STATE OF MINNESOTA

IN SUPREME COURT

C6-74-45550

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF PROCEDURE FOR NO-FAULT ARBITRATION

ORDER

IT IS HEREBY ORDERED that the Supreme Court will hold a hearing in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on August 17, 1999 at 2:00 P.M., to consider the petition of the Standing Committee for Administration on No-Fault Arbitration that recommends amendments to the Rules of Procedure for No-Fault Arbitration. The Committee's proposed amendments are annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before August 11, 1999, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before August 11, 1999.

Dated: June 7, 1999

BY THE COURT:

Kathleen A. Blatz
Chief Justice

PROPOSED RULE CHANGES

PROPOSED NEW RULE NUMBER 1 – PURPOSE

(Add as new rule)

The purpose of the Minnesota no-fault arbitration system is to promote the orderly and efficient administration of justice in this State. To this end, the Court, pursuant to Minn. Stat. § 65B.525 and in the exercise of its rule making responsibilities, does hereby adopt these rules. These rules are intended to implement the Minnesota No-Fault Act and to the extent these rules may conflict with any other statute or other law, the Minnesota No-Fault Arbitration Rules shall control.

PROPOSED CHANGE TO RULE 6

(Add new second paragraph as follows)

If the claimant waives a portion of the claim in order to come within the $10,000.00 jurisdictional limit, the claimant must specify within thirty (30) days of filing the claims in excess of the $10,000.00 being waived.

PROPOSED CHANGE TO RULE 8

(The stricken sentence is to be taken out of the present rule. The rest of the rule remains the same)

The AAA shall send simultaneously to each party to the dispute an identical list of four names of persons chosen from the panel. Each party to the dispute shall have seven business days from the mailing date in which to cross out a maximum of one name objected to, number the remaining names in order of preference, and return the list to the AAA. In the event of multi-party arbitration, the AAA may increase the number of potential arbitrators and divide the strikes so as to afford an equal number of strikes to each adverse interest. ~~A party to an arbitration may advise the AAA of any reason why an arbitrator should withdraw or be disqualified from serving prior to exercising strikes.~~

PROPOSED CHANGE TO RULE 10

(Add new second paragraph as follows)

The following facts, in and of themselves, do not create a presumption of bias or conflict of interest:

a.) That an attorney or the attorney's firm represents auto accident claimants against insurance companies, including the insurance company which is the respondent in the pending matter.

b.) That an attorney or an attorney's firm represents or has represented insurance companies.

Committee comment: No-fault claims involve relatively small sums, needing expeditious disposition and requiring arbitrators experienced in the unique area of personal injury and auto reparations law. Lawyers specializing in this area generally represent either plaintiffs or defendants and their insurers. To disqualify these practitioners simply because of the nature of their practice would seriously deplete the arbitration process of necessary expertise and unfairly impugn the given assurance of a lawyer that he or she could be fair and impartial.

PROPOSED NEW RULE - WITHDRAWAL

(New rule to be inserted after Rule 10)

A claimant may withdraw a petition up until ten (10) days prior to the hearing. The claimant will be responsible for the arbitrator's fee, if any, upon withdrawal. If the petition is withdrawn after a panel of arbitrators is submitted and if the claimant shall file another petition arising from the same accident against the same insurer, the same panel of arbitrators shall be resubmitted to the claimant and the respondent. If the petition is withdrawn after the arbitrator is selected and if the claimant shall file another petition arising from the same accident against the same insurer, the same arbitrator who was earlier assigned shall be reassigned. The claimant who withdraws a petition shall be responsible for all parties' filing fees incurred upon the refiling of the petition.

PROPOSED DELETION OF RULE 13

(Rule 13 is deleted in its entirety)

PROPOSED CHANGE TO RULE 14

(The stricken portion is to be taken out of the present rule. The bolded sentence is to be added to the present rule. The rest of the rule remains the same.)

~~If conciliation is not successful~~, (A)n informal arbitration hearing will be held in the arbitrator's office or some other appropriate place in the general locale within a 50 mile radius of the claimant's residence, or other place agreed upon by the parties. **If the claimant resides outside of the State of Minnesota, AAA shall designate the appropriate place for the hearing.**

PROPOSED CHANGE TO RULE 29

(The stricken portion is to be taken out of present rule. The bolden portion is to be added to the present rule. The rest of the rule remains the same.)

Each party **waives the requirements of Minn. Stat. § 572.23 and** shall be deemed to have ~~consented~~ **agreed** that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection herewith **including application for the confirmation, vacation, modification or correction of an award issued hereunder as provided in Rule 38;** or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

PROPOSED CHANGE TO RULE 32

(Add new second paragraph as follows)

Given the informal nature of no-fault arbitration proceedings, the no-fault award shall not be the basis for a claim of estoppel or waiver in any other proceeding.

PROPOSED CHANGE TO RULE 37 (b)

(Add bolded portion to present rule)

Neither the AAA nor any arbitrator in a proceeding under these rules **can be made a witness or** is a necessary party in judicial proceedings related to the arbitration.

PROPOSED CHANGE TO RULE 38

(Add bolded portion to present rule)

The provisions of Minn. Stat. § 572.10 through § 572.26 shall apply to the confirmation, vacation, modification or correction of award issued hereunder, **except that service of process pursuant to Minn. Stat. § 572.23 shall be made as provided in Rule 29 of these rules.**

PROPOSED CHANGE TO RULE 40(b) AND NEW RULE 40(c)

(Add bolded portion to present rule 40(b) and add new rule 40(c))

(b) If the AAA is notified of a settlement at any time up to 24 hours prior to the scheduled hearing, but after the appointment of the arbitrator, the arbitrator's fee shall be the sum of $50.00. If the AAA is notified of settlement of a claim 24 hours or less prior to the scheduled hearing, the arbitrator's fee shall be $300.00. **The fee shall be assessed equally to the parties unless the parties agree otherwise.**

(c) **Once a** hearing **is commenced, the arbitrator shall direct assessment of the fee.**

ASKEGAARD, ROBINSON, MURPHY & SCHWEICH, P.A.

Attorneys at Law

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Civil Trial Specialist, Certified by:
+ The Minnesota State Bar Association
* The National Board of Trial Advocacy

Qualified Neutral ▲

August 10, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Hearing to Consider Proposed Amendments to Rules of Procedure for No-Fault Arbitration

Dear Mr. Grittner:

As per Chief Justice Blatz's 6/7/99 Order, I am providing this letter to you (with 12 copies of the same) regarding the proposed amendments to the Rules of Procedure for No-Fault Arbitrations.

First, I am concerned about the one-sided nature of the proposed change to Rule 10. It is my belief that Subpart b. should be changed as follows:

> b.) That an attorney or an attorney's firm represents or has represented insurance companies, <u>including the insurance company which is the respondent in the pending matter</u>.

Why should the situation for an attorney who has five open defense files for a given insurance company be any different than the situation for an attorney who is prosecuting twenty personal injury claims against that same company?

I also question the propriety of the proposed change to Rule 32. I think it is improper to promulgate a rule which basically states that, in every no-fault arbitration, the claimant is deemed to have not had a full and fair opportunity to present his or her claim. Whether a determination in a no-fault proceeding should be held to collaterally estop a claimant from litigating the same issue in a later tort case is something that should be determined on a case-by-case basis, by the Court presiding over the tort action. Often times, the claims presented are significant, considerable effort is expended by both parties, and the hearings are even court-reported.

Very truly yours,

Erik J. Askegaard
EJA/tlf

MEAGHER & GEER P.L.L.P.
ATTORNEYS . AT . LAW

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Some Members Also Authorized to Practice Law in Michigan, North Dakota, Wisconsin, Kansas, Missouri, Connecticut, New York, Texas and California

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Internet JJANSEN@meagher.com

August 11, 1999

Hand Delivered

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: *In the Matter of the Proposed Amendments to the Rules of Procedure for No-Fault Arbitration*
Supreme Court File No. C6-74-45550
Our File No. 50433-1982

Dear Mr. Grittner:

Enclosed for filing with respect to the above matter please find an original and 11 copies of the following:

1. The Insurance Federation of Minnesota's Request for Leave to Appear; and

2. The Insurance Federation of Minnesota's Memorandum in Opposition to the Proposed New Rule 1 and the Proposed Amendments of Rules 8 and 10.

Very truly yours,

Jenneane Jansen

Jenneane L. Jansen

JLJ/res
Enclosures
739263

National Association of Independent Insurers

2600 River Road, Des Plaines, IL 60018-3286

LAURA KOTELMAN
ASSOCIATE COUNSEL

August 10, 1999

VIA FEDERAL EXPRESS

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Dear Mr. Grittner:

The National Association of Independent Insurers is the nation's largest property and casualty insurance trade association with over 619 member companies. NAII companies write 38.3 percent of personal auto policies and 33.9 percent of commercial auto policies in Minnesota. NAII members wrote direct premium volume totaling $908.516 million for commercial and personal auto in 1997.

I am enclosing 12 copies of a statement by the Association in response to the Order For Hearing to Consider Proposed Amendments to the Rules of Procedure for No-Fault Arbitration.

Thank you for the opportunity to comment on the proposed amendments to the Rules of Procedure for No-Fault Arbitration. If you have any questions, please do not hesitate to contact me at ext. 847-297-7800 ext. 395 or e-mail at lkotelma@naii.org.

Sincerely,

Laura Kotelman

Laura Kotelman

Enclosures

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STATEMENT OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

STATE OF MINNESOTA

IN SUPREME COURT

C6-74-45550

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF PROCEDURE FOR NO-FAULT ARBITRATION.

The National Association of Independent Insurers is the nation's largest property and casualty insurance trade association with over 619 member companies. NAII companies write 38.3 percent of personal auto policies and 33.9 percent of commercial auto policies in Minnesota. NAII members wrote direct premium volume totaling $908.516 million for commercial and personal auto in 1997. The NAII urges the Supreme Court to consider the following comments on the proposed amendments to the rules of procedure for no-fault arbitration.

The NAII is particularly concerned about the proposed change to Rule 10 regarding presumptions of bias. If the proposed second paragraph were applied equally to plaintiff and defense attorneys, a more level playing field would exist.

Rule 10, Paragraph (a) addresses the objection by insurance carriers toward attorneys or firms that represent claimants against insurers including the respondent insurer in the specific matter. Meanwhile, Paragraph (b) is silent on the issue of an objection against an attorney or firm that has represented the insurance company that is the respondent in the pending matter. Paragraph (b) is vague compared to (a) and could lead to objections to defense attorneys who have represented the specific insurance company that is the respondent in the pending matter. This objection could be made even though no bias is presumed if an attorney represents claimants before the same insurer as the one in the pending matter.

The NAII feels that the presumption of bias needs to be equal for interested insurers and claimants so that the arbitration will take place on a level playing field. NAII is concerned that a bias toward claimants exists in the current system and needs to be addressed in the proposed amendments to the no-fault rules.

The NAII is also concerned about the changes to Rule 14. The new language states that AAA shall designate the appropriate place for a hearing if the claimant resides outside Minnesota. The NAII feels that the claimant should be compelled to go to Minnesota so that defense counsel has an adequate opportunity to perform cross-examination. Furthermore, if a claimant desires to avail him/herself of the Minnesota no-fault arbitration system, then the proceedings, in all fairness, should take place in Minnesota. The stated purpose of the no-fault system in Rule 1 is "to promote the orderly and efficient administration of justice ***in this State***." (Emphasis added.) NAII would prefer that Rule 14 clarify that the administration of justice will indeed take place in Minnesota rather than some other state chosen by the AAA.

MARIANNE SETTANO

ATTORNEY AT LAW

1935 West County Road B2
Suite 245
Roseville, MN 55113
651-633-3014, ext. 7882
Fax: 651-633-2920

August 5, 1999

Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

RE: Proposed Amendments to the Minnesota No-Fault Arbitration Rules

Dear Mr. Grittner:

Enclosed please find twelve copies of the Memorandum of the No-Fault Standing Committee in support of its proposed amendments to the No-Fault Arbitration Rules.

Also enclosed are twelve copies of an Amended Petition with a Microsoft Word diskette. The original Petition contained some typographic, numbering and titling errors. With the exception of the addition of the term "facsimile" to the proposed changes to Rule 29, none of the changes in the Amended Petition are substantive.

The Standing Committee for Administration of No-Fault Arbitration respectfully requests the opportunity to make an oral presentation at the hearing on August 17, 1999. The undersigned, as well as Richard Tousignant of the law firm of Schwebel, Goetz & Sieben, will be making the presentation on behalf of the committee. Thank you for your considerations.

Sincerely,

Marianne Settano
Attorney at Law

MS/alr
Enc.

In The Matter Of The Proposed Amendments To The Minnesota No-Fault Arbitration Rules

AMENDED PETITION

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Standing Committee on No-Fault Arbitration, by its Vice Chair, does hereby submit this Amended Petition to the Court to amend the No-Fault Rules as set forth in the attached Exhibit A, which is made a part hereof.

WHEREFORE, Petitioner respectfully requests that the Court grant the relief requested.

Dated: August 5, 1999.

THE STANDING COMMITTEE
ON NO-FAULT ARBITRATION

By: _____
Marianne Settano
Its Vice Chair

PROPOSED RULE CHANGES

PROPOSED NEW RULE NUMBER 1(a) – PURPOSE AND ADMINISTRATION

(Add as new rule 1(a) (Current Rule 1(a) and rule 1(b) will be moved to Rule 1(b) and Rule 1(c)

The purpose of the Minnesota no-fault arbitration system is to promote the orderly and efficient administration of justice in this State. To this end, the Court, pursuant to Minn. Stat. § 65B.525 and in the exercise of its rule making responsibilities, does hereby adopt these rules. These rules are intended to implement the Minnesota No-Fault Act and to the extent these rules may conflict with any other statute or other law, the Minnesota No-Fault Arbitration Rules shall control.

PROPOSED CHANGE TO RULE 6

(Add new second paragraph as follows)

If the claimant waives a portion of the claim in order to come within the $10,000.00 jurisdictional limit, the claimant must specify within thirty (30) days of filing the claims in excess of the $10,000.00 being waived.

PROPOSED CHANGE TO RULE 8

(The stricken sentences are to be taken out of the present rule. The rest of the rule remains the same)

The AAA shall send simultaneously to each party to the dispute an identical list of four names of persons chosen from the panel. Each party to the dispute shall have seven business days from the mailing date in which to cross out a maximum of one name objected to, number the remaining names in order of preference, and return the list to the AAA. In the event of multi-party arbitration, the AAA may increase the number of potential arbitrators and divide the strikes so as to afford an equal number of strikes to each adverse interest. ~~A party to an arbitration may advise the AAA of any reason why an arbitrator should withdraw or be disqualified from serving prior to exercising strikes.~~

EXHIBIT A

PROPOSED CHANGE TO RULE 10

(Add new second paragraph as follows)

The following facts, in and of themselves, do not create a presumption of bias or conflict of interest:

a.) That an attorney or the attorney's firm represents auto accident claimants against insurance companies, including the insurance company which is the respondent in the pending matter.

b.) That an attorney or an attorney's firm represents or has represented insurance companies.

Committee comment: No-fault claims involve relatively small sums, needing expeditious disposition and requiring arbitrators experienced in the unique area of personal injury and auto reparations law. Lawyers specializing in this area generally represent either plaintiffs or defendants and their insurers. To disqualify these practitioners simply because of the nature of their practice would seriously deplete the arbitration process of necessary expertise and unfairly impugn the given assurance of a lawyer that he or she could be fair and impartial.

PROPOSED NEW RULE 13 - WITHDRAWAL

(New Rule 13)

A claimant may withdraw a petition up until ten (10) days prior to the hearing. The claimant will be responsible for the arbitrator's fee, if any, upon withdrawal. If the petition is withdrawn after a panel of arbitrators is submitted and if the claimant shall file another petition arising from the same accident against the same insurer, the same panel of arbitrators shall be resubmitted to the claimant and the respondent. If the petition is withdrawn after the arbitrator is selected and if the claimant shall file another petition arising from the same accident against the same insurer, the same arbitrator who was earlier assigned shall be reassigned. The claimant who withdraws a petition shall be responsible for all parties' filing fees incurred upon the refiling of the petition.

PROPOSED DELETION OF PRIOR RULE 13

(Prior Rule 13 is deleted in its entirety)

PROPOSED CHANGE TO RULE 14

(The stricken portion is to be taken out of the present rule. The bolded sentence is to be added to the present rule. The rest of the rule remains the same.)

~~If conciliation is not successful~~, (A)n informal arbitration hearing will be held in the arbitrator's office or some other appropriate place in the general locale within a 50 mile radius of the claimant's residence, or other place agreed upon by the parties. **If the claimant resides outside of the State of Minnesota, AAA shall designate the appropriate place for the hearing**.

PROPOSED CHANGE TO RULE 29

(The stricken portion is to be taken out of present rule. The bolded portion is to be added to the present rule. The rest of the rule remains the same.)

Each party **waives the requirements of Minn. Stat. § 572.23 and** shall be deemed to have ~~consented~~ **agreed** that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection herewith **including application for the confirmation, vacation, modification or correction of an award issued hereunder as provided in Rule 38;** or for the entry of judgment on any award made under these rules may be served on a party by mail **or facsimile** addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The AAA and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communication to give the notices required by these rules **and to serve process for an application for the confirmation, vacation, modification or correction of an award issued hereunder.**

PROPOSED CHANGE TO RULE 32

(Add new second paragraph as follows)

Given the informal nature of no-fault arbitration proceedings, the no-fault award shall not be the basis for a claim of estoppel or waiver in any other proceeding.

PROPOSED CHANGE TO RULE 37 (b)

(Add bolded portion to present rule)

Neither the AAA nor any arbitrator in a proceeding under these rules **can be made a witness or** is a necessary party in judicial proceedings related to the arbitration.

PROPOSED CHANGE TO RULE 38

(Add bolded portion to present rule)

The provisions of Minn. Stat. § 572.10 through § 572.26 shall apply to the confirmation, vacation, modification or correction of award issued hereunder, **except that service of process pursuant to Minn. Stat. § 572.23 shall be made as provided in Rule 29 of these rules.**

PROPOSED CHANGE TO RULE 40(b) AND NEW RULE 40(c)

(Add bolded portion to present rule 40(b) and add new rule 40(c))

(b) If the AAA is notified of a settlement at any time up to 24 hours prior to the scheduled hearing, but after the appointment of the arbitrator, the arbitrator's fee shall be the sum of $50.00. If the AAA is notified of settlement of a claim 24 hours or less prior to the scheduled hearing, the arbitrator's fee shall be $300.00. **The fee shall be assessed equally to the parties unless the parties agree otherwise.**

(c) **Once a** hearing **is commenced, the arbitrator shall direct assessment of the fee.**

STATE OF MINNESOTA
MINNESOTA SUPREME COURT

In The Matter Of The Proposed Amendments To The Minnesota No-Fault Arbitration Rules

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Memorandum Of The No-Fault Standing Committee

Rule No. 1(a) – Purpose and Administration

No-fault arbitration is intended to speed the administration of justice and decrease the expense of and simplify litigation. Minn. Stat. § 65B.42(4). No-fault arbitration occupies a unique niche in dispute resolution and some statutory provisions which might otherwise apply may not fit well in the no-fault context. In case of conflict, the no-fault rules will govern. See, e.g., *Allstate v. Allen*, 590 N.W.2d 820 (Minn. App. 1990) (holding service of process in a proceeding to vacate an arbitration award is controlled by statute).

The Minnesota Supreme Court, pursuant to Minn. Stat. § 480.051, has the power to promulgate rules which regulate civil practice and procedure in the state. The no-fault arbitration rules are promulgated by the supreme court pursuant to the statutory authority provided in Minn. Stat. § 65B.525, Rule 43.

Similar to Minnesota Rules of Civil Procedure, Rule 81.01(c) which provides that statutes which are inconsistent or conflict with the Rules of Civil Procedure are superseded insofar as they apply to pleading, practice and procedure in the district court, this proposed new Rule 1(a) is intended to eliminate conflict and promote efficient and simplified procedures for no-fault arbitration.

For the Court's information, attached are two summaries of the 1998 No-Fault Statistics, one by Karen Imus Johnson published in the *Minnesota Defense Journal* and the other by Wilbur W. Fluegel in *Minnesota Trial Lawyer*.

Rule No. 6 – Over $10,000 Waiver

This amendment is self-explanatory. If claimant waives the claim in excess of $10,000, the portion of the claim waived must be specified.

Rule No. 8 – Proposed Change – Elimination of Pre-Selection Challenge

The first step in the arbitrator selection process is for the AAA to send each party a list of four names, and each party strikes one name from this master list. In the second step, the AAA picks the arbitrator to serve in the case from the names remaining on the list. A party may then challenge the person selected. Currently, some parties are also challenging a person appearing on the original master list.

The proposed change prohibits the "first step" challenge. A first step challenge is premature, coming before an arbitrator has been selected and before that person has had an opportunity to disclose and to explain any possible disqualifying relationship. Moreover, at this early stage, it imposes an excessive administrative burden on AAA to investigate factual disputes and to rule on early first-step challenges.

Rule No. 10 – Proposed Change – Arbitrator Selection

Since *Kinder v. State Farm*, a Hennepin County trial court decision, parties have attempted to use *Kinder* to disqualify potential arbitrators in situations where, before, such arbitrators generally served without objection. Should an attorney who has cases for other claimants against the respondent insurer be disqualified to serve as arbitrator because of evident partiality? *Kinder* says "yes". Should an attorney who represents insurers be similarly disqualified? *Kinder* again says, "yes".

Under the proposed change, the foregoing cases will not be deemed instances of evident partiality (or, as it is also called, perceived bias). Questions of evident or perceived bias are questions of law. See *Kinder*, citing *Pirsig v. Pleasant Mount Mut. Fire Ins.*, 512 N.W.2d 342 (Minn. App. 1994). This proposed rule change has several factors in mind. First, the proposed amendment does no more than remove a presumption of bias. Actual bias can still be shown to disqualify. Second, the person selected as arbitrator files a disclosure of any possible disqualifying relationship. When a selected arbitrator discloses a perceived relationship, but states this will not affect his or her ability to be fair, this statement of good faith further tends to negate any adverse presumption, much the same as for any judge. It is unfair and unrealistic to characterize all plaintiffs' attorneys or all insurance defense attorneys as having a perceived bias. Third, unlike a judge, no-fault arbitrators are limited to deciding issues of fact (e.g., the reasonableness of chiropractic bills). Fourth, an attorney who represents different personal injury claimants against a respondent insurer does not, in serving as arbitrator, have a direct financial interest in the outcome of the instant case. Each case is different. On the other hand, an attorney who is employed as in-house counsel by an insurer obviously could not serve as arbitrator in that insurer's case, but could serve in another case where a different insurer is the respondent.

A copy of *Kinder II* is attached.

Rule No. 13 – Deletion Plus New Rule On Petition Withdrawal

Existing Rule 13 dealing with settlement conference by the parties is unnecessary and is deleted. It is not used and is not needed.

The proposed Rule 13 is on an entirely different subject. It deals with withdrawal of a petition by a claimant before a hearing. The rule sets out what has been Committee policy and is designed to inhibit arbitrator shopping.

Rule No. 14 – Proposed Deletion and Change – Claimant Residence

This proposed rule deals with the place of the hearing for claimants not residing in Minnesota.

Rule No. 29 – Proposed Change – Service of Notice By Mail Or Fax

Minn. Stat. § 572.23 says, unless otherwise agreed, service of motion papers in an arbitration shall be as provided for service of a summons in an action. The proposed rule amendment waives this statutory requirement and makes clear that service of process on motions to confirm, vacate, modify or correct a no-fault arbitration award may also be by mail or facsimile service on a party or its representative. This remedies the inconsistency noted in *Allstate v. Allen*, 590 N.W.2d 820 (Minn. App. 1999) and *Leek v. American Express Prop. & Cas. Co.*, 591 N.W.2d 507 (Minn. App. 1999). The committee believes it is important to keep procedures for processing no-fault claims simple and inexpensive.

Although not noted in the committee's original Petition, the Amended Petition requests that the second paragraph of Rule 29, which refers to the use of facsimile in giving notices, should be edited to add "and to serve process for an application for the confirmation, vacation, modification, or correction of an award issued hereunder".

Rule No. 32 – No Estoppel

A no-fault award shall not be the basis for estoppel or waiver in any other proceeding. No-fault awards are quite informal with no fact-finding nor rationale given. If, later in related litigation, such as an uninsured motorist claim, issues of whether claimant's injury was caused by the auto accident or aggravated a pre-existing condition, arise, it is often unclear from the no-fault arbitration award what exactly the arbitrator decided.

Rule No. 37(b) – Proposed Addition – Arbitrator Not To Be A Witness

This amendment is self-explanatory. This proposal deals with parties not being able to call the AAA or the arbitrator as a witness. Currently, the rule only prohibits an arbitrator being made a party.

Rule No. 38 – Proposed Change

This proposal should be read in connection with the proposed change to Rule 29. It deals again with service of process.

Rule No. 40(b) and (c) – Change

This proposal deals with administration. If the arbitrator does not rule on costs, the AAA shall apportion costs.

Request To Make Oral Presentation

The committee requests permission to have two of its members, representing the perspective of both the plaintiffs and the defense bar, speak to the Court on the foregoing rule changes.

Dated: August 5, 1999.

Respectfully Submitted,
Minnesota No-Fault Standing Committee

By: _____
Its Vice Chair

MINNESOTA NO-FAULT: 1998 ARBITRATION STATISTICS

Karen Imus Johnson
RIDER, BENNETT, EGAN & ARUNDEL, LLP.

The Minnesota No-Fault Automobile Insurance Act was passed in 1975. One of the stated purposes of the Act was: "To speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation[.]" Minn. Stat. § 65B.42(4). To achieve this purpose, the No-Fault Act requires "mandatory submission to binding arbitration of all cases at issue where the claim at the commencement of the hearing is in an amount $10,000 or less against any insured's reparation obligor for no-fault benefits or comprehensive or collision damage coverage." Minn. Stat. § 65B.525, Subd. 1.

The American Arbitration Association ("AAA") is the statewide administrator of the no-fault arbitration system. Since 1975, the AAA has administered nearly 40,000 no-fault cases. Each year, the AAA prepares an annual report which it submits to the Minnesota Supreme Court. The report contains a section entitled "Case Statistics and Award Study." Under "Case Statistics," the report lists the number of cases filed with the AAA during the preceding year, along with the disposition of those cases. The "1998 Award Study" section of the report contains a summary of award information obtained from the first 300 cases awarded in 1998, including the amounts claimed at the hearing and the amounts awarded by the arbitrator. The following is a summary of the "Case Statistics and Award Study" data for 1998.

In 1998, 4,668 no-fault petitions were filed with the AAA. This amount represents an increase of approximately seven percent over the 4,346 no-fault petitions filed in 1997. Of the 4,668 no-fault petitions filed in 1998, 1,184 (25.5%) went through the hearing process and resulted in an award; 1,404 (30%) settled prior to arbitration; 170 (4%) were withdrawn by the claimant; 25 (.5%) were stayed or consolidated; and 1,886 (40%) were still pending at the end of 1998. Of the cases still pending, the AAA explains that the majority "were filed in the latter part of 1998."

The 1998 Award Study revealed that the average no-fault claim presented at the time of hearing was $6,814.99. Of the 300 cases studied, 22% of the claims were $2,500 or less; 24% of the claims were between $2,501 and $5,000; 18% of the claims were between $5,001 and $7,500; 14% of the claims were between $7,501 and $10,000; and the remaining 22% of the claims were amounts in excess of $10,000. It should be noted that both Minn. Stat. § 65B.525, Subd. 1 and Rule 6 of the Minnesota No-Fault Arbitration Rules only require that the claim be "$10,000 or less" at the time the arbitration is commenced. Rule 6 specifically provides that, "In cases where the amount of the claim continues to accrue after the petition is filed, the arbitrator shall have jurisdiction to determine all amounts claimed including those in excess of $10,000."

With respect to award amounts, the study revealed the average no-fault award was $4,228.25. That amount is approximately 62% of the average claim. According to the award information, the claim was awarded in its entirety in 18% of the cases and denied in its entirety in 12% of the cases. Of the remaining cases, the claimant was awarded between 1 - 25% of the claim in 6% of the cases, between 26 - 50% of the claim in 12% of the cases, between 51 - 75% of the claim in 21% of their cases, and between 76 - 99% of the claim in 31% of the cases.

These statistics, which show that no-fault claimants recover more than half of their claim in more than 70% of the cases, will come as no surprise to the attorneys who practice no-fault law on a regular basis. What no-fault practitioners may sometimes forget, however, and what the AAA award study shows, is that it is possible for an insurer to achieve significant, if not total, victory in the no-fault forum. ▲

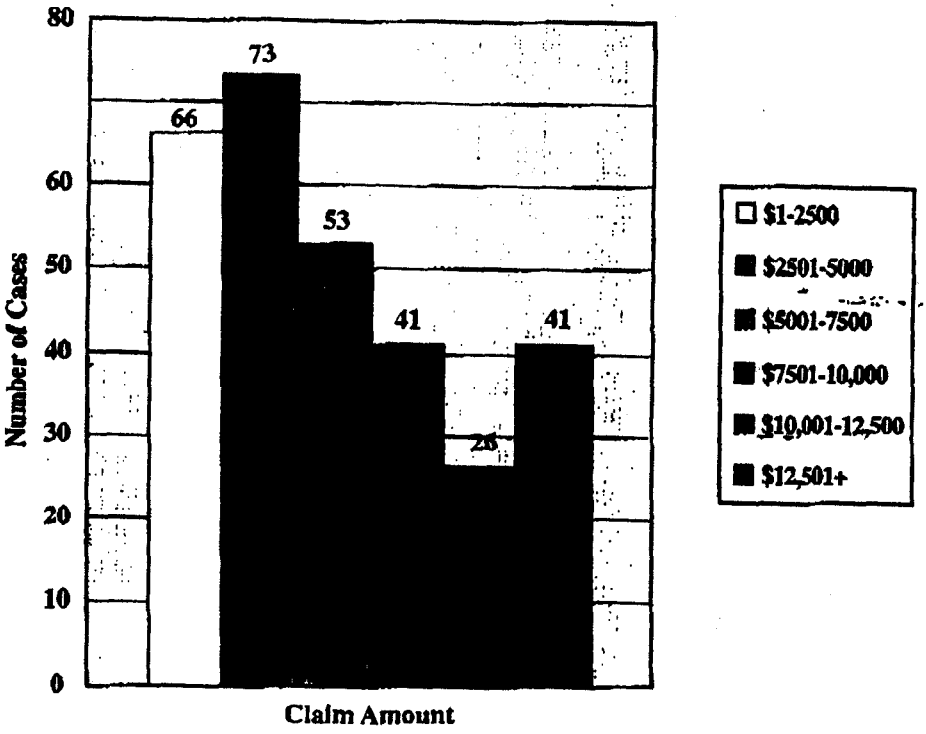
MS. JOHNSON is a magna cum laude graduate of the William Mitchell College of Law. She is an associate at the Minneapolis firm of Rider, Bennett, Egan & Arundel, LLP.

No-Fault Arbitration Update

By Wilbur W. Fluegel

The American Arbitration Association has served for more than twenty years as the statewide administrator of the no-fault arbitration system in Minnesota, and the AAA reports annually to the Supreme Court regarding the status of No-Fault arbitrations in the state.

This short article describes recent developments at the AAA, and summarizes the nature of arbitrations handled and resolved in 1998.



I. Volume of Cases Handled

Since the inception of the program, authorized under Minnesota Statute § 65B.525, in 1975, the AAA has administered nearly 40,000 no-fault cases in Minnesota. Case filings before the AAA continue to increase annually. The growth in case filings was by 18.6% in 1997 and 7.4% in 1998.

