

ORIGINAL

IN THE SUPREME COURT OF OHIO

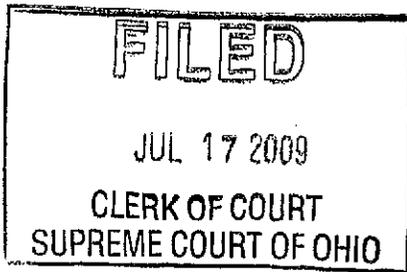
Elevators Mutual Insurance Company, et al.)	Case No. 09-0321
)	
Appellants,)	
)	
v.)	On Appeal from the
)	Sandusky County Court of Appeals
J. Patrick O’Flaherty’s, Inc., et al.,)	Sixth Appellate District
)	
Appellees.)	

MERIT BRIEF OF APPELLANT ELEVATORS MUTUAL INSURANCE COMPANY

Robert E. Chudakoff (0038594)*
 Gary S. Greenlee (0067630)
 ULMER & BERNE LLP
 Skylight Office Tower
 1660 W. 2d Street – Suite 1100
 Cleveland, Ohio 44113-1448
 (216) 583-7000
 Fax No. (216) 583-7001
rchudakoff@ulmer.com
 Counsel for Appellant
 Elevators Mutual Insurance Company

W. Patrick Murray (0008841)*
 James L. Murray (0068471)
 William H. Bartle (008795)
 111 E. Shoreline Drive
 Sandusky, Ohio 44870
 (419) 624-3000
 Fax No. (419) 624-0707
wpm@murrayandmurray.com
 Counsel for Appellees

Jay Clinton Rice (0000349)*
 Richard C.O. Rezie (0071321)
 Gallagher Sharp
 Sixth Floor, Bulkley Building
 1501 Euclid Avenue
 Cleveland, Ohio 44115
 (216) 241-5310
 Fax No. (216) 241-1608
jrice@gallaghersharp.com
 Counsel for Appellant
 NAMIC Insurance Company



* Counsel of Record

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STATEMENT OF FACTS

Appellee Richard Heyman is a convicted arsonist who seeks in this case to profit from his crimes by collecting from appellant Elevators Mutual Insurance Company ("Elevators Mutual") the very same insurance proceeds that motivated his felonious conduct. Heyman and his wife, appellee Jan Heyman, were the sole shareholders of appellee J. Patrick O'Flaherty's, Inc. ("O'Flaherty's").¹ (Docket No. 1, Complaint ¶5; Docket No. 7, Answer ¶5). Richard Heyman was O'Flaherty's President, and Jan Heyman was its Vice President. (Complaint ¶4; Answer ¶4).

Elevators Mutual issued to O'Flaherty's a Restaurant Commercial Package Policy of insurance, insuring O'Flaherty's restaurant in Fremont, Ohio, for a one-year period commencing August 31, 2000.² (Complaint ¶7; Answer ¶7; Appx. 50; Supp. 2). The policy identified O'Flaherty's as the only "named insured." (Appx. 50; Supp. 2). The policy also identified Richard Heyman and Jan Heyman as "loss payees." (Appx. 51, 53-54; Supp. 7, 13-14).

On the night of February 4, 2001, the restaurant and its contents were severely damaged by fire. (Complaint ¶9; Answer ¶9). The State Fire Marshal's investigation revealed that the Heymans were the last persons present at O'Flaherty's prior to the fire. (Docket No. 72A, Lorenzo Depo., pp. 144-145). The burglar alarm was not triggered prior to the fire, and the building was secure when the fire department arrived. (Lorenzo Depo., pp. 123-125). Xylene, paint thinner, and other ignitable liquids were identified in multiple debris samples taken from

¹ Richard Heyman, Jan Heyman, and O'Flaherty's are herein referred to collectively as "Appellees."

² Complete copies of the Restaurant Commercial Package Policy are at Docket No. 33 (Ex. 1) and at Supp. 1-55. Relevant portions of the policy are attached hereto at Appx. 50-69.

the fire scene. (Loreno Depo., pp. 24-25). The State Fire Marshal further learned that the Heymans were considerably indebted to “quite a few different companies” at the time of the fire, that at least one creditor had filed a lawsuit against the Heymans, and that the Heymans had increased their insurance on the property shortly before the fire. (Loreno Depo., pp. 143-147).

In addition, Richard Heyman’s sister-in-law told investigators that Heyman had stated, “on more than one occasion, that he ‘would like to burn the place down.’” (*State v. Heyman*, 6th Dist. No. S-04-016, 2005-Ohio-5565, ¶8) (“*Heyman I*”). The investigation further revealed that the tank for the automatic sprinkler system did not contain any water, that the Heymans had been unable to pay some of their employees’ wages, and that the Heymans were involved in several lawsuits precipitated by their nonpayment of taxes. (*Heyman I*, ¶¶7-8).

On December 7, 2001, Richard Heyman was indicted and charged with arson, aggravated arson, and insurance fraud in connection with the fire. (*Heyman I*, ¶10). Initially, he pled not guilty. (*Id.*). Heyman then deposed multiple witnesses and adduced additional evidentiary materials in his criminal case. (*State v. Heyman*, 6th Dist. No. S-04-016, 2005-Ohio-6244, 2005 Ohio App. Lexis 5627, *2) (“*Heyman II*”).

On May 25, 2004, however, after having litigated his criminal case for two and a half years, Heyman pled no contest to “arson with purpose to defraud” (R.C. §2909.03(A)(2); Appx. 47) and “insurance fraud” (R.C. §2913.47(B)(1); Appx. 48-49). (*Heyman I*, ¶¶1, 11). Based upon the prosecutor’s proffer of evidence, Heyman was found guilty and convicted of both arson and insurance fraud.³ (Docket No. 32, Ex. 1; *Heyman I*, ¶¶1, 11). Heyman was then

³ Had the prosecutor’s proffer been insufficient, Heyman could have been acquitted. See, *State v. Frye*, 3rd Dist. No. 14-07-07, 2007-Ohio-5772 (affirming finding of not guilty following no contest plea); *State v. Gump*, 8th Dist. No. 85693, 2005-Ohio-5689 (same); *State v. Mayfield*, 8th Dist. No. 81924, 2003-Ohio-2312 (same). The trial court, however, found the prosecutor’s
(footnote continued ...)

sentenced to one year in prison for felony insurance fraud and to five years of community control for felony arson. (*Heyman I*, ¶1). Heyman appealed that sentence, but the Court of Appeals, after reviewing the deposition transcripts and other evidentiary materials, found Heyman's appeal to be "wholly frivolous." (*Heyman I*, ¶19; *Heyman II*, *2).⁴

Notwithstanding the involvement of its President and one-half owner in deliberately causing the fire for the purpose of defrauding Elevators Mutual, O'Flaherty's submitted an insurance claim to Elevators Mutual for the fire damage to the restaurant building and its contents. (Complaint ¶10; Answer ¶10). Elevators Mutual, however, rejected that claim because the policy of insurance expressly excluded coverage for loss or damage caused by any "dishonest or criminal act by you, any of your partners, employees ..., directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose: (1) acting alone or in collusion with others; or (2) whether or not occurring during the hours of employment." (Form CF 497, pp. 1-2; Appx. 55-56; Supp. 24-25).

In addition, Elevators Mutual instituted this action in the Sandusky County Court of Common Pleas, seeking a declaratory judgment that it had no obligation to make any payment to the named insured (O'Flaherty's) or to either of the "loss payees" (Richard Heyman and Jan Heyman). O'Flaherty's and the Heymans responded with a counterclaim, asserting not only that Elevators Mutual was required to pay their insurance claim, but also that Elevators Mutual acted

proffer sufficient to convict Heyman of arson and insurance fraud and to send Heyman to prison for his crimes.

⁴ Heyman then filed a notice of appeal in this Court, but failed to timely file his memorandum in support of jurisdiction. This Court therefore dismissed his appeal sua sponte. *State v. Heyman* (2006), 109 Ohio St.3d 1475, 2006-Ohio-2481, 847 N.E.2d 1222.

in bad faith when it denied coverage for the fire that Richard Heyman was convicted of setting *for the purpose of defrauding Elevators Mutual*.⁵

In anticipation of trial, Elevators Mutual filed a motion in limine regarding the admissibility of evidence of Heyman's felony convictions. (Docket No. 106). On November 30, 2007, the trial court granted that motion, holding that "Elevators Mutual will be permitted to refer to and/or introduce as substantive evidence in its case-in-chief, to refer to during opening statement and closing argument, and to use for purposes of cross-examination, Defendant Richard A. Heyman's criminal convictions for arson and insurance fraud in connection with the subject fire." (Docket No. 117; Appx. 37). Ultimately, on January 28, 2008, the trial court granted summary judgment in favor of Elevators Mutual, holding that Heyman's "criminal convictions preclude the insured, Defendant J. Patrick O'Flaherty's, Inc., from recovering any insurance proceeds for this fire loss." (Docket No. 126; Appx. 38-40).⁶

On December 31, 2008, however, the Sixth District Court of Appeals, in a 2-to-1 decision, reversed the summary judgment. (Docket No. 23; Appx. 6-21). In so doing, the majority:

⁵ It should be noted that the other appellant in this case, NAMIC Insurance Company ("NAMIC") is providing Elevators Mutual with a defense to Appellees' counterclaim, pursuant to an Insurance Company Combined Professional Liability and Directors and Officers Liability insurance policy issued by NAMIC to Elevators Mutual. Accordingly, NAMIC intervened in this case in order to obtain a declaration as to the scope of coverage available to Elevators Mutual under the NAMIC policy. Although that issue became moot upon the trial court's rendering of a summary judgment in favor of Elevators Mutual, NAMIC continues to participate in this appeal as an additional appellant.

⁶ Previously, on October 6, 2005, the trial court had denied Elevators Mutual's motion for summary judgment (Docket 58; Appx. 27-31), which ruling was slightly modified on April 13, 2006 (Docket 63; Appx. 32-36). However, after granting Elevators Mutual's motion in limine, the trial court reconsidered the matter and issued a new order granting Elevators Mutual's motion for summary judgment. (Docket No. 126; Appx. 38-40).

- held that Evid. R. 410 and Crim. R. 11(B)(2), which expressly preclude *only* evidence of no contest pleas, “make the plea *and the conviction derived from the plea inadmissible*” (Docket No. 23, ¶32; Appx. 15), even though neither rule makes any mention of criminal convictions (Appx. 43, 44-46);
- attempted to limit this Court’s holding in *State v. Mapes* (1985), 19 Ohio St.3d 108, 111, 484 N.E.2d 140, that Crim. R. 11(B)(2) and Evid. R. 410 “do not prohibit the admission of a conviction entered upon [such a] plea” to situations in which the conviction is “made relevant” only “by statute”;
- held that “the distinction between a no contest plea and a conviction on that plea is a false dichotomy” (Docket No. 23, ¶32; Appx. 15); and
- held that Heyman’s felony convictions were not made relevant by any provision of the Elevators Mutual policy (Docket No. 23, ¶33; Appx. 15).

ARGUMENT

As will be discussed below, the central issue in this appeal is whether the Court of Appeals erred in holding that Evid. R. 410 and Crim. R. 11(B)(2) prohibited the trial court from considering, as evidence with respect to Appellees' insurance claim, Richard Heyman's felony convictions for arson and insurance fraud.

Elevators Mutual submits that that holding was erroneous because the two evidentiary rules relied upon by the Court of Appeals preclude only evidence of no contest *pleas*, and Elevators Mutual, in its summary judgment motion, never relied upon evidence of Heyman's *pleas*. Rather, Elevators Mutual relied only on evidence of Heyman's felony *convictions*. Moreover, that evidence of Heyman's felony convictions was undeniably relevant, both under settled case law and under the policy, and was therefore admissible. (Evid. R. 402; Appx. 42).

Proposition of Law No. 1:

Evid. R. 410(A)(2) precludes only evidence of no contest pleas (or "equivalent pleas from other jurisdictions") and does not preclude relevant evidence of criminal convictions.

As noted above, the Court of Appeals held that Evid. R. 410 prohibits evidence of a criminal conviction following a no contest plea. (Docket No. 23, ¶32; Appx. 15). However, Evid. R. 410 does no such thing. To the contrary, that rule unambiguously precludes *only* evidence of no contest *pleas* (or equivalent pleas from other jurisdictions):

Evid R 410 Inadmissibility of pleas, offers of pleas, and related statements

(A) Except as provided in division (B) of this rule, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

- (1) a plea of guilty that later was withdrawn;

- (2) *a plea of no contest or the equivalent plea from another jurisdiction;*
 - (3) a plea of guilty in a violations bureau;
 - (4) any statement made in the course of any proceedings under Rule 11 of the Rules of Criminal Procedure or equivalent procedure from another jurisdiction regarding the foregoing pleas;
 - (5) any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.
- (B) A statement otherwise inadmissible under this rule is admissible in either of the following:
- (1) any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously with it;
 - (2) a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. [Italics added].

It should be noted that the word “plea” appears twelve times in Evid. R. 410. Nowhere in Evid. R. 410 does the word “conviction” appear. This is significant, since a criminal *conviction* is not “a plea, an offer of plea, or a related statement.” Consequently, there is no prohibition in Evid. R. 410 against evidence of criminal convictions.

A. The Court Of Appeals Majority Misinterpreted *Mapes*

How did the Court of Appeals misapply such a straightforward rule of evidence? By misinterpreting this Court’s decision in *State v. Mapes* (1985), 19 Ohio St.3d 108, 484 N.E.2d 140, cert. denied, *Mapes v. Ohio* (1986), 476 U.S. 1178. *Mapes* was convicted of aggravated murder. In the subsequent death penalty hearing, the prosecution introduced evidence of a prior murder conviction (in another state) in order to prove a death-penalty

specification under R.C. 2929.04(A)(5). Mapes objected to that evidence, arguing that it was barred by Evid. R. 410 and Crim. R. 11(B)(2) because he had pled no contest in the earlier case. This Court, drawing a clear distinction between the admission of a no contest *plea* and the admission of a *conviction* entered upon that plea, rejected Mapes' argument that his no contest plea somehow rendered his subsequent criminal conviction inadmissible:

Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission of a conviction entered upon that plea when such conviction is made relevant by statute. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to criminal trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. These purposes are not disserved by the admission of a conviction entered upon a no contest plea.

Mapes, 19 Ohio St.3d at 111 (italics added) (citations omitted).

Elevators Mutual submits that this Court's holding in *Mapes* is unambiguous: Crim. R. 11(B)(2) and Evid. R. 410 prohibit *only* the admission of no contest pleas, and a conviction is not equivalent to a plea. Therefore, Crim. R. 11 (B)(2) and Evid. R. 410 do not prohibit evidence of a criminal conviction that follows a no contest plea.⁷

Several Ohio courts have reached the same conclusion, applying this Court's holding in *Mapes*. Most directly on point is *Steinke v. Allstate Ins. Co.* (3rd Dist. 1993), 86 Ohio App.3d 798, 621 N.E.2d 1275, in which Steinke sought a declaratory judgment that Allstate had a duty to defend him against a claim for assault. Allstate argued that Steinke's conviction for

⁷ Additional reasons why Crim. R. 11(B)(2) has no application to the instant case are set forth below in connection with Proposition of Law No. 2.

disorderly conduct triggered the policy's "criminal acts" exclusion (just as Heyman's conviction in the instant case triggered the "dishonest or criminal" acts exclusion in the Elevators Mutual policy (see p. 3, above)). The Common Pleas Court granted summary judgment in favor of Allstate. Citing Crim. R. 11 and Evid. R. 410, Steinke argued on appeal that evidence of his criminal conviction should not have been introduced because he had pled no contest. The Third District disagreed:

It is clear that *Crim. R. 11* and *Evid. R. 410* prohibit the use of "a plea of no contest," not a conviction pursuant to a no contest plea. The Ohio Supreme Court specifically held in *State v. Mapes* (1985), 19 Ohio St.3d 108, 111, 19 OBR 318, 320-321, 484 N.E.2d 140, 143, that "*Crim. R. 11(B)(2)* and *Evid. R. 410* prohibit only the admission of a no contest plea."

Steinke, 86 Ohio App.3d at 801 (italics in original).

In the present case, the Court of Appeals majority attempted to explain away *Steinke*, suggesting that Steinke's conviction "was admissible because the opposing party had waived the issue by failing to contemporaneously object to its admission." (Docket No. 23, ¶30; Appx. 14). That is a mischaracterization of the *Steinke* decision. The Third District clearly held that evidence of Steinke's conviction was relevant to Allstate's "criminal acts" exclusion and therefore admissible *ab initio*:

[Steinke's] criminal conviction was being introduced by Allstate to establish that the injuries herein might reasonably be expected to result from the criminal act of the insured, and, thus, relieve Allstate of any duty to cover or defend under the terms of the policy. Thus, we find no error in the admission of the criminal conviction for this purpose.

Steinke, 86 Ohio App.3d at 802 (italics added). There is nothing in the Third District's decision to suggest that the court would have held the conviction to have been inadmissible had Steinke made a timely objection.

B. Relevant Evidence Of A Conviction Is Admissible, Whether Made Relevant By Statute Or Otherwise

In *Steinke*, the Third District cited *State v. Charlton* (Jan. 29, 1992), 9th Dist. No. 91CA005113, 1992 Ohio App. LEXIS 326, where Charlton was placed on probation following a conviction for extortion. The trial court revoked Charlton's probation after Charlton was convicted of obstruction following a no contest plea. On appeal, Charlton argued that the trial court improperly admitted evidence of the conviction for obstruction, but the Court of Appeals rejected that argument:

The record verifies that the common pleas court's findings were supported by the uncontroverted evidence presented. The court relied upon the demonstration of Charlton's *conviction* and not, contrary to his assertions, upon his mere *plea* of no contest. *State v. Mapes* (1985), 19 Ohio St.3d 108, paragraph one of the syllabus, certiorari denied (1986), 476 U.S. 1178.

