

NO. A10-446 4

State of Minnesota
 In Supreme Court

Brian K. Martin,

Employee,

vs.

Morrison Trucking, Inc.,

Employer-Respondent,

and

Uninsured,

Travelers Insurance Company,

Insurer-Relator,

and

Special Compensation Fund,

Respondent.

**BRIEF AND APPENDIX OF INSURER-RELATOR
 TRAVELERS INSURANCE COMPANY**

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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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STATEMENT OF LEGAL ISSUES

- I. This Court reversed the WCCA's previous decision that Travelers was "contractually bound" to provide coverage to Morrison. Morrison asked for remand to the WCCA for purposes of addressing penalties in the event of reversal. On remand, was the WCCA free to go entirely outside the record and declare the subject exclusion "void" as contrary to "public policy"?**

Apposite authority: Roby v. State, 547 N.W.2d 354, 357 (Minn. 1996); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

- II. State pools in the involuntary market do not cover known exposure in other states; consequently, some employers must obtain separate policies in states with known exposure. Both Morrison's own agent and the administrator of the Wisconsin Pool agreed that, due to known risk in Minnesota, Morrison needed separate Minnesota coverage and could not obtain it through the Wisconsin Pool. Did the WCCA err when it held that "known, appreciable risk" in Minnesota was "not a sufficient basis" for the Wisconsin Pool to exclude Minnesota from coverage?**

Apposite authority: Brown v. Sandeen Agency, Inc., 762 N.W.2d 850 (Wis. Ct. App. 2008); Smith & Chambers Salvage v. Insurance Management Corp., 808 F.Supp. 1492 (E.D. Wash. 1992).

- III. Wisconsin law requires employers like Morrison to obtain insurance coverage for benefits that may become due under Wisconsin law, *not* the law of Minnesota or any other State. Morrison had precisely that coverage through the Pool; Travelers paid all benefits due under Wisconsin law. Did the WCCA err when it held that the mandatory coverage provisions of the Wisconsin Act somehow required Travelers to cover Morrison for Minnesota as well?**

Apposite authority: Wis. Stat. § 102.31; State v. Koch, 537 N.W.2d 39 (Wis. Ct. App. 1999); Simonton v. Department of Industry, Labor and Human Relations, 214 N.W.2d 302 (Wis. 1974); Isles Wellness, Inc. v. Progressive Northern Ins. Co., 725 N.W.2d 90 (Minn. 2006).

STATEMENT OF THE CASE

This is an insurance coverage dispute between Morrison Trucking, a Wisconsin employer, and Travelers, one of several servicing carriers of the Wisconsin Workers' Compensation Insurance Pool ("the Pool"). The Pool, a creature of Wisconsin statute, covers the "residual" or "involuntary" market – the employers unable to obtain insurance coverage in the "voluntary" market – for liability under the Wisconsin Workers' Compensation Act ("Wisconsin Act"). When Morrison, a trucking company headquartered in Wisconsin, applied for insurance through the Pool, coverage for liability imposed under the Minnesota Workers' Compensation Act ("Minnesota Act") was specifically excluded because Morrison had numerous Minnesota-resident employees – including Brian Martin – who spent 95% of their time working outside Wisconsin.¹

Martin, a Minnesota resident, was injured in Minnesota during the course of his employment for Morrison. He first brought a claim under the Wisconsin Act, and Travelers, as servicing carrier of the Pool, paid \$75,000 in benefits due under Wisconsin law. Martin then applied for additional benefits provided under the Minnesota Act, and Travelers denied coverage because its policy specifically excludes Minnesota. The Minnesota Special Compensation Fund paid Martin's benefits and sought reimbursement

¹ This exclusion was confirmed to be mandatory under Pool requirements by the President of the Wisconsin Workers' Compensation Rating Bureau, which administers the Pool. AA.57. The Pool cannot, by operation of Wisconsin law, insure known exposure outside of Wisconsin. AA.55 (Herrmann, p. 20-21). All known state pools in the residual market operate this way, as confirmed by the sources cited by the WCCA. AA.108 ("This coverage is designed solely for unknown and unanticipated exposure in states or territories other than [Wisconsin] . . ."); AA.111 ("Limited Other States Insurance is 'designed solely for unknown or unanticipated exposures.'").

from Morrison, and Morrison then impleaded Travelers. (T.5-7 “T. __” refers to the hearing Transcript.) The compensation judge enforced the plain language of the Travelers policy, and rejected Morrison’s argument that its “reasonable expectations” created coverage despite the unambiguous exclusion. The Minnesota Workers’ Compensation Court of Appeals, Judge Thomas Johnson, reversed, ruling that (1) servicing carriers of the Wisconsin Pool were “contractually bound” to cover exposure in Minnesota, despite a Pool requirement to the contrary; and (2) the “reasonable expectations” doctrine applied to create coverage even though Morrison never read the insurance policy.

