

NO. A06-2133

State of Minnesota
In Supreme Court

Auto-Owners Insurance Company,

Appellant,

v.

Jason George,
Progressive Insurance Company,
Daniel Evenson and Melissa DesMarais,

Respondents.

BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE

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I. INTRODUCTION

This *Amicus Curiae* brief is respectfully submitted on behalf of the Minnesota Association for Justice and in support of the position of the Respondent in this matter with respect to the legal issues identified below. The appeal in this matter involves issues that touch upon a number of important settlement tools used by civil litigants in injury and insurance matters in Minnesota. The goal of this Amicus Brief is to provide an overview of each of these settlement tools so the Court will have that overview, including the public policy statements articulated by the Courts, more readily available during its deliberation on this present appeal.

The decisions of the District Court below were inconsistent with the public policy considerations underlying the enactment of the Minnesota No-Fault Act, the purposes expressed therein, well-recognized principles of law relating to the promotion of settlements, the efficient and final resolution of claims, and judicial economy. The decision of the Minnesota Court of Appeals corrected those problems to a large extent by recognizing the viability of the underinsured motorist claim. One problem of the decision of the Court of Appeals, however, is that it discussed, in *dicta*, the result of an inadequate notice under *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996). The Court of Appeals, citing *Kluball v. American Fam. Mut. Ins. Co.*, 706 N.W.2d 912 (Minn. Ct. App. 2005), asserted that the result of an inadequate notice under *Malmin* would be a loss of the ability to pursue an underinsured motorists claim. A review of the decision in *Malmin* and the policy language of the insurance policy issued by Appellant Auto-Owners reveals that the proper rule should be that a failure to timely serve a

Malmin notice means that an injured insured has to litigate the underinsured motorists claim directly against the insurer and cannot bind the insurer with the judgment from the underlying action. The failure to provide a *Malmin* notice should not result in a forfeiture of the right to recover underinsured coverage provided under the policy, because the insurance company has the right to fully defend the claim in a second proceeding. If this Court in *Malmin* determined that a consent to sue clause in a policy violated Minnesota law and could not result in a forfeiture of coverage, then a notice requirement should not operate to forfeit coverage. To the extent that the *Kluball* decision holds otherwise, it should be overruled.

II. LEGAL ISSUES

1. Whether there has been a resolution of the underlying tort action to the extent that the underinsured motorist claim against Auto-Owners Insurance has matured?

The Court of Appeals appeared to answer this question in the affirmative.

2. If the underinsured motorist claim has matured, whether there was sufficient notice of the settlement of the underlying tort action pursuant to *Schmidt v. Clothier* to allow the UIM insurer to protect its subrogation rights or waive those rights by refusing to substitute a settlement check?

The Court of Appeals answered in the affirmative.

3. Whether proper notice was given to bind the underinsured motorist carrier to the results of the arbitration award rendered by Justice John Simonet?

The Court of Appeals answered in the negative.

4. If the underinsured motorist carrier is not bound by the arbitration award, should the underinsured motorist claim be forfeited or should the parties have a right to litigate the issues of liability and damages?

The Trial Court determined that the underinsured motorist claim was not forfeited, but it did indicate that, under certain circumstances, forfeiture would occur.

III. LEGAL ANALYSIS

A. AN OVERVIEW OF THE SETTLEMENT TOOLS IMPLICATED ON THIS APPEAL AND THE PRINCIPLE THAT PUBLIC POLICY FAVORS SETTLEMENTS, INCLUDING PARTIAL SETTLEMENTS

Minnesota's No-Fault Act, Minn. Stat. §§ 65B.41-.71, contains a statement of purpose, which provides in pertinent part that the Act's purposes are:

- (1) To **relieve the severe economic distress** of uncompensated victims of automobile accidents * * *;
- (3) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by **assuring prompt payment** for such treatment;
- (4) To **speed the administration of justice, to ease the burden of litigation on the courts of this state**, and to create a system of small claims arbitration **to decrease the expense of and to simplify litigation**, and to create a system of mandatory intercompany arbitration **to assure a prompt and proper allocation of the costs of insurance benefits between motor vehicle insurers;**

Minn. Stat. 65B.42 [emphasis added]. Minnesota courts heed these stated purposes when construing the No-Fault Act. *Nelson v. American Family Ins. Group*, 651 N.W.2d 499, 503 (Minn. 2002), rehearing denied Oct. 9, 2002.

