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# Insurance Coverage for an Innocent Co-insured Spouse

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## COMMENT

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1. This Comment is based in part on a continuing legal education presentation prepared by Laurie A. Kindel with the assistance of this author. See Laurie A. Kindel, *Recent Developments in Minnesota Insurance Law: Coverage for the Innocent Co-Insured Spouse*, in EVALUATING AND MANAGING INSURANCE CLAIMS (Minn. Institute of Legal Education No. 971, 1997). This derivative work was written with Ms. Kindel's gracious permission and input.

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## I. INTRODUCTION

It is well settled that an insurer may deny coverage where the insured has committed intentional or fraudulent acts that destroy the covered property.<sup>2</sup> Insurance coverage is predicated upon the fundamental principle that the loss suffered by the insured must be fortuitous.<sup>3</sup> A loss is not fortuitous if the insured caused it intentionally or fraudulently.<sup>4</sup> Furthermore, public policy and common sense dictate that the insured should not receive a financial benefit for his or her own wrong.<sup>5</sup>

Nowhere is this rule more applicable than where the insured intentionally sets fire to the covered property.<sup>6</sup> Application of this rule becomes less clear, however, when a co-insured spouse, innocent of any

2. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 5.3(a), at 475 (student ed. 1988).

3. See *id.* Fortuitous means “[h]appening by chance or accident. Occurring unexpectedly, or without known cause. Accidental; undesigned; adventitious. Resulting from unavoidable physical causes.” BLACK’S LAW DICTIONARY 654 (6th ed. 1990).

4. See KEETON & WIDISS, *supra* note 2, § 5.3(a), at 475. Insurance companies insert intentional act exclusions into their policies as the basis for denying coverage for the intentional or fraudulent acts of the insured. See Rachel R. Watkins Schoenig, *Property Insurance and the Innocent Co-Insured: Was It All Pay and No Gain for the Innocent Co-Insured?*, 43 DRAKE L. REV. 893, 894-95 (1995). Since insurance coverage is predicated on the concept of fortuity, however, even where there is no express policy provision denying coverage for such intentional acts, public policy dictates that coverage may be denied for a loss caused by an intentional act of the insured. See KEETON & WIDISS, *supra* note 2, § 5.3(a), at 475; see also *St. Paul Ins. Cos. v. Talladega Nursing Home, Inc.*, 606 F.2d 631, 633-34 (5th Cir. 1979) (holding that it is against public policy for an insurance company to insure against the consequence of the insured’s intentional wrongful acts); 18 COUCH ON INSURANCE 2d § 74:663, at 976-79 (rev. ed. 1983 & Supp. 1996) (stating that fraudulent or intentional destruction of the covered property is excepted from coverage based on public policy and morals, and relieves the insurer of liability even if there is no express policy provision to that effect).

5. See Schoenig, *supra* note 4, at 894-95 (stating that coverage may be denied for losses caused by the insured’s intentional acts in order to avoid “giving an insured a license to commit wanton and otherwise wrongful acts against the insured property” (quoting Ronald A. Hobgood & F. Anthony Lamb, *Recovery by an Innocent Co-Insured*, FOR DEF., July 1993, at 3)).

6. See *Atlas Assurance Co. of Am. v. Mistic*, 822 P.2d 897, 899 (Alaska 1991) (“Public policy dictates that an insured who intentionally sets fire to property covered by the insurance contract may not recover thereon.”); 18 COUCH ON INSURANCE 2D § 74:663, at 976 (rev. ed. 1983) (“Principles of public policy deny the right of recovery to an insured who fraudulently sets on fire the property covered by the contract of insurance.”); KEETON & WIDISS, *supra* note 2, § 5.4(c)(4), at 516 (“If the owner of a building intentionally burns it down, the loss is not fortuitous and no property insurance will be paid to such an owner.”).

wrongdoing and the victim of domestic violence, attempts to recover under the policy after the other spouse intentionally has set fire to the property.<sup>7</sup> The innocent co-insured spouse issue was addressed for the first time in Minnesota in *Watson v. United Services Automobile Ass'n*.<sup>8</sup> In that case, the Minnesota Court of Appeals held that an insurer must afford insurance coverage to the innocent co-insured spouse to satisfy the minimum requirements of Minnesota's Statutory Standard Fire Insurance policy.<sup>9</sup> The Minnesota Supreme Court has granted review of *Watson*.

This Comment contends that the Minnesota Supreme Court should affirm *Watson* for reasons beyond the statutory policy. The court should fashion a rule that allows coverage for the innocent co-insured spouse when the other spouse intentionally has burned the covered property. The situation of the innocent co-insured spouse is unique as compared to other types of innocent co-insureds. The innocent co-insured spouse is often the victim of an act of domestic violence, which leaves him or her financially and emotionally devastated. Due to this unique situation, the Minnesota Supreme Court should adopt a rule that affords coverage to the innocent co-insured spouse based on public policy or well-established rules of insurance contract construction.

Part II of this Comment begins by illustrating the typical innocent co-insured spouse case. Additionally, Part II examines how the innocent co-insured spouse issue has been resolved by courts in other jurisdictions. Part III outlines the Minnesota law upon which the *Watson* decision is based. Part III then closely examines the *Watson* decision. Finally, Part IV discusses the reasons the Minnesota Supreme Court should affirm *Watson* and afford coverage to the innocent co-insured spouse.

## II. OVERVIEW AND HISTORY

### A. *The Typical Case*

Although the typical innocent co-insured spouse case seems bizarre, the fact patterns are "surprisingly similar."<sup>10</sup> One spouse intentionally sets

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7. See Schoenig, *supra* note 4, at 893 ("For more than a century, courts have attempted to define the rights of an innocent co-insured when another insured has fraudulently caused a loss under an insurance policy.").

8. 551 N.W.2d 500 (Minn. Ct. App. 1996), *review granted* (Minn. Sept. 20, 1996).

9. See *id.* at 502-03.

10. Leane English Cerven, *The Problem of the Innocent Co-Insured Spouse: Three Theories on Recovery*, 17 VAL. U. L. REV. 849, 856 (1983); see also ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 63A at 385 (2d ed. 1996) (stating that these type of cases represent a "recurring fact pattern"). The sheer number of cases with this fact pattern lends support to this conclusion. See Larry D. Scheaffer, Annotation, *Right of Innocent Insured to Recover Under Fire Policy Covering Property Intentionally Burned by Another Insured*, 11 A.L.R.4TH 1228 (1982 & Supp. 1990) (examining

fire to the marital residence, either damaging the home and personal property or destroying everything.<sup>11</sup> Usually the couple is having marital difficulty.<sup>12</sup> And, more often than not, the incendiary act is precipitated by an event such as the innocent spouse moving out, obtaining a restraining order, or initiating divorce proceedings.<sup>13</sup> In a fit of rage, the other spouse intentionally burns the jointly-owned home.<sup>14</sup> The innocent spouse attempts to recover under the homeowner insurance policy.<sup>15</sup> The

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numerous cases with a similar fact pattern); *see also* cases cited *infra* notes 11-13.

11. *See, e.g.*, *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383, 1384 (11th Cir. 1988) (stating that the fire set by the husband totally destroyed the marital home); *Atlas*, 822 P.2d at 898 (finding that the husband burned down the marital home, causing \$100,000 of damage); *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 590 (Iowa 1990) (stating that the fire set by the husband caused "substantial damage" to the marital home); *Lewis v. Homeowners Ins. Co.*, 432 N.W.2d 334, 335 (Mich. Ct. App. 1988) (stating that the fire set by the husband caused extensive damage to the marital home and personal property therein); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 785 P.2d 192, 193 (Mont. 1990) (stating that the fire set by the husband totally destroyed the marital dwelling, including personal property therein).

12. *See, e.g.*, *Jensen v. Jefferson County Mut. Ins. Ass'n*, 510 N.W.2d 870, 871 (Iowa 1994). In *Jensen*, the couple began experiencing marital difficulties in August 1990. *See id.* On September 19, 1990, the wife asked the husband to move out. *See id.* The wife went to stay temporarily with a friend until the husband finished packing his belongings. *See id.* After the wife left, the husband set fire to the jointly-owned home. *See id.*

13. *See, e.g.*, *Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60, 61 (E.D. Mich. 1990) (finding that the husband burned down the home after the wife and children moved out); *Jensen*, 510 N.W.2d at 871 (finding that the husband burned the marital home after the wife requested that he move out); *Morgan v. Cincinnati Ins. Co.*, 307 N.W.2d 53, 53 (Mich. 1981) (finding that the husband burned the marital home after being served with divorce papers); *Winter v. Aetna Cas. & Sur. Co.*, 409 N.Y.S.2d 85, 86 (Sup. Ct. 1978) (finding that the husband returned home after a court hearing on the wife's request for a protective order, drank half a quart of cognac, and burned the marital dwelling); *Nationwide Mut. Fire Ins. Co. v. Pittman*, 348 S.E.2d 350, 350 (N.C. Ct. App. 1986) (finding that the estranged husband burned down the house after the wife moved out); *Short v. Oklahoma Farmers Union Ins. Co.*, 619 P.2d 588, 589 (Okla. 1980) (finding that the husband burned the marital home after being served with divorce papers); *Dolcy v. Rhode Island Reinsurance Ass'n*, 589 A.2d 313, 313 (R.I. 1991) (finding that the estranged husband, who was subject to a restraining order, burned down the marital home); *Error v. Western Home Ins. Co.*, 762 P.2d 1077, 1078 (Utah 1988) (finding that the estranged husband burned down the marital home after the wife filed for divorce and obtained a temporary restraining order against the husband); *Felder v. North River Ins. Co.*, 435 N.W.2d 263, 264 (Wis. Ct. App. 1988) (finding that the husband set fire to the marital home after the wife commenced divorce proceedings).

14. *See* JERRY, *supra* note 10, § 63A, at 385; *see also* cases cited *supra* note 11.

15. *See* JERRY, *supra* note 10, § 63A, at 385; *see also* cases cited *supra* notes 11-13. Generally, fire insurance coverage is contained within the homeowners policy. *See* KENNETH S. ABRAHAM, *INSURANCE LAW & REGULATION* 195 (2d ed. 1990). Homeowners insurance originated with fire insurance. *See id.* Over time, addi-

insurer denies recovery based on the policy's intentional act exclusion or fraud provision, contending that the intentional or fraudulent acts of one insured voids coverage for all co-insureds, including the innocent co-insured spouse.<sup>16</sup>

### B. Traditional Analysis for Determining Coverage

To determine coverage for the innocent co-insured spouse when the other spouse intentionally burns the insured property, courts have focused on whether the co-insured spouses' interests were joint or several.<sup>17</sup> If their interests are joint, coverage for the innocent co-insured spouse is denied.<sup>18</sup> Over time, courts have used many different analyses to determine whether the interests are joint or several.<sup>19</sup> These include: (1) analysis of the property interests based on the marital relationship;<sup>20</sup> (2) a rebuttable presumption of joint interest in the insured property;<sup>21</sup> (3) analysis of the insurance contract's express language;<sup>22</sup> (4) analysis of the innocent co-insured's reasonable expectations;<sup>23</sup> (5) analysis of the state statutory standard fire insurance policy;<sup>24</sup> or (6) analysis of the responsibility for the incendiary act.<sup>25</sup>

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tional coverages were added, broadening the scope of the policy beyond fire coverage. *See id.* It is unusual today, but theoretically possible, that a homeowner would have a fire insurance policy separate from a homeowners policy. *See id.*

16. *See* JERRY, *supra* note 10, § 63A, at 385; *see also* cases cited *supra* notes 11-13.

