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STATE OF MINNESOTA
IN SUPREME COURT

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

vs. A07-216

WESTERN NATIONAL INSURANCE COMPANY,
Respondent,

AND

THE GLASS NETWORK,
Claimant,

AUTO GLASS EXPRESS, AS ASSIGNEE FOR KATHY HELGOS,
Appellant,

vs A07-217

AUSTIN MUTUAL INSURANCE COMPANY,
Respondent

AND

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Respondent,

vs. A07-830

ARCHER AUTO GLASS, AS ASSIGNEE FOR RONALD HORNBERG,
Appellant

AND

AUTO OWNERS INSURANCE CO
Respondent,

vs A07-972

STAR WINDSHIELD REPAIR, INC. AS INTENDED ASSIGNEE OF A&E CONSTRUCTION SUPPLY, INC. ET AL
Appellant

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LEGAL ISSUES

1 Are assignments of comprehensive automobile insurance proceeds made after the insured sustains a loss valid when the insurance policy contains an anti-assignment clause?

District courts in Hennepin and Blue Earth counties held that such assignments are invalid but the district court in Winona County held the assignment valid Two panels of the court of appeals held that assignments in the face of an anti-assignment clause is invalid

Most Apposite Cases:

Windey v. North Star Farmers Mutual Insurance Company, 231 Minn 279, 43 N W 2d 99 (1950)

Ocean Accident & Guarantee Corp. v. South Western Bell Telephone Company, 100 F 2d 441 (8th Cir 1939)

Conrad Brothers v. John Deere Insurance Co., 640 N W 2d 231, 236 (Iowa 2001)

Included within this issue are two sub-issues·

A Is *Windey v. North Star Mutual Farmers Insurance* still good law in Minnesota following this Court's decision in *Travertine v. Lexington-Silverwood*?

The court of appeals mistakenly distinguished *Windey* based upon a misreading of *Windey*'s facts and therefore failed to reconcile *Windey* and *Travertine*

Most Apposite Cases:

Windey v. North Star Farmers Mutual Insurance Company, 231 Minn 279, 43 N W 2d 99 (1950)

Travertine v Lexington-Silverwood, 683 N W 2d 267 (Minn 2004)

B. Does it violate public policy to enforce anti-assignment clauses in property insurance policies where doing so breaches the covenant to indemnify and provides the insurers with a windfall at the expense of those doing business with them?

The court of appeals failed to properly apply the Minnesota Unfair Claims Practices Act that requires insurers do business with glass companies and failed to properly consider any of the accompanying public policy issues associated with its decision.

Most Apposite Cases:

Antal's Restaurant, Inc. v. Lumberman's Mutual Casualty Co., 680 A 2d 1386 (D C Ct App 1996)

Max L. Bloom Co. v. U.S. Cas. Co., 210 N W 689 (Wis 1926)

Conrad Brothers v. John Deere Insurance Co., 640 N W 2d 231, 236 (Iowa 2001)

Most Apposite Statute:

Minn. Stat § 72A 201, subd 6(14) (2005)

INTRODUCTION

For more than fifty years, the courts of this state have subscribed to the widely held concept that post-loss assignments of insurance proceeds owed under property damage insurance policies are valid even though the policy itself contains an anti-assignment clause. While insurance policies are contracts in a general sense, they are not treated merely as contracts in all respects One difference that is critical to this case involves the purpose behind the anti-assignment clause In the insurance context, an anti-assignment clause is designed to protect insurers from underwriting risks they have not expressly agreed to undertake In other words, the clause is designed to protect insurers from insuring those persons or entities that insurers do not wish to insure It does not, however, extend beyond the underwriting consideration and this is where the insurance analysis diverts from the standard contract analysis

Even though Minnesota does not accept the Restatement of Contracts, perspective relative to assignments of contracts, we have, since at least 1950, recognized that assignments of property damage insurance proceeds are assignable even when the policy contains an anti-assignment clause. This distinction makes sense here for two reasons: (1) it is entirely consistent with the Minnesota legislature's requirement that insurers make payments directly to auto glass companies; (2) it perfectly reconciles this Court's opinions in *Windey* and *Travertine*

The decisions of the court of appeals panels that are under review here failed to recognize the differing purposes of anti-assignment clauses and failed to recognize the public policy adopted by the legislature In so doing, those decisions turned on its head

clear, well reasoned and widely accepted jurisprudence governing assignments of insurance proceeds This Court is urged to apply its own precedent, persuaded by the fact that overwhelming weight of authority – both from foreign states and learned treatises – compels reversal of the court of appeals here

STATEMENT OF THE CASE

Shortpay Litigation

The facts giving rise to this appeal are neither complicated nor contested When a driver suffers damage to her vehicle's windshield, Minnesota law permits her to take her automobile to any auto glass service provider she wants *See* Minn Stat § 72A 210 subd 6(14)(15)(16) (2005) (protecting consumers' right to choose glass shop for repair or replacement of damaged automobile glass) In each of the four cases consolidated in this appeal, a vehicle suffered from damaged auto glass The owners selected a service provider and had the damaged glass replace As payment for the replacement service, each shop accepted an assignment of insurance proceeds due the customer pursuant to the comprehensive portion of the customer's auto insurance policy The shops then sent each insurer a bill for the services it performed In every case, the insurer made payment directly to the glass shop None of the insurers, however, paid the full amount of the invoices Rather, they paid a portion of the invoices leaving a deficit commonly referred to in the glass industry as a "shortpay."

Shortpays are nothing new In 2004 this Court addressed a procedural aspect of the shortpay problem by requiring the disputes to be resolved via mandatory arbitration under the Minnesota No-Fault Act *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683

N W 2d 792, 803 (Minn 2004) According to the Court, these types of disputes must be arbitrated in a manner which is efficient, cost-effective, and that does not burden the court system *Id.* at 806 *citing* Minn Stat § 65B 42 The Court also allowed shortpay claims to be consolidated if the district courts concluded a consolidated arbitration was more efficient than serial arbitrations. *Glass Serv.*, 683 N W 2d at 806-07

Arbitration has worked well Glass and insurance companies have been able to resolve payment disputes efficiently and inexpensively, whether the disputes involve single invoices or several thousand as was the case in *Glass Service* Where consolidation of invoices is required, the auto glass provider initiates a declaratory judgment action in district court seeking a judicial order consolidating the claims for arbitration *See, e.g., Alpine Glass Inc. v. Illinois Farmers Ins. Co* , No 06-1148 (PJS/RLE) 2006 WL 3486996 at *2 (D Minn Dec 04, 2006) ("This litigation began when Alpine sued Farmers in state court, seeking a declaratory judgment that the numerous short-pay claims could be consolidated into a single arbitration proceeding") App 197

Arbitration outcomes are generally the same No-fault arbitrators routinely conclude the insurers are paying less than they are obligated to pay under the insurance policies and applicable law *See, e.g., Glass Serv. Co. v. Illinois Farmers Ins. Co.*, No A06-1074 2007 WL 1815781 at * 7, 10 (Minn Ct App June 26, 2007) (affirming judgment in excess of $1 million entered on arbitration awards + based on Farmers' practice of shortpaying Glass Service) App 187-195; *see generally* App at 130-180 (arbitration awards from numerous shortpay arbitrations)

Tiring of having to answer for the shortpays, insurers began collaterally attacking this Court's holding in *Glass Service*. While some insurers began removing cases to federal court hoping to find a friendlier venue[1], others began attacking the assignments obtained by glass companies asserting that Minnesotans may not assign their insurance proceeds to auto glass providers as payment for auto glass repairs. Thus, according to the insurers, the auto glass provides enjoy no privity of contract with the insurers and have no basis to initiate arbitration.

