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The Standard Fire Policy and the Innocent Insured

I. Introduction

The Seventh Circuit Court of Appeals held that the Illinois Standard Fire Policy precluded an insurer from excluding a so-called "innocent insured" from recovering under a policy because another insured willfully procured the loss. *Streit v. Metropolitan Casualty Insurance Co.*, 863 F.3d 770, 774-75 (7th Cir. 2017). The Seventh Circuit noted that the Illinois Supreme Court had not addressed the question presented to it. *Id.* at 770, 773. The court relied on decisions from Louisiana, West Virginia, California, Idaho, Arizona and other states to support its conclusion. *Id.* at 773-74. It asserted that its interpretation of the Standard Fire Policy was "not jeopardized by any public policy concerns." *Id.* at 774. The court's decision, however, failed to recognize prior Illinois decisions analyzing policy exclusions denying coverage for so-called "innocent insureds," failed to give deference to the Illinois legislative inaction following these decisions, failed to give due deference to the Illinois Department of Insurance, and failed to recognize the effect application of the "innocent insured" rule in homeowner's fire policies in Illinois might have on public policy in the state.

II. The Standard Fire Policy

A. The New York Standard Fire Policy

The New York legislature authorized the Insurance Department Superintendent to file a Standard Fire Policy in 1886. John R. Casolaro, *A Primer on Appraisal to Resolve Valuation Disputes — Part I*, 65 N.Y. St. B.J. 10, 11 n.8 (Jan. 1993). In 1943, New York adopted the current version of the Standard Fire Policy. *Id.* New York required all fire insurance policies to "conform as to all provisions, stipulations, agreements and conditions" of the Standard Fire Policy. S.B. 1332, 1943 Leg., Reg. Sess. (N.Y. 1943).

No records of debates or committee reports exist to analyze the intent of the New York legislature. In 1886, policies insuring property frequently covered only the peril of fire. Over time, as policies developed that covered multiple perils and coverages beyond payment of the value of the property, legislators and superintendents of departments of insurance noted advantages "in permitting departures from the literal requirements of the standard fire policy as long as the terms and provisions of the resulting policy are no less favorable to the insured than those required by the standard fire policy *with respect to the perils which it covers*." Memorandum from Thomas Thacher, Superintendent of Insurance, N.Y. Insurance Department, to Governor of New York 2 (Apr. 26, 1962) (on file with authors) (emphasis added); *see* Senator Flynn of New York's April 30, 1975 bill S.B. 5770, 1975-1976 Leg., Reg. Sess. (N.Y. 1975) and May 24, 1985 letter from the Superintendent of Insurance to counsel to the governor and attached memorandum supporting a bill that would amend Section 3404(f)(1) of the Insurance Law (the superintendent noted that the demands of the insurance buying public had changed markedly in the last forty years since adoption of the 1943 Standard Fire Policy.) *Id.*

B. Illinois Adoption of the Standard Fire Policy

Illinois adopted a standard fire policy providing standard coverage and insuring "against all direct loss by fire . . . except as hereinafter provided." *Standard Fire Policy*, at 1, http://insurance.illinois.gov/prop_cas_is3_checklists/statutes/StandardFirePolicy.pdf. Section 397 of the original bill referenced the "the Standard Fire Insurance Policy adopted by the National Convention of Insurance Commissioners at its meeting held in the City of New York on the 12th day of December, 1916," and provided: "No fire insurance policy, . . . [shall be issued] in other than such standard form except only as provided in this and the following sections of this article . . ." S.B. 270, 60th Gen. Assembly, Reg. Sess. (Ill. 1937).

The standard fire policy also provided limitations on coverage for fire, including:

> This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly by: . . . (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises . . . .

Standard Fire Policy, supra, at 2, lines 11.24– The Standard Fire Policy also provided conditions that suspend insurance coverage, including losses occurring "(a) while the hazard is increased by any means within the control or knowledge of the insured . . . ." *Id.* at 2, lines 3132–.

