

A07-216  
A07-217  
No. A07-830

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State of Minnesota  
**In Court of Appeals**

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State Farm Mutual Automobile Insurance Company,

*Appellant,*

v.

Archer Auto Glass, as assignee of Ronald Hornberg,

*Respondent.*

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

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## ARGUMENT

Archer does not dispute several key points in State Farm's opening brief. Its silence helps to narrow this court's inquiry.

As a threshold matter, Archer does not dispute that review is *de novo*, nor does it argue that the district court was somehow obligated to defer to some sort of factual finding by the arbitrator. In fact Archer specifically states that the facts underlying this case are "neither complicated nor contested." (Respondent's Brief, 1). Archer thus necessarily concedes that Arbitrator Engel did not make any factual findings that were critical to this court's inquiry.

Archer also does not dispute that *if* insurance policies' anti-assignment clauses are governed by general contract principles, then State Farm's "No Change of Interest" clause bars Archer's assignment. Insurance policies' anti-assignment clauses are governed by general contract principles, so Archer's assignment is invalid and the district court erred by confirming the arbitrator's award.

Finally, Archer does not dispute that, generally, the No Fault Act and the Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules ("No Fault Rules") distinguish between providers and "claimants," and only the latter have the right to initiate No Fault arbitrations. It merely argues that *Illinois Farmers v. Glass Service Co., Inc.* held that Archer had the right to initiate No Fault arbitrations. *Illinois Farmers* did not so hold, so the district court erred by confirming the arbitrator's award.

**I. State Farm’s “No Change of Interest” clause barred its insured’s assignment to Archer.**

Archer does not dispute that the Minnesota Supreme Court’s 2004 decision in *Travertine v. Lexington-Silverwood* would compel reversal if this case involved any type of contract other than an insurance policy. Archer does not, for example, dispute that State Farm’s policy contained “*something* in [its] terms \* \* \* manifesting the intention of the parties that it shall not be assigned.” See *Travertine v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004) (bold and italics emphases in original). Nor does Archer dispute that State Farm’s “No Change of Interest” clause prohibits assignments in “specific and unmistakable terms.”<sup>1</sup> See *id.* at 273 (“When a contract prohibits assignments in specific and unmistakable terms, *any* purported assignment [i.e., including assignments of a debt owed for one party’s full performance] is void.” (emphasis added)).

Archer’s silence on these two points substantially narrows this court’s inquiry with respect to State Farm’s “No Change of Interest” clause. In light of *Travertine*, this court need only answer one question: does Minnesota law — more specifically, do Minnesota statutes — *prohibit* insurers from applying their (admittedly valid) anti-assignment

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<sup>1</sup> There is a good reason why Archer does not dispute these issues: State Farm’s anti-assignment clause states that any unauthorized changes of interest are *ineffective*. (A. 150 (“No change of interest in this policy is effective unless we consent in writing \*\*\*.)). So even under the majority rule that anti-assignment clauses do not bar assignments of compensation owed unless they explicitly limit the *power* to assign, (which the supreme court rejected in *Travertine*), State Farm’s policy clearly limits the insured’s *power* to assign, not just his or her *right* to assign. Compare *id.* with *Travertine*, 683 N.W.2d at 273 (noting that courts hold that anti-assignment clauses limit power to assign when they say that assignments are “void” or “invalid”); see also 6A C.J.S. Assignments § 132 (“[T]he debtor may assert as a defense any matter which renders the assignment absolutely invalid *or ineffective*, or void, such as, the nonassignability of the right attempted to be assigned \* \* \*.” (emphasis added)).

clauses to post-loss proceeds assignments? The answer to that question is unequivocally “no.” Archer has not directed this court’s attention to any statute that imposes such a limitation on the parties’ freedom of contract. Moreover, the Minnesota Supreme Court has specifically observed that insurers’ anti-assignment clauses actually further public policy when they bar certain types of post-loss assignments, such as uninsured motorist claims. *Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co.*, 463 N.W.2d 750, 755-56 (Minn. 1990). State Farm is therefore entitled to reversal. The district court erred as a matter of law when it failed to vacate Arbitrator Engel’s award, because the insured’s assignment to Archer was invalid.

