

### *Symposium on Jurisprudential Perspectives of Contract*

## The Problem of the Innocent Co-insured Spouse: Three Theories on Recovery

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## THE PROBLEM OF THE INNOCENT CO-INSURED SPOUSE: THREE THEORIES ON RECOVERY

### INTRODUCTION

Arson-for-profit has reached epidemic proportions in this country. Rapidly becoming a lucrative venture, arson-for-profit accounts for a significant amount of all arson. The possibility of an immediate gain through the collection of the insurance proceeds is a primary motivating factor behind for-profit arson.<sup>1</sup> In fact, statistical summaries list insurance policyholders as one of six major types of arsonists.<sup>2</sup> Federal fire officials estimate that fires set to collect insurance proceeds account for as much as one-half of the direct annual cost of arson.<sup>3</sup> In 1980 alone, the value of property damaged by reported arson was \$891 million dollars.<sup>4</sup> Statistics demonstrate that the opportunity to make a quick profit by way of the insurance policy is a motivating force behind arson-for-profit.<sup>5</sup>

Although federal and local law enforcement programs are being revamped and improved,<sup>6</sup> an insurance company's resistance in court

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1. In 1977, it was estimated that arson resulted in 1.5 billion dollars in direct annual costs to insurance companies, and through increased insurance premiums, involves everyone. JOURNAL OF COMMERCE, Oct. 25, 1977, at 10. See also, *Fighting Arson by Removing the Profit Motive*, BUS. WK., May 21, 1979, at 69, stating that the most common type of arson for-profit is a "sell out to the insurance companies."

2. Armstrong, *The All-Consuming Crime*, SATURDAY EVENING POST, March, 1978 at 24. Statistical summaries from insurance companies, fire marshals, and prosecutors list the other five major arsonists as follows: underground operators; pyromaniacs; revenge seekers; vandals; and fires set to cover other crimes. *Id.* See generally Caulfield, *Arson: Can it be Stopped?*, U.S.A. TODAY, July, 1979.

3. *Arson in U.S. Reaches a Crisis Stage*, U.S. NEWS & WORLD REP., June 8, 1981, at 42. Arson directly causes economic damage "through lost businesses, a reduction in the number of jobs, and the costs of fire fighting and medical care." *Fighting Arson by Removing the Profit Motive*, BUS. WK., May 21, 1979, at 68. The indirect costs of arson have been estimated to be "as high as 15 billion dollars a year in lost tax revenues and wages, unemployment insurance payments, relocation costs and other economic ripple effects." *Arson in U.S. Reaches a Crisis Stage*, *supra*, at 39.

4. U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS - 1980, Sept. 10, 1981, at 35-37.

5. See *supra* notes 1 and 3. Arson-for-profit accounts for 14 percent of all arsons. See *Arson in the U.S. Reaches a Crisis Stage*, *supra* note 3 at 39.

6. See generally Freudenheim, *The Most Neglected Crime in the United States*, 7 BARRISTER, 11-14 (1980). Arson has been characterized as the most neglected crime in this country. *Id.* For example, the FBI did not consider arson a crime until 1979, when it recategorized arson for investigative purposes as a "Part I" offense, ranking it in importance with murder, rape and robbery. Before this time, arson was listed, along with drunkenness and disorderly conduct, as a "Part II" offense. See *supra* at 1 and Appendix II. Furthermore, although arson increases at a rate of 25 per-

to an arsonist's attempt to fraudulently recover the proceeds of his insurance policy is still a major weapon in the fight against for-profit arson.<sup>7</sup> Arson is an elusive crime. It is probably the most difficult crime to investigate and prove primarily because most of the evidence is destroyed in the fire.<sup>8</sup> Once investigations have determined the fire to have been of incendiary origin, it must be decided upon whom liability should be imposed.<sup>9</sup> The existence of a financial motive renders the policyholder the most likely suspect.<sup>10</sup>

Primary factors influencing the decision to defend a fraudulent insurance claim are the rights and obligations of a co-insured under the policy, such as a mortgagee, corporation, partner, or spouse.<sup>11</sup> These factors are considered because the language of the insurance contract as well as public policy governing recovery vary with the nature of the relationship between the co-insureds.<sup>12</sup> Particularly problematic is a determination of the rights of an innocent spouse to recover the proceeds under a fire insurance policy.<sup>13</sup> Difficulties have arisen as a result of competing interpretations of the rights

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cent annually, only 3 percent of incendiary fires lead to an arrest and less than one percent result in a conviction. Factors contributing to the low arrest and conviction rates are the difficulties in detecting and proving arson, lack of manpower and expertise on local police forces, and public apathy and indifference to this costly crime. *See supra* note 3.

7. Karp, *the wishbone offense—a two-pronged attack against arson*, 14 FORUM 205, 205 (1978). *See generally* *Litigation said to be key to reducing arson incidence*, NAT'L UNDERWRITER (Property ed.), May 8, 1981.

8. For information on the investigation and defense of fire insurance fraud claims, *see* Gwertzman, *Arson and Fraud Fires*, 12 FORUM 827 (1977).

9. Taylor, *Updated Guidelines for defending arson for Profit Claims*, 14 FORUM 192, 195 (1978) [hereinafter cited as Taylor].

10. *See supra* note 8 at 832-33. Gwertzman notes that a number of police and fire officials believe that careless writing of insurance policies (e.g., property insured in excess of value) is partly to blame for the increase in for-profit arsons. *Id.* at 834. *See also supra* note 2 and accompanying text.

11. *See* Taylor, *supra* note 9, at 195-98. Although the primary purpose of this note is to analyze the rights of an "innocent" spouse under a fire insurance policy, other types of relationships will be addressed by analogy. Because a mortgagee's right to recover under an insurance policy is dependent upon the nature of the applicable provision in the contract, i.e., either a "loss payable" clause which constitutes an assignment of the named insured's rights, or a "standard" clause which constitutes a separate contract between the insurer and the mortgagor, a discussion of the mortgage situation specifically has been omitted. *See, e.g.,* *West v. Farm Bureau Mut. Ins. Co.*, 63 Mich. App. 279, 234 N.W.2d 485 (1975), *rev'd*, 359 N.W.2d 556 (1977) (*per curiam*); *Rent-A-Car v. Globe & Rutgers Fire Ins. Co.*, 158 Md. 169, 148 A. 252 (1930).

12. *See supra* note 11.

13. Comment, *Arson Fraud: Criminal Prosecutions and Insurance Law*, 7 FORDHAM URB. L.J. 541, 605 (1979).

and obligations of married persons under a joint fire insurance policy.

Several theories of the innocent spouse's right to recover have been forwarded. Traditionally, when the property was jointly owned, the fraudulent act of either spouse barred recovery under the policy by the innocent spouse.<sup>14</sup> Other courts have allowed the innocent spouse to recover regardless of whether the property interests were joint or severable.<sup>15</sup>

Public policy considerations also play an important part in the determination of an innocent spouse's right to recover. While courts are reluctant to impute fraud on an innocent party,<sup>17</sup> they adhere to the age-old tenet that a wrongdoer cannot benefit from his own wrong.<sup>18</sup> Since the arsonist and the innocent co-insured are married, complicity is immediately suspected because of the intimate nature of the marital relationship.<sup>19</sup> Furthermore, anachronistic views of the marital relationship, especially where the property is owned as tenants by the entirety, have complicated the determination,<sup>20</sup> as well as the valuation,<sup>21</sup> of the innocent spouse's interests under the insurance policy.

14. See, e.g., *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D.C.2d 351 (1933); *Jones v. Fidelity & Guard Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952). But cf. *Varano v. Home Mut. Fire Ins. Co.*, 164 Pa. Super. 228, 63 A.2d 97 (1949) (recovery allowed where property was jointly owned, but parties were unrelated and maintained separate policies).

15. See, e.g., *Hosey v. Seibels Bruce Group*, 363 So. 2d 751 (Ala. 1978); *Ryan v. M.F.A. Mut. Fire Ins. Co.*, 610 S.W.2d 428 (Tenn. Ct. App. 1980).

16. See, e.g., *Lovell v. Rowan Mut. Fire Ins. Co.*, 302 N.C. 150, 274 S.E.2d 170 (1981); *Howell v. Ohio Cas. Ins. Co.*, 130 N.J. Super. 350, 327 A.2d 240 (1974).

17. See, e.g., *Ijames v. Republic Ins. Co.*, 33 Mich. App. 541, 190 N.W.2d 366 (1971), where the court stated that the rule barring recovery to all insureds under the policy based on the fraud of a co-insured is "harsh and equitable [and that it] may be in need of re-examination." *Id.* at \_\_\_, 190 N.W.2d at 369; *Hosey*, 363 So. 2d at 754. See also 5A APPLEMAN, INSURANCE LAW & PRACTICE 3594 (Rev. ed. 1970).

18. See e.g., *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139 (1898); *Fuselier v. United States Fidelity & Guar. Co.*, 301 So. 2d 681, 682 (La. App. 1974); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952). These cases state that public policy will not permit recovery by an insured who knowingly burns insured property in order to collect the insurance.

19. See *supra* Taylor, note 9, at 197. Cf. *Wilson v. Concordia Farmers Mut. Ins. Co.*, 479 S.W.2d 159 (Mo. Ct. App. 1972) (recovery barred when court concluded husband and wife were joint enterprisers).

20. See *infra* notes 82-90 and accompanying text.

21. See, e.g., *Cooperative Fire Ins. Assoc. v. Domina*, 137 Vt. 3, 399 A.2d 502 (1979). See *infra* notes 143-46 and accompanying text.