17. *See* Atlas, 822 P.2d at 899; Vance, 457 N.W.2d at 590; Scheafer, *supra* note 10, at 1229.

18. *See* Atlas, 822 P.2d at 899; Vance, 457 N.W.2d at 590.

19. For articles examining the various analyses used by the courts in innocent co-insured spouse cases, see Paul B. Butler, Jr. & Bob G. Freemon, Jr., *The Innocent Coinsured: He Burns It, She Claims – Windfall or Technical Injustice?*, 17 FORUM 187 (1981); Cerven, *supra* note 10, at 856; Dennis T. D'Antonio et al., *Protecting the Innocent: A Key Rule of Insurance Coverage Takes a Wild Ride in the Courts*, A.B.A. J., Feb. 1997, at 78; Ronald A. Hobgood & F. Anthony Lamb, *Recovery by an Innocent Co-Insured*, FOR DEF., July 1993, at 3; Schoenig, *supra* note 4, at 896; Stephen P. Carney, Comment, *Spouse's Fraud as a Bar to Insurance Recovery*, 21 WM. & MARY L. REV. 543 (1979); Ann Wetherholt, Note, *Insurance – Innocent Coinsured's Recovery Not Barred by Fraud of Husband*, 21 WAYNE L. REV. 169 (1974); Jill R. Wilson, Note, *Innocent Spouse's Right to Recover in Arson Cases: The Court Fiddles While North Carolina Burns*, 17 WAKE FOREST L. REV. 1022 (1981); Scheafer, *supra* note 10; and D.E. Evins, Annotation, *Fraud, False Swearing, or Other Misconduct of Insured as Barring Recovery on Property Insurance by Innocent Coinsured*, 24 A.L.R.3D 450 (1969).

20. *See infra* notes 26-44 and accompanying text.

21. *See infra* notes 45-50 and accompanying text.

22. *See infra* notes 51-68 and accompanying text.

23. *See infra* notes 70-75 and accompanying text.

24. *See infra* notes 76-84 and accompanying text.

25. *See infra* notes 85-90 and accompanying text.

### 1. *Old Rule: Property Ownership and the Marital Relationship*

Initially, courts uniformly denied coverage to the innocent co-insured spouse based on the co-insureds' property interests.<sup>26</sup> Since spouses typically owned the property in some form of joint ownership, courts following this analysis had little trouble concluding that the spouses' interests were joint and not severable.<sup>27</sup> These courts reasoned that it was impossible to separate the innocent spouse's interest since each spouse owned an undivided one-half interest in the whole property, not merely part of the property.<sup>28</sup> The fact that the policy usually was issued in both spouses' names also was significant.<sup>29</sup> Since the ownership interest in the property was joint, any insurable interest in the property also was joint.<sup>30</sup>

These courts also justified their decision to deny coverage based on the nature of the marital relationship.<sup>31</sup> A married couple was considered

26. See Schoenig, *supra* note 4, at 896.

27. See, e.g., Kosior v. Continental Ins. Co., 13 N.E.2d 423, 425 (Mass. 1938) (tenants in common); Morgan v. Cincinnati Ins. Co., 282 N.W.2d 829, 830-31 (Mich. Ct. App. 1979) (tenancy by the entirety), *rev'd*, 307 N.W.2d 53, 55 (Mich. 1981); Jones v. Fidelity & Guar. Ins. Corp., 250 S.W.2d 281, 283 (Tex. Ct. App. 1952) (community property); Klemens v. Badger Mut. Ins. Co., 99 N.W.2d 865, 867 (Wis. 1959) (joint tenants), *overruled by* Hedtcke v. Sentry Ins. Co., 326 N.W.2d 727, 740 (Wis. 1982). This conclusion was especially easy to reach when the married couple owned the property in tenancy by the entirety with its unity of interest in property. See Cerven, *supra* note 10, at 861; see also Maravich v. Aetna Life & Cas. Co., 504 A.2d 896, 902 (Pa. Super. Ct. 1986) ("Where spouses have owned property by the entireties, these courts have disallowed recovery of insurance proceeds by the innocent spouse because it would be impossible to separate the interest of the innocent spouse . . . and because compensating the innocent spouse would destroy the 'fictional oneness' of tenancy by the entireties.").

28. See Cerven, *supra* note 10, at 859-61; see also Maravich, 504 A.2d at 903. The Maravich court cited *Matyuf v. Phoenix Insurance Co.*, 27 Pa. D. & C.2d 351, 361 (1933), and noted that coverage was denied to the innocent spouse because, as joint owners, the spouses had a "joint duty and obligation to observe good faith toward the insurer." *Id.*

29. See Vance v. Pekin Ins. Co., 457 N.W.2d 589, 590-91 (Iowa 1990); see also Klemens, 99 N.W.2d at 866 (denying coverage to the innocent co-insured spouse and stating that "[w]hat is material is the fact that the policy was written in the joint names" of the spouses).

30. See Maravich, 504 A.2d at 903-04 (stating that "the insured," as used in an insurance policy, imposes a joint obligation on both named insureds); Kosior, 13 N.E.2d at 424-25. By contrast, many decisions that have analyzed the insurance contract without regard to the form of property ownership have interpreted "the insured" to create a several obligation for the co-insured. See *infra* notes 60-61 and accompanying text.

31. See Vance, 457 N.W.2d at 591; see also Jones, 250 S.W.2d at 282 (denying coverage to the innocent co-insured spouse because of the marital relationship); Klemens, 99 N.W.2d at 866 (denying coverage to the innocent co-insured spouse because the policy was issued to the husband and wife jointly); Cerven, *supra* note

a "single entity under the law."<sup>32</sup> Their property interests were "inextricably intertwined" and their contract interests inseparable.<sup>33</sup> The courts aimed to prevent insurance fraud and to prevent the wrongdoer from benefiting from his or her own wrong.<sup>34</sup> Due to the close nature of the marital relationship, courts suspected complicity between the innocent spouse and the arsonist spouse, which generally meant no recovery for the innocent co-insured spouse.<sup>35</sup> The courts regarded the married couple as a single entity and believed that it would be against public policy to allow that entity to recover for the arson of one of its members.<sup>36</sup>

As time passed, however, courts began to find fault with this analysis, and it is no longer followed in most, if not all, jurisdictions.<sup>37</sup> Emerging public policy concerns and the questionable reasoning of the analysis prompted the disfavor.<sup>38</sup> First, the courts realized that the analogy drawn between the property interests and the insurance policy interests was questionable, because an insurance policy does not insure the property itself; rather, the interest issued in an insurance policy is more accurately characterized as the personal property of the policyholder.<sup>39</sup> Second, the old rule imputed the arsonist spouse's criminal behavior to the innocent spouse.<sup>40</sup> This was unfair and unduly harsh because the innocent spouse

10, at 857-61 (citing *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D. & C.2d 351, 358 (1933), as an early case denying coverage to the innocent co-insured spouse based on the marital relationship).

32. *Cerven*, *supra* note 10, at 861-62.

33. *Vance*, 457 N.W.2d at 591 (citing *Cerven*, *supra* note 10, at 858-62).

34. *See* *Schoenig*, *supra* note 4, at 896-97; *see also* *Kulubis v. Texas Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986) ("[P]ublic policy dictates that a wrongdoer should not benefit from his wrongdoing.").

35. *See* *Cerven*, *supra* note 10, at 849-51.

36. *See, e.g.*, *Short v. Oklahoma Farmers Union Ins. Co.*, 619 P.2d 588, 590 (Okla. 1980) (stating that to allow the innocent spouse to recover was tantamount to providing funds to the entity of which the arsonist was a member, and that result would be flatly against public policy).

37. *See* *Cerven*, *supra* note 10, at 857 (noting that while this analysis still is used in some jurisdictions, it rapidly is being replaced); *see also* *Vance*, 457 N.W.2d at 591 (stating that because the property-based rule was harsh and inequitable, courts came up with alternative analyses).

38. *See* *Hosey v. Seibels Bruce Group, S.C. Ins. Co.*, 363 So. 2d 751, 754 (Ala. 1978) ("[T]his rule has long been criticized as harsh and poorly reasoned . . ."); *Vance*, 457 N.W.2d at 591 ("This reasoning has been criticized – we think rightfully so – both on insurance law principals and present day circumstances . . ."); *see also* *Cerven*, *supra* note 10, at 862 (outlining the criticisms of the property interest and marital relationship approach).

39. *See* *Vance*, 457 N.W.2d at 591 (quoting *Cerven*, *supra* note 10, at 862) ("The proceeds of an insurance [policy] are personal and are held in the same way as any personal property voluntarily acquired. Although the value of the insurance proceeds and that of the property are similar, the proceeds of an insurance policy are not a substitute for the property.").

40. *See* *Schoenig*, *supra* note 4, at 897 (citing *Hobgood & Lamb*, *supra* note



had been exonerated from any wrongdoing.<sup>41</sup> Third, courts rejected the outdated and archaic legal fiction that husband and wife are a single legal entity.<sup>42</sup> Fourth, the danger of insurance fraud due to complicity between the spouses is slight because the spouses usually are estranged.<sup>43</sup> Finally, and perhaps most importantly, courts began to recognize that denying recovery to the guilty spouse and permitting the innocent spouse to recover one-half of the insured loss still prevented the wrongdoer from benefiting from his or her own wrong.<sup>44</sup>

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19, at 3-4).

41. See *Hosey*, 363 So. 2d at 753 (holding that an insurance company may not use arson as a defense to recovery by an innocent co-insured spouse under a fire insurance policy, where "there has been no finding that the [innocent] insured directly set the fire, had knowledge and authorized its setting[,] or later ratified the wrongful act"); *American Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 139-40 (Ind. Ct. App. 1981) ("Western civilization is based upon the premise of individual responsibility for wrongdoing. We do not impose vicarious liability . . . just because of the marital relationship."). Indeed, the fundamental unfairness of imputing the criminal conduct of the arsonist spouse to the innocent co-insured may violate the innocent spouse's right to due process or equal protection under the Federal Constitution. See Brief of Amicus Curiae Michigan Trial Lawyers Association at 9-13, *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994) (arguing that imputing the wrongful conduct of the arsonist spouse to the innocent co-insured spouse violates due process); see also *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1978) (noting that imputing the wrongful conduct of the arsonist spouse to the innocent co-insured spouse because of the marital relationship may violate equal protection).

42. See *Cerven*, *supra* note 10, at 862 n.88. There have been numerous changes in the legal treatment of marriage and marital property. See *id.* For example, many states enacted Married Women's Acts, which ended coverture with respect to the holding of marital property, thereby removing the legal unity. See *id.* In some states these acts abolished tenancy by the entirety. See *id.* Moreover, the legal fiction of marital oneness was created to protect the spouse's rights in marital property from creditors when the other spouse dies. See *American Economy*, 426 N.E.2d at 139-40. To deny insurance coverage to an innocent co-insured spouse is a perversion of this legal fiction. See *id.*; see also *Hosey*, 363 So. 2d at 753 (holding that where the property is intentionally destroyed, the wrongful conduct of the arsonist spouse may not be imputed to the innocent co-insured spouse by virtue of the marital relationship); *American Hardware Mut. Ins. v. Mitchell*, 870 S.W.2d 783, 785 (Ky. 1994) (iterating that the legal status of wives is separate and apart from that of their husbands).

