

**Burning Down the House:
Does Limiting the Innocent Spouse's Right
to Recover Make Sense?**

*DePalma v. Bates County Mutual Insurance Company*¹

I. INTRODUCTION

Homeowners purchase property insurance to protect themselves from fortuitous yet foreseeable risks, such as lightning strikes, poor electrical wiring, and, perhaps, even arson by a stranger. One risk not anticipated is that one's spouse would intentionally damage or destroy the family home. When this happens, is there coverage?² Traditionally, the innocent spouse could not recover, but the modern trend has been to allow recovery. Recovery has been limited, almost without exception, to one-half of the property damage up to the policy limits or

¹ 24 S.W.3d 766 (Mo. Ct. App. 2000) [hereinafter DePalma II].

² See generally ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 63A, at 384-88 (2d ed. 1996); Paul B. Butler, Jr. & Bob G. Freemon, Jr., *The Innocent Coinsured: He Burns It, She Claims—Windfall or Technical Injustice?*, 17 FORUM 187 (1981); Stephen P. Carney, *Spouse's Fraud as a Bar to Insurance Recovery*, 21 WM. & MARY L. REV. 543 (1979); Leane English Cerven, *The Problem of the Innocent Co-insured Spouse: Three Theories on Recovery*, 17 VAL. U. L. REV. 849 (1983); Marvin L. Karp, *Arson and the Innocent Co-insured*, 22-SPG BRIEF 8 (1993); Brent R. Lindahl, *Insurance Coverage for an Innocent Co-insured Spouse*, 23 WM. MITCHELL L. REV. 433 (1997); Rachel R. Watkins, *Property Insurance and the Innocent Co-insured: Was It All Pay and No Gain for the Innocent Co-insured?*, 43 DRAKE L. REV. 893 (1995); Annotation, *Theft and Vandalism Insurance: Coinsured's Misconduct as Barring Innocent Coinsured's Right to Recover on Policy*, 64 A.L.R.4TH 714 (1988); Larry D. Scheafer, Annotation, *Right of Innocent Insured to Recover Under Fire Policy Covering Property Intentionally Burned by Another Insured*, 11 A.L.R.4TH 1228 (1982).

one-half of the policy limits.³ In *DePalma v. Bates County Mutual Insurance Co.* (“*DePalma II*”)⁴—a case of first impression—the Missouri Court of Appeals for the Western District of Missouri held that a homeowner whose spouse intentionally destroyed their dwelling, held as entireties property, can recover only one-half of the policy limits.⁵

This Note argues that the court’s *per se* rule of recovery is flawed in two respects. First, it is inconsistent with the court’s claim that the policy language controlled the court’s decision; a straightforward application of rudimentary principles of insurance contract interpretation—in particular, *contra proferentem*—would interpret the policy language before the court as requiring full recovery. Second, the majority recovery rule overestimates one legitimate concern, the danger of collusion by spouses to profit from arson, while ignoring others, such as avoiding the punishment of victims of spousal abuse a second time *via* court decision, creating a disincentive for an irate spouse to burn the marital home in order to punish the other spouse, and encouraging insurance companies to clarify policy language. This Note suggests that allowing the innocent insured full recovery, unless the insurance company can prove, by clear and convincing evidence, that the innocent spouse knew that the other spouse intended to damage or destroy or assisted the other spouse in damaging or destroying the insured premises, might be a better approach.

³ See JERRY, *supra* note 2, § 63A, at 384-88.

⁴ 24 S.W.3d 766 (Mo. Ct. App. 2000).

⁵ *Id.* at 770.

II. FACTS AND HOLDING

On September 7, 1993, Janet DePalma intentionally set fire to the house she and her husband, Anthony DePalma (“DePalma”), owned as tenants by the entirety.⁶ DePalma played no role in starting the fire, which completely destroyed the house.⁷ More than \$30,000 in real property and \$13,000 in personal property were destroyed.⁸ DePalma told the fire investigators that he suspected that his wife had started the fire because, on the night of (or before) the fire, he and his wife had an argument that ended with DePalma saying he planned on divorcing her and keeping the house.⁹ Seven days later, the DePalmas’ insurer, Bates County Mutual Insurance Company (“Bates County Mutual”), sent the DePalmas a proof-of-loss form, which DePalma completed, leaving blank the question that asked about the source of the fire.¹⁰ Bates County Mutual “expressly rejected” the form for failure to comply with the terms of the insurance policy.¹¹ DePalma then re-submitted a series of proof-of-loss forms and inventory lists—all of which were rejected because of Janet DePalma’s missing signature, among other reasons.¹² Bates County Mutual sent a letter to DePalma stating that it would not pay the proceeds until he complied with all terms of the contract.¹³ Never did Bates County Mutual accept a proof-of-loss form from DePalma.¹⁴

⁶ *Id.* at 767.

⁷ *Id.*

⁸ *Id.*

⁹ Appellant’s Brief at 3, *DePalma II*, 24 S.W.3d 766 (Mo. Ct. App. 2000) (No. WD 57329).

¹⁰ *DePalma II*, 24 S.W.3d at 769-70.

¹¹ *Id.* at 769.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

DePalma sued for breach of contract.¹⁵ In its answer, Bates County Mutual stated that DePalma was not entitled to recover under the policy because he never had submitted a valid proof-of-loss statement and, hence, did not satisfy a condition precedent for recovery.¹⁶ Bates County Mutual moved for summary judgment, which the trial court granted, and DePalma appealed, arguing that, as an innocent insured, he was entitled to the proceeds.¹⁷ The appellate court stated that “whether an innocent spouse may recover for loss to property owned by the couple as tenants by the entirety but destroyed intentionally by the other spouse under an insurance policy issued jointly to the couple” was an issue of first impression in Missouri.¹⁸ The court held that an insurance policy’s unambiguous language determines the answer.¹⁹ (The court dismissed as dicta the comments made by Missouri courts and by the Eighth Circuit that the innocent coinsured could not recover.²⁰) Furthermore, the court held that the policy language barred DePalma from recovering only if either he or Janet DePalma had engaged in fraud or misrepresentation regarding the fire.²¹ Because there was nothing in the record indicating that either had, the court reversed the trial court.²² “Arson,” declared the court, “does not equate to fraud—something more is

¹⁵ *Id.*

¹⁶ *Id.* at 770.

¹⁷ *Id.* at 767.

¹⁸ *Id.* at 767 (quoting *DePalma v. Bates County Mut. Ins. Co.*, 923 S.W.2d 385, 388 (Mo. Ct. App. 1996) [hereinafter *DePalma I*]).

¹⁹ *Id.*

²⁰ *DePalma I*, 923 S.W.2d at 387-88.