This note examines the recent changes in the law concerning the rights of an innocent spouse to recover the proceeds under a fire insurance policy. An initial review of the nature and construction of a fire insurance policy will provide an understanding of the basic principles and policies underlying an insurance contract. Three distinct theories of recovery, emanating from disagreements as to whether property or contract law should govern the interpretation of the policy, will then be examined. An analysis and comparison of each theory will demonstrate the impropriety of a property law theory in ascertaining the innocent spouse's rights under the policy. However, a strict application of contract law will also prove to be inappropriate because insurance contracts are characteristically one-sided. Therefore, it is proposed that competing policy concerns must be considered in conjunction with insurance contract principles in order to determine properly the rights of an innocent spouse. Finally, suggestions will be made as to how some of the practical problems inherent in the decision to allow recovery may be avoided.

#### THE NATURE AND CONSTRUCTION OF FIRE INSURANCE POLICIES

A fire insurance policy is a personal contract of indemnity between the insurance company and the insured.<sup>22</sup> Fire insurance does not insure the property itself;<sup>23</sup> the proceeds are not a substitute for the real estate.<sup>24</sup> The policy is personal to the extent that it provides indemnity for loss to an insurable interest.<sup>25</sup> Additionally, the relationship between the parties is of a purely contractual nature.<sup>26</sup> Although a majority of the states have statutorily adopted the 1943 New York Standard Fire Policy,<sup>27</sup> fire insurance must still be treated

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22. 4 APPLEMAN, *INSURANCE LAW & PRACTICE* § 2107 (Rev. ed. 1969) [hereinafter cited as *Appleman*]. See COUCH ON INSURANCE 2D § 1:49 (1959). See, e.g., *Spires v. Hanover Fire Ins. Co.*, 364 Pa. 52, 70 A.2d 828 (1950).

23. *Forsyth County v. Plemmons*, 2 N.C. App. 373, \_\_\_, 163 S.E.2d 97, 99 (1968). 4 APPLEMAN, *supra* note 22.

24. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963). "If the insurance proceeds are the logical substitute of anything they are the insurance contract and the premiums paid under it." *Id.* at 85, 192 N.E.2d at 22, 242 N.Y.S.2d at 52.

25. 4 APPLEMAN, *supra* note 22, at § 2105. See, e.g., *Richardson v. Providence Washington Ins. Co.*, 38 Misc. 2d 593, 237 N.Y.S.2d 893 (1963). See also KEETON, *BASIC TEXT ON INSURANCE LAW* § 4.6 (1971), for the notion that the trend is away from the principle that insurance is personal and toward the principle that it is insurance of the property for whomever may be the owner.

26. 12 APPLEMAN, *INSURANCE LAW & PRACTICE* § 7006 (Rev. ed. 1981).

27. Comment, *Arson Fraud: Criminal Prosecution and Insurance Law*, 7

"as a voluntary contract which derives its force from the consent of the parties."<sup>28</sup> In fact, insurance contracts traditionally have been viewed as ordinary contracts.<sup>29</sup>

There is, however disagreement as to whether a strict application of contract law should govern the interpretation of an insurance policy.<sup>30</sup> Indeed, a mechanical application of contract law overlooks the fact that insurance policies are true contracts of adhesion with the only choice being to go to another company which will probably use the standard form.<sup>31</sup> Insurance policies, like adhesion contracts, are one-sided bargains in that there is a characteristic absence of bargaining power on the part of the insured.<sup>32</sup> Since the insurance company, staffed by expert legal counsel, drafts the policy to serve its best interests, the insured has little opportunity to negotiate or choose the term of the contract.<sup>33</sup> Because of the inequitable nature of the insurance contract, the general rule of construction for insurance policies is to construe the contract "strictly against the insurer and liberally in favor of the insured."<sup>34</sup> Nevertheless, principles of normal contract interpretation place limitations on this liberal rule of construction.

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FORDHAM URB. L.J. 541, 570 (1979). The following excerpt briefly summarizes the development and characteristics of a standard fire policy:

Since the latter half of the nineteenth century, state legislatures have recognized a need for uniformity among fire insurance contracts. In 1943, the New York Standard Fire Policy became effective, and has been adopted in identical or substantially similar form since then by approximately forty-five states, the District of Columbia and Puerto Rico. This Standard Policy [*sic*] contains the "165 Lines" which set forth most of the provisions of the contract. The parties do, however, retain a right to add conditions not in contravention of the Standard Policy. The 165 Lines and the endorsements and forms added thereto define the rights and obligations of the parties, and are inherently involved in the issue of arson for profit.

*Id.* (footnotes omitted).

28. 4 APPLEMAN, *supra* note 22.

29. Schultz, *The Special Nature of the Insurance Contract: A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROBS. 376, 377 (1950) [hereinafter cited as Schultz].

30. *Id.*

31. *Id.*

32. See Hollman, *Insurance as a Contract of Adhesion*, INS. L.J. 274 (May, 1978) [hereinafter cited as Hollman]. See also Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, 21 WM. & MARY L. REV. 543, 544-45 n.12 (1979) [hereinafter cited as Comment, *Spouse's Fraud as a Bar to Insurance Recovery*].

33. See Schultz, *supra* note 29, at 378-79.

34. Hollman, *supra* note 32, at 279. This rule is applicable to all types of insurance policies. *Id.*

Insurance policies, like all contracts, must be reasonably interpreted in accordance with the language used.<sup>35</sup> Where the contract is clear and unambiguous, the rights of the parties are determined from the express terms of the contract.<sup>36</sup> Where the contract is ambiguous<sup>37</sup> or capable of two or more interpretations, a construction will be adopted which favors the insured and avoids forfeiture.<sup>38</sup> Furthermore, the test to be used in interpreting the ambiguous language of a policy, as stated by one court, is "not what the insurer intended the words to mean but what a reasonable person in the position of the insured would understand them to mean."<sup>39</sup> Hence, from the principle of resolving ambiguities against the insurer flows the broader principles of honoring the reasonable expectations of the insured.<sup>40</sup>

Another concept employed in the construction of insurance contracts is the "implied exception."<sup>41</sup> An implied exception is a "basis for an insurer's nonliability that is not expressed anywhere in the contract but is said to be implicit in the nature of the agreement and the circumstances to which it applies."<sup>42</sup> For instance, the rule of fortuitousness, which requires that the loss be accidental,<sup>43</sup> is an implied exception.<sup>44</sup> It is basically an attempt to prevent fraud against the insurer, deter crime, and avoid a benefit to the wrongdoer that

35. 13 APPLEMAN, *INSURANCE LAW & PRACTICE* § 7402 (Rev. ed. 1976). See, e.g., *Marson Coal Co. v. Insurance Co. of Pa.*, 210 S.E.2d 747 (W. Va. 1974).

36. 12 APPLEMAN, *supra* note 26, at § 7004. See, e.g., *G.C. Kohlmier, Inc. v. Mollenhauer*, 237 Minn. 126, 140 N.W.2d 47 (1966), *rev'd*, 243 N.W.2d 134 (1976); *RTE Corp. v. Maryland Cas. Co.*, 74 Wis. 2d 614, 247 N.W.2d 171 (1976).

37. See Schultz, *supra* note 29, at 379, where the court's tendency to "discover" ambiguities is noted.

38. 13 APPLEMAN, *supra* note 35, at § 7401.

39. *St. Paul Fire & Marine Ins. Co. v. Thompson*, 150 Mont. 182, \_\_\_, 433 P.2d 795, 798 (1967). APPLEMAN, *supra* note 35, at § 7401.

40. Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

41. KEETON, *BASIC TEXT ON INSURANCE LAW* § 5.3(a) (1971) [hereinafter cited as KEETON].

42. *Id.* at 278.

43. *Id.* at § 5.4(a). "In view of the impact of both public policy and contract provisions, the grounds of decision in precedents concerning the requirement that loss be fortuitous, . . . are a medley of interpretations of expressed qualifications of coverage and application of implied exceptions, some based on a theory of interpretation and some on overriding public policy." *Id.* at 289.

44. KEETON, *supra* note 41. Arson is considered to be an implied exception. However, insurance companies also try to characterize it as an express exception by including it under the "increase of hazard" clause.

forms the foundation for this fortuity requirement.<sup>45</sup> Thus, it may be concluded that much of what governs the interpretation of an insurance policy stems from an acute awareness of the compelling public policy objectives consistent with the underlying purposes of the insurance contract.

This overview of the nature and construction of a fire insurance policy, although brief, provides a basic understanding of the approaches courts take in addressing the question of an innocent co-insured's right to recover. Although the threshold question in determining a right to recover appears to be whether the contract is joint or severable,<sup>46</sup> the courts nevertheless demonstrate a fundamental disagreement as to the nature of the applicable law as well as the policy concerns involved. This fundamental disagreement among the courts has generated three separate theories on an innocent co-insured's right to recover under a fire insurance policy.

#### THREE THEORIES ON THE INNOCENT CO-INSURED SPOUSE'S RIGHT TO RECOVER

Determining the right of an innocent spouse to recover the proceeds under a fire insurance policy is a formidable task. Various competing interests must be reconciled before a cogent theory of recovery can be developed. The issue, in most cases,<sup>47</sup> is whether the fraudulent act of an insured bars recovery by an innocent co-insured where the property is jointly owned.<sup>48</sup> A hypothetical will best illustrates the type of factual situation most often presented to the courts.

