

NO. A09-1506

State of Minnesota
In Supreme Court

Bruce Thompson, et al.,

Appellants,

v.

Western National Insurance Company,

Respondent.

**BRIEF AND APPENDIX OF RESPONDENT
WESTERN NATIONAL 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 ISSUES

- 1. Are disputes over the interpretation and application of No-Fault insurance contract provisions determined by arbitrators or by the courts?**

Western National Insurance Company raised this issue in the arbitration proceedings commenced by the insureds, objecting to the arbitrators determining the coverage question, and again in the district court, seeking to have the awards vacated. *See* discussion *infra* 5-6 and citations to record. The district court ruled that No-Fault arbitrators determine these questions conclusively and the arbitrators' determination is not subject to review by a district court. A.5. Western National appealed to the Minnesota Court of Appeals, which reversed the district court, holding that on this record, no factual disputes existed, and the question presented was purely one of law for the court to decide.

Apposite Authorities:

United States Fid. & Guar. Co. v. Fruchtman, 263 N.W.2d 66 (Minn. 1978);

Johnson v. Am. Family Mut. Ins. Co., 426 N.W.2d 419 (Minn. 1988);

Costello v. Aetna Cas. & Surety Co., 472 N.W.2d 324 (Minn. 1991); and,

Weaver v. State Farm Ins. Cos., 609 N.W.2d 878 (Minn. 2000).

- 2. What consequences result from an insured's failure to comply with the express conditions contained in a No-Fault policy?**

Western National Insurance Company asserted in the district court and in the court of appeals that because the Thompsons had breached the terms of the insurance contract, they were precluded from recovering the disputed claims. *See* discussion *infra* 5-6 and citations to record. The district court rejected the argument and confirmed the arbitration award. A.5. The court of appeals agreed with Western National and vacated the arbitration awards. While the Thompsons' petition for further review raised the issue of whether an arbitrator or the courts should decide if their refusal to provide the requested examination was reasonable, they did not raise any challenge to the relief ordered by the court of appeals.

Apposite Authorities:

Hoyt Props., Inc. v. Production Res. Group, L.L.C., 736 N.W.2d 313 (Minn. 2007);

McCullough v. The Travelers Cos., 424 N.W.2d 542 (Minn. 1988); and,

Weaver v. State Farm Ins. Cos., 609 N.W.2d 878 (Minn. 2000).

STATEMENT OF CASE AND FACTS

Bruce and Cindy Thompson were involved in a motor vehicle accident on September 27, 2007. Western National provided the Thompsons' No-Fault coverage, and began making payments under the policy. Western National subsequently received information that Cindy Thompson worked for her treating chiropractor, and that she and her husband were treating with her employer prior to and at the time of the accident.

In order to obtain more information concerning the Thompsons' prior conditions, ongoing treatment, and the charges, if any, for that treatment, Western National's lawyer sent a letter to the Thompsons dated January 22, 2008, scheduling their examinations under oath for February 4, 2008. A.17-18.¹ Such examinations are expressly authorized by the Western National policy. The Thompsons retained counsel, who wrote to Western National's attorney stating that the Thompsons objected to Western National's request for the examination under oath and that they would not attend the requested examinations. A.13-14. As justification for their refusal, the Thompsons' lawyer asserted, "they do not believe such a statement is warranted given the status of their claims at the present time." *Id.*²

¹ Appellants' Appendix is cited as "A. __"; Respondent's Appendix is cited as "RA. __."

² In their brief, the Thompsons assert that they gave a "phone statement" to an unidentified Western National adjuster at some unspecified time (App. Br. at 5); however, the record cites accompanying that statement do not support the assertion, and no recorded statement is included in the record. They also repeatedly characterize Western National's efforts to obtain a statement under oath as "expensive and time

An exchange of correspondence followed. RA.13; A.21-22. The Thompsons maintained their refusal to submit to the requested examinations under oath.

Based on the Thompsons' refusal to comply with the requirements of the policy, Western National denied the outstanding claims. RA.14-15. The Western National policy provides, *inter alia*:

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

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:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

* * * * *

3. Submit, as often as we reasonably require:

* * * * *

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

(cont'd)

consuming formal discovery.” *See, e.g.*, App. Br. at 8. However, the only “formal” request was for an examination under oath. Moreover, the Thompsons’ censure rings hollow in light of their own detailed requests for information from Western National. The Thompsons’ requests included “all documents supporting the denial” of the claim, “copies of all medical records and medical bills the Respondent has received from all medical providers to date”, “[a]ll correspondence to and from Claimant’s medical providers, showing the date bills and records were received and payments made”, “[a] PIP log showing all the dates and amounts of all no-fault payments”, and “all exhibits to be offered at the hearing.” (RA.17.) Both parties were simply and appropriately seeking information relevant to the claims.

RA.10. Western National notified the Thompsons that they were in breach of the insurance contract by failing to comply with the obligation to cooperate in its investigation of their claim, and to submit to the requested examination under oath. RA.13; 14-15.