III. Overview of the *Streit v. Metropolitan Casualty Insurance Co.* Decision

Metropolitan Casualty Insurance Company ("Metropolitan") issued a homeowner's insurance policy to Barbara and Wesley Streit that insured the Streit's home against risk of fire damage. *Streit v. Metro. Cas. Ins. Co*., 863 F.3d 770, 772 (7th Cir. 2017). The policy contained an exclusion for intentional losses that provided that if a loss arose out of an intentional or criminal act with the intent to cause a loss, then no insured was entitled to coverage, "even people defined as **you** or **your** who did not commit or conspire to commit the act causing the loss." *Id.*

On August 5, 2014, the Streits' son, Wesley Jr., who resided with them at the time, set fire to the family home. *Id.* The Streits made a claim under the policy and Metropolitan denied the claim based on the intentional loss exclusion. *Id.*

The Streits sued Metropolitan, claiming that the policy exclusion conflicted with the Illinois Standard Fire Policy. *Id.* On appeal, the Seventh Circuit affirmed the district court's decision granting summary judgment in favor of the Streits, finding "the coverage provided by the Metropolitan policy fails to conform to that required by the Standard Fire Policy." *Id.* at 773. The Seventh Circuit reasoned that "[u]nder the Metropolitan policy, an intentional loss caused by *any* insured party suspends coverage for *all* insured parties—even those who were innocent of any wrongdoing. By contrast, the Standard Fire Policy suspends coverage if 'the hazard is increased by any means within the control or knowledge of *the* insured.'" *Id.* (citing *Standard Fire Policy*, at 2, lines 31–32 (emphasis added)). The Seventh Circuit then construed the Standard Fire Policy to require that, where "one insured party commits an intentional harm but another insured party is innocent of any wrongdoing, then the insurance coverage is suspended only as to *the* insured who caused the loss. An innocent coinsured may still recover." *Streit*, 863 F.3d at 774 (citing *Icenhour v. Cont'l Ins. Co.*, 365 F. Supp. 2d 743, 751 (S.D. W. Va. 2004); *Century-Nat'l Ins. Co. v. Garcia*, 246 P.3d 621, 624 (Cal. 2011); *Trinity Universal Ins. Co. v.*

Kirsling, 73 P.3d 102, 106 (Idaho 2003); *Nangle v. Farmers Ins. Co. of Ariz.*, 73 P.3d 1252, 1257 (Ariz. Ct. App. 2003); *Volquardson v. Hartford Ins. Co. of the Midwest*, 647 N.W.2d 599, 609 (Neb. 2002); *Lane v. Sec. Mut. Ins. Co.*, 747 N.E.2d 1270, 1272 (Ct. App. N.Y. 2001); *Watson v. United Servs. Auto Ass'n*, 566 N.W.2d 683, 691 (Minn. 1997); *Osbon v. Nat'l Union Fire Ins. Co.*, 632 So. 2d 1158, 1160 (La. 1994); *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266, 268-70 (Mich. 1994); and *Fireman's Fund Ins. Co. v. Dean*, 441 S.E.2d 436, 438 (Ga. Ct. App. 1994)); *see Goldner v. Kemper Ins. Co.*, 152 A.D.2d 936, 936 (N.Y. App. Div. 1989) ("as a matter of fairness and equity the independent wrongdoing of one insured should not bar recovery as to the coinsured under a policy that names and is intended to protect her") (citing *Reed v. Federal Ins. Co.,* 71 N.Y.2d 581, 588 (N.Y. 1988)); *see also Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60 (E.D. Mich. 1990).

In *Lane*, the New York Supreme Court also found contrary authority, based on exclusions that referred to "an" or "any" insured as opposed to "the insured." *Lane v. Security Mut. Ins. Co.*, 668 N.Y.S.2d 1021, 1022 (N.Y. Sup. Ct. 1998), *rev'd* 256 A.D.2d 1100 (1998), *rev'd* 747 N.E.2d 1270 (N.Y. 2001). The New York Supreme Court further noted that the different lines of cases turned on "the narrowest of semantic arguments . . ." *Id.*

None of the decisions addressed the public policy implications of providing a windfall to an innocent insured based on the wrongful conduct of the co-insured. *See, e.g.*, *Borman*, 521 N.W.2d at 270 ("We do not rest [our] decision on any resolution of the merits of that [public] policy debate").

