

NO. A07-1627

State of Minnesota  
 In Court of Appeals

Michael Bundul as Trustee for the Heirs and  
 Next of Kin of Carol Bundul, and individually,  
*Plaintiff-Respondent,*

and

Benjamin Bundul,  
*Involuntary Plaintiff,*

vs.

Travelers Indemnity Company d/b/a Travelers,  
*Defendant-Appellant,*

and

Dick Devine and David Agency, Inc.,  
*Defendant.*

APPELLANT'S BRIEF AND APPENDIX

MURNANE BRANDT  
 Daniel A. Haws (#193501)  
 Kari L. Gunderman (#317299)  
 30 East Seventh Street, Suite 3200  
 Saint Paul, MN 55101  
 (651) 227-9411

*Attorneys for Appellant*

TERRY & SLANE, PLLC  
 Charles D. Slane (#270374)  
 Matthew C. Kopp (#353589)  
 7760 France Avenue South, Suite 610  
 Bloomington, MN 55435  
 (952) 832-5800

*Attorneys for Respondent*

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## STATEMENT OF THE ISSUE

**I. WHETHER A HOUSEHOLD EXCLUSION IN AN UMBRELLA INSURANCE POLICY IS INVALID AND UNENFORCEABLE AS APPLIED TO AN AUTOMOBILE ACCIDENT WHEN NO MINNESOTA LAW OR STATUTE PROHIBITS THIS EXCLUSION IN AN UMBRELLA POLICY?**

- The district court held that because the claim arises out of an automobile accident, the umbrella policy transformed into an automobile policy governed by the Minnesota No-Fault Act which the district court found to prohibit household exclusions.
  
- Apposite authority:
  - American Fam. Mut. Ins. Co. v. Continental Ins. Co., 1991 WL 271522 (Minn. Ct. App. 1991)
  - Luskin v. State Farm Fire & Cas. Co., 141 F.3d 1169, 1998 WL67760 (8th Cir. 1998)
  - Reinsurance Assoc. of Minnesota v. Hanks, 539 N.W.2d 793 (Minn. 1995)
  - Vierkant v. AMCO Ins. Co., 543 N.W.2d 117 (Minn. Ct. App. 1996)

## STATEMENT OF THE CASE

Plaintiff-Respondent Michael Bundul as Trustee for the Heirs and Next of Kin of Carol Bundul and Individually (“Bundul”) brought this suit seeking a declaratory judgment that a Personal Liability Umbrella of Security Policy (“PLUS policy”) issued to him provides coverage for the loss caused by the death of his wife, Carol Bundul. Michael and Carol Bundul had a primary automobile insurance policy through Charter Oak and Bundul recovered the policy limits of his automobile liability insurance policy. Bundul also made a claim under the PLUS policy. However, the PLUS policy contains an exclusion that precludes liability coverage for bodily injury to an insured when an insured causes bodily injury to any person who is related by blood, marriage or adoption to an insured and who is a resident of that person’s household. This is commonly referred to by courts as a “household exclusion.” It is undisputed that the household exclusion applies to this loss because Involuntary Plaintiff Benjamin Bundul is a resident relative of Michael and Carol Bundul and is the person for whom Bundul seeks coverage, alleging Benjamin Bundul caused the damages at issue.

Relying upon this contract language, Travelers brought a motion for summary/declaratory judgment requesting the court determine that the household exclusion in its PLUS policy precludes coverage to Benjamin Bundul for this accident. The Honorable Harry S. Crump, Hennepin County District Court, denied Travelers’ motion - not because the exclusion did not apply - but instead finding household exclusions in umbrella policies invalid and unenforceable when coverage is sought for damages arising out of an automobile accident because such exclusions are contrary to

Minnesota's No-Fault Act's "overarching concern for adequate compensation of accident victims . . . ." (AA-159)

The district court ignored the fact that there is no provision in the current No-Fault Act that prohibits household exclusions and that the stated purpose of the Act is to assist "uncompensated" victims of automobile accidents. Although the Minnesota Supreme Court has found household exclusions are against public policy in automobile insurance policies, there is no similar law in Minnesota prohibiting such exclusions in any other type of insurance policy. Instead, the household exclusion has been upheld in all other types of insurance considered by the courts. The district court also erred in finding that umbrella policies become automobile policies when coverage is sought for damages arising out of an automobile accident. Umbrella insurance is not mandated coverage under the No-Fault Act nor is there any case law prohibiting certain exclusions in umbrella policies.

Accordingly, Travelers respectfully appeals from the entry of the district court judgment.

## STATEMENT OF THE FACTS

The facts relevant to this matter are simple and were undisputed by the parties at the district court level.

