THE DOCTRINE OF THE IMPLIED INSURED IN ALASKA: RECENT DEVELOPMENTS CONCERNING THIRD PARTIES TO INSURANCE CONTRACTS

I. INTRODUCTION

The Alaska Supreme Court recently expanded the rights of third parties under insurance contracts in *Stewart-Smith Haidinger v. Avi-Truck, Inc.*[1] In this case, the owner of a destroyed aircraft gained standing to raise a claim under an insurance policy obtained by a lessee of the aircraft, even though the insurance policy named the lessee as the owner and the insurance company did not know of the true owner's existence. The court concluded that "[w]here the risk to the insurer is unchanged, and where a third party is within the class intended to be benefitted by the parties to an insurance contract, a third-party beneficiary insurance contract may be implied at law."[2] This decision marked the first time the Alaska Supreme Court permitted an impliedly insured third-party beneficiary to affirmatively enforce rights within an insurance contract, thus expanding the scope of the public policy favoring extension of insurance coverage to noncontracting parties in certain circumstances.

While the particular result in *Stewart-Smith Haidinger* may be desirable from a public policy perspective as protecting the insurance consumer, the broad language of the opinion should not serve as the basis for an unqualified expansion of the courts' doctrine of the implied insured.[3] This note will suggest reasons for limiting the impact of this decision through exploring the principles underlying the doctrine of the implied insured and the possible shortcomings in the criteria used by the court to identify the beneficiaries of an insurance contract. As this note will point out, the court's opinion in *Stewart-Smith Haidinger* failed to provide any workable standards for the insurer to use in evaluating the risk it is being asked to assume in a particular contract. Specifically, the court failed to recognize that

1. 682 P.2d 1108 (Alaska 1984).

2. *Id.* at 1113. A third-party beneficiary of one of these implied contracts will hereinafter be referred to as an "implied insured."

3. *See* Alaska Ins. Co. v. RCA Alaska Communications, 623 P.2d 1216 (Alaska 1981).

insurance contracts are exercises in foresight; a contract must be evaluated by considering the potentialities existing at the time the contract was written rather than considering the events as they ultimately unfolded. If *Stewart-Smith Haidinger* is read broadly without this sensitivity, its implications will cause the insurance industry considerable difficulty in evaluating policy risks and thus undermine the ability of insurers to calculate the appropriate premium necessary to cover those risks.

II. THE HISTORY OF THE IMPLIED INSURED DOCTRINE IN ALASKA

The decision in *Stewart-Smith Haidinger* is consistent with Alaska's public policy of interpreting insurance contracts in a manner that generally favors the insured. The Alaska Supreme Court has followed the general trend by declaring that insurance policies are contracts of adhesion[4] and that the purpose of Title 21 of the Alaska Statutes,[5] which regulates the insurance industry, is to protect the Alaska policyholder.[6] The judicial doctrine of the implied insured, which permits noncontracting parties to enforce insurance contracts, has thus emerged from a legal framework that favors the insured rather than the insurer.[7] Until *Stewart-Smith Haidinger,* however, the Alaska Supreme Court had applied the doctrine of the implied insured only for the benefit of noncontracting parties who were defending subrogation claims.

Prior to *Stewart-Smith Haidinger,* the Alaska Supreme Court had explicitly recognized the existence of the implied insured doctrine in two cases: *Alaska Insurance Co. v. RCA Alaska Communications*[8] and *Olympic, Inc. v. Providence Washington Insurance Co. of Alaska.*[9] In *RCA,* the doctrine was first recognized as a defense to a subrogation action rather than as a third-party right to recover the proceeds of the policy.[10] *RCA* involved a fire insurance policy obtained by a landlord

4. Stordahl v. Gov't Employees Ins. Co., 564 P.2d 63, 65 (Alaska 1977).

5. ALASKA STAT. § 21.03.010 –.90.110 (1984 & Supp. 1985).

6. Northern Adjusters v. Dep't of Revenue, 627 P.2d 205, 207 (Alaska 1981).

7. The creation of an implied at law contract has been recognized in Alaska as a judicial tool to prevent unjust enrichment. Martens v. Metzgar, 524 P.2d 666, 672 (Alaska 1974). Such a creation should be undertaken, not only to stop one party from unjustly enriching himself at the expense of another, but also to require him to make restitution for benefits received, retained, or appropriated, *id.,* provided that the restitution involves no violation or frustration of law or opposition to public policy, either directly or indirectly. Tulalip Shores, Inc. v. Mortland, 9 Wash. App. 271, 274-75, 511 P.2d 1402, 1404 (1973) (discussing the nature of restitution).

8. 623 P.2d 1216, 1219 (Alaska 1981).

9. 648 P.2d 1008, 1014 (Alaska 1982).

10. *RCA,* 623 P.2d at 1217.

in accordance with a lease provision. When a fire caused by the negligence of a commercial tenant destroyed the property, the insurance company paid the landlord for his loss. The supreme court, however, denied the insurance company's subsequent attempt to recover its loss from the tenant.[11]

The court employed a multi-stepped analysis to support its finding that the landlord's policy had impliedly insured the tenant as well as the landlord, at least for purposes of determining the insurer's subrogation rights. First, the court acknowledged the rule that "an insurer cannot recover by means of subrogation against its own insured."[12] Such an action would allow the insurer to undermine the entire purpose of insurance, namely the shifting of the risk of loss to another for a fee. Second, the court identified a public policy reason for disallowing the insurer's claim against the tenant — reducing litigation by the denial of this subrogation claim.[13] Finally, the court noted that "Since the ordinary and usual meaning of 'loss by fire' includes fires of negligent origin, it would contradict the reasonable expectations of a commercial tenant to allow a landlord's insurer to proceed against it after the landlord had contracted in the lease to provide fire insurance on the leased premises."[14] The court therefore applied the doctrine of the implied insured in finding that the policy covered a noncontracting party, but only for "the limited purpose of defeating a subrogation claim."[15]

The supreme court, however, declined to apply the doctrine of the implied insured one year later in *Olympic.* In that case, a landlord sought indemnification through his commercial tenant's liability insurance policy. The landlord sought this indemnification to cover his liability for damages from a wrongful death action brought on behalf of a firefighter who died fighting a blaze on the leased premises.[16] The lease between the landlord and tenant required the commercial tenant to provide liability insurance for the store premises on behalf of the landlord. The commercial tenant obtained such a policy, but did so only in its own name.[17] In declining to apply *RCA,* the court noted an important underlying difference between the two cases:

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11. *Id.*

12. *Id.* (quoting Graham v. Rockman, 504 P.2d 1351, 1356 (Alaska 1972)).

13. *Id.* at 1219 n.3 (noting that reducing the number of insurance claims being litigated is one policy objective met by denying this type of subrogation claim).

14. *Id.* at 1219.

15. *Id.* at 1218 (quoting Rizzuto v. Morris, 22 Wash. App. 951, 956, 592 P.2d 688, 690 (1979)).

