NO. A07-1866

State of Minnesota
In Supreme Court

STEVEN BRUA et al.,

Respondents,

v.

THE MINNESOTA JOINT UNDERWRITING ASSOCIATION,

Appellant,

RESPONDENTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE

Is appellant's policy provision which defines "pecuniary loss" as included in "bodily injury" and makes pecuniary loss subject to the policy limits for "bodily injury" void and unenforceable?

The Court of Appeals held the appellant's policy provision is void and unenforceable, affirming the trial court.

Respondents' authorities: Minn. Stat. § 340A.409; Minn. Stat. § 340A.801; *Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 149 (Minn. App.1995), *review denied* (Minn. Nov. 21, 1995); *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 871 (Minn. App. 2002).

STATEMENT OF FACTS

The decedent, Michael Brua, lost his life in a motor vehicle accident on December 30, 2003. (A25).[1] He was survived by his mother, Roxanne Brua, his father, Steven Brua, and his brother, Travis Brua, all of whom are respondents in this action. (A25).

The Bruas brought an action pursuant to the Civil Damages Act (Minn. Stat. §340A.801), seeking damages for Michael Brua's death, including pecuniary loss. (A25). The action named "Bend in the Road," a liquor vendor. (A25).

On the day Michael Brua was killed, there was in full force and effect a liquor liability insurance policy, Contract No. LL03-0572, issued by the appellant, Minnesota Joint Underwriting Association ("MJUA") to Bend in the Road. (A25).

A dispute developed as to the amount of coverage MJUA's policy provided for pecuniary loss. (A25). The Bruas contend that under applicable law, the only limit in the MJUA policy that may be applied to pecuniary loss is the $300,000 annual aggregate limit. (A25). The MJUA contends that the amount of available insurance coverage for all pecuniary loss claims by the Bruas is limited to $100,000 under the terms and conditions of the MJUA insurance policy and the applicable statutes. (A25). $100,000 is the amount of the policy's "per occurrence" limit for "bodily injury." (A15)

The Bruas, MJUA, and its insureds agreed to settle the underlying dram shop action with a payment to the Bruas of $108,000 ($100,000 in pecuniary loss and $8,000 in property damage), with the proviso that the dispute concerning the availability of

[1] References to "A*" are to the Appendix to Appellant's Brief.

additional pecuniary loss coverage could be resolved through a declaratory judgment action. The Agreement memorializing that settlement was executed by the Bruas, MJUA, and its insureds. (A27-A30) It provides that the Bruas "have standing to bring a declaratory judgment action against MJUA" to resolve pecuniary loss coverage, and that the Bruas "are assigned any rights that" MJUA's insureds "may have against MJUA in connection with the Brua action." (A26) The Agreement further provides that if the Bruas prevail, MJUA will pay the Bruas an additional $150,000 as compensation for their pecuniary loss. (A26)

The parties' coverage dispute involves a policy provision which seeks to define "bodily injury" as including "pecuniary loss." The provision is contained in a "Minnesota Amendatory Endorsement" on page 8 of the policy, which adds the following "definitions" to the policy:

> **Bodily Injury** means **bodily injury**, sickness, or disease sustained by a person, including death resulting from any of these, <u>and **pecuniary loss**</u>**....**
> **Pecuniary Loss** means loss of aid, advice, comfort, and protection that has a money value other than loss of means of support, resulting from a person's death or recoverable under applicable law.

(A23, emphasis added). The coverage limits stated in the Declarations page are:

BODILY INJURY	$	50,000 EACH PERSON
	$	100,000 EACH OCCURRENCE
PROPERTY DAMAGE	$	10,000 EACH OCCURRENCE
LOSS OF MEANS OF SUPPORT	$	50,000 EACH PERSON
	$	100,000 EACH OCCURRENCE
POLICY PERIOD AGGREGATE LIMIT	$	300,000 ANNUALLY. (A15)

ARGUMENT

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Compensating innocent victims damaged by illegal sales of alcohol has been a goal of the Minnesota legislature for almost 100 years. To insure that there will be at least a minimal pool of money for that purpose when tragedies occur, the legislature has long required liquor establishments to demonstrate financial responsibility for dram shop damages they may cause. If insurance is employed to fulfill this requirement, the policy must provide certain minimum coverages enumerated in Minn. Stat. § 340A.409.

The policy at issue in this case, written by appellant Minnesota Joint Underwriting Association (MJUA), violates the dictates of Minn. Stat. § 340A.409 in two respects. First, the policy fails to provide the mandated coverage for ***bodily injury***. Minn. Stat. § 340A.409 states that the policy must provide at least $100,000 per occurrence coverage for "bodily injury." Minnesota case law holds that, "Pecuniary loss is not bodily injury, and a plaintiff's ability to recover damages for pecuniary loss is not subject to the policy limits for bodily injury." *Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 149 (Minn. App.1995), *review denied* (Minn. Nov. 21, 1995) (emphasis added). The dram shop policy written by the appellant does contain a "bodily injury" sublimit of $100,000. Yet despite the requirements of §340A.409 and *Brault*, the appellant's policy defines "bodily injury" as including "pecuniary loss" and makes "pecuniary loss" claims payable from the statutorily mandated "bodily injury" coverage. (A23, A15). Both the district court and a unanimous Court of Appeals concluded that this merger violates Minnesota law – that pecuniary loss coverage "cannot be merged with bodily injury coverage without defeating the intent of Minn. Stat. § 340A.409 and related case law." (App. Add. 7, 13-14).

This basis for the provision's illegality – that the merged provision illegally dilutes the mandated bodily injury coverage – would be sufficient in and of itself to invalidate the appellant's provision as illegal. District Court Judge Edward Cleary so ruled. (App. Add. 6-8). But in addition to this basis, the Minnesota Court of Appeals also noted a second basis for holding the merged provision illegal. That is that the merged provision violates the requirement implicit in Minn. Stat. § 340A.409 that the policy must include ***pecuniary loss*** damages as a separate item of recovery.

The conclusion that the appellant's merged provision is illegal fully comports with the language of the statute. In a 78-word provision, Minn. Stat. § 340A.409 lists separate, mandated, damage-specific per-person and per-occurrence minimum limits, linking them with the conjunctive word, "and." There is no basis in this statutory language for appellant's claim that the statute requires only a single $100,000 per occurrence limit for all damages, rather than the cumulative limits of at least $210,000 which the statute explicitly requires. If the legislature had intended to mandate just a single per-occurrence limit, it could easily have said so, as it did in past versions of the statute. Since it did not, but instead used a damage-specific list of separate limits, that list must be taken to mean that required "bodily injury" coverage must apply to bodily injury claims.

The appellant has posited numerous rationales for why its provision complies with the law. All of these arguments are invalid. Both the trial court and the Court of Appeals found that an ambiguous phrase on the Department of Public Safety's website was too vague to be an agency interpretation, as asserted by appellant. Both lower courts also found the reasoning of two federal district court cases relied upon by appellant to be unpersuasive due to incomplete analyses. None of the other arguments proffered by appellant can overcome the plain dictates of the statute.

Appellate courts review interpretations of insurance contracts and statutes *de novo*. *Stewart v. Illinois Farmers Ins. Co.*, 727 N.W.2d 679, 683 (Minn. 2007). In this case the decisions of the district court and Court of Appeals were thorough and correct. Accordingly, the respondents respectfully request that the judgment be affirmed.

