

NO. A09-1506

State of Minnesota
 In Supreme Court

Western National Insurance Company,

Respondent,

vs.

Bruce Thompson, et al.,

Appellants.

**BRIEF OF AMICUS CURIAE
 THE INSURANCE FEDERATION OF MINNESOTA**

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ISSUE

Sound Public Policy Favors Judicial Enforcement of Insurance Policy Contractual Language Requiring Insureds to Attend Examinations Under Oath as a Condition Precedent to Coverage.

INTRODUCTION OF AMICUS PARTY

The Insurance Federation of Minnesota (“Federation”)¹ was founded in 1914. Its members sell all lines of insurance – property, casualty, and health. They include stock companies, mutual companies and co-ops. The Insurance Federation’s mission is to promote a positive political and regulatory climate in which member companies may conduct business, responsibly serve the needs of Minnesota consumers, and grow and prosper in a highly competitive, global insurance market.

DISCUSSION

This appeal is before the court because the Appellants unilaterally refused to attend examinations under oath (“EUO”) which were requested by the insurer pursuant to a standard, specific condition precedent in their automobile insurance policy. Importantly, the Appellants’ refusal was absolute, and never addressed the procedural aspects of the EUOs such as date, time, location, frequency, or scope of the investigation. Therefore, given the posture of this case’s facts, the court need not delve into

¹ This brief was authored by Johnson & Condon, P.A., in its capacity as attorneys for The Insurance Federation of Minnesota. Respondent Western National Insurance Company is a member of The Insurance Federation of Minnesota. However, the Federation is participating as an *amicus curiae* in this appeal independent of any input or financial support of Respondent. No entity other than The Insurance Federation of Minnesota made a monetary contribution to the preparation and submission of this brief.

“reasonableness” issues as to how an EUO would be conducted, or what forum addresses the scope of an EUO.

However, if the court considers the arguments raised by the Appellants and its *amicus*, the Federation urges the court to address these issues with a full understanding and appreciation of the historic function played by EUOs in combating insurance fraud, both across the country and in Minnesota. This court’s decision has the potential of impacting the effectiveness of EUOs, not only in No-Fault matters, but in all other lines of coverage. Especially since insurers are statutorily mandated to combat fraud, insurers must be able to confidently rely on perhaps their most effective tool to implement this mandate, the EUO, without the procedural and tactical complications implied by the Appellants and their *amicus*.

EUOs are utilized in a variety of insurance situations, including, but not limited to, statutory fire insurance policies.² EUOs are an efficient and expeditious mechanism, not only in the No-Fault context, but in innumerable other insurance applications, to resolve many issues raised by claims throughout a claim process. These issues include whether misrepresentations have occurred in the application for coverage, whether all conditions precedent to coverage have been properly satisfied, the validity of various components of a claim, whether a claim is fraudulently presented, and most significant in the context of this matter, whether amounts claimed are falsely inflated (“Build-up Fraud”). Minnesota’s strong public policy, reinforced by its anti-fraud legislative mandate,

² See Minn.Stat. §65A.01, subd. 3 (2008).

compels the necessity of EUOs which are unfettered by a unilateral parochial interest which emasculates these well recognized and time-honored tools. The most effective approach to implementing this public policy is to have courts, not arbitrators, address disputes regarding EUOs, as they always have.

The Insurance Federation supports an affirmance of the court of appeals' decision which is based on Minnesota's strong anti-fraud public policy, and the public policy that courts interpret and enforce contract conditions, including conditions precedent such as EUO clauses.

