

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

State of Minnesota
In Supreme Court

STAR WINDSHIELD REPAIR, INC., AS ASSIGNEE FOR AARON HELGET,
Appellant (A07-216),

vs.

WESTERN NATIONAL INSURANCE COMPANY,
Respondent (A07-216),

and

THE GLASS NETWORK,
Claimant,

AUTO GLASS EXPRESS, AS ASSIGNEE FOR KATHY HELGOS,
Appellant (A07-217),

vs.

AUSTIN MUTUAL INSURANCE COMPANY,
Respondent (A07-217),

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent (A07-830),

vs.

ARCHER AUTO GLASS, AS ASSIGNEE FOR RONALD HORNBERG,
Appellant (A07-830),

and

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).

RESPONDENT AUTO OWNERS INSURANCE COMPANY'S BRIEF

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LEGAL ISSUE

The legal issue before the Court is whether an anti-assignment clause in an insurance contract is enforceable thereby preventing an alleged assignee from obtaining rights to begin a direct action against the insurance company for payment of an unliquidated amount for replacement of a broken windshield.

Trial Court's and Court of Appeal's Rulings:

The District Court and the Court of Appeals held that the anti-assignment clause is enforceable and prevents Star Windshield from beginning a direct action in arbitration against the insurer.

Most Apposite Cases:

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

Reitzner v. State Farm Fire and Cas. Co., Inc., 510 N.W.2d 20 (Minn.App. 1993)

Vetter v. Sec. Cont'l Ins. Co., 567 N.W.2d 516 (Minn. 1997)

Wilkie v. Becker, 128 N.W.2d 704 (Minn. 1964)

STATEMENT OF THE CASE

This case originated in Blue Earth County District Court before Judge Norbert P. Smith as a declaratory judgment action. Respondent, Auto Owners Insurance Company (“Auto Owners”), sought a declaratory judgment that the non-assignability clause in its standard form automobile policy, namely, “no interest in this policy may be assigned without our written consent,” is valid and enforceable. The action was necessitated by Appellant Star Windshield Repair, Inc.’s, (“Star Windshield”) repeated attempts to obtain the assignment of rights under the Policy from Auto Owner’s insureds.

Star Windshield attempted to obtain the assignment through two separate documents. The first, presented to insureds after the work is completed, provides, “I assign any and all claims in connection with this automobile glass work against my insurance company and all policy proceeds that are for this work to Star Windshield Repair, Inc.” The second is a postcard purporting to be a customer survey. It makes an assignment and states that the warranty on the work performed is not valid unless and until the card is signed and returned. Upon its purported assignments, Star Windshield issued an unreasonable and excessive bill to Auto Owners. When Auto Owners paid a “competitive price that is fair and reasonable within the local industry at large,” as required by statute, Star Windshield demanded arbitration. Minn. Stat. § 72A.201, Subd. 6(14). Star Windshield repeated this sequence with most bills and the payment received, whereupon Auto Owners brought the declaratory judgment action.

The district court entered summary judgment in favor of Auto Owners. In its memorandum it found:

The Court does recognize that an insured is completely free to assign their right to receive payment of insurance proceeds upon a successful claim to a third party after a loss has been fixed. However this Court can find no support for the notion that an assignment of proceeds gives the assignee the right to litigate or arbitrate against the insurer in order to determine the amount of the loss. Under the language of this policy, only the insured has such right.

Under the terms of the Auto-Owners insurance policy, assignments of the contract are prohibited absent Auto-Owner's consent. At best, all Star Windshield received from the named insured was an assignment of proceeds. An assignment of proceeds post-loss does not give the assignee the right to enforce the terms of the insurance contract to which it was not a party.

App. 3 (emphasis added). Star Windshield appealed the district court's decision and Presiding Judge Dietzen and Judges Ross and Huspeni considered and decided the case on appeal, affirming the district court's decision. The Court of Appeals held, "we conclude that Minnesota case law fully supports and is fully consistent with our conclusion that a nonassignment clause can limit the assignment of postloss insurance proceeds, such as the amount due for the windshields in this case." *Auto Owners Ins. Co. v. Star Windshield Repair, Inc.*, 743 N.W.2d 329, 337 (Minn. App. 2008).