In response to the denial of their outstanding claims, the Thompsons filed No-Fault arbitration petitions with the American Arbitration Association (“AAA”). A.19-20. Western National filed responses with the AAA, advising that Western National denied coverage because the Thompsons were in breach of the insurance contract. RA.36, 45. Western National’s Rule responses in each of the respective arbitration proceedings also asserted that the grounds for denial of the claim were “questions of law which are not appropriate for the jurisdiction of the American Arbitration Association but rather lie with the district courts for the state of Minnesota.” *Id.* Western National requested that the arbitrations be stayed until a district court could address the question of whether the Thompsons had complied with the conditions of the policy. A.48-51. The requested stays were denied.

Concurrently with the arbitration proceedings, Western National filed a declaratory judgment action in Hennepin County District Court and sought summary judgment in its favor that the Thompsons were in breach of the insurance contract as a matter of law for failing to submit to the requested examinations under oath. A.2.

Following the arbitration awards, Western National moved the Hennepin County District Court to vacate the awards, and the Thompsons moved to confirm them. *Id.* Western National again asserted that the Thompsons had breached their contract, and that

because of that breach, there was no coverage for the benefits claimed, and the awards must be vacated. A.4-5.

Judge William Howard denied Western National's motion and granted the Thompsons' motion. A.3. He held that the reasonableness of and cooperation with requests for an examination under oath were questions of fact to be determined by the No-Fault arbitrators. "Any determination of reasonableness is the jurisdiction of the arbitrator under the No-Fault Act, not the district court as a matter of contract law." A.5. Judge Howard undertook no review of the merits of the arbitrators' decisions, stating simply that the arbitrators had not exceeded their authority. *Id.*³

Western National appealed. RA.53. The court of appeals reviewed both the facts of this case, and the law as expressed by this Court and the legislature, and reversed the district court. *Western Nat'l Ins. Co. v. Thompson*, 781 N.W.2d 412 (Minn. Ct. App. 2010). The court rejected, as a matter of law, the assertion that there was any question concerning the reasonableness of Western National's request.

Although the question of reasonableness in the enforcement of an insurance policy can require factual determinations, that is not the issue here. There are no disputes of fact. The policy requires the Thompsons to submit to examinations under oath. They have refused to do that. The Thompsons do not contend that the policy provision at issue is unconscionable or ambiguous; or that the time and place set for the examinations are unreasonable; or that the frequency of the examinations under oath was

³ Judge Howard did say in his memorandum, "There was no need for an examination under oath for the expedient investigation of the claim, and whether the information concerning Cindy Thompson's employment is relevant presents a genuine issue of fact." A.4.

unreasonable. In fact, Western National has not previously asked the Thompsons to submit to examinations under oath . . .

In the context of the undisputed facts of this case, only a legal question emerges: did the Thompsons breach their insurance contract by refusing to comply with the requirement that they submit to at least one examination under oath? This is a question of insurance coverage that is not dependent on the resolution of a fact dispute. As such, the question is purely one of law, and is not within the authority of no-fault arbitrators to decide.

Id. at 415-16.

The court of appeals noted that the Thompsons offered no legal excuse for their refusal to comply with the provision of the insurance contract. *Id.* at 416. Because of this failure, the court concluded that Western National had no obligation to pay the outstanding claims.

Thus, we hold that the legal issues of breach of contract and insurance coverage in this case were not arbitrable issues; that the Thompsons breached their contract as a matter of law; and that the district court erred in confirming the arbitration awards and in denying Western National's motion for summary judgment. To hold otherwise would allow a party to an insurance contract to rewrite its obligations under the guise of challenging the reasonableness of those obligations in arbitration.

Id. at 416. The court of appeals reversed the district court's order confirming the arbitrator's award and denying Western National's motion for summary judgment.

ARGUMENT

Summary of Argument

The No-Fault Act is designed to ensure prompt and full compensation to injured persons, but at the same time prevent abuses of the automobile reparation system by preventing overcompensation and payment of unfounded claims. To serve those competing purposes, the law imposes reciprocal obligations on insurers and insureds. While insurers have statutory obligations to promptly investigate and resolve claims submitted to them, insureds have equally important obligations, including statutory obligations to cooperate in the investigation and provide information requested by the insurer.

Here, there is no dispute between the parties that the conditions contained in the Western National policy are authorized by law, and in their terms completely reasonable. Moreover, there is no dispute that the request made by Western National was reasonable as to time, place and manner of the proposed examination under oath.

What is disputed is whether insureds may unilaterally refuse to comply with their obligations under the statute and the insurance policy, based upon their own judgment that the insurer has all the information that it needs to resolve a claim, and do so without any consequence. More specifically, the dispute comes down to whether the insured can refuse to provide the requested examination, force the insurer to proceed to a contested arbitration without having the information necessary to defend the claim, and then assert that the courts cannot review the arbitrator's decision on that point because it involves a question of fact, the resolution of which is immune from judicial review.

The answer to the issue presented is found in the language of the applicable statutes, and this Court's prior decisions. Coverage questions are not subject to arbitration, and should be resolved judicially prior to arbitration under the claimed coverage. And even if an arbitrator initially decides the question of whether the insured has satisfied the conditions of the policy, that decision is subject to *de novo* review by the courts. In this case, that review compels the conclusion that the insureds failed to comply with the conditions of the policy. The judgment of the district court was properly reversed by the court of appeals, and the decisions of the arbitrators properly vacated.