²¹ *Id.* at 388.

²² *Id.*

needed.”²³ As a result, the case was remanded for further proceedings.²⁴

On remand, the trial court sustained DePalma’s motion for a directed verdict on the alternative grounds that Bates County Mutual did not prove DePalma breached the contract or that DePalma’s breach was immaterial and not the cause of Bates County Mutual’s denial of the claim.²⁵ The trial court held that Janet DePalma could not recover because she intentionally started the fire but that DePalma was entitled to recover half of the value of the personal property destroyed in the fire (amounting to \$6,788.95), the principal and interest due on the house’s mortgage on September 7, 1993, (the day of the fire), or the amount of the policy’s dwelling coverage (\$30,000), plus interest from the date of the judgment.²⁶

Bates County Mutual appealed.²⁷ It argued two points that were rejected: (1) that because the “Named Insured” in the policy was Janet and Anthony DePalma, Janet’s wrongdoing was imputed to DePalma, thus barring both from recovering; and (2) that the trial court erred in dismissing its motions for a new trial and, in the alternative, for judgment notwithstanding the verdict because there was sufficient evidence that DePalma intentionally concealed or misrepresented a material fact when he submitted a signed, sworn proof-of-loss form to Bates County Mutual on which he left blank the cause and origin of the fire.²⁸ The appellate court stated that the first point was moot, having been rejected in the first appeal, and that the second lacked support because the

²³ *Id.*

²⁴ *Id.*

²⁵ *DePalma II*, 24 S.W.3d 766, 768 (Mo. Ct. App. 2000).

²⁶ *Id.*

²⁷ *Id.* at 768-69.

²⁸ *Id.*

record failed to indicate that Bates County Mutual had accepted a proof-of-loss statement from DePalma.²⁹ The rejected forms never became part of the claim.³⁰ Nevertheless, the court agreed with Bates County Mutual's third point on appeal—that, because DePalma only had an interest in half of the value of the house, he should recover only half of the dwelling coverage, \$15,000, not the \$30,000 the trial court awarded.³¹ The court reversed the trial court's award of damages and remanded the case for the trial court to enter an order awarding DePalma the reduced figure.³²

III. LEGAL BACKGROUND

A. *The Fortuity and Insurable Interest Requirements*

1. Insurable Interest

To recover under a property insurance policy, an insured must have an insurable interest in the property covered by the policy.³³ That is, an insured must have a property interest—for example, a fee simple or a leasehold—that the law requires the owner of an insurance policy to have in the thing insured.³⁴ The reason for requiring such an interest is to further the principle of indemnity—namely, reimbursement of the insured for his or her actual loss and nothing more.³⁵ If an insured has no insurable interest in the insured property, the policy is void *ab initio*, even if the policy

²⁹ *Id.* at 770.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *See generally* JERRY, *supra* note 2, §§ 40-42, at 233-50.

³⁴ JERRY, *supra* note 2, § 41, at 237.

³⁵ JERRY, *supra* note 2, § 41, at 237.

lacks an insurable interest clause.³⁶ Indemnity avoids the creation of moral hazard, the risk that the insured intentionally will destroy the covered property in order to reap a windfall due to the difference between the value of the policy and that of the property.³⁷

2. Fortuity

An axiom of insurance law is that only fortuitous—or accidental—losses are compensable.³⁸ Like the insurable interest requirement, the fortuity requirement is also an implied term in every insurance contract.³⁹ When the fortuity requirement is violated, the policy voids coverage as to the person who intentionally destroyed the property.⁴⁰ The public policy behind the fortuity requirement mirrors that behind the insurable interest requirement.⁴¹

B. The Common Law Approaches to Recovery by an Innocent Spouse: The Traditional and Modern Rules

1. The Traditional Rule: No Recovery

Traditionally, an innocent spouse could not recover when the coinsured spouse intentionally destroyed the covered property.⁴² Courts have expressed various

³⁶ JERRY, *supra* note 2, § 41, at 237. The insurable interest requirement is an implied-in-law term.

³⁷ JERRY, *supra* note 2, § 10(c)(2), at 15.

³⁸ JERRY, *supra* note 2, § 63, at 382.

³⁹ JERRY, *supra* note 2, § 63, at 383-84.

⁴⁰ JERRY, *supra* note 2, § 63A, at 385.

⁴¹ JERRY, *supra* note 2, § 63A, at 384.

⁴² *See, e.g.*, *Home Ins. Co. v. Pugh*, 286 So. 2d 49, 50 (Ala. Civ. App. 1973); *Fuselier v. U.S. Fid. & Guar. Co.*, 301 So. 2d 681, 682 (La. Ct. App. 1974); *Kosior v. Cont'l Ins. Co.*, 13 N.E.2d 423, 424 (Mass. 1938); *Ijames v. Republic Ins. Co.*, 190 N.W.2d 366, 369

justifications for the rule.⁴³ In *Matyuf v. Phoenix Insurance Co.*,⁴⁴ the Washington County Court of Pennsylvania held that it is implied “by the very nature and fundamental purpose of the insurance contract . . . that a fraudulent and felonious burning by either of the joint owners who are jointly insured is not included within the contemplated risks.”⁴⁵ Consequently, there is no coverage for an innocent spouse.⁴⁶

Another reason posited by the courts is that, because a husband and wife had a joint interest in the property, their interests in the policy were likewise joint.⁴⁷ In *Klemens v. Badger Mutual Insurance Co. of Milwaukee*,⁴⁸ for instance, the Wisconsin Supreme Court held that Mr. Klemens’ arson was imputed to Mrs. Klemens, even though she had no knowledge about and played no role in it, because the nature of the covered property made each insured responsible, under the insurance contract, for the other’s fraudulent acts (defined, in this case, as including arson).⁴⁹ A third reason, advanced in *Cooperative Fire Insurance Ass’n of Vermont v. Domina*,⁵⁰ was that, even assuming the misconduct of the arsonist spouse did not bar recovery by the innocent coinsured, “nevertheless [the innocent spouse’s] interest in the property as [a]

(Mich. Ct. App. 1971); *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511, 512 (Tex. Civ. App. 1952); *Coop. Fire Ins. Ass’n of Vt. v. Domina*, 399 A.2d 502, 503 (Vt. 1979); *Rockingham Mut. Ins. Co. v. Hummel*, 250 S.E.2d 774, 776 (Va. 1979); *Klemens v. Badger Mut. Ins. Co. of Milwaukee*, 99 N.W.2d 865, 866 (Wis. 1959).

⁴³ See JERRY, *supra* note 2, § 63A, at 385.

⁴⁴ 27 Pa. D. & C.2d 351 (1932).