### **I. THE ACCIDENT**

On November 28, 2003, Benjamin Bundul was a permissive operator of his parents' vehicle and was driving eastbound on I-94 near Osseo, Wisconsin when an accident occurred. (AA-47) Benjamin Bundul's mother, Carol Bundul, was in the passenger seat and his sister, Meredith Bundul, was in the back seat. (AA-52 – AA-55) Benjamin Bundul lost control of the vehicle and collided with an Osseo fire department tanker that was legally parked on the median shoulder of eastbound I-94. (Id.) Carol Bundul was fatally injured as a result of the automobile accident. (AA-3) Both Benjamin Bundul and Meredith Bundul suffered minor injuries and the Osseo fire department tanker sustained material damage. (AA-47)

### **II. TRAVELERS' POLICIES OF INSURANCE**

#### **A. The Automobile Policy**

Prior to the accident, Michael and Carol Bundul purchased automobile liability insurance for their vehicle from the Charter Oak Fire Insurance Company bearing Policy Number 947078093-101-1, with limits of \$500,000 per accident.<sup>1</sup> (AA-56 – AA-98) The insuring agreement in the automobile policy provided that the insurance will cover "damages for 'bodily injury' (Coverage A) or 'property damage' (Coverage B) for which

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<sup>1</sup> The Charter Oak Fire Insurance Company is a subsidiary of The Travelers Companies, Inc.

any 'insured' becomes legally responsible because of an auto accident." (AA-56) The named insureds on the automobile policy were Michael Bundul and Carol Bundul. (Id.) Benjamin Bundul was also an insured under the policy as he qualified as a "family member." (AA-57)

Because Benjamin Bundul was an "insured" who was legally responsible for Carol Bundul's injuries, on Benjamin Bundul's behalf, Travelers entered into a settlement agreement with the Bunduls whereby the Bunduls were paid \$487,436.12 - the limits of the automobile policy less the \$12,563.88 payment Travelers made to Continental Western Insurance Company for the property damage to the Osseo fire department tanker. (AA-47 – AA-51)

#### **B. The PLUS (Umbrella) Policy**

In addition to their automobile policy, Michael and Carol Bundul voluntarily chose to purchase a Personal Liability Umbrella of Security ("PLUS") policy from the Automobile Insurance Company of Hartford, Connecticut bearing Policy No. 931429845-311-7, with a \$1,000,000 limit of liability per occurrence.<sup>2</sup> (AA-99 – AA-112) Contrary to the district court's analysis, this umbrella policy cannot be categorized as excess automobile coverage. Instead, the umbrella policy provides coverage for many other types of loss such as: property damage, defamation, false imprisonment, business pursuits and loss assessment. (AA-99) Specifically, the umbrella policy contains the following coverage grant:

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<sup>2</sup> The Automobile Insurance Company of Hartford, Connecticut is a subsidiary of The Travelers Companies, Inc.

...[W]e will pay damages for which an “insured” becomes legally liable due to “*bodily injury*,” “*property damage*,” or “*personal injury*” caused by an occurrence. This coverage applies only to damages in excess of the “retained limit”.

(AA-105) The term “insured” is defined by the policy as follows:

7. a. **“Insured”** means:
  - 1) You;
  - 2) A “family member”; but, if such “family member” is legally responsible for an “occurrence” covered under this policy, only if such “family member” is also insured for such “occurrence” under one or more “primary insurance” policies for not less than the applicable deductible amount shown in the “Declarations”;<sup>3</sup>
  - 3) Any person using, with your permission, an “auto”, watercraft or “recreational vehicle”, which you own or lease or which is furnished or available for your regular use;...

(Id.) It is undisputed that Benjamin Bundul meets the definition of an insured under the umbrella policy because he was permissively using his parents’ automobile pursuant to section 7(a)(3), and he is a family member who was insured under the Bundul’s primary automobile policy pursuant to section 7(a)(2). (AA-47 – AA-51) (AA-99 – AA-112)

### **C. The Exclusions Under the PLUS Policy**

The PLUS policy contains the following pertinent household exclusion:

#### **EXCLUSIONS**

This insurance does not apply:

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<sup>3</sup> The term “family member” is defined by the policy as “a person who is a resident of your household who: (a) is related to you by blood, marriage or adoption...” (AA-105) Michael Bundul has admitted in discovery that Benjamin Bundul is his and Carol Bundul’s son and is therefore related to them by blood. (AA-113)

14. To “bodily injury” or “personal injury” to any person who is related by blood, marriage, or adoption to an “insured” and who is a resident of the household of that person; or “bodily injury” or “personal injury” to you.

