STATE OF MINNESOTA

IN SUPREME COURT

C6-74-45550

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

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 9, 1990, at 9:00 a.m., to consider the petition of the Minnesota Supreme Court Standing Committee on Arbitration to amend the Rules of Procedure for No-Fault Arbitration. A copy of the petition is 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, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 5, 1990, 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 November 5, 1990.

Dated: September 25, 1990

BY THE COURT:

Peter S. Popovich
Chief Justice

RIDER, BENNETT, EGAN & ARUNDEL

ATTORNEYS AT LAW

WILLIAM T. EGAN
EDWARD M. ARUNDEL
DONALD R. BACKSTROM
DAVID F. FITZGERALD
LARRY R. HENNEMAN*
JOHN P. FLATEN
DAYTON E. SOBY
DAVID J. BYRON
RICHARD J. NYGAARD
J. DENNIS O'BRIEN*
ALFRED SEDGWICK
STEVEN J. KLUZ
RICHARD H. KROCHOCK
GENE C. OLSON
ROGER R. ROE, JR.*
JEFFREY R. SCHMIDT
GREGORY M. WEYANDT*
ERIC J. MAGNUSON*
RONALD B. LAHNER*
JOHN B. LUNSETH II
JOAN S. MORROW
GENE H. HENNIG
SHERYL RAMSTAD HVASS
KEVIN C. DOOLEY
MARK W. SCHNEIDER*
JOHN D. SAUNDERS
PATRICK J. SAUTER
PATRICIA A. BURKE
DAVID B. DEAN

KEITH J. KERFELD
BRIAN A. WOOD*
ANN BARRY BURNS*
BARRY F. CLEGG
DAVID M. BOLT
MARTHA M. SIMONETT
JANE S. WELCH
STEPHEN P. WATTERS
LESLIE M. ALTMAN
LOUISE A. DOVRE
JILL FLASKAMP HALBROOKS
JAMES L. FORMAN
JEFFREY D. CARPENTER
KENNETH S. GUENTHNER
ROBERT B. JASKOWIAK
CHLOETHIEL W. DEWEESE
JAN M. GUNDERSON
ROBERT A. AWSUMB
JANETTE K. BRIMMER*
ANDREA S. BRECKNER
WILLIAM J. EGAN
MARY E. PAWLENTY
PATRICK J. ROONEY
TIMOTHY J. PAWLENTY
JACKIE VENCIL PRYOR
NELL E. MATHEWS
LAURA TUBBS BOOTH
THOMAS G. ROCK
TERRI L. GROEN

JONATHAN N. JASPER
YVETTE D. ANSEL
ANNE BRYANT WIGHT
DAVID T. KLAPHEKE
ANDREA MITCHELL WALSH
PAULA G. FORBES*
AMY K. ADAMS
DEBORAH C. ECKLAND
RANDALL H. LENTZ
STEPHEN O. PLUNKETT
JAMES A. CUNNINGHAM**
MARK A. SOLHEIM
MICHAEL M. SULLIVAN
JOHN M. BJORKMAN
DEBRA L. GROSSMAN
RACHEL L. KAPLAN

GENE F. BENNETT
(1926-1983)

OF COUNSEL
STUART W. RIDER, JR.
KENNETH R. JOHNSON
DOUGLAS K. AMDAHL

*ALSO ADMITTED IN WISCONSIN
**ADMITTED IN WISCONSIN ONLY

2000 LINCOLN CENTRE
333 SOUTH SEVENTH STREET
MINNEAPOLIS, MINNESOTA 55402

TELEPHONE (612) 340-7951
TELECOPIER (612) 375-0701

WRITER'S DIRECT DIAL NUMBER
340-7975

November 5, 1990

Mr. Fred Grittner
Clerk of Appellate Courts
230 State Capitol Building
St. Paul, MN 55155

C6-74-45550

Dear Mr. Grittner:

On behalf of the Insurance Federation of Minnesota, I respectfully request permission to briefly address the Court at the Hearing on November 9 on the proposed changes to the American Arbitration Association Rules. The Federation represents the interests of many insurance companies that do business in the state of Minnesota. My anticipated comments will address the proposed Rule changes and the practical working of the arbitration system. Thank you for your consideration of this request.

