Insurance Law - Wrongful Conduct of Insured - Innocent Con-Insured

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The Pennsylvania Supreme Court has held that the wrongful conduct of one co-trustee in setting fire to a building constituting part of the corpus of a family trust cannot fairly be imputed to other co-trustees so as to deny them recovery of their share of insurance proceeds.


A brick building which had housed a grocery store was destroyed by fire. The building and the land on which it was located were conveyed in 1954 by Louis Manusov (settlor) to seven named trustees as a portion of the corpus of the Manusov family trust. The trustees included the settlor, his sister Freda Kracoff, his brother-in-law Charles Kracoff, and four of his nieces and nephews: Harry Kracoff, Doris Kracoff, Sara Stark, and Nathan Petrushansky.

When the deed of trust was executed, Charles Kracoff was running the grocery store in accord with a lease agreement with Manusov. The deed of trust expressly allowed Kracoff the right to continue the lease at his discretion, subject to rental adjustments, for as long as Kracoff wished. The instruments also contained an assignability clause allowing specified individuals, either severally

* Due to the unavailability of the Giacobetti opinion in the Pennsylvania State Reports at the time of publication, citations to this reporter have been omitted.


2. Id. Manusov provided in the living trust that maintenance, insurance, taxes and other expenses in managing the property were to be covered by income from the premises. In addition, Manusov provided for himself and named grantees, trustees, or their survivors and successors. Id. Specifically:

Manusov . . . directed the payment of $200 per month to himself for the rest of his life, $300 per year “[t]o each of the Grantees or their survivors and successors,” up to $50 per week to “Grantees, Trustees, or their issue or any member of their respective families” for care and maintenance in the event of sickness or need,” such educational expenses of children of the trustees as appropriate, and one thousand dollars as a wedding gift to each trustee’s child who should marry.

Id. The trust was to end upon the demise of the last surviving trustee of the originally designated trustees, as provided for in the deed of trust. At that time, title was to vest in fee simple to the children or issue of said designated trustees, per capita. Id.

3. Id.

4. Id.

5. Id.
or jointly, to lease the property on the exact terms available to Charles Kracoff.6

From 1974, day to day operating responsibilities of the store fell upon Harry Kracoff, by which time the settlor, and Harry’s mother (Freda) and father (Charles) were deceased.7 A portion of the grocery store’s contents including improvements belonged to Charles Kracoff at his death; title to these contents was held in a trust created in his will.8 The balance of the grocery store stock and contents were owned outright by Harry Kracoff.9

Harry Kracoff purchased fire insurance from Insurance Placement Facility of Pennsylvania (IPF) in June of 1974.10 The policy insured the building housing the grocery store for $50,000 and contents of the building for $100,000.11 This “Standard Fire Insurance Policy” was in effect from June 20, 1974 through June 20, 1975, its terms and conditions being fixed by statute.12

On March 25, 1975, IPF issued a “Non-Premium Endorsement” changing the insured’s name13 to “Manusov Family Trust, Harry Kracoff, Trustee, and Harry Kracoff, A.T.I.M.A.”14 The endorsement also included a “Lenders Loss Payable Clause,”15 adding a

6. Id. Those individuals included Charles Kracoff’s son, Harry Kracoff, Solomon Stark and Nathan Petrushansky. Id.
7. Id.
8. Id. The trustees of the trust created under the will of Charles Kracoff were Harry Kracoff, Dora Kracoff, Sara Stark, and Nathan Petrushansky, the four remaining co-trustees of the Manusov Family Trust. Id.
9. Id.
10. Id.
11. Id. Appearing under the heading “Named Insured Mailing Address” was the following:
   EST/CHARLES KRACOFF
   2201 RIDGE AVE.
   PHILADELPHIA PA. 19121
   Immediately below this entry was an additional entry, “MANUSOV FAMILY
   TRUST & HARRY KRACOFF, TRUSTEE.”
   Id.
12. Id. at 855. See 40 PA. CONS. STAT. ANN. § 636(2) (1971).
13. 457 A.2d at 855. The original endorsement was to the “Estate of Charles Kracoff, Manusov Family Trust, Harry Kracoff, trustee.” Id.
14. Id. A.T.I.M.A. is a shorthand abbreviation for “as their interests may appear.” Id. at 857. See New Hampshire Ins. v. American Employers Ins., 208 Kan. 532, 533, 492 P.2d 1322, 1324 (1972), where the court noted that “a clause making a fire insurance policy payable to named insureds as their interest may appear refers to the interests existing at the time of the loss.” Id. at 536, 492 P.2d at 1325 (quoting 5 COUCH ON INSURANCE 2d § 29:109 (2d ed. 1960) (emphasis added)).
15. 457 A.2d at 855 n.1. A lender’s loss payable clause is a fire policy clause which lists the priority of claims in event of the destruction of the property insured. Generally, a mortgagee, or beneficiary under a deed of trust, is named in the clause and paid the amount
mortgagee to the policy as a payee in addition to those insured under the "Non-Premium Endorsement."  

In April of 1975 the insured property and its contents were destroyed by fire. Harry Kracoff submitted the appropriate affidavits of loss showing that the fire damage was greater than the insurance coverage on the building and its contents. Kracoff swore in the affidavits that the cause of the fire was unknown to him, but IPF determined that Kracoff started the fire and consequently refused to pay the claim.