(AA-109) As stated above, Bundul has admitted that Benjamin Bundul is a resident insured in a claim made by his parents and has further admitted that Benjamin Bundul was a resident of his and Carol Bundul’s household at the time of the accident. (AA-113) Therefore, the exclusion applies to the accident giving rise to this case.

### **III. THE LAWSUITS**

#### **A. The Underlying Lawsuit**

Following Carol Bundul’s death, Michael Bundul, as Trustee for the estate of Carol Bundul, brought a negligence claim against Benjamin Bundul in Hennepin County District Court seeking damages suffered as a result of Carol Bundul’s death.<sup>4</sup> As Benjamin Bundul’s insurer for the automobile policy insurance, Charter Oak paid the Bunduls the limits of their automobile policy. (AA-47 – AA51) (AA-117 – AA-118) However, Travelers denied coverage for Benjamin Bundul under the umbrella policy based upon the policy’s household exclusion.<sup>5</sup> Specifically, Travelers denied coverage because the uncontested facts show that Carol Bundul is an insured under the policy;

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<sup>4</sup> While the Summons and Complaint have been served upon Benjamin Bundul, the action has not yet been filed in Hennepin County District Court. *See* Respondent’s Memorandum Regarding Jurisdiction, already on file with this Court, dated September 13, 2007.

<sup>5</sup> As noted previously, Charter Oak paid the Bunduls \$487,436.12 - the limit of their automobile policy less the \$12,563.88 payment Charter Oak made to Continental Western Insurance Company for the property damage to the Osseo fire department tanker. (AA-47 – AA-51)(AA-156)

Carol Bundul is related by blood to another insured, Benjamin Bundul; and Carol Bundul was a resident of the same household as Benjamin Bundul at the time of the accident. (AA-117 – AA-118)

**B. The Declaratory Judgment/Coverage Action**

Facing this clear exclusion, Bundul brought an action against Travelers seeking a declaration that the household exclusion in the umbrella policy is invalid and unenforceable on the grounds it is contrary to public policy that prohibits such exclusions in automobile policies.<sup>6</sup> (AA-6 – AA-7) Bundul also named his insurance agent, Dick Devine, and his insurance agency, the David Agency, as defendants, alleging Devine breached his duty to advise the Bunduls as to the coverage they were purchasing as well as any exclusions that would limit their coverage. (AA-7 – AA-8) Defendants Devine and the David Agency do not take part in this appeal.<sup>7</sup>

**IV. TRAVELERS' MOTION FOR SUMMARY/DECLARATORY JUDGMENT**

On June 8, 2007, Travelers moved the district court for summary judgment to declare that there is no liability coverage afforded to Benjamin Bundul under the PLUS policy pursuant to the clear and unambiguous household exclusion. (AA-20 – AA-44) (AA-154) Bundul opposed the motion, arguing the same public policy that invalidates

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<sup>6</sup> In its Complaint, Bundul claimed the exclusion was invalid for numerous reasons, but such claims or arguments were not made in response to Travelers' summary judgment motion nor are they preserved by Bundul on appeal.

<sup>7</sup> The Court issued an Order pursuant to Minn. R. Civ. P. 54.02, which makes the district court's Order and judgment against Travelers immediately appealable.

household exclusions in automobile insurance policies should be extended to all policies of insurance that provide protection against automobile accidents. (AA-127 – AA-143)

The district court held the household exclusion is invalid and unenforceable reasoning that the household exclusion in the PLUS policy, as applied to automobile accidents, operates as additional automobile coverage and is therefore subject to Minnesota's No-Fault Act. (AA-162)

### ARGUMENT

The Minnesota Supreme Court allows parties to enter into contracts of insurance which contain exclusions from certain types of losses “so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes.” American Fam. Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983). There is no Minnesota law or statute that mandates umbrella coverage. Nor is there any law or statute in Minnesota prohibiting certain exclusions in umbrella policies or mandating that certain coverage be provided. Accordingly, this Court should reverse the district court's decision and enforce the household exclusion contained in the contract.

#### **I. STANDARD OF REVIEW**

On appeal from summary judgment, an appellate court considers: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990); *see* Admiral Merchants Motor Freight v. O'Connor & Hannan, 494 N.W.2d 261, 265 (Minn. 1992). The extent of coverage under an insurance contract is a question of law. Caspersen v. Webber, 213 N.W.2d 327, 330 (Minn. 1973). A reviewing court is not

bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). Therefore, the interpretation of an umbrella insurance policy is subject to a *de novo* standard of review. National Family Ins. v. Bunton, 509 N.W.2d 565, 567 (Minn. Ct. App. 1993).