Facts Underlying These Specific Disputes

In *Archer Auto Glass v. State Farm Insurance Co.*, Ronald and Renee Hornberg were insured by State Farm Insurance Company. App. 93. Mr. Hornberg's Ford F-150 suffered damage to the rear sliding window. App. 78. He brought the truck to Archer Auto Glass. Archer completed the necessary repair, and as payment, received an assignment of Mr. Hornberg's insurance proceeds. *Id.* Archer then billed State Farm for its work. *Id.* State Farm directly paid Archer, but significantly shortpaid the invoice. App. 82.

Star Windshield and Auto Glass Express experienced the same problem. Mr. Helget, a Western National insured, took his vehicle to Star Windshield Repair. App. 79. Ms. Helgos, insured by Austin Mutual, went to Auto Glass Express. App. 80. Both

[1] Indeed, aside from the four cases making up this consolidated appeal, there are also four cases pending before the Eighth Circuit Court of Appeals. *See, e.g.*, *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, No. 07-2021; *Alpine Glass, Inc. v. Allstate Ins. Co.*, No. 07-1873; *Alpine Glass, Inc. v. American Family Ins. Co.*, No. 07-2528; *BuyRite Auto Glass, Inc. d/b/a Rapid Auto Glass*, No. 08-1900. All four involve shortpays. All four, except *Alpine v. Allstate*, address the assignment of proceeds issue presented by this appeal.

companies completed the work and accepted an assignment of the insurance proceeds due each customer under their respective insurance policies App 79 & App 80 Star Windshield billed Western National, and Auto Glass Express billed Austin Mutual App 79 & App 80 In both cases, the insurance companies paid each company directly but shortpaid both invoices App 12 and App 83

In *Auto Owners Insurance Co. v. Star Windshield Repair, Inc.*, ten insureds—A&E Construction, Ron Canfield, Heloise Caven, Jerry Fischer, Lloyd Geiger, Eldon Jones, Dale Klooster, Joseph Lambert, Oneeta Olson and Warren Schnobrich—suffered damage to their vehicle's windshields App 53 Each took the insured automobile to Star Windshield which performed the necessary work Star Windshield accepted an assignment of proceeds and billed Auto Owners directly App 53 Auto Owners made payment directly to Star but shortpaid each invoice

Each auto glass company petitioned the American Arbitration Association under the Minnesota No-Fault Act to resolve the shortpays A no-fault arbitrator concluded that State Farm breached Mr Hornberg's policy and issued an award in Archer's favor App 25 Star Windshield and Auto Glass Express underwent the same arbitration process and, in each case, the arbitrators awarded the glass shops the full amount they billed the insurance companies, plus interest and costs App 1; 12

The final case, *Auto Owners v. Star Windshield*, never made it to arbitration Star Windshield had previously prevailed against Auto Owners in several other arbitrations App 183-86 To avoid further defeats, Auto Owners responded to Star Windshield's arbitration petitions by filing a declaratory judgment action in Blue Earth County District

Court and seeking a temporary restraining order to halt the pending arbitrations App. 52-55.

The Courts Struggle With the Anti-Assignment Arguments

Following arbitration, State Farm, Western National, and Austin Mutual moved the respective district courts to vacate the arbitrators' awards in favor of the auto glass companies App. 26-33; App. 2-9; App. 13-20. Each insurance company relied on its standard form auto policy to argue the assignments to the Petitioners were void. Auto Owners made the same argument on summary judgment as part of the declaratory judgment action. App. 56-58.

- The State Farm policy provides: "No change of interest in this policy is effective unless we consent in writing." App. 94.
- The Western National and Austin Mutual policies provide: "Your rights and duties under this policy may not be assigned without our written consent." App. 91, 87.
- The Auto Owners policy provides: "No interest in this policy may be assigned without our written consent." App. 96.

On the various motions, the district courts reached different conclusions. The Winona County District Court rejected State Farm's argument and upheld the assignment. App. 31-33. In contrast, the Hennepin County District Court in the *Austin Mutual* case held the assignment was invalid and vacated the arbitration award. App. 6-9. The Blue Earth District Court reached this same result in the *Western National* case. App. 17-20.

Curiously, the *Auto Owners* Court took still a different approach. The district court there held the assignments were valid, but not enforceable. App. 58.

The Minnesota Court of Appeals heard the *Auto Owners Insurance Co. v. Star Windshield Repair, Inc.*, 743 N.W 2d 329 (Minn. Ct. App. 2008) case first. The panel issued its decision on January 8, 2008, concluding the anti-assignment clause prohibited post-loss assignments. *Id.* at 336. Almost a month later, on February 5, 2008, the court of appeals issued a second decision—*Star Windshield Repair, Inc. v. Western Nat'l Ins. Co.*, 744 N.W 2d 237 (Minn. Ct. App. 2008)—covering the remaining three cases.

In the end, both the *Auto Owners* and the *Star Windshield* panels held the assignments were invalid because they violated the anti-assignment clauses contained in the policies. *Auto Owners*, 743 N.W 2d at 336; *Star Windshield*, 744 N.W 2d at 242-43. This contradicted 50 years of Minnesota precedent—precedent the federal courts in this state relied upon to conclude the exact same assignments are valid. *See Alpine Glass Inc. v. Illinois Farmers Ins. Co.*, No. 06-1148 (PJS/RLE) 2006 WL 3486996 at *3, 12-13 (D. Minn. Dec. 04, 2006) (Schiltz, J.) App. 197-98, 205-06; *Alpine Glass, Inc. v. American Family Insurance Co.*, No. 06-4213 (DSD/SRN) 2007 WL 1152931 (D. Minn. Apr. 18, 2007) (Doty, J.) App. 210.[2]

The consequence of the court of appeals decisions is that the auto glass providers have been stripped of their remedy against insurers. At the same time, the insurers receive a windfall by systematically paying less than their policies require. Under the rule set up by the court of appeals, future cases will require each Minnesotan to challenge

[2] Those decisions are on appeal to the Eighth Circuit. *See* footnote 1. Since the court of appeals decisions, Judge Montgomery accepted the insurer's assignment argument and dismissed a glass company's declaratory judgment action seeking consolidated arbitration. *BuyRite Auto Glass v. Illinois Farmers Ins. Co.*, 2008 WL 706608 (D. Minn. 2008) (Montgomery, J.). That case is also currently on appeal to the Eighth Circuit.

her insurer if that insurer pays less than it is obligated to pay for auto glass replacement notwithstanding the fact that, for all intents and purposes, the policyholder is removed from the billing and payment process As a consequence, the glass companies petitioned this Court to review the court of appeals decisions By order dated April 29, 2008, this Court granted review.