The plaintiffs filed a claim against IPF on January 6, 1976 with a complaint comprised of two counts: the first for an award in the amount of $50,000 for damage to the building, and the second for $100,000 as coverage on the contents of the building. IPF claimed that Kracoff's affidavit of loss was purposefully falsified as to the true origin of the fire. The insurance company further claimed that the proof of loss was made with the intent to deceive it, and therefore Kracoff breached the "Concealment, Fraud" clause of the policy. The insurer also denied liability for loss under the "Perils..."
Not Included" clause, repeating its contention that plaintiffs had materially aided in the cause of the fire and any subsequent losses.

Sitting without a jury, Judge Bullock of the Court of the Common Pleas of Philadelphia County found for IPF on both counts. The judge determined that the fire had been prearranged by someone with inside knowledge, rather than an "angry outsider" as Harry Kracoff had maintained, and resolved that the fire had been started by Harry.

In denying recovery of the insurance proceeds to the plaintiffs, Judge Bullock imputed Harry's tortious conduct to the other trustees based on the premise that Harry acted as an agent for those having an interest in the trust res. The court reasoned that the co-trustees had acquiesced in Harry's exclusive control of the business prior to the fire, and therefore the remaining co-trustees were bound by Harry's actions.

Exceptions were made by plaintiffs in their capacity as co-trustees. They did not disagree with the factual finding that Harry caused the fire to be set, but they did contest the court's decision that all interests, including those of unborn children, minors, and remaindermen, were inescapably tied to Harry's wrongful conduct. On February 2, 1979 the court dismissed all of the exceptions.

After the exceptions were dismissed, Doris Kracoff and Sara Stark resigned as trustees and the Orphans Court Division of the Court of Common Pleas of Philadelphia granted a petition for appointment of a substitute trustee, Alexander B. Giacobetti, Esquire. Giacobetti appealed to the Superior Court, which affirmed

24. 457 A.2d at 855. That clause absolves the insurer of liability where the loss was caused directly or indirectly by failure of the insured to use all reasonable means to save and preserve the property. Id.
25. Id.
27. Id. Only Harry Kracoff and Leon Bryn, Harry's son-in-law, were present in the store on the date of the fire. Id.
28. Id.
29. Id. The court further stated that it could not see how future beneficiaries of the trust might have independent standing. Id. See infra text accompanying notes 43-45.
30. 457 A.2d at 856.
31. Id.
32. Id. The court acknowledged that the remaindermen were innocent, but that they were also natural objects of the bounty of Harry Kracoff and his co-trustees. Their right to recover was contingent upon the rights of Harry Kracoff and the co-trustees to recover. Id.
33. Id.
the judgment in a per curiam order.\textsuperscript{34} Upon review, the Supreme Court of Pennsylvania vacated the decision of both lower courts and remanded the case to the court of common pleas.\textsuperscript{35}

Chief Justice Roberts, writing for a unanimous court,\textsuperscript{36} agreed with the court of common pleas that Harry Kracoff’s wrongful actions prevented him and his beneficiaries from sharing in any distribution of the fire insurance proceeds.\textsuperscript{37} Chief Justice Roberts further explained that the insurer’s right to hold Harry’s and his beneficiaries’ share of the insurance proceeds was not dependent upon the “Release and Disclaimer” executed by Harry.\textsuperscript{38} He observed that IPF’s claim to this portion of the proceeds is based on the common law principle as enunciated at least once before by the Pennsylvania high court,\textsuperscript{39} that a person may not profit from his own wrong, particularly if the wrong is criminal.\textsuperscript{40}

In considering the trial court’s decision that the other beneficiaries under the Manusov Family Trust are not privileged to retain the insurance proceeds, the court disagreed.\textsuperscript{41} Examining the findings of the court of common pleas, the court agreed that Harry Kracoff acted on his own in starting the blaze and that there was no evidence that the other income beneficiaries under the trust abetted or condoned the wrongful conduct of Harry Kracoff.\textsuperscript{42} Consequently, the court found no basis for preventing the other beneficiaries from recovering the fire insurance proceeds.\textsuperscript{43}

Chief Justice Roberts concluded that Harry Kracoff’s wrongful actions could not be imputed to the trust or to the beneficiaries.\textsuperscript{44} Citing the Restatement (Second) of Trusts,\textsuperscript{45} Chief Justice Roberts

\begin{itemize}
\item 35. 457 A.2d at 857.
\item 36. Former Chief Justice O’Brien took no part in the decision of the case. Id. at 853.
\item 37. Id. at 856. Beneficiaries are Harry Kracoff’s “children or issue” under the Manusov Family Trust. Id.
\item 38. Id. at 857.
\item 39. Id. The Supreme Court of Pennsylvania in the case of In re Greifer’s Estate, 333 Pa. 278, 5 A.2d 118 (1939), held that a wife who murdered her husband and then attempted to claim benefits under a trust covering life insurance policies on the husband’s life is barred from taking those benefits by the common law principle that a person will not be permitted to profit by his own wrong, particularly by his own crime. Id. at 279, 5 A.2d at 119.
\item 40. 457 A.2d at 857.
\item 41. Id.
\item 42. Id.
\item 43. Id.
\item 44. Id.
\item 45. \textit{Restatement (Second) of Trusts} § 276 comment a (1959), states that “[a] trustee as such is not an agent of the beneficiary . . . and has no power to subject the beneficiary to personal liability for his torts.” Id.
\end{itemize}
noted that while a trustee is not an agent of the beneficiary, over the passage of time, the other trustee-beneficiaries had assented to Harry Kracoff's increasing assumption of responsibility under the trust indenture, including that of obtaining insurance on the trust res. Chief Justice Roberts found, however, that the insurer had met its burden of showing that Harry Kracoff had become an agent of the trust and all beneficiaries for all purposes, such that the remaining trustee-beneficiaries should be denied recovery of the insurance proceeds. Accordingly, the court reversed and remanded the case to the court of common pleas.