Case Statistics

	1998	1997	1996
Cases Filed	4,668	4,346	3,663
Awards Made	1,184	1,984	1,700
Cases Settled	1,404	2,092	1,807
Cases Withdrawn	170	187	135
Stays/Consolidations	25	44	17
Still Pending	1,886	39	4

II. Size and Disposition of Claims

The average claim filed in 1998 was for $6,814.99, and the average award was for $4,228.25. As noted in the table below, of the first 300 cases filed in 1998 for which the AAA developed its statistics, the vast majority of 192, or nearly 64% were for claims amounting to $7,500 or less, and 46% were for amounts of $5,000 or less. Fully 22% or more than a fifth of all filings were for claims of $2,500 or less.

While 41 filings or over 13% were for claims in excess of the $10,000 jurisdictional limit of the AAA, it should be noted that those claims were under the $10,000 cap at filing and grew to exceed the limit by the time of disposition. The Minnesota No-Fault Arbitration Rules, promulgated by the Minnesota Supreme Court, provide that "where the amount of the claim continues to accrue after the petition is filed, the arbitrator shall have jurisdiction to determine all amounts claimed including those in excess of $10,000."[1] (See table above)

Of the awards studied by the AAA in its report to the Supreme Court, slightly less than one-fifth, or 18% resulted in the full amount of the claim being awarded, and slightly more than one-tenth or 12% of the time the claim was denied in its entirety. On average, 65% of the amount claimed was awarded by the arbitrator. (See table next page)

Significantly, more than half the claim was given 70% of the time, and more than three-quarters of the claim was awarded 48.6% or nearly half the time. A claimant had only a three in ten chance of getting 50% or less of the amount claimed.

III. Panel Members

According to its report to the Supreme Court, the AAA "maintains [a] panel of 1,027 no-fault arbitrators,"[2] and is involved in seeking to enhance the system by "recruitment of arbitrators, maintenance of arbitrator information" and otherwise[3]. Both the AAA and the MTLA maintain a list of arbitrator names,[4] but at present the biographical information on the practice areas and percentage of practice of arbitrators is maintained by the AAA alone. It is available from the case administrator assigned to the case with simply a phone call.

IV. Ethical Rules

In 1998 the AAA implemented a Code of

Ethics for Employees, which provides formal training on ethics topics. The AAA has advised the Supreme Court that since "the AAA holds a unique place in the legal and business communities, the key to its success is the ethical conduct of its employees."[5]

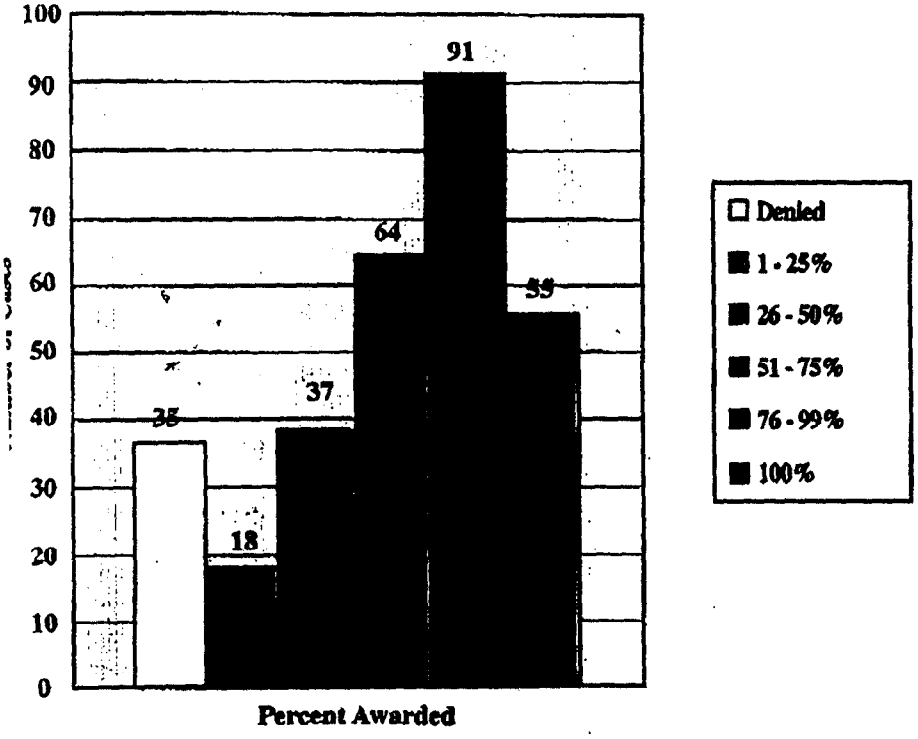
The Code of Ethics states in part, that "employees will uphold the integrity and impartiality of the American Arbitration Association and the process it administers and promotes."[6] It states that AAA Employees shall be impartial, diligent and courteous to all parties, arbitrators, fellow employees and members of the public with whom they come in contact in the course of their duties. Employees shall endeavor to avoid any appearance of partiality and shall not show favoritism to any party."[7]

V. Standing Committee

The Supreme Court appoints a standing committee to advise it on issues related to the administration of the No-Fault arbitration system and to resolve certain disputes that may arise regarding procedures. The AAA works with the Standing Committee regarding the development of the arbitration procedures, including issues of statutory or rule change.

In the three meetings held in 1998, the Standing Committee considered and responded to eighteen separate issues submitted by members of the bar, reviewed four arbitrator conduct complaints and thirty-one appeals regarding removal or reaffirmation of arbitrators. The Standing Committee is currently chaired by retired

WIL FLUEGEL is a Minneapolis attorney who serves on the Supreme Court No-Fault Standing Committee. He is board certified as a civil trial specialist by the National Board of Trial Advocacy and the Minnesota State Bar Association, and serves on the MTLA Board of Governors, Publications, Finance and Amicus Committees.



Supreme Court Justice John E. Simonette, and its members include Mike Fargione, Wil Fluegel, Keith Sjodin, Steve Smith and Richard Tousignant, as well as Pat Brendel, Mike LaFountaine, Bill Moeller, Marianne Settano, Buck Strifert and Karen Melling van Vliet.

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1. Rule 6, Minnesota No-Fault Arbitration Rules (1997).
2. Summary of Report at 5.
3. *Id.* at 1.
4. *Id.* at 5.
5. *Id.* at 1.
6. *Id.*
7. *Id.*

The Minnesota Trial Lawyer thanks the American Arbitration Association for supplying the statistics used in this article.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Michelle Bach Kinder,

Claimant,

MEMORANDUM AND ORDER

v.

File No.: CT 97-3037

State Farm Mutual Automobile Insurance Company,

Respondent.

To: Claimant through her attorney Paul K. Downes, MEYER & ASSOCIATES, P.A., Park Place East, Suite 610, 5775 Wayzata Blvd., St. Louis Park, MN 55416 and Respondent through its attorney, William M. Hart, MEAGHER & GEER, P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402-3788.

On November 23, 1998, Judge Isabel Gomez, of this District Court heard respondent's motion to stay arbitration and strike the arbitration panel. Claimant was represented by Paul K. Downes. Respondent was represented by William M. Hart. Final submissions were received in chambers on December 21, 1998.

Based upon its own file, and upon the written and oral submissions of counsel, it is hereby

ORDERED

1. That respondent's motion to strike the arbitration panel is granted.

2. That this Court's July 8, 1997 Memorandum and Order is incorporated by reference.

3. That the attached Memorandum be made part of this

Order.

4. That the matter be submitted to arbitration pursuant to Minn. Stat. § 65B.525

BY THE COURT

Isabel Gomez

Dated this 18 day of March, 1999.

Hon. Isabel Gomez,
Judge of District Court

MEMORANDUM

Background:

Pursuant to this Court's July 8, 1997, Order, plaintiff Michelle Kinder submitted to an IME; and on November 26, 1997, the parties refiled for arbitration. Kinder was represented by Paul K. Downes of Meyer and Associates, P.A. and State Farm was represented by Michael R. Moline of Meagher and Geer, P.L.L.P..

The American Arbitration Association produced a panel listing four potential arbitrators. The parties were asked to strike one member of the panel, and then the arbitrator would be selected by the AAA from the remaining two names on the list. Of the four potential arbitrators on the list, three of them were: Robert M. Frazee, an attorney at Meagher & Geer; James G. Weinmeyer, an attorney at Schwebel, Goetz & Sieben and George E. Antrim, III, an attorney at Krause & Rollins.

In a letter dated January 21, 1998, State Farm petitioned AAA for the removal of Weinmeyer and Antrim because of their evident partiality. Both lawyers at the time had active cases against State Farm and its insureds.

On January 29, 1998, Kinder's attorney submitted a letter to AAA, opposing State Farm's request to remove Weinmeyer and Antrim, and requesting that Frazee be removed as a potential arbitrator, because his firm, Meagher & Geer, represents State Farm in this lawsuit. In a letter dated February 2, 1998, AAA declared, without explanation, that "upon review of the file and the contentions of the parties, the Association has removed

Robert M. Frazee from the list and have [sic] reaffirmed George E. Antrim III and James G. Weinmeyer." See, February 2, 1998 letter attached as Exhibit I to Affidavit of Paul K. Downes.

State Farm then appealed AAA's decision to the No-fault Standing Committee, again requesting the removal of Weinmeyer and Antrim. On March 4, 1998, Anne M. Rabatin, Case Administrator for the AAA, sent the parties a letter which, without more, stated that "[t]he No-Fault Standing Committee has reviewed the parties' contentions and has voted to Reaffirm the Arbitrator's [sic]." See, March 4, 1998 letter to the parties, attached as Exhibit J to Affidavit of Paul K. Downes. Rabatin's letter also instructed the parties to submit their arbitrator lists on or before March 13, 1998. State Farm refused to do so and indicated that it would be bringing the current motion before the court.

Kinder indicates that, "[s]ince this Court's original decision, AAA has been deluged with requests on behalf of defense attorneys to remove plaintiff's lawyers as no-fault arbitrators based on this court's original decision." Plaintiff's Memorandum of Law in Opposition to Defendant's Request to Strike the Arbitration Panel and Stay the Arbitration, ("Plaintiff's Memorandum"), at 4. At an October 17, 1997, Meeting of the No-Fault Standing Committee, the members voted to allow the inclusion of the following language in letter responses to any party citing this Court's July 8, 1997, Order as the basis for objection to an arbitrator:

> The mere fact that an arbitrator has handled claims against a party to the arbitration in the past, or

currently, it [sic] is not in and of itself evidence of partiality or the appearance thereof." (Emphasis added).

See Minutes of the October 17, 1997 Quarterly Meeting of the No-Fault Standing Committee, attached as Exhibit N, to Affidavit of Paul K. Downes.

Notwithstanding the Committee's position, it appears that AAA removed Frazee because of "the mere fact" that Frazee's firm was "handl[ing] claims against a party to the arbitration . . . currently." Ibid.. Arbitrators, unlike courts, have no duty to set forth the reasons for their decisions; but no other cause for Frazee's removal has been articulated..

Analysis

"'Evident partiality' is not the same as actual bias." See, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-48, 89 S.Ct. 337, 338-39, 21 L.Ed.2d 301 (1968), as cited in Pirsig v. Pleasant Mound Mut. Fire Ins. Co., 512 N.W.2d 342, 344 (Minn. App. 1994). Whether there is evident partiality is a legal question, Pirsig, at 344, whereas whether there is actual bias is a fact question. Toyota of Berkley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 756 (9th Cir. 1987), cert. denied, 480.U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 789 (1987). The issue before this Court is whether Mr. Antrim and Mr. Weinmeyer should be stricken from the arbitration panel in this case, based upon their evident partiality.

I. Kinder's timeliness argument.

In Minnesota, "contacts between an arbitrator and a

party . . . that might create an impression of possible bias, require that the arbitration award be vacated." Northwest Mechanical Inc. v. Public Utils. Comm'n. City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979), citing, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968).

Kinder argues that "[d]etermining whether an arbitrator is qualified to hear a matter before the arbitrator has even been selected is premature and results in a waste of the court's resources." Plaintiff's Memorandum, at 4-5. She further asserts that "[u]ntil an arbitrator has actually been selected to hear a case, a well reasoned and thorough analysis of any potential arbitrator bias cannot be conducted." Id.

Given Kinder's success at having Mr. Frazee removed as a potential arbitrator prior to his selection, she is arguing that what's good for the goose is not good for the gander. Frazee was removed as a potential arbitrator, apparently because he works at Meagher and Geer, and attorneys from that firm represent State Farm here. State Farm opposes Antrim and Weinmeyer's presence on the panel, because they, themselves, are actively engaged in litigation against it.

While acknowledging that Frazee was properly removed from the panel as a potential arbitrator, Kinder nevertheless contends that evidence showing that Weinmeyer has 27 active cases against State Farm, and that Antrim has 4 active lawsuits against State Farm, "falls well short of an adequate basis to remove two potential arbitrators when nothing is known about the cases Mr.

Antrim and Mr. Weinmeyer have involving State Farm." Plaintiff's Memorandum, at 5. The undersigned is at a loss to understand why one party to an arbitration must accept evident partiality, while another gains relief from it.

As this Court found previously, arbitration in these circumstances is, as a matter of law, tainted by the appearance of impropriety. Pirsig v. Pleasant Mount Mut. Fire Ins., 512 N.W.2d 342, (Minn. App. 1994). It would be futile to order the parties to arbitrate this matter before either Antrim or Weinmeyer, only to have the matter come before this Court, yet again, on a motion to vacate the award.

II. Authority under Minn. Stat. §572.09.

Minn. Stat. §572.09 sets forth the standard to compel or stay arbitration. Although the statute indicates that "a stay should be granted only when there is a showing that there has been no agreement to arbitrate the matter," Plaintiff's Memorandum, at 6, Minn. Stat. §572.08 provides for relief "upon such grounds as exist at law or in equity . . . ."

The question of whether an arbitrator appears to be partial is certainly an equitable issue. Defendants are before this Court for a second time in essentially the same posture as before. Although there is no authority expressly permitting this Court to strike a panel before a decision has been rendered by an arbitrator, principles of equity allow this Court to do so when having the arbitration would be an exercise in futility and a waste of resources.

III. Kinder's neutral arbitrator argument.

Minn. Stat. §572.19 provides for vacating an arbitration award where "[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." Minn. Stat. §572.10, subd. 2, provides a definition of a neutral arbitrator, and reads as follows:

> Subd. 2. Disclosure by a neutral arbitrator. (a) a "neutral arbitrator" is the only arbitrator in a case or is one appointed by the court, by the other arbitrators, or by all parties together in agreement. A neutral arbitrator does not include one selected by fewer than all parties even though no other party objects. Id. (emphasis added).

Kinder argues that, because a no-fault arbitrator is not selected or agreed upon by both parties, s/he is not a neutral arbitrator, and, therefore, is "not required to avoid all appearances of evident partiality." Plaintiff's Memorandum, at 7. In support of her argument, she relies on Franke v. Farm Bureau Mutual Insurance Company, 421 N.W.2d 406 (Minn. App. 1988) and Safeco Insurance Co. of America v. Stariha, 346 N.W.2d 663 (Minn. App. 1984). However, both Franke and Safeco are distinguishable from this case.

The cases cited by Kinder dealt with a three-person arbitration panel, in which each party selected its own arbitrator, and a third, neutral, arbitrator was appointed. The third arbitrator was under a duty to avoid the appearance of evident partiality.

In no-fault arbitrations, there is only one arbitrator appointed to decide the matter. To accept Kinder's position that

no-fault arbitrators are not "neutral," would be to concede that they are necessarily biased. Acquiescing to the fact that no-fault arbitrators are necessarily biased, and accepting this fact as unremarkable, flies in the face of basic principles of fairness which all officers of the court are under a duty to observe. How can parties to arbitration maintain any faith in the process if they are forced to accept arbitrators who may not merely appear partial, but, in fact, not be partial?

IV. Kinder's argument concerning the limited number of available no-fault arbitrators.

Kinder argues that:

> "[b]ecause the number of available no-fault arbitrators is a limited number of attorneys regularly practicing in the personal injury area and because practicing in that area on behalf of the plaintiff involves pursuing claims against the same insurance companies on a regular basis, then the fact that an arbitrator may be pursuing claims against State Farm as part of his regular practice cannot be grounds for impartiality as an arbitrator in a case involving State Farm."

Plaintiff's Memorandum, at 11. As it has repeatedly noted in writing and orally on the record, this Court supports the arbitration of no-fault claims. However, if it is to survive as an alternative to litigation, the arbitration process must maintain its integrity. State Farm, like any other party to an action, is entitled to arbitration hearings that are free from the appearance of impropriety, notwithstanding any difficulty involved in finding a suitable arbitrator.

Kinder further asserts that "[n]o-fault arbitrators are unique and unlike any other type of arbitrator," and that "[t]he tragic result [of this Court's ruling] is that the majority of

plaintiff and defense lawyers are disqualified from serving as no-fault arbitrators resulting in no-fault arbitrations being decided by attorneys who do not practice in the area and are not familiar with the no-fault law." Id. at 12.

Assuming, arguendo, that no-fault arbitrators are unique, it does not follow that independent attorneys could not learn enough no-fault law to reach fair decisions in such cases. The arbitrators in this area are statutorily confined to making only factual determinations, and the legal principles underlying such determinations are not particularly arcane or intellectually demanding. While losing their role as arbitrators in their area of expertise is certainly a detriment to no-fault lawyers, this detriment is surely not so "tragic" as to outweigh the fundamental principles of fairness which support the whole arbitration machine.

V. Kinder's statistical argument.

In support of her contention that "[d]efendant's claim that they are not receiving a fair opportunity at no-fault arbitrations is not supported by actual statistics," Plaintiff's Memorandum, at 17, Kinder has provided this Court with a no-fault arbitration annual report prepared by the American Arbitration Association.

However, the statistical analysis presented to this Court does nothing to strengthen Kinder's position. Questions about whether a particular arbitrator is evidently partial, or whether no-fault arbitration in general must be free of evident

partiality, are not answered by numbers. It is for this reason that the undersigned denied plaintiff's motion to compel answers to discovery demands that State Farm provide information concerning the numerical impact of the Court's July 8, 1997, Order. If an arbitration does not meet a well-established standard for fairness, a large volume of equally defective proceedings will not transform the dross to gold.

VI. Kinder's policy arguments.

In support of her contention that "[d]efendant's request is contrary to the intended purposes of the No-Fault Act," Plaintiff's Memorandum, at 18, she argues that "[i]t has already been 2 1/2 years since [her] no-fault benefits were terminated and 2 years since her original no-fault arbitration and yet, [she] still does not have a date scheduled for the second arbitration of this matter." Id., at 19.

It is true, as Kinder asserts, that "the no-fault system was intended to allow the injured person to quickly seek medical treatment and have their medical bills paid for . . ." Plaintiff's Memorandum, at 19. As it noted on the record in the most recent hearing on this matter, the Court is dismayed that Michelle Kinder may be paying personally for the broader debate apparently launched by the undersigned's first decision in the matter of Kinder's arbitration. But insurance companies, as much as individual policy-holders, are entitled to arbitration conforming with existing law. The Court did nothing to prevent appellate review of its July 8, 1997, Order. It is, indeed,

troubling to see Kinder's arbitration at an apparent impasse, because the plaintiff has aligned herself with AAA in re-addressing at the trial level an issue which should be resolved above.

Conclusion

This Court is not holding that whenever an arbitrator has had any connection with a party to a no-fault action, that arbitrator must be stricken for evident partiality. However, existing law does require that an arbitrator be stricken when he or she is actively engaged in current litigation against a party.

The law, as it stands, requires this Court to strike both Antrim and Weinmeyer from this panel for evident partiality, since both are currently involved in litigation against a party to this arbitration. Because the issues raised in this case have been before this Court previously, they are clearly capable of repetition. It is the undersigned's hope that any further judicial scrutiny of the issues raised herein will be done by a higher court.

I.G.

MEYER & ASSOCIATES, P.A.

helping injured people

HELEN M. MEYER

PAUL K. DOWNES

DANIEL E. FOBBE

FRIEDRICH A. REEKER
Of Counsel

Attorneys at Law

August 10, 1999

Via Messenger

Frederick K. Grittner
Clerk of Appellate Court
Supreme Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Proposed Amendments to the Rules of Procedure for No-Fault Arbitration

Dear Mr. Grittner:

Enclosed for filing please find 12 copies of my Written Remarks and Request for Oral Hearing. I do request time for a brief oral presentation at the hearing on August 17.

Thank you for your assistance.

Very truly yours,

Paul K. Downes

PKD:jbr

enclos.

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Helen M. Meyer is a Civil Trial Specialist, certified by the Minnesota State Bar Association and the National Board of Trial Advocacy

STATE OF MINNESOTA
IN SUPREME COURT

In Re Hearing to Consider Proposed
Amendments to the Rules of Procedure
for No-fault Arbitration

**WRITTEN REMARKS AND
REQUEST FOR ORAL HEARING**

INTRODUCTION

Please consider this my written remarks in favor of adopting the No-Fault Standing Committee's proposed change to Rule 10 of the Rules of Procedure for No-Fault arbitration. Outlined below is a real-life example of why the rule change should be adopted in order to meet the intended purposes of the Minnesota No-Fault Act.

Also attached to these materials is an article I co-authored for the William Mitchell Law Review regarding this problematic issue of arbitrator bias (the relevant section is on pages 1013-1018).

STATEMENT OF FACTS

Micah Kinder was injured in a collision which occurred on November 24, 1993. She submitted an application for no-fault benefits under her policy of automobile insurance with State Farm Insurance Company. State Farm suspended Ms. Kinder's no-fault benefits effective July 25, 1996 and as a result she filed for no-fault arbitration with the American Arbitration Association ("AAA"). Under the procedure used by AAA for many years, Attorney James Lavoie was selected to act as the no-fault arbitrator. After being selected, Arbitrator Lavoie made the following disclosure:

> I represent the plaintiff in Kimberly Curran v. Sven Gustavsson. Sven Gustavsson is insured by State Farm and represented by R. Gregory Stephens, Kerry Evenson and Leatha Wolter of Meagher & Geer. I represent many other persons on claims where the adverse party is insured by State Farm. Also, our firm is handling other claims being defended by Meagher & Geer. I don't believe these circumstances affect my ability to be impartial, but I am compelled to make the disclosures.

Arbitrator Lavoie went on to accept the arbitrator's oath which is required by all no-fault arbitrators and reads as follows:

> The undersigned arbitrator, being duly sworn, hereby accepts this appointment and will faithfully and fairly hear and decide the matters in controversy between the above-named parties, in accordance with the Minnesota No-Fault Act and Rules promulgated thereunder and will make an award according to the best of the arbitrator's understanding.

After Arbitrator Lavoie made his disclosure, State Farm petitioned AAA to have Mr. Lavoie removed as the arbitrator. Written arguments were submitted on the issue and AAA conducted an investigation pursuant to Rule 4 of the Minnesota No-Fault Standing Committee Rules. After completing their investigation, AAA determined that "upon review of the file and the contentions of the parties, the Association has determined that Arbitrator James Lavoie shall be reaffirmed as the arbitrator on this file". Rule 4 of the No-Fault Standing Committee Rules allows that "a party may appeal the determination of the Association to the No-Fault Standing Committee". State Farm never attempted to appeal the decision to the Standing Committee and instead went forward with the arbitration with Arbitrator Lavoie presiding.

Ms. Kinder's no-fault arbitration before Arbitrator Lavoie was held on December 17, 1996. Arbitrator Lavoie issued a decision and specific Findings of Fact in favor of Ms. Kinder.

State Farm then brought a motion before the District Court to vacate Arbitrator Lavoie's award based on their argument that the arbitrator exceeded his authority by not ordering Ms. Kinder to attend an IME. As a secondary argument, State Farm suggested that the matter should be remanded for a second arbitration before a different arbitrator. The District Court, on its own initiative, questioned whether Arbitrator Lavoie was qualified to hear the case in the first place based on the fact that he was handling claims against State Farm and State Farm's insureds as part of his regular litigation practice. By order dated July 8, 1997 the District Court ordered Ms. Kinder to attend an IME, vacated Arbitrator Lavoie's decision and removed him from the case based on "the fact that he actively represents clients who are opposed to State Farm provides strong evidence that the arbitration would not be free from the appearance of impropriety".

After attending the IME as ordered, Ms. Kinder refiled for arbitration on November 26, 1997. As part of it's regular procedure, AAA issued a list of four potential arbitrators and asked each party to strike one name. The arbitrator would then be selected from the remaining two

names on the list. Instead of striking a name and returning the list, State Farm refused to return their list and argued that two of the names, James Weinmeyer and George Antrim, should be removed from the list of potential arbitrators since Mr. Weinmeyer and Mr. Antrim currently had claims pending involving State Farm.

By letter dated January 21, 1998 Defense counsel petitioned AAA to remove Mr. Weinmeyer and Mr. Antrim based on the fact that Mr. Weinmeyer had 27 active cases involving State Farm and that Mr. Antrim had four cases against State Farm. I submitted a letter opposing State Farm's request to remove the arbitrators. On February 2, 1998 AAA issued a letter denying State Farm's request to remove Mr. Antrim or Mr. Weinmeyer. Defense counsel then appealed AAA's decision to the No-Fault Standing Committee. By letter dated March 4, 1998 the Standing Committee indicated that "the No-Fault Standing Committee has reviewed the parties contentions and has voted to reaffirm the arbitrators".

After the Standing Committee refused to remove the arbitrators, State Farm petitioned the District Court for a second time asking that the court remove the two potential arbitrators and asking that the court stay the arbitration "until the AAA has generated a new arbitration panel that is made up of potential arbitrators who are not evidently partial". The same District Court judge again granted State Farm's motion and removed both potential arbitrators reasoning that "both are currently involved in litigation against a party to this arbitration".

On May 5, 1999, AAA issued its third list of potential arbitrators regarding this case. Attorney George Hottinger was one of the names that replaced the two potential arbitrators removed by the District Court. Both sides submitted their strike lists and Mr. Hottinger was selected to act as the arbitrator in this matter. The background that Mr. Hottinger provided to AAA indicates that 10% of his practice is on behalf of plaintiffs and 90% is on behalf of defendants. In light of that, State Farm had no objection to Mr. Hottinger serving as the arbitrator. Currently, the matter is set to be arbitrated before Mr. Hottinger on September 30, 1999.

ARGUMENT

It has now been almost six years since Ms. Kinder's automobile collision. More importantly, it has been over three years since her no-fault benefits were suspended and two years and eight months since she initially won her first no-fault arbitration. For the past three years Ms.Kinder has been dragged through continuous litigation and yet is still waiting to arbitrate her no-fault claim for a second time.

On a personal level, Ms. Kinder has been holding onto unpaid medical bills for almost three years and is being pursued by both medical providers and collection agencies. She is concerned that her case will continue on so long that the medical providers will no longer be willing to wait for the result of her litigation and will begin fully pursuing collection of their medical bills through a lawsuit of their own. More importantly, Ms. Kinder has delayed seeking certain appropriate medical treatment for fear of incurring additional medical bills, a result which could be detrimental to her healing process.

As this Court well knows, the drafters of the No-Fault Act hoped to satisfy a number of purposes. Some of the purposes of the No-Fault Act include:

> (1) To relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specific basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident;
> . . .
>
> (3) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment;
>
> (4) To speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation and to create a system of mandatory intercompany arbitration to assure a prompt and proper allocation of the costs of insurance benefits between motor vehicle insurers;
>
> . . .

Minn. Stat. § 65B.42.

Clearly, the above intended purposes of the No-Fault Act are not being met as evidenced by the Kinder case. The current rule, without the proposed change, does nothing to meet the

intended purpose of speeding the administration of justice and easing the burden of litigation on the courts of this state. As noted above, Ms. Kinder has had to return to the District Court level three times since initially winning her arbitration. Without the proposed rule change, the parties become stuck in a time consuming "revolving door" to the District Court for the simple purpose of selecting an arbitrator. With over 4,000 no-fault claims filed per year, the District Court, as a matter of efficiency, cannot be responsible for selecting an arbitrator.

The proposed change to Rule 10 makes good sense for both the plaintiff and defense bar. It is undisputed that both sides desire quick and fair arbitrations that are determined by intelligent and informed decision makers experienced in the area of no-fault law. Without the proposed rule change, it is arguable that virtually all of the plaintiff and defense personal injury bar would be excluded from serving as a no-fault arbitrator. The number of available no-fault arbitrators is a limited number of approved attorneys who regularly practice in the personal injury area. Practicing in the personal injury area involves representing plaintiffs pursuing claims against a limited number of insurance companies or representing one of the limited insurance companies in defending the plaintiff's claim. From the plaintiff's perspective, to disqualify an arbitrator from hearing a no-fault claim because he or she is handling an unrelated case against State Farm or a State Farm insured would effectively eliminate a large majority of, if not all, plaintiff's attorneys. Likewise, from the perspective of the defense bar, it is arguable that all of the attorneys of a law firm should be disqualified if any lawyer within that firm has worked on behalf of a particular insurance company. Furthermore, a defense lawyer could be disqualified if he or she has ever pursued a third-party or indemnification claim against the insurance company involved in the no-fault case.

The end result is that no-fault claims would be decided by attorneys who are not well versed in the arena of no-fault law. Such a system would be highly inefficient and guarantee perverse and inconsistent no-fault awards resulting in additional litigation at the District Court level and undermining the finality of arbitration awards.

The proposed change to Rule 10 will create a bright line test regarding the issue of arbitrator bias which will eliminate the need to continually return to the District Court level for something as simple as selecting an arbitrator. The proposed change to Rule 10 will create a clear standard to determine who can and cannot serve as an arbitrator. At the same time, the proposed rule change will ensure an efficient arbitration process that results in well reasoned no-fault awards which have been determined by attorneys well-versed in the nuances of no-fault law.

CONCLUSION

For all of the above reasons, the proposed change to Rule 10 of the Minnesota No-Fault Arbitration Rules should be adopted.

MEYER & ASSOCIATES, P.A.

BY _____

Paul K. Downes (#228345)
Attorney for Plaintiff
Park Place East, Suite 610
5775 Wayzata Boulevard
St. Louis Park, MN 55416
(612) 544-8985

Date: 8/10, 1999.

STATE OF MINNESOTA
IN SUPREME COURT

In Re Hearing to Consider Proposed Amendments to the Rules of Procedure for No-Fault Arbitration

AFFIDAVIT OF PAUL K. DOWNES

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

I, Paul K. Downes, first being duly sworn states and alleges that:

1. I am an attorney with the law firm of Meyer & Associates and represent Micah B. Kinder.

2. Attached hereto as Exhibit A is a true and correct copy of an article I co-authored for the William Mitchell Law Review entitled *Entitlement to Benefits: Recurring Areas of Dispute.*

   Pages 1013 - 1018 address the issue of arbitrator bias which is relevant to the proposed change to Rule 10 of the Minnesota No-Fault Arbitration Rules.

FURTHER YOUR AFFIANT SAYETH NOT

Paul K. Downes

Subscribed and sworn to before me
this 10th day of August, 1999.