⁴⁵ *Id.* at 365.

⁴⁶ *Id.*

⁴⁷ *Klemens v. Badger Mut. Ins. Co. of Milwaukee*, 99 N.W.2d 865, 866 (Wis. 1959).

⁴⁸ 99 N.W.2d 865 (Wis. 1959).

⁴⁹ *Id.* at 867.

⁵⁰ 399 A.2d 502 (Vt. 1979).

tenant[] by the entirety is such that the extent thereof cannot be determined.”⁵¹ Nevertheless, the Vermont Supreme Court acknowledged that disallowing recovery was outmoded and punitive.⁵²

Finally, and probably most significantly, some courts deem recovery by the innocent coinsured a violation of the public policy against allowing a wrongdoer to benefit—even indirectly—from his or her misdeeds.⁵³ “To allow recovery on an insurance contract where the arsonist has been proven to be a joint insured would allow funds to be acquired by the entity of which the arsonist is a member and is flatly against public policy.”⁵⁴

2. The Modern Rule: Recovery by the Innocent Spouse

The modern rule allows recovery by an innocent spouse, rejecting the arguments adduced for the old rule.⁵⁵ First, that the husband and wife have a single interest in the insured property does not mean they, as a marital unit, have a single interest in the insurance policy; presumptively, their interests are severable.⁵⁶ Second, some courts have rejected the “oneness” fiction as an archaic justification for vicarious responsibility.⁵⁷ In *Howell v. Ohio Casualty Co.*,⁵⁸ for instance, the court rejected the unity thesis:

⁵¹ *Id.* at 503.

⁵² *Id.*

⁵³ *Short v. Okla. Farmer’s Union Ins. Co.*, 619 P.2d 588, 590 (Okla. 1980).

⁵⁴ *Id.*

⁵⁵ *See* JERRY, *supra* note 2, § 63, at 383.

⁵⁶ *Howell v. Ohio Cas. Ins. Co.*, 327 A.2d 240, 242 (N.J. Super. Ct. App. Div. 1974) (per curiam).

⁵⁷ *Id.*

⁵⁸ *Id.*

[W]e reach this result irrespective of whether the interests of the wife and husband in the tenancy by the entirety, in the personal property, or in the contract rights under the policy are deemed to be joint or several. The significant factor is that the responsibility or liability for the fraud—here, the arson—is several and separate rather than joint, and the husband’s fraud cannot be attributed or imputed to the wife who is not implicated therein. Accordingly, the fraud of the co-insured husband does not void the policy as to the plaintiff wife.⁵⁹

Third, the rationale for allowing recovery is that the reasonable insured would not expect to be denied the proceeds because of the arson committed by his or her spouse.⁶⁰ Citing the doctrine of reasonable expectations, the court in *American Economy Insurance Co. v. Liggett*⁶¹ held that, if an insurance company wanted to deny the innocent coinsured the right to recover, it must use clear and prominent language, such as the following: “IF YOU OR ANY PERSON INSURED BY THIS POLICY DELIBERATELY CAUSES A LOSS TO PROPERTY INSURED THEN THIS POLICY IS VOID AND WE WILL NOT REIMBURSE YOU OR ANYONE ELSE FOR THAT LOSS.”⁶² Otherwise, the reasonable expectations of the innocent coinsured, who would consider arson by his or her spouse as fortuitous, would be frustrated.⁶³

⁵⁹ *Id.*

⁶⁰ *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 141-45 (Ind. Ct. App. 1981).

⁶¹ *Id.*

⁶² *Id.* at 141 (emphasis in original).

⁶³ *Id.* at 142.

Fourth, the rationale is that public policy favors allowing recovery even if clear language of the policy forbids recovery.⁶⁴ In *Borman v. State Farm Fire and Casualty Co.*,⁶⁵ the Michigan Supreme Court invalidated a term in a property insurance policy disallowing recovery when “any insured” intentionally damaged the insured property.⁶⁶ The court voided the provision for failing to comply with a state statute.⁶⁷

3. Amount Recoverable Under the Modern Rule: Usually Only Half

Though most courts allow the innocent spouse to recover, the nearly unanimous rule is to limit that recovery to one-half of the amount of the property damage up to the policy limits or to one-half of the amount of the proceeds up to one-half of the policy limits.⁶⁸ In *Lewis v. Homeowner’s Insurance Co.*,⁶⁹ for instance, the court concluded that limiting recovery to one-half of the property damage, not to exceed the policy limits, was warranted because:

[a rule allowing full recovery would] necessitate reliance on the “oneness” legal fiction of marital property which we rejected in determining that the parties here enjoy and assume several, not joint contractual rights and obligations. Moreover, an award greater than one-half would allow the innocent spouse to recover in excess of

⁶⁴ *Borman v. State Farm Fire & Cas. Co.*, 521 N.W.2d 266, 267 (Mich. 1994).

⁶⁵ 521 N.W.2d 266 (Mich. 1994).

⁶⁶ *Id.* at 267.

⁶⁷ *Id.*

⁶⁸ See JERRY, *supra* note 2, § 63A, at 387-88.

⁶⁹ 432 N.W.2d 334 (Mich. Ct. App. 1988).

that to which she would be entitled upon severance of the tenancy by the entirety, whether by divorce or other action of the parties.⁷⁰

The court also implied that allowing anything more than one-half recovery would run the risk of rewarding the guilty spouse for misdeeds.⁷¹ In *Delph v. Potomac Insurance Co.*,⁷² the New Mexico Supreme Court reasoned that an innocent spouse in a community property state could recover only up to one-half of the policy limits because she only had a “vested and equal interest” in fifty percent of the policy.⁷³

There are two exceptions to the majority recovery rule. Where the spouse who intentionally destroyed the property was insane at the time of the loss, the “innocent”⁷⁴ spouse can recover the full value of the

⁷⁰ *Id.* at 336-37 (quoting *St. Paul Fire & Marine Ins. Co. v. Molloy*, 433 A.2d 1135, 1142 (Md. 1981)).

⁷¹ *Id.* at 337 (“By permitting the innocent spouse to recover one half, we are attempting to reduce his loss while denying any benefit to the guilty spouse.”); see also JERRY, *supra* note 2, § 63A, at 388. Professor Jerry has noted:

Of course, where property is jointly owned, proceeds equal to one-half of the damage does not make the innocent coinsured whole; but the difficulty is apparent where one realizes that paying the innocent coinsured 100 percent of the damages increases the likelihood that the wrongdoer benefits from his or her intentional destruction of the property.

JERRY, *supra* note 2, § 63A, at 388.

⁷² 620 P.2d 1282 (N.M. 1980).