Here, there are no genuine issues of material fact in dispute. Bundul concedes the household exclusion applies to preclude coverage if it is valid and enforceable. (See AA-127 – AA-143) Bundul also received payment of the limits available under his automobile policy for the damages sustained as a result of Benjamin Bundul's alleged negligence. (AA-47 – AA-51) However, Bundul's claim was denied under the umbrella policy because of the household exclusion. The only issue for this Court, then, is whether the principles of Minnesota law, which prohibit household exclusions in automobile policies, should be extended to invalidate this exclusion in an umbrella policy.

**II. THE DISTRICT COURT ERRED IN ITS APPLICATION OF MINNESOTA LAW WHEN IT CONCLUDED THAT A HOUSEHOLD EXCLUSION IN AN UMBRELLA POLICY IS INVALID AND UNENFORCEABLE WHEN NO MINNESOTA LAW OR STATUTE MANDATES THIS COVERAGE IN AN UMBRELLA POLICY.**

**A. Minnesota Law Allows Insurers To Exclude Coverage Absent Legislative Directive**

The Minnesota Supreme Court allows an insurer to limit its liability to that which was expressly contracted "so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes." American Fam. Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983). Absent a legislative directive, an insurance company is

free to exclude from coverage, any particular type of risk, person or loss based upon the public policy favoring the parties' freedom to contract. Bobich v. Oja, 104 N.W.2d 19, 24 (Minn. 1960). In this case, Bundul entered into an insurance contract with Travelers that provides multiple types of coverage under an umbrella policy. This policy contains various exclusions, one of which is the household exclusion. There is no basis for the district court to invalidate this exclusion and frustrate this state's public policy, which favors parties' freedom to contract.

There is no Minnesota law or statute prohibiting household exclusions in umbrella policies. Consequently, in an effort to find coverage where none would otherwise exist, the district court concluded that because the Bundul accident involved an automobile, the umbrella policy of insurance, for which Benjamin Bundul now seeks coverage, became an automobile policy of insurance governed by the No-Fault Act. (AA-158) The district court relied upon the No-Fault Act, stating the household exclusion "is contrary to the Act's main purpose of adequate compensation for accident victims..." (AA-162) But in fact, the stated purpose of the No-Fault Act is to "relieve the severe economic distress of **uncompensated** victims of automobile accidents..." Minn. Stat. § 65B.42(1)(emphasis added). Thus, the public policy of the No-Fault Act was furthered in this case because Charter Oak paid the Bunduls the available policy limits on their automobile policy. No further coverage is mandated by any Minnesota law or statute.

The district court's leap to turn an umbrella policy into an automobile policy is contrary to Minnesota law and violates ordinary contract principles. Absent any state law or statute prohibiting certain exclusions in an umbrella policy, parties are free to contract

as they wish. Accordingly, this Court should reverse the district court and enforce the household exclusion in Travelers' PLUS policy.

**B. There Is No Dispute That, If Valid, The Household Exclusion In Travelers' Umbrella Policy Would Apply To Preclude Coverage**

Bundul concedes that Benjamin Bundul meets the definition of an insured under the PLUS policy because he was a resident insured of Michael and Carol Bundul's household at the time of the accident and that Carol Bundul was related by blood to Benjamin Bundul. (AA-113) In other words, it is undisputed that Benjamin Bundul was a resident relative of the home of Michael and Carol Bundul; that the Bunduls claim Benjamin Bundul negligently operated the Bundul's vehicle on November 28, 2003; and that such negligence resulted in the death of Carol Bundul. (AA-47 – AA-51) (AA-99 – AA-112) (AA-156) Bundul has further admitted that at the time of the accident: (1) Benjamin Bundul was operating the family vehicle; (2) Benjamin Bundul was a resident of the Bundul household; (3) Michael and Carol Bundul owned the vehicle in which Benjamin Bundul was driving; and (4) the Bundul estate seeks damages against Benjamin Bundul for the bodily injuries sustained as a result of the accident. (AA-47) (AA-113 – AA-114) Based upon these undisputed facts, the household exclusion would apply to preclude coverage, if it is valid.

**C. Minnesota Law Requiring Minimum Automobile Liability Insurance Necessarily Invalidates Household Exclusions In Automobile Policies Of Insurance, But Not Other Insurance Policies**

The district court Order finding the household exclusion invalid in the umbrella policy is based upon the court's unilateral transformation of an umbrella policy of

insurance into “automobile liability” insurance. The district court had to make this leap because the only Minnesota law that prohibits household exclusions is case law that predated the legislature’s repeal of certain statutes, which precluded the use of household exclusions in *automobile liability insurance* policies. See Minn. Stat. § 72A.1491, subd. 1 (1969) (renumbered § 65B.23, repealed 1974 c 408 s 33); Beaduette v. Frana, 173 N.W.2d 416 (Minn. 1969); Balts v. Balts, et al., 142 N.W.2d 66 (Minn. 1966). Although Beaduette and Balts have not been overturned, the No-Fault Act did repeal as irrelevant Minn. Stat. §§ 72A.1491 and 65B.23, both of which specifically precluded household exclusions.

