give effect to his reasonable expectations.[66] In rejecting the dissent's suggested rule, Chief Justice Reynoldson stated that the test is not whether the maker of an adhesion contract has reason to believe that an adherent would not assent to the terms of the agreement, but whether the contract gives effect to the adherent's reasonable expectations.[67]

In view of the foregoing discussion, it is suggested that the concurrence has taken the more enlightened approach. Chief Justice Reynoldson clearly does not advocate a blanket elimination of arbitration in settling contract disputes, for at the outset of his opinion, he notes that settlement of civil disputes by arbitration is a legally favored contractual proceeding. Further, he states that Iowa has always favored voluntary arbitration of specific disputes.[68] The objection raised by the concurrence, however, is that to enforce an arbitraton clause buried in an adhesion contract works an injustice on an unwary insured. It is clear, that by asserting that the arbitration clauses should be enforceable, the dissent would have the insured bound by a provision of which he is likely unaware and to which he did not voluntarily agree. An added complication of the dissent's position is that an insured's reasonable expectation of recourse to the judicial system would be cut off by allowing such clauses to be valid and enforceable. The better approach is the concurrence's reasoning, which recognizes that an insurance policy represents neither an agreement between the parties to submit their dispute to arbitration nor a knowledgeable waiver by the insured to forego his day in court.

Tim E. Jackson

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66. *Id.* at 876.

67. *Id.*

68. *Id.* at 874. *See* First Nat'l Bank v. Clay, 231 Iowa 703, 713, 2 N.W.2d 85, 91 (1942); Iowa Code § 679 (1979); *see also* note 35 *supra.*

INSURANCE—AN INSURED MAY RECOVER UNDER A POLICY OF INSURANCE FOR DAMAGE TO OR THE DESTRUCTION OF AN INSURED BUILDING EVEN IF THE BUILDING IS REPAIRED OR REPLACED AT NO COST TO THE INSURED UNDER A BUILDER'S WARRANTY.—*Gustafson v. Central Iowa Mutual Insurance Association* (Iowa 1979).

The plaintiffs, Donald Stolte and W.R. Gustafson, were farmers residing in Boone County, Iowa who had obtained insurance from the defendants, Central Iowa Mutual Insurance Association and State Farm Fire and Casualty Co., covering their farm buildings against direct loss under a standard multiperil policy.[1] Both policies were in force at the time of the loss which was the subject of the lawsuit.[2]

In 1973 both Stolte and Gustafson contacted Morton Buildings, Inc., a company whose specialty is the construction of metal buildings for farm use.[3] In addition to providing the buildings, Morton furnished both plainitiffs with an express warranty which provided that Morton would replace the buildings free of charge if directly damaged by snow or wind loads within five years.[4] The State Farm policy issued to Stolte included the Morton shed on its schedule of covered buildings. Gustafson requested and secured a coverage change endorsement subsequent to the construction of the buildings which specifically included the two Morton sheds.[5]

On June 13, 1976, a tornado swept through Boone County extensively damaging the farms of Stolte and Gustafson and destroying the Morton buildings owned by both plaintiffs.[6] The plaintiffs notified Morton and their respective insurance carriers. Pursuant to the terms of the warranty, Morton replaced the buildings at no cost to the plaintiffs.[7] However, although indemnifying the plaintiffs in accordance with policy provisions for their other losses, the insurance carriers denied payment for the Morton buildings.[8]

As a result of these denials, Stolte and Gustafson both initiated separate lawsuits in the Boone County District Court.[9] Although not formally consolidated, the actions were submitted contemporaneously on a Joint Stipulation of Facts and Briefs to the trial court.[10] On June 2, 1978, judgment was entered in favor of the plaintiffs by the district court.[11] The cases were then consoli-

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1. Gustafson v. Central Iowa Mut. Ins. Ass'n, 277 N.W.2d 609, 610 (Iowa 1979).
2. *Id.*
3. *Id.*
4. Briefs of the Appellants and Appellees, Appendix at 46. The complete warranty reads: "Morton Buildings, Inc. warrants farm buildings which it erects as follows: for a period of five (5) years to repair, or at its discretion, replace free of charge the building, framework, including roofing or side panels, if directly damaged by snow or wind loads." *Id.* at 46.
5. 277 N.W.2d at 610.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Brief of the Appellants at 1.

