

NO. A09-1506

State of Minnesota
In Court of Appeals

Western National Insurance Company,

Appellant,

v.

Bruce Thompson and Cindy Thompson,

Respondents.

APPELLANT'S REPLY BRIEF

STEMPEL & DOTY, PLC
Richard S. Stempel (#161834)
Christopher M. Drake (#338527)
41 Twelfth Avenue North
Hopkins, MN 55343
(952) 935-0908

Attorneys for Appellant

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

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF THE LEGAL ISSUES 3

LEGAL ARGUMENT 4

A. WESTERN NATIONAL’S REQUEST FOR AN EXAMINATION UNDER
OATH WAS NOT A DISCOVERY REQUEST UNDER RULE 12 OF THE NO-
FAULT ARBITRATION RULES AND IS NOT GOVERNED BY THE NO-
FAULT ACT.

CONCLUSION 10

TABLE OF AUTHORITIES

State Statutes

Minn. Stat. § 65B.56.	9
----------------------------	---

Case Law

<i>Costello v. Aetna Cas. & Sur. Co.</i> , 472 N.W.2d 324, 326 (Minn. 1991)	4
<i>Garrick v. Northland Ins. Co.</i> , 469 N.W.2d 709, 711 (Minn. 1991).	4
<i>Iowa Kemper v. Stone</i> , 262 N.W.2d 885, 887 (Minn. 1987).	4
<i>Johnson v. American Family Ins. Co.</i> , 426 N.W.2d 419, 421 (Minn. 1988).	4
<i>Safeco Ins. Co. v. Goldenberg</i> , 435 N.W.2d 616, 620 (Minn. App. 1989).	4
<i>Sorenson v. St. Paul Ramsey Med'l Ctr.</i> , 457 N.W.2d 188, 190 (Minn. 1985)	4
<i>United States Fid. & Guar Co. v. Fruchtman</i> , 263 N.W.2d 66, 71 (Minn. 1978).	4
<i>Vieths v. Illinois Famers Ins. Co.</i> , 441 N.W.2d 575, 577 (Minn. App. 1989).	4
<i>Weaver v. State Farm</i> , 609 N.W.2d 878, 884 (Minn. 2000).	9

STATEMENT OF THE LEGAL ISSUES

- A. WESTERN NATIONAL'S REQUEST FOR AN EXAMINATION UNDER OATH WAS NOT A DISCOVERY REQUEST UNDER RULE 12 OF THE NO-FAULT ARBITRATION RULES AND IS NOT GOVERNED BY THE NO-FAULT ACT.**

LEGAL ARGUMENT

A. WESTERN NATIONAL'S REQUEST FOR AN EXAMINATION UNDER OATH WAS NOT A DISCOVERY REQUEST UNDER RULE 12 OF THE NO-FAULT ARBITRATION RULES AND IS NOT GOVERNED BY THE NO-FAULT ACT.

I. The Court Has Jurisdiction to Interpret the Insurance Policy

The interpretation and construction of a contract presents a matter of law within the Court's sole discretion. *Sorenson v. St. Paul Ramsey Med'l Ctr.*, 457 N.W.2d 188, 190 (Minn. 1985); *Iowa Kemper v. Stone*, 269 N.W.2d 885, 887 (Minn. 1987). The interpretation of an insurance policy is a question of law to be determined by the courts. *Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 711 (Minn. 1991).

The determination of this dispute is outside the jurisdiction of a no-fault arbitrator. "In the area of automobile reparations, arbitrators are limited to deciding issues of fact, leaving the interpretation of law to the courts." *Johnson v. American Family Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988). The Supreme Court has held that trial court judges, not no-fault arbitrators, must determine coverage issues before ordering arbitration. *Costello v. Aetna Cas. & Sur. Co.*, 472 N.W.2d 324, 326 (Minn. 1991); *see also Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616, 620 (Minn. App. 1989); *Vieths v. Illinois Farmers Ins. Co.*, 441 N.W.2d 575, 577 (Minn. App. 1989). Requiring courts to determine coverage issues before ordering arbitration protects the insurer "from the burden of unauthorized arbitration of both the coverage dispute and the merits of the insured's claim." *United States Fid. & Guar. Co. v. Fruchtman*, 263 N.W.2d 66, 71

(Minn. 1978). Accordingly, the requests of an insurance contract upon one claiming benefits presents an issue of law reserved for exclusive determination by the trial courts.

