

NO. A05-0942

State of Minnesota
In Court of Appeals

BCBSM, Inc. d/b/a Blue Cross Blue Shield of Minnesota,
Appellant,

vs.

Minnesota Comprehensive Health Association,
Respondent.

APPELLANT'S BRIEF AND APPENDIX

RIDER BENNETT, LLP
Diane B. Bratvold (#18696X)
Karen B. Andrews (#328996)
33 South Sixth Street
Suite 4900
Minneapolis, MN 55402
(612) 340-8900

Attorneys for Appellant

HALLELAND LEWIS NILAN &
JOHNSON, P.A.
Ryan J. Burt (#276054)
Pillsbury Center South, Suite 600
220 South Sixth Street
Minneapolis, MN 55402
(612) 338-1838

Attorneys for Respondent

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES.....	1
STATEMENT OF CASE.....	2
STATEMENT OF FACTS.....	5
ARGUMENT	8
I. STANDARD OF REVIEW	8
II. STOP-LOSS INSURANCE IS NOT ACCIDENT AND HEALTH INSURANCE.....	9
A. The Statute Unambiguously Indicates That Stop-Loss Coverage Does Not Fall Within The Purview Of The Statute	9
1. Because Stop-Loss Coverage Was Omitted From Chapter 62E, It Is Not Proper To Read That Term Into The Statute	9
2. Stop-Loss Coverage Does Not Provide Benefits For Hospital, Surgical And Medical Care, But Rather Provides Benefits For Employers	11
B. Even If The Statute Is Ambiguous, Requiring The Court To Look Beyond The Statutory Language, Stop-Loss Coverage Is Not Accident And Health Insurance	14
1. The Legislature's Failure To Include Stop-Loss Coverage In The List Of Exemptions Does Not Mandate That Stop-Loss Coverage Was Intended To Be Included In The Statute's Reach	14
2. The District Court's Analysis of Chapter 60A Is Unsound.....	18
3. The Distinction Between Stop-Loss Insurance And Accident And Health Is Recognized Outside Minnesota.....	21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

<i>Am. Family Ins. Group v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000)	9
<i>Associated Indus. of Missouri v. Angoff</i> , 937 S.W.2d 277 (Mo. Ct. App. 1996)	21
<i>Avemco Ins. Co. v. McCarty</i> , 812 N.E.2d 108 (Ind. Ct. App. 2004)	22
<i>Bailey v. Fed. Intermediate Credit Bank of St. Louis</i> , 788 F.2d 498 (8th Cir. 1986)	15, 16
<i>BCBSM, Inc. v. Comm’r of Revenue</i> , 663 N.W.2d 531 (Minn. 2003)	passim
<i>Brandt v. Hallwood Mgmt. Co.</i> , 560 N.W.2d 396 (Minn. Ct. App. 1997).....	11
<i>Burkstrand v. Burkstrand</i> , 632 N.W.2d 206 (Minn. 2001)	14
<i>Colangelo v. Norwest Mortgage, Inc.</i> , 598 N.W.2d 14 (Minn. Ct. App. 1999).....	15
<i>Fid. Sec. Life Ins. Co. v. Dir. of Revenue</i> , 32 S.W.3d 527 (Mo. 2000)	22
<i>Franzen v. Borders</i> , 521 N.W.2d 626 (Minn. Ct. App. 1994).....	15
<i>Goplen v. Olmsted County Support & Recovery Unit</i> , 610 N.W.2d 686 (Minn. Ct. App. 2000).....	1, 10, 11
<i>Health Partners, Inc. v. Bernstein</i> , 655 N.W.2d 357 (Minn. Ct. App. 2003).....	10
<i>In re Will of Kipke</i> , 645 N.W.2d 727 (Minn. Ct. App. 2002).....	14
<i>Lefto v. Hogg Breath Enters., Inc.</i> , 581 N.W.2d 855 (Minn. 1998)	8

<i>Molloy v. Meier</i> , 679 N.W.2d 711 (Minn. 2004)	9
<i>N. Pac. Ry. Co. v. City of Duluth</i> , 243 Minn. 85, 67 N.W.2d 635 (Minn. 1954).....	15
<i>N. Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995).....	23
<i>Owens v. Water Gremlin Co.</i> , 605 N.W.2d 733 (Minn. 2000)	9, 11
<i>Ramsey County Med. Ctr., Inc. v. Breault</i> , 525 N.W.2d 321 (Wis. Ct. App. 1994).....	22
<i>Thompson v. Talquin Bldg. Prods. Co.</i> , 928 F.2d 649 (4th Cir. 1991)	23
<i>Travelers Ins. Co. v. Cuomo</i> , 14 F.3d 708 (2d Cir. 1993)	22
<i>United Food & Commercial Workers & Employer's Arizona Health & Welfare Trust v. Pacyga</i> , 801 F.2d 1157 (9th Cir. 1986)	23
<i>United States v. Lamere</i> , 980 F.2d 506 (8th Cir. 1992)	13
<i>Wallace v. Comm'r of Taxation</i> , 289 Minn. 220, 184 N.W.2d 588 (1971)	10

