

NO. A09-1506

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State of Minnesota  
**In Supreme Court**

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Bruce Thompson, et al.,

*Appellants,*

v.

Western National Insurance Company,

*Respondent.*

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**BRIEF AND APPENDIX OF AMICUS  
MINNESOTA ASSOCIATION FOR JUSTICE**

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Mark A. Karney (#53855)  
1300 Nicollet Avenue  
Suite 3042  
Minneapolis, MN 55403  
(612) 338-3100

*Attorney for Appellants*

Sharon L. Van Dyck (#183799)  
VAN DYCK LAW FIRM, PLLC  
5354 Parkdale Drive, Suite 103  
St. Louis Park, MN 55416  
(952) 746-1095

*Attorney for Amicus Curiae  
Minnesota Association for Justice*

STEMPEL & DOTY, PLC  
Richard S. Stempel (#161834)  
John C. Syverson (#0387068)  
41 Twelfth Avenue North  
Hopkins, MN 55343  
(952) 935-0908

*Attorneys for Respondent*

Matthew M. Johnson (#27723X)  
JOHNSON & CONDON, P.A.  
7401 Metro Boulevard, Suite 600  
Minneapolis, MN 55439-3034  
(952) 831-6544

*Attorney for Amicus Curiae  
Insurance Federation of Minnesota*

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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## **STATEMENT OF LEGAL ISSUES**

1. Does the Minnesota No Fault Act permit an automobile insurer to condition payment of No Fault benefits on an insured giving an Examination Under Oath (EUO) under any and all circumstances?
2. Who decides, an arbitrator or a Court, if an insurer's request for and and/or an insured's failure to attend an EUO is reasonable?

## **ARGUMENT<sup>1</sup>**

As this court has noted, the Minnesota No Fault Act, is “comprehensive legislation designed to both simplify and ease the burden of litigation in efforts to compensate”<sup>2</sup> persons injured in automobile accidents. To achieve the Act's stated goals, the legislature “has imposed certain obligations on both the benefit claimant and the insurer.”<sup>3</sup> The interplay between the obligations and benefits conferred by the Act is designed to balance the legitimate interests and concerns of both.

The Court of Appeals analyzed the legal impact of an Examination Under Oath (EUO) requirement contained in a Minnesota automobile insurance policy from the historical perspective of the

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<sup>1</sup> Sharon L. Van Dyck, who is affiliated with no Party, authored this brief in its entirety. No monetary contributions were made to the preparation or submission of this brief other than those of MNAJ and its counsel.

<sup>2</sup> *Neal v. State Farm Mut. Ins. Co.*, 529 N.W.2d 330, 333 (Minn. 1995); Minn. Stat. § 65B.42, subds. 1 and 4.

<sup>3</sup> *Neal*, 529 N.W. 2d at 333.

common law of contracts, rejecting the notion that the *quid quo pro* of benefits and responsibilities created by the No Fault Act controls the outcome. In light of the comprehensiveness of this legislative scheme, the Court of Appeals' analytical approach was flawed. It is important that this Court clarify the appropriate use of an EOU, just one of many tools, within the overarching legislative scheme of the No Fault Act.

**I. THE COURT OF APPEALS' INTERPREATION OF THE EUO PROVISION IN WESTERN NATIONAL'S INSURANCE POLICY IS AT ODDS WITH THE MINNESOTA NO FAULT ACT AND LONG STANDING PUBLIC POLICY.**

Western National's insurance policy states that Western National has "no duty to provide coverage" under its policy "unless there has been full compliance with the following duties:

- B. A person seeking any coverage must:
  - 3. Submit, as often as we reasonably require:
    - b. To examination under oath and subscribe to the same."

