PROBLEM OF AN INNOCENT CO-INSURED BEFORE THE 1970'S.

a. Era of "Joint Obligations"

Prior to the 1970's practitioners did not have to address an "innocent co-insured" problem because courts routinely denied recovery to any insureds due to the existence of "joint obligations" language in the policy at issue. In these decisions, courts determined that the obligations of all insureds to refrain from fraud or any other conduct meant that violations of policy conditions by one insured resulted in a denial of proceeds to all insureds, even if the others were completely innocent of wrongdoing or any other violations in the policy of insurance.

Several early cases illustrate this "joint obligations" doctrine. In *Klemens v. Badger Mutual Insurance Co. of Milwaukee,* (2) the husband co-insured "intentionally set fire to the insured property and a loss resulted." (3) When the innocent wife, who was named on the policy, sought to recover proceeds, the Court denied recovery siting to the "joint obligations" language in the policy. The Court held: (4)

What is material is the fact that the insurance was written in the joint names of Mr. And Mrs. Klemens and they have a joint obligation to comply with the terms of the policy.

In reaching this holding the Court relied upon its prior precedent in *Bellman v. Home Insurance Co.* (5) in which the Court held that:

Where the property is jointly owned, or there is a joint obligation on the part of the owners to save and preserve the property, an innocent owner cannot recover on the policy where a co-owner willfully set the property on fire. (6)

Similar results were reached by the highest court in Massachusetts in *Kosior v. Continental Insurance Co.* (7) As was true in *Klemens*, the plaintiff wife in *Kosior* was in no way concerned or involved in the setting of the fires or in any attempt to defraud the defendants." (8) In affirming the lower court denial of recovery of this innocent spouse, the Court acknowledged that there were decisions "where an innocent husband or wife, who is the sole owner of the property insured in his or her name, ahs been permitted to recover on the policy, where the buildings have been destroyed by the incendiarism of the spouse. [Citations omitted.}" (9) However, the Court distinguished these cases by stating that "Cases dealing with policies which by their express terms permit of a severance of interest of the insured are not on

point." (10) Despite plaintiff's equitable arguments in support of recover, the Court determined that the "joint obligations" language mandated a denial of recovery. As the Court held: (11)

We think the policy in question was joint and that the plaintiff cannot recover. The act of her husband in burning the insured buildings was an act of the "insured," and as such it was a fraud upon the defendants which rendered the policies void in accordance with their terms.

The "joint obligations" doctrine remained the dominant rule of law as recently as 1979. A good illustration of the more recent "joint obligations" cases can be found in *Rockingham Mutual Insurance co. v. Hummel.* (12) The facts in *Rockingham* were strikingly similar to those in *Klemens* and *Kosior*. Once again, "a husband intentionally burned a dwelling jointly owned and insured by both husband and wife." (13) While the policy at issue referred to "the insured" in the policy, this language was explicitly intended to include spouses and other relatives. As the Court explained: "The contract's "General Conditions" provided, however, the "unqualified word 'insured' includes

1. the Named Insured, and
2. if residents of his household, his spouse, the relatives of either." (14)

Treating this case as one of first impression, the Court looked to other jurisdictions to decide whether "an innocent spouse is entitled to a share of the fire insurance proceeds payable for the destruction of real property held by the husband and wife as tenants by the entirety and insured jointly, when the loss results form the wrongful and fraudulent act of the other spouse." (15) Since the Court determined that the form of the insurance contract was joint, it held that "under the policy and as the 'insured', each spouse had the joint obligation to use all reasonable mans to save and preserve the property." (16)

b. **Public Policy Arguments Against Coverage for an Innocent Co-insured.**

In addition to this joint obligation theory, in denying recovery to an innocent co-insured, courts also have cited various alleged public policy reasons for their decisions. For instance, in *Short v. Oklahoma Farmers Union Insurance Co.* (17) the Supreme Court of Oklahoma, in denying recovery to an innocent spouse, pointed to the grave policy concerns about arson. In the Court's words: (18)

Arson is a crime whose threat to the public is general. The burning of a building not only threatens the financial well being of its owner but endangers the public at large regardless of the structure's current profit position in the marketplace. Arson has been said to be difficult to detect because the intended result is the destruction of the premises that is evidence of the crime itself. In today's increasingly urban environment arson is a continuing threat to adjoining landowners, the public at large and the municipality which must combat such conflagrations. To allow recovery on an insurance contract where the arsonist has been proven to be a joint

insured would allow funds to be acquired by the entity of which the arsonist is a member and is flatly against public policy.

As recently as 1988, courts had no difficulty determining that it is not contrary to public policy to deny recovery to an innocent co-insured. In *Amick v. State Farm Fire and Casualty Co.* (19) the Court upheld a defense verdict, which resulted in the denial of proceeds to an elderly insured's estate. The appellant contended that the following jury instruction merited a reversal:

"an innocent co-insured could not recover if any other insured had committed fraud or misrepresented any material fact." (20) In deciding the appeal, the Court of Appeals framed the issue as "whether barring recovery by an innocent co-insured when another commits fraud is against public policy." (21) In concluding that no violation of public policy had occurred, the *Amick*Court explained, "Several jurisdictions have held similar policy provisions are not against public policy because insurance providers should be able to refuse to bear the risk of loss to property intentionally caused by an insured." (22)

3. DEVELOPMENT OF THE INNOCENT CO-INSURED DOCTINE.

a. **Era of "Several Liability"**

In the early 1980's, the majority rule with respect to innocent co-insureds shifted to favor recovery for innocent co-insured. In these decisions, courts emphasized that the insurance contracts created several, as opposed to joint obligations which enabled the innocent co-insured to recover proceeds under a policy. (29) Consequently the acts of one insured would not automatically void recovery under the policy at issue for another innocent co-insureds.