FACTS

Star Windshield's statement of the case attempts to create the impression that the entire field of windshield replacement is one where insurance companies have acted unfairly in attempts to pay unreasonably low prices for windshield replacement services. In so doing, Star Windshield tries to make it appear that insurance companies simply refuse to pay it "a competitive price that is fair and reasonable in its geographic area." A

factual record established at a no-fault arbitration involving Star Windshield, however, offers proof of the fallacy of the impression Star Windshield tries to create. App. 4-29. That same record shows how any insurer forced to deal directly with Star Windshield is certain to be at a substantially increased, and different, risk. *Id.*

Star Windshield has a standard way of conducting business.¹ Star Windshield installers often travel to the customer's home and change the windshield.² App. 16, Transcript p. 49. The practice of Star Windshield is to never have customers sign a written agreement with Star Windshield until after Star Windshield installers replace the windshield. *Id.* Details of the replacement never are discussed regarding an assignment prior to the work being done. App. 16, Transcript pp. 49-50. After installers replace the windshield, the installers have the customer sign a document purporting to assign the customer's rights to insurance proceeds to Star Windshield. App. 16, Transcript p. 49. In addition, the installers leave a post card with the customer that asks them to evaluate Star Windshield's work. *Id.* It requires the customer's signature and indicates that **the warranty on the windshield installed by Star Windshield shall not take effect until the signed post card, creating the assignment, is returned.** App. 16, Transcript p. 50. The terms of the contract requiring the assignment are never discussed until the windshield is

¹ Since no arbitrations took place before this matter was decided in the trial court, the arbitrations in this matter have no factual record. However, a very detailed factual record showing Star Windshield's method of operation and pricing is available through a transcript of an arbitration proceeding dated November 10, 2005. *See App. 4-29.* This transcript was attached to Auto Owner's motion in support of a Temporary Restraining Order.

² Replacements of windshields are also done in one of its three shops in Mankato, New Ulm or St. James. App. 14, Transcript p. 44.

replaced and Star Windshield is seeking payment, a time when the customer has no bargaining power. App. 16, Transcript pp. 49-50. Customers typically never became aware that Star Windshield regularly starts actions against their insurer as a result of the insured being forced to sign this post card. App. 16, Transcript p. 47.

As of November, 2005, Star Windshield owner, Jerry Mattison, had participated in 49 arbitrations. App. 15, Transcript p. 47. He estimated at that time that he did work for over 20 insurers, and he admitted to starting arbitrations against 12 different companies who disagreed with his pricing. App. 15, Transcript pp. 47-48. Though he had been to arbitration 49 times by November 10, 2005, he appeared at that hearing and offered no information about the average costs of windshield replacements in his geographic area. App. 17, Transcript pp. 54-5.

However, other testimony presented at that arbitration through the manager of another glass company showed how Star Windshield was not charging a “competitive price that was fair and reasonable within the local industry at large.”³ That manager, Tom Denne, manages 13 stores in a three-state geographic area. App. 10, Transcript p. 26. Included in those stores are stores in Mankato, Faribault, Rochester, and St. Cloud. App. 10, Transcript p. 27. Most of the matters in these arbitrations arose in the Mankato and Rochester areas. Mr. Denne stated that, as part of his job, he had to be aware of the prices charged by competitors, one of those being Star Windshield. App. 10, Transcript p. 27. He specifically testified that his company’s cost to do the windshield replacement involved

³ Auto Owners offered testimony from Tom Denne, a regional manager for Auto Glass Center. He manages 13 stores in Minnesota, North Dakota, and Iowa. He spends 80% of his work time on the road visiting these stores. App. 10, Transcript p. 26.

in that arbitration, a windshield for a 1997 Dodge Intrepid, would have been about \$400. App. 11, Transcript p. 30. The price charged by Star Windshield was \$873.99, and Mr. Denne testified that this was not a “competitive price that was fair and reasonable within the local industry at large.” App. 12, Transcript p. 35. Mr. Denne testified that his company could do the same work for about half the price and still make a profit. App. 12, Transcript p. 36. On a more general basis, Mr. Denne testified that the prices charged by Star Windshield were not fair and reasonable in the local geographic area. App. 13, Transcript pp. 37-8. He finished by saying that he knew of no one in that geographic area that charged more than Star Windshield. App. 13, Transcript p. 38.