Minnesota law requires automobile insurers to provide all of the coverage mandated by the No Fault Act. Policy provisions that restrict mandated coverage are unenforceable.<sup>4</sup> The Court of Appeals found no conflict with the No Fault Act because nothing in the No Fault Act specifically precludes an insurer from requesting an EUO, and "there is no precondition of reasonableness that the insurer must satisfy

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<sup>4</sup> *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723, 725 (Minn. 1996); *Roering v. Grinnell Mut. Reins. Co.*, 444 N.W.2d 829, 833 (Minn. 1989); *Burgraff v. Aetna Life & Cas. Co.*, 346 N.W.2d 627, 632 (Minn. 1984).

before it may require an examination under oath.”<sup>5</sup> This rationale conflicts with both the language of the Act itself and with the spirit in which that language has been interpreted.

As Western National itself has argued, EUOs are claims investigation devices. The No Fault Act specifically addresses how No Fault claims are to be handled:

Basic economic loss benefits are payable monthly as loss accrues. . . . Benefits are overdue if not paid within 30 days after the reparation obligor receives reasonable proof of the fact and amount of loss realized.<sup>6</sup>

Assuming that the claimant is an insured involved in an auto accident, the claims process for No Fault benefits begins with the insured claimant’s obligation to provide the insurer with “reasonable proof of the fact and amount of loss realized.”<sup>7</sup> In practice this generally translates into filling out a claim form provided by the insurer, providing general accident information such as any official accident report, providing access to the involved vehicle and the identity of any known witnesses, and frequently providing a recorded statement about the facts of the accident to a claims adjuster. When the insured meets this initial obligation, it triggers the insurer’s obligation to pay benefits. Any additional investigation needed to ascertain “the fact and amount of loss realized” must be conducted

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<sup>5</sup> *Western Nat’l Ins. Co. v. Thompson*, 781 N.W.2d 412, 416 (Minn. App. 2010).

<sup>6</sup> Minn. Stat. § 65B.54, subd. 1.

<sup>7</sup> Minn. Stat. § 65B.54, subd. 1.

within 30 days, since the insurer is assessed penalty interest on all “late” benefits.

The specific responsibilities of a claimant are set forth in Section 65B.56. Contrary to the apparent belief of the Court of Appeals, Section 65B.56’s cooperation requirements are not limited to attending an independent medical examination (IME):

An injured person shall also do all things ***reasonably necessary*** to enable the obligor to obtain medical reports and ***other needed information*** to assist in determining the nature and extent of the injured person’s injuries and loss, and the medical treatment received.<sup>8</sup>

In practice this generally requires an insured claimant to provide an insurer with the identity of all pertinent medical providers, authorizations to obtain medical records and billings, and employment information if an income loss claim is being made. Given the Act’s streamlined timing requirements, this information is usually provided at the same time as the initial accident information. It is updated on an ongoing basis to enable the insurer to remain current.

Nothing in this statutorily mandated claims processing scheme permits the insurer to deny coverage if the claimant fails to attend an EUO. Conditioning coverage on a claimant giving an EUO, no matter what the circumstances, infringes on the coverage mandated by the No Fault Act and is, therefore, not enforceable as a means of voiding coverage. There are undoubtedly some circumstances in which an EUO will be “reasonably necessary” to enable a no fault insurer to obtain medical reports or “other needed information” to assist it in

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<sup>8</sup> Minn. Stat. § 65B.56, subd. 1.(emphasis added).

determining the nature and extent of the injured person's injuries and the medical treatment that person has received. Accordingly, the No Fault Act does not prohibit an insurer from requesting a claimant to attend one. Nothing in the No Fault Act prohibits an insurer from writing a contractual term requiring an insured to provide an EUO that is "reasonably necessary to enable the obligor to obtain medical reports and other needed information to assist in determining the nature and extent of the injured person's injuries and loss, and the medical treatment received." An EUO requirement written this way can and should be enforced. It is within this context that Western National's request in this case must be examined.