Likewise, arbitration is intended to bring about speedy and efficient resolution of disputes. *Independent School Dist. No. 279 v. Winkelman Bldg. Corp.*, 530 N.W.2d 583 (Minn. Ct. App. 1995), review denied. The general policy of Minnesota is to encourage arbitration as a speedy, informal, and relatively inexpensive procedure for resolving controversies. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557

(Minn. 1996). Minnesota law favors arbitration. *Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young*, 524 N.W.2d 752 (Minn. Ct. App. 1994).

Furthermore, Minnesota appellate courts have consistently refused to enforce provisions in insurance contracts that contravene the public policy of the state. *See, Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52, 58 (Minn. 2001) (holding that a judgments-not-binding clause in an uninsured motorist insurance contract was not enforceable where the insured had already obtained a default judgment against the uninsured motorist); *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723, 727-28 (Minn. 1996) (holding that a consent-to-sue clause in underinsured motorist insurance contract was invalid and the insurer was bound by the default judgment obtained against an underinsured motorist, because forcing the insured to relitigate her claim simply because the insured forgot to obtain written consent from the insurer violates the public policy behind the No-Fault Act and erects unnecessary barriers to the insured's recovery of UIM benefits); *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 875 (Minn. 1988) (holding that the a clause in an uninsured motorist endorsement to an insurance policy which permits an insurer to demand a trial de novo if an arbitration award exceeds a designated amount violates the state's public policy favoring the use of arbitration to resolve disputes between contracting parties and is, therefore, unenforceable).

Cases involving disputed coverage often result in partial settlements. As noted above, it has long been the public policy of Minnesota to encourage settlement of disputes, either partial or complete. “[T]he effective and expeditious resolution of

lawsuits is a commendable goal; one fully consistent with the public policy of Minnesota. . . . Minnesota has a history of approving and encouraging partial settlements of claims.” *Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471, 475 (Minn. Ct. App. 2002), citing *Frey v. Snelgrove*, 269 N.W.2d 918, 921-22 (Minn. 1978); *Kellen v. Mathias*, 519 N.W.2d 218, 223 (Minn. Ct. App. 1994); *Klimek v. State Farm Mut. Auto. Ins. Agency*, 348 N.W.2d 103,106 (Minn. Ct. App. 1984).

In *Drake v. Ryan*, 514 N.W.2d 785, 788 (Minn. 1994), rehearing denied June 23, 1994, the Court recognized and approved of the use of various types of releases to effectuate partial settlements:

[T]his court has recognized other types of releases that have dissected a defendant’s liability, preserved part of a claim, and agreed to take a judgment only from an insurance policy rather than from a defendant’s personal assets. In *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982), we held that when an insurer unreasonably disputes coverage, the plaintiff and the insured tortfeasor may stipulate a settlement in plaintiff’s favor and agree that the judgment will be taken from the insurance policy and not from the tortfeasor’s personal assets. In *Shantz v. Richview, Inc.*, 311 N.W.2d 155, 156 (Minn. 1981), we found that a *Pierringer* release permits a plaintiff to settle with one of the two tortfeasors and reserve a claim against the tortfeasor who is not a party to the agreement. In *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 893-94 (Minn. 1977), we allowed an employee to settle a tort claim for damages not recoverable under workers’ compensation without affecting the employer’s subrogation claim against the tortfeasor for compensation benefits paid.