Perhaps more important in establishing how Star Windshield’s prices are unfair and unreasonable in the geographic area was the testimony of the owner of Star Windshield, Jerry Mattison. He admitted in that arbitration to charging a customer \$600 for a windshield that cost him about \$100.⁴ App. 23, Transcript pp. 79-80. He testified that he did 44% of his windshield replacement work for State Farm insureds, and he billed State Farm on a completely different pricing schedule from what he used for other insurance companies. App. 26, Transcript p. 92. Had the work in that particular arbitration proceeding been done for State Farm, not Auto Owners, he would have charged \$300 for the windshield instead of \$600. App. 26, Transcript p. 92. He also testified that the entire replacement, had it been done for a State Farm insured, would have been done for half of what he charged Auto Owners in this matter. App. 27, Transcript p. 93. When asked why

⁴ In his testimony, Mr. Denne said he would charge about \$200 for the same windshield. App. 11, Transcript p. 31.

he felt it was “fair” to charge State Farm half of what he would charge Auto Owners, he replied: “It’s not fair.” App. 26, Transcript p. 92. When questioned about six specific installations he had done for Auto Owner’s insureds where Auto Owners did price surveys,⁵ he admitted that his charge for windshields was on the average 174% more than the survey prices. App. 20, Transcript p. 67. His charge for the completed windshield installations was 92% more than the survey prices. App. 20, Transcript p. 67. Other than his desire to charge more for the same work, Mattison did not explain why he should receive twice as much for doing the same work.

Additionally, Star Windshield states in its brief that Auto Owners seeks to enforce the anti-assignment clause because it “prevails” as a matter of course in all matters against Auto Owners. Appellants’ Brief at 5. It stated that Auto Owners started this action “to avoid further defeats.” *Id.* As proof of its point, Star Windshield attaches several awards in arbitration where it was awarded additional monies. Appellants’ App. at 183-6. However, those awards alone are deceiving because they do not indicate that in the three arbitrations in which this attorney participated, the amounts awarded were always less than half of what Star Windshield was seeking. App. 30-35. The awards were for 42%, 39%, and 24% of what Star Windshield claimed. App. 30-35. The claim that it “prevailed” when it never even got half of what it was asking is just not supportable.

⁵ When Auto Owners feels the amount billed by a glass replacement company is excessive, it does a survey of three other replacement companies in the same geographic area. It then averages the cost of what those three companies would charge and pays that amount to Star Windshield. App. 17-18, Transcript pp. 56-58.

The importance of this factual recitation deals with the risk to the insurance company on its contract. Star Windshield's argument is predicated, in part, upon its belief that the assignment it forces its customers to make after the repair has been completed does not increase the risk to the insurance company. The facts established in the transcript from an actual arbitration show this not to be true.

This matter arises out of ten arbitrations begun by Star Windshield. After notice of the arbitrations, Star Windshield moved for a Temporary Restraining Order in Blue Earth County. The entire basis of the TRO was the anti-assignment clause contained in the Auto Owners standard auto insurance policy. That anti-assignment clause stated: "no interest in this policy may be assigned without our written consent." App. 3. The Blue Earth County District Court granted the TRO and subsequently granted summary judgment ruling that the anti-assignment clause prevented assignment of the insured's rights to Star Windshield. App. 1.

SUMMARY INTRODUCTION

The issue before the Court is quite simple: is an anti-assignment clause in an insurance contract valid and enforceable? The answer in Minnesota has been clear since at least 1964, when the Court published *Wilkie v. Becker*, 128 N.W.2d 704, 707 (1964), and it is yes. The voluminous materials presented to the Court and the distinctions that the parties have attempted to make (pre-loss versus post-loss, liquidated versus unliquidated, insurance versus non-insurance, etc.) are deceiving because they obscure what is really a simple issue. Parties to a contract, within the constraints of public policy and the law, are allowed to negotiate terms as they see fit. Parties are allowed to limit or prohibit

assignment just as parties are allowed to set payment dates and time tables. A party to a contract has the right to determine with whom it will do business and may, through the use of an anti-assignment clause, refuse to deal with nonparties with regard to the rights and obligations under the contract. As the Court of Appeals in this matter held:

We note initially what we consider to be an overarching principle that threads through Minnesota appellate court opinions that have addressed the issue of nonassignment clauses in insurance policies. The principle is that insurers should not have to do business with parties with which the insurer has not chosen to enter a contractual relationship. This principle, although not explicitly set forth in most case law, is illustrated with special clarity where an insurer, as here, is compelled to negotiate with a non-contractual party issues involving the actual dollar amounts owed on a claim.