I. Fighting Insurance Fraud is Sound Public Policy.

Every year, insurance fraud costs each Minnesota family up to \$900.³ Nationwide, the cost is even more staggering.⁴ The Coalition Against Insurance Fraud, a non-profit organization founded in 1993 to speak for consumers, insurance companies, government agencies and others on insurance fraud matters, estimates that the cumulative cost of insurance fraud in the United States is approximately \$80 billion annually.⁵

A significant portion of insurance fraud in Minnesota arises in automobile claims.⁶ In 2009, 35% of the cases referred to the Division of Insurance Fraud Prevention of the

³ 2009 Investigations Annual Report, Division of Insurance Fraud Prevention, Minnesota Department of Commerce.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Minnesota Department of Commerce were automobile claims.⁷ This incredible percentage exists despite the Minnesota No-Fault Act's 1974 provisions which entitled insurers to recover benefits paid due to intentional misrepresentation from both insureds and service providers.⁸ Clearly, and despite the fact the No-Fault Act does not limit when fraud can be investigated in the claim process, the Act itself does not have the teeth necessary to effectively combat this waive of fraud.

Twenty years after the enactment of the No-Fault Act, as insurance fraud continued to proliferate, Minnesota adopted anti-fraud legislation specifically designed to reduce this drain on Minnesota consumers. Pursuant to Minn.Stat. § 60A.954, “[A]n insurer shall institute, implement, and maintain an anti-fraud plan.”⁹ Enforcement of long-standing and well-recognized policy terms which require insureds to attend EUOs, such as the EUO provision in Respondent’s policy,¹⁰ is one of the most effective tools available to implement an anti-fraud plan. Requiring an insured to swear under oath as to the true facts of a claim is a significant disincentive to commit fraud. Conversely, insureds presenting truthful facts about their claims, including the extent or amount of the claims, have no concerns about an EUO, as the EUO will expedite the entire claim

⁷ *Id.*

⁸ Minn.Stat. 65B.54, subd. 4 (2008) states, in part: “A reparation obligor may bring an action to recover benefits which are not payable, but are in fact paid, because of an intentional misrepresentation of a material fact, upon which the reparation obligor relies, by the claimant or by a person providing products or services for which basic economic loss benefits are payable.”

⁹ Minn.Stat. § 60A.954 (2008).

¹⁰ RA. 10 (Respondent’s Appendix is referenced as “RA”).

process. To allow one side to a contract to unilaterally rewrite the terms as contended here in effect allows that party to unilaterally control whether possible fraud will ever be discovered. Such a rule of law is contrary to public policy and the legislative mandate that insurance companies fight fraud.

The very nature of No-Fault claims invites fraud by unscrupulous individuals. No-Fault fraud could include whether an accident even occurred, whether all persons claiming benefits were even in the motor vehicle, whether treatment or the type of treatment ever occurred, whether treatment is being exaggerated (Build-up Fraud), the amount charged by the provider, whether idiosyncrasies in record keeping by providers who maintain separate files for patients' separate accidents and/or injuries are hiding potential fraud, or whether any provider is "holding back" bills to then inundate the insurer with thousands of dollars of treatment expenses without the insurer ever knowing treatment has occurred.¹¹

Insurance fraud may also occur with respect to other areas beyond the specific claim for benefits, such as misrepresentations in the application for insurance, residency status of insureds, proof of vehicle ownership, and availability of other insurance. The EUO allows an insurer to conduct an inquiry into all of these areas, and therefore fulfills the public policy which favors the reduction of insurance fraud. Further, maintaining a

¹¹ In this last scenario, a claimant's counsel may argue the claimant will not attend an independent medical examination unless all benefits have been paid up through the date of the examination. If a carrier cannot confirm through an EUO as to whether, how much, or what kind of treatment has occurred, this type of argument puts an insurer in an untenable position of potentially being forced to pay expenses which may be the result of Build-Up Fraud without any ability to combat the fraud at its inception.

consistent process for allowing courts to enforce contract terms¹² such as EUO provisions furthers the goal of reducing insurance fraud.

Implications that Minn.Stat. § 65B.56 provides a mechanism for arbitrators to decide whether an insured is required to attend an EUO simply misses the issues squarely presented to this court. An EUO is a strong anti-fraud tool utilized by insurers to implement the legislature's anti-fraud mandate. A clause in the insurance policy requiring attendance at an EUO specifically permits the insurer to convene an EUO, and makes attendance a condition precedent to coverage. To the extent Minn.Stat. § 60A.954 and Minn.Stat. § 65B.56 might be incongruent, the public policy reflected in the Anti-Fraud Statute should take precedent over the minimal inconvenience faced by policyholders attending an EUO to be eligible for coverage.