I. STANDARD OF REVIEW

The interpretation of insurance contracts and the construction of statutes governing them present questions of law, which this Court reviews *de novo*. *American Nat'l Prop. & Cas. Co. v. Loren*, 597 N.W.2d 291, 292 (Minn. 1999). This Court also reviews summary judgment *de novo* to determine (1) whether there are any genuine issues of material fact to be determined, and (2) whether the district court erred in its application of the law. *Offerdahl v. Univ. of Minnesota Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

II. MINNESOTA LAW AND PUBLIC POLICY PERMIT A NO-FAULT INSURER TO INCLUDE IN ITS POLICIES CONDITIONS THAT THE INSURED MUST SATISFY BEFORE THE INSURER IS OBLIGATED TO MAKE PAYMENT, SUCH AS THE DUTY TO COOPERATE AND THE DUTY TO SUBMIT TO AN EXAMINATION UNDER OATH.

When the Minnesota legislature enacted the Minnesota No-Fault Act, it declared its intent that while claims should be promptly and fully paid, only those claims causally related to the motor vehicle accident should be paid, and that there should be no

duplicative or excess recovery for medical expense treatments and economic loss such as wage loss; the public policy is full compensation, not over compensation. Minn. Stat. § 65B.42 (1)-(5). The legislature specifically provided that one of the purposes of the No-Fault Act is “to require medical examination and disclosure.” Minn. Stat. § 65B.42(5). And to fulfill that purpose, the legislature enacted Minn. Stat. § 65B.56, entitled “Cooperation Of Person Claiming Benefits.” That statute requires the claimant to “do all things reasonably necessary to enable an obligor to obtain medical reports *and other needed information to assist in determining the nature and extent of the injured person’s injuries and loss . . .*” *Id.*, subd. 1 (emphasis added).

The policy provisions at issue here are completely consistent with the provisions of the No-Fault Act. The statutory directives concerning cooperation of the insured with an insurer’s investigation of a claim and the need to guard against excessive or unfounded claims are every bit as weighty as the legislature’s expressions regarding prompt and efficient payment of claims.⁴ In order to satisfy the policy goals that legitimate claims be paid, but that excessive or unfounded claims not be honored, the legislature has also

⁴ The Appellants and Amicus Minnesota Association for Justice (“MAJ”) argue that the quick and efficient resolution of No-Fault claims trumps any other concerns, and repeatedly assert, in one form or another, that allowing examinations under oath is tantamount to allowing full litigation discovery, contrary to the No-Fault rules. App Br. at 13, 16; MAJ Br. at 2-9, 14. They essentially argue that once an insurer has “enough” information, public policy requires a determination that it is not reasonable to ask for more. But No-Fault arbitration is not claims resolution using whatever information the claimant believes is necessary or adequate; the No-Fault Act imposes specific obligations on insureds to provide claim information requested by the insurer.

enacted the Minnesota Insurance Fraud Statute, Minn. Stat. § 60A.951-955, which requires, among other things, that insurers have a defined anti-fraud plan addressing claims fraud. Minn. Stat. § 60A.954, subd. 1. The insurance fraud statute includes all insurers; there is no exception for No-Fault insurers. Minn. Stat. § 60A.951, subd. 4(a), 5.

Examinations under oath have long been accepted throughout the United States as an effective tool to prevent fraudulent claims as well as determine other coverage issues. *See Hamberg v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 335, 337, 71 N.W. 388, 388 (1897) (noting insurance policy requirement that the insured submit to examination in presence of notary). Indeed, the United States Supreme Court has recognized for more than 125 years that examination under oath provisions in contracts of insurance are appropriate and enforceable. *See Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95 (1884) (stating that the fundamental purposes of an examination under oath is to enable the insurer “to possess itself of all knowledge [regarding the loss], and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims”).

Other jurisdictions have regularly enforced examination under oath provisions. “The majority of courts have consistently held that failure to submit to questions under oath is a material breach of the policy terms and a condition precedent to an insured’s recovery under the policy.” *Watson v. Nat’l Surety Corp. of Chicago, Illinois*, 468 N.W.2d 448, 451 (Iowa 1991) (citing cases).