16. *Olympic,* 648 P.2d at 1009.

17. *Id.* at 1009-10.

> The dispositive distinction between the present case [*Olympic*] and *RCA* is that in *RCA* the insurer seeking subrogation had contractually agreed to insure against loss due to fire . . . . It is from that context which we assessed the reasonable expectations of the parties with respect to fire loss due to the tenant's negligence. In contrast, . . . Providence [the tenant's insurer] did not contractually agree to insure against risks attributable to [the landlord].[18]

The nature of the underlying insurance policy thus distinguished the facts in *Olympic* from those in *RCA.* The addition of another party to the liability insurance policy involved in *Olympic* would have indicated an alteration of the risk the insurer believed it had assumed, and thus was "determinative in deciding whether to imply additional insureds on an insurance policy."[19] As the insurer based the premium rates on the risk insured, the rates would presumably have differed if the landlord had also been covered by the policy.[20] In contrast, the *RCA* court found that risk of loss by a fire caused by the tenant was, in fact, contemplated by the parties at the time they entered their contract. It was thus fair to prohibit the insurer from seeking compensation from the tenant for a loss generated by a risk he and the landlord had contemplated and presumably incorporated in the landlord's premiums.

III. *STEWART-SMITH HAIDINGER V. AVI-TRUCK, INC.:* FACTUAL AND PROCEDURAL BACKGROUND

Trans-Northern Aleutian ("TNA") was an Anchorage-based air transport company[21] that operated a fleet of small aircraft.[22] In an effort to expand its fleet, TNA began looking for a larger aircraft that could transport large equipment. TNA located such an aircraft in Palmer during the summer of 1976 and arranged to have it ferried to Anchorage in early December, 1976.

Rather than purchasing the aircraft outright, TNA decided to lease the aircraft. Two TNA mechanics and their wives then formed Avi-Truck, which purchased the aircraft on December 29, 1976, and leased it to TNA on January 14, 1977. The terms of the lease agreement required TNA to insure the hull of the aircraft for $60,000.[23]

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18. *Id.* at 1014.

19. *Stewart-Smith Haidinger,* 682 P.2d at 1112.

20. *Olympic,* 648 P.2d at 1014.

21. Prior to this litigation, the Alaska Department of Commerce and Economic Development issued a certificate of involuntary dissolution of Trans-Northern Aleutian, Inc. Brief for Appellant at 15, Stewart-Smith Haidinger v. Avi-Truck, Inc., 682 P.2d 1108 (Alaska 1984).

22. *Stewart-Smith Haidinger,* 682 P.2d at 1110.

23. *Id.*

TNA obtained an insurance policy on the hull of the plane from Jack Good, an employee of a local insurance brokerage firm.[24] The original binder[25] of December 13, 1976, was to insure the aircraft while it was ferried from Palmer to Anchorage and while it was on the ground in Anchorage. TNA acquired this binder approximately two weeks prior to Avi-Truck's actual purchase of the aircraft. Insurance covering the aircraft when it was in flight was added on January 24, 1977. As Alaska Statebank was financing the purchase of the aircraft, Good issued the binder naming the bank as a loss payee.[26] The binder indicated that a new policy would be issued to cover the recently acquired aircraft. The coverage was ultimately effected, however, by adding the new aircraft to an existing insurance policy covering the hulls of TNA's other aircraft.[27] The endorsement adding the new aircraft to the fleet policy was not issued until February 8, 1977.[28] Avi-Truck was not named as an insured on any of the binders or on TNA's fleet policy.

The aircraft crashed on January 31, 1977. Shortly thereafter, Alaska Statebank sued Avi-Truck in order to collect on the loan it had granted for the purchase of the aircraft. Avi-Truck then filed a third-party complaint against Stewart-Smith Haidinger, Inc., TNA's insurer, and certain other British insurance companies that had accepted TNA's policies, claiming that Avi-Truck was entitled to the proceeds of the TNA insurance policy.[29] Both parties filed cross-motions for partial summary judgment on a number of issues.[30] Judge Singleton

24. The parties dispute whether the insurance agent was told that TNA did not own the aircraft. The president of TNA claims that he told the insurer that TNA would be leasing the aircraft; the insurance agent assumed that TNA owned it. *Id.*

25. A binder exists when an agent exercises his power to bind the insurer immediately upon the insured's application for coverage. The formal papers that will constitute the policy will follow at a later date. ALASKA STAT. § 21.42.240 (1984); *see generally* 43 AM. JUR. 2D *Insurance* § 219 (1982).

26. Brief for Appellee at 4.

27. The binders stated that the aircraft was to be covered under a new policy rather than under TNA's fleet policy. Brief for Appellee at 5. An error at the insurer's offices caused the aircraft to be covered by an endorsement to the fleet policy rather than by a new policy. *Id.* at 8.

28. 682 P.2d at 1111.

29. *Id.* Avi-Truck also claimed to be the assignee of TNA and Alaska Statebank. The trial court denied the claim of assignment by TNA. The trial court granted summary judgment on this issue for the insurer, apparently agreeing with Stewart-Smith Haidinger that TNA had lost the capacity to assign its rights since it had been dissolved by the State of Alaska. Brief for Appellee at 29. No appeal was made upon this issue. *Stewart-Smith Haidinger,* 682 P.2d at 1111-12 n.1.

30. 682 P.2d at 1111. In addition to the issue of standing, the trial court was required to construe many policy exceptions contained in the contract. *Id.* While these facts are relevant to the particular risk insured by the binder, they are not relevant to this note's discussion of the analytical framework utilized by the Alaska Supreme Court.

entered an "Order for Partial Summary Judgment and to Simplify Issues" that granted Avi-Truck standing to sue TNA's insurers under TNA's insurance contract.[31]

The insurance policy in *Stewart-Smith Haidinger* resembled the policy involved in *RCA* in that it insured the owner's property interest in the aircraft itself rather than insuring against an individual's personal liability for injuries sustained from the operation of the aircraft as had been the case in *Olympic*. *Stewart-Smith Haidinger* indicates, however, that the nature of the policy as insuring property rather than personal liability is not alone sufficient to permit recovery by an unnamed beneficiary; the court also held that the third party must be within the class intended to be benefitted by the insured risk.[32] Thus, in order to fully appreciate the *Stewart-Smith Haidinger* holding, it is necessary to clarify what constitutes the insured risk as it pertains to the parties to the insurance contract, and to develop a method to ascertain if the parties fully comprehended that risk when they entered into the insurance contract.

