

INVESTIGATION AND TRIAL OF FRAUDULENT CLAIMS IN AN ARSON OR FRAUD CASE FROM THE INSURER'S PERSPECTIVE

**Proof Required and Presentation
of Evidence in the Trial of
an Arson/Fraud Case**

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I. INTRODUCTION

The litigation of claims involving arson or fraud presents a unique challenge to the trial attorney and claim representative handling the file. At the outset, arson/fraud cases demand exhaustive investigation and meticulous discovery. They often present highly technical issues as to the cause and origin of a fire. The attorney must understand the "physics of fire," and must be able to communicate with and effectively present evidence through expert witnesses. An arson/fraud case also presents challenging problems of proof, since the typical case will turn largely, if not entirely, upon circumstantial evidence.

These materials will provide an overview of the litigation of fraudulent claims, and will focus upon the proof required to sustain an arson defense and the presentation of evidence at a civil arson trial.

II. INVESTIGATION AND DISCOVERY

A. The Importance of a Prompt and Thorough Investigation.

A successful arson defense inevitably begins with a prompt and thorough investigation of the fire scene. The claims adjuster--and, preferably, the attorney and fire investigator/expert--should make a physical inspection of the premises as quickly as possible. Extreme care should be taken to preserve physical evidence and to secure the premises until the investigators have had a full opportunity to complete their investigation and analysis. Because incendiary origin is usually a hotly contested issue [bad pun intended] and is often difficult to prove, early involvement of a competent fire investigator or cause-and-origin expert is critical.

Witnesses should also be identified and interviewed at the earliest possible juncture. Statements should also be obtained from the appropriate witnesses.

B. The Examination Under Oath.

An important part of the pre-suit investigation process is the examination under oath. Under the Minnesota Standard Fire Insurance Policy, an insured is required to submit to examinations under oath and to produce documents reasonably requested by the insurer. Minn. Stat. §65A.01, subd. 3 (1983).

The examination under oath is not only an invaluable source of information, but is also a strategic claims handling device which, oftentimes, may cause a claimant to abandon a fraudulent claim without the necessity of extensive--and expensive--litigation.

The Minnesota Supreme Court has held that the satisfaction of the policy provision requiring an examination under oath is a condition precedent to recovery of benefits under the policy. McCullough v. The Travelers Companies, 424 N.W.2d 542 (Minn. 1988).

C. Coordination and Cooperation with Law Enforcement Officials: The Arson Reporting Immunity Law and the 1994 and 2002 Anti-Fraud Legislation.

Since 1979, the Arson Reporting Immunity Law, Minn. Stat. §§299F.052 to 299F.057, has required insurers and their agents to release to an appropriate law enforcement official or other "authorized person" all relevant information the insurer possesses regarding a suspicious fire loss. The Law grants immunity from civil or criminal liability for disclosures made in conformity with the Law. Minn. Stat. §299F.054, subd. 4 (1983).

In 1994, the legislature enacted Minn. Stat. §§60A.951 to 955, a statute similar to--but much broader in scope than--the Arson Reporting Immunity Law. Among other things, the 1994 Act requires disclosure of information relating to any suspected "insurance fraud," and grants immunity for all good faith disclosures under the Act.

The 2002 legislature passed additional Anti-Fraud Legislation. See 2002 Minnesota Session Laws Chapter 331. A portion of the new legislation, codified as Minn. Stat. § 45.0135 creates a division of insurance fraud prevention within the Department of Commerce. Other portions of the new legislation broaden the provisions of Minn. Stat. §§ 60A.951-956. The final portion of the new legislation, Minn. Stat. § 609.612, provides felony penalties for whoever employs, uses, or acts as a "runner", "capper", or "steerer" as those terms are defined in the statute. The new statute became effective August 1, 2002.

While a comprehensive discussion of the requirements and protections of these statutes is beyond the scope of these materials, counsel handling a claim involving arson or insurance fraud must be thoroughly familiar with both the Arson Reporting Immunity Law and the 1994 and 2002 Anti-Fraud Legislation, and must be prepared to cooperate with law enforcement personnel. Ultimately, the interaction with law enforcement officials is beneficial to the insurer not only because it assists in the criminal investigation or prosecution, but also because it is likely to be a valuable source of information.¹

III. PRETRIAL ISSUES

A. Expert Opinions.

Arson trials frequently boil down to a "battle of the experts." Consequently, counsel must take care to properly disclose: the identity of experts expected to be called at trial; the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion. Minn.R.Civ.P. 26.02(d)(1)(A).

A court is unlikely to allow a "trial by ambush" approach to an arson case. Failure to fully disclose an expert's opinions may prompt the trial court to prohibit the expert from testifying as to matters not properly disclosed. Thus, counsel who does not properly comply with the discovery rules is, literally, playing with fire, and runs the risk of having the court restrict the scope of the expert's trial testimony.