**A. Insurance policies stand on the same footing as ordinary contracts unless the legislature sees fit to treat them specially.**

Archer’s argument boils down to its claim that insurance policies “do not stand on the same footing as ordinary contracts,” and therefore this court is somehow prohibited from applying State Farm’s policy’s otherwise-valid-and-enforceable anti-assignment clause to the insured’s post-loss assignment. (Appellant’s Brief, *Star Windshield Repair, Inc. v. Western National Ins. Co. and The Glass Network v. Austin Mut. Ins. Co.*, A07-216 and A07-217, 7 (citations omitted)).<sup>2</sup> Archer’s “footing” quotation — which was taken from the Minnesota Supreme Court’s 2004 decision in *Illinois Farmers Ins. Co. v. Glass Service Co., Inc.* — is selective, to the say the least. See *Illinois Farmers Ins. Co. v. Glass Service Co., Inc.*, 683 N.W.2d 792, 802 (Minn. 2004). *Illinois Farmers* makes

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<sup>2</sup> Archer filed its responsive brief in this case at a time when this case was consolidated with A07-216 and A07-217, and it referred the court to its briefs in that matter for one of its arguments.

clear that insurance policy provisions are generally valid and enforceable unless there is some sort of “legal restriction,” (i.e., a statute) that specifically prohibits them:

*In the absence of a legal restriction to the contrary, parties to an insurance contract, just as parties to other agreements, are free to bargain for the coverage they wish. But it has long been our policy that insurance policies ‘do not stand on the same footing as ordinary contracts. The business of insurance is quasi public in character; hence, it is competent for the state, in the exercise of its policy power, to regulate it for the protection of the public.’ If a term in an insurance contract conflicts with Minnesota statutes, the contract term becomes unenforceable.*

*Id.* (emphasis added). *Illinois Farmers* is consistent with literally decades of Minnesota Supreme Court authority, all of which holds that “general contract principles” apply to insurance policies unless a statute dictates otherwise. *See id.* at 799, 802; *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.”); *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960) (“Parties to insurance contracts, as in other contracts, absent legal prohibition or restriction, are free to contract as they see fit, and the extent of liability of an insurer is governed by the contract they enter into. Subject to the statutory law of the state, a policy of insurance is within the application of general principles of the law of contracts.”). Archer has not directed this court’s attention to any statute that prohibits State Farm from applying its (otherwise valid) “No Change of Interest” provision to bar post-loss assignments of its policy proceeds.

This fact should end this court’s inquiry. Without a statutory limitation on the parties’ bargaining, State Farm’s anti-assignment clause should be enforceable in the

same way that the same clause would be enforceable in any other contract. Archer thus cannot prevail in its claim.

**B. Minnesota does not have a half century of caselaw that holds that post-loss assignments of insurance proceeds are valid in the face of policies' anti-assignment clauses.**

Archer is undeterred by the fact that there is no statute that compels the result that it seeks. It simply points to dicta from a single 50 year-old Minnesota Supreme Court decision and claims that Minnesota courts have a "half century of caselaw" that *holds* that insureds may assign their contract interests post-loss without running afoul of their policies' anti-assignment clauses. In light of *Travertine*, one has to ask why this one case would matter because any previously inconsistent opinion would have been overruled by *Travertine*.

But just as importantly — as State Farm already demonstrated on pages 15-22 of its opening brief, and as this court observed when it was rejecting an identical argument to Archer's in *Physicians Neck Back Clinics, P.A. v. Allied Ins. Co.* — Archer's alleged "half century of caselaw" is pure fiction. See *Physicians Neck Back Clinics, P.A. v. Allied Ins. Co.*, 2006 WL 2053142 (Minn. App.), (A.235) *review denied* (Minn. Oct. 17, 2006). In fact, the Minnesota Supreme Court has never *held* that an insurance policy's anti-assignment clause was ineffective as against a post-loss assignment; it merely *suggested* (in what is now 50 year-old dicta) that it might have so held if it had been squarely presented with the question. See *Windey v. North Star Farmers Mut. Ins. Co.*, 231 Minn. 279, 280-82, 43 N.W.2d 99, 100-01 (1950) (concluding that agreement "did not constitute an assignment of either the policy or the proceeds thereof"); *see also*

*Physicians Neck*, 2006 WL 2053142 at \*3-4 (“Despite having found that the assignment at issue was neither an assignment of the policy nor an assignment of the proceeds of the policy, the *Windey* court added in dictum \* \* \* .”).

