ARSON — DEFENSE OF A FRAUDULENT PROPERTY INSURANCE CLAIM

I. Introduction

Recent statistics establish that arson, and particularly arson fraud, has become one of the nation's fastest growing crimes.[1] In 1984, approximately 82,000 arson fires resulted in an estimated $855 million dollars of direct property losses.[2] Moreover, these figures encompass only fires actually classified as arson and do not include fires of suspicious or unknown origin.[3] Fire officials estimate that at least one-half of all fires classified as being of undetermined origin are the result of arson.[4] The magnitude of the arson problem is increased by the fact that property loss figures do not take into account indirect losses such as lost jobs, increased insurance premiums and the increased costs of fire protection.[5]

Nonetheless, several unique arguments and defenses exist to prevent insurance companies from paying an unwarranted claim. Knowledge of these arguments and defenses is important not only to defense attorneys but to plaintiffs' attorneys as well. This note will discuss several arguments and defenses available to defense counsel when defending an arson claim.

II. Defense of a First-Party Arson Claim

A. *The Widespread Use of the New York Standard Fire Insurance Policy*

Section 515.138 of the Iowa Code mandates that every fire insurance policy issued within the State of Iowa shall contain the standard provisions set out therein.[6] This statutory policy contains essentially the same provisions as the 1943 New York Standard Fire Policy.[7] The New York Standard

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1. C. Simon & A. White, Beating the System — The Underground Economy 187-99 (1982). During the period from 1964 to 1977 the number of arson or suspicious fires increased 571 percent while the property damage resulting from these fires increased 1,704 percent. *Id.* at 189.

2. Federal Bureau of Investigation, 1984 Uniform Crime Reports 38 (1985). In 1984, there were 82,338 reported arson offenses that resulted in an average property loss of $10,378. *Id.*

3. *Id.* at 36.

4. National Fire Protection Association, Fire Protection Handbook § 14 at 46 (15th ed. 1981).

5. *Id.*

6. Iowa Code § 515.138 (1985). For a complete text, see Appendix.

7. ABA Comm. on Property Insurance Law, Property Insurance Annotations - Fire and Extended Coverage — *Annotations of the 1943 Standard Fire Insurance Policy and Ex-*

Fire Policy (hereinafter referred to as the Standard Fire Policy), or its equivalent, is used in the majority of states.[8] Although some states have adopted "plain language" policies, these policies contain provisions similar to the provisions mandated by Iowa law.[9]

Nevertheless, the widespread use and statutory nature of the Standard Fire Policy provide many unique legal arguments when defending an arson claim brought under the policy. First, secondary authority is highly persuasive due to the widespread use of the Standard Fire Policy.[10] In *Kintzel v. Wheatland Mutual Insurance Association*,[11] the Iowa Supreme Court based its decision on a rule promulgated by a New York court when interpreting the phrase "direct loss" contained within the Standard Fire Policy.[12] Second, due to the fact that the language in the policy is prescribed by statute, it has been held that the Standard Fire Policy is not a contract of adhesion subject to the rule that it be construed against the insurer.[13] In *Kisting v. Westchester Fire Insurance Co.*,[14] the court held that the general rule that insurance contracts be construed in favor of the insured did not apply to the statutory provisions of the Standard Fire Policy.[15] However, this premise was recently rejected by the Iowa Supreme Court in *Hoekstra v. Farm Bureau Mutual Insurance Co.*[16] In *Hoekstra*, the Iowa Supreme Court held that although the form of the fire insurance policy is prescribed by Iowa statute, the fire policy is not treated as a legislative enactment when accepted voluntarily by the parties, rather it is treated like any other contract, and the same rules of construction apply.[17] In other words, the court held that even though the policy provision tracked substantially with the language of the statute, the policy provision would be liberally construed in favor of the insured.[18] Third, as a statutory policy, it may be argued that

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tended Coverage Endorsement, 3-4 (1977). All states except California, Minnesota, Massachusetts and Texas permit the use of the Standard Fire Policy. *Id.* at 7.

8. *Id.* at 3-9. Due to its length, the policy is frequently referred to as "165 lines." *See* Appendix.

9. *Id.*

10. Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799 (Iowa 1973).

11. 203 N.W.2d 799 (Iowa 1973).

12. *Id.* at 808.

13. Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 147 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969).

14. 290 F. Supp. 141 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969).

15. *Id.* at 147. *Accord* Winters v. National Indem. Co., 120 Mich. App. 156, __, 327 N.W.2d 423, 426 (1982); Laidlaw v. Commercial Ins. Co., 255 N.W.2d 807, 811 (Minn. 1977); Wall v. Pennsylvania Life Ins. Co., 274 N.W.2d 208, 213 (N.D. 1979).

16. 382 N.W.2d 100 (Iowa 1986).

17. *Id.* at 105-06.

18. *Id.* at 106. However, the Iowa Supreme Court appears to have ignored precedent in determining that provisions of the Standard Fire Policy should be interpreted liberally in favor of the insured. *See, e.g.*, Calendro v. American Foreign Ins. Co., 227 Iowa 829, 289 N.W. 485 (1940) (suit to recover under a fire insurance policy). In *Calendro*, the Iowa Supreme Court rejected the appellant's contention that an insurance policy is to be construed most strictly

interpretation of the policy is subject to statutory construction as opposed to contractual construction.[19] For example, the Iowa Supreme Court in *Olson Enterprises, Inc. v. Citizens Insurance Co.*,[20] used the principles of statutory construction when interpreting the meaning of the phrase "inception of the loss" found within the statutory policy.[21] Nevertheless, in the recent *Hoekstra* decision involving the interpretation of the phrase "reasonably required" found within the statutory fire policy the Iowa Supreme Court held that "[a]lthough statutory interpretation is a question of law for the court to determine, . . . we have said it is for the jury to decide whether the conduct or acts of a party are reasonable under the circumstances."[22] Thus, in *Hoekstra*, the Iowa Supreme Court rejected the argument that interpretation of the phrase "reasonably required" found within the Standard Fire Policy should be subject to statutory construction.[23]

More importantly, the Standard Fire Policy contains three affirmative defenses to claims brought under the policy. According to Iowa Code Section 515.138 the

> entire policy shall be void if, whether before or after the loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the in-

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against the issuing insurance company and held that this rule of construction had "no application to the interpretation of a standard form of policy required by legislative enactment." *Id.* at 839, 289 N.W. at 490.

19. Olson Enter., Inc. v. Citizens Ins. Co., 255 Iowa 141, 144, 122 N.W.2d 510, 511-12 (1963) (interpretation of the phrase "inception of the loss" found within the statutory fire policy). *See also* Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799, 807-11 (Iowa 1977) (interpretation of the phrase "direct loss"). *Cf.* Fraternal Order of Eagles v. Illinois Casualty Co., 364 N.W.2d 218, 221 (Iowa 1985) (statutory construction of dram shop coverage); American States Ins. Co. v. Estate of Tollari, 362 N.W.2d 519, 521 (Iowa 1985) (statutory construction of uninsured motorist coverage).

20. 255 Iowa 141, 121 N.W.2d 510 (1963).

21. *Id.* at 144-46, 121 N.W.2d at 511-12. *See* Appendix line 161.

22. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 105 (Iowa 1986). *See* Appendix lines 113-14, 118.

23. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d at 105. Although the contractual language of the policy essentially repeated the statutory language, the court held that it was a question of fact for the jury whether the insureds had complied with the policy provision obligating the insureds to furnish the insurer with records and documents as often as the insurer should "reasonably require." *Id.* at 105-06. Moreover, the court rejected the insurer's argument that by submitting the issue of reasonableness to the jury the court was abandoning its duty " 'to be the final arbiter in construction of Iowa statutes.' " *Id.* at 105 (quoting American States Ins. Co. v. Estate of Tollari, 362 N.W.2d 519, 521 (Iowa 1985)). The court held that:

> [t]his contention ignores the general rule that though the form of a policy is prescribed by statute, it is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from consent of the parties.