II. The Examination Under Oath is a Time-Honored Condition Precedent to Establish Coverage Under Many Insurance Policies, Including Policies Providing No-Fault Coverage.

A. Historical Perspective Regarding Examinations Under Oath.

EUOs have been recognized as a precondition to affording insurance coverage for over 100 years. In *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 81 (1884), the United States Supreme Court set forth the objective and validity of EUOs:

The object of the provisions in the policy of insurance requiring the insured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to the other sources and means of knowledge, in regard to the facts, material to their rights, to engage them to decide upon their obligations, and to protect them against false claims. A false answer as to

¹² See *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988); *AMCO Ins. Co. v. Ashwood-Ames*, 534 N.W.2d 740, 742 (Minn. Ct. App. 1995).

any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplishes its results, it would be a fraud effected; if it failed it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and willfully made, the intention to deceive the insurer would be necessarily implied for the law presumes every man to intend the natural consequences of his act.¹³

An examination of the insured under oath affords an insurer an early opportunity to obtain information and material in the insured's possession regarding the claim.¹⁴

Further:

The right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is clearly stipulated for in the form of policies now in general use. The intent of the provision is to prevent fraudulent concealment, and to enable the insurer to obtain material information in regard to the origin and circumstances of the fire, the value of the property, and the claimants' interests therein. The requirement is a reasonable one and will often no doubt be useful in securing important and truthful disclosures that would otherwise be withheld, to the injury of the insurer. When the insured refuses to be examined under oath, he will forfeit all rights to recover.¹⁵

The purposes of EUOs have also been described as follows:

Examinations under oath serve two useful purposes for insurance companies. First, where legitimate disputes exist over the value of certain claims, the insurer can obtain all pertinent information supporting the insured's opinion of the value of damaged, destroyed, or stolen property . . .

¹³ 110 U.S. at 94-5.

¹⁴ See e.g., *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975).

¹⁵ *Hickman v. London Assur. Corp.*, 195 P. 45, 48 (Cal. 1920) citing *Ostrander on Fire Insurance* § 172

Second, examination of an insured is an effective means for discouraging and detecting fraudulent claims.¹⁶

EUOs are distinctly different from discovery depositions arising in district court and mandatory arbitration matters. While the right to a deposition is granted by the Rules of Civil Procedure in a district court action or by an arbitrator in a case submitted to arbitration, the authority to conduct an EUO is based on the terms of the contract. “While depositions and EUOs share the common goal of facilitating the truth seeking process, an important distinguishing factor is that insurers conduct examinations prior to the initiation of a lawsuit.”¹⁷ An examination may provide an insurer with convincing evidence of a fraudulent claim.¹⁸ This provides the insurer with an enormous opportunity to discourage needless litigation, or to promote settlement.¹⁹

EUOs are distinctly separate from other investigative and/or discovery tools such as recorded statements and depositions. While recorded statements, depositions, and EUOs are similar in certain, usually superficial ways, the giving of recorded statements

¹⁶ Michael A. Hamilton, *Property Insurance: A Call for Increased Use of Examinations Under Oath for the Detection and Deterrence of Fraudulent Insurance Claims*, 97 Dick. L. Rev. 331-332 (1992-1993).

¹⁷ *Id.* at 334.