Auto Owners Ins. Co. v. Star Windshield Repair, Inc., 743 N.W.2d 329, 333 (Minn. App. 2008). Anti-assignment clauses are valid and enforceable in Minnesota and that simple fact must drive this Court's decision.

ARGUMENT

I. An Anti-assignment Clause in an Insurance Contract is Valid and Enforceable

A. The anti-assignment clauses at issue are unambiguous, enforceable, and should be given their intended meaning.

Minnesota case law has long recognized that contract rights are generally assignable, except where the assignment is (1) prohibited by statute; (2) prohibited by contract; or (3) where the contract involves a matter of personal trust or confidence. *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997); *Wilkie v. Becker*, 128 N.W.2d 704, 707 (Minn. 1964). "Insurance policies are contracts and unless there are statutory

provisions to the contrary, general principles of contract law apply.” *Vetter*, 567 N.W.2d at 521, citing *Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917, 926 (Minn. 1983). “The interpretation of insurance contracts is governed by general principles of contract law.” *Illinois Farmers Ins. Co. v. Glass Service Co.*, 683 N.W.2d 792, 799 (Minn. 2004), citing *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). Further, Minnesota courts have held for many years that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction. *Telex Corp. v. Data Products Corp.*, 135 N.W.2d 681, 687 (Minn. 1965); *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 601 (Minn. 1957); *Grimes v. Toensing*, 277 N.W. 236, 238 (Minn. 1938).

As noted, in 1964, this Court published its decision in *Wilkie v. Becker*. This Court quoted the following provision of 6 Am.Jur.(2d) Assignments, s 16:

The general rule is that the right to receive money due or to become due under an existing contract may be assigned even though the contract itself may not be assignable. A contract to pay money may be assigned by the person to whom the money is payable, unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.

Wilkie, 128 N.W.2d at 707. This important language is consistently cited as central to the issue of assignability. *See, e.g., Travertine Corporation v. Lexington-Silkwood*, 683 N.W.2d 267, 272 (Minn. 2004); *Granse & Associates, Inc. v. Kimm*, 529 N.W.2d 6, 8 (Minn.App. 1995).

The issue of the right to an assignment of insurance proceeds was again before this Court in *Liberty Mutual Insurance Company v. American Family Insurance Company*, 463

N.W.2d 750 (Minn. 1990). In *Liberty Mutual*, an injured party attempted to assign his claim for uninsured and underinsured benefits against his own insurer to the insurance company of a tortfeasor after that insurance company paid amounts exceeding its policy limits. *Id.* Though that argument was made, this Court specifically held, “the assignment was not an assignment prohibited by law; nevertheless it did violate the policy provision prohibiting assignment of the insured’s rights pursuant to the policy absent the insurer’s consent.” *Id.*, 755-56 (emphasis added). This Court went on to hold that the policy prohibition against assignment advanced public policy by preventing the problems of champerty and maintenance. *Id.* Importantly, this Court upheld the plain language of the contract forbidding assignment without even citing cases to support that position.

In *Travertine Corporation v. Lexington-Silkwood*, *supra*, this Court reiterated the longstanding and important canon of contract interpretation that “when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction.” *Travertine*, 683 N.W.2d at 271, citing *Telex Corp. v. Data Products Corp.*, 135 N.W.2d 681, 687 (Minn. 1965); *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 601 (Minn. 1957); *Grimes v. Toensing*, 277 N.W. 236, 238 (Minn. 1938). This Court also made it absolutely clear that contract language forbidding an assignment is enforceable. This Court held:

A contract to pay money may be assigned by the person to whom the money is payable, *unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.* The language emphasized above is crucial. We did not 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.