Id. at 788. The case of *Drake v. Ryan*, 514 N.W.2d 785, is interesting because one objection to that settlement technique being used in Minnesota was the fact that Minnesota is not a “direct action” state, in that insurance companies are not to be sued directly for indemnity of their insureds. *Id.* at 787-788. One argument made in *Drake v.*

Ryan against adopting the *Loy-Teigen* approach to settlements from Wisconsin was the distinction that Wisconsin is a direct action state and Minnesota is not, thereby eliminating the opportunity to use that settlement tool in Minnesota. *Id.* The Minnesota Supreme Court agreed that such a technical distinction was not material and did not operate to preclude this settlement method. Rather, this Court focused on the intentions of the parties as expressed through the Agreement and found that the express intention to reserve a claim against an insured to the extent of available insurance coverage was consistent with other types of settlements that had been approved in Minnesota and was consistent with the public policy favoring settlements. *Id.* at 788.

1. *Schmidt v. Clothier*. As in *Drake v. Ryan*, the *Schmidt v. Clothier* settlement is an effort by the appellate courts in Minnesota to strike a balance between the interests of the primary insurer and the injured party to try to resolve their disputes in a good faith fashion while at the same time preserving the rights of excess coverage from a first-party insurer possessing a right of subrogation. *See Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). Similar to the *Drake v. Ryan*, *Schmidt v. Clothier* settlements occur in the context of multiple layers of insurance coverage. The distinction is that the subsequent layer of insurance coverage is first-party underinsured motorist coverage, rather than third-party liability coverage. In the situation where a first-party insurer is paying benefits, it has a right of subrogation for any amounts paid back against the original tortfeasor. *See, generally, Schmidt v. Clothier*, 338 N.W.2d 256.

To date, there has not been a reported decision in the Minnesota appellate courts dealing with a situation where a *Drake v. Ryan* agreement was not adequately secured.

There are, however, situations and cases involving what a Court is to do when a *Schmidt v. Clothier* notice is not given prior to consummating a settlement. See *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923 (Minn. 1990). When an underinsured motorist carrier does not receive a *Schmidt* notice, that carrier is entitled to a presumption that it was prejudiced by virtue of the settlement with the tortfeasor in the underlying settlement that extinguished the subrogation rights of the insurer. The presumption is a rebuttable presumption, however, and if the claimant can demonstrate that no prejudice has occurred to the insurer by virtue of the underlying settlement without notice under *Schmidt v. Clothier*, then the claimant can proceed with the underinsured motorist claim. *American Family*, 459 N.W.2d at 927. When an insured cannot meet that burden, then the right to recover underinsured motorists coverage and benefits are forfeited. *Id.* Typically, that burden is met by demonstrating that the insurer could not have collected from the tortfeasor on its subrogation claim due to the financial status of the tortfeasor.

2. **Notice to an Underinsured Motorist Coverage Insurer of an Underlying District Court Action and/or Binding Arbitration.** In *Employers Mutual Companies v. Nordstrom*, 495 N.W.2d 855 (Minn. 1993), the Minnesota Supreme Court clarified that underinsured motorist coverage was truly an excess coverage and that the underlying tort action had to be resolved before the UIM claim could proceed. It should be noted that the *Nordstrom* decision came after the decision in *Schmidt v. Clothier*. Thus, the *Nordstrom* Court stated, “So, as matters apparently stand, the injured claimant can either (1) pursue a tort claim to a conclusion in a district court action, and then, if the judgment exceeds the liability limits, pursue underinsured benefits; or (2) settle the tort

claim for ‘the best settlement,’ give a *Schmidt-Clothier* notice to the underinsurer, and then maintain a claim for underinsured benefits.” *Id.*, at 857 [emphasis by underline added].

In *Nordstrom*, the Court indicated that to bind a UIM carrier by a tort judgment was less of an issue of collateral estoppel and more of an issue of contract, since the UIM carrier had agreed to pay damages the insured was “legally entitled” to recover from the tortfeasor. *Id.*, at 858-59. It was in this context that the *Malmin* decision arose, and with it the issue of whether notice of the pending tort action needed to be provided to the UIM insurer prior to judgment.

