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Stephen P. Carney

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SPOUSE'S FRAUD AS A BAR TO INSURANCE RECOVERY

In *Rockingham Mutual Insurance Co. v. Hummel*,¹ the Supreme Court of Virginia held that an innocent wife was not entitled to keep her share of the proceeds from a homeowners policy insuring real property owned by both spouses as tenants by the entirety when the loss was caused by the wrongful act of her husband.² The home of Harold Lee and Mildred Hummel was destroyed by fire in April 1975. At that time, a Rockingham Mutual Insurance Co. homeowners policy was in force that protected the Hummels from loss by fire. Pursuant to the policy, the insurer paid \$21,600 to the Hummels for the damage caused by the fire.

Subsequently, however, the insurer discovered that the husband intentionally had set fire to the property and brought suit against both husband and wife to recover the entire sum paid. Sustaining the wife's demurrer, the trial court dismissed the action against her.³ On appeal, the Supreme Court of Virginia reversed and remanded the case,⁴ ruling that the trial court had erred in dismissing the insurer's claim against the wife.

The issue of whether fraud by one insured spouse will bar recovery of insurance proceeds by both was one of first impression in Virginia. Courts in other jurisdictions that have addressed the question have reached conflicting results.⁵ Nevertheless, the court in *Rockingham* disposed of the issue summarily, stating simply that "the legal interest in the subject matter of this policy was joint and not severable."⁶ The court also stated that each spouse had a joint duty to refrain from defrauding the insurer and to use all reasonable means to preserve the property after the fire began.⁷ As a result of this joint duty, fraud by either spouse constituted a breach of the

1. 219 Va. 803, 250 S.E.2d 774 (1979).

2. *Id.* at 807, 250 S.E.2d at 776.

3. *Id.* at 804, 250 S.E.2d at 775.

4. *Id.* at 807, 250 S.E.2d at 776.

5. More recent cases have held that the innocent spouse is entitled to recover his or her share of the proceeds. *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978); *Howell v. Ohio Cas. Ins. Co.*, 130 N.J. Super. 350, 327 A.2d 240 (1974), *modifying* 124 N.J. Super. 414, 307 A.2d 142 (1973). Other jurisdictions, however, have reached the opposite result, denying recovery by the innocent spouse. *E.g.*, *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Klemens v. Badger Mut. Ins. Co.*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959).

6. 219 Va. at 806, 250 S.E.2d at 776.

7. *Id.*

contract chargeable to the "Named Insured," and barred recovery by either spouse.⁸ This Comment will examine the analysis used by the court in *Rockingham* and the propriety of that decision. Such an examination indicates that the court should have interpreted ambiguous language in the insurance contract in a reasonable manner most favorable to the innocent insured spouse. By following this reasoning, the court would have permitted recovery to Mrs. Hummel and thus reached a more equitable result.

NATURE AND CONSTRUCTION OF PROPERTY INSURANCE POLICIES

An insurance policy is a contract of indemnity between an insurance company and an insured,⁹ and is subject to the same rules that govern other contracts unless those rules are modified specifically by statute.¹⁰ In the absence of fraud or mistake, the insured applicant is bound by the provisions of the contract and cannot claim that he failed to read the terms or did not know the scope of the coverage.¹¹

The general rule of construction for interpreting any insurance policy is that the contract is to be construed strictly against the insurer and liberally in favor of the insured.¹² The existence of this

8. *Id.*

9. See generally 4 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 2105 (1969).

10. This general rule applies to fire as well as to other types of insurance policies. *E.g.*, *Carter v. Carter*, 202 Va. 892, 896, 121 S.E.2d 482, 485 (1961) (fire insurance policy); *Harleysville Mut. Ins. Co. v. Dollins*, 201 Va. 73, 77, 109 S.E.2d 405, 409 (1959) (automobile collision policy); *Connecticut Fire Ins. Co. v. Roberts Lumber Co.*, 119 Va. 479, 495, 89 S.E. 945, 948 (1916) (fire insurance policy); *Norfolk Fire Ins. Co. v. Talley*, 112 Va. 413, 415, 71 S.E. 534, 535 (1911) (fire insurance policy); *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 783, 14 S.E. 532, 533 (1892) (life insurance policy); *United States Mut. Ass'n v. Newman*, 84 Va. 52, 58, 3 S.E. 805, 807 (1887) (accident insurance policy).

