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FRAUDULENT CLAIMS AND THE INNOCENT SPOUSE: A CALLING FOR REASONABLE EXPECTATIONS

Note

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Arson[1] and other methods[2] constituting fraudulent property losses are estimated as the costliest crimes in America.[3] With arson loss alone exceeding one billion dollars annually,[4] and its occurrence incessantly rising,[5] the extraordinary economic impact of the crime falls upon local governments and homeowners who battle the constantly escalating cost of insurance premiums.[6] Accordingly, property loss caused by arson and similar acts which defraud insurers is a social problem of mounting concern.[7]

Various motives underly the fraudulent property loss epidemic.[8] One primary motivating factor is the acquisition of insurance proceeds.[9] A business depleted of cash reserves or a slow moving real estate holding is transformed readily into a cash producing asset if the property is destroyed and insurance collected. Unfortunately, property destruction for the purpose of defrauding insurers, frequently has great economic benefits compared with the remote possibility of detection.[10]

The monetary encouragement of illegal activities to obtain insurance benefits has long initiated criticism against property insurance.[11] Yet, property insurance serves an important social function by spreading an individual's risk of loss among the general public.[12] In short, insurance is an economic necessity to families and businesses which outweighs policy considerations concerned with the discouragement of illegal and fraudulent activities.[13]

Nevertheless, as insurers increasingly defend against fraudulent property losses in an attempt to curb illegal actions,[14] courts must determine the rights and interests of innocent co-insured spouses who did not cause the fraudulent loss. Generally, insurance companies deny recovery to an insured whose fraudulent act destroyed the insured property.[15] However, innocent spouses attempts to recover insurance benefits after another co-insured committed some fraudulent act, has resulted in disparate theories granting and denying recovery.[16] Unfortunately, the various judicial theories often apply inappropriate tort principles, or strictly construe contract doctrines to yield inequitable results to either the insurer or the innocent spouse.[17]

In an attempt to clarify the confusion associated with the innocent spouse's indemnification rights this paper suggests that the emerging doctrine of reasonable expecations should determine an innocent spouse's possible recovery.[18] First, this paper will introduce traditional insurance contract principles and focus on the doctrine of reasonable expectations. Second, current theories determining innocent spouses recovery rights will be analyzed and compared with other innocent co-insureds' recovery rights. In an attempt to reach fair results without resorting to inappropriate theories, this paper suggests that future cases adopt an analysis incorporating the innocent spouse's reasonable expectations of coverage rather than rely upon traditional contract construction principles.

Traditional Concepts of Insurance Contracts and Judicial Construction

Courts maintain an insurance policy's validity if the co-insured party had an interest which would be injured from the insured property's destruction.[19] Generally, an insurable interest in property exists if a benefit is derived from the property, or a loss would occur from the property's destruction.[20] An insurable interest in property requires that a pecuniary injury might occur from the natural consequence of the property's injury.[21] Thus, a co-insured can obtain a sufficient insurable interest in either personal, representative, or fiduciary capacities.[22]

An insurance policy is a contract of indemnity between an insurance company and an insured.[23] The policy is subject to the same rules that govern other contracts unless those rules are modified specifically by statute. In absence of fraud or mistake, the insured is bound by the provisions of the contract and cannot claim ignorance concerning the scope of coverage.[24]

General rules of construction require contract ambiguities to be strictly construed against the insurer and liberally favor the insured.[25] Courts construe contract ambiguities against the insurer because the insurer was responsible for drafting the contract terms. Additionally, the insurer's superior position of bargaining strength dictates a judicial willingness to favor the weaker party when interpreting contract ambiguities.[26] However, contract

interpretation favoring the insured does not guarantee that an insured will recover regardless of the contract's wording because an insurance contract must be construed reasonably.[27] Therefore, clear and unambiguous policy language prevents courts from creating a new contract or altering an existing contract.[28] Judicial interpretation must adhere to the language of the policy as an accurate representation of the parties' actual intent.[29]

Modern insurance policies are contracts of adhesion.[30] The insured has little choice determining which contract provisions are contained in the policy.[31] Instead, the insured must accept or reject a policy in its entirety as provided by the insurer.[32] Although statutory regulation developed inroads into the insurer's autonomy and increased the insured's relative bargaining position, insurer's still draft policy provisions with little public guidance. Thus, judicial construction of insurance policies as contracts of adhesion remains appropriate.[33]

The adhesionary nature of modern insurance policies is markedly different from earlier insurance contracts.[34] Initially, insurance contracts were confined primarily to the protection of mariners' goods. Early insurance contracts were entered between parties of equal bargaining power and included provisions unique to each contract.[35] Subsequently, standardized insurance contracts developed after the great London fire of 1666. A limited number of organizations providing coverage to an increasingly insuring

public provided a distinct advantage to insurers who dictated technical policy terms in standardized insurance policies.[36]

As a result, most contemporary insurance policies are difficult for the average person to understand.[37] Although insurers argued that policy terms were inherently complex and burdensome to satisfy legal subtleties,[38] courts and commentators continually underscored the necessity to write insurance policies in simple language rather than technical jargon.[39] Nevertheless, legal conflicts between insurance companies and policyholders centered upon technical phrases whose meanings were judicially interpreted. Courts recognized that inflexible application of precedent defining the technical phrases frequently resulted in unjust decisions to the weaker insured party.[40] Thus, attempting to protect the weaker policyholder while purportedly following recognized contract construction principles, courts twisted existing insurance doctrines to grant equitable decrees.[41]

Articulating disparate rationales underlying decisions which protect the insured, many jurisdictions now honor the insured's reasonable expectations of policy protection.[42] The expectations principle has justified many recent decisions granting insureds recovery although policy language appeared to deny insurance benefits.[43]

The Reasonable Expectations Doctrine

Although prior decisions arguably incorporated an implicit analysis of an insured's expectations, the reasonable

expectations doctrine blossomed in the 1960's.[44] The doctrine first appeared in life, liability, and accident insurance cases.[45] Subsequently, courts employed a reasonable expectations analysis to various insurance contract decisions. Professor Keeton formalized the doctrine as the objectively reasonable expectations of applicants and intended beneficiaries, regarding the terms of insurance contracts to be honored, even though painstaking study of the policy provisions would negate those expectations.[46] Keeton noted the doctrine's potential inappropriateness to many particular decisions, but concluded that the doctrine was created as an ideal principle for insurance contract construction and interpretation.[47]

The doctrine proposed that policy provisions should be construed with a common insured's understanding rather than interpretation from legal technicalities which laymen could not understand.[48] The underlying rationale for the doctrine's proposal was insurers unfairly qualified coverage terms inconsistent with an insured's coverage expectations.[49] This aforementioned rationale stemmed from inclusively detailed and legally complex insurance policies which were burdensome to read and difficult to understand. Furthermore, the detailed policy terms were not normally provided to the insured until the contract was already created. Thus, the reasonable expectations doctrine produced a construction principle which protected an obviously ignorant contracting insured.[50]

The expectations principle has protected insureds in varying circumstances. Generally, courts granted coverage

in cases which the policy terms indicated a reasonable person would expect coverage.[51] However, courts have granted recovery with policy terms indicating little reasonable expectation of recovery, but denial of coverage seemed unfair.[52] Moreover, recovery based on a reasonable expectations analysis has been granted although coverage was improbable and coverage denial resulted in no inequity.[53] Therefore, reasonable expectations operates for the insured's protection in several forms.[54]

Development of California decisions construing an insured's reasonable expectations exemplifies the doctrine's pervasiveness. In Steven v. Fidelity and Casualty Co.,[55] the California supreme court granted an insured coverage although the policy clearly excluded the deceased insured's risk of loss. The Steven decision clearly departed from a traditional mechanistic analysis. Instead, the decision reasoned that courts could proceed beyond the traditional principle which construed ambiguities against contract drafters, and held that courts could implicitly find the weaker insured party's reasonable expectations necessitated a different contract interpretation.[56]

The Steven court discussed the fundamental policy considerations underlying many reasonable expectation cases.[57] First, the insured could not read the policy before purchase or practically consult the policy after purchase. Additionally, the notice of noncoverage was insufficient because the situation dictated that the public could expect coverage

in absence of conspicuous language to the contrary.[58] Although the holding in Steven could be framed as a mere extension of traditional contract principles that ambiguities should be construed against the insurer, the emphasis throughout the opinion upon reasonable expectations indicated the development of a larger principle.[59]

The subtle change in California from traditional construction principles to an approach explicitly respecting the reasonable expectations doctrine continued in Gray v. Zurich Insurance Co.[60] The Gray court held that a liability insurer must defend an insured who committed an assault notwithstanding the policy language excluding the insurer from defending the insured's intentional tort. The court opined that the appropriate policy interpretation involved an analysis of the insured's reasonable coverage expectations. Similar to Steven, facutal circumstances concerning the loss and the nature of risk denoted that the insured obtained a reasonable expectation of coverage.[61]

Gray and Steven connote that the reasonable expectations doctrine is more than a traditional interpretative device.[62] Rather, the doctrine imposes a positive duty upon the stronger adhesionary drafter to honor the weaker party's expected contractual bargain.[63] Thus, insurers can limit their higher duty only through drafting intelligible language and practicing nondeceptive marketing techniques which do not mislead common insureds.

Both aforementioned cases further indicate that a reasonable expectations test entails considerations excluded

from normal contract principles.[64] Policies separate from theories associated with freedom of contract are necessarily required because the adhesionary insurance policies pervert common law contract principles.[65] Therefore, reasonable expectations should be viewed as a judicial improvisation compelled by inequities resulting from traditional interpretations of adhesionary insurance contracts.[66] Accordingly, courts should respect policy provisions and enforce the parties bargain if the insurance contract and the insurer's obligation conform to the reasonable expectations of the subscribing insured. The freedom of contract should still preserve the contract's validity if the insured had obvious notice and adequate opportunity to evaluate the policy's faults.[67]

The California supreme court again relied upon an insured's reasonable expectations in Smith v. Westland Life Insurance Co.[68] In Smith, the insured applied for life insurance, paid the first month's premium, and received a conditional coverage policy.[69] After investigating the insured's background, the insurer informed the insured that he did not meet the insurer's conditions for liability, and, the insured's premium would be refunded unless the insured agreed to new terms. However, the insured died the day after the insurer's notification.[70] Despite terms of the conditional coverage and the insurer's prior notification, the court reasoned that an insured could reasonably expect coverage after signing an application and paying a premium.[71]

Smith's holding was justified because the insurance company holding premiums without providing coverage was

unconscionable.[72] Thus, the insurer's unconscionable actions underscored the insured's expectation of coverage because the ambiguity of conditional coverage and premium payment created an expectation of coverage, although the policy indicated a contrary result.[73] Additionally, conditional coverage which purports to provide retroactive coverage is unfair to the insured because the coverage is likely to be illusory.[74]

Several themes recurred throughout the preceding discussion. First, the insurer can generally avoid liability by clearly informing the insured that the expected coverage is not included in the purchased policy.[75] Additionally, the insurer's misleading conduct significantly influences decisions which find the insured's expectation of coverage reasonable.[76] Finally, judicial preference for equitable relief provides recovery for apparently unavailable coverage.[77]

Plausable Justifications For The Reasonable Expectations Doctrine

Practical justifications exist for the continued adoption of reasonable expectations.[78] First, reasonable expectations promotes a more fully informed choice by the prospective insured about the kind of coverage he desires.[79] Second, the expectations principle serves equitable interests by allowing courts to observe circumstances surrounding the transaction which influence the insured's expectations under the contract.[80] Finally, risk-distribution concerns are served by spreading costs of otherwise uninsured losses and encouraging coverage options that promote risk spreading.[81]