43. See *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381, 385-86 (Minn. 1987); *Cerven*, *supra* note 10, at 870.

44. See *American Economy*, 426 N.E.2d at 140. Moreover, even where there is a chance that the arsonist spouse might receive a benefit, even indirectly, a careful factual analysis can be made by the trial court to prevent it. See *id.*

## 2. *Rebuttable Presumption Theory*

One analysis suggested as a more equitable alternative to the old rule is the rebuttable presumption rule.<sup>45</sup> Under this rule, the innocent co-insured spouse is allowed "to rebut the presumption of a joint obligation by proving his or her interests in the property to be severable."<sup>46</sup> This analysis has been criticized on several grounds.<sup>47</sup> The problem is that while the marital relationship is not material, the divisibility of the co-insureds' property interests is material. Thus, the rebuttable presumption rule suffers from many of the old rule's shortcomings.<sup>48</sup> Indeed, the ability of the innocent co-insured spouse to prove divisibility of the property interest may be difficult, if not impossible.<sup>49</sup> Focusing on the property interests ignores the co-insureds' rights and duties under the insurance contract.<sup>50</sup>

## 3. *Interpretation of the Insurance Contract*

A more common alternative used today examines the co-insureds' obligations under the insurance policy, as opposed to the co-insureds' property interests, to determine severability. These courts analyze the insurance contract's express language to determine whether the co-insureds' obligations under the policy to refrain from fraud or arson are joint or several.<sup>51</sup> If the obligation not to commit fraud or arson is joint, not separate, then neither spouse may recover.<sup>52</sup> Conversely, if the obligations are separate, the innocent co-insured spouse may recover under the policy.<sup>53</sup>

To determine whether the co-insureds' obligations under the policy are joint or several, courts focus on the term modifying the word "insured" in the policy's intentional act exclusion or fraud provisions.<sup>54</sup> The rules of

45. See Cerven, *supra* note 10, at 863-65.

46. *Id.* (footnote omitted).

47. See *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 591-92 (Iowa 1990).

48. See *supra* notes 37-44 and accompanying text.

49. See *Vance*, 457 N.W.2d at 591-92 (citing Cerven, *supra* note 10, at 865).

50. See *id.* (citing Cerven, *supra* note 10, at 865).

51. See, e.g., *Vance*, 457 N.W.2d at 592; *Dolcy v. Rhode Island Joint Reinsurance Ass'n*, 589 A.2d 313, 314 (R.I. 1991); *Schoenig*, *supra* note 4, at 899; see also *Republic Ins. Co. v. Jernigan*, 753 P.2d 229, 232 (Colo. 1988) (holding that an innocent co-insured spouse is entitled to coverage because the contractual obligations under the policy are several, not joint, as to each co-insured).

52. See *Dolcy*, 589 A.2d at 314.

53. See *id.*

54. See, e.g., *Obson v. National Union Fire Ins. Co.*, 632 So. 2d 1158, 1160 (La. 1994); *McAllister v. Millville Ins. Co.*, 640 A.2d 1283, 1286-87 (Pa. Super. Ct. 1994).

contract construction peculiar to insurance contracts apply.<sup>55</sup> It is a cardinal principle of insurance contract construction that policy ambiguities are construed in favor of the insured.<sup>56</sup> An insurance policy term is ambiguous if it is susceptible to more than one reasonable interpretation.<sup>57</sup> If the terms of the policy are not ambiguous, however, courts must apply the express policy language without construing it.<sup>58</sup> Where the policy language is ambiguous the court will construe the policy in favor of the innocent co-insured, hold that the rights and obligations under the policy are several as to each co-insured, and afford coverage to the innocent co-insured spouse.<sup>59</sup>

The policy language can be ambiguous when the word "the" is used to modify the word "insured." Many courts have held that the policy unambiguously affords coverage to the innocent co-insured.<sup>60</sup> The rationale is that when "the insured" is given its plain and ordinary meaning it unambiguously refers only to the named insured who has violated the terms of the policy.<sup>61</sup> Other courts have held, however, that the term "the insured" is ambiguous, possibly referring to either all insureds or only to the insured who violated the policy provision.<sup>62</sup>

Conversely, courts have held uniformly that an insurance policy intentional act exclusion or fraud provision that uses the language "an insured" or "any insured" unambiguously creates a joint obligation as to all named insureds.<sup>63</sup> When this language is present in the insurance policy, courts will deny coverage to the innocent co-insured spouse.<sup>64</sup> Again, the rationale is that these words, given their plain and ordinary meaning, unambiguously refer to all insureds named in the policy.<sup>65</sup>

Under this analysis, then, the insurance company is permitted to

55. See Schoenig, *supra* note 4, at 899 (citing *Vance*, 457 N.W.2d at 592).

56. See *KEETON & WIDISS*, *supra* note 2, § 6.3(2), at 628-29. The ambiguity is construed against the insurer because the insurer is the party responsible for the drafting of the insurance contract and because the insurance company has superior knowledge of the contract subject matter. See *id.*

57. See *Vance*, 457 N.W.2d at 593; *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 172 S.E.2d 518, 522-23 (N.C. 1970).

58. See Schoenig, *supra* note 4, at 899.

59. See *id.*

60. See, e.g., *Obson*, 632 So. 2d at 1160; *McAllister*, 640 A.2d at 1286-87.

61. See *Obson*, 632 So. 2d at 1159-60.

62. See, e.g., *Richards v. Hanover Ins. Co.*, 299 S.E.2d 561, 563 (Ga. 1983) (holding that "the insured" in the insurance policy is ambiguous as to whether the co-insureds' interests are joint or several and must be construed strictly against the insurer).

63. See, e.g., *Obson*, 632 So. 2d at 1160; *McAllister*, 640 A.2d at 1286-87; see also *Vance*, 457 N.W.2d at 592 (denying insurance coverage to the innocent co-insured spouse because that policy's use of "an insured" in the intentional act exclusion and fraud provisions created joint obligations).

64. See, e.g., *Obson*, 632 So. 2d at 1160; *McAllister*, 640 A.2d at 1287-88.

65. See *McAllister*, 640 A.2d at 1287-88.

deny coverage to the innocent co-insured spouse as long as the insurer does so with clear and unambiguous policy language. This analysis has received widespread approval by courts and consequently has been labeled the “best reasoned rule” by some courts and commentators.<sup>66</sup> It is considered the better reasoned rule because the contract interpretation does not have the inequitable result of imputing the arsonist spouse’s wrongful conduct to the innocent spouse simply because of property interests or the marital relationship.<sup>67</sup>

Unfortunately, this approach encourages insurers to draft policies to exclude innocent co-insured spouses from coverage, and it fails to consider the public policy reasons for allowing such coverage.<sup>68</sup> Moreover, the express denial of coverage to an innocent co-insured spouse in the insurance policy may run contrary to his or her reasonable expectations.<sup>69</sup>

#### 4. *Reasonable Expectations*

A reasonable expectations analysis focuses not on the meaning the insurer would give the policy’s express language, but on what meaning a reasonable person in the position of the insured would give that policy language.<sup>70</sup> Courts using this analysis allow coverage for the innocent co-insured spouse who has an objectively reasonable expectation of coverage even if the policy’s express language forbids it.<sup>71</sup> Several courts have held that the innocent co-insured spouse has a reasonable expectation of coverage.<sup>72</sup> For example, in *Steigler v. Insurance Co. of North America*<sup>73</sup> the court stated:

[A]n insurance contract should be read to accord with the reasonable expectations of the purchaser. . . . Applying these principles, we hold that an ordinary person owning an undivided in-

66. See, e.g., *Vance*, 457 N.W.2d at 592.

67. See *id.*

68. See D’Antonio et al., *supra* note 19, at 78. The shift to a contract-based approach “sent a strong and undoubtedly welcome signal to insurers that properly drafted policies could eliminate coverage for innocent co-insureds.” *Id.*

69. See *infra* notes 70-75 and accompanying text.

70. See Schoenig, *supra* note 4, at 898.

71. See, e.g., *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1978) (holding that an innocent co-insured spouse had coverage even though the policy’s express language barred coverage for “the insured”).

72. See Schoenig, *supra* note 4, at 898; see also, e.g., *Haynes v. Hanover Ins. Co.*, 783 F.2d 136, 138 (8th Cir. 1986); *Hosey v. Seibels Bruce Group, S.C. Ins. Co.*, 363 So. 2d 751, 754 (Ala. 1978); *Steigler*, 384 A.2d at 401; *American Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 141-42 (Ind. Ct. App. 1981); *Hoyt v. New Hampshire Fire Ins. Co.*, 29 A.2d 121, 123 (N.H. 1942); *Krupp v. Aetna Life & Cas. Co.*, 479 N.Y.S.2d 992, 998 (App. Div. 1984); *McAllister v. Millville Ins. Co.*, 640 A.2d 1283, 1288 (Pa. Super. Ct. 1994); *Hedtcke v. Sentry Ins. Co.*, 326 N.W.2d 727, 739 (Wis. 1982).

73. 384 A.2d 398 (Del. 1978).

terest in property, not versed in the nice distinctions of insurance law, would naturally suppose that his [or her] individual interest in the property was covered by a policy which named him [or her] without qualification as one of the persons insured.<sup>74</sup>

In short, these courts reason that the innocent co-insured spouse has reasonable expectations that the spouses have a several obligation to refrain from violating a policy's intentional act exclusion and that the arsonist spouse's conduct will not be imputed to the innocent spouse.<sup>75</sup>

### 5. *Statutory Standard Fire Insurance Policies*

Recently, several courts have looked to the state's statutory regulation of fire insurance policies to determine whether the innocent co-insured's interest is joint or several.<sup>76</sup> Courts that apply this approach follow a two-step analysis. First, the court applies insurance contract interpretation rules to determine whether the statutory policy creates joint or several obligations to refrain from arson as to each insured.<sup>77</sup> It has been held that the use of "the insured" in the statutory policy creates a several obligation as to each co-insured.<sup>78</sup> Conversely, if the statutory policy uses "an insured" or "any insured" it has been held to create joint obligations as to each co-insured.<sup>79</sup>

Second, these courts look to the innocent co-insured spouse's policy to see whether it conforms to the statutory policy.<sup>80</sup> Statutory standard fire insurance policies set forth the minimum amount of coverage an insurer must provide.<sup>81</sup> A policy that does not meet the minimum requirements is reformed by the court to meet the statute's requirements.<sup>82</sup> If the statutory policy creates a several obligation by using "the insured," an insurance

74. *Id.* at 401 (citation omitted).

75. *See, e.g., id.*

76. *See, e.g., Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60, 61 (E.D. Mich. 1990); *Fireman's Fund Ins. Co. v. Dean*, 441 S.E.2d 436, 437-38 (Ga. Ct. App. 1994); *Obson v. National Union Fire Ins. Co.*, 632 So. 2d 1158, 1158 (La. 1994); *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266, 269-70 (Mich. 1994); *Morgan v. Cincinnati Ins. Co.*, 307 N.W.2d 53, 54 (Mich. 1981).

77. *See, e.g., Obson*, 632 So. 2d at 1159-60.

78. *See Ponder*, 729 F. Supp. at 61; *Obson*, 632 So. 2d at 1159-60.

79. *See Ponder*, 729 F. Supp. at 61; *Obson*, 632 So. 2d at 1159-60.