II. <u>APPELLANT'S POLICY PROVISION FAILS TO PROVIDE THE COVERAGE MANDATED BY MINN. STAT. § 340A.409 AND IS THEREFORE VOID AND UNENFORCEABLE.</u>

A. Background - The Civil Damages Act establishes the context for Minn. Stat. § 340A.409's insurance requirements.

The statute at issue in this case – Minn. Stat. § 340A.409 – is a companion statute to Minnesota's Civil Damages Act (CDA), Minn. Stat. § 340A.801 (also referred to as the Dram Shop Act). The CDA provides a remedy for innocent victims who incur loss as a result of a liquor vendor's illegal sale of alcoholic beverages. In furtherance of that remedy, the statute at issue here, Minn. Stat. § 340A.409, creates a minimum pool of funds to compensate CDA claimants. It does so by requiring liquor licensees to maintain either insurance, a bond, or a cash or securities deposit, which can be accessed by those entitled to damages under the CDA. *See* Minn. Stat. § 340A.409, subd. 1 (requiring applicants for retail liquor licenses to demonstrate "proof of financial responsibility <u>with regard to liability imposed by section 340A.801</u>" by maintaining insurance, a bond, or a deposit of cash or securities) (emphasis added).

Because of this close relationship between the two statutes, the CDA – and the liability it imposes – is the context in which Minn. Stat. § 340A.409 must be read and understood. *See Hahn v. City of Ortonville*, 238 Minn. 428, 437, 57 N.W.2d 254, 261 (1953) (when statutes are closely related to the CDA, deal with the same general problem, and are supplementary to one another as integral parts of a unified plan, "there is an unusually strong reason for applying the rule of statutory construction that when statutes are *In pari materia* they are to be construed harmoniously and together.")

Of particular importance here is that the "liability imposed by" the CDA is damage-specific. Minn. Stat. § 340A.801 gives a right of action to any person "injured in person, property, <u>or</u> means of support, <u>or</u> who incurs other pecuniary loss...." (Emphasis added) This language plainly specifies four distinct types of damages recoverable in a dram shop proceeding, with none of the four categories subsumed within another.

"Pecuniary loss" encompasses the loss of aid, advice, comfort, and protection that a deceased or injured person would have provided. *Lefto v. Hoggsbreath Enterprises, Inc.*, 567 N.W.2d 746, 750 (Minn. App. 1997), *affirmed* 581 N.W.2d 855 (Minn. 1988) (citations omitted). It was added to the CDA as a recoverable damage in 1982.[2] Prior to that addition, for the entire existence of the CDA since its first enactment in 1911, recoverable damages had been limited to injuries to the person, property, and means of support. *See* Minn. Laws 1911, ch. 175, § 1 (codified as Minn. Stat. § 3200 (1913)).

Minnesota courts have always recognized that "pecuniary loss" is entirely separate and distinct from the other CDA damage categories, and consequently could not be recovered prior to its being explicitly added to the statute. *See Beck v. Groe*, 245 Minn. 28, 70 N.W.2d 886, 897 (1955) (pecuniary loss not compensable as an injury to the person); *State Farm Mut. Auto Ins. Co. v. Village of Isle*, 265 Minn. 360, 368-69, 122 N.W.2d 36, 41-42 (1963) ("consequential" damages, such as loss of society and loss of consortium, resulting from personal injuries wrongfully inflicted upon one's spouse, not compensable as injuries to the person); *Jones v. Fisher*, 309 N.W.2d 726, 730-31 (Minn. 1981) (pecuniary loss not compensable as an injury to the person); *Clemas v. Northern State Enterprises, Inc.*, 361 N.W.2d 149, 151 (Minn. App. 1985) (spouse's loss of companionship and aid of her injured husband not compensable as injury to the person).

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[2] In 1982 the legislature amended the Civil Damages Act, then Minn. Stat. §340.95, to add pecuniary loss damages as a category of recoverable damage. 1982 Minn. Laws ch. 528, § 7. The act, however, was erroneously recodified in 1985, thereby omitting the category of pecuniary loss damage. In 1986 the omission was corrected and the pecuniary loss clause reinstated by the Court of Appeals in *Kuiawinski v. Palm Garden Bar*, 392 N.W.2d 899 (Minn. App. 1986), *review denied*, (Minn. Oct. 29, 1986). The 1987 legislature specifically reinstated the pecuniary loss category of damages, and it has continuously remained a part of the statute ever since.

B. **Minn. Stat. § 340A.409 mandates that dram shop insurance policies, including those written by the appellant, provide certain minimum limits.**

Because of the concern that funds be available to compensate innocent victims of illegal sales of alcoholic beverages, the Minnesota legislature has long required that as a condition of obtaining their liquor licenses, liquor establishments must present proof of their financial responsibility for damages that may be awarded under the CDA.[3] The current financial responsibility requirement is codified in Minn. Stat. §340A.409.

The statute allows three options for demonstrating financial responsibility: (1) insurance, (2) filing a bond, or (3) deposit of cash or securities with the commissioner of finance. Minn. Stat. § 340A.409, Subd. 1.[4] The option at issue in this case is the insurance option.

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[3] *See*, e.g., Minn. Stat. § 3117 (1913), requiring applicants for liquor licenses to file proof of a $2,000 bond conditioned upon, *inter alia*, the licensee not selling to "any minor person... any intemperate person nor habitual drunkard," and making the sureties on the bond "liable for any damage or injury caused by or resulting from the violation of any of the conditions thereof," with "the amount recoverable to be measured by the actual damages."

[4] Minn. Stat. § 340A.409 reads in pertinent part as follows: "340A.409. Liability insurance. Subdivision 1. Insurance required. No retail license may be issued, maintained or renewed unless the applicant demonstrates proof of financial responsibility with regard to liability imposed by section 340A.801. The issuing authority must submit to the commissioner the applicant's proof of financial responsibility. This subdivision does not prohibit a local unit of government from requiring higher insurance or bond coverages, or a larger deposit of cash or securities.
The minimum requirement for proof of financial responsibility may be given by filing:
(1) a certificate that there is in effect for the license period an insurance policy issued by an insurer required to be licensed under section 60A.07, subdivision 4, or by an insurer recognized as an eligible surplus lines carrier pursuant to section 60A.206 or pool providing at least $50,000 of coverage because of bodily injury to any one person in any one occurrence, $100,000 because of bodily injury to two or more persons in any one occurrence, $10,000 because of injury to or destruction of property of others in any one occurrence, $50,000 for loss of means of support of

The insurance requirements of Minn. Stat. § 340A.409 apply directly to the appellant's policy in this case. The MJUA is an association created by statute "to provide insurance coverage to any person or entity unable to obtain insurance through ordinary methods if the insurance is required by statute, ... including, but not limited to, liquor liability." Minn. Stat. § 60I.02, Subd. 1. The MJUA's enabling statute states, "Policies and contracts of coverage issued under this section for the purposes of providing liquor liability insurance... <u>must contain at least the minimum coverage required by section 340A.409, subdivision 1</u>, or the local governing unit." Minn. Stat. § 62I.02, Subd. 4 (emphasis added).

C. The appellant's policy failed to provide at least $100,000 for "bodily injury" claims, as mandated by Minn. Stat. § 340A.409.

When insurance is relied upon for demonstrating financial responsibility, Minn. Stat. § 340A.409, Subd. 1 states that the liquor license applicant must file an insurance certificate that includes certain minimum coverages, which are described in a 78-word requirement within the statute. Specifically, this 78-word portion of the statute mandates that the policy must provide:

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any one person in any one occurrence, and $100,000 for loss of means of support of two or more persons in any one occurrence;
(2) a bond of a surety company with minimum coverages as provided in clause (1); or
(3) a certificate of the commissioner of finance that the licensee has deposited with the commissioner of finance $100,000 in cash or securities which may legally be purchased by savings banks or for trust funds having a market value of $100,000. This subdivision does not prohibit an insurer from providing the coverage required by this subdivision in combination with other insurance coverage. An annual aggregate policy limit for dram shop insurance of not less than $300,000 per policy year may be included in the policy provisions."