Information about the nature and extent of coverage is a central concern of the doctrine.[82] Under a reasonable expectations approach, insurers are normally held liable because they fail to enlighten the insured about the technicalities of the contract.[83] With extensive coverage information, the insured may better assess the policy offered to him and bargain for coverage which satisfies his needs and expectations. The insurer's responsibility to dispel inaccurate expectations is promoted through negative economic incentives.[84] Thus, information production coerced through the reasonable expectations doctrine creates a knowing bargain by the insured and, thereby, eliminates the insurer's adhesionary advantage.[85]

Another justification for honoring reasonable expectations involves equitable notions of justice. Cases noting the insurer's role creating erroneous expectations relied implicitly on equity to grant recovery clearly deniable by policy terms.[86] Furthermore, equity has operated in other contract disciplines to impose liability for losses caused by misinformation.[87] Although the insurer's misleading impression would not constitute fraud or negligent misrepresentation, equity grants relief upon the relative blameworthiness of the misinforming party.[88] Thus, if the insurer should have known of the insured's expectations, equity would strongly favor holding the insurer responsible for fulfilling those expectations.[89]

Judicial placement for clear drafting responsibility upon the insurer correctly realizes that the drafter created the policy's language. Thus, between the two parties, the

drafter's expectations should be disappointed rather than the insured's expectations.[90] Additional equitable factors favoring the insured include policies unavailable until after the contracts inception and the insured's slight opportunity to bargain for unique policy terms.[91] Although equity inherently lies in a subjective setting, courts have analyzed the preceding objective considerations to justify reliance on the expectations principle.[92]

A final justification for the reasonable expectations doctrine involves furtherance of risk and loss distribution.[93] Insurance traditionally serves an important societal function by spreading the risk of loss.[94] An increased flow of information and the insured's enhanced bargaining position should result in added types of available coverage because insureds will require policies unique to their individual needs.[95] Although the reasonable expectations doctrine should not be invoked for distributive reasons alone, the doctrine, nevertheless, allows insureds to select policies which should produce new and needed coverages for public purchase.[96]

Questionable Aspects of the Doctrine

Although justification and acceptance of the reasonable expectations doctrine exists, the doctrine's judicial application has been criticized.[97] First, no precise guidelines exist which could assist the judiciary to properly apply the doctrine. Indeed, the term "reasonable" has no explicit definition.[98] Thus, the coverage found by a reasonable

expectation analysis is neither explicit from the contract nor expressly indicated by surrounding circumstances.[99] Furthermore, the doctrine begs courts to ignore express contract language by requiring analysis of parole circumstances.[100] Therefore, disparate decisions result and uncertain liabilities loom for insurers until a formalized expectations test is adopted.[101]

As a result, insurers cannot contemplate and statistically evaluate the exact coverage provided to insureds.[102] The cost of insurance protection, therefore, may rise as insurers protect the unforeseeable expectations of coverage.[103] Further, costs may rise as insurers accrue expenses instructing insureds about insurance policies. Finally, evidentiary problems could arise from insureds' self-serving testimony concerning insurance expectations.[104] Extrinsic contractual evidence following a loss may not yield correct assessments of an insured's expectations prior to loss.[105] Nevertheless, general guidelines supporting the doctrine's analysis should arise from scholarly and judicial comment as the doctrine evolves.[106]

Although the reasonable expectations doctrine has valid criticism and support, the doctrine's emergence represents a sharp distinction from traditional insurance contract analysis.[107] An insured's reasonable expectations of coverage offers courts a subjective tool countering the insurer's greater contracting strength.[108] Thus, inequitable decisions created through adhesionary contracts should diminish as jurisdictions accept the doctrine of reasonable expectations.

Traditional Analysis and Innocent Co-Insured's Recovery Rights

Although some jurisdictions adopted the reasonable expectations analysis because traditional contract principles proved inappropriate to adhesionary drafting, most cases determining a co-insured's contract rights refrained from adopting the expectations principle.[109] As a result, inequities associated with a traditional insurance contract analysis swell when a co-insured claims benefits from a loss intentionally caused by another co-insured.[110] Generally, insurance companies deny all relief under a policy if a loss was fraudulently produced.[111] However, many courts recognize the harsh consequences of denying insurance proceeds to an innocent co-insured.[112] Attempting to grant just results, courts often escape inequitable holdings through a strained contract analysis or application of inappropriate principles.[113] One co-insured class in particular, innocent spouses, exemplifies the current struggle with traditional contract principles and fair judicial results.

Traditional Recovery Rights of The Innocent Spouse

Any discernable trend determining the recovery rights of an innocent spouse represents a truly dichotomous analysis. Courts denying insurance recovery reason that a joint and inseparable property or agency interest between the husband and wife exists on the insurance contract.[114] However, courts granting the innocent spouse recovery believe that

a several property interest exists between the spouses.[115] Thus, the pertinent decisions focus on the several nature of the wrong committed by the guilty spouse to determine whether insurance proceeds should be granted to the innocent spouse.[116]

The primary rationale used to prevent the innocent spouse from recovery scrutinizes the underlying property and surety interests of both spouses. First, traditional insurance precepts recognize that insurance policies which cover homeowners are not contracts in rem.[117] Rather, homeowner policies provide indemnity for losses to insurable interests and are personal in nature.[118] Thus, the insurance policy protecting a family home does not cover the actual property. Instead, the policy is an indemnification contract for loss of a personal insurable interest which the insured must possess at the policy's issuance and at the time of loss.[119]

Significantly, the aforementioned distinction finding an insurance policy as a contract for personal indemnification requires judicial examination of the co-insured spouse's insurable interests. The spouse's insurable interest found by courts denying the innocent spouse recovery is a joint insurable property interest between the husband and wife.[120] Accordingly, the husband and wife are viewed as holding a joint contractual obligation on the insurance policy. Thus, a non-severable right of indemnification exists, and courts deny recovery if either spouse fraudulently creates the loss.[121]

The traditional analysis denying an innocent spouse recovery was followed in Morgan v. Cincinnati Insurance Co.[122] In Morgan, the defendant insurance company issued an insurance

policy covering a house owned by the plaintiff and her husband as tenants by the entirety.[123] After the husband intentionally destroyed the house, the wife brought an action to recover the insurance on certain personal property and the destroyed realty's value. Although the couple had commenced divorce proceedings and were living sepearately when the plaintiff's husband set fire to the house, the Michigan court focused on the joint and inseparable interest existing under a tenancy by the entirety.[124] The court found that the spouses joint insurable property interest created a joint contractual interest under the insurance policy. Therefore, applying the common law principle that a bar to one joint contractor bars all joint contractors, the court withheld recovery from the innocent spouse.[125]

The Morgan court relied heavily upon precedent to reach its conclusion, but noted the harsh results and inequities that result from denying an innocent spouse recovery.[126] The court explained a more equitable ruling could result if the insurer could successfully subrogate against the husband. If the insurer could subrogate, the wife could receive some proceeds from the policy.[127] The court, however, declined to grant any recovery.

The Morgan decision represents the traditional authority denying recovery to innocent spouse. The analysis simply analyzed the coverage provided by the policy's language without noting the insurers adhesionary advantage in drafting policy language.[128] As noted in Morgan, the traditional test was

often viewed as inequitable to an innocent co-insured spouse who did nothing to destroy the property and could reasonably expect indemnity.[129]

In Short v. Oklahoma Farmer's Union Insurance Co.,[130] the Oklahoma Supreme Court followed the rationale cited in Morgan and significantly added important public policy considerations precluding recovery by the innocent spouse. In the case, a wife filed for divorce against her hsuband who destroyed their insured home after being served a divorce summons.[131] Similar to Morgan, the court held the entire insurance policy was void because policy provisions prohibited coverage if any joint insured fraudulently destroyed the property.[132]

Furthermore, the decision significantly contributed a consideration apart from Morgan's traditional analysis. The court further held that Oklahoma public policy would not allow an innocent co-insured to collect fire insurance benefits if the loss was caused by arson.[133] The court viewed arson as a crime which threatened the general public. Noting that arson was difficult to detect, the court reasoned that an increasingly urban environment strained the public's ability to combat the crime.[134] Thus, allowing recovery on an insurance contract jointly held by the arsonist would wrongly allow funds to be acquired by an entity which the arsonist was a member. Despite the possible harsh result to an innocent co-insured, the court viewed the public's interest as more important.[135]

Although the Short decision attempted to protect the public interest against arson, the court incorrectly connected

the innocent spouse's recovery with the husband's motivation to commit arson. The innocent spouse did not start the fire nor did she collusively request her estranged husband to destroy the home.[136] Additionally, the court wrongly found that the husband would collect proceeds from an entity which he belonged because the couple were divorced. In contrast, the dissent refrained, from applying the majority's fictions.[137] Instead, the dissent established the insurance contract as the insurer's adhesionary devise which should be construed in the insured's favor.[138] The dissent argued that the divorced couple had a several interest, and the co-insured wife should receive insurance benefits.[139]

The Morgan and Short opinions indicate a simplistic analysis finding a joint contractual relationship which bars an innocent spouse's recovery. Both decisions acknowledge the inherent unfairness created from the traditional approach, but refuse adoption of principles which absolve the insurer's adhesionary drafting power.[140]

As a result, several jurisdictions abandoned the traditional contract analysis to escape inequitable results.[141] Similar to Short's dissent, the general rationale permitting the innocent spouse recovery focused upon the several nature of the fraudulent spouse's wrongdoing. Those courts granting recovery disregarded the joint contractual interest created through the marriage and refused imputing the fraudulent acts of one spouse to the innocent spouse.[142]

For example, the Supreme Court of New Mexico decided Delph v. Potomac Insurance Co.[143] which involved the intentional

destruction of an insured house. The insurance company defended on insurance policy provisions declaring that the husband's arson constituted a fraud which prohibited the innocent co-insured wife from recovery.[144] The court noted the general rule that the innocent spouse may not recover where the policy interests of the co-insureds are joint, but may recover where the interests of the co-insureds are divisible or separable.[145] However, the Court reasoned that the co-insureds' interest in the jointly owned property and their joint contractual rights under the policy were immaterial to the decision's outcome. Instead, the determining factor was the husband's fraudulent act could not be attributed to his innocent co-insured spouse.[146] Therefore, the court held the fraudulent spouse's interest void, but granted the innocent spouse half the entire insurance coverage.[147]

The New Mexico treatment disregarded the fundamental principle that the insurance indemnification arose from policy provisions rather than the husband's several action.[148] The court apparently developed the tort analysis to prevent any unjust result created by a traditional contract interpretation. Since the co-insured's indemnification rights were founded upon a contract rather than a tort, a proper analysis required contract interpretation principles cognizant of the insurer's adhesionary drafting powers instead of strained tort-contract analogies.[149]

Similar to Delph's extra-contractual considerations, a separate approach recognizing an innocent spouse's recovery

rights employed the equitable maxim that one may not benefit from one's own wrongdoing.[150] Disregarding the joint contractual interests, courts examined whether an innocent spouse's recovery would benefit the fraudulent co-insured in any manner. This approach was followed by the Supreme Judicial Court of Maine in Hildebrand v. Holyoke Mutual Fire Insurance Co.[151] The Hildebrand court specifically rejected the joint contractual or property interest test as dispositive of the innocent spouse's recovery. Instead, the court determined the fraudulent ex-husband had no opportunity to benefit from his divorced wife's recovery. Therefore, the wife recovered insurance proceeds depending upon a benefit test which was not within the bargained-for insurance policy.[152]