dated for purposes of appeal.[12]

On appeal, the insurance carriers raised two main issues for consideration. First, they contended that the insureds sustained no actual loss because of the warranty replacement of the buildings and therefore were not entitled to recovery.[13] Second, the insurance carriers alleged that the warranty was "other insurance" and that the policies contained clauses barring recovery for losses to property covered by such other insurance.[14] The Iowa Supreme Court *held,* affirmed. An insured may recover under a policy of insurance for damage to or the destruction of an insured building even if the building is repaired or replaced at no cost to the insured under a builder's warranty. The insureds sustained a direct loss, as previously defined in *Kintzel v. Wheatland Mutual Insurance Association,*[15] and would thus be allowed to recover. In resolving the second issue the court indicated that the insurance carriers had a duty to clearly and explicitly express any limitations of liability in the policy, and had failed to meet the burden of proof regarding the applicability of the "other insurance" clauses to such warranties.[16] *Gustafson v. Central Iowa Mutual Insurance Association,* 277 N.W.2d 609 (Iowa 1979).

In reaching its decision in *Gustafson,* the court analyzed two rules regarding the recovery of insurance proceeds on first party property losses.[17] Under the majority New York rule, if the insured has a bona fide insurable interest, he may recover from his insurer for his loss, regardless of additional recoveries from other sources for the same loss.[18] The minority Wisconsin rule prohibits the recovery of insurance proceeds if certain events would lead to additional recoveries from collateral sources for the same loss.[19] Under the Wisconsin rule, a court looks not to the insurable interest, but instead to whether the insured has actually sustained any real loss.[20]

The New York majority rule originated in the 1897 case of *Foley v. Manufacturers Builder's Fire Insurance.*[21] In *Foley,* houses under construction on the plaintiff's property were destroyed by fire.[22] The contractor remained bound to deliver the completed houses, notwithstanding the fire.[23] The insurer denied payment on the grounds that the contractor, not the plaintiff, bore the risk and that the plaintiff had no insurable interest.[24] However, the thrust of the case was whether or not an insurable interest existed and not

12. 277 N.W.2d at 610.
13. *Id.*
14. *Id.*
15. 203 N.W.2d 799 (Iowa 1973).
16. 277 N.W.2d at 614-15.
17. *Id.*
18. *See* Foley v. Manufacturers' Builder's Fire Ins., 152 N.Y. 131, 46 N.E. 318 (1897).
19. *See* Ramsdell v. Insurance Co. of N. America, 197 Wis. 136, 221 N.W. 654 (1928).
20. *Id.*
21. 152 N.Y. 131, 46 N.E. 318 (1897).
22. *Id.*
23. *Id.*
24. *Id.* at ___, 46 N.E. at 319.

whether the insured had sustained a loss. An indication of how the question of insurable interest pervades *Foley* is found in the first sentence of the opinion, where the author stated that the sole question was whether the plaintiff had an insurable interest equal to the full value of the incomplete buildings in the course of construction on the lot when the fire occurred.[25] The court in *Foley* characterized the defense as stating that there was no insurable interest and therefore no loss.[26] The strict converse of the defense, of course, was that there was an insurable interest and therefore, a loss.

However, in *Gustafson*, the court focused on a different aspect of *Foley*. The emphasis was placed upon the language which stated that other contractual arrangements were a matter of no concern to the insurer, and although there might be double recovery, the insurer could not rely upon another contract to reduce its own liability.[27]

It is important to note that the court in *Foley* was not faced with actual double recovery. The language used in that case indicates that the structures had not yet been rebuilt. Hence, double recovery by the plaintiff for his loss was only a potentiality. In contrast, the buildings destroyed in *Gustafson* were replaced before the denial of payment by the insurers, and multiple recovery in the principle case was real, not potential. *Foley* therefore did not deal directly with the issue presented in *Gustafson*.