ARGUMENT

Post-loss assignments of property insurance proceeds are valid This is true even though the insurance policies routinely contain anti-assignment clauses The rule was adopted by this Court in *Windey v. North Star Farmers Mutual Insurance Co.*, 231 Minn 279, 43 N W 2d 99 (1950), and has never been overruled. Nevertheless, the court of appeals declined to follow that very clear statement by this court

1. Because Minnesotans May Assign Property Insurance Proceeds After A Loss Occurs, The Court of appeals Erred By Holding The Assignments To The Auto Glass Providers Are Invalid

There is a deep-seated distinction between pre-loss assignments and post-loss assignments—at least in the property insurance context. It is not a semantic distinction, but rather, an analytic path followed by nearly every court that has addressed the issue The path leads to one view: pre-loss assignments are prohibited and post-loss assignments are allowed. The distinction stems from the special function anti-assignment clauses perform in property insurance policies. Before a loss occurs, anti-assignment clauses protect insurers from underwriting a risk they did not agree to insure After a loss occurs that threat is not present The court of appeals simply erred by holding post-loss assignments of property insurance proceeds are void

A. Post-loss assignments are valid under *Windey v. North Star Farmers Mutual* even when the policy contains an anti-assignment clause

This Court, in very plain language, upheld a post-loss assignment of insurance proceeds in *Windey v. North Star Farmers Mutual Insurance Co.*, 231 Minn. 279, 43 N W 2d 99 (1950) The court recognized the validity of a post-loss assignment even though the insurance policy at issue contained an anti-assignment clause Since then, -- until the present case arose – there has not been a serious challenge to the conclusion that anti-assignment clauses do not apply to post-loss assignments of property insurance proceeds

Anti-assignment clauses perform a special function in property insurance policies *See, e g., Ocean Accident & Guarantee Corp. v. South Western Bell Telephone Co.*, 100 F 2d 441, 444 (8th Cir 1939)[3]; *Gopher Oil Co., v. Am. Hardware Mut. Ins. Co.*, 588 N W 2d 756, 763 (Minn Ct App 1999) They are designed to protect an insurer from providing coverage to a person it did not agree to insure *Ocean Accident*, 100 F 2d at 444; *Gopher Oil*, 588 N W 2d at 763 ("The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure.") Reasons for this protection vanish once the insured sustains a loss *Ocean Accident*, 100 F 2d at 446 ("After a loss the delectus personae no longer becomes material, and even though the policy prohibits such assignment the insurer cannot restrict the assignment ") Indeed, at that point, "The need to protect the insurer no longer exists after the insured sustains the loss because the liability of the insurer is essentially fixed." *Conrad Brothers*

[3] *Ocean Accident* was the basis for an ALR annotation relied upon by this Court in *Windey* 231 Minn. at 238, 43 NW at 102 *citing* 122 ALR 145

v. John Deere Insurance Co., 640 N W 2d 231, 237 (Iowa 2001) *citing Viola v. Fireman's Fund*, 965 F Supp. 654, 659 (E.D PA 1997), *Smith v Buege*, 387 S E 2d 109, 116 (WV 1989). *See also Globecon Group, LLC v. Hartford Fire Ins. Co*, 434 F 3d 165, 171 (2d Cir. 2006) ("The idea behind the majority rule is that, once the insured-against loss has occurred, the policy-holder essentially is transferring a cause of action rather than a particular risk profile "); *SR Internat'l Bus. Ins. Co v. World Trade Center Prop. LLC*, 375 F Supp 2d 238, 246 (S D N Y 2005) ("Before loss, the insurer is subjected to a risk, and it is this risk which the insurer may exempt from assignability except upon its own consent Upon loss, however, the risk disappears and nothing remains except the assured's right to payment—a mere chose in action which may be assigned within the limitations of any other chose in action "); 3 Couch on Insurance 3d, § 35:7 ("assignment before loss involves a transfer of a contractual relationship while assignment after loss is the transfer of a right to a money claim ")

Thus, the overwhelming weight of authority draws a distinction between assignments made before a loss occurs and assignments made after a loss occurs [4] These courts hold the former are prohibited while the latter are allowed Indeed, this is true even when the property insurance policy contains an anti-assignment clause *Ocean Accident*, 100 F 2d at 444; *Conrad*, 640 N W 2d at 237; *Gopher Oil*, 588 N W 2d at 763; *SR Internat'l Bus. Ins.*, 375 F Supp 2d at 246 ("*After* a loss occurs, however, a party to an

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[4] *Missouri State Life Ins. Co. v. Robertson Banking Co.*, 134 So. 25 (Ala. 1931); *Alabama Farm Bureau Ins. Co. v. McCurry*, 336 So.2d 1109 (Ala 1976); *St. Paul Fire and Marine Ins. Co. v. Allstate Ins. Co.*, 543 P 2d 147 (Ariz Ct. App 1975); *McBride v. Aetna Life Ins. Co.*, 191 S.W. 5 (Ark. 1917); *Henkel Corp. v. Hartford Accident and Indem. Co.*, 29 Cal 4th 934 (Cal 2003); *Metro. Life Ins. Co. v. Lanigan*, 222 P 402 (Colo 1924); *Int'l Rediscount Corp. v. Hartford Accident & Indem. Co.*, 425 F.Supp 669, 673 (D.C. Del. 1977); *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So 209 (Fla 1917); *Georgia Co-op Fire Ass'n v. Borchardt & Co.*, 51 S E 429 (Ga 1905); *Lain v. Metro. Life Ins. Co.*, 58 N E.2d 587 (Ill 1945); *Geddes & Moss Undertaking & Embalming Co. v. Metropolitan Life Ins. Co.*, 167 So. 209 (La Ct App 1936); *Utica Mut. Ins. Co. v. St. Paul Fire & Marine Ins Co.*, 468 A 2d 315 (Me 1983); *Whiting v. Indep. Mut. Ins. Co.*, 15 Md 297 (Md 1860); *Action Auto Stores, Inc. v United Capitol Ins. Co.*, 847 F Supp 428 (W.D. Mich 1993) relying on *Roger Williams Ins. Co. v. Carrington*, 5 N W 303 (Mich 1880); *Archer v. Merchants' & Manufacturers' Ins. Co.*, 43 Mo 434 (Mo. 1869); *Baker v. Pennsylvania Fire Ins. Co.*, 263 P 93 (Mont 1928); *Newman v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 239 N W 464 (Neb 1931); *Elat, Inc. v. Aetna Cas. and Sur. Co.*, 654 A.2d 503 (N J Super Ct. App Div 1995); *Ardon Const. Corp. v. Fireman's Ins. Co. of Newark N.J.*, 185 N Y S 2d 723 (N Y. Sup Ct. 1959); *First Citizens Bank & Trust Co. v. Universal Underwriters Ins. Co.*, 440 S E 2d 304 (N C. Ct App. 1994); *Fiorentino v. Lightning Rod Mut. Ins. Co.*, 682 N E.2d 1099 (Ohio Ct. App 1996); *Nat'l Mem'l Services v. Metro. Life Ins. Co.*, 49 A 2d 382, 383 (Pa. 1946); *Ligon v. Metro. Life Ins. Co.*, 64 S E 2d 258 (S.C 1951); *State v. Aetna Ins. Co.*, 237 N W 771 (S D 1931); *Manley v. Auto Ins. Co. of Hartford, Conn.*, 169 S W 3d 207 (Tenn Ct App 2005); *McLaren v. Imperial Cas. & Indem. Co.*, 767 F Supp 1364 (N D Tex 1991); *Time Fin. Corp. v. Johnson Trucking Co.*, 458 P 2d 873 (Utah 1969); *Aetna Ins. Co. v. Aston*, 96 S.E 772 (Va. 1918); *R.L. Vallee, Inc. v. American Int'l Specialty Lines Ins. Co.*, 431 F.Supp 2d 428 (D Vt. 2006); *Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 881 P 2d 1020 (Wash 1994); *Smith v. Buege*, 387 S E 2d 109 (W. Va 1989); *Straz v. Kansas Bankers Sur. Co.*, 986 F Supp 563 (E D Wis 1997); *Antal's Restaurant, Inc. v. Lumberman's Mut. Cas. Co.*, 680 A 2d 1386 (D C 1996)

insurance econtract may assign its right to accrued insurance proceeds to another party, even in the face of express policy language prohibiting assignments ")