> at least $50,000 of coverage because of bodily injury to any one person in any one occurrence, $100,000 because of bodily injury to two or more persons in any one occurrence, $10,000 because of injury to or destruction of property of others in any one occurrence, $50,000 for loss of means of support of any one person in any one occurrence, and $100,000 for loss of means of support of two or more persons in any one occurrence;....

Id. (emphasis added). The insurer may also include an "annual aggregate policy limit for dram shop insurance of not less than $300,000 per policy year." Minn. Stat. §340A.409, Subd. 1. Thus Minn. Stat. § 340A.409 explicitly requires appellant's policy to provide at least $100,000 per occurrence coverage for "bodily injury." Minn. Stat. § 340A.409, Subd. 1(1) (emphasis added).

The Declarations Page of appellant's policy does contain a per occurrence sublimit of $100,000 which is purportedly for "bodily injury." (A15). Yet instead of reserving this sublimit for actual "bodily injury" claims, the appellant's policy defines "bodily injury" as including the separate and distinct damage of "pecuniary loss," and makes "pecuniary loss" claims payable from the statutorily mandated "bodily injury" coverage. (A23).

Both the district court and a unanimous Court of Appeals concluded that this merger violates Minnesota law, making the policy's provisions relating to pecuniary loss "void and unenforceable." (App. Add. 8, 10). Both agreed that "if the [appellant] is going to offer pecuniary loss coverage, the coverage must exist independent of unrelated coverages and cannot be merged with bodily injury coverage without defeating the intent of Minn. Stat. § 340A.409 and related case law." (App. Add. 7, 13-14). As discussed *infra*, this conclusion is supported by Minnesota case law holding that, "Pecuniary loss is not bodily injury, and a plaintiff's ability to recover damages for pecuniary loss is not subject to the policy limits for bodily injury." *Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 149 (Minn. App.1995), *review denied* (Minn. Nov. 21, 2995). The conclusion is also supported by the plain language of Minn. Stat. § 340A.409, by numerous canons of construction, and by an examination of former versions of the statute.

D. The appellant's policy failed to include pecuniary loss damages as a separate item of recovery, as mandated by Minn. Stat. § 340A.409.

The above-stated basis for the provision's illegality – that the merged provision illegally dilutes the mandated *bodily injury* coverage – would be sufficient in and of itself to invalidate the appellant's provision. Trial judge Edward Cleary held the provision void and unenforceable on that sole basis. App Add. 6-8.

But as an additional basis for the provisions invalidity, the Court of Appeals also held that appellant's merged provision violates an obligation created by Minn. Stat. § 340A.409 to *pecuniary loss* claimants. (App. Add. 6). The Court of Appeals noted that while Minn. Stat. § 340A.409 does not specifically require separate coverage for pecuniary loss, it does require "proof of financial responsibility with regard to liability imposed by section 340A.801," which includes liability for pecuniary loss. (App. Add. 4). The quoted language thus incorporates into Minn. Stat. § 340A.409 a financial responsibility obligation directly to pecuniary loss sufferers. Specifically, the Court of Appeals concluded:

> If Minn. Stat. §§ 340A.409, subd. 1, and 340A.801 are to be construed to give effect to all of their provisions, the requirement that "proof of financial responsibility with regard to liability imposed by section 340A.801" must be read, at a minimum, to include pecuniary loss damages as a separate item of recovery subject to the aggregate limits required by Minn. Stat. § 340A.309, subd. 1.

(A6). This obligation to pecuniary loss claimants means, at a minimum, that in a policy such as the appellant's which explicitly undertakes to cover pecuniary loss, that coverage must be provided separate from the other minimum mandated coverages. Any attempt to merge it into a different coverage will result in pecuniary loss being recoverable up to the policy's aggregate limit. The obligation also means that any policy which attempts to entirely exclude pecuniary loss coverage would be illegal, again with the result that pecuniary loss would be covered up to the aggregate limit.

The appellant claims that the legislature's addition of pecuniary loss to the CDA in the same session law in which the legislature enacted financial responsibility requirements that omitted mention of pecuniary loss means that the legislature intentionally chose not to require that coverage. Appellant's Brief, pp. 6-7. But on the contrary, the legislature was entitled to deem an explicit requirement unnecessary precisely because it *was* adding pecuniary loss into the "liability imposed by sec. 340A.801." As explained above, as a result of that addition to the CDA, the legislature incorporated financial responsibility for pecuniary loss damages into § 340A.409 by reference.

The appellant also argues that omission of an explicit pecuniary loss coverage requirement from § 340A.409 was not an "apparent legislative oversight" (as concluded by Minnesota Federal District Court Judge Paul Magnuson), and therefore this Court has no basis for correcting the omission. Appellant's brief, pp. 7-8. First, it should be noted that Judge Magnuson, a jurist of extensive experience, was justified in concluding that an "oversight" was at least one logical explanation for the legislature's omission to mention the new damage in its financial responsibility requirements. That the legislature has not amended the statute in response to the judge's observation certainly does not prove the judge was wrong. But regardless of whether the omission was an oversight or the result of the legislature's belief that explicit mention was not necessary in order to mandate the coverage, this Court has the authority to clarify the matter. The respondents respectfully request that this Court adopt the reasoning of the Court of Appeals in concluding that separate pecuniary loss coverage is mandated by Minn. Stat. § 340A.409.

The appellant argues that construing the statute to mandate separate pecuniary loss coverage would improperly favor one class of claimants over another – "dependents" vs. "injured persons." Appellant's Brief, pp. 8-9. Yet the appellant has presented no legal basis for concluding that different treatment of different classes of claimants would be improper here. It is uniquely the legislature's province to make such judgments, and the legislature had a rational basis for such treatment in this case. The CDA does not set up two classes of claimants; its sets up four, and each of the four is treated differently, for justifiable reason. Property damage claimants have the lowest mandated coverage – only $10,000 – as the legislature logically considered harm to property less serious than harm resulting from injury to human beings. Bodily injury claimants and loss of means of support claimants, both of which may run the gamut from mild to severe injuries, each have mandated coverage of "50,000/100,000." Unlike the above three categories, pecuniary loss claimants are by definition victims of what many would consider the most severe loss a person could suffer – the death or catastrophic injury of a loved one such as a husband, wife, child, parent, sibling, or fiancé. Nothing prevented the legislature from concluding that pecuniary loss should be treated differently from other losses by mandating separate coverage for the loss without specifying a particular coverage level.

E. The coverages mandated by Minn. Stat. § 340A.409 cannot be merged under a single $100,000 per occurrence limit.

The appellant claims that § 340A.409's careful, 78-word listing of different limits for different damages is all surplusage because the true intent of the legislature in drafting Minn. Stat. § 340A.409, subd. 1, was simply to mandate a single, per-occurrence limit of $100,000 per year, applicable to all damages. (Appellant's Brief, p. 13; *see* Appellant's Brief, pp. 9-14).