Charlton, *3 (italics in original). Here again, a Court of Appeals recognized a clear distinction between evidence of a criminal conviction and evidence of a "mere plea."⁸

In the instant case, however, the Court of Appeals majority deemed the distinction between a no contest plea and a subsequent conviction to be of no consequence:

⁸ See also, *State v. Stevens* (Jan. 15, 1988), 2nd Dist. No. 10203, 1988 Ohio App. LEXIS 66, *7 ("It does not matter that such conviction was based on a no contest plea") (citing *Mapes*); *State v. Gurley* (July 8, 1992), 9th Dist. Nos. 15210, 15505, 1992 Ohio App. LEXIS 3574, *7 ("the admission into evidence of a prior conviction which is premised upon a no contest plea is not equivalent to the admission of the no contest plea") (citing *Mapes*); *Spencer v. Ohio State Liquor Control Comm'n* (Sept. 18, 2001), 10th Dist. No. 01AP-147, 2001 Ohio App. LEXIS 4152 (following *Steinke*); *Reynolds v. Ohio State Bd. of Examiners of Nursing Home Adm'rs*, 10th Dist. No. 03AP-127, 2003-Ohio-4958, ¶13 ("A distinction exists between the use of a no contest *plea* and the use of the Medicaid fraud *conviction* entered after the no contest plea was given") (italics in original) (citing *Mapes*); *Nagel v. Hogue*, 12th Dist. No. CA2007-06-011, 2008-Ohio-3073, ¶45 ("the only things that are rendered inadmissible are: (1) the defendant's plea of no contest; and (2) the effect of that no contest plea, namely, that the no contest plea is an admission by the defendant of the truth of the facts alleged in the charging instrument").

In our view, the distinction between a no contest plea and a conviction on that plea is a false dichotomy. The proper distinction is whether or not the conviction has been made relevant to the later proceeding by statutory provision.

(Docket No. 23, ¶32; Appx. 15). The Court of Appeals thus brushed aside this Court's holding in *Mapes* that evidence of a prior conviction entered upon a no contest plea is “*not equivalent* to the admission of the no contest plea.” *Mapes*, 19 Ohio St.3d at 111.

Moreover, the Court of Appeals' conclusion that “the proper distinction is whether or not the conviction has been made relevant to the later proceeding by statutory provision” is simply wrong. The majority reached that erroneous conclusion by misinterpreting the phrase “when such conviction is made relevant by statute.” *Mapes*, 19 Ohio St.3d at 111. According to the majority, this statement means that a conviction following a no contest plea is admissible *only* if the conviction is made relevant by statute. (Docket No. 23, ¶29; Appx. 13). If, on the other hand, the conviction is “made relevant” by a contract, by common law or by administrative ruling, the conviction is *not* admissible.

Significantly, the Court of Appeals majority offered no explanation as to the “logic” for such a distinction. Rather, the majority simply quoted the sentence in *Mapes* stating that the rules “do not prohibit the admission of a conviction entered upon that plea when such conviction is made relevant by statute,” without considering the context of that sentence.

Thus, the majority overlooked the fact that when this Court spoke of “relevancy” in *Mapes*, this Court was speaking of the relevancy of evidence of convictions *in general*, not just the relevance of convictions entered after a no contest plea. In other words, in *Mapes* this Court recognized that evidence of a conviction is not necessarily relevant in every case that comes before a trial court. Rather, the offerer of the conviction has to show a particular reason why the conviction is relevant.

In *Mapes*, the defendant's prior conviction of murder (in another state) was held to be relevant in a death penalty hearing because an Ohio statute (R.C. 2929.04) allows imposition of the death penalty for aggravated murder if, "[p]rior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing or attempt to kill another." Therefore, under that statute, evidence of a prior conviction of such an offense is admissible in a death penalty hearing.

It should be noted, however, that R.C. 2929.04 applies to *all* such convictions, not just convictions entered after a no contest plea. Accordingly, this Court, in *Mapes*, held that nothing in Crim. R. 11(B)(2) and Evid. R. 410 prevents a conviction entered after a no contest plea from being admissible under R.C. 2929.04, just like any other conviction, so long as the requirements for admission under that statute have been met (i.e., the conviction must be of an offense of which "an essential element ... was the purposeful killing or attempt to kill another"). Those rules "do not prohibit the admission of a conviction entered upon that plea when such conviction is made relevant by statute." *Mapes*, 19 Ohio St.3d at 111. The key to that holding, however, was not the fact that the particular conviction at issue in that case was "made relevant by statute." Rather, the key to the decision was the fact that Crim. R. 11(B)(2) and Evid. R. 410 "prohibit only the admission of a no-contest *plea*" and the admission of "evidence of the prior *conviction* ... was not equivalent to the admission of the no contest plea." *Mapes*, 19 Ohio St.3d at 111.

In other words, nothing in the language of this Court's opinion in *Mapes* suggests – nor is there any logical reason to conclude – that the conclusion would have been any different had the particular conviction been offered in a civil case and deemed relevant under a common law rule or principle. Otherwise, one would have to conclude that a conviction following a no

contest plea that is *not* “made relevant” in a particular case “by statute” must be deemed to be an inadmissible “plea” under Evid. R. 410 – even though this Court clearly held in *Mapes* that a “plea” and a “conviction” are two different things. Nor is there any logical reason for this Court to now do what Appellees are asking it to do, which is to restrict the admissibility of convictions following no contest pleas to cases in which evidence of a conviction is “made relevant” by statute and to bar such evidence from cases in which such evidence is made relevant under principles of common law, by contract, or by administrative regulation. As was held by this Court in *Shrader v. Equitable Life Assurance Soc’y* (1985), 20 Ohio St.3d 41, 44-45, 485 N.E.2d 1031, one such common law rule is that a beneficiary of an insurance policy should not be allowed to recover the proceeds of that policy for a loss (or death) that was “intentionally and feloniously caused” by the beneficiary.

See, in this regard, *State v. Williams* (Nov. 21, 1997), 2nd Dist. No. 16306, 1997 Ohio App. LEXIS 6083, where Williams was arrested for jaywalking. The arresting officers searched him, found four rocks of crack cocaine in his pocket, and charged him with drug abuse. Williams pled no contest to jaywalking and was convicted of that offense in Dayton Municipal Court. In his drug abuse case in Common Pleas Court, Williams sought to suppress evidence of the cocaine, arguing that his jaywalking arrest had been unlawful. To rebut that argument the prosecution sought to introduce evidence of Williams’ jaywalking conviction. The Common Pleas Court held that evidence of the conviction was inadmissible, but the Second District reversed that ruling:

We do not agree with the trial court that evidence of Williams’ conviction is barred by Evid. R. 410. That Rule, as well as Crim. R. 11(C) [sic], bars evidence of a defendant’s plea of no contest, not a conviction resulting from it when evidence of the conviction is otherwise admissible.

Williams, *5. Thus, evidence of Williams' jaywalking conviction was held to be admissible even though that conviction was *not* made relevant by statute.

It should be further noted that, in the instant case, the Court of Appeals majority itself acknowledged that the purported limitation to "made relevant by statute" is not consistent with the case law. See, for example, paragraph 29 where the majority cited cases in which evidence of prior convictions was made relevant by "a rule derived from a statute," and paragraph 33 where the majority stated that it was taking "no position on whether an insurer and an insured may contract to make a prior conviction relevant in a subsequent action on the contract. In this insurance contract, no such provision appears." (Docket No. 23, ¶¶29, 33; Appx. 14, 15). However, as noted above, the Elevators Mutual insurance contract contained an exclusion for "dishonest or criminal" acts committed by employees, directors, and other authorized representatives of the named insured. Arson and insurance fraud are unquestionably dishonest and/or criminal acts, so the majority's suggestion that Heyman's convictions are not relevant to any policy provision is factually incorrect.

Proposition of Law No. 2:

Crim. R. 11(B)(2) precludes only evidence of no contest pleas, and does not preclude relevant evidence of criminal convictions.

The Court of Appeals majority also concluded that Crim. R. 11(B)(2) precludes evidence of a criminal conviction that follows a no contest plea. Since, however, this is a civil case rather than a criminal case, it was clearly erroneous for the Court of Appeals to conclude that the admissibility of evidence in this civil proceeding is governed in any way by a rule of criminal procedure that is to be followed by the "courts of this state in the exercise of criminal jurisdiction." (Crim. R. 1(A)).

Moreover, like Evid. R. 410 discussed above, Crim. R. 11(B)(2) precludes only evidence of a no contest *plea* and does not preclude evidence of a subsequent criminal conviction:

Crim R 11 Pleas, rights upon plea

* * *

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

* * *

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and *the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.* [Italics added].

Thus, this Court, in *Mapes*, specifically held that Crim. R. 11(B)(2) "prohibit[s] *only* the admission of a no contest plea." *Mapes*, 19 Ohio St.3d at 111 (italics added).

Accordingly, in *State v. Smith* (Nov. 14, 1990), 4th Dist. No. CA 1847, 1990 Ohio App. LEXIS 4958, *11-12, the Fourth District held that the introduction of a certified copy of the defendant's conviction following a no contest plea, to prove that the defendant had violated his probation, did not contravene Crim. R. 11(B)(2):

Mapes addressed the analogous issue of whether the state could use a prior conviction following a no contest plea to prove a prior murder specification under R.C. 2949.02(A)(5). Here, the state introduced evidence of a prior conviction following a no-contest plea to prove that appellant had committed other crimes while on probation, thereby violating Rule No. 1 of his probation. As in *Mapes*, the state sought the admission of the prior conviction, not the introduction of the no-contest plea. Based upon the rationale of *Mapes*, we hold that the conviction is admissible, pursuant to

Crim. R. 11(B)(2), since it is relevant to the issue of whether appellant had committed other crimes.⁹

Moreover, in the instant case, the majority ignored the Sixth District's own prior decision in *Jaros v. Ohio State Bd. of Emergency Med. Serv.*, 6th Dist. No. L-01-1422, 2002-Ohio-2363, ¶21, where the court stated:

We acknowledge that the use of a no contest plea is prohibited in any subsequent civil or criminal proceedings. *Crim. R. 11(B)(2)*. For example, if appellant had pled no contest and been found not guilty, the no contest plea could not have been utilized by the Board for any reason. In this case, however, it is the conviction, not the no contest plea, which is the basis of the review by the Board. Therefore, the no contest plea is irrelevant for purposes of the Board's authority to revoke appellant's license.

Thus, in *Jaros*, the Sixth District clearly recognized that there is a distinction between a no contest plea and a criminal conviction following such a plea, and held that Crim R. 11(B)(2) excludes only evidence of the no contest plea itself. Likewise, in *Bivins v. Ohio State Bd. of Emergency Med. Serv.* (6th Dist.), 165 Ohio App.3d 390, 2005-Ohio-5999, 846 N.E.2d 881, ¶4, the Sixth District, citing *Jaros*, held that "it is the finding of guilty, not the plea, that is the basis of review by the Board."

In the instant case, the Court of Appeals majority cited just one case, *Wolfe v. Ohio Motor Vehicle Dealers Bd.*, 5th Dist. No. 2003CA00231, 2004-Ohio-122, where a court

⁹ See also, *State v. Cook* (Mar. 27, 1992), 7th Dist. No. 91 C.A. 80, 1992 Ohio App. LEXIS 1843, *3 ("the conviction resulting from the no contest plea is admissible pursuant to Crim. R. 11(B)(2)") (citing *Mapes*); *City of Macedonia v. Broers* (Jan. 22, 1986), 9th Dist. No. 12245, 1986 Ohio App. LEXIS 5407, *3 ("Crim. R. 11(B)(2) ... does not prohibit the use of a conviction based on a no contest plea").

Several of the cases discussed in connection with Proposition of Law No. 1 – including *Mapes*, *Steinke*, *Gurley*, *Spencer*, *Reynolds*, *Nagel*, and *Williams* – specifically addressed Crim. R. 11(B)(2) in conjunction with Evid. R. 410, and the holdings in those cases apply equally to Proposition of Law No. 2. To avoid redundancy, those discussions are not repeated here.

excluded evidence of a criminal conviction following a no contest plea. In *Wolfe*, the trial court held that Crim. R. 11(B)(2) precluded evidence of Wolfe's criminal conviction following a no contest plea *even though the conviction was made relevant by statute*. That ruling was then affirmed on appeal. Thus, *Wolfe* is inconsistent with both *Mapes* (where this Court held that Evid. R. 410 or Crim. R. 11(B)(2) do not preclude relevant evidence of a criminal conviction following a no contest plea) and the majority's decision in the instant case (that evidence of a criminal conviction following a no contest plea is not precluded by Evid. R. 410 and Crim. R. 11(B)(2) if the conviction is made relevant by statute).

Proposition of Law No. 3:

Because public policy prohibits a wrongdoer from profiting by his own wrongful conduct, public policy prohibits a convicted arsonist, and/or the close corporation of which he is a principal owner, from recovering, directly or indirectly, insurance proceeds in connection with the fire that he was convicted of causing.

A. Public Policy Prohibits A Wrongdoer From Profiting By His Crimes

Almost a quarter century ago, this Court held that the "well-established policy of the common law is that no one should be allowed to profit from his own wrongful conduct." *Shrader v. Equitable Life Assurance Soc'y* (1985), 20 Ohio St.3d 41, 44, 485 N.E.2d 1031. In that case, this Court held that "the common law bars a beneficiary of a life insurance policy from receiving the proceeds of that policy when the beneficiary intentionally and feloniously caused the death of the insured." *Id.*, at 45.

This sound public policy prevents felons from collecting the insurance proceeds that motivated their felonious conduct. As the United States Supreme Court has noted:

It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. *As well might he recover insurance money upon a building that he had willfully fired.*

New York Mut. Life Ins. Co. v. Armstrong (1886), 117 U.S. 591, 600, 6 S. Ct. 877 (italics added).¹⁰ Allowing an arsonist to collect insurance proceeds would therefore defy public policy and largely defeat the purpose of criminalizing arson. As stated by the Supreme Court of Virginia in *Eagle, Star and British Dominions Ins. Co. v. Heller* (Va. 1927), 140 S.E. 314, 323:

To permit a recovery under a policy of fire insurance by one who has been convicted of burning the property insured, would be to disregard the contract, be illogical, would discredit the administration of justice, defy public policy and shock the most unenlightened conscience.¹¹

B. The Arson And Insurance Fraud Committed By O’Flaherty’s President Is Imputed To O’Flaherty’s And Precludes O’Flaherty’s From Recovering Under The Elevators Mutual Policy

Richard Heyman was the President of O’Flaherty’s and a fifty percent shareholder. The law is quite clear that arson or fraud by an officer or shareholder of a corporation may be imputed to the corporation and precludes the corporation from recovering insurance proceeds for the fire. As is stated in 10A *Couch on Insurance* 3d §149:51:

Since a corporation can only act through its agents, employees, directors, and shareholders, their misdeeds may be imputed to the corporation, thereby relieving the insurer of liability for the loss.

¹⁰ See also, *Kimball Ice Co. v. Hartford Fire Ins. Co.* (4th Cir. 1927), 18 F.2d 563, 566 (arson) (citing *Armstrong*); *Connecticut Fire Ins. Co. v. Ferrara* (8th Cir. 1960), 277 F.2d 388, 391 (“It is a basic principle of American jurisprudence that one may not profit from his own crime”) (arson) (citing *Armstrong*); *McCullough v. State Farm Fire & Cas. Co.* (8th Cir. 1996), 80 F.3d 269, 273 (“no arsonist should ever be allowed to profit from his crime”).

¹¹ See also, *Mineo v. Eureka Security Fire & Marine Ins. Co.* (Pa. Super. 1956), 125 A.2d 612, 617 (“why then should [the Commonwealth] permit its courts to be used by the insured in an effort to obtain reward for the crime which the Commonwealth has already concluded he has committed?”); *Breeland v. Security Ins. Co.* (5th Cir. 1969), 421 F.2d 918, 923 (“the conviction for insurance fraud precludes Breeland from litigating the issue in this civil suit against the insurance company”); *Imperial Kosher Catering, Inc. v. Travelers Indem. Co.* (Mich. App. 1977), 252 N.W.2d 509, 510 (“it would be a mockery of justice for our legal processes to be used by convicted felons to profit from their crimes”).

In *Forrestwood Dev. Corp. v. All-Star Ins. Corp.* (June 1, 1978), 8th Dist. No. 37186, 1978 Ohio App. Lexis 10419, the plaintiff corporation sued its insurer to recover for a fire loss. Finding that four of the corporation's six shareholders had conspired to set the fire, the court imputed the arson committed by the shareholders to the corporation, holding:

Appellant argues that Forrestwood cannot be held accountable for the fire absent proof to the effect that a corporate resolution or its equivalent was duly made to commit the arson. We find such a requirement unreasonable in the context of an arson in a closely held corporation.... We conclude that there was sufficient evidence adduced to support a determination that the corporation was accountable for the fire.

Forrestwood, at *9-10.