V. Shortcomings of the Seventh Circuit's Decision

A. Failure to Recognize Illinois Precedent

The *Streit* decision makes little sense in view of the long-standing case law in Illinois and the Northern District of Illinois interpreting exclusions for intentional acts. While Illinois courts have considered deviations from the Standard Fire Policy in other contexts, prior Illinois case law interpreting the "innocent insured" issue have consistently upheld the exclusion when the terms are unambiguous.

1. Standard Fire Policy

One of the first reported cases that dealt with deviations from the Standard Fire Policy was *Lundquist v. Allstate Ins. Co.*, 314 Ill. App. 3d 240 (2d Dist. 2000). In *Lundquist*, the insurer issued a policy in which fire losses were not covered if a building was vacant or unoccupied for a period of thirty consecutive days. *Id.* at 242. The Standard Fire Policy provided:

> [fire losses are not covered if] a described building, whether intended for occupancy by owner or tenant is vacant or unoccupied beyond a period of sixty consecutive days (Standard Policy, lines 28-35).

Id. at 244. The insured argued that Allstate's policy impermissibly narrowed the coverage period in the Standard Policy by shortening it to thirty days rather than sixty. *Id.* The court held that because "insurance policies may not provide less coverage than that set forth in the Standard Policy," the provision in the insurance policy was void. *Id.* at 244-45 (citing 50 Ill. Admin. Code § 2301.100 (effective March 17, 1961) and 215 ILCS 5/397).

Interestingly, the insurer argued that because the policy provided coverage for vandalism, a coverage not required in the Standard Fire Policy, it was free to restrict the coverage for losses caused by vandalism. *Id.* The court noted: "while we agree that Allstate may restrict the coverage it provides for non-fire vandalism losses, we disagree that it may do so for fires caused by vandalism." *Id.* The court cited to § 2301.60 of the Administrative Code, which provided, in pertinent part:

> Appropriate forms of contracts of endorsements, whereby the interest in the property described in such policy shall be insured against other perils which the insurer is empowered to assume, may be used in connection with the Standard Policy. Such other contracts or endorsements attached to or printed thereon may contain provisions and stipulations inconsistent with the Standard Policy to the extent they are applicable only to such other perils.

50 Ill. Admin. Code § 2301.60 (effective March 17, 1961). Because the Standard Policy did not exclude fires caused by vandalism, the court determined that Allstate could not narrow coverage to less than that provided by the Standard Fire Policy. *Id.* at 244-45.

2. Innocent Insured

Before *Streit*, no court interpreting Illinois law invalidated a clause in a policy precluding any insured from recovering benefits under a policy for a loss that was intentionally procured by one of the insureds under the policy. Illinois courts, however, insisted that language in the policy unequivocally (or unambiguously) exclude coverage for any insured, including those not responsible for procuring losses, since any ambiguity would be resolved in favor of the innocent insured. *Compare West Bend Mutual Ins. Co. v. Salemi*, 158 Ill. App. 3d 241, 248 (2nd Dist. 1987) (citing *Economy Fire & Casualty Co. v. Warren*, 71 Ill. App. 3d 625 (1st Dist. 1979)) (policy language ambiguous because it does not unequivocally void policy as to innocent co-insureds), *with Aurelius v. State Farm Fire and Casualty Co.,* 384 Ill. App. 3d 969, 975-76 (2d Dist. 2008); *see also South Carolina Farm Bureau Mutual Insurance Co. v. Kelly*, 547 S.E.2d 871, 875 (S.C. App. 2001) (citing *Tyler v. Fireman's Fund Insurance Co.*, 841 P.2d. 538 (Mont. 1992)); *Noland v. Farmers Ins., Inc.,* 892 S.W.2d 271, 273 (Ark. 1995); *Reitzner v. State Farm Fire & Casualty Co., Inc.,* 510 N.W.2d 20, 24 (Minn. App. 1993).