The appellant's proposed construction of Minn. Stat. § 340A.409 cannot be sustained. The statute is clear on its face. It lists several minimum coverages which must each be provided, joining them with the conjunctive word, "and." Some damages require more coverage than others, indicating that the legislature had no intention of lumping them together under a single limit. *Am. Tower, L.P. v. City of Grant,* 636 N.W.2d 309, 312 (Minn. 2001) (if the legislative intent "is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning") (citation omitted); Minn. Stat. § 645.16 ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

Minn. Stat. §340A.409 reflects the plain intent of the legislature that when tragedy strikes as a result of the illegal sale of alcohol, the minimum pot of insurance available to compensate victims must be divided up in a *particular way,* with *certain types of damages compensated in specified minimum amounts.* Case law shows that a single alcohol-related accident often wreaks multiple types of horrendous damages on multiple people. For example, in the recent case of *Urban v. American Legion Dept. of Minnesota*, 723 N.W.2d 1, 3 (Minn. 2006), a single accident left one child paraplegic, one child seriously brain damaged, and killed the children's mother. In a scenario like that in *Urban,* the 78-word insurance requirement of Minn. Stat. § 340A.409, Subd. 1(1) would mandate that a policy provide at least $100,000 for the bodily injury to the two children who were rendered brain damaged and paraplegic, $10,000 in property damage, "and" $100,000 for the children's loss of the support of their deceased mother, for a total of $210,000 in coverage.[5]

The appellant's proposed construction is untenable because it would render the detailed list of minimum coverages in Minn. Stat. § 340A.409 Subd. 1(1) totally superfluous. *See* Minn. Stat. § 645.17(2) (in ascertaining legislative intent, courts presume that "the legislature intends the entire statute to be effective[.]"). *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) ("Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant"); *Urban*, 723 N.W.2d at 5 ("We must presume that every statute has a purpose and that no statutory language should be deemed superfluous or insignificant."). There would be no point to these detailed 78-word requirements if the legislature intended simply to require a minimum $100,000 per occurrence limit.

The appellant's proposed construction is untenable for the additional reason that it would enormously reduce the minimum coverage for innocent victims below that which is provided for in the statute's express wording. When the CDA's provisions are clear as to intent and purpose, courts must "liberally construe the act so as to...advance the remedy." *Lefto*, 581 N.W.2d at 857 (citations omitted). The "remedy to be advanced" is "the protection of innocent third persons injured as a result [of the illegal furnishing of liquor] by providing those persons a claim of civil damage." *Id.* The appellant's

[5] Pecuniary loss coverage must be provided separate from and in addition to this coverage of $210,000, as discussed *supra* in section II.D.

proposed construction would not only pervert the plain language of Minn. Stat. §340A.409, but would also reduce the minimum coverage provided for in its express language by more than 50% – from $210,000 per occurrence to $100,000 per occurrence.

The appellant's contention that the legislature intended Minn. Stat. § 340A.409 simply to require a single limit $100,000 per occurrence policy is also belied by a review of earlier versions of Minnesota's financial responsibility legislation. *See* Minn. Stat. § 645.16(5) (authorizing reference to "former law" to determine legislative intent). Before 1982 Minnesota's financial responsibility statute *did* require a single-limit per occurrence policy applicable to all damages, but thereafter the legislature rejected such a scheme in favor of the current multi-limits requirement of different coverage amounts for different damages.

From 1945 to 1982, Minnesota's then current financial responsibility statute, § 340.12, allowed liquor licensees the financial responsibility option of obtaining insurance in the amount of $10,000 per person, $20,000 per occurrence, if the pertinent municipality agreed. *See* Laws 1945, C 313, s. 1 (reproduced at RA9-RA11), amending Minn. Stat. § 340.12. In 1982 the legislature enacted the financial responsibility requirements which, with a few subsequent amendments, continue in place today. Laws 1982, Ch. 528, Sec. 3 (reproduced at A59-A61). The 1982 law eliminated the prior single-limit per person/per occurrence scheme from Minn. Stat. § 340.12, and in its place enacted Minn. Stat. § 340.11, subd. 21 (the precursor statute to Minn. Stat. § 340A.409), which contained the current *multi-limit damage-specific* policy requirement.

This conscious choice to eliminate a decades-old scheme of single limit policies applicable to all damages, and enact in its place the current multi-limit damage-specific policy requirement belies the appellant's claim that the legislature intended the current version of the statute to have the same meaning as the rejected prior version.

F. Under established Minnesota case law, "pecuniary loss" is not bodily injury and is not compensable from a dram shop policy's "bodily injury" sublimit.

Two Minnesota appellate cases have held that "pecuniary loss" is not a type of "bodily injury" so as to be compensable from a dram shop policy's "bodily injury" limit. The leading case on this issue is *Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 149 (Minn. App. 1995), *review denied* (Minn. Nov. 21, 2995). As here, the *Brault* plaintiffs, who were survivors of a family member allegedly killed due to an illegal sale of alcohol, brought a declaratory judgment action seeking to determine the extent of pecuniary loss insurance coverage. The case involved three different policies. One, issued by Empire Fire & Marine Insurance Company, did not mention "pecuniary loss," but contained a bodily injury sublimit which included coverage for "death." The insurer admitted that its policy covered pecuniary loss, but claimed that the coverage was limited by the policy's sublimit for "bodily injury" damages because "pecuniary loss damages derive solely from claims arising from bodily injury." *Brault*, 538 N.W.2d at 148. The plaintiffs countered that pecuniary loss was not "bodily injury," and consequently the only limit in the policy applicable to pecuniary loss was the policy's annual aggregate limit of $300,000. The Court of Appeals agreed with the plaintiffs. The Court first noted that a pecuniary loss claim was separate and distinct from any claim for the decedent's bodily injuries:

> An action...to recover damages for pecuniary loss is not based on any action the decedent would have had if he or she had survived. Instead, it is an independent action for the plaintiff's own injuries. *See Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 383 (Minn. App.1990), *review denied* (Minn. Mar. 22, 1990.

Id. Because the two are separate and distinct types of claims, the Court rejected the insurer's argument that pecuniary loss was payable from the bodily injury sublimit:

> <u>Pecuniary loss is not bodily injury, and a plaintiff's ability to recover damages for pecuniary loss is not subject to the policy limits for bodily injury</u>. The Braults' claims for pecuniary loss are independent of any action Nancy Brault may have had if she had survived. We conclude that the district court did not err in finding the Empire policy issued to Northland provides pecuniary loss coverage subject only to the policy's aggregate limit of $300,000.

Id. at 149. In concluding that the damages are inherently different, the *Brault* decision is consistent with 50 years of case law under the CDA holding that pecuniary loss is not recoverable as an injury to the person. *See* cases cited *supra* in Section II.A.

An earlier unpublished Minnesota Court of Appeals decision reached the same conclusion. *House v. Saloka,* 1992 WL 358699 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993) ("Since House's pecuniary loss is not 'bodily injury,' her ability to recover damages for this loss is not subject to the policy limits for bodily injury").[6]

[6] A copy of *House v. Saloka* is included in Respondents' Appendix at RA1-RA2. References to "RA *" are to the Respondents' Appendix.

Appellant admits that the "common law," as reflected in *Brault*, "recognizes bodily injury and pecuniary loss as distinct types of damages…." (Appellant's Brief, p. 14). However, the appellant claims *Brault*'s holding is inapposite here because *Brault* held only that bodily injury and pecuniary loss are mutually exclusive pursuant to their "common law" definitions, in the context of a policy that did not define their relationship. Appellant argues that no resort need be made here to *Brault*'s "common law" definitions because the appellant is free to define the terms differently from their common law usage its own policy. (Appellant's Brief, pp. 14-15).

This contention misses two essential points. The first is that the appellant is not free to fashion the terms of its contracts so that they fail to comply with a statutory mandate. *See Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960) (parties are free to fashion the terms of their own contracts "absent legal prohibition or restriction") (emphasis added). The second is that *Brault*'s pertinence to this case is precisely that it *does* set out the "common law" meaning of bodily injury and pecuniary loss in the dram shop context. **In so doing, *Brault* establishes the meaning of the phrase "bodily injury" in Minn. Stat. § 340A.409.** One of Minnesota's prime canons of statutory construction is that "words and phrases are construed according to … their common and approved usage…." Minn. Stat. § 645.08(1). In accordance with this canon, because common usage, as recognized in *Brault*, holds that pecuniary loss is not bodily injury and is not compensable from a policy's bodily injury sublimit, the same is true of Minn. Stat. § 340A.409's mandated $100,000 per occurrence for "bodily injury." *Brault* supplies the meaning of "bodily injury" for the purposes of understanding the parameters of that mandated coverage in Minn. Stat. § 340A.409.

