

NO. A05-0942

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State of Minnesota  
**In Court of Appeals**

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BCBSM, Inc. d/b/a Blue Cross Blue Shield of Minnesota,  
*Appellant,*

vs.

The Minnesota Comprehensive Health Association,  
*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

MCHA's authority to assess its contributing members is explicitly prescribed by the Minnesota Comprehensive Health Insurance Act, Minn. Stat. Ch. 62E (2004). Therefore, this appeal turns on what that statute authorizes MCHA to do. Clearly, MCHA may calculate its annual assessment based on "accident and health insurance premium[s]." Minn. Stat. § 62E.11, subd. 5. However, the plain terms of Chapter 62E do not include "stop-loss" insurance premiums; consequently, the legislature has not authorized MCHA to assess members based on stop-loss premiums. Proper application of the statute will not cause a reduction in funds for MCHA or its insureds; it simply ensures that MCHA's assessments will be correctly calculated in the future. Because the district court erroneously construed Chapter 62E, its decision granting summary judgment in favor of MCHA must be reversed.

### **I. MCHA DISREGARDS THE UNAMBIGUOUS STATUTORY LANGUAGE OF CHAPTER 62E**

It is well established that when a statute is unambiguous, courts need not, and cannot, look beyond its plain language. *See* Minn. Stat. § 645.16 (2004) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under pretext of pursuing the spirit."). Thus, the proper role of the appellate court "is simply to interpret the statutory language, not to look beyond the statute's plain meaning in order to 'in effect rewrite a statute so as to accomplish a result which might be desirable and at the same time conflict with the expressed will of the legislature.'" *Mattice v. Minn. Prop. Ins. Placement*, 655

N.W.2d 336, 341 (Minn. Ct. App. 2002) (quoting *McNeice v. City of Minneapolis*, 250 Minn. 142, 147, 84 N.W.2d 232, 237 (1957)).

While MCHA agrees that Chapter 62E is unambiguous, it nevertheless ignores the plain language of the statute, which omits any reference to stop-loss insurance. Had the legislature intended stop-loss insurance premiums to be recoverable by MCHA under Chapter 62E, it would have explicitly stated so. But rather than addressing this dispositive issue, MCHA's brief focuses largely on Minn. Stat. Ch. 60A (2004) and attempts to distinguish existing case law in order to support its position. In the absence of ambiguity, this approach is improper and should be rejected.

MCHA's only real attempt to address the plain language of the statute relates to Minn. Stat. § 62E.02, subd. 11, the definition of "accident and health insurance policy." MCHA argues that because that subdivision specifically exempts eight types of accident and health insurance policies from MCHA's assessment mechanism, and stop-loss policies were not included among the eight exemptions, the legislature must have implicitly intended those premiums to be included. *See* Minn. Stat. § 62E.02, subd. 11. (MCHA Br. at 14.) MCHA's analysis is weak.

In support of this argument, MCHA cites *In re Guardianship of Welch*, 686 N.W.2d 54 (Minn. Ct. App. 2004). In *Welch*, the statute at issue provided that a guardian could consent to "necessary medical or other professional care, counsel, treatment, or service" on behalf of a ward. *Id.* at 56 (quoting Minn. Stat. § 524.5-313(c)(4)(i) (Supp. 2003)). The statute then outlined several types of necessary medical care that were excluded from the statute's reach. *Id.* This Court held that because

neuroleptic medications, another form of necessary medical care, were not among these exceptions, they were intended to be included among the types of necessary medical care for which a guardian could give consent. *Id.*

MCHA's reliance on *Welch* is misplaced. In *Welch*, there was no dispute that neuroleptic medications were a type of "necessary medical care." Therefore, it was logical for this Court to conclude that because neuroleptic medications were not specifically excluded under the statute, they were intended to be included.

Here, on the other hand, stop-loss insurance is not a type of accident and health insurance. Section 62E.02, subd. 11, defines the term "accident and health insurance policy" for purposes of MCHA's annual assessments. (A 95.) Immediately following that definition, subdivision 11 lists eight types of accident and health insurance that are exempted from the statute's reach. *Id.* Stop-loss insurance is not on this list because it is not a type of accident and health insurance providing "benefits for hospital, surgical and medical care." *See id.* Other types of insurance that do not provide health benefits, such as homeowners' insurance or life insurance, are also not included in that list.