⁷³ *Id.* at 1284-85 (“Mr. Delph’s fraud cannot be attributed or imputed to plaintiff who is not implicated therein. His [setting fire to the marital home] could only void his interest in the insurance property.”).

⁷⁴ The quotes are here because, if the arsonist-spouse was insane when he torched the home, he lacked the appropriate *mens rea* to be guilty of arson, and, hence, his spouse is only colloquially innocent.

policy.⁷⁵ In *Home Insurance Co. v. Pugh*,⁷⁶ the wife of a man who had a history of drug and alcohol abuse, had been plagued by delirium tremens and hallucinations (both visual and oral), and had been treated at mental institutions, burned down the marital home after going door-to-door threatening people with a knife.⁷⁷ His wife was allowed to recover the full proceeds.⁷⁸ Reasoned the court:

[T]he burning of the property by an insane insured does not release the insurer from liability in the absence of any policy provision to the contrary. This is because the insane party is deemed to be incapable of entertaining a fraudulent intent or having a conscious design to destroy the property.⁷⁹

Where the arsonist spouse kills himself after setting fire to the marital home or perishes in the conflagration, the innocent spouse has been allowed to recover in two cases: *American Economy Insurance Co. v. Liggett*⁸⁰ and *Hildebrand v. Holyoke Mutual Fire Insurance Co.*⁸¹ In the former, Duwaine Liggett, according to his insurer, American Economy, intentionally had started the fire, which, in addition to destroying the marital home, killed Mr. Liggett.⁸² The court noted that Mrs. Liggett was the

⁷⁵ See, e.g., *Home Ins. Co. v. Pugh*, 286 So. 2d 49, 51 (Ala. Civ. App. 1973); *Aetna Cas. & Sur. Co. v. Dichtl*, 398 N.E.2d 582, 586-87 (Ill. App. Ct. 1979); *Baker v. Commercial Union Ins. Co.*, 416 N.E.2d 187, 189 (Mass. 1981).

⁷⁶ 286 So. 2d 49 (Ala. Civ. App. 1973).

⁷⁷ *Id.* at 50-51.

⁷⁸ *Id.*

⁷⁹ *Id.* at 51.

⁸⁰ 426 N.E.2d 136 (Ind. Ct. App. 1981).

⁸¹ 386 A.2d 329 (Me. 1978).

⁸² *Liggett*, 426 N.E.2d at 138.

sole owner of the real estate and its improvements as the surviving entireties tenant, and she also owned all of the personal property in the home as her husband's sole heir.⁸³ This, combined with the fact that Mr. Liggett could not profit from his wrongdoing (having gone to his Maker), compelled the court to require American Economy to pay the entire proceeds to Mrs. Liggett.⁸⁴ In *Hildebrand*, Mr. Hildebrand, after conveying his interest in the marital home (owned by the Hildebrands as joint tenants) to his wife, intentionally destroyed the home.⁸⁵ Allowing Mrs. Hildebrand full recovery did not violate public policy because ““(m)ere [sic] family relationship of the arsonist which does not bestow a property right or other direct financial benefit in the proceeds of insurance does not bar recovery.”⁸⁶

C. Missouri Case Law

The issue before the court in *DePalma*⁸⁷—whether to allow an innocent spouse to recover under a property insurance policy when the other spouse intentionally destroyed the insured property—was one of first impression in Missouri.⁸⁸ Only in dicta had Missouri courts dealt with the issue.⁸⁹ In *Wilson v. Concordia Farmers Mutual Insurance Co.*,⁹⁰ the Wilsons, husband and wife, had conspired to burn down their home and claim the insurance proceeds.⁹¹ The Missouri Court of

⁸³ *Id.* at 145.

⁸⁴ *Id.* at 144-45.

⁸⁵ *Hildebrand*, 386 A.2d at 330-31.

⁸⁶ *Id.* at 332 (quoting *Erlin-Lawler Enters. v. Fire Ins. Exch.*, 73 Cal. Rptr. 182, 186 (Ct. App. 1968)).

⁸⁷ 923 S.W.2d 385 (Mo. Ct. App. 1996).

⁸⁸ *Id.* at 387.

⁸⁹ *Id.*

⁹⁰ 479 S.W.2d 159 (Mo. Ct. App. 1972).

⁹¹ *Id.* at 161.

Appeals for the Western District of Missouri stated that there was no need to “explore the application here of the generally accepted doctrine that in the case of a joint policy covering joint property, not even an innocent co-owner may recover if the other co-owner is guilty of wrongful conduct.”⁹² In *Childers v. State Farm Fire & Casualty Co.*,⁹³ the Missouri Court of Appeals for the Eastern District of Missouri never had to decide the issue, denying recovery on a separate ground, fraud by both spouses.⁹⁴ Recognizing that the United States Court of Appeals for the Eighth Circuit had opined that Missouri would allow the innocent spouse to recover,⁹⁵ the court stated that Missouri probably would not allow recovery but did not elaborate why.⁹⁶

IV. THE INSTANT DECISION

In *DePalma II*,⁹⁷ the Missouri Court of Appeals for the Western District of Missouri held that an innocent coinsured whose spouse intentionally burned down the home they owned as tenants by the entireties may recover, in the absence of policy language to the contrary, one-half of the proceeds of the insurance, up to the policy limits.⁹⁸ Bates County Mutual made three points on

⁹² *Id.*

⁹³ 799 S.W.2d 138 (Mo. Ct. App. 1990).

⁹⁴ *Id.* at 141.

⁹⁵ *Haynes v. Hanover Ins. Cos.*, 783 F.2d 136, 138 (8th Cir. 1986) (“[A] rule which would impute the wrongful acts of one insured to a co-insured spouse merely because of the marital relationship is outdated and unduly harsh.”).

⁹⁶ *Childers*, 799 S.W.2d at 141.

⁹⁷ 24 S.W.3d 766 (Mo. Ct. App. 2000).

⁹⁸ *Id.* at 770 n.1 (citing *Atlas Assurance Co. of Am. v. Mystic*, 822 P.2d 897, 901 (Alaska 1991)).

appeal, and the court agreed with one.⁹⁹ The court first upheld the trial court's denial of Bates County Mutual's motions for directed verdict, judgment notwithstanding the verdict, and a new trial.¹⁰⁰ Bates County Mutual argued that because the insurance policy's named insured was a single entity (the marital community of Anthony and Janet DePalma), DePalma was barred from recovering because of the intentional act of Janet DePalma.¹⁰¹ The court held that, under the law of the case, Bates County Mutual could not litigate this issue because the issue whether DePalma could recover already had been decided in *DePalma I*.¹⁰²

Next, the court turned to Bates County Mutual's argument that the trial court erred in ordering a directed verdict in favor of DePalma and in overruling Bates County Mutual's combined motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial because there was evidence from which a fact finder could have concluded that DePalma had concealed or misrepresented a material fact.¹⁰³ This evidence, according to Bates County Mutual, included a signed, sworn proof-of-loss statement DePalma submitted to Bates County Mutual, which stated that:

⁹⁹ *Id.* at 768-70.