Implicit in either Delph or Hildebrand was the judicial protection of an innocent co-insured regardless of the insurance contract's contrary provisions.[153] Both decisions rationalized the recovery through inapplicable tort and equity considerations.[154] Although both decisions presented issues concerning technical language drafted by the insurer, neither case attempted to reach an equitable decision through a proper contract analysis. However, other cases involving innocent co-insureds demonstrate how traditional principles yield equitable results and indicate a need for new construction principles for innocent spouses.[154]

Comparisons with Other Co-Insured Classes

Judicial interpretations of insurance contracts insuring an innocent spouse's interest indicate an often inappropriate analysis of traditional or extraneous principles. In contrast to cases determining an innocent spouse's recovery rights, decisions involving shareholders and mortgagees properly use traditional contract doctrines or extra-contractual theories to analyze whether innocent co-insured's should receive benefits after a fraudulent loss.[155]

Corporate Co-insureds

Since fraudulent losses are necessarily excluded from property insurance policies, the intentional destruction of insured property by another with authority from the insured will not create a right of recovery upon the policy.[156] Thus, the act of a corporate officer, employee, or stockholder in destroying corporate property covered by an insurance contract offers unique problems because the insured corporation cannot act fraudulently by itself.[157] Generally, courts have looked to the benefit gained by the wrongdoer and impute fraud upon the corporation if the wrongdoer benefits directly or indirectly from the policy.[158]

The circumstances when a corporate director or employee sufficiently controls corporate affairs and acts to further his or the corporation's interest has been the major

consideration determining whether a corporation should be precluded from insurance proceeds.[159] In Miller & Dobrin Furniture Co. v. Camden Fire Insurance Co.,[160] the individual, who had been secretary, treasurer, director, and a principle stockholder of a corporation, substantially destroyed the insured corporate property. Before the stockholders could reach the benefits from the insurance policy, the court analyzed the dominant role the wrongdoer played in the corporate affairs.[161] In this case, the stockholders were held responsible for the fraudulent act because the parties interested in the corporation allowed the wrongdoer to completely control the corporation.[162]

The Miller decision used a benefit analysis similar to the innocent spouse decision in Hildebrand.[163] Both Miller and Hildebrand relied on the traditional maxim that one should not benefit from one's own wrongdoing. However, the maxim's application in Miller was legitimate because the insured corporation was a fictional entity which could only act through the wrongdoer's acts.[164] The corporation would inherently be innocent of wrongdoing but for the extra-contractual analysis.[165] Therefore, judicial recognition of the corporation as the wrongdoer's alter ego was a proper examination because the corporation acted solely through the wrongdoer.

Contrarily, a husband and wife do not act as agents for one another.[166] Rather, an innocent spouse's recovery made dependent on non-contractual agency principles, denotes

judicial misapplication of agency law with insurance contract law.[167] The benefit analysis used in Miller is mandated by corporate claims because a corporation can only act through its agents.[168] However, an innocent spouse is a natural person not dependent upon agents.[169] Thus, applying agency maxims to cases involving innocent spouses is not necessary to the spouse's indemnification rights under a policy.[170] Courts should accordingly refrain from using an agency or benefit analysis approach to innocent spouse cases. Instead, courts should apply those principles to applicable circumstances exemplified by Miller.

Co-insured Mortgagees

The Miller decision indicated a proper extra-contractual consideration which courts could properly use in the correct setting. Although strict contractual interpretation yielded harsh results to innocent spouses, the traditional contract interpretation could also be appropriate given the proper circumstances.[171] Co-insured mortgagees normally had their insurance rights determined under a traditional analysis.[172] However, a mortgagee's policy rights sharply contrast with an innocent spouse's policy rights.[173] Thus, a traditional contract approach could properly be used for mortgagees, but the same approach may unfairly be used against an innocent co-insured spouse.[174]

The first difference between an innocent co-insured mortgagee and an innocent spouse is the stronger contractual position of mortgagees on the policy.[175] Generally, a mortgagee

requires a mortgagor to obtain a fire insurance policy as a condition for financing the purchase.[176] Although some jurisdictions vary from the standard policy, most mortgagors obtain the New York Standard Fire Policy.[177] This standard policy contains a standard mortgagee clause which protects the interest of the mortgaged premises. The policy protects the mortgagee despite any act or neglect by the mortgagor.[178] The mortgagee, therefore, effectively obtains a separate insurance contract with the mortgagor's insurance carrier.[179] Additionally, a standard mortgage clause protects the mortgagee's interest even if the policy was itself void to the mortgagor ab initio. Yet, the innocent spouse's provision is far weaker under the insurance policy because no clause exists which separates his interest from his spouse's.[180] Thus, while an innocent mortgagee can find recovery through a traditional contract analysis, an innocent spouse can recover proceeds only if the courts strain traditional principles or analyze irrelevant tort principles.[181]

The effectively separate contract grants the mortgagee several additional advantages over the innocent spouse. The foremost advantage is the reasonable certainty that his loan will be repaid by someone.[182] Should the mortgagor default on his payment and not satisfy a foreclosure sale judgment because destruction diminished the mortgaged property's value, the mortgagee may use the insurance proceeds to satisfy the mortgage obligation. Further, the mortgagee preserves his interest unimpaired by the insurer's subrogation

rights.[183] Finally, the mortgagee is entitled to ten days notice policy cancellation by the carrier rather than five days notice which must be given the innocent co-insured spouse.[184] In return for the extensive protection provided by the standard mortgage clause, the mortgagee assumes little responsibility.[185] A mortgagee mustpay the premium if it is not paid by the mortgagor, and the mortgagee must notify the insurer of any ownership change or hazard increase within the mortgagee's knowledge.[186]

Mortgagees received the advantageous treatment because courts recognized the mortgagee's precarious position with a fraudulent mortgagor.[187] Moreover, insurers viewed mortgagees as desirable customers because mortgagees provided insurers with a large volume of business and share with the insurer an interest in maintaining the value of the insured premises.[188]

The standard mortgage clause is distinguished from the older and now little used loss payable clause.[189] Under the loss payable clause, the mortgagee was not protected by a separate contract of insurance. The mortgagee, therefore, could recover proceeds to the extent that the mortgagor could collect from the policy.[190] Similar to the innocent spouse, the mortgagee's derivative interest could be invalidated by any fraudulent act of the co-insured mortgagor. Under the older policy, the mortgagee was viewed only as an appointee of insurance funds and was in no better position than an innocent spouse is today.[191]

Although modern mortgagees enjoy greater equitable contract protection than former mortgagees, today's innocent

co-insured spouses still obtain inequitable decisions resulting from traditional insurance contract constructions. While the stronger bargaining and contractual positions of mortgagees allow courts to apply traditional contract principles, traditional contract theory does not adequately address the innocent spouse issue.[192] One solution to the innocent spouse problem involves application of the spouse's reasonable expectations.

An Appropriate Analysis Through Reasonable Expectations

The reasonable expectations doctrine requires that purchase of an insurance policy entitles the consumer to broad measures of protection comensurate with the consumer's expectations of coverage.[193] As previously discussed, Professor Keeton found the reasonable expectations doctrine to honor the consumer's expectations even though painstaking study of policy provisions would otherwise negate those expectations.[194] The emerging doctrine equitably allows courts to grant or deny coverage within a contractual analysis. Additionally, the doctrine mandates examination of the insured's objectively reasonable expectations.[195]

Although decided two decades prior to formal acknowledgment of the expectations doctrine, the Supreme Court of New Hampshire decided a case involving an innocent spouse in Hoyt v. New Hampshire Fire Insurance Co.[195] Although the policy language expressed a joint covenant between the spouses, the contract analysis employed by the court found that the

policy's meaning should be derived from the beliefs a reasonable person in the innocent spouse's position would entertain about coverage. Moreover, the court recognized that the insurance company's intended meaning should not be followed because the company would inherently use fine language to limit its liability.[196] Therefore, the Hoyt court granted insurance recovery to the innocent spouse because a reasonable person would expect his property to be insured regardless of the fraudulent spouse's actions.[197]

The Hoyt decision determined that insurance companies implicitly use adhesionary drafting strength to limit liability from property losses. Without stating its rationale, the court used the insured's reasonable expectations of coverage as a mechanism to reduce the insurer's advantageous drafting position.[198] Unlike other decisions, the reasonable expectations analysis allowed the court to interpret policy provisions without using inappropriate and fictional principles to grant the innocent spouse a fair result.[199]

Similar to Hoyt, the recent Illinois decision of Economy Fire and Casualty Co. v. Warren[200] used a reasonable expectations test to grant an innocent co-insured spouse relief after his wife intentionally destroyed their property. Citing Hoyt, the court found that the innocent spouse would not be versed in the subtle distinctions of insurance law. Therefore, the spouse would naturally suppose his property interest was covered by the insurance policy without qualification.[201]

Warren significantly added to Hoyt by finding that the insured's expectations of coverage could greatly be influenced by the insurer.[202] As previously analyzed, information about the nature and extent of coverage is a central concern of the doctrine.[203] The Warren decision incisively found that the insurer could enlighten the insured through express and nontechnical language. Therefore, adoption of the reasonable expectations doctrine should diminish the innocent spouse's ignorance concerning the policy he bargained for.[204] Accordingly, the doctrine should reduce litigation concerning ambiguous contract language by coercing the insurer to draft provisions clearly.[205]

Additionally, allowing an innocent spouse recovery through a reasonable expectations analysis allows equitable results without resorting to noncontractual principles.[206] Since the insurer created the innocent spouse's coverage expectations through misinformation, equity would grant the innocent spouse recovery because the relative blameworthiness clearly fell upon the drafting insurer.[207] Thus, the insurer created the insured's expectations, and equity strongly requires holding the insurer liable for its misrepresentation.

Finally, the reasonable expectations analysis strengthens the contractual position of a spouse similar to the protected position of a modern mortgagee.[208] Both innocent mortgagees and innocent spouses are often unable to prevent another co-insured from intentionally destroying property.[209] While mortgagees have overcome their previously perilous

contract position, innocent spouses, in a majority of jurisdictions, are still liable for their spouse's wrongdoing.[210] Although those same courts denying recovery acknowledge the inherently unfair result, reasonable expectations would prevent unfair results by honoring the spouse's bargained-for expectations of coverage.[211] If the insurer explicitly informed the spouse that a co-insured spouse's fraud would prevent the innocent spouse from recovery, the innocent spouse could not reasonably expect coverage.[212] Therefore, the reasonable expectations doctrine allows proper decisions for either the insurer or innocent spouse, but shields the innocent spouse from the insurer's adhesionary advantage as the modern mortgagee has done through the separate mortgagee clause.[213]

Conclusion

The fraudulent insurance loss is a problem of great concern to insurers and the public. New techniques detecting fraudulent claims are increasingly being developed by state agencies and the insurance community to stop this epidemic. Unfortunately, the spreading discovery and prosecution of fraudulent insureds has not resulted in just results to innocent spouses who did nothing to defraud the insurer.[214] A traditional analysis strictly construing the policy's technical language or developing tests which use inappropriate principles to convey coverage do not adequately confront the

innocent spouse's expectations of insurance protection.[215] By judicial recognition of the reasonable expectations doctrine, insurers will be coerced into providing spouses with information concerning their insurance policies.[216] In return, spouses, especially those seperated or divorced, could knowingly protect their financial interests from another's wrongdoing.

