

A07-216

A07-217

A07-830

**State of Minnesota
In Court of Appeals**

STAR WINDSHIELD REPAIR, INC., AS ASSIGNEE FOR AARON HELGET,

Appellant (A07-216),

VS.

WESTERN NATIONAL INSURANCE COMPANY,

Respondent (A07-216),

and

THE GLASS NETWORK,

Claimant,

AUTO GLASS EXPRESS, AS ASSIGNEE FOR KATHY HELGOS,

Appellant (A07-217),

VS.

AUSTIN MUTUAL INSURANCE COMPANY,

Respondent (A07-217).

CORRECTED APPELLANTS' REPLY BRIEF

MOHRMAN & KAARDAL, P.A.
Steven R. Kluz, Jr. (#286588)
33 South Sixth Street
Minneapolis, MN 55402
(612) 465-0939 (612) 825-7777
*Attorneys for Respondent
Austin Mutual*

LIVGARD & RABUSE, P.L.L.P.
Charles J. Lloyd (#174257)
2520 University Avenue SE, Suite 202
Minneapolis, MN 55414
Attorneys for Appellants

RIDER BENNETT, L.L.P
Eric Magnuson (#66412)
Mark R. Bradford (#335940)
33 South Sixth Street, Suite 4900
Minneapolis, MN 55402
(612) 340-7907
*Attorneys for Respondent
Western National*

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION1

ARGUMENT.....2

 1. The District Courts Erred As A Matter Of Law In Finding The Post-Loss
 Assignment Of Property Damage Insurance Proceeds Invalid.....2

 A. The plain language of the anti-assignment provisions in these cases
 does not explicitly prohibit the assignment of post-loss proceeds.....2

 B. The insurance companies fail to distinguish governing Minnesota
 precedent6

 C. Austin Mutual and Western National ignore Minnesota’s accord with
 the great weight of national authority on this issue8

CONCLUSION.....13

TABLE OF AUTHORITIES

| Cases | Page |
|---|-------------|
| <i>Alpine Glass, Inc. v. Ill. Farmers Ins. Co.</i> , No. 06-CV-1148, 2006 WL 3486996, at *2 (D. Minn. Dec. 4, 2006)..... | 3 |
| <i>Antal’s Restaurant, Inc. v. Lumbermen’s Mut. Cas. Co.</i> , 680 A.2d 1386, 1387 (D.C. Ct. App. 1996)..... | 7, 9 |
| <i>Bloebaum v. Gen. Am. Life Ins., Co.</i> , 734 S.W.2d 539, 540 (Mo. App. Ct. 1987) | 5 |
| <i>Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.</i> , 682 P.2d, 388, 394 (Ariz. 1984)..... | 13 |
| <i>Holloway v. Republic Indemnity Co. of America</i> , 147 P.3d 329, 335 (Or. 2006) .. | 10, 11 |
| <i>Illinois Farmers Insurance Co. v. Glass Service Co.</i> , 683 N.W.2d 792 (Minn. 2004) | 6, 12 |
| <i>Leuthold v. Redwood County</i> , 206 Minn. 199, 202, 288 N.W. 165, 167 (Minn. 1939) | 8 |
| <i>Lewis v. Bush</i> , 30 Minn. 244, 245, 15 N.W. 113..... | 8 |
| <i>Loyola University Medical Center v. Med Care HMO</i> , 535 N.E.2d 1125, 1129 n.2 (Ill. App. Ct. 1989)..... | 4, 5 |
| <i>Miller v. Shugart</i> , 316 N.W.2d 729, 733-34 (Minn. 1982) | 11 |
| <i>Parkway Insurance Co. v. New Jersey Neck & Back</i> , 748 A.2d 1221, 1227-28 (N.J. Super. Ct. 1998) | 11, 12 |
| <i>Parrish Chiropractic Centers, P.C. v. Progressive Cas. Inc. Co.</i> , 874 P.2d 1049, 1053 n.5 (Colo. 1994) | 4 |
| <i>Physicians Neck & Back Clinics, P.A. v. Allied Insurance Co.</i> , No. A05-1788, 2006 WL 2053142 (Minn. Ct. App. July 25, 2006)..... | 4, 5, 11 |
| <i>Reitzner v. State Farm Fire & Cas. Co., Inc.</i> , 510 N.W.2d 20, 26 (Minn. App. 1993) | 2, 8 |
| <i>Smith v. Buege</i> , 387 S.E.2d 109, 116 (W.Va. 1989) | 10 |