The appellant cannot circumvent a statutory mandate to provide $100,000 in "bodily injury" coverage by redefining "bodily injury" in an eccentric manner that is completely at odds with the common law (and therefore the statutory) meaning. This rule has been recognized specifically in the dram shop insurance context. In *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 871 (Minn. App. 2002), the court held that a dram shop policy's definition of a mandated damage coverage (in that case "loss of means of support") had to be co-extensive with case law interpretations of that damage category in the dram shop context, because, "insurance coverage required by law must not be omitted from a policy and policy provisions must not contravene applicable statutes."[7] The rule also comports with common sense. If a hypothetical merchant is required by statute to sell "10 elephants," that merchant cannot fulfill that obligation by defining "elephants" as also including "bears" and then selling 5 elephants and 5 bears.

Because decades of law, culminating in *Brault*, holds that pecuniary loss is not bodily injury, the appellant cannot override that definition in its policy and still comply with the statutory mandate to supply a certain minimum coverage for "bodily injury."

[7] The court in *Britamco* determined that the particular damage sought by the plaintiff was not a "loss of means of support," but instead was a type of "bodily injury" subject to the policy's bodily injury sublimit. *Britamco*, 649 N.W.2d at 871-72.

G. Because appellant's provision violates the law, it is void and unenforceable.

As noted before, it is a basic tenet of Minnesota dram shop law that "insurance coverage required by law must not be omitted from a policy, and policy provisions must not contravene applicable statutes." *Britamco*, 649 N.W.2d at 871. Because appellant's provision violates Minn. Stat.§ 340A.409, the district court and Court of Appeals concluded that the provision is void and unenforceable. (App. Add. 8, 10). This conclusion is supported by long-standing Minnesota case law. *See Shank v. Fidelity Mut. Life Ins. Co.*, 221 Minn. 124, 21 N.W.2d 235, 237-38 (1946) (court held that an exclusion which violated a statute offended public policy and was void, even as against a claimant to whom the exclusion might have been legally applied had it been properly drafted); *see also Onstad v. State Mut. Life Assur. Co.*, 226 Minn. 60, 32 N.W.2d 185 (1948).

III. ALL OF THE APPELLANT'S CLAIMED RATIONALES FOR ITS POLICY'S ILLEGALITY ARE INVALID.

Minnesota law requires the appellant to provide at least $100,000 in bodily injury coverage in its policy, and explicitly holds that pecuniary loss *cannot* draw on that coverage. *See*. Minn. Stat. § 340A.409, Subd. 1; *Brault*, 538 N.W.2d at 149. Despite these clear edicts, the appellant's policy does precisely what is prohibited. It requires pecuniary loss claims to draw on and dilute the minimum $100,000 that the law mandates must be available for true bodily injury claims, instead of providing pecuniary loss coverage as a separate sublimit Appellant's policy also violates the financial responsibility obligation to pecuniary loss victims imposed by Minn. Stat. § 340A.409. The appellant's attempts to rationalize away the illegality of its merged provision are all invalid.

A. The Brua's case is not based upon any claimed ambiguity in the policy, but rather on its failure to comply with applicable law.

The appellant claims that its policy is "clear and unambiguous" and the court therefore cannot "rewrite" it. (Appellant's Brief, p. 14). This ignores the fact that the appellant's policy, even if it is clear, must comply with the law. Parties are only free to fashion the terms of their own contracts "absent legal prohibition or restriction." *Bobich*, 258 Minn. at 294, 104 N.W.2d at 24. (emphasis added). The appellant's enabling statute explicitly requires the appellant to include in its policy the minimum coverage required by Minnesota's "financial responsibility" law, Minn. Stat. § 340A.409. Minn. Stat. § 62I.02, Subd. 4. Thus the appellant was not free to ignore the dictates of this law, nor of case law construing dram shop terminology. In the dram shop area, "insurance coverage required by law must not be omitted from a policy and policy provisions must not contravene applicable statutes." *Britamco*, 649 N.W.2d at 871. XXX

The dictate that dram shop insurance coverage comply with the financial responsibility law is particularly crucial in the context of the appellant MJUA and its clients. The MJUA is the insurer of last resort, providing coverage to dram shops who cannot obtain it "though ordinary methods." Minn. Stat. §62I.02, Subd. 1. The dram shops have no power to negotiate terms and no choice to go to a different insurer. Given that these dram shops are uninsurable by ordinary means, as a practical matter they are the least likely establishments to be financially responsible for damages to the public caused by their illegal acts. Thus it is all the more important that the MJUA's policy comply fully with the mandatory minimum insurance requirements.

B. When a policy provides pecuniary loss coverage, it must do so in a legal fashion.

The appellant argues that it is not required to provide coverage for pecuniary loss, and therefore it is free to handle that coverage in any way it chooses. (Appellant's Brief, p. 16). As discussed *supra* in Section II.D, appellant's policy *is* required to provide coverage for pecuniary loss. But even if that were not so, appellant's argument still fails. *Brault* established more than a decade ago that when a policy does cover pecuniary loss, it must be handled in a legal fashion, and if no legal sublimit exists, the court will not hesitate to find that pecuniary loss is covered up to the policy's aggregate limit. *Brault*, 538 N.W.2d at 149; *see also House*, 1992 WL 358699 (reaching same conclusion).

The appellant seeks to rationalize its merged provision by arguing that it is nothing but a boon to the public for appellant to extend the definition of "bodily injury" to include pecuniary loss. (Appellant's Brief, pp. 9, 16). But merger of the two categories is not only illegal – it is also unfair to both types of claimants, and is an invitation to litigation. A merged provision like appellant's dupes both types of claimants into believing they have coverage that they don't have. Bodily injury claimants are duped because the law entitles them to a full $100,000 in coverage and the appellant's Declarations page seems to provide that, but in fact a policy endorsement reduces that coverage, diverting some of it to persons who do not have true bodily injury claims. Pecuniary loss claimants are also duped. Those who rely only on the appellant's Declarations page will wrongly believe there is no pecuniary loss coverage at all, to the appellant's advantage. Pecuniary loss claimants who learn that there is coverage should be able to rely on the level the policy seems to provide for them, but in fact cannot, as bodily injury claimants may insist that they be given the priority right to the bodily injury funds that the law grants them. Because of the likelihood that the apparent coverage under the merged provision might not actually be extended, both the district court and the Court of Appeals referred to it as "illusory" coverage:

> [T]he [l]egislature could not have intended to allow illusory coverage by an underwriter's merger of two listed, but unrelated, components of coverage under one specific, statutorily mandated limit.

(*Brua* Court of Appeals decision, App. Add. 15, *quoting Brua* district court opinion, App. Add. 8.)

Faced with the appellant's policy, some claimants will be unaware of their rights, to their disadvantage. All claimants may be forced into litigation to resolve what should have been clear and legal in appellant's policy in the first place.

Illegality in a statutorily mandated policy is a troubling occurrence that should not be overlooked. This policy is utilized by the appellant in every dram shop policy transaction in which the appellant is involved. It should provide the mandated coverage, not a penny less.