B. Innocent Co-Insureds/Mortgagees/Contract Vendors.

One issue that frequently arises during the pre-suit or pretrial stages of an arson case is the question of how to handle the claims of an innocent co-insured (such as an additional insured, loss payee, mortgagee or contract for deed vendor) for benefits under the policy. In general, a mortgagee

¹ The appendix to these materials contains a copy of the form used by the Minnesota Attorney General's office for reporting a suspected fraudulent insurance claim.

or other innocent insured will be allowed to recover a portion of the proceeds of the policy sufficient to satisfy its interest in the property. See Hogs Unlimited v. Farm Bureau Mut. Ins. Co., 401 N.W.2d 381 (Minn. 1987). In the past, the result could differ depending upon the status of the innocent insured and the specific policy language. See Reitzner v. State Farm Fire & Cas. Co., Inc., 510 N.W.2d 20 (Minn. Ct. App. 1993) (contract vendor denied recovery).

However, in response to the holding of the Reitzner case, the Minnesota Standard Fire Insurance Policy was amended during the 1994 legislative session to provide contract for deed vendors with the same protection previously provided only to mortgagees. Effective January 1, 1995, the Minnesota Standard Fire Insurance Policy provides as follows with respect to the rights of innocent mortgagees and contract for deed vendors:

Notwithstanding any other provisions of this policy, if this policy shall be made payable to a mortgagee or contract for deed vendor of the covered real estate, no act or default of any person other than such mortgagee or vendor or the mortgagee's or vendor's agent or those claiming under the mortgagee or vendor, whether the same occurs before or during the term of this policy, shall render this policy void as to such mortgagee or vendor nor affect such mortgagee's or vendor's right to recover in case of loss on such real estate; provided, that the mortgagee or vendor shall on demand pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee or vendor for any sum for loss under this policy for which no liability exists as to the mortgagor, vendee, or owner, and this company shall elect by itself, or with others, to pay the mortgagee or vendor the full amount secured by such mortgage or contract for deed, then the mortgagee or vendor shall assign and transfer to the company the mortgagee's or vendor's interest, upon such payment, in the said mortgage or contract for deed together with the note and debts thereby secured.

Minn. Stat. §65A.01, subd. 3 (1994).

This amendment to the Minnesota Standard Fire Insurance Policy, which extends to contract for deed vendors the protections previously extended solely to mortgagees under the Minnesota Standard Fire Insurance Policy, applies to policies or contracts of insurance issued or renewed on or after January 1, 1995.

Also since the decision in the Reitzner case, the Minnesota Supreme Court has limited the holding in the Reitzner case. In Watson v. United Services Automobile Association, 566 N.W.2d 683 (Minn. 1997), the Minnesota Supreme Court has held that the statutory standard fire policy, M.S. 65A.01, excludes coverage only for the particular insured who intentionally caused the loss or committed fraud and does not exclude coverage for an innocent co-insured. In the Watson case, the Supreme Court reformed USAA's policy to provide coverage for an innocent co-insured in conformity with the language required by the Minnesota statutory standard fire insurance policy.

The interest of an innocent mortgagee or contract for deed vendor is limited to the unpaid balance on a mortgage or the amount due on the contract for deed. American Family Mutual Insurance Company v. Staeheli, 520 N.W.2d 422 (Minn. Ct. App. 1994). See also Minnesota Federal Savings & Loan Assn. v. Iowa National Mutual Ins. Co., 372 N.W.2d 763 (Minn. Ct. App. 1985).

IV. LEGAL STANDARDS

A. General Standard -- What Must be Proved to Prevail on an Arson Defense?

To prevail in a civil action for insurance proceeds allegedly due,

an insurer who claims arson as a defense must demonstrate by a preponderance of the evidence that the insured either set the fire or arranged to have it set.

DeMarais v. North Star Mut. Ins. Co., 405 N.W.2d 507, 509 (Minn. Ct. App. 1987) (citing Quast v. Prudential Property and Cas. Co., 267 N.W.2d 493, 495 (Minn. 1978)).

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B. Elements of Proof.

To prove arson in Minnesota, an insurer must establish that: (1) the fire was of an **incendiary nature** (i.e., intentionally caused and not accidental); and (2) that the insured had **motive** to start the fire. DeMarais, 405 N.W.2d at 509; Quast, 267 N.W.2d at 495.

In some jurisdictions, the insurer may also be required to prove that the insured had opportunity to set the fire, or to present unexplained surrounding circumstantial evidence implicating the insured. See, e.g., St. Paul Fire & Marine Ins. Co. v. Salvatore Beauty College, 930 F.2d 1329 (8th Cir. 1991) (applying Iowa law), and Boone v. Royal Indemnity Co., 460 F.2d 26 (10th Cir. 1972) (applying Colorado law). Although these additional elements are not required in Minnesota, proof of opportunity or other evidence implicating the insured is certainly helpful.

V. PROOF OF ARSON AND PRESENTATION OF EVIDENCE AT TRIAL

A. Circumstantial Evidence.

Direct evidence of arson is exceedingly rare. You will probably never have a case in which a witness comes forward to testify that he or she saw the insured douse the sofa with kerosene and then light the match. Consequently, the trial of an arson case generally turns upon circumstantial evidence.