¹⁰⁰ *Id.* at 768.

¹⁰¹ *Id.*

¹⁰² *Id.* The court noted that “[a] review of briefs in *DePalma I* indicates that in fact the same theory was raised and rejected. The only difference is that Bates County Mutual has since discovered another decision upon which to base the same argument.” *Id.*

¹⁰³ *Id.*

the said loss did not originate by any act, design, or procurement on the party of your insured [*i.e.*, Janet DePalma], or this affiant [*i.e.*, DePalma]; nothing has been done by or with the privity or consent of your insured [Janet DePalma] or this affiant [DePalma], to violate the conditions of the policy, or render it void.¹⁰⁴

DePalma also had left blank a space on the form asking for the cause and origin of the fire.¹⁰⁵ Bates County Mutual claimed that DePalma made these representations and concealments when he knew that Janet DePalma had set fire to their home.¹⁰⁶ The insurance policy had a term voiding the policy if *any* insured “intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.”¹⁰⁷ Because Bates County Mutual never accepted a proof-of-loss form from DePalma, the court held that the misrepresentation argument failed as there was nothing for Bates County Mutual to rely on to its detriment.¹⁰⁸

Finally, the court addressed Bates County Mutual’s contention that assuming, *arguendo*, that DePalma could recover, the insurance policy forbade him from recovering more than the extent of his interest in the property.¹⁰⁹ The policy language provided that “this Company does

¹⁰⁴ *Id.* at 768-69.

¹⁰⁵ *Id.* at 769.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 770 (“Because DePalma’s proof-of-loss statements were rejected by Bates County Mutual, they never became part of the claim. Therefore, we find that DePalma’s [misrepresentation or concealment] cannot be the basis for Bates County Mutual’s [misrepresentation defense].” (citing *Omaha Paper Stock Co. v. Cal. Union Ins. Co.*, 262 N.W.2d 174, 179 (1978))).

¹⁰⁹ *Id.*

insure *the insured* . . . to the extent of the actual cash value . . . of the property at the time of loss or damage . . . nor in any event for more than the interest of *the insured*.”¹¹⁰ The court agreed, referencing in a footnote that the “vast majority” of courts limit recovery to “one-half of the insurance proceeds, up to the policy limits.”¹¹¹ The court reversed the trial court’s award of damages and remanded the case to the trial court so that a damage award of \$15,000 could be entered in DePalma’s favor.¹¹²

V. Comment

DePalma II filled a gap in Missouri’s insurance law. Nonetheless, the court’s decision to limit recovery to only one-half of the dwelling coverage—the majority recovery rule¹¹³—was flawed in that: (1) the very term it claimed mandated such a limited recovery contained a patent ambiguity that traditional contract analysis should interpret to require full recovery; and (2) policy considerations favor allowing full recovery by an innocent insured, unless the insurance company can prove, by clear and convincing evidence, that the insured either knew of the intentional destruction of the insured premises or assisted in the destruction of the premises.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.* at 770 n.1 (“The vast majority of courts which have reached this issue, and which have allowed recovery at all, have held that the innocent coinsured may only recover one-half of the insurance proceeds, up to the policy limits.” (citing *Atlas Assurance Co. of Am. v. Mystic*, 822 P.2d 897 (Alaska 1991))).

¹¹² *Id.* at 770.

¹¹³ *See supra* notes 68-86 and accompanying text.

The primary flaw is the court's blinkered reading of the clause in DePalma's insurance policy that limited recovery to no more than "the interest of *the insured*."¹¹⁴ The court treated "the insured" as if it meant "an insured seeking recovery under the policy."¹¹⁵ Though arguably a fair interpretation, the court's definition belies its endorsement of *contra proferentem*.¹¹⁶ Almost all courts have interpreted "the insured" as meaning either "the named insureds collectively" or "the insured seeking recovery."¹¹⁷ Given this ambiguity, the court should

¹¹⁴ *DePalma II*, 24 S.W.3d at 770 (emphasis added).

¹¹⁵ If the court construed "the insured" as "the named insureds," then DePalma would have recovered the entire proceeds, because, at the time of loss, Anthony and Janet DePalma, as tenants by the entirety, held the entire interest in their house.

¹¹⁶ *DePalma I*, 923 S.W.2d 385, 388 (Mo. Ct. App. 1996) (citing *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301 (Mo. 1993) (en banc)). *Peters* endorsed *contra proferentem* when a contract term is ambiguous: "If the language [of an insurance policy] is ambiguous, it will be construed against the insurer." *Peters*, 853 S.W.2d at 302. The Missouri Supreme Court has given two reasons why it has embraced *contra proferentem* (at least in cases of ambiguous language):

First, insurance is designed to furnish protection to the insured, not defeat [it]. Ambiguous provisions of a policy designed to cut down, restrict, or limit insurance coverage already granted, or introducing exceptions or exemptions must be strictly construed against the insurer. Second, as the drafter of the insurance policy, the insurance company is in a better position to remove ambiguity from the contract. As noted by Judge Learned Hand, "[t]he canon *contra proferentem* is more rigorously applied in insurance than in other contracts, in recognition of the difference between parties in their acquaintance with the subject matter. . . . Insurers who seek to impose upon words of common speech or esoteric significance intelligible only to their craft, must bear the burden of the resulting confusion. *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210-11 (Mo. 1992).

¹¹⁷ Ronald A. Hobgood & F. Anthony Lamb, *Recovery by an Innocent Co-insured*, FOR THE DEFENSE: THE MAGAZINE FOR

have interpreted it to mean “the named insureds.” Had it done so, DePalma would have recovered to the extent of the interest in the property he and his wife collectively held: the entire proceeds.

The term “the insured” may have been selected by Bates County Mutual, and other insurance companies because of the common law fiction that husband and wife were one:¹¹⁸ that is, the phrase may be an archaic remnant of the common law. By allowing DePalma to recover only one-half of the value of the home, the court treated Mrs. DePalma’s arson as effecting a severance (though it did not use these words). But, there can be no severance of an entireties estate by the unilateral act of either spouse.¹¹⁹ “Neither has a separate estate or

DEFENSE, INSURANCE, AND CORPORATE COUNSEL, July 1993, at 3 (“The unanimous view appears to be that such language is ambiguous because it is susceptible to more than one reasonable interpretation: ‘the insured’ could refer only to the insured seeking recovery, or it could refer to all insureds under the policy.”).