11. *E.g.*, *Maryland Cas. Co. v. Morris Oil Co.*, 233 F.2d 291, 293 (4th Cir. 1956); *Carriers Ins. Exch. v. Truck Ins. Exch.*, 203 F. Supp. 764, 766 (W.D. Va. 1962), *aff'd*, 310 F.2d 653 (4th Cir. 1962); see *Ashby v. Dumouchelle*, 185 Va. 724, 733, 40 S.E.2d 493, 497 (1946). This rule, however, is not ironclad; reformation is permitted when provisions in the contract have been inserted by mutual mistake of the insured and the insurer. *Maryland Cas. Co. v. Morris Oil Co.*, 233 F.2d at 294; *Carriers Ins. Exch. v. Truck Ins. Exch.*, 203 F. Supp. at 766; see, *e.g.*, *Bankers Fire Ins. Co. v. Henderson*, 196 Va. 195, 205-06, 83 S.E.2d 424, 430 (1954).

12. See, *e.g.*, *White v. Blue Cross*, 215 Va. 601, 602, 212 S.E.2d 64, 65 (1975) (health insurance policy); *Aetna Ins. Co. v. Carpenter*, 170 Va. 312, 327, 196 S.E. 641, 647 (1938) (fire insurance policy); *Collins v. Metropolitan Life Ins. Co.*, 163 Va. 833, 839, 178 S.E. 40, 42 (1935) (life insurance policy); *Palmetto Fire Ins. Co. v. Fansler*, 143 Va. 884, 891, 129 S.E. 727, 729 (1925) (fire insurance policy); *United States Mut. Ass'n v. Newman*, 84 Va. 52, 59, 3 S.E. 805, 808 (1887). The modern viewpoint differs from early decisions that held that courts should construe contracts objectively and in favor of neither the insurer nor the insured.

rule, however, does not guarantee that the insured will recover regardless of the wording of the insurance contract. An insurance policy must be construed reasonably;¹³ therefore, if the language is clear and unambiguous, the courts are without power to make a new contract or to alter the old one and must adhere to the wording of the contract as an accurate representation of the actual intent of the parties.¹⁴ If the wording is ambiguous, however, and the insurance policy has two reasonable and possible interpretations, the court will adopt that which favors the insured¹⁵ and avoids a forfeiture.¹⁶

Merchants Ins. Co. v. Edmond, Davenport & Co., 58 Va. (17 Gratt.) 138, 145 (1866). The rationale for the present rule is twofold. First, because the purpose of contracts of insurance is to indemnify an insured for damages, these contracts should be enforced whenever possible. *Central Sur. & Ins. Corp. v. Elder*, 204 Va. 192, 197, 129 S.E.2d 651, 655 (1963); *Dressler v. Reserve Life Ins. Co.*, 200 Va. 689, 692, 107 S.E.2d 406, 408 (1959); *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 389, 2 S.E.2d 303, 307 (1939). Second, the insurance company drafts the contracts and often includes complex clauses that the insured seldom reads; the insured must accept the policy as written if he wishes to be protected. *Harrison v. Provident Relief Ass'n*, 141 Va. 659, 671, 126 S.E. 696, 700 (1925) (quoting *Stratton's Adm'r v. New York Life Ins. Co.*, 115 Va. 257, 270, 78 S.E. 636, 640 (1913)). Because much of the language found in insurance policies today is required by statute, see, e.g., VA. CODE §§ 38.1-349, -365, -366, -390 (Repl. Vol. 1976), the second rationale for construing an insurance policy strictly against the insurer and liberally in favor of the insured is now less compelling. An insurance company could argue that provisions written by the elected representatives of the public should not be construed strictly against the insurer. This argument also has been countered:

Insurance contracts continue to be contracts of adhesion, under which the insured is left little choice beyond electing among standardized provisions offered to him, even when the standard forms are prescribed by public officials rather than insurers. Moreover, although statutory and administrative regulations have made increasing inroads on the insurer's autonomy by prescribing some kinds of provisions and proscribing others, most insurance policy provisions are still drafted by insurers. Regulation is relatively weak in most instances, and even the provisions prescribed or approved by legislative or administrative action ordinarily are in essence adoptions, outright or slightly modified, of proposals made by the insurers' draftsmen.