Notes

1. The second edition of Webster's New World Dictionary 78 (2d ed. 1974), defines arson as the crime of purposely setting fire to another's building or property, or to one's own, as to collect insurance. Although many people view arson as an ailment of modern urban society, it has threatened the safety of mankind since the moment our predecessors abandoned the cave for more combustible dwellings. History is replete with instances of arson. For example, the emperor Nero destroyed a sizable portion of Rome when he set fire to a poor neighborhood in order to clear land for a new palace. Also, arson was a primary weapon of the predatory Asiatic tribes led by Attila the Hun and others. Today, arson is one of the most critical problems facing American cities. According to the New York Property Insurance Underwriting Association, cities are burning at a rate that exceeds an ability to revitalize or rebuild. Public Adjusters Asked to Lend Their Support in Battle Against Arson, The Nat. Property

accidents by design, inflated medical bills, phantom auto thefts, or arson, conservative estimates of insurance fraud total four billion dollars per year. Schneider, The Insurance Industry and the Fight Against Arson, J. Ins., May/June, 1981, at 16.

3. Id. Also, recessionary periods historically increase the occurrence of fraud. Id. at 19-20.

4. The Uniform Crime Report of 1977 estimated the direct loss from arson to total $1.3 billion dollars. The direct loss from larceny-theft totalled $1.1 billion dollars, and the loss from burglary totalled $1.4 billion dollars. Dousing the Arson Racket, J. Am. Ins., Summer 1979, at 26.

5. Arson grew an estimated 285% between 1966 and 1975. Currently, arson is growing 25% per year. Id.

6. The Western Insurance Information Service disclosed that one-third of all fire insurance premiums ultimately paid arson claims in 1977. Businesses pay higher premiums and pass the cost to consumers. Local

governments suffer from decreased tax revenues. Failure to Develope Arson Programs Hit, Nat. Underwriter, Sept. 1, 1979, at 25.

7. Arson is the product of social and economic ills. The lack of jobs, substandard housing, prohibitive fuel and energy costs, regressive tax practices, rising crime rates, inability of landlords to collect rents and home loan defaults produce the arson epidemic. Jones, Alliance Criticizes Senate Arson Study, Nat. Underwriter, March 16, 1976, at 18.

8. E.g., R. Carter, Arson Investigation, 18-44 (1978) (classifying six motives for arson: (1) financial personal goals; (2) non-financial personal goals; (3) aiding a cause; (4) revenge, spite, or anger; (5) arson to commit or conceal another crime; (6) vandalism or malicious destruction). See also, Basmajian, The Arson Problem, CPCU J. June, 1981, at 113-14.

9. E.g., Synder, For Florida: A Fraud Force, J. Ins., March/April 1981, at 6 (discussion of insurance

inducement to commit fraud and the state government's response).

10. E.g., For every one hundred fires classified as suspicious or incendiary, an average of nine persons are arrested, two persons convicted, and seven-tenths receive jail sentences. Dousing the Arson Racket, J. Am. Ins., Summer, 1979, at 25.

11. A. Campbell, Insurance and Crime 6 (1902). The insurance fund is a constant temptation to fraudulently exploit. The temptation extends to all races and classes of people. Id. at 6-8. Therefore, the insurer must refrain from paying fraudulent claims or face public refusal of insurance as a criminal motivation. Id. at 400-01.

12. See J. Long & D. Gregg, Property and Liability Insurance Handbook 16-29 (1965) (analyzes the risk distribution object of insurance and how risk distribution is achieved through statistical data).

13. Insurance should be viewed as one part of a two stage process which communities use as protection against loss.

Underwriter, Jan. 11, 1980, at 49. The Alliance of American Insurers estimates that the 1979 arson death toll exceeds one thousand, and arson property damage losses in 1979 were well in excess of one billion dollars. The dollar loss figure of 1979 exhibited a 24.5 percent increase over the 1978 total. Even when the dollar increase is translated into real dollars through an adjustment for inflation, evidence still exists that arson is growing at an alarming rate.

Recent statistics demonstrate that arson is the leading cause of all non-residential structure fires. It is responsible for 26.7 percent of these fires. Arson is also the primary cause of death and dollar loss of property for this type of fire. In residential fires, arson is the third leading cause of the fire, and it accounts for 10.7 percent of all residential fire deaths. Basmajian, CPCU J., June, 1981 at 11.

2. Insurance fraud is limited only by the creativity of the wrongful mind. Whether the sources of fraud come from

The community provides laws and agencies which prevent or minimize loss. Insurance protects the individuals in a community only if the laws and agencies have not prevented loss. Insurance is a necessary evil which individuals use to compensate for the communities inadequate methods of loss prevention. See A. Campbell, Insurance and Crime 126-28 (1902).

14. Improved investigative techniques coupled with aggressive litigation have slowed the growth of insurance fraud. See, e.g., Gordon, Seal-Up Program is Arson-Stopper, J. Ins., Sept./Oct. 1981, at 31 (devising system with combined public and private support to prevent arson from occurring); Karchmer, Arson Prevention: A Task for the 80's, J. Ins., Sept./Oct. 1981, at 27 (recognizing that the private insurer will have to take a higher responsibility for arson detection because the government will provide less service); Synder, For Florida: A Fraud Force, J. Ins., March/April 1981, at 6 (noting that Florida had been labeled the insurance fraud capital of

the world in 1976 and the insurance industry's attempt to relieve the situation).

15. See 5A J. Appleman, Insurance Law and Practice §3587-90 (rev. ed. 1970 & Supp. 1981) (discussing various methods an insured may lose coverage through fraud).

16. A majority of jurisdictions do not allow recovery. See Home Ins. Co. v. Pugh, 51 Ala. App. 373, 374, 286 So. 2d 49, 50 (1973) (law does not allow an innocent owner to recover on a policy of insurance where co-owner wilfully set jointly owned property on fire); Fuselier v. United States Fidel. & Guar. Co., 301 So. 2d 681, 682 (La. App. 1974) (Louisiana law does not permit one to profit from a wrongdoing); Kosier v. Continental Ins. Co., 299 Mass. 601, 602, 13 N.E.2d 423, 424 (1938) (wrongful acts of plaintiff's husband rendered policy void); Ijames v. Republic Ins. Co., 33 Mich. App. 541, 544, 190 N.W.2d 366, 369 (1971) (the attempt to defraud the insurer by any co-insured completely bars an innocent co-insured's recovery upon the policy); Bridges v. Commercial Standard

Ins. Co., 252 S.W.2d 511, 512 (Tex. Civ. App. 1952) (husband cannot recover after wife intentionally destroyed community property); Rockingham Mut. Ins. Co. v. Hummel, 219 Va. 803, 805, 250 S.E.2d 774, 776 (1979) (if either spouse departed from contractual duties, the policy would be voided); Klemens v. Badger Mut. Ins. Co. of Milwaukee, 8 Wis. 2d 565, 566, 99 N.W.2d 865, 866 (1959) (intentional destruction of property violated parties' promise to save and preserve property). Cf. Howell v. Ohio Cas. Ins. Co., 124 N.J. Super. 414, 307 A.2d 142 (1973) (the New Jersey Superior Court allowed innocent spouse recovery); Hawthorne v. Hawthorne, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963) (the wife sought the proceeds of an insurance policy on real property held by the entirety and wilfully destroyed by her husband. The court refused to bar recovery by deciding that the contract and its proceeds were personalty and there can be no holding by the entirety in personality). Contra, Jones v. Fidelity

& Guar. Ins. Co., 250 S.W.2d 281 (Tex. Civ. App. 1952) (property covered was community property so proceeds would be community property).

17. E.g., Morgan v. Cincinnati Ins. Co., 19 Mich. App. 49, 282 N.W.2d 829 (1979); Short v. Oklahoma Farmer's Union Ins. Co., 619 P.2d 588 (Okla. 1980).

18. Professor Robert E. Keeton has expressed the doctrine as: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970).

19. An insurance policy should not be viewed as a wager contract because insurance depends wholly upon possession of an insurable property interest by the policyholder. Since property insurance contracts are essentially indemnity contracts, a loss must be suffered before

recovery can be granted. Logically, if the insured has no interest in the property, he can sustain no loss from the property's destruction; thus, he cannot receive insurance benefits. See 4 J. Appleman, Insurance Law and Practice §2121 (rev. ed. 1969 & Supp. 1981).

20. E.g., Aetna Ins. Co. v. King, 265 So. 2d 716 (Fla. 1st DCA 1972) (finding an insurable interest although no legal or equitable title); Liverpool & London & Globe Ins. Co. v. Bolling. 176 Va. 182, 10 S.E.2d 518 (1940) (divorcee required to and did find insurable interest in building owned by former father-in-law in which she conducted a general merchandise business).

21. 4 J. Appleman, Insurance Law and Practice §2123 (rev. ed. 1969 & Supp. 1981). E.g., Milan v. Providence Washington Ins. Co., 227 F. Supp. 251, 254-55 (E.D. La. 1964) (must have economic interest in property).

22. See 3 R. Anderson, Couch Cyclopedia of Insurance Law 2d §24:18 to 114 (2d ed. 1960 & Supp. 1980) (for an exhaustive analysis of individuals who may have insurable interests).

See, e.g., Providence Washington Ins. Co. v. Stanley, 403 F.2d (5th Cir. 1968) (whether stockholder or partner, the spouse could obtain an insurable interest in the property).

23. Insurance, other than life and accident where the result is death, is a contract of indemnity. Indemnity indicates that the insured party is entitled to compensation for loss occasioned by the perils insured against. The right to recover is commensurate with the loss sustained. However, in the case of valued policies, the contract is not one of perfect indemnity. In such policies, the insurer, as usually required by state regulation, agrees in advance to the value of the property insured for the purpose of measuring the damages. See 1 R. Anderson, Couch Cyclopedia of Insurance Law 2d §1.9 (2d ed. 1959 and Supp. 1980).

24. See 4 J. Appleman, Insurance Law and Practice §2108 (rev. ed. 1969 & Supp. 1981).

25. Judge Learned Hand explained the reason for this doctrine.

"[I]nsurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion." Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir.), cert. denied, 331 U.S. 849 (1947).

See, e.g., Heffron v. Jersey Ins. Co., 144 F. Supp. 5 (E.D.S.C. 1956), aff'd, 242 F.2d 136, 140 (4th Cir. 1957) ("As the insurer prepared the policy, any ambiguity is to be resolved against it and liberally in favor of the insured."); Hathaway v. Commercial Ins. Co., 85 Misc. 2d 485, 380 N.Y.S.2d 529 (1976).

26. 7 Williston on Contracts §900 (3d ed. 1963). One court, however, disagrees: "[I]nsurance contracts are not strictly construed against the insurer. They are construed just as any other contract is construed . . . by its [sic] plain meaning with no application of strictness in favor of either party, unless an ambiguity is found. When an ambiguity is found, it will be resolved against

the drafter of the instrument. . . . " Union Planters Corp. v. Harwell, 578 S.W.2d 87, 92 (Tenn. 1978) (emphasis in original).

Staunch supporters of standard-form contracts deny the alleged oppressiveness of insurance policies. The standard-form contract is not unique to insurance, yet supporters claim it is the insurer who makes the greatest sacrifice because of insurance's risk-distributing nature. See 9 R. Anderson, Couch Cyclopedia of Insurance Law 2d §39:2 (2d ed. 1962 & Supp. 1980).

27. Young, Lewis & Lee, Insurance Contract Interpretation: Issues and Trends, 1975 Ins. L.J. 71, 77 (1975).

28. Id.

29. Professor Gellhorn calls this belief the "emotional benchmark of the common law of contracts." Gellhorn, Limitations on Contract Termination Rights--Franchise Cancellations, 1967 Duke L.J. 465, 475 n.34 (1967).