Brenda M. Erke
Notary Public

BRENDA M. ERKE
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires
January 31, 2000

SCHWEBEL GOETZ & SIEBEN

ATTORNEYS AT LAW

July 19, 1999

James R. Schwebel †*
John C. Goetz †*
William R. Sieben †*
Richard L. Tousignant *

James S. Ballentine
Daniel J. Bresnahan *
William A. Crandall *
T. Joseph Crumley
Candace L. Dale
Leo M. Daly
Paul E. Godlewski *
Mark H. Gruesner
Max H. Hacker
William E. Jepsen
Robert L. Lazear
Mark L. Pfister
Peter W. Riley †*
Robert J. Schmitz
Laurie J. Sieff
Larry E. Stern
Sharon L. Van Dyck
James G. Weinmeyer
Roy D. Zimmer

Of Counsel:
Robert Latz

† *Member of the American Board of Trial Advocates*

* *Certified by the National Board of Trial Advocacy as a Civil Trial Specialist*

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

Would you please accept this letter as my submission in accordance with the Court's Order of June 7, 1999, for comments concerning the proposal to consider proposed amendments to the rules of procedure for no-fault arbitration. For your reference this is Order No. C6-74-4550.

As an attorney who exclusively represents claimants, I am writing in support of the rule changes. Although I will not comment about all the rule changes, I do wish to comment on two of them.

1. **Proposed change to Rule 10.** I have frequently experienced objections made by insurance company counsel to the appointment of attorneys who represent claimants in injury actions. Ironically, these same respondents' counsel see no problem with an insurance defense lawyer, even insurance house counsel, serving as a neutral arbitrator.

   Several years ago, when I was a member of this court's no-fault standing committee, we considered a change to the arbitrator's selection process. This change was necessitated by the fact that there were few arbitrators who did extensive practice on both the plaintiffs and defense side, and so they were getting greatly over utilized and there were substantial delays in the hearing of no-fault cases. Obviously substantial delays are directly contrary to the intent and purpose of the act.

5120 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402-2246
Telephone Minneapolis: 612-377-7777 Telephone St.Paul: 651-777-7777 Toll Free: 800-752-4265 Fax: 612-333-6311

Accordingly, a new procedure, for selecting arbitrators, with each party striking one, was implemented. All arbitrators were considered to be "neutral," and were asked to sign an oath to that effect. The previous practice of characterizing arbitrators as "plaintiff," "defendant" or "neutral" was abandoned. In so doing, the rules subcommittee of the no-fault standing committee, specifically recognized that there would be appointment of arbitrators who would have substantial plaintiffs or substantial defense practices. Nonetheless, it was expected that as officers of the court and lawyers in good standing of the bar of the State of Minnesota, when attorneys took the oath to act impartially, they would do so.

The net result was that the delay in hearing of cases was substantially reduced.

The proposed rule change is necessary, in my opinion, to avoid the conduct of attorneys who attempt to claim that simply because an attorney has a substantial plaintiffs' or defense practice, they cannot serve as a neutral arbitrator. In essence, the circumstances are no different than when plaintiffs or defense lawyers are appointed to the bench, and are then expected to act impartially. Many attorneys have so served, and the proposed rule change should be adopted.

2. **Proposed change to Rule 32.** This rule will give effect to what was clearly the original intent of the no-fault arbitration procedures. Simply put, as the court is aware, no-fault arbitration hearings are intended to allow quick and inexpensive resolution of no-fault claims.

Unfortunately, I have observed that respondents counsel, from time to time, attempt to claim that the result of a no-fault arbitration impairs or impedes the subsequent claims of the plaintiff. Ironically, of course, they strenuously object to any such collateral estoppel effect to successful plaintiffs awards in a no-fault claim.

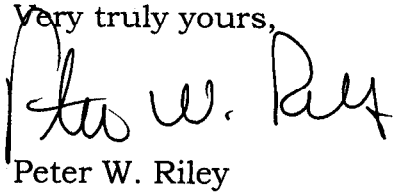
As the court is aware, claimants can and do pursue their claims without the benefit of legal counsel; it would be particularly unjust to those claimants who are unrepresented to find out that their action seeking payment of a medical bill or some wage loss could seriously impair or impede their subsequent personal injury action.

By the same token, a claimant should not be forced to delay no-fault hearings for fear that the outcome will be used against them in subsequent third-party litigation or other claims.

Accordingly, I urge the adoption of the proposed change to Rule 32 so that no-fault hearings can be conducted without concern for effects on subsequent third-party proceedings.

Thank you for your time and consideration in this matter. I do urge the Court to adopt all of the proposed changes in their entirety.

Very truly yours,



Peter W. Riley
Direct Dial No: 612-344-0425

PWR/at

WILLIAM W. LENINGTON
ATTORNEY AT LAW

1012 GRAIN EXCHANGE BUILDING
MINNEAPOLIS, MINNESOTA 55415
TELEPHONE 612-332-0351
FAX 612-342-2399

July 6, 1999

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

C6-74-45550

Re: Proposed Amendment to the Rules of Procedure for No-Fault Arbitration

As requested, I would like to provide comments with regard to the proposed changes to Rule 10 of the Rules of Procedure for No-Fault Arbitration.

The proposed change would provide as follows:

> "The following facts, in and of themselves, do not create a presumption of bias or conflict of interest:
>
> a) That an attorney or the attorney's firm represents auto accident claimants against insurance companies, including the insurance company which is the respondent in the pending matter."

The only reason the Standing Committee feels compelled to create this Rule is because this notion has been successfully challenged in the District Court and flies in the face of common sense. Attached, please see the District Court case of Kinder v. State Farm (Hennepin County District Court, 97-3037, 4/25/97,) which held that an Award must be vacated because the arbitrator hearing the case in which State Farm was a party had clients with cases pending against State Farm. This obviously created an impression of possible bias in the opinion of the District Court. The court held that a carrier is entitled to arbitrate hearings that are free from the appearance of impropriety and possible bias.

Further, the Comments to the said proposed rule change also require a response. First, the Comments suggest that because the size of no-fault claims are not substantial that this somehow excuses the appearance of bias and conflict of interest. Frankly, the size of the claim should not matter in order to maintain the integrity and respect for the judicial/arbitration process and to allow for a fair hearing no matter how great or small the sum in dispute. Further, the fact of the matter is that no-fault arbitrations can involve substantial sums of money. While the monetary limit at the time of filing is $10,000.00, which in itself is a substantial sum, yet this amount is allowed to accrue and thus medical bills, wage loss and replacement service claims are allowed to accumulate after the filing so that by the time of the hearing a few months later the sum can be $20,000 or more, plus penalty interest.

Additionally, the Comments suggest that an arbitrator for a no-fault case requires some "special expertise" is ridiculous. This is not rocket science. A jury pulled off the street without any experience with no-fault would not require any "special expertise" to consider these cases thoughtfully and meaningfully. In fact, what the current system promotes and what the proposed rule tries to codify is not "special expertise" but the protection and encouragement of biases and predispositions to a given outcome by allowing plaintiff's attorneys with cases pending against a given carrier to act, at the same time, as an arbitrator where that carrier is now a party in some separate action.

In short, the proposed Rule further undermines the integrity of the system, which is already questioned, and should be denied. In fact, if anything, there should be a rule that any arbitrator who has a case pending against a given carrier can not sit as an arbitrator on a case involving that carrier. This would save the time and cost to all involved of bringing motions in District Court to vacate awards such as in the Kinder case.

Thank you for your consideration.

Very truly yours,

WWL/sr

William W. Lenington

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED
97 JUL -8 PM 2:59

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

BY HENN. CO. COURT ADM.

Michelle Bach Kinder,

Claimant,

v.

State Farm Mutual Automobiles Insurance Company,

Respondent.

MEMORANDUM AND ORDER

File No.: CT 97-3037

To: Claimant through her attorney Paul K. Downes, MEYER & ASSOCIATES, P.A., Park Place East, Suite 610, 5775 Wayzata Blvd., St. Louis Park, MN 55416 and Respondent through its attorney, Michael R. Moline, MEAGHER & GEER, P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402-3788.

On April 25, 1997 Judge Isabel Gomez of this District Court heard Claimant's Motion to Confirm Arbitration Award and Respondent's Motion to Vacate Arbitrator Lavoie's Award. Claimant was represented by Paul K. Downes. Respondent was represented by Michael R. Moline.

At the hearing, the Court requested further briefing. The parties' final submissions were received by the Court on May 19, 1997.

Based upon the parties' written and oral arguments, and upon its own filed herein, the Court makes the following

ORDER

1. That Claimant's Motion to Confirm the Arbitration Award is DENIED.

2. That Respondent's Motion to Vacate Arbitrator Lavoie's Award is GRANTED.

3. That Claimant shall submit to an Independent Medical Examination in accordance with Minn. Stat. §65B.56, Subd. 1, and Neal v. State Farm Mut. Ins. Co., 529 N.W.2d 330, 333 (Minn. 1995).

4. That any further dispute as to whether the benefits sought by Claimant are reasonable, necessary and related to a motor vehicle accident shall be submitted to arbitration pursuant to the standards and procedures set forth in Minn. Stat. §56B.525 et seq.

5. That costs and attorney's fees in this case be borne by the parties.

6. That the attached MEMORANDUM be made part of this Order.

BY THE COURT:

Isabel Gomez

Hon. Isabel Gomez,
Judge of District Court

Dated this 8 day of July, 1997.

MEMORANDUM

Introduction:

On November 24, 1993, claimant Michelle Bach Kinder was involved in a motor vehicle accident. At the time of the accident, she was insured with State Farm. On or about November 24, 1993, she began treating with a chiropractor for injuries she sustained as a result of the accident.

State Farm began investigating Kinder's claim for benefits, which included obtaining her medical and chiropractic records both before and after the November 24, 1993 motor vehicle accident. State Farm also spoke with Kinder's treating chiropractor.

Medical records and discussions with Kinder's chiropractor indicated that her injuries were resolving and that no further treatment would be expected after approximately March of 1994. Subsequently, Kinder treated with her chiropractor one time per month from September through December of 1994. She did not see a chiropractor from January of 1995 through September of 1995. From September of 1995 through April of 1996, Ms. Kinder began treating with her chiropractor between one and five times per month. State Farm paid $10,720.00 for all Kinder's chiropractic visits through April of 1996.

Kinder's chiropractor then referred her to the Northwest College of Chiropractic ("NCC") for an intensive physical therapy and chiropractic rehabilitation program. Her chiropractor did not inform State Farm of this referral.

On or about May 28, 1996, State Farm received a bill for Kinder's treatment at NCC in the amount of $1,530.40. That bill covered treatment at NCC from April 18, 1996 through May 17, 1996.

On June 19, 1996, State Farm sent Kinder a letter which informed her that she was scheduled for a medical examination (an "IME") with Dr. Michael Jackson on August 5, 1996. At Kinder's request, State Farm rescheduled the examination to August 8, 1996.

On July 1, 1996, Helen Meyer, an attorney at Pritzker & Meyer, P.A., contacted Marshall Heitzman, State Farm's Claim Representative in this case, and informed him that she had been retained to represent Ms. Kinder. Meyer further indicated that "Ms. Kinder [was] willing to attend an independent medical examination but only on the condition that all outstanding claims [were] paid in full prior to the date of any examination." Respondent's Exhibit C.

Ms. Meyer restated that position in a letter dated July 16, 1996. State Farm then suspended Kinder's no-fault benefits, refusing to pay any additional amounts until she attended an examination. As a result of State Farm's having suspended benefits, Kinder filed a petition for no-fault benefits. Because, pursuant to the standards and procedures set forth in Minn. Stat. §56B.525 et seq., all claims for $10,000.00 or less must be arbitrated through the American Arbitration Association, ("AAA"), this matter proceeded to be arbitrated through the AAA.

At the time of the arbitration, State Farm was represented

by the lawfirm of Meagher & Geer. The parties were presented with a panel of arbitrators. Each party struck one member of the panel and ranked the remaining arbitrators in order of preference. Arbitrator James A. Lavoie was selected to arbitrate the matter.

The American Arbitration Association does not require or forward disclosure of potential conflicts of interest until the arbitrator is selected and accepts appointment. On October 15, 1996, Lavoie accepted appointment to arbitrate this matter and made the following disclosure:

> "I represent the plaintiff in Kimberly Curran v. Sven Gustavsson. Sven Gustavsson is insured by State Farm and represented by R. Gregory Stephens, Kerry Evenson, and Leatha Walter of Meagher & Geer. I represent many other persons on claims where the adverse party is insured by State Farm. Also, our firm is handling other claims being defended by Meagher and Geer. I don't believe these circumstances affect my ability to be impartial, but I am compelled to make the disclosures." See, Exhibit A to Second Supplemental Affidavit of Michael R. Moline.

The parties received Arbitrator Lavoie's disclosure only after he accepted appointment.

On October 23, 1996, R. Gregory Stephens, of the Meagher & Geer lawfirm, wrote to the American Arbitration Association and objected to Arbitrator Lavoie's appointment, citing the inherent conflict of interest, or evident partiality. Kinder's attorney, Paul K. Downes, filed a response, asking that Arbitrator Lavoie remain. On November 8, 1996, the American Arbitration Association, without explanation, "determined that Arbitrator James Lavoie shall be reaffirmed as the arbitrator on this file." See, Exhibit B to Second Supplemental Affidavit of Michael R. Moline.

State Farm petitioned Arbitrator Lavoie to compel Kinder to attend an IME. Lavoie denied State Farm's petition. State Farm contends that they are entitled to an IME as of right, whereas Kinder argues that Lavoie was within the scope of his authority when he determined that her failure to attend an IME was reasonable.

The arbitration hearing took place on December 17, 1996. On January 2, 1997, Lavoie awarded Kinder $3,295.02 in medical expenses, $451.98 in mileage reimbursement, $159.94 in interest, and $210.00 in costs which represent the filing fee plus 50% of the arbitrator's fee, for a total award of $4,116.94. By cross-motions, Kinder moves to confirm Arbitrator Lavoie's award, and State Farm moves to vacate the award.

Analysis:

Minn. Stat. §572.19 establishes grounds for vacating an arbitration award:

"the Court shall vacate an award where . . .

(2) [t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) [t]he arbitrators exceeded their powers; . . . ."

I. Evident partiality.

"Evident partiality goes to the right of a party to have an arbitration hearing that is free from an appearance of impropriety." Pirsig v. Pleasant Mount Mut. Fire Ins., 512 N.W.2d 342, 343 (Minn. App. 1994). "Evident partiality" is not the same as actual bias. Commonwealth Coatings Corp. v.

Continental Cas. Co., 393 U.S. 145, 147-48, 89 S. Ct. 337, 338-39, 21 L.Ed.2d 301 (1968), rehearing denied, 393 U.S. 1112, 89 S. Ct. 848, 21 L.Ed.2d 811 (1969). "[E]vident partiality is a legal question . . . It is not enough that the arbitrators be unbiased; they must not even appear to be biased." Pirsig, supra, citing, Commonwealth Coatings, 393 U.S. at 150.

In this case, after the parties exercised their first strikes in choosing an arbitrator, Lavoie disclosed the fact that he represented the plaintiff in a matter in which State Farm insured the defendant. When he Lavoie accepted appointment as an Arbitrator in this matter, State Farm was represented by R. Gregory Stephens, Kerry Evenson, and Leatha Walter of Meagher & Geer. Thus, Meagher and Geer's attorneys represented State Farm not only on cases in which Lavoie was then actively prosecuting, but in this case as well. It was only after Lavoie's disclosure that R. Gregory Stephens could, and did, write to the American Arbitration Association and object to Lavoie's appointment, citing the inherent conflict of interest, or evident partiality.

Kinder cites Rule 8 of the AAA Rules in support of her position that State Farm "failed to follow the necessary procedure to challenge an arbitrator . . . " Claimant's Memorandum - Part II, ("Claimant's Memorandum"), at 3. Rule 8 provides, in part, as follows:

> . . . A party to an arbitration may advise AAA of any reason why an arbitrator should withdraw or be disqualified from serving prior to exercising strikes. . . .

Claimant correctly notes that it was not until after State Farm had exercised its strikes that it complained about Lavoie's

qualifications to arbitrate this dispute. However, State Farm had no reason to object to Lavoie's appointment prior to his disclosure.

This case is distinguishable from Safeco Ins. Co. v. Stariha, 346 N.W.2d 661 (Minn. App. 1984), where the Court determined that "[a] remote and unrelated attorney-client relationship between a neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality," Id. at 666. Here, Lavoie's relationship with State Farm was neither remote or unrelated. At the time of this arbitration, Lavoie was actively representing a plaintiff who was suing a defendant insured by State Farm: that relationship was both immediate and related.

Lavoie further disclosed that he represents many other persons on claims where the adverse party is insured by State Farm, and that his firm is handling other claims being defended by Meagher and Geer. Whereas his relationship to attorneys associated with Meagher and Geer might not automatically rise to the level of evident partiality, the fact that he actively represents clients who are opposed to State Farm provides strong evidence that the arbitration would not be "free from an appearance of impropriety." See, Pirsig, Supra, at 343.

Claimant further argues that because State Farm is the largest auto insurance carrier in the State of Minnesota, "to suggest that an arbitrator should be disqualified based on the fact that they . . . are presenting a claim against [them] would eliminate a large majority of plaintiff's attorneys and would

create a significantly unlevel playing field as it pertains to potential arbitrators." Claimant's Memorandum, at 9. While this Court is mindful of the desirability of arbitrating no-fault claims, the arbitration process must maintain its integrity if it is to survive as an alternative to litigation. Although the pool of individuals who can arbitrate claims against State Farm may indeed be diminished due to State Farm's size, State Farm is entitled to arbitration hearings that are free from the appearance of impropriety.

In Minnesota, "contacts between an arbitrator and a party . . . that might create an impression of possible bias, require that the arbitration award be vacated." Northwest Mechanical Inc. v. Public Utils. Comm'n, City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979), citing, Commonwealth Coatings Corp. v. Continental Cas. Co., Supra, at 150. Because Lavoie's relationship with State Farm evidences possible bias, his award must be vacated.

II. Scope of arbitrator's authority.

In the area of automobile reparation, the Minnesota Supreme Court has limited the arbitrator's role to one of deciding issues of fact, reserving to the courts the interpretation of the law. Neal v. State Farm Mut. Ins. Co., 529 N.W.2d 330, 331 (Minn. 1995); Johnson v. American Family Mut. Ins. Co., 426 N.W.2d 419, 421 (Minn. 1988). Although the reason why Kinder refused to attend an IME is a question of fact, the legal effect of her refusal to attend the IME is a question of law. When a case presents both legal questions and factual disputes, it is

improper to defer to an arbitrator's determination. AMCO Ins. Co. v. Ashwood-Ames, 334 N.W.2d 740 (Minn. Ct. App. 1991).

Minn. Stat. §65B.55, subd. 1, (1986) provides as follows:

> Any person with respect to whose injury benefits are claimed under a plan of reparation security, shall upon request of the reparation obligor from whom recovery is sought, submit to a physical examination by a physician or physicians selected by the obligor as may be reasonably required.

Under Minn. Stat. §65B.56, Subd. 1, State Farm was entitled to its first IME as a matter of right.

Pursuant to Neal v. State Farm, Supra, Kinder's refusal to attend any IME until State Farm paid all contested benefits was unreasonable as a matter of law. The Court in Neal specifically stated,

> "That the insurer suspends, rather than terminates, payment until the claimant has, upon request, submitted to a physical examination scheduled in accordance with the statutory guidelines seems eminently reasonable." Id., at 333.

This record herein shows that State Farm suspended Kinder's benefits due to her refusal to submit to an IME. State Farm had previously paid for claimant's treatment, and only scheduled an IME pursuant to the statutory guidelines after she had returned to treatment and submitted a large amount of contested bills at one time.

Prior to the arbitration hearing, State Farm petitioned Lavoie to compel Kinder to attend the IME that State Farm was entitled to as a matter of right under Minn. Stat. §65B.56, Subd. 1. Lavoie denied State Farm's petition, subsequently finding that claimant's refusal to attend the IME was reasonable because State Farm had breached its contract with her. In making that

determination, Lavoie obviously interpreted the insurance contract. The "interpretation and construction of either the statute or the insurance contract or both" is a question for the courts. AMCO Ins. Co., Supra, at 332, citing Sorenson v. St. Paul Ramsey Medical Ctr., 457 N.W.2d 188, 190 (Minn. 1990). Arbitrator Lavoie exceeded the scope of his authority.

Conclusion:

The facts of this case show that Arbitrator Lavoie should not have arbitrated this matter due to evident partiality. Moreover, his determination that State Farm breached its contract with Kinder and his decision that her failure to attend an IME was reasonable are legal determinations. Thus, Arbitrator Lavoie exceeded the scope of his authority in deciding this case. For these reasons, this Court must set aside his Findings and Order.

I.G.

GREENE
ESPEL

ATTORNEYS & COUNSELORS

JOHN E. SIMONETT
DIRECT DIAL (612) 373-8359

May 21, 1999

Mr. Fred Grittner
Supreme Court Administrator
25 Constitution Avenue
St. Paul, MN 55155

Re: **Petition to Amend No-Fault Arbitration Rules** C6-74-45550

Dear Mr. Grittner:

I enclose the original and seven copies of the Petition of the Minnesota Standing Committee on No-Fault Arbitration to amend the No-Fault Rules.

Will you please file? I believe the Court should, on this matter, hold a hearing after published notice, as I expect the petition to generate considerable interest.

A copy of the petition goes to Justice Gilbert, who is the Court's liaison to the committee.

Please call me if you have any questions. Thank you.

Very truly yours,

John E. Simonett

JES/em
Enclosures
c: Justice James H. Gilbert (w/enc.)
Kate A. Stifter (w/o enc.)

P.S. I will see about the disk.

333 SOUTH 7TH STREET / SUITE 1700 / MINNEAPOLIS, MN 55402
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PROFESSIONAL LIMITED LIABILITY PARTNERSHIP

In The Matter Of The Proposed Amendments To The Minnesota No-Fault Arbitration Rules

PETITION

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Standing Committee on No-Fault Arbitration, by its Chair, does hereby represent and respectfully petition the Court to amend the No-Fault Rules as set forth in the attached Exhibit A, which is made a part hereof.

Petitioner is prepared to have members of the Standing Committee appear and discuss the proposed rule changes at any hearing the Court may require.

WHEREFORE, Petitioner respectfully requests that the Court set this matter for hearing and grant the relief requested.

May 19, 1999.

THE STANDING COMMITTEE
ON NO-FAULT ARBITRATION

By: _____
John E. Simonett
Its Chair

RULES SUBCOMITTEE

PROPOSED RULE CHANGES

PROPOSED NEW RULE NUMBER 1 – PURPOSE

(Add as new rule)

The purpose of the Minnesota no-fault arbitration system is to promote the orderly and efficient administration of justice in this State. To this end, the Court, pursuant to Minn. Stat. § 65B.525 and in the exercise of its rule making responsibilities, does hereby adopt these rules. These rules are intended to implement the Minnesota No-Fault Act and to the extent these rules may conflict with any other statute or other law, the Minnesota No-Fault Arbitration Rules shall control.

PROPOSED CHANGE TO RULE 6

(Add new second paragraph as follows)

If the claimant waives a portion of the claim in order to come within the $10,000.00 jurisdictional limit, the claimant must specify within thirty (30) days of filing the claims in excess of the $10,000.00 being waived.

PROPOSED CHANGE TO RULE 8

(The stricken sentence is to be taken out of the present rule. The rest of the rule remains the same)

The AAA shall send simultaneously to each party to the dispute an identical list of four names of persons chosen from the panel. Each party to the dispute shall have seven business days from the mailing date in which to cross out a maximum of one name objected to, number the remaining names in order of preference, and return the list to the AAA. In the event of multi-party arbitration, the AAA may increase the number of potential arbitrators and divide the strikes so as to afford an equal number of strikes to each adverse interest. ~~A party to an arbitration may advise the AAA of any reason why an arbitrator should withdraw or be disqualified from serving prior to exercising strikes.~~

EXHIBIT A

PROPOSED CHANGE TO RULE 10

(Add new second paragraph as follows)

The following facts, in and of themselves, do not create a presumption of bias or conflict of interest:

a.) That an attorney or the attorney's firm represents auto accident claimants against insurance companies, including the insurance company which is the respondent in the pending matter.

b.) That an attorney or an attorney's firm represents or has represented insurance companies.

Committee comment: No-fault claims involve relatively small sums, needing expeditious disposition and requiring arbitrators experienced in the unique area of personal injury and auto reparations law. Lawyers specializing in this area generally represent either plaintiffs or defendants and their insurers. To disqualify these practitioners simply because of the nature of their practice would seriously deplete the arbitration process of necessary expertise and unfairly impugn the given assurance of a lawyer that he or she could be fair and impartial.

PROPOSED NEW RULE - WITHDRAWAL

(New rule to be inserted after Rule 10)

A claimant may withdraw a petition up until ten (10) days prior to the hearing. The claimant will be responsible for the arbitrator's fee, if any, upon withdrawal. If the petition is withdrawn after a panel of arbitrators is submitted and if the claimant shall file another petition arising from the same accident against the same insurer, the same panel of arbitrators shall be resubmitted to the claimant and the respondent. If the petition is withdrawn after the arbitrator is selected and if the claimant shall file another petition arising from the same accident against the same insurer, the same arbitrator who was earlier assigned shall be reassigned. The claimant who withdraws a petition shall be responsible for all parties' filing fees incurred upon the refiling of the petition.

PROPOSED DELETION OF RULE 13

(Rule 13 is deleted in its entirety)

PROPOSED CHANGE TO RULE 14

(The stricken portion is to be taken out of the present rule. The bolded sentence is to be added to the present rule. The rest of the rule remains the same.)

~~If conciliation is not successful~~, (A)n informal arbitration hearing will be held in the arbitrator's office or some other appropriate place in the general locale within a 50 mile radius of the claimant's residence, or other place agreed upon by the parties. **If the claimant resides outside of the State of Minnesota, AAA shall designate the appropriate place for the hearing**.

PROPOSED CHANGE TO RULE 29

(The stricken portion is to be taken out of present rule. The bolden portion is to be added to the present rule. The rest of the rule remains the same.)

Each party **waives the requirements of Minn. Stat. § 572.23 and** shall be deemed to have ~~consented~~ **agreed** that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection herewith **including application for the confirmation, vacation, modification or correction of an award issued hereunder as provided in Rule 38;** or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

PROPOSED CHANGE TO RULE 32

(Add new second paragraph as follows)

Given the informal nature of no-fault arbitration proceedings, the no-fault award shall not be the basis for a claim of estoppel or waiver in any other proceeding.

PROPOSED CHANGE TO RULE 37 (b)

(Add bolded portion to present rule)

Neither the AAA nor any arbitrator in a proceeding under these rules **can be made a witness or** is a necessary party in judicial proceedings related to the arbitration.

PROPOSED CHANGE TO RULE 38

(Add bolded portion to present rule)

The provisions of Minn. Stat. § 572.10 through § 572.26 shall apply to the confirmation, vacation, modification or correction of award issued hereunder, **except that service of process pursuant to Minn. Stat. § 572.23 shall be made as provided in Rule 29 of these rules.**

PROPOSED CHANGE TO RULE 40(b) AND NEW RULE 40(c)

(Add bolded portion to present rule 40(b) and add new rule 40(c))

(b) If the AAA is notified of a settlement at any time up to 24 hours prior to the scheduled hearing, but after the appointment of the arbitrator, the arbitrator's fee shall be the sum of $50.00. If the AAA is notified of settlement of a claim 24 hours or less prior to the scheduled hearing, the arbitrator's fee shall be $300.00. **The fee shall be assessed equally to the parties unless the parties agree otherwise.**

(c) **Once a** hearing **is commenced, the arbitrator shall direct assessment of the fee.**

STATE OF MINNESOTA

IN SUPREME COURT

File No. C6-74-45550

In the Matter of the Proposed Amendments to the Rules of Procedure for No-Fault Arbitration

THE INSURANCE FEDERATION OF MINNESOTA'S REQUEST FOR LEAVE TO APPEAR

Per this court's June 7, 1999 order, William M. Hart (Atty. Lic. No. 150526) respectfully requests leave to make an oral presentation at the hearing on the proposed amendments to the rules of procedure for no-fault arbitration, to be held August 17, 1999. If leave is granted, Mr. Hart will appear on behalf of the Insurance Federation of Minnesota. His written materials have been filed with this request.

Respectfully submitted,

Dated: 11 August 1999

By _____

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738737

No. C6-74-45550

State of Minnesota

In Supreme Court

IN THE MATTER OF THE
PROPOSED AMENDMENTS TO THE
RULES OF PROCEDURE FOR NO-FAULT ARBITRATION

THE INSURANCE FEDERATION OF MINNESOTA'S MEMORANDUM IN OPPOSITION TO THE PROPOSED NEW RULE 1 AND THE PROPOSED AMENDMENTS OF RULES 8 AND 10

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STATEMENT OF QUESTION PRESENTED

Minnesota statutes provide that an arbitration award cannot be sustained where "there was evident partiality by an arbitrator appointed as a neutral." This court has held that evident partiality exists if the circumstances "might create an impression of possible bias." Should this court approve a bright-line exception to these rules of law, thus allowing individuals with evident partiality to nevertheless serve as neutral arbitrators in the mandatory no-fault arbitration system?

The Insurance Federation of Minnesota urges the court to reject the proposed changes to Rules 8 and 10 of the Rules of Procedure for No-Fault Arbitration.

INTRODUCTION

The Insurance Federation of Minnesota represents approximately 90 insurance companies, agent organizations, service bureaus and individual members. The Federation's objective is to work with government to develop public policy. The Federation monitors legislative and regulatory activities that impact the insurance industry and develops policy positions, which it communicates to legislators, legislative committees, state agencies, and Minnesota courts. The Federation has appeared as *amicus curiae* in numerous cases before this court. The Federation's interest in the proposed no-fault rules is a public one, as the rules have wide-ranging impact on the public in this state.

The Standing Committee on No-Fault Arbitrations has petitioned this court to adopt/amend two rules that would drastically limit the parties' right to report about and establish a neutral arbitrator's evident partiality.[1] First, Rule 8 would be amended to eliminate a party's right to ask for the disqualification of a potential arbitrator prior to the party's exercising the right to strike.[2] This would be accomplished by eliminating the following language from the current Rule 8: "A

---

[1]By statutory definition, a person appointed to serve as the sole arbitrator is a "neutral" arbitrator. Minn. Stat. § 579.10, subd. 2 (a) (stating that "a 'neutral arbitrator' is the only arbitrator in a case * * *").

[2]The appointment procedure calls for the American Arbitration Association (AAA) to circulate a list of four potential arbitrators. Each party may strike one arbitrator from the list and then rank the remaining three in order of preference. The AAA then chooses the arbitrator from the parties' strike lists.

party to an arbitration may advise the AAA of any reason why an arbitrator should withdraw or be disqualified from serving prior to exercising strikes."[3]

Second, Rule 10 would be amended to carve out an exception to the rule prohibiting the appointment of a neutral arbitrator having evident partiality. This would be accomplished by the expedience of the new rule's limiting definition:

> The following facts, in and of themselves, do not create a presumption of bias or conflict of interest:
>
> a.) That an attorney or the attorney's firm represents auto accident claimants against insurance companies, including the insurance company which is the respondent in the pending matter.
>
> b.) That an attorney or an attorney's firm represents or has represented insurance companies.

With utmost respect to the Standing Committee, the Insurance Federation urges the court to reject this proposed change.[4]

---

[3]A party ought not be required to exercise their strike on an arbitrator who cannot serve under any circumstances. And while the Federation understands that the rule will eliminate selection disputes about evident partiality, much of that could be solved if more care were taken not to assign such arbitrators to the panel in the first place. On balance, if the rules are going to use a system of strikes, it is unfair to require one party to use their strike on an evidently partial candidate, while the other party is not put to such a choice. If a panel member is not qualified to serve, he or she should be removed immediately. The rule change erects an unwarranted barrier to that end.