STATUTES

Minn. Stat. § 60A.06	18, 19
Minn. Stat. § 60A.06, subd. 1(10).....	19
Minn. Stat. § 60A.06, subd. 1(5)(a)	18, 19
Minn. Stat. § 60A.235	13, 20
Minn. Stat. § 60A.235, subd. 1.....	13
Minn. Stat. § 60A.235, subd. 3.....	1, 6, 13, 20
Minn. Stat. § 62A.02	18

Minn. Stat. § 62E.01.....	1, 21
Minn. Stat. § 62E.02, subd. 11	passim
Minn. Stat. § 62E.02, subd. 23	10
Minn. Stat. § 62E.10.....	5, 17
Minn. Stat. § 62E.10, subd. 2a	3
Minn. Stat. § 62E.10, subd. 3	5
Minn. Stat. § 62E.11, subd. 5	5, 8, 9, 17
Minn. Stat. § 645.08(1)	9
Minn. Stat. § 645.16	14
Minn. Stat. § 645.17(1)	15, 16
Minn. Stat. Ch. 60A	18, 20
Minn. Stat. Ch. 62A	13, 20
Minn. Stat. Ch. 62C.....	5
Minn. Stat. Ch. 62E.....	passim

OTHER AUTHORITIES

BLACK’S LAW DICTIONARY 807 (7th ed. 1999).....	12
--	----

STATEMENT OF ISSUES

1. Has the Minnesota Comprehensive Health Association, a non-profit corporation created by the legislature, exceeded its statutory authority by including premiums for stop-loss policies in its calculation of the annual assessment owed and paid by contributing members including Blue Cross Blue Shield of Minnesota?

The district court held no.

Apposite authorities:

Minn. Stat. § 62E.01, *et seq.* (2004).

Minn. Stat. § 60A.235, subd. 3 (2004).

BCBSM, Inc. v. Comm'r of Revenue,
663 N.W.2d 531 (Minn. 2003).

Goplen v. Olmsted County Support & Recovery Unit,
610 N.W.2d 686 (Minn. Ct. App. 2000).

STATEMENT OF CASE

This appeal arises from the district court's grant of summary judgment in favor of Respondent Minnesota Comprehensive Health Association ("MCHA"), based on the district court's conclusion that "stop-loss insurance" policies are "accident and health insurance" policies, for which MCHA may assess its contributing members pursuant to Minn. Stat. Ch. 62E (2004).

As a contributing member of MCHA, Appellant BCBSM, Inc., d/b/a Blue Cross Blue Shield of Minnesota ("BCBSM"), pays an annual assessment to MCHA. Since 1996, MCHA has assessed its members for stop-loss premiums received as if they were premiums for accident and health insurance. However, stop-loss coverage and accident and health coverage are inherently separate forms of insurance. While accident and health insurance pays accident and health care benefits to employees, stop-loss insurance is excess insurance for employers that are self-insured. It "stops the loss" when a self-insured employer is obligated to pay catastrophic losses sustained by employees. The employer, not an employee, is the insured and an employee is in no way entitled to any benefits under the employer's stop loss coverage.

Following a tax decision by the Minnesota Supreme Court in 2003 that differentiated between stop-loss and health care policies, *see BCBSM, Inc. v. Comm'r of Revenue*, 663 N.W.2d 531 (Minn. 2003), BCBSM objected to MCHA's annual assessment, seeking a recalculation. (A 32.) BCBSM argued that MCHA had exceeded its statutory authority by including premiums received from stop-loss policies. (*Id.*) MCHA refused to recalculate or change its assessment. (A 35.)

BCBSM commenced this action against MCHA in district court in December 2003.¹ (A 2-7.) In December 2004, BCBSM filed an amended complaint seeking (1) an accounting and recalculation of the MCHA annual assessment to BCBSM for the years 1996 to 2002, (2) damages for unjust enrichment, and (3) a declaratory judgment that the phrase “accident and health insurance premium” as used in Chapter 62E does not include stop-loss coverage provided to self-insured employers. (A 43-49.)

The parties filed cross-motions for summary judgment.² (A 17-18; 73.) In March 2005, the Hennepin County District Court, the Honorable Richard S. Scherer presiding, granted summary judgment in favor of MCHA. (A 81.) The district court determined there were no disputed material fact issues and that the issue was one of statutory interpretation. (A 73-74.) The district court then concluded that stop-loss insurance is a type of accident and health insurance and may be included in MCHA’s annual

¹ In November 2003, a hearing on this issue took place before the MCHA Appeals Committee. (A 39.) Nevertheless, because BCBSM was concerned that MCHA would not issue a decision prior to the end of the year, and because BCBSM wished to preserve its rights, BCBSM pursued an action in district court. In January 2004, MCHA issued an opinion denying BCBSM’s appeal. (A 35.) Consequently, BCBSM timely appealed to the Commissioner of Commerce. (A 38.) However, after months of delays due to the commissioner’s busy calendar, BCBSM elected to proceed in the district court. (A 39-40.) *See* Minn. Stat. § 62E.10, subd. 2a (stating that “[i]n lieu of the appeal to the commissioner, a person may seek judicial review of the board’s action”).

