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Nos. A07-216, A07-217, A07-830 and A07-972

State of Minnesota
In Supreme Court

Auto Owners Insurance Co.,

Respondent (A07-972),

vs.

Star Windshield Repair, Inc., as Intended Assignee of
A & E Construction Supply, Inc., et al.,

Appellant (A07-972),

and

Star Windshield Repair, Inc., as assignee for Aaron Helget,

Appellant (A07-216),

vs.

Western National Insurance Company,

Respondent (A07-216),

and

The Glass Network,

Claimant (A07-217),

Auto Glass Express, as assignee for Kathy Heglos,

Appellant (A07-217),

vs.

Austin Mutual Insurance Company,

Respondent (A07-217),

and

State Farm Mutual Automobile Insurance Company,

Respondent (A07-830),

vs.

Archer Auto Glass, as assignee for Ronald Hornberg,

Appellant (A07-830).

BRIEF OF *AMICUS CURIAE* PROGRESSIVE INSURANCE COMPANY IN SUPPORT OF RESPONDENTS

(All Counsel Identified on following page)

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I. *AMICUS CURIAE*

A. Introduction of Amicus Progressive.[1]

Amicus Progressive Preferred Insurance Company is the largest of the Progressive automobile insurance companies underwriting automobile insurance in Minnesota. For purposes of this *amicus curiae* brief, Progressive Preferred Insurance Company, along with the other Progressive companies issuing automobile insurance in Minnesota, shall be collectively referred to as Progressive Insurance Company (Progressive). Amicus thanks the Minnesota Supreme Court for permitting it to appear in this case.

Progressive is a significant player in the Minnesota market, having in place approximately ten percent (10%) of the automobile policies in force in Minnesota. Progressive insured's replace or repair approximately 18,000 windshields per year. Its average cost for the repair or replacement of those windshields is higher than the similar average cost in every other state in the United States. Progressive is not a stranger to the windshield arbitration process, having been involved in arbitrations with Star Windshield and Auto Glass Express. Progressive has not, to date, been involved in any arbitration with Archer Auto Glass.

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[1] In accordance with Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, Progressive, by and through the undersigned counsel, certifies that the positions it takes in the following *amicus curiae* brief has not been drafted, approved or financed by any of the Respondents or their counsel. Any duplication of Progressive's analysis and the Respondents is not intentional.

II. STATEMENT OF LEGAL ISSUE

The question in this appeal is whether the District Court and the Court of Appeals erred in ruling and holding that the anti-assignment clause in an insurance contract is enforceable preventing Star Windshield from obtaining rights to begin a direct action against the insurance company for payment of an unliquidated amount for replacement of a broken windshield?

The District Court and the Court of Appeals each held that the anti-assignment clause is enforceable and prevents glass vendors (e.g., Star Windshield, Archer Auto Glass, Auto Glass Express, etc.) from commencing a direct action in arbitration against the insurer.

III. DISCUSSION

A. An Overview of the Auto Glass Replacement Industry.

The replacement of auto glass involves three necessary parties – the insured, the auto glass vendor and the insurance company. It also involves contracts between the insured and its insurance company, as well as between the insured and the glass vendor. Depending upon the language of the glass vendor's assignment, the insured will have assigned one of the following:

a.) Its right to proceeds paid by the insurance company; or

b.) Both its right to proceeds **and** the insured's claim for any dispute related to the replacement of auto glass.

When a dispute arises regarding the proper amount to be paid for a windshield or window replacement, the dispute by its very nature is not a fixed

loss. There are questions regarding the cost of the replacement glass, the cost of the labor or services rendered in replacing the glass, and the overall cost being sought by the glass vendor. In each dispute, the insurance company has already paid what it determined to be a fair and reasonable amount for similar goods, services and labor charged in the geographical area. The glass vendor has accepted the proceeds and commences an action as an assignee of the insured to collect what it euphemistically calls a "short-pay." It is not a short-pay, it is a disputed claim. The insurance company is not required by law or otherwise simply to pay whatever the amount charged by the glass vendor. It need only pay what is a fair and reasonable amount.

However, because the glass vendor has procured an assignment of the right to proceeds and/or the claim from the insured, the insured is not an active participant in the resolving the dispute. Yet, the resolution of this dispute has an impact on the insured's insurance *vis-à-vis* higher premiums and could have a direct impact if the insured agreed to pay any amounts not paid by the insurance company. The insurance companies, such as Progressive, have contractually sought to bar these types of assignments (through anti-assignment clauses) because the insured does and should have an interest in the outcome of the arbitration. If the insured is in the room, the insured will know that the insurance company and she has a joint interest in keeping the costs down in replacing the window.