Archer is not reading *Windey* carefully enough. The insurer in *Windey* was trying to reap a windfall by arguing that the purported assignment (actually a contract for deed) voided its coverage *entirely*; in other words, it argued that *no one* was entitled to its proceeds, neither *the assignee, nor the assignor*.<sup>3</sup> See *Windey*, 231 Minn. at 20-81, 43 N.W.2d at 100 (describing “questions for decision” as asking whether policy was “void” under various provisions. (Emphasis added.)). Nothing about the court’s opinion suggests that the plaintiff’s “right to initiate a legal action” (as opposed to the insurer’s obligation to pay whatever amount it owed to the vendor) was at issue. This makes perfect sense given that the insurer was trying to avoid paying *anything* to *anyone*. There is thus no support for Archer’s claim that *Windey* held that “the assignee had the right to initiate a legal action on the policy based on a transfer of [a claim or] right of action [on the policy].” (Respondent’s Brief, 6). In fact, the supreme court’s actual *holding* in *Windey* was precisely the opposite from what Archer claims; the court concluded that the contract at issue “gave the [purported assignee] no rights against the insurer, but only against the [purported assignors] so far as concerned the application of

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<sup>3</sup> Of course that is not what State Farm is arguing here. State Farm does not dispute that Ronald Hornberg has *every right* to demand that State Farm arbitrate a dispute over what amount State Farm should pay to repair his Ford F150. State Farm simply disputes whether Hornberg’s assignment is *effective* to give *Archer* the right to compel State Farm to arbitrate *with Archer*. State Farm’s policy says “no.” *Windey* does not compel this court to hold that the assignment to Archer is effective.

the proceeds in case of loss or damage.” *Windey*, 231 Minn. at 283, 43 N.W.2d at 101-02.

Archer is likely confused by the final section in *Windey*. The court in *Windey* considered an argument that is irrelevant to this case, i.e., whether performance of the contract for deed *after the loss* related back to before the loss, so as to void coverage under a provision that prohibited the insured from changing title to the property while the insurance was in effect. *Id.* at 281, 43 N.W.2d at 100. In its analysis of that issue, the court concluded that because the vendor was not prepared to convey the property at the time that it entered into the contract for deed, later performance did not relate back so as to void the vendor’s coverage, and the court then noted that plaintiff stood in the vendor’s shoes with respect to the vendor’s right to recover. *Id.* at 284, 43 N.W.2d at 102. The court’s discussion arose in response to an insurance provision that is not at issue in this case, and it was not essential to the outcome because the plaintiff’s right to sue was not contested. Rather, the court’s ultimate holding — i.e., that the insurer could not reap a windfall — ultimately hinged on its conclusion that the plaintiff’s agreement with the insured “did not constitute an assignment of either the policy or the proceeds thereof.” *Id.* at 283, 43 N.W.2d at 101. And it was in that context that the court stated that the plaintiff had not gained any “rights against the insurer.” 231 Minn. At 283, 43 N.W.2d at 101-02.

*Windey* does not deserve all the ink that has been spilt in discussion of it. It is mere dicta in a 50 year-old case and, as State Farm pointed out in its original brief, Minnesota Supreme Court authority issued well before *Travertine* held that insurance

policies' anti-assignment clauses were not only *enforceable* as against post-loss assignments, rather they furthered public policy insofar as they barred assignment of the particular rights involved in that case. *Liberty Mut. Ins. Co. v. Amer. Fam. Mut. Ins. Co.*, 463 N.W.2d 750, 755-56 (Minn. 1990) (emphasis added). One has to ask, if *Windey's* purported "holding" was what Archer claims it was, then why did the court not discuss *Windey* when it had the chance in *Liberty Mutual*? The answer is obvious: *Windey* did not hold what Archer claims it held; it was merely dicta. *Physicians Neck*, 2006 WL 2053142 at \*3-4. And in any event, the much more recent *Liberty Mutual* decision clearly supports State Farm's position, not Archer's. Archer's post-loss-assignment argument thus has literally *no* Minnesota Supreme Court authority to support it, which makes its position rather flimsy in the face of that court's decision in *Travertine*.

Finally, Archer suggests that this court should reject its own unpublished decision in *Physicians Neck*, on two grounds. (Appellant's Brief, *Star Windshield Repair, Inc. v. Western National Ins. Co. and The Glass Network v. Austin Mut. Ins. Co.*, A07-216 and A07-217, 12-13). First, Archer claims that *Physicians Neck* is "only applicable in the context of medical benefits insurance that implicates the policy concern of controlling medical costs." (*See id.* at 12). Archer offers no support for this claim. Nor does Archer explain why there is no corresponding public policy interest in reducing automobile premiums by controlling comprehensive insurance costs.