In *Remy v. The Travelers Home and Marine Ins. Co.*, the court noted that an insurer may exclude coverage for an innocent insured if the policy language indicates that if any insured intentionally procures a loss, no insured will recover. 2013 WL 2573952, at *5 (N.D. Ill. June 11, 2013) (citing *Thoele v. Aetna Cas. & Sur.,* 39 F.3d 724, 727 (7th Cir. 1994) (collecting cases); *see also Brile for Brile v. Estate of Brile,* 296 Ill. App. 3d 661, 667 (2d Dist. 1998) ("the use of the phrase 'an insured 'in an exclusionary clause unambiguously means 'any insured . . . 'while the use of the term 'the insured 'in an exclusionary clause is meant to refer to a definite, specific insured ;("*Allstate Ins. Co. v. Smiley,* 276 Ill. App. 3d 971, 979 80–(2d Dist. 1995) (insurer properly denied coverage for a loss caused by a husband›s negligence where the loss was connected to the wife's home business and the couple›s homeowner›s policy excluded coverage for injuries arising from the business activities of "an insured" or "any insured").

As noted by the Seventh Circuit in *Streit*, no Illinois case addressed the issue of whether the Standard Fire Policy precluded an insurer from excluding innocent insureds from recovery based on the intentional setting of a fire by a co-insured. Nonetheless, previous decisions by Illinois and federal courts provided clear direction to insurers concerning the appropriate manner in which they could exclude coverage for "innocent insureds" and the legislature did not attempt to change the long-standing precedent.

B. Failure to Recognize the Implications of Legislative Inaction

The legislature took no action to overrule the court decisions permitting exclusion of innocent insureds. Arguably, the legislature's failure to address these decisions through legislation indicates that it did not believe that the Department of Insurance had improperly determined the public policy issues implicated when an insurance policy precludes coverage for an innocent insured. *See Miller v. Lockett,* 98 Ill. 2d 478, 483 (1983) ("Where the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent"); *People v. Foster*, 99 Ill. 2d 48, 55 (1983) ("While it is true that a legislature's failure to amend a statute after judicial interpretation is not conclusive evidence of the correctness of that interpretation, such inaction is suggestive of legislative agreement"); *Union Elec. Co. v. Illinois Commerce Comm'n*, 77 Ill. 2d 364, 380 (1979) ("[S]tatutory interpretation over an extended period of time strengthens the presumption of acquiescence in the face of inaction by the legislature") (citing Schaefer, *Precedent and Policy*, 34 U.Chi.L.Rev. 3, 11 (1966)); *People v. Antoine*, 286 Ill. App. 3d 920, 925 (4th Dist. 1997) ("The legislature is presumed to know of judicial interpretation of statutes; thus, its inaction suggests agreement with the judicial interpretation") (citing *In re May 1991 Will County Grand Jury,* 152 Ill. 2d 381, 388 (1992)); *People v. Agnew,* 105 Ill. 2d 275, 280 (1985). *But see Blount v. Stroud*, 232 Ill. 2d 302, 324–25 (2009) ("[W]here the meaning of the statute is unambiguous, we will give little weight to the fact that the legislature did not amend the statute after appellate opinions interpreting the same").

In *Streit*, the court reasoned that the Illinois legislature did not foreclose its interpretation of the Standard Fire Policy by enacting Section 155.22b of the Insurance Code. 863 F.3d at 775. Section 155.22b provides:

> (b) If a policy excludes property coverage for intentional acts, the insurer may not deny payment to an innocent co-insured who did not cooperate in or contribute to the creation of the loss if the loss arose out of a pattern of criminal domestic violence and the perpetrator of the loss is criminally prosecuted for the act causing the loss. . . .

215 ILCS 5/155.22b (2004).

The Seventh Circuit's analysis is arguably correct based on the way it framed the issue. The Illinois legislature, however, obviously considered the innocent insured issue and proscribed insurers from excluding coverage to innocent abused spouses in very narrow circumstances. The fact that the legislature addressed the innocent insured issue by creating a limited exception in which an innocent insured cannot be excluded from coverage but did not legislatively overturn prior court decisions permitting exclusion of innocent insureds with respect to fire losses in other circumstances is a strong indication that the legislature did not disagree with those decisions. The Seventh Circuit's suggestion that the enactment of Section 155.22b did not legislatively preclude its ruling was correct but ignored the long-standing presumption derived from the legislature's failure to act in the face of court decisions. The presumption should be stronger when the legislature specifically addresses the issue decided by the courts and leaves prior court decisions intact.