80. *See, e.g., Ponder*, 729 F. Supp. at 61 (noting that once the obligation under the statutory policy has been determined, the issue becomes whether the policy at issue in the particular case must be reformed to conform with the standard fire insurance policy).

81. *See, e.g., Borman*, 521 N.W.2d at 269 (stating that each fire insurance policy "shall contain, at a minimum, the coverage provided for in the standard fire insurance policy").

82. *See, e.g., Ponder*, 729 F. Supp. at 61-62; *Obson*, 632 So. 2d at 1161.

policy that uses “an insured” or “any insured” is reformed to meet the requirements of the statute.<sup>83</sup> Thus, in cases where the statutory policy’s fraud and intentional act provisions create obligations that are several, not joint, the innocent co-insured spouse can recover, regardless of whether his or her own insurance policy has language to the contrary.<sup>84</sup>

### 6. *Responsibility for the Incendiary Act*

Another analysis used by some courts determines severability based on the responsibility or liability for the incendiary act.<sup>85</sup> These courts reason that if the co-insured spouse is innocent of any wrongdoing, the responsibility or liability for the incendiary act itself is several, not joint.<sup>86</sup> Thus, the insurer must provide coverage to the innocent co-insured spouse even if the policy language clearly and unambiguously forbids it.<sup>87</sup>

This view was most clearly articulated in *Howell v. Ohio Casualty Insurance Co.*,<sup>88</sup> where the court stated:

We hold that the trial court correctly determined that the fraud of the husband was no bar to recovery under the policy by the innocent wife. However, we reach this result irrespective of whether the interests of the wife and husband in tenancy by the entirety, in personal property, or in the contract right under the policy are deemed to be joint or several. The significant factor is that the responsibility or liability for the fraud – here the arson – is several and separate rather than joint, and the husband’s fraud cannot be attributed or imputed to the wife who is not implicated therein. Accordingly, the fraud of the coinsured husband does not void the policy as to the plaintiff wife. . . . This conclusion is supported by the policy provisions prepared

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83. See, e.g., *Obson*, 632 So. 2d at 1160-61.

84. See, e.g., *Ponder*, 729 F. Supp. at 61-62; *Fireman’s Fund Ins. Co. v. Dean*, 441 S.E.2d 436, 438 (Ga. Ct. App. 1994); *Obson*, 632 So. 2d at 1160-61; *Borman*, 521 N.W.2d at 267; *Morgan v. Cincinnati Ins. Co.*, 307 N.W.2d 53, 54-55 (Mich. 1981).

85. See, e.g., *Howell v. Ohio Cas. Ins. Co.*, 327 A.2d 240, 242 (N.J. Super. Ct. App. Div. 1974); *Delph v. Potomac Ins. Co.*, 620 P.2d 1282, 1285 (N.M. 1980); *Dolcy v. Rhode Island Reinsurance Ass’n*, 589 A.2d 313, 315 (R.I. 1991); *Kulbis v. Texas Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986); *Error v. Western Home Ins. Co.*, 762 P.2d 1077, 1081 (Utah 1988).

86. See, e.g., *Dolcy*, 589 A.2d at 315.

87. See *id.* The *Dolcy* court noted that:

This view always allows the innocent co-insured to recover under the policy, even if the obligation [under the policy] to refrain from fraud and arson is deemed to be joint. According to this theory, the obligation of the insurer under the insurance policy is considered to be several as to each insured.

*Id.*

88. 327 A.2d 240 (N.J. Super. Ct. App. Div. 1974).

by the defendant carrier, even though we do not deem them necessarily controlling here.<sup>89</sup>

The underlying rationale is that it is unfair to allow an insurer to deny coverage, because it is tantamount to imputing the wrongful conduct of one spouse to the spouse who is innocent of any wrongdoing.<sup>90</sup>

### C. Determining the Amount of Coverage

Once a court finds there is coverage for the innocent co-insured spouse, the issue turns to the amount of recovery. As a general rule, the innocent co-insured spouse recovers his or her proportional interest (one-half of the value of the insured property) limited, of course, by the total policy limits.<sup>91</sup> This appears to be the rule even when the innocent spouse continues to reside with the arsonist spouse.<sup>92</sup>

The rationale is that permitting recovery of one-half reduces the innocent spouse's loss while denying any benefit to the arsonist spouse.<sup>93</sup> In addition to increasing the chances that the wrongdoer would benefit, allowing the innocent co-insured spouse to recover more than one-half would confer a windfall on the innocent spouse. If allowed to recover more than one-half, the innocent co-insured spouse would receive more than he or she would be entitled to upon severance of the common own-

89. *Id.* at 242.

90. *See Error*, 762 P.2d at 1080-81. In *Error*, the court compared the rules in other jurisdictions and the rationales underlying those rules. *See id.* The court then stated:

The rationale that most appeals to our sense of reason and fairness, and the rationale we adopt today, is that which focuses upon the responsibility for the fraudulent act. When the responsibility or liability for the fraud is separate rather than joint, an insured's fraud cannot be attributed or imputed to an innocent coinsured.

*Id.*

91. *See, e.g.*, *Atlas Assurance Co. of Am. v. Mystic*, 822 P.2d 897, 901 (Alaska 1991). In *Atlas*, the court noted that "[t]he vast majority of courts which have reached this issue, and which have allowed recovery at all, have held that the innocent coinsured may only recover one-half of the insurance proceeds, up to the policy limits." *Id.* (citing *Lewis v. Homeowners Ins. Co.*, 432 N.W.2d 334, 336 (Mich. Ct. App. 1988)). The court then held that the innocent co-insured spouse could recover "one-half of the damages or one-half of the [insurance] contract limits, whichever is less." *Id.*; *cf. Delph v. Potomac Ins. Co.*, 620 P.2d 1282, 1284 (N.M. 1980) (limiting the recovery of the innocent co-insured spouse to one-half of the amount of damage up to one-half of the policy limits).

92. *See Atlas*, 822 P.2d at 901; *see also Maravich v. Aetna Life & Cas. Co.*, 504 A.2d 896, 907 (Pa. 1986) (allowing an innocent spouse to recover one-half of insurance proceeds even though she continued to live with the arsonist spouse after the fire because any benefit to the arsonist spouse was indirect).

93. *See Lewis v. Homeowners Ins. Co.*, 432 N.W.2d 334, 337 (Mich. Ct. App. 1988).

ership, whether by divorce or other means.<sup>94</sup> If the arsonist spouse dies in the fire, however, his or her interest is extinguished, and the innocent co-insured spouse may recover the full coverage amount.<sup>95</sup> Since the arsonist spouse is dead, there is no risk of benefit to the wrongdoer.<sup>96</sup>

### III. COVERAGE FOR THE INNOCENT CO-INSURED SPOUSE IN MINNESOTA

#### A. *Minnesota Law Prior to Watson*

Until recently, no Minnesota appellate decisions had considered whether an innocent co-insured spouse could recover under a fire policy. Two Minnesota cases, however, had addressed the issue of fire coverage for other types of innocent co-insureds.<sup>97</sup> In both these cases, the courts applied the interpretation of the insurance contract analysis.<sup>98</sup> The courts determined coverage based on the severability of the co-insureds' obligations, under the express terms of the insurance contracts, to refrain from intentionally or fraudulently destroying the covered property.<sup>99</sup>

In *Hogs Unlimited v. Farm Bureau Mutual Insurance Co.*,<sup>100</sup> two innocent co-insured partners sought recovery under an insurance policy for their proportionate interest in partnership property.<sup>101</sup> The property had been intentionally destroyed by the third partner.<sup>102</sup> The insurance company denied coverage on the basis of the policy's fraud provision, which voided

94. See *Atlas*, 822 P.2d at 900-01; *Lewis*, 432 N.W.2d at 336-37.

95. See *Atlas*, 822 P.2d at 901; see also, e.g., *American Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 144-45 (Ind. Ct. App. 1981) (allowing a wife full recovery under a policy when the husband perished in the fire); *Felder v. North River Ins. Co.*, 435 N.W.2d 263, 266 (Wis. Ct. App. 1988) (allowing a wife to recover the full amount under the policy where the husband set fire to the marital home and then committed suicide by gunshot during the fire).

96. See *Atlas*, 822 P.2d at 901; *American Economy*, 426 N.E.2d at 140; *Felder*, 435 N.W.2d at 266.

97. See *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381 (Minn. 1987); *Reitzner v. State Farm Fire and Cas. Co.*, 510 N.W.2d 20 (Minn. Ct. App. 1993).

98. See *supra* notes 51-69 and accompanying text for a discussion of the interpretation of the insurance contract analysis.

99. See *Hogs Unlimited*, 401 N.W.2d at 386; *Reitzner*, 510 N.W.2d at 24.

100. 401 N.W.2d 381 (Minn. 1987).

101. *Id.* at 383.

102. *Id.* at 382. *Hogs Unlimited* was a general partnership consisting of three partners in the business of raising hogs. *Id.* The partners had obtained an insurance policy on partnership property through Farm Bureau Mutual Insurance Company. *Id.* The three general partners were named insureds under the terms of the policy. *Id.* While the policy was in effect, one of the general partners intentionally placed a hose into the barn, releasing anhydrous ammonia and causing the death of 243 hogs owned by the partnership. *Id.* at 383.



coverage for losses procured by the fraud of "the insured."<sup>103</sup> The Minnesota Supreme Court held that the innocent co-insured partners could recover their proportionate interests in the property.<sup>104</sup> The court reasoned that the term "the insured" in an insurance policy unambiguously refers only to the insured who intentionally or fraudulently destroys the property and not to innocent co-insureds.<sup>105</sup> An insurer may deny coverage to the innocent co-insured, but only if it does so in the insurance contract with clear and unambiguous language such as "an insured" or "all insureds" or "any insured."<sup>106</sup>

Six years later, in *Reitzner v. State Farm Fire & Casualty Co.*,<sup>107</sup> the Minnesota Court of Appeals was given the opportunity to apply the analysis used by the supreme court in *Hogs Unlimited*. In *Reitzner*, the innocent co-insured, the holder of a vendor's interest on a contract for deed, sought recovery under a homeowner policy after the vendee intentionally set fire to the property.<sup>108</sup> The insurance company denied coverage to the innocent co-insured, noting the insurance policy's express terms voided coverage for "any insured" when the losses are caused by the intentional or fraudulent acts of another insured.<sup>109</sup> Relying on *Hogs Unlimited*, the court of appeals held that an insurer may deny coverage to an innocent co-insured with clear and unambiguous language.<sup>110</sup> The court reasoned that the insurance policy's reference to "any . . . insured" in the intentional act exclusion clearly and unambiguously denied coverage for an innocent co-insured.<sup>111</sup>

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103. *Id.* at 384-85.

104. *Id.* at 386.

105. *Id.* at 385.

106. *Id.* at 386 (holding that "unless forbidden by the insurance contract, the innocent co-insured partners may recover their proportionate interest under the insurance policy").

107. 510 N.W.2d 20 (Minn. Ct. App. 1993).

108. *Id.* at 20. Stephen Walker purchased real property on a contract for deed. *Id.* at 22. The contract for deed required Walker to obtain insurance on the property, which Walker obtained through State Farm. *Id.* The policy named both Walker, the vendee, and Timothy L. LaPerre, the vendor, as co-insureds under the policy. *Id.* On or about March 28, 1991, Walker intentionally set fire to the property. *Id.* LaPerre then assigned his interest in the property and any interest in insurance proceeds under the State Farm policy to Bryan Reitzner. *Id.* at 23. Reitzner attempted to recover for the fire losses under the insurance policy as an innocent co-insured. *Id.*

109. *Id.* at 22-23.