IV. CONSTRUCTION OF THE INSURANCE CONTRACT

A. Defining the Risk

The nature of insurance is in contract.[33] For an agreed upon price, the insurer will bear the risk that *agreed upon* future events will occur to the detriment of the insured. Alaska law states that an insurance contract may only be enforced by someone who had an insurable interest in the insured item at the time the risk was realized in a loss.[34] The *Stewart-Smith Haidinger* court found that adding the true owners of the aircraft to the policy as beneficiaries did not alter the risk that the insurers originally had agreed to take.[35] The insurers claimed that the addition of Avi-Truck altered the risk because Avi-Truck had reserved the right to do maintenance on the aircraft and Avi-Truck, un-

31. *Id.* at 1111. The trial court found that:

> The third-party plaintiffs were within the class of persons contemplated to be covered by insurance at the time the insurance contract was negotiated, i.e., within the class of owners and operators of the aircraft. The court further finds that the persons contemplated to operate the aircraft, the pilots contemplated to fly it, and the persons contemplated to service the aircraft, remained unchanged at all times during the negotiation of coverage and thereafter, and that the risk to the carriers was not effected [sic] by ultimate ownership of the aircraft being placed in Avi-Truck, Inc.

Id. (quoting the findings provided by the trial court).

32. *Id.* at 1113.

33. ALASKA STAT. § 21.42.150 (1984).

34. *Id.* § 21.42.030 (1984).

35. Stewart-Smith Haidinger v. Avi-Truck, Inc., 682 P.2d 1108, 1113 (Alaska 1984).

like TNA, was not a certified carrier.[36] According to the insurers, both of these factors indicated that Avi-Truck was able to control the aircraft and thus increase the risk of its loss.[37] The court disagreed, reasoning that the reservation of maintenance work was a distinction without a difference since the mechanics for TNA and the owners of Avi-Truck were the same people. The actual maintenance performed upon the aircraft would be the same regardless of the titles accorded the workers, either as TNA mechanics or as owners of Avi-Truck.[38] Additionally, since TNA and not Avi-Truck would be operating the plane, Avi-Truck's lack of certification was irrelevant to the risk the insurers agreed to undertake.[39]

The court's evaluation of the risk overlooks some important considerations. In stressing the events that *actually* occurred prior to the crash, the court ignored the fact that insurance policies are drafted with a concern toward the *probabilities* of future occurrences. The court was overly impressed with the facts as they actually occurred because they fell within the anticipated events: TNA did operate the aircraft as part of its fleet and the TNA mechanics did service the aircraft.

It is not unreasonable, however, to imagine that Avi-Truck's ownership interest and the provisions in the lease could have created other scenarios.[40] Avi-Truck could possibly have utilized different maintenance techniques as the owner of the aircraft; Avi-Truck could even have ordered other mechanics to do the work, thus taking the control of the aircraft out of TNA's hands. Of course, TNA did operate the aircraft without interference from Avi-Truck and the maintenance was provided by mechanics who could be identified as serving both Avi-Truck and TNA. This focus on the events as they actually unfolded, however, ignores the before-mentioned possibilities that existed *at the time of the contract's formation* due to Avi-Truck's ownership of the aircraft. Had the insurer been aware at the time of contracting of the different potentialities presented by Avi-Truck's ownership, the terms of the policy might well have been differed. The fact that Avi-Truck failed to act in a manner revealing that TNA was

36. *Id.*

37. Brief for Appellant at 33. *See also id.* at 26 (arguing that whether Avi-Truck's failure to obtain an airworthiness certificate materially altered the risk should be a question of fact decided by the jury, not by the judge in a summary judgment motion).

38. *Stewart-Smith Haidinger,* 682 P.2d at 1113.

39. *Id.*

40. Ownership includes the right to control the property. Some jurisdictions have held that this right creates an essentially changed risk. *See, e.g.,* Otsego Aviation Serv. v. Glens Falls Ins. Co., 277 A. D. 612, 616, 102 N.Y.S. 2d 344, 347 (1951).

While not expressing whether this reflected a greater risk, the court did note that Avi-Truck, unlike TNA, was not a certified carrier. 682 P.2d at 1113.

merely leasing the aircraft and did not own it should have no bearing upon the court's discussion of the risk, which is evaluated in terms of the *potential* for occurrences. Insurance contracts are exercises in foresight in which parties attempt to shift from one party to another the risk that a particular future event will occur. Thus, the risk these contracts insure against must be evaluated with sensitivity to the *potentialities* in existence at the time the contracts were written rather than with deference to the way the risks played themselves out.[41]

Moreover, the court's analysis in *Stewart-Smith Haidinger* fails to recognize the increased burden faced by an insurer when additional, noncontracting parties are permitted to enforce the insurance policy, regardless of any possible control the additional parties may have over the property prior to its loss.[42] This additional burden arises during the payment process in two ways. First, an increased number of potential claimants forces the insurer into greater expenditures of time and money, and possibly into greater litigation, to determine the rightful recipient of the insurance proceeds. Second, the insurer faces an added risk of paying the wrong party. Neither of these burdens would be present if the rights under the contract were limited to the bargaining parties.[43]

The burdens the insurer in *Stewart-Smith Haidinger* confronted do not seem to include the fear of wrongful payment because TNA was dissolved by the State of Alaska and could no longer exercise its contractual rights.[44] Thus, the insurers were subject only to Avi-Truck's claims to the proceeds. If, however, the court's justification in finding Avi-Truck to be impliedly insured was the fact that Avi-Truck was the sole remaining payee, the court's method once again illustrates

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41. This distinction may be illustrated by the following example:

> Assume that R agrees to insure the boat of S against its sinking during a trip across the pond. Unknown to R, the boat has a plug in its bottom and S has the ability to remove that plug if she should so desire. It is also possible for the plug to loosen itself without any assistance from S. Fortunately for all concerned, the boat completes the voyage without incident.

According to the court's analysis, because the boat completed its journey with the plug in place, the fact that the plug could have been removed is of no consequence. The more complete analysis would recognize that the mere existence of the plug would increase the risk of an unsuccessful voyage. The fact that the plug did not fail does not diminish the fact that it could have been loosened, causing the boat to sink. One should thus be careful to distinguish between the result achieved and the potential results that were possible yet avoided. The latter are more indicative of the definition of risk.

42. American Financial Corp. v. Computer Sciences Corp., 558 F. Supp. 1182, 1185 (D. Del. 1983).

43. *Id.* It should be noted that the use of interpleader procedures by the insurer could diminish this risk of wrongful payment. Yet the use of such a device assumes that the insurer has agreed to its underlying liability for the proposed loss.

44. Brief for Appellee at 29.

the inappropriateness of hindsight analysis. Future courts wishing to apply the doctrine of the implied insured may not confront cases so neatly confined to one possible payee. More importantly, the supreme court did not state whether the doctrine of the implied insured was limited to situations in which a single payee claimed entitlement to the proceeds; so confining the doctrine would avoid possible future litigation to eliminate contenders for the proceeds. The *Stewart-Smith Haidinger* decision did not address itself to these factors, preferring instead to handle the situation with the general requirement that the risk not be altered.