This Court “reversed and remanded for reconsideration” in light of Carlson v. Allstate Insurance Company, 749 N.W.2d 41 (Minn. 2008) (reasonable expectations doctrine cannot apply in the face of plain and unambiguous policy language). Martin v. Morrison Trucking, Inc., et al., 765 N.W.2d 639 (Minn. 2009). On remand, the WCCA, Judge Thomas Johnson again presiding, did not limit reconsideration to the penalty issue, as requested by Morrison in its brief to this Court. AA.104 (“AA. __” refers to Travelers’ Addendum and Appendix). Instead, it independently formulated an entirely new basis to “invalidate” the unambiguous exclusion, this time ruling that it is “void as against public policy” because it “violates the mandatory coverage provisions” of the Wisconsin Act. Also, the WCCA rewrote the Pool rulebook in holding that “known, appreciable risk” outside Wisconsin is “not a sufficient basis” to exclude coverage, and that the Pool *must* provide coverage for benefits due under Minnesota law to every Pool insured who “needs” it. No party ever previously raised these arguments. This appeal followed.

STATEMENT OF FACTS

1. Bryan Martin's workers' compensation claim.

In July 2002, Brian Martin was injured in the scope of his employment as a truck driver with Morrison Trucking. Martin's injury occurred in Minnesota. Martin also lives in Minnesota, and spent 95% of his work time outside Wisconsin. Nonetheless, the Wisconsin Act responded to his workers' compensation claim, and Travelers, as servicing carrier of the Wisconsin Pool, paid all benefits due and owing under Wisconsin law.

Martin then filed for additional benefits in Minnesota. Travelers denied the claim because its policy expressly excludes benefits due under Minnesota law. AA.103. Morrison's agent, the Travelers underwriter and the administrator of the Wisconsin Pool all testified the policy was properly underwritten to exclude Minnesota given Morrison's business circumstances. AA.99-101 (Petree); AA.57 (Herrmann, p. 26); T.104 (Sorenson).

2. Issuance of the Travelers policy with Minnesota benefits exclusion.

The Wisconsin Workers' Compensation Insurance Pool is a creature of Wisconsin statute, designed to "cover exposures in the state of Wisconsin for Wisconsin employers" who are unable to obtain insurance in the voluntary market. AA.55 (Hermann, p. 20-21). The Pool is administered by the Wisconsin Compensation Rating Bureau ("WCRB"), of which Ralph Herrmann is President. AA.54 (Hermann, p. 7). Herrmann's testimony was introduced at the hearing to explain the operation of the Wisconsin Pool.

Applicants to the Pool – typically high risk employers unable to obtain coverage in the voluntary market – are randomly assigned to one of several “servicing carriers,” including Travelers. Travelers Ex. 4, p. 11-12 and Depo Ex. 1. The servicing carrier issues a temporary binder to the applicant assigned it, and proceeds to underwrite and issue a policy according to the Pool’s guidelines. The Pool requires that known out-of-state exposure be excluded because the Pool “is not permitted to issue a policy covering exposure in another state.” AA.55 (Herrmann, p. 21). A *limited* other states coverage endorsement is available to cover unknown and unanticipated out-of-state exposures: claims involving employees who regularly work in Wisconsin and happen to be out of state when injured. AA.103.

Morrison requested limited other states coverage through the Wisconsin Pool via a “Supplementary ‘Wisconsin Limited Other States Coverage’ Request.” AA.60. This form is used by the Pool’s servicing carriers to identify whether the applicant has out-of-state exposure. AA.55 (Hermann, p. 20). Because Morrison’s request listed many Minnesota-resident employees who worked outside Wisconsin 95% of the time, the Travelers underwriter who processed the application identified exposure in Minnesota and listed it on the “Schedule of Excluded States.”

Q: So, then, based on the information that was supplied to you in terms of the Minnesota – the nine Minnesota drivers and all the other information, then, that was your decision that a proper underwriting of this policy would place Minnesota under the schedule of Excluded States?

A: Yes.

T.104. This exclusion was a matter of “normal protocol” for Pool servicing carriers:

Q: And in general terms then, if an employer in Wisconsin ever has employees that reside outside of the state of Wisconsin, it is the policy of the Wisconsin risk pool to exclude coverage for the states where the employee's [sic] reside?

A: That is normal protocol, yes.

AA.57 (Herrmann, p. 26). Herrmann explained that such acts must be taken because the Wisconsin Pool is not designed to, and *cannot*, cover known or anticipated exposure outside Wisconsin:

Q: What is the purpose of the Wisconsin pool as it would relate to whether it is designed to cover out-of state exposures?

A: The pool is designed to cover exposures in the state of Wisconsin for Wisconsin employers or employers that have exposure in Wisconsin. *It is not designed to provide coverage in states other than Wisconsin.*

Q: And the reason for that is?