Given the "reasonably necessary" language in Section 65B.56, the Court of Appeals statement that "there is no precondition of reasonableness that the insurer must satisfy before it may require an examination under oath" is simply wrong. The ostensible purpose of an EUO is to gather information. Western National argued to the Court of Appeals that it wants the EUO to gather information. The No Fault Act provides that Western National can request claimants such as the Thompsons to attend an EUO if an EUO is reasonably necessary to assist Western National "in determining the nature and extent of the injured person's injuries and loss, and the medical treatment received." The insurer's right to an EUO, as with the entire No Fault claims handling process, is subject to a reasonableness standard, policy language otherwise notwithstanding.

In concluding that the Western National policy language created an absolute, enforceable contractual duty ungoverned by the standards of reasonableness "that has had long-standing judicial

approval in Minnesota,” the Court of Appeals relied primarily upon a line of fire insurance cases.<sup>9</sup> *Hamberg v. St. Paul Fire & Marine Ins. Co.*<sup>10</sup>, an 1897 opinion of this court, and *Claflin v. Commonwealth Ins. Co.*<sup>11</sup>, an 1884 opinion by the United States Supreme Court, both refer to insurance policies that require an insured to undergo an EUO. Both are fire insurance policies. In its brief to the Court of Appeals, Western National relied on these two cases and a number of others,<sup>12</sup> focusing on this court’s 1988 opinion *McCullough v. The Travelers Companies*.<sup>13</sup> While *McCullough* may at first appear to be on point, it is not.

The *McCullough* court held that a provision in a fire insurance policy that requires an insured to submit to an EUO was a condition precedent to the recovery of policy benefits, though the insured’s failure to submit to an EUO did not constitute a breach that

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<sup>9</sup> *Western Nat’l*, 781 N.W.2d at 415.

<sup>10</sup> 68 Minn. 335, 71 N.W. 388 (1897).

<sup>11</sup> 110 U.S. 81 (1884).

<sup>12</sup> Western National cited *Dyno-Bite, Inc. v. Travelers Cos.*, 80 439 N.Y. Supp. 2d (N.Y.A.D. 1981), *Standard Mut. Ins. Co. v. Boyd*, 452 N.E.2d 1074 (Ind. App. 1983), *Robinson v. National Auto. & Cas. Ins. Co.*, 282 P.2d 9309 (Cal. App. 1955), *Pizzirusso v. Allstate Ins. Co.*, 532 N.Y. Supp. 2d 309 (N.Y.A.D. 1988) and *Bulzomi v. New York Cent. Mut. Fire Ins. Co.*, 459 N.Y. Supp. 2d 861 (N.Y.A.D. 1983). *Robinson* involved a residential theft insurance policy. All of the others involve standard fire insurance policies.

<sup>13</sup> 424 N.W.2d 542 (Minn. 1988).

warranted the forfeiture of benefits.<sup>14</sup> Critically distinct from this case, however, is the fact that the policy provision at issue in *McCullough* is mandated by Minnesota statute. Fire insurance policies in Minnesota are required to conform to the precise language set forth in Minnesota Statutes Section 65A.01. The statutorily mandated language makes an insurer's right to compel an insured to submit to an EUO absolute: "the insured shall, within a reasonable period after demand by this company, submit to examinations under oath by any person named by this company, and subscribe the oath."<sup>15</sup>

Fire insurance policies have historically contained EUO provisions of this nature, as is evident by *Hamberg* and *Chaflin*. The policy form adopted by Minnesota in Section 65A.01 has similarly been adopted by most other states, thus the fact that other states have cases upholding a fire insurer's contractual right to an EUO is not surprising. Even in the context of the judicial interpretation of a statutorily mandated fire insurance policy, however, courts are reluctant to factor the indicia of reasonableness entirely out of the equation. For example, in *Thompson v. West Virginia Essential Prop. Ins. Ass'n*<sup>16</sup> the West Virginia Supreme Court, interpreting statutory and policy language identical to the language contained in the Minnesota fire insurance statute, held that an insured's refusal to

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<sup>14</sup> *McCullough*, 424 N.W.2d at 544 – 545.

<sup>15</sup> Minn. Stat. § 65A.01, subd. 3.