This Court applied this precise rule in *Windey v. North Star Mutual Farmers Insurance Co.*, 231 Minn 279, 43 N W 2d 99 (1950) On May 23, 1946, Farmers Mutual Insurance Company issued an insurance policy protecting a barn from wind damage 231 Minn at 281, 43 N W 2d at 100 It contained a provision stating that it "should become void if the policy should be assigned without the consent of the insurer " *Id.* The barn was destroyed on June 27, 1947 *Id* at 282, 43 N W 2d at 101 Five months later, on November 13, 1947, the insureds assigned "the insurance policy and any money due thereunder as a result of the loss or damage occasioned by the windstorm" to Arthur Windey *Id.*

Windey sought to collect the proceeds from Farmers Mutual Insurance Company. Farmers Mutual refused to pay the claim on several grounds, including an argument that the assignment was prohibited by the anti-assignment clause *See Windey*, 231 Minn at 281-82, 43 N W 2d at 100-02 This Court rejected the argument reasoning, "Assignment, after loss, of the proceeds of insurance does not constitute an assignment of the policy, but only a claim of right of action on the policy " *Id.* at 283, 43 N W 2d at 102 "Such an assignment does not void the policy under a provision that if it is assigned without the insurer's consent it shall become void " *Id.* By reasoning that the assignment occurred post-loss, the Court held the anti-assignment clause did not prohibit the assignment

Windey's material facts are indistinguishable from the case now before this Court Like Mr Windey, who received an assignment of the property insurance proceeds after

the barn was destroyed, the auto glass replacement companies received an assignment of proceeds after the auto glass was already damaged Neither did anything to affect the insurers' underwriting risk By the time the assignment was made, the insurers' liability was fixed From the perspective of the insurer, as a question affecting risk, it makes no difference if the insurer pays the insured, or its assignee *See Ocean Accident*, 100 F 2d at 446; *Buege*, 387 S E 2d at 211 To hold otherwise, as the court of appeals did, would be extend the anti-assignment clause beyond what it could permissibly cover

This is true regardless of whether the debt is of a specified or of an unspecified amount *See Ocean Accident*, 100 F 2d at 446 (rejecting insurer's argument that the illiquidity of the debt rendered the post-loss assignment void) Thus, the court of appeals erred by suggesting the illiquidity of the debt assigned to the auto glass petitioners created an exception to the rule favoring the assignability of post-loss insurance proceeds *See Auto Owners*, 743 N W 2d at 336 ("even if a public-policy limitation on nonassignment clauses permitted the assignment of *fixed* postloss proceeds, it would not apply to the case before us" because the amount owed to the glass company is not fixed); *Star Windshield*, 744 N W 2d at 240 (same)

The analysis performed by the majority rule and adopted in *Windey* explains why post-loss assignments of proceeds are valid—even when the policy contains an anti-assignment clause *Ocean Accident*, 100 F 2d at 446 ("The reasons that induce the restrictive clause have no existence or application after the risk has ceased") The Iowa Supreme Court addressed the exact same issue in *Conrad Brothers v. John Deere Insurance Co.*, 640 N W 2d 231, 236 (Iowa 2001) The court examined a specific anti-

assignment clause which read—"your rights and duties under this policy may not be transferred without our written consent " 640 N W 2d at 237 fn 1 In discussing the clause the court recognized that "insurers may impose conditions in the terms of the policy on an insured's ability to assign its rights under the insurance policy " *Conrad*, 640 N W 2d at 236 *citing* 43 Am Jur 2d *Insurance* § 790, at 852 But, that right ends once loss occurs As the court noted, "The need to protect the insurer no longer exists after the insured sustains the loss because the liability of the insurer is essentially fixed " *Conrad*, 640 N W 2d at 237, *citing Viola*, 965 F Supp at 659, *Buege*, 387 S E 2d at 116 Notably, the clause in *Conrad* which read—"your rights and duties under this policy may not be transferred without our written consent"—is identical to the two of the clauses in this appeal and indistinguishable from the other two [5] *Conrad* examined the clause and upheld the assignments Its decision was correct and should be followed This analysis been acknowledged as sound by more than fifty years of Minnesota case law *See Illinois Farmers Ins Co. v Glass Serv. Co.*, 669 N W 2d 420, 424-25 (Minn Ct App 2003) *aff'd in part, rev'd in part on other grounds* by *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683 N W 2d 792 (Minn 2004); *Reitzner v. State Farm Fire & Cas. Co.*, 510 N W 2d 20, 26 (Minn Ct App 1993); *In re Estate of Sangren*, 504 N W 2d 786, 790 (Minn Ct App. 1993); *Gopher Oil v. Am. Hardware Mut. Ins. Co.*, 588 N W 2d 756, 762-64 (Minn

[5] The wording of the anti-assignment clause used by Auto Owners and State Farm involving change or assignment of interest similarly is ineffective to defeat a post-loss assignment of insurance proceeds *R.L Vallee, Inc. v. American Intern't Spec. Lines Ins. Co.*, 431 F Supp 2d 428 (D VT 2006) (post-loss assignment of proceeds valid notwithstand provision in policy stating "Assignment of Interest under this Policy shall not bind the Company until its consent is endorsed onto this Policy ")

Ct App 1999). The federal district courts in Minnesota recognize the persuasiveness of the rule and apply it to disputes indistinguishable from the one at bar *See Alpine Glass Inc. v. Illinois Farmers Ins. Co.*, No 06-1148 (PJS/RLE) 2006 WL 3486996 at *3, 12-13 (D Minn Dec 04, 2006) App 197-98, 205-06; *Alpine Glass, Inc. v. American Family Insurance Co.*, No 06-4213 (DSD/SRN) 2007 WL 1152931 (D. Minn. Apr. 18, 2007) App 210

Indeed, the insurer in *Alpine Glass, Inc. v. Illinois Farmers Insurance Co.*, made the same arguments the insurers are making here—and relied on the exact same authority the court of appeals relied upon *See Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 2006 WL 3486996 at *2, 12-14 App 197, 205-06 United States Magistrate Judge Franklin Noel conducted a sweeping analysis of Minnesota law on the topic *See id.* at *12-14 App 205-06 Relying on *Windey*, he recommended dismissing the auto insurers' counterclaims based upon the anti-assignment clause *See id.* United States District Judge Patrick Schiltz adopted Judge Noel's report and recommendation writing, "The law of Minnesota (and other states) 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 " *Alpine Glass, Inc. v. Illinois Farmers*, 2006 WL 3486996 at *2 (emphasis in the original) App 197 Recognizing the latter are valid, he then upheld the assignments of property insurance proceeds to Alpine *Id.*

The analysis applied by this Court in *Windey*, the Eighth Circuit in *Ocean Accident*, the Iowa Supreme Court in *Conrad* and the federal cases in this district is

correct and ought to be followed It is the majority rule It is the correct analytical approach and as such, provides the appropriate framework for addressing post-loss assignments of property insurance proceeds to auto glass providers as payment for auto glass repair services The court of appeals erred by not applying it and this Court must reverse.

B. The court of appeals erred by disregarding *Windey's* holding as dictum

Despite the long line of authority discussed above, the *Auto Owners* and *Star Windshield* panels reached a different conclusion on the assignment issue They suggested post-loss assignments should be void According to both panels, the language setting forth the rule governing the validity of assignments from *Windey* is mere dictum which may be disregarded *Auto Owners*, 743 N W 2d at 335; *Star Windshield*, 744 N W 2d at 240-41 This conclusion is wrong The anti-assignment discussion of *Windey* is not dictum and the suggestion otherwise is premised on the incorrect assumption that no assignment was made to Windey *See Auto Owners*, 743 N W 2d at 335 (*Windey* "did not constitute an assignment of either the policy or the proceeds thereof") *Windey*'s facts while not the most orderly, prove the point.