The present No-Fault Act has no similar language specifically prohibiting household exclusions. See generally, Minn. Stat. § 65B et seq. In fact, the stated purpose of the No-Fault Act is “[t]o relieve the severe economic distress of **uncompensated** victims of automobile accidents . . . .” See generally, Minn. Stat. § 65B.42(1)(emphasis added). In furthering this purpose, the same No-Fault Act, through the legislature, imposed statutory minimum amounts of insurance for injuries arising out of maintenance and use of automobiles. Minn. Stat. § 65B.41. The minimum liability policy requires bodily injury coverage in the amount of \$30,000 per person and \$60,000 per accident. Minn. Stat. § 65B.49, subd. 3(1). The No-Fault Act also mandates insurers provide their specific coverages for persons when purchasing automobile insurance policies, including, but not limited to, wage loss and medical expense coverage and uninsured and underinsured coverage. See Minn. Stat. §§ 65B.44, 65B.49.

None of these statutory requirements apply to policies of insurance other than the automobile insurance required by the legislature and particularized in the statute. The Bunduls had this required insurance with Charter Oak. (See AA-56 – AA-98) When the policy limits were paid, the purpose of the No-Fault Act was furthered and, in fact, satisfied. To impose these same requirements on an umbrella insurance policy frustrates Minnesota's countervailing public policy favoring freedom to contract. Bobich v. Oja, 104 N.W.2d 19 (Minn. 1990); American Fam. Mut. Ins. Co. v. Ryan, 330 N.W. 2d 113 (Minn. 1983).

**D. Umbrella Policies Are Not Automobile Liability Policies**

Nowhere in the No-Fault Act does the legislature impose mandates on any umbrella insurance policy which may provide coverage in the event of an automobile accident or any other occurrence. An umbrella policy of insurance is not an automobile policy of insurance and the laws applicable to automobile liability policies do not apply.

Indeed, Minnesota appellate courts have found that an umbrella policy is not dedicated to automobile liability, but instead provides various coverages that are unrelated to automobile ownership and operation. See American Fam. Mut. Ins. Co. v. Continental Ins. Co., 1991 WL 271522 (Minn. Ct. App. 1991) (AA-125 – AA-126) (holding that one automobile policy was more specifically designed and intended to cover automobile accidents than an umbrella policy, and observing that an umbrella policy generally covers automobile accidents and a variety of other risks.)

Furthermore, umbrella policies are not subject to any of the statutory mandates applicable to automobile policies. Instead, umbrella policies provide high limits of

coverage at a modest premium because of the need for underlying coverage and the exclusions. See Jostens v. Mission Ins. Co., 387 N.W.2d 161, 165 (Minn. 1986). In Jostens, the Minnesota Supreme Court said:

This arrangement [of having underlying coverage] enables the umbrella insurer to offer high limits at a relatively modest premium. The umbrella policy is attractive to the prudent person who wants protection for the infrequent but always possible and much-to-be-dreaded catastrophic loss. See 8A J. Appleman, *Insurance Law and Practice* § 4909.85 at 452 (1981). The policy can be issued for a relatively modest premium because most claims are absorbed by the underlying insurer, and also because the umbrella insurer's defense costs are ordinarily less than those of other insurers. The cost of defense is no small item.

(Id. at 165)

Several other jurisdictions have also clearly distinguished an umbrella policy from an automobile policy. For example, the Alabama Supreme Court has stated:

An umbrella policy...is fundamentally excess insurance designed to protect against catastrophic loss. Before an umbrella policy is issued, a primary policy (the "underlying policy") must be in existence and this primary policy must by law provide uninsured motorist coverage. The umbrella policy assumes a risk of much less frequent occurrences, i.e. the risk in excess of primary policy limits, and accordingly carries premiums which reflect the lesser magnitude of this risk.

Trinity Universal Ins. Co. v. Metzger, 360 So.2d 960, 962 (Ala. App. 1976). One New Jersey appellate court stated it this way:

[I]t is important to recognize the distinction between an automobile policy [and] an umbrella policy...The former is mandated by and subject to strict statutory regulation...[An] umbrella policy is not subject to such regulation. **It is additional coverage not required for the purpose of auto insurance.** While it is well established that automobile liability insurance is statutorily required and that any deviation therefrom would be in contravention with the public policy of New Jersey mandating auto insurance. Conversely, umbrella policies are not required. Any additions,

exclusions, or other conditions of such policy does not contravene public policy...