Until recently, it was generally the rule in this country that where one of two or more insureds intentionally caused the loss to the insured property, the remaining insureds, although entirely innocent of any wrongdoing, could not recover. The primary reasons advanced to support this rule are based on fraud and that it is impossible to separate the interests of other co-insureds in the property. The most typical set of circumstances out of which this issue arises occurs when arson is committed by one spouse without the knowledge or cooperation of the other. In addition, loss situations involving trust beneficiaries, corporate co-insureds, partners, and landlords and tenants illustrate the same issue and have evoked the same arguments for and against recovery.

The issue of whether an insured's fraud by deliberate burning of property jointly owned is imputed to co-insureds is not one of first impression in Pennsylvania, although it is in the case of a trustee's incendiary act against trust property. To begin, there exists a well recognized common law principle that a person will not be permitted to profit by his own wrong, particularly his own crime. This policy applies to fire insurance claims, thereby forbidding recovery to insureds who fraudulently and intentionally set fire to property covered by an insurance contract, as well as simultaneously deny-

46. 457 A.2d at 857.
47. Id. The court also concluded that the insured could not deny recovery based on the "Concealment, Fraud" and "Perils Not Included" clauses on the basis that Harry Kracoff's conduct could not be deemed an action of the trust. Id.
48. Id.
50. Id. at 137, 138. The standard fire insurance policy contains the provision that voids the policy in the event of fraud by the insured. Id. See supra note 12.
52. See supra note 39.
53. See, e.g., General Electric Credit Corp. v. Aetna Casualty & Sur. Co., 437 Pa. 463,
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ing recovery to innocent co-insureds.

In Matyuf v. Phoenix Insurance Co., 54 a Washington County Court of Common Pleas judge not only applied the above mentioned principle, but held that the acts of the husband in destroying the insured property barred his wife's recovery even though she was not involved in his fraudulent act. 55 This was predicated on the theory that:

[W]hen 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 assureds 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. 56

Further, permitting a recovery by the innocent spouse of one-half the proceeds of the policy would be, in effect, to substitute another contract in place of the one made to protect the indivisible ownership by the entireties. 57

In an earlier Pennsylvania case, Bowers Company v. London Assurance Corp., 58 the superior court concluded that the contract insured the assureds jointly. The named assureds were "John A. Perry and L. S. Bowers Company, as their interests may appear." 59 Bowers Company, a car dealership, sold a car to Perry under a bailment lease which required Perry to insure the car against damage by fire; the proceeds of any loss were payable to Bowers as its interest might appear. 60 Until final payment had been made and Perry owned the whole interest in the car, Perry and Bowers possessed joint interest in the policy, 61 as distinguished from the automobile, where the interests are distinct and enforceable by separate actions regardless of the rights of a co-insured. 62 The court

473, 263 A.2d 448, 454 (1970) and Owl & Turtle, Inc. v. Travelers Indem., 554 F.2d 196, 198 (5th Cir. 1977), citing as settled law that principles of public policy deny the right of recovery to an insured who fraudulently sets on fire property covered by an insurance contract.

54. 27 Pa. D. & C.2d 351 (C.P. Wash. 1933). This opinion was unreported for 29 years until the Superior Court of Pennsylvania cited the opinion and caused it to be published in Taylor v. Seckinger, 199 Pa. Super. 262, 184 A.2d 317 (1962).

55. Id. at 365.
56. Id. at 365.
57. Id. at 359.
59. Id. at 122.
60. Id. at 123.
61. Id. at 124.
62. The holding in this regard was based on language in the policy restricting coverage to the named insureds "as their interest may appear." The Bowers court noted:
found that "the policy did not purport to insure the interests of the assured in severalty but jointly, the two interests combined constituting one whole subject of insurance." The court determined, therefore, that Bowers would be prevented from recovering on the policy if it were established that Perry had fraudulently burned the car.

Another case applying Pennsylvania law and supporting the traditional no-recovery view is *Mele v. All Star Insurance Corp.*, where a fire destroyed a building owned by the plaintiffs, husband and wife. It was found that the fire was of an incendiary origin that was caused to be set by the husband, and thus the jury returned a verdict for the defendant insurer. The plaintiffs in their post trial motions argued that the court committed fundamental error in refusing to charge that the plaintiff wife was entitled to recover monetary damages irrespective of the jury's verdict as to the alleged arson by her husband. Chief Judge Joseph S. Lord, III, of the Federal District Court for the Eastern District of Pennsylvania, however, charged the jury that under Pennsylvania law a wife as co-owner of the insured property with her husband and co-insured on a policy, would be barred from any recovery under that policy if her husband was responsible for the fire.

The *Mele* court found that the *Bowers* rationale applied, but noted that the interests of the co-insureds in *Bowers* were not the same as the interests of the husband and wife before it. Nevertheless, Chief Judge Lord determined that the "clear albeit somewhat vintage position of the Pennsylvania courts" bound him to conclude that Mrs. Mele, the innocent spouse, was barred by the fraudulent acts of her husband, if the jury determined he was responsible for the fire.