Minnesota courts have recognized this truth, holding that: "[d]irect proof of arson is seldom available, and the insurer may use circumstantial evidence to support the inference that the insured set the fire or arranged to have it set." DeMarais, 405 N.W.2d at 509. Evidence of the fire's incendiary nature, combined with evidence of motive, is sufficient to support a jury verdict that the insured caused the fire and to outweigh any conflicting inference, thereby denying a claim for payment under the insurance policy. Id.

Minnesota's jury instruction dealing with direct and circumstantial evidence states as follows:

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Direct and Circumstantial Evidence

A fact can be proved in one of two ways:

1. A fact is proved by direct evidence when that fact is proved directly without any inferences.
2. A fact is proved by circumstantial evidence when that fact can be inferred from other facts proved in the case.

For example, the fact that “a person walked in the snow” could be proved:

1. By an eyewitness who testified directly that he or she saw a person walking in the snow.
2. By circumstantial evidence of shoe-prints in the snow, from which it can be indirectly inferred that a person had walked in the snow.

Using direct and circumstantial evidence

You should consider both kinds of evidence. The law makes no distinction between the weight given to either direct or circumstantial evidence.

It is up to you to decide how much weight to give any kind of evidence.

CIVJIG 12.10

The challenge for the claim representative and trial lawyer is to connect the pieces of circumstantial evidence to form a single, cohesive strand which leads to the ultimate finding of arson. This process should begin during the initial investigation and continue through the closing argument at trial.

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B. Proof of Incendiary Origin.

(i) Use of a Cause-and-Origin Expert.

Unless the incendiary nature of the fire is uncontested (i.e., the insured admits it was a set fire, but claims someone else set it), the retention of an expert witness to provide opinion testimony regarding the cause and origin of the fire is essential to proving arson. An expert should be retained at the earliest possible juncture and should be provided full access to the fire scene and to all other relevant information.

When presenting cause and origin evidence through an expert at trial, the liberal use of exhibits and visual aids is usually the most effective way of presenting your expert's testimony to the jury. The use of photographs, videotapes, blowups, diagrams, models and key pieces of physical evidence from the fire scene will: (1) hold the jury's interest; (2) allow the jury to visualize the scene; and (3) assist the jury in understanding--and believing--your expert's opinions.

(ii) Areas of Testimony to Cover With Your Cause-and-Origin Expert.

Your cause and origin expert may very well be the key witness of your entire case. As such, it is important to present to the jury his/her background and qualifications in addition to testimony regarding the investigation into the origin and cause of the fire.

After establishing his/her background and qualifications the expert will need to educate the jury on just what is involved in conducting an investigation into the origin and cause of the fire. The expert will need to convince the jury that he or she does in fact possess the skill and training to enable them to dig through a burned-out building and determine not only where the fire started, but also what actually caused the fire to start.

The fire investigator will need to present an opinion as to the area of origin of the fire and the cause of the fire being incendiary.

Other areas that are oftentimes covered with the fire investigator

include testimony regarding the approximate time that the fire started, the direction of the fire as it progressed through the structure, and the significance of any observations made at the fire scene by the fire investigator.

This expert testimony oftentimes includes testimony regarding the "positive" signs of arson together with the elimination of accidental causes for the fire.

The expert is sometimes asked to relate motive characteristics appropriate to your particular case with the fire traits appropriate to your particular case. The expert fire investigator may also be able to offer opinions as to whether or not any explanation of the insured and/or the insured's expert for the cause of the fire is in fact feasible.

(iii) Evidence Used to Prove Incendiary Origin.

(a) Evidence of an accelerant. Obviously, evidence confirming the existence of a flammable liquid or other accelerant at the fire scene strongly supports the notion that the fire was incendiary in nature. Of course, the accelerant found at the fire scene must be one that would not normally have been there to have the desired effect with the jury.

The existence of an accelerant can be confirmed through chemical testing and analysis. Most, if not all, fire investigators will agree that the absence of a positive test sample does not necessarily mean that an accelerant had not been used. Rather, they will acknowledge that the absence of a positive test sample merely indicates that the sample did not come back positive. An accelerant could have been burned up in the fire or dissipated prior to the time the sample was obtained and tested. Even in the absence of a positive chemical test, the existence of an accelerant can be established through expert testimony regarding burn patterns, evidence of "pooling" of a flammable liquid at the fire scene, and the like. It is imperative to use visual, documentary evidence to support this type of testimony.

(b) Multiple points of origin. Generally, an accidental fire will

have a single source or "point of origin." Hence, the identification of multiple points of origin creates a strong inference that the fire was not accidental, but rather was intentionally set. Multiple points of origin can be established through expert testimony (i.e., opinion evidence regarding burn patterns, charring, etc.), or through eyewitness testimony (i.e., witness sees fire burning in two discreet portions of the building).