| | |
|---|----|
| <i>Spirit of Excellence, Ltd. v. Intercargo Ins. Co.</i> , 777 N.E.2d 660, 674 (Ill. App. Ct. 2002) | 5 |
| <i>SR International Business Insurance Co. v. World Trade Center Properties, LLC</i> , 375 F.Supp.2d 238, 241 (S.D.N.Y. 2005) | 10 |
| <i>Tex. Farmers Ins. Co. v. Gerdes</i> , 880 S.W.2d 215, 218 (Tex. Ct. App. 1994) | 12 |
| <i>Travertine Corp. v. Lexington-Silverwood</i> , 683 N.W.2d 267, 274 (Minn. 2004)3, 4, 6, 13 | |
| <i>Windey v. N. Star Farmers Mut. Ins. Co.</i> , 43 N.W.2d 99, 102 (Minn. 1950) | 2 |

Statutes

| | |
|--|----|
| Minn. Stat. § 72A.201, subd. 6(14) | 12 |
|--|----|

Other Authorities

| | |
|--|---|
| 4 Appleman on Insurance Law and Practice § 2107 (1969) | 5 |
| Couch on Insurance 2d § 41A:42 | 5 |
| Keeton & Widiss, <i>Insurance Law</i> § 4.1(c)(3)(i) (1988)..... | 5 |

INTRODUCTION

For more than fifty years, Minnesota's jurisprudence on the issue of post-loss assignments of property insurance proceeds put Minnesota in the very well established majority of states that permit such assignments notwithstanding the existence of an anti-assignment clause in the insured's policy. Austin Mutual and Western National would like to change that and put Minnesota in the decided minority on the issue. To convince this Court to take our state in that misguided direction, the insurers ignore the prior decisions of this Court and the Minnesota Supreme Court that directly address the issue presented here. Similarly, they ignore cases from other jurisdictions that directly address and soundly reject the precise position the insurers assert here. Finally, the insurers ignore the writings of commentators and insurance treatises which uniformly deny the insurers' position here. Instead, Austin Mutual and Western National rely on cases that have nothing whatsoever to do with property insurance and, in some instances, nothing whatsoever to do with insurance at all. Unfortunately, the trial courts below accepted the insurers' flawed reasoning and set aside perfectly valid arbitration awards. Those decisions cannot withstand the scrutiny that the overwhelming weight of authority brings to bear on this question. Accordingly, those decisions should be reversed and the arbitration awards they set aside reinstated.

ARGUMENT

1. The District Courts Erred As A Matter Of Law In Finding The Post-Loss Assignment Of Property Damage Insurance Proceeds Invalid.

A. The plain language of the anti-assignment provisions in these cases does not explicitly prohibit the assignment of post-loss proceeds.

Both Austin Mutual and Western National urge the Court to enforce the plain language of their respective anti-assignment provisions. Auto Glass Express and Star Windshield agree. The Court should give effect to the plain language of the anti-assignment clauses, neither of which explicitly prohibits the assignment of post-loss insurance proceeds.