John and Jean Smith own a home as tenants by the entirety. In July, 1981, their home was extensively damaged by fire. The Smith's were jointly insured against loss by

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45. *Id.*

46. See generally Recent Developments, *Innocent Coinsured's Recovery Not Barred by Fraud of Husband*, 21 WAYNE L. REV. 169-74 (1974).

47. In some cases, however, neither the property nor the policy are jointly owned. See, e.g., *Hosey v. Seibels Bruce Group*, 363 So. 2d 751 (Ala. 1978) (husband owned property in fee simple and was the only named insured); *Simon v. Security Ins. Co.*, 390 Mich. 72, 210 N.W.2d 322 (1973) (husband had stolen wife's personal property in which she had sole interest); *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511 (Tex. Civ. App. 1952) (house belonged to husband and policy was issued to him); *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis. 2d 240, 159 N.W.2d 89 (1968) (husband owned property subject to his mother's life estate and was only named insured).

48. Annot., 11 A.L.R. 4th 1228 (1982).



fire under a homeowners' policy issued to them by the General Casualty Company. The policy contains the same conditions and exceptions, including the definition of the word "insured," as the "165 Lines" of the New York Standard Fire Policy. Mr. Smith filed a fire loss claim with General in order to collect the proceeds under the policy.

Through subsequent investigations, General discovered that John Smith had intentionally set the fire and, therefore, denied coverage. Since there was no direct proof that Mrs. Smith participated in the planned arson, she was not implicated in her husband's fraudulent act. As a result, Mrs. Smith filed suit against General Casualty, claiming that the fraudulent acts of her husband should not bar her, as an "innocent" co-insured, from recovery under the policy.

It should be noted that there are variations in the facts. In some cases, the couple is divorced or the fraudulent spouse dies in the fire. In others, there are variations in the nature of the property ownership. Also, sometimes the wife sets the fire. The effect of these differences on the outcome of the case will be discussed at different points throughout the note.

While the cases are surprisingly similar from a factual standpoint, courts nevertheless have reached conflicting results in addressing the question. One point of departure is a fundamental disagreement among the courts concerning the nature of the applicable law. The question of whether an innocent co-insured may recover the proceeds under the policy is usually contingent upon a determination of whether the contract interests are joint or severable.<sup>49</sup> The courts differ as to whether contract or property law should govern the interpretation of the co-insureds' interests under the policy.

Another source of conflict manifests itself in the degree of importance placed upon either of two competing public policies. In reaching their decisions, the courts inevitably must weigh the desire to avoid a possible benefit to the wrongdoer against that of preventing the imposition of fraud on an innocent party. At any rate, these conflicting interests in law and public policy are revealed in three distinct theories on the innocent spouse's right to recover.

The innocent co-insured spouse's chances of recovering ulti-

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49. *Id.*

mately depend upon which of the three theories the court adopts. Under the first theory or the old rule, arson on the part of one spouse absolutely bars the innocent spouse from recovery.<sup>50</sup> The "rebuttable presumption"<sup>51</sup> theory allows recovery where the co-insureds' interests in the property are severable,<sup>52</sup> while the third theory or the new dominant rule permits recovery irrespective of whether the property interests are joint or several.<sup>53</sup> Each of these three theories will be discussed in turn.

### *The Old Rule: An All or Nothing Proposition*

Until recently, the general rule was that an innocent co-insured could not recover the proceeds of a fire insurance policy when the property covered was intentionally burned by the other insured.<sup>54</sup> While this principle is rapidly being replaced, it is still followed in a number of jurisdictions.<sup>55</sup> Illustrative of the rationale underlying the old rule is *Matyuf v. Phoenix Insurance Co.*,<sup>56</sup> one of the earliest cases to expound the rule with respect to the marital relationship.<sup>57</sup>

50. See *infra* notes 54-91 and accompanying text.

51. The phrase "rebuttable presumption" refers to the opportunity to rebut the presumption that the contract is joint by proving the interests in the property to be separate.

52. See *infra* notes 92-98 and accompanying text.

53. See *infra* notes 99-113 and accompanying text.

54. See *infra* notes 97 and 99 and accompanying text.

55. The old rule is still followed in Louisiana, Massachusetts, Pennsylvania, Texas, Vermont, Virginia, and Wisconsin. In all of the states, except Louisiana, the courts noted that the insured property was jointly owned. See *Fuselier v. United States Fidelity & Guar. Co.*, 301 So. 2d 681 (La. App. 1974). In Wisconsin, the rule does not apply where the fraudulent party was not a named insured. See *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis. 2d 240, 159 N.W.2d 89 (1968).

56. 27 Pa. D. & C.2d 351 (1933).

57. Other early cases dealing with the marital relationship are: *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952); *Klemens v. Badger Mut. Ins. Co.*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959).

The question of the innocent co-insured's right to recover under a fire policy presented itself as early as 1884 in *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N.W. 797 (1884). In *Monaghan*, Mrs. Monaghan fraudulently made a false proof of loss statement in order to collect the proceeds of a fire policy under which she and her three minor children were the named insured. The minor children, who were innocent of any wrongdoing, brought suit to recover under the policy. The Michigan Supreme Court concluded that the interests under the insurance contract were indivisible and, therefore, denied recovery stating "if the right of action has become barred as to one of the joint contractors, it has to all of them." *Id.* at 804. This case can be distinguished based on the fact that Mrs. Monaghan was the only adult insured and the company relied on her. Another early case, often cited by the cases dealing with

In *Matyuf*, the court denied recovery to an innocent insured wife whose husband intentionally burned the jointly-insured property. The court held:

When two joint owners of property (especially if they hold by entireties) are jointly insured by one policy, it is implied, by the very nature and fundamental purpose of the insurance contract, that both of the assured shall observe good faith toward the insurer, and that a fraudulent and felonious burning by either of the joint owners who are jointly insured is not included within the contemplated risks.<sup>58</sup>

Other factors in the court's decision to deny recovery were the policies against a possible benefit to the wrongdoer and the discouragement of arson-for-profit.<sup>59</sup> Further, the court noted in dicta that if the wife had dealt with the insurer on her own behalf, she may have been able to recover the full value of her interest because her husband would have been a stranger to the contract.<sup>60</sup> Thus, recovery depended upon the form and divisibility of the interests under the contract coupled with a strong public policy concern.

Under the old rule, courts deny recovery concluding that the contract is joint,<sup>61</sup> yet are often unclear as to how they arrive at this decision. Contract law alone is insufficient to support a finding of a joint contract. Consequently, the courts also rely on the nature of the property ownership and the marital relationship in order to hold the interests under the contract joint.

Contract law treats the question of whether a contract is joint or several as one of interpretation.<sup>62</sup> According to the rules of inter-

husband and wives, is *Bellman v. Home Ins. Co.*, 92 N.H. 242, 29 A.2d 121, 123 (1942) quoting *Caswell v. Maplewood Garage*, 84 N.H. 241, 252, 149 A. 746, 754 (1930).

58. 27 Pa. D. & C.2d at 365.

59. *Id.* at 359.

60. *Id.* at 365. As a practical matter, it is doubtful whether a spouse could obtain fire insurance upon one half of his or her interest in the property. See P. Butler, Jr., and B. Freeman, Jr., *The Innocent Coinsured: He Burns It, She Claims—Windfall or Technical Injustice?*, 17 FORUM 187, 209 (1981) [hereinafter cited as Butler & Freeman, *The Innocent Coinsured*].

61. *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D. & C.2d 351 (1933); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952); *Klemens v. Badgers Mut. Ins. Co.*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959); *Bellman v. Home Ins. Co.*, 178 Wis. 34, 189 N.W. 1028 (1922).

62. RESTATEMENT (SECOND) OF CONTRACTS § 112, Comment b, at 258 (Tent. Draft No. 2, 1965). In some states, an agreement undertaken by two or more persons is presumed to be joint. 2 WILLISTON ON CONTRACTS § 320 (3d. ed. 1959).

pretation, the nature of an obligation is controlled by the intent of the parties at the time of the making of the contract.<sup>63</sup> Since the insurance contract is written in the joint names of the husband and wife, they are held to be jointly obligated to comply with the terms of the policy.<sup>64</sup> This assumes that the creation of a joint contract was contemplated by the contracting parties and that there is "necessarily a relation of suretyship between them."<sup>65</sup> While the focal point of ordinary contract law analysis is the intent of the contracting parties, use of this approach in the construction of a standardized and unnegotiable contract is problematic.<sup>66</sup>

The express terms of the policy also serve as a basis for determining contract interests to be joint.<sup>67</sup> Because arson-for-profit is the basis of an innocent co-insured's claim, an examination of the fraud clause is essential.<sup>68</sup> When triggered by a fraudulent act of "the insured," the fraud clause relieves the insurer of liability under the policy.<sup>69</sup> While the policy defines the unqualified word "insured,"<sup>70</sup> there is no express definition of the meaning of the phrase "the in-

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63. *Id.* at 651. See *Gray v. Holyoke Mut. Fire Ins. Co.*, 302 So. 2d 104 (Ala. 1974).

64. *Mele v. All-Star Ins. Corp.*, 453 F. Supp. 1338 (E.D. Pa. 1978); *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D. & C.2d 351 (1933); *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979); *Klemens v. Badger Mut. Ins. Co.*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959).