- (c) **Testimony of eyewitnesses.** Eyewitness testimony may also be probative of incendiary origin. For example, testimony that the smoke was a particular color can support the notion that an accelerant was used. Likewise, the observations of an eyewitness regarding the location of flames in a particular area of the fire scene or the speed with which the fire spread can provide additional foundation for expert cause and origin testimony. Oftentimes, the testimony of the responding firefighters can be very helpful in this respect. Responding firefighters also can provide testimony regarding the observation of any odors consistent with an accelerated fire. Frequently, eyewitnesses, whether they be lay people or fire department personnel, can also provide pertinent observations regarding the conduct and demeanor of the insured at the fire scene.

- (d) **Eliminating accidental causes.** Through inspection, testing and analysis of the fire scene, an expert may be able to establish that a fire was incendiary in nature by eliminating possible accidental causes. For example, an expert may be able to rule out the possibility that the fire was caused by a defective appliance, faulty wiring, a malfunctioning heater/furnace, or the like. While this tends to be a more difficult method of proving incendiary origin, it can be very effective, particularly where the insured alleges a specific accidental cause which can be disproved. Evidence eliminating accidental causes can also be used to bolster opinions regarding the use of an accelerant and multiple points of origin.

C. **Proof of Motive.**

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(i) Evidence of Financial Problems.

Evidence that the insured was experiencing financial difficulties prior to or at the time of the loss is the most common--and a very effective--means of proving that the insured had motive to intentionally cause the fire. Care should be exercised during the investigative and discovery stages of the lawsuit to obtain a complete picture of the insured's financial situation by using authorizations to obtain copies of tax returns, IRS documents, bank statements, etc.

Facts which may be helpful in proving motive include the following:

- Insured is heavily in debt.
- Insured has lost his/her employment.
- Insured has recently gone through or is going through a divorce proceeding.
- Insured is behind on mortgage or Contract for Deed payments.
- Insured is behind on utility bills.
- Insured has received shut-off notices from utilities.
- Insured has run up a large amount of debt.
- Insured's monthly expenses exceed his/her monthly income.
- Insured has a gambling problem.
- There are judgments and/or tax liens against the insured or the insured property.
- The property is encumbered by multiple mortgages or liens.
- The building was up for sale at the time of the loss.
- A business showing losses or experiencing declining profits.
- Poor business location.
- Zoning problems and/or building code problems.
- Seasonal business problems.
- Foreclosure or bankruptcy eminent.
- Balloon payment on contract for deed coming due.
- Insured is unable to obtain financing for the property in question or for other real estate.

- The building was in need of substantial repairs, remodeling or improvements.
- Fixtures/equipment used in business are obsolete or in a state of disrepair.

(ii) Other Facts Indicating Motive.

In addition to proof of financial problems, there are other types of evidence that may create an inference of motive.

In the DeMarais case, for example, there was evidence that the insureds were dissatisfied with their home, and that their house had been characterized as a "lemon." The court held that this evidence (in conjunction with other evidence of financial difficulty, including overdue mortgage payments) was sufficient to prove motive. DeMarais, 405 N.W.2d at 511.

Similarly, the Court in Quast held that evidence of the insured's prior unsuccessful attempts to sell the house was, in and of itself, sufficient to establish motive. Quast, 267 N.W.2d at 495.

The fact that the insured had a prior loss at the same location within a relatively short time frame may also be used as evidence of motive. Multiple fires in succession could indicate that the insured was attempting to "finish off" a previously failed attempt at destroying the property and/or its contents.

Evidence that the property and/or the contents were insured significantly in excess of actual value may be used to establish that the insured had a motive to cause the loss.

(iii) Presenting Evidence of Motive.

As is the case with proving incendiary origin, proof of motive may require expert testimony. An accountant may be needed to review financial data and to express opinions about the insured's financial condition. This is particularly true where a business is involved. A real estate appraiser may also be required if property valuation is an issue.

When presenting evidence of motive at trial it is, again, important to use visual aids. Blowups of bank statements, business records or other key financial documents can have a sizeable impact upon a jury. Demonstrative evidence--such as charts which graphically portray declining revenues, rising expenses, or debts in excess of assets--can be a very effective way of proving financial motive.

D. Proof of Opportunity.

Although proof that the insured had the opportunity to set the fire is not required to prevail on an arson defense in Minnesota, see DeMarais, 405 N.W.2d at 510-11, evidence of opportunity is certainly helpful in proving arson. For example, eyewitness testimony that places the insured in or around the premises at or near the time the fire started is clearly probative of the notion that the insured set the fire. Evidence that the building was secured at the time of the fire or evidence that the insured was one of only a few persons who had access to the premises at the time of the fire is equally probative on the issue of opportunity.

E. Other Types of Evidence Indicating Arson or Fraud: Proof that the Incendiary Fire was Planned.

Evidence suggesting that the insured planned the fire, though not a required element of an arson defense, may also be extremely helpful in proving the insured intentionally set the fire.

For instance, there was evidence in the DeMarais case that the insured and all of his family members were conveniently away from home at the time of the fire, even though they normally would have been home at that hour. The court accepted this as competent evidence that the insured had planned the fire, and relied upon this evidence in upholding the jury's finding of

arson. DeMarais, 405 N.W.2d at 511.