The doctrine of "several liability" is well illustrated in *Lovell v. Rowan Mutual Fire Insurance Co.,* (24) in which the Supreme court of North Carolina decided an issue of first impression as to "whether the innocent wife can recover under an insurance policy issued to her husband, which insures property owned by them as tenants by the entirety when the loss by fire resulted from the intentional burning of the property by the husband." (25) The Court in *Lovell* reversed the lower Court of appeals decision, which denied recovery on the basis that the property had been held as a tenancy by the entirety. The Court explained that under this reasoning "since under real property law the interest of husband and wife are nonseparable, one spouse cannot recover for damages to the entirety property intentionally occasioned by the act of the other." (26)

In reversing the lower court decision, the Court in *Lovell* was persuaded by the reasoning in *Howell v. Ohio Casualty Insurance Company.* (27) AS the Court in *Lovell* explained;

The *Howell* court viewed those contract rights as several, not joint, personal property, able to be possessed separately and individually by each spouse. 124 N.J.Super. at 419, 307 A.2d at 145. It follows therefore that the interest of one spouse could not be subject to divestment or forfeiture by the unilateral actions of the other. (28)

The *Lovell* Court also rejected the rationale that a tenancy by the entirety mandates that the interests in the policy are joint, rather than several. As the Court reasoned:

We see nothing in the analysis of the *Hummel* court which persuades us to adopt the result reached in that case. The mere fact that property is held by the entirety should not, standing alone, bar the innocent spouse's recovery. "The unity of a person of husband and wife [expressed through the tenancy by the entirety] gives no clue to the relationship that ought properly to obtain between the owners of the proceeds of insurance". *Hawthorne v. Hawthorne, supra,* 242 N.Y.S.2d at 51, 192 N.E.2d at 21. *The insurance policy on the entirety property is a personal contract, appertaining to the parties to the contract and not to the thing which is subject to the risk insured against.* (29)

The holding in *Lovell* was recently challenged in a federal action, *Nationwide Mutual Insurance Co. v. Lisenby,* (30) in this declaratory judgement action, the District Court in *Nationwide* determined that:

With respect to the Lisenby case, North Carolina through *Lovell* has set a clear direction for considering the interest of an innocent spouse. Unless there is a clear and unambiguous contractual exclusion of the interest of the innocent spouse, the North Carolina law of the several property interests dictates the results that should be reached. In the instant case, the policy language ["an insured"] does not clearly exclude the interest of the innocent spouse and is therefore ambiguous.

New York courts also have recognized the innocent co-insured doctrine. In *Reed v. Federal Insurance Co.,* (31) the Court looked favorably upon the decisions such as *Howell v. Ohio Casualty Insurance Co.,* (32) which supported the argument that obligations were several. As the Court in *Reed* noted "as a matter of fairness and equity, concluding that the independent wrongdoing of one insured should not bar recovery as to the co-insured under a policy that names and is intended to protect her." (33)

b. **Public Policy Arguments Favoring Coverage.**

During the shift to the now majority rule, which favors recovery by innocent co-insureds, courts have reversed several policy rationales opposed to this doctrine, such as the one enunciated above in *Short, supra.* For instance in *Howell v. Ohio Casualty Insurance Company,* (34) the Appellate Division rejected the notion that allowing recovery to the non-arsonist would be harmful as a matter of public policy. As the Court explained, "[t]he significant factor is that the responsibility or liability for the fraud---here, the arson, is several rather than joint, and the husband's fraud cannot be attributed or imputed to he wife who is not implicated herein." (35) This reversal of the public policy rationale is also illustrated in *Error v. Western Home Insurance Co.,* (36) in which the Supreme Court of Utah held that "[t]he responsibility or liability for the fraud (arson) in this case is several and separate and not joint and the fraud of Ray Error can not [sic] be attributed to Plaintiff the innocent spouse. [Citations omitted.]" (37) In reaching this holding, the Court in *Error* was persuaded by the policy rationale that "focuses

upon the responsibility for the fraudulent act," as opposed to property interests or obligations under the insurance policy." (38) The Court explained this rationale as length as follows:

When the responsibility or liability for the fraud is separate rather than joint, an insured's fraud cannot be attributed or imputed toan innocent co-insured. As noted by the Wisconsin Supreme Court when it adopted the same rationale:

Courts adopting the modern rule recognize the need to deter arsonists but also recognize the fundamental principle of individual responsibly for wrongdoing. A legal principle denying coverage to an innocent party implicitly imputes the guilt of the arsonist to the innocent insured. *An absolute bar to recovery by an innocent insured is particularly harsh in a case in which the arson appears to be retribution against the innocent insured. Having lost the property, the innocent insured is victimized once again by the denial of the proceeds forthcoming under the fire insurance policy. Focusing on the nature of the individual responsibility for the wrongdoing, we hold that the obligations of the insurer under the insurance policy in this case should be considered several as to each person insured.* [Emphasis added.] (30