² MCHA opposed BCBSM’s motion for summary judgment arguing that it was authorized to assess contributing members based on stop-loss premiums. In its cross-motion for summary judgment, MCHA also argued the district court lacked jurisdiction, BCBSM’s claims were untimely, and BCBSM failed to include all necessary parties. The district court found it had jurisdiction. (A 75-76.) However, the district court did not decide either the timeliness or the necessary parties issue. (A 80.)

assessment to its contributing members. (A 74.) Judgment was entered on March 18, 2005. (A 81.) This appeal followed. (A 82-83.)

STATEMENT OF FACTS

In 1976, the legislature established the Minnesota Comprehensive Health Association (“MCHA”), a nonprofit corporation, to provide health-insurance coverage to Minnesota residents who are unable to obtain insurance in the private market. Minn. Stat. § 62E.10 (1977). Membership in MCHA is a mandatory condition of doing business in Minnesota as an accident and health insurer, self-insurer, health-maintenance organization, or community integrated service network. Minn. Stat. § 62E.10, subd. 3 (2004). (A 99.) BCBSM, Inc., d/b/a Blue Cross Blue Shield of Minnesota (“BCBSM”), is a licensed nonprofit health services plan operating in Minnesota under Minn. Stat. Ch. 62C (2004), and is a contributing member of MCHA. (A 27.)

MCHA’s health plan’s operating and administrative expenses are paid in part by annual assessments that MCHA levies on its contributing members. Minn. Stat. § 62E.11, subd. 5 (2004). (A 102.) MCHA is authorized by statute to calculate this annual assessment based on “accident and health insurance premium[s].” *Id.* The statute defines accident and health insurance as “insurance or nonprofit health service plan contracts providing benefits for hospital, surgical, and medical care.” Minn. Stat. § 62E.02, subd. 11 (2004). (A 95.)

Contributing members are liable for claims expenses for the MCHA health plan that exceed premium payments received from eligible residents. Minn. Stat. § 62E.11, subd. 5 (A 102.) Each contributing member shares in the expenses of the comprehensive health-care plan in an amount calculated by MCHA. *Id.* This amount is equal to the ratio of the contributing member’s total accident and health insurance premiums received

from Minnesota residents, divided by the total accident and health insurance premiums received by all contributing members from, or on behalf of, Minnesota residents. *Id.*

As a contributing member, BCBSM filed annual premium reports with MCHA during the calendar years 1996 to 2002. (A 27-28.) These forms were issued by MCHA and titled, "Minnesota Premium Plan Costs." (A 56.) Based on these annual reports, MCHA calculated BCBSM's annual assessment. (A 27-30.) For the calendar years 1996 to 2002, BCBSM made payments to MCHA in the full amount of its annual assessment, as determined by MCHA. (A 27.)

As required on the MCHA form, each year's report included BCBSM's premiums earned for accident and health insurance premiums. (A 27-28; 56.) Additionally, the reports specifically requested, and BCBSM provided, premiums earned from stop-loss coverage.³ (*Id.*) Stop-loss coverage insures the employer's unique risk for extraordinarily high health care costs. (A 54.) A stop-loss policy purchased by the employer does not provide benefits for hospital, surgical, and medical care, but instead protects the employer's risk beyond the amount of risk that the employer is willing to bear. (A 54.) The point at which the risk is transferred to a stop-loss insurer is known as the "attachment point." *See* Minn. Stat. § 60A.235, subd. 3 (2004) (distinguishing between health plan and stop-loss policies, in part, by the attachment point)). (A 54, 89.) The employee or individual receiving health care is not the beneficiary of stop-loss

³ MCHA has stated in responses to requests for admission that the report forms for 1996 to 1997 did not request the premiums for stop-loss policies be reported on a separate line. (A 27.) MCHA's instructions to contributing members during the years 1996 to 1997 required including stop-loss premiums in the total premiums received. (A 56.)

coverage and the stop-loss carrier has no direct relationship with the employee. (A 54.) The employer who self-funds health care costs pays benefits directly out of the employer's assets. (*Id.*)

Because MCHA erroneously classified stop-loss coverage as accident and health insurance, MCHA incorrectly computed BCBSM's annual assessment from 1996 to 2002. Consequently, BCBSM estimates that it has made excess annual contributions of approximately \$6 million.⁴

⁴ An attached chart summarizes the total MCHA assessment paid by BCBSM, the total stop-loss premiums reported by BCBSM to MCHA, and the portion of the MCHA assessment tied to stop-loss premiums. (A 28-30; 53; 56-57) (admitting amount of total assessments levied against BCBSM and portion based on stop-loss premiums for years 1998 to 2002); (A 56-57) (identifying portion of 1996 and 1997 MCHA assessments paid by BCBSM that was attributable to stop-loss premiums.)