65. CORBIN ON CONTRACTS § 925 (West 1952). *Contra Morgan v. Cincinnati Ins. Co.*, 411 Mich. 267, 307 N.W.2d 53 (1981), *rev'g*, 91 Mich. App. 49, 282 N.W.2d 829 (1979). In *Morgan*, the court rejected the insurer's argument that the Michigan standard fire insurance form intended to impose a mutual obligation of suretyship among each of several insureds stating that "[s]uch an intent is unlikely; as this case aptly illustrates, an insured often has no control over the conduct of others." *Id.* at \_\_\_, 307 N.W.2d at 55.

66. See *supra* notes 34-44 and accompanying text.

67. *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952); *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979). The *Kosior* court specifically distinguishes those cases in which the insurance contract expressly permitted severance. *Id.* at \_\_\_, 13 N.E.2d at 425. Cf. *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511 (Tex. Civ. App. 1952) (no reference is made to the policy language).

68. Insurers also rely on the "increase of hazard" clause to escape liability when "the insured" intentionally burns the property. See *Winter v. Aetna Cas. & Sur. Co.*, 96 Misc. 2d 497, 409 N.Y.S.2d 85 (Sup. Ct., Special Term 1978) (involves the "increase of hazard" clause).

69. See *supra* note 68.

70. *Id.* The term "insured" may be singular or plural according to the circumstances, and may include one or more original promises. 44 C.J.S. INSURANCE § 49 (1945). See *Rent-A-Car v. Globe & Rutgers Fire Ins. Co.*, 158 Md. 169, 148 A. 252 (1930).

sured" as it applies to the fraud clause.<sup>71</sup> Yet the courts following the old rule encounter few difficulties in defining the term. The term "the insured" is defined as meaning the "named insured."<sup>72</sup> This explanation of "the insured" is consistent with the interpretation of a joint policy as creating duties and obligations applicable to both insureds. Hence, arson by either spouse is "chargeable to the 'named insured' preventing either spouse from recovering any amount under the policy."<sup>73</sup> Furthermore, the denial of recovery is compatible with the public policy of avoiding a benefit to the wrongdoer.<sup>74</sup>

Unfortunately, the courts do not go far enough in their analysis of the definition of "the insured" under the policy. Equating "the insured" with the express definition of "insured" assumes that the word "insured" means the same thing throughout the entire policy regardless of how it is modified.<sup>75</sup> At the very least, the term "the insured" is ambiguous<sup>76</sup> and, therefore, should be construed in favor of the insured so as to avoid a forfeiture.<sup>77</sup> By avoiding a forfeiture,

71. Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, *supra* note 32, at 549.

72. *Id.* This discussion, of course, assumes that the policy in question is identical or similar to the New York Standard Fire Policy.

73. *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, \_\_\_, 250 S.E.2d 774, 776 (1979). See *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Klemens v. Badger Mut. Ins. Co.*, 8 Wis.2d 565, 99 N.W.2d 865 (1959).

74. The public policy of avoiding a benefit to the wrongdoer is broadly expressed in *Short v. Oklahoma Farmers Union Ins. Co.*, 619 P.2d 588 (Okla. 1980), where the court stated "[t]hat 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". *Id.* at 590. (Emphasis added). In *Erlin Lawler Enter., Inc. v. Fire Ins. Exch.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968), the court looked for an actual benefit to the wrongdoer stating that "[a]n analysis must be made in each case to see if the arsonist will benefit by recovery on the policy, either directly or indirectly." *Id.* at \_\_\_, Cal. Rptr. at 185. The court further indicated that if there was no apparent benefit to the wrongdoer, the corporate entity and the shareholders would be allowed to recover. *Id.* See *Mercantile Trust Co. v. New York Underwriters Ins. Co.*, 376 F.2d 502 (7th Cir. 1967); *Miller v. Dobrin Furniture Co. v. Camden Fire Ins. Co.*, 55 N.J. Super. 205, 150 A.2d 276 (1959). It is interesting to note that *Erlin* and *Miller* involved a corporation, and *Mercantile* dealt with a trustor-trustee relationship whereas the relationship in *Short* was a husband and wife.

75. Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, *supra* note 32, at 549-54. See *supra* note 70 and accompanying text.

76. *Assurance Co. v. Bell*, 108 Ga. App. 766, 134 S.E.2d 540 (1963); *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, 109 A.2d 420 (1963). *Contra* G.C. Kohlmer, Inc. v. Mollenhauer, 237 Minn. 126, 140 N.W.2d 47 (1966), *rev'd*, 243 N.W.2d 134 (1976).

77. See *supra* note 38 and accompanying text.

the courts effectuate the purpose of an insurance contract which is to indemnify the insured against loss to an insurable interest.<sup>78</sup> Since the insured making the claim under the policy is innocent of any wrongdoing, the purpose of the fraud clause, which excludes coverage of a loss caused intentionally by "the insured," is not advanced by a denial of recovery.<sup>79</sup> Furthermore, allowing the innocent co-insured to recover by construing the ambiguous policy language against the company does not conflict with the proposition that public policy prohibits recovery by an insured who intentionally burns insured property in order to collect the insurance. From the standpoint of the innocent co-insured, the loss is clearly fortuitous.<sup>80</sup> As one court stated, "[t]here is no such policy against insurance to indemnify an insured against the consequences of a violation of law by others without his direction or participation, or against his own negligence, or the negligence of others."<sup>81</sup>

Other factors courts employ to support the presumption of a joint contract are equally troublesome. For instance, the nature of the property ownership and the marital relationship of the co-insureds also serve as a basis for determining contract interests to be joint.<sup>82</sup> Where the property is jointly owned, especially through tenancy by the entirety, the contract is presupposed to be joint because the insurable interest, like the property interest, is deemed to be indivisible.<sup>83</sup> This presupposition of a joint contract is bolstered by the notion that a married couple constitutes a single entity under the law.<sup>84</sup> Since the property interests of a husband and wife are regarded

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78. See *supra* notes 22-25 and accompanying text.

79. See *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, 190 A.2d 420 (1963).

80. See *supra* notes 43-45 and accompanying text.

81. *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, \_\_\_, 190 A.2d 420, 423 (1963).

82. *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952); *Cooperation Fire Ins. Assoc. v. Domina*, 137 Vt. 3, 399 A.2d 502 (1979); *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979). Cf. *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511 (Tex. Civ. App. 1952) (court relies solely on nature of property ownership and marital relationship). *Contra* *Short v. Oklahoma Farmers Union Ins. Co.*, 619 P.2d 588 (Okla. 1980) (marriage status was held to be irrelevant).

83. See *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281, 282 (Tex. Civ. App. 1952); *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511, 512 (Tex. Civ. App. 1952); *Cooperative Fire Ins. Assoc. v. Domina*, 137 Vt. 3, \_\_\_, 399 A.2d 502, 503 (1979); *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, \_\_\_, 250 S.E.2d 774, 776 (1979).

84. Compare *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979) with *American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, 426 N.E.2d 136 (1981).

as inextricably intertwined, the contract interests also are considered inseparable.

Because an insurance contract does not insure the property itself,<sup>85</sup> the analogy drawn between the interests in the property and those under the contract is questionable. The proceeds of an insurance contract are personalty and are held in the same way as "any personal property voluntarily acquired."<sup>86</sup> Although the value of the insurance proceeds and that of the property are similar, the proceeds of an insurance policy are not a substitute for the property.<sup>87</sup> Finally, the reliance on archaic legal fictions, such as the marital "unit" and tenancy by the entirety, is untenable<sup>88</sup> in light of the Married Women's Acts<sup>89</sup> and the numerous changes in the legal treatment of marriage and marital property.<sup>90</sup>

Premised on anachronistic and outmoded concepts, the old rule has proven to be "harsh and inequitable . . . [and] . . . in need of re-examination."<sup>91</sup> For example, in *Short v. Oklahoma Farmers Union*

85. See *supra* notes 22-25 and accompanying text.

86. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, \_\_\_, 192 N.E.2d 20, 22, 242 N.Y.S.2d 50, \_\_\_ (1963). See *Forsyth County v. Plemmons*, 2 N.C. App. 373, \_\_\_, 163 S.E.2d 97, 99 (1968). For a complete listing of those states which recognize tenancy by the entirety, see Grilliot & Yocum, *Tenancy By The Entirety: An Ancient Fiction Frustrates Modern Creditors*, 17 AM. BUS. L.J. 341, 354-61 (1979) [hereinafter cited as Grilliot & Yocum]. See *infra* note 150 and accompanying text.

87. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, \_\_\_, 192 N.E.2d 20, 22, 242 N.Y.S.2d 50, \_\_\_ (1962). 4 APPLEMAN, *supra* note 22.

88. See *Erlin Lawler Enter., Inc. v. Fire Ins. Exch.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968) (mere family relationship of arsonist does not bar recovery when there is no benefit); *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis. 2d 240, 159 N.W.2d 89 (1968) (a husband and wife are still individuals and are responsible for their own acts). Tenancy by the entirety has also been extensively criticized as being an irrational and outmoded legal fiction. *Appeal of Robinson*, 88 Me. 17, 22-23, 33 A. 652, 654 (1895). Grilliot & Yocum, *supra* note 86. See also *D'ercole v. D'ercole*, 407 F. Supp. 1377 (D. Mass. 1976) (§ 1983 challenge to the common law concept of tenancy by the entirety); *Klein v. Mayo*, 367 F. Supp. 583 (D. Mass. 1973) (§ 1983 discrimination based upon statutory preclusion to partitioning of land held by tenants by the entirety).

89. In some jurisdictions, the Married Women's Acts have been held to abolish tenancy by the entirety. Annot. 141 A.L.R. 179, 181 & n. 18 (1941). In others, Married Women's Acts abolish tenancy by the entirety only as to personalty. *Id.* at 182 & n. 19. "The Married Women's Acts, by lifting at least with respect to the taking and holding of property, the disabilities of coverture, removed the legal unity from which the estate by the entities was implied." *Id.* at 186 & n. 30.