110. The *Reitzner* court seized upon the language from *Hogs Unlimited* that stated an innocent co-insured could recover "unless forbidden by the insurance contract." *Id.* (quoting *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381, 386 (Minn. 1987)).

111. *Reitzner*, 510 N.W.2d at 24. Under Minnesota law, any term in an insurance policy that is susceptible to more than one reasonable interpretation is ambiguous. See *Columbia Heights Motors v. Allstate Ins. Co.*, 275 N.W.2d 32, 34

## B. *The Watson Case*

The Minnesota Court of Appeals recently addressed coverage for an innocent spouse in *Watson v. United Services Automobile Ass'n*.<sup>112</sup> Elizabeth Watson and her husband, Keith Watson, jointly owned the trailer home in which they lived.<sup>113</sup> In 1991, due to marital problems, the couple separated and Elizabeth Watson moved out of their home.<sup>114</sup> On January 13, 1994, soon after the couple's dissolution hearing but prior to the entry of the dissolution judgment, Keith Watson intentionally burned the couple's home.<sup>115</sup> The fire caused \$26,500 in damages to the home, as well as \$13,000 in personal property losses.<sup>116</sup>

Elizabeth Watson filed a claim of loss with United Services Auto Association (USAA) hoping to recover her losses under the fire insurance policy.<sup>117</sup> USAA denied coverage, citing the policy's intentional act exclusion and fraud provisions.<sup>118</sup> The policy excluded coverage for a loss caused by the intentional or fraudulent act of "an insured."<sup>119</sup>

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(Minn. 1979). If a term is ambiguous, it must be construed in favor of the insured. *See id.* at 36. In the absence of an ambiguity, the terms contained in an insurance contract are to be understood in their plain, ordinary, and popular meaning. *See Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960). Concluding that "any insured," as used in the insurance contract in *Reitzner*, clearly and expressly denied coverage for innocent co-insureds, the court denied coverage. *See Reitzner*, 510 N.W.2d at 24 (citing *Amick v. State Farm Fire & Cas. Co.*, 862 F.2d 704, 706 (8th Cir. 1988) for the proposition that a "[k]ey factor is whether the policy provision barring recovery by innocent co-insureds is clear and unambiguous").

112. 551 N.W.2d 500 (Minn. Ct. App. 1996), *review granted* (Minn. Sept. 20, 1996).

113. *Id.* at 500.

114. *Id.* The Watsons' dissolution hearing was not held until December of 1993, some two years after they had separated. *Id.* Although the dissolution was granted at the time of the hearing, the dissolution judgment was not entered until January 31, 1994. *Id.*

115. *Id.* at 500-01.

116. *Id.* at 501.

117. *Id.* Prior to the fire, the Watsons had insured their home under a fire insurance policy through United Services Automobile Association (USAA). *Id.* The policy provided coverage up to \$28,500 on the home, and an equal amount for property loss. *Id.*

118. *Watson*, 551 N.W.2d at 501.

119. *Id.* Specifically, the intentional act exclusion at issue in *Watson* precluded recovery for "any loss arising out of any act committed: (1) by or at the direction of *an insured*; and (2) with the intent to cause a loss." *Id.* (emphasis added). Similarly, the fraud provision stated that "[t]he entire policy will be void if *an insured* has . . . , after a loss, willfully and with intent to defraud[,] concealed or misrepresented any material fact or circumstance relating to this insurance." *Id.* (emphasis added). Apparently, the insurer denied recovery based on the fact that both the policy's intentional act exclusion and fraud provision used "an insured" and, thus, the intentional or fraudulent acts of one insured voided coverage for all co-

The *Watson* court ruled that Elizabeth Watson was entitled to recover under the insurance policy as an innocent co-insured spouse.<sup>120</sup> The court based its decision on the statutory Standard Fire Insurance Policy.<sup>121</sup> Using the approach employed by courts in two other jurisdictions, the *Watson* court applied a two-step analysis.<sup>122</sup> First, the court applied the modern insurance contract approach and concluded that the insurance policy's use of "an insured" in the intentional act exclusion and fraud provisions unambiguously excluded coverage for all named insureds under the policy, including innocent co-insureds.<sup>123</sup>

Second, the court compared Elizabeth Watson's insurance policy to the statutory Standard Fire Insurance Policy<sup>124</sup> to see whether her policy conformed with the requirements of the statutory policy.<sup>125</sup> The court noted that the statutory policy's fraud provision uses the term "the insured," which applies only to the named insured who has violated the terms of the policy, not to innocent co-insureds.<sup>126</sup> The statutory policy sets forth the minimum requirements an insurer may provide; an insurer may provide more coverage, but not less.<sup>127</sup> Therefore, the court held that the statutory policy mandates coverage for an innocent co-insured and that the Watsons' insurance policy must be reformed to afford coverage to Elizabeth Watson as an innocent co-insured.<sup>128</sup> The court limited Eliza-

insureds.

120. *Id.* at 504.

121. *Id.*; see also MINN. STAT. § 65A.01 (1996) (setting out the provisions of the Minnesota Standard Fire Insurance Policy).

122. *Watson*, 551 N.W.2d at 502. The cases from other jurisdictions from which the court adopted this analysis were *Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60 (E.D. Mich. 1990) and *Obson v. National Union Fire Ins. Co.*, 632 So. 2d 1158 (La. 1994). The holdings and analyses used by the *Ponder* and *Obson* courts are discussed *supra* notes 76-84 and accompanying text.

123. *Watson*, 551 N.W.2d at 501-02. The court noted this was the approach used in two earlier Minnesota cases, *Hogs Unlimited v. Farm Bureau Mutual Insurance Co.*, 401 N.W.2d 381 (Minn. 1987), and *Reitzner v. State Farm Fire & Casualty Co.*, 510 N.W.2d 20 (Minn. Ct. App. 1993). See *supra* notes 97-111 and accompanying text (discussing the *Hogs Unlimited* and *Reitzner* cases). The *Watson* court reasoned that "the" is a definite article and does not refer to all insureds. *Watson*, 551 N.W.2d at 501-02 (citing *Hogs Unlimited*, 401 N.W.2d at 385). Conversely, "an" is an indefinite article and, used in its plain and ordinary sense, means any or all insureds. *Id.* That is, "an insured," unlike "the insured," when given its plain and ordinary meaning, refers to all named insureds. *Id.* at 502 (citing *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 593 (Iowa 1990); *Dolcy v. Rhode Island Joint Reinsurance Ass'n*, 589 A.2d 313, 316 (R.I. 1991)).

124. MINN. STAT. § 65A.01 (1996).

125. *Watson*, 551 N.W.2d at 502.

126. *Id.* (citing *Hogs Unlimited*, 401 N.W.2d at 384-85).

127. *Id.* (citing *Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204, 209 (Minn. Ct. App. 1993)).

128. *Id.* (citing *Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60 (E.D. Mich. 1990); *Obson v. National Union Fire Ins. Co.*, 632 So. 2d 1158 (La. 1994)).

beth Watson's recovery under the policy, however, to one-half of the insured loss.<sup>129</sup>

In support of its holding, the court of appeals reasoned that the legislature used "the insured" in the statute, because affording coverage to innocent co-insureds effects "the better public policy."<sup>130</sup> The court stated:

We do not think the legislature intended to visit the blame of the errant insured on coinsureds who, having no control over the unauthorized conduct, are themselves blameless; nor do we think the legislature intended to make insureds their brother's keeper under penalty of losing their own insurance protection.<sup>131</sup>

The court further noted that the trend in modern case law has been to allow the innocent co-insured to recover, especially in innocent spouse cases, because the husband and wife usually are estranged, making the likelihood of collusion slim.<sup>132</sup>

To justify this holding, however, the *Watson* court had to resolve a direct conflict between the *Hogs Unlimited*<sup>133</sup> and *Krueger v. State Farm Fire & Casualty Co.*<sup>134</sup> decisions.<sup>135</sup> In *Hogs Unlimited*, the court held an insurer may deny coverage even to an innocent co-insured as long as the policy language is clear and unambiguous.<sup>136</sup> Conversely, in *Krueger*, the court held the statutory policy, which provides coverage to innocent co-insureds, sets forth the minimum amount of coverage an insurer must provide, and the insurer may not abridge the statute by providing less coverage.<sup>137</sup> Thus, *Hogs Unlimited* allowed the insurer to deny coverage to an innocent

129. *Id.* at 504 (citing *Hogs Unlimited*, 401 N.W.2d at 386).

130. *Id.* at 502-03 (citing *Hogs Unlimited*, 401 N.W.2d at 385-86). *Hogs Unlimited* is not a fire insurance case; however, the fraud provision in both the Standard Fire Insurance Policy, Minnesota Statutes section 65A.01, and the insurance policy at issue in *Hogs Unlimited* used the term "the insured." See *Hogs Unlimited*, 401 N.W.2d at 384. Rather than interpret what the policy at issue meant by "the insured," the *Hogs Unlimited* court looked to the statutory policy to determine what the legislature intended when it used the term "the insured." See *id.*

131. *Watson*, 551 N.W.2d at 502 (citing *Hogs Unlimited*, 401 N.W.2d at 385-86).

132. *Id.* at 502-03. It should be noted that although the *Watson* court cited *Hogs Unlimited*, this quote originally was articulated in *Morgan v. Cincinnati Insurance Co.*, 307 N.W.2d 53, 60 (Mich. 1981).

133. *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381 (Minn. 1987).

134. 510 N.W.2d 204 (Minn. Ct. App. 1993).

135. See *Watson*, 551 N.W.2d at 503.

136. *Hogs Unlimited*, 401 N.W.2d at 386 (holding that an innocent insured may recover "unless forbidden by the insurance contract"); see also, e.g., *Reitzner v. State Farm Fire & Cas. Co.*, 510 N.W.2d 20, 24 (Minn. Ct. App. 1993) (applying *Hogs Unlimited* and holding that "any . . . insured" unambiguously excluded coverage for innocent co-insureds).

137. *Krueger*, 510 N.W.2d at 209.

co-insured, but *Krueger* precluded the insurer from doing so.<sup>138</sup>

The *Watson* court resolved this conflict in favor of coverage for the innocent co-insured spouse on two grounds. First, the court reiterated that public policy favors coverage for innocent co-insureds.<sup>139</sup> Second, the innocent co-insured has a reasonable expectation of coverage under Minnesota law,<sup>140</sup> and the statutory policy must be construed liberally in favor of the insured.<sup>141</sup>

#### IV. REASONS FOR AFFIRMING *WATSON* AND ALLOWING COVERAGE FOR THE INNOCENT CO-INSURED SPOUSE IN MINNESOTA

In short, the *Watson* court created a rule that requires insurers to allow coverage for the innocent co-insured spouse when the other spouse intentionally has burned the covered property.<sup>142</sup> Insurers no longer are allowed to deny fire coverage to the innocent co-insured spouse even with clear and unambiguous language.<sup>143</sup> Given the unique circumstances of the innocent co-insured spouse, as compared to other innocent co-insureds, the Minnesota Supreme Court should affirm this ruling.<sup>144</sup> The

138. See *Watson*, 551 N.W.2d at 503.

139. *Id.*

140. See *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (adopting the reasonable expectations doctrine). It should be noted that this is a somewhat contorted use of the reasonable expectations doctrine. The reasonable expectations doctrine is a tool of insurance contract construction. See Laurie Kindel Fett, *The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditional Tools of Contract Interpretation*, 18 WM. MITCHELL L. REV. 1113, 1122 (1992). Yet, the *Watson* court apparently relies on the doctrine, at least in part, to resolve a conflict between two Minnesota appellate court decisions.

