

Nos. A07-216, A07-217 and A07-830

State of Minnesota
In Court of Appeals

Star Windshield Repair, Inc., as assignee for Aaron Helget,
Appellant (A07-216),

v.

Western National Insurance Co.,
Respondent (A07-216),

and

The Glass Network,
Claimant, Appellant (A07-217),

Auto Glass Express, as assignee for Kathy Heglos,
Claimant, Appellant (A07-217),

v.

Austin Mutual Insurance Company,
Respondent (A07-217),

and

State Farm Mutual Automobile Insurance Company,
Appellant (A07-830),

v.

Archer Auto Glass, as assignee of Ronald Hornberg,
Respondent (A07-830).

**BRIEF OF APPELLANT STATE FARM MUTUAL
 AUTOMOBILE INSURANCE COMPANY**

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STATEMENT OF LEGAL ISSUES

- I. In Minnesota, anti-assignment clauses need not contain “magic words” to preclude assignments of contractual rights. State Farm’s insurance policies’ “Conditions” section states that “[no] change of interest in this policy is effective unless we consent in writing.” State Farm did not consent to its insured’s glass claim assignment to Archer. Was the State Farm insured’s post-loss assignment barred by the policy’s “Conditions” section?

Yes. The district court confirmed the arbitrator’s award, holding that the assignment of post-loss insurance proceeds was “distinctly different” from an “assignment of insurance coverage,” but without specifically discussing State Farm’s arguments or authority on this issue.

Apposite Authority: *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267 (Minn. 2004);

Physicians Neck & Back Clinics, P.A. v. Allied Ins. Co., 2006 WL 2053142, *rev. denied* (Minn., Oct. 17, 2006).

- II. The No Fault Act distinguishes between “claimants” and providers. No Fault Rule 5 only speaks of “claimants” demanding arbitration, and the supreme court has stated that “individual policyholders,” not glass providers with assignments, are the only “claimants.” Are auto glass providers with assignments “claimants” within the meaning of the No Fault Act and No Fault Rule 5, such that they may initiate arbitrations of auto glass claims without the insureds’ participation?

No. The district court confirmed the arbitrator’s award without discussing State Farm’s arguments on this issue.

Apposite Authority: Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rule 5;

Illinois Farmers Ins. Co. v. Glass Service Co., Inc., 683 N.W.2d 702 (Minn. 2004);

Minn. Stat. § 65B.54, Subd. 4 (2007);

Minn. Stat. § 65B.57 (2007).

STATEMENT OF THE CASE

This is an appeal from an order confirming an arbitrator's award in an auto glass claim. The award was issued on August 14, 2006. (A. 10). Appellant State Farm petitioned the Winona County District Court for an order vacating the arbitrator's award on November 14, 2006. (A. 8). The district court denied State Farm's motion and entered an order confirming the arbitrator's award on April 4, 2007. (A. 15). State Farm appealed the district court's order to this court on April 19, 2007. (A. 114-15).

STATEMENT OF THE FACTS

On June 8, 2000, State Farm issued policy number 865 2727-B28-23E to Ronald and Renee Hornberg of Winona, MN. (A. 119). This policy was in effect on June 2, 2005, when Mr. Hornberg's Ford F150 (which was insured under the policy) allegedly suffered damage to the rear sliding window. (*Id.*; A. 118).

One section of Mr. Hornberg's policy is titled "Reporting a Claim — Insured's Duties." (A. 125-26). Heading 1 in that section articulates the insured's duty to notify State Farm of a loss as soon as reasonably possible:

1. Notice to Us of an Accident or Loss

The *insured* must give us or one of our agents written notice of the accident or *loss* as soon as reasonably possible.

* * *

The notice must give us:

- a. *your* name; and

- b. the names and addresses of all *persons* involved; and
- c. the hour, date, place and facts of the accident or *loss*; and
- d. the names and addresses of witnesses.

(*Id.*). Heading 5 in that same section articulates the insured's duty to cooperate with State Farm, which includes a duty to refrain from voluntarily incurring expenses:

5. Insured's Duty to Cooperate With Us

* * *

The *insured* shall not, except at his or her own cost, voluntarily:

- a. make any payment or assume any obligation to others; or
- b. incur any expense, other than for first aid to others.

(A. 126). The "CONDITIONS," section of the policy also renders void any attempt to transfer the insured's interests under the policy to others:

1. Policy Changes

* * *

- b. **Change of Interest.** No change of interest in this policy is effective unless we consent in writing ***.

(A. 150).

The policy's "Limit of Liability — Comprehensive and Collision Coverages," section articulated three methods for determining the cost of repairing or replacing physical damage to the vehicle:

The cost of repair or replacement is based upon one of the following:

- 1. the cost of repair or replacement agreed upon by *you* and us;

2. a competitive bid approved by us; or
3. an estimate written upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area where the *car* is to be repaired as determined by a survey made by us. If *you* ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its preloss condition.

Any deductible amount that applies is then subtracted.

(A. 144). The policy's list of "Defined Words" made clear that "*You* or *Your* — means the named insured or named insureds shown on the declarations page." (A. 124). Mr. Hornberg's policy's declarations page listed Ronald and Renee Hornberg as the named insureds. (A. 119).

Mr. Hornberg never notified State Farm that he had suffered a glass loss. (A. 172; *see also* A. 175 ("P/H [policyholder] and A/O [agent's office] agree was not reported. Pay based on bids." "PH [policyholder] called back * * * PH did not contact Agent." "tt [talked to] Rosalee at a/o [agent's office] — no record of Ni [named insured] reporting glass damage.")). On December 23, 2005, State Farm received an invoice from Archer Auto Glass of Winona, MN, allegedly for repairs to Mr. Hornberg's vehicle. (A. 172). The invoice was dated August 17, 2006. (A. 171). It included a paragraph that purported to assign Mr. Hornberg's rights with respect to "any and all claims," in connection with the glass replacement:

Replacement of the glass in my automobile has been done to my satisfaction and I hereby authorize and direct my insurance company to pay this invoice directly to Archer Auto Glass and to release policy, coverage and other information to Archer Auto Glass. I have insisted that, where

possible, Archer Auto Glass use original equipment parts and materials in the replacement of my automobile glass. I assign any and all claims in connection with this automobile glass installation against my insurance company and all policy proceeds due for this installation to Archer Auto Glass.