90. See generally Glendon, *The New Marriage and the New Property*, 13 FAM. L.Q. 441-60 (1980); Thomas, *Changing American Family: Can the Courts Catch Up?*, 6 PEPPERDINE L.R. 733-49 (1979).

91. *Hosey v. Seibels Bruce Group*, 363 So. 2d 751, 753 (Ala. 1978); *American*

*Insurance Co.*,<sup>92</sup> the husband set fire to property which was jointly owned and insured, but had been awarded to the wife in a divorce proceeding before the husband's act of arson. Although the court noted that the marital status of the insureds was irrelevant, it denied recovery to the innocent wife stating that it was flatly against public policy to give funds to the *entity* of which the arsonist was a member.<sup>93</sup> Thus, the court precluded recovery under the contract by the innocent joint insured *owning property jointly* with the arsonist. Obviously, the court was concerned with allowing a benefit to the wrongdoer. Nevertheless, there is no reason why the court could not have achieved the same result by giving the proceeds to the innocent spouse through a constructive trust or some other device which would preclude any benefit to the wrongdoer. At any rate, the weaknesses of the old rule demonstrate the impropriety of a property or strict contract law analysis to ascertain the innocent co-insured spouse's right to recover. The shortcomings of the old rule led some courts to reevaluate their approach to the problem of the innocent co-insured. Eventually, a second approach, the "rebuttable presumption" theory, emerged which attempts to provide a fairer result. However, the "rebuttable presumption" theory also relies on property law and therefore is incapable of properly addressing the question of the innocent co-insured's right to recover.

#### *An Attempt at Fairness: The Rebuttable Presumption Theory*

Recognizing that an absolute bar to recovery often resulted in grave injustice, courts sought to provide a more equitable alternative to the old rule. Consequently, the rebuttable presumption theory was created to afford the innocent co-insured an opportunity to refute the old rule's conclusive presumption of a joint contract. This change in the courts' approach to the problem of the innocent co-insured originated in 1942 with *Hoyt v. New Hampshire Fire Insurance Co.*<sup>94</sup>

In *Hoyt*, a fire insurance policy was issued to three persons who held the insured property as tenants in common. Rejecting the argument that a policy issued to all of the tenants creates a joint obligation, the court held that:

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*Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, \_\_\_ 426 N.E.2d 136, 139 (1981); *James v. Republic Ins. Co.*, 33 Mich. App. 541, \_\_\_, 190 N.W.2d 366, 369 (1941).

92. 619 P.2d 588 (Okla. 1980).

93. *Id.* at 590. See *supra* note 74.

94. 92 N.H. 242, 29 A.2d 121 (1942).



[w]hether the rights of obligees are joint or several is a question of construction, and in construing an insurance contract, the test is not what the insurance company intended the words of the policy to mean but what a reasonable person in the position of the insured would have understood them to mean.<sup>95</sup>

By altering the focus of the inquiry to that of the reasonable expectations of the insured,<sup>96</sup> the *Hoyt* decision nullified the old rule's conclusive presumption of a joint contract.<sup>97</sup>

After *Hoyt*, a number of courts recognized the harshness of the old rule.<sup>98</sup> The imputation of fraud on an innocent insured began to outweigh the concern for a possible benefit to the wrongdoer.<sup>99</sup> Accordingly, in some jurisdictions the innocent co-insured spouse is allowed to rebut the presumption of a joint obligation by proving his or her interests in the property to be severable.<sup>100</sup> Thus, the innocent spouse must show "sole or major and separable interest" in the insured property.<sup>101</sup>

95. *Id.* at \_\_\_, 29 A.2d at 123 (citations omitted).

96. In *Hoyt*, the court observed that "[t]he ordinary person owning an undivided interest in the property, not versed in the nice distinctions of insurance law, would naturally suppose that his individual interest in the property was covered by a policy which named him without qualification as one of the persons insured." *Id.*

97. The old rule can avoid *Hoyt* by relying upon the nature of the property interests involved and the marital relationship of the co-insureds. *American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, \_\_\_, 426 N.E.2d 136, 139 (1981).

98. See, e.g., *Steigler v. Insurance Co. of North America*, 384 A.2d 398 (Del. 1978); *Economy Fire & Cas. Co. v. Warren*, 71 Ill. App. 3d 625, 390 N.E.2d 361 (1979); *Howell v. Ohio Cas. Ins. Co.*, 124 N.J. Super. 414, 307 A.2d 142 (1973), *modified*, 130 N.J. Super. 350, 327 A.2d 240 (1974) (per curiam).

99. *Auto Owners Ins. co. v. Eddinger*, 366 So. 2d 123 (Fla. Dist. Ct. App. 1979); *Economy Fire & Cas. Co. v. Warren*, 71 Ill. App. 3d 625, 390 N.E.2d 361 (1979); *American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, 426 N.E.2d 136 (1981); *Morgan v. Cincinnati Ins. Co.*, 441 Mich. 267, 307 N.W.2d 53 (1981), *rev'g*, 91 Mich. App. 49, 282 N.W.2d 829 (1979).

100. In Alabama, California, Michigan and Tennessee, the innocent co-insured is permitted to rebut the presumption of a joint contract. See *Hosey v. Seibels Bruce Group, S.C. Ins. Co.*, 363 So. 2d 751 (Ala. 1978); *Erlin Lawler Enter., Inc. v. Fire Ins. Exchg.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968); *Simon v. Security Ins. Co.*, 390 Mich. 72, 210 N.W.2d 322 (1973); *Ryan v. MFA Mut. Ins. Co.*, \_\_\_ Tenn. App. \_\_\_, 610 S.W.2d 428 (1980). In Michigan, the opportunity to rebut the presumption of a joint contract, see *Simon v. Security Ins. Co.*, 390 Mich. 72, 210 N.W.2d 322 (1973) (dealt with personal property), may no longer be good law in light of *Morgan v. Cincinnati Ins. Co.*, 441 Mich. 267, 307 N.W.2d 53 (1981), *rev'g*, 91 Mich. App. 49, 282 N.W.2d 829 (1979).

101. *Simon*, 390 Mich. at \_\_\_, 210 N.W.2d at 327. See also *Hosey v. Seibels*

The logic behind the rebuttable presumption theory is nonetheless ill-founded. While the loss is viewed from the standpoint of the innocent co-insured, the theory is ultimately based upon a property rationale. Like the old rule, the rebuttable presumption rule "rests on a perceived link between co-ownership of property and a joint contractual obligation."<sup>102</sup> Yet, the decisions acknowledge the immateriality of the marital relationship, which bolstered the property rationale under the old rule, to the disposition of the innocent spouse's right to recover.<sup>103</sup> Here, by demonstrating the severability of the property interests, the innocent spouse destroys the perceived link between the nature of the property ownership and the contractual obligations, and thus can recover under the policy. However, it is not entirely clear from the case law how the innocent spouse might demonstrate severability of interest, especially where entireties property is involved.<sup>104</sup> Perhaps the opportunity to rebut the joint contract presumption is a compromise between the desire to avoid a benefit to the wrongdoer and the indemnification objectives of the insurance contract. Despite its attempt to rectify the injustices of the old rule, the theory still suffers from some of the same infirmities. For example, the tortious conduct of one spouse is effectively attributed to the innocent spouse and recovery is barred if the latter cannot prove the divisibility of their property interests. Furthermore, the property rationale ignores the nature and extent of the parties' rights and duties as governed by the insurance contract. While the rebuttable presumption theory does not go as far as does the new line of authority, it is at least an attempt to ameliorate the inequities of the old rule.

### *The New Dominant Rule: The Best Reasoned Rule*

Within the last four years, a new line of authority has emerged which ameliorates the infirmities of the old rule and the rebuttable presumption theory. This new rule permits the innocent co-insured to recover irrespective of whether the interests in the property are joint or several.<sup>105</sup> Often referred to as the best

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Bruce Group, S.C. Ins. Co., 363 So. 2d 751 (Ala. 1978); *Ryan v. MFA Mut. Ins. Co.*, \_\_\_ Tenn. App. \_\_\_, 610 S.W.2d 428 (1980).

102. *St. Paul Fire & Marine Ins. co. v. Molloy*, \_\_\_ Md. \_\_\_, \_\_\_, 433 A.2d 1135, 1140 (1981).

103. *Hosey*, 363 So. 2d 751; *Erlin Lawler Enter. Inc. v. Fire Ins. Exch.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968). See *supra* note 84 and accompanying text.

104. See *supra* note 101. See also *infra* note 144.

105. Recovery under the new dominant rule is permitted regardless of the form of property ownership: *Safeco Ins. Co. of America v. Karstone*, 510 F. Supp. 856

reasoned rule,<sup>106</sup> this new line of authority is rapidly replacing the old rule.