The minority, or Wisconsin, rule originated in *Ramsdell v. Insurance Co. of North America* in 1928.[28] This rule also prevails in England.[29] In *Ramsdell* both a lessor and lessee insured the same property.[30] After a fire, the lessee restored the building and both parties brought suit on their respective insurance policies.[31] Since restoration had already been made the Wisconsin court had to deal with the question of actual double recovery, unlike the court in *Foley*. The court in *Ramsdell* stated that "[t]here was one building insured; there was one fire; there was one loss."[32] Since the building had been restored by the lessee, the lessor was found to have suffered no actual loss.[33] The court looked to the "substance of the whole transaction rather than seek a metaphysical hypothesis upon which to justify a loss that is no loss."[34]

The analysis by the court in *Gustafson* of the cases following the two rules was intended to answer the question of whether the insured had suffered an actual loss.[35] The insurers relied upon the principle of indemnity[36] and the

25. *Id.* at ___, 46 N.E. at 318.
26. *Id.* at ___, 46 N.E. at 319.
27. 277 N.W.2d at 612.
28. 197 Wis. 136, 221 N.W. 654 (1928).
29. *See* Darrell v. Tibbits, L.R. 5 Q.B.D. 560 (1879); Castellain v. Preston, L.R. 11 Q.B.D. 380 (1883).
30. 197 Wis. at ___, 221 N.W. at 654, 655.
31. *Id.* at ___, 221 N.W. at 655.
32. *Id.*
33. *Id.*
34. *Id.*
35. 277 N.W.2d at 610-11.

repair-or-replace options contained in their policies to support their arguments that there was no actual loss.[37] Under these latter provisions, the insurer had the option to repair or replace the damaged property. Since replacement can be considered the epitome of indemnification, the cost to repair or replace the damaged or destroyed property will establish the ceiling on the payment by the insurer. These clauses had previously been construed in Iowa case law to support this proposition.[38] The conclusion reached by the insurers was that the free replacement of the buildings by Morton was merely a factor influencing the cost to replace the buildings.[39] The insurers' argument was that there was no replacement cost to the insured and therefore, no payment due under the policy.[40] There was simply no loss to be indemnified.

The insureds disputed the statement of the issue by the insurers. Instead, they saw the issue as whether or not the insurers had a right to be subrogated to the collateral contract rights which the insureds had against innocent third

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36. This principle is well stated in 1 RICHARDS ON INSURANCE, § 152 at 574-75 (5th ed. 1952), where the author states: "The true basis of any contract of property insurance is indemnity, i.e., recovery by the insured of the actual economic impairment of his interest in the insured res. No possible gain to the insured by the occurrence of the insured event is contemplated." *Id. See also* A. ANDERSON, COUCH ON INSURANCE § 1:9 (2d ed. 1959); J. APPLEMAN, 4 INSURANCE LAW AND PRACTICE, § 2107 (1969); R. KEETON, BASIC INSURANCE LAW, § 3.1 at 90 (1971).

37. Briefs of the Appellants and Appellees, Appendix at 8, 16. The insuring agreement contains this clause:

> In consideration of the Provisions and Stipulations Herein or Added Hereto and of the Premium Above Specified (or specified in the endorsement(s) made a part hereof), this Company, for the term shown above from the inception date shown above at noon (Standard time) to the expiration date shown above at noon (Standard time) at location of the above property involved, to an amount not exceeding the limit of liability above specified, does insure the Insured named in the Declarations above and legal representatives, to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or construction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the Insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND OTHER PERILS INSURED AGAINST IN THIS POLICY INCLUDING REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for the preservation from the perils insured against in this policy, but not elsewhere.

Id. at 8 (emphasis in the original). The above language is from the State Farm policy. The Central Iowa policy is substantially the same, except for agreeing to indemnify the insured, instead of using the word "insure." *Id.* at 16.

38. Britven v. Occidental Ins. Co., 234 Iowa 682, 687, 13 N.W.2d 791, 794 (1944) (building destroyed by fire, dispute over value); Farmers Mercantile Co. v. Farmers Ins. Co., 161 Iowa 5, 21, 141 N.W. 447, 454 (1913)(dispute over the value of goods removed from building to prevent destruction by fire).