Id. (quoting Norton v. Home Ins. Co., 320 A.2d 688, 692 (Me. 1974)).

sured relating thereto.[24]

Thus, arson committed or procured by the insured or a false or fraudulent statement as to a material fact made willfully by the insured is a complete bar to a claim brought under the policy. In addition, the Standard Fire Policy contains certain precedents to recovery which are collectively known as the cooperation clause. These precedents must be complied with prior to recovery under the policy.[25] To illustrate, the pertinent text of section 515.138 states that:

> [t]he insured shall give immediate written notice to this Company of any loss . . . AND WITHIN SIXTY DAYS AFTER THE LOSS, UNLESS SUCH TIME IS EXTENDED IN WRITING BY THIS COMPANY, THE INSURED SHALL RENDER TO THIS COMPANY A PROOF OF LOSS, signed and sworn to by the insured . . . . The insured, as often as may be reasonably required, shall . . . submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers.[26]

Therefore, the insured must comply with the four procedural steps of notice of loss, proof of loss, examination under oath and production of documents to recover under the policy.[27] Although all four provisions are conditions precedent to recovery, the insurer must require the insured to submit to an examination under oath and produce certain documents before either of these provisions can be used against the insured to preclude recovery.[28] In addition, the policy prescribes that claims must be brought within twelve months after the fire.[29] Thus, it is imperative that counsel for both the defense and plaintiff have a good understanding of the Standard Fire Policy mandated by section 515.138 of the Iowa Code.[30]

B. *Affirmative Defenses*

1. *Arson Defense*

As an affirmative defense, the insurer bears the burden of proof with respect to the arson defense.[31] Further, the clear majority of jurisdictions

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24. Iowa Code § 515.138 (1985). *See* Appendix lines 1-6 & 21-24, 31-32.

25. Iowa Code § 515.138 (1985). *See* Appendix lines 90-122.

26. Iowa Code § 515.138 (1985). *See* Appendix lines 90-122 (full text of the cooperation clause).

27. Iowa Code § 515.138 (1985). The policy may also be avoided for the insured's failure to preserve the property during or after the loss and for any increase in hazard caused by the insured. *Id. See* Appendix lines 21-24 & 31-32.

28. Iowa Code § 515.138 (1985).

29. *Id. See* Appendix lines 160-61.

30. Iowa Code § 515.138 (1985).

31. George v. Travelers Indem. Co., 81 Mich. App. 106, __, 265 N.W.2d 59, 62 (1978). *See also* Boone v. Royal Indem. Co., 460 F.2d 26, 29 (10th Cir. 1972); Galbraith v. Hartford Fire

hold that the insurer must meet its burden of proof by the preponderance of the evidence.[32] Nonetheless, once an insurer suspects that the insured's fire was the result of arson, the insurer must establish that the fire was of an incendiary nature and proper proof that the insured caused or procured the fire.[33] Proof that the insured caused or procured the fire is established by evidence showing that the insured had the motive and opportunity to cause the fire.[34] In *George v. Travelers Indemnity Co.*,[35] the Michigan Court of Appeals stated that once the incendiary origins of the fire have been established, "Michigan courts have affirmed arson convictions based on circumstantial evidence of motive (such as insurance coupled with business difficulties) plus opportunity (such as access to the building)."[36] Thus, incendiarism, motive and opportunity have become commonly known as the "arson triangle." Nevertheless, one court found "opportunity" to be too narrow of a term and defined the third element of the "arson triangle" to be any "circumstantial evidence connecting the insured to the fire."[37]

Typically, proof of incendiarism will come from an examination of the property by a qualified expert.[38] Once all accidental causes are ruled out, the expert will look for any direct evidence of arson such as multiple points of origin, timing devices and accelerants.[39] In addition, the expert may conduct a chemical analysis at the point of origin of the fire.[40] In contrast, motive and opportunity evidence will usually come from the insured through the counsel's effective use of the examination under oath and request for production of documents.[41] Generally, motive evidence falls into three catego-

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Ins. Co., 464 F.2d 225, 226 (3d Cir. 1972).

32. Don Burton, Inc. v. Aetna Life & Casualty Co., 575 F.2d 702, 707 (9th Cir. 1978). *See also* Honeycutt v. Aetna Ins. Co., 510 F.2d 340, 349 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975); Mele v. All-Star Ins. Corp., 453 F. Supp. 1338, 1340 (E.D. Pa. 1978). *Contra* Carpenter v. Union Ins. Society of Canton, Ltd., 284 F.2d 155, 162 (4th Cir. 1960).

33. Werner's Furniture, Inc. v. Commercial Union Ins. Co., 39 Ill. App. 2d 59, _, 349 N.E.2d 616, 621 (1976). *See also* Haynes v. Farm Bureau Mut. Ins. Co., 11 Ark. App. 289, _, 669 S.W.2d 511, 513 (1984); Klayman v. Aetna Casualty & Sur. Co., 501 P.2d 750, 752 (Colo. Ct. App. 1972).

34. Quast v. Prudential Property & Casualty Co., 267 N.W.2d 493, 495 (Minn. 1978). *See also* Gregory's Continental Coiffures & Boutique v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187, 1191 (7th Cir. 1976); George v. Travelers Indem. Co., 81 Mich. App. 106, _, 265 N.W.2d 59, 62 (1978).

35. 81 Mich. App. 106, 265 N.W.2d 59 (1978).

36. *Id.* at _, 265 N.W.2d at 62.

37. Mele v. All-Star Ins. Corp., 453 F. Supp. 1338, 1341 (E.D. Pa. 1978).

38. *See, e.g.*, Do-Re Knit Inc. v. National Union Fire Ins. Co., 491 F. Supp. 1334, 1335 (E.D.N.Y. 1980) (fire causation expert hired by the defendant opined that the fire was of incendiary origin).

39. ABA Comm. On Property Insurance Law, Defending Fraudulent Claims While Avoiding Tort Damage Exposure, tab 5, pp. 12-14 (1985).

40. *Id.* at 13.

41. *See, e.g.*, Gregory's Continental Coiffures & Boutique v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187 (7th Cir. 1976). A certified public accountant hired by the insurer testified

ries: 1) the financial condition of the insured; 2) the condition of the property; and 3) the nature of the insurance coverage.[42] Opportunity evidence involves both the opportunity of the insured or an agent of the insured to set the fire and any circumstantial evidence connecting the insured to the fire.[43] Both the insured's whereabouts at the time of the fire and how access was gained to the building are relevant facts in determining opportunity.[44] Naturally, when attempting to connect the fire to the insured, any evidence eliminating the opportunity and motive of other individuals is relevant.[45]

Mele v. All-Star Insurance Corp.,[46] is a case in point. Investigation of the fire determined that it was of incendiary nature with seven separate points of origin.[47] Motive was established by two significant facts.[48] First, the building had been purchased for $30,000 but was insured for approximately $203,000.[49] Second, the insured was unemployed and $35,000 in debt at the time of the fire.[50] Since the insured was out of town vacationing at the time of the fire, the defense had to establish that the insured had procured someone to set the fire.[51] Nonetheless, the fire was connected to the insured through circumstantial evidence.[52] Specifically, the building was unlocked at the time of the fire and the fire occurred during nonworking hours.[53] Thus, the ease of accessibility to the building established the arsonist's opportunity.[54] Another circumstance that connected the insured to the fire was that the five gallon container of cleaning fluid, the accelerant, was recently purchased by the insured.[55] Therefore, the jury inferred that the arsonist had access to the building and knew the accelerant was inside.[56]

Although motive in *Mele v. All-Star Insurance Corp.* was established by the insured's financial condition and over-insurance, other cases illustrate

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that in his professional opinion the insured was in "shaky" financial condition. *Id.* at 1189. The certified public accountant based his opinion upon the examination of the insured's tax return. *Id.* Thus, the insurer established motive through the use of the contractual provision requiring the insured to produce documents.

42. ABA Comm. on Property Insurance Law, Defending Fraudulent Claims While Avoiding Tort Damage Exposure, tab 5, p. 14 (1985).

43. *Id.* at 16.

44. *Id.* at 16-17.

45. Great American Ins. Co. v. K & W Log, Inc., 22 Wash. App. 468, _, 591 P.2d 457, 460 (1979) (defendant could not think of any other person with a motive to set the blaze). *See also* Raphtis v. St. Paul Fire & Marine Ins. Co., 86 S.D. 491, _, 198 N.W.2d 505, 508-09 (1972).

46. 453 F. Supp. 1338 (E.D. Pa. 1978).