The first case to expound the new rule was *Howell v. Ohio Casualty Insurance Co.*<sup>107</sup> In *Howell*, the appellate court affirmed the trial court's determination that the fraud of a husband does not preclude his innocent co-insured wife from collecting the proceeds under a fire insurance policy. In upholding the decision of the lower court,<sup>108</sup> the appellate court added that it reached its decision irrespective of whether the property or contract interests were joint or several. Instead, the court declared the "significant factor" to be that the "responsibility or liability for the fraud—here, the arson—is several and separate rather than joint, and the husband's fraud cannot be attributed or imputed to the wife who is not implicated therein."<sup>109</sup> Finally, the court noted that, although not controlling, ambiguities in the policy language supported its conclusion.<sup>110</sup>

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(D.C. Cal. 1981) (joint tenancy); *Steigler v. Insurance Co. of North America*, 384 A.2d 398 (Del. 1978) (tenancy by the entirety); *Auto Owners Ins. Co. v. Eddinger*, 366 So. 2d 123 (Fla. App. 1979) (tenancy in common); *Economy Fire and Cas. Co. v. Warren*, 71 Ill. App. 3d 625, 390 N.E.2d 361 (1979) (joint tenancy); *American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, 426 N.E.2d 136 (1981) (tenancy by the entirety); *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978) (joint tenancy); *St. Paul Fire & Marine Ins. v. Molloy*, \_\_\_ Md. \_\_\_, 433 A.2d 1135 (1981) (tenants by the entirety); *Morgan v. Cincinnati Ins. Co.*, 130 N.J. Super. 350, 327 A.2d 240 (1974) (tenancy by the entirety); *Delph v. Potomac Ins. Co.*, 95 N.M. 257, 620 P.2d 1282 (1980) (community property); *Winter v. Aetna Cas. & Sur. Co.*, 96 Misc. 2d 497, 409 N.Y.S.2d 85 (Sup. Ct., Special Term 1978) (tenancy by the entirety); *Lovell v. Rowan Mut. Fire Ins. Co.*, 302 N.C. 150, 274 S.E.2d 170 (1981), *rev'd* 46 N.C. App. 150, 264 S.E.2d 743 (1980) (tenancy by the entirety).

106. *Steigler v. Insurance Co. of North America*, 384 A.2d 398 (Del. 1978); *American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, 426 N.E.2d 136 (1981); *Winter v. Aetna Cas. & Sur. Co.*, 96 Misc. 2d 497, 409 N.Y.S.2d 85 (Sup. Ct. Special Term, 1978); *Ryan v. MFA Mut. Ins. Co.*, \_\_\_ Tenn. App. \_\_\_, 610 S.W.2d 428 (1980).

107. 124 N.J. Super. 414, 307 A.2d 142 (1973), *modified*, 130 N.J. Super. 350, 327 A.2d 240 (1974) (*per curiam*).

108. The trial court held that "the rights and interests under this policy can be said to be several, not joint, and thus not subject to divestment or forfeiture by the unilateral actions of one spouse." *Howell*, 124 N.J. Super. 414, \_\_\_, 307 A.2d 142, 145 (1972).

109. 130 N.J. Super. 350, \_\_\_, 327 A.2d 240, 242 (1974).

110. Specifically, the *Howell* court stated:

The "Named Insured" is the husband "and/or" plaintiff wife. Although the term "Insured" means the named insured, the use of the ambiguous phrase "and/or" and the reasonable expectations of the insureds by reason thereof compel a determination that the fraudulent conduct by one insured should not void the policy as to the other who is completely innocent thereof.

*Id.*

The *Howell* decision has been instrumental in the development of the new line of authority.<sup>111</sup> However, both *Howell*<sup>112</sup> and its progeny are unclear as to whether they focus on the severability of the contract rights or the liability for fraud to determine the innocent spouse's rights.

If the courts were to focus solely on the fact that the liability for fraud is separate, recovery would be permitted regardless of the nature of the contract interests. Thus, whenever fraud by an insured is involved, the innocent co-insured could recover irrespective of whether the contract interests were joint or several. If contract interests were the sole basis of recovery, then even if fraud was involved, the innocent co-insured would not be entitled to recover where the contract interests were found to be joint. At any rate, the courts employ both factors in holding that the innocent spouse is entitled to recover, thereby reaching the most equitable result under the circumstances. Recovery under the new dominant rule thus is grounded on the fact that the contract rights and the fraud liability are deemed to be divisible regardless of the nature of the property interests.

Pursuant to the new dominant rule, neither property law nor the existence of the marital relationship is relevant to the innocent spouse's rights.<sup>113</sup> Furthermore, the policy against imputing liability for fraud on an innocent person is significantly more important than the possibility of a potential benefit to the wrongdoer.<sup>114</sup> Courts

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111. Excluding the *Howell* decision itself, seven out of the eleven remaining courts comprising the new dominant rule cite to *Howell* as support for holding that the innocent co-insured is entitled to recover. See *supra* note 105.

112. In *Howell*, the appellate court affirmed the decision of the trial court which held the interests in the property and in the contract to be several. See *supra* note 108. However, the appellate court seemed to place more emphasis on the fact that the liability for fraud was separate. See *supra* note 104 and accompanying text. Thus, it is unclear as to which of the two, separate fraud liability or separate contract and property interests, is the significant factor.

113. Neither property interests nor the marital status of the co-insureds is relevant because "[t]he unity of person of husband and wife (expressed through the tenancy by entirety) gives no clue to the relationship that ought properly to obtain between the owners of the proceeds of insurance." *Howell v. Ohio Cas. Ins. Co.*, 124 N.J. Super. 414, \_\_\_, 307 A.2d 142, 144 (1973) quoting *Hawthorne v. Hawthorne*, 13 N.Y.S.2d 50, 51 (1963). Furthermore, "[m]arried people are still individuals and responsible for their own acts." *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis. 2d 240, \_\_\_, 159 N.W.2d 89, 93 (1968).

114. Imposition of liability for fraud on an innocent person is contrary to the American system of justice which is premised on individual responsibility for misconduct. *American Economy Ins. Co. v. Liggett*, \_\_\_, Ind. App. \_\_\_, \_\_\_, 426 N.E.2d 136,

recognize the fundamental injustice of barring recovery under the circumstances because the reasonable person does not expect arson to be imputed as a result of the intentional acts of the spouse. Hence, liability under the fraud clause is several as to each insured under the policy. This same result also is attained through the use of traditional rules of insurance contract construction.

The decision to grant recovery under a contract analysis turns on the policy language and the contract law applicable to that language. In the policy's fraud provision, the term "the insured" is found to be ambiguous and capable of two or more interpretations.<sup>115</sup> Since the reasonable person would believe that his individual interest in the property is covered,<sup>116</sup> the contract is construed against the insurer and the contract interests under the policy are held to be divisible.<sup>117</sup> Hence, insurance contract law and adhesion contract theories supply the basis for ruling that the innocent spouse is entitled to recover where there is no clear policy language to the contrary.

It is the combination of insurance contract principles and concerns for equity that renders this new line of authority to be the best reasoned rule. Holding the contract interests and fraud liability to be severable effectuates the reasonable expectations of the ordinary purchaser of insurance.<sup>118</sup> By allowing the innocent co-insured to recover, avoiding a forfeiture, the purpose of an insurance contract, which is to provide indemnity against loss, is thereby promoted.<sup>119</sup>

Despite the fact that the new dominant rule mitigates the harshness and inequities of the other two theories, it nonetheless has

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140 (1981); *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, \_\_\_, 190 A.2d 420, 423 (1963). Some courts also note that there is no danger of a benefit to the wrongdoer anyway. *American Economy Ins.*, \_\_\_ Ind. App. at \_\_\_, 426 N.E.2d at 144; *Safeco Ins. Co. of Am. v. Kartsone*, 510 F. Supp. 856, 859 (D.C. Cal. 1981).

115. *Auto Owners Ins. Co. v. Eddinger*, 366 So. 2d 123 (Fla. App. 1979); *American Economy Ins.*, \_\_\_ Ind. App. \_\_\_, 426 N.E.2d 136 (1981).

116. *Hoyt v. New Hampshire Fire Ins. Co.*, 92 N.H. 242, \_\_\_, 29 A.2d 121, 123 (1942).

117. See *supra* notes 32-34 and accompanying text. Some courts use the *Pawtucket* rationale and define the term "the insured" in the fraud provision as applying only to the insured who defrauds the insurer and attempts to make a claim. *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978); *Morgan v. Cincinnati Ins. Co.*, 411 Mich. 267, 307 N.W.2d 53 (1981); *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, \_\_\_, 190 A.2d 420, 423 (1963).

118. See *supra* notes 40, 95, 116-17 and accompanying text.

119. See *supra* note 22 and accompanying text.

shortcomings of its own. In particular, the new rule is too overprotective of the marital relationship in its attempt to achieve the most equitable results.<sup>120</sup> Even though the courts disclaim its relevancy,<sup>121</sup> the marital relationship is undoubtedly a factor in the courts' treatment of the liability for the fraudulent conduct of the guilty spouse. It is at this point that the courts often confuse tort law with contract law principles.<sup>122</sup> As previously noted, it is not clear whether the focus of the new rule is on the liability for fraud or on the nature of the contract rights.<sup>123</sup> The issue in these actions concerns the nature and extent of the contractual obligations under the insurance policy,<sup>124</sup> not whether the denial of recovery is tantamount to an imputation of vicarious liability based on the marital relationship. Furthermore, the new rule ignores the realities of the marital relationship. The new rule is essentially an invitation to collusion and creates "the virtually insurmountable obstacle of proving both the arson of one spouse, and the conspiracy between spouses in order to defeat recovery in the first instance."<sup>125</sup> Thus, in reality, the decision to grant a right of recovery generates some unfavorable side effects.