This is a recognition that the quantities of the respective interests might vary from time to time, as payments were made on account of the contract, and that the character of interest might not be precisely alike nor the quality the same, but is not evidence of an intention to insure such varying interests separately, so as to permit separate actions on the policy with the same effect as if separate policies had been issued.

*Id.* at 125.
63. *Id.*
64. *Id.* at 127.
66. *Id.* at 1339.
67. *Id.* at 1341.
69. 453 F. Supp. at 1342.
A majority of the courts in other jurisdictions which have examined the issue have ruled that the fraud of one co-owner vitiates the policy as to the other.\textsuperscript{70} Massachusetts, for example, follows this approach.\textsuperscript{71} In one such case, a woman whose husband had intentionally burned buildings owned by the couple as tenants in common conceded that, at law, her husband's act rendered the fire insurance policy in both of their names void.\textsuperscript{72} The wife was in no way connected with the fire, but the court held that the policy was joint and that the wife could not maintain a suit in equity to recover her interest.\textsuperscript{73} In ruling against the wife, the Supreme Judicial Court of Massachusetts pointed out that the status of the husband and wife as joint insureds (not as insureds each with a separately protected interest) was a feature of the policy upon which the insurer was entitled to rely, a feature that could not be rewritten by the court.\textsuperscript{74} The court premised its conclusion on the finding that the policy was joint and that the husband's action of burning the insured structures was an act of the "insured," therefore, fraud perpetrated against the insurer rendered the policies void in accordance with the policy language.\textsuperscript{75}

The principle of joint responsibility of joint insureds was similarly adopted by the Wisconsin Supreme Court.\textsuperscript{76} There, following the husband's conviction for arson in the burning of the couple's home, the wife sought to recover under the fire insurance policy issued to them jointly. She maintained that her husband's wrongful act should not preclude her from recovery, however, the policy contained provisions stating that the insurer was not liable for loss caused by the neglect of the insured,\textsuperscript{77} and that the policy should be void in any case of fraud by the insured.\textsuperscript{78} The court held that

\textsuperscript{70} See, e.g., Ryan v. MFA Mut. Ins. Co., 610 S.W.2d 428, 429 (Tenn. Ct. App. 1980), where the court listed Alabama, Louisiana, Massachusetts, Michigan, Texas, Vermont, Virginia, and Wisconsin as jurisdictions which have adhered to the traditional rule. Id. at 429. See also 18 Couch on Insurance § 74:663-77 (2d ed. 1983) (compiling cases following the traditional rule).

\textsuperscript{71} Kosier v. Continental Ins., 299 Mass. 601, 13 N.E.2d 423 (1938).

\textsuperscript{72} Id. at 603, 13 N.E.2d at 424.


\textsuperscript{74} Arson Recovery By Innocent Co-Insureds, Fire & Casualty Cas. (CCH), Fire & Marine Section, at CW-1 (July 1981).

\textsuperscript{75} 299 Mass. at 604, 13 N.E.2d at 425.

\textsuperscript{76} Klemens v. Badger Mut. Ins., 8 Wis. 2d 565, 99 N.W.2d 865 (1959).

\textsuperscript{77} Id. at 566, 99 N.W.2d at 866.

\textsuperscript{78} Id. The "Concealment, Fraud" clause under the Wisconsin standard policy is substantially similar to that used in Giacobetti. See supra note 23.
since the policy was in the joint names of the insureds, the insureds had undertaken an obligation that each would not commit neglect and that the breach of the policy caused by the willful destruction of the insured property by a co-insured is chargeable to both insureds and thereby precludes recovery by the innocent joint insured. The court barred recovery by the innocent spouse not on the basis of the indivisibility of the joint interests in the insured property, but because of the joint duties of the co-insured parties to comply with the terms of the policies.

The Supreme Court of Vermont considered the issue in a case where a husband willfully burned property that he and his wife had jointly insured. Assuming misconduct by the husband would not bar recovery by the innocent wife, the court stated that her interest in the property could not be determined because the property was held as tenants by the entireties, and therefore she could not be permitted recovery. Invoking the logic of the Matyuf decision, the court advanced a second ground for denying recovery on the basis that a recovery by the wife would be to substitute another contract in place of the one made to protect the entireties ownership.

Virginia is typical of all jurisdictions that have followed the traditional line of no recovery. The Supreme Court of Virginia held that an innocent wife was not entitled to keep her share of the proceeds from a homeowner’s policy for property owned by the couple as tenants by the entireties where destruction of the property was caused by the incendiary act of the husband. The court disposed of the issue summarily, stating simply that the legal interest in the subject matter of the policy was joint and not severable.

While decisions prohibiting recovery by innocent co-insureds in arson losses are rooted in a long series of cases, there is a growing
movement favoring recovery. The first of these rulings emanates from the New Hampshire Supreme Court. The New Hampshire case involved the loss by fire of property owned by three tenants in common. The fire which destroyed the property was purposely set by one of the three owners who subsequently pleaded guilty to an indictment charging him with arson. There was no evidence that the other co-owners had any guilty knowledge of the fire. Notwithstanding the fact that the fire insurance policy was issued in the names of all the tenants in common, the New Hampshire court held that the innocent co-insureds may recover on the basis of the "reasonable expectation" theory of policy construction.