47. *Id.* at 1340.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

that motive may be established by factors concerning the condition of the property.[57] For example, in *Godwin v. Farmers Insurance Group*,[58] the insurer produced evidence that zoning restrictions made insurance proceeds from a fire more valuable than a sale of the property.[59] Furthermore, access to the building is only one fact in establishing opportunity or connecting the insured to the fire.[60] For example, a statement by the insured that " 'if the business . . . [doesn't] pick up . . . you will see the biggest bonfire you ever saw' " is highly persuasive.[61] Though insurance carriers will not normally be confronted with such an incriminating statement, connecting evidence may also be established by both the recent use of the building and by recent insurance transactions.[62] To illustrate, the insured in *Sperrazza v. Cambridge Mutual Fire Insurance Co.*,[63] had recently given the tenants notice to quit prior to a fire that destroyed the building.[64] In *Haynes v. Farm Bureau Mutual Insurance Co.*,[65] the insured reinstated the insurance policy by paying the necessary premium on the night before the fire.[66]

As the case law illustrates, an insurer may base its defense on circumstantial evidence.[67] The court in *Great American Insurance Co. v. K & W Log, Inc.*,[68] succinctly stated the rationale for this rule by noting that "[i]ncendiary fires are planned and executed covertly and seldom lend themselves to proof by direct evidence."[69] Furthermore, courts have held that a liberal standard of relevancy must be used in determining the admissibility of circumstantial evidence.[70] To illustrate, the Eighth Circuit Court

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57. *See, e.g.*, Quast v. Prudential Property & Casualty Co., 267 N.W.2d 493 (Minn. 1978) (insurer introduced evidence that the insured had been unsuccessful in selling the property prior to the fire).

58. 129 Ariz. 416, 631 P.2d 571 (1981).

59. *Id.* at 575.

60. *See generally* ABA COMM. ON PROPERTY INSURANCE LAW, DEFENDING FRAUDULENT CLAIMS WHILE AVOIDING TORT DAMAGE EXPOSURE, tab 5, pp. 16-18 (1985).

61. Barrell of Fun, Inc. v. State Farm Fire & Casualty Co., 739 F.2d 1028, 1029 n.2 (5th Cir. 1984).

62. ABA COMM. ON PROPERTY INSURANCE LAW, DEFENDING FRAUDULENT CLAIMS WHILE AVOIDING TORT DAMAGE EXPOSURE, tab 5, p. 18 (1985).

63. 313 Pa. Super. 60, 459 A.2d 409 (1983).

64. *Id.* at __, 459 A.2d at 411.

65. 11 Ark. App. 289, 669 S.W.2d 511 (1984).

66. *Id.* at __, 669 S.W.2d at 514.

67. Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187, 1191-92 (7th Cir. 1976). *See also* Mele v. All-Star Ins. Corp., 453 F. Supp. 1338, 1341 (E.D. Pa. 1978); Quast v. Prudential Property & Casualty Co., 267 N.W.2d 493, 495 (Minn. 1978).

68. 22 Wash. App. 468, 591 P.2d 457 (1979).

69. *Id.* at __, 591 P.2d at 460. Criminal convictions for arson may also be based on circumstantial evidence if there is clear evidence of incendiarism and motive to set the fires. Mele v. All-Star Ins. Corp., 453 F. Supp. 1338, 1341 (E.D. Pa. 1978).

70. Raphtis v. St. Paul Fire & Marine Ins. Co., 86 S.D. 491, __, 198 N.W.2d 505, 510-11 (1972). *See also* McIntosh v. Eagle Fire Ins. Co., 325 F.2d 99, 100 (8th Cir. 1963).

of Appeals stated that "[w]hen the affirmative defense of incendiarism is based upon circumstantial evidence, as it generally is, the scope of admissibility of evidence must necessarily be broad."[71]

Furthermore, the fact that the insured has not been criminally charged with arson is not admissible in a civil trial.[72] Evidence of an acquittal is equally inadmissible.[73] The court in *Galbraith v. Hartford Fire Insurance Co.*,[74] stated the purpose behind the inadmissibility rule by noting "[a]n acquittal in a criminal prosecution is not necessarily a judgment of innocence, but merely a negative statement that the quantum of proof necessary for conviction had not been presented."[75]

Finally, Iowa Code section 100A.2 provides for investigation cooperation between insurance companies and the State of Iowa in suspected arson cases.[76] Thus, in Iowa, defense counsels are provided with an additional source of evidence to establish arson and negate a fraudulent claim.

2. *Fraud or False Swearing Defense*

Similar to the arson defense, the insurer has the burden of proof in regards to the affirmative defense of fraud or false swearing.[77] However, in contrast with the arson defense, the standard of proof is not as readily ascertainable. For example, the courts in Iowa generally require that fraud be proven by "clear and convincing" evidence.[78] Nevertheless, in the context of the Standard Fire Policy a number of states allow the insurer to prove fraud by the preponderance of the evidence.[79] The courts that allow fraud to be proven by the preponderance standard premise their decision on the fact that fraudulent insurance claims are different than common law fraud.[80]

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71. McIntosh v. Eagle Fire Ins. Co., 325 F.2d 99, 100 (8th Cir. 1963).

72. United States v. Burch, 394 F.2d 1 (5th Cir. 1961). *See also* Greenberg v. Aetna Ins. Co., 427 Pa. 511, _, 235 A.2d 576, 578 (1967).

73. Galbraith v. Hartford Fire Ins. Co., 464 F.2d 225, 227 (3d Cir. 1972).

74. 464 F.2d 225 (3d Cir. 1972).

75. *Id.* at 227.

76. IOWA CODE § 100A.2 (1985). Section 100A.2(1) provides that the state may require an insurance company to release information to the state relating to a fire loss. *Id.* In addition, section 100A.2(4) provides that an insurance company may request fire loss information from the state. *Id.*

77. Galbraith v. Hartford Fire Ins. Co., 464 F.2d 225, 226 (3d Cir. 1972). *See* note 26, *supra.*

78. Beeck v. Aquaslide N' Dive Corp., 350 N.W.2d 149, 155 (Iowa 1984).

79. Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111, 114 (7th Cir. 1968). *See also* Hammann v. Hartford Accident & Indem. Co., 620 F.2d 588, 589 (6th Cir. 1980); L & S Enterprises Co. v. Great American Ins. Co., 454 F.2d 457, 460 (7th Cir. 1971); Summer v. Stark City Patrons' Mut. Ins. Co., 63 Ohio App. 369, _, 26 N.E.2d 1021, 1023 (1940); St. Paul Mercury Ins. Co., v. Salovich, 41 Wash. App. 652, _, 705 P.2d 812, 815 (1985). *Cf.* First National Bank v. Ins. Co. of North America, 424 F.2d 312, 317 (7th Cir. 1970) (under Illinois law proof of a criminal act in a civil case need only be proven by a preponderance of the evidence).

80. ABA COMM. ON PROPERTY INSURANCE LAW, DEFENDING FRAUDULENT CLAIMS WHILE

Since the parties entered into a contract with knowledge that fraud is an affirmative defense, the insurer is simply attempting to prove breach of an express contract term.[81]

Although fraud or false swearing is a separate affirmative defense, it is often pled simultaneously with an arson defense.[82] Since the insured's financial condition is quite often the motive to commit arson, many insureds will also submit exaggerated proofs of loss.[83] If fraud or false swearing is substantiated, it will not only support the arson claim, but will void the Standard Fire Policy.[84] In addition, the combined defenses of arson and fraud give the jury an option when they suspect that the insured committed arson but are hesitant to accuse him of a crime.[85] Nonetheless, care must be taken to plead both defenses separately to prevent the inadvertent loss of a viable defense.[86]

Essentially, any insured who willfully makes a false statement in regards to a material portion of his claim with the intent to deceive his insurer has thereby voided the policy and barred his own claim.[87] Although the misrepresentation must relate to a material fact, the term has been broadly defined.[88] To illustrate, the Eleventh Circuit Court of Appeals stated that "[a] misrepresentation is material if it 'might affect [the insurer's] action in respect to . . . settlement or adjustment of the claim of the insured.' "[89] Thus, it is important to note that a misrepresentation is not determined to be material by whether the false answer proves to be unimportant but whether the misrepresentation might have affected the insurer's decision in regard to the

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AVOIDING TORT DAMAGE EXPOSURE, tab 5, pp. 6-7 (1985).

81. *Id.*

82. *See, e.g.*, Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111, 114 (7th Cir. 1968) (insurer defended on the grounds of arson and exaggerated proofs of loss).

83. *Id.* at 117.

84. IOWA CODE § 515.138 (1985). *See* Appendix lines 1-6.

85. *Cf.* Galbraith v. Hartford Fire Ins. Co., 464 F.2d 225, 227 (3d Cir. 1972). The court held that an acquittal was inadmissible on the grounds that an acquittal was not a judgment of innocence, but a negative statement that the requisite degree of proof was not met. *Id.* In addition, the court held that the fact that charges had not been filed was equally inadmissible. *Id.* Thus, the court acknowledged that lay jurors give both the acquittal and absence of criminal charges too much weight in a civil arson defense case. *Id.*

86. *See* FED. R. CIV. P. 12. *See generally* 16C APPLEMAN, INSURANCE LAW & PRACTICE § 9260 (1981 & Supp. 1986). *See, e.g.*, Hounihan v. Farm Bureau Mut. Ins. Co., 523 S.W.2d 173 (1975) (insurer by first denying liability on affirmative defense of arson was precluded from subsequently denying liability on a different ground).