B. Determining the Class to be Benefitted

The second important element of the *Stewart-Smith Haidinger* decision is the manner in which the court identified the intended beneficiaries of the insurance contract. According to the Alaska Supreme Court, third parties desiring to utilize the doctrine of the implied insured must be within the class intended by the contracting parties to benefit from the insurance policy.[45]

In assessing this intent, the court in *Stewart-Smith Haidinger* appears to have gone beyond the general rules it had previously expressed regarding contract interpretation. In *Pepsi Cola Bottling Co. v. New Hampshire Insurance Co.*,[46] the court held that where the terms of an insurance policy are clear and unambiguous, the intent of the parties must be ascertained from the instrument itself.[47] Where the terms are uncertain or ambiguous, though, intent may be ascertained from the language and conduct of the parties, the objects the parties sought to accomplish, and the surrounding circumstances at the time they negotiated the contract.[48]

Whenever possible, the court will utilize the definitions provided in the policy itself to determine the intent of the parties.[49] Yet, a court

45. 682 P.2d at 1113; *accord* Allegheny Airlines, Inc. v. Forth Corp., 663 F.2d 751, 759 (7th Cir. 1981) (construing Indiana law); Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., 399 F.2d 289, 292 (2d Cir. 1968) (construing New York law). *See also* Tolifson v. Globe Am. Casualty Co., 138 Ariz. 31, 32, 672 P.2d 983, 984 (Ct. App. 1983); City of Milwaukee v. Allied Smelting Corp., 117 Wis.2d 377, 383, 344 N.W.2d 523, 525 (Ct. App. 1983); Logan v. Gans, 277 Pa. Super. 282, 284-85, 419 A.2d 772, 774 (1980); Stewart v. Gainesville Glass Co., 131 Ga. App. 747, 752, 206 S.E.2d 857, 860 (1974).

46. 407 P.2d 1009 (Alaska 1965).

47. *Id.* at 1013; *see also* Werley v. United Servs. Auto Ass'n, 498 P.2d 112, 116 (Alaska 1972); Marwell Constr., Inc. v. Underwriters at Lloyd's, London, 465 P.2d 298, 304 (Alaska 1970). The interpretation of contracts is thus treated in the same manner as a question of law. National Bank of Alaska v. J. B. L. & K. of Alaska, 546 P.2d 579, 586 (Alaska 1979) (utilizing a clearly erroneous standard).

48. *Pepsi*, 407 P.2d at 1013.

49. Insurance Co. of N. Am. v. State Farm Mut. Auto Ins., 663 P.2d 953, 955

need not interpret an insurance contract strictly by its literal terms even when those terms are unambiguous. In *Stordahl v. Government Employees Insurance,*[50] the court demonstrated its protective attitude toward policyholders when it ruled that insurance policies were contracts of adhesion.[51] Both the superior bargaining power of the insurance company and the lack of expertise on the part of the consumer underscore the need for this protective public policy.[52] Thus, to assure the consumer is protected, the language of the contract "should be construed to provide the coverage which a lay person would reasonably have expected."[53]

Alaska also accepts the nearly unanimous rule that ambiguities in an insurance policy are to be resolved in favor of the insured.[54] An ambiguity does not exist, however, merely because the parties disagree as to the interpretation of any of the contract terms.[55] An ambiguity exists only where the contract as a whole, evaluated in light of all the extrinsic evidence,[56] supports two different, yet reasonable interpreta-

(Alaska 1983); Tenopir v. State Farm Mut. Co., 403 F.2d 533, 536 (9th Cir. 1968) (construing Alaska law).

50. 564 P.2d 63 (Alaska 1977).

51. *Id.* at 65.

52. Insurance policies are considered contracts of adhesion because the insured is usually presented with a form contract on a take it or leave it basis. *Id.* at 65 n.4; *see also* Hahn v. Alaska Title Guar. Co., 557 P.2d 143, 145 n.5 (Alaska 1976).

53. *Stordahl,* 564 P.2d at 66. A court is not required to find that contract language is ambiguous prior to using this rule of construction. *Id.*

54. Lumberman's Mut. Casualty Co. v. Continental Casualty Co., 387 P.2d 104, 108-09 (Alaska 1963); *accord* Simmons Ref. Co. v. Royal-Globe Ins. Co., 543 F.2d 1195, 1197 (7th Cir. 1976); Richards v. Hanover Ins. Co., 250 Ga. 613, 615, 299 S.E. 2d 561, 563 (1983); Bailey v. Universal Underwriters Ins. Co., 258 Or. 201, 210, 474 P.2d 746, 751 (1970), *reh'g denied,* 258 Or. 228, 482 P.2d 158 (1971).

55. Modern Constr., Inc. v. Barce, Inc., 556 P.2d 528, 529 (Alaska 1976). Differing testimony among the parties as to their subjective intent does not necessarily establish an issue of fact regarding the reasonable expectations of the parties at the time they entered into the contract. Such self-serving statements of intent are not considered to be probative. Peterson v. Wirum, 625 P.2d 866, 870 (Alaska 1981). The parties' testimony recounting their subjective intentions or understandings will normally accomplish no more than the restatement of the conflicting positions. Day v. A. & G. Constr. Co., 528 P.2d 440, 444 (Alaska 1974). "Rather, the court must look to express manifestations of each party's understanding of the contract in attempting to give effect to the intent behind the agreement." *Peterson,* 625 P.2d at 870.

56. Extrinsic evidence refers to evidence other than the language of the contract that bears on the parties' intentions. Wright v. Vickaryous, 598 P.2d 490, 497 n.22 (Alaska 1979). The correct role of extrinsic evidence in the interpretation of contracts has not always been clear in Alaska. Initially, the supreme court had implied that extrinsic evidence could be used only after a preliminary finding of ambiguity. *See* Wessells v. State, 562 P.2d 1042, 1046 (Alaska 1977); Tsakres v. Owens, 561 P.2d 1218, 1221-22 (Alaska 1977); Hendricks v. Knik Supply, Inc., 522 P.2d 543, 546 (Alaska 1974). Approval of this use of the evidence was actually two-tiered, however, as the court would first consider extrinsic evidence in order to determine if a contract

tions.[57] Furthermore, the court's ability to interpret ambiguities in contracts does not give it the power to ignore or rewrite insurance contracts that are plain on their faces by creating ambiguities where none in truth exist.[58] The role of the court is not to do violence to the terms of the contract by artificially creating ambiguities where none exist, but to honor the intentions of the parties.[59] The court must interpret the contract to uphold the true intentions of the parties even when that interpretation favors the insurer.[60]

Under its latest articulation by the Alaska Supreme Court, the doctrine of the implied insured has apparently exceeded the bounds of the general legal framework for the construction of insurance contracts. First, the court in *Stewart-Smith Haidinger* did not find that the terms of the policy were ambiguous on the issue of the insured's identity.[61] Because the court did not find the policy to be ambiguous,

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provision was ambiguous. Then, the court would re-examine the same evidence to interpret the contract. *Tsakres,* 561 P.2d at 1223 (Boochever, C.J., concurring). The supreme court has since moved away from this two-tiered test and has held that all extrinsic evidence should be utilized in finding the parties' true intention. *Wright,* 598 P.2d at 497 n.22; *Stordahl,* 564 P.2d at 66; *accord* 3 A. CORBIN, CONTRACTS § 536, at 25-30 (1960).