Thus, unlike in *Welch*, where the omitted term was actually part of the broader definition, here, stop-loss insurance is not part of the broader definition of accident and health insurance. Accordingly, there would be no basis for including stop-loss insurance among the exempted forms of accident and health insurance outlined in Minn. Stat. § 62E.02, subd. 11. In short, MCHA endorses a logical fallacy, not a logical truth, when it contends stop-loss insurance is included because it is not excluded. The plain language

of Section 62E does not authorize MCHA to include stop-loss insurance premiums in its assessments.

**II. EVEN IF IT WERE PERMISSIBLE TO LOOK BEYOND CHAPTER 62E, STOP-LOSS COVERAGE IS NOT ACCIDENT AND HEALTH INSURANCE FOR PURPOSES OF MCHA'S ANNUAL ASSESSMENT**

**A. Stop-loss Insurance Is Not "Third Person" Accident And Health Insurance**

Even if this Court looks beyond the plain language of the statute, there is no authority for MCHA's position that it may assess its contributing members for stop-loss insurance premiums. Nonetheless, MCHA argues that the definition of accident and health insurance in Chapter 60A encompasses two types of arrangements – a "first person" arrangement and a "third person" arrangement. (MCHA Br. at 12-13.) MCHA further contends that BCBSM's own words "conclusively prove" that stop-loss coverage is "a form of accident and health insurance as specifically defined by Minn. Stat. § 60A.06, subd. 1(5)(a)." (MCHA Br. at 13.) MCHA then argues that Minn. Stat. § 60A.06, subd. 1(5)(a), mandates that stop-loss insurance premiums are included under Chapter 62E.

This reasoning is flawed on several grounds. First, MCHA looks in the wrong place for the definition of accident and health insurance. For purposes of MCHA's annual assessments, "accident and health insurance" is defined by Chapter 62E, not Chapter 60A. Chapter 62E defines accident and health insurance as insurance that provides "benefits for hospital, surgical and medical care." Minn. Stat. § 62E.02, subd. 11. (A 95.) As BCBSM argued at length in its opening brief, stop-loss insurance

does not provide hospital, surgical, or medical care benefits. The distinction between stop-loss and accident and health insurance has been recognized by the legislature. *See* Minn. Stat. § 60A.235, subd. 1 (2004) (providing standards to distinguish health care from stop-loss insurance and stating that “[t]he laws regulating the business of insurance in Minnesota impose distinctly different requirements upon accident and sickness insurance policies and stop loss policies.”). (A 88.) Therefore, MCHA is wrong that accident and health insurance is “defined” by Chapter 60A for purposes of its assessment procedure.

Second, MCHA tries to persuade by mischaracterizing BCBSM’s position. Section 60A.06, subd. 1(5)(a), is not a definition at all. Chapter 60A provides that insurers in Minnesota are permitted to sell insurance that

insure[s] against loss or damage by the sickness, bodily injury or death by accident of the assured or dependents, *or* those for whom the assured has assumed a portion of the liability for the loss or damage, including liability for payment of medical care costs or for provision of medical care.

*Id.* (emphasis added). (A 85.) BCBSM agrees that Section 60A.06 permits the sale of insurance to protect against loss caused by the sickness, injury or death of the assured or his or her dependents, or for liability for the payment of medical care costs or provision of medical care.

MCHA provides no link between the kinds of insurance permitted under Chapter 60A and the definition of accident and health insurance in Chapter 62E. There is no statutory cross-reference, no legislative history, and no judicial interpretation that even hints at a link. But MCHA’s analysis lacks more than authority; it fails common sense.

MCHA constructs a “first person” – “third person” dichotomy between the kinds of insurance permitted under Minn. Stat. § 60A.06, subd. 5. Not only is this dichotomy without authority, it does nothing more than obfuscate. Even assuming Chapter 60A allows “third person” accident and health insurance to be sold, there is no logical basis to conclude that Chapter 62E authorizes an assessment of this “third person” insurance. The authority for MCHA’s assessment must derive from Chapter 62E and no amount of wishful thinking can extend MCHA’s authority to all permissible lines outlined in Chapter 60A.

MCHA fails to explain any basis for virtually disregarding Chapter 62E, which governs its assessment procedure and omits stop-loss coverage, in favor of language contained in Chapter 60A, which merely outlines permissible statutory lines of insurance. This giant leap cannot be ignored – there is simply no basis for looking to Minn. Stat. § 60A.06, subd. 1(5)(a), rather than Minn. Stat. § 62E.02, subd. 11, for the definition of accident and health insurance as it pertains to this case.

