

# **NO-FAULT BENEFITS AN OVERVIEW**

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## I. When Does a Claim Arise?

Minn. Stat. §§ 65B.41 - 65B.71 comprise the Minnesota No-Fault Automobile Insurance Act. Policies of automobile insurance must comply with the requirements of the statute. A policy may, however, extend benefits beyond the mandates of the statute. Pavel v. Norseman Motorcycle Club, Inc., 362 N.W.2d 5 (Minn. Ct. App. 1985).

For purposes of this article, no-fault benefits refer to the "basic economic loss benefits" described in Minn. Stat. § 65B.44 and § 65B.45. Some policies call these PIP (personal injury protection) benefits.

Minn. Stat. § 65B.46 provides the basic description of when a claim to no-fault benefits will arise. Generally, a person suffering injuries arising out of the maintenance or use of a "motor vehicle" has a right to benefits. And a pedestrian struck by a motorcycle also has a right to no-fault benefits.

### A. Maintenance or Use of a Motor Vehicle

The phrase "maintenance or use of a motor vehicle" is defined at Minn. Stat. § 65B.43, subd. 3. The definition generally includes all activities incident to "use of a motor vehicle as a vehicle" and specifically mentions "occupying, entering into, and alighting from it." The statute excludes (1) conduct within the course of a business of servicing or maintaining motor vehicles if the conduct is on the business premises and (2) loading and unloading a vehicle unless the conduct occurs while occupying, entering or alighting from the vehicle.

Clear general principles have been established to determine whether or not an injury arises out of the maintenance or use of a motor vehicle.

- (1) There must be a causal relationship between the injury and the use of the vehicle for transportation purposes.
- (2) The vehicle must be more than just the place where the injury occurs.
- (3) The injury must be a natural and reasonable incident or consequence of the use of the vehicle.

See North River Ins. Co. v. Dairyland Ins. Co., 346 N.W.2d 109, 114 (Minn. 1984).

In the case of Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987), the supreme court enunciated a three-part test to determine if the injury arises out of "maintenance or use." The court did the following analysis:

- (1) First, consider the extent of causation between the automobile and the injury;
- (2) If enough causation exists, determine whether any other act of independent significance occurred breaking the causal link;
- (3) If cause exists and there is no intervening independent act, consider whether the motor vehicle was being used for transportation purposes or

was merely the site of the accident.

In applying the Klug standards, the court of appeals has held that the requirement of "causation" can be established if the vehicle is an "active accessory", i.e. the use of the vehicle is actively connected with the injury. Kemmerer v. State Farm, 513 N.W.2d 838 (Minn. Ct. App. 1994).

The court of appeals has also indicated that the "use" of a motor vehicle is not limited to operating or driving the vehicle. Rather, the phrase "use of a motor vehicle" will extend to "those activities whose costs should be attributed to motoring." Kemmerer, 513 N.W.2d at 843. Likewise, the term "transportation purposes" has been acknowledged to have a broader meaning than is suggested by its literal terms. State Farm v. Beauchane, No A-14-0986, 2015 WL 1514925 \*3 (Minn. Ct. App. April 6, 2015) (Truck parked with rope tied to trailer hitch was being used for "transportation purposes" because the rope had been placed with the intent of pulling over dead tree.)

The practical application of these general standards may not always be self-evident. A review of appellate decisions will provide guidance as the principles are applied to unusual fact patterns.

#### 1. Gun Shot Cases

Nat'l Family Ins. Co. v. Boyer, 269 N.W.2d 10 (Minn. 1978). The accidental discharge of a handgun inside a car injures a person who is in the process of entering the car. No coverage. Vehicle is "mere situs" of the accident.

Perry v. State Farm Mut. Auto. Ins. Co., 506 F.Supp. 130 (D.Minn. 1980). Following a routine traffic stop, an individual was shot to death by a police officer as the individual was getting out of his van. Coverage exists. The entire incident arose out of the use of the vehicle as a vehicle.