Second, Archer claims that *Physicians Neck* involved "pre-loss" assignments because the insureds assigned their interests after suffering an accident, but before

receiving treatment with the assignee/providers. (*Id.* at 12-13). Again, Archer offers absolutely no authority for this premise. (*See id.*)

Both of these arguments are meritless. Nothing in *Physicians Neck* suggests that the court was persuaded to reach the result that it did because the assignments were to a medical services provider, or because the insured entered into the assignments before receiving services and thus the assignments were “pre-loss.” *See generally, Physicians Neck*, 2006 WL 2053142 at \*1-4. Rather, the court’s holding was clearly motivated by its conclusions that: 1) Minnesota did *not* have a 50 year history of allowing assignments of insurance proceeds despite contrary policy language; and 2) *Travertine* was based on general contract principles that are applicable to insurance policies. *Id.* at \*4.

Finally, *Physicians Neck* is entirely consistent with Colorado authority on which the supreme court relied in *Travertine*. *See Parrish Chiro. Centers, P.C. v. Progressive Cas Ins. Co.*, 874 P.2d 1049, 1053-55 and n. 5 (Colo. 1994). And the Colorado court specifically rejected arguments that were identical to Archer’s “pre-loss” and “medical providers are special” arguments here. *See id.*

**C. The fact that *Travertine* and *Illinois Farmers* were issued just three weeks apart is in State Farm’s favor, not Archer’s.**

In an attempt to fill the void in supreme court authority, Archer suggests that the Minnesota Supreme Court somehow opined about glass providers’ assignments’ validity in *Illinois Farmers v. Glass Service Co., Inc.*, even though Archer must necessarily concede that *Illinois Farmers* did not challenge the assignments’ validity, and even though it would have been rather unusual (and perhaps inappropriate) for the court to

give an advisory opinion under such circumstances. (See Appellant's Brief, *Star Windshield Repair, Inc. v. Western National Ins. Co. and The Glass Network v. Austin Mut. Ins. Co.*, A07-216 and A07-217, 11); see also *Illinois Farmers Ins. Co. v. Glass Service Co.*, 669 N.W.2d 420, 422 n. 1 (Minn. App. 2003) ("Some customers explicitly assigned their claims against the insurers to the auto glass companies, while others did not. Although the insurers discuss the assignments, they do not explicitly challenge their validity in this appeal.") *aff'd* (Minn. July 22, 2004). Archer does not claim that *Illinois Farmers* reached the anti-assignment clause issue explicitly; rather, Archer claims that the court must have tacitly approved of the assignments because it "voiced no objection" to them just three weeks after it decided *Travertine*. (Appellant's Brief, *Star Windshield Repair, Inc. v. Western National Ins. Co. and The Glass Network v. Austin Mut. Ins. Co.*, A07-216 and A07-217, 11); see *Illinois Farmers v. Glass Service Co., Inc.*, 683 N.W.2d 792, 799 (Minn. 2004) (showing opinion issued July 22, 2004); *Travertine*, 683 N.W.2d at 267 (showing opinion issued July 1, 2004).

Archer has it upside down. *Travertine's* and *Illinois Farmers'* closeness in time means that the court's opinions were likely circulating either at the same time or at least in close proximity to one another, so it is likely that the court considered their potential overlap. And the opinions contained several indications that the court saw *Travertine* as equally applicable to insurance policies, but did not address the assignment issue in *Illinois Farmers* because it was not raised.

The first of these indications was the court's citation, in *Travertine*, to *Vetter v. Security Continental Insurance* (an insurance case) as the primary authority for its

rejection of the Restatement (Second) of Contracts § 322. *Travertine*, 683 N.W.2d at 272. The court then cited *Vetter* again for the general rule that contract rights are assignable, but *only* when the contract does not contain an anti-assignment clause.<sup>4</sup> See *Travertine*, 683 N.W.2d at 272. The court actually added emphasis to its quote from *Vetter* to make this point. See *id.* Assuming that the court was aware that the *Illinois Farmers* assignment-validity issue was waiting in the wings when the court was considering the opinion in *Travertine* (and that's not an unreasonable assumption, given their proximity to one another), then it is hard to imagine why the court would choose one of its own *insurance* cases for this point of law if it believed that its holding in *Travertine* not would apply to *all* contracts in the absence of a statutory provision mandating otherwise.