87. Breeland v. Security Ins. Co., 421 F.2d 918, 923 (5th Cir. 1969). *See also* Perovich v. Glenn Falls Ins. Co., 401 F.2d 145, 147 (9th Cir. 1968); Trice v. Commercial Union Assurance Co., 397 F.2d 889, 891 (6th Cir. 1968); Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111, 114-15 (7th Cir. 1968); Transportation Ins. Co. v. Hamilton, 316 F.2d 294, 296-97 (10th Cir. 1963).

88. Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441 (11th Cir. 1984).

89. *Id.* at 1443. *See also* Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 184 (2d Cir. 1984).

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Nevertheless, because fraud or false swearing is a type of contractual fraud, the carrier does not have to show detrimental reliance.[90] In the landmark case of *Claflin v. Commonwealth Insurance Co.*,[91] the United States Supreme Court summarily stated the rule. "A false answer as to any matter of fact, material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected. If it failed, it would be a fraud attempted."[92]

Circumstances substantiating a fraud or false swearing defense can occur in a number of ways.[93] For example, the court in *Esquire Restaurant, Inc. v. Commonwealth Insurance Co.*,[94] held that a false answer regarding the insured's involvement in the fire was sufficient.[95] A more common example occurs when the insured exaggerates or falsifies the extent of the loss.[96] In *Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Insurance Co.*,[97] the court held that a "substantial" or "gross overvaluation" of the loss will void the policy.[98] Moreover, the court held that a "gross overvaluation" of sufficient magnitude would create a presumption of intent to defraud the insurer.[99] In addition, knowingly including items not destroyed has been held to preclude recovery under the policy.[100] Similarly, the court in *Lykos v. American Home Assurance Co.*[101] held that willful duplication of lost items barred the insured's claim.[102] Furthermore, the court rejected the insured's allegations that the inflated claim was for the purpose of negotiation.[103] The court held that " 'a design on the part of the insured to gain a position of advantage in the settlement of the loss through false representation is a fraudulent design and the making of such representa-

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90. American Diver's Supply & Mfg. Corp. v. Boltz, 482 F.2d 795, 797 (10th Cir. 1973). *See also* Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441, 1443 (11th Cir. 1984).

91. 110 U.S. 81 (1884).

92. *Id.* at 95.

93. ABA Comm. on Property Insurance Law, Defending Fraudulent Claims While Avoiding Tort Damage Exposure, tab 5, pp. 2-5 (1985).

94. 393 F.2d 111 (7th Cir. 1968).

95. *Id.* at 114.

96. Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187, 1192 (7th Cir. 1976). *See also* American Diver's Supply & Mfg. Corp. v. Boltz, 482 F.2d 795, 796-98 (10th Cir. 1973); Tenore v. American & Foreign Ins. Co., 256 F.2d 791, 793-94 (7th Cir. 1958).

97. 536 F.2d 1187 (7th Cir. 1976).

98. *Id.* at 1192.

99. *Id.* (citing Tenore v. American & Foreign Ins. Co., 256 F.2d 791, 795 (7th Cir. 1958)).

100. American Diver's Supply & Mfg. Corp. v. Boltz, 482 F.2d 795, 798-99 (10th Cir. 1973).

101. 452 F. Supp. 533 (N.D. Ill. 1978), *aff'd*, 609 F.2d 314 (7th Cir. 1979).

102. *Id.* at 316.

103. *Id.*

tions knowingly for that purpose is an attempt to defraud.' "[104] Moreover, although most misrepresentations will occur in the written proof of loss or the oral examination under oath, one court has held that a misrepresentation to the insurer's representative during the investigation phase can provide the basis for a fraud defense.[105]

Although case law is replete with examples of willful misrepresentations substantiating the fraud defense, differences of opinion between the insured and insurer as to the value of destroyed items are insufficient to substantiate a fraud defense.[106] In *Transportation Insurance Company v. Hamilton*,[107] the insured's books, records and original invoices were destroyed in addition to the insured items.[108] Thus, the insured had to obtain other records to substantiate the cost of the destroyed merchandise.[109] During the insured's effort to substantiate her loss, disagreements arose as to the value of the destroyed merchandise.[110] Nevertheless, the court held that in the absence of concealment or the withholding of information, a wide variance of opinion was insufficient to support a fraud claim.[111]

3. *Noncompliance With the Cooperation Clause*

An insured's noncompliance with the contractual provisions of the Standard Fire Policy will preclude recovery under the policy.[112] More importantly, the four prescribed contractual provisions of notice of loss, proof of loss, examination under oath and production of documents, collectively known as the cooperation clause, are the insurer's best defense against a fraudulent claim. First, in comparison with the arson defense, breach of a contractual provision is easier to prove than a secret or covert crime such as arson. Second, in jurisdictions requiring fraud to be proved by clear and convincing evidence, the requisite degree of proof is less.[113]

Moreover, effective use of the examination under oath and request for production of documents can substantiate the defenses of arson and/or fraud. For example, a demand that the insured produce his tax return might reveal an insured's poor financial condition and thus establish motive.[114]

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104. *Id.* (quoting 14 COUCH ON INSURANCE 2d § 49.556 (1965)).

105. American Diver's Supply & Mfg. Corp., 482 F.2d at 798. The court held that misrepresentations during the investigation phase "violate the fraud clause and destroy the intended atmosphere of honest [and] good faith dealing." *Id.*

106. Transportation Ins. Co. v. Hamilton, 316 F.2d 294, 298 (10th Cir. 1963).

107. 316 F.2d 294 (10th Cir. 1963).

108. *Id.* at 295.

109. *Id.*

110. *Id.* at 297.

111. *Id.* at 298.

112. IOWA CODE §515.138 (1985). *See* Appendix lines 90-122 & lines 157-61.

113. *See* notes 73-74 *supra*.

114. *See, e.g.*, Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187 (7th Cir. 1976) (certified public accountant testified that insured ap-

Careful examination of the insured's proof of loss coupled with a thorough investigation under oath may reveal willful misrepresentations and thus substantiate a fraud defense.[115] Thus, the importance of the cooperation clause is twofold. First, noncompliance with the cooperation clause will preclude recovery under the policy. Second, the four elements of the cooperation clause are vital in establishing either the arson or fraud defense. Theoretically, an insured may preclude his own recovery by refusing to cooperate with the investigation prior to the carrier's final decision to deny or pay the claim. Nonetheless, care should be taken to plead all three affirmative defenses of arson, fraud, or noncompliance separately so as to avoid the loss of a viable defense.[116]

A careful reading of the Standard Fire Policy reveals that the insured must submit a notice of loss and proofs of loss prior to recovery under the policy.[117] The examination under oath and request for production of documents are also precedents to recovery, however, the insurer must require the insured's compliance before the two provisions may be used to preclude recovery.[118] Since the most significant case law has been generated in regards to the three provisions of proofs of loss, examinations under oath and requests for production of documents, this note will emphasize these three areas.

An insured's failure to submit written proofs of loss within sixty days after demanded by the insurer is an absolute defense to the claim.[119] In *Lentini Bros. Moving & Storage Co. v. New York Property Insurance Underwriting Association*,[120] the insured brought suit ten months after the fire in order to comply with the twelve month statute of limitations mandated by the Standard Fire Policy.[121] Thereafter, the insurer wrote to the insured forwarding proof of loss forms for completion and return.[122] The insured failed to complete the forms and the insurer amended its answer to assert the affirmative defense that the plaintiff had failed to complete proofs of loss as

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peared in "shaky" financial condition based on accountant's review of the insured's tax returns).

115. *See, e.g., id.* at 1192 (insured's "gross overvaluation" of loss in sworn proofs of loss provided basis for fraud defense).

116. *See* note 81 *supra*.

117. IOWA CODE § 515.138 (1985). *See* Appendix lines 90-113 & lines 157-61.

118. *Id. See* Appendix lines 113-22 & lines 157-61. *See also* Nicolai v. Transcontinental Ins. Co., 61 Wash. 2d 295, _, 378 P.2d 287, 288-89 (1963) (court held that the insurer must demand an examination under oath and that a mere request was insufficient to bar recovery).