39. Brief of the Appellant at 10.

40. *Id.*

parties.[41] Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand or right so that he who substitutes succeeds to the rights of the other in relation to the claim.[42] The insureds' argument was that the insurers had no right to the benefits of the collateral contracts, which was precisely the language in *Foley* relied upon by the Iowa Supreme Court.[43] The court in *Gustafson* agreed with the insureds' and identified the essential question as who was to receive the benefit of the warranty.[44]

A review of the cases cited by the court in *Gustafson* as supporting both the New York and Wisconsin rules,[45] as well as a review of the *Kintzel* case, which was heavily relied upon in *Gustafson,*[46] reveals that the adversaries were arguing different issues, and that the two opposing rules do not actually deal with the same issue. In adopting the New York rule, the court did not really face or answer the valid question raised by the insurers. That question was whether or not the insureds, as a result of the free replacement of the buildings, had sustained a loss for which payment was owed, and further, whether or not actual double recovery should be allowed.[47]

In the past, the Iowa Supreme Court has disapproved of multiple recovery. Although *Kintzel* was relied upon to a great extent in *Gustafson, Kintzel* did not actually deal with double recovery,[48] and thus is distinguishable. In

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41. Brief of the Appellee at 5-16.

42. BLACK'S LAW DICTIONARY 1595 (4th ed. 1951).

43. 277 N.W.2d at 612. The court in *Gustafson* quoted from *Foley:* "But the contract relations between the plaintiffs and the contractors is a matter in which the defendant has no concern."

44. *Id.* at 613.

45. *Id.* at 612, 613. In addition to these cases cited by the Iowa Supreme Court in *Gustafson, see also* cases applying the Wisconsin rule rationale: Acree v. Hanover Ins. Co., 561 F.2d 216 (10th Cir. 1977); Smith v. Jim Dandy Mkts., 172 F.2d 616 (9th Cir. 1949); Eldin v. Security Ins. Co., 160 F. Supp. 487 (S.D. Ill. 1957); State Farm Fire & Cas. Co. v. Bretheren Mut. Ins. Co., 39 Md. App. 570, 386 A.2d 1249 (1978); MFA Mut. Ins. Co. v. Farmers & Merchants Ins. Co., 443 S.W.2d 220 (Mo. Ct. App. 1969); Haskin v. Greene, 205 Or. 140, 286 P.2d 128 (1965); Cheatwood v. De Los Santos, 561 S.W. 2d 273 (Tex. Civ. App. 1978); Stebane Nash Co. v. Campbellsport Mut. Ins. Co., 27 Wis. 2d 112, 133 N.W.2d 737 (1965), *and* applying the New York rule, Dubin Paper Co. v. Insurance Co. of N. America, 361 Pa. 68, 63 A.2d 85 (1949); Savarese v. Ohio Farmers Ins. Co., 260 N.Y. 45, 182 N.E. 665 (1932).

46. The court cited to *Kintzel* numerous times and found the language to be controlling concerning direct loss. 277 N.W.2d at 611. The court in its conclusion stated "we decline to alter our stance in *Kintzel,* that determination of the loss should not be postponed to some future unspecified date. . . ." *Id.* at 613. Despite recognizing the factual distinction between *Kintzel* and *Gustafson* the court chose to disregard the differences.

47. As already noted, the appellants focused their arguments on whether or not the insured sustained a net loss. The appellees countered with the argument that subrogation to third-party contract rights were at issue. *See* notes 39-44 and accompanying text, *supra.*

48. 203 N.W.2d 799 (1973). *Kintzel* actually involved a question of the validity of an assignment of a policy. A person named Proesch sold property to Kintzel under a contract, which required that Kintzel maintain insurance on the property to the benefit of Proesch. Kintzel then sold the property to Hicks, using a contract containing a similar clause. Hicks failed to procure insurance and the property was damaged in a windstorm. Kintzel made a claim to her insurer,

fact, the court in *Kintzel* distinguished a prior Iowa case which dealt with and denied double recovery[49] on the grounds that *Kintzel* did not involve that issue.[50] The court in *Kintzel* also discussed the "trustee" theory, which avoids double recovery.[51] This theory is that where the vendee as equitable owner will bear the loss occasioned by a casualty pending completion of a sale, the proceeds of the vendor's insurance policies, even though the vendee did not contribute to the premiums, constitute a trust fund for the benefit of the vendee to be credited to the purchase price[52] or in some cases, to be turned over to the vendee after receipt by the vendor of the full purchase price.[53] The trustee theory was acknowledged in Iowa in the case of *Brady v. Welsh*.[54] In *Brady* the court found that the vendor "has been paid the full purchase price of the farm, and, if permitted to retain the money received by him as insurance, he will profit to that extent."[55] The rule was approved in *Brady* as a wholesome one which tended to effect justice between the parties.[56]

It is clear from a review of *Davidson v. Hawkeye Insurance Co.*[57] and *Brady*[58] that the prevailing past philosophy of the Iowa Supreme Court has been to disapprove of multiple recoveries subsequent to casualty losses. *Kintzel*, which the court in *Gustafson* admitted did not deal with double recovery,[59] was used in *Gustafson* solely for its definition of loss.