Very truly yours,

RIDER, BENNETT, EGAN & ARUNDEL

By Louise Dovre
Louise A. Dovre

LAD/tld

Enclosures

ARTHUR, CHAPMAN & MCDONOUGH, P.A.

ATTORNEYS AT LAW

500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
Telephone 612 339-3500
Telecopier 612 339-7655

Writer's Direct Line: 375-5917

LINDSAY G. ARTHUR, JR.[1]
JOHN T. CHAPMAN[1]
MICHAEL P. MCDONOUGH[1]
ROBERT W. KETTERING, JR.[1]
THEODORE J. SMETAK[1]
DONNA D. GECK[1,3]
PATRICK C. CRONAN
THOMAS A. PEARSON
COLBY B. LUND[1]
THOMAS O. ALBERS[1,2,4]
MICHAEL R. QUINLIVAN[4]
SALLY J. FERGUSON[1]
JAMES S. PIKALA
JEREMIAH P. GALLIVAN
KATHERINE L. MACKINNON
BLAKE W. DUERRE[5]
KAREN MELLING VAN VLIET
EUGENE C. SHERMOEN, JR.
PAUL J. ROCHEFORD
CRAIG R. KIEFFER
GREGORY J. JOHNSON

November 6, 1990

Mr. Frederick K. Grittner
Supreme Court Administrator
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Hearing to Consider Proposed Amendments to Rules of Procedure for No-Fault Arbitration
Court File: C6-74-45550
Hearing Date: November 9, 1990 at 9:00 a.m.

Dear Mr. Grittner:

I am enclosing 12 copies of the Report of the Standing Committee for Administration of Arbitration Under the Minnesota No-Fault Act. I would ask you kindly note my request to address the Court at the hearing scheduled for this Friday. I will speak on behalf of the Committee to introduce the report, to articulate the basis for the significant changes, and respond to such questions as may arise. I do believe the chairperson of the committee, Mr. Leonard Lindquist, will be in attendance. If you do not already show his request to speak, please add his name as well. The report is submitted at his request.

Thank you.

Sincerely,

ARTHUR, CHAPMAN & McDONOUGH, P.A.

Theodore J. Smetak

TJS/vlh
Enclosures
cc: Leonard Lindquist, Esq.
James R. Deye, American Arbitration Association

STATE OF MINNESOTA

IN SUPREME COURT

C6-74-45550

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

The undersigned hereby submits this Request To Make An Oral Presentation at the November 9, 1990, hearing to consider the Proposed Amendments to the Rules of Procedure for No-Fault Arbitration.

SCHWEBEL, GOETZ & SIEBEN, P.A.

By _____
James R. Schwebel (#98267)
ATTORNEYS FOR PLAINTIFF
5120 IDS Center
Minneapolis, Minnesota 55402
(612) 333-8361

STATE OF MINNESOTA

IN SUPREME COURT

C6-74-45550

IN RE: PROPOSED AMENDMENTS TO RULES OF PROCEDURE FOR NO-FAULT ARBITRATION

COMMENTS ON THE PROPOSED AMENDMENTS TO THE RULES OF PROCEDURE FOR NO-FAULT ARBITRATION

I. INTRODUCTION

Any modifications, however small, in the no-fault arbitration procedural rules should not be made within a historical vacuum. We must have a sense of a history regarding the concept of arbitration as we contemplate alterations in the no-fault arbitration procedural rules. As early as 1963, Justice Rogosheske stated that "[o]ne of the fundamental objectives of the [arbitration] act was to encourage and facilitate the arbitration of disputes by providing a speedy, informal, and relatively inexpensive procedure for resolving controversies. . . ." Layne-Minnesota Co. v. Regents of the Univ. of Minnesota, 266 Minn. 284, 123 N.W.2d 371, 374 (1963). Historically, it has been "[t]he general policy of Minnesota to encourage arbitration as a speedy, informal, and relatively inexpensive procedure for resolving controversies. . . ." Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182, 285 N.W.2d 667, 669 (Minn. 1979). "[T]he basic intent of the [arbitration] act is to discourage litigation and to foster voluntary resolution of disputes in a forum created and controlled by the written agreement of

the . . . parties." Eric A. Carlstrom Construction. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479, 483 (Minn. 1977).