The suspicious absence of a family pet at the time of the fire, or the removal of valuable personal property or items of sentimental value prior to the fire constitute additional facts which may be used to establish that the insured planned the fire.

The insured's behavior prior to the fire can also provide evidence that the fire was planned. If, for example, the insured increased the amount of coverage shortly before the loss, or even if the insured simply contacted the agent or insurer to verify the extent of coverage, an inference that the insured planned the fire can be argued. Likewise, evidence that a fire or burglar alarm system had been disconnected prior to the fire or that windows or doors which would allow passersby to see what was happening inside a building were covered at the time of the fire can be used to create strong inferences that a fire had been planned.

Suspicious behavior by the insured during the submission of the insurance claim is yet another source of evidence that may be used to implicate the insured. Unusual familiarity with the claims process or insurance terminology, pushy behavior or an eagerness to settle, and an inability to provide receipts or other documentation to establish ownership of personal property all may be indicators of a fraudulent claim.

F. Evidence of Criminal Arson Proceedings in the Civil Action.

(i) Insured Convicted of the Crime of Arson.

The general common law rule is that a judgment of conviction in a criminal case does not necessarily bar a subsequent civil action based upon the offense of which the party stands convicted. See The Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968). However, the Thompson Court carved out an important exception to that general rule:

an exception to this rule has developed in situations where the convicted defendant attempts by subsequent civil litigation to profit from his own crime, as where an arsonist seeks to recover insurance proceeds for damage caused by the fire which he was convicted of setting...

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Thompson, 281 Minn. at 551, 163 N.W.2d at 292 (emphasis added). Hence, a judgment of conviction in a criminal arson trial will be conclusive as to the result of a civil action for insurance proceeds.

(ii) Insured Acquitted or not Charged with the Crime of Arson.

On the other hand, the fact that the insured was not charged with the crime of arson or was acquitted after a criminal trial generally will not be admissible in the civil action. See Krueger v. State Farm Fire & Cas. Co., 510 N.W.2d 204, 209-211 (Minn. Ct. App. 1993).

In an action in federal court, "it is reversible error to permit an insured seeking the proceeds of a fire insurance policy to present evidence of non-prosecution or acquittal on criminal arson charges." Krueger, 510 N.W.2d at 210 (citations omitted). In Krueger, the Minnesota Court of Appeals followed the federal rule in upholding the trial court's ruling that evidence of the non-prosecution of the insured on related criminal arson charges was irrelevant and inadmissible in the parallel civil action. In so holding, the Krueger Court wrote:

Several reasons support the general rule of law excluding this evidence: (1) it goes to the principal issue before the jury and is highly prejudicial; (2) the burdens of proof in civil and criminal cases are different; and (3) a prosecutor's opinion regarding whether the insured set the fire is inadmissible evidence because it is based on knowledge outside the prosecutor's personal experience.

Krueger, 510 N.W.2d at 210 (citations omitted).

In situations where an insured has been acquitted or not charged with the crime of arson it is recommended that the insurer's attorney bring a motion in limine precluding the admission of any such testimony. The motion in limine should also ask for an order of the court requiring the attorneys to instruct all of their witnesses that they make no mention of the fact that the insured was either not charged with arson or that there was a criminal trial.

G. Other Trial Issues.

(i) Motive Determined as of the Date of the Loss.

Since evidence of the insured's financial condition is designed to prove motive, and motive must be determined to exist at the time of the fire, an insured's financial condition after the loss--regardless of whether it has worsened or improved--is generally irrelevant and will usually be inadmissible at trial. See Hirsch v. Century Ins., 617 N.Y.S.2d 512 (1994) and Sylvester, Inc. v. Aetna Casualty & Surety Co., 189 A.D.2d 730, 592 N.Y.S.2d 741 (1993). However, situations may develop during the course of trial which may serve to open the door to post-fire financial evidence which may have been seen as irrelevant at the beginning of trial.

(ii) Don't Forget Damages.

Too often, a civil arson or fraud case is viewed as an "all or nothing" proposition, with the focus solely upon whether or not the fraud was committed. In such instances, the insurer may be overlooking another important defense to the claim: the extent of the insured's damages.

While the evolution of valued policy law has, in some instances, eliminated the need to prove the value of a dwelling, contesting the value of contents, equipment, inventory, additional living expense, loss of income and the like remains a viable defense to a claim. Hence, even where the insurer fails to prove arson, it is nevertheless possible to defeat a portion of the claim by introducing evidence to challenge or disprove the claimed damages.

(iii) Misrepresentation.

The Minnesota Standard Fire Insurance Policy provides as follows with respect to misrepresentation:

This entire policy shall be void if, whether before a loss, the insured has willfully, or after a loss, the insured has willfully and with intent to defraud, concealed or misrepresented any material fact or circumstance concerning this insurance or the

subject thereof, or the interests of the insured therein.

Minn. Stat. §65A.01, subd. 3 (1994).