Under such circumstances as these, judicial regulation of contracts of adhesion, whether concerning insurance or some other kind of transaction, remains appropriate.

Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966-67 (1970) (footnote omitted).

13. E.g., *Harmon v. Farm Bureau Mut. Auto. Ins. Co.*, 172 Va. 61, 65, 200 S.E. 616, 618 (1939); *Hamburg-Bremen Fire Ins. Co. v. Browning*, 102 Va. 890, 894, 48 S.E. 2, 3 (1904); *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, 963, 9 S.E. 694, 695 (1889). See also *Kennard v. Travelers' Protective Ass'n*, 157 Va. 153, 160 S.E. 38 (1931).

14. *Carter v. Carter*, 202 Va. 892, 896, 121 S.E.2d 482, 485 (1961); see *National Fire Ins. Co. v. Dervishian*, 206 Va. 563, 566, 145 S.E.2d 184, 186 (1965); *Harmon v. Farm Bureau Mut. Auto. Ins. Co.*, 172 Va. 61, 65, 200 S.E. 616, 618 (1939).

15. E.g., *National Fire Ins. Co. v. Dervishian*, 206 Va. 563, 567, 145 S.E.2d 184, 187 (1965); *Harleysville Mut. Ins. Co. v. Dollins*, 201 Va. 73, 77, 109 S.E.2d 405, 409 (1959); *Ayres v.*

ROCKINGHAM MUTUAL INSURANCE CO. v HUMMEL

The court in *Rockingham* reached its decision without any discussion of the general rules of construction and interpretation of insurance contracts. Instead, the court relied on the general rule that the right of an innocent coinsured to compensation under a fire insurance policy when the other coinsured has committed arson depends upon whether the interests of the two parties are joint or severable.¹⁷ Concluding that the interests in *Rockingham* were joint and not severable, the court denied recovery to the innocent wife.¹⁸

The Nature of the Property Interest

The court in *Rockingham* first supported its decision on the basis that the Hummels' interests in the property were indivisible because the Hummels held as tenants by the entirety.¹⁹ Courts in other states similarly have denied recovery to an innocent coinsured spouse on this basis.²⁰ The court in *Rockingham*, however, relied not on the decisions of these courts, but primarily on the holding of the

Harleysville Mut. Cas. Co., 172 Va. 383, 389, 2 S.E.2d 303, 305 (1939).

16. *E.g.*, *Williams v. Metropolitan Life Ins. Co.*, 139 Va. 341, 349, 123 S.E. 509, 512 (1924); *Virginia Fire & Marine Ins. Co. v. Thomas*, 90 Va. 658, 662, 19 S.E. 454, 456 (1894); *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 585 (1882); *see White v. Blue Cross*, 215 Va. 601, 602, 212 S.E.2d 64, 65 (1975). Construing the language of a contract to avoid forfeiture fulfills the indemnifying purpose of insurance. *See note 12 supra*.

17. 219 Va. at 805, 250 S.E.2d at 776. When the interests and obligations of the coinsured parties are joint, the innocent coinsured is not allowed to recover his share of the proceeds; when the interests are divisible, recovery is allowed. The courts, however, have been unable to agree on the definition of joint interests and obligations. *See, e.g.*, *Hildebrand v. Holyoke Mut. Ins. Co.*, 386 A.2d 329 (Me. 1978) (holding that the innocent wife could recover on a policy when the husband had set fire to the house); *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938) (holding that the innocent spouse could not recover because the form of the contract and the legal interests in the property were joint); *Hoyt v. New Hampshire Fire Ins. Co.*, 92 N.H. 242, 29 A.2d 121 (1942) (holding that the innocent tenant in common could recover his share of the proceeds); *Howell v. Ohio Cas. Ins. Co.*, 130 N.J. Super. 350, 327 A.2d 240 (1974), *modifying* 124 N.J. Super. 414, 307 A.2d 142 (1973) (holding that the innocent spouse could recover under a policy listing husband "and/or" wife as the "Named Insured"); *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D. & C.2d 351 (1933) (holding that the innocent spouse could not recover under the policy); *Klemens v. Badger Mut. Ins. Co.*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959) (holding that the innocent spouse could not recover under the policy).

18. 219 Va. at 806, 250 S.E.2d at 776.