In *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996), the injured claimant obtained a tort verdict in excess of the underlying liability limits and sought summary judgment on the issue of coverage, since liability and damages had been determined. He further argued that a “consent-to-sue” clause in the UIM insurance portion of the policy was void as contrary to the Minnesota No-Fault Act. *Id.* at 724-25. The UIM insurer asserted that its policy provision was enforceable, and it is very important to note the remedy it sought: to have an opportunity to litigate the issues of liability and damages in a second action. The UIM insurer did not seek to void coverage due to claimed non-compliance with the clause. *Id.*, at 725. The trial court in *Malmin* denied the injured claimant’s motion for summary judgment, and determined that the UIM claim would have to be established by relitigating the personal injury claim, but agreed to certify the following question to the appellate courts:

Is an injured person who has received a jury verdict on all liability and damage issues against a tortfeasor [sic] in an amount in excess of the tortfeasor's underlying liability limits, entitled to a recovery of the excess amount from his underinsured motorist carrier, *without a full relitigation of all liability and damage issues in a second action against the underinsured motorist carrier*, when the underinsured motorist policy contains a provision that states : "any judgment for damages arising out [of] a 'suit' brought without our written consent is not binding upon us."

Id., at 725 [emphasis added].

The Minnesota Supreme Court answered that question in the negative, found the consent-to-sue clause invalid and bound the UIM insurer with the outcome of the tort action. The Court did note that while a notice requirement would be an allowable policy provision, the consent-to-sue was invalid. It is important to note that throughout the *Malmin* decision, there was never a discussion of the forfeiture of the UIM claim in the event of improper notice, but rather only relitigation of the claim was discussed as the remedy to the insurer if improper notice was found. *Id.*

In *Kluball v. American Fam. Mut. Ins. Co.*, 706 N.W.2d 912 (Minn. Ct. App. 2005), the Minnesota Court of Appeals upheld a District Court decision to dismiss a UIM claim where no Schmidt-Clothier notice had been provided prior to the execution of the release of the tortfeasor. The District Court was upheld in its finding that the insured had not overcome the presumption of prejudice given the lack of notice. The lower Court also found that a "Malmin" notice given 5 days before a binding arbitration agreement was insufficient. Although both the District Court and the Court of Appeals determined that the failure of notice forfeited the UIM claim regardless of whether the claim was analyzed under *Malmin* or *Schmidt*, it must be noted that in that decision, the failure of

the insured to protect the right of subrogation for the UIM carrier was a key factor. Also, it appears that the Courts involved were mistaken somewhat as to the procedural history of *Malmin*. For example, at page 917 of the decision, the Court stated that in *Malmin*, “[t]he insurer *denied coverage* because the insured had not complied with provisions in the policy that required both notice to the insurer of a potential UIM claim and the insurer’s written consent to sue the tortfeasor.” *Kluball*, 706 N.W.2d at 917 [emphasis added]. As noted above, the issue in *Malmin* was relitigation, not a termination of coverage. *Kluball* can be reconciled with the other decisions discussed herein when it is noted that since the *Schmidt* notice followed the signature on the release and there was no showing that prejudice was avoided, the totality of those unique circumstances required that no claim for UIM go forward. *See Baumann*, 459 N.W.2d at 926-27, noting the Court’s historic reluctance to “declare a forfeiture of insurance benefits.”

Since the *Nordstrom* and *Malmin* decisions, the use of Alternative Dispute Resolution (ADR) has grown, as is reflected in part by the Rules of General Practice for the District Courts, particularly Rule 114, and other statutory and procedural rule provisions. Not surprisingly, with the growth of ADR, there has developed in practice the use of various forms of ADR to try to achieve “the best settlement” of the underlying tort action. In practice, these include using arbitrations to determine the settlement figure to be used in a proper *Schmidt-Clothier* notice, when there is no intent to try to bind the UIM carrier by the result of the arbitration. There no doubt will continue to be the use of ADR in these situations.

B. THE DECISION OF THE MINNESOTA COURT OF APPEALS IN THE MATTER NOW ON APPEAL

1. Resolution of the Underlying Tort Action.

The Court of Appeals concluded that the underlying tort action was concluded via a settlement of the action, citing extensively to the language of the agreement between the Respondent and Farm Bureau Insurance Company and the *Schmidt* notice and waiver that occurred here. The Appellant here strenuously argues that an injured party must “choose” between a *Malmin* approach versus a *Schmidt* approach, in reliance on the decision of the Minnesota Court of Appeals in *Kluball*, 706 N.W.2d 912. This Court is urged by the undersigned *Amicus* to resist taking too technical of an approach to this issue. This is because, in practice, the notice concepts under the two cases are not mutually exclusive and because the potential for settlement exists well into the litigation process, with settlements at times occurring after verdicts are reached in tort actions.