Here's how State Farm can support that statement: an expansion of the quote from *Vetter* to include more of the quoted paragraph, superimposed with the supreme court's *Travertine* emphasis literally makes State Farm's case here because it juxtaposes the court's "absence of a contractual provision to the contrary" holding with a statement that insurance policies are not subject to special contract principles unless a statute dictates a different result:

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<sup>4</sup> The policy at issue in *Vetter* involved an alleged novation, not a mere assignment, and its statement regarding anti-assignment clauses was just general background to its decision, so State Farm is not necessarily arguing that *Vetter* compels the result that State Farm urges here. See *Vetter v. Security Continental Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997). State Farm's point is merely that the court's choice to cite *Vetter* certainly refutes Archer's suggestion that the court viewed *Travertine* as applying some sort of special contract principle that was limited to management agreements and had no application to insurance policies.

Insurance policies are contracts and unless there are statutory provisions to the contrary, general principles of contract law apply. As a general rule, *and in the absence of a contractual provision to the contrary*, an obligor on a contract may assign all beneficial rights to another, or may delegate his or her duty to perform under the contract to another, without the consent of the obligee.

*Vetter v. Security Continental Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997) (underlining added; italics added by court in *Travertine*). In *Travertine*, the court emphasized that this italicized language from *Vetter* (an insurance case) articulated a “*general rule*” that was “crucial” to the court’s decision because it showed that Minnesota does not require that the parties use “specific terms to preclude assignment.” *Travertine*, 683 N.W.2d at 272. They need only include “*something* expressing their intent that the contract not be assignable.” *Id* (emphasis in original). Why would the court point to an insurance case for this point if, as Archer claims, insurance policies’ anti-assignment clauses did not “stand on the same footing as ordinary contracts” with respect to post-loss proceeds assignments? Archer’s position does not make any sense.

If that was not enough, there was also the court’s observation in *Travertine* that “[o]ther courts have taken this approach and given effect to contract provisions that specifically prohibit the assignment of one’s right to receive money due under a contract,” which was supported, in part, by a citation to a post-loss insurance-proceeds-assignment case from Colorado. *Travertine*, 683 N.W.2d at 274, n. 3; *see also Parrish*, 874 P.2d at 1051-53 and n. 5 (Colo. 1994) (describing facts and holding that assignment after accident but before treatment was “post-loss.”). As this court observed in *Physicians Neck*, the court’s citation to *Parrish* can’t have been inadvertent; this is

particularly true given how closely *Illinois Farmers* followed *Travertine* and the fact that they were both unanimous decisions. *Physicians Neck*, 2006 WL 2053142, at \*4. It is highly unlikely that seven justices overlooked the possibility that the bar (and the lower courts, including this one) might understand that citation to suggest that the *Travertine* rule had a broad application that would include post-loss assignments of insurance proceeds.

Finally, *Illinois Farmers* also contains indications about how the court reconciled that opinion with *Travertine*. At the outset of its discussion the court specifically stated that the parties' positions limited its analysis to "where and how *this dispute* shall be resolved." *Illinois Farmers*, 683 N.W.2d at 800 (emphasis added). Note that the court did not say "where and how *these types of disputes* shall be resolved." *See id.* It limited its inquiry to "this dispute." The court also specifically stated that it was not reaching one of the issues that *Illinois Farmers* had raised in the district court, namely whether Glass Service had the "right" to arbitrate:

*Glass Service is correct that, in this case, Farmers initially contested Glass Service's right to arbitrate and opposed Glass Service's demand for consolidated arbitration. However this opposition was jurisdictional and did not involve a challenge to the merits of Glass Service's claim. Farmers' current declaratory judgment action seeks only to determine where and how this dispute shall be resolved; it does not call upon the courts of this state to resolve the merits of the dispute.*

*Id.* (emphasis added); *see also Illinois Farmers*, 669 N.W.2d at 423 (describing *Illinois Farmers'* district court arguments). There was simply no reason for the supreme court to address the assignments' validity when *Illinois Farmers* had limited the issues before the court to avoid the jurisdictional issue regarding glass providers' "right[s] to arbitrate."