Windey involved two transactions, a contract for deed and an assignment of an insurance policy after an insured sustained the loss *Compare Windey*, 231 Minn at 281, 43 N.W 2d at 100 ("On February 10, 1947 a contract for deed was executed by Orval Rosten as agent for all the owners . as vendors . to sell and convey the land to [Windey]"), *with Windey*, 231 Minn at 282, 43 N W.2d at 101 ("On November 13, 1947, the insured assigned to plaintiff the insurance policy and any money due thereunder ").

The contract for deed required the vendors to apply the insurance proceeds to the purchase price if loss occurred before the deeds were delivered *See Windey*, 231 Minn at 283, 43 N W 2d at 101 ("The provision in the contract by which the vendors agreed to apply the proceeds of the insurance in the event of loss upon the unpaid purchase price ") The barn was destroyed before the deeds were delivered but the vendors never applied the insurance proceeds to the contract price Rather, they assigned the policy to Windey on the same day they delivered the deeds *See id.* at 282, 43 N W 2d at 101 ("The building in question was destroyed on June 27, 1947, by a windstorm On November 13, 1947 deeds conveying the property to plaintiff were delivered ")

Both the *Star Windshield* and the *Auto Owners* panels missed the assignment [6] They focused on the provision of the contract for deed requiring the vendors to apply the proceeds to the contract price *Star Windshield*, 744 N W 2d at 241 ("the assignment 'did not constitute an assignment of either the policy or the proceeds thereof'"); *Auto Owners*, 743 N.W 2d at 335-36 (concluding *Windey* is dicta because no assignment occurred) The *Star Windshield* panel went so far as to write the transaction at issue "gave the vendee no rights against the insurer, but only against the insureds so far as concerned the application of the proceeds in the case of loss or damage " *Star Windshield*, 744 N.W 2d

[6] *See Star Windshield Repair, Inc. v. Western National Ins. Co.*, 744 N W 2d 237, 241 (2008) (After discussing only the contract for deed and not the subsequent assignment, the Court wrote "In dictum, the court went on to say that a post-loss assignment is not an assignment of the policy "); *Auto Owners Ins. Co v. Star Windshield Repair, Inc.*, 743 N W 2d 329, 335 (Minn Ct App 2008) (refusing to apply *Windey* because "the non-assignment clause had no application in that case" and stating "Although the supreme court found no actual assignment, it nevertheless went on to state in dicta that 'Such an assignment does not void the policy under a provision that if it is assigned without the insurer's consent it shall become void '")

at 241 Both panels either overlooked or ignored the November 13, 1947, assignment of insurance proceeds.

The *Windey* opinion begins by acknowledging the case was an "Action by Plaintiff as the insured's assignee to recover on a tornado policy." *Windey*, 231 Minn. at 280, 43 N.W.2d at 100. It expressly states that "On November 13, 1947, the insured assigned to plaintiff the insurance policy and any money due thereunder as a result of the loss or damage occasioned by the windstorm." *Id.* at 282, 43 N.W.2d at 101. The opinion ends by concluding "Plaintiff, as vendor's assignee of the proceeds after loss, stands in their shoes so far concerns his right to recover." *Windey*, 231 Minn. at 284, N.W.2d at 102.

Windey stood before the Minnesota Supreme Court as an assignee. He stood in the insureds' shoes to recover against the insurer; and he did so because he received an assignment of proceeds after the building was destroyed by a tornado. This Court distinguished between a pre-loss assignment and a post-loss assignment writing "Assignment after loss, of the proceeds of insurance does not constitute an assignment of the policy, but only a claim of right of action on the policy." 231 Minn. at 283, 43 N.W.2d at 102. It also recognized the validity of the post-loss assignment: "Such an assignment does not void the policy under a provision that if it is assigned without the insurer's consent it shall become void." *Id.* These rules controlled the outcome of the decision and therefore cannot be discarded as dicta. *Windey*'s holding controls; the court of appeals erred by disregarding it and this Court must reverse.

C. *Life Rehab Services, Inc. v. Allied Property & Casualty Insurance Co.*, demonstrates that this appeal is properly limited to post-loss assignments of insurance proceeds to auto glass providers

It is anticipated that the insurance industry—as it did below—will mix rules from two incompatible industries to suggest that the majority rule discussed above is not sound To underscore the point, it will rely on a case involving the pre-loss assignment of no-fault medical benefits to suggest post-loss assignments of property insurance proceeds are prohibited But examining the facts, the regulatory framework, and applying a clear analysis demonstrates not that the property insurance rule is unsound, but that cases involving personal injury claims and medical benefits are inapposite The court of appeals failed to draw the distinction

The case proving the point is *Life Rehab Services, Inc. v. Allied Property & Casualty Ins. Co.*, No 05-1279 (PJS/RLE) 2007 WL 2247606 (D Minn Aug 2, 2007) App 223 [7] The dispute in *LIFE Rehab* arose after certain insurers refused to work directly with a chiropractic clinic *See LIFE Rehab*, 2006 WL 91334 at *1 App 217 The clinic required its patients to sign an "assignment of benefit" agreement *before* tendering treatment *Id.* (emphasis added) After treating the patient, the clinic submitted an invoice to the insurers *See id.* The insurers then paid benefits directly to the patients,

[7] There are two *Life Rehab* decisions The first is *LIFE Rehab Services, Inc. v. Allied Property & Casualty Ins. Co.*, No 05-1279 (JNE/FLN) 2006 WL 91334 (D Minn Jan 6, 2006) App 217, which lays out the facts and touches upon the anti-assignment issue on a motion to dismiss Without a full record, the federal district court required the parties to address the issue on a motion for summary judgment Thus, the second decision, *Life Rehab Services, Inc. v. Allied Property & Casualty Ins. Co.*, No 05-1279 (PJS/RLE) 2007 WL 2247606 (D Minn Aug 2, 2007), App 223, contains the analysis of the anti-assignment issue

ignoring the assignments and ignoring the clinic. *Id.* The medical clinic sued to force the insurers to honor the assignments. *Id.* The insurers relied on an anti-assignment clause to defend the suit.

In response to the subsequent Motion for Summary Judgment, Magistrate Judge Raymond L. Erickson prepared a Report and Recommendation in favor of the insurers. *Life Rehab*, 2007 WL 2247606 at *5-13, App. 227-36. According to the Report and Recommendation, the anti-assignment clause rendered the attempted assignments void. *See id.* This conclusion was correct. The path to the conclusion, however, took some wrong turns.

First, Judge Erickson overlooked that the health care arena involves special policy considerations unrelated to property damage cases. Thus, health insurance policies garner an exception to the general preference for the assignability of post-loss proceeds. *See* Keeton & Widiss, *Insurance Law* § 4.1(c)(3)(i) (1988); 3 Couch on Insurance 3d § 35:1 (noting exception in some states to assignability of benefits for health care coverages); 43 Am. Jur. 2d *Insurance* § 792 (noting that anti-assignment clauses regarding health services are valid and enforceable because of "special function" of those coverages). Accordingly, while *Life Rehab* is correct, it is only applicable in the context of cases involving health care. *See Antal's Rest., Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1389 n.3 (D.C. 1996) (noting that cases involving health insurance benefits are inapposite to cases involving property insurance proceeds).