Some hypothetical situations may be helpful to illustrate this point. In the first hypothetical, please assume that a tort action is commenced against the underinsured driver but no *Malmin* notice is given. The case goes to trial and a verdict in excess of the liability coverage occurs. Please further assume that there was a difficult evidentiary issue or jury instruction issue that was ruled upon in favor of the injured party by the trial court. Using the potential for an appeal as leverage, the liability carrier offers to pay 95% of its coverage in settlement. The injured party accepts and gives proper *Schmidt* notice, thus giving the UIM carrier a full opportunity to protect its right of subrogation, and plans to pursue the UIM claim in a second action. Did the party “choose” litigation of the

claim or best settlement? Could the UIM carrier argue that the lack of a *Malmin* notice precludes the claim? In this hypothetical, the approach of the Court of Appeals in this case makes sense, because a Court should determine that the hypothetical case resolved by settlement, and that the UIM case can continue, with there being no binding effect of the verdict on the UIM carrier due to the lack of a *Malmin* notice.

In the second hypothetical, please assume that the case described above went through post-trial motions and the verdict was reduced to a judgment. Please assume further, however, that a proper *Malmin* notice was provided to the UIM carrier. While the appeal is pending, the liability carrier makes an offer of 95% of the policy limit, and the injured party gives a proper *Schmidt* notice to the UIM carrier. The UIM carrier will be bound by the Judgment as to the value of the total claim. The *Schmidt* notice gives the UIM carrier the opportunity to substitute its check for the proposed settlement, preserve its subrogation rights and continue the appeal, or to waive that interest and pay the claim over and above the liability payment. This hypothetical demonstrates that the “choice” between a *Malmin* approach and a *Schmidt* approach are not mutually exclusive concepts that should be “chosen.” They are complimentary concepts, not mutually exclusive concepts.

In the final hypothetical, assume the same facts as in hypothetical number 2, except no “settlement” occurs. The appeal proceeds, the judgment is upheld, and at the conclusion of the case, the liability carrier pays the amount of its coverage, the UIM carrier pays the remainder without a release and in only partial satisfaction of the judgment, and then can pursue subrogation against the underinsured motorist. In the last

hypothetical, the *Malmin* notice binds the UIM carrier, and because no release of the underinsured motorist claim was requested, there was never a need to provide a *Schmidt* notice.

The case currently before the Court affords this Court an opportunity to correct any misconception created by the *Kluball* decision. In these cases, there are two important considerations: First, is there adequate notice to the UIM carrier to fairly bind it to a judgment from an underlying tort action? If not, the injured party has to relitigate the issue, but no forfeiture should occur for a faulty or non-existent *Malmin* notice. The second consideration is whether the UIM carrier's subrogation rights have been protected so that the UIM carrier can protect or waive those rights. If there is no rebuttal of the presumption of prejudice from a faulty or non-existent *Schmidt* notice, then forfeiture of benefits occurs.

2. **Sufficiency of *Schmidt v. Clothier* Notice to Auto-Owners.** Unlike the cases where no *Schmidt v. Clothier* notice is given and no opportunity is provided to substitute a settlement check, in this case Auto-Owners was provided with an opportunity, after the arbitration and before execution of the release, to substitute its check. By letter dated May 19, 2005, it expressly waived its right to substitute as to these two tortfeasors. Therefore, it appears that the *Schmidt v. Clothier* notice that was provided after the arbitration served its purpose and the insurer waived its right, foregoing its opportunity to utilize a full thirty days to determine whether or not it wanted to preserve its right of subrogation by substitution. The Court of Appeals correctly concluded that an appropriate notice and waiver by the insurer occurred here.