ARGUMENT

In this case, there are no genuine issues of material fact – the parties agree that BCBSM has paid its annual assessment to MCHA and the parties agree on what portion of the assessment is attributable to the premiums BCBSM receives from stop-loss coverage. The question is one of statutory interpretation; specifically, whether stop-loss policies are accident and health insurance policies for which MCHA may assess its members.

Minn. Stat. § 62E.11, subd. 5 (2004), authorizes MCHA to calculate a member’s annual assessments based on premiums received from “accident and health insurance.” But MCHA has exceeded its statutory authority by including premiums from “stop-loss coverage” in its assessment calculation. Stop-loss coverage protects a risk borne by the self-insured employer and does not provide health care benefits to employees. Therefore, it is inherently different from accident and health insurance. Because the district court erroneously construed the Minn. Stat. Ch. 62E (2004), its decision granting summary judgment in favor of MCHA must be reversed.

I. STANDARD OF REVIEW

When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, which this Court reviews *de novo*. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

II. STOP-LOSS INSURANCE IS NOT ACCIDENT AND HEALTH INSURANCE

A. The Statute Unambiguously Indicates That Stop-Loss Coverage Does Not Fall Within The Purview Of The Statute

When interpreting a statute, this Court first determines whether the language of the statute, on its face, is clear or ambiguous. *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). “A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Words and phrases are construed according to their “common and approved usage.” Minn. Stat. § 645.08(1) (2004). “If the words of the statute are ‘clear and free from all ambiguity,’ further construction is neither necessary nor permitted.” *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000).

The district court concluded that Minn. Stat. Ch. 62E (2004) was unambiguous. (A 77.) BCBSM agrees. Chapter 62E clearly outlines who qualifies as a contributing member of MCHA, how the assessment process operates, and which premiums may be assessed pursuant to this process. Nevertheless, the district court’s construction of this plain language was erroneous.

1. Because Stop-Loss Coverage Was Omitted From Chapter 62E, It Is Not Proper To Read That Term Into The Statute

Chapter 62E indicates that the amount of the assessment levied on each contributing member depends on the amount of “accident and health insurance premium[s]” received by each member. Minn. Stat. § 62E.11, subd. 5. (A. 102.) Such

premiums are defined as “payments received from or on behalf of Minnesota residents for coverage by a health maintenance organization or community integrated service network.” Minn. Stat. § 62E.02, subd. 23; (A 96.) *see also Health Partners, Inc. v. Bernstein*, 655 N.W.2d 357, 360-61 (Minn. Ct. App. 2003). Furthermore, “accident and health insurance” is defined as “insurance or nonprofit health service plan contracts providing benefits for hospital, surgical and medical care.” Minn. Stat. § 62E.02, subd. 11. (A 95.)

Conspicuously absent from Chapter 62E, however, is any mention of stop-loss coverage. The definitions of accident and health insurance premiums and policies make no reference to stop-loss coverage, *see* Minn. Stat. § 62E.02, subs. 11, 23, and in fact, the term “stop-loss insurance” has been omitted from the statute altogether.

The canons of statutory construction prohibit courts from adding words to a statute to supply that which the legislature “purposely omits or inadvertently overlooks.” *Goplen v. Olmsted County Support & Recovery Unit*, 610 N.W.2d 686, 689 (Minn. Ct. App. 2000). (quoting *Wallace v. Comm’r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971)). In *Goplen*, 610 N.W.2d at 689, the statute at issue, by its terms, applied only to the survival of remedies for collection of child support arrearages owed by an obligor, not to the recovery of overpayments from an obligee-parent. Consequently, this Court held that the magistrate was not empowered to extend the statute beyond its express terms to recover child-support overpayments by withholding income from an obligee-parent. *Id.*

Although the statute at issue in *Goplen* differs from Chapter 62E in substance, the holding in *Goplen* is certainly applicable here. By its terms, Chapter 62E makes premiums for “accident and health insurance” assessable by MCHA, not premiums for stop-loss coverage. Because the legislature omitted the term “stop-loss insurance” from the statute, either purposely or inadvertently, it is not proper to read this term into the statute. *See Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396, 400 (Minn. Ct. App. 1997) (noting statutory language was controlling where it “specifically delineates those individuals afforded protection under it,” and conspicuously fails to mention those persons respondent asserted were included in the statute’s reach).

On its face, the MCHA statute makes clear that contributing members’ annual assessments were not intended to include stop-loss insurance premiums. Therefore, further construction is neither necessary nor proper. *Owens*, 605 N.W.2d at 736.

2. Stop-Loss Coverage Does Not Provide Benefits For Hospital, Surgical And Medical Care, But Rather Provides Benefits For Employers

Despite the legislature’s omission of stop-loss insurance from the statute, the district court concluded that such coverage was a form of accident and health insurance because “stop-loss coverage, although providing coverage only after the specified attachment point is reached, provides benefits for hospital, surgical and medical care.” (A 78.) This conclusion is clearly erroneous on several grounds.