119. Lentini Bros. Moving & Storage Co. v. New York Property Ins. Underwriting Ass'n, 76 A.D.2d 759, _, 428 N.Y.S.2d 684, 686-87 (1980). *See also* Do-Re Knit, Inc. v. National Union Fire Ins. Co., 491 F. Supp. 1334, 1336 (E.D.N.Y. 1980).

120. 76 A.D.2d 759, 428 N.Y.S.2d 684 (1980).

121. *Id.* at _, 428 N.Y.S.2d at 685. At the time of suit the investigation of the fire was unresolved. *Id.*

122. *Id.*

prescribed by the Standard Fire Policy.[123] Subsequently, the insurer moved for summary judgment on the grounds that the insured's failure to file proofs of loss was an absolute defense to the action.[124] The court granted summary judgment in favor of the insurer and the appellate court affirmed.[125]

Although the *Lentini* case is a good illustration of the consequences of an insured's failure to file proofs of loss, by far the majority of litigation involving noncompliance with the cooperation clause involves examinations under oath and requests for production of documents. As illustrated earlier, both these provisions are not only precedents to recovery but are also extremely useful tools in determining the validity of a claim. In *Claflin v. Commonwealth Insurance Co.*,[126] the Supreme Court summarily stated the purpose of the examination under oath.

> The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured.[127]

Thus, the purpose of an examination under oath is to enable the insurer to obtain all relevant information in the possession of the insured regarding the claim in order for the insurer to determine its obligations under the policy. Since arson is a secret crime, the insured and his documents are often the best source of evidence.

Once the importance of the examination under oath is firmly established, counsel must have a good understanding of the case law interpreting this important contractual provision. First, the Standard Fire Policy prescribed by section 515.138 of the Iowa Code uses the phrase "as often as may be reasonably required" in referring to the insured's contractual duty to submit to an examination under oath.[128] Thus, the insurer must demand that the insured submit to an examination under oath.[129] In *Nicolai v.*

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123. *Id.* at _, 428 N.Y.S.2d at 686. The insurer also defended on the grounds that the insured had failed to appear for an examination under oath. *Id.*

124. *Id.*

125. *Id.*

126. 110 U.S. 81 (1884).

127. 110 U.S. at 94-95.

128. Iowa Code § 515.138 (1985). *See* Appendix lines 113-16.

129. Nicolai v. Transcontinental Ins. Co., 61 Wash. 2d 295, _, 378 P.2d 287, 288 (1963). In *Nicolai*, the property was destroyed and the insured wife died in the blaze. *Id.* The insured husband was missing so the insurer defended on the grounds that the contract had been breached because the insurer had not been able to examine the insureds. *Id.* Nevertheless, the

Transcontinental Insurance Co.,[130] the court stated that the insurer's demand should clearly state the time and place of the examination and the person who will conduct the examination.[131] Moreover, the demand should be made in clear and unambiguous language.[132] In *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*[133] the insured's lawyer wrote a letter to the insurer that the insureds would not be present at the requested examination under oath since they had decided not to pursue their claim at the present time.[134] However, the letter did indicate that the insureds might bring suit later within the twelve month statute of limitations.[135] Subsequently, the insureds brought suit and the insurer moved to dismiss on the grounds that the insured had breached the policy for failure to submit to the examination.[136] The court denied the summary judgment without prejudice to General Insurance's right to renew the motion upon a proper showing that the delay was prejudicial to its case.[137] Ultimately, the insurer failed to show prejudice and the court held that the insured's failure to submit to the examination when first requested was not a breach of the policy because the carrier failed to insist upon its right to the examination.[138] Nonetheless, although the court denied the insurer's pre-trial motion to dismiss, the court ordered the insureds to submit to an examination under oath.[139]

Nonetheless, the only limitation in regards to the examination under oath is that the requests for information must be material and relevant to the insured's loss.[140] In fact, the court in *Mulkey v. United States Fidelity & Guaranty Co.*,[141] stated that the examination should be liberal in scope

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court held for the estate due to the fact the carrier had failed to demand an examination and because there was no evidence to suspect arson. *Id.* at 289.

130. 61 Wash. 2d 295, 378 P.2d 287 (1963).

131. *Id.* at _, 378 P.2d at 288. *See also* Brookins v. State Farm Fire & Casualty Co., 529 F. Supp. 386 (S.D. Ga. 1982).

132. C-Suzanne Beauty Salon, Ltd. v. General Ins. Co., 574 F.2d 106, 108 (2d Cir. 1978).

133. 574 F.2d 106 (2d Cir. 1978).

134. *Id.* at 108.

135. *Id.*

136. *Id.* at 109.

137. *Id.*

138. *Id.* at 111.

139. *Id.* at 109.

140. Claflin v. Commonwealth Ins. Co., 110 U.S. 81, 95 (1884). *See also* Gipps Brewing Corp. v. Central Mfrs. Mut. Ins. Co., 147 F.2d 6, 13 (7th Cir. 1945); Mulkey v. United States Fidelity & Guar. Co., 243 S.C. 121, _, 132 S.E.2d 278, 283 (1963), *overruled on other grounds*, Johnson v. South State Ins. Co., 288 S.C. 239, 341 S.E.2d 793 (1986). *See generally* 5A APPLEMAN, INSURANCE LAW & PRACTICE § 3552 (1970, Supp. 1986).

141. 243 S.C. 121, 132 S.E.2d 278 (1963), *overruled on other grounds*, Johnson v. South State Ins. Co., 288 S.C. 239, 341 S.E.2d 793 (1986). The South Carolina Supreme Court held in *Johnson* that an insured's fraudulent claim under a fire insurance policy for loss of contents did not preclude the insured's recovery under the policy for loss of dwelling and additional living expenses. *Id.* at _, 132 S.E.2d at 794. The court held that the policy was severable and that

and that anything pertinent and relevant to the insurance and to the amount and circumstances of the loss could be inquired into.[142] Furthermore, an insured's failure to comply with all reasonable requests of the insurer is a breach of the policy and a complete defense to a claim.[143] This is true whether the insured refuses to submit to the examination under oath or refuses to answer specific questions during the examination under oath.[144]

To illustrate, in *Southern Guaranty Insurance Co. v. Dean*,[145] a suspicious fire destroyed the insured's restaurant resulting in an investigation by the insurer.[146] Subsequently, the insurer demanded an examination under oath and the insured complied.[147] However, the insured refused to answer questions regarding both the restaurant's financial condition and the insured's financial condition.[148] In addition, the insured refused to provide tax returns or financial statements or to allow the carrier to examine her checking accounts.[149] The court denied recovery to the insured on the grounds that the questions were material to both the amount of loss and to the defense of arson.[150]

In addition, the court in *Gipps Brewing Corp. v. Central Manufacturers Mutual Insurance Co.*,[151] held that an insured may not refuse to answer questions on the grounds that they are controversial or might be used for

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fraud as to one section did not preclude recovery under other sections. *Id.* However, the court acknowledged that the majority of jurisdictions hold that fraud as to one section of the policy voids the entire contract. *Id.*

142. *Id.* at _, 132 S.E.2d at 283. *See also* Southern Guar. Ins. Co. v. Dean, 252 Miss. 69, _, 172 So.2d 553, 556 (1965)("in an examination of the insured, all those matters are material which have a bearing on the insurance and the loss").

143. Dyno-Bite, Inc. v. Traveler's Cos., 80 A.D.2d 471, _, 439 N.Y.S.2d 558, 560 (1981). *See also* Lentini Bros. Moving & Storage Co. v. New York Property Ins. Underwriting Ass'n, 76 A.D.2d 759, _, 428 N.Y.S.2d 684, 686-87 (1980).

144. *See, e.g.*, Lentini Bros. Moving & Storage Co. v. New York Property Ins. Underwriting Ass'n, 76 A.D.2d at _, 428 N.Y.S.2d at 687. The court held that the insured's failure to appear for the examination under oath as demanded by the insurer and required by the policy was an absolute defense. *Id. See also* Gipps Brewing Corp. v. Central Mfrs. Mut. Ins. Co., 147 F.2d 6, 12-13 (7th Cir. 1945) (insured's refusal to answer questions regarding the proofs of loss was held to be a breach of the policy and thus a bar to recovery).

145. 252 Miss. 69, 172 So. 2d 553 (1965).

146. *Id.* at _, 172 So. 2d at 555-56.

147. *Id.* at _, 172 So. 2d at 556.

148. *Id.* at _, 172 So. 2d at 556-57 (for example, the insured refused to state the restaurant's gross profits during the immediate period preceding the sale).

149. *Id.* (in addition, the insured refused to state which bank her checks were drawn on and refused to answer questions regarding her mortgage).