30. See, e.g., 3 A. Corbin, Contracts §559 n.20 (1960); Magulas v. Travelers Ins. Co., 114 N.H. 704, 327 A.2d

608 (1974); Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 638 (1965).

31. The lack of choice as to contract terms is a major reason why insurance contracts are singled out as inherently oppressive, because the insurer can legislate the conditions of coverage by contract in a substantially authoritarian form. Kessler, Contracts of Adhesion--Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 632 (1943).

32. Gardner, Reasonable Expectations : Evolution Completed or Revolution Begun, 1978 Ins. L.J. 573, 574 (1978). The policy terms are drafted by expert advisors of the insurer. The insured is in an inferior bargaining position with no real input to policy terms. Id.

33. Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L.R. 961, 966-67 (1970) ("[A]lthough statutory and administrative regulations have made increasing inroads on the insurer's autonomy by prescribing some kinds of provisions . . . , most insurance policy

provisions are still drafted by insurers." In most instances, the regulation is weak and leaves unfavorable provisions for the insured.). Id.

34. See generally 1 R. Anderson, Couch Cyclopedia of Insurance Law 2d §1:1 (2d ed. 1959 & Supp. 1980).

35. Prior to the London Fire of 1666, insurance policies were bargained for at arms-length by merchant mariners. Neither the mariner nor the insurer were at an advantageous position. Note, The Insurance Contract and the Doctrine of Reasonable Expectation, 6 Forum 116, 117 (1971).

36. Id. See also Isaacs, The Standardizing of Contracts, 27 Yale L.J. 34 (1917); Llewellyn, Book Review, 52 Harv. L. Rev. 700 (1939); Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971).

37. See Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 963-64 (1970). Insurers conceived imaginative and sharply restrictive limitations to recovery. The result was clearly

unconscionable to the normal person. Id. See, e.g., Aetna Ins. Co. v. Getchell Steel Treating Co., 395 F.2d 12 (8th Cir. 1968) (policy and endorsement were construed to give effect to all provisions, thus the finding that insured's fire policy was intended to cover every loss proximately caused by fire and every loss flowing from such peril); Great W. Cas. Co. v. Truck Ins. Exch., 358 F.2d 883 (10th Cir. 1966) (no policy language supported the insured's claim of coverage for destroyed vehicle which was to have been insured by the lessee); Union Ins. Soc'y v. William Gluckin & Co., 353 F.2d 946 (2d Cir. 1965) (since the critical language in the policy was ambiguous, a triable issue of fact existed as to the intent of the parties); Fidelity & Cas. Co. v. Seven Provinces Ins. Co., 345 F.2d 227 (6th Cir. 1965) (the case was remanded to determine what the ambiguous provision meant in the regular course of business); Garner v. American Home Assur. Co., 62 Tenn. App. 172, 460 S.W.2d 358 (1970) (where the ambiguity is

confined to a single provision, only that provision will be interpreted; here no ambiguity existed so the court gave effect to the policy as a whole).

38. See Young, Lewis & Lee, Insurance Contract Interpretation: Issues and Trends, 1975 Ins. L.J. 71, 72 (1975). "The burdensome language of contemporary insurance contracts can be attributed in part to legislatively imposed requirements and in part to the common law. The good intent of each molding force is not in question. The nature of the insurance product and legal nuances easily give rise to complex policy wording. It is generally recognized that policy language must be harmonized to satisfy technical, economic and legal requirements of insurance companies, regulators and the courts. Those standard forms mandated by statutes or administrative orders are typically reflections of or reactions to judicial decision. In effect, the courts have been the chief architects of a great bulk of the verbose and highly technical policy language." Id.

39. Id. But see Reutershan & Kunze, Who Wants a New Insurance Policy? 24 Drake L. Rev. 753 (1975) (noting the judicial outcry against technical insurance policies but noting the inherent drafting difficulties without the jargon).

40. For an example of unequal bargaining positions even among professionals, see Donnelly v. Transportation Ins. Co., 589 F.2d 761 (4th Cir. 1978). An exclusion in the plaintiff-attorney's policy denied defense coverage for "any dishonest, fradulent, . . . act or omission." Id. at 763. The insurer refused to defend the attorney because one of the claims for unauthorized sale of a client's securities was not an act covered by the policy. Yet, the policy specifically protected the attorney against becoming "obligated to pay as damages because of any act or omission . . . arising out of performance of professional services for others in the insured's capacity as a lawyer." Id. at 765-66. The court held that "[p]olicy language, susceptible of more than one interpretation, is construed, if reasonably possible,

to provide coverage." Id. at 768. As long as one of the charges against the attorney could arguably fall within this definition of the policy, the insurer owed its insured a defense on all charges.

41. The nature of the problem presented by contracts of adhesion has long been recognized, but the courts, bound by their sense of the imperative of freedom of contract, have generally not responded to the problem in a creative or analytic fashion. Instead, in the time-honored tradition of the common law, courts reacted to the equities of particular cases, cloaking the result in legal fictions. See Kamarck, Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations, 29 Hastings L.J. 153, 158-59 (1977). See also Comment, Contracts of Adhesion Under California Law, 1 U.S.F.L. Rev. 306, 307 (1967).

42. At least seventeen jurisdictions use a reasonable expectations analysis. See Note, A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance

Contracts, 13 U. Mich. J.L. Rev. 603, 609 & n.22 (1980).

43. See Bandura v. Fidelity & Guar. Life Ins. Co., 443 F. Supp. 829, 832 (W.D. Pa. 1978) (policy interpreted according to the parties' intent when the contract was made); INA Life Ins. Co. v. Brundin, 553 P.2d 236, 242 (Ala. 1975) (policyholder's reasonable expectations control interpretation); Insurance Co. of N. Am. v. Sam Harris Constr. Co., 22 Cal. 3d 409, 583 P.2d 1335, 149 Cal. Rptr. 292 (1978) (meaning ascertained by reference to insured's reasonable expectations of coverage); Allstate Ins. Co. v. Anderson, 87 Mich. App. 539, 542, 274 N.W.2d 66, 68 (1978) (per curiam) (court's duty is to ascertain the meaning the insured would reasonably expect); Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 187 Neb. 720, 722, 193 N.W.2d 752, 754 (1972) (per curiam) (objectively reasonable expectations of the insured will be honored); Jones v. Continental Cas. Co., 123 N.J. Super. 353, 359, 303 A.2d 91, 94 (1973) (insured receives protection necessary to

fulfill his reasonable expectations).

44. Abraham, Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured, 67 Va. L. Rev. 1151, 1152-53 (1981).

45. Id. See Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (liability); Ransom v. Penn Mut. Life Ins. Co., 43 Cal. 2d 420, 274 P.2d 633 (1954) (life); Kievet v. Loyal Protective Life Ins. Co., 34 N.J. 475, 170 A.2d 22 (1961) (accident).

46. Keeton, supra note 37, at 967. A subsequent analysis by the doctrine's creator can be found in Keeton, Reasonable Expectations in the Second Decade, 12 Forum 275 (1975) [hereinafter cited as Keeton II].

47. Keeton, supra note 37,at 967.

48. Id. at 967-69.

49. "An important corollary of the expectations principle is that insurers ought not to be allowed to use qualifications and exceptions from coverage that are inconsistent with the reasonable expectations of a policyholder having an

ordinary degree of familiarity with the type of coverage involved. This ought not to be allowed even though the insurer's form is very explicit and unambiguous, because insurers know that ordinarily policyholders will not in fact read their policies. Policy forms are long and complicated and cannot be fully understood without detailed study; few policyholders ever read their policies as carefully as would be required for moderately detailed understanding." Id. at 968.

50. Id. For an analysis of Keeton's influence on the doctrine, see, Note, A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts, 13 U. Mich. J.L. Rev. 603, 611-12 (1980). Cf., Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 553 (1971). If a court were to enforce, literally, all terms found in a mass-standardized contract, it would be a candid recognition that private lawmakers can control a person's rights whether that person consented or not.

Professor Slawson questions whether this private lawmaking power is constitutional without appropriate procedural safeguards. Id.

51. Professor Abraham has attempted to classify cases which use the reasonable expectations approach. First, he argues two basic themes, misleading impression and mandated coverage, occur throughout judicial opinions granting coverage through reasonable expectations. See Abraham, Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured, 67 Va. L. Rev. 1150, 1154-68 (1981).

52. See, e.g., Smith v. Westland Ins. Co., 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975) (layman's expectation of complete and immediate coverage upon premium payment is so strong that insurer wishing to avoid obligation must use more than clear and unequivocal language).

53. See, e.g., Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (reasonable expectations

must be honored regardless of policy provisions because of circumstances involved in marketing the policy). Cf. Herzog v. National Am. Ins. Co., 2 Cal. 3d 192, 194, 465 P.2d 841, 843, 84 Cal. Rptr. 705, 707 (1970) (expectation of automobile liability coverage under homeowner's policy unreasonable because liability coverage was otherwise available). See generally Comment, The Insurer's Duty to Defend Made Absolute: Gray v. Zurich, 14 U.C.L.A. L. Rev. 1328 (1967).

54. Abraham, supra note 44 at 1154.

55. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

56. Id. at 869, 377 P.2d at 288, 27 Cal. Rptr. at 176.

57. Professor Abraham has classified Steven as a misleading automated marketing case. Abraham, supra note 44 at 1155-56.

58. The insurer in Steven had not placed its vending machine in close proximity to counters of airlines not covered by the policy. The insured's misimpression arose from his failure to understand the fine print of the policy

and the absence of an agent to correct any misunderstandings. Contrary to the court's finding, there was little evidence in Steven suggesting that a reasonable insured actually would have expected the disputed coverage; it is more likely that a reasonable insured would not have considered the possibility of a substitute flight, and thus would have had no preexisting expectation concerning the disputed coverage. Id. at 877, 377 P.2d at 293-94, 27 Cal. Rptr. at 181-82.

59. See discussion of Steven in Abraham, supra note 44 at 1156. Cf. Note, Idaho and the Doctrine of Reasonable Expectations: A Springboard for an Analysis of a New Approach to a Valuable But Often Misunderstood Doctrine, 47 Ins. Counsel J. 325, 327 (1980) (arguing that courts had no reasons to depart from traditional principles in most instances).

60. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

61. Gray was insured by the defendant under a comprehensive liability endorsement which covered against liability for

bodily injury and property damage. A standard insuring clause excluded coverage for loss caused intentionally by or at the direction of the insured. Gray was sued for intentionally assaulting the plaintiff. Id. at 267, 419 P.2d at 170, 54 Cal. Rptr. at 106. As an alternative ground of liability, the court found that the complaint presented the possibility that the damages sought would be covered by the policy. Id. at 276, 419 P.2d at 177, 54 Cal. Rptr. at 113.

62. Cf. Squires, A Skeptical Look at the Doctrine of Reasonable Expectation, 6 Forum 252, 254 (1971) (arguing that the Gray application of reasonable expectations was a mere restatement of old principles).

63. Reasonable expectations extends beyond mere construction of ambiguous language against the insurer. The doctrine allows judicial determination of a reasonable person's beliefs as to his coverage regardless of policy language. See Keeton, supra note 37, at 972.

64. Id.

65. Standard insurance contracts, which are inherently adhesionary, are indiscriminate between general or particular application. Only one party drafts the form, and the drafter predictably includes generalized terms that slant broadly and uniformly in his favor. See Kamarck, Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations, 29 Hastings L.J. 153, 157 (1977).

