Innocent Insureds Could Be Barred from Recovery

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In general, insurance policies do not cover the intentional acts of an insured person. In many cases, however, this does not address the entire question presented to an insurer. Frequently, insurers are faced with a situation where an insured has, for example, burned his home down, but it is not at all clear whether his wife knew about the wrongdoing. Then, an insurer must determine whether the insured's conduct can be imputed to other "innocent insureds." Like most questions of insurance, this must be answered by a careful analysis of the policy terms.

Historically, Illinois courts have allowed an "innocent insured" to recover a prorated share of any policy proceeds. This history, however, may be rewritten after the Second District's recent ruling in *Aurelius v. State Farm Fire & Cas. Co.*, 2008 Ill. App. LEXIS 769. In *Aurelius*, the Second District affirmed a trial court's decision to deny coverage to an insured based on the intentional acts of another insured based on the explicit and unambiguous policy language. Although Illinois courts have suggested an insurer may abrogate the "innocent co-insured" doctrine for the past 30 years, *Aurelius* is the first case to affirm such a result.

This issue was first addressed in *Economy Fire & Casualty Co. v. Warren*, 71 Ill.App.3d 625 (1st Dist. 1979). In *Warren*, the court determined an innocent insured could recover one-half of the insurance proceeds when he held property jointly with his wife. Interestingly, the court never quoted the policy language. In any event, the *Warren* Court concluded if the insurer intended an insured's wrongdoing would be imputed to other insureds, "it should have made the terms of the policy more express in this regard." 71 Ill.App.3d at 629. Thus, the court suggested

an insurer could bar the recovery of all insureds based on the wrongdoing of one insured if the policy allowed it.

The First District addressed this issue again in *State Farm Fire & Cas. Ins. Co. v. Miceli*, 164 Ill.App.3d 874, 518 N.E.2d 357 (1st Dist 1987). In *Miceli*, the court interpreted a "concealment of fraud" provision that provided the "entire policy shall be void if any insured has intentionally concealed or misrepresented any material fact or circumstance." 164 Ill.App.3d at 880. The *Miceli* Court determined "there is no clear statement here that the policy would be void as to all insureds if one insured were to engage in concealment or misrepresentation." *Id*. at 881. Thus, the court concluded the policy was ambiguous.

In response to these decisions, some insurers inserted "joint obligations" clauses in their policies. These provisions were discussed in *Wasik v. Allstate Ins. Co.*, 351 Ill.App.3d 260, 813 N.E.2d 1152 (2d Dist. 2004). In *Wasik*, the Insuring Agreement in the policy provided the "terms of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person." 351 Ill.App.3d 264-65. The policy also had a "concealment or fraud" provision that precluded coverage for "any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance." *Id*.

The *Wasik* Court determined "[a]lthough the clauses could be read as entirely prohibiting coverage for a loss caused by the act or failure to act of 'any' insured, they do not clearly state that the policy will be void or coverage will be excluded as to all insureds in the event of some improper behavior by 'any' insured." 351 Ill.App.3d at 261. The court also concluded the

placement of the joint obligations clause in the policy rendered the provision ambiguous. Specifically, the court noted the clause "is not a part of any of the exclusionary clauses but is instead found among the general policy declarations." 351 Ill.App.3d at 267. The court then concluded it could be interpreted to apply to the "general obligations to pay premiums and to take certain actions before and after a loss." *Id*. Thus, the *Wasik* concluded this provision was ambiguous.

In *Aurelius*, State Farm relied on two provisions. First, there was a provision in "Section I – Conditions" that provided "[i]f you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and *we will not pay you or any other insured for this loss*." 2008 Ill.App. LEXIS 769, at 3 (emphasis added). Second, there was a provision in "Section I and Section II – Conditions" that read "*[t]his policy is void as to you and any other insured*, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance either before or after a loss." *Id*. at 4 (emphasis added).

Plaintiff claimed these provisions were ambiguous, but the court disagreed. The court concluded that even though the intentional act provision applied regardless of whether the named insured caused a loss or another insured caused a loss, there was only one consequence: the policy was void and the insurer would not pay either the named insured or any other insured for the loss. Furthermore, the court noted the "Concealment or Fraud condition states that the policy is void as to 'you and any other insured' if 'you or any other insured' intentionally conceals or misrepresents any material fact either before or after a loss." *Id.* at 16.

According to the Second District, unlike the other policy provisions, the provisions in the State Farm policy not only provided that the policy is void due to any insured's conduct but also that the insurer will not pay you or any other insured for this loss. Thus, the *Aurelius* Court suggests a court should focus on two criteria when analyzing whether a policy provision allows an insured's conduct to be imputed to an "innocent insured." First, the policy must explicitly void coverage for any improper conduct by an insured. Second, the policy must clearly and unequivocally state the insurer will not pay "you or any other insured for the loss." If the policy satisfies these criteria, then the insurer can impute the improper conduct of one insured to any other insured under the policy.

In short, *Aurelius* is significant because it fulfills the promise of *Economy v. Warren*. In that case, the court suggested an insurer could impute the improper conduct of one insured to all other insureds. In *Aurelius*, the court approved of language that explicitly and unambiguously accomplished that goal. Specifically, an insurer can provide a "policy will be void as to you and any other insured if you or any person insured under this policy" have engaged in certain conduct, If the policy contains this terminology, the insurer can properly deny coverage to all insureds and the "innocent insured" doctrine will not apply.

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