A: Well, to my knowledge we are not – the assigned risk pool is not authorized to write business outside of the State of Wisconsin, so we are – *we are not permitted to issue a policy covering exposure in another state.*

Q: *[I]s it the expectation and intent of the pool . . . to exclude a state such as Minnesota if it is determined and ascertained by the servicing carrier that there are known risks, expected risks outside the state of Wisconsin?*

A: *Yes.*

AA.55-56 (Herrmann) (emphasis supplied).

3. State Pools in the residual market do not cover known risk outside their borders.

All of the sources cited by the WCCA are in agreement with Herrmann's testimony that residual market pools cannot cover known, anticipated risk outside the

employer's state of domicile. The sources confirm that the purpose of an "assigned risk" pool is to satisfy the requirements of the workers' compensation law of the employer's (and pool's) state of domicile – *without* extending coverage to other states where known exposure exists.

Limited Other States Insurance is "designed solely for unknown or unanticipated exposures." . . . By virtue of the state-specific nature of workers' compensation statutes, insurers or state pools in the residual market are not obligated to extend policy coverage beyond that which is needed to satisfy the requirements of the employer's state of domicile. *Consequently, some employers may be faced with obtaining separate policies from each state where a potential exposure exists.*

AA.108, 112.²

This coverage is designed solely for unknown and unanticipated exposure in states or territories other than those designated in 3.A of the policy [here, Wisconsin] and not otherwise specifically excluded.

AA.108. Here, Morrison's agent – undisputedly acting on Morrison's behalf – testified she knew the Wisconsin Pool policy would not cover Minnesota-resident employees, and that Morrison would need a separate policy if any employees resided in Minnesota.

AA.99-101. Because Morrison told her, falsely, that his Minnesota-resident truckers were independent owner/operators, not employees, she did not advise him to obtain separate coverage. AA.99-101. Morrison, for his part, did not examine his policy to confirm that the coverage he wanted was included; rather, he simply "assumed" that whatever he wanted, he got from the Pool.

Q: Now – and then at some point you were sent a copy of the policy, correct?

² The WCCA cited these sources on p.20, fn. 13 of its latest Opinion. AA.07; AA.20.

A: Yes.

Q: Okay. But you didn't read through it, that's also fair to say?

A: Yes.

Q: That's true?

A: Yes.

Q: So, your expectation, when you say I expected coverage, that wasn't based on anything that the policy per se said so much as just what you thought the situation was; fair to say?

A: Yes. On the application, *we never put on the application I didn't want Minnesota coverage, so when I wasn't informed I wasn't getting coverage – when I wasn't informed about Minnesota, you know, I – you just expected the application to be what you bought, basically.*

AA.97-98 (T.44-45) (emphasis supplied). This interpretation is difficult to understand in light of the fact that Morrison signed a “*request*” for limited other states coverage, which unequivocally informed him – just above his signature block – that his “*eligibility*” for such coverage had yet to be determined:

SUPPLEMENTARY “WISCONSIN LIMITED OTHER STATES”
COVERAGE – *REQUEST*

* * *

By my signature below, I hereby certify that I have answered all questions in this Questionnaire accurately and completely. *I understand that the Pool and its servicing carrier will rely upon this information in **determining my/our eligibility** for “Other States” coverage, and that immediate notice must be provided to the servicing carrier should any operations change in the future.*

AA.60 (Travelers Ex. 4 at Depo. Ex. 7) (emphasis supplied). Despite this, Morrison did not open the Pool policy to confirm his company's “*eligibility*” was determined

favorably. Had he done so, he would have discovered that the Policy unambiguously excludes Minnesota benefits:

PART THREE – OTHER STATES INSURANCE is amended to read as follows:

1. Other states insurance applies in all states except Wisconsin, those states having a monopolistic state fund, and those states listed in the schedule below...

SCHEDULE OF EXCLUDED STATES

MN

IMPORTANT! IF YOU BEGIN WORK IN ANY STATE OTHER THAN WISCONSIN, YOU MUST OBTAIN INSURANCE COVERAGE IN THAT STATE AND DO WHATEVER ELSE MAY BE REQUIRED UNDER THAT STATE'S LAW, AS 'WISCONSIN LIMITED OTHER STATES' INSURANCE DOES NOT SATISFY THE REQUIREMENTS OF THAT STATE'S WORKERS' COMPENSATION LAW.

AA.103 (Morrison Exhibit 3).

SUMMARY OF ARGUMENT

The WCCA erred and rewrote the rules for the residual market Pools of the other 49 states when it held that coverage for Minnesota benefits “cannot” be excluded if pool servicing carriers identify “known, appreciable risk” in Minnesota. Based on the WCCA’s own sources, assigned risk pools are *not* designed to cover *any* known or anticipated exposure outside their State of domicile. Employers who have risk in several states simply must obtain separate policies, and it is their and their agents’ responsibility to properly place that coverage – not that of the assigned risk pool or servicing carrier. Minnesota both exceeds its authority and strains comity when it imposes such burdens on the Wisconsin Pool.