Second, *Life Rehab* does not involve a post-loss assignment of proceeds. Unlike property insurance, medical insurance is reimbursement insurance—the insurance

company does not incur a debt and a policyholder is not entitled to payment simply because he suffers an ache or a pain The insurer must pay only when the policyholder obtains treatment and thus incurs a reimbursable expense In *LIFE Rehab*, the assignment took place *before* the policyholder underwent treatment and *before* the policyholder incurred any reimbursable expense *LIFE Rehab*, 2006 WL 91334, *1 App 217 In other words, the case not only involved medical benefits but also involved a pre-loss assignment of insurance [8]

Third, the statutory framework governing no-fault medical benefits also demonstrates that *Life Rehab* was correctly decided, yet that decision does not conflict with auto glass cases implicating property insurance assignments In the auto glass industry, insurers are *required* to work directly with auto glass providers Minn Stat § 72A 201 subd 6(14) That is not the case in the medical field The legislature left open the possibility that medical insurers could avoid working directly with medical providers Minn Stat § 65B 54 (authorizing but not requiring insurers to work with health care providers) Since the legislature commanded the insurers to work directly with auto glass providers, they have no choice but to honor the assignments *See Alpine Glass Inc. v. Illinois Farmers Ins. Co.*, No 06-1148 (PJS/RLE) 2006 WL 3486996 at *3, 12 (D Minn Dec 04, 2006) ("Thus, Minnesota state law, while not expressly stating so, requires

[8] The insurers typically argue that *Life Rehab* involves a post-loss assignment of proceeds because the patient had already suffered an injury This argument is contradicted by Minnesota's regulatory framework governing no-fault medical benefits The Minnesota Legislature ended the question by passing Minn Stat § 65B 54 subd 1 which provides "loss accrues not when injury occurs, but as medical expense is *incurred* . ." Thus, the attempt to liken the assignments in *Life Rehab* to a post-loss assignment fails

insurance companies such as Farmers to honor its insureds' assignments of proceeds of their auto glass policies ") App 198, 205

Finally, *Life Rehab* did not involve an insurer attempting to escape payment The insurers had already paid the insureds directly for the full amount of the medical benefits *Life Rehab Serv.*, 2007 WL 2247606 at *3 App 225 The medical clinic was simply seeking a court order requiring the insurers to work directly with the clinics *Id.* In contrast, the insurers here are seeking to use the anti-assignment clause as a shield to avoid paying the amount they promised to pay They are not paying the insureds directly for the full amounts of the claim In fact, in three of the four cases at issue here, no-fault arbitrators already found that the insurers had breached the terms of the insurance policies at issue by shortpaying auto glass claims App 1, 12, 25

Judge Schiltz recognized the persuasiveness of these distinctions His summary judgment order in favor of the insurers in *Life Rehab* expressly stated that the auto glass case he previously decided—*Alpine Glass, Inc. v. Illinois Farmers Insurance Co.*—"is distinguishable from the present case in several respects, including the language of the anti-assignment clause, the type of insurance involved, the governing statutory framework , and the fact that the insurer in *Alpine Glass* had already made payments to the assignee " *Life Rehab*, 2007 WL 2247606 at *1, App 224 Judge Schiltz is correct

The court of appeals failed to acknowledge that this case implicates a very narrow issue—post-loss assignments of property insurance proceeds to auto glass providers In overlooking the narrowness of the issue they relied on inapposite authority to support the outcome Doing so was error that must be corrected

2. The Court of Appeals Erred By Relying on Authority Unrelated to Post-loss Assignments of Property Insurance Proceeds

Having misread *Windey* and rejected the long line of authority adopting its reasoning, the court of appeals were forced to look at cases outside of the property insurance context Ultimately, both panels looked to *Travertine v. Lexington-Silverwood*, 683 N W. 2d 267 (Minn 2004), for support They stretched its reasoning beyond the breaking point and patched the gaps with language from a personal injury case to conclude post-loss assignments of property insurance proceeds should be prohibited. By applying *Travertine* as they did, the court of appeals effectively overruled *Windey* They did not need to take this action *Windey* controls when assignments of property insurance proceeds are made after loss occurs *Travertine* does not Thus, it was error to extend *Travertine* and *sub silentio* overrule *Windey*

A. Because the Minnesota legislature requires auto insurers to do business with the auto glass providers, *Travertine*'s analysis is limited to pre-loss assignments in the property insurance context

Travertine is a sound decision Its reasoning is solid and its analysis clear Properly read, however, it does not extend as far as the court of appeals suggests. Viewed against the backdrop of insurance law, the furthest *Travertine* can be said to reach is to pre-loss assignments It does not extend to post-loss assignments of property insurance proceeds and the court of appeals erred in holding otherwise

Travertine's facts are easily stated In August of 1989, Travertine negotiated a management agreement with Berkey and Lennon *Travertine Corp. v. Lexington-Silverwood*, 683 N W 2d 267, 269 (Minn. 2004) The agreement contained a prohibition

providing that "the rights and obligations of Berkey/Lennon shall not be assignable except that Berkey may assign to Lennon or Lennon assign to Berkey such rights and obligations " *Id.* at 269 The dispute arose when Berkey assigned his rights to Lennon, who then assigned his rights to Lexington-Silverwood *Id.*

This Court focused on the language of the contract *See Travertine*, 683 N.W 2d at 270-71 It applied traditional contract principles reasoning that "the primary goal of contract interpretation is to determine and enforce the intent of the parties " *Id.* at 271 The Court relied on this primary purpose theory to reject a default interpretive rule provided by the Restatement (Second) of Contracts that might have upheld the assignment, but allowed Travertine to assert a breach of contract claim against Lennon for violating the covenant not to assign *Id* at 271-72 (rejecting § 322) In holding that Lennon's attempted assignment to Lexington-Silverwood was void, the court reasoned· "The primary purpose of clauses prohibiting the assignment of contract rights is to protect the contracting party from dealing with parties he has not chosen to do business with." *Id.* (citations omitted)

Travertine's analysis was correct In fully negotiated contracts, particularly personal services contracts such as that at issue in *Travertine*, a party should not have to do business with one with whom he has not chosen to do business That principle, however, does not hold true in the property insurance context beyond underwriting to after a loss occurs. Aside from the fiction that an average vehicle owner is capable of negotiating the terms of a standard form auto insurance policy, the fact remains that insurers routinely do business with third-party services providers—like glass

companies—who repair the owner's damaged property *See Illinois Farmers Ins. Co. v. Glass Serv.*, 683 N.W 2d 792, 796 (Minn 2004) ("[A]uto glass companies routinely bill their customers' insurance companies directly ") In fact, the statutory regulation requires it Minn Stat § 72A 201, subd 6(14) (2005) (insurers engage in unfair claims practice by failing to provide direct payment to the insureds' chosen vendor). Thus, the reasons for voiding the assignment in *Travertine*—respecting one's right to avoid doing business with someone he does not want to do business with—do not apply, at least not to assignments of post-loss proceeds associated with auto glass claims

The panels erred by missing this point. To force this case under *Travertine*, the *Auto Owners* panel relied on an "overarching principle not expressly set forth in most case law" that "insurers should not have to do business with parties with which the insurer has not chosen to enter a contractual relationship " 743 N.W 2d at 333. The court does not cite any authority for this proposition *See id.* Auto insurers are statutorily obligated to do business with auto glass companies *See* Minn Stat § 72A 201, subd 6(14); *see also Life Rehab v. Allied Prop. & Cas. Co.*, No. 05-1279 (PJS/RLE) 2007 WL 2247606 (D Minn Aug 2, 2007) (the governing statutory framework "required the insurers to deal directly with the assignee"). App 224