#### PRACTICAL PROBLEMS AND POSSIBLE SOLUTIONS

While the new dominant rule avoids the difficulties that plagued the first two theories,<sup>126</sup> the decision to grant a right of recovery also gives rise to various practical problems. A major concern that accompanies the decision to grant recovery is spousal complicity. Often the innocence of the so-called "innocent" spouse is not always certain.<sup>127</sup> Under the new dominant rule, the "innocent" co-insured is

120. See generally Butler & Freeman, *The Innocent Coinsured*, *supra* note 60.

121. See *supra* note 113 and accompanying text.

122. See Butler & Freeman, *The Innocent Coinsured*, *supra* note 60, at 206.

123. See *supra* note 112 and accompanying text.

124. See e.g., *St. Paul Fire & Marine Ins. Co. v. Molloy*, \_\_\_\_ Md. \_\_\_\_, \_\_\_\_, 433 A.2d 1135, 1140 (1981), where the court stated:

Whether an innocent co-insured, notwithstanding his or her spouse's misconduct, 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. To hold otherwise would be to deny the parties to agreements insuring jointly owned property the ability to determine the nature of the co-insureds' contractual interests and obligations.

*Id.* (citations omitted). See also *Lovell v. Rowan Mut. Fire Ins. Co.*, 302 N.C. 150, \_\_\_\_, 274 S.E.2d 170, 173 (1981).

125. Butler & Freeman, *The Innocent Coinsured*, *supra* note 60, at 210.

126. See *supra* 113-19 and accompanying text.

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

certain to recover unless the insurer can successfully challenge his or her alleged innocence.<sup>128</sup> Such being the case, all insurers can be expected to investigate the possibility of spousal complicity "since on that basis they could quickly and with impunity deny coverage altogether."<sup>129</sup> Arson is a difficult crime to investigate and prove but "proof of complicity in arson is even more difficult"<sup>130</sup> because often there is a lack of any concrete evidence or eyewitnesses.

When investigating the potential of spousal complicity, it is often appropriate to examine the status of the marriage at the time of the fire. Suspicion of complicity will vary depending upon whether the fraudulent spouse dies in the fire, the couple is divorced or the marriage is on-going.<sup>131</sup> Obviously, where the fraudulent spouse dies as a result of the arson, there is no danger of any subsequent benefit to the wrongdoer if the "innocent" spouse is allowed to collect the proceeds.<sup>132</sup> Despite strong suspicions of guilt, the alleged innocence of the "innocent" spouse will probably go unchallenged unless there is direct proof of collusion. The threat of litigation for a bad-faith refusal to pay a claim "is strong incentive

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there was evidence that Mr. Hosey had been moving furniture out of the house on the afternoon prior to the fire. Letter from Alan C. Livingston, Attorney at Law, to Leane M. English (Feb. 15, 1982). Also, in *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978), Mr. Hildebrand put the house in his wife's name about eighteen months prior to the fire. Later the family moved to the beach for the summer, taking with them many of their personal belongings. The house was destroyed by fire several nights later. Based upon these facts, Mrs. Hildebrand was suspected of collusion but there was no direct evidence of involvement that would implicate her. Letter from Theodore H. Kurtz, Attorney at Law, to Leane M. English (Feb. 22, 1982).

128. See *Wilson v. Concordia Farmers Mut. Ins. Co.*, 479 S.W.2d 159, 161 (Mo. Ct. App. 1972) (husband and wife barred from recovery as joint enterprisers). See *supra* Taylor, note 9, at 197.

129. Letter from Miriam Gerber, Attorney at Law, to Leane M. English (Feb. 23, 1982).

130. Letter from Alan C. Livingston, Attorney at Law, to Leane M. English (Feb. 15, 1982).

131. The marriages involved are often atypical. See, e.g., *Steigler v. Insurance Co. of North America*, 348 A.2d 398 (Del. 1978) (Mr. Steigler was convicted of assault with intent to commit murder against his wife in connection with the arson).

132. *American Economy Ins. Co. v. Liggett*, \_\_\_, Ind. App. \_\_\_, 426 N.E.2d 136 (1981); *Safeco Ins. Co. of Am. v. Kartson*, 510 F. Supp. 856 (D.C. Cal. 1981); *Howell v. Ohio Cas. Ins. Co.*, 124 N.J. Super. 414, 307 A.2d 142 (1973), *modified*, 130 N.J. Super. 350, 327 A.2d 240 (1974). Other relationships in which the possibility of a benefit to the wrongdoer is considered are trustor-trustee, landlord-tenant, and in the corporate context. See e.g., *Mercantile Trust Co. v. New York Underwriters Ins. Co.*, 376 F.2d 502 (7th Cir. 1967) (trustor-trustee); *Erlin Lawler Enter. Inc. v. Fire Ins. Exch.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968) (corporation).

for the insurance company to settle with its insured unless it had strong evidence of guilt."<sup>133</sup>

Because complicity in arson is difficult to prove and recovery is the most equitable result under the circumstances, it is questionable whether coverage will ever be denied. Furthermore, a subsequent benefit to the wrongdoer is always a distinct possibility when the fraudulent spouse is still alive.<sup>134</sup> Insurance companies are clearly disadvantaged under the new dominant rule. One possible solution helps to alleviate these practical problems.

The burden of proof should be shifted to the "innocent" spouse to establish his or her lack of involvement in the fraudulent acts of the other spouse. Since complicity in arson is so difficult to detect, the burden placed on the insurance companies to prove collusion in order to deny coverage is inordinate. Therefore, once the insurer has proven the fire to have been of incendiary origin, the spouse seeking coverage under the policy would be obligated to prove his or her innocence. Congress has already enacted a statute pursuant to which an innocent spouse who is subject to federal income tax liability as a result of omissions of income from a joint return may prove that he or she had no knowledge of the omission.<sup>135</sup> Under 26 U.S.C. § 6013(d)(3), a husband and wife who file a joint tax return are jointly and severally liable for the tax due on their combined incomes. Recognizing the grave injustices that result from an imposition of joint liability upon an innocent spouse, Congress enacted 26 U.S.C. § 6013(e) in 1971 which relieves an innocent spouse of federal income liability if he or she establishes a lack of knowledge of the omission and if under the circumstances, taking into consideration direct or indirect benefits to the innocent spouse from the items omitted, imposition of liability would be inequitable.<sup>136</sup> Perhaps a similar piece of legislation could best accomplish a shift in the burden of proving spousal complicity by the insurer to that of proving innocence by the spouse seeking coverage under the policy. This

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133. Letter from Alan C. Livingston, Attorney at Law, to Leane M. English (Feb. 15, 1982). *See also*, *Chavers v. National Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); *Gruenberg v. Aetna Ins. Co.*, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973); *Safeco Ins. Co. of Am. v. Kartsone*, 510 F. Supp. 856 (1981).

134. In *Ryan v. MFA Mut. Ins. Co.*, \_\_\_\_ Tenn. App. \_\_\_\_, 610 S.W.2d 428 (1980), Mr. and Mrs. Ryan reconciled shortly after Mr. Ryan was permitted to recover under the policy. Letter from William H. Crawford, Jr., Attorney at Law, to Leane M. English (Feb. 11, 1982).

135. 26 U.S.C. § 6013(e) (1980).

136. 26 U.S.C. § 6013(e)(1)(B),(C) (1980). *See* S. REP. 91-1537, 91st Cong., 2d Sess. 3, reprinted in (1970) U.S. CODE CONG. & AD. NEWS 6089.



shift in responsibility affords the "innocent" spouse with an opportunity to escape joint liability and lessens the likelihood that the insurer will be defrauded.

Perhaps the best solution to the entire problem is to revise the policy language. If the insurance companies intend the fraudulent acts of one spouse to void the policy as to both, the policy should be redrafted to reflect this position.<sup>137</sup> The desired result could be obtained by substituting the term "the" insured in the fraud provision with "a," "any" or "an" insured.<sup>138</sup> Drafting the policy to expressly deny recovery not only serves the interests of the insurance companies but also advances the public good by discouraging fraud.<sup>139</sup>

These solutions serve separate functions: the first is a defensive measure whereas the second is preventive. Yet, both protect the insurer from being victimized by potentially fraudulent claims.

Having decided that the innocent co-insured may recover on the fire insurance policy, courts must then determine the extent to which he or she is entitled to recover. Although the most equitable result is desired, courts do not want their decisions to encourage arson-for-profit. Thus, a proper evaluation of the innocent co-insured's interests in the policy is necessary to a just result. Unfortunately, there is a lack of unanimity in rationale among the courts in determining the extent to which an innocent co-insured is entitled to recover. Some courts refer to the interests in the real estate to ascertain the extent of recovery<sup>140</sup> while others look to the

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137. This suggestion is also made by the courts. See, e.g., *Economy Fire & Cas. Co. v. Warren*, 71 Ill. App. 3d 625, 390 N.E.2d 361 (1979); *Ryan v. MFA Mut. Ins. Co.*, \_\_\_\_ Tenn. App. \_\_\_\_, 610 S.W.2d 428 (1980).

138. See Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, *supra* note 32, at 549-54.

139. See discussion of the contract revision solution in Butler & Freeman, *The Innocent Coinsured*, *supra* note 60, at 211, where the authors observed:

This approach should satisfy those jurisdictions that have attacked the provisions of the policy based on the reasonable expectations of the insured. Nothing can be drafted to force a court to not employ a "public policy" rationale, but the proposed exclusion should help bring the reasoning of the courts back into the arena of contract law, instead of tort and criminal law.

Another method of discouraging arson-for-profit is to recommend that those who collect on fire insurance claims be encouraged to repair or replace the building instead of taking the cash and "walking." See *Fighting Arson by Removing the Profit Motive*, BUS. WK., May 21, 1979, at 68. Allowing the innocent co-insured to recover can also prevent certain frauds, such as conspiracy. See Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, *supra* note 32, at 555 n. 73.