The WCCA also erred when it went entirely outside the record and procedural boundaries to hold that an unambiguous contract provision is “void as contrary to public policy.” This argument was never raised by any party, reaches the same result (mandatory Minnesota coverage) previously reversed by this Court, and is substantively erroneous because the Wisconsin Workers’ Compensation Act does not, in fact, mandate coverage for workers’ compensation benefits due under *Minnesota* law.

Ultimately, this is a case about contract interpretation. Minnesota law is clear that courts will not unreasonably construe insurance contracts in order to create coverage. This bedrock principle is especially apt when the effect of the judicial “invalidating” of a contract term is to flatly contradict the requirements of *Wisconsin* law, where the contract was formed in accordance with specific rules. Under bedrock Minnesota law, the WCCA erred because the Wisconsin Pool policy at issue here plainly and unambiguously excludes Minnesota, and there is no legal or factual basis on which to “invalidate” the contract. The WCCA should be, once again, reversed.

STANDARD OF REVIEW

On review upon certiorari, the Minnesota Supreme Court has original jurisdiction to review decisions of the Workers’ Compensation Court of Appeals. Minn. Stat. § 176.481. The Supreme Court has full authority to modify orders of the compensation judges or remand a case for further proceedings as it deems just and proper. *Id.*

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Grubb v. State*, 433 N.W.2d 915, 917

(Minn. Ct. App.1988), review denied (Minn. Feb. 22, 1989); see also Rutz v. Rutz, 644 N.W.2d 489 (Minn. Ct. App. 2002) (appellate courts do not engage in a redetermination of facts but defer to the trial court’s credibility determinations and to findings that are supported by the record).

On appeal from a decision of the Workers’ Compensation Court of Appeals, the Supreme Court reviews questions of law *de novo*. Alcozer v. N. Country Food Bank, 635 N.W.2d 695, 701 (Minn. 2001). When reviewing questions of law, this Court is free to exercise its independent judgment. Owens v. Water Gremlin Co., 605 N.W.2d 733, 735 (Minn. 2000); Bruns v. City of St. Paul, 555 N.W.2d 522, 525 (Minn. 1996).

ARGUMENT

I. This Court reversed the WCCA’s previous decision that Travelers was “contractually bound” to provide coverage to Morrison. Morrison asked for remand to the WCCA for purposes of addressing penalties in the event of reversal. On remand, the WCCA was not free to go entirely outside the record and declare the subject exclusion “void” as contrary to “public policy.”

The WCCA’s initial decision held Travelers was “contractually bound” to provide coverage to Morrison. AA.33 (“Travelers . . . was contractually bound to issue a policy to the employer, including the requested endorsement.”) This holding was challenged on appeal to this Court; the first issue statement in Travelers’ brief reads:

As a servicing carrier of the Wisconsin Assigned Risk Pool, Travelers was required to exclude coverage for known exposure outside Wisconsin. The insurance policy issued to Morrison conspicuously excluded Minnesota because numerous employees lived there and spent 95% of their time outside Wisconsin, and Morrison’s own agent and the President of the Wisconsin Workers Compensation Rating Bureau testified the policy was

properly underwritten. Travelers was not “contractually bound” to provide all-risk, all-states coverage to Morrison.³

In response, Morrison Trucking argued that, in the event of a reversal, Morrison should be allowed remand to the WCCA to address the penalty award:

If the Workers’ Compensation Court of Appeals Decision is not affirmed, then the matter should be remanded to the Workers’ Compensation Court of Appeals to address the penalty award of the compensation judge.

AA.104 (Respondent’s Brief, dated 1/26/2009). This Court went on to reverse, issuing the following decision:

IT IS HEREBY ORDERED that the decision of the Workers’ Compensation Court of Appeals filed October 29, 2008, be, and the same is, reversed and the matter is remanded for reconsideration in light of Carlson v. Allstate Insurance Company, 749 N.W.2d 41 (Minn. 2008).

Martin v. Morrison Trucking, Inc., et al., 765 N.W.2d 639 (Minn. 2009). The reversal presumably included the sua sponte holding that Travelers was “contractually bound” to provide coverage for Minnesota benefits.

However, on remand, the WCCA did not simply address the penalty award as requested by Morrison. Rather, it reassessed the entire case without restraint, as if for the first time. It “reconsidered” the reasonable expectations issue, effectively reversing itself. It then reassessed whether Travelers “could” exclude Minnesota, finding again that it could not. AA.17. Not a single issue was recognized as “reversed” by this Court, despite its unequivocal order. Therefore, the WCCA’s conclusion that Travelers was “obligated to provide coverage” to Morrison should be reversed on the sole basis that the issue was

³ Insurer-Relator’s Brief, p. 9, Martin v. Morrison Trucking, et al., Case No. No. A08-2056.

already resolved and became the law of the case on this Court's previous reversal.