By definition, stop-loss insurance is excess insurance for the employer, not primary insurance for the employee. “Stop-loss insurance” is defined as:

[I]nsurance that protects a self-insured employer from catastrophic losses or unusually large health costs of covered employees. Stop-loss insurance essentially provides excess coverage for a self-insured employer. The employer and the insurance carrier agree to the amount the employer will cover and the stop-loss insurance will cover claims exceeding that amount.

BLACK'S LAW DICTIONARY 807 (7th ed. 1999) (emphasis added). In responses to requests for admission, MCHA admitted that "a policy of stop-loss insurance covers a self-insurer's risk for payment of medical care costs and the provision of medical care for employees and dependants for whom the self-insurer has assumed a portion of the liability." (A 25.)

Thus, stop-loss insurance differs from accident and health insurance in significant ways. Unlike accident and health care policies that provide *employees* with benefits for hospital, surgical and medical care, stop-loss insurance provides no medical care benefits for an employee. (A 54.) Instead, stop-loss insurance covers the *employer's* risk for extraordinary health care costs, such as those caused from catastrophic losses sustained by one employee or a group of employees. (*Id.*) Stop-loss insurance is paid directly from the employer's assets, and the employer receives the benefits of the insurance when it has not collected enough fees to cover the loss. (*Id.*) This inherent difference cannot be overemphasized – if stop-loss insurance provides benefits to self-insured employers, it cannot also provide benefits to employees for hospital, surgical and medical care. Stated bluntly, no employee may collect a penny from BCBSM under an employer's stop loss contract.

The legislature clarifies the distinction between health care and stop-loss policies elsewhere in the statutes. The legislature has adopted standards for determining whether

contracts are health-plan contracts or stop-loss contracts. Minn. Stat. § 60A.235, subd. 1 (2004). (A 88.) While the purpose of this section is to determine how a policy is treated for regulatory purposes, the legislature specifically recognized that “[t]he laws regulating the business of insurance in Minnesota impose *distinctly different requirements upon accident and sickness insurance policies and stop-loss policies.*” (*Id.*) (emphasis added). The legislature determined that a stop-loss policy would be regulated as a health plan only if the policy (1) provides coverage to the employer for health care claims in an amount (the “attachment point”) that is lower than \$10,000, (2) meets an aggregate threshold (or aggregate attachment point) as determined under a formula, or (3) provides “direct coverage of health care expenses of an individual.” Minn. Stat. § 60A.235, subd. 3 (2004). (A 89.)

Section 60A.235 is germane for several reasons. First, the fact that the legislature has expressly differentiated between stop-loss policies and accident and sickness policies means that the two types of policies are discrete. This significantly undercuts MCHA’s position that stop-loss insurance and accident and health insurance are indistinguishable. Second, the fact that the legislature included references to stop-loss coverage in Chapter 62A, but omitted it from Chapter 62E, cannot be ignored. “Where language is included in one section of a statute but omitted in another section of the same statute, it is generally presumed that the disparate inclusion and exclusion was done intentionally and purposely.” *United States v. Lamere*, 980 F.2d 506, 514 (8th Cir. 1992). Therefore, the district court erroneously construed Chapter 62E by concluding that stop-loss policies are accident and health insurance policies for which MCHA may assess its members.

B. Even If The Statute Is Ambiguous, Requiring The Court To Look Beyond The Statutory Language, Stop-Loss Coverage Is Not Accident And Health Insurance

This Court has found a statute ambiguous where it “is not particularly clear and the parties provide reasonable but opposing interpretations.” *In re Will of Kipke*, 645 N.W.2d 727, 731 (Minn. Ct. App. 2002). If this Court concludes that Chapter 62E is ambiguous, it may “look to other indicators of legislative intent, as well as the statutory language, to interpret the statute.” *See Burkstrand v. Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001) (citing Minn. Stat. § 645.16 (2004) (outlining canons of construction)).

Here, the district court concluded that even if the statute was ambiguous, “the most relevant statutory law also supports MCHA’s contention that ‘stop-loss’ coverage is assessable as a form of ‘accident and health insurance.’” (A 78.) The district court’s conclusion is flawed on several grounds.

1. The Legislature’s Failure To Include Stop-Loss Coverage In The List Of Exemptions Does Not Mandate That Stop-Loss Coverage Was Intended To Be Included In The Statute’s Reach

Invoking the doctrine of *expression unius est exclusion alterius*, the district court concluded that because Minn. Stat. § 62E.02, subd. 11, specifically exempts eight types of insurance from coverage,⁵ and does not mention stop-loss coverage, the legislature

⁵ That statute provides that “Policy” does not include coverage that is

(1) limited to disability or income protection coverage, (2) automobile medical payment coverage, (3) supplemental to liability insurance, (4) designed solely to provide payments on a per diem, fixed indemnity or nonexpense incurred basis, (5) credit accident and health insurance issued pursuant to chapter 62B, (6) designed solely to provide dental or vision

intended it to be included. (A 78.) This legal maxim, meaning that the expression of one thing is the exclusion of another, is a rule of construction, and not of substantive law. *N. Pac. Ry. Co. v. City of Duluth*, 243 Minn. 85, 87, 67 N.W.2d 635, 638 (Minn. 1954). The doctrine is used only where it is first determined that the language of the statute is ambiguous, and it serves only as an aid in discovering legislative intent when it is not otherwise manifest. *Id.*; *Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14, 17-18 (Minn. Ct. App. 1999).