66. See Keeton, supra note 37, at 972.

67. A knowledgeable purchaser should voluntarily enter into or refrain from contractual obligations. See F. Pollock & F. Maitland, History of English Law 233 (2d ed. 1968). Cf. Williston, Freedom of Contract, 6 Cornell L.Q. 365, 374 (1921) (unlimited freedom of contract does not necessarily lead to public or individual welfare).

68. 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975).

69. Id. at 114, 539 P.2d at 435, 123 Cal. Rptr. at 651.

70. Id. at 115, 539 P.2d at 436, 123 Cal. Rptr. at 652.

71. Id. at 120, 539 P.2d at 442, 123 Cal. Rptr. at 655.

72. Id. at 126, 539 P.2d at 443-44, 123 Cal. Rptr. at 659-60. Cf. Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir.), cert. denied, 331 U.S. 849 (1947) (relying upon contract ambiguity rather than reasonable expectations).

73. Accord, Collister v. Nationwide Ins. Co., 479 Pa. 579, 595, 388 A.2d 1346, 1354 (1978) (insurer failed to establish by clear and convincing evidence that deceased could not have entertained reasonable expectations of coverage).

74. The insurer could conditionally receive the premium and after the insured's death, terminate the policy based on the conditional premiums.

75. See, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975) (burglary and robbery policy could not condition coverage on proof of visible marks of entry); Foremost Life Ins. Co. v. Water, 88 Mich. App. 599, 278 N.W.2d 688 (1979) (refusal to enforce a subrogation clause that would defeat the primary

purpose of a disability policy); Lariviere v. New Hampshire Ins. Group, 120 N.H. 168, 413 A.2d 309 (1980) (liability policy covering insured's building and moving business could not exclude coverage for damage occurring during the movement of any building, because such exclusion would defeat the reasonable expectations of the insured).

76. See notes 55-59 and accompanying text, supra.

77. See notes 60-66 and accompanying text, supra.

78. Professor Abraham has made an inclusive study of rationales supporting and opposed to the doctrine of reasonable expectations in Abraham, Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured, 67 Va. L.R. 1151, 1168-89 (1981).

79. See notes 82-85 and accompanying text, infra.

80. See notes 86-92 and accompanying text, infra.

81. See notes 93-96 and accompanying text, infra.

82. See Keeton, supra, note 37, at 968 (reasonable expectations resolves insured's misunderstands).

83. E.g., Collister v. Nationwide Life Ins. Co., 479 Pa.

579, 388 A.2d 1346 (1978) (clear note must be given to prevent coverage).

84. Simply, the insurer must provide information to the prospective insured or face consequences of liability because the insured misconstrued the insurer's provisions Cf. Fritz v. Old Am. Ins. Co., 354 F. Supp. 514, 516-18 (S.D. Tex. 1973) (despite Texas law that ambiguity does not defeat right of insurance company to set policy terms without regard to insured's expectations, mail order solicitation through form contracts imposes higher duty on company).

85. See Letter from Robert L. Wasserman to Editor (Nov. 1978), reprinted in 1978 Ins. L.J. 663 (1978) (the obvious solution for those involved with drafting policies is to educate the average person so he can understand them).

86. E.g., Klos v. Mobil Oil Co., 55 N.J. 117, 259 A.2d 889 (1969) (since insurer created expectation, fairness must hold him responsible).

87. See Uniform Commercial Code §2-302, Comment 1, §2-302

(1979) (permits a court that finds a contract or clause unconscionable to refuse to enforce the contract, to enforce it without the clause, or to limit application of the clause so as to avoid an unconscionable result). See generally Spanogle, Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931 (1969); Note, Unconscionability--The Code, the Court, and The Consumer, 9 B.C. Ind. & Com. L. Rev. 367 (1968).

88. See Hill, Damages for Innocent Misrepresentation, 73 Colum. L. Rev. 679, 686-88 (1973).

89. See generally J. Pomeroy, Equity Jurisprudence §870 (2d ed. 1892). See also Comment, Theories of Unconscionability, Reasonable Expectations, and Implied Warranty Defeat Policy Clause Limiting Recovery to Burglary Evidenced by Exterior Marks, 64 Geo. L.J. 987, 991-92 (1976) (the entire aspect of drafting and marketing policies is unfair to the insured and may be declared unconscionable).

90. See Comment, note 89 supra.

91. Id. Also, Keeton, supra note 37, at 963.

92. See, e.g., Home Ins. Co. v. Randolph, 106 N.J. Super. 439, 441-43, 256 A.2d 81, 83-84 (Ch. Div. 1969) (failure to inform insured that coverage would cease with transfer of car title to son results in continuation of coverage); Barth v. State Farm Fire & Cas. Co., 214 Pa. Super. 434, 443-44, 257 A.2d 671, 675 (1969) (reliance on brochure distributed with policy results in coverage for loss not technically included because of insured's reasonable expectations and unclear exclusion clause).

93. Abraham, supra note 78, at 1185-1189. "Risk distribution" is used to refer to risks spread among members of a group and may refer to a number of different concepts. See Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961).

94. See note 12 supra.

95. Abraham, supra note 78, at 1186. However, insurers have not generally differentiated coverage offerings. Id. at 1186 and n.120.

96. Id. at 1189.

97. See, e.g., Gardner, Reasonable Expectations: Evolution Completed or Revolution Begun?, 1978 Ins. L.J. 573 (1978); Squires, A Skeptical Look at the Doctrine of Reasonable Expectation, 6 Forum 252 (1971); Comment, Reasonable Expectations: The Insurer's Dilemma, 24 Drake L. Rev. 853 (1975).

98. See In re Nice & Schreiber, 123 F. 987 (E.D. Pa. 1903) ("reasonable" is a relative term); Waschak v. Moffat, 173 Pa. Super. Ct. 209, 96 A.2d 163 (1953) ("reasonable" depends on the set of facts involved); Houston & T.C.R. Co. v. Everett, 1 Tex. 862, 86 S.W. 17 (1905) ("reasonable" encompasses what is sensible, rational, fitting, and proper).

99. See note 97 and accompanying text, supra.

100. See Note, supra note 50 at 618-19 (indicating that an insurer cannot foresee an insured's expected coverage because elements outside the contract are included with an expectations test).

101. Id.

102. Insurers can only evaluate costs of premiums through statistical analysis of previous and expected probabilities. See generally note 12 supra.

103. See generally Comment, The Doctrine of Reasonable Expectations Applied to Void a Crop Spraying Exclusion, 53 N.D. L. Rev. 613, 617 (1977) (courts may allow coverage circumstances outside the policy to hold insurers liable for losses not expected).

104. See Connor & Olerich, The Creation of Insurance Coverage by Estoppel, 20 Def. L.J. 461, 471 (1971) (evidentiary problems arise when courts reconstruct the policy due to outside events).

105. Id.

106. See Abraham, supra note 78, at 1197-98.

107. See generally Note, The Insurance Contract and the Doctrine of Reasonable Expectation, 6 Forum 116, 122-23 (1971) (contrasting the expectations doctrine with traditional construction principles).

108. See R. Keeton, Basic Text on Insurance Law §6.3(a) (1971).

109. See note 42 and accompanying text, supra.

110. Although courts note the unfairness of denying the innocent spouse relief, the result is inevitable through a traditional analysis. See, e.g., Home Ins. Co. v. Pugh, 51 Ala. App. 373, 374, 286 So. 2d 49, 50 (1973) (law does not allow an innocent owner to recover on a policy of insurance where co-owner wilfully set jointly owned property on fire); Fuselier v. United States Fidel. and Guar. Co., 301 So. 2d 681, 682 (La. App. 1974)(Louisiana law does not permit one to profit from a wrongdoing); Kosier v. Continental Ins. Co., 299 Mass. 601, 602, 13 N.E.2d 423, 424 (1938) (wrongful acts of plaintiff's husband rendered policy void); Ijames v. Republic Ins. Co., 33 Mich. App. 541, 544, 190 N.W.2d 366, 369 (1971) (the attempt to defraud the insurer by any co-insured completely bars an innocent co-insured's recovery upon the policy); Bridges v. Commercial Standard Ins. Co., 252 S.W.2d 511, 512 (Tex. Civ. App. 1952)

(husband cannot recover after wife intentionally destroyed community property); Rockingham Mut. Ins. Co. v. Hummel, 219 Va. 803, 805, 250 S.E.2d 774, 776 (1979) (if either spouse departed from contractual duties, the policy would be voided); Klemens v. Badger Mut. Ins. Co. of Milwaukee, 8 Wis. 2d 565, 566, 99 N.W.2d 865, 866 (1959) (intentional destruction of property violated parties promise to save and preserve property).

111. See 5A J. Appleman, Insurance Law and Practice §3587-90 (rev. ed. 1970 & Supp. 1981).

112. E.g., Morgan v. Cincinnati Ins. Co., 19 Mich. App. 49, 282 N.W.2d 829 (1979); Shurt v. Oklahoma Farmer's Union Ins. Co., 619 P.2d 588 (Okla. 1980).

113. See Address by Paul B. Butler, Jr., ABA Convention: Section on Tort and Ins. Law (Aug. 11, 1981) (innocent co-insureds present tremendous problems with fraudulent insurance claims because courts must strain insurance principles to grant relief upon the insurance policy).

114. See, e.g., Federal Ins. Co. v. Wong, 137 F. Supp. 232

(S.D. Cal. 1956) (joint adventurers in ownership of truck and willful destruction by one are not insured by policy covering accidental loss); Kosior v. Continental Ins. Co., 299 Mass. 601, 13 N.E.2d 423 (1938) (no recovery in equity because the policy was joint); Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N.W. 797 (1884) (contract of insurance was joint); Ijames v. Republic Ins. Co., 33 Mich. App. 541, 190 N.W.2d 366 (1971) (contract was joint); Matyuf v. Phoenix Ins. Co., 27 Pa. D. & C.2d 351 (1933) (the contract was a joint agreement by both parties to use good faith, and wilful destruction by one was outside this implied condition of the contract and therefore not insured against); Bridges v. Commercial Standard Ins. Co., 252 S.W.2d 511 (Tex. Civ. App. 1950) (goods were community property so they had a joint undivided interest); Jones v. Fidelity & Guar. Ins. Co., 250 S.W.2d 281 (Tex. Civ. App. 1952) (right to recover was joint since obligations of the contract were joint and because the property was community property);

Klemens v. Badger Mut. Ins. Co., 8 Wis. 2d 565, 99 N.W.2d 865 (1959) (joint obligation under contract to refrain from fraud); Bellman v. Home Ins. Co., 178 Wis. 349, 189 N.W. 1023 (1922) (as partners, had joint obligations).

115. See, e.g., Kosier v. Continental Ins. Co., 299 Mass. 601, 13 N.E.2d 423 (1938) (finding separable interests); Klemen v. Badger Mut. Ins. Co., 8 Wis. 2d 565, 99 N.W.2d 865 (1959) (fraudulent act is not attributable to wife because separate interest exists).

116. See Comment, Innocent Coinsured's Recovery not Barred by Fraud of Husband, 21 Wayne L. Rev. 169, 170 (1974).

117. Property insurance contracts are personal to the parties and insure personal interests in property. Insurance policies do not cover the property but risks of loss to the property. See 29 Richmond on Insurance Law §1439 (1964).

118. Id.

119. See 4 J. Appleman, Insurance Law and Practice §2105 (rev. ed. 1979 & Supp. 1980).

120. The joint insurable property interest arises from the marriage whereby the spouses are co-owners of community property. See C. Moynihan, Introduction to the Law of Real Property 216 (1962).