Further, the "public policy" issue was never considered by a lower court and was unavailable for consideration on appeal. See Roby v. State, 547 N.W.2d 354, 357 (Minn. 1996); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

II. State pools in the involuntary market do not cover known exposure in other states; consequently, some employers must obtain separate policies in states with known exposure. Both Morrison's own agent and the administrator of the Wisconsin Pool agreed that, due to known risk in Minnesota, Morrison needed separate Minnesota coverage and could not obtain it through the Wisconsin Pool. The WCCA erred when it held that "known, appreciable risk" in Minnesota was "not a sufficient basis" for the Wisconsin Pool to exclude Minnesota from coverage.

In its most recent opinion, the WCCA held that the Wisconsin Pool *cannot* exclude coverage for Minnesota benefits, even if its servicing carrier identifies exposure there.

The fact that travel in Minnesota posed a "known, appreciable risk" *is not a sufficient basis* for excluding Minnesota from coverage. This was not a voluntary market plan and Travelers *could not elect to exclude* necessary coverage simply because it did not want to underwrite the risk – hence the term "involuntary markets."

AA.17 (emphasis supplied). Ironically, this holding is directly contradicted by the sources the WCCA used to "support" its holding – sources never before raised or addressed by the parties. AA.106-119. The sources recognize that state pools in the residual market are designed to satisfy requirements of the law of their State of domicile, and *cannot* insure known exposure outside that State.

This coverage is designed solely for unknown and unanticipated exposure in states or territories other than those designated in 3.A of the policy and not otherwise specifically excluded.

AA.108.

Limited Other States Insurance is “designed solely for unknown or unanticipated exposures.” . . . By virtue of the state-specific nature of workers’ compensation statutes, insurers or state pools in the residual market are not obligated to extend policy coverage beyond that which is needed to satisfy the requirements of the employer’s state of domicile. Consequently, some employers may be faced with obtaining separate policies from each state where a potential exposure exists.

AA.108; AA.112; see also AA.117 (“insurers in the residual market are not obligated to extend policy coverage beyond that which is needed to satisfy the requirements of the state of domicile of the employer.”). Courts addressing this issue have plainly held that state residual market pools are designed solely to satisfy requirement of their respective States’ laws, and servicing carriers must comply with pool regulations:

An assigned risk pool is comprised of private insurance companies that subscribe to a state insurance plan. The state insurance plan provides those employers who are unable to secure coverage in the voluntary market with a means of insuring their operations through a designated carrier. Thus, the plan provides the employers with a means of securing *the coverage required under the state workers compensation act*. The insurance companies are bound by the rules of the plan as it is approved by the state insurance regulatory authorities *and must operate in accordance with those rules*.

Smith & Chambers Salvage v. Insurance Management Corp., 808 F.Supp. 1492, 1494

fn.1 (E.D. Wash. 1992). Wisconsin courts have specifically confirmed that Wisconsin’s

Pool is meant to cover liability under Wisconsin law only:

Sandeen and Sky High’s interpretation of the policy is unreasonable. In fact, if we followed their interpretation, we would turn the insurance Pool on its head. Sandeen and Sky High’s interpretations amount to coverage for an employee’s injury occurring in any state and a claim filed in any state. *It is unreasonable to conclude this is a nationwide policy because it is meant to fulfill obligations under Wisconsin law only.*

Brown v. Sandeen Agency, Inc., 762 N.W.2d 850, 854 (Wis. Ct. App. 2008). This fact – that the Pool covers exposure under Wisconsin law only and Travelers cannot insure known exposure outside Wisconsin through the Pool – was specifically confirmed by the Pool administrator:

The pool is designed to cover exposures in the state of Wisconsin for Wisconsin employers or employers that have exposure in Wisconsin. It is not designed to provide coverage in states other than Wisconsin . . . [T]he assigned risk pool is not authorized to write business outside of the State of Wisconsin, so we are – we are not permitted to issue a policy covering exposure in another state.⁴

AA.55-56 (Herrmann Depo.). Herrmann further explained that when employees are residents of other states and their employer obtains insurance through the Pool, the State of residence of the employees simply must be excluded:

Q: And in general terms then, if an employer in Wisconsin ever has employees that reside outside of the state of Wisconsin, it is the policy of the Wisconsin risk pool to exclude coverage for the states where the employee's [sic] reside?

A: That is normal protocol, yes.

AA.57 (Herrmann Depo., p. 26). Even Morrison's own agent understood that Minnesota benefits could not be covered through the Wisconsin Pool if Morrison had Minnesota-resident employees. AA.99 (Petree). Travelers merely applied this rule, and issued a policy that conformed in all respects with Pool requirements.

Q: So, then, based on the information that was supplied to you in terms of the Minnesota – the nine Minnesota drivers and all the other information,

⁴“Limited Other States Insurance” is an endorsement which allows insurers to obtain coverage for Wisconsin employees who just happen to be out of state when injured. Morrison applied for and obtained such coverage, subject to the express exclusion for Minnesota benefits.

then, that was your decision that a proper underwriting of this policy would place Minnesota under the schedule of Excluded States?