Following the rationale in *Hedtcke v. Sentry Ins. Co.,* (40) the Court in *Error* upheld the lower court determination that "liability for fraud - arson - was separate rather than joint and that the fraud could not be attributed to Julie, the innocent co-insured." (41) According to the Court in *Error,* "[I]t follows, then, that Ray's fraud does not void the policy as to Julie." (42)

Similar public policy considerations were expressed by the Supreme Court of Kentucky as recently as 1994 in *American Hardware Mutual Insurance v. Mitchell*. (43) In *Mitchell,* the Court determined that the innocent co-insured question was one of first impression. After evaluating leading decisions on this issue, the Court held that "An insurance policy which covers the interests of more than one insured should be considered several or separate as to each person insured." (44) In reaching this decision, the Court explicitly rejected any public policy arguments against the doctrine on the basis of ownership of land and or marital status. As the Court explained, "the proper rule should be that an innocent spouse should not be denied coverage under any policy of insurance simply because of the martial relationship." (45)

4. **THE INSURANCE DEFENSE BAR'S REACTION.**

The Problem of the Properly Drafted Exclusion

It tuned out that the "era of several liability" was short-lived. Within a few years, courts shifted the focus to issues in the drafting of insurance contracts, rather than stressing rules of several liability or public policy rationales, which favored the innocent c0-insured. This shift in analysis also sent a strong and undoubtedly welcome signal to insurers that properly drafted policies could eliminate recovery for innocent co-insureds. (46)

On example of the "contract interpretation approach" which dates from the late 1970's, is the Supreme Court of Delaware's decision in *Steigler v. Insurance Company of North America.* (47) The *Steigler*Court expressly rejected the decisions grounded upon land titles or property rights. As the court stated; (48)

We are not called upon to review the law applicable to the real property interests of the Steiglers, and we have no intention of doing so. In our view, the case is fundamentally a contract dispute between an insurance company and a policy holder and so we look to the law governing that kind of problem rather than to the law governing land titles.

The *Steigler* Court subsequently determined that "We have regarded the rights of the husband and wife as separate under the contract and, so viewed, both logic and justice require that the amount recoverable be likewise allocated." (49)

As was pointed out in the article by Karp, "Update on Rights of the Innocent Co-Insured," cited *supra,* one Court, in *American Economy Insurance Co. v. Liggett* (50) went as far as to provide the insurers with model language, which, if adopted, would avoid the entire innocent co-insured issue. As the Court advised that:

It should be noted at the outset that there is no reason why this implied exception [to deny recovery to innocent co-insured] cannot be made an express exception in the policy. It could be written in bold letters and red ink across the face of the policy:

IF YOU OR ANY PERSON INSURED BY THIS POLICY DELIBERATELY CAUSES A LOSS TO PROPERTY INSURED THEN THIS POLICY IS VOID AND WE WILL NOT REIMBUSE YOU OR ANYONE ELSE FOR THAT LOSS.51)

Not surprisingly, insurance carriers took this hint and altered the standard policy language. Consequently, the 1990 ISO form HO 00 03 policy reads as follows:

"Insured" means you and residents of your household who are:

a. Your relatives; or
b. Other persons under the age of 21 and in the care of any person named above.

Concealment, Misrepresentation or Fraud. This policy is void in any case of fraud by you as it relates to this Coverage at any time. It is also void if you or any other insured, at any time, intentionally conceals or misrepresents a material fact concerning:

a. This Policy;
b. The Covered Property;
c. Your interest in the Covered Property; or
d. A claim under this Policy.

5. COURTS' RESPONSE TO THIS REACTION

Question of Contract Interpretation.

Responding to this change in language in more recent years, courts have now been resolving the issue of the right so the innocent co-insured as simply being a matter of contract interpretation, without any reference to public policy considerations. For instance, in *Vance v. Pekin Insurance Co.,* (52) the Court faced the issue of first impression of "whether arson by one co-insured spouse bars the innocent co-insured spouse from recovering under an insurance policy." The Court, after evaluating competing rules of law, adopted the "best reasoned rule," which posits that "recovery depends - no on property rationales or marital relationships - but on a contract analysis of the insurance policy provisions. (53) The Court went on to hold that:

We likewise conclude the exclusion here clearly and unequivocally says that a loss caused by an intentional acct of *any insured party* bar coverage. Donald Vance was clearly *an insured* so his arson bars recovery by *any insured* under the policy and that includes Susan Vance. We think a reasonable person in Susan's position would read the policy that way." [Emphasis added.] (54)

In summing up its decision, the Court noted that "Our answer [to the issue raised on appeal] does not depend upon how the insured property is held or upon whether the co-insureds are married. Rather we apply a contract analysis to determine the meaning of the exclusion." (55)

6. NEW TRENDS.

a. Reformation Approach

In recent years, several jurisdictions, seeking to do equity, have taken a novel reformation approach to policies, which by their clear language deny recovery to any co-insured. Under this approach, courts will actually change the policies at issue to read "the insured" as opposed to "any" or "an insured", which if allowed to stand, would deny coverage for an innocent co-insured. (56)