¹¹⁸ See GEORGE W. THOMPSON, 4 THOMPSON ON REAL PROPERTY § 1803, at 330 (perm. ed. 1940). According to Thompson: Estates by entireties are creatures of the common law created by legal fiction and based wholly on the common law doctrine that the husband and wife are one, and, therefore, there is but one estate and, in contemplation of law, but one person owning the whole. It is a peculiar and anomalous [sic] estate, *sui generis* in character. Estates by the entirety have no moieties. Each owner holds the entirety. Each receives *per tout et non per my* [i.e., by the whole and not by the half].

Id.

¹¹⁹ See *Coffey v. Coffey*, 485 S.W.2d 167, 170 (Mo. Ct. App. 1972) (“[N]either the husband nor the wife owning [entireties property] can dispose of the whole or any part thereof without the consent, agreement or acquiescence of the other.”). The classic expression of this principle of law can be found in *In re Holmes’ Estate*, 200 A.2d 745, 748 (Pa. 1964), which states:

It is fundamental that once the estate by the entireties existed, neither tenant could partition (except after

interest in the land, but each has the whole estate.”¹²⁰ Consequently, reading “the insured” as “any insured” would require DePalma, being seized of the entire estate, to receive the full compensation under the policy with Bates County Mutual.

Another problem with the court’s interpretation of the phrase “the insured” is that it ignores the context that indicates that the phrase was not intended to operate as a limitation on *individual* recovery, but rather on recovery by the marital unit, “the insured,” that normally would receive the proceeds. Confirmation can be found in the antecedent language, which provides that “this Company does insure the insured . . . to the extent of the actual cash value of the property.”¹²¹ It seems that the phrase is designed to shield Bates County Mutual from having to award a windfall to insureds who, say, insure a leasehold as if it were a fee simple absolute (creating moral hazard).¹²² In other words, the policy’s insurable interest clause apparently does not apply to the case where one spouse intentionally destroys the insured

divorce), nor terminate or sever by his or her own conveyance as a joint tenant can do, nor by his or her own act affect the other’s right to survivorship.

But see Fuston v. Nat’l Mut. Ins. Co., 440 N.E.2d 751, 753-54 (Ind. Ct. App. 1982) (holding that a tenancy by the entireties can be terminated by the felonious act of one spouse and converted into a tenancy in common).

¹²⁰ Peters v. Dona, 354 P.2d 817, 819-20 (Wyo. 1936).

¹²¹ *DePalma II*, 24 S.W.3d 766, 770 (Mo. Ct. App. 2000).

¹²² Furthermore, the court’s conjunction of “this Company does insure the insured to the extent of the actual cash value . . . of the property at the time of loss or damage” (an affirmative statement) with “nor in any event for more than the interest of the insured” (a negative statement) suggests that the latter was not meant to modify the former. Consider this example: “Learned Hand may eat all the donuts he wants to, nor shall he go into my closet and rifle through my books.” A normal sentence would have “but,” not “nor,” as the transition.

property without the knowledge or the complicity of the other spouse. There is a gap in the contract.

The only remaining leg for the court's position is its comment, in a footnote, that "[t]he vast majority of courts which have reached this issue, and which have allowed recovery at all, have held that the innocent insured may only recover one-half of the insurance proceeds, up to the policy limits."¹²³ The footnote cited *Atlas Assurance Co. of America v. Mistic*,¹²⁴ which in turn cited *Lewis* for this proposition.¹²⁵ *Lewis* concedes that "[most cases allowing recovery,] while adequately explaining why an innocent insured should not be precluded from any recovery, have been deficient in explaining why the recovery should be limited to one-half of the property damage (or the amount of the policy, whichever is less)."¹²⁶ In justifying limited recovery, *Lewis* quoted the following passage from *St. Paul Fire & Insurance Co. v. Molloy*:¹²⁷

Since '[w]e have regarded the rights of husband and wife [to be] separate under the contract, . . . both logic and justice require that the amount recoverable be likewise allocated,' so that the innocent spouse be compensated for one-half the damages within the limits of the policy. Permitting recovery of more would necessitate reliance on the 'oneness' legal fiction of marital property which we rejected in determining that the parties here enjoy and assume several, not joint, contractual rights and obligations.

¹²³ *DePalma II*, 24 S.W.3d at 766.

¹²⁴ 822 P.2d 897, 901 (Alaska 1991).

¹²⁵ *DePalma II*, 24 S.W.3d at 770 n.1.

¹²⁶ *Lewis v. Homeowner's Ins. Co.*, 432 N.W.2d 334, 336 (Mich. Ct. App. 1988).

¹²⁷ 433 A.2d 1135 (Md. 1981).

Moreover, an award greater than one-half would allow an innocent spouse to recover in excess of that to which she would be entitled upon severance of the tenancy by the entirety, whether by divorce or other action of the parties.¹²⁸

The first claim—that allowing full recovery would resuscitate the unity fiction rejected in allowing coverage, embracing symmetry as a virtue—is problematic because, as the *Liggett* court noted, the *very reason* for the existence of tenancy by the entirety is to operate asymmetrically as a shield for innocent spouses, protecting them from the misdeeds of the other spouses.¹²⁹ Further, the rationale was inapplicable to the facts before the court in *DePalma II* because, as previously argued, the policy language requires full recovery. The second claim—that allowing any recovery for more than one-half would hand the innocent spouse a windfall—is, likewise, inapposite because, at the time the court was hearing Bates County Mutual’s appeal, a divorce court already had ruled that Janet DePalma would have no right or interest in either the marital home or DePalma’s claim against Bates County Mutual.¹³⁰ Even assuming the innocent insured would

¹²⁸ *Lewis*, 432 N.W.2d at 336-37 (quoting *St. Paul Fire & Marine Ins. Co.*, 433 A.2d at 1142 (citations omitted)).

¹²⁹ *American Economy Insurance Co. v. Liggett*, 426 N.E.2d 136, 140 (Ind. Ct. App. 1981), states:

The legal fiction of the entireties estate in real estate is designed for the protection of the spouses and the marriage. It was initially designed to prevent the individual creditors of either spouse from taking the marital home. . . . [It is] a perversion of this legal fiction, designed to protect the spouses’ rights and marital property, to use it to destroy the property rights of an innocent spouse.