The No-Fault Act, the Insurance Fraud Statute, and sound public policy support the examination under oath provisions contained in Western National's policy.⁵ There is

⁵ The sole issue addressed by the Thompsons in their brief concerns the reasonableness of Western National's request for an examination under oath and whether arbitrators are the sole judges of reasonableness. *See* App. Br. at 3, 8, and 18. While the Thompsons do not directly challenge the inclusion of the examination under oath provision in their No-Fault policy, their amicus MAJ asserts that the policy provision making payments subject to the condition precedent of an examination under oath "infringes on the coverage mandated by the No Fault Act and is, therefore, not enforceable as a means of avoiding coverage." MAJ Br. at 4. Although the amicus cites no authority for this proposition, at least one court has reached a somewhat similar conclusion. *See Cruz v. State Farm Mut. Auto. Ins. Co.*, 648 N.W.2d 591, 601 (Mich. 2002). In that case, the Michigan Supreme Court stated, "an EUO that contravenes the requirements of the no-fault act by imposing some greater obligation upon one or another of the parties is, to that extent, invalid." *Id.* at 598. In reaching this conclusion, the Michigan Supreme Court recognized that other state supreme courts have reached different results under their state's No-Fault act. *See Barabin v. AIG Hawaii Ins. Co.*, 921 P.2d 732 (Hawaii 1996) and *New Jersey Auto. Full Ins. Underwriting Ass'n v. Jallah*, 606 A.2d 839 (N.J. 1992), *cited in Cruz*, 648 N.W.2d at 699 n.15.

But even the analysis of the Michigan Supreme Court does not support the claim of the MAJ, because under Minnesota law, no "greater obligation" is imposed by Western National's policy provision than is required by statute. As discussed above, the examination under oath provision in the Western National policy is fully supported by express provisions in the No-Fault Act and other statutory provisions. Moreover, the provision has been in the Western National policy since at least the late 1990s; the Western National policy in this case contains the legend "Copyright, Insurance Services Office, Inc., 1997". RA. 1-12. This Court has noted that the Insurance Service Office publishes "widely-used insurance forms" that contain standard policy language. *General Cas. Co. of Wisc. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 576 n.3 (Minn. 2009). No reported judicial challenge has ever been raised before to this term in the Western National policy or any other standard No-Fault policy. And, before a policy form or revision can be used in Minnesota, it must be submitted to the Minnesota Department of Commerce for approval. Minn. Stat. § 70A.06 (commissioner has power and duty to review and approve all policy forms issued in Minnesota); Minn. Stat. § 60A.03, subd. 2(1) ("The commissioner shall have and exercise the power to enforce all the laws of this state relating to insurance, and it shall be his duty to enforce all the provisions of the laws of this state relating to insurance.").

no basis for the Thompsons or the courts to ignore these requirements of the policy. Examination under oath provisions are valid and enforceable under Minnesota law.

III. LONGSTANDING PRECEDENT AND PUBLIC POLICY REQUIRE THAT COURTS DECIDE ISSUES OF NO-FAULT COVERAGE, INCLUDING QUESTIONS INVOLVING FACT DISPUTES

A. Coverage Disputes Are To Be Resolved By Courts Prior To Arbitration Proceedings Commenced Under The Claimed Coverage

This Court has repeatedly held that courts – not arbitrators – decide questions of insurance coverage. This is especially true for questions of insurance coverage under the No-Fault Act. *See Johnson v. Am. Family Mut. Ins. Co.*, 426 N.W.2d 419 (Minn. 1988). The rationale behind this longstanding public policy is ensure a uniform and coherent body of No-Fault law. *Id.* at 421 (“We think that consistency mandates that the courts interpret the no-fault statutes, not various panels of arbitrators.”).

While generally arbitrators are the sole and final judges of fact and law, *Cournoyer v. Am. Television & Radio Co.*, 249 Minn. 577, 579, 83 N.W.2d 409, 411 (1957), that rule does not apply in the context of insurance arbitrations. In such cases, courts, not arbitrators, decide coverage issues, whether they involve questions of fact or questions of law. This Court has applied this rule in several different procedural contexts; the rule is the same regardless of whether the coverage issue arises before or after arbitration. But this Court’s decisions are equally clear that it is preferable for the court to decide coverage in the first instance.

In *Costello v. Aetna Cas. & Surety Co.*, 472 N.W.2d 324, 327 (Minn. 1991), a coverage issue arose before arbitration. This Court affirmed summary judgment against

an insured, Costello, who sought to compel arbitration with his insurer, Aetna, for underinsured motorist (“UIM”) coverage. The Court reasoned that “[i]n order to invoke UIM coverage under the Aetna policy, Costello’s injury must have been caused by an ‘underinsured motor vehicle’” as defined by statute and under the terms of the policy. *Id.* at 326. “The court, however, must make a finding of coverage before Costello is entitled to invoke his right to arbitration.” The court explained:

[W]hether Costello’s injury was caused by an underinsured motor vehicle is a precondition to coverage that must be decided by the court. [citation omitted] The court must make an initial determination that Costello’s damages are greater than the limit on [the driver of the other vehicle’s] bodily injury liability coverage, ...

Id. at 326. Costello’s damages had been decided in a prior judicial proceeding and the parties agreed that those damages were less than the limit on the other driver’s policy. *Id.* at 327. Despite Costello’s argument that an arbitrator should nonetheless determine his damages anew under the arbitration clause in the policy, the Court held there was no coverage as a matter of law and no right to arbitration.

In *United States Fid. & Guar. Co. v. Fruchtman*, 263 N.W.2d 66, 71 (Minn. 1978), the Court set aside an arbitrator’s award in an uninsured motorist case. The factual and legal decision of the arbitrator that a condition of coverage (physical contact with an uninsured motor vehicle) had been satisfied, was afforded no deference. In *Fruchtman*, the challenge occurred on a motion to vacate an arbitrator’s award, but this Court specifically held that when the challenge is presented on a motion to stay or compel arbitration, the trial court should decide the issue in the first instance, making any necessary findings of fact.