This "reformation" approach is well illustrated in *Fireman's Fund Insurance Co. v. Dean,* (57) In *Dean,* "Joyce Kidwell was tried and convicted for the murder of Thomas Kidwell [the innocent co-insured]." (58) When the Estate of Thomas Kidwell tried to recover proceeds defendant refused to pay proceeds on the grounds of several contractual defenses, including a fraud and concealment clause. Under this provision, the policy provided as follows:

[t]he entire policy will be void if, whether before or after a loss, *an insured* has:

a. intentionally concealed or misrepresented nay material fact or circumstance;
b. engaged in fraudulent conduct; or
c. made false statements; relating to this insurance. [Emphasis original.] (59)

Faced with this provision, the Court determined that "This language is not ambiguous. To the contrary, it is clear that the policy is voided if 'an insured' [in this case Mrs. Kidwell] conceals material facts." (6)

In response to this clear language, Mr. Kidwell's estate asserted that the Court should reform the policy to conform to the standard fire policy set fort in OCGA Section 33-32-1(a), which imposed several, as opposed to joint, obligations, e.g., "the insured" as opposed to "an" or "any insured." The Court of Appeals acknowledged that a number of jurisdictions have adopted the reformation approach when policy language which imposed joint obligations conflicted with sate statutory several obligations dictated by the use of the phrase "the insured." It also noted that in the leading Supreme Court decision on innocent co-insureds, *Richards, supra,* the use of 'the insured' in the fraud provision Standard Fire Policy must be construed to provide several obligations as to each co-insured." (61) In light of these considerations, the Court in *Dean* held that: (62)

The minimum coverage allowed in Georgia creates several obligations as to each co-insured and Fireman's Fund's insurance contract must be reformed to conform with the minimum coverage provided in the Standard Fire Policy.

As noted in *Dean*, other jurisdictions have adopted the reformation approach when the policies at issue would otherwise deny recovery to innocent co-insureds by their express language. (63) In *Dolcy v. Rhode Island Joint Reinsurance Ass'n,* (64) the Supreme Court of Rhode Island faced the issue of first impression as to "Whether an innocent, noncollusive spouse may recover under a fire insurance policy issued to a husband and wife, on property held by tenants by the entirety, when the other spouse intentionally sets fire to the property." (65) The Court acknowledged that several jurisdictions will reform policies imposing joint obligations when state statutory minimums mandate several obligations on the insureds. In a footnote, the Supreme Court of Rhode Island declined to apply the reformation approach because "the insurer is denying coverage based on a nonstatutory clause entitled 'Intentional Loss.'" (66) The court added that "[t]he plaintiff does not argue that this clause is 'inconsistent' with the statutorily prescribed clauses." (67) In light of this analysis, had the clause at issue conflicted with state statutory minimum safeguards for insureds, there is no doubt that the *Dolcy* Court would have ruled in favor of the insureds.

Another good example of the "reformation" approach is the decision in *Spence v. Allstate Insurance Co.,* (68) as reported by Christopher L. Troy, Esq., in the Newsletter of the Property Insurance Law Committee, of the Tort and Insurance Practice Section of the American Bar Association in the Summer of 1995. As Mr. Troy explained, "At the intermediate appellate level,

the verdict in favor of Mr. Spence [the innocent co-insured] was reversed because the trial court had misapplied the innocent co-insured doctrine." (69) This decision, however, was ultimately reversed by the Tennessee Supreme Court, which concluded that "the amendment [Tennessee Amendatory Endorsement] nullified the 'joint obligations' component of the insuring agreement in the context of intentional or criminal acts of an insured and represented a 'complete reversal of Allstate's position toward innocent co-insureds set forth in the main policy.'" (70)

b. **Placing the Burden of Proof on the Innocent Co-insured to Prove His Innocence in Order to Recover Proceeds Under the Insurance Policy.**

In at least one instance, courts have placed the burden of proof on an innocent co-insured to prove his "innocence" in order to recover proceeds under the policy of insurance. In *Richards v. Hanover Insurance Co.,* (71) the Supreme Court of Georgia determined that the policy at issue "was silent as to whether the Richards' rights and obligations under the policy are to be considered joint or several." (72) In light of this ambiguity, the Supreme Court determined that "we interpret the contract in favor of coverage and against forfeiture, and conclude that Mrs. Richards' obligation to save and preserve the insured property was several and not joint." (73) The Court held that "Mrs. Richards is not automatically barred from recovery under her homeowners policy by her husband's alleged act of arson." (74)

After reaching the above holding, the *Richards* Court provided the loser court with specific instructions as to the burdens of proof on arson and the innocence of the co-insured. The Court directed the following:

If, on retrial, the insurance company again asserts the "neglect provision" exclusion, it has the initial burden of proving that one of the co-insureds breached that provision by intentionally setting fire to the dwelling. *See Welch v. Professional Ins. Corp.,* 140 Ga. App. 336, 231 S.E.2d 103 (1976). *Once this is shown, however, the burden shifts to Mrs. Richards (as the co-insured claiming coverage under the policy) to prove her non-participation in the alleged wrongful conduct.* [Emphasis added.] (75)

7. **CONCLUSION**

It is clear that jurisdictions have taken many different approaches to the problem of the innocent co-insured utilizing principles of contract law, legislation, property rights or public policy. Due to the existence of conflicting rules of law on this issue, the ground is fertile for practitioners to advance arguments favoring or rejecting recovery for the innocent co-insured, despite the case authority that exists in any particular jurisdiction. In addition, it is evident that event he slightest legislative change governing the standard insurance policy language can have profound consequences on the jurisprudence governing this Innocent Co-Insured doctrine.