[4]The Insurance Federation also respectfully recommends that this court reject a portion of the final sentence of Proposed Rule 1- Purpose. The relevant portion is: "and to the extent these rules may conflict with any other statute or other law, the Minnesota No-Fault Arbitration Rules shall control." The Insurance Federation appreciates that this phrase is probably meant to avoid what was an unfortunate and confusing conflict between the rules of civil procedure and the no-fault rules. *See Leek v. American Express Property Casualty*, 591 N.W.2d 507 (Minn. App. 1999) (holding that Minn. Stat. § 572.23 and Minn. R. Civ. P. 4.03 and 4.05 required personal service or service via acknowledged mail of a motion to vacate an arbitrator's award, and therefore superseded No-Fault Rule 29, which allowed for service via U.S. Mail); *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820 (Minn. App. 1999) (same holding as above; also held service on counsel was ineffective). The Insurance Federation agrees that the conflict was misleading and needed to be remedied. Nevertheless, the Insurance Federation believes this phrase is ill-advised for two reasons: it will likely engender even more confusion and mislead more parties and courts than the conflict it was intended to remedy; and it appears to violate separation-of-powers.

With due respect to the Standing Committee, only the courts have the power to decide whether particular statutes or rules will apply to a given situation when they are in conflict. *E.g. Beck v. Groe*, 245 Minn. 28, 41, 70 N.W.2d 886, 895 (Minn. 1955). And only the legislature may decide to whom its laws will apply:

The proposed change to Rule 10 has its genesis in two orders issued by the Honorable Judge Isabel Gomez in *Kinder v. State Farm Ins. Cos.*, Hennepin County Dist. Ct. File No. CT 97-003037. In the first order (A. 1-10), filed July 8, 1997, the court vacated an arbitration award on the ground that the arbitrator's disclosures evidenced possible bias, thus disqualifying him under the evident-partiality standard. State Farm had objected to the arbitrator on the basis of possible bias, which stemmed from the arbitrator's ongoing adverse relationship with State Farm and its insureds on a number of litigation and arbitration matters. The claimant argued that an ongoing and direct adversarial relationship with one of the parties could not be evident partiality because such a rule would disqualify a large number of potential arbitrators. The court rejected that reasoning, holding that the integrity of the system is paramount and that parties like State Farm are no less entitled to an arbitration free of evident partiality than are individuals and smaller insurers:

> While this Court is mindful of the desirability of arbitrating no-fault claims, the arbitration process must maintain its integrity if it is to survive as an alternative to litigation. Although the pool of individuals who can arbitrate claims against State Farm may indeed be diminished due to State Farm's size, State Farm is entitled to arbitration hearings that are free from the appearance of impropriety.
>
> In Minnesota, "contacts between an arbitrator and a party * * * that might create an impression of possible bias, require that the arbitration award be vacated." [Citations]. Because [the arbitrator's] relationship with State Farm evidences possible bias, his award must be vacated.

(A. 8).

> Pure legislative power, which can never be delegated, is the authority to make a complete law — complete as to the time it shall take effect and as to whom it shall apply * * *.

Lee v. Delmont, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949). The no-fault rules should not purport to supersede this court's decisions or Minnesota statutes.

Shortly after this first order, Kinder's attorney proposed to the Standing Committee a rule that would overrule Judge Gomez's decision. This prompted a discussion at the Standing Committee's October 17, 1997 meeting:

> Discussion of Kinder v. State Farm Insurance
> In response to the decision by Isabel Gomez, Paul Downes [counsel for Kinder] proposed a change to Rule 8 stating that an arbitrator should not be stricken or removed on the sole basis that they ever handled a case against the insurance company. * * *

(A. 12).

The second order came after the district court remanded *Kinder* for arbitration, and the AAA circulated another list of potential arbitrators. The list included two potential arbitrators that State Farm challenged for evident partiality. The first person had four active claims against State Farm and was a member of a firm that had brought 29 such claims in the several immediately preceding years. The second potential arbitrator had 27 active claims against State Farm, nearly half of which were no-fault claims. That arbitrator had made at least another 100 claims against State Farm. And his firm had made a staggering 557 claims against State Farm in just the two previous years — more than one new claim for every business day. In addition to State Farm's challenge, Kinder challenged a third arbitrator for evident partiality on the ground that he was a partner in the firm representing State Farm in the arbitration. State Farm conceded that the latter potential arbitrator should be stricken. The AAA rejected State Farm's challenge, stating, without explanation, that "[u]pon review of the file and the contentions of the parties, the Association has removed [the defense-attorney arbitrator] from the list and have [sic] reaffirmed [the two arbitrators challenged by State Farm]." (A. 14).

State Farm appealed the AAA's decision to the Standing Committee. Thereafter, the AAA reported to the parties that "[t]he No-Fault Standing Committee has reviewed the parties' contentions

and has voted to Reaffirm the Arbitrator's [sic]." (A. 16). Because the AAA's actions were inconsistent with a court order already filed in the case, State Farm moved the district court to disqualify the two potential arbitrators as having evident partiality. Kinder opposed the motion. In response to the argument that a no-fault arbitrator is not a "neutral" arbitrator within the meaning of the statute, the district court stated that "[t]o accept Kinder's position that no-fault arbitrators are not 'neutral,' would be to concede that they are necessarily biased." (A. 24-25). Moreover, said the court, "[a]cquiescing to the fact that no-fault arbitrators are necessarily biased, and accepting this fact as unremarkable, flies in the face of basic principles of fairness * * * ." (A. 25). The court then asked: "How can parties to arbitration maintain any faith in the process if they are forced to accept arbitrators who may not merely appear partial, but, in fact, not be [im]partial?" *Id.* (emphasis in original). Thus, the same concerns for systemic integrity and faith in the system informed both of the district court's orders. The second order therefore went on to state:

> As it has repeatedly noted in writing and orally on the record, this Court supports the arbitration of no-fault claims. However, if it is to survive as an alternative to litigation, the arbitration process must maintain its integrity. State Farm, like any other party to an action, is entitled to arbitration hearings that are free from the appearance of impropriety, notwithstanding any difficulty involved in finding a suitable arbitrator.

Id. Stating a concern that the issue would continue to recur, the district court asserted a "hope that any further judicial scrutiny of the issues raised herein will be done by a higher court." (A. 28).[5] But, Kinder's counsel decided not to pursue immediate appellate review, and instead continued to challenge the result through the Standing Committee.

---

[5]In *Kinder* itself, the AAA circulated a strike list with no evidently partial arbitrator candidates. The parties followed the usual procedures, and the AAA assigned an arbitrator. The hearing is scheduled for September 30, 1999.

At bottom, the proposed rule strikes at the heart of any system of adjudication — its integrity and the trust its participants must repose in the system's fundamental fairness. The proposed rule is said to be necessary for the sake of expedience, so as not to require any changes in the system of arbitrator assignments or to "impugn" those who would be asked to step aside on matters where they have evident partiality. For the reasons that follow, the Insurance Federation urges this court to reject proposed Rule 10 and, instead, to search out solutions that allow for a system that is not only expedient, but also fair and well supported by all of its participants.

DISCUSSION

I. Because due process requires that no-fault arbitrators avoid even the appearance of possible bias, a concern for the system's integrity and for fundamental fairness cautions against the blanket exception created by proposed Rule 10.

The evident partiality of a neutral arbitrator so undermines arbitration as a system of adjudication that Minnesota law mandates that an award infected by it be vacated. Minn. Stat. § 572.19 (providing that "the court shall vacated an award where * * * [t]here was evident partiality by an arbitrator appointed as a neutral"). More than 30 years ago, the United States Supreme Court interpreted the nearly identical federal counterpart and concluded that the integrity of our system is so paramount that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also *must avoid even the appearance of bias*." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (emphasis added). The Court therefore resoundingly answered "no" to the question whether "[e]lementary requirements of impartiality taken for granted in every judicial proceeding * * * [are] suspended when the parties agree to resolve a dispute through arbitration." *Id.* at 145. This court has, in turn, acceded to the *Commonwealth Coatings* appearance-of-bias approach. *Northwest Mechanical, Inc. v. Public Tuils. Comm'n, City*

of Virginia, 283 N.W.2d 522, 524 (Minn. 1979) (stating that "[w]e believe *Commonwealth Coatings* * * *, to which we accede, applies to this case and requires reversal"). This court agreed that an arbitration award cannot stand if the arbitrator had "'any dealings that might create an impression of possible bias.'" *Northwest Mechanical*, 283 N.W.2d at 524 (quoting *Commonwealth Coatings*, 393 U.S. at 149). *See also, Pirsig v. Pleasant Mound Mut. Fire Ins. Co.,* 512 N.W.2d 342, 344 (Minn. App. 1994) (stating that "[i]t is not enough that the arbitrators be unbiased; they must not even appear to be biased"); *Egan & Sons Co. v. Mears Park Development Co.*, 414 N.W.2d 785, 786 (Minn. App. 1987) (affirming the vacation of an award where neutral arbitrator's dealings might have created an impression of possible bias), *review denied* (Minn. Jan. 20, 1988).

In short, the impartiality of one who presides over a judicial or quasi-judicial proceeding is so critical to the system's success that even the appearance of a *possible* bias cannot be tolerated. This stringent standard protects the *process* and preserves the parties' faith in the system. The systemic concern necessarily takes into account not only the way things are, but also the way system participants think things are. That is why the existence of actual bias is only of secondary concern. *See, Pirsig*, 512 N.W.2d at 344. ("'Evident partiality' is not the same as actual bias"). *Egan & Sons*, 414 N.W.2d at 786 ("[i]mpermissible contacts (or evident partiality) are dealings, even if not producing any actual prejudice, where such dealings 'might create an impression of possible bias'"). It is also why the evident-partiality standard is not just some lofty aspiration, discardable if the circumstances seem expedient. It is, instead, a critical component of due process itself. And due process, in turn, requires that arbitrators be truly neutral:

> [D]ue process requires a 'neutral and detached judge in the first instance,' and the command is no different when a legislature delegates adjudicative functions to a private party.

Concrete Pipe and Prods. of Calif. v. Construction Laborers Pension Trust for S. Calif., 508 U.S. 602, 618 (1993) (citations omitted).[6]

Moreover, due process requires that a neutral arbitrator be *and appear* impartial: "Justice, indeed, must satisfy the appearance of justice." *Concrete Pipe*, 508 U.S. at 618. This is true even if the person making the decision has no actual bias:

> [T]his stringent rule may sometimes bar trial even by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. This * * * is no less true where a private party is given statutory authority to adjudicate a dispute * * * .

Id. Thus, the appearance of justice — due process — is not satisfied by an evidently partial arbitrator's assurance that he or she is impartial. *Id.* For this reason, the court should reject the Standing Committee's concern that the evident-partiality standard needs to be relaxed so as not to "unfairly impugn the given assurance of a lawyer that he or she could be fair and impartial." Proposed Rule 10, Committee Comment. This subjective approach would advance nothing, since no one would propose to question the actual motives of individuals on a case-by-case basis. The *appearance* of bias is just as destructive to the system. That is why the court should bypass the concern for individual feelings and focus instead on a larger system-wide analysis that studies the inevitable results of placing one arbitrator after another in a position of deciding a controversy when they have pending a number of substantially similar matters against an adversary they would now judge. Although not every resulting decision will reflect bias, it is inevitable that bias will creep into and infect the system, even if only as the subconscious actions of some who are placed in that position.

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[6] *See also New Creative Enterprises, Inc., v. Dick Hume & Associates, Inc.*, 494 N.W.2d 508, 512 (Minn. App. 1993) (holding that, when arbitration is mandated by statute, due process "demands no less" than the requirements of the Minnesota Arbitration Act), *review denied* (Minn. March 16, 1993).

This reflection upon human nature is not meant to "impugn" anyone. Indeed, it has long been recognized that it is the human inclination toward self-interest, and not actual biased conduct, that defines a disqualifying conflict. Therefore, in the insurance-defense context, courts have recognized that it is the subconscious temptation, not an attack on individual integrity, that drives the analysis:

> Common logic dictates that in such circumstances, counsel for USF&G would be inclined, albeit acting in good faith, to bend his efforts, however unconsciously, toward establishing that any recovery by [the plaintiff] would be grounded on the theory of [plaintiff's] claim which was not covered by the policy. Therein lay the conflict.

United States Fidelity & Guar. Co. v. Louis Roser Co. Inc., 585 F.2d 932, 938 (8th Cir. 1978). The *Roser* court went on to stress, however, that it had no concern about the propriety of counsel's actual conduct: "In addition, we stress that the record does not indicate and the appellant does not contend that USF&G's attorney acted improperly." *Id.*, n. 5. Thus, the rules governing evident partiality are not about impugning individuals, but about systemic integrity. Therefore, the United States Supreme Court has stressed that it is the possible temptation to an *average* person, and not the motivations or integrity of any particular individual, that requires recusal:

> [T]he test is whether the * * * situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof * * *, or which might lead him not to hold the balance, nice clear, and true * * *.'

Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (holding that the mayor could not preside over minor traffic offenses if the city's revenue depended, even in part, on fines levied in that court). Those who may even be tempted to favor one party over the other — even if only subconsciously — should not serve as arbitrators. This court should not adopt a blanket exception to this reality.

The request for a system free of evident partiality is not an indictment of any single person or group. It is, instead, an acknowledgment that human nature often tempts our self-interests,

making it necessary to remove even the suggestion that the system — not the result in any one case — is even slightly infected with partiality. Due process demands no less. This should not hurt anyone's feelings in the first instance, but such a consideration is, in any event, an inadequate basis for adopting a rule that accommodates partiality in the no-fault system.

Nor should the court accept the Standing Committee's premise that evident partiality should be defined away by rule because disqualification "would seriously deplete the arbitration process of necessary expertise * * * ." Proposed Rule 10, Committee Comment. The Insurance Federation challenges that premise on two fronts. First, the premise merely assumes that no-fault claims — factually among the simplest civil cases in our entire system — "requir[e] arbitrators experienced in the unique area of personal injury and auto reparations law." *Id.* To the contrary, since no-fault arbitrators are *prohibited* from deciding questions of law (*Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988)), an arbitrator's expertise in the law is of no relevance whatever. As for resolving the factual disputes presented in no-fault arbitrations — typically, whether the claimed medical expenses are "reasonable and necessary" as a result of an automobile accident — surely the system does not need a civil trial specialist as an arbitrator. Indeed, this court has determined that *lay juries* are capable of determining whether dissociation — a manifestation of split identities — is sufficiently similar to hypnosis and whether any memories of abuse were first recalled during such a dissociation. *Wall v. Fairview Hosp. & Health Care Servs.*, 584 N.W.2d 395 (Minn. 1998), *reh'g denied* (Oct. 9, 1998). If a lay jury is capable of deciding such factual disputes, it is difficult to understand why the no-fault arbitration system cannot function unless every arbitrator is "experienced in the unique area of personal injury and auto reparations law."

Second, and far more importantly, Judge Gomez was on target when she held that insurers, "like any other party to an action, [are] entitled to arbitration hearings that are free from the

appearance of impropriety, *notwithstanding any difficulty involved in finding a suitable arbitrator.*" (A. 25) (emphasis added). An exception to basic due process is not justified by expedience. This court recently made that point clear in *In re Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999). There the court examined the administrative child-support process statutorily created to address a dire need to expedite the adjudication of certain child-support matters. But the system created a tribunal that was not inferior to the district court and that permitted child-support officers to practice law. Therefore, despite the need for expeditious disposition of child-support cases, this court struck down the law as unconstitutional. The court explained:

> To this end, the legislature has created an expedited administrative process to adjudicate child support cases involving families receiving certain types of public assistance. While evidence of the administrative child support process' efficacy is hotly disputed by the parties, *there is no controversy about the importance of streamlining child support mechanisms. Nonetheless, the importance of this shared goal cannot ignore separation of powers constraints.*

Id. at 721 (emphasis added). In short, while insurers and claimants alike agree that there are benefits to a system that expeditiously disposes of certain no-fault claims, the importance of this shared goal cannot ignore due process constraints. If due process creates difficulty in the assignment of arbitrators, the solution lies in efforts to design a better system, not in adopting a rule that allows for evident partiality in violation of due process.

In addition to due process deficiencies, the blanket approach suffers from overbreadth. Evident partiality is "not susceptible to precise formulation in the abstract." *Barcon v. Tri-County Asphalt Corp.*, 430 A.2d 214, 219 (N.J. 1981) (addressing standards for party-designated — i.e., non-neutral — arbitrators where law allows vacation of arbitration award for evident partiality of a non-neutral arbitrator). Yet that is precisely what this proposed rule would do. No matter how many adverse cases the arbitrator has pending against a party he or she would judge, no matter the

circumstances, the rule would disarm any challenge on the basis of evident partiality. Under such a standard, an arbitrator who makes his living solely by representing no-fault claimants against one particular insurer would not be evidently partial. This simply cannot be. Instead, evident partiality should be decided on the facts of individual cases: "Whether a particular * * * arbitrator has * * * shown evident partiality can be decided only on the facts of each case." *Id.* at 220. For example, does it matter if it is the same claim representative with whom the arbitrator is separately trying to negotiate?[7] Does it matter if the witnesses — chiropractors or IME doctors, for example — are the same as those testifying in the claim the arbitrator is making as an advocate? What about identical issues like two-a-day chiropractic treatment or health-club membership in which a particular company takes a firm position? These things, though they all affect the arbitrator's ability to be unbiased, are summarily swept away by the blanket of the proposed rule. Moreover, by lowering the bar for impartiality and erecting a bright-line barrier to challenges, this rule encourages arbitrators to relax their own judgment about when they are biased. Put another way, by increasing the speed limit for bias, the rule assures that at least some arbitrators will go the limit plus five more miles per hour. Challenges for evident partiality provide an important check and balance to the system that should not be removed with a bright-line exception.

And that check and balance is especially important in the no-fault system because arbitration is mandatory. In contractual arbitration, the mere disclosure of a suspicious relationship will cause one of the contracting parties to withhold its assent to that arbitrator. That is why many cases — *Commonwealth Coatings*, for example — stress disclosure obligations. But in the mandatory no-fault system, disclosure never triggers any unilateral rights to disqualify the arbitrator. The objecting

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[7]The Illinois Supreme Court has held that bias is presumed under such circumstances. *Drinane v. State Farm Auto. Ins. Co.*, 606 N.E.2d 1181 (Ill. 1992).

party must be able to count on the court to disqualify an evidently partial arbitrator. Proposed Rule 10 takes away any effective check and balance, even if disclosure is candid.

And because Proposed Rule 10 lowers the bar for evident partiality, the expected result should be relaxed disclosure. But disclosure is also especially important in the no-fault system because the parties get very little information about the potential arbitrators before they must exercise their strikes. They have no pre-strike opportunity to contact the potential arbitrators about the nature of their practice, or their potential for partiality. Likewise, they have no opportunity to gain that information after the arbitration. In fact, proposed amended Rule 37(b) purports to prohibit district courts from making arbitrators into witnesses in actions related to the award. Proposed amended Rule 37(b) and Committee Comments. Proposed Rule 10 works a double negative — it discourages disclosure and it removes the only effective check and balance for evident partiality of a certain type.

Finally, the existence of evident partiality makes it difficult to rationally negotiate settlements. Because the identity of the arbitrator has more to do with the likelihood of success than do the merits of the claim, there is no consistency in settlement discussions. And once the arbitrator is actually assigned, one party usually has a significantly reduced incentive to negotiate. This focus on the arbitrator's identity — and the de-emphasis of the claim's actual merits — is just another unhealthy consequence of evident partiality that the proposed rule would perpetuate.

In sum, the proposed blanket rule tries to declare that "bias doesn't happen in Minnesota." But because such a rule effectively forecloses judicial scrutiny, it is quite certain that bias would be well served by it. Instead of adopting such a rule, the court should allow a system-specific standard for evident partiality to find its own level through judicial scrutiny of particular cases. That time-tested method assures that the problem will not summarily be cast aside, but will, instead, be closely

examined and compared to prior decisions. As Oliver Wendell Holmes so deftly reminds us, "[t]he life of the law has not been logic: it has been experience." Holmes, *The Common Law* at 1 (Howe ed. 1963). The experience of court-made law will serve the system better than a bright-line rule. Alternatively, through the Standing Committee or an *ad hoc* committee, the court can search out rule-making solutions that address all concerns. But the Insurance Federation urges the court not to adopt a rule that summarily declares the absence of any problem despite weighty and well-reasoned authority to the contrary.

II. Evident partiality is an ongoing problem that the system should attempt to solve, rather than deny by erecting a rule.

Minnesota's appellate courts have consistently held that contacts between an arbitrator and a party show evident partiality if they might create an impression of possible bias. *Northwest Mechanical*, 283 N.W.2d at 524. *See also*, *Pirsig*, 512 N.W.2d at 344 (holding that "contacts between an arbitrator and a party, or between arbitrators, that might create an impression of possible bias, require that the arbitration award be vacated"). Minnesota's courts have looked to a number of factors to determine whether a relationship creates an impression of possible bias: whether the relationship was substantial; long-standing and repeated; and related to the subject matter of the arbitration. *See Egan & Sons*, 414 N.W.2d at 786 (substantial relationship); *Safeco Ins. Co. of America v. Stariha*, 346 N.W.2d 663, 666 (Minn. App. 1984) (long standing and repeated); *Unstad v. Lynx Golf, Inc.* 1997 WL 193805 at **3 (Minn. App.) *review denied* (June 26, 1997) (related to the subject matter of the arbitration) (A. 29-31); *Ehlen v. Rice*, 1998 WL 188864 at ** 2 (Minn. App.) (contacts going to the merits of the dispute and long-standing relationship) (A. 32-34). The decisions have interpreted evident partiality broadly — consistent with *Commonwealth Coatings* —

to include contacts that are "more than trivial." *Commonwealth Coatings*, 393 U.S. at 151-52, 89 S.Ct. at 340-41 (White, J., concurring).[8]

The existence of a substantial, ongoing, and repeated adverse relationship between the arbitrator and a party undeniably gives the appearance of possible bias. Indeed, the Illinois Supreme Court concluded that an arbitrator who represented a party adverse to an insurer — and was therefore required to negotiate with that insurer on his client's behalf — was presumptively biased in an uninsured-motorist arbitration:

> When an arbitrator and a party to the arbitration are negotiating a separate matter, a danger arises that undue influence may occur upon the arbitrator. However, actual proof of such influence may seldom be evident where communication between the parties actually crosses from one matter to the other. * * * The existence of an interest or bias is a very real possibility when an arbitrator and a party to the arbitration meet separately to negotiate a separate matter. Thus, it is proper to create a presumption of bias in a factual situation such as here.

Drinane v. State Farm Auto. Ins. Co., 606 N.E.2d 1181, 1185 (Ill. 1992). A rule denying the existence of this apparent bias would do nothing to serve the no-fault system, but would, instead, do

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[8]Minnesota law regarding evident partiality is consistent with that of several other jurisdictions nationwide. *E.g. Olson v. Merrill Lynch, Pierce, Fenner & Smith*, 51 F.3d 157, 159-60 (8th Cir. 1995) (requiring disclosure of "even indirect ties"); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982) (vacating award where arbitrator failed to disclose a repeated, significant, direct and substantial financial relationship with a party); *Burlington Northern R.R. v. Tuco, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) (award may be vacated for evident partiality if arbitrator fails to disclose "facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality"); *Richco Structures v. Parkside Village, Inc.*, 263 N.W.2d 204, 558 (Wis. 1978) (vacating award where arbitrator failed to disclose "facts which might indicate to a reasonable person that the arbitrator has or might reasonably be supposed to have an interest in the outcome of the arbitration, or which may reasonably support an inference of or the appearance of the existence of bias, prejudice, partiality, or the absence of impartiality.").

Some jurisdictions distinguish between Justice Black's and Justice White's opinions in *Commonwealth Coatings*. *E.g. Morelite Const. Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984). Those distinctions that apply the more "stringent" standard — supposedly articulated by Justice White — look for something between the appearance of bias and actual bias. *Id.* at 84. But others, like Minnesota, make no mention of the two opinions. *E.g. Northwest Mechanical, Inc. v. Public Tuils. Comm'n, City of Virginia*, 283 N.W.2d 522, 524 (Minn. 1979) (citing Justice White's concurring opinion without discussion); *Drinane v. State Farm Mutual Auto. Ins. Co.*, 606 N.E.2d 1181, 1184-85 (Ill. 1992). Still others specifically reject this supposed distinction. *Burlington Northern*, 960 S.W.2d at 633-37.

This court does not now have to decide whether Minnesota distinguishes between the two opinions because, regardless of which standard the court is applying, this proposed rule would preclude considering one factor.

substantial harm by erecting a barrier to the problem's solution and by encouraging system participants to lose faith in the existence of due process.

And if Minnesota adopts such a rule, it will be alone in the country. Indeed, only two other no-fault states — Florida and New York — mandate binding arbitrations of these claims. Fla. Stat. ch. 627.736 (1999); and N.Y. Insurance Law § 5106 (McKinney 1999). And only Florida has a system that is remotely similar to Minnesota's. *Compare* Fla. Stat. ch. 627.736 (1999) (arbitration between *providers* and insurers is mandatory and binding) *with* N.Y. Insurance Law § 5106 (McKinney 1999) (arbitrator's award is binding except where vacated or modified by a special master arbitrator; if award exceeds $5,000, insurer or claimant may institute court action to adjudicate dispute *de novo*). Thus, not only is Minnesota the only state to have such a far-reaching mandatory arbitration system, the proposed rule would make it the only state to allow attorneys with substantial numbers of pending adverse claims against a particular insurer to sit as a "neutral" factfinder on that insurer's arbitrations.

This is not to say, of course, that every attorney who was *ever* adverse to an insurer could *never* act as an arbitrator in a no-fault case in which the latter was a party. Such a bright-line rule would serve the system no better than would Proposed Rule 10. But the court should remember that the United States Supreme Court vacated the award in *Commonwealth Coatings* because of the neutral arbitrator's sporadic business relationship with one of the parties that produced fees of only $12,000 over a four-year period. *Commonwealth Coatings*, 393 U.S. at 146. The Court referred to this situation as a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case." *Id.* at 148. Here, the proposed rule is in direct response to the disqualification of an arbitrator who had 25 pending claims against the insurer and whose firm had made 557 claims just since January 1997. And fifty-three of that

arbitrator's 100 personal claims against the insurer were no-fault claims. This is important because many of the witnesses are the same in these types of arbitrations. Arbitrators must assess the credibility of the same chiropractors, the same treating and IME doctors, and the same claim representatives in case after case after case. And many of the fact issues recur, like frequency of treatment and the claiming of expenses for things like health-club memberships and new mattresses. Unfortunately, resolution of these issues appears to depend less on the facts of the case and more on whether the arbitrator has a financial stake in having the insurer agree to pay for those types of claims in the future.

And that is perhaps the most important point. Attorneys with pending claims can derive direct financial gain because making a higher award helps achieve higher settlements in other cases. And if a recurring factual issue favors the claimant in more and more cases, the insurer will be less likely to fight it in the future, again directly assisting the arbitrator in later settlement negotiations with that insurer. Moreover, by driving up the *average* award, the arbitrator makes it more likely that his or her cases will attain a tort threshold, thus triggering the recovery of general damages. One commentator describes this strategy as follows:

> Close examination of claiming practices in some no-fault states has shown an alarming and recurring pattern of some injured parties overutilizing medical services in an effort to generate a tort claim.

Tyrpin & Lee, *An Analysis of the Minnesota Private Passenger Automobile No-Fault System*, 24 Wm. Mitchell L. Rev. 1019, 1032 (1998) (A. 35-59).[9] These financial incentives can be substantial.

For the majority of claimants' lawyers, their adversarial relationship with insurers is professional and gentile, but it is nonetheless adversarial. They may have an interest, for example,

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[9]The authors prepared this article in conjunction with a presentation by the Insurance Federation at a no-fault symposium at the William Mitchell College of Law in March 1998.

in salvaging a particular chiropractor's credibility, or in convincing the insurer (through the award) that their client's chiropractic care was necessary treatment. In any event, it never behooves their clients to find, for example, that certain care is not necessary, or that a particular care provider is not credible. And, whether consciously or unconsciously, these interests are likely to cause bias; these attorneys can no more be expected to set those interests aside than could a labor union be expected to ignore the interests of one of its members:

> [T]he primary function of [a labor union] is that of bargaining with employers on behalf of its membership in order to achieve these objectives [favorable work conditions]. * * * By its very nature, therefore, a labor union addresses disputes concerning compensation arrangements between its members and third parties with interests identical to those of the affected members; *to suppose that it would do otherwise is to suppose that it would act in a manner inconsistent with its reason for being.*

Graham v. Scissor-Tail, Inc., 623 P.2d 165, 177-78 (Cal. 1981) (holding contract between promoter and musicians was unconscionable because it provided for mandatory, binding arbitration of all contract disputes in front of the musicians' union). A rule denying the potential for partiality — an impression of possible bias — under such circumstances does not eliminate partiality, it perpetuates partiality.

And from outward appearances — the only thing by which to judge such an issue — it seems to many insurers an unfortunate fact that some no-fault arbitrators are not impartial. Their biases are evident from the things they say in their Statements of the Case in the arbitrations in which they appear as counsel, leaving a clear impression that they could not serve without bias. How can an insurer be expected to believe that the attorney making the following comment would be fair and impartial as an arbitrator:

> The small penalty of awarding statutory interest comes nowhere close to making up for the cost of fees and expenses related to bringing this action. Insurance companies

> count on this fact, and use it to try to force Plaintiff's (sic) to "settle-out" benefits for a fraction of their value.

(A. 60). Likewise, what is an insurer to expect when it sees a "rail-against-the-insurer" template that is cut and pasted into many arbitration books, with only the insurer's name changing:

> Metropolitan Property & Casualty Insurance has violated the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that he had bought and paid for, Metropolitan Property & Casualty Insurance turned their back on him. This is how Metropolitan Property & Casualty Insurance treated this particular customer and all of their customers.
>
> American Family has violated the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that she had bought and paid for, American Family turned their back on her. This is how American Family Insurance treated this particular customer.
>
> Liberty Mutual has violated the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that she had bought and paid for, Liberty Mutual turned their back on her. This is how Liberty Mutual Insurance treated this particular customer.
>
> State Farm has violated the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that she had bought and paid for, State Farm turned their back on her. This is how State Farm Insurance treated this particular customer.

(A. 61-64). Do we really expect either of the following attorneys, acting as arbitrators, to carefully weigh an IME doctor's report when they make statements like:

> That doctor saw the claimant, of course, on only one occasion for a brief period of time, and his conclusions contain no great surprises, considering the purpose of the examination. It deserves to be given no weight whatsoever, when compared to the overwhelming weight of evidence in this case.
>
> As attorneys, this unsupported opinion, from a doctor about whom MetLife refuses to reveal information that would certainly impeach his credibility, is the same "bought-and-paid-for" opinion insurance doctors have touted in virtually every IME they perform.

(A. 65-66).

These comments go beyond normal advocacy. They show the existence of a bias that creates an atmosphere of distrust whenever these attorneys become the decision-maker instead of the opponent. Likewise, how can an insurer accept an arbitrator's findings of fact when, as an advocate, he or she encourages other arbitrators to disregard the law? For example, one attorney/arbitrator repeatedly seeks attorneys' fees in arbitration, arguing that such an award is "now allowed under the No-Fault Rules." (A. 67). But he uses ellipses — together with a citation to an outdated version of the rule — to truncate the express admonition, in the very rule he cites, that "[t]he arbitrator may *not*, in the award, include attorneys fees for either party":

> [A]ttorneys' fees are now allowed under the No-Fault Rules. "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable consistent with the Minnesota No-Fault Act * * * ." Minnesota Rules of Procedure for No-Fault Arbitration, Rule 32, 1/1/91.[10] The arbitrator can only make the No-Fault procedure "just and equitable" by awarding attorneys' fees to the Claimant.