As this Court noted in Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267 (Minn. 2004):

> 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. at 271. Here, if the Court adopts the Appellants' argument that the non-assignment clauses are unenforceable, the insurance companies will be forced to deal on a contractual basis with non-parties to the insurance contract. Such a holding is contrary to the well-established precedent in Minnesota that parties may agree that their contractual rights and obligations are not to be assigned. *See* Travertine, 683 N.W.2d at 272 (summarizing the case precedent in Minnesota on this precise issue).

We have seen repeatedly in the health care industry where transparency and full-disclosure of all costs have become the norm and the more the insured is involved in the claims payment process the better it is for all the parties who pay the premiums. The same is true for the auto glass replacement industry. Good public policy in both industries is for early and full disclosure, as well as direct involvement by the insured in the claims process because it is the insured that ultimately pays for every premium increase and not the third party vendor, such as the glass vendors. If the insured wants to pay more to have her windshield replaced (as in health industry when a patient wants to see physician out of network), she may choose to do so with the knowledge that she is going to pay more for that choice. Here, the insured frequently is led to believe (erroneously)

that she does not have to pay for the auto glass replacement because she has signed an assignment of the claim to the glass vendor.

Finally, enforcing the contractual anti-assignment prohibitions – as this Court has repeatedly done in the past -- will not leave the glass vendor without a remedy. In fact, if the insured believes that his insurance company has not paid the glass vendor what is "a competitive price that is fair and reasonable within the local industry at large," he can file a No-Fault arbitration claim as the glass vendors have done in the past. In the end, it will result in the insured becoming an active party to the dispute resolution process – as the insured should be to truly appreciate the economic reality of selecting a glass vendor of their choice.

B. Progressive Joins the Arguments Set Forth By the Respondents.

The Respondents have carefully set forth in their respective memoranda the reasons why this Court should uphold the decision by the Court of Appeals and why the Appellants' argument for reversal should be rejected. As they have noted, the law in Minnesota is that non-assignment clauses are enforced absent a statute or common law that precludes enforcement of the anti-assignment clause, there is a material difference between the assignment of a fixed loss and the claims at issue in this matter, and public policy compels enforcement of the anti-assignment clauses. Without repeating those arguments, Progressive joins the arguments set forth by Respondents.

C. Resolution of the Amount Due On Disputed Claims Is Not Governed by Minn. Stat. Section 72A.201 Subd. 6(14).

Appellants argue that the contractual anti-assignment clauses cannot be enforced to preclude insurance companies from doing business with glass vendors because state law requires insurers to do business with glass vendors in the payment of claims. In support of this argument, appellants direct the Court's attention to Minn. Stat. § 72A.201, subd. 6(14) which requires an insurer to provide payment directly to the insured's chosen vendor an amount that is fair and reasonable. However, the payment of a fixed amount as required by statute is not the same as litigating whether the charge by the glass vendor is proper.

This issue, in fact, highlights the distinction between an assignment where the loss is fixed and an assignment where the amount due is in dispute. Thus, where the loss is fixed (i.e. there is an agreement on a set amount that is due), everyone agrees the insurer is required by law to make payment directly to the glass vendor. In that scenario, the "assignment" signed by the insured is essentially directing the insurance company to make payment to the vendor. See e.g. Star Windshield Assignment ("I authorized and direct my insurance company to pay the amount billed for this work directly to Star Windshield Repair, Inc. I assign . . . all proceeds due for this work to Star Windshield Repair, Inc.") Appellants' Appendix at 79.

In contrast, where the amount due to the glass vendor is in dispute because the vendor is seeking more than the amount determined to be a fair and reasonable

payment, the assignment is of a disputed legal claim against the insurer and goes beyond what is required of the insurer by Minn. Stat. § 72A.201 Subd. 6(14). See Id. ("I assign any and all claims in connection with this automobile glass work against my insurance company . . . to Star Windshield, Inc.") In this latter instance, the assignment forces the insurer to negotiate and, if necessary arbitrate with the glass vendor in violation of the anti-assignment clause. The Minnesota statute requiring direct payment does not require this level of dealing between the insurer and the vendor. Thus, the Appellate Court correctly concluded that the enforcement of the anti-assignment clause is necessary to protect the insurer from having to conduct business with a non-party to the insurance contract (i.e. the glass vendor).

D. The Process of Glass Replacement Does Involve the Insured When the Payment is in Dispute.

Appellants erroneously argue that assignments should be permitted because the statutes and cases remove the glass customer from the process. This argument is based on Minn. Stat. § 72A.201 subd. 6(14) and this Court's statement in Illinois Farmers v. Glass Service Company, 683 N.W.2d 792 (Minn. 2004) that "Minnesota's statutory scheme for automobile insurance essentially removes the auto glass customer from the payment process." Appellants' argument must be rejected because it ignores the real import from the cases and statutes.