In light of the basic purposes underlying arbitration as a mechanism of alternative dispute resolution, procedural modifications in the present arbitration act, if any, should be minimal. Such revisions should be effected to streamline, rather than complicate, the process. It is within the context of the historical purposes of arbitration that the following comments are made.

II. COMMENTS ON THE PROPOSED RULE 5 -- INITIATION OF ARBITRATION

Proposed Rule 5, subdivisions (e)(f) state:

> (e) At the time of filing the arbitration form, or within 30 days after, the claimant shall file an itemization of benefits claimed and supporting documentation.
>
> (f) Within 30 days after receipt of the itemization of benefits claimed and supporting documentation from claimant, respondent shall serve a response to the petition setting forth all grounds upon which the claim is denied and accompanied by all documents supporting denial of the benefits claimed.

The above sections are ambiguous because they are silent as to whether costs incurred by a claimant between the itemization and hearing are to be recovered and/or arbitrated. Presumably, in order to effect the purpose of Minnesota's No-Fault Act, the claimant's costs incurred by him or her after the itemization is filed but prior to the arbitration hearing, are either to be paid or arbitrated. To do otherwise would contravene the purposes of the Act and the arbitration dispute resolution process. This

ambiguity should be cleared up by including a provision stating that the intervening costs incurred are recoverable and arbitrable.

III. COMMENTS ON PROPOSED RULE 12 -- DISCOVERY

Minn. Stat. § 65B.525, Rule 14, the current Discovery rule for No-Fault Arbitrations provides:

> **RULE 14. Discovery.**
>
> The voluntary exchange of information is encouraged. Formal discovery of any kind beyond exchange of medical reports and other exhibits to be offered at the hearing is discouraged. However, upon application and good cause by any party, the arbitrator may permit any discovery allowable under the Minnesota Rules of Civil Procedure for the District Courts. Any medical examination deemed necessary by the respondent shall be completed within 90 days following commencement of the case unless extended by the arbitrator for good cause.

Proposed Rule 12 provides:

> The voluntary exchange of information is encouraged. Formal discovery is discouraged except that a party is entitled to: (1) exchange of medical reports; (2) medical authorizations directed to all medical providers consulted by the claimant in the seven years prior to the accident; (3) employment records and authorizations for two years prior to the accident, when wage loss is in dispute; (4) supporting documentation required under No-Fault arbitration Rule 5; and (5) other exhibits to be offered at the hearing.
>
> However, upon application and good cause shown by any party, the arbitrator may permit any discovery allowable under the Minnesota Rules of Civil Procedure for the District Courts. Any medical examination for which the respondent can establish good cause shall be completed within the 90 days following the commencement of the case unless extended by the arbitrator for a good cause.

Historically, the general rule is that formal discovery of any type is discouraged. Only upon a showing of "good cause" should formal discovery be ordered. The burden is upon the party requesting formal discovery responses to establish such good cause.

The legislature has expressed its purposes in requiring arbitration of no-fault claims:

> (4) To speed the administration of justice, to ease the burden of litigation on the courts of the state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation . . . . Minn. Stat. § 65B.42 (1986).

The clear intent of the legislature was to provide a simple, inexpensive method of resolving no-fault disputes. Accordingly, the Supreme Court promulgated rules that explicitly discourage formal discovery. Proposed Rule 12 undermines the intent of the legislature and further chips away at the historic informality of arbitration. The proposed rule further increases the cost of arbitration to all parties and continues to destroy the important distinctions between arbitration and litigation.

The proposed rule also undermines the no-fault arbitration system. It is futile to institute an alternative dispute forum such as arbitration if the system is to be encumbered with the identical discovery rules that have clogged the district courts. If proposed Rule 12 is adopted, arbitrations will continue to become as lengthy and expensive as district court actions.

Although there is no Minnesota appellate discussion of the issue, at least two district courts have ruled on this issue. In Richardson v. Employers Mut. Cas. Co., Henn. Cty. Dist. Ct. File No. 869633 and in Ray v. American Family Ins. Co., Henn. Cty. Dist. Ct. File No. 788846, discovery rules were held inapplicable to arbitrations. In two recent cases before American Arbitration Association arbitrators, discovery was denied. Jones v. State Farm Insurance Company, (attached as Exhibit A) and Thrun v. American Family Insurance Group, (attached as Exhibit B), formal discovery was summarily denied.