150. *Id.* at _, 172 So. 2d at 557. At the time of the examination the insurer was investigating the possibility of arson and thus the insured's financial condition was relevant to establishing motive. *Id.* at _, 172 So. 2d at 556. The court also acknowledged that the insured's failure to produce her tax returns precluded recovery under the policy for failure to comply with the production of documents provision contained within the policy.
Id.

151. 147 F.2d 6 (7th Cir. 1945).

impeachment.[152]

> We think there is no escape from the conclusion that these witnesses purposely refused to answer questions which were material to the inquiry. We see no basis for refusal to answer upon the ground that they were controversial or that the answers thereto might have been used for the purpose of impeachment. Such a limitation would seriously impair and perhaps destroy defendants' right under this provision of the policy. Neither do we think there is any merit in plaintiff's suggestion that the examination was only properly directed at the amount of the loss.[153]

Furthermore, some authorities hold that an insured's refusal to submit to an examination under oath based on the insured's fifth amendment right against self-incrimination precludes recovery under the policy.[154] In *Hickman v. London Assurance Corp.*,[155] the court held that the fifth amendment right against self-incrimination had no application to an extrajudicial proceeding authorized by a contract between the parties.[156] "The obligation to perform the [examination] was as binding on [the insured] as his obligation to pay the premiums on the policies."[157] Moreover, the court in *Hudson Tire Mart, Inc. v. Aetna Casualty & Surety Co.*,[158] stated that "since there are numerous relevant matters with respect to which an insured may be examined without necessarily incriminating himself, the requirement of his appearance alone in no way violates his due process rights."[159] However, the decision in *Gruenberg v. Aetna Insurance Co.*,[160] in effect granted the insured a postponement of the examination under oath while criminal charges were pending. In *Gruenberg*, the insured's lawyer had given a "conditional" refusal to the carrier that as soon as the criminal charges were resolved the insured would submit to the examination.[161] Moreover, the insured alleged that the insurance companies had falsely implied that the insured had a motive to commit arson and demanded an examination under oath while criminal charges were pending in order to use the insured's failure to appear as a bar to recovery.[162] Although the insured offered to submit to an examination upon resolution of the criminal charges, the carrier alleged that the

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152. *Id.* at 13.

153. *Id.*

154. Hickman v. London Assurance Corp., 184 Cal. 524, 195 P. 45 (1920). *See also* Hudson Tire Mart, Inc. v. Aetna Casualty & Sur. Co., 518 F.2d 671 (2d Cir. 1975); Restina v. Aetna Casualty & Sur. Co., 61 Misc. 2d 574, 306 N.Y.S.2d 219 (1969).

155. 184 Cal. 524, 195 P. 45 (1920).

156. *Id.* at _, 195 P. at 49.

157. *Id.*

158. 518 F.2d 671 (2d Cir. 1975).

159. *Id.* at 674.

160. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

161. *Id.* at _, 510 P.2d at 1035, 108 Cal. Rptr. at _.

162. *Id.* at _, 510 P.2d at 1038, 108 Cal. Rptr. at _.

insured's prior refusal barred recovery.[163] Thereafter, the insured brought suit against the insurance company for breach of an implied duty of good faith and fair dealing.[164] Though the lower court dismissed the complaint, the appellate court held that the plaintiff had sufficiently stated facts to constitute an action in tort against the insurer for breach of an implied duty of good faith and fair dealing.[165] Thus, the *Gruenberg* decision holds that an insured may delay the examination under oath as long as criminal charges are pending.

Nonetheless, the court in *Mulkey* held that an insurer cannot rely on a refusal to answer a question that is not material on its face, but is material to the investigation of the claim.[166] In *Mulkey*, the insured had left town the evening before the fire to go fishing and returned the following morning shortly after the fire.[167] During the examination under oath the insured was asked several questions concerning his whereabouts on the morning of the fire.[168] The insured informed the carrier that he had stopped for a beer on the way home from fishing but refused to tell the carrier where he had stopped on the grounds that the question was immaterial.[169] At the time of the question the insured was unaware of the possibility of arson, whereas the carrier had received an arson report from a hired investigator.[170] Although the insured's whereabouts were material to the investigation of arson, the court held that the insured "should be placed on notice that the failure to answer a particular question, not patently material, may be used as grounds for avoidance."[171]

The provision contained within the Standard Fire Policy requiring the insured to produce documents which will corroborate the insured's loss is designed to serve the same purpose as the examination under oath.[172] Both the examination under oath and production of documents provisions are designed to enable the insurer to obtain all the necessary information to determine the extent of the carrier's obligations and to protect the carrier from false claims.[173] Although an insurer may not harass an insured with

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163. *Id.* at _, 510 P.2d at 1035, 108 Cal. Rptr. at _.

164. *Id.*

165. *Id.* at _, 510 P.2d at 1042, 108 Cal. Rptr. at _.

166. Mulkey v. United States Fidelity & Guar. Co., 243 S.C. 121, _, 132 S.E.2d at 283-84, *overruled on other grounds*, Johnson v. South State Ins. Co., 288 S.C. 239, 341 S.E.2d 793 (1986). *See* Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 148 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969) (citing Mulkey v. United States Fidelity & Guar. Co., 243 S.C. 121, 130-31, 132 S.E.2d 278, 283-84 (1963)).

167. Mulkey v. United States Fidelity & Guar. Co, 243 S.C. at _, 132 S.E.2d at 283.

168. *Id.*

169. *Id.* at _, 132 S.E.2d at 283-84.

170. *Id.* at _, 132 S.E.2d at 284.

171. *Id.*

172. Chavis v. State Farm Fire & Casualty Co., 79 N.C. App. 213, _, 338 S.E.2d 787, 789, *rev'd on other grounds*, 317 N.C. 683, 346 S.E.2d 496 (1986).

173. Chavis v. State Farm Fire & Casualty Co., 79 N.C. App. at _, 338 S.E.2d at 789

"aimless questions and demands for documents," any requested documents which relate to the validity of the insured's claim are both material and relevant.[174]

An insured's failure to submit all documents material to the rights and obligations of the carrier has been held to ban the insured's right to recovery.[175] For example, in *Horton v. Allstate Insurance Co.*,[176] the insured submitted sworn proofs of loss to the carrier after a fire damaged the insured's home.[177] Allstate rejected the proofs of loss and requested more detailed loss statements and additional documentation.[178] The insured failed to comply with the insurer's request and "took no action to either excuse or dispute his noncompliance."[179] Instead, the insured brought suit against Allstate seeking recovery under the policy.[180] At trial, the court granted Allstate's motion for summary judgment on the grounds that the insured had failed to comply with the contractual provisions contained in the policy.[181] On appeal, the appellate court affirmed, holding that full compliance with the terms of the policy is a condition precedent to bringing suit against the insurer.[182] Further, the court held that a request for production of an insured's documents

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(citing Claflin v. Commonwealth Ins. Co., 110 U.S. 81 (1884); Southern Guar. Ins. Co. v. Dean, 252 Miss. 69, 172 So. 2d 553 (1965)).

174. *Id.* (citing Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 286 A.D. 505, 145 N.Y.S.2d 206 (1955), *modified*, 1 N.Y.2d 534, 136 N.E.2d 842, 154 N.Y.S.2d 870 (1956)). In *Chavis*, the trial court held that the insureds' steadfast refusal to comply with the insurer's request to produce copies of the insureds' bank and loan accounts precluded recovery under the fire insurance policy. Chavis v. State Farm Fire & Casualty Co., 79 N.C. App. 213, _, 338 S.E.2d at 790. Although the insureds had authorized the insurer to obtain copies of the insureds' federal and state tax returns for the preceding five years and had answered questions under oath regarding their debts, assets, and earnings, the court held that the insureds' financial condition was clearly relevant to the insurer's arson defense and therefore the insurer had the right to request the bank records. *Id.* at _, 338 S.E.2d at 790-92. However, on appeal, the North Carolina Supreme Court reversed and held that the production of documents provision did not require the insureds to sign an "overbroad release" in favor of the insurer. Chavis v. State Farm Fire & Casualty Co., 317 N.C. at _, 346 S.E.2d at 498-99. The release requested would have allowed the insurer access to all records in any bank or financial institution the insureds had done business with. *Id.* at _, 346 S.E.2d at 498. The court held that the insurer's lack of specificity and the insureds' compliance with all other requests distinguished the instant case from other cases precluding the insured's recovery for noncompliance with the production of documents provision. *Id.* at _, 346 S.E.2d at 499 (citing Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969); Southern Guar. Co. v. Dean, 252 Miss. 69, 172 So. 2d 553 (1965)).