57. *Stordahl,* 564 P.2d at 67 n.13. Words must be examined in the context in which they are used. A finding that a word or phrase isolated from its context is susceptible to more than one meaning does not make that word or phrase ambiguous. Similarly, the fact that a word or phrase in its context supports one reasonable and one unreasonable meaning does not mean that the term is ambiguous if the meaning of the provision as a whole is clear. Underwriters at Lloyd's of London v. Cordova Airlines, 283 F.2d 659, 665 (9th Cir. 1960).

58. Guin v. Ha, 591 P.2d 1281, 1285 (Alaska 1979); *accord* Mercantile Bank and Trust Co. v. Western Casualty & Sur. Co., 415 F.2d 606, 609 (8th Cir. 1969) (construing Kansas law); Hercules Casualty Ins. Co. v. Preferred Risk Ins. Co., 337 F.2d 1, 4 (10th Cir. 1964) (construing Oklahoma law); Southeastern Fidelity Ins. v. Suwannee Lumber Mfg. Co., 411 So. 2d 950, 951 (Fla. Dist. Ct. App. 1982); Eaglestein v. Pacific Nat. Fire Ins. Co., 377 S.W.2d 540, 542 (Mo. Ct. App. 1964).

59. Ness v. National Indem. Co. of Nebraska, 247 F. Supp. 944, 947-48 (D. Alaska 1965) (construing Alaska law).

60. The United States Supreme Court has addressed this rule of construction for insurance policies. The rule developed in Bergholm v. Peoria Life Ins. Co., 284 U.S. 489 (1932), is similar to that currently employed in Alaska:

> It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.
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> Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense.

Id. at 492 (citations omitted).

61. 682 P.2d at 1113.

its actions are difficult to understand, especially in light of the accepted interpretation of certain terms in an insurance contract. Specifically, the "insured" is normally the party whose name is found on the policy form in a designated area following the words "does insure" or some other appropriate phrase. A "claimant" is designated in a similar manner and refers to the insured or a third party who might be entitled to reimbursement for injuries or damages suffered.[62] The court in *Stewart-Smith Haidinger* held that the "insured" named in this particular contract did not control, as "TNA intended to insure the aircraft for its own benefit *or for the benefit of whoever eventually purchased it.*"[63] The court effectively held, then, that it was the ownership interest, not the interest of the party designated as "the insured," that was the interest the parties intended to insure under the contract.

Second, the latest formulation of the doctrine of the implied insured may exceed the bounds of contract construction in another manner. Many jurisdictions have held that the general rule of interpreting ambiguities in favor of the insured operates only after the identity of the insured has been determined.[64] Under this approach, the use of the rule favoring the insured would not have been appropriate in *Stewart-Smith Haidinger.*[65] Third, the court found that the parties had not specifically contemplated that Avi-Truck was to benefit from the insurance policy at the time of its writing.[66] The insurer did not know of Avi-Truck's existence, as TWA obtained the insurance policies prior to Avi-Truck's purchase of the aircraft.[67] Still, the court found that Avi-Truck was an implied beneficiary of the contract.

The court in *Stewart-Smith Haidinger* acknowledged that technically the insurance contract was not intended to benefit any third party.[68] The court appears correct in this assessment because as a general rule of contract interpretation, the absence of any evidence showing that the parties intended the contract to benefit a third party leaves

62. White v. Alaska Ins. Guar. Ass'n, 592 P.2d 367, 369 (Alaska 1979).

63. 682 P.2d at 1114 (emphasis added).

64. Wylie v. Mountain Motors, 126 W. Va. 205, 211, 27 S.E.2d 494, 496 (1943); *accord* Lazarus v. Manufacturers Casualties Ins. Co., 267 F.2d 634 (D.C. Cir. 1959); United Nuclear Corp. v. Mission Ins. Co., 97 N.M. 647, 651, 642 P.2d 1106, 1110 (Ct. App. 1982); McBroome-Bennett Plumbing, Inc. v. Villa France, Inc., 515 S.W.2d 32, 37 (Tex. Civ. App. 1974). *Contra* American Home Assur. Co. v. Hartford Ins. Co., 190 N.J. Super. 477, 484, 466 A.2d 1128, 1132 (Super. Ct. App. Div. 1983).

65. The court in *Stewart-Smith Haidinger* did not address itself to this rule.

66. 682 P.2d at 1112.

67. *Id.*

68. The Alaska Supreme Court recognized the right of third parties to benefit under a contract in State v. Osborne, 607 P.2d 369 (Alaska 1980). This right depends upon the parties to the contract intending that at least one of the purposes of the contract is to benefit the third party. *Id.* at 371.

outsiders as incidental beneficiaries, at best.[69] A third party who was not intended to be a beneficiary cannot therefore claim damages from any failure by the insurer or the insured to fulfill the contract terms.[70] A third party is also without the ability to change this status unilaterally; it cannot make itself a party to the contract merely by acting in reliance upon the terms bargained for by others.[71] These observations make it clear that the doctrine of the implied insured as applied in *Stewart-Smith Haidinger* does not come within the current Alaska rules governing third party beneficiary contracts. The court in *Stewart-Smith Haidinger* acknowledges this weakness,[72] yet it claims that "under the special circumstances of this case, a third-party beneficiary contract should be implied at law."[73]

Other decisions by the Alaska Supreme Court are not very helpful in identifying the factual circumstances that will warrant the addition of a third party to an insurance contract by implication. Although not decided under the doctrine of the implied insured, the reasoning of the decision in *Syndoulos Lutheran Church v. A.R.C. Industries, Inc.*[74] is illustrative. There the court permitted a landowner to sue a subcontractor for defective workmanship even though he was not in privity with the subcontractor.[75] The court held that although the subcontractor had not specifically known the identity of the landowner at the time it entered the contract with the general contractor, the subcontractor must have known that there would eventually be an owner and that his work was intended to benefit that owner.[76]

The court had not found that such foresight was required of the parties in a previous case involving a factual arrangement very similar to that in *Syndoulos.* The court in *State v. Osborne*[77] did not permit an employee of a building contractor to bring a suit against a homeowner for unpaid wages after the building contractor had become bankrupt. The court held that there was no indication that the homeowner negotiated to have a house built so that he could confer a benefit on the contractor's employees.[78] Although the homeowner must have known that the contractor would employ workmen when he