The Appellate Court of Illinois adopted the New Hampshire approach by holding for an innocent co-insured husband whose wife burned the home which they had owned as joint tenants. Applying the reasonable expectation theory, the Illinois court held that if the insurance company had intended the wrongdoing of a co-insured to be imputed to the innocent co-insured, it should have made the policy language expressly clear in that regard, so that a

89. Id., 29 A.2d at 122.
90. Id.
91. Id. at 243, 29 A.2d at 123. The reasonable expectation theory as stated by the Hoyt court considers:

The mere fact that the language employed may be sufficient to "express a joint covenant" is not conclusive. Whether 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.

Id. (citations omitted). The court further stated:

The ordinary person owning an undivided interest in 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. And the fact that under such circumstances the insurance company may have had good reasons for preferring to issue a joint policy is unimportant unless those reasons were disclosed.

Id. (citations omitted).

The reasonable expectation theory has been adopted in Pennsylvania. In Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 594, 388 A.2d 1346, 1352 (1978), the Pennsylvania Supreme Court held that it was a reasonable expectation of the insured wife to believe that the insurer was providing interim life insurance benefits when her husband, the life insurance applicant, died between the insurer's receipt of the application and premium deposit and the date of the medical examination. The insured wife brought an action against the insurer to recover benefits when the insurer denied liability, asserting that certain conditions in the application had not been fulfilled by the applicant. Id. at 582, 388 A.2d at 1347.

reasonable person in the position of an innocent co-insured could
have expected that result.93

Recovery has been allowed even where the form of ownership is
by tenants by the entirety. The Law Division of the Supreme
Court of New Jersey, in considering whether the co-insured wife
may collect fire insurance benefits resulting from the husband’s in-
tentional burning of the family home, held that the fraud of the
husband did not prohibit recovery under the policy by the inno-
cent wife.94 The court noted that the outmoded metaphysical con-
cept of tenants by the entireties, based on the legal fiction of the
"oneness" of husband and wife could be used as a basis for deny-
ing recovery to the innocent spouse,95 but concluded that the inter-
ests under the insurance policy are several and not joint, and thus
not subject to divestment or forfeiture by the singular actions of
one spouse.96

On appeal in the same case, the Appellate Division of the Super-
ior Court of New Jersey97 reached the same result, but reasoned
that the primary factor in allowing the innocent wife recovery is
that responsibility for the fraud was several and separate rather
than joint and that the husband’s fraud cannot be imputed to the
wife regardless of the property rights or contract rights being joint
or several.98 Additional support for the court’s holding was based
on the ambiguous use of the term "and/or" in listing the named
insured under the policy;99 the court simply applied the public pol-
icy argument of resolving the ambiguity against the insurer and in
favor of the innocent co-insured wife.100

Similarly, the Supreme Court of Delaware used an ambiguity in
the insurance policy as the primary basis for allowing recovery by

93. Id. at 629, 390 N.E.2d at 364.
95. 124 N.J. Super. at 417, 307 A.2d at 144.
96. Id. at 419, 307 A.2d at 145.
98. Id. at 354, 327 A.2d at 242.
99. Id. at 355, 327 A.2d at 242. In the policy the named insured was listed as "Gene K.
Howell and/or Donna L. h/w." Id. at 353, 327 A.2d at 241.
100. Id. at 355, 327 A.2d at 242. Considering the use of language in the policy, the
court stated:
[U]nless the terms thereof are plainly to the contrary and in some fashion clearly
called to the attention of the insureds, the obligation of the carrier should be consid-
ered several as to each person insured, and the fraud or misconduct of one insured
should not bar recovery by the innocent co-insureds to the extent of their respective
interests in the property involved.
Id. at 356, 327 A.2d at 243.
an innocent co-insured. Focusing upon the word “insured” as it appeared in the “Concealment, Fraud” provision of the insurance contract, the court noted that where language of an insurance contract is ambiguous, it should be construed strongly against the drafting insurance company. The Delaware Supreme Court also applied the reasonable expectation theory to hold that a contract of insurance should be read in congruity with the reasonable expectations of the insured so far as the language will allow. The Supreme Judicial Court of Maine followed the lead of Delaware in construing the term “insured” in the “Concealment, Fraud” provision of the fire policy as referring to the specific insured who is responsible for causing the loss and is seeking to recover under the policy, and not jointly to all insureds. Thus, recovery was allowed for the innocent spouse, despite the fact the term “insured” as defined in one section of the policy included both spouses if they lived in the same household.

Summarizing the “ambiguities theory” as used by some courts to permit recovery is a Tennessee Court of Appeals decision involving a wife’s arson and her husband’s attempt to collect the fire insurance proceeds. The Tennessee court undertook a detailed survey of the precedent both for and against recovery and determined that the new majority rule provided a better reasoned approach and a more equitable result. The court held that provisions in the standard fire insurance policy, such as fraud of the insured, or neglect of the insured, should be construed to mean that if an insured is guilty of fraud or neglect or of increasing a hazard to the property, then he or she may not recover under the policy. Voiding of coverage with respect to all co-insureds on the basis of one

102. See supra note 23. This provision is substantially similar to that used in the Giacobetti policy.
104. 384 A.2d at 401.
106. Id. The policy provided under the “general conditions” section that “[t]he unqualified word ‘insured’ includes (1) the Named Insured and (2) if residents of his household, his spouse, the relative of either, and any other person under the age of twenty-one in the care of an Insured.” Id.
108. Id. at 437.
109. The standard fire insurance policy of the State of Tennessee is substantially similar to that of the Commonwealth of Pennsylvania. Id. at 438-40. See supra note 12.
110. 610 S.W.2d at 437.
insured's fraud or neglect would bar recovery only if made clear and unambiguous in the policy and if the insurer informed all prospective applicants of the insurance company's position from the beginning.\textsuperscript{111}