While statutory exceptions are generally construed to exclude all others, certain circumstances require a different outcome. For example, in *Franzen v. Borders*, 521 N.W.2d 626 (Minn. Ct. App. 1994), this Court recognized that this maxim does not apply where the result will be absurd. *Id.* at 629; *see also* Minn. Stat. § 645.17(1) (2004) (“the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”). Furthermore, the maxim does not apply “when a nonexclusive reading serves the purposes for which the statute was enacted or allows the exercise of incidental authority necessary to an expressed power or right.” *Bailey v. Fed. Intermediate Credit Bank of St. Louis*, 788 F.2d 498, 500 (8th Cir. 1986).

care, (7) blanket accident and sickness insurance as defined in section 62A.11, or (8) accident only coverage issued by licensed and tested insurance agents or solicitors which provides reasonable benefits in relation to the cost of covered services. The provision of clause (4) shall not apply to hospital indemnity coverage which is sold by an insurer to an applicant who is not then currently covered by a qualified plan.

Minn. Stat § 62E.02, subd. 11. (A 95.)

Thus, it is wrong to conclude that stop-loss coverage is included in Chapter 62E merely because it was not mentioned in the statute's list of exclusions. As previously noted, Chapter 62E sets forth, in great detail, the process by which MCHA may assess its contributing members. The legislature expressly included accident and health insurance premiums, not stop-loss insurance premiums, within the statute's reach. Because stop-loss coverage was omitted altogether, it is not surprising that stop-loss coverage was not specifically exempted in subdivision 11. It would be unreasonable to require the legislature to specifically omit stop-loss coverage in a list of exemptions when it has already exempted such coverage by omitting it from the statute in the first place. *See* Minn. Stat. § 645.17(1) (legislature does not intend absurd or unreasonable result).

Furthermore, the legislature's purpose is served without requiring a court to read in language that was purposely or inadvertently omitted. *See Bailey*, 788 F.2d at 500. The district court appeared to question whether Chapter 62E's purpose would be thwarted if BCBSM received relief. In a section titled "Other Issues and Observations," the court asked whether "those who would ultimately suffer are those citizens the legislature intended to protect when it established MCHA." (A 80.) This statement reflects a serious misunderstanding of Chapter 62E by the district court. The district court's concerns are unwarranted and should not influence this Court's decision.⁶

⁶ The district court also observed that it was "curious that BCBSM only now challenges MCHA's authority to assess its sales of stop-loss insurance policies after voluntarily paying those assessments for years." (A 80.) BCBSM dutifully paid its assessments, based on MCHA's calculations, until the supreme court's decision in *BCBSM, Inc. v. Comm'r of Revenue*, 663 N.W.2d 531 (Minn. 2003). BCBSM then promptly objected to MCHA's assessment and requested a correction. When MCHA refused, BCBSM

The purpose of Chapter 62E is to provide health-insurance coverage to Minnesota residents who are unable to obtain insurance in the private market. Minn. Stat. § 62E.10. (A 98.) “Uninsurable” Minnesota residents receive the same coverage whether or not MCHA’s annual assessment includes premiums received from stop-loss policies. Pursuant to the statute, contributing members are liable for all claims expenses for the MCHA health plan that exceed premium payments received from eligible Minnesota residents. Minn. Stat. § 62E.11, subd. 5. (A 102.) MCHA members pay their assessments annually and, when necessary to assure MCHA’s financial stability, through periodic interim assessments. *Id.* subd. 6. (A 102-03.) Each contributing member then pays a portion of these costs, based on a formula outlined in the statute. *Id.* subd. 5. (A 102.)

Thus, Minnesota’s residents will receive coverage according to the terms of Chapter 62E; the question is how the annual assessment will be computed. This is precisely the reason that BCBSM has sought an accounting. A lawful assessment for BCBSM for the years 1996 to 2002 will require an accounting not only of the assessable premiums, but the changed ratio. While the accounting and reallocation will impact BCBSM’s annual MCHA assessment, MCHA will not lose funds. In short, an accounting will result in the same total amount being paid by all contributing members, but reallocated differently among those members, in accordance with the ratio found in Section 62E.11, subd 5. (A 102.)

pursued this litigation. The district court’s observation has no bearing on the issue of statutory construction presented here.

Nothing in the language or legislative purpose of Chapter 62E supports the conclusion that MCHA is authorized to assess members based on premiums received from stop-loss coverage. Neither the definition of accident and health insurance in Chapter 62E, nor the presence of specific exceptions within the statute, nor the legislature's goal of insuring Minnesota residents implies that the legislature included stop-loss premiums in MCHA's annual assessment. As such, even if this Court concludes that Chapter 62E is ambiguous, the applicable canons of construction support reversing the district court.