69. *See* United States v. Aleutian Homes, 193 F. Supp. 571, 576 (D. Alaska 1961).
70. Century Ins. Agency v. City Commerce Corp., 396 P.2d 80, 82 (Alaska 1964).
71. *White,* 592 P.2d at 369.
72. 682 P.2d at 1112.
73. *Id.*
74. 662 P.2d 109 (Alaska 1983).
75. *Id. See also* Keel v. Titan Constr. Co., 639 P.2d 1228, 1231 (Okla. 1981).
76. *Syndoulos,* 662 P.2d at 114.
77. 607 P.2d 369 (Alaska 1980).
78. *Id.* at 371. *See also* Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208 (9th Cir. 1979); Paulson v. National Indem. Co., 498 P.2d 731 (Alaska 1972).

signed the contract, the homeowner intended to confer no benefit on the workmen. The Alaska Supreme Court has also agreed with the proposition that the benefit that can be implied from a contract must surely be somewhat limited when a stranger to the contract attempts to enforce the contract.[79]

V. THE RULE IN OTHER JURISDICTIONS

In the course of making its decision in *Stewart-Smith Haidinger,* the court examined the available precedent from other jurisdictions on the doctrine of the implied insured. This examination was appropriate, since the court had limited its previous application of the doctrine, in *RCA,* to subrogation claims against the implied insured.[80] Thus, if the court wished to allow the implied insured to instigate a suit to collect the proceeds of an insurance policy, it could not rely upon the doctrine of the implied insured as it stood after *RCA* and would have to expand the express limits of the doctrine.

The other jurisdictions the court examined varied in their acceptance of the doctrine permitting an implied insured to enforce an insurance contract affirmatively. One case, *Farmer's Insurance Exchange v. Nelson,*[81] involved a factual situation similar to that in *Stewart-Smith Haidinger.* Contrary to a lease provision, the lessee in *Nelson* obtained an insurance policy in his own name rather than in the name of the lessor. The Texas Court of Civil Appeals held that the benefits payable to the lessee from the insurance policy would be charged with a lien in favor of the lessor.[82] The lessor could then proceed directly against the insurer as a creditor to recover his pro rata share of the funds payable under the policy.[83]

A Louisiana case, *Taylor v. Audubon Insurance Co.,*[84] permitted the buyer of a house to proceed directly against an insurer for his share of the proceeds of a policy obtained by the seller in her own name but paid for by the buyer. Like the policy obtained by TNA, the *Taylor* policy insured a property interest. The Louisiana Court of Ap-

79. *See* Rego v. Decker, 482 P.2d 834, 837 (Alaska 1971) (desiring certainty in contracts).

80. Stewart-Smith Haidinger v. Avi-Truck, Inc., 682 P.2d 1108, 1112 n.2 (Alaska 1984).

81. 479 S.W.2d 717 (Tex. Civ. App. 1972).

82. *Id.* at 721. If the insurer is not informed of the lease, it is not bound thereby; but after the information is given to it, the duty rests upon the insurer to treat the proceeds of the policy as though such a provision was written into the policy. Fidelity & Guarantee Ins. Corp. v. Super-Cold Southwest Co., 225 S.W.2d 924, 927 (Tex. Civ. App. 1949).

83. *Nelson,* 479 S.W.2d at 721.

84. 357 So. 2d 912 (La. Ct. App.), *cert. denied,* 359 So. 2d 1307 (La. 1978). *Compare* Moran v. Kenai Towing & Salvage, Inc., 523 P.2d 1237 (Alaska 1974).

peals found that because the insurer had intended to insure the owner of the house, the policy could be equitably reformed to include the buyers as beneficiaries.[85] The *Taylor* court emphasized its conclusion that the equitable construction of the contract would not prejudice the insurer. Because there was no evidence that the company would have altered the terms of the policy or increased the premium had it known the buyers were to be the beneficiaries, the court decided it was proper to reform the contract.[86]

The Alaska Supreme Court declined to use the term "reformation" in its treatment of the contract in *Stewart-Smith Haidinger,* preferring instead the term "implication at law" in the creation of a third-party beneficiary contract.[87] To reform a contract, the court would have to find that the parties had made a mutual mistake and then would have to conform the contract to meet the parties' clear intentions.[88] The court's hesitation in using the term "reformation," and its substitution of the language "implication at law," however, is not overly persuasive considering the court's basis for applying the doctrine of the implied insured to *Stewart-Smith Haidinger.* Although it is true that the insurer did not know that Avi-Truck existed, the doctrine of the implied insured is based upon the idea that the insurer has contracted to insure a certain class of beneficiaries rather than a particular individual. The only mistake the parties in *Stewart-Smith Haidinger* made was that the parties incorrectly identified TNA as the representative of the class rather than the true owner, Avi-Truck.[89] It is the underlying contract, namely the insurance of an ownership interest, that the court has determined to be controlling, not the owner's identity.

Acceptance of the implied insured doctrine has not been universal. *Spires v. Hanover Fire Insurance Co.*[90] and *American Empire Insurance v. Fidelity Deposit Co.*[91] are the two leading cases that do not allow a party unnamed in an insurance policy to proceed directly against the insurer.

In *Spires,* a lessee was required to keep an airplane hangar and

85. 357 So. 2d at 915.

86. *Id.* at 914-15; *accord* Lighting Fixture & Electric Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1214 (5th Cir. 1969) (the fact that an incorrect name is unintentionally or mistakenly inserted in a policy does not provide the insurer with sufficient grounds for avoiding the policy and reformation for the mutual mistake may be obtained when the policy, as written, does not insure the person or interest intended to be insured); *see also* Mat-Su/Blackard/Stephan & Sons v. State, 647 P.2d 1101, 1104 (Alaska 1982).

87. *Stewart-Smith Haidinger,* 682 P.2d at 1113 n.3.

88. Riley v. Northern Commercial Co., 648 P.2d 961, 969 (Alaska 1982).

89. *See also* Cousineau v. Walker, 613 P.2d 608, 611-13 (Alaska 1980).

90. 364 Pa. 52, 70 A.2d 828 (1950).

91. 408 F.2d 72 (5th Cir. 1969) (construing Florida law).

any buildings she herself erected on her rented property in good condition. If a building was damaged, the lease required the lessee to restore it to its original condition by the end of the lease period. The lessee purchased a fire insurance policy covering all the buildings on the property. The *Spires* court denied the lessor standing to bring a suit to enforce the insurance contract for two reasons. First, the lessee had an insurable interest that was separate from that of the lessor, her interest being the value of the hangar she was bound to restore at the conclusion of the lease period rather that the lessor's possessory interest in the hangar. Second, the policy did not name the lessor as an intended beneficiary.[92] As in *Stewart-Smith Haidinger,* the insurer in *Spires* was not even aware of the lessor's existence. The *Spires* court followed the strict rule of construction that a "promissor cannot be held liable to an alleged beneficiary of a contract unless the latter was within his contemplation at the time the contract was entered into and such liability was intentionally assumed by him in his undertaking."[93]

The Alaska Supreme Court declined to follow *Spires* on the ground that the Pennsylvania court rested its holding in part on a finding that the risk to the insurer would be altered if a third party was allowed to proceed directly against it.[94] The *Spires* court had determined that adding more parties as potential insureds increases the probability that a claim will be filed, and thus also increases the possibility and the magnitude of litigation facing the insurer.[95] The court in *Stewart-Smith Haidinger* avoided this argument by deferring to the trial court's finding that the insurer's risk had not been increased by allowing Avi-Truck to bring this suit.[96]

The *Spires* court recognized that the substantive rights of the insurer were affected when it was faced with a potential proliferation of litigants. First, the insurer has the right to choose the person whom it is willing to insure.[97] Second, the insurer has the right to deal with the named insured whether in negotiating a settlement or in honoring a

92. *Spires,* 364 Pa. at 56, 70 A.2d at 830.