(*Id.*) The invoice listed a total amount due of \$815.32, \$689.63 of which was supposedly for parts. (*Id.*)

On January 10, 2006, State Farm obtained bids from two of Archer's competitors; this was in accordance with the procedures established by a December 4, 2002 Consent Order between State Farm and the Minnesota Commissioner of Commerce.¹ (*See* A. 173). The Consent Order dictated the means by which State Farm was required to determine the amount to pay glass shops that submit invoices directly to State Farm when there has been no prior notice of loss. (*See id.*; *see also* A. 178-80).

One of the competitors, K&M Glass, (which was a member of State Farm's "Offer & Acceptance" Program) would have replaced the rear window for \$640.27. (A. 173). Another of the competitors, Sugarloaf Ford (which was not a member of State Farm's "Offer & Acceptance" Program) offered to replace the window for \$290.13. (*Id.*).

¹ The Consent Order governs all glass claims received after December 14, 2002, and applied to Mr. Hornberg's glass claim. (*See generally*, A. 179-80 (stating procedure for claims received 10 days after order's execution)). Per the Consent Order, State Farm was required to pay glass providers the lowest of three competitive bids whenever it did not receive "prior notice" of a glass loss. (A. 179). The first such "bid" was the glass provider's invoice; the second would come from a provider in State Farm's "Offer & Acceptance" program; and the third would come from another provider that was not in State Farm's "Offer & Acceptance" program. (*Id.*). Archer was not a member of State Farm's "Offer & Acceptance" program.

As outlined in the Consent Order, State Farm was required to pay the lowest of the three bids. (A. 179). (“Respondents will pay the lower amount of three competitive bids.”). On January 10, 2006, State Farm sent Archer a check for \$290.13. (A. 177). Archer disputed the amount that State Farm owed, claiming that Sugarloaf Ford’s bid was for used glass, and that it was not for the same piece of glass. (See A. 173-74). On January 16, 2006, State Farm confirmed with Sugarloaf Ford that its bid was for a new rear slider window, and that the price for that part was \$213.83; the remainder of Sugarloaf Ford’s \$290.13 bid was for labor and adhesives. (*Id.*).

Archer petitioned for arbitration on the same day, January 16, 2005. (A. 276). Archer still claimed that State Farm should have paid it \$815.32 to replace the State Farm insured’s auto glass, even though Sugarloaf Ford would have performed the same replacement for \$290.13. (See *id.*; see also A. 183). Archer’s petition sought an award of \$525.19, in addition to the \$290.13 that State Farm had already paid toward Mr. Hornberg’s claim. (A. 276).

State Farm’s insured, Mr. Hornberg, was not involved with Archer’s petition for arbitration. (See *id.*). He did not initiate the petition. (See *id.*) He did not sign it. (See *id.*) There is no evidence that suggests that he received a copy of it, or that he even knew about it. (See *id.*) There is no evidence that he understood the petition’s consequences on his loss history, and thus the underwriting implications that the petition potentially has with respect to any insurer with whom Mr. Hornberg may wish to obtain a future policy. (See *id.*) Archer simply initiated the arbitration in its own name, apparently on the theory that it was acting as Mr. Hornberg’s assignee. (See *id.*)

State Farm responded to Archer's petition on March 3, 2006. (A. 234). It asserted that its policy prohibited changes of interest, and that any purported assignment was thus "invalid and unenforceable." (A. 231). It also disputed whether Archer had standing to initiate the arbitration and denied that Archer was an "insured" or "claimant" under Minnesota's No Fault Act and No Fault Rules. (A. 230).

The arbitration occurred on July 17, 2006 in Winona, Minnesota. (A. 181). Kalene Engel presided over it. (*Id.*). At the arbitration, State Farm was represented by one of its claim representatives, Pat Quade. (*Id.*). Mr. Quade registered several objections to the arbitration itself, including that the arbitration raised "legal and coverage issues which are outside the jurisdiction of a no-fault arbitrator." (A. 191). He argued that Archer's assignment was not valid because State Farm's policy prohibited changes of interest and State Farm had not given its consent to the assignment. (A. 191-92). Mr. Quade also argued that Archer was neither an "insured," nor a "claimant" within the meaning of Minnesota's No Fault Act, and it therefore lacked standing to initiate the arbitration. (A. 191).

Arbitrator Engel nonetheless proceeded with the hearing and ultimately issued an award of \$350.14 to Archer. (A. 10). State Farm petitioned to vacate the arbitrator's award. (A. 1-9). It argued that it did not have an agreement to arbitrate with Archer. (A. 7). State Farm also argued that the arbitrator had exceeded her powers by allowing the arbitration to proceed and by making an award to Archer, despite State Farm's "No Change of Interest" provision, which rendered the assignment to Archer void, and despite the fact that Archer was not a "claimant" within the meaning of the No Fault Act and No

Fault Rule 5. (A. 7-8). The district court denied State Farm's motion and entered an order confirming the arbitrator's award on April 4, 2007. (A. 15-24). It did not specifically discuss either of State Farm's arguments.² (*See id.*).

ARGUMENT

This is an appeal from a district court order confirming a No Fault arbitrator's award in favor of the respondent, Archer Auto Glass. This case has far-reaching implications regarding the process by which disputed auto glass claims are to be resolved and, specifically, it asks whether *providers* may take assignments of insureds' statutory rights and compel insurers to arbitrate the providers' supposed claims.

This appeal raises two legal issues. First, it asks whether Minnesota has some sort of insurance-policy-exception to its general rules of contract interpretation. Assuming that the answer to that question is "no," then this court's decision in *Travertine Corp. v. Lexington-Silverwood* should apply equally to anti-assignment clauses in insurance policies, and glass providers' assignments are voided by clauses like State Farm's "No Change of Interest" provision. *See generally, Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267 (Minn. 2004).