II. The Policy Requires an Examination Under Oath

Appellant's contract of insurance requires a person seeking coverage to appear for an examination under oath. The contract language is plain and straight forward. Despite the fact that Appellant's contract contains the provision requiring a person seeking coverage to submit to an examination under oath, it is the Appellant who has had to endure the filing of no-fault arbitration petitions, the cost of defending those arbitrations and proceeding to district court in an attempt to enforce the clear language of the contract of insurance.

There are several errors of law in this case. First, the no-fault arbitrators' lack the authority to make the legal determination of whether Appellant's contract required the Respondents to submit to examinations under oath. Second, the no-fault arbitrators' ruling erred in its analysis in the Appellant's contract of insurance. As will be discussed in the next section, the only test of reasonableness relates to how often the Appellant would require the Respondents to submit to an examination under oath, not whether the initial requests was reasonable.

The errors of law made by the no-fault arbitrators were compounded by the district courts' flawed analysis of this contract question of law. This case involves the Appellant's ability to enforce a standard contract provision prior to the initiation of any no-fault arbitration proceeding. The problem with the analysis of the no-fault arbitrators and the district court is that introducing a factual test of reasonableness into what is

clearly a legal issue would result in subjective and discretionary series of determinations when an insurer can actually enforce its examination under oath provision. For example, what might constitute a reasonable fact basis for requesting an examination under oath to one arbitrator or district court judge could easily vary with respect to another arbitrator or judge. There would likely be as many results as to whether or not an insurer could enforce the contractual duty as there are individuals making that fact determination based on “reasonableness.”

One of the critical functions of the Appellate Court is to provide parties with a clear understanding of what an individual’s duties are under a contract of insurance. That interest is best served by reversing the district court and the no-fault arbitrators’ analysis and enforcing a longstanding and straightforward contractual provision. This case is not before this court because Appellant asked its insureds to submit to an examination under oath on five separate occasions to cover the same material over and over again. The Appellant simply asked its insured claimants, who have received the benefit of thousands of dollars of insurance coverage and are seeking thousands more, to provide information relating to their insurance coverage and claim. Minnesota law supports the Appellant’s legal position in this matter; the district court’s endorsement of the no-fault arbitrators’ rulings in this matter must be reversed.

III. The use of “as often as we reasonably require” in Western National’s examination under oath provision does not require Appellant to establish the request is reasonable.

In their brief, Respondents characterize the legal issue as the reasonableness of a discovery request. This argument fails to capture the issue presented in this dispute.

Appellant's contract of insurance, under which Respondents seek coverage, unequivocally states that a person seeking any coverage must submit to examination under oath. The purpose of the examination under oath is to allow the insurer to gather facts relating to the claim being presented.

The contract provision clearly states that "A person seeking any coverage must:

3. **Submit, as often as we reasonably require:**

b. To examination under oath and subscribe to the same."

The reference to reasonableness in the contract provision before this court relates to the frequency of the insurer requiring the insured to submit to the examination under oath, not whether the insurer has to establish that its first and only request is reasonable.

Appellant's contract specifically states in "Duties After an Accident or Loss" that there is no coverage unless there is "full compliance" with the duties set forth in that portion of the contract. The phrase "as often as we reasonably require" modifies the word "submit." The only test of reasonableness concerning Appellant's examination under oath provision is how often Western National requires a person seeking coverage to submit to an examination under oath.