**D. The foreign authority on which Archer relies actually supports State Farm's arguments.**

Finally, Archer points to three decisions from outside Minnesota that upheld post-loss assignments on the grounds that such assignments do not increase insurers' risks or hazards of loss, so prohibiting them would allow the insurer to essentially reap a windfall. (Appellant's Brief, *Star Windshield Repair, Inc. v. Western National Ins. Co. and The Glass Network v. Austin Mut. Ins. Co.*, A07-216 and A07-217, 9-11). At the outset, assignments to glass providers actually *do* increase insurers' risks or hazards of loss. State Farm addresses that issue in a separate "public policy" section at the end.

But more importantly, each of these three cases really proves State Farm's point because, as can be demonstrated by a comparison of these cases with others from these same jurisdictions, each of the courts' holdings are just insurance-specific manifestations of the majority rule that the Minnesota Supreme Court rejected in *Travertine*. Compare *Nat'l Amer. Ins. Co. v. Jamison Agency, Inc.*, 501 F.2d 1125, 1128 (8th Cir. 1974) (applying South Dakota law and allowing post-loss assignment of proceeds despite anti-assignment clause) with *Wandler v. Lewis*, 567 N.W.2d 377, 385 (S.D. 1997) (applying SD law and allowing assignment of compensation despite anti-assignment clause, in part because "there is no language in this provision stating an unauthorized assignment renders the transaction void, which is often required to hold the assignee lacks standing."); compare *SR Int'l Business Ins. Co., Ltd v. World Trade Center Properties, LLC*, 375 F. Supp.2d 238, 245-46 (S.D.N.Y. 2005) (applying NY law and allowing post-loss assignment despite anti-assignment clause) with *University Mews Assoc. v.*

*Jeanmarie*, 471 N.Y.S.2d 457, 461 (N.Y. Sup. Ct. 1983) (applying NY law, “For a contractual clause forbidding or restricting an assignment of rights thereunder to reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void, such clause must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way.”); compare *Antal’s Restaurant, Inc. v Lumberman’s Mut. Cas. Co.*, 680 A.2d 1386, 1388 (D.C. Ct. App. 1996) (applying D.C. law and upholding post-loss assignment) with *Bewley v. Miller*, 341 A.2d 428, 430 (D.C. Ct. App. 1975) (D.C. law, “Clauses purporting to restrict the power to assign an otherwise assignable contract are ineffective unless the restriction is phrased in express, precise language. The language of this contract is not of the definite character required to interpret it as precluding the assignment of the claim for money.”). As State Farm stated in its original brief, *Travertine* pulled the rug out from under the majority rule that post-loss assignments of insurance proceeds are valid in the face of an anti-assignment clause. Courts that apply a rule of law similar to *Travertine’s* also enforce insurers’ anti-assignment clauses to bar post-loss assignments of insurance proceeds. See, e.g., *Holloway v. Republic Indem. Co. of Amer.*, 147 P.3d 329, 333-35 (Or. 2006); *Parrish*, 874 P.2d at 1051-53.

**II. Archer does not have a statutory or constitutional right to compel State Farm to arbitrate its claim.**

**A. Nothing the No Fault Act or *Illinois Farmers* suggests that Archer has the right to compel State Farm to arbitrate its claim.**

Archer does not claim that there is anything in the No Fault Act that *requires* that courts treat glass providers specially. It does not dispute that the No Fault Act actually

draws several distinctions between providers and “claimants,” which are the only parties empowered with initiating No Fault arbitrations. And it merely dismisses State Farm’s discussion of the No Fault Standing Committee’s interpretations of the Minnesota No-Fault, Comprehensive or Collisions Damage Automobile Insurance Arbitration Rules (“No Fault Rules”) by stating that the American Arbitration Association administers glass claims. (Respondent’s Brief, 11). That’s true, of course, but it doesn’t make Archer a “claimant” within the meaning of the No Fault Act or No Fault Rule 5, and sooner or later Archer will need to show how it falls within the definition of that term.