² State Farm's appendix includes the memoranda in support of and opposition to its motion. It is aware that this court prefers that the parties not include memoranda in their appendices. It does so here because the district court's order failed to acknowledge one of State Farm's issues and did not address any of the authority on which State Farm relied for the other. (*Compare* A. 25-46 *with* A. 15-24). The district court's order also credited Archer with having raised an issue (waiver based on direct payment) that it never actually raised. (*Compare* A. 19 *with* A. 48-57). So State Farm has included the memoranda and transcript of the hearing to clarify the issues that were considered below.

And second, this case asks whether — apart from the validity of the assignments — auto glass providers may initiate arbitrations under the No Fault Act. Nothing in the No Fault Act or the Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules (“No Fault Rules”) allows any type of provider to initiate arbitration, nor does anything in the Minnesota Supreme Court’s decision in *Illinois Farmers v. Glass Service Co., Inc.*, 683 N.W.2d 792 (Minn. 2004). Rather, the No Fault Act, No Fault Rules and *Illinois Farmers* actually show that providers such as Archer are not “claimants” within the meaning of the No Fault Act and No Fault Rules, and they thus do not have the right to initiate arbitration, regardless of whether they have valid assignments from State Farm’s insureds.

I. Review is de novo.

Minn. Stat. § 572.19 requires the district court to vacate the arbitration award if the arbitrator “exceeded [her] powers,” or “there was no arbitration agreement.” See Minn. Stat. § 572.19 (2007). Minnesota courts have also held that, in the area of automobile reparations, an arbitrator exceeds his or her powers if he or she errs with respect to the law; arbitrators’ conclusions of law are thus subject to *de novo* review by a district court. *Weaver v. State Farm Ins. Co.*, 609 N.W.2d 878, 882 (Minn. 2000); *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1998). This court therefore applies *de novo* review to a district court’s decision to vacate or confirm an arbitrator’s award. *E.g., Weaver*, 609 N.W.2d at 882.

State Farm requested that the district court vacate Arbitrator Engel's award on the grounds that it did not have an agreement to arbitrate with Archer, and because Arbitrator Engel exceeded her powers with respect to the following conclusions of law:

- 1) She concluded, incorrectly, that Mr. Hornberg's purported "assignment" to Archer was valid and enforceable, despite State Farm's "No Change of Interest" clause; and
- 2) She concluded, incorrectly, that Archer had standing to initiate the arbitration under the No Fault Act and No Fault Rule 5.

(A. 35). Contract interpretation — such as whether a contractual anti-assignment clause voids an assignment — obviously presents a question of law. *E.g., Travertine*, 683 N.W.2d at 271 ("Contract interpretation is a question of law which we review *de novo*"). This is also true of statutory construction, such as whether, under the No Fault Act or No Fault Rule 5, Archer had the right to initiate arbitration against State Farm. *E.g., Illinois Farmers*, 683 N.W.2d at 803. So the issues that State Farm raised obviously required *de novo* review by the district court, and this court's review of the district court's decision is also *de novo*.

One brief note in anticipation of an argument that Archer may raise about the standard of review: in Archer's memorandum in opposition to State Farm's motion below, Archer argued that, "because the factual findings of the No-Fault arbitrator are conclusive and not open to review, this Court must deny State Farm's motion to vacate."

(A. 50). But Archer did not identify any factual findings that were supposedly "conclusive" of any of the issues that State Farm raised, and the district court likewise did

not base any of its conclusions of law on any sort of factual finding by the arbitrator. (See *id.*; see generally, A. 19-23).

II. The district court erred by failing to vacate the arbitrator's award because the State Farm insured's "assignment" was invalid and unenforceable.

State Farm's policy expressly stated that "[n]o change of interest in this policy is effective unless we consent in writing." (A. 150). On its face, then, the policy explicitly limited the insured's power to assign any of his or her rights under the policy. (See *id.*); see also *Travertine*, 683 N.W.2d at 273-74. The insured's assignment to Archer violated this prohibition with respect to two rights under the policy. It purported to assign:

- 1) "any and all claims in connection with this automobile glass installation against my insurance company[;]" as well as,
- 2) "all policy proceeds due for this installation[.]"

(A. 171 (emphasis added)). As State Farm explains more fully below, Minnesota does not draw a distinction between these two types of rights with respect to an anti-assignment clause; both assignments are barred by such clauses, regardless of how the clauses are worded. See *Travertine*, 683 N.W.2d at 271-75; see also *Physicians Neck & Back Clinics, P.A. v. Allied Ins. Co.*, 2006 WL 2053142, *4 (Minn. App.) *rev. denied* (Minn., Oct. 17, 2006) (A. 235-38). But Archer and other glass providers urge this court to draw such a distinction, so it is useful to clarify that the insured's assignment to Archer purportedly assigned *both* the statutory right to compel arbitration, and the right to payment of the insurance proceeds, though that distinction ultimately has no bearing on this court's decision.

A. Under Minnesota law, an anti-assignment clause need not contain “magic words” to bar assignments of all types of rights under a contract.

In *Travertine*, the Minnesota Supreme Court decided that a management agreement’s anti-assignment clause precluded an assignment of compensation that one of the parties owed to the assignor for work performed under the agreement:

We are asked to determine whether a nonassignment clause precludes assignment of the right to payment under a contract if the clause does not explicitly limit, beyond the express nonassignment terms contained in that clause, the power of assignment, or provide that any purported assignment shall be invalid or void. We hold that such a nonassignment clause does preclude assignment, and therefore reverse the court of appeals’ decision to the contrary.

Travertine, 683 N.W.2d at 269. The assignee argued that the anti-assignment clause did not bar the assignment of compensation because the clause merely stated that “the rights and obligations of [the parties] shall not be assignable,” and did not “specifically state that any attempted assignment will be ‘void’ or ‘invalid,’ or that [the assignor] ‘lacks the power’ to assign the contract.” *Id.* at 270-71.