The definition of "direct loss" adopted in *Kintzel* considered the causational aspects of a casualty, not the economic result. The court held that "direct loss" by windstorm meant damage due to the strength or force of wind.[60] The court further stated that the term meant not an immediate impact upon the insured's wallet, but instead that "direct loss" was generally

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which was denied on the grounds that her security interest was protected by the portion of the property undamaged by the storm. At this point Proesch conveyed the property to Hicks and assigned his interest in the original sales contract with Kintzel to Hicks. Hicks then intervened in the action by Kintzel against her insurer. Kintzel lost at the trial court level and Hicks appealed. The Iowa Supreme Court first held that Proesch had a valid interest which could be assigned to and enforced by Hicks and then went on to hold that direct loss, as the phrase appeared in the policy, was synonymous with proximate cause and not with actual pecuniary loss. *Id.* at 801-03, 808, 810. Three justices dissented on the grounds that the assignment was invalid. They would not have reached or considered the loss issue. Also, one justice took no part in the decision. *Id.* at 811-12.

49. Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N.W. 514 (1887) (sale of a house which was subsequently destroyed by fire).

50. 203 N.W.2d at 809.

51. *Id. See also* Dubin Paper Co. v. Insurance Co. of N. America, 361 Pa. 68, 63 A.2d 85 (1949).

52. 203 N.W.2d at 809.

53. Savarese v. Ohio Farmers Ins. Co., 260 N.Y. 45, 182 N.E. 665 (1932).

54. 200 Iowa 44, 204 N.W. 235 (1925).

55. *Id.* at 46, 204 N.W. at 236.

56. *Id.*

57. 71 Iowa 532, 32 N.W. 514 (1887).

58. 200 Iowa 44, 204 N.W. 235 (1925).

59. 277 N.W.2d at 612.

60. 203 N.W.2d at 808.

synonymous with proximate cause.[61] This was quite a different issue than that of the *amount* of the loss. There was no inconsistency in the insurers' admission that their insureds sustained a direct loss but that there was no loss payable.

The definition of "direct loss" in *Kintzel* was described as a result of the court's preference for the New York rule.[62] However, as indicated above, this rule may be the result of cases dealing with factual situations readily distinguishable from both *Gustafson* and the cases applying the Wisconsin rule. The following review of some of the cases cited by the court in *Gustafson* should make this more apparent.

The first case cited by the court in support of the New York rule is *DeBellis Enterprises, Inc. v. Lumberman's Mutual Casualty Co.*[63] The plaintiff bought property at a tax sale and insured it at full value. After a fire, the prior owner redeemed the property at a low cost and the plaintiff sued his insurer for payment for the fire loss.[64] The New Jersey Supreme Court held that the plaintiff could recover insurance proceeds to the extent of his interest in addition to the redemption price received from the prior owner.[65] This interest was considerably less than the full value of the building.[66] The plaintiff likely was doubly compensated to the extent that the redemption price and the interest overlapped, but the redemption was a subsequent and fortuitous event.

In *Montgomery v. First National Bank*,[67] a purchaser brought property from the plaintiff and insured it with the plaintiff named as a loss payee.[68] The purchaser then burned the building down, forged the plaintiff's signature on the insurance check and defaulted on the purchase contract.[69] The plaintiff sued defendant bank for conversion as a result of its cashing the forged check. The Oregon Supreme Court rejected the defendant's argument that the plaintiff sustained no actual loss because he subsequently sold the property to another party at a profit.[70] However, this latter sale was a subsequent collateral agreement, not in effect at the time of the loss.[71] Also, the original sales agreement provided that any insurance payments received by the plaintiff would be applied to the unpaid balance due on the contract.[72] This contractual provision would have yielded a result

61. *Id.*
62. 277 N.W.2d at 611.
63. 77 N.J. 428, 390 A.2d 1171 (1978).
64. *Id.* at ___, 390 A.2d at 1176, 1177.
65. *Id.*
66. *Id.*
67. 265 Or. 55, 508 P.2d 428 (1973).
68. *Id.* at ___, 508 P.2d at 429, 430.
69. *Id.*
70. *Id.*
71. *Id.* at ___, 508 P.2d at 435.
72. *Id.* at ___, 508 P.2d at 430.

similar to the trustee theory[73] by prior agreement, as opposed to retrospective application of an equitable judicial doctrine. The net effect of the contract clause was to specifically avoid double recovery by reducing the amount owed by the buyer.