Instead of addressing the Act or the Rules, Archer simply insists that the Minnesota Supreme Court considered (and rejected) all of State Farm’s statutory and regulatory arguments in *Illinois Farmers*. (Respondent’s Brief, 11 (“State Farm cannot escape the fact that *Illinois Farmers* conclusively resolved these issues.”)). Archer is wrong. As State Farm showed above, the court’s opinion shows that it limited its inquiry to the rather narrow issue that was presented to it. It only asked “where and how *this dispute* shall be resolved.” *Illinois Farmers*, 683 N.W.2d at 800 (emphasis added). And it very specifically noted that it was not addressing whether Glass Service had the *right* to arbitrate.<sup>5</sup> *Id.*

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<sup>5</sup> This is one of the reasons why this court’s recent *Illinois Farmers* decision is irrelevant to State Farm’s arguments. First, that case did not address any of the arguments that State Farm is raising here. See generally, *Glass Service Co., Inc. v. Illinois Farmers Ins. Co.*, No. A06-1074 (Minn. Ct. App. filed June 26, 2007) (R. A. 4-25). And second, *Illinois Farmers*’ decision to limit the issues on the first appellate round likely means that any new issues regarding Glass Services’ standing would be law of the case.

The court also carefully quoted from Glass Service's arguments at the outset to explain that Glass Service saw itself as a "claimant" entitled to notice from Illinois Farmers of its "right to demand arbitration":

[Glass Service's] first argument is \* \* \* that if Farmers denies a claim, it is to advise the claimant of the claimant's right to demand arbitration. \* \* \* Glass Service claims that, in order for Farmers to preserve its contractual right to mandatory arbitration, Farmers, after denying Glass Service's claim, was required to advise Glass Service of its 'right to demand arbitration.'

*Id.* at 798-99. The court's use of quotes around the phrase "right to demand arbitration," certainly suggests doubt about whether any such "right" exists.

The court's recitation of Glass Service's statement of the issues is also the *only* time that it referred to Glass Service's "*right* to arbitrate" as opposed to its *obligation* to do so. Elsewhere in the opinion, the court asked whether the No Fault Act "*requires* Glass Service to arbitrate its claims against Farmers." *Id.* at 803. It carefully phrased its recitation of the assignment's effect in terms of *Illinois Farmers'* rights against *Glass Service*, not the other way around. *Id.* ("Thus, if Farmers had the right to demand no-fault arbitration against individual policyholders, it will also have that right against Glass Service as assignee of the policyholders' claims against Farmers.").

Moreover, the Illinois Farmers policy language quoted in that section mirrored the language in No Fault Rule 5, titled, "Initiation of Arbitration," which speaks of only two parties to arbitration: 1) respondents (insurers); and 2) "claimants." (A. 252-57). So while the court was doing all of these things — quoting from No Fault Rule 5's "claimant" requirement and tiptoeing around Glass Service's assertion of a "right to

demand arbitration” — it seems highly improbable that the court *inadvertently* repeated — not just twice, but *four times* — that Glass Service was not a “claimant,” within the meaning of the No Fault Rules, and that, instead, “the claimants \* \* \* are the individual policyholders.” *Illinois Farmers*, 683 N.W.2d at 804-05 (“In summary, the claimants in this case are the individual policyholders, each of whom possess a claim against Farmers of under \$10,000.”). State Farm’s argument on this point does not — as Archer claims — “evaporate” when the court’s “claimant” statements are “properly placed in the context of the entire opinion.” (Respondent’s Brief, 8). Rather, the context suggests a far deeper meaning than any of the statements have in isolation. Glass providers do not have the right to compel insurers to arbitrate their claims.

**B. This court can summarily reject Archer’s misguided Remedies Clause and subject-matter-jurisdiction arguments.**

Archer apparently believes that it has “constitutional right to enforce its assignment and pursue the amounts assigned to it.” (Respondent’s Brief, 10). Archer locates the support for this supposed “entitlement” in Minnesota’s Constitution, art. 1, § 8, which is Minnesota’s Remedies Clause. Archer might want to look into that clause a little more closely. This case does not implicate Minnesota’s Remedies Clause.

At least 39 states have Remedies, or “Open Court” clauses in their state constitutions. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 340, n. 4 (Or. 2001); *see also* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1279 (1995). Such clauses evolved in state constitutions as a type of brake on aggressive legislative reforms. *Smothers*, 23 P.3d