The assignee further argued that the anti-assignment clause should not bar the assignment because the “modern trend of authority disfavors contractual prohibitions on assignments.” *Id.* at 271. It urged the court to adopt the “default interpretive rules” articulated in the Restatement (Second) of Contracts, § 322, including that section’s provision that an anti-assignment clause “does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor’s due performance of his entire obligation.” *Id.*

The Minnesota Supreme Court rejected the Restatement § 322, observing that its own precedent was “to the contrary,” and holding, “we believe that our precedent still reflects the proper rule of law.” *Id.* It cited two of its own cases, both of which held that contracts are generally assignable unless there is “*something* in the terms of the contract manifesting the intention of the parties that it shall not be assigned.” *Id.* at 272 (emphasis in original). The court emphasized the word “something” and held that, under Minnesota law, a contract need not contain any sort of “specific terms or magic words” in order to prohibit *all* assignments, of proceeds or any other substantive contract rights or duties.³ *Id.*

The court then considered whether to draw a distinction between the “right” to assign, and the “power” to assign. *Id.* at 272-73. It acknowledged that some courts draw such a distinction, and that, when they draw them, an anti-assignment clause does not prohibit assignments of compensation unless it explicitly states that any purported assignment is “void” or “invalid.” *Id.* at 273. The court rejected the distinction, and instead applied the management agreement’s anti-assignment clause’s plain language. *Id.* Finally, the court noted, in a footnote, that “[o]ther courts have taken this approach and given effect to contract provisions that specifically prohibit the assignment of one’s right

³ It’s perhaps worth noting that, if anything, State Farm’s anti-assignment clause is even clearer than the clause at issue in *Travertine*. After all, State Farm’s clause stated that “[n]o change of interest in this policy is *effective* unless we consent in writing.” (A. 150 (emphasis added)). So even if the Minnesota Supreme Court had required more than just “something” in *Travertine*, State Farm’s policy contains more: it explicitly limits the *power* to assign. Compare *id.* with *Travertine*, 683 N.W.2d at 273 (noting that courts hold anti-assignment clauses limit power to assign when they say that assignments are “void” or “invalid”).

to receive money due under a contract.” *Id.* at 274, n. 3. In support of this statement, the court cited a 1994 Colorado Supreme Court decision that invalidated No Fault insureds’ assignments to medical providers based on the policy’s anti-assignment clause, which stated, “Interest in this policy may not be assigned without our written consent.” *See id.*; *Parrish Chiro. Centers, P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1051 (Colo. 1994).

The supreme court’s holding in *Travertine* thus holds that Minnesota follows a minority rule when it comes to anti-assignment clauses in contracts. Minnesota courts will enforce such clauses as written, even if they do not explicitly state that any such assignment is void or invalid, and even insofar as they operate to bar assignment of “one’s right to receive money due under a contract.” *Travertine*, 683 N.W.2d at 274, n. 3. And thus, the only way that State Farm’s anti-assignment clause would *not* bar the assignment to Archer is if Minnesota courts were prepared to carve out some sort of insurance-policy exception to the general contract principles articulated in *Travertine*. No such exception exists. In fact, the supreme court has repeatedly stated that insurance policy interpretation is “governed by general principles of contract law.” *Illinois Farmers Ins. Co. v. Glass Service Co., Inc.*, 683 N.W.2d 792, 799 (Minn. 2004); *see also Vetter v. Security Cont. Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997) (“Insurance policies are contracts and unless there are statutory provisions to the contrary, general principles of contract law apply.”).

Although *Travertine* is a recent Minnesota Supreme Court decision that was obviously relevant to the issues that State Farm raised in this case, the district court failed

to discuss it; in fact, it failed to even cite it. (*See* A. 15-24). Nonetheless, Archer cannot deny that, if this case were about any type of contract other than an insurance policy, *Travertine* would govern, and the State Farm insured's assignment to Archer would be clearly invalid. So Archer argues — and the district court apparently accepted this argument — that insurance policies are somehow different from other contracts when it comes to assignments of money owed under the contract. As the district court stated, “[t]he assignment of post-loss proceeds is distinctly different from the assignment of insurance coverage.” (A. 22). The district court was incorrect.

B. Minnesota law does not distinguish between post-loss assignments of insurance policy proceeds and assignments of other contractual rights, or of money owed under other types of contracts.

As a threshold matter, Archer's assignment was clearly *not* a mere post-loss assignment of insurance *proceeds*. (*See* A. 171). Rather, the State Farm insured necessarily assigned two things: 1) proceeds; and 2) *the insured's statutory right to initiate arbitration*. The parties would not be here today if Archer was not claiming that it had an assignment of *both* rights under the policy. Archer cannot have its cake and eat it. It cannot rely on the State Farm insured's assignment as authorizing it to initiate arbitration against State Farm, and then turn around and claim that it merely has an assignment of insurance *proceeds*.

If, as is obviously the case, Archer had an assignment of the insured's statutory right to initiate arbitration, then that assignment was necessarily of a substantive right under the policy and it is not subject to the exception that Archer claims exists for post-loss assignments of insurance proceeds. Archer's arguments are entirely circular. Under

either scenario, its purported assignment could not effectively transfer the right to compel State Farm to arbitrate this claim. Thus, even under Archer's understanding of the law, the assignment was necessarily barred by State Farm's anti-assignment clause.

But Archer's — and the district court's — understanding of Minnesota law was also flatly wrong. As support for their positions, both Archer and the district court relied on three pre-*Travertine* decisions that were either implicitly overruled, or did not actually hold what they claimed they held. (See A. 51-55; A. 21-23 (citing *Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co.*, 463 N.W.2d 750 (Minn. 1990); *Windey v. North Star Farmers Mut. Ins. Co.*, 231 Minn. 279, 43 N.W.2d 99 (Minn. 1950); *Reitzner v. State Farm Fire & Cas. Co.*, 510 N.W.2d 20 (Minn. App. 1993)).

Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co., on which the district court relied, does not actually support its decision. (See A. 22). Rather, in *Liberty Mutual* the Minnesota Supreme Court specifically stated that, in certain circumstances, anti-assignment provisions are enforceable with respect to post-loss insurance proceeds, and such applications may actually *advance* public policy:

[A]ssignment of the insured's interest [in his uninsured/underinsured motorist claim] is not ... the assignment of a cause of action for personal injury; it is the assignment of the insured's interest in an existing claim for benefits pursuant to a contract of insurance. Hence the assignment was not an assignment prohibited by law; *nevertheless, it did violate the policy provision prohibiting assignment of the insured's rights pursuant to the policy absent the insurer's consent, which was neither sought nor given.* We need not here decide whether the prohibition against such assignment is enforceable in all circumstances. Suffice it to say that because assignment of the insured's interest in the uninsured/underinsured motorist coverages raises the same problems of champerty and maintenance that are present in the assignment of a personal injury claim, *the policy prohibition against assignment can only be said to advance public policy.*

Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co., 463 N.W.2d 750, 755-56 (Minn. 1990) (emphasis added). Contrary to what the district court apparently believed, *Liberty Mutual* supported State Farm, not Archer.

Windey v. North Star Farmers Mut. Ins. Co., on which the district court also relied, did not allow an insured to assign post-loss proceeds despite an anti-assignment clause. (See A. 21-22); *Windey v. North Star Farmers Mut. Ins. Co.*, 231 Minn. 279, 283-84, 43 N.W.2d 99, 101-02 (1950). The insureds in *Windey* entered into a contract for deed in which they agreed, *pre-loss*, that they would apply policy proceeds toward any loss, should one occur before the purchaser took possession of the property. *Id.* at 280-82, 43 N.W.2d at 100-01. The court had to decide whether that agreement constituted a *pre-loss* assignment, which clearly would have been void under the policy's anti-assignment clause:

The questions for decision are:

* * *

(2) Whether a provision *in the contract for the sale of insured property* that if loss or damage occurred while the contract was in force the proceeds of the insurance should be applied on the purchase price constituted an assignment of the policy within the meaning of a policy provision that the policy should become void if assigned by the insured without the insurer's consent.

Id. (emphasis added). Thus, the question was whether the agreement was an assignment of the policy *at all*, and the court was therefore not required to consider whether a *post-loss* assignment was invalid.

The court concluded that the agreement “did not constitute an assignment of either the policy *or the proceeds thereof*.” *Id.* at 283, 43 N.W.2d at 101 (emphasis added). This conclusion ended the legal inquiry, because the agreement did not alter the insurer’s rights and was not barred by the anti-assignment clause. *Id.* So, while the court then casually stated (citing treatises and cases from outside Minnesota) that post-loss assignments of proceeds were not “void” under a policy’s anti-assignment clause, its observation was unnecessary to the outcome. *Id.*, 43 N.W.2d at 101-02. It was, as this court correctly observed in *Physicians Neck & Back Clinics, P.A. v. Allied Ins. Co.*, pure dicta. *Id.*; *Physicians Neck & Back*, 2006 WL 2053142 at *3-4.

The only Minnesota appellate court that has ever *held* that an insurance policy’s anti-assignment clause did not bar post-loss proceeds assignments was this court’s decision in *Reitzner v. State Farm Fire & Cas. Co.*, on which the district court also relied. (A. 2); *See Reitzner v. State Farm Fire & Cas. Co.*, 510 N.W.2d 20, 26 (Minn. App. 1993). But (with due respect to this court) that decision was grounded on an erroneous reading of the Minnesota Supreme Court’s 1990 decision in *Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co.*, which State Farm has already discussed above. *Reitzner* misunderstood *Liberty* to hold that anti-assignment clauses do not bar assignments of post-loss proceeds, when *Liberty* in fact held that such a clause barred such an assignment, and that that result favored public policy in that case. *Compare Reitzner*, 510 N.W.2d at 26 (citing *Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co.* and holding that “insured can put in a claim under a policy and promise the claimed proceeds to another without first checking with the company.”) *with Liberty*, 463 N.W.2d at 755-56

(stating converting settlement to loan receipt agreement was valid, in part because post-loss assignment was barred by anti-assignment clause). *Reitzner* is certainly not an accurate prediction of what the Minnesota Supreme Court would hold when confronted with the post-loss-assignability-of-insurance-proceeds question today.⁴

In fact, the very best prediction of what the Minnesota Supreme Court will hold when confronted with this issue is this court's decision in *Physicians Neck & Back*. In that case, this court held that *Travertine* was not limited to management agreements, and applied equally to insurance policies:

PNBC also argues that *Travertine* is limited to cases involving management agreements and, therefore, is inapplicable to insurance contracts. We are not persuaded. The *Travertine* court itself gives an indication as to its intended scope both by its broad application of the plain language analysis

⁴Archer and the district court also both relied on secondary sources, including Couch on Insurance, Am. Jur., and a 37 year-old version of Appleman's on Insurance. (A. 53; A.22). But these secondary authorities are of no assistance to this court. They merely articulate the *majority* rule that post-loss insurance proceeds are assignable, even in the face of an anti-assignment clause. But none of the cases that the treatises cite articulate such a rule in the context of state law that *rejects* the majority rule regarding "right[s] to damages for [an alleged] breach of the whole contract," under the Restatement (Second) of Contracts, § 322. In other words, in states that follow the law that *Travertine* rejected, post-loss assignments of insurance proceeds are allowed (despite an anti-assignment clause) along with all the other types of assignments of money owed under the contract. See Restatement (Second) of Contracts, § 322, Comment b and Illustrations (1981) (noting "[w]here a right to the payment of money is fully earned by performance, for example, a provision that an attempt to assign forfeits the right may be invalid as a contractual penalty" and illustrating point with example involving "industrial insurance policy"); see also, 2-5 Appleman on Insurance, § 5.8 (2d ed. 2006) (explaining that "insurance contracts are governed by the law of contracts generally" and discussing Restatement § 322 in conjunction with post-loss assignments of insurance proceeds). But this hardly matters in Minnesota following *Travertine*. *Travertine's* rejection of the Restatement's § 322 pulls the rug out from under the majority rule allowing assignment of post-loss insurance proceeds. That rule has no application in Minnesota.

and by its favorable citation to *Parrish Chiro. Ctrs, P.C. v. Progressive Cas. Ins. Co.*

* * *

We conclude that the plain-language analysis applied by the *Travertine* court governs the analysis of the instant case. First, it is the most recent statement by the Minnesota Supreme Court on the issue of nonassignment provisions in a contract. Second, although *Travertine* involves a management agreement, not an insurance policy, the supreme court endorses an analysis of nonassignment provisions based on the canons of contract construction. * * * Finally, we do not interpret the supreme court's citation to *Parrish* in support of its conclusion in *Travertine* to be inadvertent. Rather, the *Travertine* court approved of the general proposition in *Parrish* that nonassignment provisions should be upheld when their terms are clear and unambiguous.