141. *Watson*, 551 N.W.2d at 503.

142. See *id.* at 502-03.

143. See *id.* It must be noted that *Watson* adopts a rule of absolute coverage for any co-insured with fire insurance. See *id.* The court's decision is not limited to the innocent co-insured spouse, but also includes other types of innocent co-insureds with fire insurance. See *id.*

144. In the alternative, the court should broaden the scope of the *Watson* decision to afford coverage to the innocent co-insured spouse in all cases (not just fire insurance cases) where the other spouse has intentionally destroyed jointly-insured marital property. The scope of the decision is not broad enough to provide coverage to the innocent co-insured spouse in all cases. It is inapplicable when the abusive spouse destroys insured marital property by a violent act other than arson. For example, in *State v. Zeien*, shortly after the wife filed a dissolution petition, the estranged husband entered the home and damaged or destroyed a water bed, two television sets, a video recorder, a refrigerator, a clock, and a microwave. 505 N.W.2d 498, 498 (Iowa 1993). He also punched holes in the walls and stained the carpet. See *id.* The husband admitted that he damaged the property in anger over the wife's decision to file for divorce. See *id.*

Under these facts, the *Watson* absolute coverage rule would be inapplicable to the innocent co-insured spouse, who sought coverage under a homeowner pol-

court should affirm, however, for reasons apart from, or in addition to, the Minnesota Standard Fire Insurance Policy.

If the court affirms solely on the basis of the Minnesota Standard Fire Insurance Policy, the insurance industry will use its powerful insurance lobby to influence the state legislature to amend the statute to exclude the innocent co-insured spouse. Simply changing the statutory policy's fraud provision language from "the insured" to "an insured" would accomplish this result. Unfortunately, there is no innocent co-insured spouse lobby to guarantee that the legislature considers public policy reasons for allowing coverage. The Minnesota Supreme Court should prevent such a result by affording coverage to the innocent co-insured spouse based on public policy.

Furthermore, if the court fails to affirm *Watson*, it likely will hold that the interpretation of the insurance contract approach used in *Hogs Unlimited* is the applicable rule of law in innocent co-insured spouse cases. Not only would this allow insurers to deny coverage to the innocent co-insured spouse, but it would encourage insurers to do so.<sup>145</sup> Insurers would be able to deny coverage to an innocent co-insured spouse with the language "the insured" in the intentional act exclusion and fraud provision. A rule based solely on the interpretation of the insurance contract is inadequate in innocent co-insured spouse cases. Review of the insurance policy's express language fails to address public policy concerns unique to the innocent co-insured spouse.<sup>146</sup> Indeed, in *Hogs Unlimited*, the supreme court indicated that it might treat innocent spouse cases differently and specifically limited its holding to business ventures.<sup>147</sup> The principles underlying an insurance coverage rule for co-insured business partners are drastically different than they are for co-insured spouses.

The court should affirm *Watson* because well-established public policy principles unique to the circumstances of the innocent co-insured spouse militate in favor of coverage. Even if the court refuses to acknowledge the

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icy in this type of situation, because the property was not intentionally damaged by fire. Minnesota's statute on homeowners insurance, unlike the statute on fire insurance, does not contain a fraud and intentional act provision that requires coverage for innocent co-insureds. See MINN. STAT. § 65A.27-30 (1996). Thus, if the policy clearly and unambiguously excluded coverage for an innocent co-insured, the innocent co-insured spouse would be without financial recourse. See *Hogs Unlimited*, 401 N.W.2d at 386 (holding an innocent insured may recover "unless forbidden by the insurance contract").

In *Zeien*, the husband was charged and convicted under a state criminal statute for the destruction of property. See *Zeien*, 505 N.W.2d at 498. A criminal conviction does nothing to compensate the innocent spouse, however. The issue of insurance coverage for the wife in the *Zeien* case was not addressed by that court. See *id.*

145. See D'Antonio et al., *supra* note 19, at 78.

146. See *id.*

147. See *Hogs Unlimited*, 401 N.W.2d at 385-86.

public policy considerations and reverts to the interpretation of the insurance contract analysis it used in *Hogs Unlimited*, coverage nevertheless should be allowed under rules of insurance contract construction. Established rules of insurance contract construction require coverage for the innocent co-insured spouse.

## A. Public Policy

### 1. Domestic Violence

It is a fundamental principle of insurance contract law that courts will not enforce provisions of an insurance contract that are against public policy.<sup>148</sup> Domestic violence is a problem of epidemic proportions in the United States.<sup>149</sup> There is a strong public policy against domestic violence.<sup>150</sup> In Minnesota, this public policy against domestic violence has

148. See JERRY, *supra* note 10, § 31 (e), at 177; see also Northern States Power Co. v. Fidelity & Cas. Co., 523 N.W.2d 657, 661 (Minn. 1994) (“As with all insurance contract-related issues, courts must consider . . . public policy.”); RLI Ins. Co. v. Pike, 556 N.W.2d 1, 3 (Minn. Ct. App. 1996) (citing *Shank v. Fidelity Mut. Life Ins. Co.*, 221 Minn. 124, 128, 21 N.W.2d 235, 238 (1945)) (“It is axiomatic that the parties to an insurance contract . . . cannot make a contract which is . . . contrary to public policy . . .”). One commentator suggests that an insurance policy provision also violates public policy when the provision would force the insured to engage in unreasonable behavior in order to preserve coverage. See ABRAHAM, *supra* note 15, at 95. To preserve coverage, an innocent co-insured spouse would have to guard his or her property, confront the violent spouse, and prevent the violent spouse from destroying the property. The innocent spouse would be in danger of bodily harm and would most often have to engage in violence to stop the violent spouse. Thus, an insurance contract provision which denies coverage to an innocent co-insured spouse can be characterized as requiring unreasonable behavior by the innocent co-insured to preserve coverage.

149. See Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota’s Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1285 n.1 (1994). While the actual numbers may be in dispute, all reports indicate pervasive domestic violence in this county. See *id.* Moreover, the numbers are not a true reflection of the problem, since many instances of domestic violence go unreported. See *id.* Women are much more likely to be the victim of domestic violence than are men. See *id.* “Battery by a spouse or lover is the single most common reason for women entering a hospital emergency room . . .” Linda Mills, *Empowering Battered Women Transnationally: The Case for Postmodern Interventions*, 41 J. NAT’L ASS’N SOC. WORKERS 261, 261 (1996). Approximately 85% of all domestic abuse victims are female. See Brief of Amicus Curiae California Alliance Against Domestic Violence and Ad Hoc Committee of Law Professors Working on Domestic Violence, at 2 n.4, *Borman v. State Farm Fire Ins. & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994) (citing Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies*, U.S. DEP’T OF JUST. REP. (1986)). It must be noted that this is not uniformly true, and in some cases the battering spouse can be the wife. See *id.*; see also *DePalma v. Bates County Mut. Ins. Co.*, 923 S.W.2d 385, 386 (Mo. Ct. App. 1996) (stating that the wife apparently burned down the marital home).

150. See *Blackman v. Commissioner*, 88 T.C. 677, 678, 682-83 (T.C. 1987). In

been codified in the "Domestic Abuse Act."<sup>151</sup> A rule that allows insurers to exclude coverage for the innocent co-insured spouse is an affront to the public policy against domestic violence.

When a spouse burns down the marital home, it is often an act of domestic violence or part of an ongoing pattern of domestic violence, where the arson is simply the abuser's current weapon of choice.<sup>152</sup> Domestic violence largely is motivated by the abusive spouse's desire to control and dominate the other spouse.<sup>153</sup> Typically, the domestic violence increases when the abused spouse attempts to assert control over his or her own life.<sup>154</sup> When the abused spouse attempts to leave the relation-

*Blackman*, the court denied the husband's loss deduction claim for a home destroyed by a fire, where the husband intentionally set fire to the wife's clothes during a domestic dispute. *See id.* The court stated that to allow a loss deduction would be to encourage couples to settle their dispute with fire and would be contrary to the public policy against domestic violence. *See id.*; *see also* Cloutterbuck v. Cloutterbuck, 556 A.2d 1082, 1087 (D.C. 1989) (noting the "substantial public policy interest in protecting victims of domestic violence"); Brennan v. Orban, 678 A.2d 667, 669 (N.J. 1996) (noting public policy against domestic violence). Public policy has been defined as "[c]ommunity common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like." BLACK'S LAW DICTIONARY 1231 (6th ed. 1990).

151. MINN. STAT. § 518B.01, subsds. 2(a), 4, 6 (1996). The Act enables the victim of domestic violence to obtain a court order for protection through summary proceedings. *See id.* "The rationale for such statutes is expressed in the Arkansas Domestic Abuse Act which states that 'this chapter shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within households in this state.'" Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. J. 401, 406 n.24 (1995) (quoting ARK. CODE ANN. § 9-15-101 (1993 & Supp. 1995)).

152. *See* MINN. STAT. § 518B.01, subd. 2(a) (defining domestic abuse as "(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats"); Hogs Unlimited v. Farm Bureau Mut. Ins. Co., 401 N.W.2d 381, 385 (Minn. 1987) (noting that generally "one spouse torches the home to spite or hurt the other"); Brief of Amicus Curiae University of Michigan Women and the Law Clinic et al. at 2, *Borman v. State Farm Fire Ins. & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994) (citing *Statement Before the Consumer Subcomm. of the Senate Commerce, Science & Tech. Comm.* (1993) (testimony of Francis A. McGarry, President, National Association of State Fire Marshals) (stating that the connection between arson and domestic violence is one of the ten areas in "desperate need of research")); Jim Adams, *State Is Trying to Curb Growing Arson Problem*, STAR TRIB. (Minneapolis), Feb. 21, 1997, at 1B (noting that a 1996 study by the Minnesota state fire marshal of 100 arson cases found that one of the primary motives in arson cases is domestic violence); Deann Smith, *Task Force May Bring in Funding: Group Fights Arson on Volunteer Basis*, BATON ROUGE ADVOC., Dec. 9, 1996, at 1B (noting that domestic disputes account for many arson cases).

153. *See Borman*, 521 N.W.2d at 270 n.17.

154. *See id.*; *see also* Mary Schouvieller, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence In*



ship, the abusive spouse retaliates by burning the marital home in an effort to deprive the innocent spouse of a home and, perhaps, to force the innocent spouse to return to the abuser.<sup>155</sup>

If the insurer denies coverage, the innocent spouse may be forced to decide between remaining homeless or returning to the abuser.<sup>156</sup> The innocent co-insured spouse's inability to recover under the policy is added incentive for the abusive spouse to commit the arson in the first place.<sup>157</sup> Moreover, the inability to recover under the policy means the innocent spouse has been victimized twice: once by the abusive spouse, depriving the innocent spouse of a home, personal property, or both; and a second time by the insurer, depriving the innocent spouse of compensation for the losses.<sup>158</sup> Even if the abused spouse finds the courage not to return to

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*Minnesota*, 14 LAW & INEQ. J. 593, 626 (1996) (stating that separation from the abuser marks the height of danger for the domestic abuse victim).