Provisions of the policy relevant to the existence and terms of coverage necessarily must be independently judicially construed and interpreted to ascertain the intention of the parties; and, clearly, where plain language excludes disputes as to coverage from arbitration, a court must interfere and prevent the arbitration proceedings. Where coverage is preconditioned on the establishment of facts, . . . , such factual disputes must be tried and resolved by the trial court accompanied by findings of fact. Rule 52.01, Rules of Civil Procedure. If such factual preconditions are not established, coverage is not afforded by the policy, and the objecting party must be protected from the burden of unauthorized arbitration of both the coverage dispute and the merits of the insured's claim.

Id. Even though *Fruchtman* involved a post-arbitration *de novo* review of the coverage issue, the Court declared that an initial determination of coverage by the court is “preferable” to an initial determination of coverage by the arbitrator to avoid “needless arbitration of the merits of the insured’s claim.” *Id.* at 72.

In decisions following *Fruchtman*, this Court has reiterated that “the court ought to decide the issue in the first instance.” *Costello*, 472 N.W.2d at 326; *see generally Johnson*, 426 N.W.2d at 421 (holding “arbitrators are limited to deciding issues of fact, leaving the interpretation of the law to the courts”). The court of appeals has also recognized and applied “the supreme court’s directive as requiring the trial court to determine any coverage issues before ordering arbitration.” *Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616, 620 (Minn. Ct. App. 1989) (adding that “if the trial court for some reason . . . orders arbitration and the arbitrators decide a coverage issue, the trial court may and should review the coverage issue if raised by post-award motion”).

Here, satisfaction of the policy requirements was an express condition precedent to any obligation of Western National to pay the Thompsons’ claims. Until there was a judicial determination that the conditions had been satisfied, there was no point in a

“needless arbitration of the merits of the insured’s claims.” *See Fruchtman*, 263 N.W.2d at 72.

B. Even If Coverage Decisions Are Addressed Initially By An Arbitrator, The Arbitrator’s Decision Is Not Controlling, And Is Subject To *De Novo* Judicial Review

Despite clear precedent from this Court, the Thompsons convinced the district court that the arbitrators’ decisions regarding the examination under oath were factual determinations not subject to judicial review, relying on *Weaver v. State Farm Ins. Cos.*, 609 N.W.2d 878 (Minn. 2000). That conclusion is clearly wrong, as the court of appeals concluded.

1. *Weaver* Involved Compliance With A Statutory Requirement, Not A Condition Precedent Contained In An Insurance Policy, And It Does Not Control Here

In *Weaver*, this Court examined the question of whether the refusal to submit to an independent medical examination based on the insurer’s nonpayment of claimed benefits presents an issue of fact or law for the arbitrator. 609 N.W.2d at 882. The Court noted that Minn. Stat. § 65B.56, subd. 1 “explicitly requires” that the IME request be reasonable. The Court also observed that the statute “specifically requires” cooperation by the claimant, quoting the language of the statute that an injured person “shall also do all things reasonably necessary to enable the obligor to obtain medical records and other needed information to assist in determining the nature and extent of the injured person’s injuries and loss, and the medical treatment received.” *Id.*

The Court then concluded that the arbitrator could consider the conduct of the insured as part of the arbitrator's obligation to determine the statutory entitlement of the insured to No-Fault benefits, subject to *de novo* judicial review.

As litigants dispute the obligations under the [A]ct, it makes little sense to require them to shuttle back and forth between the arbitrator making factual determinations and the Court deciding legal questions. Rather, the arbitrator can determine the facts and apply the law to those facts subject to *de novo* review by the district court.

Id. at 884.

In this case, the court of appeals distinguished *Weaver*, noting that the question in *Weaver* was the insured's refusal to submit to independent medical examination, an issue controlled by statute, and not an issue involving construction and application of the terms of the insurance policy. 781 N.W.2d at 886. The court of appeals also observed that an examination under oath is far different from the necessarily invasive and privacy compromising physical medical examination. *Id.*

Because it dealt with a statutory obligation and not a condition precedent under the insurance policy, *Weaver* does not stand for the proposition that the issue of the insureds' failure to comply with the conditions of the policy must be arbitrated. At most, *Weaver* holds that issues relating to statutorily required medical examinations are to be submitted in the first instance to No-Fault arbitrators, but that their decisions on such matters are subject to *de novo* review by the courts.

2. Even Under Weaver, An Arbitrator's Decision Concerning The Reasonableness Of A Request For An Examination Under Oath Is Subject To De Novo Review

While holding that the arbitrator, in the first instance, should consider the reasonableness of an independent medical examination as a part of determining what benefits, if any, to award to the claimant, in *Weaver* the Court also held that the arbitrator's decision with respect to the reasonableness of the conduct of the parties is not conclusive. Noting that Rule 32 of the Rules of Procedure for No-Fault Arbitration authorized arbitrators in No-Fault cases to "grant any remedy or relief deemed just and equitable", the Court nonetheless reaffirmed, "[t]o achieve the consistency desired in interpreting the No-Fault Act, this Court and the district court review *de novo* the arbitrator's legal determinations necessary to granting relief." *Id.* at 882 (citing *Neal v. State Farm Mut. Ins. Co.*, 529 N.W.2d 330, 331 (Minn. 1995)).