Weitz v. Allstate Ins. Co., 642 A.2d 1040, 1041 (N.J. Super. 1994) (emphasis added); *see also* Wright v. State Farm Mut. Auto. Ins. Co., 332 Or. 1, 22 P.3d 744 (2001); Bogas v. Allstate Ins. Co., 221 Mich. App. 576, 562 N.W.2d 236 (1997), *appeal denied*, 456 Mich. 925, 573 N.W.2d 620 (1998); State Farm Mut. Auto. Ins. Co. v. Gengelbach, 1992 WL 88025 (D. Kan. 1992); Electric Ins. Co. v. Rubin, 32 F.3d 814 (1994).

The Minnesota legislature simply has not required automobile owners to purchase umbrella coverage and there is no legislation dictating the parameters of coverage contained in such policies. Furthermore, unlike Bundul's underlying automobile policy, wherein its scope is defined by statute, the PLUS umbrella policy is defined by the policy's plain language and is unencumbered by the statutory requirements for automobile insurance.

**E. Minnesota Law Upholds Household Exclusions In Homeowner's And Multi-Peril Policies**

The Minnesota Supreme Court has long-held that household exclusions are valid in homeowner's policies based upon the countervailing public policy of the parties' freedom to contract. American Fam. Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983); Bobich v. Oja, 104 N.W.2d 19 (Minn. 1960). The Court in Ryan stated:

The well-settled general rule in the construction of insurance contracts...provides that parties are free to contract as they desire, and so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes, the extent of the insurer's liability is governed by the contract entered into.

American Fam. Mut. Ins. Co. v. Ryan, 330 N.W.2d at 115 citing Bobich, 104 N.W.2d at 24.

Thus, both the Minnesota legislature and the Minnesota Supreme Court have upheld household exclusions in homeowner's policies and have found them not to be unconscionable because they do not contravene applicable statutes. *See e.g.*, American Fam. Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983) (finding a household exclusion in a homeowner's policy valid); Vierkant v. AMCO Ins. Co., 543 N.W.2d 117 (Minn. Ct. App. 1996)(stating that "until the legislature so determines, household exclusions are not invalid as a matter of public policy"); Merseeth v. State Farm Fire & Cas. Co., 390 N.W.2d 16 (Minn. Ct. App. 1986) (holding that a policy excluding liability coverage for any bodily injury to an insured or resident relative of an insured excluded coverage for son's injury.)

The Minnesota Supreme Court has also upheld household exclusions in other forms of insurance, such as a multi-peril insurance policy. *See* Reinsurance Assoc. of Minnesota v. Hanks, 539 N.W.2d 793 (Minn. 1995) (finding that a household exclusion in a multi-peril insurance policy was valid.)<sup>8</sup> Clearly then, Minnesota courts have sought to distinguish automobile insurance policies from other types of insurance coverage. For this reason, the public policy behind the No-Fault Act should not extend to other types of insurance policies, including umbrella policies. Otherwise, the public policy favoring

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<sup>8</sup> Incidentally, this loss occurred in Wisconsin and Wisconsin courts have similarly found that household exclusions in homeowner's policies are valid since they serve a legitimate purpose and are not contrary to public policy. *See e.g.*, Shannon v. Shannon, et al., 150 Wis.2d 434, 442 N.W.2d 25 (1989).

parties' freedom to contract, without a specific mandate from the legislature, would be abrogated.

The district court's logic would necessarily allow Travelers' PLUS policy to enforce the household exclusion if the accident or claim arose under a homeowners, property loss or personal liability action. Parties will be required to evaluate application of the PLUS, or any other umbrella policy, on an ad-hoc basis. This is certainly not what the law intends or requires.

**F. A Majority Of Other Jurisdictions Uphold Household Exclusions In An Umbrella Policy**

**1. Eighth Circuit case applying Minnesota law**

While no Minnesota state court has specifically addressed the validity of the household exclusion in an umbrella policy, the Eighth Circuit Court of Appeals has affirmed a Minnesota District Court decision enforcing a household exclusion in an umbrella policy in Luskin v. State Farm Fire & Cas. Co., 141 F.3d 1169, 1998 WL 67760 (8th Cir. 1998) (AA-119). The district court disregarded the significance of this case despite recognizing that in Luskin, an umbrella policy's household exclusion was upheld "under similar circumstances to the case at bar."<sup>9</sup> (AA-160)

In Luskin, an insured brought suit after he was sued by his twelve-year-old son for personal injury damages exceeding the limits of his automobile insurance policy and

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<sup>9</sup> With regard to Luskin, the district court noted in its Memorandum that "no copy of the federal district court's opinion was provided." (AA-160 – AA-161). Travelers did not provide a copy of the opinion because none was issued; instead, Judge Rosenbaum granted State Farm Fire & Casualty Company's summary judgment motion from the bench.