(A. 67). In short, this attorney — himself sometimes a no-fault arbitrator — is encouraging other arbitrators to rule contrary to law. *See LaValley v. National Fam. Ins. Corp.*, 517 N.W.2d 602, 605 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994) (holding that attorneys' fees are not recoverable). If he were successful in convincing an arbitrator to award attorneys' fees, but the arbitrator did not explain the breakdown of the award, there would be no way to challenge it. And acting as an arbitrator, this attorney apparently believes that he has free rein to award attorneys' fees in violation of the law, so long as he does not categorize any portion of the award as being for fees. How can an insurer have faith in an arbitrator's findings of fact if it knows they may be based on blatant, but unspoken, violations of the law? In a system where the arbitrator's decision is virtually

[10]This quotation comes from a 1997 arbitration book (A. 68). The no-fault rules have expressly prohibited awards of attorneys' fees since 1993.

review-proof, the court should expect a more stringent standard of impartiality, not the relaxed standard of Proposed Rule 10:

> [W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.

Commonwealth Coatings, 93 U.S. at 149.

The above examples help show why faith in the system has deteriorated. And without bipartisan faith in the system, the expediency and finality of arbitration are of secondary importance:

> [W]e give priority to the need to maintain the integrity of arbitration and public faith in the process. * * * [I]t is our strongly held view that honest, fair, and impartial arbitration is as important as the finality of arbitration.

Barcon, 430 A.2d at 219. *See also, Commonwealth Coatings*, 393 U.S. at 151 ("The arbitration process functions best when an amicable and trusting atmosphere is presented and there is voluntary compliance with the decree, without need for judicial enforcement."). The no-fault system does not need definitional barriers to thwart challenges for evident partiality. It needs a mechanism through which problems can be exposed and fair and workable solutions put in place.

The comments to AAA's 1997 surveys show that many participants in this system feel it is unbalanced. For example, in response to Question 2, "How could case administration be improved," participants wrote:

> Get balanced panels.
>
> The decision could have been based on the evidence.
>
> Panel equity.
>
> The strike list process of appointing an arbitrator continues to mystify me. Why is it when there are two plaintiff attorney's and two defense attorneys on a panel, [the insurer] gets their third choice or a Claimant's attorney assigned.

(A. 73-74). These comments to Question 5, "What aspect of the arbitration process was most effective," also show a lack of faith in the process:

> The arbitrator spent too much time asking questions of Claimant. If Claimant's counsel doesn't perform adequately, this shouldn't give the arbitrator the right to prove up the case for him/her.
>
> Is this effective? You have got to be kidding.

(A. 74-75). And perhaps most telling are the comments in response to Question 6, "What aspect of the arbitration process could be improved?":

> I have no complaints about the arbitration is [sic] this case but the panels are severely skewed toward plaintiff attorneys.
>
> If possible more unbiased arbitrators.
>
> Your panels continue to stink.
>
> Fair decision.
>
> Fair panels - St. Cloud panels are horrendous.
>
> The arbitrator was the most Claimant's oriented arbitrator possible. He is counsel on a case which I am defending, but did not disqualify himself. He did not give the Respondent a fair hearing.
>
> Unbiased arbitrators. I am so tired of plaintiff attorney's dominating the strike lists.
>
> AAA must do a better job of putting together an impartial panel of arbitrators. In this case Respondent was forced to present it's [sic] case to a lawyer who practices exclusively in the area of personal injury and had no incentive to deny any part of claimant's claim. Not surprisingly, the Arbitrator ruled against the insurance company in every aspect.
>
> The panel of arbitrators apparently have no regard for a just and equitable system.

(A. 75). Granted, the AAA's surveys generated a number of favorable responses from satisfied participants, but the quality and quantity of responses that go straight to the core of the proposed rule shows that the problem is a real one. And it is so obvious to most participants that it has spawned

the claimants' practice of arbitrator shopping. This is done by waiting for an arbitrator assignment, withdrawing the claim if the arbitrator does not seem favorable enough, and then refiling at a later time. This strategy is typified by the following correspondence from one claimant's counsel to an insurer: "We intend to re-file this matter next year to get a new panel. I believe that it would be in the best interest of [my client] and your company if we were able to resolve this matter on a full and final basis rather than to incur the additional filing fee and costs." (A. 76). And even the Standing Committee understands that claimants shop for partial arbitrators. That is why the Committee has proposed a rule to thwart the practice, requiring that the same panel or arbitrator be assigned upon refiling of any withdrawn claim. *See* Proposed New Rule - Withdrawal. A rule that would define away what is actually happening — i.e. the use of arbitrators who appear biased — will not serve the system well, and the Insurance Federation therefore urges the court to reject it.

CONCLUSION

Proposed Rule 10 is bound to have an adverse and confusing effect. It is written as though it is overcoming a "presumption" of bias, but that language does not even address the legal standard in Minnesota. The actual standard for evident partiality — the appearance of a possible bias — does not presume anything about the bias of a given individual. It protects the system's integrity by opting for an arbitrator in whose decision both parties will have faith and confidence. Indeed, Judge Gomez did not purport to "presume" bias, and the insurer did not ask her to do so. She found the existence of evident partiality by applying this court's legal standard to the case-specific facts. But despite its confusing reference to a "presumption," the proposed rule would effectively, if not completely, foreclose judicial relief in circumstances where this court's own case law would disqualify an arbitrator. Moreover, by defining away the existence of bias, the proposed rule would

sanction the failure to disclose contacts that would otherwise raise questions about the appearance of partiality. These things can only foster a further lessening of faith in the system.

The Federation appreciates that the current system may have worked well in the past. Unfortunately, the legal profession has become more fragmented and less collegial. The practice is now widely treated as "a business." While system manipulation and bias once seemed unthinkable, they now appear likely. A fuller examination of Justice Holmes' famous statement about law and logic — quoted above — reveals that experience sometimes counsels us to consider the development of better rules:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of the nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Holmes, *The Common Law*, at 1 (Howe ed. 1963). There are many other states that have a no-fault system, but none use precisely the same dispute-resolution system as Minnesota. In other words, there is no single, rigid formula without which a no-fault system cannot exist. There is nothing inviolate about the way things are. In response to the real and ongoing systemic problem revealed by the debate over this rule, the Insurance Federation urges the court to seek out real solutions, either through its Standing Committee or an *ad hoc* committee. Alternatively, the court can allow a rule of evident partiality to find its own level in the judiciary based upon case-by-case decisions. But the court should not adopt a blanket rule that acts as a barrier to the important check and balance provided by the rule against evident partiality. Proposed Rule 10 should be rejected.

Respectfully submitted,

Dated: 11 August 1999

By _____

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On behalf of The Insurance Federation of Minnesota

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STATE OF MINNESOTA

COUNTY OF HENNEPIN

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DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Michelle Bach Kinder,

Claimant,

BY DEPUTY HENN CO DISTRICT COURT ADMINISTRATION

MEMORANDUM AND ORDER

v.

File No.: CT 97-3037

State Farm Mutual Automobiles Insurance Company,

Respondent.

To: Claimant through her attorney Paul K. Downes, MEYER & ASSOCIATES, P.A., Park Place East, Suite 610, 5775 Wayzata Blvd., St. Louis Park, MN 55416 and Respondent through its attorney, Michael R. Moline, MEAGHER & GEER, P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402-3788.

On April 25, 1997, Judge Isabel Gomez of this District Court heard Claimant's Motion to Confirm Arbitration Award and Respondent's Motion to Vacate Arbitrator Lavoie's Award. Claimant was represented by Paul K. Downes. Respondent was represented by Michael R. Moline.

At the hearing, the Court requested further briefing. The parties' final submissions were received by the Court on May 19, 1997.

Based upon the parties' written and oral arguments, and upon its own filed herein, the Court makes the following

ORDER

1. That Claimant's Motion to Confirm the Arbitration Award is DENIED.

2. That Respondent's Motion to Vacate Arbitrator Lavoie's Award is GRANTED.

3. That Claimant shall submit to an Independent Medical Examination in accordance with Minn. Stat. §65B.56, Subd. 1, and Neal v. State Farm Mut. Ins. Co., 529 N.W.2d 330, 333 (Minn. 1995).

4. That any further dispute as to whether the benefits sought by Claimant are reasonable, necessary and related to a motor vehicle accident shall be submitted to arbitration pursuant to the standards and procedures set forth in Minn. Stat. §568.525 et seq.

5. That costs and attorney's fees in this case be borne by the parties.

6. That the attached MEMORANDUM be made part of this Order.

BY THE COURT:

Isabel Gomez

Hon. Isabel Gomez,
Judge of District Court

Dated this 8 day
of July, 1997.

A. 2

On or about May 23, 1996, State Farm received a bill for Kinder's treatment at NCC in the amount of $1,530.40. That bill covered treatment at NCC from April 18, 1996 through May 17, 1996.

On June 19, 1996, State Farm sent Kinder a letter which informed her that she was scheduled for a medical examination (an "IME") with Dr. Michael Jackson on August 5, 1996. At Kinder's request, State Farm rescheduled the examination to August 8, 1996.

On July 1, 1996, Helen Meyer, an attorney at Pritzker & Meyer, P.A., contacted Marshall Heitzman, State Farm's Claim Representative in this case, and informed him that she had been retained to represent Ms. Kinder. Meyer further indicated that "Ms. Kinder [was] willing to attend an independent medical examination but only on the condition that all outstanding claims [were] paid in full prior to the date of any examination." Respondent's Exhibit C.

Ms. Meyer restated that position in a letter dated July 16, 1996. State Farm then suspended Kinder's no-fault benefits, refusing to pay any additional amounts until she attended an examination. As a result of State Farm's having suspended benefits, Kinder filed a petition for no-fault benefits. Because, pursuant to the standards and procedures set forth in Minn. Stat. §56B.525 et seq., all claims for $10,000.00 or less must be arbitrated through the American Arbitration Association, ("AAA"), this matter proceeded to be arbitrated through the AAA.

At the time of the arbitration, State Farm was represented

by the lawfirm of Meagher & Geer. The parties were presented with a panel of arbitrators. Each party struck one member of the panel and ranked the remaining arbitrators in order of preference. Arbitrator James A. Lavoie was selected to arbitrate the matter.

The American Arbitration Association does not require or forward disclosure of potential conflicts of interest until the arbitrator is selected and accepts appointment. On October 15, 1996, Lavoie accepted appointment to arbitrate this matter and made the following disclosure:

> "I represent the plaintiff in Kimberly Curran v. Sven Gustavsson. Sven Gustavsson is insured by State Farm and represented by R. Gregory Stephens, Kerry Evenson, and Leatha Walter of Meagher & Geer. I represent many other persons on claims where the adverse party is insured by State Farm. Also, our firm is handling other claims being defended by Meagher and Geer. I don't believe these circumstances affect my ability to be impartial, but I am compelled to make the disclosures." See, Exhibit A to Second Supplemental Affidavit of Michael R. Moline.

The parties received Arbitrator Lavoie's disclosure only after he accepted appointment.

On October 23, 1996, R. Gregory Stephens, of the Meagher & Geer lawfirm, wrote to the American Arbitration Association and objected to Arbitrator Lavoie's appointment, citing the inherent conflict of interest, or evident partiality. Kinder's attorney, Paul K. Downes, filed a response, asking that Arbitrator Lavoie remain. On November 8, 1996, the American Arbitration Association, without explanation, "determined that Arbitrator James Lavoie shall be reaffirmed as the arbitrator on this file." See, Exhibit B to Second Supplemental Affidavit of Michael R. Moline.

State Farm petitioned Arbitrator Lavoie to compel Kinder to attend an IME. Lavoie denied State Farm's petition. State Farm contends that they are entitled to an IME as of right, whereas Kinder argues that Lavoie was within the scope of his authority when he determined that her failure to attend an IME was reasonable.

The arbitration hearing took place on December 17, 1996. On January 2, 1997, Lavoie awarded Kinder $3,295.02 in medical expenses, $451.98 in mileage reimbursement, $159.94 in interest, and $210.00 in costs which represent the filing fee plus 50% of the arbitrator's fee, for a total award of $4,116.94. By cross-motions, Kinder moves to confirm Arbitrator Lavoie's award, and State Farm moves to vacate the award.

Analysis:

Minn. Stat. §572.19 establishes grounds for vacating an arbitration award:

> "the Court shall vacate an award where . . .
>
> (2) [t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) [t]he arbitrators exceeded their powers; . . . ."

I. Evident partiality.

"Evident partiality goes to the right of a party to have an arbitration hearing that is free from an appearance of impropriety." Pirsig v. Pleasant Mount Mut. Fire Ins., 512 N.W.2d 342, 343 (Minn. App. 1994). "Evident partiality" is not the same as actual bias. Commonwealth Coatings Corp. v.

Continental Cas. C , 393 U.S. 145, 147-48, 89 . Ct. 337, 338-39, 21 L.Ed.2d 301 (1968), rehearing denied, 393 U.S. 1112, 89 S. Ct. 848, 21 L.Ed.2d 812 (1969). "[E]vident partiality is a legal question. . . . It is not enough that the arbitrators be unbiased; they must not even appear to be biased." Pirsig, supra, citing, Commonwealth Coatings, 393 U.S. at 150.

In this case, after the parties exercised their first strikes in choosing an arbitrator, Lavoie disclosed the fact that he represented the plaintiff in a matter in which State Farm insured the defendant. When he Lavoie accepted appointment as an Arbitrator in this matter, State Farm was represented by R. Gregory Stephens, Kerry Evenson, and Leatha Walter of Meagher & Geer. Thus, Meagher and Geer's attorneys represented State Farm not only on cases in which Lavoie was then actively prosecuting, but in this case as well. It was only after Lavoie's disclosure that R. Gregory Stephens could, and did, write to the American Arbitration Association and object to Lavoie's appointment, citing the inherent conflict of interest, or evident partiality.

Kinder cites Rule 8 of the AAA Rules in support of her position that State Farm "failed to follow the necessary procedure to challenge an arbitrator . . . " Claimant's Memorandum - Part II, ("Claimant's Memorandum"), at 3. Rule 8 provides, in part, as follows:

> . . . A party to an arbitration may advise AAA of any reason why an arbitrator should withdraw or be disqualified from serving prior to exercising strikes. . . .

Claimant correctly notes that it was not until after State Farm had exercised its strikes that it complained about Lavoie's

qualifications to arbitrate this dispute. However, State Farm had no reason to object to Lavoie's appointment prior to his disclosure.

This case is distinguishable from Safeco Ins. Co. v. Stariha, 346 N.W.2d 663 (Minn. App. 1984), where the Court determined that "[a] remote and unrelated attorney-client relationship between a neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality," Id. at 666. Here, Lavoie's relationship with State Farm was neither remote or unrelated. At the time of this arbitration, Lavoie was actively representing a plaintiff who was suing a defendant insured by State Farm: that relationship was both immediate and related.

Lavoie further disclosed that he represents many other persons on claims where the adverse party is insured by State Farm, and that his firm is handling other claims being defended by Meagher and Geer. Whereas his relationship to attorneys associated with Meagher and Geer might not automatically rise to the level of evident partiality, the fact that he actively represents clients who are opposed to State Farm provides strong evidence that the arbitration would not be "free from an appearance of impropriety." See, Pirsig, Supra, at 343.

Claimant further argues that because State Farm is the largest auto insurance carrier in the State of Minnesota, "to suggest that an arbitrator should be disqualified based on the fact that they . . . are presenting a claim against [them] would eliminate a large majority of plaintiff's attorneys and would

create a significantly unlevel playing field as it pertains to potential arbitrators." Claimant's Memorandum, at 9. While this Court is mindful of the desirability of arbitrating no-fault claims, the arbitration process must maintain its integrity if it is to survive as an alternative to litigation. Although the pool of individuals who can arbitrate claims against State Farm may indeed be diminished due to State Farm's size, State Farm is entitled to arbitration hearings that are free from the appearance of impropriety.

In Minnesota, "contacts between an arbitrator and a party . . . that might create an impression of possible bias, require that the arbitration award be vacated." Northwest Mechanical Inc. v. Public Utils. Comm'n. City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979), citing, Commonwealth Coatings Corp. v. Continental Cas. Co., Supra, at 150. Because Lavoie's relationship with State Farm evidences possible bias, his award must be vacated.

II. Scope of arbitrator's authority.

In the area of automobile reparation, the Minnesota Supreme Court has limited the arbitrator's role to one of deciding issues of fact, reserving to the courts the interpretation of the law. Neal v. State Farm Mut. Ins. Co., 529 N.W.2d 330, 331 (Minn. 1995); Johnson v. American Family Mut. Ins. Co., 426 N.W.2d 419, 421 (Minn. 1988). Although the reason why Kinder refused to attend an IME is a question of fact, the legal effect of her refusal to attend the IME is a question of law. When a case presents both legal questions and factual disputes, it is

improper to defer an arbitrator's determination. AMCO Ins. Co. v. Ashwood-Ames, 334 N.W.2d 740 (Minn. Ct. App. 1991).

Minn. Stat. §65B.56, subd. 1, (1986) provides as follows:

> Any person with respect to whose injury benefits are claimed under a plan of reparation security, shall upon request of the reparation obligor from whom recovery is sought, submit to a physical examination by a physician or physicians selected by the obligor as may be reasonably required.

Under Minn. Stat. §65B.56, Subd. 1, State Farm was entitled to its first IME as a matter of right.

Pursuant to Neal v. State Farm, Supra, Kinder's refusal to attend any IME until State Farm paid all contested benefits was unreasonable as a matter of law. The Court in Neal specifically stated,

> "That the insurer suspends, rather than terminates, payment until the claimant has, upon request, submitted to a physical examination scheduled in accordance with the statutory guidelines seems eminently reasonable." Id., at 333.

This record herein shows that State Farm suspended Kinder's benefits due to her refusal to submit to an IME. State Farm had previously paid for claimant's treatment, and only scheduled an IME pursuant to the statutory guidelines after she had returned to treatment and submitted a large amount of contested bills at one time.

Prior to the arbitration hearing, State Farm petitioned Lavoie to compel Kinder to attend the IME that State Farm was entitled to as a matter of right under Minn. Stat. §65B.56, Subd. 1. Lavoie denied State Farm's petition, subsequently finding that claimant's refusal to attend the IME was reasonable because State Farm had breached its contract with her. In making that

determination, Lavoie obviously interpreted the insurance contract. The "interpretation and construction of either the statute or the insurance contract or both" is a question for the courts. AMCO Ins. Co., Supra, at 332, citing Sorenson v. St. Paul Ramsey Medical Ctr., 457 N.W.2d 188, 190 (Minn. 1990). Arbitrator Lavoie exceeded the scope of his authority.

Conclusion:

The facts of this case show that Arbitrator Lavoie should not have arbitrated this matter due to evident partiality. Moreover, his determination that State Farm breached its contract with Kinder and his decision that her failure to attend an IME was reasonable are legal determinations. Thus, Arbitrator Lavoie exceeded the scope of his authority in deciding this case. For these reasons, this Court must set aside his Findings and Order.

I.G.

Quarterly Meeting of the No-fault Standing Committee
October 17, 1997 Minutes

In Attendance:

John E. Simonett, Chair
Louise Dovre Bjorkman
Michael Ford
Robert Hauer Jr.
David Jorstad
Marianne Settano
Stephen J. Smith
Keith Sjodin
Richard Tousignant
Karen Melling van Vliet

AAA Staff:

Kelly Baker
Jim Deye
Paul Dompier
Ehren Ekstrand
Nancy Quam
Anne Rabatin
Kathryn Stifter

Guests:

Paul Downes
Roger Haydock
Michael Moline
Jody Hanson
Judy Heitz
Jim Kremer

The meeting was called to order at 2:30 p.m.

$10,000 jurisdictional limit

The Committee discussed Jan Gunderson's submission of Judge Justman's Order in Beste v. Allstate Insurance and determined that no rule or policy change is necessary at this time.

Proposed amendment to Rule 12

The committee determined that a rule requiring respondents to produce a copy of the no-fault file is not necessary.

Proposed amendment to Rule 8

Ms. Bjorkman moved to deny the proposal that strikes be equal for claimants and respondents in situations where there are multiple respondents. Ms. Settano seconded. Motion carried to deny proposal.

Minutes of April 18, 1997 meeting

Mr. Hauer moved to approve the previous minutes and Ms. Bjorkman seconded. Motion carried.

Consideration of this quarter's nominees to the No-fault panel

Mr. Jorstad moved to approve this quarter's nominees. Mr. Ford seconded. Motion carried.

Discussion of Kinder v. State Farm Insurance

In response to the decision by Isabel Gomez, Paul Downes proposed a change to Rule 8 stating that an arbitrator should not be stricken or removed on the sole basis that they ever handled a case against the insurance company. Michael Moline spoke in opposition to the proposal. The Chair appointed a special subcommittee (Sjodin, Tousignant and Melling van Vliet) which will meet to recommend to the full committee what action will be taken on behalf of the Standing Committee. The Chair asked Mr. Downes and Mr. Moline to draft their positions and submit them to the AAA for transmittal to the subcommittee.

In the interim, the committee agreed upon the following statement which AAA may include in a letter to a party objecting to an arbitrator based only on the Gomez decision:

The mere fact that an arbitrator has handled claims against a party to the arbitration in the past, or currently, is not in and of itself evidence of partiality or the appearance thereof.

Mr. Jorstad moved to accept this language and Mr. Hauer seconded. The motion carried.

National Arbitration Forum

Roger Haydock presented a proposal to amend the No-fault rules to allow competitive proposals from arbitration providers. Mr. Smith made a motion to amend Rule 1 by adding Rule 1c to designate the AAA and delete all other references to AAA throughout the rules. Mr. Sjodin seconded. The motion failed.

Mr. Sjodin then moved that the petition to amend the Rules of Procedure for No-Fault Arbitration, presented by the National Arbitration Forum, be respectfully declined. Mr. Jorstad seconded. Motion carried.

Arbitrator biographical reporting practices

This topic will be discussed by the special subcommittee assigned to the Gomez decision.

Request to provide arbitrator biographical data to parties

Mr. Tousignant moved to deny the request that AAA provide biographical sheets to parties. Mr. Jorstad seconded. Motion carried.

Proposal for new rule providing for arbitrator compensation when a case is postponed

Mr. Hauer moved to deny the proposal. Mr. Jorstad seconded. Motion carried.

Report from nominating subcommittee

Mr. Jorstad, on behalf of the nominating subcommittee (Jorstad, Smith, Settano and Sjodin) moved for the nomination of the following individuals to the No-Fault Standing Committee:

Michael Fargione to fill the seat currently held by Bob Hauer
Michael LaFountaine to fill the seat currently held by Michael Ford
William Strifert to fill the seat currently held by Louise Dovre Bjorkman

Mr. Sjodin seconded the nomination. The committee voted to recommend the nominees to the MN Supreme Court.

Brief submitted by Dr. David Ketroser

The committee members agreed that health care providers should not be allowed to bring no-fault claims in the provider's own name based on an assignment of benefits. Mr. Hauer will respond to Dr. Ketroser on behalf of the committee.

Results of removal/reaffirmation appeals

The final votes on appeals submitted to the committee from April through September were distributed to the committee. There was no discussion.

Other business

Chairman Simonett will not be able to attend the next Standing Committee meeting. He has asked Ms. Settano to chair the January 16, 1998, meeting in his place.

There was a resolution by the Chair commending Louise Dovre Bjorkman, Michael Ford and Bob Hauer for their service on the Standing Committee. Their contribution to the prompt and fair administration of justice is greatly appreciated by the Committee, the AAA and the Court.

The meeting was adjourned at 4:33 p.m.

The next quarterly meeting of the Standing Committee will be on January 16, 1998, at 3 P.M. at the offices of the AAA.

Kathryn Stifter, No-fault Supervisor


American Arbitration Association
Dispute Resolution Services Worldwide

514 Nicollet Mall, Floor 6, Minneapolis, MN 55402-1092
telephone: 612 332 6545, facsimile: 612 342 2334
http://www.adr.org

February 2, 1998

Paul K. Downes
Meyer & Associates, P.A.
5775 Wayzata Blvd., Suite 610
St. Louis Park, MN 55416

Michael R. Moline / File 50433-1446
Meagher & Geer
4200 Multifoods Tower
33 S. Sixth Street
Minneapolis, MN 55402

Re: 56 600 04092 97
Michelle Bach Kinder
and
State Farm Insurance Companies

Dear Parties:

The Association has received Mr. Downes January 29, 1998, letter, and request for the removal of Robert M. Frazee in response to Mr. Moline's request for the removal of George E. Antrim III and James G. Weinmeyer.

Upon review of the file and the contentions of the parties, the Association has removed Robert M. Frazee from the list and have reaffirmed George E. Antrim III and James G. Weinmeyer.

Therefore, enclosed is a revised list of four members of our No-Fault Panel from which the arbitrator is to be appointed. The parties shall have until February 11, 1998, to submit their strikes and/or order of preference. If we have not received the list by the due date, we will assume that all names listed are acceptable.

The Association requests that copies of all correspondence to our office be exchanged between the parties with the exception of the strike list and the calendar. If you have any questions, please contact the undersigned.

Sincerely,

Anne M. Rabatin
Case Administrator

AMR/s
Enclosure(s)

Post-it® Fax Note 7671	Date 11/4	# of pages ▶
To Jenneane Jansen	From Sue Harrow	
Co./Dept. Meagher & Geer	Co. AAA	
Phone #	Phone #	
Fax # 338-8384	Fax #	

A. 14

American Arbitration Association
Dispute Resolution Services Worldwide

514 Nicollet Mall, Floor 6, Minneapolis, MN 55402-1092
telephone: 612 332 6545, facsimile: 612 342 2334
http://www.adr.org

CASE NO.: 56 600 4092 97
CLAIMANT: Michelle Bach Kinder
RESPONDENT: State Farm Insurance Companies
RE: Selection of the Arbitrator
DUE DATE: February 11, 1998

ADMINISTRATOR: Anne M. Rabatin

NO FAULT PANEL OF ARBITRATORS SUBMITTED TO THE PARTIES

If your mutually acceptable choice for arbitrator is unable to accept appointment or, if for any other reason the appointment cannot be made from this list, the Association will make an appointment without the submission of an additional list to the parties.

George E. Antrim III
Krause & Rollins
Minneapolis, MN

Bruce P. Candlin
Candlin & Wright
Bloomington, MN

Robert J. King, Sr.
Hvass, Weisman & King
Minneapolis, MN

James G. Weinmeyer
Schwebel, Goetz, Sieben & Moskal
Minneapolis, MN

DATED:_____

ON BEHALF OF: _____

SIGNED: _____

**********DO NOT CONTACT THE NAMES ON THIS LIST**********

A. 15

1446

American Arbitration Association
Dispute Resolution Services Worldwide

514 Nicollet Mall, Floor 6, Minneapolis, MN 55402-1092
telephone: 612 332 6545, facsimile: 612 342 2334
http://www.adr.org

March 4, 1998

Paul K. Downes
Meyer & Associates, P.A.
5775 Wayzata Blvd., Suite 610
St. Louis Park, MN 55416

Michael R. Moline / File 50433-1446
Meagher & Geer
4200 Multifoods Tower
33 S. Sixth Street
Minneapolis, MN 55402

REC'D MAR 05 1998

Re: 56 600 04092 97
Michelle Bach Kinder
and
State Farm Insurance Companies

Dear Parties:

The No-Fault Standing Committee has reviewed the parties' contentions and has voted to Reaffirm the Arbitrator's.

Therefore, the parties shall have until March 13, 1998 to submit their strikes and/or preference. If we have not received the list by the due date, we will assume that all names listed are acceptable.

Sincerely,

Anne M. Rabatin
Case Administrator

AMR/s

A. 16

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Michelle Bach Kinder,

Claimant,

MEMORANDUM AND ORDER

v.

File No.: CT 97-3037

State Farm Mutual Automobile Insurance Company,

Respondent.

To: Claimant through her attorney Paul K. Downes, MEYER & ASSOCIATES, P.A., Park Place East, Suite 610, 5775 Wayzata Blvd., St. Louis Park, MN 55416 and Respondent through its attorney, William M. Hart, MEAGHER & GEER, P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402-3788.

On November 23, 1998, Judge Isabel Gomez, of this District Court heard respondent's motion to stay arbitration and strike the arbitration panel. Claimant was represented by Paul K. Downes. Respondent was represented by William M. Hart. Final submissions were received in chambers on December 21, 1998.

Based upon its own file, and upon the written and oral submissions of counsel, it is hereby

ORDERED

1. That respondent's motion to strike the arbitration panel is granted.

2. That this Court's July 8, 1997 Memorandum and Order is incorporated by reference.

3. That the attached Memorandum be made part of this

Order.

4. That the matter be submitted to arbitration pursuant to Minn. Stat. § 65B.525

BY THE COURT

Isabel Gomez

Hon. Isabel Gomez,
Judge of District Court

Dated this 18 day
of March, 1999.

MEMORANDUM

Background:

Pursuant to this Court's July 8, 1997, Order, plaintiff Michelle Kinder submitted to an IME; and on November 26, 1997, the parties refiled for arbitration. Kinder was represented by Paul K. Downes of Meyer and Associates, P.A. and State Farm was represented by Michael R. Moline of Meagher and Geer, P.L.L.P..

The American Arbitration Association produced a panel listing four potential arbitrators. The parties were asked to strike one member of the panel, and then the arbitrator would be selected by the AAA from the remaining two names on the list. Of the four potential arbitrators on the list, three of them were: Robert M. Frazee, an attorney at Meagher & Geer; James G. Weinmeyer, an attorney at Schwebel, Goetz & Sieben and George E. Antrim, III, an attorney at Krause & Rollins.

In a letter dated January 21, 1998, State Farm petitioned AAA for the removal of Weinmeyer and Antrim because of their evident partiality. Both lawyers at the time had active cases against State Farm and its insureds.

On January 29, 1998, Kinder's attorney submitted a letter to AAA, opposing State Farm's request to remove Weinmeyer and Antrim, and requesting that Frazee be removed as a potential arbitrator, because his firm, Meagher & Geer, represents State Farm in this lawsuit. In a letter dated February 2, 1998, AAA declared, without explanation, that "upon review of the file and the contentions of the parties, the Association has removed

Robert M. Frazee from the list and have [sic] reaffirmed George E. Antrim III and James G. Weinmeyer." See, February 2, 1998 letter attached as Exhibit I to Affidavit of Paul K. Downes.

State Farm then appealed AAA's decision to the No-fault Standing Committee, again requesting the removal of Weinmeyer and Antrim. On March 4, 1998, Anne M. Rabatin, Case Administrator for the AAA, sent the parties a letter which, without more, stated that "[t]he No-Fault Standing Committee has reviewed the parties' contentions and has voted to Reaffirm the Arbitrator's [sic]." See, March 4, 1998 letter to the parties, attached as Exhibit J to Affidavit of Paul K. Downes. Rabatin's letter also instructed the parties to submit their arbitrator lists on or before March 13, 1998. State Farm refused to do so and indicated that it would be bringing the current motion before the court.

Kinder indicates that, "[s]ince this Court's original decision, AAA has been deluged with requests on behalf of defense attorneys to remove plaintiff's lawyers as no-fault arbitrators based on this court's original decision." Plaintiff's Memorandum of Law in Opposition to Defendant's Request to Strike the Arbitration Panel and Stay the Arbitration, ("Plaintiff's Memorandum"), at 4. At an October 17, 1997, Meeting of the No-Fault Standing Committee, the members voted to allow the inclusion of the following language in letter responses to any party citing this Court's July 8, 1997, Order as the basis for objection to an arbitrator:

> The mere fact that an arbitrator has handled claims against a party to the arbitration in the past, or

> **currently**, it [sic] is not in and of itself evidence of partiality or the appearance thereof." (Emphasis added).