The Court of Appeals of Maryland, in analyzing the question of recovery by an innocent co-insured, observed that this has been a problem vexing the appellate courts of many jurisdictions for several years.\textsuperscript{112} The court believed that the crucial question was not whether the co-tenants were married, or joint property owners lacking the marital relationship, since in either of these cases a joint interest in the insured property exists,\textsuperscript{113} but what the parties intended, and thus whether the contract sets forth the obligations of the co-insureds as joint or several.\textsuperscript{114} Thus, the decision was based on the law applied to a contract dispute rather than the law governing land titles.\textsuperscript{115}

The public policy considerations supporting the position that the tortious conduct of one insured does not bar the claim of an innocent co-insured were presented by the Indiana Court of Appeals.\textsuperscript{116} The court, in reiterating the well known principle that the law does not permit a guilty party to profit from his own wrongdoing,\textsuperscript{117} stated that the "arsonist whose business is failing 
\ldots must not be permitted, as a matter of public policy, to find a way out of his dilemma by setting a fire."\textsuperscript{118} This form of public policy, however, is easily achieved by denying recovery to the guilty co-insured and permitting the innocent co-insured recovery within the policy limits.\textsuperscript{119} The Supreme Court of New Jersey has adopted the stance of the Indiana court on the question of whether an innocent partner can recover where his partner had intentionally destroyed the property.\textsuperscript{120} Commenting on this situation the New Jersey court stated that recovery should not be precluded provided the

\textsuperscript{111} Id.
\textsuperscript{113} Id. at 149, 433 A.2d at 1140.
\textsuperscript{114} Id. at 150, 433 A.2d at 1140.
\textsuperscript{115} Id. at 151, 433 A.2d at 1141.
\textsuperscript{117} See supra note 39.
\textsuperscript{118} 426 N.E.2d at 140.
\textsuperscript{119} Id. The court further stated that "[w]here there is some prospect that the guilty party might benefit, even indirectly, a careful factual analysis can be made by the trial court to determine whether that prospect exists and to protect against it." Id. (citations omitted).
\textsuperscript{120} Ambassador Ins. Co. v. Montes, 76 N.J. 477, 388 A.2d 603 (1978).
wrongdoer does not benefit.\textsuperscript{121}

Perhaps the most significant case in light of Giacobetti is \textit{Mercantile Trust Co. v. New York Underwriters Ins. Co.},\textsuperscript{122} a diversity action in the Court of Appeals for the Seventh Circuit which permitted recovery by the trustee and residuary beneficiary despite the fraud of the life beneficiary who obtained the fire insurance policy.\textsuperscript{123} The court stated that an insurance contract is indivisible as to risk, but that the issue of whether fraud of an insured would bar recovery by an innocent co-insured was not clear-cut.\textsuperscript{124} The issue was whether the trustee's interest in the house was divisible claimant-wise from the life beneficiary's interest in the contents.\textsuperscript{125} After reviewing several cases that permit recovery by an innocent co-insured, the court found Hoyt v. New Hampshire Fire Ins.\textsuperscript{126} and its progeny persuasive, for the trustee was unaware of the life beneficiary's tortious conduct, nor did it have any control over the property in question.\textsuperscript{127}

Also significant in light of Giacobetti is the holding in \textit{Mercantile} as it relates to the innocent remainderman. Edward Luer owned a beneficial life interest in the property. As a result, the court did not believe that Illinois law would impute Edward Luer's fraud to the trustee who was an innocent co-insured, or to his son, Frank Luer, the innocent remainderman.\textsuperscript{128} In addition, the $20,000 proceeds collected by the trustee for destruction of the residence was to be held for the descendants of the life beneficiary, Edward Luer, so that he would not profit from his wrongdoing.\textsuperscript{129} As the Supreme Court of Maine indicated, "mere family relationship of the arsonist which does not bestow a property right or other direct benefit in the proceeds of insurance does not bar a recovery."\textsuperscript{130}

\begin{footnotes}
\item[121] \textit{Id.} at 483, 388 A.2d at 606.
\item[122] 376 F.2d 502 (7th Cir. 1967).
\item[123] \textit{Id.} at 506.
\item[124] \textit{Id.} at 505.
\item[125] \textit{Id.}
\item[126] 92 N.H. 242, 29 A.2d 121 (1942). See supra text accompanying notes 88-91.
\item[127] 376 F.2d at 506.
\item[128] \textit{Id.}
\item[129] \textit{Id.} The court indicated that this suggestion accords with sound principles of trust and property law and adopted it so that Edward Luer could not profit from his wrongdoing. \textit{Id.} See G. Bogert, \textsc{Trust} \& \textsc{Trustees} § 471 (2d ed. 1960) and Restatement of Property § 138 (1936).
\end{footnotes}
Illustrative of the Pennsylvania cases that favor recovery of an innocent co-insured is an opinion by Judge McCune of the United States District Court for the Western District of Pennsylvania in *Opat v. State Farm Fire & Casualty Insurance Co.* There the issue was whether the actions of one insured spouse in burning a dwelling held as tenants by the entireties barred recovery by the innocent co-insured spouse under Pennsylvania law. Prior to *Giacobetti*, however, neither the Pennsylvania Supreme Court nor the Pennsylvania Superior Court had addressed the precise issue. Thus, Judge McCune turned to *Matyuf*, *Bowers* and *Mele*, all of which had held that an innocent spouse is barred from recovery by the fraudulent act of a guilty spouse. Notwithstanding the Pennsylvania approach, Judge McCune reached the opposite result citing in part a Maryland Court of Appeals decision in *St. Paul Fire & Marine Insurance Co. v. Molloy*.