Travertine, 683 N.W.2d at 272, (emphasis in original) citing *Wilkie v. Becker*, 128 N.W.2d 704, 707 (1964). This Court went on to uphold the validity of an anti-assignment clause declaring:

We hold that the anti-assignment clause is a valid and enforceable term of the management agreement, and that the parties intended to deny Lennon the power to assign his rights under the management agreement to anyone but Berkey. Therefore, Lennon's purported assignment of his right to compensation to Lexington-Silverwood is void.

Id. at 274. This Court also cited a federal district court case, *Bel-Ray Co. v. Chemrite Ltd.* 181 F.3d 435, 442 (3rd Cir. 1999), for the proposition that "contractual provisions limiting or prohibiting assignments operate only to limit a parties' right to assign the contract, but not their power to do so, unless the parties manifest an intent to the contrary with specificity." *Id.* at 273 (emphasis added).

The non-assignability clause in Auto Owner's standard form automobile policy provides, "no interest in this policy may be assigned without our written consent." App. 3. This clearly meets the requirements of a non-assignability clause and under the holding in *Travertine*, it should be enforced. Both *Star Windshield Repair, Inc. v. Western Nat. Ins. Co.*, and *Auto Owners Ins. Co. v. Star Windshield Repair, Inc.*, found that *Travertine* should control the analysis in the case at bar. 744 N.W.2d 237, 242 (Minn.App. 2008); 743 N.W.2d 329, 336.

A subsequent, non-published decision of the Minnesota Court of Appeals, *Physician Back and Neck Clinics v. Allied Insurance Company*, 2006 WL 2053142 (Minn.

App.) provides other, recent authority that non-assignment clauses are enforceable. App. 35-40. In that case a patient signed a document referred to as a private-insurance-information which stated: "I authorize payment directly to Physicians Neck and Back Clinic of medical benefits otherwise payable to me from Allied." *Physicians* 2006 WL 2053124 at 1. Notwithstanding this agreement, Allied Insurance Company paid the patient directly for the claim submitted for \$3,218 worth of services provided by Physicians Neck and Back Clinic. *Id.* The patient did not pay the clinic, and the clinic sued Allied Insurance arguing that it should have been paid pursuant to the document authorizing direct payment to the clinic. The contract for health insurance that the patient had stated that "rights and duties under the policy may not be assigned without Allied's written consent." *Id.*

The Minnesota Court of Appeals held that the non-assignment provision was enforceable for three reasons. First, it concluded that the plain language of the contract prohibited assignment. *Id.* at 4. Second, it held that the *Travertine* Court endorsed the idea that the plain language of the contract must be used in determining the intent of the contracting parties. *Id.* Third, the Court held that the citations used by the *Travertine* Court to support its decision made it clear that the *Travertine* Court approved the general proposition that non-assignment provisions should be upheld. *Id.*

Magistrate Judge Raymond Erickson did an exhaustive review of all Minnesota caselaw on the issue of anti-assignability clauses in insurance policies in his Report and Recommendation in the 2007 Minnesota District Court matter of *Life Rehab Services, Inc., v. Allied Property & Cas. Ins. Co.*, 2007 WL 2247606. App. 41-50. The district court

adopted his analysis and recommendation and found that anti-assignment clauses in insurance policies are valid and enforceable. *Life Rehab*, 2007 WL 2247606 at 2. While recognizing such an order is not precedent in the case at bar, Magistrate Erickson's incredibly detailed analysis of Minnesota caselaw provides a complete review of law in this area.

The plaintiffs in *Life Rehab* treated patients who were insured by the respective defendants. *Id.* at 3. The plaintiffs' patients commonly signed "assignment of benefit" agreements that purported to assign their respective rights to receive payments from their insurers, the defendants, to the plaintiffs. *Id.* The patients' insurance policies all contained substantially similar anti-assignment provisions that provided that the patients' rights and duties under the policy may not be assigned without the appropriate defendants' consent. *Id.* The defendants, refusing to recognize the purported assignments, paid the patients directly and refused to deal with the plaintiffs. *Id.* The plaintiffs then brought a declaratory judgment action seeking an order finding the anti-assignment provisions ineffective and forcing the defendants to deal with them. *Id.*

Magistrate Erickson, after analyzing all caselaw in Minnesota dealing with anti-assignment clauses, concluded that anti-assignment clauses in insurance contracts are enforceable. In reaching this conclusion he relied heavily on this Court's decisions in *Wilkie v. Becker* and *Travertine Corp. v. Lexington-Silverwood*. Quoting from *Travertine* (which quoted the 1964 *Becker* decision), Magistrate Erickson ruled, "A contract to pay money may be assigned by the person to whom the money is payable unless there is

something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.” *Life Rehab*, 2007 WL 2247606 at 7.