The only circumstance when a forfeiture of coverage can occur is when either no *Schmidt* notice is provided or a deficient notice occurs. When there are procedural defects alleged to exist in a *Schmidt* notice, the case of *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923 (Minn. 1990), makes clear that there must be a showing of “actual prejudice.” A UIM insurer has 30 days within which to complete its investigation and decide whether or not to “substitute” its own money for the funds offered by the tortfeasor’s liability insurer. See *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 927. If the insured fails to give this opportunity to the UIM insurer before signing a release with the liability carrier, it is “deemed prejudicial to the underinsurer [but the] presumption of prejudice shall be rebuttable” with “the burden of demonstrating by a preponderance of the evidence the absence of prejudice... [being] borne by the insured.” *Id.* ” “An insured’s failure to sustain that burden ... result[s] in forfeiture.” *Id.*

The *Schmidt* situation is easily distinguished from a *Malmin* situation, because a non-existent or faulty *Schmidt* notice can result in actual, substantive prejudice to the UIM insurer, because that insurer may have had a viable subrogation claim that could be pursued either against a gap in liability coverage left over from a “best settlement” or against the personal assets of an underinsured motorist. In *Malmin* situations, there is no substantive prejudice to the insurer. If it is not bound by the outcome of a trial or ADR process due to a lack of notice, then it simply defends the claim.

3. Forfeiture of the UIM Claim Is Not Warranted, Since Auto-Owners Has Not Been Prejudiced. The issue on the notice pursuant to *Malmin* and the related authority that has extended the principles of *Malmin* to arbitration situations focuses upon

providing the underinsured motorist carrier with a meaningful opportunity to participate in the action or otherwise to intervene to assert its rights. The Court of Appeals determined that the Appellant here did not have sufficient notice prior to the arbitration to allow the Appellant to be bound by its outcome. The Court of Appeals properly determined that the Respondent will have to relitigate the UIM claim, but did not forfeit Respondent's right to pursue that claim. Essentially, the UIM carrier has not been prejudiced by this decision. If it is not bound by the arbitration outcome, it remains entitled to fully defend the issues of liability and damages presented by the claim.

This approach is entirely consistent with the decision in *Malmin*. In *Malmin*, this Court ruled,

[W]e hold that a consent to sue clause which requires written consent from the insurer before the insurer will be bound by a judgment against a tortfeasor is contrary to the purposes of the No-Fault Automobile Insurance Act, Minn. Stat. §§65B.41-.71 (1994). Thus, [the UIM insurer] is bound by the damages award obtained by the Malmins in [the liability trial in] Hennepin County District Court.

Malmin, 552 N.W.2d. at 728.

This ruling is in line with “the reasoning of courts in other jurisdictions that have refused to enforce consent to sue clauses in automobile insurance contracts [which would otherwise] ... *forc[e] the insured to relitigate his or her claim against a tortfeasor [in a UIM proceeding]* simply because the insured neglected to obtain written consent from the insurer,” *Id.*, as such a clause “violates the public policy behind our No-Fault Act and erects unnecessary barriers to the insured's recovery of UIM benefits.” *Id.*

This approach and discussion in *Malmin* is consistent with the policy language cited by the Appellant in this case, language that is fairly standard in current underinsured

motorists coverage clauses. Under the notice clause cited by Appellant, the Company states: "...We will not be bound by any judgement for damages arising from a suit against an underinsured motorist unless...". The notice clause mentions nothing about forfeiture of benefits or coverage. This is consistent with the approach discussed in *Malmin*. To the extent that the decision below or the decision in *Kluball* indicate otherwise, those decisions must be reversed and overruled. A faulty or non-existent *Malmin* notice means that an injured insured must relitigate their claim against their insurer, not forever lose the right to benefits purchased from that company.

IV. CONCLUSION

For the reasons stated above, the decisions of the Court of Appeals should be clarified and affirmed.

Respectfully submitted,

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Dated: May 5, 2008

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Amicus Curiae* brief submitted on behalf of the Minnesota Trial Lawyers Association, conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1) for a brief produced with a proportionally spaced font.

There are 4,552 words in this brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this brief was Microsoft Word 2004 for Mac, Version 11.2.

HARPER & PETERSON, P.L.L.C.

Dated: May 5, 2008

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