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RE: NEW OHIO SUPREME COURT DECISION ON ADMISSIBILITY OF ARSON CONVICTION

On March 24, 2010, the Ohio Supreme Court issued a very important decision addressing when an insured's conviction for arson and insurance fraud can and cannot be used or admitted into evidence in any related civil proceedings. A link for a copy of the decision in *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's*, 2010-Ohio-1043 is below.

- [*Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's*, 2010-Ohio-1043](#)

This claim arose from a fire loss at the insured restaurant. The actual insured was a corporation owned by Mr. and Mrs. Heyman. Elevators Mutual determined Mr. Heyman intentionally set the fire and denied the claim based upon a policy exclusion for loss caused by a dishonest or criminal act.

Mr. and Mrs. Heyman were indicted for aggravated arson, arson and insurance fraud. Mr. Heyman ultimately pled no contest to the charges of insurance fraud and arson, and was convicted of those charges. The charges against Mrs. Heyman were dismissed.

Elevators Mutual filed suit against the corporation and the Heymans for a declaratory judgment, as well as to recoup monies it advanced initially after the loss. There was a counterclaim alleging, among other things, breach of contract and bad faith.

The issue presented by this case is whether Mr. Heyman's no contest plea and conviction for arson and insurance fraud was admissible and could be used as evidence. In a 6-to-1 decision, the Supreme Court held the no contest plea and resulting conviction were not admissible. Justice Lanzinger based the majority opinion on Ohio Rule of Evidence 410, which specifies a no contest plea "is not admissible in any civil or criminal proceeding against the defendant who made the plea." She noted the same language is contained in Ohio Criminal Rule 11(B)(2). Justice Lanzinger noted neither rule provided any exceptions to the prohibition against the admissibility of such a plea or conviction.

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Justice Lundberg Stratton wrote a separate opinion, concurring in part and dissenting in part. She noted a different approach was taken by the Michigan following its Supreme Court decision in *Lichon v. American Universal Ins. Co.* (1990), 435 Mich. 408, 459 N.W.2d 288. *Lichon* held an insured in a civil action could maintain their innocence in a fire loss even if they had previously pled no contest to a charge of arson. After *Lichon* was decided, Michigan amended its version of Rule 410, which now permits evidence of a no contest plea to be presented in a civil action “to support a defense against a claim asserted by the person who entered the plea.”

This decision does not address or seek to limit the admissibility of a conviction where the insured either pled guilty or was convicted at trial. It is limited to instances where the insured pled no contest. Based upon this decision, I anticipate a significant increase of insureds who are prosecuted for arson and/or insurance fraud to plead no contest to the charges filed against them, to avoid any adverse implications in any related civil proceeding.

The best recourse the insurance industry has in response to this decision is to lobby to have Rule 410 and Rule 11 amended so they mirror the language Michigan adopted. If you have any questions regarding this decision or its implications, please feel free to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Tom Glassman', with a stylized flourish extending to the right.

Thomas F. Glassman