Similarly, in *Blich Ford, Inc. v. MIC Property and Casualty Ins. Corp.* (M.D. Ga. 2000), 90 F. Supp.2d 1377, the insured car dealership's corporate secretary, who owned 49% of the corporation, was convicted of arson in connection with a fire at the dealership. The court imputed the corporate secretary's arson to the corporation and granted summary judgment in favor of the insurer:

Brett Blich was a stockholder, an officer, and a director of the insured. The acts of Brett Blich are imputed to the corporation, and the corporation violated the policy. Therefore Blich Ford may not recover insurance proceeds from MIC.

Blich Ford, 90 F. Supp.2d at 1383.¹²

¹² See also, *State Auto Property and Casualty Ins. Co. v. St. Louis Supermarket #3, Inc.* (Jan. 5, 2006), E.D. Mo. No. 4:04cv1358, 2006 U.S. Dist. Lexis 240 (granting summary judgment in favor of insurer; court imputed 50% shareholder's arson to insured corporation); *Capitol Indem. Corp. v. Evolution, Inc.* (D.N.D. 2003), 293 F. Supp.2d 1067, 1072-1073 (granting summary judgment in favor of insurer; court held that corporate president's "actions were not only that of an officer and director, but his actions were that of the corporation"); *American Economy Ins. v. Camera Mart, Inc.* (Sept. 15, 2006), E.D. Ark. No. 4:05-CV-00155, 2006 U.S. Dist. Lexis 66433 (arson committed by corporate officer and part-owner may be imputed to corporation).

K&T Enters., Inc. v. Zurich Ins. Co. (6th Cir. 1996), 97 F.3d 171, is strikingly similar to the present case. Kareem and Tahani Khoury each owned a 50% interest in the corporation, which operated a failing Dairy Queen franchise. Kareem was implicated in the fire that destroyed the Dairy Queen. He subsequently was convicted of mail fraud, as a result of his sending proof-of-loss statements to Zurich that fraudulently concealed his involvement in the fire. Despite that involvement, the corporation (K&T) filed a lawsuit seeking recovery under the insurance policy. Zurich moved for summary judgment, which motion was denied. The case then went to trial, and the jury returned a verdict in favor of K&T. Zurich moved for judgment as a matter of law, which motion was denied, and Zurich appealed. The Sixth Circuit Court of Appeals *reversed*, holding that Zurich was entitled to judgment as a matter of law:

When is fire not the enemy of ice? When the 50% shareholder of a failing Dairy Queen franchise in Blissfield, Michigan torches that franchise outlet for profit, and his wife, who also owns 50% of the franchise, is still permitted by a district court upon a jury verdict to collect fire insurance proceeds for the damage caused by the arson. *We reverse this decision, which, if left to stand, would encourage individuals to use the corporate veil to perpetrate insurance fraud.*

K&T Enterprises, 97 F.3d at 172 (italics added).

Precisely the same scenario occurred in the present case. Richard Heyman was convicted of arson and insurance fraud and is now trying to use the corporate veil to profit from his crimes. Such a result would be manifestly unjust and contrary to public policy. Because a corporation acts through its officers, Heyman's arson and insurance fraud are imputed to O'Flaherty's and prohibit O'Flaherty's from recovering under the Elevators Mutual policy for any loss resulting from Heyman's fraudulent and criminal conduct.

C. Jan Heyman Is A Mere Loss Payee Who “Stands In The Shoes Of” O’Flaherty’s And Therefore Is Not Entitled To Recovery Under The Elevators Mutual Policy

Appellee Jan Heyman also seeks to recover under the Elevators Mutual policy.¹³

However, she was not a named insured in that policy; she was merely listed, along with her husband Richard, as a “loss payee” “[s]ubject to form CP1218 Loss Payable Provisions.” (Commercial Property Declarations; Appx. 51; Supp. 7).¹⁴ As such, she “stands in the shoes” of the insured – i.e., O’Flaherty’s – and has no greater rights under the policy than does O’Flaherty’s. In other words, because O’Flaherty’s is not entitled to recover under the Elevators Mutual policy, neither is Jan Heyman. As explained in *Pittsburgh Nat’l. Bank v. Motorists Mut. Ins. Co.* (9th Dist. 1993), 87 Ohio App.3d 82, 85, 621 N.E.2d 875, there are essentially two types of “loss payable clauses” found in insurance contracts:

The first, *the simple mortgage clause*, typically states that the proceeds of the policy shall be paid first to the mortgagee *as his interest may appear*. Under such a clause, *the mortgagee is simply an appointee of the insured, and its right of recovery is only as*

¹³ Like her husband, Jan Heyman faced criminal charges in connection with the subject fire, but those charges were dismissed as part of Richard Heyman’s plea agreement. (Docket No. 6, Brief of Defendants-Appellants, pp. 25-26; Docket No. 20, Reply Brief of Defendants-Appellants, pp. 4-5).

¹⁴ The “Loss Payable” provision of Policy Form CP1218 states as follows:

B. LOSS PAYABLE

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for loss or damage jointly to you and the Loss Payee, *as interests may appear*. [Italics added].

(CF 491, p. 1; Appx. 53; Supp. 13).

great as that of the insured. Notably, under a simple mortgage clause, *anything that would void the policy in the hands of the mortgagor likewise voids it as to the mortgagee.*

The protection provided the mortgagee under the second type of loss payable clause, the standard mortgage clause, is broader. Such a clause states, in effect, that coverage for the mortgagee will not be invalidated by any act or neglect of the insured. Generally, this type of clause is considered to constitute a separate contract between the insurer and the mortgagee. [Italics added; citations omitted].

Thus, a “simple” or “open” loss payable clause, providing that the loss payee will be paid “as interests may appear,” affords the loss payee no greater right to recover than that of the insured itself.¹⁵ That is the situation we have here.¹⁶ The “Loss Payable” provision in the Elevators Mutual policy expressly states that it will pay a claim to the loss payee “as interests may appear.”

Therefore, neither of the named loss payees, Jan Heyman and Richard Heyman, has any right to recovery that is any greater than the right of the named insured (O’Flaherty’s). And since O’Flaherty’s has no right of recovery (due to the criminal conviction of Richard Heyman), the loss payees also have no right of recovery.

¹⁵ See, *Associates Commercial Corp. v. Nationwide Mut. Ins. Co.* (App. Div. 2002), 748 N.Y.S.2d 792, 793 (“it is well settled that a ‘loss payee’ stands in the shoes of its insured and may only recover if the insured can”); *Old Am. Mut. Fire Ins. Co. v. Gulf States Fin. Co.* (Tex. App. 2002), 73 S.W.3d 394, 395-396 (“the loss payee stands in the shoes of the insured; it enjoys the same rights as the insured, no more, no less”); *Continental Ins. Co. v. Garrison* (E.D. Wis. 1999), 54 F. Supp.2d 874, 883 (“a loss payee has no greater rights to the proceeds of the policy than the insured”); *Bast v. Capitol Indem. Corp.* (Minn. 1997), 562 N.W.2d 24, 27 (“The loss payee ‘stands in the shoes’ of the insured and is subject to all the defenses the insurer may have against the insured”) (ellipsis omitted).

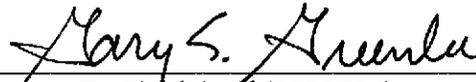
¹⁶ The Elevators Mutual policy contains a “standard” mortgage clause, but it applies only to “mortgageholders” shown in the declarations. (Form CF 160, pp. 7-8; Appx. 67-68; Supp. 21-22). No mortgageholders are shown in the declarations. The declarations refer only to “loss payees” who are expressly subject to the “Loss Payable” provision excerpted above.

CONCLUSION

Appellees are trying to *profit* from Richard Heyman's criminal conduct by collecting insurance money for the very arson that he was convicted of committing for the purpose of defrauding Elevators Mutual. For all of the reasons set forth above, that should not be permitted to occur.

Accordingly, appellant Elevators Mutual Insurance Company respectfully requests that the holding of the Sixth District Court of Appeals be reversed, and that the trial court's Final Judgment Entry granting summary judgment in favor of Elevators Mutual and against Appellees be reinstated in all respects.

Respectfully submitted,



Robert E. Chudakoff (0038594)

(Counsel of Record)

Gary S. Greenlee (0067630)

ULMER & BERNE LLP

Skylight Office Tower

1660 West 2nd Street – Suite 1100

Cleveland, Ohio 44113-1448

Tel: (216) 583-7000

Fax: (216) 583-7001

E-mail: rchudakoff@ulmer.com

ggreenlee@ulmer.com

Attorneys for Plaintiff-Appellant
Elevators Mutual Insurance Company

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant Elevators Mutual Insurance

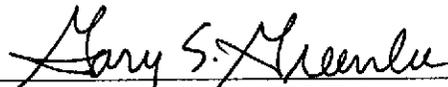
Company was sent to each of the following by first class mail on July 17, 2009:

W. Patrick Murray, Esq.
James L. Murray, Esq.
111 E. Shoreline Drive
Sandusky, Ohio 44870

ATTORNEYS FOR APPELLEES,
J. PATRICK O'FLAHERTY'S, INC.,
RICHARD A. HEYMAN,
AND JAN N. HEYMAN

John Travis, Esq.
Jay Clinton Rice, Esq.
Richard C.O. Rezie, Esq.
Gallagher Sharp
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLANT,
NAMIC INSURANCE COMPANY



Robert E. Chudakoff (0038594)
Gary S. Greenlee (0067630)
ULMER & BERNE LLP

Attorneys for Appellant
Elevators Mutual Insurance Company

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SANDUSKY COUNTY
COURT OF APPEALS
FILED

FEB 19 2009

WARREN P. BROWN
CLERK

IN THE SUPREME COURT OF OHIO

Elevators Mutual Insurance Company,

Appellant,

v.

J. Patrick O'Flaherty's, Inc., et al.,

Appellees.

) Supreme Court Case No.

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09-0321

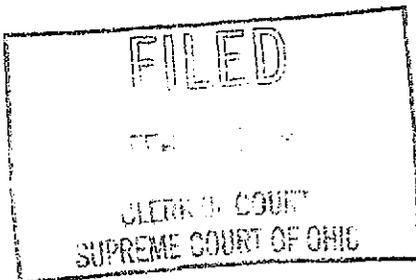
On Appeal from the
Sandusky County Court of Appeals
Sixth Appellate District
Court of Appeals
Case No. 08CAS00006

NOTICE OF APPEAL OF APPELLANT
ELEVATORS MUTUAL INSURANCE COMPANY

Robert E. Chudakoff (0038594)*
Gary S. Greenlee (0067630)
ULMER & BERNE LLP
Skylight Office Tower
1660 W. 2d Street - Suite 1100
Cleveland, Ohio 44113-1448
(216) 583-7000
Fax No. (216) 583-7001
rchudakoff@ulmer.com
Attorneys for Appellant
Elevators Mutual Insurance Company

W. Patrick Murray (0008841)
James L. Murray (0068471)
111 E. Shoreline Drive
Sandusky, Ohio 44870
(419) 624-3000
Fax No. (419) 624-0707
wpm@murrayandmurray.com
Attorneys for Appellees

John Travis (0011247)
Jay Clinton Rice (0000349)
Richard C.O. Rezie (0071321)
Gallagher Sharp
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310
Fax No. (216) 241-1608
jrice@gallaghersharp.com
Attorneys for Intervenor
NAMIC Insurance Company



* Counsel of Record

Notice Of Appeal Of Appellant Elevators Mutual Insurance Company

Appellant Elevators Mutual Insurance Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Sandusky County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. S-08-006 on December 31, 2008.

This case raises a question of public or great general interest.

Respectfully submitted,



Robert E. Chudakoff (0038594), Counsel of Record
Gary S. Greenlee (0067630)
ULMER & BERNE LLP
Skylight Office Tower
1660 W. 2d Street – Suite 1100
Cleveland, Ohio 44113-1448
(216) 583-7000
Fax No. (216) 583-7001
rchudakoff@ulmer.com

Attorneys for Appellant
Elevators Mutual Insurance Company

Certificate Of Service

A copy of the foregoing Notice of Appeal was sent to each of the following by

first class mail on February 13, 2009:

W. Patrick Murray, Esq.
James L. Murray, Esq.
111 E. Shoreline Drive
Sandusky, Ohio 44870

ATTORNEYS FOR APPELLEES,
J. PATRICK O'FLAHERTY'S, INC.,
RICHARD A. HEYMAN,
AND JAN N. HEYMAN

John Travis, Esq.
Jay Clinton Rice, Esq.
Richard C.O. Rezie, Esq.
Gallagher Sharp
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

ATTORNEYS FOR INTERVENOR,
NAMIC INSURANCE COMPANY



Robert E. Chudakoff (0038594)
Gary S. Greenlee (0067630)
ULMER & BERNE LLP

Attorneys for Appellant
Elevators Mutual Insurance Company

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1756260

SANDUSKY COUNTY
COURT OF APPEALS
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In the Supreme Court of Ohio

ELEVATORS MUTUAL INSURANCE)
COMPANY)

Plaintiff/Appellee,)

v.)

J. PATRICK O'FLAHERTY'S, INC., et)
al.)

Defendants/Appellees.)

SUPREME COURT CASE NO.: BROWN
On appeal from the Sandusky County
Court of Appeals, Sixth Appellate
District

Court of Appeals Case No.: S-08-006

NOTICE OF APPEAL OF APPELLANT/INTERVENOR NAMIC INSURANCE COMPANY

W. Patrick Murray (0008841)
Telephone: (419) 624-3122
James L. Murray, Esq. (0068471)
Telephone: (419) 624-3129
William H. Bartle (0008795)
Telephone (419) 624-3012
Murray & Murray Co., L.P.A.
111 E. Shoreline Drive
Sandusky, Ohio 44870
Facsimile: (419) 624-0707

Attorneys for Defendants/Appellees
**J. Patrick O'Flaherty's, Inc.,
Richard A. Heyman, & Jan N. Heyman**

Robert E. Chudakoff (0038594)
Gary S. Greenlee (0067630)
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
Telephone: (216) 583-7000
Facsimile: (216) 583-7001

Attorneys for Plaintiff/Appellee Elevators
Mutual Insurance Company

Jay Clinton Rice (0000349)
(Counsel of Record)
Richard C.O. Rezie (0071321)
GALLAGHER SHARP
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Telephone: (216) 241-5310
Facsimile: (216) 241-1608
Email: jrice@gallaghersharp.com; and
rrezie@gallaghersharp.com

*Attorneys for Appellant/Intervenor NAMIC
Insurance Company*

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SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

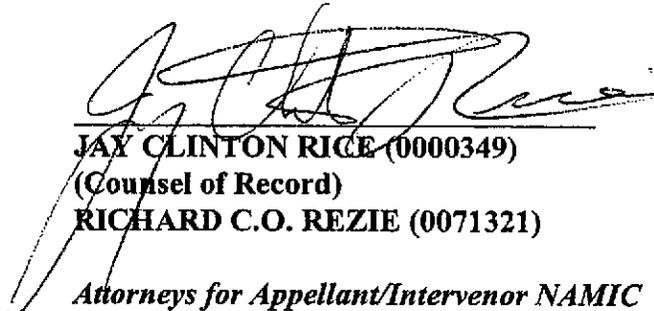
A copy of the foregoing Notice of Appeal of Appellant NAMIC Insurance Company has been mailed this 11 day of February, 2009 to the following:

Robert E. Chudakoff, Esq.
Gary S. Greenlee, Esq.
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448

*Attorneys for Plaintiff/Appellee Elevators
Mutual insurance Company*

W. Patrick Murray, Esq.
James L. Murray, Esq.
Murray & Murray Co., L.P.A.
111 E. Shoreline Drive
Sandusky, Ohio 44870

*Attorneys for Defendants/Appellees
J. Patrick O'Flaherty's, Inc.,
Richard A. Heyman, &
Jan N. Heyman*


JAY CLINTON RICE (0000349)
(Counsel of Record)
RICHARD C.O. REZIE (0071321)

*Attorneys for Appellant/Intervenor NAMIC
Insurance Company*

**SANDUSKY COUNTY
COURT OF APPEALS
FILED**

DEC 31 2008

**WARREN P. BROWN
CLERK**

**IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY**

Elevators Mutual Insurance Company

Court of Appeals No. S-08-006

Appellee

Trial Court No. 01-CV-987

v.

J. Patrick O'Flaherty's, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided:

DEC 31 2008

* * * * *

Robert E. Chudakoff and Gary S. Greenlee, for appellee Elevators Mutual Insurance Company; D. John Travis, Jay C. Rice and Richard C.O. Rezie, for appellee-intervenor NAMIC Insurance Company.

W. Patrick Murray, James L. Murray and William H. Bartle, for appellants.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment issued to an insurer by the Sandusky County Court of Common Pleas in a dispute over fire coverage. For the reasons that follow, we reverse.

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{¶ 2} Appellants, Richard A. and Jan N. Heyman, are equal shareholders in appellant J. Patrick O'Flaherty's, Inc., a company that operated a restaurant of the same name on the west side of Fremont, Ohio. Appellee, Elevators Mutual Insurance Co., provided a commercial fire insurance policy for this restaurant.

{¶ 3} On February 4, 2001, after the restaurant was closed, a fire started on the second floor, eventually spreading and destroying the entire structure. An investigation by the state fire marshal revealed that the origin of the fire was business records stored on the second floor which had been soaked in paint thinner. An investigator for the state fire marshal ruled the fire to have been caused by arson.

{¶ 4} A further investigation found that appellants were heavily in debt and that they had recently increased the amount of insurance on the property. Moreover, a former employee told investigators that on more than one occasion Richard Heyman had stated that he "would like to burn the place down." Richard Heyman was determined to be the last person to leave the restaurant before the fire. *State v. Heyman*, 6th Dist. No. S-04-016, 2005-Ohio-5565, ¶ 7-8.