A: Yes.

T.104 (Sorenson); AA.57 (Herrmann Depo., p. 26) (confirming correctness of Travelers' exclusion). The State of residence of employees can indicate exposure there – even the “Producers Guide to Understanding NCCI’s Residual Market Limited Other States Insurance Endorsement,” cited by the WCCA, recognizes that to be covered by the Limited Other States Endorsement, an employee may need to “elect coverage in *and live in*” the state listed under Item 3.A. of the policy (here, Wisconsin). AA.118 (§ C.1) (emphasis supplied).

In short, everyone with any insurance expertise and knowledge of the operation of the Pool – including the source relied upon by the WCCA – agrees that it was appropriate for Travelers to exclude Minnesota due to Morrison’s Minnesota-resident employees (including Martin) who spent 95% of their work time outside Wisconsin. Yet, the WCCA held exactly the opposite, concluding that Travelers “could not elect to exclude necessary coverage simply because it did not want to underwrite the risk – hence the term ‘involuntary markets.’” AA.17. With all due respect to the WCCA, “involuntary market” does not mean that the policy must cover whatever the insured “needs” – nationwide – or whatever the insured believes should be covered. See Brown, 762 N.W.2d at (“It is unreasonable to conclude this [Pool policy] is a nationwide policy because it is meant to fulfill obligations under Wisconsin law only.”) To the contrary, “all states” coverage through the pool is *not available* – let alone guaranteed – to those

employers who, by virtue of their exposure outside the pool state, “need” it. But see AA.17 (“Travelers was obligated to provide coverage to the employer necessary to meet its mandated responsibility of obtaining compensation insurance to cover the full extent of its liability to its employees.”). This should come as a surprise to no one given the numerous conspicuous warnings given to Pool applicants of the potential need to obtain additional coverage in other States.

IMPORTANT! IF YOU BEGIN WORK IN ANY STATE OTHER THAN WISCONSIN, YOU MUST OBTAIN INSURANCE COVERAGE IN THAT STATE AND DO WHATEVER ELSE MAY BE REQUIRED UNDER THAT STATE’S LAW, AS “WISCONSIN LIMITED OTHER STATES” INSURANCE DOES NOT SATISFY THE REQUIREMENTS OF THAT STATE’S WORKERS’ COMPENSATION LAW.

AA.103.

REMEMBER: If your clients have employees who travel or work out of state, this endorsement may not be applicable and they may need separate workers’ compensation insurance.

AA.118 (gray box; Producer’s Guide).

“Wisconsin Limited Other States Coverage” is intended to provide limited, temporary coverage for Wisconsin employers for injury to an employee who regularly works in Wisconsin, but just happens to be in another state at the time the compensable injury occurs, and elects coverage in the other state. *It is not intended to provide coverage to employers who have operations in other states.* Such operations will most likely require the employer to obtain coverage to satisfy the requirements of the Worker’s Compensation law in the other state, and *the Wisconsin Pool policy cannot provide this coverage.*

AA.90 (Wisconsin Workers’ Compensation Insurance Pool Information and Procedures).

As recognized in the sources cited by the WCCA, it is the responsibility of servicing

carriers to identify and impose only that coverage available through the Pool – no more, no less – to each specific employer-applicant:

Note: There is no legal definition of “temporary” or what constitutes “beginning operations” in another state. This is a gray area that depends on individual circumstances that a servicing carrier will consider.

AA.113; AA.108.⁵ Herrmann also testified to this, explaining that servicing carriers use documents like the “Supplementary Wisconsin Limited Other States Coverage Request” completed by Morrison to identify risk outside Wisconsin, and exclude it. AA.55 (Herrmann, p. 20).

Q: And my question simply to you is this, is it the expectation and intent of the pool then to exclude a state such as Minnesota if it is determined and ascertained by the servicing carrier that there are known risks, expected risks outside the state of Wisconsin?

* * *

A: Yes.

AA.55-56 (Herrmann, p. 21-22). The WCCA’s holding purports to reverse this longstanding rule, imposed by Wisconsin to govern its own Pool, instead requiring that servicing carriers of residual market pools identify each applicant’s “needs” – everything necessary to “meet [the employer-applicant’s] mandated responsibility of obtaining compensation insurance to cover the full extent of its liability to its employees” – and issue a policy conforming to them. The holding *drastically* expands the obligations of

⁵ In its previous opinion, the WCCA grappled with defining the term “operations,” inexplicably resorting to Minnesota guidebooks to conclude that a Wisconsin Pool underwriter “erred” in excluding Minnesota. AA.35-36. Notably, the WCCA did not seek out the currently cited sources at that time, which support Travelers on that point.

the Wisconsin Pool – not to mention the pools of every other State – in at least the following ways:

- Minnesota coverage is mandatory if the employer has exposure in Minnesota.
- Employers obtaining insurance in the involuntary market of any other state will *never* need separate coverage in Minnesota.
- Insureds through the state pools of the other 49 States need not read their policies – if they apply for coverage in Minnesota, they get it regardless of how the policy is underwritten.
- State pools of the other 49 States cannot require servicing carriers to satisfy the requirements of their own State’s workers’ compensation laws only. Rather, servicing carriers must determine if Minnesota exposure exists and insure it if it does.
- Any provisions excluding coverage in other state are void as against public policy, since public policy holds employers need to have workers compensation insurance.