<sup>16</sup> 186 W. Va. 84, 411 S.E.2d 27 (1991).

submit to an EUO did not automatically result in a denial of coverage, but instead factored into a reasonableness determination about whether the insured's refusal to attend would result in his failure to receive benefits under the policy.<sup>17</sup> The *Thompson* court reached its holding after examining the history of EUO provisions in fire insurance policies, an exercise that may be useful to this court in order to assist in placing the fire insurance cases into their appropriate context.

One panel of the Minnesota Court of Appeals addressed the legal effect of a claimant's refusal to attend an EUO in the context of an automobile insurance policy in the unpublished opinion *Metropolitan Prop. And Cas. Ins. Co v. King*.<sup>18</sup> The *King* court, like the Court of Appeals in this case, held that the EUO requirement in an automobile No Fault policy was enforceable. When, under the facts of that case, the court determined that the claimant had willfully violated this term in his contract by refusing to attend an EUO, his contractual breach resulted in the forfeiture of his No Fault benefits.<sup>19</sup> *King* is unpublished and is not precedent. Its reasoning and analysis deserves no deference, since it suffers from the same flawed analysis as the Court of Appeals decision in this case. Indeed, the *King* court's legal analysis is remarkably similar to that of both Western National

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<sup>17</sup> *Thompson*, 186 W. Va. at 90 - 91, 411 S.E.2d at 33 - 34.

<sup>18</sup> 203 WL 21008323 (Minn. App. 2003). A copy of this opinion can be found in the appendix to this brief at A-000001.

<sup>19</sup> *King* at \*3.

and the Court of Appeals below, though the Court of Appeals did not directly refer to *King*.

In short, Minnesota's statutory No Fault insurance scheme controls the outcome of this case. Western National's policy is an automobile insurance policy, and the enforceability of any of its provisions, including conditions of coverage, are governed by the terms of the No Fault Act. Under that scheme the claimant is to receive prompt payment of medical bills incurred after an accident.<sup>20</sup> The insurer is entitled to the claimant's cooperation in providing ready access to basic accident and medical information.<sup>21</sup> Cooperation between the two is expected, and is subject to a statutory reasonableness requirement.<sup>22</sup> In holding otherwise, the Court of Appeals erred and should be reversed.

**II. MINNESOTA LAW GRANTS TO THE NO FAULT ARBITRATOR THE AUTHORITY AND RESPONSIBILITY OF DETERMINING THE REASONABLENESS OF A REQUEST OR FAILURE TO ATTEND AN EUO.**

Upon concluding that both an insured's request for an EUO and a claimant's response to such a request are subject to a reasonableness requirement, the question remains: Who decides what is reasonable when the parties disagree? The trial court held that since reasonableness is traditionally considered to be a question of fact, it should be determined in the first instance by a no fault

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<sup>20</sup> Minn. Stat. § 65B.54.

<sup>21</sup> Minn. Stat. § 65B.56, subd. 1; *Neal*, 529 N.W.2d at 333.

<sup>22</sup> *Id.*

arbitrator who, in the context of disputes over no fault benefits, is the statutorily designated fact finder. The trial court's holding is fundamentally in keeping with this court's own pronouncements on the nearly identical issue and should be reinstated.

No fault disputes are subject to binding arbitration when the amount in controversy is \$10,000 at the time the claim is filed.<sup>23</sup> An arbitrator's subject matter jurisdiction over such a claim arises from the \$10,000 monetary threshold.<sup>24</sup> It does not depend on an insurer's formal denial of the claim.<sup>25</sup> Under this Court's cases interpreting the No Fault law, no fault arbitration is subject to more judicial supervision of legal issues than the arbitration of traditional labor disputes. Because justice requires the interpretation of insurance contracts and of the provisions of the No Fault Act to be consistent, in the No Fault context arbitrators are limited to deciding questions of fact.<sup>26</sup> The interpretation of the law – whether an interpretation of the No Fault Act or an interpretation of an insurance contract providing no fault coverage – is to be done by the courts.<sup>27</sup> The rules this Court promulgated to govern no fault arbitration procedure grant arbitrators in no-fault cases the authority to “grant any remedy or relief deemed

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<sup>23</sup> Minn. Stat. § 65B.525, subd. 1.