¹³⁰ Appellant’s Brief at 2, *DePalma II*, 24 S.W.3d 766 (Mo. Ct. App. 2000) (No. WD 57329).

get a windfall, there are strong policy reasons for allowing it.¹³¹

A possible justification for the court's decision is that spouses are equals and, therefore, are entitled to an equal share of the property. Such a default rule seems reasonable; however, when these equals divorce in Missouri, the property is not presumptively divided fifty-fifty.¹³² The conduct of the parties during the marriage, which would include burning down the marital home, and the contribution of each spouse to the acquisition of marital property are two factors courts are to consider in deciding how to divide the marital property.¹³³ Because the DePalma's marriage already had been dissolved, because Ms. DePalma was not entitled to the insurance proceeds, and because, in general, no divorce court need award any property to the arsonist spouse—and is unlikely to do so—this justification is insufficient to explain the court's recovery rule.

What underlies the majority recovery rule is an overriding desire to prevent collusion between spouses engaging in insurance fraud.¹³⁴ This rule, however, creates some perverse incentives of its own in violation of public policy. First, it mitigates, but does not eliminate, the "punishment motive" of would-be arsonist spouses.

¹³¹ See *infra* notes 134-46 and accompanying text.

¹³² See MO. REV. STAT. § 452.330.1 (2000).

¹³³ MO. REV. STAT. § 452.330.1(2)(4) (2000).

¹³⁴ Cerven, *supra* note 2, at 869 (quoting Butler & Freemon, *supra* note 2, at 210). The concern is as follows:

The new rule [allowing recovery] is essentially an invitation to collusion and creates "the virtually insurmountable obstacle of proving both the arson of one spouse, and the conspiracy between spouses in order to defeat recovery in the first instance." Thus, in reality, the decision to grant a right of recovery generates some unfavorable side effects.

Id. at 869.

Often, arson by a spouse is an act of domestic violence, retaliation for the innocent spouse trying to leave the relationship, a tool of control.¹³⁵ An example is *Fuselier v. United States Fidelity & Guaranty Co.*¹³⁶ In that case, the police responded to a domestic dispute between the Fuseliers that had turned violent.¹³⁷ While Mrs. Fuselier was being taken to the hospital for treatment by the police, Mr. Fuselier set fire to their house.¹³⁸ As in *DePalma II*, in which Janet DePalma burned down the marital home after being told by DePalma that he was leaving her and keeping the house, marital squabbles often precipitate arson.¹³⁹ Where there is tangible

¹³⁵ Lindahl, *supra* note 2, at 454-57. Lindahl has stated: When a spouse burns down the marital home, it is often an act of domestic violence or part of an ongoing pattern of domestic violence, where the arson is simply the abuser's current weapon of choice. Domestic violence largely is motivated by the abusive spouse's desire to control and dominate the other spouse. Typically, the domestic violence increases when the abused spouse attempts to assert control over his or her own life. When the abused spouse attempts to leave the relationship, the abusive spouse retaliates by burning the marital home in an effort to deprive the innocent spouse of a home and, perhaps, to force the innocent spouse to return to the abuser.

Lindahl, *supra* note 2, at 455-56; *see also* Victoria L. Lutz & Cara M. Bonomolo, *My Husband Just Trashed Our Home: What Do You Mean That's Not a Crime?*, 48 S.C. L. REV. 641, 642 (1997) (“[B]atterers often damage property to terrorize, threaten, and exert control over a victim of domestic violence.” (citation omitted)).

¹³⁶ 301 So. 2d 681 (La. Ct. App. 1974) (denying recovery to either spouse).

¹³⁷ *Id.* at 682.

¹³⁸ *Id.*

¹³⁹ *See, e.g.*, *Morgan v. Cincinnati Ins. Co.*, 282 N.W.2d 829, 830 (Mich. Ct. App. 1979) (Husband and wife had initiated divorce proceedings and were living separately when the husband torched the home.); *Delph v. Potomac Ins. Co.*, 620 P.2d 1282, 1283 (N.M. 1980) (Husband and wife lived apart; after the wife filed for divorce, the husband set fire to their house.); *Short v. Okla. Farmers Union*

evidence that a domestic dispute immediately preceded spousal arson, especially where one spouse broaches the possibility of divorce, any worry about collusion is probably overblown.¹⁴⁰ Sometimes, allowing a full recovery would create a windfall for the innocent spouse; however, this overcompensation would have the positive effect of discouraging, if only slightly, an irate spouse from burning down the family home because doing so would *benefit*, not harm, the innocent spouse. To be sure, this incentive effect may be weak, but full recovery also would serve a core function of insurance—advancing indemnification, broadly conceived to include the peace of mind that insurance companies capitalize on in their advertisements. Full recovery would prevent an innocent spouse like DePalma—who had made all the mortgage payments and, perhaps, the insurance premiums, as well—from falling into a financial hole.

Ins. Co., 619 P.2d 588, 589 (Okla. 1980) (On the day the wife served summons on her husband, he burned down the insured home.); Jones v. Fid. & Guar. Ins. Co., 250 S.W.2d 281, 281 (Tex. Civ. App. 1952) (After dissolution of marriage, but before property disposition, the husband burned down the home.).

¹⁴⁰ See Lindahl, *supra* note 2, at 459. Lindahl has noted: The innocent co-insured spouse case . . . is uniquely different from other situations involving innocent co-insureds, because in the case of the innocent co-insured spouse, collusion or complicity is unlikely. For instance, co-insured business partners may be more inclined than spouses to commit insurance fraud, especially in times of failing fortunes. This same reasoning does not apply in innocent spouse cases where the husband and wife are estranged and one spouse burns the house to spite or hurt the innocent spouse. The act by the arsonist spouse of burning the marital home is not intended to benefit the innocent spouse, but rather to deprive the innocent spouse of a home and financial resources. Under these circumstances, complicity or collusion between spouses not only is unlikely, it is patently illogical.

Given the danger of arson to both property and life,¹⁴¹ it is ironic that the court embraced a rule that *encourages* innocent spouses, often the only ones privy to the evidence that the fire was started by the other spouse, to become not so innocent by concealing evidence that the other spouse committed the crime of arson. Had DePalma first consulted an attorney about his predicament and been told that he could recover only one-half if his wife intentionally burned the home but the entire amount if a third party did it, he may have decided it would be better to keep what he knew under his hat rather than tell the investigators about the argument he had with his wife, how he had told her he wanted the house for himself, and that he suspected his wife had set fire to the house. The majority rule enlists the innocent spouse—at least some of them—in a campaign to hinder the arson investigation. The civil law should not frustrate the criminal law.¹⁴²

¹⁴¹ The Oklahoma Supreme Court, in *Short v. Oklahoma Farmers Union Insurance Co.*, 619 P.2d 588, 590 (Okla. 1980), opined that:

[a]rson is a crime whose threat to the public is general. The burning of a building not only threatens the financial well-being of its owner, but endangers the public at large regardless of the structure's current profit position in the marketplace. Arson has been said to be difficult to detect because the intended result is the destruction of the premises that is evidence of the crime itself. In today's increasingly urban environment, arson is a continuing threat to the adjoining landowners, the public at large, and the municipality which must combat such conflagrations.