Minnesota courts have historically found anti-assignability provisions enforceable and the Court should overrule the above-referenced cases and reverse the cases at bar to reach a different conclusion.

B. *The assignment of liquidated post-loss proceeds are not assignments of interests in the policy.*

Windey v. North Star Farmers Mut. Ins. Co., 43 N.W.2d 99 (Minn. 1950), is an important decision on the issue of assignability and because parties have cited it as authority for conflicting positions, a close analysis of the case is necessary. In *Windey*, this Court considered a windstorm insurance policy taken out by the owners of a piece of real property. *Id.* at 100. The policy contained circumstances under which it would be void, including if “the policy should be assigned without the written consent of the insurer endorsed thereon.” *Id.* Prior to the loss but subsequent to the issuance of the policy, the owners entered into a contract for deed with a third party. *Id.* at 100-101. The contract provided that if any loss or damage occurred to the property while the contract was in force, any insurance proceeds would be applied to the purchase price. *Id.* A tornado destroyed the building covered by the insurance policy and the owners assigned the proceeds from the insurance policy to the third party. *Id.*

This Court held that “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 did

not constitute an assignment of either the policy or the proceeds thereof.” *Id.* at 101

(emphasis added). However, in *dicta*, the Court stated:

Assignment, after loss, of the proceeds of insurance does not constitute an assignment of the policy, but only of a claim or right of action on the policy. Such an assignment does not void the policy under a provision that if it is assigned without the insurer’s consent it shall become void.

Id. at 102. The above-referenced language, found in *dicta*, has become a basis for assignees to claim an interest in proceeds when a policy specifically prohibits such an assignment.

The problem with applying the above-quoted *dicta* in this way is twofold for the case at bar. First, the insurance company in *Windey* was asserting that the policy was void because of the alleged attempted assignment of the policy. *Id.* at 100. The *dicta* is specifically considering the fact that the insurance policy contains a provision that the policy is void if it is assigned without the insurer’s consent. The insurance company in *Windey* was taking the position that it did not have to pay anything under the policy because it was voided when the alleged purported assignment took place. The Court is making the distinction between actions that would void the policy and actions that were not assignments under the terms of the policy because the specific factual circumstances demanded it. Because *Windey* is so factually dissimilar to the case at bar on this important issue, the *dicta* is rendered wholly inapplicable.

Second, the *Windey* Court was considering the contractual application of liquidated, post-loss proceeds paid by an insurance company for a covered event to a purchase price. This as well is very different from the case at bar. As the Court noted:

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 did not constitute an assignment of either the policy or the proceeds thereof. The provision was an agreement operative *in futuro* and was contingent not only upon the happening of loss or damage covered by the policy, but also of the conditions precedent, upon the occurrence of which the vendee's rights depended. It gave the vendee no rights against the insurer, but only against the vendors so far as concerned the application of the proceeds in case of loss or damage.

Windey, 43 N.W.2d at 101–102 (emphasis added). Star Windshield is not merely seeking the transfer of payment under the policy to it; Star Windshield is seeking rights against Auto Owners, to take Auto Owners to arbitration to dispute the amount paid under the policy. Star Windshield arbitrates frequently. As of November 2005 it had arbitrated 49 times. App. 15. Star Windshield does not take Auto Owners to arbitration because Auto Owners refuses to pay a competitive and reasonable price, but rather because Auto Owners refuses to pay a bill that is inflated for the mere fact that it is going to Auto Owners. The owner of Star Windshield testified that he charges Auto Owners' insureds twice as much as he charges State Farm insureds simply because they are Auto Owners' insureds. App. 26, Transcript p. 92. Clearly, being forced to deal with Star Windshield despite its anti-assignment policy increases the risk to Auto Owners.