<sup>24</sup> *In re The Claims for No-Fault Benefits Against Progressive Ins. Co.*, 720 N.W.2d 865, 870 – 71 (Minn. App. 2006, *rev. den.* Nov. 22, 2006).

<sup>25</sup> *Id.*

<sup>26</sup> *Weaver v. State Farm Ins. Cos.*, 609 N.W.2d 878, 882 (Minn. 2000).

<sup>27</sup> *Id.*

just and equitable.”<sup>28</sup> As this court has explicitly recognized, to grant the relief they are authorized to grant, no fault arbitrators must apply the law to the facts as they find them.<sup>29</sup> “As a general proposition the arbitrator has jurisdiction to award, suspend or deny benefits. To achieve the consistency desired in interpreting the no-fault act, this court and the district court review de novo the arbitrator’s legal determinations necessary to granting relief.”<sup>30</sup>

This court announced and applied this approach in *Weaver v. State Farm Insurance Companies*<sup>31</sup> The reasonableness issue in *Weaver* is parallel to the reasonableness issue present here. *Weaver* addressed the reasonableness of an independent medical examination (IME) request and/or refusal. This case addresses the reasonableness of an EUO request and/or refusal. Both a request for an IME and a request for information through an EUO are subject to the reasonableness standard set forth in Section 65B.56. Since this Court’s announcement of the IME rules in *Weaver*, no fault arbitrators routinely address the reasonableness of IME requests. After making the reasonableness determination the arbitrator either suspends benefits until the claimant attends the IME or denies the requested IME. He/she then moves on to award or deny benefits, with full knowledge of the disputed IME request as contemplated by Section

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<sup>28</sup> Rules of Procedure for No-Fault Arbitration, Rule 32.

<sup>29</sup> *Weaver*, 609 N.W.2d at 882.

<sup>30</sup> *Id.*

<sup>31</sup> 609 N.W.2d 878 (Minn. 2000).

65B.56, subdivision 1.<sup>32</sup> Those determinations are subject to de novo review by the trial court.<sup>33</sup> Arbitrators have had no difficulty making these determinations, and there has been no explosion of IME disputes in district courts since *Weaver* was decided.

Consistency demands that Western National's request for an EUO in this case be governed by the same procedure. Both requests for an IME and requests for information such as an EUO are governed by the mandatory arbitration provisions of Section 65B.525. Both are governed by the claims practices guidelines of Section 65B.54. Both are governed by the cooperation requirements of Section 65B.56 – including that Section's express preference for admissibility of evidence of perceived noncooperation rather than the termination of benefits.<sup>34</sup> Both are then subject to de novo review by the trial court.

The trial court applied this standard. According to the arguments made below Western National's request for an EUO came after the claimants had filled out the claims application it had provided, provided medical authorizations, employment authorizations, access to the accident report and damaged vehicle, and given a recorded statement to a Western National claims adjuster.

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<sup>32</sup> “If the claimant refuses to cooperate in responding to requests for examination and information as authorized by this section, evidence of such noncooperation shall be admissible in any suit or arbitration filed for damages for such personal injuries or for the benefits provided by sections 65B.41 to 65B.71.” Minn. Stat. § 65B.56, subd. 1.

<sup>33</sup> *Weaver*, 609 N.W.2d at 884 – 885.

<sup>34</sup> Minn. Stat. § 65B.56, subd. 1; *see also Neal*, 529 N.W.2d at 333.

According to Western National, the request for an EUO was triggered by the realization that Mrs. Thompson was employed by her treating chiropractor – a fact that she had disclosed in her initial application.