2. The District Court's Analysis of Chapter 60A Is Unsound

The district court also relied on Minn. Stat. § 60A.06 (2004) in its analysis, concluding that stop-loss coverage "covers the same damages as those conceived under Minn. Stat. §§ 60A.06, subd. 1(5)(a), 62E.02, subd. 11" because "[t]he premiums result in a repayment of the self-insured's payment of medical care costs." (A 79.)

Minn. Stat. § 60A.06 (2004) lists the lines of insurance that are permitted by statute. Section 60A.06, subd. 1(5)(a) states that insurers are authorized:

To insure against loss or damage by the sickness, bodily injury or death by accident of the assured or dependents, or those for whom the assured has assumed a portion of the liability for the loss or damage, including liability for payment of medical care costs or for provision of medical care.

(A 85.) Likewise, Section 62E.02, which governs MCHA assessments, defines accident and health insurance policies as "contracts providing benefits for hospital, surgical and medical care." Minn. Stat. § 62E.02, subd. 11. (A 95.) But while the two statutes

discuss accident and health policies in a similar manner, as they should, it does not follow that stop-loss coverage is included within the statute's authorized assessment.

The district court contends that stop-loss coverage is either "subsumed within the existing statutory lines" or stop-loss coverage is "illegal." (A 78.) Essentially, the court is assuming that if BCBSM is authorized to offer stop-loss coverage under Minn. Stat. § 60A.06, then stop-loss coverage must be a subset of accident and health insurance, which is authorized under the same provision. Alternatively, the court reasons BCBSM is not authorized to sell stop-loss coverage. The court's analysis simply does not follow.

Section 60A.06 includes numerous types of insurance within each authorized statutory line, and does not declare any sort of legal equivalence simply because various types of insurance are grouped within an authorized line. Minn. Stat. § 60A.06 lists at least fifteen different authorized lines and, within many of these lines, the statute includes a number of sub-categories. (A 84-87.) For example, Section 60A.06, subd. 1(10), authorizes insurance "against loss from death of domestic animals and to furnish veterinary service." (A 85.) By authorizing both types of insurance, the statute does not imply that insurance for veterinary services is a sub-category of insurance against loss from death of an animal. Similarly, more than one type of policy is authorized by Section 60A.06, subd. 1(5)(a), which includes at least the following examples of insurance coverage: loss by sickness, bodily injury, accidental death, payment of medical care costs, or provision of medical care expenses. (*Id.*) Simply because this subdivision authorizes both accident and health care coverage and stop-loss coverage, this Court

should not infer that stop-loss coverage is the legal equivalent or subset of accident and health care coverage.

The two policies are far from equivalent. As already discussed *supra* § A.2, stop-loss coverage provides benefits to self-insured *employers*, whereas accident and health insurance provides benefits to *employees* for hospital, surgical and medical care. As even the trial court stated, for stop-loss coverage, “[t]he premiums result in a repayment of the *self-insured’s* payment of medical care costs.” (A 79.) (emphasis added.) The district court failed to recognize that stop-loss premiums do *not* result in health or accident benefits to the *employees*, as accident and health insurance does.

Because neither Chapter 60A nor Chapter 62A directly refer to or define stop-loss coverage, the relevant distinction is drawn in Minn. Stat. § 60A.235, discussed *supra* § A.2. Yet, the district court’s opinion does not even discuss this statutory provision. Importantly, when the supreme court analyzed stop-loss insurance under the tax code, it turned to Section 60A.235. The district court, however, rejected the supreme court’s analysis in *BCBSM, Inc. v. Comm’r of Revenue*, 663 N.W.2d 531 (Minn. 2003), concluding that because the issue at bar “does not involve a question of taxation and does not bring statutory canons of construction related to taxation issues to bear upon its consideration of the issue,” the case was inapplicable. (A 80.)

Although *BCBSM, Inc.*, is not binding, it is persuasive. The Minnesota Supreme Court applied the definition of stop-loss insurance found in Minn. Stat. § 60A.235, subd. 3, to distinguish those policies from health plan contracts before deciding an insurer’s liability for the state premium tax. 663 N.W.2d at 532. In analyzing the

differences between stop-loss and health care policies, the supreme court made two important observations. First, under a self-funded health care plan, the employees' health care costs "are paid directly out of the employer's assets and it is the employer who assumes the risk for employees' health care coverage" *Id.* Second, a stop-loss policy covers "the employer's risk above the specified amount known as the attachment point." *Id.* As a result, the stop-loss insurer "has no direct relationship" with the employee. *Id.* The court then held that premiums received by an insurer on stop-loss insurance are not subject to a premium tax because it is not the "direct business" of the insurer. *Id.* at 531, 534.

For the same reasons recognized by the supreme court in *BCBSM, Inc.*, stop-loss policies are excess insurance for employers and not accident or health insurance for employees under Minn. Stat. § 62A.01, *et seq.* The employer pays the medical benefits, not the stop-loss carrier. This significant distinction takes stop-loss premiums out of the MCHA assessment statute. As a result, premiums for stop-loss coverage are not subject to MCHA's annual assessment, just as these premiums are not subject to taxation.