The Court in *Windey* was considering a contract where one party agreed to transfer to another party an asset it owned. The origin of the asset is of no significance to the conclusion: a party can promise to pay any asset it has to another as consideration for a contract. Such a promise is not the assignment of the policy or the proceeds, as the Court

states, but merely an independent contract, possible consideration for which is the transfer of future assets.

Reitzner v. State Farm Fire and Cas. Co., Inc., 510 N.W.2d 20 (Minn. App. 1993) is instructive to distinguish the assignment of rights under a contract and the assignment of liquidated proceeds of a successful claim. In *Reitzner*, the vendee to a contract for deed set fire to the insured property and went to prison. *Id.* at 22-23. Subsequently, both the vendee and the vendor assigned their rights with regard to the fire loss to Reitzner. *Id.* at 23. When Reitzner attempted to collect the insurance money, the insurer argued that because the assignments violated the terms of the policy, they were void, and that, as a result, Reitzner had no standing to bring suit. *Id.* at 26.

In holding that the assignment was valid, the Court of Appeals emphasized that “[Reitzner] did not receive a pure assignment of the policy, but rather, received an assignment of the proceeds due under the policy should the claim be successful.” *Id.* (*emphasis added*). The Court went on to note:

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

Reitzner, 510 N.W.2d at 26 (*emphasis added*), citing *Liberty Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 463 N.W.2d 750, 755 (Minn.1990) (an assignment of an insured's interest in an existing claim for benefits pursuant to a contract of insurance is not an assignment prohibited by law).

The assignment at issue in *Reitzner* was basically a promise to pay over the insurance proceeds if there were any. *Id.* at 26 (emphasis added). The Court made a similar observation in *In re Estate of Sangren*, 504 N.W.2d 786 (Minn. App. 1993), where it stated “[f]urther, this was not really an assignment of the policy. Rather, it was an assignment of the *proceeds* of the policy. A claim for proceeds is more a debt, subject to the ordinary rules of assignment, than a contract right to insurance protection.” *Sangren*, 504 N.W.2d at 790 (emphasis in original). An assignment of such a fixed loss is entirely different from the kind of assignment claimed here by Star Windshield. The amounts claimed by Star Windshield are not fixed because they are subject to being a “competitive price that is fair and reasonable with the local industry at large.” Minn. Stat. § 72A.201, Subd. 6(14). Because the claims represent unliquidated amounts, Star Windshield does not have the right to arbitrate those amounts with Auto-Owners.

In its Brief to this Court, Star Windshield asserts, “[p]ost-loss assignments of property insurance proceeds are valid. This is true even though the insurance policies routinely contain anti-assignment clauses. This rule was adopted by this Court in *Windey v. North Star Farmers Mutual Insurance Co*, 43 N.W.2d 99 (1950), and has never been overruled.” Appellants’ Brief at 8. This assertion is not true. As quoted above, the Court in *Windey* expressly found that there was no assignment of the policy or the proceeds. *Windey*, 43 N.W.2d at 101. Later in its brief, Star Windshield states:

[T]his 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.

Appellants' Brief at 9. This assertion begs the question: if the Court stated the proposition so clearly, why didn't Star Windshield quote it or at least jump cite it? This is one of many examples in Star Windshield's brief of broad assertions credited to cases, without jump cites, and which do not actually say what Star Windshield asserts they do.⁶

CONCLUSION

Star Windshield argues for a complete reversal of Minnesota law holding that anti-assignment clauses are enforceable. It simply argues that this Court should not be guided by precedent. It is respectfully submitted that the law in this area is well-established and that the two Appellate Court decisions should be affirmed.

Dated: June 26, 2008.

Respectfully submitted,

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⁶ See, e.g., Star Windshield's brief at page 11 with 33 cases string-cited for the assertion that "the overwhelming weight of authority draws a distinction between assignments made before a loss occurs and assignments made after a loss occurs" and only one jump cite.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to MINN.R.CIV.APP.P. 132.01, subd. 3, for a brief produced using the Proportional Serif font, 13 point or larger. The length of this brief is 6,008 words. This brief was prepared using Microsoft Word 2003.

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