175. Georgian House of Interiors v. Glenn Falls Ins. Co., 21 Wash. 2d 470, 151 P.2d 598 (1944). *See also* Southern Guar. Ins. Co. v. Dean, 252 Miss. 69, 172 So. 2d 553 (1965)..

176. 125 Ill. App. 3d 1034, 467 N.E.2d 284 (1984).

177. *Id.* at _, 467 N.E.2d at 284.

178. *Id.*

179. *Id.*

180. *Id.* at _, 467 N.E.2d at 285.

181. *Id.*

182. *Id.*

was a reasonable condition precedent to recovery.[183] More importantly, the court held that filing proofs of loss was not in itself sufficient to satisfy the requirements of the production of documents.[184]

However, the Iowa Supreme Court's recent *Hoekstra* decision may seriously impair a fire insurer's ability to determine the extent of its obligations and to protect itself from fraudulent claims.[185] In *Hoekstra*, a fire in August, 1982 substantially destroyed the insureds' home, along with their personal belongings and financial records.[186] An "independent cause and origin investigator" hired by Farm Bureau suggested that the fire was of incendiary origin.[187]

Pursuant to the policy, Farm Bureau requested by letter that the insureds submit to examinations under oath.[188] At the examinations, Farm Bureau requested that the insureds provide copies of their 1979, 1981, and 1982 tax returns and to sign an authorization which would have permitted Farm Bureau to obtain copies of the insureds' bank and insurance records from various institutions.[189] Although the insureds did provide Farm Bureau with copies of their 1981 and 1982 tax returns, the insureds refused to sign the authorization upon advice of counsel.[190] Farm Bureau countered by requesting specific insurance and financial information, including copies of all documents in the files of an insurance company which had covered a prior fire of the insureds' home.[191]

The insureds did not comply with Farm Bureau's request and subsequently brought suit for breach of contract for failure to pay.[192] Farm Bureau answered by asserting the affirmative defenses of arson, fraud, and fail-

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183. *Id.* (citing Niagara Fire Ins. Co. v. Forehand, 169 Ill. 626, 48 N.E. 830 (1897)).

184. *Id.*

185. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100 (Iowa 1986).

186. *Id.* at 102.

187. *Id.* at 102-03. The local fire chief determined that the fire was caused accidentally by "sparking strands of wire that were grounding on the dehumidifier cord." *Id.* at 102. The cause and origin investigator removed the breaker serving the electrical circuit for the dehumidifier from the fuse box during his investigation. *Id.* at 103. The investigator did not provide the insureds, per their request, with a receipt for the removal of the breaker from the fire site. *Id.* "Neither the breaker nor any analysis of it was returned" to the insureds. *Id.*

188. *Id.* at 103. After delay due to illnes within the insureds' family, the insureds submitted to the examination under oath. *Id.* The examinations determined that the insureds mistakenly had used replacement cost values in their proof of loss forms. *Id.* The insureds subsequently forwarded to Farm Bureau corrected copies of their proof of loss forms. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The insureds filed a three count petition against Farm Bureau alleging: 1) that the insureds had complied with the terms of the insurance policy and that Farm Bureau had breached the contract for failure to pay; 2) that Farm Bureau had acted in bad faith for failure to settle the first-party claims; and 3) that Farm Bureau had intentionally inflicted emotional distress upon the insureds by failing to settle the claim. *Id.*

ure to comply with necessary conditions precedent to suit.[193] At trial, the trial court overruled Farm Bureau's motions for summary judgment and directed verdict for failure to comply with the disclosure provisions of the policy.[194] Moreover, the jury returned a verdict for the insureds on the breach of contract claim for failure to pay.[195] Farm Bureau appealed on the grounds that the insureds had failed to comply with the disclosure provisions of the policy.[196]

On appeal, the Iowa Supreme Court acknowledged that the fighting issue in the case was whether the insureds had complied with the production of documents provision contained within the policy.[197] Furthermore, the court noted that the instant dispute centered around the statutory and contractual language of the policy which obligated the insureds to produce records and documents "as often as may be reasonably required" by the insurer to corroborate the insureds' loss.[198]

In affirming the lower court's decision, the Iowa Supreme Court rejected Farm Bureau's argument that interpretation of the term "reasonably required" was subject to statutory as opposed to contractual construction.[199] The court held that although "statutory interpretation is a question of law for the court to determine, . . . it is for the jury to decide whether the conduct or acts of a party are reasonable under the circumstances."[200] Furthermore, the court held that although the Iowa statute was incorporated into the fire insurance policy, the general rule of construing an insurance policy in favor of the insured was applicable and that an insured need only prove "substantial compliance" with the disclosure provisions of the policy in order to bring suit against the carrier.[201] Finally, the court held that the record disclosed sufficient facts to generate a jury question whether the insureds had substantially complied with the disclosure provisions of the policy and affirmed the decision of the lower court.[202]

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193. *Id.*

194. *Id.*

195. *Id.* The jury returned a verdict for the insurer on the emotional distress claim. *Id.* The court had previously entered a directed verdict for the insurer on the bad faith claim. *Id.*

196. *Id.* The insureds also appealed the directed verdict for the insurer in regards to the bad faith claim. *Id.*

197. *Id.* at 104.

198. *Id.* The disputed policy contractual language required the insureds to produce requested records and documents and to allow the insurer to make copies of the same as often as the insurer reasonably required. *Id. See Appendix* lines 117-22.

199. *Id.* at 105. *See* notes 23-24 and accompanying text.

200. *Id.*

201. *Id.* at 106. Farm Bureau alleged that due to the fact the fire policy was mandated by Iowa statute, the principle of strict construction should be used in interpreting the disputed language. *Id. See* notes 16-18 and accompanying text.

202. *Id.* at 100-01. Prior to filing suit, the insureds had furnished Farm Bureau with:

> a proof of loss with a corrected fifty-six page inventory of the damaged or destroyed personal property; a proof of loss on a prior 1980 home fire, submitted to a different

The danger in the Iowa Supreme Court's holding in *Hoekstra* that "substantial compliance" with the disclosure provisions of the Standard Fire Policy is sufficient to bring suit under the policy is that it seriously impairs an insurer's ability to investigate fires of suspicious origin. As discussed earlier, arson is a a secret and covert crime and the insured and his documents are frequently the best source of evidence in determining the validity of the claim. Moreover, in suspected arson cases such as *Hoekstra*, the insureds' financial condition is both relevant and material to the insurer's affirmative defense of arson. In *Hoekstra*, both the insureds' financial condition and prior fire history were material to the insurer's affirmative defense of arson. Further, Farm Bureau's specific request to produce documents regarding the insureds' prior fire was not a mere fishing expedition.

As stated in *Claflin*, the purposes of the examination under oath and production of documents provisions contained within the Standard Fire Policy are to "enable the Company to possess itself of *all* knowledge, and *all* information as to other sources and means of knowledge, in regard to the facts, material to the rights, to enable them to decide upon their obligations and to protect them against false claims."[203] However, the Iowa Supreme Court's holding, in effect, allows an insured to unilaterally decide the extent of his compliance with the disclosure provisions contained within the policy. This would seriously impair an insurer's ability to protect itself against false claims and may lead to premature decisions based on incomplete investigations by insurers regarding their obligations under fire insurance policies issued in Iowa. More importantly, the Iowa Supreme Court's holding in *Hoekstra* that an insured's "substantial compliance" with the disclosure provisions of the policy is sufficient to sustain a suit against the carrier is contrary to a primary purpose of the cooperation clause of the Standard Fire Policy to avoid costly and time-consuming litigation.[204]

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insurance carrier; a letter from their bank showing account and loan balances on the date of loss; a letter from the county recorder concerning the mortgage on plaintiff's home; a letter from a savings and loan company setting out the balance on their home mortgage; copies of 1980 and 1981 income tax returns; and a copy of a 1982 W-2 statement of earnings.

Id. at 104. Subsequent to filing suit the insureds furnished Farm Bureau with their 1979 tax return. *Id.* The insureds refused to sign Farm Bureau's "blanket" authorization on the grounds that further requests were unreasonable. *Id.* at 105. In addition, one of the insured's father may have objected to release of certain documents involving an inactive building partnership in which he had been associated. *Id.* at 104.