{¶ 5} On April 4, 2001, as the investigation was proceeding, appellants filed an insurance claim for their loss under the fire policy issued by appellee. Appellee advanced appellants \$30,000 on the claim under a reservation of rights. Following the investigation of the fire, however, appellee denied the claim. On November 30, 2001, appellee initiated the present action, seeking a declaration that it had no duty to insure under a provision in its policy that barred coverage for an insured's intentional acts.

Appellee also sought to recover the money it had advanced. On December 7, 2001, appellants were named in an indictment, charging two counts of aggravated arson, simple arson and insurance fraud.

{¶ 6} Both appellants pled not guilty, but following negotiations appellant Richard Heyman agreed to plead no contest to arson and insurance fraud in return for dismissal of the aggravated arson counts and dismissal of the indictment against Jan Heyman.¹ The trial court accepted Richard Heyman's plea, found him guilty on both counts and sentenced him to one year incarceration on the insurance fraud and five years community service on the arson. Richard Heyman's conviction and sentence were affirmed on appeal. *Id.* at ¶ 19.

{¶ 7} Consideration of the present matter was deferred pending conclusion of the criminal proceeding. Following, on July 2, 2004, appellee moved for summary judgment. Appellants opposed the motion and filed their own cross-motion for summary judgment. The trial court denied both motions.²

¹In the trial court in this matter, Richard Heyman proffered an explanation of his plea, suggesting that he entered the plea because he had little confidence in his appointed lawyer, he sought to avoid the greater penalty of an aggravated arson conviction and he wished to spare his wife from prosecution.

²On April 20, 2007, NAMIC Insurance Company, issuer of appellee Elevators' professional liability and director's and officer's policy intervened in defense to appellants' counterclaim. NAMIC is an appellee and has filed a brief in this matter. Nevertheless, for clarity, we shall refer to appellee Elevators Insurance Company in the singular as NAMIC's arguments are pendant to Elevators'.

{¶ 8} On November 7, 2007, appellee moved in limine that the court determine the admissibility of Richard Heyman's insurance fraud and arson conviction. Appellants opposed admission of the conviction.

{¶ 9} On November 30, 2007, the court ruled that Richard Heyman's conviction could not be introduced at trial as substantive evidence. Citing Evid.R. 410 and Crim.R. 11(B)(2), the trial court concluded that Richard Heyman, " * * * entered this plea with the expectation that it could not be used collaterally against him in a civil case * * *. This well settled practice is best left undisturbed by this court."

{¶ 10} Later, however, the court revisited this decision, concluding that, while the no contest *plea* to arson and insurance fraud were not admissible, the *conviction* for these offenses could be admitted. Since the arson and insurance fraud convictions conclusively established Richard Heyman's culpability, the court continued, he was barred from profiting from his own misdeeds and, because he was president and a principal shareholder in J. Patrick O'Flaherty's, Inc., both he and Jan Heyman were barred from benefiting from these acts. With this, the court granted appellee's motion for summary judgment.

{¶ 11} From this judgment, appellants now bring this appeal, setting forth the following two assignments of error:

{¶ 12} "A. The trial court erred in ruling that evidence of Richard Heyman's criminal convictions after pleas of no contest were admissible.

{¶ 13} "B. The trial court erred in granting the plaintiff insurer's Motion for Summary Judgment, finding that the criminal convictions following pleas of no contest precluded the insured and/or any of the loss payees from recovering any insurance proceeds from the fire loss in question and that since defendants were barred from recovering any fire insurance proceeds, their counterclaims failed as a matter of law."

{¶ 14} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 15} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C). The evidence supporting a motion for summary judgment must be admissible. Civ.R. 56(E).

{¶ 16} At issue is whether the trial court properly considered Richard Heyman's conviction entered on a no contest plea.

{¶ 17} Crim.R. 11(B)(2) provides:

{¶ 18} "With reference to the offense or offenses to which the plea is entered:

{¶ 19} "* * *

{¶ 20} "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and *the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.*" (Emphasis added.)

{¶ 21} In material part, Evid.R. 410 dictates that, "* * * evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

"* * *

{¶ 22} "(2) A plea of no contest or the equivalent plea from another jurisdiction
* * *"

{¶ 23} Appellants insist that these rules mean what they say: a plea of no contest should not be used against a defendant in any subsequent civil proceeding. Since that is exactly what occurred in the present matter, appellants maintain, the trial court erred in considering this inadmissible evidence.

{¶ 24} Appellee disagrees. Citing *State v. Mapes* (1985), 19 Ohio St.3d 108, and derivative cases, appellee insists that, while the no contest *plea* may be inadmissible, the *conviction* that results from the plea is admissible. In this matter, according to appellee, it was the conviction that came into evidence. Since that conviction conclusively established Richard Heyman's guilt in the arson of his restaurant and his fraudulent attempt to collect insurance under appellee's policy, appellee argues that he, the corporation and his spouse are collaterally estopped from relitigating that issue.

{¶ 25} Appellee cites numerous foreign cases for the proposition that, as a matter of policy, an arsonist ought not to be allowed to profit from the act of arson. The question here, however, is not one of policy, but of evidence. The rule, as articulated in Evid.R. 410 and Crim.R. 11(B)(2), is that "* * * a no contest plea may not be used against the defendant in any subsequent civil or criminal proceeding." 1 Weissenberger, Ohio Evidence (1995) 61, Section 410.3. The sole Ohio exception to the rule was promulgated by the Supreme Court of Ohio in *State v. Mapes*, supra. Id.

{¶ 26} David Mapes killed a bar owner during an after-hours robbery. He was indicted for aggravated murder with a capital specification alleging a prior murder conviction. A jury convicted Mapes of the principal offense. The prior murder specification was tried separately to the bench. The court found Mapes guilty of the specification based on a foreign judgment of conviction for murder entered on the New Jersey equivalent of a no contest plea. Mapes was sentenced to death.

{¶ 27} On appeal, Mapes argued that Crim.R. 11(B)(2) and Evid.R. 401 precluded admission of his conviction entered on a no contest plea. On consideration, the court rejected Mapes' argument, holding "Crim.R. 11(B)(2) and Evid.R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. 2929.04(A)(5)." Id. at paragraph one of the syllabus. In its opinion, the court explained:

{¶ 28} "Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission of a conviction entered upon that

plea *when such conviction is made relevant by statute*. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to criminal trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See I Weissenberger, Ohio Evidence (1985) 55, Section 410.1 and Advisory Committee Notes to Fed. R. Evid. 410. These purposes are not disserved by the admission of a conviction entered upon a no contest plea." Id. at 111 (emphasis added).

{¶ 29} Many appellate courts, including this one, have followed *Mapes*, allowing the introduction of convictions entered on no contest pleas into administrative proceedings, but only when a statute makes such introduction specifically relevant to the proceeding. *Spencer v. Ohio St. Liquor Cont. Comm.* (Sept. 18, 2001), 10th Dist. No. 01AP-147 (statute expressly made conviction for illegal sale of liquor ground for license suspension), *Jaros v. Ohio St. Bd. of Emergency Med. Serv.*, 6th Dist. No. L-01-1422, 2002-Ohio-2363, ¶ 17 (Ohio Administrative Code expressly makes conviction of offense involving moral turpitude a ground for revocation of EMT license), *Reynolds v. Ohio St. Bd. of Exam. of Nursing Home Admin.*, 10th Dist. No. 03AP-127, 2003-Ohio-4958, ¶ 16 (Medicaid fraud conviction is an express ground for revocation of administrator's license); but, see, *Wolfe v. Ohio Motor Vehicle Dealers Bd.*, 5th Dist. No. 003CA00231,

2004-Ohio-122, ¶ 53 (trial court did not abuse discretion in refusing admission of conviction entered on no contest plea). In each of these instances, the conviction on a no contest plea was deemed relevant because of a statute or rule derived from a statute that expressly set a prior conviction as an element of necessary consideration.

{¶ 30} Appellee cites *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App.3d 798, 801-802 and *Bott v. Stephens*, 3d Dist. No. 1-05-09, 2005-Ohio-3881, ¶ 7, in support of a broader application of *Mapes*. Appellee's reliance on these cases, however, is misplaced. In *Steinke* the court noted that irrespective of the applicability of *Mapes*, the prior conviction was admissible because the opposing party had waived the issue by failing to contemporaneously object to its admission. *Id.* at 802. In *Bott*, at ¶ 8, admissibility of the conviction was not essential to the disposition of the case because the court concluded that, even with the admission of the conviction, a question of fact concerning an insured's mental state precluded summary judgment. Thus, a broader application of *Mapes* in these cases is mere dicta.

{¶ 31} The syllabus rule of *Mapes* is exceptionally narrow. It only goes to the admissibility of a conviction on a no contest plea for the sole purpose of proving a capital specification as provided for in R.C. 2929.04(A)(5). The language in the *Mapes* opinion itself is only slightly broader: "These rules [Evid.R. 410 and Crim.R. 11(B)(2)] do not prohibit the admission of a conviction entered upon [a no contest] plea when such conviction is made relevant by statute." *Mapes* at 111.

{¶ 32} In our view, the distinction between a no contest plea and a conviction on that plea is a false dichotomy. The proper distinction is whether or not the conviction has been made relevant to the later proceeding by statutory provision. Anything less and the rules make the plea and the conviction derived from the plea inadmissible.

{¶ 33} What is at issue in this matter is not a statute, but exclusionary provisions in an insurance policy.³ We take no position on whether an insurer and an insured may contract to make a prior conviction relevant in a subsequent action on the contract. In this insurance contract, no such provision appears. As a result, the rule of *Mapes* does not operate to override Evid.R. 410 and Crim.R. 11(B)(2) and the trial court erred in concluding that it did. Accordingly, appellants' first assignment of error is well-taken. Appellants' second assignment of error concerns the issue preclusion effect of the judgment of conviction and, therefore, is moot.

³Causes of Loss – Special Form (B)(1)(h) of the policy provides, "We will not pay for loss or damage caused directly or indirectly by any of the following * * * Dishonest or criminal acts by you, any of your partners, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose * * *."

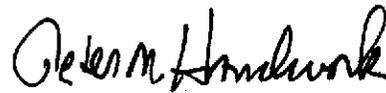
Commercial Property Conditions (A) of the policy provides, "This Coverage Part is subject to the following conditions * * * A. Concealment, Misrepresentation or Fraud[.] This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning: 1. This Coverage Part; 2. This Covered Property; 3. Your interest in the Covered Property; or 4. A claim under this Coverage Part."

{¶ 34} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Sandusky County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____



JUDGE

Arlene Singer, J. _____
CONCUR.



JUDGE

Thomas J. Osowik, J.,
DISSENTS.

OSOWIK, J.

{¶ 35} I would respectfully dissent and affirm the decision of the court of common pleas that found the no contest pleas and convictions of arson and insurance fraud to be admissible and thereby preclude appellants from claiming insurance proceeds for the fire losses.

{¶ 36} In this case, it is undisputed that the plaintiff pled no contest to a charge of arson with purpose to defraud in violation of R.C. 2909.03(A)(2) and to insurance fraud, in violation of R.C. 2913.47(B)(1). He was found guilty of both of these charges.

{¶ 37} It is also undisputed that the property involved in the arson was the property covered by the insurance policy which is the subject of this dispute and that the contract of insurance excludes coverage for criminal acts and insurance fraud.

{¶ 38} Despite having pled no contest and subsequently being found guilty and sentenced as a result of these charges, appellant sought payment from his insurer for the losses sustained as a result of the arson of which he was convicted after his no contest plea. The insurance company initiated this declaratory judgment action to determine its rights and obligations under its contract of insurance.

{¶ 39} The resolution of this conflict ultimately hinges upon the impact and consequences of uttering two words in a criminal proceeding: no contest. These three syllables are of some significance in a criminal proceeding, and even the United States Supreme Court has struggled with the concept as to precisely what a defendant does admit when he enters a no contest plea. In *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct.160, 27 L.Ed.2d 162, the court surmised that the no contest plea possibly originated from the early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter by offering to pay a sum of money to the king. *Id.* at 36, fn. 8.

{¶ 40} The court further referenced an early 15th century case "in which a defendant did not admit his guilt when he sought such a compromise, but merely 'that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine.'" Id.

{¶ 41} Regardless of the historical origins of the no contest plea, pursuant to Crim.R. 11(B)(2), a no contest plea is "an admission of the truth of the facts alleged in the indictment, information, or complaint * * *."

{¶ 42} In his first assignment of error, appellant argues that his plea of no contest and subsequent conviction to the criminal charges should not be admissible. The United States Sixth Circuit Court of Appeals addressed this precise application of the no contest plea to a similar federal rule. Federal case law that interprets the federal rule, while not controlling, is persuasive. *Myers v. City of Toledo* (2006), 110 Ohio St.3d 218, 221.

{¶ 43} Fed.R.Evid. 410 provides in relevant part:

{¶ 44} "Evidence of a plea of * * * nolo contendere * * * is not admissible in any civil or criminal proceeding against the person who made the plea * * *."

{¶ 45} This language is virtually identical in relevant part to Crim.R. 11(B)(2), with the exception that the plea cannot be used against the person who made the plea as opposed to the Ohio Rule, which limits the application to the defendant.

{¶ 46} Crim.R. 11(B)(2) states in relevant part:

{¶ 47} "'* * * and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶ 48} In *Walker v. Schaeffer* (C.A.6, 1988), 854 F.2d 138, the court stated:

{¶ 49} "We do not consider our conclusion to be barred by Fed.R.Evid. 410, which provides that evidence of 'a plea of nolo contendere' is not, 'in any civil or criminal proceeding, admissible against the defendant who made the plea.' This case does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the *defendant*. See, e.g., *United States v. Manzella*, 782 F.2d 533 (5th Cir.), *cert. denied*, 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986) (use of nolo contendere plea to impeach defendant in subsequent criminal prosecution). In this case, on the other hand, the persons who entered prior no-contest pleas are now plaintiffs in a civil action. Accordingly, use of the no-contest plea for estoppel purposes is not 'against the defendant' within the meaning of Fed.R.Evid. 410. This use would be more accurately characterized as 'for' the benefit of the 'new' civil defendants, the police officers.

{¶ 50} "We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future *civil liability*. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police."

{¶ 51} Rule 410 of the Ohio Rules of Evidence is substantially identical to the federal rule. Evid.R. 410 states in relevant part:

{¶ 52} "(A) Except as provided in division (B) of this rule, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

{¶ 53} "(1) a plea of guilty that later was withdrawn;

{¶ 54} "(2) a plea of no contest or the equivalent plea from another jurisdiction;

{¶ 55} "(3) a plea of guilty in a violations bureau; * * *"

{¶ 56} The court in *Levin v. State Farm Insurance* (E.D.Mi.1990), 735 F.Supp. 236 adopted the *Walker* interpretation of the rule. The facts of that case are identical to the case before the court today. The plaintiff entered a plea of no contest to a criminal charge of arson. Based upon that plea, he was found guilty and sentenced. The plaintiff then sought compensation for fire damage to his home.

{¶ 57} The court was called upon to resolve the sole evidentiary issue of whether the plaintiff's nolo contendere plea may be admitted at trial. The court held that the insurer was not precluded from introducing evidence of the nolo contendere plea in the civil action brought by the individual who offered the nolo contendere plea in the prior criminal case.

{¶ 58} Likewise, I do not believe it to be a logical application of Crim.R. 11(B)(2) if the no contest plea were not admissible in this instance and would circumvent the

unambiguous language of the rule. I would further suggest that it would be better public policy if Evid.R. 410(A) would be amended to explicitly prevent an individual who pled no contest to criminal charges from excluding evidence of that plea in an action in which the pleader seeks to establish a claim arising out of the crime of which the pleader was convicted. In that manner in future disputes, it would avoid a semantical discussion of the definition of the word *against* and its relationship to the word *defendant*.

{¶ 59} For the foregoing reasons, I would affirm the judgment of the trial court and find both of appellants' assignments of error not well-taken.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

SANDUSKY COUNTY
COURT OF APPEALS
FILED

FEB 09 2009

WARREN P. BROWN
CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Elevators Mutual Insurance Company

Court of Appeals No. S-08-006

Appellee

Trial Court No. 01-CV-987

v.

J. Patrick O'Flaherty's, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided: FEB 09 2009

* * * * *

This matter is before the court on the motions of appellee, Elevators Mutual Insurance Company, for reconsideration or, in the alternative, rehearing en banc of our decision in *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc., et al.*, 6th Dist. No. S-08-006, 2008-Ohio-6946. Appellee also moves to certify a conflict. Appellants, J. Patrick O'Flaherty's, Inc. and Richard A. and Jan N. Heyman, have filed a memorandum in opposition to which appellee has filed replies.

Reconsideration and En Banc

On an application for reconsideration, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or

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was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. The application is not designed for use when a party simply disagrees with the logic or conclusions of the court. *State v. Owens* (1996), 112 Ohio App.3d 334, 336. Neither is it an opportunity to reargue the case.

Although appellee exhaustively attacks what it considers our errant reasoning in the principal decision, it has not directed our attention to any issue that we failed to consider or did not fully consider. With respect to the conflict appellee perceives between the principal decision and our prior decision in *Jaros v. Ohio Bd. of Emergency Med. Serv.*, 6th Dist. No. L-01-1422, 2002-Ohio-2363, as we stated at ¶ 29 in the principal decision, we do not share appellee's perception that such a conflict exists. Accordingly, appellee's motions for reconsideration and for rehearing en banc are found not well-taken and are denied.