¹⁸ *Id.*

¹⁹ *Id.*

or the taking of depositions with both sides present does not constitute substantial compliance with the policy conditions which require an EUO.²⁰

The court in *Goldman* identified the following factors which distinguish EUOs from these other devices:

1. While the obligation to sit for a deposition arises out of Rules of Civil Procedure, the obligation to sit for an examination under oath is contractual.
2. The insured's counsel plays a different role during EUOs than during depositions.
3. EUOs are taken before litigation to augment the insurer's investigation of the claim, while depositions are not part of the claim investigation process.
4. An insured has a duty to volunteer information related to the claim during an EUO, in accordance with the policy. There is no such obligation in a deposition.
5. In an EUO, the insurer has the right to examine the insured independently, but it has no parallel right to do so under the Rules of Civil Procedure.²¹

In the end, the EUO is a key part of an insurer's ability to investigate the claim in an expeditious fashion once a question arises during any part of the claims process. It is not, and should not, be limited to just a specific time after the initial submission of the

²⁰ *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300 (Fla. App. 4 Dist., 1995); *Pervis v. State Farm Fire & Cas. Co.*, 901F.2d 944 (11th Cir. 1990) *cert denied*, 498 U.S. 899 (1990)). *See also*, *Downie v. State Farm Fire and Cas. Co.*, 929 P.2d 484 (Wash. Ct. App. 1997) where the Washington Court of Appeals ruled that a recorded statement is not a substitute for an EUO, and does not excuse an insured from submitting to an EUO.

²¹ *Goldman* at 305.

claim as questions will always come up throughout a claims process which can best be addressed in an EUO.

B. Minnesota Courts Have Historically Always Approved the Use of Examinations Under Oath Policy Provisions.

The EUO requirement in insurance contracts has long-standing judicial approval in Minnesota, dating back to the 1800s.²² Under Minnesota law, the EUO requirement is a condition to recovery under the policy.²³ In *McCullough*, an insured brought an action to collect under a fire policy.²⁴ The Minnesota Supreme Court held that while the provision of the fire policy requiring the insured to submit to an EUO was not a condition precedent to bringing suit, it was a condition to recovery of policy benefits.²⁵

C. Enforcement of Examination Under Oath Conditions in the No-Fault Context.

Other jurisdictions which utilize a No-Fault system of automobile insurance have determined that EUOs are conditions precedent to the receipt of No-Fault benefits.²⁶

²² See *Hamberg v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 335, 71 N.W. 388 (1897).

²³ *McCullough v. Travelers Companies*, 424 N.W.2d 542, 544 (Minn. 1988) (rehearing denied August 22, 1998).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Dynamic Medical Imaging, P.C. v. State Farm Mut. Auto. Ins.*, 905 N.Y.S.2d 880 (Nassau Dist. Ct., 1st Dist. 2010) (While an examination under oath has been treated by the courts as condition precedent to coverage, the No-Fault regulations treat the examination under oath as a form of verification. Thus, where a carrier properly demands an examination under oath, "...the verification is deemed to have been received by the insurer on the day the examination was performed."); *Shaw v. State Farm Fire & Cas.*

There is nothing unique about these other jurisdictions' No-Fault systems as to EUOs when they are compared to the Minnesota No-Fault system.

Minn.Stat. § 65B.48, subd. 1, sets forth the minimum requirements and coverages which must be provided by Minnesota No-Fault insurers: "Every owner of a motor vehicle of a type which is required to be registered or licensed or is principally garaged in this state shall maintain . . . a plan of reparation security **under provisions approved by the commissioner.**"²⁷ While the Minnesota No-Fault Act mandates both the type (i.e. medical expenses, wage loss, replacement services) and amount of coverage owed (i.e., \$20,000 medical), the No-Fault Act does not proscribe the inclusion of fraud-combating policy conditions which must be met in order to receive coverage. In fact, such EUO provisions have existed for many years in Minnesota No-Fault insurance forms approved by the Commissioner. (RA. 1-12).²⁸

Co., 37 So.3d 329 (Fla. 5th DCA 2010); *Barabin v. AIG Hawaii Ins. Co., Inc.*, 921 P.2d 732 (1996) (policy provision requiring insured to submit to EUO was valid, and requires the insured to submit to the examination).

²⁷ Minn.Stat. § 65B.48, subd. 1 (2008) (emphasis added).

²⁸ The Insurance Service Office, Inc. form contained in Western National's contract with the Thompsons is copywritten 1997.