The arbitrator has authority on a case-by-case basis to award, suspend or deny benefits when the insured has refused to attend an independent medical examination because of nonpayment of a disputed claim. *The relief awarded is subject to de novo review by the district court, however.*

Id. at 886 (emphasis added).

If the Court concludes that the question of an examination under oath may be considered by the arbitrator rather than by a court in the first instance, a *de novo* standard clearly applies to judicial review of any decisions the arbitrators might make. Not only is that result consistent with this Court's prior decisions, but it also makes sense. Whether the request for an examination under oath is "reasonable" based upon the arbitrator's personal views, biases and practice area could result in completely different decisions on

an insurer's request for an examination under oath on essentially the same facts.⁶ Whether an insured would be required to provide an examination under oath would, in every case, depend on the luck of the draw. Notably, it would also require arbitrators to decide issues beyond those contemplated by the No-Fault arbitration system, which provides that arbitrators determine "reasonable expenses for all necessary" medical treatments "arising out of the maintenance or use of a motor vehicle." Minn. Stat. § 65B.44, subd. 1(a), 2(a); Minn. Stat. § 65B.525. While the arbitration system is intended to answer these two narrow and specific questions with finality, there is nothing in the No-Fault Act that reflects a legislative judgment that any other issues should be subject to conclusive arbitration without subsequent judicial review.

IV. REGARDLESS OF WHETHER THE ISSUE IS INITIALLY OR FINALLY DETERMINED JUDICIALLY, IN THIS CASE THE THOMPSONS HAD NO BASIS TO REFUSE THE REQUEST THAT THEY PROVIDE AN EXAMINATION UNDER OATH

The court of appeals concluded that under any standard of review that might be used, there was no basis in this case for the Thompsons to refuse to provide the requested information. That decision was absolutely correct.

The Thompsons have not disputed the validity of the examination under oath provision in Western National's contract of automobile insurance. Instead, they assert

⁶ The Thompsons actually argue in favor of such inconsistency, asserting that because the decisions of various arbitrators are not precedent, they won't bind insurers in other proceedings, implying that such a rule ameliorates any unfairness resulting from a particular ruling. App. Br. at 15. It is hard to conceive of an argument more at odds with this Court's statement on the need for consistency in the development of No-Fault law.

that they may unilaterally judge the “reasonableness” of the request for the examinations. There is clearly no authority for that proposition in either the statute or the policy.

Moreover, the Thompsons never claimed that the time, place or manner of the proposed examinations under oath were in any way unreasonable. Western National’s request further urged the Thompsons to contact Western National’s counsel to change the examination under oath appointments if needed to fit the Thompsons’ schedules. Clearly, the requests were reasonable on their face.

Finally, the requests were in fact reasonable. The examinations under oath were requested as part of the orderly process of Western National’s claims handling, and fulfillment of its statutory duties. Although Western National began paying the Thompsons’ claims, it undertook to investigate the claims further when it received information about the treatment of the Thompsons with the same chiropractor prior to the accident, and information that indicated that the charges might be less than represented because Cindy Thompson worked for the chiropractor. Western National was entitled to investigate further the causal relationship between the accident and the treatment for which the Thompsons were seeking payment, as well as the amount of the charges for that treatment.

In turn, the Thompsons had both statutory and contractual obligations to provide Western National with information relating to the claim. And Western National was entitled to investigate those issues as it saw fit, not only up until the point in time when the insureds decided that Western National had “enough” information. The court of

appeals correctly held that the Thompsons breached the insurance contract as a matter of law. 781 N.W.2d at 416.

V. BECAUSE THE THOMPSONS VIOLATED CONDITIONS OF THE POLICY, WESTERN NATIONAL IS NOT OBLIGATED TO PAY THEIR CLAIMS

The court of appeals declared the Thompsons' failure to perform a duty imposed by the policy was a breach of contract, citing *Associated Cinemas of Am., Inc. v. World Amusement Co.*, 201 Minn. 94, 99, 276 N.W. 7, 10 (1937). *Thompson*, 781 N.W.2d at 416. The court then held that the consequence of a breach of contract is "the negation of insurance coverage for their claims", although the court also said that "presumably" Western National would "reinstate" coverage after it has conducted the requisite examinations. *Id.*

The Thompsons did not raise in their petition for further review any challenge to this aspect of the court of appeals' decision, and do not address it in their brief to this Court. Accordingly, they have waived any argument they might have as to the proper remedy in this case. *See Hoyt Props., Inc. v. Production Res. Group, L.L.C.*, 736 N.W.2d 313, 317 n.1 (Minn. 2007) (issues not raised in appellants' petition for review are beyond the scope of the appeal and will not be considered by the Court); *Anderly v. City of Minneapolis*, 552 N.W.2d 236, 239-40 (Minn. 1996) (explaining that "this court may decline to hear an issue if it is not raised in either a petition for further review or a conditional petition for further review"). Under the law of this case as declared by the court of appeals, the claims asserted by the Thompsons are barred. However, in the event that the Court chooses to address the issue of the proper remedy for the insureds'

misconduct, it will find ample guidance in its own prior decisions and decisions of other courts that have addressed similar issues.