Another case cited in *Gustafson, Aetna Casualty and Surety Co. v. Cameron Clay Products, Inc.*[74] actually articulated the trustee theory. In *Aetna* a purchaser of property sued the owner for both specific performance and insurance proceeds after a fire.[75] The West Virginia Supreme Court held that although the owner should receive the proceeds, he had to hold them in trust for the purchaser.[76] In so holding, the court avoided double recovery.

Of the remaining cases cited by the court in *Gustafson,* two involved valued policy laws, where insureds were allowed by statute to recover the face amount of the policy even if their interest was less.[77] Two other cases cited dealt with situations where the double recovery was the result of gratutitous and unforeseen acts by parties not obligated by contracts with the insureds.[78] The remainder of the cases cited in *Gustafson* likewise involved situations where the double recovery was the potential result of the facts, although that result was not necessarily mandated by the holdings.[79]

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73. *See* notes 51-56 and accompanying text, *supra.*

74. 151 W. Va. 269, 151 S.E.2d 305 (1966).

75. *Id.* at ____, 151 S.E.2d at 306.

76. *Id.* at ____, 151 S.E.2d at 307, 308.

77. Rutherford v. Pearl Assurance Co., 164 So. 2d 213 (Fla. App. 1964); Board of Trustees v. Cream City Mut. Ins. Co., 255 Minn. 347, 96 N.W.2d 690 (1959). In the latter case the Minnesota Supreme Court recognized the potential for a double recovery (sale price and insurance proceeds) but held that the express authorization of the statute controlled.

78. Hughes v. Potomac Ins. Co., 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (1962) (after flood waters damaged property by erosion the local flood control district replaced the lost soil free of charge); New Eng. Gas & Elec. Ass'n. v. Ocean Accident & Guarantee Corp., 330 Mass. 640, 116 N.E.2d 671 (1953) (after a power turbine sustained damage while in operation, the manufacturer replaced the unit free of charge even though there was no warranty).

79. Plate Glass Underwriters Mut. Ins. Co. v. Ridgewood Realty Co., 219 Mo. App. 186, 269 S.W. 659 (1925) (insurer replaced a broken window, then tried to subrogate against the landlord on the lease: no double recovery involved); Koppinger v. Implement Dealers Mut. Ins., Co., 122 N.W.2d 134 (N.D. 1963) (vendor retained an insurable interest in the unpaid balance on machinery, but the court left open the possibility of subrogation by the vendor's insurer against the vendee); Heidisch v. Globe & Republican Ins. Co., 368 Pa. 602, 84 A.2d 566 (1951) (owner of property which was condemmed under power of eminent domain retained an insurable interest in the property and could recover for a casualty).

Another case cited and used as a refinement of the original *Foley* doctrine is Alexandra Restaurant, Inc. v. New Hampshire Ins. Co., 272 App. Div. 346, 71 N.Y.S.2d 515 (1947). In that case both the lessor and the lessee insured the same property. After a fire damaged the property the lessor repaired the damage and the lessee filed a claim with his insurer. The insurer denied the claim. The New York Apellate Division Court noted that the building had been fully restored at no cost to the lessee and that the insurer's contentions were plausible and persuasive. However, the court found itself bound by prior New York law, *i.e., Foley,* and held for the insured.