Certify a Conflict

Section 3(B)(4), Article IV, Ohio Constitution requires that when a court of appeals finds itself in conflict with another court of appeals on the same question of law, that court must certify its decision and the record of the matter to the Supreme Court of Ohio for a resolution of the question. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

In the principal case, pursuant to *State v. Mapes* (1985), 19 Ohio St.3d 108, we held that a criminal conviction resulting from a no contest plea is only admissible in subsequent proceedings if made relevant by statute. Appellee insists that this holding

conflicts with that of other courts of appeals in *State v. Williams* (Nov. 21, 1997), 2d Dist. No. 16306; *Steinke v. Allstate Ins. Co.* (1993), 86 Ohio App.3d 798; *State v. Smith* (Nov. 14, 1990), 4th Dist. No. CA 1847; *State v. Cook* (Mar. 27, 1992), 7th Dist. No. CA 80; *State v. Charlton* (Jan. 29, 1992), 9th Dist. No. 91CA005113; and, *Haley v. Holderman* (Mar. 13, 1997), 10th Dist. No. 96APE08-1019.

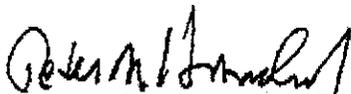
We have already distinguished *Steinke* in the principal decision. 2008-Ohio-6946, ¶ 30. *Smith*, *Cook*, and *Charleton* are all cases in which a defendant's probation was revoked because of a later conviction obtained on a no contest plea. Each defendant had as a term of probation, entered under express statutory authority of former R.C. 2951.02(C) (rev. 7/1/96), that he not commit future crimes. Thus, each defendant had his subsequent conviction made relevant to the probation revocation proceeding under authority derived from a statute. Consequently, there is no conflict with the principal decision.

Williams involved an issue of whether a no contest plea to a minor misdemeanor mooted the question of the propriety of the arrest as a basis for suppressing evidence obtained in a post arrest search. The appellate court stated that the misdemeanor conviction precluded a trial court finding in the suppression proceeding that the arrest was improper. Nevertheless, the court reversed the order of suppression based not on this conclusion, but because the police had probable cause to arrest the defendant. As a result, the portion of the decision upon which appellee asserts conflict was not necessary to the resolution of the case and does not form a basis to premise conflict.

Haley concerned whether a defendant's conviction for securities violations as the result of a no contest plea waived his right to challenge the constitutionality of the statute and administrative code section under which he was convicted. Inclusion of this case among those purportedly in conflict with the principal decision frankly mystifies us. We find no conflict.

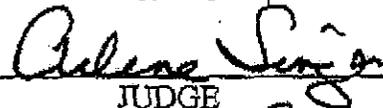
Because we fail to find any of the cases appellee sets forth is in conflict with the decision at issue, appellee's motion to certify a conflict is not well-taken and is, hereby, denied.

Peter M. Handwork, J.



JUDGE

Arlene Singer, J.
CONCUR.



JUDGE

Thomas J. Osowik, J.
CONCURS AND
WRITES SEPARATELY.



JUDGE

OSOWIK, J.

I would concur with the majority in the analysis of the decisions cited by appellee to certify the decision as a conflict with other appellate jurisdictions. Specifically, in its decision and judgment entry, the majority distinguished *Steinke v. Allstate Ins. Co.* The other referenced cases are of little relevance to the issue involved in this matter now before the court or are supported by the analysis in *State v. Mapes*.

That being stated, the facts of this case are unique. I would maintain my opinion that the proscription against the subsequent use of a no contest plea against a defendant is not affected.

A no contest plea is not being used against a convicted arsonist when he submits a claim for benefits to his property insurer. In this instance, his pleas in the criminal cases are not subjecting him to civil liability.

Appellant's suggested approach does not hold enough water to extinguish the raging flames of his pleas. This is nearly an inflammatory application of Crim.R. 11(B)(2) and Evid.R. 410 and its implications could be incendiary.

The Supreme Court should review this court's decision as a result of the exceptional facts of this case; however, I agree with the majority that there is not at the present time a conflict to support a certification.

2005 OCT -6 AM 8:26

CLERK

IN THE COURT OF COMMON PLEAS OF SANDUSKY COUNTY, OHIO

ELEVATORS MUTUAL INSURANCE, *
COMPANY, *

Plaintiff

Case No. 01 CV 987

-vs-

J. PATRICK O'FLAHERTY'S, INC, *
et al., *

Defendants

DECISION & ENTRY

BACKGROUND

This issue comes before the Court for consideration of a motion for summary judgment filed by plaintiff, Elevators Mutual Insurance Company, against defendants, J. Patrick O'Flaherty's, Inc., Richard A. Heyman and Jan D. Heyman. A reply to said motion was filed by said defendants, together with a cross-motion for summary judgment. Plaintiff then filed a reply to said defendants' cross-motion for summary judgment.

FACTS

Defendant J. Patrick O'Flaherty's, Inc. operated a restaurant which was lost in a fire on the night of February 4, 2001. At the time of the fire, plaintiff had in force an insurance policy which provided coverage on the building and contents of said restaurant. The named insured under this policy was J. Patrick O'Flaherty's, Inc. The policy contained a loss payable provision naming Richard A. Heyman and Jan D. Heyman as additional insureds.

Following an investigation of the origins of the fire, plaintiff denied coverage on the grounds of arson, misrepresentation, dishonest or criminal act, and fraud by an insured. Before denying this claim, plaintiff issued a good faith advance to the defendants in the amount of \$30,000. Plaintiff claims additional claims-related expenses of \$69,742 as of the date of the filing of its motion for summary judgment.

On December 7, 2001 defendant Richard A. Heyman was indicted by the Sandusky County grand jury on charges of aggravated arson, arson and insurance fraud (see Case No. 01 CR 1010). Defendant Jan D. Heyman was also indicted on similiar charges (see Case No. 01 CR 1011).

JOURNALIZED

10/6/05 LJR

On May 25, 2004, defendant Richard A. Heyman entered a plea of *no contest* (see Rule 11 of Ohio Rules of Criminal Procedure) in relation to the charges of arson and insurance fraud as charged in said indictment; and he was ultimately convicted and sentenced on said plea. As part of the plea agreement, all charges against defendant Jan D. Heyman were dismissed.

ISSUE

Should said motions for summary judgment be granted?

PRELIMINARY ISSUE

May J. Patrick O'Flaherty's, Inc. defend the plaintiff's summary judgment motion, and present its own motion, when it is not represented by counsel?

LAW

A corporation is not permitted to appear in or defend a civil lawsuit except by counsel; and an officer of a corporation is not permitted to act on behalf of a corporation that is not represented by counsel.

THEREFORE, since J. Patrick O'Flaherty's, Inc. is a corporation, and is defending plaintiff's motion for summary judgment, and is prosecuting its own motion for summary judgment, all without counsel, its reply to plaintiff's motion, and its own motion for summary judgment, must be stricken from the record. The court will decide plaintiff's motion for summary judgment, and the defendants' cross-motion for summary judgment as it applies to Richard A. Heyman and Jan D. Heyman, on the merits. Said cross-motion is **DISMISSED** as to defendant, J. Patrick O'Flaherty's, Inc. No further filings will be permitted on behalf of defendant, J. Patrick O'Flaherty's, Inc., until said corporation is represented by counsel.

APPLICABILITY OF SUMMARY JUDGMENT

Summary judgment may be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. When a court considers a motion for summary judgment, it must construe the facts and all reasonable inferences to be drawn therefrom in a light which is most favorable to the non moving party. If, upon examination of the facts in this light, the court finds that reasonable minds could come to but one conclusion, which is adverse to the non-moving party, then the motion may be granted. *Wean v. Temple United, Inc.*, 50 Ohio St. 2d 317, 327 (1977), *see also Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 66 (1978).

ANALYSIS AND CONCLUSION

While plaintiff argues several points of law regarding why it is entitled to summary judgment, all arguments are based on the conviction of Richard Heyman of arson and insurance fraud as

having an issue preclusive effect on the matter of his setting fire to the restaurant which is the subject of plaintiff's insurance policy. As discussed below, this court finds that the *no contest* plea entered by defendant Richard A. Heyman has no issue-preclusive effect, and, therefore, plaintiff's motion for summary judgment fails.

Plaintiff cites authority from a number of jurisdictions, which establishes that a defendant who has been convicted of the crime of arson is precluded from arguing the issue again in a subsequent civil trial. *Hopps v. Utica Mut. Ins. Co.*, 506 A.2d 294 (N.H. 1985); see also *Aetna Life and Cas. Ins. Co. v. Johnson*, 673 P.2d 1277 (Mont. 1977), *Aetna Cas. & Ser. Co. v. Niziolek*, 481 N.E.2d 1356 (Mass. 1985), *Hanover Ins. Co. v. Hayward*, 464 A.2d 156 (Me. 1983), *Merchants Mut. Ins. Co. v. Arzillo*, 472 N.Y.S.2d 97 (App. 1984). Clearly this case law supports plaintiff's assertion that a criminal conviction of arson of Richard Heyman in relation to the fire of his restaurant would preclude him from arguing the issue of the origin of the fire in the current civil matter.

Further plaintiff asserts that defendant J. Patrick O'Flaherty's, Inc. would be barred from any recovery under plaintiff's insurance policy as Richard A. Heyman is an officer of said corporation. Again, it is settled law in Ohio that a corporation may not benefit by receiving the proceeds of an insurance policy when one of its officers is convicted of the arson associated with the fire. *Forrestwood Development Corp. v. All-Star Ins. Co.*, 1978 WL 208443 (Ohio App. 8 Dist. 1978). Therefore, a conviction against Richard Heyman would clearly bar defendant J. Patrick O'Flaherty's, Inc., as the named insured, from recovering under the insurance policy issued by plaintiff.

Both plaintiff and defendants attach significance to the addition of Richard Heyman and Jan Heyman as loss payees under the subject insurance policy.

There are generally two types of loss payee provisions available under an insurance policy. The first is an "open type" of loss payee provision. The effect of this type of loss payee provision is to put the listed loss payee in the same position as the insured, should a loss occur under this policy. The second type of loss payee is that of a "lender loss" payee provision. This type of loss payee provision is drafted to protect an innocent lender from being denied payment for its the loss due to the actions of the named insured, or an officer of the named insured corporation. *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.*, 87 Ohio App.3d 82 (Ohio App. 9 Dist. 1993).

Plaintiff attaches great weight to this provision in the policy, because if the loss payee provision were to be interpreted as the "open type" the Heyman defendants would be prevented from recovering under the policy due to the arson conviction of Richard Heyman. Conversely, the Heyman defendants argue that they should be considered as "lender loss" payees under the policy, which would allow recovery regardless of the guilt or innocence of Richard Heyman in the criminal case. While defendants offer as an exhibit a copy of the declarations of his insurance policy showing that Richard and Jan Heyman were once listed as

“building owners” under the loss payee section, they do not offer evidence to show that this would have given them any more status than a simple loss payee. Furthermore, plaintiff has offered evidence, through affidavits, that the Heymans were at all times considered by Elevators Mutual Insurance Company to be simple loss payees. This court finds that Richard and Jan Heyman were at all times simple loss payees under the policy issued by plaintiff, and that they therefore stand in the shoes of the named insured, and are subject to the same potential exclusions and/or defenses for the claim at issue.

Plaintiff also claims that because there is no coverage under the policy, defendants’ counterclaims should be dismissed as well. Plaintiff also asks this court to award it a recovery of its attorney fees as compensatory damages for the fraud committed by Richard Heyman. Again, Plaintiff bases these claims on the conviction of Richard Heyman of arson and insurance fraud in connection with the fire of February 4, 2001.

Clearly all of Plaintiff’s arguments are dependant upon its ability to use collateral estoppel to preclude defendants from arguing the innocence of Richard Heyman in connection with the fire which destroyed J. Patrick O’Flaherty’s restaurant on the night of February 4, 2001. Plaintiff argues that the plea of *no contest* entered by Richard Heyman in this court on May 25, 2004 to arson and insurance fraud has such an issue preclusive effect.

To this end, Plaintiff cites *State v. Mapes*, 19 Ohio St. 3d 108 (1985). The State in *Mapes* was permitted by the trial court to introduce evidence of a *non vult* plea entered by the defendant in a criminal matter in the State of New Jersey. The *non vult* plea in the State of New Jersey is apparently the equivalent of a no contest plea in the State of Ohio, and is permitted under New Jersey law “to the human end that a guilty defendant need not run the gauntlet” *id.* at 111, citing *State v. Forcella*, 245 A.2d 181, 189 (N.J. 1968). *Mapes* argued that the use of his conviction based on the *no vault* plea was barred by *Crim. R. 11(B)(2)* and *Evid. R. 410*. The Ohio Supreme Court in *Mapes* held that here there was no error on the part of the trial court in the admission of evidence of the New Jersey conviction. In its holding, the Supreme Court noted that there were circumstances in which it had allowed admission of a no contest plea -- such as in death penalty convictions and in relation to seeking enhanced penalties. However, the Court also noted that the primary goal of *Evid. R. 410* is to “protect the traditional characteristic of the no contest plea, which is avoiding the admission of guilt that is inherent in pleas of guilty.” *id.* at 111.

The Supreme Court of the State of Ohio has also held that

“The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. Consequently,

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collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case.” *Stacy v. Batavia Local School Dist. Bd. Of Educ.*, 97 Ohio St.3d 269, at p.273, paragraph 16.

Here the attempted use of Richard Heyman’s *no contest* plea to collaterally estop him from arguing his innocence would work against the primary goal of *Evid. R. 410* as stated by the Ohio Supreme Court in the *Mapes* case, and is not consistent with Ohio’s definition of issue preclusion. Richard Heyman chose to enter the plea of *no contest* for his own reasons, which are not relevant here. What is relevant is that he entered this plea with the expectation that it could not be used collaterally against him in a civil case, as his criminal case was not actually litigated or decided on the merits. This well settled practice is best left undisturbed by this court.

Plaintiff also cites a case from the Third District Court of Appeals in Ohio that extended the *Mapes* case into the area of collateral estoppel and insurance law. This is not binding on this court, and this court finds that *Mapes* should be confined to the specific facts of that case.

THEREFORE, it is the judgment of this Court that Richard Heyman’s *no contest* plea may not be used collaterally against him in this case.

And since there clearly is a dispute of material fact, i.e., Richard Heyman’s responsibility, if any, for the fire which destroyed the restaurant known as J. Patrick O’Flaherty’s, the motions for summary filed by each of the parties are not well taken.

JUDGMENT ENTRY

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by plaintiff, and the Cross-Motion for Summary judgment filed by defendants, are **DENIED**.

Also currently before this court is defendants’ motion for reformation of the insurance policy. After due consideration of this motion and accompanying memorandum, the same is hereby **DENIED**.

The clerk shall forward a copy of this entry to counsel for plaintiff and to the individual defendants. This is not a final appealable Order. The assignment commissioner shall schedule the case for a status pre-trial.


HARRY A. SARGEANT, Jr. Judge

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KAREN P. BROWN
CLERK

IN THE COURT OF COMMON PLEAS OF SANDUSKY COUNTY, OHIO

**ELEVATORS MUTUAL INSURANCE *
COMPANY,**

Plaintiff *

Case No. 01 CV 987

-vs- *

**J. PATRICK O'FLAHERTY'S, INC, *
et al.,**

Defendants *

DECISION & ENTRY
(Summary Judgment)

BACKGROUND

This case comes before the Court for consideration of a Motion for Summary Judgment filed by plaintiff, Elevators Mutual Insurance Company, against defendants, J. Patrick O'Flaherty's, Inc., Richard A. Heyman and Jan D. Heyman. A response to said motion was filed by said defendants, together with a cross-motion for summary judgment. Plaintiff then filed a reply to said defendants' cross-motion for summary judgment.

FACTS

Defendant, J. Patrick O'Flaherty's, Inc., operated a restaurant which was destroyed in a fire on the night of February 4, 2001. At the time of the fire, plaintiff had in force an insurance policy which provided coverage on the building and contents of said restaurant. The named insured under this policy was J. Patrick O'Flaherty's, Inc. The policy contained a loss payable provision naming Richard A. Heyman and Jan D. Heyman as additional insureds.

Following an investigation of the origins of the fire, plaintiff denied coverage on the grounds of arson, misrepresentation, dishonest or criminal act, and fraud by an insured. Before denying this claim, plaintiff issued a good faith advance to the defendants in the amount of \$30,000. Plaintiff claims additional claims-related expenses of \$69,742 as of the date of the filing of its motion for summary judgment.

On December 7, 2001 defendant Richard A. Heyman was indicted by the Sandusky County grand jury on charges of aggravated arson, arson and insurance fraud with relation to said fire (see Case No. 01 CR 1010). Defendant Jan D. Heyman was also indicted on similar charges (see Case No. 01 CR 1011).

JOURNALIZED
4-13-00 MCH

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On May 25, 2004, defendant Richard A. Heyman entered a plea of *no contest* (see Rule 11 of Ohio Rules of Criminal Procedure) in relation to the charges of arson and insurance fraud as charged in said indictment; and he was ultimately convicted and sentenced on said plea. As part of the plea agreement, all charges against defendant Jan D. Heyman were dismissed.

ISSUE

Should said motions for summary judgment be granted?

PRELIMINARY ISSUE

May J. Patrick O'Flaherty's, Inc. defend the plaintiff's summary judgment motion, and present its own motion, when it is not represented by counsel?

LAW

A corporation is not permitted to appear in or defend a civil lawsuit except by counsel; and an officer of a corporation is not permitted to act on behalf of a corporation that is not represented by counsel.