In the insurance context, various consequences result when the insured does not satisfy policy conditions. These include forfeiture of all coverage (*viz.*, failure to bring a claim within a contractual limitation period contained in the policy (*Hayfield Farmers Elevator & Mercantile Co. v. New Amsterdam Cas. Co.*, 203 Minn. 522, 282 N.W. 265, 269 (1938)), failure to provide prompt notice that results in prejudice to the insurer (*Reliance Ins. Co. v. St. Paul Ins. Cos.*, 239 N.W.2d 922, 924-925 (Minn. 1976)), and negation of the obligation to pay until the condition is satisfied (*viz.*, no obligation of insurer to pay defense costs prior to tender of defense, so no right of insured to receive payments prior to satisfaction of the condition (*Home Ins. Co. v. Nat'l Union Fire Ins.*, 658 N.W.2d 522, 531-32 (Minn. 2003))).

In *Weaver*, the Court addressed the “range of options” available when the insured fails to discharge her or his obligation to submit to a statutorily required independent medical examination. The options identified by the Court included suspension of benefits until the obligation was satisfied, and, where the insurer is prejudiced significantly, denial of the benefits claimed. 609 N.W.2d at 886. Although presenting a different issue (failure to comply with statute versus breach of the insurance contract), what is consistent across these different scenarios is the notion that an insured may not ignore their affirmative obligations under the No-Fault system with impunity.

On the most basic level, Western National was compelled to participate in arbitrations without having an opportunity to fully investigate the claims, and develop

evidence based on that investigation. For that, the appropriate consequence is vacatur of the arbitration award, which was ordered by the court of appeals.

But in order to fully satisfy the goals of the No-Fault system, and give meaning to the reciprocal obligations of the insurer and insureds, there must be a greater consequence than merely requiring the parties to repeat the arbitration process once the insureds have been forced to honor their obligations under the policy and the law. In some jurisdictions, an insured's failure to comply with a request for an examination under oath results in forfeiture of all coverage. *See, e.g., Watson v. Nat'l Surety Corp.*, 468 N.W.2d 448, 451 (Iowa 1991) (insured's failure to submit to examination under oath precludes recovery under policy); *Allison v. State Farm Fire & Cas. Co.*, 543 So.2d 661, 663 (Miss. 1989) (insured's refusal to answer certain questions in examination under oath precludes coverage under policy).⁷

In other jurisdictions, an insured's failure to submit to an examination under oath results in a suspension of coverage. *See* authorities cited in 13 *Couch on Insurance 3d* §196:29 (2005). That is what the court of appeals appears to have had in mind when it commented that "presumably Western National will reinstate coverage after it has conducted the requisite examinations." *Thompson*, 781 N.W.2d at 416. Forfeiture of benefits for the period between refusal and compliance by the insured is an appropriate consequence of breach. *See generally Weaver*, 609 N.W.2d at 886 (describing the "range

⁷ For additional authorities discussing examination under oath as a condition precedent, *see* 13 *Couch on Insurance 3d* §196:22 – 196:23 (2005).

of options” for remedy as including “[i]f the IME request was reasonable and its refusal unreasonable, the arbitrator may award or ratify the insurer’s suspension of disputed payments until an IME is completed”).

This Court has never expressly addressed the consequences of an insured’s complete refusal to submit to an examination under oath.⁸ In *McCullough v. The Travelers Cos.*, 424 N.W.2d 542 (Minn. 1988), the Court considered the possible consequences that might befall an insured who did not submit to an examination under oath as required in a fire insurance policy. The Court held that, because the insured had not expressly refused to submit to the examination sought, but simply asked for a postponement of the examination, and later expressed a willingness to be examined, dismissal of a suit brought by the insured to recover under the policy was not required. The Court noted that under the policy “an oral examination under oath is not a condition precedent to suit. Rather, we hold that the examination requirement is a condition to recover under the policy.” 424 N.W.2d at 544. The Court contrasted the contractual requirement for an examination under oath with a provision that would void the policy if the insured fraudulently conceals or misrepresents facts during the investigation. *Id.*, n. 2. In that case, the insurer did not rely on the voidance provision. *Id.*

⁸ The court of appeals has held that an insured’s refusal results in no coverage under the policy. *Metropolitan Prop. & Cas. Ins. Co. v. King*, No. C9-02-1737, 2003 WL 21008323 (Minn. Ct. App. May 6, 2003). The court specifically considered and rejected the insured’s post-refusal offer to sit for an examination under oath that was limited in scope. The insured’s “conditional offer to appear for an examination under oath failed to cure his breach of the contract.” *Id.* at *1, 4.