Judge McCune stated *Mele* and *Bowers* were not controlling to the extent that those rulings were based on the assumption that the property covered by the policy was jointly held, and that the policy itself was a joint contract. Further, Judge McCune reasoned that even if he were to apply the rule of *Bowers*, that the fraud of one insured bars recovery by the non-culpable insured, it was necessary to determine whether the insurance policy in this case was a joint contract. Applying the rules of contract construction to give the words of the policy a reasonable interpretation, Judge McCune analyzed the definition of “insured” in the insurance contract and concluded that “nothing in the policy sections that define the ‘insureds’ sheds any light on whether the obligations of the insureds are joint or several.”

Judge McCune also chose not to presume that the insurance policy covers the joint interest simply because the insured property is

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131. 542 F. Supp. 1321 (W.D. Pa. 1982). In this case the husband and wife owned a residence as tenants by the entireties which was destroyed by fire. The wife was found to have committed the arson in concert with her brother-in-law. *Id.* at 1321.
132. *Id.* at 1324.
136. 542 F. Supp. at 1325.
138. 542 F. Supp. at 1325.
139. *Id.*
140. *Id.* at 1326. The named insured was listed in the policy as “Opat, David W. and Janice M.” *Id.*
jointly owned. Instead, he recognized that the legal fiction of the "oneness" of husband and wife has largely disappeared and that today, separate property ownership by spouses is common. The principle was also acknowledged that one spouse cannot be held vicariously liable for the tortious acts of the other solely because of the marital relationship. Attempting to predict how the Supreme Court of Pennsylvania would rule, Judge McCune held the interests under the policy were several rather than joint regardless of the form of property ownership, and concluded that the innocent spouse should not be precluded from recovery by the fraudulent acts of the culpable spouse.

Citing Judge McCune's opinion in Opat as a newly announced change in the law is a recent decision in the Allegheny County Court of Common Pleas. In this case, the plaintiff's husband, a fireman, was found to have caused the fire that destroyed the couple's house. The innocent spouse was not implicated in the fire and sought to recover one-half of the insurance proceeds on the residence. Judge Barry, with Judge Narick concurring, examined the decision in Opat and announced that he was not bound by the district court opinion. However, the court agreed that the definition of "insured" in the instant case was not dissimilar to that used in the insurance policy in Opat. Further, Judge Barry observed that the "Concealment, Fraud" provision was substantially similar to the provision examined in Giacobetti. Applying the rules of contract construction, Judge Barry found it possible that the provisions in the insurance policy relating to fraud could void the entire policy. Regardless, he resolved the ambiguities in favor of the innocent spouse by finding that the obliga-

141. Id.
142. Id.
143. Id. at 1327. Judge McCune noted that Matyuf, which was factually similar, was a common pleas court decision and thus he was not bound by its holding unless it reflected a consensus of legal thought; he found that it did not. Id.
145. Id. at 1, 11-12.
146. Id. at 14. In Opat, the policy stated: "'Insured' means (1) the Named Insured stated in the declarations of the policy; [and] (2) if residents of the Named Insured's household, his spouse, the relatives of either, and any other person under the age of twenty-one in the case of any insured ...." 542 F. Supp. at 1326. Judge Barry noted that under the Coleman policy "Insured Person" was defined as "you and, if a resident of your household, any dependent person in your care." No. GD 80-13869 at 14. Compare supra note 99 with supra note 106.
tions under the policy were several rather than joint. Additionally, in analyzing the joint contractual obligation, Judge Barry quoted extensively from the Maryland Court of Appeals opinion in Molloy, indicating that the form of property ownership is of no consequence, especially in tenants by the entireties, as each owner possesses an undivided interest in the whole. As a result, if the no-recovery jurisdictions base their holdings on the relationship between the form of property ownership and the nature of the contractual obligation, then there is no valid reason to distinguish spouses holding property jointly from other co-owners. Judge Barry, choosing to align himself "with the growing number of courts which set a more analytically persuasive tack," held there was no bar to permitting recovery to the innocent spouse. Consequently, Judge Barry found that denying recovery to the guilty insured while permitting the innocent insured recovery is consistent with public policy.

In Giacobetti, Chief Justice Roberts has impliedly agreed with the influential new majority rule that innocent co-insureds may recover, despite the intentional destruction by the other co-insured. Giacobetti is consistent with the recent pro-recovery line of thinking but the court fails to cite any precedent in support of its ruling, mentioning not once the Pennsylvania cases or decisions of other jurisdictions that have raised and resolved the issue.

The court did, however, give effect to the public policy argument that a person may not profit from his crime, by having denied recovery of the share of insurance proceeds that would have flowed to Harry Kracoff and his children or issue. The Giacobetti court was justified in prohibiting recovery by Harry Kracoff, but its denial of recovery to innocent minors and unborn remaindermen, whose rights of recovery the court perceived as dependent upon Harry Kracoff's right to recover, was perhaps not the most desirable result.