State Farm denied coverage pursuant to a household exclusion in the umbrella policy. (Id. at \*1) The District Court held the exclusion was valid and enforceable under Minnesota law. (Id.) The Eighth Circuit Court of Appeals reviewed the case and disputed issues *de novo* and found no error of state law.<sup>10</sup> (Id.)

Though it is an unpublished opinion, Luskin is unquestionably instructive because it, too, was a declaratory judgment action concerning a personal liability umbrella policy coverage dispute. Luskin at \*1. This Minnesota federal court decision is consistent with the majority of jurisdictions across the country that have similarly held such policy exclusions to be valid in umbrella policies and with Minnesota law upholding household exclusions in non-automobile policies.

## **2. Extra-jurisdictional cases uphold household exclusions**

Based upon Travelers' research, of the 16 states that have considered the issue of the validity of a household exclusion in umbrella policies, 13 states have found household exclusions are valid in umbrella policies while only three states have held such an exclusion to be invalid. (AA-32 – AA-33) The majority of courts agree that because umbrella policies are optional policies that apply not only to liability arising from the use of an automobile, but to other personal activities of an insured, the policy's limitations on coverage do not conflict with statutory provisions mandating coverage and the household exclusion in an umbrella policy does not violate public policy. *See e.g.* Weitz v. Allstate Ins. Co., 642 A.2d 1040, 1041-42 (N.J. App. Div. 1994); Walker v. State Farm Mut.

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<sup>10</sup> In its opinion, the district court stated the Eighth Circuit Court of Appeals affirmed finding no error of "statutory" law. (AA-161). In fact, the decision was affirmed because there was no error of "state" law, which includes both statutory and common law.

Auto. Ins., 850 So.2d 882, 886-89 (La. Ct. App. 2003); Wright v. State Farm Mut. Auto. Ins. Co., 22 P.3d 744 (Or. 2001); Bogas v. Allstate Ins. Co., 221 Mich. App. 576, 562 N.W.2d 236 (1997), *appeal denied*, 456 Mich. App. 925, 573 N.W.2d 620 (1998); State Farm Mut. Auto. Ins. Co. v. Gengelbach, 1992 WL 88025 (D. Kan. 1992)(AA-120 – AA-124); Electric Ins. Co. v. Rubin, 32 F.3d 814 (3rd Cir. 1994) (construing Pennsylvania law); Shahan v. Shahan, 988 S.W.2d 529 (Mo. 1999); Schanowitz v. State Farm Mut. Auto. Ins. Co., 702 N.E.2d 629 (Ill. 1998); Auto Owners Ins. Co. v. Van Gessel, 665 So.2d 263 (Fla.2d D.C.A. 1995), *review denied*, 671 So.2d 788 (Fla. 1996); Shelter General Ins. Co. v. Lincoln, 590 N.W.2d 726 (Iowa 1999); State Farm Mut. Auto. Ins. Co. v. Daprato, 840 A.2d 595 (Del. 2003); Howe v. Howe, 218 W.Va. 638, 625 S.E.2d 716 (2005); Costello v. Nationwide Mut. Ins. Co., 143 Md. App. 403, 795 A.2d 151, 159-60 (2002).

Several of these courts found that the policy considerations applicable to automobile liability policies are not applicable to umbrella policies, which are optional. *See* Walker v. State Farm Mut. Auto. Ins., 850 So.2d 882 (La. App. 2 Cir. 2003); Bogas v. Allstate Ins. Co., 221 Mich.App. 576, 562 N.W.2d 236 (1997), *appeal denied*, 456 Mich. 925, 573 N.W.2d 620 (1998); Weitz v. Allstate Ins. Co., 273 N.J. Super. 548, 642 A.2d 1040 (1994); State Farm Mut. Auto. Ins. Co. v. Gengelbach, 1992 WL 88025 (D. Kan. 1992) (AA-120 – AA-124); Electric Ins. Co. v. Rubin, 32 F.3d 814 (3d Cir. 1994).

While the district court urged the Minnesota Supreme Court not to be persuaded by this majority of foreign jurisdictions and instead follow the reasoning of the three minority states who have found household exclusions invalid in the context of an

umbrella policy, in doing so, the court went against Minnesota law to change the direction of the state's public policy.

**G. Minnesota's Public Policy Is For The Legislature To Determine, Not The Court**

It is well-settled that courts do not determine public policy, they determine law. It is the function of the legislature to determine public policy. Mattson v. Flynn, 13 N.W.2d 11 (Minn. 1944) (holding that the public policy of the state is determined by the legislature and not the courts, and courts cannot engraft additional limitations into law.)