D. Enforcement of Examinations Under Oath as a Condition Precedent to Establishing Coverage is in Harmony with Minnesota Precedent.

The consequences of refusing to submit to an EUO have not been determined by this court.²⁹ However, this court has addressed the issue in the context of enforcing policy conditions requiring insureds to submit a sworn proof of loss under fire policies.

In *Nathe Bros. Ins. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341 (Minn. 2000), this court analyzed the proof of loss provisions in the policy in conjunction with the Minnesota Standard Fire Insurance Policy statute, Minn.Stat. § 65A.01, et seq. The *Nathe* court observed the sworn proof of loss closely resembles the submission to an examination under oath. However, the court concluded that the insured's failure to submit a timely proof of loss was not an automatic bar to recovery because the policy did not contain an express condition precedent:

We therefore conclude that the failure to submit to a sworn proof of loss in a timely manner will not necessarily bar recovery on a policy, absent specific policy language stating that failure to timely submit a sworn proof of loss will be fatal to the rights of the insured or that the submission of a sworn proof of loss is a condition precedent to the liability of the insurer. Because the Minnesota Standard Fire Insurance Policy contains no such specific language, nor are such conditions necessarily implied in its terms, the Standard Fire Insurance Policy's requirement that a proof of loss be submitted within 60 days is not a condition precedent to recovery nor does failure to timely submit a proof of loss effect a forfeiture.³⁰

Unlike the insurance contract at issue in *Nathe*, the contract between Respondent and the Appellants contains the exact condition precedent contemplated by the court:

²⁹ See generally, Respondent's Brief.

³⁰ 615 N.W.2d at 348.

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

* * *

B. A person seeking any coverage must:

3. Submit, as often as we reasonably require:

* * *

b. To examination under oath as subscribed the same.³¹

Because the Respondent's policy contains the specific condition precedent found lacking in *Nathe*, a ruling in this case which determines the breach of the contract results in no coverage is in harmony with *Nathe*. The rulings, in tandem, reinforce that words and clauses in contracts have meaning, and will be enforced as written.³² Moreover, each case will confirm that matters of contract interpretation and coverage are issues for the court, not for arbitrators.³³

CONCLUSION

The EUO is a necessary tool to combat insurance fraud. Public policy and Minnesota statutes mandate that insurers take steps to combat the growing problem of insurance fraud in many forms of insurance coverage, including No-Fault. The EUO is a time-honored condition precedent to receiving insurance coverage under a policy which

³¹ RA-10.

³² *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 882 (Minn. 2002) (parties are free to contract as they desire with the use of plain and ordinary policy language to effectuate their intent).

³³ *Johnson*, 426 N.W.2d at 421; *AMCO*, 534 N.W.2d at 742.

fulfills that purpose. A unilateral unconditional refusal to attend an EUO, therefore, is a breach of contract. Consistent with Minnesota case law which mandates that courts, not arbitrators, interpret insurance contracts, such a breach results in a denial of further benefits under the policy. This outcome is in harmony with Minnesota precedent, and will be in the best interests of both policyholders in this state and insurers who write coverage in this state.

Respectfully submitted,

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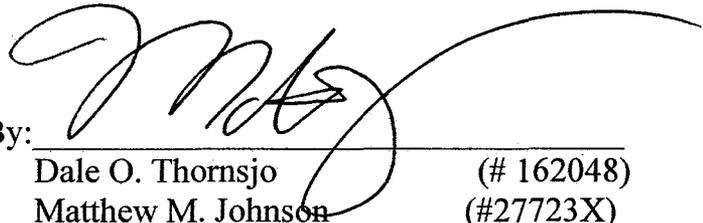
CERTIFICATION OF BRIEF LENGTH

The undersigned counsel for Amicus Curiae, The Insurance Federation of Minnesota hereby certifies that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, in that it is printed in proportionately spaced typeface utilizing Microsoft Word software and contains 3,474 words, excluding the Table of Contents and Table of Authorities.

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