Meric v. Midcentury Ins. Co., 343 N.W.2d 688 (Minn. Ct. App. 1984). A thief leaving the scene of a holdup shoots the driver of a van as the thief tries to take over the van for a getaway. Coverage exists. The driver's death resulted from the use of his van as a vehicle. However, in Gibbons v. Crum & Forster, No. CX-92-1081, 1992 WL 340549 (Minn. Ct. App. Nov. 24, 1992), a cab driver shot by a passenger was denied benefits, because the vehicle was simply the site of the injury.

Fire & Cas. Ins. Co. of Connecticut v. Illinois Farmers Ins. Co., 352 N.W.2d 798 (Minn. Ct. App. 1984). A hunter taking his gun from the car accidentally shoots a friend who is unloading his gun from the other side of the car. Coverage denied. This is a typical hunting accident in which the vehicle is the mere situs of the accident.

Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987). A mentally ill individual is involved in an automobile chase with a co-worker. During the automobile chase, he fires a shotgun at the co-worker and causes a gunshot wound. The court of

appeals found the injury was not covered by no-fault. Continental Western Ins. Co. v. Klug, 394 N.W.2d 872 (Minn. Ct. App. 1986). The Supreme Court reversed and, applying the three-pronged test discussed on Page 1, granted no-fault coverage.

Farmers Ins. Group v. Chapman, 416 N.W.2d 857 (Minn. Ct. App. 1987). Claimant is shot while he and a hunting partner are unloading their guns outside their vehicle. Claimant argues the law prohibits carrying loaded guns in a car so the vehicle is related to the injury. No-fault benefits are denied after applying the three-pronged Klug test.

Hanson v. Grinnell Mut., 422 N.W.2d 288 (Minn. Ct. App. 1988). A pickup truck is used to tow a camper. The camper is set up for the night. The owner wants to run the truck in order to recharge the batteries on the camper. As he gets into the truck to start it, a shotgun that is on the seat of the truck discharges and causes his injuries. It is not known why the gun went off. No-fault benefits are denied. No causal relationship is established between the use of the truck as a vehicle and the injury.

McIntosh v. State Farm Mut. Auto. Ins. Co., 488 N.W.2d 476 (Minn. 1992). A woman's boyfriend chases her, tries to ram her car, and then shoots her. The company denies benefits because this is not an "accident." The Supreme Court requires payment of no-fault. If the Klug standards are met, no-fault benefits are available even for the victim of an intentional tort. (If the boyfriend had injured himself in this incident, Minn. Stat. § 65B.60 would exclude benefits for him; benefits are excluded for a person who causes an intentional injury, either to himself or to another person.)

State Farm v. Strope, 481 N.W.2d 853 (Minn. Ct. App. 1992). While driving, the operator of a pickup truck tries to disentangle his dog from a shotgun on the floor. When the gun goes off, the passenger is injured. Since there is no evidence that the truck's movement or the operation of the vehicle contributed to the gun's going off, benefits are denied.

Fromm v. State Farm, No. C8-96-732, 1996 WL 589103 (Minn. Ct. App. October 15, 1996). A man is shot. His wife tries to rescue him from the assailant by pulling him into a pickup truck. She is shot while assisting him into the truck. Benefits are denied. The shotgun blast is an act of independent significance breaking any causation between the use of the vehicle and the injury.

## 2. Other Assault Cases

Generally, coverage is denied in cases of assault unless the vehicle is actively involved in causing the injury. The fact that the assault followed a dispute over someone's behavior in driving a vehicle does not create coverage.

Holm v. Mutual Service Cas. Ins. Co., 261 N.W.2d 598 (Minn. 1977). (The issue in this case involves automobile liability coverage.) Following a high-speed chase, an individual claims that a police officer assaulted him. The assault is an independent cause of the injury unrelated to the use of any motor vehicle.

Wieneke v. Home Mut. Ins., 397 N.W.2d 597 (Minn. Ct. App. 1986). Two men, who accuse each other of driving improperly, come to a stop light in their respective cars. One gets out and punches the other in the nose through an open window of the car. In this en banc decision, the majority finds that the injury did not arise from the maintenance or use of a motor vehicle.