Appellant's use of a merged provision is not authorized by *Lynch ex rel. Lynch v. American Family Mut. Ins. Co.*, 626 N.W.2d 182, 190 (Minn. 2001), as claimed by the appellant. *Lynch* allowed an insurer to provide underinsured motorist coverage under circumstances in which it was not required by the No-Fault Act. *Lynch* is distinguishable from this case because there was no concern in *Lynch* that an insurer's use of a broader definition would dilute and divert funds intended for other types of claimants.

C. A one-sentence ambiguous summary on the Department of Public safety website addressing a type of policy not involved here does not govern this case.

The Department of Public Safety (DPS) website contains, in its instructions on how to obtain a liquor license, the following brief, ambiguous summary regarding liquor liability insurance: "The minimum limits of the policy are $100,000 and a $300,000 aggregate per policy year per licensed location." (A32). The appellant claims that this remark constitutes an agency "interpretation" which is entitled to deference. (Appellant's Brief, pp. 13-14). Both the district court and the Court of Appeals disagreed.

In the first instance, the statement in the DPS website is ambiguous. Does it mean that the "minimum limits" of a dram shop policy are $100,000 per *occurrence*, or $100,000 per *type of damage*? The Court of Appeals "declined to interpret this vague language as an agency's interpretation of its own 'regulation.'" (App. Add. 7).

Second, if the statement is read as authorizing a single-limit per occurrence policy of $100,000, it is irrelevant to this case. The appellant's policy is not a single-limit per occurrence policy. It is one with multiple-limits. Two federal cases cited by the appellant itself explicitly recognized this as a distinguishing difference. *Scottsdale Ins. Co. v. Wohlsol, Inc.*, 2005 WL 2972997 at *5, n.4 (D. Minn. Nov 07, 2005) (cases regarding policies that "specifically listed separate limits for each distinct component of damages" are "distinguishable" from those in which the "policy lists one limit for all injury"); *Peterson v. Scottsdale Ins. Co.*, 409 F.Supp.2d 1139, 1149, n. 6 (D. Minn. 2006) (case involving policy with separate limits for different damages not "apposite" to one involving policy with single occurrence limit) (cases cited at Appellant's Brief at 12-14).

Furthermore, in the context of the entire DPS website, it is immediately obvious that the brief phrase excerpted by the appellant was intended to be more of a rough summary than a comprehensive "interpretation." The phrase is found in a 3-page section entitled, "Steps To Follow to Apply To State of MN For a Liquor License." (A31-A33) By contrast, elsewhere in the same DPS website the actual insurance requirements of Minn. Stat. § 340A.409 are set forth fully. This occurs in the section entitled, "Frequently Asked Questions About Alcohol Enforcement," under the subheading entitled, "What is my liability as a license holder? Do I have to have insurance? Dram Shop/Third Party Liability Insurance." (RA3-RA8). There the website states:

> No retail license may be issued, maintained or renewed unless the applicant demonstrates proof of financial responsibility with regard to liquor liability. This may be given by filing:
> a. A certificate that there is in effect for the license period an insurance policy or pool providing at least:
> - $50,000 of coverage because of bodily injury to any one person in any one occurrence,

- $100,000 because of bodily injury to two or more persons in any one occurrence,
- $10,000 because of injury to or destruction of property of others in any one occurrence,
- $50,000 for loss of means of support of any one person in any one occurrence ***and***
- $100,000 for loss of means of support of two or more persons in any one occurrence;....

(RA7-RA8) (emphasis added).

Thus the brief, unclear summary phrase relied upon by the appellant is too casual and too ambiguous to be considered an agency "interpretation." It is not an agency rule, passed with the procedural protections afforded by Minnesota's rule-making process. It is also not a fully developed position taken by the DPS in the context of a contested case hearing or lawsuit regarding this specific policy. It is merely a brief, short-hand notification to potential licensees that minimum insurance is required, with the details of the requirements spelled out elsewhere in the DPS website.

Even if the phrase relied upon by the appellant were in fact a full-blown agency interpretation that was applicable to this case (which the Bruas deny), that interpretation would merely be entitled to "deference." *See Estate of Marion Atkinson v. Minnesota Dep't of Human Servs.* 564 N.W.2d 209, 213 (Minn. 1997) (regarding interpretation which had been given in course of a contested case hearing, reviewing court stated, "We ...grant deference to the agency's interpretation of its governing statute"). However, the court may refuse to adopt even such a full-blown agency interpretation if it "is erroneous and in conflict with the expressed purpose of the statute and intention of the legislature."

Beck, 245 Minn. at 43, 70 N.W.2d at 897. *See also Shank v. Fidelity Mut. Life Ins. Co.*, 221 Minn. 124, 21 N.W.2d 235, 238 (1946) (commissioner of insurance lacked the power to change or waive the plain provisions of the statute). Where, as here, the purported agency interpretation is at odds with the express statutory language, the law provides that the statutory language must prevail.

Because the DPS statement relied upon by the appellant addresses a type of policy different from that involved in this case, and is an ambiguous rough summary rather than a full-blown, well thought out agency interpretation, and because the statement is at odds with the statutory language, the statement carries no weight in this case.

D. Two federal cases ruling on single-limit $100,000 per-occurrence policies do not govern this case.

The federal district court cases of *Scottsdale Ins. Co. v. Wohlsol*, 2005 WL 2972997 (D.Minn. Nov 07, 2005) and *Peterson v. Scottsdale Ins. Co.*, 409 F.Supp.2d 1139 (D.Minn. Jan 12, 2006) relied upon by appellant (App. Br., pp. 12-14) are distinguishable from this case and have no persuasive value.

Wohlsol and *Peterson* both addressed whether a single-limit $100,000 per occurrence policy was allowed. This case, by contrast, deals with a multiple-limits policy. Both *Wohlsol* and *Peterson* explicitly recognize that this is a crucial distinguishing difference. *Wohlsol* acknowledged that both *Brault* and *Britamco*, while not "squarely addressing the issue," "could be understood as sanctioning an interpretation of Minn. Stat. §340A.409 that <u>requires separate minimum limits for each distinct</u>

component of damages, which can then be added together to arrive at one total minimum limit." *Wohlsol* at *5, n. 4 (emphasis added). *Wohlsol* then proceeded to *distinguish Brault* and *Britamco because they were multiple limits policies.* Specifically, *Wohlsol* stated that *Brault* and *Britamco:*

> are distinguishable from the instant case because the insurance policies in *Brault* and *Britamco* specifically listed separate limits for each distinct component of damages, while the Scottsdale policy lists one limit for all injury caused by serving alcohol to one person.

Id. *Peterson* also held that *Brault* was not "apposite," in part because, "Unlike the circumstances in *Brault*, Scottsdale's insurance policy is a single occurrence limit of $100,000, irrespective of the type of damages being claimed…." *Peterson*, 409 F.Supp.2d at 1150, n. 6. Thus based on the analyses of *Wohlsol* and *Peterson* themselves, *Brault* and *Britamco do* govern this case, while *Wohlsol* and *Peterson* are distinguishable because they address only a single-limit per-occurrence policy.

Even if they had been applicable, *Wohlsol* and *Peterson* are of no value here because neither decision considered certain matters that were critical to their analyses. Both cases construed Minn. Stat. §340A.409 as allowing a $100,000 per occurrence limit because they concluded the legislature could not have intended to require cumulative insurance of $210,000. Both cases noted that dram shops who choose to satisfy their financial responsibility requirement with the third alternative – that of depositing cash or securities with the Commissioner of Finance – must only deposit $100,000,[8] and

[8] Minn. Stat. §340A.409, Subd. 1 ("The minimum requirement for proof of financial

concluded that the legislature could not have intended to require that dram shops who purchase insurance must provide a larger pool for potential victims ($210,000 total) than dram shops who deposit cash or securities. *See Wohlsol*, at *5 ("The legislature could not have intended such an incongruous result"); *Peterson*, 409 F. Supp.2d at 1148 ("Such an interpretation would be unreasonable, if not absurd").