As noted above, the statutes apply only where there is no dispute as to the amount due and owing. Similarly, this Court's comment that the insured is

removed from the payment process deals only with the payment process and not the dispute resolution process. Thus, where the amount due and owing is undisputed, the insured has little involvement with the payment process. The insured brings his or her car in for service, the glass vendor is told in advance by the insurer the amount that will be paid, the vendor does the work and bills consistent with the information from the insurer and the insurer issues payment. All that happens without the insured's involvement consistent with state law.

However, where there is a dispute as to what is a fair and reasonable payment, the matter turns to dispute resolution. The above payment process no longer applies and the insured has a real interest. The simple reason the insured has an interest is because, without doubt, the amount an insurer has to pay on a glass claim will have an economic consequence on the insured.

Progressive, which has approximately a ten percent market share, pays on approximately 18,000 glass claims per year. If this number was representative, there would be approximately 180,000 glass claims per year. As can be seen from the arbitration claims before the Court, the amount in dispute is often more than $300 per claim. See App. 14 (Star Windshield billed $742.69 and was paid $530.44), App. 27 – 28 (Archer Auto billed $851.32 and was paid $290.13). While the number of arbitrations is a small percentage of the glass claims paid annually, the potential total amount to be paid can have an impact on the cost of insurance.

The insured undeniably has an interest in the resolution of the amount to be paid on a glass claim. To argue otherwise, ignores the economic realities of premiums and insurance payments. Under the circumstances, it is not proper for the arbitration process to go forward without the insured.

E. Progressive's Insurance Company's Anti-assignment Clause.

Over the past four plus years, Progressive Insurance Company's Minnesota insurance policy has had an anti-assignment provision, which uses the term "transfer" instead of the more formal term "assignment." While the language has slightly changed over the years, from prohibiting the transfer of the policy[2] to prohibiting the transfer of the duties and rights under the policy,[3] it is clear that the insured is precluded from making an assignment without the written consent of Progressive.

The anti-assignment provisions in the Progressive insurance contracts are similar to those contained in the Respondents' insurance policies as demonstrated in the following chart:

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[2] The anti-assignment provision in the March 2004 Progressive Minnesota Motor Vehicle Policy Form No. 9608 MN (03/04) reads in pertinent part as follows: "Transfer. This policy may not be transferred to another person without our written consent."

[3] The anti-assignment provision in the current Auto Policy Endorsement effective in 2008 in Minnesota reads in pertinent part as follows: "Transfer of Interest. The rights and duties under this policy may not be transferred to another person without our written consent."

Name of Ins. Co.	**Anti-Assignment Language:**
State Farm Ins. Co.	No change of interest in this policy is effective unless we consent in writing.
Auto Owners Ins. Co.	No interest in this policy may be assigned without our written consent.
Progressive Ins. Co. (2004)	This policy may not be transferred to another person without our written consent.
Western National Ins. Co.	Your rights and duties under this policy may not be assigned without our written consent.
Austin Mutual Ins. Co.	Your rights and duties under this policy may not be assigned without our written consent.
Progressive Ins. Co. (current)	Your rights and duties under this policy may not be transferred to another person without our written consent.

Under this Court's holding in Wilkie, Vetter and Travertine, each of the above anti-assignment clauses provide the "something" that this Court said is sufficient to manifest the intent of the parties that the contract shall not be assigned. *See* Wilkie v. Becker, 268 Minn. 262, 128 N.W.2d 704, 707 (1964); Vetter v. Sec. Cont'l Ins., Co., 567 N.W. 516, 521 (Minn. 1997) and Travertine, 683 N.W.2d at 272.

As this Court recently reaffirmed in Travertine:

> We did not [in Wilkie] require that the parties use specific terms to preclude assignment, but merely required the parties to include *something* expressing their intent that the contract not be assignable.
>
> . . . .
>
> Once again, we did not [in Vetter] require specific terms or magic words, but merely some indication that the parties intended that the contact not be assigned.

Id. at 272.

In short, in the event this Court upholds the Respondents' contractual right to enforce its anti-assignment provision, then any language that merely demonstrates some indication that the parties intended to prohibit the assignment of the contract should also be upheld.

IV. CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Minnesota Supreme Court affirm the appeals court, and hold the anti-assignment provisions enforceable as a matter of law. This will ensure that the real parties in interest continue to have a stake in the outcome of the arbitration, particularly in light of the fact that the disputes that proceed to arbitration involve substantive issues related to the price of the glass being charged, as well as for the services rendered in replacing the glass.

Respectfully submitted,

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Dated: July 8, 2008

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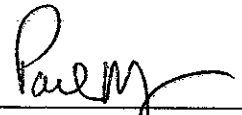
CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief produced using proportional serif font, 13-point or larger. The length of this brief is 2696 words. This brief was prepared using Microsoft Windows 98, Word 2008.



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