93. *Id.* at 57, 70 A.2d at 830-31.

94. *Stewart-Smith Haidinger,* 682 P.2d at 1113 n.4.

95. *See supra* notes 29-31 and accompanying text.

96. 682 P.2d at 1113 n.4.

97. Chief Justice Maxey elaborated further on the right of an insurer to choose his insured in a very concise concurring opinion:

> A contract of insurance is as much a personal one as is a contract to marry. An insurer is concerned with the moral risk as well as with the material risk involved in an insurance contract. A fire insurance company will not insure a man's property if the man has had too many fires. A casualty company will not insure a car owner if the owner has had too many accidents. An insurance company cannot be forced to enter into a contractual relationship with anybody.

Spires, 364 Pa. at 60, 70 A.2d at 835 (Maxey, C. J., concurring).

claim.[98] The Alaska Supreme Court in *Stewart-Smith Haidinger* failed to recognize these rights and instead focused on the possibility that the insurance company would be unjustly enriched if it did not honor Avi-Truck's claim.[99] Although the court does not expressly state this concern,[100] it appears troubled that Avi-Truck would be without any remedy if it was not allowed to pursue the insurer directly.

Such a concern with a party's inability to recover may not be appropriate for the court to consider when interpreting an insurance contract. The fact that an insurer is liable to a named insured does not create a legal liability for the insurer to an unnamed third party simply because the third party has a claim against the named insured. In *American Empire,* the Fifth Circuit directly addressed this issue in a case involving an insured who failed to make premium payments to the ultimate detriment of some non-parties to the insurance contract.[101] The court denied recovery to the non-parties, stating that "The claims of the third party are not against the [insurer] but against the named insured or their receiver for failure to account to [them.]"[102]

When compared with the remedies available to the principal parties to a contract, the remedies available to a third party outside the contract are generally limited. Still, in most situations the inability of the third party to proceed directly against the insurer would not extinguish its ability to be made whole.[103] In a case such as *Stewart-Smith Haidinger,* where the lessor would not be able to collect directly from the insurer on the insurance contract, the lessor could still sue the lessee to enforce the appropriate provisions of the lease and in effect become the ultimate beneficiary of the insurance contract.[104] Upon obtaining the insurance proceeds, the insured, in this case the lessee, would then retain only that portion of the policy proceeds that compensated it for loss to any actual interest the insured might have had in the property. The insured would hold the remainder of the proceeds

98. *Id.* at 59, 70 A.2d at 831-32.

99. 682 P.2d at 1113.

100. The trial court had rejected Avi-Truck's attempt to gain standing as TNA's assignee. *See supra* note 29. The court may have viewed granting Avi-Truck standing as an implied beneficiary as the only means to allow the company to be indemnified for a loss the court felt it should not suffer.

101. 408 F.2d at 74.

102. *Id.* at 76. This conclusion is based upon the rule that parties are presumed to contract only for themselves absent any clearly expressed intent to confer a benefit upon another. *Id.*

103. *See Spires,* 364 Pa. at 58, 70 A.2d at 831 (acknowledging that third party status affects substantive, not just procedural, rights).

104. *Id.;* Commercial Union Assurance Co. v. Pucci, 523 F. Supp. 1310, 1316 (W.D. Pa. 1981).

in a constructive trust for any others who have an interest in the property.[105]

Restricting third parties' remedies under an insurance contract to an action against the insured may also be desirable from the standpoint of judicial economy. The parties to a suit over an insurance contract would then be limited to those who, on the face of the contract, have the power to enforce it. These parties not only have the ability to enforce the contract, but also can release the other party from its obligations. Restricting the litigation to the contractual parties thus will involve only those "who [have] control over an action to enforce rights, and not necessarily the person who may ultimately be entitled to the benefit of any recovery obtained, nor the person beneficially interested in the outcome."[106]

Although the Alaska Supreme Court distinguished *Spires* from *Stewart-Smith Haidinger* because the supposed alteration of the risk in *Spires* was not present in *Stewart-Smith Haidinger,* the court's distinction would rest more appropriately on the existence of alternative remedies available to the third party in *Spires.* In *Stewart-Smith Haidinger,* Avi-Truck had no alternative remedy since TNA was no longer a viable corporation and could not exercise its rights.[107] If Avi-Truck was to receive any compensation for its loss, the court had to provide an equitable link between Avi-Truck and the insurer. *Stewart-Smith Haidinger's* reliability as a precedent could depend upon the court's subsequent willingness to recognize the lack of any alternative remedy as a prerequisite for an application of the implied insured doctrine. While the facts suggest that all such alternative remedies must be so exhausted, the court did not include this factor among the numerous limitations it imposed on the scope of its holding.

VI. THE STRICTER STANDARDS OF JUSTICE RABINOWITZ

Justice Rabinowitz has repeatedly stressed that judicial interpretations of contracts should adhere to the intent of the parties.[108] In previous cases in which the Alaska Supreme Court defined the rights

105. Insurance Co. of N. Am. v. Alberstadt, 383 Pa. 556, 119 A.2d 83, 85-86 (1956).

106. West Penn. Admin., Inc. v. Union Nat'l of Pittsburgh, 233 Pa. Super. 311, 327, 335 A.2d 725, 732 (Pa. 1975); *see also* Insurance Co. of N. Am. v. Waterhouse, 424 A.2d 675, 679 (Del. Super. Ct. 1980); Donovan v. New York Casualty, 373 Pa. 145, 147-48, 94 A.2d 570, 571 (1953).

107. *Stewart-Smith Haidinger,* 682 P.2d at 1113.

108. Olympic, Inc. v. Providence Wash. Ins. Co., 648 P.2d 1008, 1014 (Alaska 1982) (Matthews, J., with whom Rabinowitz, C.J., joins, dissenting); Alaska Ins. Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216, 1220 (Alaska 1981) (Rabinowitz, C.J., dissenting); United States Fire Ins. Co. v. Colver, 600 P.2d 1, 4 (Alaska 1979) (Rabinowitz, J., dissenting).

of strangers to an insurance policy, Justice Rabinowitz consistently joined or filed dissents that stressed deference to the bargained-for terms. In *Stewart-Smith Haidinger,* however, Justice Rabinowitz joined in the court's opinion.