In the course of representing an insurer in the defense of a civil case based upon a claim of arson it is also important to develop and present, if available, evidence that the insured has willfully and with intent to defraud concealed or misrepresented material facts or circumstances relating to the claim. Such evidence could well develop into an additional defense upon which the insurer could prevail at trial. See Supornick v. National Retailers Mutual Ins. Co., 209 Minn. 500, 296 N.W. 904 (1941).

In order to void a policy for misrepresentation or fraud, only willful or intentional misstatements which are calculated to deceive the insurer will operate to void the policy. An "honest mistake" will not void the policy. Whether such a statement is a willful or intentional misstatement is a question of fact for the jury. See Henning Nelson Construction Co. v. Fireman's Fund, 383 N.W.2d 645 (Minn. 1986).

If an insured is found to have fraudulently concealed or misrepresented facts with respect to one portion of the insured's claim (i.e., contents or personal property) coverage for the remaining portion of the insured's claim (i.e., building) is also voided. See Collins v. USAA Property and Cas. Ins. Co., 580 N.W.2d 55 (Minn. Ct. App. 1998).

(iv) Jury Trial v. Court Trial.

Obviously, in the trial of an arson/fraud case both the insured and the insurer have the right to demand a trial by jury. While some may be of the opinion that the insurer may be better off trying such a first party case to the court rather than to the jury, experience suggests that the insurer may be better served by demanding a jury trial. Even though there are fewer fact finders to convince in a court trial as opposed to a jury trial (i.e., one judge as opposed to six jurors), my experience has been that it is usually easier to obtain a verdict in favor of the insurer from a jury than from the court. The pangs of conscious that any one individual, even a judge, might experience when forced to decide an issue involving substantial dollars between

an insured as opposed to a large insurer provides one likely explanation for this phenomenon. Human nature seems to dictate that most individuals would tend to err in favor of the "little guy" as opposed to the "deep pocket" who could more easily absorb the loss. By contrast, jurors faced with making the same determination will not find themselves in the difficult position of being the sole person responsible for making a decision to deny an insured money from a large insurer. Because the individual members of a jury share the responsibility for this decision, the "pangs of conscience" may not be as significant a factor.

(v) Insurer's Claim for Attorney's Fees.

In Gendreau v. Foremost Ins. Co., 423 N.W.2d 712 (Minn. Ct. App. 1988) the Minnesota Court of Appeals affirmed a trial court's holding which awarded the insurer attorney's fees as a result of the insured bringing suit on a fraudulent insurance claim.

In Gendreau, the insured brought a lawsuit against its fire insurer seeking \$16,000.00 for loss of the insured's trailer and \$14,000.00 for loss of the personal contents of the trailer. The insurer counterclaimed for attorney's fees contending that the insured made fraudulent representations as to the personal property which he lost in the fire. The trial court granted the insurer's motion for attorney's fees pursuant to M.S. § 549.21², after the jury found the insured intended to defraud his insurer.

The jury in Gendreau found that the insured suffered a personal property loss in the amount of \$4,000.00 (\$10,000.00 less than he had claimed). The jury also found that the insured had misrepresented facts with an intent to defraud the insurer as to the nature and extent of the loss. That being the case, the trial court denied the insured recovery and then held a hearing on the insurer's motion for attorney's fees. At that hearing, the trial court found that the insured knew the claim was false when he made it as substantiated by the jury verdict. The trial court determined that bringing such a claim was bad faith and a waste of valuable court resources and ordered attorney's fees in favor of the insurer.

² The predecessor of M.S. 549.211, the current statute providing for sanctions in civil actions.

In its analysis, the Minnesota Court of Appeals recognized that attorney's fees are generally not recoverable by the prevailing party absent a specific contractual agreement or a statute to the contrary. The Court of Appeals recognized that an award of attorney's fees under M.S. § 549.21 based on a party's bad faith must be bad faith with respect to the litigation before the Court, not in the underlying action which was the basis for the suit.

The insured in Gendreau argued that any bad faith in its fraudulent claim was part of the underlying action and did not constitute bad faith in the litigation itself.

In granting the insurer's request for attorney's fees the trial court stated in its memorandum:

The Plaintiff knew that his claim was false when he made it . . . To bring such a claim into court for litigation is not only bad faith . . . but a waste of valuable court resources.

Gendreau, 423 N.W.2d at 714.

In sustaining the trial court's award of attorney's fees the Court of Appeals stated as follows:

The fees were properly awarded because Gendreau brought a frivolous claim to Court, not because he made a fraudulent claim to the insurer.

Gendreau, 423 N.W.2d at 714.

Based upon the holding of the Gendreau case there is authority in Minnesota supporting an insurer's claim for attorney's fees if an insured elects to bring a fraudulent claim to Court.

VII. JURY INSTRUCTIONS AND SPECIAL VERDICT FORMS.

Investigation and Trial of Fraudulent Claims on Behalf of an Insurer

As in any trial, the jury instructions and special verdict form used in an arson/fraud trial are of critical importance.

Particular attention should be paid to the jury instructions regarding Direct and Circumstantial Evidence, CIVJIG 12.10; Evaluation of Testimony--Credibility of Witnesses, CIVJIG 12.15; Expert Testimony, CIVJIG 12.20; Impeachment, CIVJIG 12.25; Burden of Proof, CIVJIG 14.15; Damages--Burden of Proof, CIVJIG 90.15.