121. E.g., Federal Ins. Co. v. Wong, 137 F. Supp. 232 (S.D. Cal. 1956); Kosier v. Continental Ins. Co., 299 Mass. 601, 13 N.E.2d 423 (1938); Monaghan v. Agriculture Fire Ins. Co., 53 Mich. 238, 18 N.W. 797 (1884).

122. 91 Mich. App. 49, 282 N.W.2d 829 (1979).

123. Id. at 50, 282 N.W.2d at 830.

124. The court was required to determine whether the spouses interest was divisible. If the interest was divisible, the wife could recover; if not, no recovery could be granted. See Simon v. Security Ins. Co., 390 Mich. 72, 210 N.W.2d 322 (1973).

125. 91 Mich. App. at 50-51, 282 N.W.2d at 830-31.

126. Id. The court would grant the innocent wife recovery had the spouses proceeded to divorce.

127. Id.

128. See generally Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971).

129. E.g., Kosior v. Continental Ins. Co., 299 Mass. 601, 602, 13 N.E.2d 423, 424 (1938); Matyuf v. Phoenix Ins. Co., 27 Pa. D. & C.2d 351, 353 (1933); Bridges v. Commercial Standard Ins. Co., 252 S.W.2d 511, 512 (Tex. Ct. App. 1952).

130. 619 P.2d 588 (Okla. 1980).

131. The husband was subsequently convicted of arson, and the insurer admitted that the wife took no part in the intentional destruction. After the fire, the parties were awarded a divorce which granted all properties, including the proceeds of the insurance, to the wife. Id. at 589-91.

132. Id. at 590.

133. Id.

134. See generally President's Nat.'l Advisory Panel on Ins. in Riot-Affected Areas, Meeting the Insurance Crisis

of Our Cities (1968).

135. 619 P.2d at 590.

136. Id. at 589-91.

137. Id. at 591-94.

138. Id. at 593.

139. Additionally, Oklahoma recognized a married woman's personal rights as separate by statute. See Okla. Stat. tit. 32, §15 (Supp. 1973).

140. Cf. Hoyt v. New Hampshire Fire Ins. Co., 92 N.H. 242, 29 A.2d 121 (1942) (looking to the co-insureds' expectations of coverage).

141. See, e.g., Arenson v. National Auto. and Cas. Ins. Co., 45 Cal. 2d 81, 286 P.2d 816 (1955); Hildebrand v. Holyoke Mut. Fire Ins. Co., 386 A.2d 329 (Me. 1978); Walker v. Lumbermans Mut. Cas. Co., 491 S.W.2d 696 (Tex. Civ. App. 1973).

142. Id.

143. 95 N.M. 257, 620 P.2d 1282 (1980).

144. Id. at 258, 620 P.2d at 1283.

145. Id. at 259, 620 P.2d at 1284. Cf. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948) (separate spouses interests to avoid injustice).

146. 95 N.M. at 260-62, 620 P.2d at 1284-85.

147. Id.

148. See note 23 supra.

149. Courts often employed fictional principles to avoid decisions which were unjust to the insured. See Keeton II, supra note 46, at 278. See generally W. Prosser, Law of Torts 613-22 (4th ed. 1971) (discussion of relationship between contract and tort).

150. See Restatement of Restitution 11, §1 (1937).

151. 386 A.2d 329 (Me. 1978). The innocent wife sought damages from her defendant insurer. The insurer counter-claimed for the amount paid to the innocent mortgagee. The sole issue on appeal was whether the insured's recovery would violate Maine public policy and provisions of the insurance contract. Id. at 330.

152. Id. at 332. The court relied upon Erlin-Lawler Enter., Inc. v. Fire Ins. Exch., 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968)(to find no property or financial benefit would inherently bestow to an arsonist because his wife recovered insurance proceeds). But see Butler & Freemon, The Innocent Co-Insured: He Burns It, She Claims--Windfall or Technical Injustice? 17 Forum 187, 208 (1981). Butler & Freemon argue that the innocent wife's recovery may nevertheless benefit the arsonist. The benefit to the arsonist transpires if the wife is granted recovery and subsequently dies. In that event, the proceeds fall to the arsonist under his rights of survivorship. Id. at 207-09.

153. In Delph and Hildebrand, the policies excluded coverage for loss intentionally caused by the insured. See 95 N.M. 256, 258, 620 P.2d 1282, 1283 (1980); 386 A.2d 329, 331 (Me. 1978). However, the term "insured", has been interpreted with various results. See also Risjord & Austin, Who Is "The Insured" Revisited, 1961

Ins. Counsel J. 100 (1961) (construction of term in various jurisdictions).

154. See Butler & Freemon, supra note 152, at 206-209. The courts simply apply rules of law which conveniently provide the desired result rather than applying a consistent test. Id.

155. Compare Morgan v. Cincinnati Ins. Co., 91 Mich. App. 49, 50, 282 N.W.2d 829, 830 (1979) (holding against innocent wife with extreme reluctance) with Miller & Dorbin Furniture Co. v. Camden Fire Ins. Co., 55 N.J. Super. 205, 150 A.2d 276 (1959) (using agency principles to deny innocent stockholders recovery under policy).

156. 9 R. Anderson, Couch Cyclopedia of Insurance Law §23:31 (2d ed. 1960) (agent effects interests of one he represents).

157. See H. Henn, Law of Corporations §180 (2d ed. 1970). The corporation must be organized and managed by natural people. Id. The management of the company is required to act as fiduciaries for the corporation. Id. at 231.

158. See 18 R. Anderson, Couch Cyclopedia of Insurance Law

§74:670 (2d ed. 1968 & Supp. 1980). As a general rule, the wilful burning of property by a stockholder in a corporation is not a defense against the collection of the insurance by the corporation; nor can the corporation be prevented from collecting the insurance because its agents wilfully set fire to the property, if done without the participation or authority of the corporation, or all its stockholders. Id. See, e.g., Kimball Ice Co. v. Hartford Fire Ins. Co., 18 F.2d 563 (4th Cir. 1927) (officer and general manager fraudulently set fire to corporate property and court would not grant recovery because corporation would benefit from decree).

159. See Kimball Ice Co. v. Hartford Fire Ins. Co., 18 F.2d 563 (5th Cir. 1927). In Kimball, the court allowed agent's action to be imputed to the corporation because of the cumulation of several facts: he placed the policy in the name of the company without knowledge of the other officers; he owned one-fourth of the capital stock of the company; he had exclusive control and

management of the property; and, significantly, he was a large creditor of the company which was insolvent. Id. at 564-67. See, e.g., Fidelity-Phoenix Fire Ins. Co. v. Queen City Bus & Transfer Co., 3 F.2d 784 (4th Cir. 1925); Meily Co. v. London & L. Fire Ins. Co., 142 F. 873 (C.C.E.D. Pa.), aff'd, 148 F. 683 (3d Cir. 1906). See also McCormick, Frauds of the Insured, Imputation of Knowledge in Fidelity Cases, 4 Forum 204 (1969).

160. 55 N.J. Super. 205, 150 A.2d 276 (1959).

161. Id. at 208-11, 150 A.2d at 280-81. The wrongdoer had to be viewed as the person who would substantially benefit from the payment of insurance. If he did benefit from the insurance proceeds, the court could not grant recovery under the principle that no man should be permitted to allege his own wrongdoing as a ground for recovery of suit. Id.

162. Id. at 217, 150 A.2d at 286. The court looked beyond the corporate fiction to analyze the role played by

individuals who composed the corporation. The arsonist was clearly a principal of the corporation. He owed large sums to the corporation, held several offices, and owned a significant portion of stock in the corporation. Id. at 215-217, 150 A.2d at 284-86.

163. See notes 150-53 and accompanying text, supra.

164. In a close corporation, the courts are prone to place a higher fiduciary duty among controlling stockholders. See H. Henn, Law of Corporations §268 (2d ed. 1970). Thus, the Miller court correctly looked to the management of the corporate affairs. Finding that the wrongdoer was allowed to dictate policy of the corporation in all matters, the court was correct to impute the wrongdoing to the stockholders. While the stockholders were literally innocent of the arson, they had consented to any acts which the wrongdoer intended to complete in furtherance of the corporation.

165. An agency analysis is necessary to determine

whether a person, who had authority from another, acted within his authority (or whether another allowed such conduct to operate) to impute the wrongdoing to another. Id. In Miller, the wrongful actions were impliedly consented to by the other shareholders. 55 N.J. Super. 205, 207, 150 A.2d 276, 281 (1959).

166. The court's reliance in Hildebrand at 386 A.2d 329, 332, upon Erlin-Lawler Enterprises, Inc. v. Fire Ins. Exch., 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968), is incorrect because Erlin-Lawler property used an agency determination. The arsonist's actions were not attributable to the wife in Erlin-Lawler because the arsonist absolved corporate ties. Id. at 384, 73 Cal. Rptr. at 185. Erlin-Lawler was applying a test similar to Miller which is reserved for corporate matters and not matters between husband and wife who hold no corporate property which was destroyed.

167. See note 166, supra. Additionally, Butler & Freemon, supra note 152, at 206-207 (courts should not confuse the

innocent spouse recovery with inappropriate tort, agency, or benefit analysis principles).

168. See note 157, supra.

169. The insured in Miller was the corporation. However, the insured in Hildebrand was a person.

170. See note 167, supra.

171. Traditional principles of construction should theoretically apply if the parties are of equal contracting and bargaining strength. See R. Keeton, Basic Text on Insurance Law §6.3(a) (1971).

172. See generally 11 R. Anderson, Couch Cyclopedia of Insurance Law 2d §42:684 (2d ed. 1960 & Supp. 1980) (for discussion of mortgagee clause construction).

173. The mortgagee is protected by a separate clause in the insurance contract which aids his recovery. For example, the clause usually appears as: "Loss, if any, under this policy shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear under all present or future mortgages upon the property herein described in

which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgages, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such

increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice to cancel this agreement. Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full

assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgagee's (or trustee's) claim." Connally, Mortgagor-Mortgagee Problems and the Standard Mortgage Clause, 13 Forum 786, 787-88 n.4 (1978).

174. See, Note, Fire Insurance Recovery Rights of the Foreclosing Mortgagee: Is His Lien Lost in the Ashes?, 8 Fordham Urb. L.J. 857, 858-863 (1980) (the mortgagee has developed a separate clause in the insurance contract which uniquely provides the mortgagee with advantages not available to the normal insured person).

175. See, 6A J. Appleman, Insurance Law and Practice §4164 at 477 n.3 (2d ed. 1970 & Supp. 1981). See, e.g., Hartford Fire Ins. Co. v. Associates Capital Corp., 313 So. 2d 404, 407 (Miss. 1975); General Elec. Credit Corp. v. Aetna Cas. & Sur. Co., 437 Pa. 463, 465, 263 A.2d 448, 450 (1970). Contra, 11 R. Anderson, Couch Cyclopedia of Insurance Law 2d §42:650 (2d ed. 1960 & Supp. 1980)

(mortgagee's separate clause should not be viewed as a complete contract in itself).

176. Mortgagees require insurance on the mortgaged property to protect their insurable interest, the mortgage, from failure. See Lev, Mortgagees and Insurers: The Legal Nuts and Bolts of Their Relationship, 12 Forum 1012, 1012 (1977) (the mortgagee is only concerned with the protection of the loan).

177. See generally Comment, Arson Fraud: Criminal Prosecution and Insurance Law, 7 Fordham Urb. L.J. 541, 570 (1979) (a minority of jurisdictions use small variations from the standard mortgagee clause).