This significant interference with the residual market pools of the other 49 States is, respectfully, not justified by Morrison Trucking’s failure to read his Wisconsin Pool policy and obtain appropriate insurance coverage in Minnesota. The WCCA’s holding that “known, appreciable” risk in Minnesota is “not a sufficient basis” to exclude coverage through the Wisconsin Pool contradicts bedrock principles of residual market pools, as set forth in both the undisputed record and the very sources cited by the WCCA. It should be reversed.

III. Wisconsin law requires employers like Morrison to obtain insurance coverage for benefits that may become due under Wisconsin law, *not* the law of Minnesota or any other State. Morrison had precisely that coverage through the Pool; Travelers paid all benefits due under Wisconsin law. The WCCA erred when it held that the mandatory coverage provisions of the Wisconsin Act somehow required Travelers to cover Morrison for Minnesota as well.

The WCCA held that Travelers' exclusion of Minnesota is "contrary to public policy" because it is "inconsistent with the mandatory coverage provisions of the Wisconsin Worker's Compensation Act."

The Wisconsin Worker's Compensation Act requires a Wisconsin employer to obtain insurance, and the insurer to provide insurance, for worker's compensation liability to the full extent of the employer's liability to its employees. [Travelers'] exclusion of Minnesota is inconsistent with the mandatory coverage provisions of the act and is contrary to public policy. The purported exclusion is arbitrary and invalid and cannot be enforced to prevent coverage of Morrison's [sic] Trucking liability to the employee in Minnesota.

AA.18. This holding should not stand for several reasons. First, such an argument was never made or addressed by the parties. Second, as set forth below, the Wisconsin Act does *not* require employers to obtain insurance covering liability imposed by the law of any other State. Therefore, the holding is substantively incorrect. Third, it is axiomatic that courts may not judicially modify the terms of contracts when they are not ambiguous. Murphy Oil USA, Inc. v. Brooks Hauser, 820 F.Supp. 437, 442 (D. Minn. 1993). There was never a finding of an ambiguity here. Fourth, as to declaring contracts void due to "public policy," Minnesota courts cannot do so absent a finding that the contract is "injurious to the interests of the public" or "contravene[s] some established interest of society." Isles Wellness, Inc. v. Progressive Northern Ins. Co., 725 N.W.2d 90, 93 (Minn. 2006).

This is not a field for the play of individual notions of public policy. Rather, it is only those indisputable public interests standing in opposition to what the contract seeks to accomplish that should be permitted to strike down its enforceability.

Perkins v. Hegg, 3 N.W.2d 671, 672 (Minn. 1942); see also Katun Corp. v. Clarke, 484 F.3d 972, 976 (8th Cir. 2007) (quoting Hollister v. Ulvi, 271 N.W. 493, 498-99 (Minn. 1937)) (a court's power to declare a contract void due to public policy is "a very delicate and undefined power, and . . . should be exercised only in cases free from doubt."); Equitable Holding Co. v. Equitable Bldg. & Loan Ass'n, 279 N.W. 736, 740-41 (Minn. 1938) (public policy requires that freedom of contract be not interfered with lightly); Christensen v. Eggen, 577 N.W.2d 221, 225 (Minn. 1998) ("[P]ublic policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public.") (citing Rossman v. 740 River Drive, 241 N.W.2d 91, 92 (Minn. 1976)). Here, the WCCA did not even mention the strong public policy favoring freedom of contract, nor did it identify an expressed public policy in Minnesota of requiring the residual market pools of the other 49 states to issue any and all "necessary" coverage for Minnesota benefits. It did not elucidate any "injury to the public" caused by the Wisconsin Pool's mandate that known exposure in Minnesota be excluded, let alone balance that against Wisconsin employers' ability to hire agents and brokers, read their insurance policies and obtain necessary separate coverage. It certainly did not place any weight on Wisconsin's interest in governing its own Pool. Therefore, given the glaring lack of any balancing of interests, the WCCA's reliance on "public policy" to "invalidate" the unambiguous contract is erroneous on its face.

Moreover, the WCCA's holding that the exclusion of Minnesota somehow runs afoul of the "mandatory coverage provisions" of Wisconsin law is substantively

incorrect. Wisconsin law *does not* require employers to obtain insurance for liability imposed under *Minnesota* law. The Wisconsin statute is very explicit: insurance is required for liability which may be imposed “under this chapter” – i.e., under *Wisconsin* law.