ENDNOTES:

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1. First party insurance litigation generally refers to legal disputes between a policyholder and his insurance company as to coverage for damages to the policyholder's property. Other third-parties may also be involved in these disputes, including named mortgagees and loss payees who have rights to proceeds in a policy of insurance. This paper will focus on individual policyholders, as opposed to partnerships or other businesses, which also face innocent co-insured problems. For an analysis of this doctrine as it affects partnerships, the reader is referred to Karp, Marvin L., "Update on Rights of Innocent Co-Insured," *Property Insurance Coverage Disputes Issues and Techniques for Managing First-Party Claims,* Tort and Insurance Practice Section American Bar Association, Chicago 1992. This article also provides a thorough historical survey of the innocent co-insured doctrine, which was helpful to the authors of this article.
2. 8 Wis. 2d 505, 99 N.W.2d 865 (1959) which was subsequently overruled by *Hedtke v. Sentry Insurance Co.,* 109 Wis. 2d 461, 326 N.W.2d 727 (1982).
3. *Id.* at 866
4. *Id*. at 866.
5. 178 Wis. 349, 189 N.W. 1028 (1922).
6. *Id.* at 867
7. 13 N.E.2d 423 (Mass. 1938).
8. *Id.* at 424
9. *Id.* at 425
10. *Id.* at 425
11. *Id.* at 425.
12. 250 S.E.2d 774 (Va. 1979).
13. *Id.* at 775.
14. *Id.* at 775.
15. *Id.* at 775
16. *Id.* at 776
17. 619 P.2d 588 (Okla. 1980).
18. *Id.* at 590.
19. 862 F.2d 704 (8th Cir. 1988) (applying Missouri Law).
20. *Id.* at 705
21. *Id.* at 705
22. *Id.* at 706. In string-cite fashion, the court in *Amick* cited the following cases as evidence that no public policy was violated: *Spezialetti v. Pacific Employers Insurance Co.,* 759 F.2d 1139, 1142 (3rd Cir. 1985) (Court upholds policy language that bars 'any insured' from recovery, 'any insured' meaning any person covered under the insurance policy); *Bryant v. Allstate Insurance Co.,* 592 F.Supp. 39, 42 (E.D. Ky. 1984) ("The court sees no injustice in requiring the company to pay only those risks it insured, where, as here, the coverages are spelled out in clear and unambiguous language"); *Bryan v. Employers National Insurance,* 294 Ark. 219, 742 S.W.2d 557, 558 (1988) (an innocent

co-partner could not recover under a policy where arson was committed by a partner because the language of the policy specifically barred recovery); *West Bend Mutual Insurance co. V. Salemi,* 158 Ill. App. 3d, 241, 110 Ill. Dec. 608, 511 N.Ee.2d 785 (1987) (Innocent co-insured not barred from recovery in the absence of contractual language which clearly expressed that intention); *Hogs Unlimited v. Farm Bureau Mutual Insurance co.,* 401 N.W.2d 381 Minn. 1987) (Unless forbidden by insurance contract, innocent insured partners could recover their proportionate interest despite a partner's international destruction); *Krupp v. Aetna Life & Casualty Co.,* 103 A.D.2d 252, 479 N.Y.S.2d 991 (1984) (allows recovery by innocent co-insured in the absence of specific language excluding coverage). *Id.* at 706.

23. *See, e.*g., *Hosey v. Seibels Bruce Group S.C. Ins. Co.,* 363 So.2d 751 (Ala. 1978), *Economy Fire and Gas. Co. v. Warren,* 71 Ill. App. 3d 625, 28 Ill. Dec.194, 390 N.E.2d 361 (1979), *Hildebrand v. Holyoke Mutual Fire Insurance Co.,* 386 A.2d 329 (Me. 1978).
24. 274 S.E.2d 170 (N.C. 1981).
25. *Id.* at 171
26. *Id.* at 173.
27. 124 N.J.Super 414, 307 A.2d 142 (1973), *aff'd* 130 N.J. Super 350, 327 A.2d 240 (App. Div. 1974).
28. *Id.* at 172
29. 43 Am. Jur.2d, Insurance, Section 194. [Emphasis added.]
30. United States District Court for the Middle District of North Carolina, Rockingham Division 3:9CV721 (Decided, Filed and Entered on April 17, 1995), which was reported in Mealy's *Litigation Reports,* Insurance Fraud, Volume 2, #8, 5/24/95.
31. 71 N.Y.2d 581, 528 N.Y.S.2d 355, 523 N.E.2d 480 (1988).
32. 130 N.J. Super 350, 327, A.2d 240 (1974).
33. *Id.* at 358. *But see, Krupp v. Aetna Life & Casualty Co.,* 103 App. Div. 252, 479 N.Y.S.2d 492 (1984) (under modern approach, Courts generally look to the policy language and use additional rules of contract construction to determine whether the rights of the insured are joint or several).
34. 130 N.J. Super 350, 327 A.2d 240 (App. Div. 1974).
35. *Id.* at 242.
36. 762 P.2d 1077 (Utah 1988).
37. *Id.* at 1079-1080.
38. *Id.* at 1080.
39. *Id.* at 1081.
40. 109 Wis.2d 461, 326 N.W.2d 717 (1982).
41. *Id.* at 1081.
42. *Id.* at 1081.
43. 870 S.W.2d 783 (Ky. 1993).
44. *Id.* at 785.
45. *Id.* at 785.
46. *See* M. Karp "Update or Rights of the Innocent Co-Insured."
47. *384 A.2d 398 (Del. 1978).*
48. Id. *at 401*