See Minutes of the October 17, 1997 Quarterly Meeting of the No-Fault Standing Committee, attached as Exhibit N, to Affidavit of Paul K. Downes.

Notwithstanding the Committee's position, it appears that AAA removed Frazee because of "the mere fact" that Frazee's firm was "handl[ing] claims against a party to the arbitration . . . currently." Ibid.. Arbitrators, unlike courts, have no duty to set forth the reasons for their decisions; but no other cause for Frazee's removal has been articulated.

Analysis

"'Evident partiality' is not the same as actual bias." See, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-48, 89 S.Ct. 337, 338-39, 21 L.Ed.2d 301 (1968), as cited in Pirsig v. Pleasant Mound Mut. Fire Ins. Co., 512 N.W.2d 342, 344 (Minn. App. 1994). Whether there is evident partiality is a legal question, Pirsig, at 344, whereas whether there is actual bias is a fact question. Toyota of Berkley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 756 (9th Cir. 1987), cert. denied, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 789 (1987). The issue before this Court is whether Mr. Antrim and Mr. Weinmeyer should be stricken from the arbitration panel in this case, based upon their evident partiality.

I. Kinder's timeliness argument.

In Minnesota, "contacts between an arbitrator and a

party . . . that might create an impression of possible bias, require that the arbitration award be vacated." Northwest Mechanical Inc. v. Public Utils. Comm'n, City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979), citing, Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968).

Kinder argues that "[d]etermining whether an arbitrator is qualified to hear a matter before the arbitrator has even been selected is premature and results in a waste of the court's resources." Plaintiff's Memorandum, at 4-5. She further asserts that "[u]ntil an arbitrator has actually been selected to hear a case, a well reasoned and thorough analysis of any potential arbitrator bias cannot be conducted." Id.

Given Kinder's success at having Mr. Frazee removed as a potential arbitrator prior to his selection, she is arguing that what's good for the goose is not good for the gander. Frazee was removed as a potential arbitrator, apparently because he works at Meagher and Geer, and attorneys from that firm represent State Farm here. State Farm opposes Antrim and Weinmeyer's presence on the panel, because they, themselves, are actively engaged in litigation against it.

While acknowledging that Frazee was properly removed from the panel as a potential arbitrator, Kinder nevertheless contends that evidence showing that Weinmeyer has 27 active cases against State Farm, and that Antrim has 4 active lawsuits against State Farm, "falls well short of an adequate basis to remove two potential arbitrators when nothing is known about the cases Mr.

Antrim and Mr. Weinmeyer have involving State Farm." Plaintiff's Memorandum, at 5. The undersigned is at a loss to understand why one party to an arbitration must accept evident partiality, while another gains relief from it.

As this Court found previously, arbitration in these circumstances is, as a matter of law, tainted by the appearance of impropriety. Pirsig v. Pleasant Mount Mut. Fire Ins., 512 N.W.2d 342, (Minn. App. 1994). It would be futile to order the parties to arbitrate this matter before either Antrim or Weinmeyer, only to have the matter come before this Court, yet again, on a motion to vacate the award.

II. Authority under Minn. Stat. §572.09.

Minn. Stat. §572.09 sets forth the standard to compel or stay arbitration. Although the statute indicates that "a stay should be granted only when there is a showing that there has been no agreement to arbitrate the matter," Plaintiff's Memorandum, at 6, Minn. Stat. §572.08 provides for relief "upon such grounds as exist at law or in equity . . . ."

The question of whether an arbitrator appears to be partial is certainly an equitable issue. Defendants are before this Court for a second time in essentially the same posture as before. Although there is no authority expressly permitting this Court to strike a panel before a decision has been rendered by an arbitrator, principles of equity allow this Court to do so when having the arbitration would be an exercise in futility and a waste of resources.

III. Kinder's neutral arbitrator argument.

Minn. Stat. §572.19 provides for vacating an arbitration award where "[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." Minn. Stat. §572.10, subd. 2, provides a definition of a neutral arbitrator, and reads as follows:

> Subd. 2. Disclosure by a neutral arbitrator. (a) a "neutral arbitrator" is the only arbitrator in a case or is one appointed by the court, by the other arbitrators, or by all parties together in agreement. A neutral arbitrator does not include one selected by fewer than all parties even though no other party objects. Id. (emphasis added).

Kinder argues that, because a no-fault arbitrator is not selected or agreed upon by both parties, s/he is not a neutral arbitrator, and, therefore, is "not required to avoid all appearances of evident partiality." Plaintiff's Memorandum, at 7. In support of her argument, she relies on Franke v. Farm Bureau Mutual Insurance Company, 421 N.W.2d 406 (Minn. App. 1988) and Safeco Insurance Co. of America v. Stariha, 346 N.W.2d 663 (Minn. App. 1984). However, both Franke and Safeco are distinguishable from this case.

The cases cited by Kinder dealt with a three-person arbitration panel, in which each party selected its own arbitrator, and a third, neutral, arbitrator was appointed. The third arbitrator was under a duty to avoid the appearance of evident partiality.

In no-fault arbitrations, there is only one arbitrator appointed to decide the matter. To accept Kinder's position that

no-fault arbitrators are not "neutral," would be to concede that they are necessarily biased. Acquiescing to the fact that no-fault arbitrators are necessarily biased, and accepting this fact as unremarkable, flies in the face of basic principles of fairness which all officers of the court are under a duty to observe. How can parties to arbitration maintain any faith in the process if they are forced to accept arbitrators who may not merely appear partial, but, in fact, not be partial?

IV. Kinder's argument concerning the limited number of available no-fault arbitrators.

Kinder argues that:

> "[b]ecause the number of available no-fault arbitrators is a limited number of attorneys regularly practicing in the personal injury area and because practicing in that area on behalf of the plaintiff involves pursuing claims against the same insurance companies on a regular basis, then the fact that an arbitrator may be pursuing claims against State Farm as part of his regular practice cannot be grounds for impartiality as an arbitrator in a case involving State Farm."

Plaintiff's Memorandum, at 11. As it has repeatedly noted in writing and orally on the record, this Court supports the arbitration of no-fault claims. However, if it is to survive as an alternative to litigation, the arbitration process must maintain its integrity. State Farm, like any other party to an action, is entitled to arbitration hearings that are free from the appearance of impropriety, notwithstanding any difficulty involved in finding a suitable arbitrator.

Kinder further asserts that "[n]o-fault arbitrators are unique and unlike any other type of arbitrator," and that "[t]he tragic result [of this Court's ruling] is that the majority of

plaintiff and defense lawyers are disqualified from serving as no-fault arbitrators resulting in no-fault arbitrations being decided by attorneys who do not practice in the area and are not familiar with the no-fault law." Id. at 12.

Assuming, arguendo, that no-fault arbitrators are unique, it does not follow that independent attorneys could not learn enough no-fault law to reach fair decisions in such cases. The arbitrators in this area are statutorily confined to making only factual determinations, and the legal principles underlying such determinations are not particularly arcane or intellectually demanding. While losing their role as arbitrators in their area of expertise is certainly a detriment to no-fault lawyers, this detriment is surely not so "tragic" as to outweigh the fundamental principles of fairness which support the whole arbitration machine.

V. Kinder's statistical argument.

In support of her contention that "[d]efendant's claim that they are not receiving a fair opportunity at no-fault arbitrations is not supported by actual statistics," Plaintiff's Memorandum, at 17, Kinder has provided this Court with a no-fault arbitration annual report prepared by the American Arbitration Association.

However, the statistical analysis presented to this Court does nothing to strengthen Kinder's position. Questions about whether a particular arbitrator is evidently partial, or whether no-fault arbitration in general must be free of evident

partiality, are not answered by numbers. It is for this reason that the undersigned denied plaintiff's motion to compel answers to discovery demands that State Farm provide information concerning the numerical impact of the Court's July 8, 1997 Order. If an arbitration does not meet a well-established standard for fairness, a large volume of equally defective proceedings will not transform the dross to gold.

VI. Kinder's policy arguments.

In support of her contention that "[d]efendant's request is contrary to the intended purposes of the No-Fault Act," Plaintiff's Memorandum, at 18, she argues that "[i]t has already been 2 1/2 years since [her] no-fault benefits were terminated and 2 years since her original no-fault arbitration and yet, [she] still does not have a date scheduled for the second arbitration of this matter." Id., at 19.

It is true, as Kinder asserts, that "the no-fault system was intended to allow the injured person to quickly seek medical treatment and have their medical bills paid for . . . " Plaintiff's Memorandum, at 19. As it noted on the record in the most recent hearing on this matter, the Court is dismayed that Michelle Kinder may be paying personally for the broader debate apparently launched by the undersigned's first decision in the matter of Kinder's arbitration. But insurance companies, as much as individual policy-holders, are entitled to arbitration conforming with existing law. The Court did nothing to prevent appellate review of its July 8, 1997, Order. It is, indeed,

troubling to see Kinder's arbitration at an apparent impasse, because the plaintiff has aligned herself with AAA in re-addressing at the trial level an issue which should be resolved above.

Conclusion

This Court is not holding that whenever an arbitrator has had any connection with a party to a no-fault action, that arbitrator must be stricken for evident partiality. However, existing law does require that an arbitrator be stricken when he or she is actively engaged in current litigation against a party.

The law, as it stands, requires this Court to strike both Antrim and Weinmeyer from this panel for evident partiality, since both are currently involved in litigation against a party to this arbitration. Because the issues raised in this case have been before this Court previously, they are clearly capable of repetition. It is the undersigned's hope that any further judicial scrutiny of the issues raised herein will be done by a higher court.

I.G.

*193805 NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Tom UNSTAD, claimant, Appellant,
v.
LYNX GOLF, INC., a California business corporation, Respondent.

No. C7-96-2259.
Court of Appeals of Minnesota.
April 22, 1997.
Review Denied June 26, 1997.

Dale C. Nathan, Nathan & Associates, 3600 Kennebec Drive, Suite 7B, Eagan, MN 55122 (for appellant).

Edward F. Fox, J. Aron Allen, Doherty, Rumble, & Butler, P.A., 2800 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101 (for respondent).

Considered and decided by RANDALL, Presiding Judge, TOUSSAINT, Chief Judge, and KLAPHAKE, Judge.

RANDALL, Judge

**1 Appellant challenges the trial court's order confirming the arbitrator's award and denying his motion to vacate on the ground of evident partiality of the arbitrator. We affirm.

FACTS

Appellant Thomas Unstad was employed by respondent Lynx Golf, Inc., as an independent sales representative. In December 1994, Unstad was discharged by Lynx. Unstad commenced an arbitration proceeding by filing a Demand with the American Arbitration Association (AAA), asserting claims against Lynx pursuant to Minn.Stat. § 325E.37 (1996) for commissions and other monetary relief.

Because the parties could not decide on a mutually acceptable arbitrator, the AAA selected AnnDrea M. Benson to be the arbitrator. Benson is employed by Piper Jaffray, Inc., as Deputy General Counsel. Prior to her being appointed as arbitrator, the AAA asked Benson to "disclose any past or present relationship with parties or their counsel, direct or indirect, whether financial, professional, social, or of any other kind." Benson answered that she had nothing to disclose.

Following a one day arbitration hearing, Benson issued her award, finding for Unstad in part and Lynx in part. Benson credited Unstad with certain commissions in the amount of $417.75 and awarded Lynx $10,309.45, representing the net value of certain inventory held by Unstad. Unstad filed an application to vacate the award arguing evident partiality pursuant to Minn.Stat. § 572.19 (1986), after learning that Doherty, Rumble, & Butler (DRB), the law firm representing Lynx, had provided legal services to Piper Jaffray during the pendency of the arbitration. Unstad named arbitrator Benson, Lynx's attorney from DRB, and DRB as parties in his application to vacate.

A preliminary hearing was held in Hennepin County District Court in which Benson, Lynx's attorney, and DRB were dismissed as parties. Benson, however, was directed to appear for her deposition and DRB was directed to submit a complete disclosure statement detailing all legal services provided by DRB to Piper Jaffray in the past three years.

According to the disclosure statement, DRB worked with Piper Jaffray on seven special projects. These projects primarily involved the issuance of revenue bonds for local governments or public offerings of stock by private corporations and were unrelated to the arbitration between Unstad and Lynx.

Benson testified during her deposition that she had no direct or indirect involvement with these projects or any contact, including business or social, with any attorneys from DRB. She testified further that she did not know most of the Piper Jaffray employees who worked on these projects and that of the few she did know, she was confident that she did not work with them on any of the special projects or issues involving DRB. She also stated that she had no involvement in retaining, approving, or reviewing the work of outside counsel, including that of DRB. Finally, she testified there was no formal conflicts mechanism in place at Piper Jaffray to check for possible conflicts of interest.

**2 The district court confirmed the arbitration award, finding that Unstad had "failed to provide any evidence, other than mere allegations" that Benson either knew of the business relationship between DRB and Piper Jaffray, or knew any person involved in such a relationship at the time of the arbitration. The

district court concluded that Unstad failed to provide sufficient evidence of "either evident bias or the appearance of bias."

DECISION

A party attacking an arbitration award has the burden of demonstrating the grounds relied on to vacate the award. *Franke v. Farm Bureau Mut. Ins. Co.*, 421 N.W.2d 406, 408 (Minn.App.1988), *review denied* (Minn. May 25, 1988). "The standard of review to be applied on appeal is derived from the ground asserted for vacation of the award." *Pirsig v. Pleasant Mound Mut. Fire Ins. Co.*, 512 N.W.2d 342, 343 (Minn.App.1994).

Initially, in the statement of the case in his brief and his reply brief, appellant argues that the arbitration award should be vacated because the arbitrator's decision was not made consistently with Minn.Stat. § 325E.37 (1996). However, appellant failed to address the issue in the main body of his brief. An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (Minn.1971). Because appellant failed to develop this issue in his brief beyond the assertions contained in the statement of the case, appellant has waived this issue on appeal.

Similarly, Minn.R.Civ.App.P. 128.02, subd. 3 (1996), provides that "[t]he reply brief must be confined to new matter raised in the brief of the respondent." In this case, respondent does not address the issue of whether the arbitrator's decision was made consistently with the provisions of Minn.Stat. § 325E.37. Therefore, appellant may not address the issue in his reply brief.

In Minnesota, an arbitration award may be vacated only upon proof of one or more grounds set forth in Minn.Stat. § 572.19 (1996). *Pirsig*, 512 N.W.2d at 343. The Minnesota Arbitration Act provides, in part, that upon application of a party, "the court shall vacate an award where: * * * (2)[t]here was evident partiality by an arbitrator appointed as a neutral * * * ." Minn.Stat. § 572.19, subd. 1(2). Here, appellant sought to vacate the arbitration award, alleging that evident partiality existed because DRB performed legal services for arbitrator Benson's employer, Piper Jaffray.

Evident partiality involves the right of a party to have an arbitration hearing free of the appearance of impropriety. *Pirsig*, 512 N.W.2d at 343. It is not the same as actual bias. *Id.* at 344. Whether the conduct challenged constitutes "evident partiality" is a legal question reviewed de novo. *Id.* at 343. The party challenging the arbitration award must establish facts that create a reasonable impression of partiality. *Id.*

**3. In the present case, the contacts between DRB and Piper Jaffray were limited in scope and unrelated to the arbitration between Unstad and Lynx. Of the seven projects performed by DRB for Piper Jaffray over the last three years, only three took place during the same time period as the arbitration. One involved the issuance of revenue bonds for the City of Lenexa, Kansas, another involved a public offering of common stock, and the last entailed the representation of two individuals subpoenaed to testify before the Securities and Exchange Commission in Chicago. Benson also testified that she did not work on or assist any Piper Jaffray personnel with any of these projects. Likewise, Benson stated that she does not know, either professionally or socially, any attorney from DRB. Therefore, DRB's contacts with Piper Jaffray were not so substantial as to require disclosure and a finding of evident partiality. *Cf. Egan & Sons Co. v. Mears Park Development Co.*, 414 N.W.2d 785, 786 (Minn.App.1987) (finding evident partiality existed, requiring disclosure, where arbitrator and arbitrator's law firm had substantial contacts with party to the arbitration), *review denied* (Minn. Jan. 20, 1988).

The record supports the finding that Benson had no knowledge of any contacts between DRB and Piper Jaffray. The record discloses no evidence of the arbitration process or Benson's decision-making process being compromised during the arbitration between Unstad and Lynx.

A remote and unrelated attorney-client relationship between the neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality.

Safeco Ins. Co. v. Stariha, 346 N.W.2d 663, 666 (Minn.App.1984).

We conclude, as did the trial court, that Unstad failed to establish facts that create a reasonable impression of evident partiality, requiring vacatur of

the arbitration award.

Affirmed.

Charles EHLEN, M.D., Appellant,
v.
Steven RICE, M.D., et al., Respondents.

No. C0-97-1741.
Court of Appeals of Minnesota.
April 21, 1998.

Stearns County District Court, File No. C5-95-3792.

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Considered and decided by SCHUMACHER, Presiding Judge, SHUMAKER, Judge, and MANSUR, Judge. (FN*)

UNPUBLISHED OPINION

SHUMAKER, Judge.

**1 This is an appeal from the district court's order denying appellant's application to vacate or modify an arbitration award. We affirm.

FACTS

Appellant and respondents are physicians who are members of a partnership formed to construct, own and operate a medical office building.

In 1991 and 1992 appellant questioned the propriety of respondents' interpretation of provisions of the partnership agreement as to the definition of "managing partner," the number of votes necessary to take binding action, and the means for amending the agreement. Appellant brought a declaratory judgment action against respondents seeking judicial construction of the parties' partnership agreement. Respondents counterclaimed, alleging that appellant breached both the partnership agreement and his fiduciary duty to the partnership, and they asked for dissolution of the partnership. Respondents also moved to stay the action and to compel binding arbitration as provided in the partnership agreement. The district court granted the motion.

The parties selected a retired judge to serve as the neutral arbitrator. On December 19, 1996 the arbitration hearing was held. Before beginning the arbitration hearing, the arbitrator disclosed to the parties and counsel that, at some time in the past, respondent Dr. Peter Larsen had examined his eyes. The arbitrator then asked appellant and his attorney if either objected to him serving as arbitrator because of this contact. Neither stated any objection. Apparently after the hearing, although the record is unclear as to the precise time, respondent Dr. Frank Brown reviewed his office records and discovered that he had treated the arbitrator's wife approximately nineteen years earlier. Neither Dr. Brown nor the arbitrator recalled that relationship.

The arbitrator issued his findings and order on January 23, 1997. Among other things, he found that appellant had materially breached the partnership agreement and he ordered appellant to sell his interest to respondents. On February 14, 1997, the arbitrator issued a supplemental order providing that appellant's portion of the arbitration fee could be deducted from the buyout price if he had not paid it prior to the consummation of the buyout.

Appellant served his application to vacate or modify the award on April 14, 1997, alleging that the award was the product of undue means and evident partiality and that the arbitrator exceeded his powers. After a hearing, the district court denied the application, holding that the application was untimely, that the arbitrator did not have a conflict of interest, and that the arbitrator did not exceed his powers.

DECISION

Under Minnesota law, the court must vacate an arbitration award if the award was procured by undue means, the arbitrator was evidently partial to a party, or the arbitrator exceeded his powers. Minn.Stat. § 572.19, subd. 1(1), (2), (3) (1996). The application to vacate the award on any of these grounds must be made within the time limits set by statute:

**2 An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or undue means, it shall be made within 90 days after such grounds are known

or should have been known.

Minn.Stat. § 572.19, subd. 2 (1996).

Appellant combines undue means and evident partiality into a single ground for this appeal and argues that the arbitrator's relationships with two of the respondents create an impression of bias and that disclosure of those relationships was essential. Minnesota statute requires a neutral arbitrator to immediately disclose in writing any relationship to the parties involving any conflict of interest or potential conflict of interest. Minn.Stat. § 572.10, subd. 2(b) (1996). The arbitrator did disclose orally the one relationship of which he was aware.

The district court ruled that appellant's application on the partiality ground was untimely. We agree. Appellant learned of the relationship upon which the evident partiality was predicated on December 19, 1996. He served his application to vacate the award on April 14, 1997, 116 days after he knew or should have known of the grounds for vacation of the award.

Appellant urges that the 90-day limit did not begin until the arbitrator issued his supplemental order. However, the limitation period for vacating an award on the ground of partiality begins when the applicant knew or should have known of such ground, irrespective of when the actual award was made. *See* Minn.Stat. § 572.19, subd. 2. Here, appellant knew or should have known as of December 19, 1996.

In addition to being untimely in his application, appellant waived any challenge to the award on the ground of the arbitrator's relationship with one of the respondents. After learning of the relationship, appellant declined to object to the arbitrator's service as a neutral arbitrator.

A party who challenges an arbitration award must "establish facts that create a reasonable impression of partiality." *Pirsig v. Pleasant Mound Mut. Fire Ins. Co.*, 512 N.W.2d 342, 343 (Minn.App.1994). Parties to arbitration have a right to have a "hearing that is free from an appearance of impropriety." *Id.* Whether there is evident partiality is a legal question. *Id.* at 344. This court's review of legal questions is de novo. *Id.* at 343. Contacts between an arbitrator and a party that might create an impression of possible bias require that the arbitration award be vacated. *Id.* at 344.

In *Pirsig* the contacts did not go to the merits of the dispute and there was no longstanding relationship involved. This court held that such facts did not create an appearance of impropriety and would not "lead a reasonable person to believe the neutral arbitrator would be partial to one party." *Id.*

**3. In this case, the arbitrator at some time in the past had a single contact for a medical examination with one of the respondent doctors. Other than that, he had no relationship with that respondent. The other contact occurred about nineteen years ago between another of the doctor respondents and the arbitrator's wife for the purpose of a single medical examination. Neither the arbitrator nor the doctor recalled that contact. The district court ruled that such limited and remote contacts did not create a conflict of interest for the arbitrator. We find no error in this ruling.

In assessing the merits of a challenge to an arbitrator's powers, this court's scope of review is limited. The arbitrator's powers are derived from the arbitration agreement and only when the arbitrator has clearly exceeded those powers will the arbitrator's decision be overturned. *State Auditor v. Minn. Ass'n. of Professional Employees,* 504 N.W.2d 751, 755 (Minn.1993). The limited scope of review accords finality to an arbitrator's decision, which is one of the goals of arbitration. *See Park Const. Co. v. Independent Sch. Dist. No. 32,* 216 Minn. 27, 33, 11 N.W.2d 649, 652 (1943), and *Aufderhar v. Data Dispatch, Inc.,* 452 N.W.2d 648, 651 (Minn.1990).

Appellant argues that the arbitrator exceeded his powers by ordering an "involuntary" dissolution of the partnership agreement. *See* Minn.Stat. § 572.19, subd. 1(3) (1996) (a court may vacate an award if the arbitrator exceeded his powers). In this case, the partnership agreement required that the partners submit to arbitration and defined the scope of the arbitration. Paragraph 18 of the partnership agreement states:

> *Any* controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

(Emphasis added.)

Appellant asserts that the arbitrator exceeded his authority by dissolving the partnership. A review of

the record shows that the arbitrator made findings only on the issues properly before him, including the dissolution of the partnership. An arbitrator has authority to determine the facts and apply the law to the case. *Independent Sch. Dist. No. 279 v. Winkelman Bldg. Corp.*, 530 N.W.2d 583, 587 (Minn.App.1995). In this matter, the arbitrator properly ordered the dissolution of the partnership pursuant to the partnership agreement, the request of respondents, and Minn.Stat. § 323.27 (uniform partnership act; partner's interest chargeable). The district court concluded that the arbitrator did not exceed his powers. The evidence supports that conclusion. Affirmed.

FN* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. Art. VI, § 10.

AN ANALYSIS OF THE MINNESOTA PRIVATE PASSENGER AUTOMOBILE NO-FAULT SYSTEM†

Terry Tyrpin††
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† Prepared in conjunction with *Back to the Basics of No-Fault Auto Insurance*, a presentation given by Bob Johnson, J.D., *cum laude*, 1977, William Mitchell College of Law, Executive Vice President of the Insurance Federation of Minnesota, at the William Mitchell Law Review's *No-Fault Insurance Law Symposium*, held on March 20, 1998.

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I. INTRODUCTION

This article provides a description of state automobile insurance reparations systems, specifically analyzing the performance of Minnesota's no-fault law in the context of its effect on insurance claiming patterns. In addition, it compares the value to consumers of the reparations system and related insurance coverages in Minnesota with the value to consumers of the more modest, traditional financial responsibility and tort law system in Wisconsin. The article also discusses public policy considerations relevant to strengthening the Minnesota No-Fault Automobile Insurance Act. In the latter context, subjects addressed include the exclusive verbal tort threshold, managed medical care, and similar measures that have been examined or tried in other no-fault states.

II. HISTORY OF NO-FAULT

Since the 1960s, the motor vehicle accident reparations system and the rules used to assess legal responsibility for motor vehicle crashes and compensate victims have been the subjects of controversy.[1] The debate has centered around the costly and tedious process of determining who is at fault after vehicular crashes occur. In an attempt to provide quick and fair compensation to the greatest number of injured persons possible without the delays, costs and uncertainty of recovery associated with the court system, no-fault legislation was introduced in the 1970s in many states. Over the last three decades, nearly 20 states have at one time or another experimented with no-fault accident reparations systems. Several of these states have since repealed their laws or substantially modified them. To this day, in fact, the no-fault system remains a source for public debate and potential reform in some states. In certain states, especially where the cost of automobile insurance is perceived as too high, changes to the system are being proposed to try to reduce the claims expenses that drive the cost of coverage.

Under an automobile no-fault system, the vehicle owner's insurance company covers bodily injury expenses incurred by the driver and his or her passengers, regardless of who caused the accident. Access to the court system is limited to those cases where more serious injuries are incurred or when out-of-pocket expenses

1. For a more complete analysis of no-fault laws, *see generally* ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW (2d ed. 1992).

exceed a specified sum. This first-party coverage for losses is designed to provide prompt payments for economic losses, lower the litigation costs associated with the tort system, and reduce or eliminate the costs for non-economic losses (i.e., pain and suffering). The creators of no-fault had intended that tort liability be abolished and all accident injuries be compensated by insurers without determining whether negligence played a role in the crash. This original pure form of no-fault was never enacted in any state. Where administered today, no-fault systems typically embody elements of both tort liability and fault-free compensation. Because they do not abolish tort liability completely, these laws are often referred to as modified no-fault plans.

Ironically, in many no-fault states, tort liability is virtually unrestricted and, accordingly, there are still many accident-triggered lawsuits. The system encourages those involved in a crash to overutilize medical and treatment services, hence accident compensation often remains a slow process and the expenses of allocating fault means bodily injury liability insurance costs are higher than they should be. Under modified no-fault systems, a lawsuit in theory should be a remedy in only a very small percentage of cases where the nature of injury or the amount of damages would not be compensated fairly under a no-fault plan. In these states, access to the courts is permitted if the bodily injury claim exceeds a tort threshold level, which may be either a monetary sum, a specified class of injury, or a combination of both.

In theory at least, even modified no-fault plans are supposed to limit the right to bring a lawsuit for an accidental injury. Under these laws, the right to sue for minor automobile injuries is restricted and victims are provided personal injury protection (PIP) benefits, regardless of who is at fault. A verbal threshold variety restricts lawsuits to recover non-economic damages to those cases where serious injuries have been sustained. A "serious injury" would generally be a specific physical condition, for example, death, dismemberment, serious disfigurement, fractures or other severe impairment. Under verbal threshold no-fault laws, it was thought that lawsuits should be confined to only those cases where severe injuries had occurred, and the right to seek redress in court for subjective injuries and damages (i.e., pain and suffering, emotional distress, etc.) should not be impaired. In contrast, under a monetary threshold no-fault plan, accident victims can sue if their out-of-pocket expenses for medical care, wage loss, or other neces-

sary services exceed a specific monetary sum stated in the law.

Today, 13 states have some type of no-fault system for the compensation of persons injured in crashes.[2] Of these states, Florida, Michigan, and New York are the only no-fault states with a verbal tort threshold. The remaining no-fault states have monetary lawsuit thresholds, currently ranging from $1,000 to $5,000. Several of these also have a verbal threshold, in which case injured parties have the option of applying either an economic (dollar threshold) or a subjective degree of injury standard to determine whether a tort lawsuit can be brought to recover non-economic damages. At one time, most no-fault states had very low dollar thresholds (e.g., $200-$500 of medical expenses). These laws failed to reduce the filing of tort liability suits because of the ease in accruing medical diagnostic and treatment bills and thus quickly surpassing the monetary threshold. In addition, low dollar thresholds created an incentive to exaggerate the seriousness of the injury in order to surpass the threshold. Monetary thresholds have been increased over time in an attempt to match the rising cost of medical services and to make it more difficult to file a lawsuit.

Kentucky, New Jersey and Pennsylvania now administer what are known as "choice no-fault" laws. Under a choice system, vehicle owners can select the no-fault process and collect benefits from their own automobile insurer regardless of who is at fault. Tort lawsuits are restricted but not eliminated in these states. Conversely, motorists can opt instead for a traditional tort liability system and coverages, and be able to sue other drivers on grounds of negligence. In a true choice state, the tort-chooser often files a negligence claim against his or her own insurer.

Ten states,[3] along with the District of Columbia, have laws that require automobile insurers to offer personal injury protection (PIP) benefits, which are "added on" to the existing tort liability coverages. Some states require the purchase of add-on coverage, while other states do not. Although PIP benefits are similar to those provided in no-fault states, add-on laws are different in one respect: there are no restrictions on the right to file a liability claim

2. The 13 states are: Colorado, Florida, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah. Connecticut, Georgia, and Nevada repealed their no-fault laws in 1993, 1991, and 1980, respectively.

3. Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, and Wisconsin.

or lawsuit against another driver. As in no-fault states, however, add-on PIP coverage compensates the insured for economic losses (e.g., medical, wage loss, etc.) regardless of whose negligence caused the injury.

At present, the remaining 27 states have traditional tort liability systems, under which there are no limitations on the right to assert negligence-based lawsuits. In full tort states, parties can sue to recover both economic as well as non-economic or subjective losses such as pain and suffering and emotional distress. In all but four of these states, bodily injury and property damage liability insurance must be acquired and maintained as a statutory condition of owning and operating a motor vehicle.

III. THE MINNESOTA AUTOMOBILE INSURANCE SYSTEM

A. *Minnesota No-Fault Law*

Minnesota has administered a modified no-fault law, known as the No-Fault Automobile Insurance Act,[4] since January 1, 1975. The law permits injured persons to sue for pain and suffering or other non-economic damages if a monetary or verbal threshold or qualifier is met. General damages (i.e., damages compensating for non-economic losses) are recoverable only if injury results in permanent disfigurement or injury, disability (for 60 days or more), fatality, or medical expenses exceeding $4,000. First-party PIP benefits include a $40,000 limit on the following: $20,000 for medical expense loss arising out of injury to any one person; and a total of $20,000 for income loss, replacement services loss, funeral expense loss, survivor's economic loss, and survivor's replacement services loss arising out of the injury to any one person. Disability and income loss benefits are capped at 85 percent of the injured person's loss of present and future gross income, up to $250 per week, and replacement service loss benefits and survivor's economic loss benefits are limited to $200 per week.