See also Chavis v. State Farm Fire & Casualty Co., 317 N.C. 683, 346 S.E.2d 496 (1986), where the court held that the production of documents provision did not require an insured to sign an open-ended overbroad release in favor of the insurer. The court looked upon the insurer's request for a "blanket" release with disfavor due to the lack of specificity and the insureds' compliance with other requests. *Id.* at _, 346 S.E.2d at 498-99. *See* note 174 and accompanying text.

203. Claflin v. Commonwealth Ins. Co., 110 U.S. at 94-95 (emphasis added).

204. Buckner, *An Insurer's Right to Production of Documents and Examination under*

Finally, the Standard Fire Policy requires the insured to bring suit under the policy within twelve months after the loss occurred.[205] Although the majority rule upholds the validity and enforceability of suit limitation clauses, the identifiable trend is toward mitigation of the consequences produced by enforcement of these clauses.[206] Frequently, courts rely on the doctrines of waiver and estoppel to avoid the twelve month statute of limitation.[207] To illustrate, some courts hold that failure to plead the limitation clause as an affirmative defense constitutes a waiver, while other courts allow the insurer leave to amend.[208] In addition, the Iowa Supreme Court held that an insurer had waived the twelve month statute of limitation by continuing negotiations beyond the end of the twelve month period.[209] However, negotiations alone, as long as they are terminated within a reasonable time prior to the expiration of the limitation period, are not sufficient to support a waiver.[210] Moreover, neither investigation of the loss nor a request for an examination under oath will amount to waiver or estoppel.[211]

Another example of avoidance of the limitation clause occurred when a court held the insurer was estopped from asserting the twelve month limitation clause as a defense due to the insurer's offer to settle the claim well before the expiration date.[212] Although neither the insured nor his attorney was aware of the limitation, the court held that the early offer to settle had lulled the insured into forebearance from suit within the twelve month period.[213] Nonetheless, in the absence of waiver by the insurer, the Iowa Supreme Court has upheld the twelve month statute of limitation.[214] More importantly, the Iowa Supreme Court interpreted the phrase "within twelve

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Oath, BEST'S REVIEW 122 (Oct. 1982).

205. IOWA CODE § 515.138 (1985). *See* Appendix lines 157-61.

206. ABA COMM. ON PROPERTY INSURANCE LAW, DEFENDING FRAUDULENT CLAIMS WHILE AVOIDING TORT DAMAGE EXPOSURE, tab 9, p. 3 (1985).

207. *Id.* at pp. 12-16. Waiver is a voluntary relinquishment of a known right while estoppel occurs when there has been a change in the position of the parties and the party invoking estoppel has changed his position to his detriment. *Id.* at 13. Though the doctrines are separate and distinct, the courts tend to use the words interchangeably. *Id.*

208. *Id.* at 15.

209. Scheetz v. IMT Ins. Co., 324 N.W.2d 302 (Iowa 1982).

210. Peters v. Home Ins. Co., 11 Mich. App. 627, 162 N.W.2d 91 (1968).

211. Proc v. Home Ins. Co., 17 N.Y.2d 239, 217 N.E.2d 136, 270 N.Y.S.2d 412 (1966). The court held that the twelve month limitation was not waived by the insurers furnishing of blank proofs of loss and examination of the insured where the insurer communicated to the insured in writing that neither the furnishing of the forms nor the examination should be taken as a waiver of any policy provision. *Id.* at _, 217 N.E.2d at 139. See ABA COMM. ON PROPERTY INSURANCE LAW, DEFENDING FRAUDULENT CLAIMS WHILE AVOIDING TORT DAMAGE EXPOSURE, tab 9, pp. 1-17 (1985) for an excellent discussion of waiver and estoppel in regards to the twelve month limitation.

212. Pasmear Inn, Inc. v. General Accident Fire & Life Assurance Corp., 44 A.D.2d 647, 353 N.Y.S.2d 278 (1974).

213. *Id.* at _, 353 N.Y.S.2d at 279.

214. Olson Enter., Inc. v. Citizens Ins. Co., 255 Iowa 141, 121 N.W.2d 510 (1963).

months next after inception of the loss" to mean twelve months from the date of the fire rather than twelve months from the denial of the claim.[215]

III. Bad Faith

The California Supreme Court in the landmark case of *Gruenberg v. Aetna Insurance Co.*,[216] "held that the insurer's duty of good faith and fair dealing 'is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself.' "[217] In *Gruenberg*, the court held that where an insurer refused to compensate an insured for an insured loss, without proper cause, such refusal "may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing."[218] Moreover, the court held that the insurer's duty of good faith and fair dealing was "unconditional and independent" of the insured's contractual duty to cooperate with the insurer in settlement of the claim.[219]

Although *Gruenberg* recognized the tort of bad faith, one court has held that the Standard Fire Policy is exempt from a bad faith cause of action.[220] In *A. A. A. Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co.*,[221] the insured alleged that the Standard Fire Policy was an adhesion contract which put the insured at a substantial disadvantage in settlement negotiations due to the fact the insurer's liability was limited to the amount of the loss plus interest.[222] The court held that the Standard Fire Policy was not a contract of adhesion since the terms of the policy are mandated by the legislature.[223] Furthermore, the court was persuaded by the lead of other state legislatures that had previously enacted legislation "imposing liability for punitive damages and attorney's fees or providing statutory penalties for an insurer's bad faith in failing to pay a claim."[224]

Though the Iowa Legislature has adopted a statute dealing with unfair claims practices, the Iowa Supreme Court has held that the statute does not give rise to a private cause of action for damages in an individual whose

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215. *Id.* at 147, 121 N.W.2d at 513.

216. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

217. W. Shernoff, S. Cage & H. Levine, Insurance Bad Faith Litigation, § 5.40 at 5-57 (1985) (quoting Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, _, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, _ (1973)).

218. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d at _, 510 P.2d at 1037. *See* notes 155-160 *supra*.

219. *Id.* at _, 510 P.2d at 1040.

220. A. A. A. Pool Serv. & Supply, Inc. v. Aetna Casualty & Sur. Co., 121 R.I. 96, 395 A.2d 724 (1978).

221. *Id.*

222. *Id.* at _, 395 A.2d at 725.

223. *Id.* at _, 395 A.2d at 726.

224. *Id. See, e.g.*, Del. Code Ann. tit. 18, §§ 2304(16), 2308 (Rev. 1974); Ill. Ann. Stat. ch. 73, § 767 (Smith-Hurd Supp. 1985).

carrier violated the statute.[225] Similarly, the Iowa courts have yet to recognize an action in tort for an insurer's bad faith refusal to pay a first-party claim.[226] In *Hoekstra v. Farm Bureau Mutual Insurance Co.*,[227] the most recent case on the subject, Chief Justice Reynoldson stated that "[a]lthough we have yet to encounter a case that convinces us to adopt that remedy, we are unwilling, on our limited experience with such situations, to say one could not exist. Perhaps, as Mr. Justice Stewart said about pornography, we shall know it when we see it."[228] Thus, although the bad faith issue is not uniform throughout the country, Iowa does not recognize an action in tort for an insurer's bad faith refusal to pay a first-party claim.

IV. Conclusion

Both the statutory nature and widespread use of the Standard Fire Policy provide defense counsel with many unique legal arguments when defending a fraudulent claim brought under the policy. Furthermore, the Standard Fire Policy contains the three affirmative defenses of arson, fraud and noncompliance within the cooperation clause. Moreover, the cooperation clause provides defense counsel with important investigative tools to prevent the payment of an unwarranted claim. Thus, defense counsel must have a good understanding of both the Standard Fire Policy and the case law interpreting it in order to prevent the loss of a viable defense. Finally, counsel should not limit itself to one defense, but should view the evidence in the cumulative.

Charles T. Smith

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225. Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35 (Iowa 1982). *See* Iowa Code § 507B.4 (1985).

226. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100 (Iowa 1986). *See also* Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633 (Iowa 1984); Higgins v. Blue Cross, 319 N.W.2d 232 (Iowa 1982); M-Z Enter. Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408 (Iowa 1982); Case Note, *Iowa Does Not Recognize an Independent Tort Action for an Insurer's Bad Faith Failure to Settle First-Party Claims*, 33 Drake L. Rev. 955 (1983-84). *See generally* Phelan, *The First-Party Dilemma: Bad Faith or Bad Business?*, 34 Drake L. Rev. 1031 (1985-86).

227. 382 N.W.2d 100 (Iowa 1986).

228. *Id.* at 112 (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

APPENDIX

STANDARD PROVISIONS—IOWA ONLY

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision, may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above

APPENDIX

STANDARD PROVISIONS—IOWA ONLY
(Continued)

the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

APPENDIX

STANDARD PROVISIONS—IOWA ONLY
(Continued)

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.