Physicians Neck & Back, 2006 WL 2053142 at *4. In so holding, this court handily dispatched with all of the arguments that swayed the district court in this case. Compare (A. 21-23) with *Physicians Neck & Back*, 2006 WL 2053142 at *3. The district court did not attempt to reconcile its holding with *Physicians Neck & Back*. (See A. 21-23).

Lastly, although the district court did not rely on this decision and its progeny, a federal district court opinion supported its decision below, but, with due respect to the federal district court, its decision was flatly wrong. See *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 2006 WL 3486996 (D. Minn.) (A.23-51). In *Alpine Glass*, the federal court held, incorrectly, that Minnesota has “long distinguished between the assignment by an insured of its right to *coverage* under an insurance policy and the assignment by an insured (after a loss) of its right to *proceeds* under an insurance policy.” *Id.* at *2 (emphasis in original). The court relied on *Windey*, even though the only portion of the *Windey* decision that supported its holding was dicta. Compare *id.* with *Windey*, 231

Minn. at 283-84, 43 N.W.2d at 101-02. It relied on two court of appeals decisions, including *Reitzner*, even though its task was to predict what the Minnesota Supreme Court would hold, and even though *Reitzner's* holding was at odds with the very supreme court authority on which it purported to rely.⁵ See *Alpine Glass*, 2006 WL 3486996 at *2-3. It rejected *Physicians Neck & Back*, dubbing this court's reasoning "questionable." *Id.* at *3. And it simply ignored *Travertine's* holding that the Minnesota Supreme Court would not require "magic words," to enforce an anti-assignment clause, stating, instead, that "[i]f Farmers wants to overcome a half century of caselaw distinguishing between the assignment of coverage and the assignment of proceeds, Farmers will have to use clearer language" than the clause's prohibition on assignments of an "interest in this policy." *Id.* at *2. The court made no effort to explain why *Travertine's* general contract principles did not apply equally to insurance policies, nor why insurance policies must contain "magic words" when other Minnesota contracts do not have to have them. See *id.* at *2-4.

Finally, *Alpine Glass* can be distinguished from this case, in any event, on two bases. First, *Alpine Glass* did not consider whether the policy's anti-assignment clause barred assignment of the right to initiate arbitration, as opposed to insurance proceeds. See generally, *Alpine Glass*, 2006 WL 3486996 at *2-4. And second, the anti-assignment provision at issue in *Alpine Glass* apparently did not include the language — present in

⁵The federal district court also relied on dicta in *In Re Estate of Sangren*, 504 N.W.2d 786, 790 (Minn. App. 1993). In *Sangren*, the court of appeals held that the insurer waived any objection to the assignment because the assignment was made in the insurer's presence. *Id.* *Sangren* did not support the holding in *Alpine Glass*.

State Farm's policy — that any such assignment would be *ineffective*. *See id.* at *2. So even under the federal district court's read of *Travertine*, State Farm's anti-assignment clause barred its insured's assignment to Archer of the right to initiate arbitration.

Travertine requires the result that State Farm urges in this case, as this court has correctly held. *Physicians Neck & Back*, 2006 WL 2053142 at *3-4.

C. *The right to initiate arbitration is a separate contractual right that cannot be assigned, regardless of whether post-loss insurance proceeds are assignable.*

Even if State Farm's policy *proceeds* could be assigned despite the anti-assignment clause, the right to initiate *arbitration* against a contracting party is a separate substantive right that cannot be assigned so long as there is "*something* in the terms of the contract manifesting the intention of the parties that it shall not be assigned." *Travertine*, 683 N.W.2d at 272. This is an especially critical distinction where, as here, the amount owed under the contract cannot be determined outside of arbitration; in other words, the right to demand arbitration to determine the amount owed is separate from the right to payment of a *fixed* amount.

There were actually *two* contractual rights at issue in *Travertine*. In addition to the right to compensation for full performance of the assignor's contractual duties, the assignee also claimed to have obtained the right to compel arbitration in order to collect that compensation:

Travertine moved the district court for an order staying arbitration. The court determined that Lennon's transfer of his right to compensation was not a valid present assignment, *concluding that even if the assignment was enforceable, it was only an assignment of Lennon's right to receive compensation and not his right to demand arbitration*. The court granted

Travertine's motion to stay arbitration, but the court of appeals reversed. We granted Travertine's petition for further review, and now reverse.

Id. at 270 (emphasis added). The court correctly held that such a right was not assignable when it reversed the court of appeals, thereby reinstating the district court's order, which stayed the arbitration. *Id.* The right to initiate arbitration is a separate right. Even if Minnesota followed the Restatement (Second) of Contracts, § 322, State Farm's anti-assignment clause would still bar assignment of the right to initiate arbitration, because such an assignment is "the delegation to an assignee of the performance by the assignor of a duty or condition." *Id.* at 271.

State Farm did not consent to its insured's assignment of the right to initiate arbitration against it, and therefore the assignment could not give Archer that right. State Farm respectfully requests that this court reverse the district court and enter an order vacating the arbitrator's award.

III. Regardless of whether its assignment was valid, Archer may not initiate arbitration against State Farm under the No Fault Act.

"When a statute designates the persons who may bring a claim, only the persons so designated have the right to bring such an action." *Gloria Dei Lutheran Church-Missouri Synod v. Gloria Dei Lutheran Church of Cold Spring, Minn.*, 513 N.W.2d 488, 490 (Minn. App. 1994). State Farm's insureds obviously have a statutory right to initiate arbitration against it seeking payment of auto glass claims under \$10,000. Minn. Stat. § 65B.525, Subd. 1 (2007). The right is granted by the No Fault Act, but nothing in the No Fault Act supports allowing *providers* to initiate arbitration, for obvious reasons. *See id.* Only insureds can have comprehensive or collision damage coverage claims. Providers,

such as glass shops — which perform services for an insured in consideration for a fee — have only a contract claim against the insured. The providers' contract claims against the insured are not comprehensive or collision damage coverage claims and, therefore, are not subject to the No Fault Act.