49. *Id. at 402*
50. 426 N.E.2d 136 (Ind. Ct. App. 1981).
51. *Id.* at 141.
52. 457 N.W.2d 589, 591 (Iowa 1990).
53. M. Karp, *Innocent Co-insured Spouse,* 17 Val.U.L.Rev. at 867-68. *See, Auto-Owners Ins. Co.,* 366 So.2d at 124." *Id.* at 592.
54. *Id.* at 593.
55. Id. at 593. *See also, Dolcy v. Rhode Island Joint Reinsurance Ass'n,* 589 A.2d 313, 314 (R.I. 1991); *Reitzner v. State Farm Fire and Casualty Co., Ins.,* 510 N.W.2d 20, 24 (Minn. Ct. App. 1993).
56. *See,* Zuck, Jeremy E., and Bolduan, Lindham, "What are the Courts Doing? The latest opinions and trends in Insurance Fraud Cases," The Defense Research Institute, Inc. Chicago: 1994, for a detailed analysis of reformation cases involving innocent co-insureds.
57. 441 S.E.2d 436 (Ga. App. 1995).
58. *Id.* at 437
59. *Id.* at 437-438.
60. *Id.* at 438.
61. *Id.* at 438.
62. *Id.* at 438.
63. *See, e.g., Borman v. State Farm Fire, Etc., co.,* 198 Mich. App. 675, 499 N.W.2d 419, 421 (1993); *FBS Mfg. Corp. v. State Farm Fire, etc. Co.,* 833 F. Supp. 688, 695 (N.D. Ill. 1993); and *Ponder v. Allstate Ins. Co.,* 729 F.Supp. 60 (E.D. Mich. 1990).
64. 589 A.2d 313 (R.I. 1991).
65. *Id.* at 313.
66. *See VanMarter v. Royal Indemnity Co.,* 556 A.2d 41, 45 (R.I. 1989) (where insurance policies do not conform to statutory requirements, the language of the policy will be disregarded and the contract will be construed to conform to the statute).
67. *See Osborne,* 91 R.I. at 473, 165 A.2d at 727. *Id.* at 315.
68. 883 S.W.2d 586 (Tenn. 1994).
69. *Id.,* at p. 18.
70. *Id.* at 19. *See also, Ponder v. Allstate Ins. Co.,* 729 F.Supp. 60 (E.D. Mich. 1990) for another example of a "reformation" approach.
71. 250 Ga. 613, 299 S.E.2d 561 (1983).
72. *Id.* at 563.
73. *Id.* at 564.
74. *Id.* at 564.
75. *Id.* at 564.

APPENDIX

REPRESENTATIVE SAMPE OF PLEADING FEDERAL AND STATE DECISIONS ON THE INNOCENT CO-INSURED DOCTRINE.

The State-by-State list below does not reflect all of the leading decisions with respect to the innocent co-insured doctrine. It is only intended to guide the practitioner to several important innocent co-insured decisions. To avoid duplication, we have not commented upon decisions listed below, which were referred to in the body of the paper. These decisions are marked with an asterisk.

a**. Alabama**

Hosey v. Seibels Bruce Group S.C. Ins. Co., 363 So. 2d 751 (Ala. 1978).

b**. Alaska**

Atlas Assurance Company of America v. Mistic, 822 P.2d 897 (Alaska 1991) The Supreme Court of Alaska, after evaluating the recent trends in innocent co-insured jurisprudence, determined that "where policy language clearly precludes recovery_____of the co-insureds wrongfully cause _____loss, the courts will deny recovery to the "innocent co-insured." In *Mistic*, however, Atlas [the insurer] "concedes that it is not clear from the language of the policy whether Mistic is precluded from recovery," *Id.* at 899. Consequently, the Court held that "under the modern laws, Mistic's rights under the contract of insurance are considered severable and _____is entitled to recover." *Id.* at 899.

c**. Arizona**

d**. Arkansas**

Noland v. Farmers Ins. Co., Inc., 319 Ark. 449, 892 S.W.2d 271 (Ark. 1995). The Supreme Court of Arkansas confirmed that it would adhere to its prior holding in *Bryan v. Employers Nat'l Ins. Corp.* 294 Ark. 219, 742 S.W.2d 557 (1988), that "whether an innocent co-insured, regardless of the relationship, is able to recover under an insurance policy is dependent upon the language of the policy." *Id.* at 272. The provision at issue provided as follows:

Intentional Acts. If any insured directly causes or arranges for a loss of covered property in order to obtain insurance benefits, this policy is void.