**B. MCHA’s Arguments Regarding The Applicable Case Law Are Unpersuasive**

In its opening brief, BCBSM argued, alternatively, that the supreme court’s reasoning in *BCBSM, Inc. v. Comm’r of Revenue*, 663 N.W.2d 531 (Minn. 2003), supported its argument that stop-loss insurance is not accident and health insurance. MCHA attempts to distinguish *BCBSM, Inc.*, but its arguments are not convincing. (MCHA Br. at 17.)

First, BCBSM has never asserted that the *BCBSM, Inc.* decision was directly on point. To the contrary, BCBSM asserted that the decision is persuasive because the supreme court recognized the differences between stop-loss and health care policies. Thus, while the court's ultimate holding – that stop-loss premiums were not subject to a premium tax under the 1996 version of the statute because they were not the “direct business” of the insurer – does not control this case, the court's discussion of stop-loss insurance is nevertheless noteworthy.

Second, MCHA is wrong that *BCBSM, Inc.* is now moot. While the amendment to Minn. Stat. § 2971.01 may now include stop-loss insurance in the definition of “direct business,” the amendment does not include stop-loss coverage in the definition of “accident and health insurance” under Minn. Stat. § 62E.02, subd. 11. And even if it did, the amendment is effective only for premiums received after December 31, 2005. (RA 23.) Therefore, the amendment has no bearing on this Court's decision.

Finally, this Court should reject MCHA's suggestion that BCBSM should have exercised its rights sooner because Minn. Stat. § 60A.235 was enacted in 1995, eight years before the *BCBSM, Inc.* decision. (See MCHA Br. at 17 n.17.) BCBSM challenged MCHA's assessment procedure as soon as it had reason to believe that MCHA was exceeding its authority. Furthermore, BCBSM has paid MCHA's assessments and has complied with the procedural requirements of Minn. Stat. § 62E.10, subd. 2a. There is no basis for MCHA's implication that BCBSM's position somehow lacks credibility because it obediently paid its assessments, as requested by MCHA, for the past six years. (See MCHA Br. at 18.)

Courts have long allowed statutory challenges, for example, to constitutionality, even where the statute was enacted many years prior to the action. *See generally State ex. rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 825, 827 (Minn. Ct. App. 2002) (allowing challenge to statutory language enacted in 1983); *In re Blodgett*, 490 N.W.2d 638, 644 (Minn. Ct. App. 1992) (allowing challenge to statutory language enacted in 1939). Similarly, here, there is no “expiration date” on BCBSM’s ability to argue that MCHA has exceeded its authority under Chapter 62E, particularly when BCBSM has paid the assessments it contends are not legislatively authorized.

### **C. MCHA’s Public Policy Argument is Misleading**

MCHA also asserts a public policy argument in support of its position that BCBSM should pay assessments based on stop-loss insurance premiums. Although MCHA contends that it is “clear” that the legislature intended this funding mechanism to reach “as broadly as possible [and] to include ‘stop-loss’ arrangements,” it cites no authority for this proposition. (MCHA Br. at 20.) To the contrary, the legislature explicitly stated that MCHA could assess its contributing members based only upon premiums received from insurance or contracts “providing benefits for hospital, surgical, and medical care.” Minn. Stat. § 62E.02, subd. 11. This language is more narrow than the language in Chapter 60A, which outlines all the permissible types of insurance policies in Minnesota, including policies that pay accident and health insurance injury and death benefits as well as liability benefits. Thus, there is no basis for MCHA’s contention that the legislature intended Chapter 62E to reach “as broadly as possible” and to include stop-loss insurance premiums.

Furthermore, MCHA implies that Minnesota residents who are unable to obtain insurance in the private market will suffer if BCBSM does not continue paying premiums from stop-loss coverage. This is not true. BCBSM initiated this action to receive an accounting and to prevent MCHA from continuing to exceed its authority in the future. However, the outcome of this appeal will not cause a reduction in funds for MCHA or its insureds. An MCHA member is assessed in a manner consistent with the following ratio:

$$\frac{\text{Member's accident and health insurance premium}}{\text{Total accident and health insurance premiums received}}$$

Minn. Stat. § 62E.11, subd. 5. (*See* MCHA Br. at 7.) This ratio is applied to MCHA's total operational, administrative, and claims expenses and members are liable for all claims expenses that exceed premiums received from insureds. "Claims expenses of the state plan which exceed the premium payments allocated to the payment of benefits shall be the liability of the contributing members." Minn. Stat. § 62E.11, subd. 5. In other words, MCHA gets whatever money it needs, regardless of whether stop-loss insurance premiums are included in the assessment.