The Court also distinguished cases from other jurisdictions where the insured expressly refused to submit to an examination under oath, and was held to have breached the contract, voiding coverage. “Here, the undisputed portion of the record reflects no similar circumstances entitling Travelers to summary judgment.” *Id.* at 545.⁹

Implicit in this analysis was the recognition by the Court that if there were, in fact, a term in the policy that made provision of an examination under oath a condition precedent to recovery, and if the evidence showed that the insured unequivocally and explicitly refused to provide that examination under oath, then recovery would be

⁹ Subsequent to *McCullough*, this Court had occasion in two different cases to consider what consequence should befall an insured who failed to submit a timely proof of loss. In *Nathe Bros. Inc. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341 (Minn. 2000), the Court recognized that insurance policies may properly contain provisions declaring the failure to comply with time limitations set forth in the policy is fatal to recovery. *Id.* at 347-348. However, the Court also noted that the policy in question did not contain such a provision:

We therefore conclude that the failure to submit 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.

Id. at 348. Thus, the Court held that failure to submit a timely proof of loss did not operate as an automatic bar to recovery under the particular policy. *Id.* at 349. Here, unlike in *Nathe*, the policy *does* contain an express condition precedent. In a second case, which was decided on the same day as *Nathe*, the Court reached a similar, but not identical conclusion. In *Leamington Co. v. Nonprofits Ins. Ass'n*, 615 N.W.2d 349 (Minn. 2000), the Court held that the untimely submission of a proof of loss was not a bar to recovery since the insurer claimed no prejudice. *Id.* at 354. The Court also observed that forfeiture provisions contained in a policy are strictly construed, and will not result in forfeiture where the policy language does not “plainly manifest that intent.” *Id.* at 354, n.3. These cases further support the notion that if there is a clear condition precedent in the policy, it will be honored.

precluded under the policy. That is precisely the result that other courts have reached in similar circumstances. And it is the case here.

The Thompsons and the amicus make much of the fact that policies considered in *McCullough* and other cases were fire insurance policies, and not No-Fault policies, and that somehow a different result should obtain because of that distinction. In a sense, they are correct, but the consequence of the distinction is something different than what they advocate.

One of the purposes of the No-Fault Act is to prevent unfounded and fraudulent claims. Minn. Stat. § 65B.42 (2), (5). Other statutes seek the same result. *See, e.g.*, Minn. Stat. § 60A.954, subd. 1 (requiring insurers to “institute, implement, and maintain” an anti-fraud plan that is designed, in part, to prevent “claims fraud”). For this reason, insureds are specifically required by the No-Fault Act, and by the terms of the Western National policy, to both cooperate with the insurer and to provide requested information. An insured who intentionally violates those obligations should not be allowed to avoid significant consequences. Merely requiring a new arbitration does little more than penalize the insurer, which must incur the additional expense of the second proceeding. And simply deferring the insurer’s payment obligation (which presumably would eliminate any claim by the insured for penalty interest under Minn. Stat. § 65B.54, subd. 2) is an inadequate consequence.

The most appropriate consequence is forfeiture, and if that forfeiture is not a complete loss of coverage under the policy, it must be at least loss of coverage during the time in which the insureds are in violation of the terms of the policy. *Home Ins. Co.*, 658

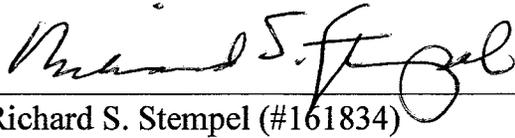
N.W.2d at 531-32 (no obligation to pay defense costs until condition of format tender of defense is satisfied). Either result balances the dual policies of the No-Fault Act and the interests of the parties.

CONCLUSION

The provisions in Western National's policy are clear and unambiguous, and consistent with both the letter and spirit of the No-Fault Act. On this record, there can be no persuasive claim that the request by Western National for examinations under oath was anything but reasonable. And under this Court's decisions, whether the terms and conditions of an insurance policy provide coverage for a specific claim is to be resolved in judicial proceedings. The conclusions of the arbitrators regarding the reasonableness of Western National's requests in this case are entitled to no deference, and have no effect on these proceedings. The court of appeals correctly held that the request for examination under oath was reasonable, and the Thompsons' failure to comply with that request was a breach of the conditions of the policy. That decision should be affirmed.

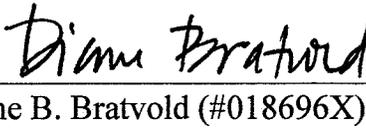
Because Western National was forced to proceed to arbitration without the investigation it was entitled to under its policy and the statute, the awards were properly set aside by the court of appeals. Moreover, the court of appeals properly concluded that the Thompsons were not entitled to recover any benefits while they were in breach of the policy conditions. If the Court reaches the issue of a proper remedy for the Thompsons' breach of their contractual obligations, Western National respectfully submits that the Court should also affirm that conclusion of the court of appeals.

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Dated: September 21, 2010.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Western National Insurance Company certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Professional Plus 2007 and contains 7,627 words, including headings, footnotes and quotations.

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