¹⁴² Insofar as lower-class insureds are less likely than upper- and middle-class insureds to know the minutiae of insurance, contract, and property law (or to know someone who does), the majority recovery rule disproportionately will benefit the affluent, in a way that punishes the ignorant for instinctively informing insurance companies and the police about the cause of the property destruction.

While the majority rule on recovery takes into account the incentive effects recovery has on insureds, it ignores the beneficial effect of a penalty default rule¹⁴³ (allowing full recovery) would have by compelling insurance companies to clarify their policy language. A simple change from the phrase “the insured” to “an insured” or “any insured” would have disallowed any recovery by DePalma.¹⁴⁴ Given the context of the phrase limiting recovery to the interest of “the insured,” it is arguable that the contract lacks a term dealing with recovery when there is a case involving an innocent and a guilty spouse. If so, imposing a penalty default would be especially appropriate where the insurance company—here, Bates County Mutual—is relatively informed, as a repeat player, about spousal arson as compared with the insured—here, DePalma.¹⁴⁵ A full

¹⁴³ See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (“Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.”).

¹⁴⁴ See *Raub v. W. Am. Ins.*, No. 98-T-0015, 1999 WL 1483437, at *1 (Ohio Ct. App. Mar. 5, 1999) (holding that an exclusionary clause barring recovery by “an insured” if the property were destroyed by “an insured” disallowed recovery by an innocent spouse); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 687 (Utah 1999). This linguistic change is no longer a real option for insurance companies.

¹⁴⁵ See Ayres & Gertner, *supra* note 143, at 98 (“[W]hen the rationale is to inform the relatively uninformed contracting party, the penalty default should be against the relatively informed party. This is especially true when the uninformed party is also uninformed about the default rule itself. If the uninformed party does not know that there is penalty default, she will have no opportunistic incentives.”). Arguing for a penalty default, in part, because of an insured’s ignorance about the term seems to contradict the claim that savvy, yet unethical, innocent insureds, under the majority recovery rule, will conceal evidence that their spouses

recovery rule would prod insurance companies to replace unclear language with clear language, substituting, for instance, “an insured” for “the insured.” Alternatively, insurance companies might adopt the crystal-clear language recommended in *Liggett*: “IF YOU OR ANY PERSON INSURED BY THIS POLICY DELIBERATELY CAUSES A LOSS TO PROPERTY INSURED THEN THIS POLICY IS VOID AND WE WILL NOT REIMBURSE YOU OR ANYONE ELSE FOR THAT LOSS.”¹⁴⁶ Without a full recovery rule, the call to change the language is muted.

committed arson. The contradiction is more apparent than real. For the penalty default rule to work, *most*, not all insureds, must be ignorant of the default rule, which probably would be true. The criticism of the majority rule is that it creates an incentive that works on *some*, but not necessarily all (otherwise *DePalma II* never would have happened), insureds to stymie arson investigations by concealing (maybe even actively suppressing) evidence that their spouses committed the crime.

¹⁴⁶ See *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 141 (Ind. Ct. App. 1981). The recommended policy language in *Liggett* is probably no longer a live option in Missouri; the year *DePalma II* was decided, the Missouri General Assembly passed legislation forbidding any insurance company from denying an innocent coinsured recovery if the innocent coinsured files a police report and agrees to cooperate in any criminal prosecution of the other insured. See MO. REV. STAT. § 375.1312.5 (2000). The language might be effective in denying recovery if the statutory conditions for recovery are not satisfied or as an *in terrorem* clause. Nothing in the statute, however, addresses the appropriate remedy for the innocent coinsured; it merely refers to the “innocent coinsured’s ownership interest in the property,” without clarifying the nature of this interest or whether it, as this Note argues, should be interpreted broadly where the policy language is silent on the matter. See MO. REV. STAT. § 375.1312.5 (2000). The statutory definition of “innocent coinsured” as “an insured who did not cooperate in or contribute to the creation of a property loss” also leaves wiggle room for insurance companies to argue that the domestic abuse victim’s acts (including, perhaps, threatening to sue for divorce and to take the family home) puts her outside the protection of the statute. See

A full recovery rule is not free of problems. It would increase the risk of arson because: (1) faking ignorance about the cause of loss is not difficult; and (2) increasing the amount of recovery may make collusion more attractive.¹⁴⁷ However, Missouri Revised Statutes Section 375.1312(5) requires that an allegedly innocent spouse file a police report and cooperate in the criminal prosecution of the arsonist spouse in order to recover anything, thus reducing the risk.¹⁴⁸ Because of these statutory protections and because of the policy concerns that seem to favor full recovery, the better approach might be to allow full recovery even if the policy language clearly limits each spouse's recovery to only one-half of the policy limits.

In sum, the policy language in DePalma's policy, the court's abbreviated analysis to the contrary notwithstanding, called for full recovery for DePalma. The proffered reasons for limiting recovery were inapplicable or militated in favor of full recovery. Moreover, the policy concern motivating the court—the fear of collusion—was overblown in comparison to other public interests, for example, the need to discourage arson, the protection of victims of spousal abuse from being victimized twice, and the interest in insurance companies clarifying their policy language.

MO. REV. STAT. § 375.1312.1(3) (2000) (emphasis added).

¹⁴⁷ One could foresee a husband and wife conspiring to have the husband burn down the house and flee, while the wife claims the entire proceeds as an innocent insured. The wife collects the proceeds; they meet somewhere in Mexico and start life anew. With the majority recovery rule, this would be a very unlikely scenario.

¹⁴⁸ MO. REV. STAT. § 375.1312.5 (2000).

VI. CONCLUSION

DePalma v. Bates County Mutual Insurance Co. filled a gap in Missouri insurance law, one that was subsequently ratified by the Missouri General Assembly.¹⁴⁹ But its limitation of recovery by the innocent coinsured to one-half of the value of the insured property was flawed. It ignored an ambiguity in the insurable interest clause, and it disregarded a significant public policy in favor of full recovery. The Missouri Supreme Court,¹⁵⁰ or the legislature, ought to consider allowing the innocent coinsured to recover the entire proceeds. If either of these bodies does so, there might be fewer burning houses.

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¹⁴⁹ MO. REV. STAT. § 375.1312.5 (2000).

¹⁵⁰ Only because the codification of the innocent coinsured doctrine is silent on exactly how the “ownership interest” of the innocent coinsured is to be determined where the property held by the insured is entireties property should the court take on this quasi-legislative power.