Edwards v. State Farm Mut. Auto. Ins. Co., 399 N.W.2d 95 (Minn. Ct. App. 1987). A young woman was abducted and forced into a car where she was assaulted and murdered. The injury did not arise from the operation, maintenance or use of a vehicle. (The claim involves uninsured motorist benefits.) See also Bonner v. State Farm, No. C8-98-2243, 1999 WL 153791 (Minn. Ct. App. March 23, 1999) in which a woman received some unspecified injury while being robbed at gunpoint in her car. No-fault benefits are denied. The robber is stealing the woman's money, not her car. The car is simply the site where the robbery occurred.

Peterson v. American Family Ins. Co., 417 N.W.2d 316 (Minn. Ct. App. 1988). A man drives into a roadside rest area in Wisconsin to ask directions from a group of teenagers. They kidnap him, drive around for several miles, and then murder him by strangulation. The injury does not result from the "use" of a motor vehicle.

Lindsey v. Sturm, 436 N.W.2d 788 (Minn. Ct. App. 1989). Person loses vision in one eye when hit by a drunk in a dispute over an improperly parked car. Plaintiff argues that "but for" the improper use of the car, no injury would have occurred. No coverage. Independent act breaks the causal link between car and injury. Car is not an active accessory to the intentional tort.

Bunker v. Hartford Ins. Co., No. C6-92-11, 1992 WL 104747 (Minn. Ct. App. May 19, 1992). Man is in a fight, is pushed into a passing car, falls, and is run over. No-fault benefits are available. The car, not the fight, caused the injury.

### 3. Loading and Unloading Cases

"Maintenance or use" of a motor vehicle generally does not include "conduct in the course of loading or unloading the vehicle" unless the conduct occurs "while occupying, entering into or alighting from" the vehicle. Minn. Stat. § 65B.43, subd. 3. In the case law, coverage often depends on whether or not the vehicle was involved in causing the injury.

Krupenny v. Westbend Mut. Ins. Co., 310 N.W.2d 133 (Minn. 1981). A person is injured when a dumpster falls from a garbage truck. Coverage is denied. The injury arose from the mechanical unloading of the dumpster and coverage is excluded by Minn. Stat. § 65B.43, subd.3.

Galle v. Excalibur Ins. Co., 317 N.W.2d 368 (Minn. 1982). In consolidated cases, three individuals are injured while unloading trucks. Two individuals are hurt while lifting things inside the truck. The third person is hurt when the cable on the door of a trailer breaks causing him to fall. The first two individuals are denied benefits. The injuries were the

result of a lifting accident and were not related to the use of a vehicle for transportation purposes. (The "loading or unloading" exclusion is not used as a basis for the denial because the injured party was technically considered to be "occupying" not "unloading" the vehicle when the injury occurred.) The third individual is covered because the malfunction of the vehicle itself caused his injuries.

Petrick v. Transport Ins. Co., 343 N.W.2d 876 (Minn. Ct. App. 1984). A truck driver slips on oil in the truck trailer when unloading his truck. Coverage exists. He is occupying the vehicle and the condition of the vehicle is causally related to the injury. Likewise, in Minkel v. Progressive Cas., No. C5-98-1177, 1998 WL 811559 (Minn. Ct. App. Nov. 24, 1998), a man who fell from the bed of his pickup truck while loading furniture was covered as "alighting from" his truck when he fell.

North River Ins. Co. v. Dairyland Ins. Co., 346 N.W. 2d 109 (Minn. 1984) A farm worker is injured while removing a tarpaulin from the top of a trailer. He was either standing on the trailer or getting down from the trailer as he fell. Coverage exists.

Jorgenson v. Auto-Owners Ins. Co., 360 N.W.2d 397 (Minn. Ct. App. 1985). A can filled with gasoline is stored inside the trunk of a car. When the trunk of the car is opened, sparks from faulty wiring cause the trunk to catch fire. To prevent an explosion at the gasoline station where the car is parked, an individual tries to remove the gas can from the trunk. Gasoline spills, and the individual is badly burned. Coverage exists. The injuries were caused by a defect in the vehicle itself (defective trunk wires), not by unrelated loading or unloading activities.