155. See *Speegle v. State*, 286 So. 2d 914, 917 (Ala. Crim. App. 1973) (noting that at the husband's trial for arson of the marital home, the wife testified that the husband warned her that unless she returned home, there would be no home to which she could return because he would burn the house); *People v. Martinez*, 564 N.Y.S.2d 414, 415 (App. Div. 1991) (upholding trial court finding that estranged husband intentionally burned marital home after wife refused to reconcile); *Moore v. State*, 736 P.2d 996, 998 (Okla. Crim. App. 1987) (affirming the husband's conviction for arson of the marital home, where the wife testified at trial that the husband told the wife that he would rather see her dead than with anyone else); *Bogan v. State*, 837 S.W.2d 422, 422 (Tex. Ct. App. 1992) (upholding the conviction of the husband for arson after he threatened to burn down the house if his estranged wife did not move home).

156. See *Borman*, 521 N.W.2d at 270 n.17. In domestic violence cases, the abused spouse is often financially vulnerable, and arson becomes a weapon of economic coercion against the abused spouse who cannot recover from the loss. See Brief of Amicus Curiae California Alliance Against Domestic Violence and Ad Hoc Committee of Law Professors Working on Domestic Violence at 13, *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994). The public policy importance and social implications are compounded when innocent children from the marriage are involved. See *id.* It is a misconception that an abused spouse is free to leave the abusive relationship. See *State v. Kelly*, 478 A.2d 364, 370 (N.J. 1984). Battered spouses often lack the financial resources to leave. See *id.* at 372. Moreover, the stigma of cultural and social stereotypes may make it difficult for the abused spouse to leave the abuser. See *id.* Finally, fear also may deter the abused spouse from leaving the abuser. See *id.* The inability of many women to leave an abusive and violent relationship is known as "battered woman's syndrome." See LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 95-104 (1984).

157. See *Borman*, 521 N.W.2d at 270.

158. See *Hedtcke v. Sentry Ins. Co.*, 326 N.W.2d 727, 740 (Wis. 1982). In *Hedtcke*, the innocent co-insured wife sought coverage under the fire insurance policy after the husband had pleaded guilty for the arson of the marital home. *Id.* at 736. At the time of the fire, the wife had moved out of the home, initiated divorce proceedings, and obtained a restraining order requiring the husband to vacate the home. *Id.*

the abuser, the costs of the abuser's domestic violence are borne largely by the taxpayers who fund the public welfare system.<sup>159</sup> Allowing one spouse to use criminal and intentional acts to deprive the innocent spouse of both home and insurance proceeds is against public policy.

It is vitally important that courts begin to consider the impact of domestic violence when deciding these types of cases. Failing to acknowledge these domestic violence considerations is tantamount to sending the message that domestic violence is not a serious problem.<sup>160</sup> It also reinforces the erroneous, yet common, view that violence in the home is largely a "private matter" not within the province of the courts.<sup>161</sup> In affirming *Watson*, the court must further the public policy against domestic violence and send the message that the law will not tolerate this type of domestic violence.

## 2. Fairness: Avoiding a Harsh Result

As the *Watson* court expressly stated, the "better public policy" is to allow coverage for the innocent co-insured spouse.<sup>162</sup> Conversely, a rule

159. See Brief of Amicus Curiae University of Michigan Women and Law Clinic et al. at 16-17, *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994) (citing Maryanne George, *One Act, A Massive Bill: Fire in Ann Arbor Demonstrated How Victims and Society Pay*, DETROIT FREE PRESS, Feb. 17, 1994, at 16A) (arguing that the denial of coverage to the innocent co-insured spouse increases the societal costs of domestic violence by increasing the number of spouses and children who are dependent on the welfare system, state funded shelters, or other public assistance).

160. See Schouvieller, *supra* note 154, at 632. The continued high levels of domestic violence show that the message against domestic violence is not being heard, and more attention from the courts and legislature is needed. See Preble, *supra* note 151, at 406. "The law may have come a long way in de-emphasizing the historical view of marriage and family as private sanctuaries beyond the scrutiny of the law, but it has not yet gone far enough." *Id.* Since most domestic violence victims are women, failing to acknowledge domestic violence considerations in innocent co-insured spouse cases is tantamount to reinforcing the negative stereotype that women maintain an inferior status in society and, therefore, abuse of women is acceptable. See Schouvieller, *supra* note 154, at 632 (stating that domestic violence is a product of society's acceptance and support of male superiority and female inferiority); see also Hobday, *supra* note 149, at 1285 n.2. (citing Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 983-97 (1989)) (noting that, incredibly, wife-beating was legally acceptable until the 19th century).

161. See Hobday, *supra* note 149, at 1285 ("Throughout history, society has largely ignored domestic abuse due to the traditional view that violence in the home constitutes a 'private matter.'"); see also Preble, *supra* note 151, at 406 (arguing that the judicial system needs to fight this traditional view and scrutinize domestic abuse).

162. *Watson v. United Servs. Auto. Ass'n*, 551 N.W.2d 500, 503 (Minn. Ct. App. 1996) (citing *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d

that denies coverage to the innocent co-insured spouse runs contrary to basic principles of equity and fairness. It imputes the wrongful conduct of the arsonist spouse to the innocent co-insured spouse merely because the spouses are insured under the same policy.<sup>163</sup> This is an especially harsh and inequitable result, because the innocent co-insured spouse is left financially and emotionally devastated, losing both a home and personal property.<sup>164</sup>

A rule requiring coverage for the innocent co-insured spouse still would preclude coverage if the insurer comes forth with evidence of complicity or collusion between the co-insured spouses.<sup>165</sup> Placing the burden on the insurance company to prove the complicity or collusion is an equitable result, given the insurer's vastly superior financial resources.<sup>166</sup> Thus, the Minnesota Supreme Court should follow the trend in other jurisdictions and afford coverage to the innocent co-insured spouse.<sup>167</sup>

### 3. *Minimal Risk of Insurance Fraud*

Finally, the public policy reasons for allowing coverage for the innocent co-insured spouse outweigh the competing public policy interest in preventing insurance fraud. It is true that "arson-for-profit," like domestic violence, represents a serious national problem accounting for a significant amount of all arson.<sup>168</sup> Deterrence is hindered by the fact that arson

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381, 386 (Minn. 1987)), *review granted* (Minn. Sept. 20, 1996).

163. See *Hosey v. Seibels Bruce Group, S.C. Ins. Co.*, 363 So. 2d 751, 754 (Ala. 1978) (noting that imputing the wrongful act of one spouse to the other has been criticized as a "harsh" result); *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1977) (noting it would be unfair and contrary to public policy to allow an insurer to impute the wrongful conduct of the arsonist spouse to the innocent co-insured spouse); Brief of Amicus Curiae Michigan Trial Lawyers Ass'n at 9-13, *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994) (arguing that imputing the wrongful conduct of the arsonist spouse to the innocent co-insured spouse violates basic principals of fairness and due process).

164. See *Borman*, 521 N.W.2d at 270 n.1; *Hedtcke v. Sentry Ins. Co.*, 326 N.W.2d 727, 740 (Wis. 1982).

165. In the case of complicity or collusion, the co-insured spouse is not innocent, and coverage can be denied on public policy grounds and because the insured has violated the fraud provision of the policy. See *supra* notes 2-5 and accompanying text (summarizing the reasoning, public policy, and methodology behind the use of intentional act exclusions and fraud provisions in insurance policies).

166. See *American Star Ins. Co. v. Allstate Ins. Co.*, 508 P.2d 244, 249 (Or. Ct. App. 1973) ("Normally the insurance company has resources and expertise superior to that of the insured.").

167. See *Watson*, 551 N.W.2d at 502 (citing *Hogs Unlimited*, 401 N.W.2d at 385) (noting that the trend in most jurisdictions is to allow the innocent co-insured to recover).

168. See *Cerven*, *supra* note 10, at 849. Insurance policyholders are considered to be one category among the six major types of arsonists. See *id.* Successful in-

is one of the most difficult crimes to investigate and prove because most of the evidence is destroyed in the fire.<sup>169</sup> While law enforcement programs designed to ferret out arson have improved, the resistance of insurance companies in court "is still a major weapon in the fight against for-profit arson."<sup>170</sup> The opportunity to recover insurance proceeds is a "primary motivating factor behind for-profit arson."<sup>171</sup> Once the incendiary origin of a fire is determined, the "existence of financial motive renders the policyholder the most likely suspect."<sup>172</sup>

The innocent co-insured spouse case, however, is uniquely different from other situations involving innocent co-insureds, because in the case of the innocent co-insured spouse, collusion or complicity is unlikely. For instance, co-insured business partners may be more inclined than spouses to commit insurance fraud, especially in times of failing fortunes.<sup>173</sup> This same reasoning does not apply in innocent spouse cases where the husband and wife are estranged and one spouse burns the house to spite or hurt the innocent spouse.<sup>174</sup> The act by the arsonist spouse of burning the marital home is not intended to benefit the innocent spouse, but rather to deprive the innocent spouse of a home and financial resources.<sup>175</sup> Under these circumstances, complicity or collusion between spouses not only is unlikely, it is patently illogical.

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insurance fraud harms more than just the insurance company because the insurer passes its increased operating costs along to the insurance consumer in the form of higher premiums. *See id.* at 849 n.1; *see also Borman*, 521 N.W.2d at 270. In *Borman*, the defendant-appellant State Farm Fire & Casualty and Amicus Curiae Auto Club Group Insurance Company argued that insurance companies must be able to deny coverage even to innocent co-insureds when insurance contracts have clear, unambiguous policy language. The insurance companies posited further that this result is necessary to combat insurance fraud and to deliver homeowners insurance to the public at affordable premiums. *Borman*, 521 N.W.2d at 270.

169. *See Cerven*, *supra* note 10, at 849-50.

170. *Id.* Indeed, "[t]he fact that the insured has been acquitted in a prior prosecution for burning the property to defraud the insurer does not prevent the insurer from raising incendiarism as a defense on the policy because of the difference of parties in the two actions and the greater degree of proof required in the criminal prosecution." 18 COUCH ON INSURANCE 2D § 74:663, at 979 (rev. ed. 1983).

171. *Cerven*, *supra* note 10, at 849.

172. *Id.* at 850. The close and intimate nature of the marital relationship adds to the suspicion of complicity. *See id.* at 851.

173. *See Hogs Unlimited v. Farm Bureau Ins. Co.*, 401 N.W.2d 381, 385 (Minn. 1987). Collusion or complicity is more likely in the case of co-insureds involved in business ventures. *See id.* (suggesting that in failing business ventures the temptation to collect on insurance covering business assets may be more prevalent and the danger of collusion among investors may be more enhanced than in the case of co-insured spouses).

174. *See id.*

175. *See id.*

## B. Rules of Insurance Contract Construction

### 1. Reasonable Expectations

Coverage for the innocent co-insured spouse also is supported by the reasonable expectations doctrine. This doctrine recognizes that insurance policies are typically long and complicated documents, which the ordinary insured will have difficulty reading and understanding.<sup>176</sup> Moreover, there is great disparity in bargaining power between insurance companies and those who seek insurance.<sup>177</sup> The insurance contract is drafted by the insurer with the "aid of skillful and highly paid legal talent."<sup>178</sup> The insured is forced to accept "whatever contract may be offered on a 'take-it-or-leave-it' basis if he [or she] wishes insurance protection."<sup>179</sup> As a result, the objective reasonable expectations of insureds "regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."<sup>180</sup>

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176. See KEETON & WIDISS, *supra* note 2, at 634; see also *Atwater Creamery Co. v. Western Nat'l Mut Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985) (noting that insurance companies recognize that "a lay person lacks the necessary skills to read and understand insurance policies, which are typically long, set out in very small type and written from a legalistic or insurance expert's perspective").