Here, Appellant requested an examination under oath of the Respondents one time, and only one time, by letter dated January 22, 2008. The appointment for these statements was set for February 4, 2008. The statements were set ninety minutes apart as the actual statements take approximately 1 hour. Rather than fulfill their contractual duty, Respondents retained counsel who advised Appellant, by letter dated January 28, 2008, that Respondents would not attend the requested statements. The no-fault arbitrations,

upon which Respondents rely were not filed until February 24, 2008. Thus, the no-fault arbitration process, which Respondents cite as the reason justifying their non-compliance with an unambiguous contractual duty, was not even initiated at the time Respondents breached their contractual duty.

This appeal is about the determination and application of contract law, not whether Appellant was “reasonable” to request the examinations under oath of Respondents. Minnesota has long recognized that issues of law are reserved for the courts, not arbitrators. That is exactly the situation presented in this case. Appellant asked Respondents to fulfill a clear contractual duty. Respondents refused this request. By operation of the contract, Appellant has no duty to provide coverage to these Respondents who have refused to meet their unambiguous duty.

Respondents point to their executed authorizations and other acts and argue that this somehow excuses refusing to submit to the requested examinations under oath. Although ingenuous, their argument obscures the actual fact that neither Bruce nor Cindy Thompson satisfied their contractual duty of submitting to the requested examinations under oath. This failure constitutes breach of contract and voids coverage of these claims.

The facts are simple and straight forward in this matter. The Appellant requested that the respondents submit to examinations under oath as clearly required by the contract of insurance. Rather than comply with this contractual duty, the Respondents filed no-fault arbitrations against Appellant. The Respondents’ refusal to submit to the requested examinations under oath was express and it was intentional. The clear and unambiguous

language of this contract of insurance required Respondents to fulfill this duty. The effect of the Respondents' failure to submit to examinations under oath is a question of law for the courts; it is not for the determination of a no-fault arbitrator. Appellant respectfully requests that the court reverse the trial court and void coverage in this matter based upon the Respondent's expressed and intentional breach of contract.

B. The Respondents' reliance upon *Weaver v. State Farm*, 609 N.W.2d 878 (Minn. 2000) is not controlling on the issue of law in this matter.

The Respondents' efforts to extend *Weaver* to the facts of this case are misplaced. There are significant discrepancies between *Weaver* and the instant case. The Supreme Court's decision in *Weaver* is based on the fact that the No-Fault Act specifically provides for an independent medical examination. Minn. Stat. § 65B.56, Subd. 1 (1998). The statute specifically requires that the independent medical request be reasonable. *See Id.* The court further reasoned that the severance of legal and factual issues under the No-Fault Act between court and arbitrator was contrary to the stated purpose of speeding the administration of justice. *Weaver v. State Farm*, 609 N.W.2d 878, 884.

Appellant requested the examinations under oath of the insured claimants prior to the initiation of any no-fault arbitration proceeding. The No-Fault Act does not specifically prohibit examinations under oath. The legal issue here is a contract dispute concerning the duties of a person seeking coverage under Appellant's contract of insurance, not an interpretation of the no-fault act. The undisputed facts of this case are simple and direct: Appellant requested that its insured fulfill a specific contract duty and the insured refused. This is a breach of contract in its purest form. Any attempt by the

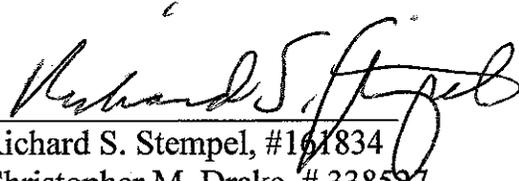
Respondent to turn this case into an assault on the No-Fault Act is disingenuous and must be rejected.

CONCLUSION

Appellant respectfully requests that the clear language of its contract be in force and that the determination of the no-fault arbitrators, upon which district court relied, be rejected on the grounds of jurisdiction and lack of authority on the part of the no-fault arbitrators.

Dated: 10 - 22 - 09

STEMPEL & DOTY, PLC

BY: 
Richard S. Stempel, #161834
Christopher M. Drake, # 338527
Attorneys for Respondents
41 Twelfth Avenue North
Hopkins, MN 55343
(952) 935-0908