Moreover, under the Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules (“No Fault Rules”),⁶ specifically Rule 5, titled, “Initiation of Arbitration,” there are only two players in connection with arbitrations: 1) respondents (insurers); and 2) “claimants.” (A. 252-57). In *Illinois Farmers*, the Minnesota Supreme Court stated that the word “claimant” in the No Fault Rules means the “individual policyholders,” not glass providers who were initiating claims pursuant to an alleged assignment. *See Illinois Farmers*, 683 N.W.2d at 804-805. In that case, Glass Service attempted to avoid arbitration altogether by claiming that it was a single “claimant” with a claim in excess of the jurisdictional limit for No Fault arbitrations. *Id.* at 804. The court rejected Glass Service’s argument, holding that the claimants were “the individual policyholders.” *Id.* The court specifically held that the “form, volume, and amount of the assignments does not * * * transform Glass Service’s status as an assignee of 5,700 plus individual claims into a claimant with a single claim of over \$1 million.”

⁶ The Supreme Court has observed that the relationship between the No Fault Rules and the No Fault Act is similar to that of an administrative agency’s rules, such that the No Fault Rules have the “force and effect of statute.” *Illinois Farmers*, 683 N.W.2d at 801-02 (citing *US West Material Resources, Inc. v. Comm’r of Revenue*, 511 N.W.2d 17, 20 n.2 (Minn. 1994) for proposition that “administrative rules have the force and effect of law”).

Id. The court then went on to reiterate its holding that Glass Service's purported assignments did not transform its status "from an assignee to an individual claimant." *Id.* at 805. So, to the extent that *Illinois Farmers* addresses the issue in this case, it demonstrates that the Supreme Court interprets the word "claimant" to mean (solely) the insured-policyholder. *See id.* at 804-05. Thus, under No Fault Rule 5, only the insured-policyholder has the right to initiate arbitration of glass claims.

The court's interpretation was consistent with the No Fault Act itself, which draws clear distinctions between "claimants," on the one hand, and "the person providing * * * products or services," on the other. Minn. Stat. § 65B.54, Subd. 4, for example, allows insurers to bring actions to recover benefits paid due to intentional misrepresentation, but such actions "may be brought only against the person providing the products or services, unless *the claimant* has intentionally misrepresented the facts or knew of the misrepresentation." Minn. Stat. § 65B.54, Subd. 4 (2007) (emphasis added). And Minn. Stat. § 65B.57 prevents economic loss benefits "paid or payable to any *claimant*" from becoming subject to garnishment or attachment, unless the party seeking to garnish or attach the benefits is a "person who has provided treatment or services, as described in section 65B.44, subdivision 2, to the victim of a motor vehicle accident." Minn. Stat. § 65B.57 (2007) (emphasis added). These and other provisions in the No Fault Act leave no doubt that a "claimant," is the insured or accident victim receiving benefits, not a provider. *See also* Minn. Stat. §§ 65B.51, subd. 1 (2007) (describing method of deducting benefits from "claimant's" damages when "claimant" is found to be at fault); 65B.56, Subd. 2 (2007) (requiring "claimant" to participate in arbitrations between

insurers and stating “[a]ny person receiving benefits * * * shall participate and cooperate * * * in any and all arbitration proceedings * * * by or on behalf of the obligor paying the benefits.”).

The manner in which the No Fault Rules reference such “claimants” also strongly suggests that the “claimant” is the insured. The rules thus require insurers to “advise *the claimant* of *claimant’s* right to demand arbitration” when denying a claim. (A. 253 (emphasis added)). They describe what to do if the “*claimant* asserts a claim against more than one insurer,” in which event the “*claimant* shall so designate upon the arbitration petition.” (*Id.* (emphasis added)). “Claimants” are obligated to “file an itemization of benefits claimed and supporting documentation.” (*Id.*) And only after the “claimant” has filed this information must the insurer respond within 30 days. (*Id.*) Nothing in the No Fault Rules suggests that *providers* — such as Archer — have the right to compel insurers to engage in arbitration. (*See generally*, A. 252-57).

Finally, the Supreme Court’s interpretation is consistent with the long-standing interpretations of the No Fault Rules by the committee empowered to administer them. The No Fault Rules themselves provide that arbitrations under Minn. Stat. § 65B.525 “shall be administered by a Standing Committee.” (A. 252). The Standing Committee is charged with selecting an arbitration organization, and is therefore empowered to interpret the rules. (*See* A. 252). The arbitration organization is subject to the Standing Committee’s “continuing supervision.” (*Id.*). Only the Standing Committee has the power to propose amendments to the rules, which must then be reviewed and approved by the Supreme Court. (A. 257). The No Fault Standing Committee is thus akin to an

administrative agency insofar as it is charged with interpreting the “statute” (the Rules) that it is obligated to enforce.⁷ Cf. *Illinois Farmers*, 683 N.W.2d at 802 (stating, by comparison to administrative agency rules, that No Fault Rules have force and effect of statute).

The Standing Committee long-ago interpreted the word “claimant” to exclude providers. In fact, it has repeatedly specifically *rejected* arbitration petitions by chiropractic providers who claimed to have obtained “assignments” of the insured’s interests under their insurance policies. (See A. 258-64). In 1997, the Standing Committee resisted a chiropractor’s attempt to initiate arbitrations on his patients’ behalf. (A. 258-60). Like Archer, the chiropractor claimed that he was entitled to initiate such

⁷ It is well-settled in Minnesota that, although courts are not bound by administrative agency’s interpretations of the law, an agency’s interpretation of “the statutes it administers” is “entitled to deference” and “should be upheld absent a finding that it is in conflict with the express purpose of Act and the intention of the legislature.” E.g., *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988); see also *City of Minneapolis v. Minnesota Pollution Control Agency*, 604 N.W.2d 140, 144-45 (Minn. App. 2000). Lower courts should leave it to the legislature or the Minnesota Supreme Court to “overrule” that agency’s reasonable interpretation:

[W]hen an agency reasonably interprets a statute, it is the role of the legislature or the supreme court, and not the role of this court, to overrule that interpretation.