Therefore, since J. Patrick O'Flaherty's, Inc. is a corporation, and it is defending plaintiff's motion for summary judgment, and is prosecuting its own motion for summary judgment, all without counsel, its response to plaintiff's motion, and its own motion for summary judgment, must be stricken from the record. The court will decide plaintiff's motion for summary judgment, and the defendants' cross-motion for summary judgment as it applies to Richard A. Heyman and Jan D. Heyman, on the merits. No further filings will be permitted on behalf of defendant, J. Patrick O'Flaherty's, Inc., until said corporation is represented by counsel.

APPLICABILITY OF SUMMARY JUDGMENT

Summary judgment may be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. When a court considers a motion for summary judgment, it must construe the facts and all reasonable inferences to be drawn therefrom in a light that is most favorable to the non-moving party. If, upon examination of the facts in this light, the court finds that reasonable minds could come to but one conclusion, which is adverse to the non-moving party, then the motion may be granted. *Wean v. Temple United, Inc.*, 50 Ohio St. 2d 317, 327 (1977), *see also Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 66 (1978).

ANALYSIS AND CONCLUSION

While plaintiff argues several points of law regarding why it is entitled to summary judgment, all arguments are based on the conviction of Richard Heyman of arson and insurance fraud as

having an issue preclusive effect on the matter of his setting fire to the restaurant which is the subject of plaintiff's insurance policy. As discussed below, this court finds that the *no contest* plea entered by defendant Richard A. Heyman has no issue-preclusive effect, and, therefore, plaintiff's motion for summary judgment fails.

Plaintiff cites authority from a number of jurisdictions, which establish that a defendant who has been convicted of the crime of arson is precluded from arguing the issue again in a subsequent civil trial. *Hopps v. Utica Mut. Ins. Co.*, 506 A.2d 294 (N.H. 1985); see also *Aetna Life and Cas. Ins. Co. v. Johnson*, 673 P.2d 1277 (Mont. 1977), *Aetna Cas. & Ser. Co. v. Niziolek*, 481 N.E.2d 1356 (Mass. 1985), *Hanover Ins. Co. v. Hayward*, 464 A.2d 156 (Me. 1983), *Merchants Mut. Ins. Co. v. Arzillo*, 472 N.Y.S.2d 97 (App. 1984). Clearly this case law supports plaintiff's assertion that the criminal conviction of Richard Heyman of arson in relation to the fire of his restaurant would preclude him from arguing the issue of the origin of the fire in the current civil matter.

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Both plaintiff and defendants attach significance to the addition of Richard Heyman and Jan Heyman as loss payees under the subject insurance policy.

There are generally two types of loss payee provisions available under an insurance policy. The first is an "open type" of loss payee provision. The effect of this type of loss payee provision is to put the listed loss payee in the same position as the insured, should a loss occur under this policy. The second type of loss payee is that of a "lender loss" payee provision. This type of loss payee provision is drafted to protect an innocent lender from being denied payment for its loss due to the actions of the named insured, or an officer of the named insured corporation. *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.*, 87 Ohio App.3d 82 (Ohio App. 9 Dist. 1993).

Plaintiff attaches great weight to this provision in the policy, because if the loss payee provision were to be interpreted as the "open type" the Heyman defendants would be prevented from recovering under the policy due to the arson conviction of Richard Heyman. Conversely, the Heyman defendants argue that they should be considered as "lender loss" payees under the policy, which would allow recovery regardless of the guilt or innocence of Richard Heyman in the criminal case. While defendants offer as an exhibit a copy of the declarations of his insurance policy showing that Richard and Jan Heyman were once listed as

“building owners” under the loss payee section, they do not offer evidence to show that this would have given them any more status than a simple loss payee. Furthermore, plaintiff has offered evidence, through affidavits, that the Heymans were at all times considered by Elevators Mutual Insurance Company to be simple loss payees. This court finds that Richard and Jan Heyman were at all times simple loss payees under the policy issued by plaintiff, and that they therefore stand in the shoes of the named insured, and are subject to the same potential exclusions and/or defenses for the claim at issue.

Plaintiff also claims that because there is no coverage under the policy, defendants’ counterclaims should be dismissed as well. Plaintiff also asks this court to award it a recovery of its attorney fees as compensatory damages for the fraud committed by Richard Heyman. Again, Plaintiff bases these claims on the conviction of Richard Heyman of arson and insurance fraud in connection with the fire of February 4, 2001.

Clearly all of Plaintiff’s arguments are dependant upon its ability to use collateral estoppel to preclude defendants from arguing the innocence of Richard Heyman in connection with the fire that destroyed the restaurant on the night of February 4, 2001. Plaintiff argues that the plea of *no contest* entered by Richard Heyman in this court on May 25, 2004 to arson and insurance fraud has such an issue preclusive effect.

To this end, Plaintiff cites *State v. Mapes*, 19 Ohio St. 3d 108 (1985). The State in *Mapes* was permitted by the trial court to introduce evidence of a *non vult* plea entered by the defendant in a criminal matter in the State of New Jersey. The *non vult* plea in the State of New Jersey is apparently the equivalent of a no contest plea in the State of Ohio, and is permitted under New Jersey law “to the human end that a guilty defendant need not run the gauntlet” *id.* at 111, citing *State v. Forcella*, 245 A.2d 181, 189 (N.J. 1968). *Mapes* argued that the use of his conviction based on the *no vault* plea was barred by *Crim. R. 11(B)(2)* and *Evid. R. 410*. The Ohio Supreme Court in *Mapes* held that here there was no error on the part of the trial court in the admission of evidence of the New Jersey conviction. In its holding, the Supreme Court noted that there were circumstances in which it had allowed admission of a no contest plea -- such as in death penalty convictions and in relation to seeking enhanced penalties. However, the Court also noted that the primary goal of *Evid. R. 410* is to “protect the traditional characteristic of the no contest plea, which is avoiding the admission of guilt that is inherent in pleas of guilty.” *id.* at 111.

The Supreme Court of the State of Ohio has also held that

“The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. Consequently,

collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case." *Stacy v. Batavia Local School Dist. Bd. Of Educ.*, 97 Ohio St.3d 269, at p.273, paragraph 16.

Here the attempted use of Richard Heyman's *no contest* plea to collaterally estop him from arguing his innocence would work against the primary goal of *Evid. R. 410* as stated by the Ohio Supreme Court in the *Mapes* case, and is not consistent with Ohio's definition of issue preclusion. Richard Heyman chose to enter the plea of *no contest* for his own reasons, which are not relevant here. What is relevant is that he entered this plea with the expectation that it could not be used collaterally against him in a civil case, as his criminal case was not actually litigated or decided on the merits. This well settled practice is best left undisturbed by this court.

Plaintiff also cites a case from the Third District Court of Appeals in Ohio that extended the *Mapes* case into the area of collateral estoppel and insurance law. This is not binding on this court, and this court finds that *Mapes* should be confined to the specific facts of that case.

THEREFORE, it is the judgment of this Court that Richard Heyman's *no contest* plea may not be used collaterally against him in this case.

And since there clearly is a dispute of material fact, i.e., Richard Heyman's responsibility, if any, for the fire which destroyed the restaurant known as J. Patrick O'Flaherty's, the motions for summary filed by each of the parties are not well taken.

JUDGMENT ENTRY

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by plaintiff, and the Cross-Motion for Summary judgment filed by defendants, Richard Heyman and Jan Heyman, are each **DENIED**.

Also currently before this court is defendants' motion for reformation of the insurance policy. After due consideration of this motion and accompanying memoranda, the same is hereby **DENIED**.

The clerk shall forward a copy of this entry to counsel for plaintiff and to the individual defendants. This is not a final appealable Order. The assignment commissioner shall schedule the case for a status pre-trial.


HARRY A. SARGEANT, Jr. Judge

SANDUSKY COUNTY
COMMON PLEAS COURT
FILED

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WARREN P. BROWN
CLERK

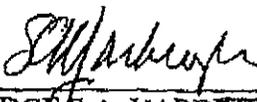
COURT OF COMMON PLEAS
SANDUSKY COUNTY, OHIO

ELEVATORS MUTUAL INSURANCE) CASE NO. 01-CV-987
COMPANY,)
) JUDGE S.A. YARBROUGH
Plaintiff)
vs.)
) ORDER AND JUDGMENT ENTRY
J. PATRICK O'FLAHERTY'S INC., et al.,)
)
Defendants)

Before the Court is the Motion in Limine of Plaintiff Elevators Mutual Insurance Company ("Elevators Mutual") regarding the admissibility of evidence of Defendant Richard Heyman's criminal convictions for arson and insurance fraud in connection with the fire that is the subject of this lawsuit. The Court, having considered the merits of Elevators Mutual's Motion and the brief and arguments advanced by Defendants in opposition thereto, finds Elevators Mutual's Motion to be well taken and hereby grants the same.

Elevators Mutual will be permitted to refer to and/or introduce as substantive evidence in its case-in-chief, to refer to during opening statement and closing argument, and to use for purposes of cross-examination, Defendant Richard A. Heyman's criminal convictions for arson and insurance fraud in connection with the subject fire.

IT IS SO ORDERED.


JUDGE S.A. YARBROUGH

cc: Robert E. Chudakoff, Esq.
James L. Murray, Esq.
D. John Travis, Esq.

JOURNALIZED

12/4/07 LR

TO THE CLERK:

PURSUANT TO CIVIL RULE 58 (B)
SEND FILE STAMPED COPIES WITH
DATE OF JOURNALIZATION TO:

() ALL COUNSEL
() ALL PARTIES

COURT OF COMMON PLEAS
SANDUSKY COUNTY, OHIO

RECEIVED
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CLERK

ELEVATORS MUTUAL INSURANCE) CASE NO. 01-CV-987
COMPANY,)
) JUDGE S.A. YARBROUGH
Plaintiff)
) **ORDER AND FINAL JUDGMENT**
vs.) **ENTRY GRANTING PLAINTIFF'S**
J. PATRICK O'FLAHERTY'S INC., et al.,) **MOTION FOR SUMMARY**
) **JUDGMENT**
Defendants)

The Court has granted the Motion in Limine filed by Plaintiff Elevators Mutual Insurance Company ("Elevators Mutual") and has held that the criminal convictions (but not the no contest plea) of Defendant Richard Heyman for arson and insurance fraud in connection with the subject fire shall be admissible evidence in this case. In light of this ruling that the criminal convictions are proper evidence before the Court, the Court finds that it is appropriate to reconsider the Plaintiff's previously filed Motion for Summary Judgment. See, Ohio Civ. R. 54(B); and *Al-Marayati v. Cappelletty*, 1999 Ohio App. Lexis 5729 (6th Dist.) ("due to the interlocutory nature of a denial of a motion for summary judgment, a trial court has the authority to *sua sponte* vacate, revise or modify its prior denial." [citing *Peters v. Ashtabula Metro. Hous. Auth.*, 89 Ohio App. 3d 458 (1993)].

In its previous Decision & Entry (dated and Journalized October 6, 2005, and later re-filed April 12, 2006 and re-journalized April 13, 2006, hereafter "Decision & Entry"), the Court (Judge Sargeant) denied the Motion for Summary Judgment filed by Elevators Mutual, but also held as follows:

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1. "[I]t is settled law in Ohio that a corporation may not benefit by receiving the proceeds of an insurance policy when one of its officers is convicted of the arson associated with the fire. *Forrestwood Development Corp. v. All-Star Ins. Co.*, 1978 WL 208443 (Ohio App. 3 Dist. 1978). Therefore, a conviction against Richard Heyman would clearly bar defendant J. Patrick O'Flaherty's, Inc., as the named insured, from recovering under the insurance policy issued by plaintiff." (Decision & Entry at p. 3).
2. "This court finds that Richard and Jan Heyman were at all times simple loss payees under the policy issued by plaintiff, and that they therefore stand in the shoes of the named insured, and are subject to the same potential exclusions and/or defenses for the claim at issue." (Decision & Entry at p. 4).
3. "[I]t is the judgment of this Court that Richard Heyman's *no contest* plea may not be used collaterally against him in this case." (Decision & Entry at p. 5).

The Court now finds the first and third holdings above are inconsistent. Given this Court's granting of the Plaintiff's Motion in Limine that the criminal convictions (not the no contest pleas) are properly admissible, and the undisputed fact that Defendant Richard Heyman was found guilty and convicted of arson and insurance fraud in connection with the subject fire, and that he was President and 50% shareholder of J. Patrick O'Flaherty's, Inc. at the time of the fire, the Court finds as a matter of law that the criminal convictions preclude the insured, Defendant J. Patrick O'Flaherty's, Inc., from recovering any insurance proceeds for this fire loss.

The Court maintains its previous judgment that the remaining Defendants, Richard and Jan Heyman (individually), were simple "loss payees" who stood in the shoes of the insured corporation and were subject to the same defenses as, and had no greater rights than the insured corporation. Since the corporation is precluded from recovering, the individual Defendants (Richard and Jan Heyman) are also precluded from any recovery as loss payees under the policy. See, *Pittsburgh Nat'l. Bank v. Motorists Mut. Ins. Co.*, 87 Ohio App.3d 82, 85 (Summit Cty. 1993) (loss payee stands in the shoes of the insured and has no greater right of recovery).

Since the Court finds that coverage under the policy is precluded, the Defendants' counterclaims (all which are dependent upon a finding that the insurance claim was wrongfully denied) also fail as a matter of law. See, *Bullet Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App.3d 327, 334 (Montgomery Cty. 1992) ("correct in saying that success on the bad faith claim is dependent on success on the contract claim"); *Essad v. Cincinnati Cas. Co.*, 2002-Ohio-2002 at ¶34, 2002 WL 924439 (Mahoning Cty. App.) ("the success of the tort claim hinges on the success of the contract claim"); *Toledo-Lucas County Port Authority v. AXA Marine & Aviation Ins. (UK) Ltd.*, 220 F.Supp.2d 868 (N.D. Ohio 2002) ("Ohio Supreme Court would likely hold that an insured may not maintain a claim of bad faith in the absence of coverage under the policy."); *Bob Schmitt Homes, Inc. v. Cincinnati Ins. Co.*, 2000 WL 218379 (Ohio App. 8th Dist.) (because "[t]he rule announced in *Zoppo [v. Homestead Ins. Co.]*, 71 Ohio St.3d 552 (1994)] presupposes that the insured is entitled to coverage in the first instance"... "the initial factual prerequisite to [a bad faith] claim [was] lacking.").

For the foregoing reasons, the Court now finds that Plaintiff's Motion for Summary Judgment is well taken and hereby grants the same. Accordingly, the Court hereby enters final judgment as follows:

1. In favor of Plaintiff Elevators Mutual Insurance Company and against Defendants on Counts I through IV (for declaratory relief) of Plaintiff's Complaint, Counts V, VI and VII of the Complaint having been previously dismissed by Plaintiff, and
2. In favor of Plaintiff Elevators Mutual and against Defendants on Defendants' Counterclaims.

The Court further finds that there is no just reason for delay.

IT IS SO ORDERED.

Jeremy 18
Dated: December __, 2007

SA. YARBROUGH

JUDGE SA. YARBROUGH

Evid. R. 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evid. R. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

Evid. R. 410. Inadmissibility of Pleas, Offers of Pleas, and Related Statements

(A) Except as provided in division (B) of this rule, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

(1) A plea of guilty that later was withdrawn;

(2) A plea of no contest or the equivalent plea from another jurisdiction;

(3) A plea of guilty in a violations bureau;

(4) Any statement made in the course of any proceedings under Rule 11 of the Rules of Criminal Procedure or equivalent procedure from another jurisdiction regarding the foregoing pleas;

(5) Any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.

(B) A statement otherwise inadmissible under this rule is admissible in either of the following:

(1) Any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously with it;

(2) A criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

History:

Amended, eff 7-1-91.

Crim. R. 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

History:

Amended, eff 7-1-76; 7-1-80; 7-1-98.

Rev. Code § 2909.03. Arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Cause, or create a substantial risk of, physical harm to any property of another without the other person's consent;

(2) Cause, or create a substantial risk of, physical harm to any property of the offender or another, with purpose to defraud;

(3) Cause, or create a substantial risk of, physical harm to the statehouse or a courthouse, school building, or other building or structure that is owned or controlled by the state, any political subdivision, or any department, agency, or instrumentality of the state or a political subdivision, and that is used for public purposes;

(4) Cause, or create a substantial risk of, physical harm, through the offer or the acceptance of an agreement for hire or other consideration, to any property of another without the other person's consent or to any property of the offender or another with purpose to defraud;

(5) Cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by another person, the state, or a political subdivision without the consent of the other person, the state, or the political subdivision;

(6) With purpose to defraud, cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by the offender, another person, the state, or a political subdivision.

(B) (1) Whoever violates this section is guilty of arson.

(2) A violation of division (A)(1) of this section is one of the following:

(a) Except as otherwise provided in division (B)(2)(b) of this section, a misdemeanor of the first degree;

(b) If the value of the property or the amount of the physical harm involved is five hundred dollars or more, a felony of the fourth degree.

(3) A violation of division (A)(2), (3), (5), or (6) of this section is a felony of the fourth degree.

(4) A violation of division (A)(4) of this section is a felony of the third degree.

History:

134 v H 511 (Eff 1-1-74); 136 v S 282 (Eff 5-21-76); 139 v S 199 (Eff 1-1-83); 144 v H 675 (Eff 3-19-93); 146 v S 2. Eff 7-1-96.

Rev. Code § 2913.47. Insurance fraud

(A) As used in this section:

(1) "Data" has the same meaning as in section 2913.01 of the Revised Code and additionally includes any other representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner.