B. *Minnesota Average Liability Premium Outpaces National Mean*

According to data compiled by the National Association of Insurance Commissioners, the average Minnesota consumer paid an annual premium of $713 for automobile liability and physical dam-

4. *See* MINN. STAT. § 65B.44 (1996).

age insurance in 1996.[5] Of that amount, 61% (or $437) of the total premium went toward liability coverage.[6]

Minnesota is the twenty-fourth most expensive state in the country for automobile liability and physical damage insurance; it ranks twentieth highest in terms of liability coverage only. From 1987 to 1993, the average liability premium in this state was substantially lower than the countrywide norm. The slowing down of the countrywide liability premium over the last three years has resulted in Minnesota's premium now being almost the same as the national average. From 1987 to 1996, the average liability premium increased 58 percent in Minnesota,[7] rising at a higher pace than the average of the other nine no-fault states (52%)[8] and the nation (47%).[9] Average liability premiums for Minnesota and the U.S. are both lower than the aggregate of the no-fault states, demonstrating that in spite of their faster growth in insurance rates, policyholders in Minnesota are still paying lower amounts for protection than their counterparts in other no-fault states combined, particularly those in the Northeast.

C. *Minnesota Drivers are Filing More First-Party Injury Claims Than Before*

Over the last five years, insurance companies have noted an increase in the number of personal injury protection claims filed and paid in the state. Such growth has helped to increase overall PIP loss costs and, hence, rates paid by policyholders for this type of coverage. According to the Fast Track Monitoring System report, the PIP claim frequency, or number of claims per 100 insured cars, in Minnesota increased 13 percent from 1992 to 1996.[10] This,

5. *See* NATIONAL ASS'N OF INS. COMM'RS, STATE AVERAGE EXPENDITURES & PREMIUMS FOR PERSONAL AUTO. INS. IN 1996 Table 3 (January 1998) [hereinafter 1996 EXPENDITURES & PREMIUMS].

6. *See infra* Appendix, Figure 1.

7. *See* 1996 EXPENDITURES & PREMIUMS, *supra* note 5, Table 4; NATIONAL ASS'N OF INS. COMM'RS, STATE AVERAGE EXPENDITURES & PREMIUMS FOR PERSONAL AUTO. INS. IN 1991 Table 4 (January 1993) [hereinafter 1991 EXPENDITURES & PREMIUMS].

8. Kentucky, New Jersey, and Pennsylvania are excluded from this analysis because they have choice laws.

9. *See infra* Appendix, Figure 2.

10. *See infra* Appendix, Figure 3; NATIONAL ASS'N OF INDEP. INSURERS, INSURANCE SERVS. OFFICE, INC., & NATIONAL INDEP. STATISTICAL SERV., FAST TRACK MONITORING SYSTEM (3d Qtr. 1997) [hereinafter FAST TRACK MONITORING SYSTEM]. The *Fast Track Monitoring System* contains quarterly statistical personal automobile loss experience, representing about two-thirds of the Minnesota premium volume.

along with a 9 percent growth in average loss (i.e., claim severity), have contributed to a 23 percent increase in loss cost since 1992. In other words, it cost personal automobile insurers 23 percent more to offer no-fault protection in Minnesota in 1996 than it did in 1992.

D. Rising PIP Claim Severities in Minnesota Result in Higher Attorney Involvement

Initially, a monetary threshold can eliminate some liability claims and lawsuits, but its effectiveness diminishes over time. As experienced in most other states, inflation has had an effect on the cost of injury and other types of claims. From 1987 to 1996, the average claim severity for PIP coverage in Minnesota has grown 77 percent in the cost per injury claim ($4,353 vs. $2,453).[11]

As inflation reduces the value of the threshold, increasing numbers of PIP claimants qualify for tort claims. Based on data compiled by the Insurance Research Council, this trend is certainly true in the case of Minnesota as the number of PIP claimants who qualify for tort liability claims have more than tripled from 1977 to 1992.[12] In 1977, 10 percent of PIP claimants in Minnesota qualified for a tort claim, compared to 22 percent in 1987; in 1992, this proportion jumped to 34 percent. As more injured parties file bodily injury (BI) liability claims, it is expected that attorney representation will grow as well.

Compared to no-fault states in general, the proportions of BI and PIP claimants represented by an attorney are higher in Minnesota. Thirty-two percent of PIP claimants in this state hired legal assistance when they were involved in an automobile accident in 1992, while 29 percent of PIP claimants in all no-fault states sought counsel.[13] Moreover, 84 percent of BI claimants in Minnesota hired an attorney, compared to 81 percent of claimants in all no-fault states.[14]

It is jointly prepared by the National Association of Independent Insurers, Insurance Services Office, Inc. and National Independent Statistical Service.

11. *See infra* Appendix, Figure 4; FAST TRACK MONITORING SYSTEM, *supra* note 10 (3d Qtr. 1997 & 4th Qtr. 1991).

12. *See infra* Appendix, Figure 5; INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INS. COSTS 46 (September 1994) [hereinafter CLAIMING BEHAVIOR].

13. *See infra* Appendix, Figure 6.

14. *See* CLAIMING BEHAVIOR, *supra* note 12, at 50-51.

E. More Rapidly Growing Claiming Behavior in Minnesota

No-fault laws provide for injured parties to be compensated by their own insurance companies, in an attempt to reduce the number of third-party BI liability claims and thus reduce a significant portion of the average automobile insurance premium. One measurement of policyholder claiming patterns, used by the Insurance Research Council, is the ratio of bodily injury liability claims per 100 property damage (PD) liability claims. This figure represents the likelihood of an injury claim being made, if an accident resulting in vehicle damage occurs. In 1997, Minnesota had 10.3 paid injury claims per 100 vehicle damage claims,[15] lower than the amount (17.7 claims) for the other eight no-fault states combined.[16] This ratio has been growing steadily at an overall rate of 78 percent in Minnesota since 1980, compared to the 62 percent increase for other no-fault states.[17] These figures suggest that while Minnesota drivers currently are not claiming as many injuries as residents of most other no-fault states, they have, however, been filing these claims at an above-average pace over the last 17 years.

Minnesota has also out-paced the country as a whole in terms of reporting injury claims since 1980. The national BI-to-100-PD claim frequency ratio, however, is about three times higher than Minnesota. This is not surprising, as the national average includes tort states which have higher BI claim frequencies than Minnesota and other no-fault states.

F. Comparisons Between Minnesota and Wisconsin

There are many similarities between Minnesota and its neighbor to the east, Wisconsin. For example, likenesses in geophysical traits, climate, the size of their major urban areas and the demographics of the local population are obvious. Because of these similar characteristics, comparisons are often made between these two states by policymakers and the public alike. The following discussion thus offers an examination of the automobile insurance sys-

15. *See* INSURANCE RESEARCH COUNCIL, AUTO INJURIES: TRENDS IN AUTO INJURY CLAIMS Tables A-1, A-25 (1996 ed.) [hereinafter TRENDS IN AUTO INJURY CLAIMS]; FAST TRACK MONITORING SYSTEM, *supra* note 10 (3d Qtr. 1997).

16. Kentucky, New Jersey, and Pennsylvania are excluded from this analysis because they have choice laws. Michigan is excluded because it has Property Protection Insurance instead of the standard Property Damage Liability coverage.

17. *See infra* Appendix, Figure 7.

tems and related premium and loss experience of these two states.

1. Automobile Insurance Systems

There are more differences than similarities when the comparison measures motor vehicle insurance and accident reparations rules.[18] Minnesota policymakers have created a more socialized type of automobile insurance and accident compensation system for their constituents, in the form of a modified no-fault law. This law mandates the purchase and maintenance of certain insurance coverages, providing motorists with a simple and certain financial cushion in the event they are injured as the result of a motor vehicle crash.

Where automobile insurance is a mandatory requirement under Minnesota law, there is no governmental mandate to purchase or maintain insurance in the state of Wisconsin. In comparison to the highly structured no-fault plan in Minnesota, Wisconsin simply follows traditional tort liability rules in resolving motor vehicle accident claims.[19] That is, motorists in this state retain an unrestricted right to bring an action based on negligence against a tortfeasor, no matter how inconsequential the damage. A financial responsibility law, known as the Wisconsin Safety Responsibility Act,[20] is administered, requiring a driver to establish proof in the ability to pay a judgment if he/she is found negligent for another person's injury or damage in the event a motor vehicle crash occurs. Proof of financial responsibility can be established by showing the existence of an automobile liability insurance contract with policy limits commensurate with the minimum limits required under law. It can also be established by depositing financial assets sufficient to pay a judgment entered as the result of a tort liability cause of action. Accordingly, the primary automobile insurance coverage in Wisconsin is bodily injury and property damage liability insurance at limits adequate to meet the state's financial responsibility law.

Motorists residing in Wisconsin thus generally rely on two avenues of recourse for compensation of motor vehicle injuries. One source for compensation is the set of benefits that may be available

18. *See generally* ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW (2d ed. 1992).

19. *See* WIS. STAT. ANN. § 632.32(4)(b) (Supp. 1998).

20. *Id.* §§ 344.01-.579 (1991 & Supp. 1998).

if an injured party is covered by a private health insurance plan or a governmentally administered health-benefit program (e.g., Medicare). Another source is the civil justice system, where recovery is not guaranteed and the time between injury and recovery of damages often can be years. While compensation for motor vehicle injuries in Wisconsin is largely dependent on whether a victim has access to medical benefits or to the vagaries and chance of the tort liability system, crash victims in Minnesota can recover a substantial amount of economic or out-of-pocket losses through their own automobile insurance company, regardless of whether their own negligence contributed to the crash or injury.

It should be noted that Wisconsin does have a weak add-on law, providing $1,000 of optional first-party medical expense indemnification similar to that found in Minnesota. Like the personal injury protection (PIP) coverage in Minnesota, the add-on coverage in Wisconsin pays benefits for economic loss arising out of a motor vehicle crash or incident regardless of fault. There are significant differences, however. In Wisconsin, the add-on coverage is optional in nature and, with its nominal benefit level of $1,000, it bears little resemblance to the mandated, higher-limit PIP coverage that is the centerpiece of the no-fault law in Minnesota. The add-on benefits in Wisconsin are intended as excess coverage over any other source of reimbursement to which the insured person has a legal right.

2. *Premium and Loss Experience*

Another way in which the two states differ is in the cost of automobile insurance. NAIC data show that Wisconsin has the ninth lowest combined (liability and physical damage) average premium in the United States, 18 percent lower than Minnesota. Despite the substantial difference in both states' premiums, they have risen at about the same pace (50%) over the last ten years.[21]

The average liability premium in Wisconsin is the thirteenth lowest in the nation, 28 percent lower than Minnesota's.[22] The lower liability cost for automobile insurance in Wisconsin is attributable to several factors, including lower health care costs, lower

21. *See infra* Appendix, Figure 8; 1996 EXPENDITURES & PREMIUMS, *supra* note 5, Table 3; 1991 EXPENDITURES & PREMIUMS, *supra* note 7, Table 3.

22. *See* 1996 EXPENDITURES & PREMIUMS, *supra* note 5, Table 4; 1991 EXPENDITURES & PREMIUMS, *supra* note 7, Table 4.

utilization of medical services reimbursed by automobile insurers, fewer attorneys involved with injury claim representation, and a more basic accident reparations and insurance system. Some may perceive the Minnesota automobile insurance mechanism as more sophisticated and socialistic by virtue of: (1) its mandatory coverages; (2) the potential to compensate a greater number of injury victims more quickly under a no-fault insurance system; or (3) the ability to access personal injury protection benefits regardless of whether the injured party was negligent, owned an automobile, or had an automobile insurance policy of his or her own. In addition to having an accident reparations system that provides immediate compensation for economic loss regardless of fault considerations, motorists in Minnesota are not forced to trade away significant limitations on their right to use the tort liability system. Because of the low monetary threshold in the Minnesota no-fault law, motorists in the state are assured of the right to litigate injury claims that are not very serious in nature, providing they accrue a rather moderate amount of medical bills, wage loss, and related economic expenses. All of these consumer-friendly features, however, come at a price, resulting in the cost of automobile insurance in Minnesota being a more expensive commodity than in the neighboring state of Wisconsin.

More than $61 out of every $100 of the average insurance premium in Minnesota are used to cover liability protection, while a smaller proportion of the premium in Wisconsin pays for these coverages.[23] As discussed below, residents of Minnesota are more prone to seek legal counsel and pay substantially higher health care costs than their neighbors to the east. In contrast, the portion of the insurance premium that pays for vehicle theft, fire, and so on is about the same in both states, while motorists in Wisconsin use a greater portion of their premiums to pay for collision coverage than their counterparts in Minnesota. The latter fact is attributable to higher automobile collision repair costs in Wisconsin, as compiled by Automatic Data Processing Claims Solutions Group.[24] In 1996, average costs reflecting parts, labor, towing and storage costs, and so on ranked Wisconsin eighteenth highest in the nation and Minnesota the thirty-second highest.

According to the Insurance Research Council, attorney in-

23. *See id.; see infra* Appendix, Figure 9.
24. ADP Claims Solutions Group is located in San Ramon CA.

volvement in Wisconsin has been relatively low.[25] Compared to 52 percent of BI claimants represented by counsel in all tort and add-on states, the proportion of BI claimants represented by an attorney in this state was only 42 percent in 1992. In contrast, 84 percent of BI claimants in Minnesota hired an attorney; this is not surprising as residual injury claims in no-fault states are filed mostly by people with more serious injuries (i.e., those who would seek representation).

Residents of Wisconsin also have the benefit of paying comparatively low hospitalization costs. Among the 44 states for which data are compiled by Mutual of Omaha Companies in 1992-1996, Wisconsin ranks tenth lowest in terms of total charge per admission during this time period.[26] Compared to Minnesota, there are 20 states with lower admission charges. Both Wisconsin's and Minnesota's charges are lower than the average of all 44 states. According to Mutual of Omaha, the five-year average total charges per hospital admission for Wisconsin and Minnesota are $7,667 and $8,885, respectively, while the 44-state average is $9,626.

As mentioned above, policyholders in Minnesota are filing injury claims more rapidly than before. Since 1980, the number of injury claims per 100 damage claims rose 78 percent. This large increase may be attributable to more people overcoming the tort threshold and filing bodily injury liability claims. Wisconsin's growth rate has been increasing as well, but much more slowly; there are now only 20 percent more injury claims per 100 damage claims being filed in this state compared to 1980.[27] This suggests that Wisconsin motorists are not as apt to litigate their motor vehicle claim as residents of other states.

IV. IMPROVING THE MINNESOTA SYSTEM

A no-fault law can create a more socially benevolent accident compensation system where more injury victims receive more immediate compensation for their economic losses. When the cost of providing no-fault benefits equals or exceeds the liability claim sav-

25. *See* CLAIMING BEHAVIOR, *supra* note 12, at 49-50.

26. *See* MUTUAL OF OMAHA COMPANIES' GROUP OPERATION ANNUAL REPORT, CURRENT TRENDS IN HEALTH CARE COSTS AND UTILIZATION 5 (1996 & 1997 eds.); MUTUAL OF OMAHA INSURANCE COMPANY GROUP ACTUARIAL REPORT, CURRENT TRENDS IN HEALTH CARE COSTS AND UTILIZATION 5 (1995 ed.).

27. *See* TRENDS IN AUTO INJURY CLAIMS, *supra* note 15, Table A-51; FAST TRACK MONITORING SYSTEM, *supra* note 10 (3d Qtr. 1997).

ings accrued through restricting the right to litigate injury claims, the no-fault system is dysfunctional or out of balance. The challenge for policymakers, therefore, is to develop and maintain a no-fault system producing a significant enough reduction in bodily injury claim costs to exceed the cost of providing accident compensation (i.e., PIP benefits) without consideration of negligence to a larger universe of claimants. Reducing liability-related claim costs is a common objective of no-fault plans; the Minnesota No-Fault Automobile Insurance Act is no exception. One of its introductory provisions recites the legislative objective: "to prevent the overcompensation of those automobile accident victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury."[28]

A. *Conversion to Exclusive Verbal Tort Threshold*

Policymakers in states that administer no-fault insurance laws have increasingly examined new approaches to help rein in the costs that drive automobile insurance premiums. Under study are the continued filing of tort-based bodily injury liability claims and the accrual of fault resolution expenses which, according to the original designers and proponents of no-fault, were supposed to have been abolished. Some states have amended their no-fault law by deleting their monetary threshold in preference for an exclusive verbal tort threshold. Monetary and verbal tort thresholds restrict access to the tort liability system, preventing the overcompensation of those sustaining only minor injuries, yet assuring those sustaining serious injuries the opportunity to seek compensation for intangible, non-economic damages. Some states have found that a plural tort threshold (i.e., one encompassing both monetary and verbal criteria for "serious injury") does not significantly reduce the number of liability claims for non-economic damage. This in turn adversely affects bodily injury liability claim costs and ultimately the price of BI insurance coverage.

Several studies have shown that no-fault laws which feature a single verbal tort threshold are more successful in containing the growth in bodily injury claim costs.[29] In addition, other commenta-

28. MINN. STAT. § 65B.42(2) (1996).

29. For a more complete explanation, *see* Department of Legislative Reference, Research Division, General Assembly, *No-Fault Auto Insurance: Does it Provide Consumers More Benefits at a Lower Cost?*, LEGISLATIVE REPORT SERIES, Vol. 8, No. 3, (Dec. 1990); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, PART

tors have made the observation that no-fault laws which incorporate monetary tort thresholds encourage the overconsumption of medical care and related services and, in some cases, fraud.[30] Under no-fault laws, motorists can use their PIP benefits to finance the medical services they incur. The more services consumed, the greater the economic loss sustained by the motorist. Eventually, the injured person may consume enough medical services to reach the monetary threshold and file a liability claim. Since tort liability awards or settlements for general damages (e.g., pain and suffering) are determined by multiplying the amount of special damages (i.e., actual out-of-pocket expenses) by two, three, or an even larger number, there is a built-in financial inducement to generate and exaggerate economic losses. In short, the economic incentive fostered under a monetary tort threshold no-fault plan can become perverted and result in the over-treatment of minor injuries. At some point, if bodily injury liability claim severities in Minnesota were to become acute, one option that policymakers should consider is abolishing the no-fault law's monetary threshold in preference for an exclusive verbal tort threshold.

B. Implementation of Managed Medical Care System

Close examination of claiming practices in some no-fault states has shown an alarming and recurring pattern of some injured parties overutilizing medical services in an effort to generate a tort claim. According to the American Hospital Association, the average cost per day at a community hospital increased 37 percent ($536 vs. $736) from 1990 to 1995 in Minnesota.[31] Policymakers have searched for methods to help insurers contain medical costs more efficiently, since these types of expenses make up a large portion of the PIP benefits paid by insurers in states with no-fault laws.

Personal injury protection coverage pays for all reasonable and necessary medical care up to the policy limits. Under Minnesota's law, the medical care provided to motor vehicle injury victims is on a fee-for-service basis. This means that an injured party with access to PIP coverage selects one or more doctors, seeks treatment, and

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ONE: ANALYSIS OF CLAIM FREQUENCY (2d ed. February 1995); Brian W. Smith, *Reexamining the Cost Benefits of No-Fault*, CPCU JOURNAL, March 1989, at 28-36.

30. *See* STEPHEN CARROLL ET AL., THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES (Institute for Civil Justice, RAND Corporation 1995) for a more complete analysis of the impact of monetary tort thresholds.

31. *See* AMERICAN HOSPITAL ASSOCIATION, HOSPITAL STATISTICS (annual).

sends the bill for medical services to the automobile insurer. With the growth of managed care in the Minnesota health and workers' compensation insurance markets,[32] automobile PIP coverage remains the last unmanaged source of medical treatment reimbursed through private insurance. This is a dubious distinction since it affords a haven for health care providers who have been left out of the "managed care revolution" in other coverages. Whereas medical practitioners are limited to fixed-fee reimbursement under other insurance and benefit programs, there are no ceilings or rules that limit medical service compensation under the Minnesota No-Fault Automobile Insurance Act. This fact would make it attractive for medical providers to bill their automobile insurance patients at higher rates than other fixed-fee patients.

The policymakers in several states with no-fault laws have seized the opportunity to contain automobile injury expenses by authorizing insurers to use managed medical care on a voluntary basis. In these states, insurance companies that wish to offer a managed care program must file for approval from the state insurance department. Once permission is granted, the insurers then provide consumers with the option of purchasing a policy under which the insured agrees to select doctors and hospitals from a health care network with which the insurers have a contract. This system works much like the managed care program in the accident and health insurance setting except that the consumer has the ability to accept managed care coverage in exchange for a lower premium, or reject it. Even when accepted, the insured can receive medical treatment from providers outside of the insurance company network in emergency situations or if the accident occurs out of the managed care network service area. A managed care system benefits the consumer since it allows the policyholder an option to get the same coverage but at a lower cost. It also encourages quality medical care by providers who are injury specialists.

Managed care systems compel network providers to treat patients and deliver services in the most efficient manner possible. There would be no economic incentive for unnecessary and excessive medical treatments, thus managed care can eliminate over-

32. According to figures from the Minnesota Managed Care Review, over 60 percent of 1996 accident and health premiums in Minnesota were paid to health maintenance organizations (HMOs). This does not include the percentage of the health care market which is covered by preferred provider and other managed care networks.

treatment by medical providers. It also mitigates the questionable services of insureds obtaining unnecessary treatment to "build up" or accrue greater economic loss in order to meet a tort threshold and initiate a liability claim. As long as policyholders receive treatment in the managed care network, the overall cost of medical care paid for by automobile insurance premiums is less, therefore helping to keep the price of personal injury coverage as low as possible.

The experience in Colorado, the first state to adopt managed care for PIP coverage in late 1991, provides some insight into the potential impact of managed care in the automobile insurance system. During the four-year period prior to managed care, the Fast Track Monitoring System shows that Colorado's PIP claim severity increased 60 percent from 1987 to 1990.[33] After the system went into effect, average PIP claim payments in the state dropped 4 percent over the next four years, while claim payments for similar coverage in other states continued to rise an average of 14 percent. Even the PIP claim frequency has tapered off in Colorado during the past five years; this has kept the loss cost (average loss per insured vehicle) for this insurance coverage from growing significantly, as it has countrywide. For all states offering PIP coverage, the average PIP loss cost is now 23.5 percent higher than what it was six years ago ($72.94 in 1996 vs. $59.06 in 1990), while Colorado's loss cost is now only 0.4 percent higher ($100.56 vs. $100.20). In other words, it now costs automobile insurers throughout the country 23.5 percent more to offer PIP coverage to their policyholders than in 1990; in Colorado, it costs insurers only 0.4 percent more.

It should be noted that managed medical care in automobile insurance is not possible in states that administer more traditional tort law systems where third-party liability insurance is the norm. Automobile insurers have little ability to influence the medical care chosen by persons injured through the negligence of their policyholders. Managed care thus requires a privity of contract between insurer and insurance customer so that the provision of medical benefits can be regulated and linked by the insurer to its medical networks. Personal injury protection (no-fault) coverage provides the privity of contract necessary to create a managed medical care

33. *See* FAST TRACK MONITORING SYSTEM, *supra* note 10, (3d Qtr. 1997 & 4th Qtr. 1991).

coverage option.

C. Other Measures

Since every no-fault automobile insurance act has unique provisions or benefit/coverage requirements that set it apart from other similar accident reparations laws, there is no one formula or template to follow in setting up a cost-benefit balanced no-fault system. Each of the 13 no-fault laws in the United States is in many ways a reflection of the locale and its beliefs on accident compensation. If policymakers are concerned that the costs generated under a no-fault law are outstripping its benefits or value, the following is a list of other measures that can be considered to improve the plan's operational efficiency:

- A first-party benefits package that balances the dual goals of reimbursing out-of-pocket losses for most minor and moderate injuries with the objective of promoting affordability of coverage;
- Peer review of medical services or, alternatively, implementation of medical service fee schedules for standardized procedures and treatments similar to the system used in state workers' compensation programs;
- Additional restrictions on the filing of tort liability claims for the recovery of non-economic damages as, for example, the use of an exclusive verbal tort threshold to limit liability suits to only the most serious cases;
- Elimination of duplicate payments for automobile crash injuries by exposing collateral benefit sources and assuring that no-fault insurers operate as excess benefit payors in relationship to claims arising initially under state workers' compensation or other governmental disability programs;
- Prohibitions against the "stacking" of coverages or limits;
- Statutory and other procedural penalties to function as deterrents against the filing of fraudulent claims and overbilling;
- Authority for no-fault insurers to use coordination-of-benefit programs; and
- Flexibility for no-fault insurers to settle inter-company conflicts by contracting with alternative-dispute-resolution providers of their choice.

V. SUMMARY

This article has analyzed the performance and assessed the value of Minnesota's no-fault accident compensation system in the context of its effect on insurance claiming patterns and premiums. In addition, the article has compared the accident reparations system in Minnesota with the insurance and injury compensation rules in Wisconsin, and addressed public policy considerations relevant to strengthening the Minnesota No-Fault Automobile Insurance Act.

Minnesota's average liability premium falls in the upper half of all states, partly due to growing PIP claim frequency and to the average cost of these claims. Attorney representation in this state is higher than average among PIP claimants, suggesting that people in this state are more inclined to seek attorney representation. These factors, along with inflation, have caused average PIP dollar losses to grow over time, increasing on a per-claim basis by 77 percent over the last decade. In turn, the result is a greater number of claimants surpassing the $4,000 monetary threshold and qualifying for a tort claim.

Although most motorists in Minnesota file PIP claims, their medical and other expenses usually do not exceed the $4,000 monetary threshold; hence, the rate of bodily injury liability claims is substantially lower than average. This is a sign of an effective no-fault system. While relatively few BI claims are filed compared to the nationwide average, attorney involvement in these types of claims is higher in Minnesota than the average no-fault state. The higher utilization of attorneys is corroborated by the increased number of injury claims filed for every 100 vehicle damage claims. Compared to other no-fault states, drivers in Minnesota are filing more injury claims, per unit of damage claims, than they were in 1980; in addition, the overall 17-year growth rate at which they are being filed is higher in Minnesota than in other no-fault states combined.

With regard to a comparison between Minnesota and Wisconsin, it is clear that the maxim, "getting what one pays for," is applicable to accident compensation systems as well. Minnesota automobile insurance consumers pay more than their counterparts in Wisconsin to insure private passenger vehicles; they should, however, since the No-Fault Automobile Insurance Act is a more comprehensive, robust accident compensation system than the very modest tort liability system in Wisconsin. In Minnesota, consumers

have the convenience of being served by their own insurance company. They receive immediate injury compensation (i.e., insurance benefits) regardless of whether their own negligence contributed to or caused an injury. Insured motorists in Minnesota involved in "single-vehicle crashes," where automobiles make contact with fixed objects, leave the pavement, or roll over, would be able to collect no-fault accident compensation from their own insurer. In Wisconsin, under similar circumstances, the motorist would not have a claim against another motorist or tortfeasor and could conceivably find that his or her injuries are not compensable through automobile insurance.

No-fault benefits also provide compensation to a wider range of injury victims, as coverage is not limited to the named insured, family members, permissive vehicle users and guest passengers. No-fault insurance systems such as the Minnesota Act provide compensation even to pedestrians and those who do not own an automobile. In Wisconsin, being hit by an uninsured motorist can threaten the likelihood of obtaining injury compensation; under no-fault systems, compensation for injuries caused by uninsured drivers would not depend on whether the injured person maintained uninsured motorist insurance coverage. In sum, Wisconsin residents who are injured in an automobile crash have no guarantees of being compensated for their injury. They must file a liability claim against another motorist and can find themselves trying to recover damages from another person's insurance company under trying circumstances, i.e., where the other person and his or her insurer are contesting liability.

Another attribute of no-fault compensation systems that greatly influences what consumers pay for automobile insurance is the tort threshold or the limit on the right to recover for subjective, non-economic injuries. It has been suggested that the purpose of a tort threshold is to reduce the number of injured persons who are eligible to make a tort claim and bring a lawsuit in tort. An effective tort threshold should reduce total tort payments enough to equal or exceed the total cost of no-fault payments in a state and reduce average bodily injury liability premiums in the state by an amount equal to or greater than the average premium for PIP no-fault insurance. A healthy, balanced no-fault plan will successfully keep overall personal injury insurance premiums from rising, year after year, more than the rate of inflation. Their efficacy in restricting access to tort liability payments (thus avoiding legal expenses

and other costs and delays associated with using the civil justice system) to enough victims to prevent premium increases may have diminished over time. Reasons might include the effect of medical inflation, increased skill in overcoming thresholds, fabrication, and claim buildup.

The health of a no-fault system should be monitored and reviewed periodically by the state lawmakers, just as the health and well-being of a medical patient must be evaluated at regular intervals by a physician. If careful study suggests that bodily injury claim costs, which partially drive rising automobile insurance premiums, are rising in an alarming manner, Minnesota policymakers have options available. They might, for instance, consider installing a mechanism to adjust for medical cost inflation. The state insurance regulator could be empowered to multiply the dollar threshold component by a described inflation index. Another approach would be to examine the adequacy of the verbal tort threshold; for example, what percentage of tort liability claims in Minnesota is predicated on qualification under the verbal threshold? If the amount greatly exceeds the percentage of liability claims arising from monetary threshold qualifications, the description of "serious injury" may require re-engineering. Similarly, if monetary threshold liability claims are disproportionately larger than verbal threshold cases, the remedy might be to convert a plural threshold into an exclusive verbal tort threshold.

Managed medical care programs would also be a constructive approach to checking the increase in medical costs that are paid for by automobile insurance premiums. A review of recent claiming trends in Colorado suggests that managed care is working as intended. Specifically, the average claim payments and, hence, loss costs for PIP have been declining since the implementation of the program. PIP claim frequencies are also lower than what they were five years ago, when the system began in this state. It is believed that enactment of managed care in Colorado has successfully kept the cost of claims from being even higher. Without this system, costs would continue to rise as demonstrated in other states. In order to slow the growth of medical claim costs in Minnesota and thus help contain injury costs, local policymakers would be prudent to consider authorizing insurers to introduce managed care programs.

Finally, as long as a state's no-fault automobile insurance plan is a modified variety where elements of the tort liability system re-

main intact, there will be multiple (i.e., liability and no-fault) cost-drivers that affect the cost of insurance claims and, ultimately, the price of automobile insurance. Minnesota has such a modified no-fault law. Should policymakers in this state ever grow concerned about rising automobile insurance premiums or question whether their no-fault system is delivering adequate value to their constituents, they might consider the strategies examined and used by public officials in other states to improve the efficiency of modified no-fault laws.