178. See Stockton v. Atlantic Fire Ins. Co., 207 N.C. 43, 45,175 S.E. 695, 697 (1934) (standard mortgage clause applies to acts or admissions by the mortgagor); 11 R. Anderson, Couch Cyclopedia of Insurance Law 2d §42:687 (2d ed. 1960 & Supp. 1980) (clause protects mortgagee from mortgagor's acts).

179. See note 175, supra.

180. See 11 R. Anderson, Couch Cyclopedia of Insurance Law 2d §42:695 (2d ed. 1960 & Supp. 1980). See, e.g., Oklahoma Farmers' Educ. & Coop. Union v. Folsom, 325 P.2d 1053, 1055-56 (1958) (applied to policy covering building despite insured's actions).

181. See, e.g., Home Ins. Co. v. Pugh, 51 Ala. App. 373, 374, 286 So. 2d 49, 50 (1973) (law does not allow an innocent owner to recover on a policy of insurance where co-owner wilfully set jointly owned property on fire); Fuselier v. United States Fidel. & Guar. Co., 301 So. 2d 681, 682 (La. App. 1974) (Louisiana law does not permit one to profit from a wrongdoing); Kosier v. Continental Ins. Co., 299 Mass. 601, 602, 13 N.E.2d 423, 424 (1938) (wrongful acts of plaintiff's husband rendered policy void); Ijames v. Republic Ins. Co., 33 Mich. App. 541, 544, 190 N.W.2d 366, 369 (1971) (the attempt to defraud the insurer by any co-insured completely bars an innocent co-insured's recovery upon the policy); Bridges v. Commercial Standard Ins. Co., 252 S.W.2d 511, 512 (Tex.

Civ. App. 1952) (husband cannot recover after wife intentionally destroyed community property); Rockingham Mut. Ins. Co. v. Hummel, 219 Va. 803, 805, 250 S.E.2d 774, 776 (1979) (if either spouse departed from contractual duties, the policy would be voided); Klemens v. Badger Mut. Ins. Co. of Milwaukee, 8 Wis. 2d 565, 566, 99 N.W.2d 865, 866 (1959) (intentional destruction of property violated parties' promise to save and preserve property).

182. See Note, supra note 174, at 861.

183. See R. Riegel, J. Miller & A. Williams, Insurance Principles and Practices 53 (6th ed. 1976).

184. Id. See, e.g., Aetna State Bank v. Maryland Cas. Co., 345 F. Supp. 903 (N.D. Ill. 1972) (mortgagee must be given notice for policy to become void).

185. See Lev, Mortgagees and Insurers: The Legal Nuts and Bolts of Their Relationship, 12 Forum 1012, 1014 (1977).

186. In the event the mortgagee fails to pay a premium not paid by the mortgagor, the policy lapses and neither party has his interest protected. Courts are divided on

whether the clause imposes a contractual duty on the mortgagee to pay premiums or merely gives the mortgagee an option to keep the insurance in force. See W. Vance, Law of Insurance 776 (3d ed. 1951).

187. See 11 R. Anderson, Couch Cyclopedia of Insurance Law 2d §42:683 (2d ed. 1960 & Supp. 1980); 5A J. Appleman, Insurance Law and Practice §3381 (2d ed. 1970 & Supp. 1981).

188. Mortgagees are usually large lending institutions or responsible individuals likely to keep the insurance in force and to guard against destruction of their security interests, although they are under no duty to do so. See, Note, supra note 174 at 862 n.37.

189. See generally id. at 862-63.

190. See 5A Appleman, Insurance Law and Practice §3401 (2d ed. 1970 & Supp. 1981). For cases finding the clause as designating only a beneficiary interest, see, e.g., Capital Fire Ins. Co. v. Longhorne, 146 F.2d 237, 241 (8th Cir. 1945); German Ins. Co. v. Hayden, 21 Colo. 127, 128, 40

P. 435, 436 (1895); Wharen v. Markle Banking & Trust Co., 145 Pa. Super. 99, 102, 20 A.2d 885, 887 (1941). Jurists writing opinions on mortgage clause cases frequently use the terms "standard mortgage clause" and "loss payable clause" interchangeably. This leads to unnecessary confusion among courts and law review writers. See Note, Foreclosure, Loss, and the Proper Distribution of Insurance Proceeds Under Open and Standard Mortgage Clauses: Some Observations, 7 Val. L. Rev. 485, 489 (1973).

191. See 5A Appleman, supra note 190, at 3401.

192. Cf. Howell v. Ohio Cas. Ins. Co., 124 N.J. Super. 414, 307 A.2d 142 (1973) (the New Jersey Superior court allowed innocent spouse recovery); Hawthorne v. Hawthorne, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963) (the wife sought the proceeds of an insurance policy on real property held by the entirety and wilfully destroyed by her husband. The court refused to bar recovery by deciding that the contract and its proceeds were personalty and there can be no holding by the entirety in personalty).

193. See generally Keeton, note 37, supra.

194. Id. at 967. See, e.g., Bandura v. Fidelity & Guar. Life Ins. Co., 443 F. Supp. 829, 832 (W.D. Pa. 1978) (policy interpreted according to the parties' intent when the contract was made); INA Life Ins. Co. v. Brundin, 553 P.2d 236, 242 (Ala. 1975) (policyholder's reasonable expectations control interpretation); Insurance Co. of N. Am. v. Sam Harris Constr. Co., 22 Cal. 3d 409, 583 P.2d 1335, 149 Cal. Rptr. 292 (1978) (meaning ascertained by reference to insured's reasonable expectations of coverage); Allstate Ins. Co. v. Anderson, 87 Mich. App. 539, 542, 274 N.W.2d 66, 68 (1978) (per curiam) (court's duty is to ascertain the meaning the insured would reasonably expect); Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 187 Neb. 720, 722, 193 N.W.2d 752, 754 (1972) (per curiam) (objectively reasonable expectations of the insured will be honored); Jones v. Continental Cas. Co., 123 N.J. Super. 353, 359, 303 A.2d 91, 94 (1973) (insured receives protection

necessary to fulfill his reasonable expectations).

195. 92 N.H. 242, 29 A.2d 121 (1942).

196. Id. at 244, 29 A.2d at 123.

197. Id.

198. Id. See also, Note, Interpreting the 'Business Pursuits' Exclusion in Homeowner's Policies--Toward Honoring Reasonable Expectations, 25 S.D.L. Rev. 132, 139-40 (1979) (doctrined used as a devise to stop adhesionary drafting).

199. Most decisions refrain from viewing the underlying expectations. See, e.g., Aetna Ins. Co. v. Getchell Steel Treating Co., 395 F.2d 12 (8th Cir. 1968) (policy and enforcement were construed to give effect to all provisions, thus, the finding that insured's fire policy was intended to cover every loss proximately caused by fire and every loss flowing from such peril); Great W. Cas. Co. v. Truck Ins. Exch., 358 F.2d 883 (10th Cir. 1966) (no policy language supported the insured's claim of coverage for destroyed vehicle which was to have been insured by the lessee); Union Ins. Soc'y v. William Gluckin & Co., 353

F.2d 946 (2d Cir. 1965) (since the critical language in the policy was ambiguous, a triable issue of fact existed as to the intent of the parties); Fidelity & Cas. Co. v. Seven Provinces Ins. Co., 356 F.2d 227 (6th Cir. 1965) (the case was remanded to determine what the ambiguous provision meant in the regular course of business).

200. 28 Ill. App. 3d 625, 390 N.E.2d 361 (1977).

201. The wrongdoing wife confessed to burning the property. Id. at 626, 390 N.E.2d at 362. The insurance company argued that the spouses had a joint interest which barred the innocent husband from recovery. Id. at 627-29, 390 N.E.2d at 363-64.

202. Id. at 629, 390 N.E.2d at 364. The court would require the insurer to make the meaning understandable before denying the innocent spouse recovery. Id. Accord, Butler & Freemon, supra note 152, at 211 (concluding that insurers should redraft standard policies if coverage is to be excluded from innocent spouse).

203. See Abraham, Judge-Made Law and Judge-Made Insurance:

Honoring the Reasonable Expectations of the Insured, 67 Va. L. Rev. 1151, 1169-70 (1981) (primary goal of reasonable doctrine is to promote understanding of policy through greater information flow).

204. Id. Also, Keeton, supra note 37, at 963.

205. The reduction of litigation should occur from policies which both the insured and insurer understand. Thus, discrepancies between the parties concerning losses which are within the policy should decrease.

206. See Butler & Freemon, supra note 153, at 211 (calling for insurers to draft clearly and explain coverage to insureds).

207. See Keeton, supra note 37, at 967.

208. A purpose of reasonable expectations is to eradicate the adhesionary power of the insurer. See Keeton, note 37, supra. The mortgagee already obtained bargaining equality with the insurer through the standard mortgagee clause. 6A J. Appleman, Insurance Law and Practice §4164 at 447 n.43 (2d ed. 1970 & Supp. 1981).

209. See 5A J. Appleman, Insurance Law and Practice §3381

(2d ed. 1970 & Supp. 1981).

210. E.g., Morgan v. Cincinnati Ins. Co., 19 Mich. App. 49, 282 N.W.2d 829 (1979) (following traditional rule); Short v. Oklahoma Farmer's Union Ins. Co., 619 P.2d 588 (Okla. 1980) (followed majority rule and added further policy considerations).

211. The courts would no longer have to blindly follow principles which lead to harsh results. See, e.g., Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 595, 388 A.2d 1346, 1354 (1978) (insurer failed to establish by clear and convincing evidence that deceased could not have entertained reasonable expectations of coverage).

212. See Butler & Freemon, supra note 153, at 208-09. Cf. INA Life Ins. Co. v. Brundin, 533 P.2d 236, 242 (Alaska 1975) (expectations of purchaser of accident coverage were influenced by advertising literature); Providential Life Ins. Co. v. Clem, 240 Ark. 922, 403 S.W.2d 68 (1966) (upholding insureds' right to rely on group accident insurance application and holding insureds were not

bound by the terms of a policy they had no opportunity to read); Lawrence v. Providential Life Ins. Co., 238 Ark. 981, 385 S.W.2d 936 (1965)(same).

213. See note 208, supra.

214. See Butler & Freemon, supra, note 152, at 209-11 (problems involving subrogation, collusion, and mortgagee rights must first be resolved before granting the innocent spouse recovery).

215. E.g., Fuselier v. United States Fidel. and Guar. Co., 301 So. 2d 681, 682 (La. App. 1974)(Louisiana law does not permit one to profit from a wrongdoing); Kosier v. Continental Ins. Co., 299 Mass. 601, 602 13 N.E.2d 423, 424 (1938)(wrongful acts of plaintiff's husband rendered policy void); Ijames v. Republic Ins. Co., 33 Mich. App. 541, 544, 190 N.W.2d 366, 369 (1971)(the attempt to defraud the insurer by any co-insured completely bars an innocent co-insured's recovery upon the policy).

216. See Letter from Robert L. Wasserman to Editor, 1978 Ins. L.J. 663 (Nov. 1978).

"A problem exists, to be sure. However, the solution rests not in tearing down or diluting the well-established wording, phraseology and meanings found in insurance policies; it lies in educating the average person so that he or she can understand them.

This task should be assumed by, and rightfully belongs to, those people upon whom most of the insurance-buying public depends for advice and counsel: the local agent or broker." Id.

217. But see Smith & Channon, The Rising Storm, 17 Forum 139, 149 (1981)(judges must deal with cases on an individual basis rather than responding to insurance industry pleas).