While an accounting and reallocation will impact BCBSM's annual assessment, MCHA will not lose funds and uninsured individuals will continue receiving coverage through MCHA. Therefore, the legislature's purpose is served without requiring this Court to read in language that was purposely or inadvertently omitted.

### **III. MCHA'S BRIEF FAILS TO PROPERLY RAISE INCIDENTAL ISSUES**

In its statements of the case and facts, MCHA makes several improper statements that must be addressed. MCHA implies that BCBSM (1) violated MCHA's operating

rules by filing this action; (2) filed its claims too late; and (3) appealed the calculation of its assessment in bad faith because BCBSM's writing carrier contract had been terminated eight months prior to the challenge. (MCHA Br. at 3, 8-9.) BCBSM denies each of these claims as unsupported, untrue, and outside the scope of appellate review.

To be perfectly clear, BCBSM sought district court review of MCHA's decision to assess stop-loss premiums pursuant to plain statutory language stating that "[i]n lieu of the appeal to the commissioner, a person may seek judicial review of the board's action." Minn. Stat. § 62E.10, subd. 2a. Further, BCBSM's position, as articulated to the district court, is that its claims against MCHA for unauthorized assessments are governed by the six year statute of limitations, so its claims are timely because they fall within the six year limitations period. *See* Minn. Stat. § 541.05, subd. 1(2) (2004) (providing limitations period for liability created by statute). (A 43-49 (BCBSM's amended complaint seeking relief for years 1996-2002)). BCBSM could not await further administrative action or it would forgo relief for some or all of this period. Finally, BCBSM was the writing carrier for MCHA, but the termination of that contract was completely unrelated to this action.<sup>1</sup>

MCHA also states that BCBSM created a situation where the district court and the Commissioner of Commerce had "concurrent jurisdiction," implying that this action was not properly before the district court. (MCHA Br. at 9.) The district court rejected this claim, correctly recognizing that, because BCBSM had withdrawn its appeal to the

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<sup>1</sup> Furthermore, because MCHA never raised BCBSM's role as writing carrier to the district court, it is not properly before this Court on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Commissioner and Chapter 62E allows an aggrieved party to seek judicial review of the MCHA board's decision, the district court had jurisdiction. (A 76 (citing Minn. Stat. § 62E.10, subd. 2a (2004)); *see also* BCBSM Br. at 3 n.1-2.)

MCHA has not filed a notice of review pertaining to this issue. *See City of Duluth v. Duluth Police Local*, 690 N.W.2d 357, 359 (Minn. Ct. App. 2004) (“Even if the district court decision is ultimately in favor of respondent, the respondent must file a notice of review to challenge that portion of the decision decided adversely against the respondent”). This Court should reject any arguments MCHA makes about concurrent jurisdiction.

Importantly, MCHA has failed to develop any of these claims beyond the statement of facts and has not presented this Court with a statement of legal issue or legal argument. As such, it has waived each of these claims, however tenuous, assuming it now attempts to develop them further. *See, e.g., In re Olson*, 648 N.W.2d 226, 228 (Minn. 2002) (holding that court of appeals did not err in refusing to address issue where argument section of brief did not discuss the issue). This Court should disregard MCHA's claims as nothing more than negative aspersions. Each claim lacks merit and MCHA has failed to properly present any alleged error for appellate review.

### **CONCLUSION**

MCHA's statutory analysis is flawed. MCHA agrees that Chapter 62E is not ambiguous, but it refuses to even discuss that Chapter 62E does not include stop-loss insurance. MCHA never directly analyzes Chapter 62E's definition of accident and

health insurance, which only encompasses policies that pay benefits for hospital, surgical and medical care. Stop-loss insurance does not pay these benefits.

Instead of discussing the statute from which it derives its authority, MCHA focuses on whether stop-loss insurance is included in the authorized lines of insurance outlined in Chapter 60A. But Chapter 60A is not at issue in this appeal. The proper issue is simply whether stop-loss insurance is accident and health insurance, as defined under Chapter 62E. Because the plain language of Chapter 62E omits stop-loss insurance from the statute's reach, MCHA has exceeded its authority by including stop-loss insurance premiums in its annual assessments. The district court's decision granting summary judgment to MCHA must, therefore, be reversed.

Respectfully submitted,

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