Another case considering the state of the law in Iowa prior to *Gustafson* is Citizens Ins. Co. v. Foxbuilt, Inc., 226 F.2d 641 (8th Cir. 1955). This case was cited in *Gustafson,* 277 N.W.2d at 613. The court in *Citizens* noted that the law in Iowa was unsettled, and established its standard

In contrast, the cases applying the Wisconsin rule involved factual situations more similar to those in *Gustafson*. In *Glen Falls Insurance Co. v. Sterling*,[80] the plaintiff had contracted to have a home built. The incomplete structure was damaged by wind and the contractor replaced it at no extra cost.[81] In upholding the denial of payment by the insurer, the Maryland Supreme Court rejected *Foley* as dealing only with an insurable interest question, and held that the right to recover was commensurate with the actual loss sustained.[82] The court cautioned, however, that the decision was based only on the facts before it, and offered no opinion as to the result if the contractor had failed to perform.[83]

Similarly, in *Paramount Fire Insurance Co. v. Aetna Casualty and Surety Co.*,[84] the Texas Supreme Court considered an executory sales contract where both parties were insured. The seller had collected the full purchase price as specific performance despite damage caused by casualty to the property.[85] The court held that the seller had suffered no "legal loss" and denied recovery of the insurance proceeds.[86]

The Wisconsin rule cases, including recent cases in Missouri[87] and Oklahoma,[88] dealt directly with the issue of double recovery. They also involved

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of review of the federal district court's decision as a clear misconception of local law or a clear misapplication of it to the evidentiary facts. 226 F.2d at 643. The limited scope of review and the acknowledged unsettled state of the law should be considered when reviewing this case, which upheld the New York rule.

80. 219 Md. 217, 148 A.2d 453 (1959).

81. *Id.* at ___, 148 A.2d at 455.

82. *Id.* at ___, 148 A.2d at 455, 456.

83. *Id.* at ___, 148 A.2d at 457.

84. 163 Tex. 250, 353 S.W.2d 841 (1962).

85. *Id.* at ___, 353 S.W.2d at 843.

86. *Id.* at ___, 353 S.W.2d at 844, 845.

87. MFA Mut. Ins. Co. v. Farmers & Merchants Ins. Co., 443 S.W.2d 220 (Mo. Ct. App. 1969). This case, applying the Wisconsin rule, may have an effect upon the validity of the 1925 Missouri case cited by the court in *Gustafson* as supporting the New York rule. *See* note 79, *supra*. If *MFA* overrules *Ridgewood*, reliance upon *Ridgewood* to support the New York rule is clearly erroneous. However, the two cases may indicate that the Missouri courts recognize the two distinct factual situations involved. Faced with facts such as those presented in *Gustafson*, the Wisconsin rule would be applied. Under a different set of facts, where insurable interest is at issue, application of the New York rule would be justified. The Missouri courts would thus be able to deal consistently with both multiple recovery/actual loss questions and with insurable interest questions.

88. Acree v. Hanover Ins. Co., 561 F.2d 211 (10th Cir. 1977). In *Acree* an executory sales contract was outstanding when the property was damaged by fire. Only the seller was insured. The buyer executed, then claimed the benefits of the seller's insurance. The seller tried to retain both the full sales price and the insurance proceeds. The court held in favor of the buyer and ordered the seller to hold the proceeds in trust for the buyer. *Id.* at 219. The court also noted that insurance indemnifies the holder of an insurable interest against actual loss, and that upon receipt of the full sales price the seller had sustained no loss. *Id.* It is interesting to note that *Acree* is quite similar to *Aetna* factually. *See* notes 74-76 and accompanying text, *supra*. The results are also nearly identical: in both cases the buyer received the proceeds of the seller's insurance on a trustee theory. *Aetna* and *Acree* both clearly follow the Wisconsin rule regarding

actual double recovery, where repairs or receipt of the full purchase price occurred prior to the payment of the claim by the insurance company, and where payment would have resulted in a profit. Double recovery in these cases was not merely speculative or potential, and unlike the New York rule cases, the existence of an insurable interest was not the major question.

It is readily apparent that the cases construing the Wisconsin rule are more nearly on point with a situation like *Gustafson* than are the cases construing the New York rule. The typical factual situation to which the Wisconsin rule is applied occurs when a collateral contract is in existence at the time of the loss, and repairs or recovery under that contract are made prior to payment of the insurance claim. However, where the contract arises after the loss occurs, or the extra recovery is gratuitous and unforeseen, or the insurance claim is paid prior to the claim under the collateral contract, the insurance carriers should not be able to claim the benefits of those contracts or recoveries. Any incidental multiple recovery resulting from these latter situations should be unobjectionable.[89] It is only where the factors present before the loss create a certainty of multiple recoveries that such recoveries should be denied.