19. *Id.*

20. *E.g.*, *Kosior v. Continental Ins. Co.*, 299 Mass. 601, _____, 13 N.E.2d 423, 424 (1938); *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D. & C.2d 351, _____ (1933); *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511, 512 (Tex. Ct. App. 1952).

Wisconsin Supreme Court in *Klemens v. Badger Mutual Insurance Co.*²¹ in reaching its conclusions.²²

Although *Klemens* also involved the right of an innocent spouse to recover proceeds on jointly owned property when loss resulted from fraud by the other spouse,²³ reliance on this case was misplaced. The court in *Klemens* 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 insured parties to comply with the terms of the policies.²⁴ Indeed, the court in *Klemens* emphasized the immateriality of the nature of the property interest in the secured property.²⁵ Furthermore, the Superior Court of New Jersey in *Howell v. Ohio Casualty Insurance Co.*,²⁶ cited the reasoning of *Klemens* in allowing the innocent wife to recover even though both spouses held the property as tenants by the entirety.²⁷

Courts invoking property interest concepts as the basis for denying recovery to an innocent spouse make no reference to insurance law to support their decisions. Instead, these courts rely exclusively on the idea that jointly owned land must create an insurable interest that is also joint.²⁸ That such an emphasis is misguided is indicated by the traditional characterization of a fire insurance policy as a personal contract indemnifying the insured party for loss to his insurable interest and not as one providing proceeds on the property itself.²⁹ Thus, application of insurance contract principles as utilized by the courts in *Klemens* and *Howell* provides a better reasoned approach to resolving the issue of an innocent spouse's right to recover insurance proceeds when the property is destroyed by the fraud of the other spouse. Because insurance contract principles and not property law provide the proper line of inquiry, the court in *Rockingham* erred when it used the indivisibility of property inter-

21. 8 Wis. 2d 565, 99 N.W.2d 865 (1959).

22. 219 Va. at 806, 250 S.E.2d at 776.

23. 8 Wis. 2d 565, ___, 99 N.W.2d 865, 866 (1959).

24. *Id.*

25. *Id.*

26. 130 N.J. Super. 350, 327 A.2d 240 (1974), *modifying* 124 N.J. Super. 414, 307 A.2d 142 (1973).

27. *Id.* at ___, 327 A.2d at 242.

28. *See* note 20 *supra* & accompanying text.

29. By not allowing a joint interest in property to foreclose recovery, this reasoning also supports the public policy purpose of insurance, which is to provide indemnity. *See* note 12 *supra*.

ests as the basis for denying recovery. Proper insurance contract analysis would have permitted Mrs. Hummel to retain the proceeds.³⁰

The Form of the Policy

The court in *Rockingham* also cited the form of the policy to support its decision. The policy listed "Harold Lee and Mildred Hummel" as the "Named Insured;" therefore, the court held that the obligations and duties of the coinsured parties under the contract were joint.³¹ A violation of these duties by either insured was deemed chargeable to both, thus barring recovery by the innocent insured.³² The court cited only a short passage from *Klemens* as support for this conclusion.³³ Despite the court's reliance on this passage, principles of contract law applicable to insurance contracts indicate that the court would have found firmer support for a contrary holding and thereby would have produced a more equitable result.

The court in *Rockingham* found that two clauses in the homeowners policy were relevant to its conclusion. The first completely voided the policy in case of fraud by "the insured", the second relieved the insurance company of any liability if "the insured" failed to exercise care in preserving the property at and after the loss.³⁴ The Hummels' policy also contained a clause that defined the

30. In addition, under Virginia law, Mrs. Hummel could have obtained a separate insurance policy on her interest in the property owned jointly by her and her husband. The Code of Virginia states that a person must have an insurable interest in property in order to qualify as a beneficiary under a property insurance policy. VA. CODE § 38.1-331 (Repl. Vol. 1976). An insurable interest is defined as "any lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage." *Id.* This statutory section codifies previous case law. See *Home Ins. Co. v. Dalis*, 206 Va. 71, 75, 141 S.E.2d 721, 724 (1965). Prior cases had held that any legal or equitable interest, including an undivided interest in property, created an insurable interest. See *Liverpool & London & Globe Ins. Co. v. Bolling*, 176 Va. 182, 188, 10 S.E.2d 518, 520 (1940); *Palmetto Fire Ins. Co. v. Fansler*, 143 Va. 884, 895, 129 S.E. 727, 728 (1925). Mrs. Hummel's interest undeniably was a "substantial economic interest" in the property. If she had had a separate policy, she could have recovered for the damage to her interest despite her husband's fraud. The court should not deny recovery simply because the Hummels obtained one insurance policy instead of two.