C. Failure to Afford Deference to the Illinois Department of Insurance

The Seventh Circuit appeared to give no deference to the Illinois Department of Insurance, the agency charged with reviewing and approving policies issued in the state. The first question is whether it should have given any deference to the department.

1. When Deference Is Due

The courts have applied essentially two standards of deference for the decisions of the Department of Insurance. The Appellate Court, Second District, noted that deference must be given to the advisory opinions of the Illinois Department of Insurance, although those decisions were not binding on the courts. *Village of Roselle v. Roselle Police Pension Bd.*, 382 Ill. App. 3d 1077, 1082-83 (2d Dist. 2008). The Appellate Court, Third District, held that it "must also afford considerable deference to" the Department of Insurance's interpretation of the pension code, as the legislature expressly gave the responsibility for providing advisory services to funds covered by the pension code to that administrative agency. *Cronholm v. Board of Trustees of the Lockport Fire Protection District*, 2016 IL App (3d) 150122, ¶ 14. The Illinois Supreme Court noted that the approval of a provision in a policy of insurance by the Illinois Department of Insurance is "entitled to great weight as against the contention that such a provision is against public policy." *Kirk v. Fin. Sec. Life Ins. Co.*, 75 Ill. 2d 367, 376 (1978).

When the administrative agency is interpreting a statute, however, the courts review the administrative agency's determination *de novo*, and the court will rely on principles of statutory construction and defer to the plain language of the statute as the best indicator of the legislature's intent. *Village of Roselle*, 382 Ill. App. 3d at 1080.

The distinction makes sense. The interpretation of statutes by an administrative agency should not supplant long-standing judicial principles of statutory construction. On the other hand, when the administrative agency has competence in the area of regulation that the courts do not have, and the agency makes a decision based on public policy, the agency determination should be given great deference.

2. No Deference Afforded in *Streit*

In *Kirk*, the Illinois Supreme Court noted that the Illinois Insurance Code required the Department of Insurance to review all policies issued in the state:

> The Director of the Department of Insurance is required by statute to review policies of insurance in certain categories and approve or disapprove them, based on criteria including the established public policy of this State.

Kirk, 75 Ill. 2d at 374-75.

The Illinois Insurance Code also explicitly requires the Department of Insurance to review fire policies issued in the state. The Code provides:

.397 §Standard Fire Policy. The Director of Insurance shall promulgate such rules and regulations as may be necessary to effect uniformity in all basic policies of fire and lightning insurance issued in this State, to the end that there be concurrency of contract where two or more companies insure the same risk.

215 ILCS 5/397.

Pursuant to its authority, the Illinois Department of Insurance reviewed and approved the policy language at issue in *Streit*. The Seventh Circuit, however, failed to afford the Department of Insurance's approval of the policy provision at issue with the "great weight" to which it was entitled. Moreover, the Seventh Circuit also failed to recognize that significant public policy concerns are implicated in providing coverage to so-called "innocent insureds."

D. Failure to Recognize the Public Policy Concerns Regarding Coverage for "Innocent" Insureds

1. One Should Not Benefit from Wrongdoing.

The *Streit* court recognized that Illinois public policy precluded indemnity against the willful act of a person based on the old common-sense principle "best stated by Justice Cardozo: '[n]o one shall be permitted to take advantage of his own wrong.'" *Streit*, 863 F.3d at 774 (quoting *Messersmith v. American Fidelity Co.*, 133 N.E. 432, 433 (1921) and citing *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494 (1975)). The Seventh Circuit reasoned that its decision was not at odds with this doctrine because "under the Standard Fire Policy, the insured does *not* recover damages caused by his own wrong." *Streit*, 863 F.3d at 774.