In fact, there is a very logical reason for the legislature's choice to treat the two types of dram shops differently, a reason that was never considered in *Wohlsol* or *Peterson*, but that was found appropriate and persuasive by both the trial court and the Court of Appeals. (App. Add. 7-8, 14). The legislature was entitled to conclude *that when a vendor has the wherewithal to deposit $100,000 in cash or securities with the commissioner of finance*, as opposed to making the much smaller cash outlay needed for insurance premiums (in the subject case the estimated premium was under $4,000[9]), it is sensible to treat that vendor differently with regard to its mandated demonstration of responsibility. Quite simply, the vendor who can afford to tie up $100,000 in cash or securities is far more likely to be solvent with respect to claimant's judgments. Therefore the total amount *guaranteed* to all claimants of such a vendor in a single year –$100,000 – may be lower than the multiple coverages and $300,000 aggregate limit guaranteed in dram shop insurance policies. By contrast, for vendors who choose the much less

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responsibility may be given by filing…(3) a certificate of the commissioner of finance that the licensee has deposited with the commissioner of finance $100,000 in cash or securities which may legally be purchased by savings banks or for trust funds having a market value of $100,000.")

[9] *See* A15, Liquor Liability Policy, Declarations page (estimated premium of $3,986.20).

expensive insurance option (in this case costing less than 4% of a $100,000 cash deposit), larger and more detailed financial responsibility requirements are in order.

Furthermore, *Peterson* and *Wohlsol* ignore the fact that even under their own construction, there would not be parity between the victims of insured dram shops versus those which make a cash or securities deposit, due to the minimum $300,000 aggregate insurance limit expressly provided for in Minn. Stat. § 340A.409. By reason of that aggregate, victims of insured dram shops who have been injured in different occurrences will have at least $300,000 coverage. In contract, victims from multiple occurrences caused by dram shops who chose the cash/securities option will have only $100,000 in total proceeds. Appellant's argument is not aided by its citation to *Babcock v. Liedigk*, 198 Mich. App. 354, 497 N.W.2d 590 (Mich. App. 1993). That case concluded that Michigan's differently worded statute did not require an aggregate insurance limit in an amount greater than the cash/securities requirement. By contrast, it is undisputed that Minnesota's statute *does* explicitly provide for a greater aggregate limit ($300,000) than its cash/securities requirement ($100,000). Accordingly *Babcock* has no pertinence here. It is simply a construction of an entirely different statute.

Examination of the predecessor statutes to Minn. Stat. § 340A.409 demonstrates that as far back as 1945 the legislature made a *conscious decision* to require more insurance coverage than the amount of a cash/securities deposit, if insurance was used to demonstrate financial responsibility. *See* Minn. Stat. § 645.16(5) (authorizing reference to "former law" to determine legislative intent). In 1943, when the legislature first offered insurance as an option for demonstrating financial responsibility, the insurance requirement was the same dollar amount as the cash/securities requirement -- between \$3,000 to \$5,000, as the local governing body of the municipality determined. Laws 1943 c. 568 s. 1, amending Minn. Stat. § 340.12. In 1945 the legislature changed the law to require *more* insurance than cash/securities. While the cash/securities deposit amount remained unchanged, the municipalities were given the option of allowing the filing of a liability insurance policy which "shall be in the amount of \$10,000 coverage for one person and \$20,000 coverage for more than one person…." Laws 1945, C. 313, s. 1, amending Minn. Stat. § 340.12. (Copy included at RA9-RA11). In 1982 the legislature adopted the essentials of its current scheme. It increased the dollar amounts of all of the financial responsibility requirements, while at the same time keeping the amount of required insurance larger than the required cash/securities deposit.

Thus in 1945 the legislature specifically moved away from a statutory scheme in which equal amounts were required for demonstrating financial responsibility by the three available options (insurance, bond, and cash/securities), and instead enacted a scheme in which the required insurance was larger. This conscious movement away from an earlier "equal amounts" scheme belies the appellant's claim that the legislature could not possibly have intended to impose different insurance vs. cash/securities amounts in the current scheme.

Finally, the value of *Peterson* and *Wohlsol* is further limited because both cases considered the meaning of Minn. Stat. § 340A.409 essentially as *dicta*. Both held as a threshold determination that the statute did not apply to private insurers such as the one involved in those cases. *Peterson*, 409 F. Supp.2d at 1145-47; *Wohlsol*, at *5. The *Peterson* court explicitly noted that the threshold determination "in and of itself" warranted summary judgment, and that the court was proceeding to the issue of whether the policy actually complied with Minn. Stat. §340A.409 merely "in the interest of completeness." *Peterson*, 409 F. Supp.2d at 1147 By contrast, in this case there is no question that Minn. Stat. §340A.409 applies and binds all policies issued by the MJUA, per explicit statutory requirement. Minn. Stat. §621.02, Subd. 4

The two federal cases would not be precedential in any event. But given that they are distinguishable on their own terms, have incomplete analyses, and dealt with the subject issue only as dicta, they are of no persuasive value in this case.

E. A comparison of Minn. Stat. § 340A.409 with the insurance requirements of Minnesota's No-Fault Act supports the conclusion that the required dram shop coverages are cumulative.

The appellant argues that the legislature's omission to specify that the limits mandated by § 340A.409 must be "stated" or "separate," as in portions of Minnesota's No-Fault Act, indicates that the legislature intended that the dram shop limits could be lumped together in a single per-occurrence $100,000 limit. (Appellant's Brief, p. 7). In fact, an examination of the provisions of the No-Fault Act referenced by the appellant supports the opposite conclusion – that the dram shop mandatory limits *are* cumulative.

The uninsured/underinsured provision of the No-Fault Act requires that policies provide "separate uninsured and underinsured motorist coverages." Minn. Stat.

§ 65B.49, Subd. 3a. Appellant concedes that the requirements for these two coverages are cumulative, and asserts this is so because the word "separate" is included. (Appellant's Brief, p. 7).

Appellant also points to the motor vehicle liability insurance requirement of Minn. Stat. § 65B.49, Subd. 3. Like Minn. Stat. § 340A.409, this provision requires mandatory minimum coverages for bodily injury ($30,000/$60,000) and for injury to or destruction of property ($10,000).[10] The appellant concedes that these limits are cumulative, but claims this is only so because the statute requires that the limits be "stated." (Appellant's Brief, p. 7). In other words, the appellant concludes that "stated" is a synonym for "separate."

In fact, "stated" is not a synonym for "separate." Webster's Online Dictionary defines "stated" as "declared as fact; explicitly stated." Thus the requirement that limits be "stated" simply means they must be explicitly set down, not that they must be separate or cumulative. (The requirement that the limits be "stated" would presumably prohibit a policy that indicates it is providing the "minimum mandatory limits," without stating dollar amounts.)

[10] Minn. Stat. § 65B.49, Subd. 3 reads as follows: "Residual liability insurance. (1) Each plan of reparation security shall also contain stated limits of liability, exclusive of interest and costs, with respect to each vehicle for which coverage is thereby granted, of not less than $30,000 because of bodily injury to one person in any one accident and, subject to said limit for one person, of not less than $60,000 because of injury to two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, of not less than $10,000 because of such injury to or destruction of property of others in any one accident."

The motor vehicle liability insurance requirements are admittedly cumulative, despite the absence of an explicit requirement that they be "separate." The same holds true of the dram shop insurance requirements of § 340A.409. In both instances the statute provides a list of specific minimum limits for different types of damages, linking the list with the conjunctive word "and." Such a construction is sufficient to denote that the limits are cumulative, without the necessity of the word "separate."