Neither Bundul nor the district court identified any Minnesota statute that prohibits household exclusions in umbrella insurance policies. The reason is because Minnesota law is clear that a household exclusion is only invalid where it is prohibited by statute. The only basis to prohibit household exclusions in an automobile policy is because specific statutes under Minnesota law mandate owners of motor vehicles to maintain minimum amounts of coverage. *See* Minn. Stat. §§ 60A.06, 65B.44. In furthering this mandate of the legislature, the Minnesota Supreme Court determined that household exclusions would frustrate this statutory requirement and result in no insurance for family members. Beaduette v. Frana, 173 N.W.2d 416 (Minn. 1969). However, the Supreme Court also held that these exclusions were only to be invalidated if prohibited by law. Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829 (Minn. 1979) (upholding the exclusion in homeowners policy as distinguished from automobile policies because "Minnesota law has prohibited householder or family exclusions in automobile liability policies since 1969.")

There is no statutory mandate for coverage in an umbrella policy. Indeed, in American Fam. Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983), the Minnesota Supreme Court limited an insurer's liability to that which was expressly contracted "so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes." Id. Absent a legislative directive, an insurance company is free to exclude from coverage any particular type of risk, person or loss based upon the public policy favoring the parties' freedom to contract. Bobich v. Oja, 104 N.W.2d 19, 24 (Minn. 1960).

To be sure, an umbrella policy is not an automobile liability insurance policy and is not dedicated solely to automobile liability coverage. As the district court recognized, Travelers' umbrella policy itself very plainly shows that it covers multiple types of liability: homeowners', personal, business pursuits, business property, and loss assessment - all in addition to automobile liability coverage. (See AA-99 – AA-112) Thus, it was err for the district court to find the umbrella policy converted into an automobile policy simply because the automobile liability coverage portion of the policy has been implicated as a result of the November 28, 2003 accident.

For the above reasons, the district court was unjustified in assimilating the public policy considerations devoted to automobile liability policies to umbrella policies. The No-Fault Act relied upon by Bundul only applies to automobile liability policies and Bundul failed to show that there is any comparable statute applicable to umbrella insurance policies. Accordingly, the No-Fault statute is not controlling in this matter.

## CONCLUSION

In this case, the Bunduls were afforded insurance coverage through their automobile insurance policy, consistent with Minnesota law, and this type of coverage would not support the household exclusion. The Bunduls also voluntarily chose to purchase an optional, umbrella policy that provided additional coverage over and above their automobile policy. As the coverage afforded by the umbrella policy is not required by statute nor mandated by the legislature, Travelers was well-within its rights to contract with the Bunduls for the specific risks covered and the specific risks excluded.

In ruling that the household exclusion is invalid as applied to the context of an automobile accident, the district court improperly interpreted Minnesota law. Household exclusions have been found to be valid in homeowner's and umbrella policies and not valid in automobile liability policies because the latter policies are governed by statutes mandating owners of motor vehicles to maintain minimum amounts of insurance coverage. The Minnesota legislature simply has not mandated the same coverage requirements for umbrella policies. Not surprisingly then, there are no Minnesota decisions that support the invalidation of the household exclusion clause in an umbrella policy. For this reason, a Minnesota federal court in Luskin, upheld such an exclusion under circumstances similar to this case finding there was no error of state law.

This Court should reaffirm its past decisions, including Luskin, and follow the majority of states in holding that the exclusionary clause in Bundul's PLUS policy is valid and not violative of Minnesota public policy. The district court's Order should be reversed and summary judgment should be entered in favor of Travelers.

Respectfully submitted,

**MURNANE BRANDT**

Date: 9/21, 2007

A handwritten signature in black ink, appearing to read 'D. A. Haws', written over a horizontal line.

Daniel A. Haws #193501

Kari L. Gunderman #317299

30 East Seventh Street, Suite 3200

Saint Paul, MN 55101

(651) 227-9411

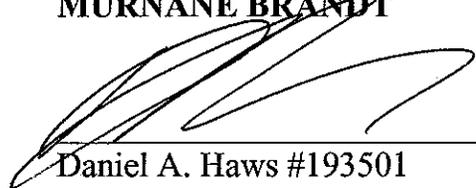
**ATTORNEYS FOR APPELLANT**

**CERTIFICATE OF BRIEF LENGTH**

The undersigned counsel for Appellant certify that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 5,900 words, excluding the Table of Contents and Table of Authorities.

**MURNANE BRANDT**

Date: 9/21, 2007



Daniel A. Haws #193501  
Kari L. Gunderman #317299  
30 East Seventh Street, Suite 3200  
Saint Paul, MN 55101  
(651) 227-9411

**ATTORNEYS FOR APPELLANT**