Except as provided in par. (c), a contract [for the insurance of compensation *provided under this chapter* or against liability therefore] under par. (a) shall be construed to grant full coverage of all liability of the assured *under this chapter* unless the department specifically consents by written order to the issuance of a contract providing divided insurance or partial insurance.

Wis. Stat. § 102.31 (emphasis supplied). Nowhere does Wisconsin law state that employers must be insured for workers’ compensation benefits due under the law of every other State.

Further confirming that only liability imposed under *Wisconsin* law must be insured are the cases cited by the WCCA – case law never before raised or addressed by any of the parties. In State v. Koch, 537 N.W.2d 39 (Wis. Ct. App. 1999), Reedway, an interstate trucking company domiciled in Wisconsin, obtained its workers’ compensation insurance through a third party with which it contracted to haul freight. The coverage was limited in two significant ways: (1) to Reedway’s “drivers and drivers’ assistants,” and (2) only while they were operating under the North American Van Lines, Inc.’s interstate authority. Id. at 44. In light of these limitations, the Wisconsin court recognized that “potential exists for uncovered employees if Reedway were to perform work for any other company,” or if Reedway employed individuals “who were not drivers or drivers’ helpers.” Id. Therefore, the court concluded that Reedway was underinsured for benefits that could become due *under Wisconsin law*. See id. at 44-45

(citing Wis. Stat. § 102.31(1)(b)) (“a contract under par. (a) [for the insurance of compensation *provided under this chapter* or against liability therefore] shall be construed to grant full coverage of all liability of the assured *under this chapter . . .*”) (emphasis supplied). The case does not, even remotely, speak to benefits due under the law of another State. Koch is simply inapposite, and does not stand for the proposition that Morrison was somehow “uninsured” under Wisconsin law because it lacked coverage for liability imposed under Minnesota law.

Similarly, in Simonton v. Department of Industry, Labor and Human Relations, 214 N.W.2d 302 (Wis. 1974), nowhere is it held that a Wisconsin employer must obtain insurance sufficient to cover benefits due under the law of States other than Wisconsin. The court simply held that the Wisconsin Workers’ Compensation Act should respond to a Wisconsin employee who is injured in Minnesota during the course of his or her employment. Id. at 303, 307.⁶ The Simonton court does not express a view that Wisconsin employers must obtain insurance coverage for liability that may accrue under the law of another State. Again, the case is simply not relevant, and does not support the WCCA’s holding that Wisconsin law requires employers to be insured for liability imposed under Minnesota law.⁷ There is no such requirement in Wisconsin, and the

⁶ This is *exactly* what happened here: Martin received \$75,000 in benefits due under Wisconsin law even though he was injured in Minnesota.

⁷ Notably, both Koch and Simonton emphasize that the responsibility of obtaining appropriate insurance coverage rests with the employer, not the insurer. Koch, 537 N.W.2d at 45 (“every employer shall insure payment . . .”); Simonton, 214 N.W.2d at 307 (“insurance for the protection of both parties to the employer-employee status was taken out in that expectation [that there was coverage under the workmen’s compensation act for the operations conducted outside Wisconsin].”). The WCCA’s holding

WCCA's holding that the Pool runs afoul of the "mandatory coverage requirements" of Wisconsin law is clear error and should be reversed.

CONCLUSION

The WCCA erred when it, once again, rewrote the unambiguous language of the Travelers policy based on its conviction that Wisconsin "cannot" refuse to insure known risk outside Wisconsin through its residual market pool. The issue was not even available for consideration on appeal due to this Court's prior reversal, nor was it raised by any of the parties. Moreover, the holding is substantively incorrect, as confirmed by the WCCA's own sources, because (1) residual market pools simply *cannot* insure known risk outside their home States; and (2) Wisconsin law does *not* mandate insurance for liability imposed under Minnesota law. As confirmed by every witness with insurance expertise and the very sources consulted by the WCCA, Travelers appropriately excluded Minnesota after identifying exposure here. Morrison's failure to read his policy does not justify rewriting the unambiguous policy and the longstanding, widely understood and applied rules governing the residual market pools of the other 49 states.

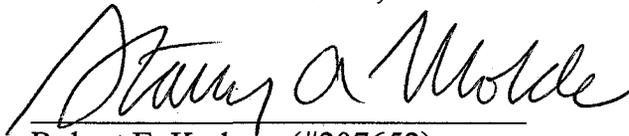
The WCCA should be, once again, reversed, and any remand should be with specific instructions to address the penalty award only.

contradicts this basic premise as well, placing the burden of ascertaining "necessary coverage" on insurers instead of employers. AA.17 ("Travelers was obligated to provide coverage to the employer necessary to meet its mandated responsibility of obtaining compensation insurance to cover the full extent of its liability to its employees.").

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Respectfully submitted,

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