The Court determined that the policy terms explicitly excluded payment of insurance benefits to "any other insured" for the act of any insured "causing or arranging for a loss." It then held that "Diarl Noland, as an 'other insured,' is

precluded from receiving any benefit under these clear terms of the policy." *Id.* at 273.

e. **California**
f. **Colorado**

Chacon V. American Family Mut. Ins. Co., 788 P.2d 748 (Colo. 1990).

g. **Connecticut**

McCauley Enterprises v. New Hampshire Ins. Co., 716 F.Supp. 718 (D. Conn. 1989)(applying Connecticut law) The Court first determined that "whether an individual co-insured can recover depends upon whether the obligations and interests of the co-insured under the insurance contract are considered to be joint or several." *Id.* at 720. The Court determined that the innocent co-insured could recover for real property as the policy language referred to "the insured." It denied recovery for personal property because "the language 'any insured' has been consistently interpreted as expressing a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured." *Id.* at 721.

h. **Delaware**

**Steigler v. Insurance Co. of North America,* 384 A.2d 398 (Del. 1978).

i**. Florida**

j. Georgia

**Fireman's Fund Ins. Co. v. Dean,* 441 S.E.2d 436 (Ga. Ct. App. 1995).

**Richards v. Hanover Ins. Co.,* 256 Ga. 613, 299 S.E.2d 561 (1983).

k. Hawaii

l. Idaho

m. Illinois

***** *Economy Fire and Cas. Co. v. Warren,* 71 Ill. App. 3d 625, 28 Ill. Dec. 194, 390 N.E.2d 361 (1979).

n. Indiana

*_American Economy Ins. Co. v. Liggett,_ 426 N.E.2d 136 (Ind. Ct. app. 1981).

o. Iowa

***Vance v. Pekin Ins. Co.,** 457 N.W.2d 589 (Iowa 1990).

p. Kansas

Weathers v. American Family Mut. Ins. Co., 793 F.Supp. 1002, 1016 (D. Kansas 1992) ("The modern approach in determining whether an innocent co-insured may recover under a policy of insurance, often referred to as the 'best reasoned-rule' requires a court to contractually analyze the provisions of the applicable insurance policy. [Citations omitted.] If the policy language is ambiguous, such language is construed against the insurer. _Id. Although the Kansas courts have not had an opportunity in recent years to rule on the matter, the court believes that the Kansas courts would adopt the 'best-reasoned rule.' See. Millers Nat. Ins. Co. v. Bunds,_ 158 Kan. 662, 149 P.2d 350 (1944) (holding that where the interests of the co-insureds are regarded as divisible or separable, an innocent co-insured is not precluded from recovering from a fire insurance policy even though one of the other co-insured intentionally burned the covered property.") _Id._ at 1016. [Emphasis added.] _Turley v. State Farm,_ 1990 ("As State Farm correctly notes, Kansas courts have not yet decided whether fraudulent misconduct by one insured in violation of an insurance policy provision voids the policy as to an innocent co-insured who has an interest in the property. Other jurisdictions have split on this issue relevant considerations being the characterization of the co-insured's interest as either joint or several, the construction of any applicable fraud provision of the policy and the court's interpretation of public policy concerns.")

q. Kentucky

*American Hardware Mut. Ins. V. Mitchell, 870 S.W.2d 783 (Ky. 1993).

r. Louisiana

Travelers Ins. Co. v. Blanchard, 431 So.2d 913 (La. Ct. App. 1983) (The Court upheld an exclusion in a homeowners policy because son, who committed the theft, fell within the definition of "an insured." As the Court noted, "there is not question---that the minor, John Blanchard, was an insured under this policy when he committed these intentional acts of theft." _Id._ at 914.

s. Maine

*_Hildebrand v. Holyoke Mutual Fire Ins. Co.,_ 386 A.2d 329 (Me. 1978).

t. Maryland

St. Paul Fire and Marine Ins. Co. v. Molloy, 291 Md. 139, 433 A.2d 1135 (Ct.App. 1981) (Deciding a case of first impression, the Maryland Appeals Court determined that "whether an innocent co-insured can recover under an insurance contract, depends primarily upon whether the parties intended, and thus whether the contract contemplates, the obligations of the co-insureds to be joint or several." *Id.*at 1140. Interpreting the contract language at issue, the Court determined that "nowhere in the policy is the precise nature of either the named insured's interest in the insurance contract or the insured's obligations under that contract specifically defined to be either joint or several." *Id.* at 1142. In light of these determinations, the Appeals Court upheld the jury instructions by holding that "the insurance contract provides coverage for each of the name insured's interests separately, and that the alleged incendiary act of Charles does not defeat liability to Diane for her share of the loss." *Id.* at 1142.)

u. Massachusetts

**Kosior v. Continental Ins. Co.,* 13 N.E.2d 423 (Mass. 1938).

v. Michigan

**Ponder v. Allstate Ins. Co.,* 729 F.Supp. 60 (E.D. Mich. 1990).

w. Minnesota

**Reitzner v. State Farm Fire and Casualty Co. Inc.,* 580 N.W.2d 20 (Minn. Ct. App. 1993).

x. Mississippi

Hall v. State Farm Fire & Casualty Co., 937 F.2d 210 (5th Cir. 1991) (applying Mississippi law). The Court of Appeals refused to find any error in the trial judge's interpretation of the "policy condition on intentional acts to exclude coverage for intentional damage caused by her husband [the guilty co-insured]." *Id.* at 213. The actual clause reads as follows:

14. Intentional Acts. If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss.

Id. at 213

The Court of Appeals found no ambiguity in the above condition. As the Court held, "the policy before us is not ambiguous. The terms 'you' and 'insured' are clearly

defined to include a resident spouse. Wayne Hall is that resident spouse." *Id.* at 214.