Several situations exist, however, in which either an arsonist would benefit from the arsonist's wrongful conduct or the innocent insured would receive a benefit that would not exist but for the arsonist's wrongful conduct.

a. The RC or ACV Windfall to the "Innocent Insured"

In Illinois, fire policies typically provide replacement cost benefits ("RC") based on the cost to rebuild the structure with like kind and quality materials. *See* Ill. Dept. of Ins., Property Insurance Consumer Guide at 15 (2015) (available at http://insurance.illinois.gov/Main/ PropertyInsuranceConsumerGuide.pdf). The "actual cash value" ("ACV") benefit is based on the calculation of RC and then reduced based on depreciation. *Id.*; *see also Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 281 (1st Dist. 2009); 22A Ill. Law and Prac. Insurance § 389. Neither ACV nor RC reflects the fair market value of the insured property, as the value of a house and the property on which it is built is determined primarily by location rather than the cost to rebuild. *See General Cas. Co. v. Tracer Industries, Inc.*, 285 Ill. App. 3d 418, 422 (4th Dist. 1996) ("[M]arket price is determine by what people would be willing to pay for a property. A very ornate and expensive house in an area where people would not want to live would have a high replacement cost but a low market value").

When an insured purchases a house, the insured typically pays the fair market value of the home based on a variety of considerations, including the availability of jobs near the location of the house, the school district, the crime level in the area, the quality of construction, the condition of the structure, and the layout and features of the house. The "fair market value," therefore, cannot be equated with the concept of "actual cash value" as it is used in the insurance industry. A house that may cost $100,000 to purchase may have a $300,000 cost to rebuild. Thus, a so-called "innocent insured" spouse may receive $150,000 (that spouse's one-half interest for the RC value of the structure) after the co-insured sets fire to their house. The innocent insured could not have received $150,000 from the sale of the house. The innocent insured would only have a marital interest of $50,000 in the house if sold. Thus, the wrongful act of the arsonist creates a $100,000 windfall to the so-called "innocent insured."

The Seventh Circuit's decision in *Streit* may go against the basic concept that no person can receive a benefit based on another's wrongful conduct. For example, if a woman's spouse steals a car and then gives it to her, she is not entitled to keep the car from its rightful owner on the basis that she was "innocent" of any wrongdoing. Yet, if an innocent insured receives RC or ACV that is significantly greater than the fair market value of the house, he or she is receiving a benefit that only exists because of the wrongful conduct.

b. The Wrongdoer and Innocent Insured Remain Married

If the arsonist is a spouse and the innocent insured remains married to the arsonist after the fire, the arsonist will benefit by his wrongful conduct by virtue of his marital interest in the property. In the example above, if the innocent insured receives $150,000 for a house with a fair market value of $100,000, and if the arsonist and innocent insured remain married after the insurance company pays the innocent insured one-half the RC value, then the arsonist has the benefit of the proceeds. If the innocent insured buys a new house with the $100,000 and buys a new car with the remaining proceeds, the arsonist will be able to live in the house, drive the car, and retain a one-half interest in both.

c. The "Under Water" Mortgage

An unfortunate, and all-to-frequent, scenario occurs when the insured structure is encumbered by a mortgage that exceeds the fair market value of the house. When the insurance policy contains a clause that provides that the mortgagee is entitled to payment irrespective of the conduct of an insured, an innocent insured will receive the benefit of full relief from the mortgage indebtedness although the house could not be sold for the amount of the mortgage. Thus, the innocent insured receives a greater amount due to the wrongful act of the spouse. (The arsonist also receives full relief from the indebtedness, although the insurer would have a claim against the arsonist for the amount paid to the mortgage holder.)

2. The Courts Should Not Encourage Wrongful Conduct

The Seventh Circuit undoubtedly faced a sympathetic fact scenario. Although not mentioned in the opinion, the insureds' appellate brief noted that their son plead guilty "but mentally ill" to the charge of aggravated arson. Brief for Plaintiffs–Appellees at 2, *Streit v. Metropolitan Cas. Ins. Co.*, 863 F.3d 770 (7th Cir. 2017) (No. 16-3203). Thus, the parents found themselves in a heart-wrenching situation through the loss of their house while dealing with a child with a mental illness. Although the situation was extremely sympathetic, the court's decision could encourage wrongful conduct. Mental illness cannot be equated with lack of intelligence. If a child were to overhear his parents discussing their financial problems, and a parent innocently commented that they would be better off financially if the house burned, the child could take it upon himself to procure the loss to help his parents out of their financial predicament.