The rule in Minnesota is clear: the assignment of post-loss property damage insurance proceeds is assignable, even when a policy contains a generally-worded anti-assignment clause. See *Windey v. N. Star Farmers Mut. Ins. Co.*, 43 N.W.2d 99, 102 (Minn. 1950) (“Assignment, after loss, of the proceeds of insurance does not constitute an assignment of the policy, but only of a claim or right of action on the policy. Such an assignment does not void the policy under a provision that if it assigned without the insurer’s consent it shall become void.”); *Liberty Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 463 N.W.2d 750, 755 (Minn. 1990) (An assignment of an insured’s interest in an existing claim for benefits pursuant to a contract of insurances is not an assignment prohibited by law.); *Reitzner v. State Farm Fire & Cas. Co., Inc.*, 510 N.W.2d 20, 26 (Minn. App. 1993) (“An

assignment of insurance monies due on a successful claim does not require the insurance company's written consent. An insurance company has a right to put in its policy a provision that the policy cannot be assigned without its consent, but an insured can put in a claim under a policy and promise the claimed proceeds to another without first checking with the company."..

Therefore, an application of the plain language of the generally-worded anti-assignment provisions in these cases does not render post-loss assignment invalid. As the United States District Court held in a factually and legally indistinguishable case, if an insurance company "wants to overcome a half century of caselaw distinguishing between the assignment of coverage and the assignment of proceeds, [it] will have to use clearer language." *Alpine Glass, Inc. v. Ill. Farmers Ins. Co.*, No. 06-CV-1148, 2006 WL 3486996, at *2 (D. Minn. Dec. 4, 2006), App. 73-74. The language in the clauses here is general and does not *clearly* bar long-accepted post-loss assignments.

The insurance companies' argument relies on a pair of cases wholly inapplicable in this context. First, they turn to a case that implicates not an insurance policy but an individually negotiated management contract. In *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 274 (Minn. 2004), the court read an anti-assignment clause as prohibiting a party's power to assign proceeds. Nonetheless, the court also recognized "the general rule . . . that the

right to receive money due or to become due under an existing contract may be assigned even though the contract itself may not be assignable.” *Id.* at 272. Nothing in *Travertine* suggests that its reasoning applies to insurance policies.

Next, the insurance companies rely on this Court’s extension of the *Travertine* holding to a case implicating an insurance policy in *Physicians Neck & Back Clinics, P.A. v. Allied Insurance Co.*, No. A05-1788, 2006 WL 2053142 (Minn. Ct. App. July 25, 2006), App. 89. Although in *Physicians Neck*, this Court interpreted an anti-assignment clause as prohibiting a post-loss assignment, *see id.* at *4, *Physicians Neck* concerned a *pre-loss* assignment, fundamentally different from the post-loss assignments in this case.

Both insurers rely on a footnote from a case in an unrelated jurisdiction, itself without convincing legal authority, to suggest that *Physicians Neck* in fact does address post-loss proceeds, based on the contention that loss is incurred for the purposes of medical insurance when the injury happens. *See Parrish Chiropractic Centers, P.C. v. Progressive Cas. Inc. Co.*, 874 P.2d 1049, 1053 n.5 (Colo. 1994). For its characterization of time of loss as time of injury, *Parrish* relies wholly on a footnote in *Loyola University Medical Center v. Med Care HMO*, 535 N.E.2d 1125, 1129 n.2 (Ill. App. Ct. 1989) (“In ordinary terms, an insured’s loss would *seem* to be his or her injury, whether to himself, property, or business expectations. Under a fire policy, for example, an insured’s loss may be

the damage to the burned building, contents, and interruption of business.”) (emphasis added). Interestingly, the *Loyola* Court reaches its conclusion by analogizing to property damage insurance, without considering the fundamental difference between the two kinds of coverage.