The facts presented in *Gustafson* fit precisely into the pattern most frequently associated with application of the Wisconsin rule. Accordingly, that rule, not the New York rule which concerns insurable interest, should have been applied and adopted.

The holding in *Gustafson* contains two primary messages for the insurance industry. The first is that the principle of indemnity is not a valid plea in defense of a claim such as the one in *Gustafson*. The second is that policy language, particularly in the event of an omisson or ambiguity, will be strictly construed against the insurer, despite any apparent or actual multiple recovery for the loss from other sources. This merely reiterates the court's prior holdings, which placed the burden upon the insurance industry to make their policies as explicit as possible to avoid disappointing the reasonable expectations of the insureds.

Due to the large number of farm buildings in Iowa and the frequent occurrence of damaging wind storms, it is likely that the insurance industry will seriously consider amending their policy forms to include within the "other insurance" clauses warranties such as the ones offered by Morton.[90]

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multiple recovery (avoiding it), but follow the New York rule regarding insurable interest. It appears that the use of *Aetna* by the court in *Gustafson* to support the proposition allowing double recovery is questionnable.

89. In *Gustafson*, the court expressed concern over possible hardship to the insureds if a dispute arose regarding the warranty subsequent to the loss. 277 N.W.2d at 611. This raises the question of whether the insurers might merely delay payment until the warranty was honored in all such cases, intending thereby to avoid payment. However, this is not possible because the State Farm policy, like most standard policies, requires that the insurer pay the claim within sixty days of the submission by the insured of proof of loss. Briefs of the Appellants and Appellees, Appendix at 17.

90. The "other insurance" clause of the State Farm policy reads:

Such amendments would circumvent the actual impact of *Gustafson* by complying with the warning that the policies should be explicit. Another option would be to require disclosure of buildings covered by such warranties on the application for insurance and to exclude those buildings from coverage. Failure to disclose the existence of such a warranty could then justify denial of payment. Until such time as amendments or application procedures are developed to avoid a recurrence of the *Gustafson* situation the insurance industry must look forward to paying some losses which are arguably not losses at all.

Another result of *Gustafson* could be to offer a competitive advantage to those companies that offer such warranties. The advantage would appear in the following manner: the owner of the building would be guaranteed, in the event of a loss, receipt of the value of the loss from the insurer and either a new building or the value of a new building under the warranty. Instead of replacing the damaged or destroyed building, the builder could offer the owner a new building twice the size or value of the old one. This possibility could be an original inducement to purchase from one builder rather than another. The owner should thus be doubly insured, a result expressly prohibited by his insurance policy, merely because the builder's insurance is characterized as a warranty. Whether or not such schemes will appear remains to be seen.[91]

The insureds in *Gustafson* actually did sustain a loss in the form of the premium paid for coverage on the Morton buildings plus interest. However, if the premium and interest had been refunded and the insurers' payment denials upheld, an equitable solution would have been reached.

The insurers went to court with the most favorable factual situation possible on their side and lost. The plaintiffs have profited handsomely from the holding. Although the result may be a future benefit to both the insurance industry and the consuming public from enhanced clarity in insurance poli-

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> Other insurance covering on any property covered under coverages D, E and F is prohibited unless otherwise provided in writing added hereto. If during the term of this policy, the insured shall have any such other prohibited insurance, whether collectible or not, the insurance under this policy shall be suspended and of no effect.

The Central Iowa policy is substantially the same. Briefs of the Appellants and Appellees, Appendix at 35. In order to avoid the impact of *Gustafson*, insurance companies could include, either in the definitions section or in the other insurance clause itself, language describing the prohibited insurance as meaning warranties or other contracts for the repair or replacement of the insured property against damage resulting from perils external to the property itself and included as covered perils under the policy of insurance. Or, the insurers could include under the subrogation clauses the right to assignment of benefits from any such warranties. Of course, either provision should be accompanied by a concomitant reduction of premiums in recognition of the reduced risk.

91. The appellants raised this possibility in their reply brief to the Iowa Supreme Court. Apparently the court discounted this argument as too remote or speculative, since there is no mention of such considerations in the *Gustafson* opinion.

cies, perhaps this could have been accomplished without the adoption of a rule which is inapplicable to the situation.

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