The *Streit* decision would give any child cart blanche to assist their parents when the parents face financial difficulties and are "under water" on their mortgage. Whether the probability of such a scenario is so low that it does not justify stripping the benefits of insurance from parents facing such a situation is, in fact, a decision that will impact public policy. If the legislature intended for the Department of Insurance to make these difficult decisions concerning public policy, the courts should not substitute their judgment for the Department of Insurance.

Streit created another curious anomaly. Take, for example, a husband and wife who purchase property in an area of town they hope will increase in value. A downturn in the real estate market depresses the value of the home for less than the couple paid for it, yet it is insured for replacement cost at a much higher value. If one spouse decides to remedy the couple's financial predicament by burning the house to the ground, thus creating a "total loss," the so-called "innocent insured" would recover the replacement cost or actual cash value, a value far exceeding the fair market value of the home at the time. If, however, one spouse decides to turn the heat off during a prolonged cold spell and effectuates a total loss through bursting water pipes, the innocent insured would recover nothing because the Standard Fire Policy does not address water losses, and the insurer, according to *Streit* and *Lundquist*, is free to exclude the innocent insured in that situation. Thus, the *Streit* decision would serve no purpose other than to encourage a wrongdoer to destroy the house by fire rather than water.

VII. Other Approaches

Courts from other jurisdictions have taken a more nuanced approach to balancing public policy concerns and insuring that the courts do not inadvertently encourage behavior that not only raises the costs of every insured's premium, but also endangers the property and personal safety of others.

Certain jurisdictions carefully consider whether the wrongdoing spouse will benefit if the "innocent spouse" receives proceeds under the policy. The California Court of Appeals, recognizing that the "basic function of the court is to see that no one takes advantage of his own wrong," noted that an "analysis must be made in each case to see if the arsonist will benefit by the recovery on the policy, either directly or indirectly." *Erlin-Lawler Enterprises, Inc. v. Fire Ins. Exchange*, 267 Cal. App. 2d 381, 385 (1968); *see also Fellman v. Fireman's Fund Ins. Co.*, 735 F.2d 55, 60 (2d Cir. 1984) ("[I]nquiry should focus on who would have been the actual beneficiary of the insurance proceeds"). As such, California courts do not permit innocent spouses to recover when the other spouse intentionally burns insured property that is community property. *Erlin-Lawler Enterprises, Inc.*, 267 Cal. App. 2d at 386; *see also Republic Ins. Co. v. Jernigan*, 753 P.2d 229, 232-33 & n.6 (Colo. 1988) (en banc) (compiling cases holding that innocent co-insured may not recover under homeowner's policy where co-insured intentionally sets fire to the property were the insureds' interests are joint and non-separable); *Howell v. Ohio Cas. Ins. Co.*, 307 A.2d 142, 145 (N.J. Super. Ct. 1973) (permitting recovery by innocent spouse based on finding that husband and wife's interests in the policy were several rather than joint).

The Indiana Court of Appeals has likewise recognized:

> As a matter of public policy, we deny any recovery of insurance proceeds to a beneficiary of a life insurance policy who has murdered the insured. The law does not permit the guilty party to profit from his wrongdoing. There is no clause or policy language which purports to deny insurance benefits to the murderer. It is pure and simple a matter of fundamental justice and equity expressed as the public policy of the law. Similarly, the arsonist whose business is failing and who cannot sell his property must not be permitted, as a matter of public policy, to find a way out of his dilemma by setting a fire.

> It may also be appropriate to prevent the depressed, jealous, murderous or even insane spouse from profiting by setting a fire by denying that spouse any recovery from an insurance carrier.
>
> This public policy is easily vindicated by denying any recovery to the living guilty spouse and permitting the innocent spouse recovery of one-half of the insured loss within policy limits. Where 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.