Justice Rabinowitz has not objected to the principle that the court may find an implied insured from a contract; rather, his analysis has recognized that when no overwhelming public policy considerations are involved, parties should be allowed to bargain for terms according to their own preferences[109] rather than having the judiciary imply the terms from the contract. Judicially imposed terms, in Justice Rabinowitz's view, should not control unless the underlying contract utterly fails to provide for the situation that led to the litigation.[110] Leaving the parties to the terms of their bargain is particularly appropriate when neither party could be characterized as unsophisticated in the area of contracts.[111]

Justice Rabinowitz expressed no displeasure with the court's finding in *Stewart-Smith Haidinger* that the policy involved was intended to insure an ownership interest in the aircraft rather than the lessee's interest actually held by TNA. As will be shown in the next section, the court's conclusion that the insurance contract concerned the ownership interest in the aircraft and not TNA's actual interest keeps the doctrine of the implied insured as expanded in *Stewart-Smith Haidinger* within Alaska's statutory framework for interpreting insurance contracts.

VII. ALASKA'S STATUTORY FRAMEWORK FOR INTERPRETING INSURANCE POLICIES

Under the Alaska statutory scheme for regulating insurance contracts, only persons with an insurable interest in the insured item at the time of the loss may enforce an insurance contract.[112] Title 21 of the Alaska Statutes defines an insurable interest as "an actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from any loss, destruction, pecuniary damage or impairment."[113] Under this definition, as the owner of the aircraft Avi-Truck unquestionably had an insurable interest in the aircraft.

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109. *RCA,* 623 P.2d at 1220 (Rabinowitz, C.J., dissenting).

110. *Id.* at 1220 n.1 (quoting R. KEETON, INSURANCE LAW § 4.4(b), at 210 (1971)).

111. *Id.* at 1220.

112. ALASKA STAT. § 21.42.030(a) (1984).

113. *Id.* § 21.42.030(c) (1984). Alaska prohibits anyone from obtaining insurance as a wager rather than as coverage of an insurable interest. ALASKA STAT. § 21.42.075 (1984).

The controlling factor in determining the rights of a property holder, however, is whether the insurance policy covers the property interest the holder is seeking to enforce. In *Stewart-Smith Haidinger,* the insurer thought that it was covering TNA in its capacity as the owner of the aircraft. The property interest the parties intended the contract to cover was an ownership interest in the aircraft.[114] The Alaska statutory scheme, however, apparently does not provide for separate recognition of the property interests of an owner and a lessee.[115] The pertinent section of Title 21 reads: "When the name of the person insured is specified in a policy insuring property, the insurance can be applied only to the proper interest of the person insured."[116] The supreme court has interpreted this statute as governing only the relationship between the contractual parties. Consequently, the statutory language would not reach any equitable relationship that might exist between the insurer and a third party.[117]

As the court in *Stewart-Smith Haidinger* used its equitable powers to substitute Avi-Truck for TNA within the contract, the pivotal question in evaluating the legitimacy of the court's decision then becomes whether TNA's "proper interest in the aircraft" was its actual interest as a lessee or the interest of an owner, as the insurer believed it to be at the time the parties entered into the contract.[118] Because the insurer's belief that it was insuring the ownership interest in the aircraft is consistent with the greater property interest that Avi-Truck is trying to enforce, interpreting the policy to insure the ownership interest would not necessarily be inconsistent with the statute. This interpretation is particularly consistent in light of the fact that TNA was under its own contractual obligation to obtain insurance to protect the ownership interest in the aircraft. The court in *Moran v. Kenai Towing & Salvage, Inc.*[119] followed this interpretation of the statute. There the court construed a policy obtained by a mortgagee to include the property interests of both the mortgagor and the mortgagee.[120]

A prime concern of the legislature in enacting Title 21 was its desire to insure that an insurance company should not be legally obli-

114. Brief for Appellee at 29, Stewart-Smith Haidinger v. Avi-Truck, Inc., 682 P.2d 1108 (Alaska 1984). It should be noted that this is consistent with the insurer's claim that it believed it was dealing with the owner in TNA.

115. ALASKA STAT. § 21.42.040 (1984); *see generally* Currier v. North British Elec. Co., 101 A.2d 266, 268 (N.H. 1953) (insurance is a personal contract that provides coverage only for the interest of the insured, not insurance for the property as such).

116. ALASKA STAT. § 21.42.040 (1984).

117. Moran v. Kenai Towing & Salvage, Inc., 523 P.2d 1237, 1240 n.2 (Alaska 1974).

118. *Id.* at 1240.

119. *Id.*

120. *Id.*

gated to compensate for the loss of a property interest greater than it had contemplated in the contract.[121] The policy in *Stewart-Smith Haidinger* was intended to insure the entire value of the aircraft. Thus, as applied in *Stewart-Smith Haidinger,* the doctrine of the implied insured does not conflict with the statutory objective. If the legislature does not approve of unnamed parties enforcing insurance contracts, it has not made this intention clear to the judiciary. A restriction could be written into the framework of Title 21 easily, and should be included if the legislature wishes to curtail the rights of implied beneficiaries.

VIII. CONCLUSION

Stewart-Smith Haidinger marks the expansion of the implied insured doctrine in Alaska. Where the risk to the insurer is unchanged, meaning the insurable interest remains the same as that contemplated by the insurer, and where a third party is within the class the parties intended to benefit from a policy, an insurance contract may be implied at law in favor of an unnamed third party. The court's restrictions upon this expansion, however, leave some doubts regarding the proper application of the doctrine to various factual scenarios. First, the court's examination of the alteration of the insurer's risk was not an exhaustive one. Most importantly, the court failed to recognize that insured risks should be interpreted with regard to the potentialities that existed at the time of contracting rather than the actual results of subsequent events.

Also, the court's restrictions are silent on the significance of the availability of alternative remedies for the implied insured and whether the unavailability of such remedies is an important prerequisite to proper application of the doctrine. While Avi-Truck was without satisfactory alternatives in this particular case, the court did not acknowledge this fact. Finally, the court failed to mention whether or not the signatory to the contract must be incapable of enforcing its own rights, as TNA was here, before the doctrine may be applied. The court did not indicate what its holding would have been if the original insured, TNA, was still a viable corporation at the time of the litigation.

The factual situation presented in *Stewart-Smith Haidinger* was well suited for the court's exercise of its equitable powers. Still, the court failed to assess the impact of the individual factors that appear to justify its equitable intervention. The broad qualifying language purporting to limit the doctrine of the implied insured does not address all such factors. Greater guidance is needed from the court to

121. ALASKA STAT. § 21.42.040 (1984).

prevent the doctrine of the implied insured from becoming a destabilizing force in Alaska's insurance industry.

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