y. Missouri

Amick v. State Farm Fire and Cas. Co., 862 F.2d 704 (8th Cir. 1988).

z. Montana

Woodhouse v. Farmers Union Mut. Ins. Co., 785 P.2d 192 (Mont. 1990). After reviewing the history of the innocent co-insured doctrine, the Supreme Court of Montana determined that "this is, plainly and simply, a contract case." *Id.* at 914. It further decided that "the provision clearly and unequivocally states that a loss caused by an intentional act of an insured party bars coverage." *Id.* at 914. In light of these conclusions, the Supreme Court held that "Alan Woodhouse was clearly an insured, and his act was clearly intentional. Accordingly we find that the loss was not covered, and reverse the decision of the District Court." *Id.* at 194.

aa. Nebraska
bb. Nevada
cc. New Hampshire

Hoyt v. New Hampshire Fire Ins. Co., 92 N.H. 242, 29 A.2d 121 (1942).

dd. New Jersey

**Howell v. Ohio Casualty Ins. Co.,* 124 N.J. Super. 414, 307 A.2d 142 (1973), *aff'd*, 130 N.J. Super. 350 327 A.2d 240 (App. Div. 1974).

ee. New Mexico
ff. New York

**Reed v. Federal Ins. Co.,* 71 N.Y.2d 581, 528 N.Y.S.2d 355, 523 N.E.2d 480 (1988). *Krupp v. Aetna Life & Cas. Co.,* 103 App. Div. 2d 252, 479 N.Y.S.2d 992 (1984) (Under modern approach, courts generally look to the policy language and use traditional rules of contract construction to determine whether the rights of the insured are joint or severable.)

gg. North Carolina

**Lovell v. Rowan Mut. Ins. Fire Ins. Co.,* 274 S.E.2d 170 (N.C. 1981).

hh. North Dakota

ii. Ohio

jj. Oklahoma

**Short v. Oklahoma Farmers Union Ins. Co.,* 619 P.2d 588 (Okla. 1980).

kk. Oregon

ll. Pennsylvania

McAllister v. Millville Mut. Ins. Co., 433 Pa. Super. 330, 640 A.2d 1283, 1287 (1994). The lower court in *McAllister* determined that recovery for the innocent co-insured would be required if "the court cannot determine whether the interests and obligations of the named insureds are joint or several. Conversely, if the language of the policy, particularly the exclusionary clause, clearly indicates that the insureds obligations are joint, then the prohibited acts of one insured bars all others from recovering. [Citations omitted]" *Id.* at 1287. The Court in *McAllister* ultimately denied recovery to the innocent co-insureds because "the policy specifically provides that Millville will not pay for loss resulting from neglect by 'any insured' or from the intentional acts of 'an insured.'" *Id.* at 1288. As the Court held, "the use of the terms 'any' and 'an' in the exclusions clearly indicate that the insureds' obligations under the policy' neglect and intentional provision are joint not several. Finding these obligations to be joint, the intentional acts of John D. McAllister bar any recovery by the appellees." *Id.* at 1288.

mm. Rhode Island

**Dolcy v. Rhode Island Joint Reinsurance Ass'n.,* 589 A.2d 313 (R.I. 1991).

nn. South Carolina

McCracken v. Gov't Employees Ins. Co., 284 S.C. 66, 325 S.E.2d 62 (1985). The Supreme Court of South Carolina held that "in the absence of any statute or specific policy language denying coverage to a co-insured for the arson of another co-insured, the innocent co-insured shall be entitled to recover his or her share of the insurance proceeds." *Id.* at 64.

oo. South Dakota

pp. Tennessee

qq. Texas

rr. Utah

**Error v. Western Home Ins. Co.,* 762 P.2d 1077 (Utah 1988).

ss. Vermont

Cooperative Fire Ins. Ass'n of Vermont v. Donina, 137 Vt. 3, 399 A.2d 502 (Vt. 1979) (After evaluating competing approaches to the innocent co-insured problem, e.g., the *Klemens* approach v. *Howell,*the Supreme Court of Vermont held that "Mrs. Donima [the innocent co-insured] cannot be permitted to make a burning, fraudulently done by her co-insured husband, the basis of recovery in this action of the total proceeds of the policy." *Id.* at 502. The Court added that "permitting recovery by the wife of one-half of the proceeds of the policy, as suggested by the appellees, would be to substitute another contract in place of the one made to protect the indivisible ownership by the entireties. *Matyuf v. Phoenix Insurance Co.,* 27 Pa. D. & C.2d 351, 359 (1933)." *Id.* at 502).

tt. Virginia
uu. Washington
vv. West Virginia
ww. Wisconsin

**Hedtke v. SentryIns. Co.,* 109 Wis. 2d 461, 326 N.W.2d 727 (1982). *Taryn E.F. by Gruenwald v. Joshua M.C.,* 178 Wisc. 2d 418, 505 N.W.2d 418,421 (1993). ("Exclusionary clause [sexual molestation] precludes coverage for the insured who committed the excludable acts of *any* insured. Even when read with the severability clause, this exclusion unambiguously operates to preclude coverage to all insureds for liability attributable to the excludable acts of any one of the insured." [Emphasis added.])