In addition to these standard jury instructions, counsel should also use case law to fashion specific instructions regarding the relationship between arson and circumstantial evidence; the burden of proof in a civil arson case being different from the burden of proof in a criminal arson case; the lack of an eyewitness; and motive considerations.

Sample jury instructions and a verdict form are included in the appendix.

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CIVJIG 12.10
DIRECT AND CIRCUMSTANTIAL EVIDENCE

Direct and circumstantial evidence

A fact can be proved in one of two ways:

1. A fact is proved by direct evidence when that fact is proved directly without any inferences.
2. A fact is proved by circumstantial evidence when that fact can be inferred from other facts proved in the case.

For example, the fact that "a person walked in the snow" could be proved:

1. By an eyewitness who testified directly that he or she saw a person walking in the snow.
2. By circumstantial evidence of shoe-prints in the snow, from which it can be indirectly inferred that a person had walked in the snow.

Using direct and circumstantial evidence

You should consider both kinds of evidence. The law makes no distinction between the weight given to either direct or circumstantial evidence.

It is up to you to decide how much weight to give any kind of evidence.

CIVJIG 12.15
EVALUATION OF TESTIMONY— CREDIBILITY OF WITNESSES

Guidelines for evaluating testimony

You must decide what testimony to believe and how much weight to give it.

Here are some guidelines:

1. Will a witness gain or lose if this case is decided a certain way?
2. What is the witness's relationship to the parties?
3. How did a witness learn the facts? How did he or she know, remember, and tell the facts?
4. What was his or her manner?
5. What was his or her age and experience?
6. Did the witness seem honest and sincere?
7. Was the witness frank and direct?
8. Is the testimony reasonable compared with other evidence?
9. Are there any other factors that bear on believability and weight?

In addition, you should rely upon your own experience, good judgment, and common sense.

CIVJIG 12.30 EXPERT TESTIMONY

Opinion testimony

Most witnesses are allowed to testify only about what they saw, heard, or experienced. Usually, they are not allowed to give their opinions.

But some witnesses are allowed to give their opinions, because they have special training, education, and experience.

When a witness gives an opinion, you should consider the following guidelines:

1. What are the education, training, experience, knowledge, and ability of the witness?
2. What reasons are given for the opinion?
3. What are the sources of the information?
4. What are the guidelines already given to you for any testimony?

You need not give this opinion testimony any more importance than other evidence.

**CIVJIG 12.25
IMPEACHMENT**

Guidelines for impeachment

[1. You may consider what the witness did or said in the past, if it is not consistent with what he or she is saying now.

If what was said in the past was not under oath, use it only to decide the truth or weight of what the witness is saying now.

If it was under oath, or the witness is a party in this case (or an agent for one of the parties), then use it to decide the issues in this case and the truth and weight of what the witness is saying now.]

[2. You may consider whether the witness has been convicted of a crime. You may consider whether the kind of crime makes it more likely that he or she is not telling the truth.]

[3. You may consider a witness's reputation for truthfulness.]

CIVJIG 14.15
BURDEN OF PROOF

Deciding the issues in a case

You will be asked to answer "yes" or "no" to some questions on the verdict form.

The greater weight of the evidence must support a "yes" answer.

This means that all of the evidence, regardless of which party produced it, must lead you to believe that the claim is more likely true than not true.

Greater weight of the evidence does not necessarily mean the greater number of witnesses or the greater volume of evidence.

Any believable evidence may be enough to prove that a claim is more likely true than not.

ARSON--CIRCUMSTANTIAL EVIDENCE

Because this is a civil case, the insurer has the burden of proving arson by the greater weight of the evidence. Because direct proof of arson is seldom available, the insurer is permitted to use circumstantial evidence to support the inference that the insured set the fire or arranged to have it set.

Quast v. Prudential Property & Casualty Co., 267 N.W.2d 493 (Minn. 1978); DeMarais v. Northstar Mutual Ins. Co., 405 N.W.2d 507 (Minn. App. 1987).

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ARSON--BURDEN OF PROOF

You must not confuse the state's burden in a criminal case involving the offense of arson with an insurance company's burden of proof in this civil suit involving the claim of intentional burning. In a criminal case, the state must prove that a particular person perpetrated the offense and must prove all the elements of the crime beyond a reasonable doubt. Such burdens have no bearing in this civil suit.

Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702 (9th Cir. 1978); Cora Pub, Inc. v. Continental Casualty Co., 619 F.2d 482 (S.D. Fla.) (5th Cir. 1980); Hanover Fire Ins. Co. of New York v. Argo, 251 F.2d 80 (5th Cir. 1958).

Investigation and Trial of Fraudulent Claims on Behalf of an Insurer

ARSON--LACK OF AN EYEWITNESS

In determining whether the fire was intentionally set, or an insured's involvement in setting it, the lack of an eyewitness or direct evidence should not control your decision.