Am. Econ. Ins. Co. v. Liggett, 426 N.E.2d 136, 140 (Ind. Ct. App. 1981) (citing *Erlin-Lawler Enterprises, Inc.*, 267 Cal. App. 2d 381; *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978)).

In Indiana, the courts also consider the fair market value of property, or the ability to sell it to a willing buyer based on current market conditions, in determining the amount that must be paid. *See, e.g.*, *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 356-57 (Ind. 1982) (adopting and applying the "broad evidence rule," which permits consideration of "'every fact and circumstance which would logically tend to the formation of a correct estimate of loss,'" including the fair market value of the property) (quoting *McAnarney v. New York Fire Ins. Co.*, 159 N.E. 902, 905 (1928)). Thus, some of the potential problems with the difference between fair market value and replacement cost and actual cost value may be ameliorated by the different approach to valuing the loss.

Other jurisdictions carefully consider public policy considerations in determining whether an "innocent insured" is entitled to recovery. For example, Texas courts are directed to consider four policy considerations for evaluation in such cases:

> (1) That the wrongdoer not benefit from his wrongdoing;
> (2) prevention of fraud on the insurance company;
> (3) prevention of unjust enrichment by the insurance company;
> (4) refusal to impute the criminal acts of the wrongdoer to an innocent victim.
>
> It seems patent . . . that the first of these considerations is by far the dominant one.

Norman v. State Farm Fire & Cas. Co., 804 F.2d 1365, 1366 (5th Cir. 1986). The Fifth Circuit in *Norman* also recognized the public policy concerns specific to intentional fire losses:

> [W]hen buildings are torched, lives may be lost and other property jeopardized. The law should assiduously seek, therefore, to avoid holding out any incentive to such actions and should be diligent to assure that it permits no benefits to be derived from them by their perpetrators. We conclude that it would be a strange rule indeed that guaranteed the would-be arsonist a minimum of one-half of the insured value of his building-paid in cash and as community property-even were he found guilty of the act, so long as he arranged matters so that the insurance company could not prove that he had let his spouse in on his scheme.

Id.

VIII. The Available Options

Illinois courts have several options in the wake of the *Streit* decision, including:

(1) Illinois courts could follow *Streit* and ignore the presumption created by the legislature's inaction as well as the public policy concerns noted by decisions of other courts in other states. Doing so, of course, would be a radical departure from the long-standing prior decisions of Illinois and federal courts.

(2) The courts could follow *Streit* but, at the same time, require that trial courts ensure that the insured that procured the loss does not benefit from his or her wrongful conduct. It would seem, however, that such a decision should either be left to the legislature or, at a minimum, the Illinois Supreme Court, as significant guidance should be given to the trial courts concerning the factors that must be considered to avoid rewarding wrongful misconduct.

(3) The Illinois appellate courts could decline to follow *Streit* and continue to follow the long-standing precedent permitting insurers to preclude recovery by innocent insureds except in those situations proscribed by the legislature. In doing so, the courts would also defer to the legislature, which certainly seems appropriate since the legislature is better situated to analyze the issue on a global basis and doing so would avoid case-by-case decisions from the courts. *See Webb v. Webb*, 180 Ill. App. 3d 619, 623 (4th Dist. 1989) ("[A]ny alteration in the legislative scheme . . . should come from the legislature and not piecemeal by the courts"); *see also In re Fairchild's Estate*, 21 Ill. App. 3d 459, 461 (4th Dist. 1974) ("If apportionment in Illinois is to come where a will is involved, it should come through the legislature and not piecemeal on an Ad hoc case to case basis"). The courts would also be giving due deference to the Department of Insurance.

IX. Conclusion

Illinois courts should decline to follow *Streit* for the simple reason that it did not consider any of the public policy concerns implicated by the differing circumstances that may arise when addressing recovery of an innocent insured. If a defense lawyer encounters a court that is inclined to follow *Streit*, then counsel should request a hearing to ensure that an insured does not benefit from his or her wrongful conduct and that the innocent insured does not receive a windfall.

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