The Thompsons declined to attend the EUO because they believed the request was unreasonable. Western National, apparently wanting to conduct a fraud investigation into the treatment and billing practices of the Thompsons' treating chiropractor, ceased paying benefits.<sup>35</sup> In the briefs filed at the Court of Appeals Western National stated that it needed an EUO "to compare Respondents' testimony as to their treatment with the CPT codes billed to Western National by Respondent's chiropractic providers." "Once Western National became aware that the [Thompson] had been receiving care prior to the motor vehicle accident and at a free or reduced charge, they requested the examination under oath to determine the nature and extent of the previous care and if the billing for services occurred merely because of the motor vehicle accident or if they were still receiving free or reduced charges for chiropractic services." This description of Western National's concerns strongly indicates that the suspected fraud under investigation was perpetrated by the Thompson's treating chiropractor, not the Thompsons themselves. Under established law, however, a no fault insurer's concern over potential fraud by a medical

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<sup>35</sup> The Complaint in this action states at paragraph III that Western National was undertaking a fraud investigation into the treatment being provided to Bruce and Cindy Thompson - and the circumstances surrounding the accident - pursuant to Minn. Stat. §60A.951, et. seq., Minnesota's insurance fraud statutory scheme, when it requested the EUO.

provider who it suspects of improper treatment or billing is not a legitimate basis for the failure to pay benefits unless there is evidence that the claimant materially misrepresented the facts or knew of the provider's misrepresentation.<sup>36</sup> While sympathetic to an insurer's right to protect itself from fraud, the legislature has determined through the No Fault Act that an insurer's remedy for an allegedly fraudulent claim submitted by a medical provider is to bring an independent action against that provider to recoup benefits paid.<sup>37</sup> Any information the Thompsons have about their chiropractor's treatment and billing practices could then be appropriately gathered during a deposition in such an action.

The Thompsons each filed for No Fault arbitration. Western National sought to stay both arbitrations. The issue of the reasonableness of the requested EUOs was considered and denied by both arbitrators independently in the context of ruling on the motions to stay. Applying the arguments submitted by Western National itself in this case to the law governing suspected medical provider fraud in no fault disputes, it is hard to argue that the trial court's de novo affirmation of those awards was error.

### **CONCLUSION**

The Minnesota No Fault Act governs an automobile insurer's use of an EUO just as it governs the entire No Fault claims process. In the delicate balancing of the rights and responsibilities of both

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<sup>36</sup> *In re Progressive*, 720 N.W.2d at 872.

<sup>37</sup> *Id.*; Minn. Stat. 65B.54, subd. 4.

insurers and claimants, a No Fault insurer's request for an EUO is subject to the reasonableness requirements of Minnesota Statutes Section 65B. 56. The balanced approach this court adopted with respect to a related investigative tool, an IME, is properly applied to an EUO. The reasonableness of a request for an EUO and of a claimant's failure to provide one should, in the first instance, be presented to the no fault arbitrator for resolution as a question of fact. The arbitrator's decision to suspend benefits until a claimant complies with a reasonable request, and/or to award or deny benefits based on the evidence as a whole, is then subject to de novo review by the court. This system complies with the No Fault Act, is even handed in application to both claimants and insurers, and has proved to be effective in the related IME context. It should be expressly extended here.

Date: August 26, 2010

VAN DYCK LAW FIM, PLLC

By: Sharon L. Van Dyck  
Sharon L. Van Dyck (#183799)  
5354 Parkdale Drive, Suite 103  
St. Louis Park, MN 55416  
952-746-1095  
sharon@vandycklaw.com

ATTORNEYS FOR AMICUS MNAJ

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,642 words. This brief was prepared using Microsoft Word 2007.

Date: August 26, 2010

VAN DYCK LAW FIM, PLLC

By: Sharon L. Van Dyck  
Sharon L. Van Dyck (#183799)  
5354 Parkdale Drive, Suite 103  
St. Louis Park, MN 55416  
952-746-1095  
sharon@vandycklaw.com

ATTORNEYS FOR AMICUS MNAJ