(2) "Deceptive" means that a statement, in whole or in part, would cause another to be deceived because it contains a misleading representation, withholds information, prevents the acquisition of information, or by any other conduct, act, or omission creates, confirms, or perpetuates a false impression, including, but not limited to, a false impression as to law, value, state of mind, or other objective or subjective fact.

(3) "Insurer" means any person that is authorized to engage in the business of insurance in this state under Title XXXIX [39] of the Revised Code, the Ohio fair plan underwriting association created under section 3929.43 of the Revised Code, any health insuring corporation, and any legal entity that is self-insured and provides benefits to its employees or members.

(4) "Policy" means a policy, certificate, contract, or plan that is issued by an insurer.

(5) "Statement" includes, but is not limited to, any notice, letter, or memorandum; proof of loss; bill of lading; receipt for payment; invoice, account, or other financial statement; estimate of property damage; bill for services; diagnosis or prognosis; prescription; hospital, medical, or dental chart or other record; x-ray, photograph, videotape, or movie film; test result; other evidence of loss, injury, or expense; computer-generated document; and data in any form.

(B) No person, with purpose to defraud or knowing that the person is facilitating a fraud, shall do either of the following:

(1) Present to, or cause to be presented to, an insurer any written or oral statement that is part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive;

(2) Assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement that is intended to be presented to an insurer as part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive.

(C) Whoever violates this section is guilty of insurance fraud. Except as otherwise provided in this division, insurance fraud is a misdemeanor of the first degree. If the amount of the claim that is false or deceptive is five hundred dollars or more and is less than five thousand dollars, insurance fraud is a felony of the fifth degree. If the amount of the claim that is false or deceptive is five thousand dollars or more and is less than one hundred thousand dollars, insurance fraud is a felony of the fourth degree. If the amount of the claim that is false or deceptive is one hundred thousand

dollars or more, insurance fraud is a felony of the third degree.

(D) This section shall not be construed to abrogate, waive, or modify division (A) of section 2317.02 of the Revised Code.

History:

143 v H 347 (Eff 7-18-90); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 67. Eff 6-4-97.



Elevators Mutual Insurance Company

722 North Cable Rd

Lima, OH

45805-1795

Phone (419) 227-6604

Restaurant Commercial Package Policy

Common Policy Declarations

Page 1

Policy: 3851	Agency 118- 11	M	D	4
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Named Insured and Address

J. PATRICK O'FLARHERTY'S INC.
3619 HAYES AVENUE
FREMONT, OH 43420

Agent Name and Address

E. SCHMENK INSURANCE AGENCY INC.
375 EAST MAIN STREET
PO BOX 256
OTTAWA, OH 45875-

Policy	From:	8/31/2000	at 12:01 A.M. Standard Time at your
Period	To:	8/31/2001	mailing address shown above.

BUSINESS DESCRIPTION: Restaurant w/ Cooking

ENTITY: CORPORATION

In return for the payment of the premium, and subject to all terms of this policy, we agree with you to provide the insurance as stated in this policy.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS:
(THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT)

	Premium
Commercial Property Coverage Part	\$2,826
General Liability Coverage Part	\$1,228
Total Annual Premium:	\$4,054

LOCATIONS:

LOC	Description / City / State
1	3619 Hayes Avenue Fremont OH

FORMS AND ENDORSEMENTS APPLICABLE TO THIS COVERAGE PART:

EM0151-0493 IL0017-1198 IL0244-0498 IL0021-0498

Secretary: *Julia A. ...* Agent: _____

Date: 2/14/2001

Elevators Mutual Insurance Company

722 North Cable Rd

Lima, OH 45805-1795

Phone (419) 227-6604

Commercial Property

Duplicate

Page 1

Policy No. 3851CP	Agency 118 - 11	M	D	4
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Named Insured and Address

J. PATRICK O'FLARHERTY'S INC.
3619 HAYES AVENUE
FREMONT, OH 43420

Agent Name and Address

E. SCHMENK INSURANCE AGENCY INC.
375 EAST MAIN STREET
PO BOX 256
OTTAWA, OH 45875-

Policy	From:	8/31/2000	at 12:01 A.M. Standard Time at your
Period	To:	8/31/2001	mailing address shown above.

Loc	Bldg	Construction Description	Occupancy	Co-Ins	Infl. Guard	Repl Cost	Cause of Loss	LIMIT
Loc 1-Bldg 1 Change Effective: 1/9/2001								
		Mixed Construction	Restaurant					
1	1	Building ON one story Frame & Concrete Block Building.		80%	N/A	N/A	SPECIAL	500,000
1	1	Business Personal Property		80%	N/A	N/A	SPECIAL	100,000
		Mixed Construction	Restaurant					
1	1	Glass A \$50.00 deductible applies to Glass coverage. Two panes 48"x34" etched interior glass						Included
		Frame						
1	2	Building ON one story 28'x110' Storage Building & Water Supply Tank.		80%	N/A	N/A	SPECIAL	40,000
1	ALL	Outside Signs A \$50.00 deductible applies to Signs.		N/A	N/A	N/A	SPECIAL	7,000
1	ALL	Restaurant Extended Protection						Included
1	ALL	Multiple Deductible - Building #2 and the Business Personal Property in Building #1 carry a \$500 deductible.						

ADDITIONAL INTEREST

Loc.	Bldg	Name	Address	Type
1	1	Richard & Jan Heyman c/o J. Patrick O'Flarherty's 3619 Hayes Avenue Fremont, OH	43420-	Loss Payable Subject to form CP1218 LOSS PAYABLE PROVISIONS

Date: 2/14/2001

COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. CONTROL OF PROPERTY

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this Coverage Part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

C. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

E. LIBERALIZATION

If we adopt any revision that would broaden the coverage under this Coverage Part without additional premium within 45 days prior to or during the policy period, the broadened coverage will immediately apply to this Coverage Part.

F. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

G. OTHER INSURANCE

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the in-

surance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.

2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

H. POLICY PERIOD, COVERAGE TERRITORY

Under this Coverage Part:

1. We cover loss or damage commencing:
 - a. During the policy period shown in the Declarations; and
 - b. Within the coverage territory.
2. The coverage territory is:
 - a. The United States of America (including its territories and possessions);
 - b. Puerto Rico; and
 - c. Canada.

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

This will not restrict your insurance.



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CP 12 18 06 95

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

- BUILDING AND PERSONAL PROPERTY COVERAGE FORM
- BUILDERS' RISK COVERAGE FORM
- CONDOMINIUM ASSOCIATION COVERAGE FORM
- CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
- STANDARD PROPERTY POLICY

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement effective	12:01 A.M. standard time	Policy No.
Named Insured		Countersigned by

(Authorized Representative)

SCHEDULE

Prem. No.	Bldg. No.	Description of Property	Loss Payee (Name & Address)	Provisions Applicable		
				Loss Payable	Lender's Loss Payable	Contract of Sale

A. When this endorsement is attached to the STANDARD PROPERTY POLICY CP 00 99 the term Coverage Part in this endorsement is replaced by the term Policy.

The following is added to the LOSS PAYMENT Loss Condition, as indicated in the Declarations or by an "X" in the Schedule:

B. LOSS PAYABLE

For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:

1. Adjust losses with you; and

2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

C. LENDER'S LOSS PAYABLE

1. The Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:

- a. Warehouse receipts;
- b. A contract for deed;
- c. Bills of lading;

(over)



- d. Financing statements; or
 - e. Mortgages, deeds of trust, or security agreements.
2. For Covered Property in which both you and a Loss Payee have an insurable interest:

- a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear.
- b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.
- c. If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:

- (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
- (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee.

- d. If we pay the Loss Payee for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:
 - (1) The Loss Payee's rights will be transferred

to us to the extent of the amount we pay; and

- (2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

- 3. If we cancel this policy, we will give written notice to the Loss Payee at least:
 - a. 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
- 4. If we elect not to renew this policy, we will give written notice to the Loss Payee at least 10 days before the expiration date of this policy.

D. CONTRACT OF SALE

- 1. The Loss Payee shown in the Schedule or in the Declarations is a person or organization you have entered a contract with for the sale of Covered Property.
- 2. For Covered Property in which both you and the Loss Payee have an insurable interest, we will:
 - a. Adjust losses with you; and
 - b. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.
- 3. The following is added to the OTHER INSURANCE Condition:

For Covered Property that is the subject of a contract of sale, the word "you" includes the Loss Payee.

CAUSES OF LOSS—SPECIAL FORM

Words and phrases that appear in quotation marks have special meaning. Refer to Section F.—Definitions.

A. COVERED CAUSES OF LOSS

When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations; that follow.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance or Law

The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance or Law, applies whether the loss results from:

- (1) An ordinance or law that is enforced even if the property has not been damaged; or
- (2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

b. Earth Movement

- (1) Any earth movement (other than sinkhole collapse), such as an earthquake, landslide, mine subsidence, or earth sinking, rising or shifting. But if earth movement results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

- (2) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or volcanic action, we will pay for the loss or damage caused by that fire, building glass breakage or volcanic action. (See Section F. for definition of volcanic action.)

a volcano when the loss or damage is caused by:

- (a) Airborne volcanic blast or airborne shock waves;
- (b) Ash, dust or particulate matter; or
- (c) Lava flow.

All volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

e. Utility Services

The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion does not apply to the Business Income coverage or to Extra Expense coverage. Instead, the Special Exclusion in paragraph B.4.a.(3) applies to these coverages.

f. War and Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including sabotage, insurrection or rebellion, but not including labor disputes.



against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows from a sewer, drain or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or
 - (c) Doors, windows or other openings.

But if Water, as described in **g. (1)** through **g. (4)** above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

2. We will not pay for loss or damage caused by or resulting from any of the following:

- a. Artificially generated electrical current, including electric arcing, that disturbs electrical devices, appliances or wires.

But if artificially generated electrical current results in fire, we will pay for the loss or damage caused by that fire.

- b. Delay, loss of use or loss of market.
- c. Smoke, vapor or gas from agricultural smudging or industrial operations.
- d.
 - (1) Wear and tear;
 - (2) Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
 - (3) Smog;
 - (4) Settling, cracking, shrinking or expansion;
 - (5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals;
 - (6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay

for the loss or damage caused by that elevator collision;

- (7) The following causes of loss to personal property:
 - (a) Dampness or dryness of atmosphere;
 - (b) Changes in or extremes of temperature; or
 - (c) Marring or scratching.

But if an excluded cause of loss that is listed in **2.d.(1)** through **(7)** results in a "specified cause of loss" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.

- e. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion. We will also pay for loss or damage caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.
- f. Continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more.
- g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:
 - (1) You do your best to maintain heat in the building or structure; or
 - (2) You drain the equipment and shut off the supply if the heat is not maintained.
- h. Dishonest or criminal act by you, any of your partners, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:
 - (1) Acting alone or in collusion with others; or
 - (2) Whether or not occurring during the hours of employment.This exclusion does not apply to acts of destruction by your employees (including leased employees); but theft by employees (including leased employees) is not covered.
- i. Voluntary parting with any property by you or anyone else to whom you have entrusted

...pretense.

- j. Rain, snow, ice or sleet to personal property in the open.
- k. Collapse, except as provided below in the Additional Coverage for Collapse. But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.
- l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss," we will pay for the loss or damage caused by that, "specified cause of loss."

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss or damage.

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

c. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance.

of part or all of any property on or off the described premises.

4. Special Exclusions

The following provisions apply only to the specified Coverage Form:

- a. **Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form, or Extra Expense Coverage Form.**

We will not pay for:

the failure of power or other utility service supplied to the described premises, however caused, if the failure occurs outside of a covered building.

But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss resulting from that Covered Cause of Loss.

- (2) Any loss caused by or resulting from:
 - (a) Damage or destruction of "finished stock"; or
 - (b) The time required to reproduce "finished stock."

This exclusion does not apply to Extra Expense.

- (3) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

- (4) Any increase of loss caused by or resulting from:

- (a) Delay in rebuilding, repairing or replacing the property or resuming "operations," due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
- (b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the suspension of "operations," we will cover such loss that affects your Business Income during the "period of restoration."

- (5) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration."
- (6) Any other consequential loss.

b. Leasehold Interest Coverage Form

(1) Paragraph B.1.a., Ordinance or Law, does not apply to insurance under this Coverage Form.

- (2) We will not pay for any loss caused by:
 - (a) Your cancelling the lease;
 - (b) The suspension, lapse or cancellation of any license, or
 - (c) Any other consequential loss.

c. Legal Liability Coverage Form

(1) The following Exclusions do not apply to insurance under this Coverage Form:

- (a) Paragraph B.1.a., Ordinance or Law;
 - (b) Paragraph B.1.c., Governmental Action;
 - (c) Paragraph B.1.d., Nuclear Hazard;
 - (d) Paragraph B.1.e., Utility Services; and
 - (e) Paragraph B.1.f., War and Military Action.
- (2) The following additional exclusions apply to insurance under this Coverage Form:

(a) Contractual Liability

We will not defend any claim or "suit," or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

- (i) Your assumption of liability was executed prior to the accident; and
- (ii) The building is Covered Property under this Coverage Form.

(b) Nuclear hazard.

We will not defend any claim or "suit," or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

C. LIMITATIONS

The following limitations apply to all policy forms and endorsements, unless otherwise stated.

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

a. Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

b. Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or

equipment, other than an explosion.

c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

- (1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or
- (2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

d. Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

- (1) Building materials and supplies held for sale by you, unless they are insured under the Builders Risk Coverage Form; or
- (2) Business Income coverage or Extra Expense coverage.

e. Property that is missing, where the only evidence of the loss or damage is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

f. Gutters and downspouts caused by or resulting from weight of snow, ice or sleet.

g. Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.

2. We will not pay more than \$500 in any one occurrence for loss of or damage to glass that is part of a building or structure, regardless of the number of panes, plates or similar units of glass. Subject to this \$500 aggregate, we will not pay more than \$100 for any one pane, plate, multiple plate insulating unit, window or solar heating panel, jalousie, louver or shutter.

However, this limitation does not apply to:

- a. Loss or damage by the specified causes of loss, except vandalism or theft.
- b. Business Income coverage or Extra Expense coverage.

3. We will not pay for loss of or damage to the following types of property unless caused by the specified causes of loss or building glass breakage:

- a. Valuable papers and records, such as books of account, manuscripts, abstracts, drawings, card index systems, film, tape, disc, drum, cell or other data processing, recording or storage media, and other records.

- c. Fragile articles such as glassware, statuary, marbles, chinaware and porcelains, if broken. This restriction does not apply to:
- (1) Glass that is part of a building or structure;
 - (2) Containers of property held for sale; or
 - (3) Photographic or scientific instrument lenses.

- d. Builders' machinery, tools and equipment owned by you or entrusted to you; provided such property is Covered Property.

However, this limitation does not apply:

- (1) If the property is located on or within 100 feet of the described premises, unless the premises is insured under the Builders Risk Coverage Form; or
- (2) To Business Income coverage or to Extra Expense coverage.

4. The special limit shown for each category, a. through d., is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are:

- a. \$2,500 for furs, fur garments and garments trimmed with fur.
- b. \$2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semi-precious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item.
- c. \$2,500 for patterns, dies, molds and forms.
- d. \$250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

This limitation, C.4., does not apply to Business Income coverage or to Extra Expense coverage.

5. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire extinguishing equipment if the damage:

- a. Results in discharge of any substance from an automatic fire protection system; or
- b. Is directly caused by freezing.

However, this limitation does not apply to Business Income coverage or to Extra Expense coverage.

The term Covered Cause of Loss includes the Additional Coverage—Collapse as described and limited in D.1. through D.5. below.

1. We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building insured under this Coverage Form, if the collapse is caused by one or more of the following:

- a. The "specified causes of loss" or breakage of building glass, all only as insured against in this Coverage Part;
- b. Hidden decay;
- c. Hidden insect or vermin damage;
- d. Weight of people or personal property;
- e. Weight of rain that collects on a roof;
- f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation. However, if the collapse occurs after construction, remodeling or renovation is complete and is caused in part by a cause of loss listed in D.1.a. through D.1.e., we will pay for the loss or damage even if use of defective material or methods, in construction, remodeling or renovation, contributes to the collapse.

2. If the direct physical loss or damage does not involve collapse of a building or any part of a building, we will pay for loss or damage to Covered Property caused by the collapse of personal property only if:

- a. The personal property which collapses is inside a building insured under this Coverage Form; and
- b. The collapse was caused by a cause of loss listed in D.1.a. through D.1.f. above.

3. With respect to the following property:

- a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;
 - b. Awnings, gutters and downspouts;
 - c. Yard fixtures;
 - d. Outdoor swimming pools;
 - e. Fences;
 - f. Piers, wharves and docks;
 - g. Beach or diving platforms or appurtenances;
 - h. Retaining walls; and
 - i. Walks, roadways and other paved surfaces;
- if the collapse is caused by a cause of loss listed in D.1.b. through D.1.f., we will pay for loss or damage to that property only if:

- a. Such loss or damage is a direct result of the collapse of a building insured under this Coverage Form; and

b. The property is Covered Property under this Coverage Form.

4. Collapse does not include settling, cracking, shrinkage, bulging or expansion.

5. This Additional Coverage, Collapse, will not increase the Limits of Insurance provided in this Coverage Part.

E. ADDITIONAL COVERAGE EXTENSIONS

1. **Property In Transit.** This Extension applies only to your personal property to which this form applies.

a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.

b. Loss or damage must be caused by or result from one of the following causes of loss:

(1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.

(2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the road bed.