140. *Safeco Ins. Co. of Am. v. Kartsone*, 510 F. Supp. 856 (D.C. Cal. 1981);

interests in the insurance contract.<sup>141</sup> Again, in this context, courts disagree as to whether property law or insurance contract principles should govern the inquiry into the amount of recovery.<sup>142</sup>

Under a property law analysis, the courts equate the interests in the insurance proceeds with those in the real estate. Where the property interests are severable, valuation of the innocent co-insured's interests in the insurance proceeds presents no problem.<sup>143</sup> However, valuation of the interests in the proceeds is a complicated task where the property is held by the entirety and the interests are regarded as inseparable.<sup>144</sup> Recovery by the innocent co-insured tenant by the entirety is barred because the extent of his or her interests in the proceeds cannot be determined.<sup>145</sup> Thus, a property

*American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, 426 N.E.2d 136 (1981); *Delph v. Potomac Ins. Co.*, 95 N.M. 257, 620 P.2d 1282 (1980). The courts following the "rebuttable presumption" theory also use the property interests to determine the extent of the interests in the proceeds. *Hosey v. Seibels Bruce Group, S.C. Ins. Co.*, 363 So. 2d 751 (Ala. 1978); *Simon v. Security Ins. Co.*, 390 Mich. 72, 210 N.W.2d 322 (1973); *Ryan v. MFA Mut. Ins. Co.*, \_\_\_ Tenn. App. \_\_\_, 610 S.W.2d 428 (1980).

141. *Steigler v. Insurance Co. of North America*, 384 A.2d 398 (Del. 1978); *Howell v. Ohio Cas. Ins. Co.*, 124 N.J. Super. 414, 307 A.2d 142 (1973), *modified*, 130 N.J. Super. 350, 327 A.2d 240 (1974) (per curiam); *Winter v. Aetna Cas. & Sur. Co.*, 96 Misc. 2d 497, 409 N.Y.S.2d 85 (Sup. Ct., Special Term 1978); *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, 192 N.E.2d 20, 242, N.Y.S.2d 50 (1963).

142. See *supra* note 49 and accompanying text.

143. In some cases' valuation of the interests in the property is not difficult because of the form of ownership. See, e.g., *Auto Owners Ins. Co. v. Eddinger*, 366 So. 2d 123 (Fla. App. 1979) (property held as tenants in common). Furthermore, valuation under the "rebuttable presumption" theory is simplified because the innocent co-insured must first show sole or major interest in the property in order to recover. The extent of the property interests are therefore ascertained. See *supra* note 140.

144. See *supra* note 104. In *Cooperative Fire Ins. Assoc. v. Domina*, 137 Vt. 3, 399 A.2d 502 (1979), the court stated that even assuming that the fraudulent acts of the husband could not bar recovery by the innocent wife, "nevertheless her interest in the property as tenants by the entirety is such that the extent thereof cannot be determined." *Id.* at \_\_\_, 399 A.2d at 503. It is interesting to note that in both *Liggett* and *Safeco*, the courts were able to determine the extent of the interests in the insured property even though the property was held by the entirety and as joint tenants with right of survivorship respectively because in both cases the fraudulent spouse died in the fire. Consequently, the courts determined that at the time of the fire the innocent spouse's interest extended to the whole estate and full recovery was granted. Perhaps, if the fraudulent spouse had lived, both *Liggett* and *Safeco* may have resulted in a bar to recovery for the same reason that the *Domina* court barred recovery.

145. The argument that the interests in entirety estates are indeterminable seems tenuous in light of the fact that courts in general, and divorce courts in particular, are able to divide them. See e.g., *Branstetter v. Branstetter*, 36 N.C. App. 532, 245 S.E.2d 87 (1978); *Carter v. Continental Ins. Co.*, 242 N.C. 578, 89 S.E.2d 122 (1955). In *Delph v. Potomac Ins. Co.*, 95 N.M. 257, 620 P.2d 1282 (1980), the court observed

law theory works as much of a hardship here as it does when used to determine the innocent co-insured's right to recover.<sup>146</sup>

An insurance policy is a personal contract of indemnity and does not insure the property itself.<sup>147</sup> Although the insured must have an insurable interest in the property in order to recover under the policy,<sup>148</sup> the proceeds are not a substitute for the realty.<sup>149</sup> Rather, the proceeds are a product of the contractual relationship between the insurer and the insured, and as such, are severable as voluntarily acquired personal property.<sup>150</sup> Since the insurance contract rights are separate and the proceeds are segregable, recovery

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that "New Mexico courts have segregated out the interests in community property when it has been necessary to do so in order to avoid injustice." *Id.* at \_\_\_, 620 P.2d at 1284.

146. See *supra* notes 82-88 and accompanying text. Use of tenancy by the entirety is inappropriate to analyze the rights of the innocent co-insured spouse. Since the tenancy was originally designed to protect marriage and the marital home against creditors, use of the tenancy under the circumstances acts to frustrate justice. *American Economy Ins. Co. v. Liggett*, \_\_\_ Ind. App. \_\_\_, \_\_\_, 426 N.E.2d 136, 140 (1981). Generally, the tenancy has been criticized as outdated and out of step with modern day social and economic conditions. *Grilliot & Yocum*, *supra* note 86. For criticisms of the use of tenancy by the entirety to bar recovery in other areas, see *Fort Lee Sav. & Loan Ass'n v. Li Butti*, 106 N.J. Super. 211, 214, 254 A.2d 804, 806 (1969) (dissenting opinion), subsequently adopted in, 55 N.J. 532, 264 A.2d 33 (1970) (*per curiam*) (surplus monies from mortgage foreclosure sale); *King v. Greene*, 30 N.J. 395, 413, 153 A.2d 49, \_\_\_ (1959) (dissenting opinions) (proceeds of an execution sale).

147. See *supra* notes 22-25 and accompanying text.

148. 4 APPLEMAN, *supra* note 22, at § 2121 (Rev. ed. 1969). An interest in the insured property is required because of the policy against wager contracts. *Id.*

149. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963). See also *Fort Lee Sav. & Loan Ass'n v. Li Butti*, 106 N.J. Super. 211, 215-16, 254 A.2d 804, 807-08 (1969) (dissenting opinion, Carton, J.).

150. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963). 43 AM. JUR. 2D *Insurance* § 194 (1969). Personal property is divisible because it is held as tenants in common in those jurisdictions where personalty cannot be held by the entireties. However, classification of insurance proceeds as personalty and, therefore, separable will not work in those jurisdictions where tenancy by the entireties is recognized in personalty. See *Grilliot & Yocum*, *supra* note 86, at 354-61 (fifteen states recognize tenancy by the entirety in personalty). Consequently, the same problem of indeterminable interests arises with personalty as it does with real estate. See *supra* notes 144-45 and accompanying text. Most notably, in those jurisdictions where recovery was barred because the proceeds were said to be a substitute for the real estate, tenancy by the entirety is recognized in personalty. Once again, tenancy by the entirety will work a hardship on the innocent co-insured spouse if used to bar recovery even under the personalty rationale. Under the circumstances, a denial of coverage would still impose liability for fraud on an innocent spouse. See also Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, *supra* note 32, at 554-55. In one jurisdiction under the new dominant rule where personalty may be held by the entireties, recovery was allowed based upon the fact that since the contract rights were

is granted to the extent of the innocent co-insured's interests which is held to be one-half of the total amount of the proceeds.<sup>151</sup>

Allowing the innocent spouse to recover to the extent of his or her contract interests is consistent with the purpose of an insurance contract which is to provide indemnity. Moreover, a contract law analysis avoids the difficulties inherent in a property law theory where the extent of recovery is subject to such legal fictions as the estate by the entirety and the notion that husband and wife are one person. Insurance contract principles accommodate modern day conditions and, therefore, produce the most equitable results.

### CONCLUSION

Although an absolute bar to recovery by an innocent co-insured was once the dominant rule, it is rapidly being replaced by a new line of authority. Currently, fourteen jurisdictions allow recovery to an innocent co-insured whose property interests are severable from those of the other insured. In ten of these jurisdictions, recovery is allowed regardless of the nature of the property interests. Seven jurisdictions still bar recovery by an "innocent" co-insured where the property is jointly owned.<sup>152</sup> The new dominant rule focuses on the nature of the insurance contract interests along with the notion of individual responsibility for misconduct. The new rule also permits the innocent co-insured to recover regardless of the property interests involved. This is the most equitable approach to the question of an innocent co-insured spouse's right to recover. Finally, although the new rule also has some shortcomings, these problems can be resolved by contract revisions and a shift in the burden of proof of complicity.<sup>153</sup> In conclusion, if courts continue to follow the new dominant rule, some safeguards, such as those recommended, must be devised so that the most equitable result will be achieved for both the insurer and the insured.

*Leane English Cerven*

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separate, "both logic and justice require that the amount recoverable be likewise allocated." *Steigler v. Insurance Co. of North America*, 384 A.2d at 398, 402 (Del. 1978).

151. See, e.g., *Auto Owners Ins. Co. v. Eddinger*, 366 So.2d 123 (Fla. App. 1979); *Howell v. Ohio Cas. Ins. Co.*, 124 N.J. Super. 414, 307 A.2d 142 (1973).

152. See, e.g., *supra* notes 14-16 and accompanying text.

153. See generally *Butler & Freeman, The Innocent Coinsured*, *supra* note 60, at 211.