The ability or opportunity to present an actual eyewitness is rarely possible in an arson case.

Fenton Country House v. Auto Owners Ins. Co., 63 Mich. App. 445, 449, 234 N.W.2d 559 (1975).

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ARSON--MOTIVE CONSIDERATION

When determining whether or not the evidence establishes that an insured intentionally caused the fire, or participated in causing the fire, you may consider evidence of any financial motivation on the part of an insured to the effect that he would financially benefit from the fire and any resulting insurance payments.

Bonne v. Royal Indemnity Co., 460 F.2d 26, 29 (10th Cir. 1972); Lawson v. State Farm Fire & Cas. Co., 585 P.2d 318 (Colo. App. 1976).

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CIVJIG 90.15
DAMAGES—BURDEN OF PROOF

Definition of "burden of proof"

A party asking for damages must prove the nature, extent, duration, and consequences of his or her (injury) (harm).

You must not decide damages based on speculation or guess.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Pete Pyro,

Court File No: _____

Plaintiff,

vs.

SPECIAL VERDICT FORM

All Heart Insurance Company,

Defendant.

We, the jury empaneled and sworn for the trial of the above-entitled matter, for our special verdict, answer the questions submitted to us as follows: (You must answer all the questions).

1. Was the fire at 1313 Unlucky Lane, St. Paul, Minnesota on February 24, 1995 an incendiary fire? (intentionally set)

ANSWER: ____ Yes ____ No

2. Did Plaintiff Pete Pyro participate in, arrange for, or aid or abet the setting of the fire of February 24, 1995?

ANSWER: ____ Yes ____ No

3. After the loss, did Plaintiff Pete Pyro willfully and with intent to defraud, conceal or misrepresent any material fact or circumstance concerning this loss to Defendant All Heart Insurance Company?

ANSWER: ____ Yes ____ No

Investigation and Trial of Fraudulent Claims on Behalf of an Insurer

4. What is the actual cash value of the damage sustained to the building owned by Plaintiff Pete Pyro as a result of the fire of February 24, 1995?

ANSWER: \$ _____

5. What is the actual cash value of the contents owned by Plaintiff Pete Pyro which were damaged as a result of the fire of February 24, 1995?

ANSWER: \$ _____

6. What is the amount of additional living expense sustained by Plaintiff Pete Pyro as a result of the fire of February 24, 1995?

ANSWER: \$ _____

Foreperson _____

If, after deliberating for six hours you cannot reach a unanimous verdict, you may return a verdict based upon a 5/6ths verdict.

IF 5/6THS VERDICT, CONCURRING JURORS SIGN HERE:

SUSPECTED INSURANCE FRAUD CLAIM REPORT

Reporting Insurer: _____

Address: _____

Name and Title of Contact Person: _____

Telephone Number: _____

INSTRUCTIONS

The following information is necessary for the Attorney General's Office to evaluate the allegation of suspected fraud. Please respond to all questions and attach separate sheet(s) of paper if necessary. When responding to the questions, note that the term "you" refers to the insurer identified above and any employees or agents of the insurer.

I. General Claim Information

A. Claim No. _____ Policy No. _____ Date of Loss: _____

B. Relevant insured/claimant information (full name, address, DOB for all party(ies) involved):

C. Date claim was submitted: _____

D. The date on which you first discovered a fraudulent claim may have been submitted:

E. If a third party claim was made, the name and address of the policyholder against whom the claim was made: _____

F. State whether the above-described claim(s) were paid and, if so, the date(s) on which payment(s) was made: _____

G. State whether you denied the claim: _____

H. If you did not deny the claim, explain why you did not do so: _____

I. If the claim arises out of a motor vehicle accident, state whether the claim was submitted to arbitration pursuant to the Minnesota No-Fault Act, and if so:

Investigation and Trial of Fraudulent Claims on Behalf of an Insurer

- i) the name of the arbitrator;
 - ii) the date of the arbitration hearing;
 - iii) the parties who appeared at the arbitration hearing; and
 - iv) the award of the arbitrator.
-
-

II. Suspected Fraud

A. Please state all facts upon which you base your belief that the claim was fraudulent.

B. If you have any statements by any third party relating to the legitimacy of the claim, please describe the facts contained in such statement(s). In the alternative, please attach a copy of any such statement(s).

C. Please identify the name, address and telephone number of each person who possesses or claims to possess knowledge of any fact relating to the claim and state the nature of any knowledge possessed by that person, and the content of any documents that he person has provided to you.

D. Description of investigation, if any, conducted by you:

III. Documents Requested

A. Provide copies of any statements or documents identified in responses to Requests II.B and II.C above.

B. Provide a copy of any claim forms that you believe were fraudulently submitted.

C. Provide copies of any documents not otherwise provided upon which you base your belief that the claim identified above was fraudulent.

Signature: _____ Date of Report: _____

Send to local law enforcement or:

Attorney General Mike Hatch
c/o Hilary Lindell Caligiuri, AAG
525 Park, Suite 500
Saint Paul, MN 55103
Facsimile: (651) 297-4348

AG: #555903-v1