A property damage insurer is obligated to compensate an insured as soon as damage happens to the insured property, regardless of whether the damaged property is ever repaired. This is because property insurance policies are “contracts of indemnity, intended solely to indemnify the insured for his actual monetary loss by the occurrence of the disaster.” *Spirit of Excellence, Ltd. v. Intercargo Ins. Co.*, 777 N.E.2d 660, 674 (Ill. App. Ct. 2002) (citing 4 Appleman on Insurance Law and Practice § 2107 (1969)). Medical insurance policies are also indemnity contracts. See *Bloebaum v. Gen. Am. Life Ins., Co.*, 734 S.W.2d 539, 540 (Mo. App. Ct. 1987) (citing Couch on Insurance 2d § 41A:42. In practice, medical insurance functions as reimbursement insurance; only once an insured received treatment is there an actual compensable monetary loss. The assignment in *Physicians Neck* occurred before the patient received chiropractic treatment. 2006 WL 2053142, at *1. Therefore, its holding should be limited to pre-loss assignments in the context of medical insurance, which in fact garners an exception to the general preference for the assignability of post-loss proceeds. See Keeton & Widiss, *Insurance Law* § 4.1(c)(3)(i) (1988).

The Court in this case should give effect to the plain language of the anti-assignment provisions in place. Both are generally worded prohibitions of the assignment of “rights and duties.” Minnesota allows post-loss assignments even in the face of such provisions, and the Court here should do so as well.

B. The insurance companies fail to distinguish governing Minnesota precedent

Quite simply, Minnesota law has recognized the assignability of post-loss property damage insurance policies for decades, and the Minnesota Supreme Court has never deviated from that rule. The insurance companies’ attempts to distinguish precedent in this case are unconvincing.

First, the insurers take issue with the glass companies’ reference to the Minnesota Supreme Court’s holding in *Illinois Farmers Insurance Co. v. Glass Service Co.*, 683 N.W.2d 792 (Minn. 2004). *Farmers*, which concerned the arbitrability of assigned proceeds for auto glass repair and replacement, was decided shortly after *Travertine*, and the Minnesota Supreme Court took no issue with the assignments in *Farmers*. *See id.* at 805. Western National argues that because assignability was not expressly litigated, *Farmers* “cannot be regarded as binding authority on an issue that was neither litigated nor discussed.” W. Nat’l Br. at 19. This contention, however, reveals the flimsiness of the insurers’ own authority. *Travertine*, after all, “neither litigated nor discussed” assignments of

insurance proceeds. As such, it cannot be asserted as binding authority in support of broad anti-assignment provisions.

The insurers also rely on the fact that the Minnesota Supreme Court enforced an anti-assignment clause in an insurance policy. *See Liberty Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 463 N.W.2d 750, 755 (Minn. 1990). In *Liberty Mutual*, the supreme court did not hold that the anti-assignment provision at issue was valid in every case. *Id.* at 756. In fact, it recognized the general rule of assignability of proceeds. *Id.* at 755. Instead, it invalidated the assignment in this particular case because of considerations of “champerty and maintenance” akin to those of a personal injury claim. *Id.* The replacement or repair of auto glass presents a fundamentally different situation, despite Austin Mutual’s attempt to characterize the assignment as Auto Glass Express purchasing Ms. Heglos’s claim. Austin Mut.’s Br. at 12.

Instead, the factual record reflects that Auto Glass Express accepted the assignment as payment for replacing Ms. Heglos’s windshield, and nothing more. What is really at issue here is a chose in action, or a claim against an insurer after loss has occurred. *See Antal’s Restaurant, Inc. v. Lumbermen’s Mut. Cas. Co.*, 680 A.2d 1386, 1387 (D.C. Ct. App. 1996). Minnesota law considers choses in action freely assignable:

The rule to be applied was concisely stated by Mr. Justice Mitchell in *Lewis v. Bush*, 30 Minn. 244, 245, 15 N.W. 113, as follows: ‘The law of this state is that an assignment of a chose in action is valid and complete in itself upon the mutual assent of the assignor and assignee without notice to the debtor. That notice is only necessary in order to charge the debtor with the duty of payment to the assignee, and protect the assignee from the danger of loss by reason of the debtor’s paying to the assignor without notice of the assignment.’