3. The Distinction Between Stop-Loss Insurance And Accident And Health Is Recognized Outside Minnesota

A number of other jurisdictions have also recognized the distinction between stop-loss insurance and health insurance. In *Associated Indus. of Missouri v. Angoff*, 937 S.W.2d 277, 285 (Mo. Ct. App. 1996), the Missouri Court of Appeals held that the state director of insurance had no authority to regulate stop-loss coverage as medical expense

insurance. The court of appeals noted the prominent differences between the two policies in terms of the insured risk and the insured relationship:

Stop-loss insurance, on the other hand, does benefit the employer. It is issued to an employer or the trustees of a self-funded plan to protect the employer or trust from unusual or catastrophic losses. It provides no direct benefits whatsoever for any employee or their dependents.

Id. at 283; *Cf. Fid. Sec. Life Ins. Co. v. Dir. of Revenue*, 32 S.W.3d 527, 530 (Mo. 2000) (criticizing analysis in *Angloff* and holding that insurance company's payments under stop-loss policies were deductible as "health insurance benefits" under the state's insurance premium tax); *see also Avemco Ins. Co. v. McCarty*, 812 N.E.2d 108, 124 (Ind. Ct. App. 2004) (affirming preliminary injunction against stop-loss insurers and holding that insurers were contributing members of state health association fund because they insure for medical expenses).

Many courts have reached the same conclusion as the court in *Angoff* in a variety of contexts. Ultimately, those courts also conclude that stop-loss insurance is not health insurance. For example, the Wisconsin Court of Appeals has held stop-loss insurance is not accident and health insurance in the context of an ERISA claim:

[S]top-loss policy is not health insurance, and it does not pay benefits directly to participants. Rather, the policy is designed to protect [the employer] from catastrophic losses. Further, the policy does not cover participants of the Plan, but instead covers the Plan itself. As a result, the Plan, and not the insurance company, is solely liable to the participants for the payment of benefits.

Ramsey County Med. Ctr., Inc. v. Breault, 525 N.W.2d 321, 325 (Wis. Ct. App. 1994).

Federal courts have also reached similar conclusions. *See, e.g., Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 723 (2d Cir. 1993), *rev'd on other grounds, New York State Conf.*

of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (noting stop-loss insurance is “akin to reinsurance in that it does not provide coverage directly to plan members or beneficiaries”); *Thompson v. Talquin Bldg. Prods. Co.*, 928 F.2d 649, 653 (4th Cir. 1991) (“The purpose of the stop-loss insurance is to protect [the employer] from catastrophic losses, it is not accident and health insurance for employees”); *United Food & Commercial Workers & Employer’s Arizona Health & Welfare Trust v. Pacyga*, 801 F.2d 1157, 1161-62 (9th Cir. 1986) (noting that stop-loss insurance does not provide plan participants with health insurance, but rather protects the plan itself in the event it is required to pay out more than a certain amount each year”). This reasoning is persuasive, and demonstrates further the inherent differences between accident and health insurance and stop-loss insurance.

CONCLUSION

This appeal presents a question of pure statutory construction. By enacting Chapter 62E, the legislature intended to provide accident and health care coverage for Minnesota residents who are otherwise without insurance. To accomplish its purpose, the legislature authorized MCHA to assess each contributing member, including BCBSM, based on premiums collected for accident and health insurance. Nothing in the legislature’s chosen language or its stated purpose authorizes MCHA to assess its members based on stop-loss premiums. The statute’s language does not mention or encompass stop-loss policies. Stop-loss coverage is not accident and health care insurance; it provides no health or medical benefits to employees.

Moreover, the statute's purpose is met regardless of how MCHA computes each member's annual assessment because MCHA's total funding remains the same. MCHA is authorized to assess whatever it needs to pay claims. The question on appeal is whether MCHA is authorized to compute the annual assessment using only accident and health insurance premiums or whether it may also include stop-loss premiums. At the end of the day, this appeal resolves how MCHA's funding will be allocated among all member insurers.

MCHA has exceeded its statutory authority by including premiums from stop-loss coverage in its assessment calculation. Because the district court erred in granting summary judgment in favor of MCHA, BCBSM respectfully requests this Court to reverse and remand for further proceedings to determine appropriate relief.

Respectfully submitted,

Dated: July 5, 2005

RIDER BENNETT, LLP

By *Diane Bratvold*

Diane B. Bratvold (18696X)

Karen B. Andrews (328996)

Attorneys for Blue Cross and Blue Shield of
Minnesota

33 South Sixth Street

Suite 4900

Minneapolis, MN 55402

(612) 340-8900

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

Proportional serif font, 13-point or larger.

The length of this brief is 5,826 words. This brief was prepared using Microsoft Word 2000.



Diane B. Bratvold

33 South Sixth Street
Suite 4900
Minneapolis, Minnesota 55402
(612) 340-8900

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) (with amendments effective July 1, 2007).