31. 219 Va. at 806, 250 S.E.2d at 776.

32. *Id.*

33. *Id.*

34. *Id.* at 804-05, 250 S.E.2d at 775. These standard provisions were required by statute. The Code of Virginia provides in relevant part:

unqualified word "Insured" as including the "Named Insured" and any relatives of the named insured living in the household.³⁵

Definition of "the Insured"

The court's holding in *Rockingham* hinged on its conclusion that the Hummels violated the joint duties to exercise care and not to commit fraud.³⁶ Unfortunately, the court did not analyze carefully the wording of the insurance policy. Both the fraud and neglect provisions triggered forfeiture only when committed by "the insured."³⁷ The critical inquiry here is a determination of to which parties the term refers. Although the unqualified word "insured" is defined in the policy,³⁸ the two words "the insured" are not, and the court equated the latter wording with the former.

Courts in other states have been unable to agree on a definition of the term "the insured." In *Assurance Co. v. Bell*,³⁹ the Court of Appeals of Georgia interpreted a homeowners liability policy to require the company to pay all sums that the insured was legally obligated to pay as a result of bodily injury or property damage to others. In addition, the policy provided that the insurance company could settle a claim for damage to property with "the insured or the

This entire policy shall be void if, whether before or after a loss, *the insured* has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

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

VA. CODE § 38.1-366 (Repl. Vol. 1976) (emphasis supplied).

35. The relevant portion of the policy provided:

When used in this policy the following definitions apply:

a. "Insured" means

- (1) The Named Insured stated in the Declarations of this policy;
- (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 care of any Insured.

Homeowners policy issued to Harold Lee and Mildred Hummel (this provision is located on the third page of Exhibit A introduced at trial in *Rockingham Mut. Ins. Co. v. Hummel*).

36. 219 Va. at 806, 250 S.E.2d at 776.

37. See note 34 *supra* & accompanying text.

38. See note 35 *supra* & accompanying text.

39. 108 Ga. App. 766, 134 S.E.2d 540 (1963).

owner thereof.”⁴⁰ The court concluded that “[t]he language ‘an insured’ makes the company liable for damage caused by *any* person included in the omnibus clause, while the language ‘the insured,’ referring to settlement of claims, is *ambiguous*, since it may mean either the named insured or the insured actually causing the damage.”⁴¹ Conversely, in *G.C. Kohlmer, Inc. v. Mollenhauer*,⁴² the Supreme Court of Minnesota concluded that the term “the insured” was unambiguous.⁴³ The court held that this term, when used in an automobile liability policy that excluded from its coverage injury to any employee of the insured referred to both the named insured and the omnibus⁴⁴ insured.⁴⁵ Other courts have encountered similar difficulties in interpreting the term “the insured.”⁴⁶

The court in *Rockingham* should have addressed the meaning of the term “the insured.” In so doing, it could have permitted recovery by Mrs. Hummel through one of two avenues. If the court had found the term ambiguous, it should have followed the holding in *Assurance Co. v. Bell*⁴⁷ and resolved that ambiguity in favor of the insured by preventing a forfeiture.⁴⁸ Alternatively, had the court concluded that the term was unambiguous, two interpretations favorable to Mrs. Hummel were possible. The court could have

40. *Id.* at ____ , 134 S.E.2d at 543.

41. *Id.* (emphasis supplied).

42. 237 Minn. 126, 140 N.W.2d 47 (1966).

43. *Id.* at ____ , 140 N.W.2d at 52.

44. Omnibus provisions in automobile liability insurance policies are required by statute in many states. Such provisions extend the coverage provided for the named insured to anyone operating the named insured's automobile with his permission. *See, e.g.*, VA. CODE § 38.1-381 (Cum. Supp. 1979).

45. 237 Minn. at ____ , 140 N.W.2d at 50. Despite the conclusion that “the insured” was an unambiguous term, the decision by the court in *Kohlmer* was favorable to the named insured. This interpretation meant that exclusion from coverage applied not only to an employee of the named insured but also to any employee of a permittee of the named insured. Given this broader exclusion, the insurance company would not be required to indemnify injured parties in as many cases, and the premiums required from the named insured would be lower.

46. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Wabash Fire & Cas. Ins. Co.*, 264 F Supp. 637, 643 (D. Minn. 1967) (holding that the term “the insured” in an exclusion provision in an automobile liability policy referred to both the insured seeking the protection under the policy and to the named insured); *Marwell Constr., Inc. v. Underwriters at Lloyd's, London*, 465 P.2d 298, 305 (Alaska 1970) (holding that the term “the insured,” as used in an exclusion provision denying coverage to any employee of “the insured,” referred only to the person seeking coverage).

47. *See* notes 39-40 *supra* & accompanying text.

48. *See* notes 12, 15, 16 *supra* & accompanying text.

adopted the *Kohlmer* determination that "the insured" refers to all parties insured under the contract. Thus, to trigger the forfeiture provision of the Hummels' contract, fraud would have had to have been committed by both spouses.

A second interpretation is suggested by the reasoning of the Supreme Court of New Hampshire in *Pawtucket Mutual Insurance Co. v. Lebrecht*.⁴⁹ In *Pawtucket*, the court construed the term "the insured" in a manner most favorable to the insured by acknowledging that the term could have different meanings depending on which provision of the contract was being interpreted.⁵⁰ A husband and wife were the named insured under a comprehensive homeowners liability policy. When the son of the named insured, himself an omnibus insured, committed an intentional assault, the injured party sued the parents for failure to supervise the son adequately.⁵¹ The parents sought insurance coverage under their policy but the insurer argued that the policy specifically excluded any coverage for damage intentionally caused by "the insured."⁵²

Although conceding that for some purposes of the policy "the insured" might refer to any of the parties insured under the contract, the court found that in the exclusion provision reference to "the insured" meant only the particular insured party committing the act.⁵³ Thus, the court found that although the son's act would deny him coverage under the policy because the intentional act was his, no such forfeiture operated as to the parents who were innocent of any intentional wrongdoing.⁵⁴ To construe "the insured" most favorably to Mrs. Hummel, the court thus could have applied the reasoning of *Pawtucket*, reading the exclusion provision to deny coverage only to "the insured" who committed the fraud or neglect.

In order to determine which interpretation of the term "the insured" was correct, the court in *Rockingham* should have analyzed carefully the articles "the" and "an." The generally accepted rule recognizes the use of "the" before a noun for a particularizing or specifying effect, and the use of "a" or "an" in an indefinite or

49. 104 N.H. 465, 190 A.2d 420 (1963).

50. *Id.* at _____, 190 A.2d at 422-23.

51. *Id.* at _____, 190 A.2d at 423.

52. *Id.* at _____, 190 A.2d at 422.

53. *Id.* at _____, 190 A.2d at 423.

54. *Id.* at _____, 190 A.2d at 422.

generalizing sense.⁵⁵ For example, in *Dooley v. Penland*,⁵⁶ the Supreme Court of Tennessee addressed a provision of a will that required the trustee of the decedent's property to use "the interest" and as much of the principal as was necessary to support the decedent's widow. The court held that in this context, "the interest" should be construed as meaning all of the interest and not merely a part of it.⁵⁷

In another insurance coverage situation, the Supreme Court of Iowa considered a clause in a fire insurance policy that voided the policy if "the property" was mortgaged or encumbered. In *Born v. Home Insurance Co.*,⁵⁸ the court construed the language of the policy as follows:

That the words "the property" were intended to include all the property is indicated in what immediately precedes as to other insurance "on any said property." The use of "the" in the one instance and "any" in the other surely *indicates an intention to express something different*, and the same is true of the use of the word "any" in respect to change in title or possession. "The property" is without qualification, and we think must be held to refer to *all* the property insured, and therefore *mortgaging or encumbering a part of it did not work a forfeiture of the entire policy*.⁵⁹

The policy issued to the Hummels by the Rockingham Mutual Insurance Co. defined the unqualified word "insured" as including