Leuthold v. Redwood County, 206 Minn. 199, 202, 288 N.W. 165, 167 (Minn. 1939). Because the public policy considerations that guided the court in *Liberty Mutual* are inapplicable here, the case should be understood as not at all contradicting general rule governing property damage insurance as expressed by this Court in *Reitzner*: “An insurance company has a right to put in its policy a provision that the policy cannot be assigned without its consent, but an insured can put in a claim under a policy and promise the claimed proceeds to another without first checking with the company.” 510 N.W.2d at 26.

Minnesota policy is clear on this issue. The assignment of post-loss proceeds transfers a chose in action, which is freely assignable in Minnesota. Minnesota precedent supports this position, and this Court should bring the rulings of the district courts in line with Minnesota case law.

C. Austin Mutual and Western National ignore Minnesota’s accord with the great weight of national authority on this issue

Both Austin Mutual and Western National focus their analyses on the unsupported idea that a provision barring the assignment of “rights and duties”

somehow directly and explicitly bars the assignment of post-loss proceeds. To reach this conclusion, both ignore the great weight of national authority that views anti-assignment clauses so worded as general and still allows the assignment of post-loss proceeds.

In *Antal's Restaurant*, the court was faced with an assignment of post-loss proceeds when a policy contained an anti-assignment clause. See *Antal's Restaurant*, 680 A.2d at 1387. After a survey of the field, the court concluded that the “great weight of national authority” distinguishes between pre- and post-loss assignments based on the idea that, post-loss, risk to the insurer cannot increase because the insurer has become “a debtor to the assured for the amount of the actual loss.” *Id.* at 1388 (citations omitted). Most notably for the purposes of the insurance companies’ analysis, the specific policy language interpreted by the *Antal's Restaurant* Court was identical to the provisions at issue here: “Your rights and duties under this policy may not be transferred without our written consent” *Id.* at 1387. Even in the face of a “rights and duties” anti-assignment provision, the court found a post-loss assignment valid because the insurer’s pre-loss “inchoate” right to proceeds becomes “absolute and transferable” after loss. *Id.* at 1389 (citations omitted).

The United States District Court for the Southern District of New York reached a similar conclusion with a similar provision. In *SR International*

Business Insurance Co. v. World Trade Center Properties, LLC, 375 F.Supp.2d 238, 241 (S.D.N.Y. 2005), the court interpreted an anti-assignment provision that stated that the “insured’s rights and duties under this policy may not be transferred without the written consent of the Company.” The court found post-loss assignments to be valid even when a policy contains an express anti-assignment provision. *Id.* at 246. The court relied on the rationale that an insurer’s risk before loss disappears after loss and becomes instead a “mere chose in action which may be assigned within the limitations of any other chose in action.” *Id.* (citations omitted). *Smith v. Buege*, 387 S.E.2d 109, 116 (W.Va. 1989) similarly acknowledged that “the recognized reason for the prohibition of assignments without the consent of the insurer . . . is not applicable after a loss because the liability of the insurer was already fixed by the loss prior to the effective date of the assignment, and like any other chose in action such liability is assignable regardless of the conditions of the policy in question.”

The insurance companies here ignore these cases articulating the majority rule and instead cite to distinguishable cases from other jurisdictions. First, Western National relies on the court’s construction of an anti-assignment provision in *Holloway v. Republic Indemnity Co. of America*, 147 P.3d 329, 335 (Or. 2006). This case is distinguishable in two important ways. First, the *Holloway* Court relies on Oregon precedent endorsing the broad construction of

anti-assignment provisions. *See id.* at 334-35. Minnesota, on the other hand, has expressly affirmed the idea that post-loss proceeds are assignable even when a policy includes an anti-assignment provision. The *Holloway* Court also summarily dismissed contrary authority in favor of its own analytical approach, an approach without analog in Minnesota case law. *See id.* at 335. Second, the procedural posture of the case is fundamentally different. In *Holloway*, a tort plaintiff received an assignment of her employer's bad faith claim against its insurer as part of a settlement agreement. *Id.* at 332-33. Minnesota law, however, recognizes the right of a tort plaintiff to attempt to recover from the defendant's insurer after settling a tort claim with the defendant. *See Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982). Moreover, the claim being assigned in these cases is simply the right to receive proceeds owed. Therefore, the reasoning in *Holloway* is inapplicable here.