Another AAA arbitrator has taken a more moderate approach. In Schmitz v. Sentry Insurance Company (attached as Exhibit C), AAA arbitrator Robert Cragg ordered that "the applicant need not answer formal interrogatories, but must provide medical and employment authorizations and medical reports, if any, together with any exhibits which are to be offered at the hearing." There is a clear trend among AAA arbitrators to deny formal discovery in arbitrations.

Other commentators agree. "In most states discovery procedures continue to be unavailable in connection with an arbitration process." Widiss, Uninsured and Underinsured Motorist Insurance, § 25.14 (1987). "As to arbitration, discovery is generally not available as an incident of the arbitration proceeding itself. Discovery is expensive and time consuming and is thus inconsistent with the desires of parties who refer their disputes to arbitrators . . ." Note, 74 Harv.L.Rev. 940, 943 (1961).

Federal Courts have long refused to apply the Federal Rules of Civil Procedure relating to discovery to arbitration proceedings. In Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Company, 20 F.R.D. 359 (S.D.N.Y. 1957), the court vacated a notice to take depositions of five of the petitioner's employees. "The fundamental differences between the fact finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one and its superfluity and utter incompatibility in the other." Id. at 362. See also, Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9, (D. Pa. 1960).

Similarly, in Ruff v. Metropolitan Property and Liability Insurance Company, the Rhode Island Supreme Court held that the discovery provisions of the Rules of Civil Procedure were not applicable in an uninsured motorist arbitration. 508 A.2d. 672 (R.I. 1986), citing Lutz Engineering Company, Inc. v. Sterling Engineering and Construction Company, Inc., 112 R.I. 605, 314 A.2d. 8 (1974).

In a Michigan case involving arbitration through the American Arbitration Association, discovery was denied. When disputes are submitted to arbitration, the parties "relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses, the litigating parties have no

comparable privilege." (Citations omitted). City of Dearborn v. Freeman-Darling, Inc., 119 Mich. App. 439, 326 N.W.2d. 831 (1982), quoting Burton v. Bush, 614 F.2d. 389 (4th Circ., 1980).

Proposed Rule 12 authorizes discovery which is far more elaborate than the discovery allowable under the Minnesota Rules of Civil Procedure or as outlined in current Rule 14. An example is the requirement that "employment records and authorizations for two years in dispute" be given. Adoption of the five subpoints under proposed Rule 12 will open the door for extensive discovery discussions and quasi discovery motions before arbitrators for purposes of determining whether medical authorizations and employment authorizations are calculated to lead to relevant information to be considered by the arbitrators. This is only one possible scenario among many. If adopted, proposed Rule 12 will establish an intricate discovery mechanism which contravenes the historical purpose of the arbitration process.

For these reasons, proposed Rule 12 should be abolished in its entirety and existing Rule 14 should be retained as is. Indeed, existing Rule 14 already contravenes the underlying purposes of arbitration in that it provides for common discovery mechanisms outlined in the Minnesota Rules of Civil Procedure.

IV. ATTORNEYS' FEES

Originally, arbitration was to be a process through which a lay person could navigate without the help of an attorney. However, this is not presently the case. As procedures for arbitration have come more elaborate, the services of an attorney

are required in order to protect one's interests and rights throughout the arbitration process. If the proposed rules are adopted, making the arbitration more intricate, lay persons will become more confused by the steps of arbitration. The result is that the arbitration process is becoming more and more the territory of attorneys. Therefore, it is only right that as arbitration morrors the litigation process, the prevailing party in arbitration should be awarded attorneys' fees.

V. CONCLUSION

I strongly urge the Minnesota Supreme Court to consider the historical purpose of arbitration to provide for speedy, informal, and inexpensive procedures for resolving controversies before it makes any modifications in the existing no-fault arbitration rules. The ambiguities in proposed Rule 5 providing for changes in the initiation of arbitration should be cleared up by including a provision stating that the intervening costs incurred are recoverable and arbitrable. In addition, proposed Rule 12 should be rejected in its entirety because it will add to an already far-too-complicated discovery process in No-Fault Arbitration.