City of Minneapolis, 604 N.W.2d at 144-45. This is especially true when the statute that the agency is entrusted with administering is “highly technical” or the agency’s interpretation is “long-standing.” E.g., *Arvig Telephone Co. v. Northwestern Bell Telephone Co.*, 270 N.W.2d 111, 114 (Minn. 1978); see also *Sherburne County Social Serv. v. Stearns County Social Serv.*, 1999 WL 55660, *2 (Minn. App.) (holding phrase “community based services” was “technical in nature”) (A. 265-68).

arbitrations because he had obtained allegedly valid “assignments” of his patient’s claims:

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.

(A. 260). The Standing Committee has had occasion to reconsider that rule twice since it first formally articulated it ten years ago. (A. 261-64). On October 15, 2004, the same chiropractor again requested that the Standing Committee interpret its rules to allow providers to be “claimants.” (See A. 261). This time, the committee felt compelled to state its interpretation in even more explicit terms:

Dr. Ketroser made a presentation in support of allowing health care providers with assignments to bring no-fault claims on their own behalf. After full discussion Wil Fluegel moved that the following be made a part of the Standing Committee’s Policy Statement:

For purposes of the administration of the Minnesota No-fault Arbitration Rules, the word Claimant shall mean an insured under a policy of no-fault automobile insurance. Claims for economic loss benefits can be made only by the insured.

Richard Tousignant seconded and the motion carried. AAA will send a letter to Dr. Ketroser advising him of the committee’s decision.

(A. 261). And again, on April 15, 2005, the committee reiterated the above definition of “claimant,” even while it acknowledged that the arbitration organization under its supervision “administers claims filed by auto glass companies under the no-fault rules.”

(A. 264).

To be sure, the committee's interpretation speaks only of "[c]laims for economic loss benefits" and thus leaves unanswered the question of whether it interprets the word "claimant" to somehow take on an entirely different meaning with respect to other species of insured losses. (*See id.*) But an agency is prohibited from ignoring its own rules from one case to the next. *In Re Proposed Debarment of Sunram Constr.*, 1998 WL 799175, *3 (Minn. App.) ("Relator asserts that respondent's decision to debar relator by default and to impose the maximum three-year term, without considering its own rule to determine the period of debarment, was an arbitrary and capricious abuse of discretion. We agree.") (A. 269-71). If the word "claimant" means "insured," when health care providers want that word to include them, then it still means "insured" when Archer wants to be included. And thus claims by *all* providers (regardless of the services that they provide) are necessarily barred because those providers are not "claimants," within the No Fault Rules' meaning.

Public policy also cries out for a holding that auto glass providers may not initiate arbitrations under the No Fault Act. If the No Fault Act and No Fault Rule 5 give auto glass providers the right to compel arbitration, then they will be unique among the providers affected by the Act, though presumably not for long. One can imagine the string of providers who would seek to initiate their own No Fault claims if auto glass providers are allowed to: body shops, funeral homes, providers of replacement services, massage therapists, and, of course, chiropractors. The No Fault Standing Committee presumably has had a good reason for consistently rejecting arbitration petitions by chiropractic providers over the last ten years.

Perhaps most importantly, insureds' rights to initiate arbitrations need to be exclusive because of the effect that those arbitrations could have on the insureds' future premiums. Insureds may ultimately pay the price for their choices to obtain glass services from more expensive providers, and they are entitled to make those choices with their eyes fully open. State Farm needs to be able to confirm what its insureds agreed to pay and what they understood about those costs when they agreed to pay them. It cannot do that if — as Archer would have it — the insureds are cut out of the process. State Farm furthermore needs to be assured that its payments will discharge its obligations *to its insureds* under its policies, something that it cannot do if the provider controls the arbitration between the parties. And there may be factual issues — apart from just pricing — that affect State Farm's obligations to the insured, but not the provider. For example, the insured could have opted to replace a windshield that could have been repaired, instead, which could generate a dispute between State Farm and its insured, not State Farm and the provider.

Allowing providers to initiate and prosecute arbitrations could also have a direct negative effect on the insureds themselves, though they may be oblivious to the providers' actions. There are two ways in which that can happen. First, as was noted above, larger indemnity payments on providers' inflated claims may have underwriting consequences — including, potentially, increasing the insureds' future premiums — when insureds renew with State Farm, or when they negotiate new policies with other insurers. *See* Minn. Stat. § 70A.05 (2) (2007) (“Risks may be classified by any reasonable method for the establishment of rates and minimum premiums. * * * Rates

thus produced may be modified for individual risks in accordance with rating plans or schedules which establish standards for measuring probable variations in hazards, *expenses*, or both.” (Emphasis added.)). The fact that providers have initiated arbitration may have an adverse effect on the insureds’ interests by raising the “loss adjustment expenses” associated with handling those losses that are allocated to the insureds. *See id.* Minnesota law allows insurers to consider such expenses in rate-making, so that insureds whose providers are commencing arbitrations on the insureds’ behalf could ultimately suffer higher premiums for the comprehensive coverage under which glass claims are paid, *even if the insurer successfully defends the arbitrations. Id.* It hardly furthers the No Fault Act’s purposes to allow providers to lure insureds into inadvertently raising their own future premiums.

The No Fault Act and No Fault Rules do not give Archer the right to initiate arbitration against State Farm, regardless of whether Archer’s purported assignment was valid. The district court therefore erred by failing to vacate the arbitrator’s award. State Farm respectfully requests that this court reverse the district court and enter an order vacating the arbitrator’s award.

CONCLUSION

Archer’s purported assignment was invalid and unenforceable and did not transform it into a “claimant” within the meaning of No Fault Rule 5. Archer thus lacked the power to compel State Farm to arbitrate this claim and was not entitled to an award of insurance proceeds. For these reasons, State Farm respectfully requests that this court reverse the district court and issue an order vacating Arbitrator Engel’s award.

Respectfully submitted,

Dated: 5/29/07

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