F. Minn. Stat. § 340A.409 does not authorize "blending."

Appellant claims that "blending" of pecuniary loss into the mandated bodily injury coverage is authorized by a sentence in Minn. Stat. 340A.409, subd. 1 which reads, "This subdivision does not prohibit an insurer from providing the coverage required by this subdivision in combination with other insurance coverage." (Appellant's Brief, p. 16).

As a threshold matter, the appellant has waived this argument by failing to make it before the trial court or the Court of Appeals. Appellant argues this for the first time in a single sentence on page 16 of its Brief to the Minnesota Supreme Court, and will have the opportunity to make a more extended argument in its Reply brief, to which the Bruas will have no chance to respond. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reviewing court may generally only consider those issues presented to and ruled on by lower court).

More importantly, the argument itself has no merit. Both logic and legislative history indicate the sentence was not intended to allow "blending" of other coverages (such as fire or premises coverage) into the coverage limits of the mandated 340A.409

coverages, effectively diluting and eliminating them. Rather, the sentence merely allowed the mandated dram shop coverages – with their own limits intact – to be included in a "multiline policy" with other types of coverage such as general liability or fire insurance.

The sentence was added to Minn. Stat. 340A.409's predecessor statute in a bill that was approved on June 7, 1985 and was made effective the day following enactment. Laws 1985, c. 309, sec. 7. (RA15) Less than three weeks later, on June 24, 1985, the Department of Commerce proposed rules related to the Liquor Liability Assigned Risk Plan and the Market Assistance Plan for Liquor Liability Assistance. 9 S.R. 2735 – 2742 (reproduced at RA23-RA230). Those rules authorized dram shops to seek two different types of policies: a "monoline liquor liability policy" which "refers to a policy for only liquor liability insurance without any other type of coverage," or a "multiline liquor liability policy," which is "liquor liability insurance offered in conjunction with other types of coverage such as general liability insurance, or fire insurance offered in a single package policy." 9 S.R. 2737-38, 2740. (RA23-RA24, RA28). (The Rules were approved on Monday, September 2, 1985. 10 S.R. 592.)

This timing indicates that the sentence relied upon by appellant was simply intended to provide unquestioned statutory authority for multi-line policies. Appellant's proposed construction – that the language authorized liquor vendors to mix and combine other coverages under the *same limits* as the required coverages – is untenable, as it would eviscerate the requirement of liquor liability insurance.

Additionally, as previously discussed, pecuniary loss is mandated by Minn. Stat. § 340A.409, and therefore is not an "other insurance coverage" which would ever come within the purview of the sentence relied upon by appellant.

G. This Court is entitled to reach the question of the policy's compliance with the statute.

The appellant asserts that respondents' arguments about illegality of the policy depend upon a "hypothetical set of facts" involving multiple claimants, which appellant claims "raises the question of whether it was even appropriate for the lower courts to reach the question of whether the policy complied with the statute." (Appellant's Brief, 16-17).

There is no little irony in appellant's seeking to block consideration of the policy's illegality, given that appellant's proffered basis for obtaining review by this Court was the need for the Court to speak on this issue to resolve conflict among the courts. Furthermore, this argument was roundly rejected by the lower courts. As District Judge Edward Cleary pointed out, the parties' settlement authorized the Court to reach the issue of the policy's illegality. The settlement authorized the Bruas to bring a declaratory judgment action on this specific issue, confirmed that the Bruas have standing to bring the action, and stated in pertinent part:

> If Plaintiffs prevail in the declaratory judgment action by establishing that under applicable law the only limit in the policy that may be applied to pecuniary loss is the $300,000 annual aggregate limit, the MJUA will pay an addition sum of $150,000 to Plaintiffs for pecuniary loss

(A26). This procedural posture, combined with substantive issues before the Court, led Judge Cleary to reason as follows:

> Finally, Defendant suggests that even if the Court finds the merger of pecuniary loss and bodily injury coverage void and unenforceable, as it does, it should look the other way in this case because of the lack of bodily injury damages here. The Court declines to do so and notes that it is settling an issue of statutory interpretation and insurance coverage, and it is not making any equitable finding as to damages actually awarded in this case. Any payments made by the Defendant to the Plaintiff in settlement of this matter either before or after this decision, are being made pursuant to an agreement of the parties.

(App. Add. 8).

Furthermore, as discussed previously, the appellant owed a financial responsibility obligation not just to bodily injury claimants, but also directly to pecuniary loss claimants to provide separate coverage limits. *See supra*, Section II.D.

H. The illegality of appellant's policy is different from exhaustion of limits.

Appellant argues that any policy limit may be exhausted before full compensation of all claimants, and that this fact justifies appellant in diverting funds intended for certain claimants to others. (Appellant's Brief, p. 17). While it is certainly true that any policy limit may be exhausted before there has been full recovery, that universal fact does not justify an insurer's draft of an illegal provision.

I. Reformation is not an appropriate remedy here.

The appellant argues for the first time in a footnote on the last page of its brief that the appropriate remedy for any illegality in its policy would be reformation. (Appellant's Brief, p. 18, n. 5).

Once again, the argument is waived due to appellant's failure to raise it in the lower courts. *See Thiele,* 425 N.W.2d at 582. In fact, the appellant has argued fervently at every juncture, and does so again in the subject brief, that the Court cannot and should not re-write the appellant's policy – the one issue on which appellant and respondents agree. *See* Appellant's Brief, p. 14. The issue of waiver is particularly acute here because reformation of a policy is an equitable remedy that generally requires a full trial to the court. *See Glaser v. Alexander*, 247 Minn. 130, 140, 76 N.W.2d 682, 688 (1956).

Appellant cites *Watson v. United Services Auto. Ass'n.*, 566 N.W.2d 683 (Minn. 1997), as authority for reformation in this instance. But *Watson* is inapposite. In that case, involving a fire policy which failed to conform to the statutorily mandated form fire policy, it was the *insured* who sought reformation. The appellant has not produced any authority that the *insurer* may seek reformation of its own illegal policy as a tactic against an insured.

J. Policy arguments made by the MDLA must be directed to the legislature.

The Minnesota Defense Lawyers Association's Amicus Brief argues that a decision in the Bruas' favor will result in increased premiums. The MDLA provides no factual basis for that conclusion. But in any event, that is a policy argument which must be addressed to the legislature, not the Court. It is the job of this Court to enforce the statute as written by the legislature, which is uniquely able to weigh matters of financial impact upon the insurance industry.

The MDLA also argues that the court's decision would "retroactively" impose obligations upon insurers. (MDLA Brief, p. 5). This argument has no merit, since the statute which insurers are asked to comply with has been in effect since 1982. Furthermore, the MDLA cannot argue that it was previously unaware of the alleged illegality of certain policies, such as those with single per occurrence limits of $100,000. The illegality of such policies has long been put forward by the plaintiffs' bar. In fact, this very issue was raised in the *Brault* case, though the court did not reach the issue. It is disingenuous for the insurance industry to now seek to benefit from any supposed confusion regarding the statute's construction, given that at least one insurer made express efforts to prevent the Minnesota Supreme Court from considering and resolving the issue as a final matter. *See Wohlsol,* *2 (insurer opposed certification).

CONCLUSION

For the reasons stated above the Bruas respectfully request that the judgment of the Court of Appeals be affirmed.

Dated this 24th day of March, 2009.

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CERTIFICATE OF COMPLIANCE

This brief conforms to the requirements of Minn.R.App.P. 132.01, subds 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 12,387 words. This brief was prepared using Microsoft Word 2003 software.

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