SCHWEBEL, GOETZ & SIEBEN, P.A.

By _____
James R. Schwebel (#98267)
ATTORNEYS FOR PLAINTIFF
5120 IDS Center
Minneapolis, Minnesota 55402
(612) 333-8361

IN THE MATTER OF THE ARBITRATION BETWEEN

Jovita Jones,

Claimant,

ORDER

v.

State Farm Insurance Company,

Respondent.

Based upon all the files, records and proceedings herein and upon the arguments of counsel,

IT IS HEREBY ORDERED:

That respondent's motion for formal discovery is denied.

Dated this 13 day of March, 1989.

AMERICAN ARBITRATION ASSOCIATION

By: Maureen McVerry

EXHIBIT A

A M E R I C A N A R B I T R A T I O N A S S O C I A T I O N

In the Matter of the Arbitration between

LeVonne Thrun

AND

American Family Insurance Group

CASE NUMBER: 56 60 0757 88

ORDER OF ARBITRATOR

After reviewing the contentions of both parties, the Arbitrator has directed the Association to advise as follows:

"Respondent's request for Formal Discovery is hereby denied.

A brief Statement of the Case must be in the possession of the Association, for transmittal to the Arbitrator, by April 24, 1989.

Copies of each document or exhibt which a party intends to offer in evidence must be in the possession of the oppossing party by April 25, 1989.

DATED: 4/18/89

Robert W. Groth

ROBERT W. GROTH, ARBITRATOR

EXHIBIT B

CRAGG & FOBBE

ROBERT S. CRAGG
DANIEL E. FOBBE
JAMES B. "JAY" STOKER*

OF COUNSEL: J. W. CRAGG

*ALSO ADMITTED IN CALIFORNIA

August 31, 1989

American Arbitration Association
514 Nicollet Mall, Suite 670
Minneapolis, Minnesota 55402-1092

Attention: Kate

Re: Shelly Schmitz v. Sentry
Insurance Company
Case No. 56 60 0367 89

Ladies and Gentlemen:

The discovery dispute between the parties is resolved as follows: "Pursuant to Minnesota No-Fault Arbitration Rule No. 14, the applicant need not answer formal interrogatories, but must provide medical and employment authorizations and medical reports, if any, together with any exhibits which are to be offered at the hearing."

Very truly yours,

Robert S. Cragg
Arbitrator

RSC:sg

EXHIBIT C

LAW OFFICES

SCHWEBEL, GOETZ & SIEBEN, P. A.

5120 I D S CENTER

80 SOUTH EIGHTH STREET

MINNEAPOLIS, MINNESOTA 55402-2246

FAX (612) 333-6311

MINNESOTA TOLL-FREE (800) 752-4265

TELEPHONE (612) 333-8361

DIANE C. HANSON (1948-1985)

JAMES R. SCHWEBEL ††
JOHN C. GOETZ †
WILLIAM R. SIEBEN †
DAVID J. MOSKAL *†
WILLIAM A. CRANDALL *†
PAUL E. GODLEWSKI
LARRY E. STERN **
MARK H. GRUESNER
MICHAEL D. TEWKSBURY ***
MARY C. CADE
JAMES G. WEINMEYER

MAX H. HACKER
RONALD N. SCHUMEISTER
DONALD L. BURKE *
RICHARD L. TOUSIGNANT
MICHAEL A. ZIMMER **
ROBERT L. LAZEAR
CANDACE L. DALE
LAURIE J. SIEFF
SHARON L. VAN DYCK
T. JOSEPH CRUMLEY
CHRISTINE D. ZONNEVELD

OF COUNSEL
MICHAEL G. SIMON

*ALSO ADMITTED IN WISCONSIN
**ALSO ADMITTED IN NORTH DAKOTA
***ALSO ADMITTED IN COLORADO
†ALSO ADMITTED IN ARIZONA

November 5, 1990

OFFICE OF APPELLATE COURTS

NOV 5 1990

FILED

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

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

Dear Mr. Grittner:

Enclosed please find the following:

1. Request to Make Oral Presentation; and

2. Comments on Proposed Amendments to the Rules of Procedure for No-Fault Arbitration.

Yours sincerely,

James R. Schwebel

JRS/dd
Enclosure