55. *United States v. Hudson*, 65 F. 68, 71 (W.D. Ark. 1894), *appeal dismissed*, 17 S. Ct. 994 (1897); *Brooks v. Zabka*, 168 Colo. 265, ____ , 450 P.2d 653, 655 (1969); *see People v. Enlow*, 135 Colo. 249, ____ , 310 P.2d 539, 546 (1957); *Lowry v. City of Mankato*, 231 Minn. 108, ____ , 42 N.W.2d 553, 558 (1950). The Virginia Supreme Court, by implication, agreed with this position when it held in a larceny case that two separate acts of asportation were not "the same act" for purposes of determining whether the criminal defendant had been subjected to double jeopardy. *Jones v. Commonwealth*, 218 Va. 757, 240 S.E.2d 658 (1978), *cert. denied*, 435 U.S. 909 (1978). *But see Stevens v. Duncan*, 189 Ga. 730, ____ , 7 S.E.2d 745, 746 (1940) (holding that under a statute allowing nonresidents to act as executors of a resident's will when the executor has "the interest in the estate" of the deceased, the word "the" should be interpreted as meaning "an"); *Howell v. State*, 164 Ga. 204, ____ , 138 S.E. 206, 210 (1927), *appeal dismissed*, 275 U.S. 576 (1927) (holding that the term "the" generally determines the particular thing meant but that in the proper circumstances it may also mean "more than one" or "any").

56. 156 Tenn. 284, 300 S.W. 9 (1927).

57. The court was influenced by the use of the qualifying phrase "as much of as may be necessary" before the word "principal." This phrase did not precede the word "interest." *Id.* at ____ , 300 S.W. at 11-12.

58. 110 Iowa 379, 81 N.W. 676 (1900).

59. *Id.* at ____ , 81 N.W. at 678 (emphasis supplied).

"the named insured."⁶⁰ A reasonable interpretation of "the insured," a term never defined in the Hummels' policy, would have included all "the named insured" parties collectively.⁶¹ The reasoning of the courts in *Pawtucket*, *Dooley*, and *Born* suggests that so allowing Mrs. Hummel recovery would have been the correct determination.⁶² The articles "a" and "an," words generally meaning a single or any one of a great number,⁶³ preceded the word "insured" in several clauses in the Hummels' policy.⁶⁴ Because the words "a" and "an" could have been used to define and limit the term "insured" to a single insured, the court in *Rockingham* should have construed the term "the insured" as meaning the named insured parties collectively.⁶⁵ Under this construction, fraud by one insured spouse would not have been imputed to the other spouse. Only a fraud perpetrated jointly by the parties listed as "named insured" would have voided the policy as to both; therefore, the innocent spouse would have been allowed to keep her share of the proceeds.

A conclusion that fraud by one spouse would not void the policy as to both still would deny recovery to the spouse who committed the fraud. Although the insurance policy would remain in force, the

60. See note 35 *supra*.

61. The policy is void only if fraud or neglect is committed by "the insured." See note 34 *supra*. One could argue that if the term "the insured" did not include all insured parties, the Hummels could have committed fraud jointly and not have been barred recovery by any language in the policy because no forfeiture provision applied to them. Clearly, however, such an interpretation would violate the common law principle that a wrongdoer should not profit from his wrongful acts.

62. See notes 49, 56, 58 *supra* & accompanying text.

63. *People v. One 1940 Buick Sedan*, 71 Cal. App. 2d 160, ____ , 162 P.2d 318, 320 (1945); see, e.g., *United States v. St. Clair*, 62 F. Supp. 795, 797 (W.D. Va. 1945); *First Trust Joint Stock Land Bank v. Armstrong*, 222 Iowa 425, ____ , 269 N.W. 502, 506 (1936); *Ebeling v. Bankers' Cas. Co.*, 201 P. 284, 285 (Mont. 1921); *People v. Ogden*, 8 App. Div. 464, ____ , 40 N.Y.S. 827, 828 (1896); *Deschane v. McDonald*, 86 N.W.2d 518, 520 (N.D. 1957).

64. The policy contained the following provisions:

- a. to bodily injury to any person, including a residence employee or an insured farm employee, if any person or organization has a policy providing workmen's compensation or occupational disease benefits for such bodily injury or if benefits for such bodily injury are in whole or in part either payable or required to be provided under any workmen's compensation or occupational disease law;
- b. to bodily injury to

- (1) any insured under parts (1) and (2) of the definition of "Insured"

Homeowners policy issued to Harold Lee and Mildred Hummel (provision located on the seventh page of Exhibit A introduced at trial in *Rockingham Mut. Ins. Co. v. Hummel*).