Western National also relies on two cases addressing reimbursement for chiropractic care, both of which are distinguishable just like *Physicians Neck*. The public policy considerations cited in *Parkway Insurance Co. v. New Jersey Neck & Back*, 748 A.2d 1221, 1227-28 (N.J. Super. Ct. 1998) are inapplicable here. First, *Parkway* suggests that anti-assignment clauses protect insurers from dealing "with parties with whom they had not contracted." The Minnesota Unfair Claims Practices Act (UCPA), however, obligates the insurance companies to do business

with the glass shops. *See* Minn. Stat. § 72A.201, subd. 6(14) (providing that an insurance company must “provide payment to the insured’s chosen vendor”). Second, *Parkway* invokes the idea of freedom of contract, but this consideration cuts both ways; after all, it is the insured’s freedom to contract with the glass company of its choice that is supported by statute in the UCPA. Third, *Western National* cites to the potential for contradictory results through repeated arbitration, but Minnesota law specifically allows the consolidation of these kind of claims into a single proceeding. *See Ill. Farmers*, 683 N.W.2d at 805. Finally, the court refers to anti-assignment provisions as cost-saving measures, but the insurers in these cases are at no risk of incurring additional costs—the loss has already happened, and they are obligated to compensate the glass shop for it.

Finally, *Western National* relies on a case out of Texas, but Texas “consistently enforce[s]” anti-assignment clauses. *Tex. Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. Ct. App. 1994). Minnesota has no such strict, entrenched policy. While it enforces anti-assignment clauses, it does so with the understanding that they do not reach as far as post-loss proceeds. It is inapt to analogize to a case from a jurisdiction with a different underlying policy.

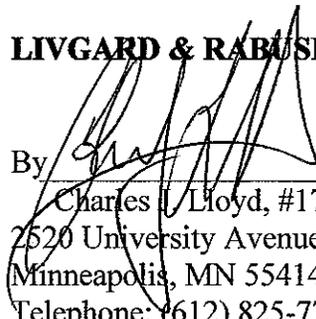
Currently, Minnesota law conforms to the majority rule that post-loss proceeds are assignable. *Western National* and *Austin Mutual* ignore this majority rule and rely on distinguishable cases in their attempt to argue otherwise.

CONCLUSION

The district courts in both of these cases ruled contrary to Minnesota law and contrary to the holdings of several state and federal district courts in factually and legally indistinguishable cases. There is quite simply no precedent in Minnesota for the invalidation of a post-loss assignment of property damage insurance proceeds simply because a policy contains a non-specific anti-assignment clause. In fact, cases in several jurisdictions hold quite the opposite. To limit the interpretation of an insurance policy to strict contract principles, the result mandated if *Travertine* is applied, perpetuates an untenable legal fiction—that an insured actually negotiates the terms of an insurance policy with the insurer. In the words of one court, relying on “patently unfounded assumptions of intent” leads to absurd results. See *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d, 388, 394 (Ariz. 1984). Here, all signs point to assignability: Minnesota precedent, the majority rule, and the Minnesota statutory scheme. Therefore, both Auto Glass Express and Star Windshield respectfully ask this Court to reverse the decisions of the lower courts.

Dated: 24 April, 2007

LIVGARD & RABUSE, P.L.L.P.

By 

Charles J. Lloyd, #174257
2520 University Avenue S.E., Suite 202
Minneapolis, MN 55414
Telephone: (612) 825-7777
Facsimile: (612) 825-3977

**ATTORNEYS FOR APPELLANTS
STAR WINDSHIELD AND AUTO
GLASS EXPRESS**