at 356 (“Drafters of remedy clauses in state constitutions sought to protect absolute common-law rights by mandating that a remedy always would be available for injury to those rights.”). Modern courts (including Minnesota’s) usually apply four factors to decide whether a statute violates the Remedies Clause. They ask whether the statute: 1) abrogates; 2) a common law right that was in existence at the time that the State Constitution was passed; 3) without providing a reasonable substitute; and 4) without a permissible, legitimate legislative objective. *Smothers*, 23 P.3d at 356-57 (articulating factors); *see also Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 641-44 (Minn. 2006); *Sartori v. Harnischfeger*, 432 N.W.2d 448, 452-54 (Minn. 1988). Such clauses do not guarantee that parties may enforce whatever specific remedy they may choose for business purposes, as Archer apparently believes. Nor do they “freeze” the common law in place. *Smothers*, 23 P.3d at 354 (remedies clauses do not “freeze” common law). They merely allow the judiciary to inquire into the purpose behind legislation that abrogates an existing common law right and to consider the adequacy of the alternatives. *See id.*; *see also Sartori*, 432 N.W.2d at 453. Minnesota’s Remedies Clause has no relevance to this case. Glass providers have remedies for their contractual claims: they can recover payment from insureds, who will then take up any disputes that they may have with their insurers.<sup>6</sup>

Finally, Archer argues that State Farm’s interpretation of *Illinois Farmers* “would allow insurers exclusively to control whether the district court has jurisdiction over such

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<sup>6</sup> Moreover, were Archer to succeed with its Remedies Clause analysis, then literally *any* provider would have the right to take assignments of insureds’ rights to initiate No Fault arbitrations.

disputes: only if the insurer demanded arbitration would the court be divested of jurisdiction by way of operation of the No-Fault Act.” (Respondent’s Brief, 10). Archer then goes on to point out that subject matter jurisdiction is *per se* non-waivable, and ultimately concludes with this rather bold assertion, “What State Farm would have this Court ignore is the fact that it is not a question of arbitration or nothing, but rather arbitration or district court.” (*Id.* at 14). Actually, Archer has given itself one too many options. State Farm is arguing that glass providers, like all the other various providers affected by the No Fault Act, do not have *any* rights against State Farm. Archer has contractual rights against State Farm’s insured. And State Farm’s insured may assert claims against State Farm based on the providers’ services, but there is no claim or right of action that can run between Archer and State Farm because the No Fault Act requires arbitration and only insureds can initiate it.

The district courts’ subject matter jurisdiction is not subject to the parties’ control. It always “lacks” (or chooses to forego, as a matter of comity) subject matter jurisdiction over comprehensive losses under \$10,000. Illinois Farmers can choose not to complain about Glass Service’s standing to initiate arbitration. But neither party could have “chosen” to pursue their claims in district court instead of arbitration because subject matter jurisdiction is nonwaivable.

**III. Barring providers from taking assignments of the insureds’ interests and initiating No Fault arbitrations furthers a public policy interest in controlling insureds’ automobile insurance premiums.**

Finally, contrary to what Archer claims, assignments to glass providers *unquestionably do* increase insurers’ risks or hazards of glass losses; perhaps most

accurately, they increase the *magnitude* of those losses because they increase the likelihood that State Farm (and thus, ultimately, its insureds) will spend more to repair its insureds' cars than it would have had to pay in the absence of the assignments.

To understand why this is so, consider how (or more accurately, "whether") insureds' and glass providers' interests are aligned. How does it benefit Ronald Hornberg if State Farm spends thousands of dollars to arbitrate Archer's claim? It does not. And suppose that State Farm instead opted to simply pay Archer's bill, even though that bill was almost *three times* higher than what a nearby competitor would have charged for the same repair. Could Mr. Hornberg suffer an adverse effect from the larger payment? Of course he could. As State Farm pointed out in its original brief, insureds can suffer direct negative effects from their decisions to go to more expensive glass providers; they're just not aware of those effects. *See* Minn. Stat. § 70A.05 (2) (2007) (stating bases on which rates may be classified).

Treating glass providers specially by allowing them to initiate No Fault arbitrations gives them a unique opportunity to inflate their pricing, because insureds have no investment in the process. This case is a perfect example: Archer charged over \$800.00 for a repair that could have been done for \$290.00. If glass providers were treated the same as every other provider under the No Fault Act, then they would be forced to work with insureds to get their bills paid, which would re-introduce market forces into the auto glass industry.

## 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: 7/10/07

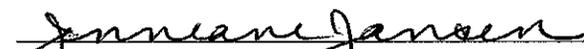
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**LOCAL RULE 7.1 WORD-COUNT COMPLIANCE CERTIFICATE**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,986 words. This brief was prepared using Microsoft Word 2002.

Date: 7/10/07

  
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