To prop up the rickety "overarching principle" argument, the panels simply stated that insurance contracts are contracts, and as such, must be given their plain and ordinary meaning *Auto Owners*, 743 N.W 2d at 336-37; *Star Windshield*, 744 N.W.2d at 239-40. Both then applied an irregular and extraordinary definition to the words employed by the specific clauses at play. Indeed, the definitions applied by both panels contradict

decades of jurisprudence and the great weight of authority, all of which demonstrate the plain and ordinary meaning of these clauses is that they apply to pre-loss assignments but not to post-loss assignments *See* fn 3 *supra.*

Moreover, while the "plain language" discussion may be the default interpretive rule in some cases, the rule is not absolute It has long been this State's policy that insurance policies "do [ ] not stand on the same footing as ordinary contracts " *Illinois Farmers Ins. Co.*, 683 N W 2d at 802 There are instances where insurance contracts are treated differently from ordinary contracts One such situation concerns where a policy provision contradicts a statutory requirement Here, the anti-assignment clause cannot be read to protect insurers from doing business with glass venders given that Minnesota Statutes obligates insurers to do business with glass companies in the payments of claims

The court of appeals analysis also misses a key point The post-loss assignment of policy proceeds does not constitute an assignment of the contract but rather only a claim or a right of action on the policy, a chose in action *Smith v Buege*, 387 S E 2d 109, 211 (WV 1989) *citing Windey*, 231 Minn At 283, 43 N W 2d at 102 Consequently, the "overarching principle" does not extend to the lengths asserted by the court of appeals

The cases that address this issue all note that the anti-assignment clause in an insurance policy is intended to protect an insurer from insuring a party it does not want to insure That fits precisely within *Travertine's* reasoning It makes no sense at all, however, to extend that reasoning to post-loss assignments of proceed because there is no increase in the underwriting risk and property damage insurers routinely do business with contractors, repairers and other third-party vendors In the auto glass arena, they have no

choice in Minnesota – under Minn Stat § 72A 201, Subd 6(14), they must do business with the insureds' chosen vendor Thus, *Travertine's* analysis necessarily cannot be extended to post-loss assignments of proceeds for auto glass repair or replacement even if the Court believed such an extension was a good idea

Travertine and *Windey* can be read to both apply in this setting, but only by reversing the court of appeals To affirm, this Court must both overrule *Windey* and ignore the legislature's express determination that insurers do business with glass companies That is an exercise in judicial *fiat* that this Court is respectfully urged to reject

B. Champerty principles do not prohibit post-loss assignments

The court of appeals did not simply misapply *Travertine*, they contorted previous precedent to fill the gaps left by *Travertine* These gaps are significant and the effort to fill in those gaps contradicted cautionary warnings given by this Court and created new public policy in Minnesota The policy discussed by the panels is "champerty " Champerty has no place in the property insurance context and this Court must reject the sweeping statement made by the *Auto Owners* panel

Champerty is a very limited doctrine It is a principle derived from medieval England during the waning days of the feudal system *See Osprey, Inc. v. Cabana Ltd. Partnership*, 532 S E 2d 269 (S C 2000) In efforts to increase their estates the nobility purchased interests in unrelated suits as a gamble *Id.* at 272-73 These "nobles" would then employ professional maintainers to manage their suits and ensure victory *See id.* The maintainers would engage in despicable tactics, up to and including "the

employment of bullies to prevent an opponent from appearing in court at a critical moment " *Id.* Thus, champerty statutes were enacted to prohibit this type of meddling

This Court discussed champerty in *Huber v. Johnson*, 68 Minn 74, 70 N W 806 (1897), where it struck down an agreement involving a stranger to a lawsuit who advanced money to fund litigation with the understanding that the Plaintiff would share his winnings *Id.* at 76, 70 N W 806. In striking down the agreement as champertous, this Court articulated the policy behind champerty noting it is designed "to prevent officious intermeddlers from stirring up rife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial purpose of the law." *Id.* at 78, 70 N W at 807 *Huber* is infused with the idea that champerty is an obsolete doctrine "It is no doubt true that the changes in the law making chooses in action assignable have so emasculated common law rules against champerty and maintenance that it is difficult to determine how much, if anything, of the old English statutes on the subject remain in force " *Id.* at 79, 70 N W at 807 That was 110 years ago

Despite this, the *Auto Owners* Court suggested that post-loss assignments of property insurance proceeds are champertous and therefore violate public policy 743 N W 2d at 334 It reached this conclusion by pulling a thread of discussion from a case involving a personal injury settlement, uninsured motorists claim, and a very speculative type of litigation *See Auto Owners*, 743 N W 2d at 334

The *Auto Owners* panel relied on champerty because of this Court's discussion in *Liberty Mutual Insurance Co. v. American Family Insurance Co.*, 463 N W 2d 750, 755-

56 (Minn 1990) In *Liberty Mutual*, Anderson was injured when an unidentified motorist swerved to avoid a car that was parked on I-494 *Liberty Mutual*, 463 N W 2d at 751 The parked car belonged to Ladd and Anderson sued him for negligence The court entered judgment in Anderson's favor for $215,154 65 *Id.*

The insurance policy covering Ladd had a $100,000 limit of liability. *Id.* Thus, there was approximately a $115,000 deficit *See id.* Ladd, fearful of a personal claim against him, argued that Anderson's injury was not his fault, but rather, was caused by the unidentified motorist *See id.* at 752 Under this theory, Ladd argued that Anderson's insurer had no subrogation rights against him *Id.* Anderson's insurer was Liberty Mutual It took the position that Ladd was responsible and as such, it was exercising its right of subrogation to pursue the claim against him. *Id.*

Even though American Family was only liable to the $100,000 limit on Ladd's policy, it nevertheless reached agreement with Anderson to pay $230,000 in exchange for an assignment of his uninsured/underinsured claim against Liberty Mutual *Liberty Mutual*, 463 N.W 2d at 753 Underlying this "deal" was the prospect of a bad faith claim Obviously, a bad faith claim carried the potential of a substantial judgment *See Liberty Mutual*, 463 N W 2d at 756-57 The deal also stated that if American Family recovered more than $115,000 from Liberty Mutual, Anderson would be entitled to a portion of the recovery *See id.*

This Court struck down the assignment "because [the] assignment of the insured's interest in the uninsured/underinsured motorist coverages raises the same problems of champerty and maintenance " *Id.* at 756-57 The court was correct; American Family

was the type of "meddler" the Court discussed in *Huber* It had no skin in the game and sought to bankroll Anderson's litigation against his own insurer with the hopes of sharing in the proceeds of a windfall of speculative litigation The Court was correct in striking down the assignment as champertous

The champerty discussion in *Liberty Mutual* also happened to be consistent with the anti-assignment clause involved in that case *See id.* at 756 But, this Court issued a cautionary warning to both practitioners and the lower courts "We need not decide here whether the prohibition against 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 can only be said to advance public policy " *Id.* at 756

Despite *Liberty Mutual*'s facts, the nature of the claim, the cautionary warning and the express limitation on its holding, the *Auto Owners* panel—at the strenuous urging of the insurance company—extended its reasoning to this case by concluding assignments of post-loss property insurance proceeds as payment for a specific service are champertous *Auto Owners*, 743 N W 2d at 334 ("it is difficult to imagine an assignment of post-loss proceeds that does not raise public-policy concerns associated with champerty and maintenance") Magistrate Judge Erickson's Report & Recommendation in *Life Rehab Services, Inc. v. Allied Property & Casualty Ins. Co.*, No 05-1279 (PJS/RLE) 2007 WL 2247606 at *5-7 made the same mistake ("Since the attempted assignment, in *Liberty Mutual*, came after loss, we are unable to meaningfully distinguish

the Court's holding there from the circumstances we confront here) App 229 This is wrong