65. This is a reasonable interpretation of "the insured." The policy defined "Insured" as "The Named Insured." See note 35 *supra*. "The Named Insured" was defined as "Harold Lee and Mildred Hummel." See text accompanying note 31 *supra*.

culpable insured could not recover when his willful act caused the damage or injury. This rule would apply even in the absence of a clause in the insurance contract denying recovery.⁶⁶

Policy Considerations

The above interpretation of the term "the insured" best fits the rules that ambiguous terms or clauses in an insurance policy should be construed in favor of the insured⁶⁷ and that forfeitures of insurance policies are not favored.⁶⁸ This conclusion is proper even though the wording "the insured," as found in the fraud and negligence provisions of the policy issued to the Hummels, is required by statute.⁶⁹ When the insurer drafted the insurance policy, it could have defined the complete term "the insured" as meaning "a named insured" or "any named insured." Such a definition would have voided the entire policy if only one of the named insured parties had committed a fraud. Instead, by choosing to define only the unqualified term "insured," the insurer created an ambiguity that the court in *Rockingham* should have resolved in favor of the innocent insured.

A rule allowing the innocent spouse to recover, however, might conflict with the rule in some jurisdictions that if personal property is held by the entirety, insurance proceeds received because of the destruction of such property also are held by the entirety.⁷⁰ Although the Supreme Court of Virginia has not ruled on this specific question, in *Oliver v. Givens*⁷¹ it held that the proceeds from the voluntary sale of property held by the entirety also were held by the entirety and were immune from the claims of the individual creditors of one of the spouses. In order to protect a married couple from the claims of individual creditors, the Supreme Court of Virginia doubtless would follow the same reasoning in dealing with the proceeds from a fire insurance policy.

66. *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 153-54 (1897); *Orient Ins. Co. v. Cox*, 218 Ark. 804, ___, 238 S.W.2d 757, 759 (1951); *Fedele v. National Liberty Ins. Co.*, 184 Va. 528, 35 S.E.2d 766 (1945); *Bellman v. Home Ins. Co.*, 178 Wis. 349, ___, 18 N.W. 1028, 1028 (1922).

67. See note 15 *supra* & accompanying text.

68. See note 16 *supra* & accompanying text.

69. See note 34 *supra*.

70. *E.g.*, *Cooper v. Cooper*, 225 Ark. 626, ___, 284 S.W.2d 617, 620 (1955).

71. 204 Va. 123, 129 S.E.2d 661 (1963).

A holding in *Rockingham* allowing Mrs. Hummel to retain her share of the proceeds from the policy nevertheless would have been consistent with the policies underlying the holding in *Oliver*. Although the court in *Oliver* held that the proceeds from the property were held by the entirety, the decision is distinguishable from *Rockingham*, in *Oliver*, neither spouse committed fraud. Under the suggested holding, Mrs. Hummel would have retained her recovery as her sole property because the recovery would have been based on the damage to the value of her interest in the property.⁷² Furthermore, the rule in *Oliver* sought to protect the insured spouses from the claims of individual creditors that arose simply because the entirety property was destroyed through no fault of the insured parties. Clearly, a holding in *Rockingham* allowing Mrs. Hummel to keep her share of the insurance proceeds as her sole property similarly would have protected the interest of the innocent insured spouse.⁷³

CONCLUSION

The court in *Rockingham* erred when it failed to analyze the contract implications of the insurance policy issued to Mr. and Mrs. Hummel. Because this was a case of first impression in Virginia concerning an issue addressed in only a few jurisdictions, a careful analysis of contract rules as they apply to insurance law would have been appropriate. Instead, the court relied almost exclusively on the conclusions of the *Klemens* decision, holding that the obligations to exercise care during the fire and not to commit fraud were joint, and denying recovery to the innocent spouse. An analysis of the applicable contract rules would have led the court to conclude that the insurance contract was ambiguous and thus should have been interpreted in a reasonable manner most favorable to the innocent insured spouse. Based on this conclusion, the court should have held that the duties under the policy were not joint, but severable, and thus reached the more equitable result.

S. P. C.

72. See note 29 *supra* & accompanying text.

73. Such a result also would have aided in preventing certain frauds. One spouse would be less likely to conspire with the other to defraud an insurance company if refusal to participate in that wrong would permit the innocent spouse to recover his or her share of the proceeds.