Though not controlling, Mercantile addressed this issue and held that the father's/co-trustee's fraudulent act was not imputa-

148. No. GD 80-13869 at 16.
150. No. GD 80-13869 at 18.
151. 291 Md. at 150, 433 A.2d at 1141.
152. No. GD 80-13869 at 19.
153. Id.
154. 457 A.2d at 854.
ble to the son, the innocent remainderman.\textsuperscript{155} The \textit{Mercantile} court reasoned that neither the son nor Mercantile, the other trustee, had any knowledge of the father's actions.\textsuperscript{156} Consequently, the proceeds payable by the insurer in \textit{Mercantile} were held for the father's descendants and none of the proceeds could be expended for the benefit of the fraudulent co-insured father. The court adopted this approach as being in accord with "sound principles of trust and property law."\textsuperscript{157}

Similarly, in \textit{Giacobetti}, there was no evidence or any finding by the court that any trustee other than Harry Kracoff, or any beneficiary of the remainder interest, either started or was involved with the fire.\textsuperscript{158} The \textit{Giacobetti} court could have more fully effectuated stated public policy by permitting the innocent remaindersmen to recover. This could have been carried out by allowing the innocent co-trustees to hold Harry's share of the recovery proceeds for the benefit of Harry's descendants in the form of a constructive trust, as was done in \textit{Mercantile}. Harry, personally, would have received absolutely no benefit had the Manusov Family Trust recovered the entire proceeds of the fire insurance policy. This result was approved by the Supreme Judicial Court of Maine\textsuperscript{159} where it stated that mere family relationship to the arsonist which does not bestow a direct benefit in the insurance proceeds does not bar recovery.\textsuperscript{160}

The court's reasoning in allowing recovery to the other co-trustees was also based on the policy designation under the insured's name, "as their interest may appear," which indicated the diverse interests of several persons in the same property.\textsuperscript{161} This designation referred to the interests of the co-insureds as they existed at

\begin{itemize}
  \item \textsuperscript{155} 376 F.2d at 506.
  \item \textsuperscript{156} \textit{Id}.
  \item \textsuperscript{157} \textit{Id}. The court cited \textit{G. Bogert, TRUST} \& \textit{TRUSTEES} § 471 (2d ed. 1960) (applying the theory of constructive trusts as a device to compel one who unfairly holds a property interest by reason of unjust, unconscionable, or unlawful means to convey that interest to another to whom it justly belongs), and \textit{RESTATEMENT OF PROPERTY} § 138 (1936) (for the proposition that the owner of a life estate in possession or in reversion has a duty not to act upon the land in which his estate for life exists so that his conduct does not diminish the market value for all of the persons who own the interest which will, or may, take effect in possession after the termination of the estate for life).
  \item \textsuperscript{158} Brief for Appellant at 6, \textit{Giacobetti v. Insurance Placement Facility of Pa.}, 457 A.2d 853 (Pa. 1983).
  \item \textsuperscript{159} \textit{See} Hildebrand v. Holyoke Mut. Fire Ins., 386 A.2d 329 (Me. 1978).
  \item \textsuperscript{160} \textit{Id}. at 332.
  \item \textsuperscript{161} 457 A.2d at 855. \textit{See supra} note 14.
\end{itemize}
the time of the loss. Since 1812, Pennsylvania has followed the presumption that a conveyance or devise to two or more persons, not husband and wife, carries with it no right of survivorship unless clearly expressed. Further, in the Commonwealth, unless the terms of an agreement call for a joint tenancy, a tenancy in common will be presumed. The Manusov Family Trust indenture, based on the reported facts, did not expressly or by necessary implication call for a joint tenancy. Therefore the interests of the innocent co-trustees were easily divisible and separable from the interests of Harry Kracoff so that there was no conceptual basis for prohibiting recovery by the innocent co-trustees.

In commenting on the situation where one of several tenants in common committed arson, the Supreme Court of New Hampshire stated that the test for recovery is what the reasonable “insured” understood the terms of the policy to mean. The Giacobetti court, though not expressly giving effect to the “reasonable expectation” theory, concluded that the “Concealment, Fraud” provision in the policy did not permit the insurer, to deny proceeds to the trust because the conduct of Harry Kracoff was unilateral and not deemed an act of the trust. The reasonable expectations of the innocent co-trustees were that they would not be barred by the “fraudulent and unauthorized” act of the co-trustee, Harry Kracoff.

The decision of the Pennsylvania Supreme Court in Giacobetti

164. See Margarite v. Ewald, 252 Pa. Super. 244, 247, 381 A.2d 480, 482 (1977) (deed conveying real property to a husband and wife and a third party was held to create a tenancy by the entireties between the married couple, and their one-half interest was held in common in relation to the third person, and not as tenants in common with right of survivorship). See also Zomisky v. Zamiska, 449 Pa. 239, 241, 296 A.2d 722, 723 (1972) (deed creating a joint tenancy with right of survivorship); Michael Estate, 421 Pa. 207, 211, 218 A.2d 338 (1966) (deed creating a tenancy in common as between two married couples).
166. See generally Hoyt v. New Hampshire Fire Ins., 92 N.H. 242, 29 A.2d 121 (1942); see supra note 91.
167. See supra note 91.
168. 457 A.2d at 857.
169. Id.
sets the stage for the logical conversion of Pennsylvania to the better reasoned position in allowing the recovery of insurance proceeds to innocent co-insureds. Chief Justice Robert's opinion gives guidance between the lines as to what theory will be acceptable when this issue arises, but until that guidance is expressly stated and firmly established by the supreme court, the wrongful conduct of a co-insured may continue to bar enjoyment by innocent co-insureds of fire insurance proceeds in Pennsylvania.

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