177. See KEETON & WIDISS, *supra* note 2, at 634; see also *Atwater Creamery Co.*, 366 N.W.2d at 277 ("The doctrine of protecting the reasonable expectations of the insured is closely related to the doctrine of contracts of adhesion. Where there is unequal bargaining power between the parties so that one party controls all of the terms and offers the contract on a take-it-or-leave-it basis, the contract will be strictly construed against the party who drafted it."); Fett, *supra* note 140, at 1119 (stating that insurance contracts are almost always contracts of adhesion because they are drafted by the insurer). Courts give legal effect to the insureds' reasonable expectations to account for this inequality and level the playing field between the parties. See Fett, *supra* note 140, at 1122-23.

178. Fett, *supra* note 140, at 1119 (citing SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 900, at 19-20 (W. Jaeger ed., 3d ed. 1973)).

179. *Id.*

180. *Atwater Creamery Co.*, 366 N.W.2d at 277 (quoting Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970)); see also Fett, *supra* note 140, at 1122. Stated another way, the reasonable expectations doctrine means that "courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer." KEETON & WIDISS, *supra* note 2, at 633. The point, then, is that "insurers ought not to be allowed to use qualifications, limitations, restrictions, and exceptions in an insurance policy that are contrary to the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved." *Id.* at 637. The insurance policy coverage "should be determined in accordance with what lay persons would reasonably understand as the scope of coverage." *Id.* at 636. "The reasonable expectations doctrine gives the

Nowhere does the reasonable expectations doctrine seem more applicable than in the case of an innocent co-insured spouse.<sup>181</sup> The innocent co-insured spouse typically is not a sophisticated purchaser of insurance. Instead, the typical innocent co-insured spouse is an ordinary person who relies on the insurers to provide coverage that meets the co-insured's needs.<sup>182</sup> With respect to a property insurance contract covering the interests of more than one insured, "an ordinary person . . . not versed in the nice distinctions of insurance law, would naturally suppose that his [or her] individual interest in the property was covered."<sup>183</sup> The innocent

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court a standard by which to construe insurance contracts without having to rely on arbitrary rules which do not reflect real-life situations and without having to bend and stretch those rules to do justice in individual cases." *Atwater Creamery Co.*, 366 N.W.2d at 278. Thus, the reasonable expectations doctrine applies even when there is no ambiguity in the policy, and the policy language expressly denies coverage to an innocent co-insured spouse. *See id.* (noting the policy term regarding burglary was clear and unambiguous, but allowing recovery based on the insured's reasonable expectations).

181. In *Atwater Creamery Co.*, the Minnesota Supreme Court set forth several factors for determining whether application of the reasonable expectations doctrine is appropriate, including: (1) whether there is unequal bargaining power between the parties; (2) whether the insured is an ordinary, unsophisticated lay person; (3) whether the insured relied on the insurer to provide coverage which meets the insured's needs; (4) whether the particular policy provision is generally known to the public; (5) whether there is a major policy term hidden as an exclusion; and (6) whether the policy language is ambiguous. 366 N.W.2d at 277-78. Factors one through four all are present in innocent co-insured spouse cases. *See infra* notes 182-187 and accompanying text. Indeed, the *Watson* court itself expressly stated the innocent co-insureds have a reasonable expectation of coverage. *See Watson v. United Servs. Auto. Ass'n*, 551 N.W.2d 500, 503 (Minn. Ct. App. 1996), *review granted* (Minn. Sept. 20, 1996).

It should be noted, however, that some of the Minnesota decisions that followed *Atwater Creamery Co.* suggest that factor five (hidden exclusion) must exist for the doctrine to be applicable. *See Board of Regents v. Royal Ins. Co.*, 517 N.W.2d 888, 891 (Minn. 1994) (suggesting that the reasonable expectations doctrine addresses egregious situations in which coverage described in the large print would be defeated by an exclusion deceptively hidden in the small print); *National Indem. Co. v. Ness*, 457 N.W.2d 755, 757 (Minn. Ct. App. 1990) (suggesting the reasonable expectations doctrine has "generally been limited to those cases in which the policy, while purporting to provide a specific coverage, so limited the coverage as to amount to a hidden exclusion"). While the presence of a hidden exclusion is undoubtedly an important factor, a closer reading of *Atwater Creamery Co.* suggests that it is not determinative, but instead is only one factor among several that the court will consider. *See Atwater Creamery Co.*, 366 N.W.2d at 278 (stating that the reasonable expectations doctrine applies "in certain circumstances, such as where major exclusions are hidden in the definitions section").

182. *See Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1978) (referring to an innocent co-insured spouse as an "ordinary person . . . not versed in the nice distinctions of insurance law" and as an "ordinary purchaser").

183. *Id.* (holding that when "read to accord with the reasonable expectations of an ordinary purchaser," a policy that names the innocent co-insured spouse

co-insured spouse reasonably would expect that the policy for which he or she was paying substantial premiums would provide coverage for any fire causing loss to the property, unless he or she intentionally set it.<sup>184</sup> This is true even if the spouse carefully reviews the policy terms, since the spouse typically is an ordinary person not versed in insurance law distinctions.<sup>185</sup>

Due to the disparity in bargaining power between the parties, even if the innocent co-insured spouse were to notice the exclusion for innocent co-insureds, the insurer would be unwilling to negotiate the term, forcing the innocent co-insured to take the policy as is.<sup>186</sup> Even if the insurer were willing to negotiate, the innocent spouse would be forced to pay extra for additional coverage or for a separate policy to ensure that there would be coverage in the event a loss is caused intentionally by the other spouse. A principal reason courts give legal effect to the insured's reasonable expectations is to account for this inequality and level the playing field between the parties.<sup>187</sup> Thus, the Minnesota Supreme Court should affirm *Watson* based on application of the reasonable expectations doctrine.

## 2. Unconscionability

The unconscionability doctrine also militates in favor of coverage for the innocent co-insured spouse. A contract is unconscionable if no reasonable person would make such a contract and no fair and honest person would accept it.<sup>188</sup> Unconscionable contracts, or clauses in contracts, are characterized by unequal bargaining power between the parties, which results in absence of meaningful choice for one party and contract terms that are unreasonably favorable to the other.<sup>189</sup> Where a contract is found to be unconscionable, courts may "remove the unconscionable clause or

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without qualification as one of the persons insured does not bar coverage for the innocent co-insured spouse when the other spouse destroys the property by arson).

184. *See id.* (applying the reasonable expectations doctrine and affording coverage to the innocent co-insured spouse).

185. *See id.*; Fett, *supra* note 140, at 1122.

186. *See* Fett, *supra* note 140, at 1119 (citing SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 900, at 19-20 (W. Jaeger ed., 3d ed. 1973) (stating that "insurance contracts are drafted with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant [for insurance] will be permitted"))).

187. *See id.* at 1122-23.

188. *See* Glarner v. Time Ins. Co., 465 N.W.2d 591, 595 (Minn. Ct. App. 1991) (citing Overholt Crop. Ins. Serv. Co. v. Bredeson, 437 N.W.2d 698, 702 (Minn. Ct. App. 1989)) ("A contract is unconscionable if it is such as no man [or woman] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair man [or woman] would accept on the other.").

189. *See* Gorden v. Crown Cent. Petroleum Corp., 423 F. Supp. 58, 61 (D. Ga. 1976); Vierkant v. Amco Ins. Co., 543 N.W.2d 117, 120 (Minn. Ct. App. 1996); *Glarner*, 465 N.W.2d at 596.

limit its application to avoid an unfair result."<sup>190</sup>

An insurance contract that bars coverage for the innocent co-insured spouse may be unconscionable. No reasonable innocent co-insured would make a contract requiring payment of a substantial premium if that contract could be voided by the acts of some other party.<sup>191</sup> Similarly, no fair and honest insurer should accept a contract that unfairly imputes wrongful conduct from one spouse to the other.<sup>192</sup> Insurance companies provide a vital public service and, therefore, have a responsibility to the public to provide fair policy terms.<sup>193</sup> Finally, the contract is plagued by unequal bargaining power, because the innocent co-insured spouse is forced to accept whatever terms are offered on a "take-it-or-leave-it basis."<sup>194</sup>

190. *Glamer*, 465 N.W.2d at 596; see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (stating that if the contract or a contract term is unconscionable, "the court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term").

191. See *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1978) (holding that the co-insured spouse paying a substantial premium for property insurance would reasonably expect his or her individual interest in the property to be covered regardless of the intentional or fraudulent acts of a co-insured).

192. See *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 592 (Iowa 1990) (quoting *Cerven*, *supra* note 10, at 867-68) ("Courts recognize the fundamental injustice of barring recovery . . . because a reasonable person does not expect arson to be imputed as a result of the acts of the spouse."); see also *Steigler*, 384 A.2d at 401 (noting that imputing the wrongful conduct of the arsonist spouse to the innocent co-insured spouse may violate equal protection); Brief of Amicus Curiae Michigan Trial Lawyers Association at 9-13, *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266 (Mich. 1994) (arguing that imputing the wrongful conduct of the arsonist spouse to the innocent co-insured spouse violates due process).

193. See *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979). In noting the special duty the insurance company has to the public, the *Egan* court stated:

The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.

*Id.* (citations omitted); see also *American Standard Ins. Co. v. Le*, 539 N.W.2d 810, 815 (Minn. Ct. App. 1995) ("The policy of insurance between the insurer and the insured creates a fiduciary duty in the insurer toward its insured. Therefore, when the parties' respective interests conflict, the insurer must subordinate its interest to that of its insured.").

194. See *Fett*, *supra* note 140, at 1119. *Fett* addressed the issue of unconscionability in insurance contracts by stating:

All insurance contracts run the risk of having unconscionable terms be-



## V. CONCLUSION

The Minnesota Supreme Court should affirm *Watson*. The interpretation of the insurance contract analysis used in *Hogs Unlimited* is inadequate in innocent co-insured spouse cases. The innocent co-insured spouse is often the victim of domestic violence. Insurance fraud is unlikely because the incendiary act is intended to spite or hurt the innocent spouse. If coverage is denied, the innocent spouse is left financially and emotionally devastated and may become a ward of the state. Given these unique circumstances, the court should adopt a rule that mandates coverage for the innocent co-insured spouse. Strong public policy against domestic violence, principles of equity and fairness, and established rules of insurance contract construction all support this result. Moreover, the superior financial resources of insurers require that the insurer bear the burden of establishing complicity between the spouses. Only if the insurer can establish complicity between the spouses should coverage for the innocent co-insured spouse be denied.

*Brent R. Lindahl*

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cause they are drafted solely from the insurer's perspective, and the language chosen is not subject to negotiation. The lack of negotiation, coupled with the vast experience of the insurer with prior claims, results in language which strongly favors the insurer. Insurance contracts provide insurers with many opportunities for overreaching when drafting their policies, and courts at times refuse to enforce these terms even if they are clear and unambiguous.

*Id.* at 1121.