(3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.

c. The most we will pay for loss or damage under this Extension is \$1000.

a. Steam boilers, steam engines, turbines, and other machinery, and their parts, are covered only when they are being transported by a motor vehicle.

b. Valuable papers and records, such as books, manuscripts, maps, drawings, photographs, and other documents, are covered only when they are being transported by a motor vehicle.

c. The following types of property are covered only when they are being transported by a motor vehicle:

1. Cash, jewelry, and other valuables.

This Coverage Extension is additional insurance. The Additional Condition, Coinsurance, does not apply to this Extension.

2. **Water Damage, Other Liquids, Powder Or Molten Material Damage.** If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes.

F. DEFINITIONS

"Specified Causes of Loss" means the following:

Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

1. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:

a. The cost of filling sinkholes, or
b. Sinking or collapse of land into man-made underground cavities.

2. Falling objects does not include loss or damage to:

a. Personal property in the open; or
b. The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.

3. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam.

4. We will not pay for loss or damage to property covered by this Extension if the loss or damage is caused by or results from the following types of property:

a. Valuable papers and records, such as books, manuscripts, maps, drawings, photographs, and other documents, are covered only when they are being transported by a motor vehicle.

b. The following types of property are covered only when they are being transported by a motor vehicle:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION H—DEFINITIONS.

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this section, A.1., and limited in A.2., Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

a. **Building**, meaning the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Fixtures, including outdoor fixtures;
- (3) Permanently installed:
 - (a) Machinery and
 - (b) Equipment;
- (4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:
 - (a) Fire extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
- (5) If not covered by other insurance:

(a) Additions under construction, alterations and repairs to the building or structure;

(b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

b. **Your Business Personal Property** located in or on the building described in the Declarations or in the open (or in a vehicle) within

100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property—Separation of Coverage form:

- (1) Furniture and fixtures;
- (2) Machinery and equipment;
- (3) "Stock";
- (4) All other personal property owned by you and used in your business;
- (5) Labor, materials or services furnished or arranged by you on personal property of others;
- (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
 - (a) Made a part of the building or structure you occupy but do not own; and
 - (b) You acquired or made at your expense but cannot legally remove;
- (7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

c. **Personal Property of Others** that is:

- (1) In your care, custody or control; and
- (2) Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

2. Property Not Covered

Covered Property does not include:

- a. Accounts, bills, currency, deeds, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities.



- b. Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;
- c. Automobiles held for sale;
- d. Bridges, roadways, walks, patios or other paved surfaces;
- e. Contraband, or property in the course of illegal transportation or trade;
- f. The cost of excavations, grading, backfilling or filling;
- g. Foundations of buildings, structures, machinery or boilers if their foundations are below:
 - (1) The lowest basement floor; or
 - (2) The surface of the ground, if there is no basement;
- h. Land (including land on which the property is located), water, growing crops or lawns;
- i. Personal property while airborne or waterborne;
- j. Bulkheads, pilings, piers, wharves or docks;
- k. Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;
- l. Retaining walls that are not part of a building;
- m. Underground pipes, flues or drains;
- n. The cost to research, replace or restore the information on valuable papers and records, including those which exist on electronic or magnetic media, except as provided in the Coverage Extensions;
- o. Vehicles or self-propelled machines (including aircraft or watercraft) that:
 - (1) Are licensed for use on public roads; or
 - (2) Are operated principally away from the described premises.

This paragraph does not apply to:

 - (1) Vehicles or self-propelled machines or autos you manufacture, process or warehouse;
 - (2) Vehicles or self-propelled machines, other than autos, you hold for sale; or
 - (3) Rowboats or canoes out of water at the described premises;
- p. The following property while outside of buildings:
 - (1) Grain, hay, straw or other crops;
 - (2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, signs (other than signs attached to buildings), trees, shrubs or plants (other than "stock" of

trees, shrubs or plants), all except as provided in the Coverage Extensions.

3. Covered Causes Of Loss

See applicable Causes of Loss Form as shown in the Declarations.

4. Additional Coverages

a. Debris Removal

(1) We will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

(2) The most we will pay under this Additional Coverage is 25% of:

(a) The amount we pay for the direct physical loss of or damage to Covered Property; plus

(b) The deductible in this policy applicable to that loss or damage.

But this limitation does not apply to any additional debris removal limit provided in the Limits of Insurance section.

(3) This Additional Coverage does not apply to costs to:

(a) Extract "pollutants" from land or water; or

(b) Remove, restore or replace polluted land or water.

b. Preservation of Property

If it is necessary to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss or damage to that property:

(1) While it is being moved or while temporarily stored at another location; and

(2) Only if the loss or damage occurs within 30 days after the property is first moved.

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$1,000 for your liability for fire department service charges:

(1) Assumed by contract or agreement prior to loss; or

(2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

d. Pollutant Clean Up and Removal

We will pay your expense to extract "pollutants" from land or water at the described

premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants." But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12 month period of this policy.

5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

If a Coinsurance percentage of 80% or more or, a Value Reporting period symbol, is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

a. Newly Acquired or Constructed Property

(1) You may extend the insurance that applies to Building to apply to:

- (a) Your new buildings while being built on the described premises; and
- (b) Buildings you acquire at locations, other than the described premises, intended for:

(i) Similar use as the building described in the Declarations; or

(ii) Use as a warehouse.

The most we will pay for loss or damage under this Extension is \$250,000 at each building.

(2) You may extend the insurance that applies to Your Business Personal Property to apply to that property at any location you acquire other than at fairs or exhibitions.

The most we will pay for loss or damage under this Extension is \$100,000 at each building.

(3) Insurance under this Extension for each newly acquired or constructed property

will end when any of the following first occurs:

- (a) This policy expires;
- (b) 30 days expire after you acquire or begin to construct the property; or
- (c) You report values to us.

We will charge you additional premium for values reported from the date construction begins or you acquire the property.

b. Personal Effects and Property of Others

You may extend the insurance that applies to Your Business Personal Property to apply to:

- (1) Personal effects owned by you, your officers, your partners or your employees. This extension does not apply to loss or damage by theft.
- (2) Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is \$2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

c. Valuable Papers and Records — Cost of Research

You may extend the insurance that applies to Your Business Personal Property to apply to your costs to research, replace or restore the lost information on lost or damaged valuable papers and records, including those which exist on electronic or magnetic media, for which duplicates do not exist. The most we will pay under this Extension is \$2,500 at each described premises, unless a higher limit is shown in the Declarations.

d. Property Off-Premises

You may extend the insurance provided by this Coverage Form to apply to your Covered Property, other than "stock," that is temporarily at a location you do not own, lease, or operate. This Extension does not apply to Covered Property:

- (1) In or on a vehicle;
- (2) In the care, custody or control of your salespersons; or
- (3) At any fair or exhibition.

The most we will pay for loss or damage under this Extension is \$10,000.

e. Outdoor Property

You may extend the insurance provided by this Coverage Form to apply to your outdoor fences, radio and television antennas (including satellite dishes), signs (other than

signs attached to building trees, shrubs and plants (other than "stock" of trees, shrubs or plants), including debris removal expense, caused by or resulting from any of the following causes of loss if they are Covered Causes of Loss:

- (1) Fire;
- (2) Lightning;
- (3) Explosion;
- (4) Riot or Civil Commotion; or
- (5) Aircraft.

The most we will pay for loss or damage under this Extension is \$1,000, but not more than \$250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence.

Each of these Extensions is additional insurance. The Additional Condition, Coinsurance, does not apply to these Extensions.

B. EXCLUSIONS AND LIMITATIONS

See applicable Causes of Loss Form as shown in the Declarations.

C. LIMITS OF INSURANCE

The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

The most we will pay for loss or damage to outdoor signs attached to buildings is \$1,000 per sign in any one occurrence.

The limits applicable to the Coverage Extensions and the Fire Department Service Charge and Pollutant Clean Up and Removal Additional Coverages are in addition to the Limits of Insurance.

Payments under the following Additional Coverages will not increase the applicable Limit of Insurance:

1. Preservation of Property; or
2. Debris Removal; but if:
 - a. The sum of direct physical loss or damage and debris removal expense exceeds the Limit of Insurance; or
 - b. The debris removal expense exceeds the amount payable under the 25% limitation in the Debris Removal Additional Coverage;

we will pay up to an additional \$10,000 for each location in any one occurrence under the Debris Removal Additional Coverage.

D. DEDUCTIBLE

We will not pay for loss or damage in any one occurrence until the amount of loss or damage exceeds the Deductible shown in the Declarations. We will then pay the amount of loss or damage in excess of the Deductible, up to the applicable Limit of Insurance, after any deduction required by the Coinsurance condition or the Agreed Value Optional Coverage.

When the occurrence involves loss to more than one item of Covered Property and more than one Limit of Insurance applies, the Deductible will reduce the total amount of loss payable if loss to at least one item is less than the sum of (1) the Limit of Insurance applicable to that item plus (2) the Deductible.

Example No. 1:

(This example assumes there is no coinsurance penalty.)

Deductible: \$250

Limit of Insurance—Bldg. 1: \$60,000

Limit of Insurance—Bldg. 2: \$80,000

Loss to Bldg. 1: \$60,100

Loss to Bldg. 2: \$90,000

The amount of loss to Bldg. 1 (\$60,100) is less than the sum (\$60,250) of the Limit of Insurance applicable to Bldg. 1 plus the Deductible.

The Deductible will be subtracted from the amount of loss in calculating the loss payable for Bldg. 1:

\$60,100

- 250

\$59,850 Loss Payable—Bldg. 1

The Deductible applies once per occurrence and therefore is not subtracted in determining the amount of loss payable for Bldg. 2. Loss payable for Bldg. 2 is the Limit of Insurance of \$80,000.

Total amount of loss payable: \$59,850 + 80,000
= \$139,850

Example No. 2:

(This example, too, assumes there is no coinsurance penalty.)

The Deductible and Limits of Insurance are the same as those in Example No. 1.

Loss to Bldg. 1: \$70,000 (exceeds Limit of Insurance plus Deductible)

Loss to Bldg. 2: \$90,000 (exceeds Limit of Insurance plus Deductible)

Loss Payable—Bldg. 1: \$60,000 (Limit of Insurance)

Loss Payable—Bldg. 2: \$80,000 (Limit of Insurance)

Total amount of loss payable: \$140,000

E. LOSS CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select

an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

3. Duties In The Event Of Loss Or Damage

a. You must see that the following are done in the event of loss or damage to Covered Property:

- (1) Notify the police if a law may have been broken.
- (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
- (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
- (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
- (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
- (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.
Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.
- (7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

(E) cooperate with us in the investigation or settlement of the claim.

- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

4. Loss Payment

a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:

- (1) Pay the value of lost or damaged property;
- (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
- (3) Take all or any part of the property at an agreed or appraised value; or
- (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.

b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

c. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.

d. We will not pay you more than your financial interest in the Covered Property.

e. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.

f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

g. We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:

- (1) We have reached agreement with you on the amount of loss; or
- (2) An appraisal award has been made.

5. Recovered Property

If either you or we recover any property after loss settlement, that party must give the other prompt

notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

6. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner of a building, building means the entire building. Such building is vacant when 70% or more of its square footage:

(i) Is not rented; or

(ii) Is not used to conduct customary operations.

(2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

7. Valuation

We will determine the value of Covered Property in the event of loss or damage as follows:

a. At actual cash value as of the time of loss

or damage, except as provided in b., c., d., e. and f. below.

b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is \$2,500 or less, we will pay the cost of building repairs or replacement.

The cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property. However, the following property will be valued at the actual cash value even when attached to the building:

(1) Awnings or floor coverings;

(2) Appliances for refrigerating, ventilating, cooking, dishwashing or laundering; or

(3) Outdoor equipment or furniture.

c. "Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.

d. Glass at the cost of replacement with safety glazing material if required by law.

e. Tenant's Improvements and Betterments at:

(1) Actual cash value of the lost or damaged property if you make repairs promptly.

(2) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:

(a) Multiply the original cost by the number of days from the loss or damage to the expiration of the lease; and

(b) Divide the amount determined in (a) above by the number of days from the installation of improvements to the expiration of the lease.

If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.

(3) Nothing if others pay for repairs or replacement.

f. Valuable Papers and Records, including those which exist on electronic or magnetic media (other than prepackaged software programs), at the cost of:

(1) Blank materials for reproducing the records; and

(2) Labor to transcribe or copy the records when there is a duplicate.

F. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

1. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies.

a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property. Instead, we will determine the most we will pay using the following steps:

- (1) Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;
- (2) Divide the Limit of Insurance of the property by the figure determined in step (1);
- (3) Multiply the total amount of loss, before the application of any deductible, by the figure determined in step (2); and
- (4) Subtract the deductible from the figure determined in step (3).

We will pay the amount determined in step (4) or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

Example No. 1 (Underinsurance):

When:

The value of the property is	\$250,000
The Coinsurance percentage for it is	80%
The Limit of Insurance for it is	\$100,000
The Deductible is	\$250
The amount of loss is	\$40,000
Step (1): $\$250,000 \times 80\% =$	$\$200,000$
(the minimum amount of insurance to meet your Coinsurance requirements)	
Step (2): $\$100,000 \div$	$\$200,000 = .50$
Step (3): $\$40,000 \times .50 =$	$\$20,000$
Step (4): $\$20,000 -$	$\$250 = \$19,750$

We will pay no more than \$19,750. The remaining \$20,250 is not covered.

Example No. 2 (Adequate Insurance):

When:

The value of the property is	\$250,000
The Coinsurance percentage for it is	80%
The Limit of Insurance for it is	\$200,000
The Deductible is	\$250
The amount of loss is	\$40,000

The minimum amount of insurance to meet your Coinsurance requirement is \$200,000 (\$250,000 x 80%). Therefore, the Limit of Insurance in this Example is adequate and no penalty applies. We will pay no more than \$39,750 (\$40,000 amount of loss minus the deductible of \$250).

b. If one Limit of Insurance applies to two or more separate items, this condition will apply to the total of all property to which the limit applies.

Example No. 3:

When:

The value of the property is:

Bldg. at Location No. 1	\$ 75,000
Bldg. at Location No. 2	\$100,000
Personal Property at Location No. 2	\$ 75,000
	<hr/>
	\$250,000

The Coinsurance percentage for it is 90%

The Limit of Insurance for Buildings and Personal Property at Location Nos. 1 and 2 is \$180,000

The Deductible is \$1,000

The amount of loss is:

Bldg. at Location No. 2	\$30,000
Personal Property at Location No. 2	\$20,000
	<hr/>
	\$50,000

Step (1): $\$250,000 \times 90\% =$ \$225,000 (the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)

Step (2): $\$180,000 \div$ \$225,000 = .80

Step (3): $\$50,000 \times .80 =$ \$40,000

Step (4): $\$40,000 -$ \$1,000 = \$39,000.

We will pay no more than \$39,000. The remaining \$11,000 is not covered.

2. Mortgageholders

a. The term "mortgageholder" includes trustee or assignee of mortgage.

b. We will pay for covered loss or damage to buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear.

c. The mortgageholder has the right to receive loss payment even if the mortgageholder has started foreclosure or similar action on the building or structure.

d. If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgageholder:

- (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
- (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

All of the terms of this Coverage Part will then apply directly to the mortgageholder.

e. If we pay the mortgageholder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The mortgageholder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
- (2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired.

At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

f. If we cancel this policy, we will give written notice to the mortgageholder at least:

- (1) 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
- (2) 30 days before the effective date of cancellation if we cancel for any other reason.

g. If we elect not to renew this policy, we will give written notice to the mortgageholder at least 10 days before the expiration date of this policy.

G. OPTIONAL COVERAGES

If shown in the Declarations, the following Optional Coverages apply separately to each item.

1. Agreed Value

- a. The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for loss of or damage to that property than the proportion that the Limit of Insurance under this Coverage Part for the property bears to the Agreed Value shown for it

in the Declarations.

b. If the expiration date for this Optional Coverage shown in the Declarations is not extended, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage expires.

c. The terms of this Optional Coverage apply only to loss or damage that occurs:

- (1) On or after the effective date of this Optional Coverage; and
- (2) Before the Agreed Value expiration date shown in the Declarations or the policy expiration date, whichever occurs first.

2. Inflation Guard

a. The Limit of Insurance for property to which this Optional Coverage applied will automatically increase by the annual percentage shown in the Declarations.

b. The amount of increase will be:

- (1) The Limit of Insurance that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Limit of Insurance, times
- (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times
- (3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365.

Example:

If:

The applicable Limit of Insurance is \$100,000

The annual percentage increase is 8%

The number of days since the beginning of the policy year (or last policy change) is 146

The amount of increase is
 $\$100,000 \times .08 \times 146 \div 365 = \$3,200$

3. Replacement Cost

a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form.

b. This Optional Coverage does not apply to:

- (1) Personal property of others;
- (2) Contents of a residence;
- (3) Manuscripts;

- (4) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac; or
 - (5) "Stock", unless the including "Stock" option is shown in the Declarations.
- c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.
- d. We will not pay on a replacement cost basis for any loss or damage:
- (1) Until the lost or damaged property is actually repaired or replaced; and
 - (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.
- e. We will not pay more for loss or damage on a replacement cost basis than the least of (1), (2) or (3), subject to f. below:
- (1) The Limit of Insurance applicable to the lost or damaged property;
 - (2) The cost to replace, on the same premises, the lost or damaged property with other property:
 - (a) Of comparable material and quality; and
 - (b) Used for the same purpose; or
 - (3) The amount you actually spend that is necessary to repair or replace the lost or damaged property.
- f. The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

H. DEFINITIONS

1. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
2. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.