VI. APPENDIX OF FIGURES

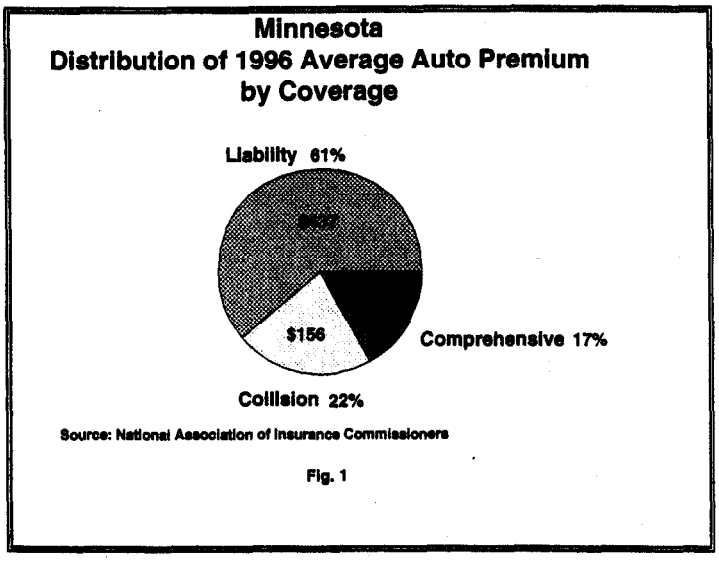


Fig. 1

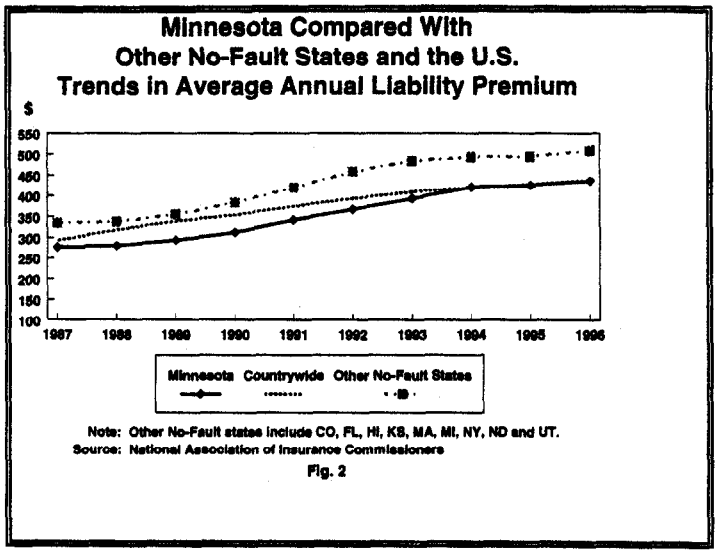

Minnesota Compared With
Other No-Fault States and the U.S.
Trends in Average Annual Liability Premium
$
550
500
450
400
350
300
250
200
150
100
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
Minnesota
Countrywide
Other No-Fault States
Note: Other No-Fault states include CO, FL, HI, KS, MA, MI, NY, ND and UT.
Source: National Association of Insurance Commissioners

Fig. 2

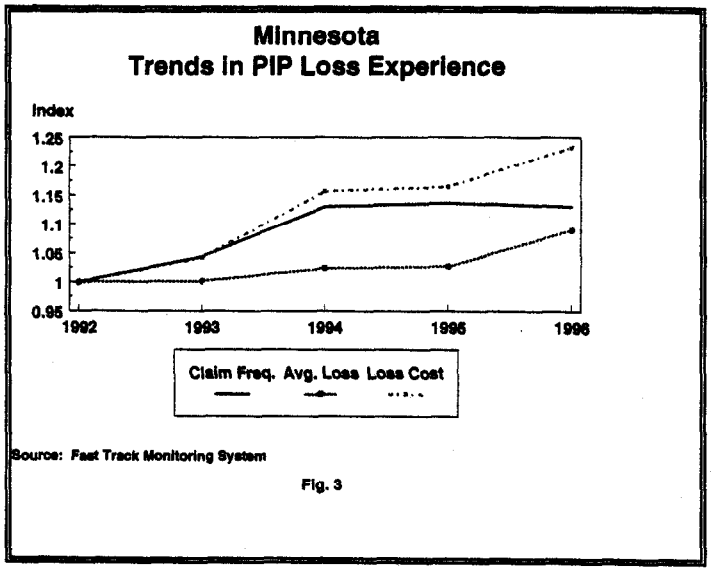

Minnesota
Trends in PIP Loss Experience
Index
1.25
1.2
1.15
1.1
1.05
1
0.95
1992
1993
1994
1995
1996
Claim Freq.
Avg. Loss
Loss Cost
Source: Fast Track Monitoring System

Fig. 3

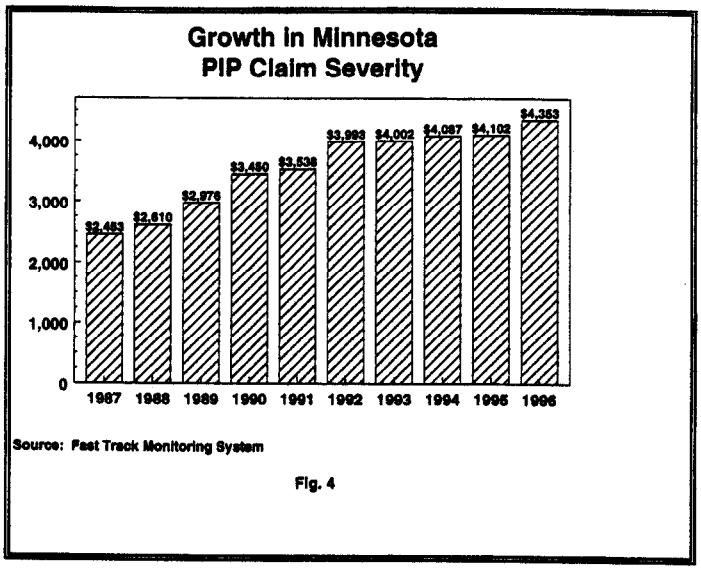

Growth in Minnesota
PIP Claim Severity
4,000
3,000
2,000
1,000
0
$2,483
$2,610
$2,976
$3,480
$3,538
$3,998
$4,002
$4,097
$4,102
$4,353
1987 1988 1989 1990 1991 1992 1993 1994 1995 1996
Source: Fast Track Monitoring System

Fig. 4

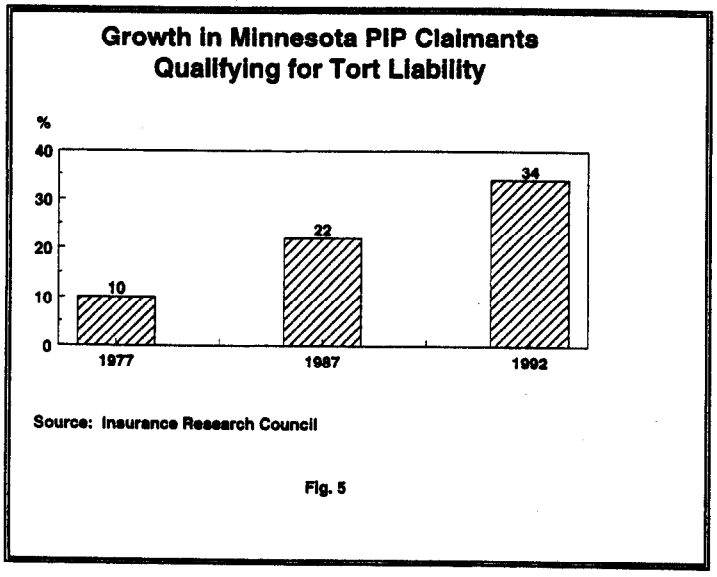
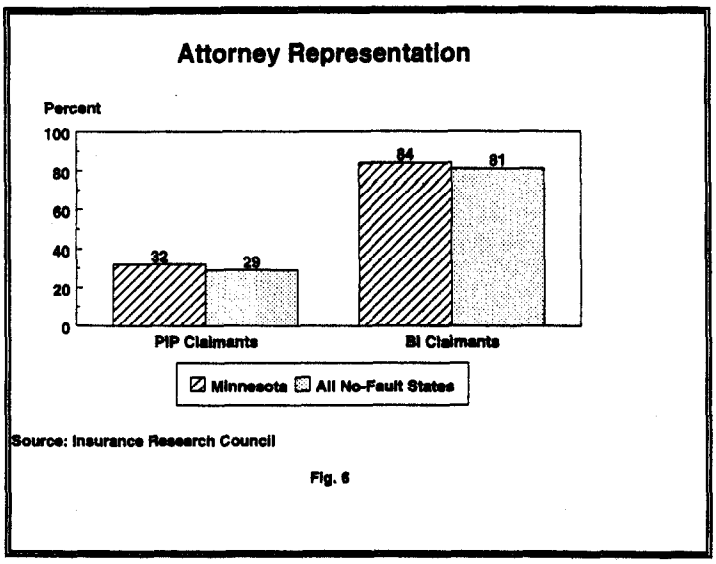
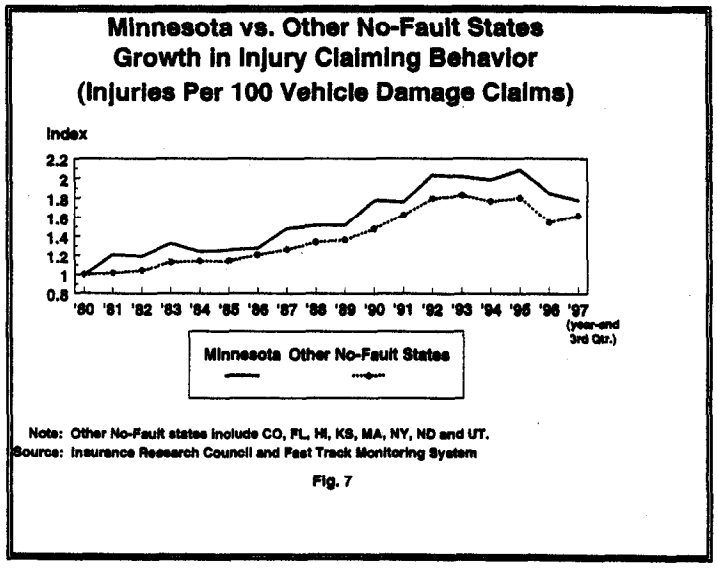

Growth in Minnesota PIP Claimants
Qualifying for Tort Liability
%
40
30
20
10
0
10
22
34
1977
1987
1992
Source: Insurance Research Council

Fig. 5



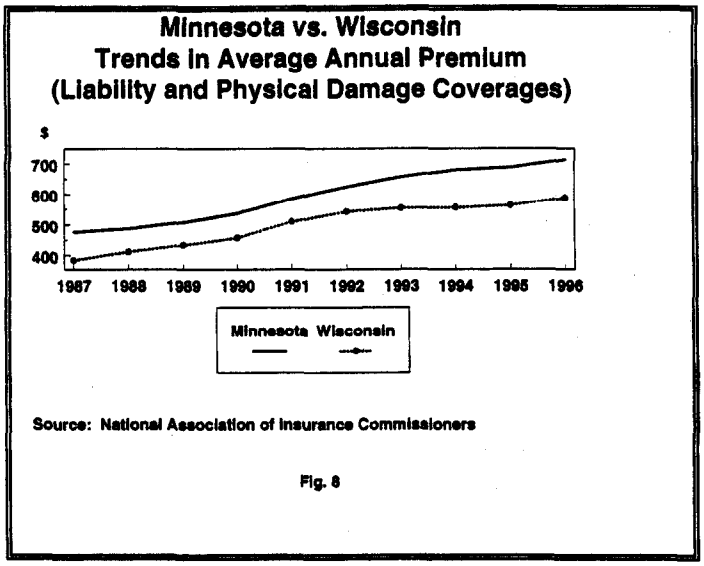
Source: Insurance Research Council

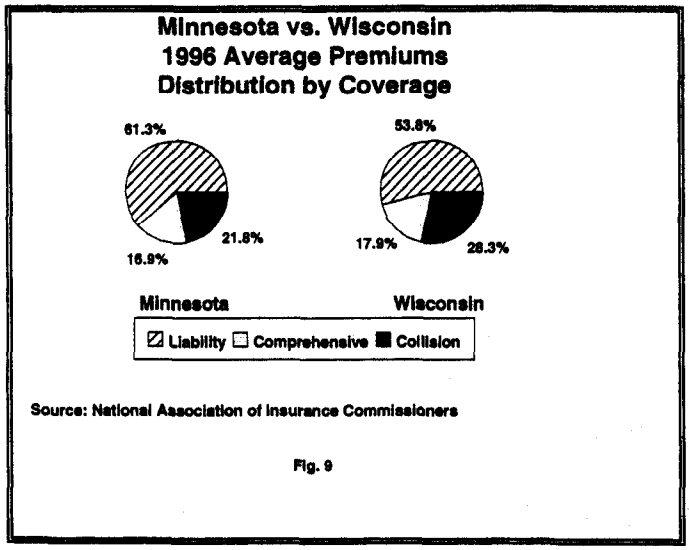
Fig. 6



Note: Other No-Fault states include CO, FL, HI, KS, MA, NY, ND and UT.
Source: Insurance Research Council and Fast Track Monitoring System

Fig. 7


Minnesota vs. Wisconsin
Trends in Average Annual Premium
(Liability and Physical Damage Coverages)
$
700
600
500
400
1987 1988 1989 1990 1991 1992 1993 1994 1995 1996
Minnesota Wisconsin
Source: National Association of Insurance Commissioners
Fig. 8


Minnesota vs. Wisconsin
1996 Average Premiums
Distribution by Coverage
61.3%
21.8%
16.9%
53.8%
17.9%
28.3%
Minnesota
Wisconsin
Liability Comprehensive Collision
Source: National Association of Insurance Commissioners
Fig. 9

For the above reasons, Claimant respectfully and strongly request that each and every item of her allowable costs be assessed against Respondent. Unfortunately, due to the present law regarding attorney's fees, no matter what action the arbitrator takes in this case, [redacted] will still bear a cost for the insurance company's inexcusable failure to pay for her reasonable and necessary accident-related healthcare. The small penalty of awarding statutory interest comes nowhere close to making up for the cost of fees and expenses related to bringing this action. Insurance companies count on this fact, and use it to try to force Plaintiff's to "settle-out" benefits for a fraction of their value. At least by awarding [redacted] all costs allowable in this matter, the arbitrator can minimize to the extent possible the unjustified expense [redacted] has had to incur to enforce payment of her bills.

CONCLUSION

For the above-cited reasons, Claimant respectfully requests a total award of $6,925.30 in this matter.

Respectfully submitted,

Date: April 29, 1999

By: [redacted]

ATTORNEYS FOR CLAIMANT

(1) To relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident.

. . .

(2) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment.

Minn. Stat. Sec. 65B.42 (1986).

Metropolitan Property & Casualty Insurance has violated both the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that he had bought and paid for, Metropolitan Property & Casualty Insurance turned their back on him. This is how Metropolitan Property & Casualty Insurance treated this particular customer and all of their customers. Metropolitan Property & Casualty Insurance has the burden of proof. They must show you by a preponderance of the evidence that they had a right to deny benefits as they became due. Metropolitan Property & Casualty Insurance cannot meet that burden.

In Wolf v. State Farm Insurance Co., our Minnesota appellate courts determined that the no-fault insurer has the first burden of proof. Before we even move on to the claimant showing that they had a right to receive care, Metropolitan Property & Casualty Insurance must first give you substantiating evidence which would allow them to deny benefits. Under the Wolf Decision and Ruppert decisions the appellate courts tell us that

> of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident.
>
> . . .
>
> (2) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment.

Minn. Stat. Sec. 65B.42 (1986).

American Family has violated both the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that she had bought and paid for, American Family turned their back on her. This is how American Family treated this particular customer. Respondent has the burden of proof. They must show you by a preponderance of the evidence that they had a right to deny benefits as they became due. Respondent cannot meet that burden.

In Wolf v. State Farm Insurance Co., our Minnesota appellate courts determined that the no-fault insurer has the first burden of proof. Before we even move on to the claimant showing that they had a right to receive care, American Family must first give you substantiating evidence which would allow them to deny benefits. Under the Wolf Decision and Ruppert decisions the appellate courts tell us that benefits can be terminated only after the injury has been cured. There is absolutely no showing on the part of Respondent that Claimant's injuries have been cured. Therefore, American Family, as a matter of law, must pay all of the bills. Wolf v. State Farm Insurance Co., 450 N.W.2d (Minn. App. 1990), Ruppert v. Milwaukee Insurance Co., 392 N.W.2d 550 (Minn. App. 1986).

Insurance companies often argue that the Courts have not given us a definition of the word necessary. This is untrue. In Krummi v. MSI Insurance

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. . .

(2) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment.

Minn. Stat. Sec. 65B.42 (1986).

Liberty Mutual has violated both the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that she had bought and paid for, Liberty Mutual turned their back on her. This is how Liberty Mutual treated this particular customer. Respondent has the burden of proof. They must show you by a preponderance of the evidence that they had a right to deny benefits as they became due. Respondent cannot meet that burden.

In Wolf v. State Farm Insurance Co., our Minnesota appellate courts determined that the no-fault insurer has the first burden of proof. Before we even move on to the claimant showing that they had a right to receive care, Liberty Mutual must first give you substantiating evidence which would allow them to deny benefits. Under the Wolf Decision and Ruppert decisions the appellate courts tell us that benefits can be terminated only after the injury has been cured. There is absolutely no showing on the part of Respondent that Claimant's injuries have been cured. Therefore, Liberty Mutual, as a matter of law, must pay all of the bills. Wolf v. State Farm Insurance Co., 450 N.W.2d (Minn. App. 1990), Ruppert v. Milwaukee Insurance Co., 392 N.W.2d 550 (Minn. App. 1986).

This takes the customer out of the disagreement and allows them to receive the care they need.

State Farm is now trying to punish their customer, Maria Sall by dragging her through an arbitration rather than the appropriate party. This cause of action should be State Farm v. the medical providers. See Tab #15.

LAW

The Minnesota No-Fault Act was proposed to our State Legislature by the insurance industry. The Legislature accepted no-fault insurance and the No-Fault Act was meant to address problems with getting immediate payment for bills incurred as a direct result of accidents. The purpose of the Act was:

> (1) To relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident.
>
> . . .
>
> (2) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment.

Minn. Stat. Sec. 65B.42 (1986).

State Farm has violated both the spirit and the letter of the law. They have taken their customer's money time after time and when their customer went to them for the much needed benefits that she had bought and paid for, State Farm turned their back on her. This is how State Farm treated this particular customer. Respondent has the burden of proof. They must

the mounting unpaid charges. He did, however, participate through January 10, 1997.

ARGUMENT

A. **Medical/chiropractic Expenses**. The Respondent takes the position in this case that it has no obligation to complete its payments for the chiropractic care with Dr. [redacted], or the PDR rehabilitation program, based on the report of Dr. [redacted]. That doctor saw the Claimant, of course, on only one occasion for a brief period of time, and his conclusions contain no great surprises, considering the purpose of the examination. It deserves to be given no weight whatsoever, when compared to the overwhelming weight of evidence in this case.

Mr. [redacted] was involved in a serious motor vehicle collision. No one doubts this. The Respondent paid a considerable sum of money pursuant to its statutory obligation. It now takes the incredible position that payments can be basically "suspended in mid-air." The Claimant was approximately 50-60 percent done with the PDR rehabilitation program when he received notice of the suspension of benefits. This came at a most unfortunate time, considering that:

(1) objective testing, as described previously, showed tremendous improvement; and

(2) Mr. [redacted] himself reported significant subjective improvements on the Pain Questionnaire.

Suspending benefits at this point is a little like stopping the completion of a house that needed rehabilitation at the 60%

unavailable for review at this arbitration. You will note he acknowledges her symptamology as dating from the time of her accident, acknowledges her symptoms were present upon examination and yet discounts her case entirely on the basis he feels her symptoms should be alleviated by now, without giving any weight to the opinions of four of [redacted] own health professionals, including one specialist, who concluded [redacted] still required additional treatment. There is absolutely no justification for his opinion even suggested other than his belief, after a five minute exam, that [redacted] has reached pre-accident status (contradicted by his findings of symptoms during the exam) and his belief apparently as a rule without exceptions, that one week of care is sufficient to recover from a traumatic injury if it involves soft tissue damage.

It is clear [redacted] benefitted from the treatment she received, but for which MetLife has denied payemnt. Through the course of physical therapy, chiropractic care, and massage therapy, [redacted] has been able to return and function normally in her day-to-day life with minimal pain. Throughout her treatment, she has continued with a home exercise program.

The treatment [redacted] is receiving, while unfortunately not a cure for her condition, is precisely the type of care to which she is entitled. There can be no argument that it is not related to the accident according to all the medical testimony; even the adverse doctor does not dispute this fact. The only excuse he offers is that it is no longer reasonable for her to have any type of treatment after this period of time. As attorneys, this unsupported opinion, from a doctor about whom MetLife refuses to reveal information that would certainly impeach his credibility, is the same "bought-and-paid-for" opinion insurance doctors have touted in virtually every IME they perform.

insurer. Failure to do so results in less than the bursement mandated by the No-Fault Act.

Therefore, under the authority granted to the arbitrator by le 32 of the Rules of Procedure for No-Fault Arbitration, aimant respectfully requests that the arbitrator explicitly award expenses, including the cost of securing medical records, otocopy costs for the arbitration booklets, and the arbitration iling fee in the award against Respondent.

We ask that the Arbitrator explicitly confirm that the Arbitrator's fees should be borne by the insurer.

15. **Attorney's Fees**. Minn. Stat. § 549.21, Subd. 2 (1988) states:

> "Upon motion of a party, or upon the Court's own motion, the Court in its discretion may award to that party costs, disbursements, reasonable attorneys' fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party: asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass or commit a fraud upon the Court...."

In this case, the insurer's failure to pay outstanding benefits amounts to bad faith.

Even without bad faith, attorneys' fees are now allowed under the No-Fault Rules. "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable consistent with the Minnesota No-Fault Act..." Minnesota Rules of Procedure for No-Fault Arbitration, Rule 32, 1/1/91. The arbitrator can only make the No-Fault procedure "just and equitable" by awarding attorneys' fees to the Claimant.

The arbitrator can soften the harshness of this rule somewhat,

and still remain within the rules, by making sure that all costs, fees, and interest are reimbursed by the insurer.

The interest begins to accumulate when the benefits become overdue. The date for beginning the interest calculation on the amount owed is the date the claimant first notified the insurance company of a possible claim. Pederson v. All Nation Ins. Co., 294 N.W.2d 693 697 (Minn. 1980); Haagenson v. National Farmers Union Prop. & Cas. Co., 277 N.W.2d 648, 653 (Minn. 1979).

CONCLUSION

Claimant [redacted] was insured under a policy with State Farm Insurance Company on November 5, 1992. The [redacted] carried insurance with State Farm Insurance Company to protect themselves against a misfortune such as this accident when this contract was made with the understanding that their insurance coverage would provide payment to [redacted] medical providers for medical bills incurred as the result of an automobile accident.

[redacted] arbitration claim clearly falls within the statutory guidelines along with case law support as set forth herein. As noted by [redacted] doctors, [redacted] medical bills, wage loss, and retraining expenses, are reasonable and necessary and arose from the automobile collision on November 5, 1992. Therefore, all overdue benefits must be awarded to Claimant [redacted] along with costs and interest.

Respectfully submitted,

Dated: April 10, 1997.

[redacted]

By [redacted]

Attorneys for Claimant

[redacted]

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June 21, 1999

Kate Stifter
American Arbitration Association
200 South Sixth Street
Suite 700
Minneapolis, MN 55402

Re: AAA Case Survey Responses and arbitrator practice percentages.

Dear Ms. Stifter:

I would like to obtain summary information from the AAA's No-Fault Case Surveys for the last three years, specifically: the percentage of responses that chose each option in response to Questions Three "Did the Arbitrator conduct the hearing in a fair and impartial manner?" and Four "Did the Arbitrator seem knowledgeable in the area of the dispute?"; and the responses to Question Two "What aspect of the arbitration process could be improved?".

I also understand the AAA keeps information about arbitrators' practice percentages, i.e., what percentage of their practice is plaintiffs' (or claimants') side, and what percentage is defense side. Could you tell me what percentage of AAA's No-Fault arbitrators report that their practice is over 50% plaintiffs' (or claimants') side? I would appreciate it. Thank you very much for your assistance.

Please call me if you have any questions about these requests. We will cover any charges for obtaining copies of documents regarding this information.

Sincerely,

Jenneane Jansen

Jenneane Jansen

JLJ\727170

American Arbitration Association
Dispute Resolution Services Worldwide

Kathryn A. Stifter
Supervisor of Case Administration

700 Pillsbury Center, 200 South Sixth Street
Minneapolis, MN 55402-1092
telephone: 612 332 6545, facsimile: 612 342 2334
http://www.adr.org
e-mail: StifterK@adr.org

July 29, 1999

Jenneane Jansen
Meagher & Geer
4200 Multifoods Tower
33 S. Seventh St.
Minneapolis, MN 55402

Dear Ms. Jansen:

I received your letter of June 21, 1999 on July 27, 1999. In your letter you request that the Association provide you with statistical information from case surveys and information about the percentage of No-fault arbitrators who could be described as "plaintiff" attorneys.

The Association is not able to easily compile the makeup of its no-fault panel in the manner you request without expending considerable resources, and therefore, we regret we are unable to provide you with information on the number of "plaintiff" no-fault arbitrators at this time.

With respect to your request for information on the Association case survey forms, please be advised that the forms contain information on parties and their counsel, in which there is an expectation of confidentiality. Accordingly, we do not believe it appropriate to share the surveys with outside individuals. Although the surveys are reviewed internally, responses are not tabulated by question numbers. As a special project, the Association did tabulate the surveys received from January 1, 1997 to May 14, 1997. During that time 2,474 surveys were issued and 164 were completed and returned to the Association. I have enclosed the requested information from that project. I hope you find it helpful.

Please call me if you have any questions.

Sincerely,

Kathryn A. Stifter
Supervisor of Case Administration

Enclosures

No-Fault Case Survey

Administrator:
Case Number:
Claimant:
Respondent:

The AAA continually strives for excellence in our service and the performance of the arbitrators. Please help us by taking a minute to fill out the following questionnaire and returning it to our office in the enclosed envelope or via facsimile to (612) 342-2334.

1. Please rate the administrative service.

EXCELLENT	5	4	3	2	1	POOR

2. How could case administration be improved?

3. Did the Arbitrator conduct the hearing in a fair and impartial manner?

IMPARTIAL	5	4	3	2	1	BIASED

4. Did the Arbitrator seem knowledgeable in the area of the dispute?

VERY KNOWLEDGEABLE	5	4	3	2	1	LACKING NECESSARY KNOWLEDGE

5. What aspect of the arbitration process was most effective?

6. What aspect of the arbitration process could be improved?

7. Which words best describe your experience with the arbitration process?

Cost Effective Conclusive Expedient

Confidential Other:_____.

Thank you for completing this questionnaire. Please feel free to make additional comments on the back of this form. If you have any questions on the services provided by AAA, please call us at (612) 332-6545.

Signed_____(optional)

Question #3:

Did the arbitrator conduct the hearing in a fair and impartial manner?

9%	Impartial
63%	5
15%	4
6%	3
2%	2
2%	1
3%	Biased

Question #4:

Did the Arbitrator seem knowledgeable in the area of the dispute?

8%	Very Knowledgeable
62%	5
20%	4
4%	3
3%	2
2%	1
1%	Lacking Necessary Knowledge

Comments on question #2: How could case administration be improved?

- Doing a good job
- It is fine as is
- Speeding up the calendar process
- Don't know
- No suggestion
- Arbitrator could render award faster
- Great AAA. You guys always do a wonderful job in administrative claims.
- Get balanced panels
- Quicker updates on address changes
- The arbitration date could have come a little sooner
- Findings of fact by arbitrator would be helpful

(Continued on question #2)

- Schedule hearings earlier
- The decision could have been based on the evidence
- The service has always been exceptional
- Just fine
- Panel equity
- Exact time task for decisions/modifications of awards based on previous Arbitrators before this one that are still out there
- Very good
- The strike list process of appointing an arbitrator continues to mystify me. Why is it when there are two plaintiff attorney's and two defense attorneys on a panel, Western National invariably gets their third choice or a Claimant's attorney assigned

Comments on question # 5: What aspect of the arbitration process was most effective?

- The hearing
- The entire process really works well to resolve No-Fault disputes
- Speed of administration
- Entire process was excellent
- Arbitration hearing
- Quick and single resolution of claim
- The arbitrator's knowledge in the area of dispute
- Quick, concise
- Speed and cost
- Time utilization
- The arbitrator was excellent on getting the parties to focus on the issues
- Arbitrator had read materials in advance
- We both were allowed to speak, and present our case fully
- Entire
- Speed
- The award
- The arbitrator
- Hearing
- Timely, fair, well qualified arbitrators
- Inexpensive and quick
- Administrative service
- Speed and cost
- Neil O'Neill is a wonderful arbitrator
- It only took 35-40 minutes
- The informal nature was a big help
- The expedient manner in which the process is completed
- Speed-efficiency
- The administration of the case was expedient and efficient
- Quick award
- I guess from the Claimant's perspective, what was most effective, is she had her decision from the Arbitrator, awarding her everything as soon as testimony had concluded
- The arbitrator spent too much time asking questions of Claimant. If Claimant's counsel doesn't perform adequately, this shouldn't give the arbitrator the right to prove up the case for him/her
- Informality - allowed client to feel more at ease

(Cont. #5)

- Arbitrator did a good job of being fair and listening to all evidence and argument
- Arbitrator apparently doesn't understand No-Fault concepts and failed to follow the law
- Is this effective? You have got to be kidding.
- The arbitrator did a very professional job. My client was very impressed with his professionalism. Personally, I was somewhat disappointed with the Award. The arbitrator was very well prepared and did a nice job
- The arbitrator seemed very knowledgeable about the No-Fault law. The hearing went smoothly
- Administration
- The arbitrator was very knowledgeable in the subject area. He was extremely polite and respectful to all participants. You should have him on your lists more often.
- Short time for hearing and informal
- The arbitrator was very incidental and his questions honed in on the heart of the case immediately, making to correct award possible

Comments of question # 6: What aspect of the arbitration process could be improved?

- Explanation of award
- I have no complaints about the arbitration is this case but the panels are severely skewed toward plaintiff attorneys
- The process is very effective and efficient in resolving No-Fault disputes
- Don't know
- No suggestion
- If possible more unbiased arbitrators
- More knowledgeable arbitrator
- Could require Respondent's to give their book to Claimant before the date of hearing
- Would like a reason for the decision by the arbitrator
- It takes too long from filing to hearing
- Your panels continue to stink
- Fair decision
- Directions to this arbitrators office
- Arbitrators ability to define the issues
- Fair panels - St. Cloud panels are horrendous
- The arbitrator was the most Claimant's orientated arbitrator possible. He is counsel on a case which I am defending, but did not disqualify himself. He did not give the Respondent a fair hearing.
- More timely response referring decision
- Unbiased arbitrators. I am so tired of plaintiff attorney's dominating the strike lists.
- A change in the arbitration rules: Where a claimant recovers 90% or more of original claim, arbitrator's compensation should be paid by Insurer as a matter of AAA rule.
- Arbitrator slower than most in getting out award and she was not very pleasant at the hearing
- The award was issued well beyond 30-days. I know this is difficult for AAA to control.
- At least two defense attorneys on the strike list - see this panel - this is "fair and impartial"
- It would be helpful if hearing dates could be obtained sooner but I realize that's not realistic due to the volume of claims
- It took far too long for the hearing to be scheduled
- Would like a reason for the decision by the arbitrator
- AAA must do a better job of putting together an impartial panel of arbitrators. In this case Respondent was forced to present it's case to a lawyer who practices exclusively in the area of personal injury and had no incentive to deny any part of claimant's claim. Not surprisingly, the Arbitrator ruled against the insurance company in every aspect
- The panel of arbitrators apparently have no regard for a just and equitable system

[redacted]

June 21, 1999

[redacted]
STATE FARM INSURANCE COMPANY
[redacted]

Re: [redacted]

Dear [redacted]

On behalf of [redacted] I have been asked to approach you with reference to a no-fault buy-out. Our current records indicate that $9,634.03 has been paid out of the medical fund. Currently, $2,084.35 remains unpaid, plus miscellaneous mileage for those appointments that were denied.

Further, our records indicate that out of the $2,955.85 she incurred in wage loss, that your company has paid $1,901.73. We have calculated an outstanding wage loss of $1,054.14.

On behalf of [redacted] I have been authorized to offer a buy-out of her no-fault medical and wage loss funds for the combined total of $3,138.49. As you know, this matter was filed for arbitration, but unilaterally withdrawn by [redacted] at our advice.

We intend to re-file this matter next year to get a new panel. I believe that it would be in the best interest of [redacted] and your company if we were able to resolve this matter on a full and final basis rather than to incur the additional filing fee and costs.

I look forward to your prompt response.
Sincerely,

[redacted]

Attorney at Law
[redacted]

PLYMOUTH-AUTO

JUN 22 1999

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