The auto glass providers obtained an assignment as payment for the work they performed They not only have an interest in the outcome, but they are the *only* party with an interest in the outcome They are not engaging in speculative litigation, but are simply trying to get paid the amounts that no-fault arbitrators have already concluded that they are owed

Read in the appropriate context, *Liberty Mutual* and the champerty discussion should be limited—as this Court expressly acknowledged—to classes of cases involving personal injury claims and cases where the uninvolved "meddler" is engaging in speculative litigation. *See Huber*, 68 Minn. at 79, 70 N W at 807 Champerty has no place in cases of this type and the court of appeals erred by suggesting otherwise

This error is emphasized by the courts' strained attempts to distinguish its prior precedent on post-loss assignments of property insurance proceeds. *See Auto Owners*, 743 N W 2d at 334-45(discussing many cases involving post-loss assignments of property insurance proceeds), *Star Windshield*, 744 N W 2d at 241-42 (same) Each was forced to distinguish case after case where post-loss assignments of property insurance proceeds were upheld. *Id.* Neither was able to cite a single Minnesota case where they were struck down *See id.*

The errors made by the court of appeals must be corrected They should not have ignored *Windey* and they erred by extending *Travertine*. They erred by overlooking the purpose of anti-assignment clauses in property insurance contracts and by assuming all

anti-assignment clauses perform the same functions These considerations require this Court to reverse

3. Prohibiting Post-Loss Assignments of Property Insurance Proceeds Related to Auto Glass Claims Violates Public Policy

The discussion above is not correct simply because it is supported by this Court's prior precedent or because the vast majority of jurisdictions adopt the analysis as sound It is also correct because interpreting anti-assignment clauses to prohibit post-loss assignments violates public policy

The rule was examined by the District of Columbia Court of Appeals in *Antal's Restaurant, Inc v. Lumberman's Mutual Casualty Co.*, 680 A 2d 1386, 1389 (D C Ct App 1996) In *Antal's*, the insurers tried to distinguish a clause which prohibited the "assignment of the policy" from a clause which prohibited the assignment of "your rights" under the policy *Id.* The court researched the issue before soundly rejecting the insurer's argument *Id.* ("the case law and commentary rejects the distinction founded on particular language of the clause")

It did so because of the well accepted rule that once loss occurs, liability is "fastened upon the insurer" and "the policy or rights thereunder may be assigned without the consent of the insurer " *Id. citing* 43 Am Jur 2d *Insurance* § 791 at 853-854 Before loss, "the insured has only an inchoate right to compensation, but after the loss that right has 'become absolute' and transferable without consent and the policy no longer significant except as evidence of the existence and amount of the debt *Id. citing Alkan v. New Hampshire Ins. Co.*, 53 Wis 136, 10 N W 91, 95 (1881)

Thus, the court reasoned "a provision prohibiting an assignment after loss has occurred is generally regarded as void, in that it is against public policy to restrict the relation of debtor and creditor by restricting or rendering subject to the controls of the insurer an absolute right in the chose of action *Antal's Restaurant*, 680 A.2d at 1389 *citing* 16 Couch § 63:41 at 766, *accord* 43 Am.Jur.2d *Insurance* at 854 ("A specific provision against an assignment after loss is null and void as inconsistent with the covenant of indemnity and contrary to public policy ") On this reasoning, no matter which of the specific anti-assignment clauses the Court elects to scrutinize, the outcome is the same—the anti-assignment clauses cannot be interpreted to prohibit post-loss assignments

Antal's Restaurant and the authorities discussed therein are not the only sources proving the point This same conclusion is reached by the supreme courts of Wisconsin and Iowa. *See Max L. Bloom Co. v. U.S. Cas. Co.*, 210 N W 689 (Wis 1926) *citing Dogge v. Nw. Nat'l Ins Co.*, 5 N W 889 (Wis 1880) and *Alkan v New Hampshire Ins. Co.*, 10 N W 91 (Wis 1881); *Conrad Bros. v. John Deere Ins. Co.*, 640 N W 2d 231, 237 (Iowa 2001) Thus, even if a clause was so specific that it expressly prohibited post-loss assignments the clause would be unenforceable as contrary to public policy *See Conrad*, 640 N W 2d at 237 *citing Straz v. Kansas Bankers Sur. Co.*, 986 F. Supp. 563, 569 (E D. Wis 1997), 43 Am Jur 2d *Insurance* § 792, at 854 Couch on Insurance states the point bluntly: "a provision in a policy prohibiting an assignment after loss has occurred is generally regarded as void, in that it is against public policy to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the

insurer an absolute right in the nature of a chose in action " 3 Couch on Insurance 3d, § 35:8

Moreover, the conclusion that post-loss assignments cannot be prohibited—at least in the auto glass context—finds support in the regulatory framework governing auto glass claims and auto insurance policies The Minnesota Unfair Claims Practices Act, Minn Stat § 72A 201 subd 6(14) (2005) requires insurers to make payments directly to auto glass repair companies Additionally, Minn Stat § 65B 134 requires insurers to provide deductible free coverage for auto glass "By forbidding deductibles Minnesota's statutory scheme for automobile insurance essentially removes the auto glass customer from the payment process " *Glass Serv*, 683 N W 2d at 796 As a result, "auto glass companies routinely bill their customers' insurance companies directly " *Id.* Read together, the two statutes demonstrate legislative intent to remove the policyholder from the billing and payment process The statues and cases lead to the inescapable conclusion· Minnesota state law requires insurers to honor the post-loss assignment of proceeds

The idea that post-loss assignments cannot be prohibited in the auto glass context is further underscored by *Illinois Farmers Insurance Co. v. Glass Service Co.*, 683 N W 2d 792, 805-07 (Minn 2004), which established the *procedure* that auto glass providers must follow to resolve shortpay disputes *See id.* The Court specifically allowed the auto glass providers to consolidate its shortpay claims *Id.* Obviously, this could not occur if post-loss assignments are prohibited

Moreover, each Minnesotan has paid a premium for a certain level of auto glass coverage No-fault arbitrators have consistently determined that the insurers are not

paying the amount they are obligated to pay under the policies Since the insurers make the payment directly to the auto glass providers, the policyholders are removed from the transaction The only vehicle providing the auto glass providers with contractual privity to challenge the shortpays is the assignment Absent the assignment, there is nothing stopping the insurers from breaching the insurance policies with impunity This is the outcome they want Insurers receive a windfall at the expense of those doing business with them, in this case the auto glass providers This violates public policy The court of appeals erred by missing these considerations and this Court must reverse

CONCLUSION

The panels erred by misreading *Windey* and dismissing it as dicta *Windey* controls when property insurance proceeds are assigned after a loss occurs *Travertine* does not address property insurance cases and extending it in the insurance context beyond the assignment of the underwriting risk to the post-loss assignment of insurance proceeds is an error that must be corrected Moreover, the public policies relied on by the court of appeals have no application in the property insurance context Champerty is not sound in this case as it would violate public policy to hold the post-loss assignments to auto glass providers are invalid For all of these reasons, the appellants, glass companies

who have established that insurers here are all in breach of their policy obligations, respectfully request that the decisions of the court of appeals below be reversed.

Dated: May 29, 2008

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

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