Himle v. American Family Mut. Ins. Co., 445 N.W.2d 587 (Minn. Ct. App. 1989). Person injured by a horse while attempting to load horse into a trailer attached to a motor vehicle. No coverage, since injured person was not "occupying" the trailer at the time of the injury.

Anderson v. American Cas. Co., 504 N.W.2d 467 (Minn. 1993). A bulldozer being unloaded from a tractor-trailer goes over the side of the trailer and the operator is injured. Dew on the bulldozer treads is blamed for slippery conditions which caused the accident. Because the dew is on the bulldozer, which is not a "motor vehicle," there is no coverage.

Kemmerer v. State Farm. A pickup equipped with a "topper" is used on a camping trip. A kayak is loaded on top of the vehicle. One of the people on the trip tries to enter the "topper" in order to get a beer. The door of the topper catches on an elastic rope holding the kayak in place. The rope snaps off, injuring the man's eye. There is an adequate causal link with the vehicle because the door caused the rope to snap off. The truck was being used for transportation, not just for storage. The group had driven to the beach, had used recreational equipment which had been in the truck, had reloaded the truck, and was planning to drive to a new campsite for the evening. These circumstances are enough to show transportation purposes. No fault benefits are awarded.

Melchert v. Farm Bureau, No. CX-95-1094, 1995 WL 593061 (Minn. Ct. App. October 10, 1995). Man working on a trailer attached to a motor vehicle is injured when his son tries to

toss a hay bale onto the trailer. There is no causal relationship between the injury and the use of the vehicle for transportation purposes. Benefits denied.

#### 4. Slip and Fall Cases

The Supreme Court decision in Marklund v. Farm Bureau Mut. Ins. Co., 400 N.W.2d 337 (Minn. 1987) establishes the basic standard for injuries caused by a fall. Coverage will depend on the specific causation issues in each case.

In Marklund, a person who fell on ice at a gas station after he had completely finished pumping gas for his car did not suffer an injury arising out of the "maintenance" of a motor vehicle. The Court, commenting on the policy goals of the No-Fault Act, indicates that hazards that typically give rise to slip and fall injuries will generally not be hazards related to the activity of motoring. The court does not go so far as to reverse Brehm v. Illinois Farmers Ins. Co., 390 N.W.2d 475 (Minn. Ct. App. 1986), where the individual fell while actually involved in washing the windows of his car. Brehm was covered because his injury arose out of the "maintenance" of a motor vehicle.

Nadeau v. Austin Mut. Ins. Co., 350 N.W.2d 368 (Minn. 1984) An individual on an icy street is injured in attempting to avoid an oncoming vehicle. She does not come in contact with the vehicle. Coverage exists. The injury is related to the use of the vehicle because the individual was within a "zone of danger" caused by the vehicle. The risk of physical impact with the vehicle was a cause of the injury.

Barry v. Illinois Farmers Ins. Group, 386 N.W.2d 299 (Minn. Ct. App. 1986). The claimant pulled her car out of the garage, left it running while she went back to close the garage door, and then fell on ice as she was going back to the car while she was about an arm's length away. The court held that the use of the car was clearly an active accessory to the injury, and benefits were awarded.

Christiansen v. General Accident Ins., 482 N.W.2d 510 (Minn. Ct. App. 1992). A woman got out of the rear passenger door after a car was parked on an icy street. She was trying to steady herself by leaning on the car as she walked around it. She fell on the ice. Benefits were denied since she had finished "alighting from" the car.

Harbold v. Nat'l Cas. Co., No. C7-96-1385, 1997 WL 40720 (Minn. Ct. App. Feb. 4, 1997). Individual, with physical disabilities requiring use of a cane, gets out of a van, closes the door and promptly falls down. Because she was using her good hand to close the door and was not using cane to steady her, she fell on ice. Benefits were denied because she had finished alighting and had "taken an overt act toward entering her home."

Medicine Lake Bus Co. v. Smith, 554 N.W.2d 623 (Minn. Ct. App. 1996). A small bus (16 passengers) comes to a stop. Man who intends to exit from bus loses his balance and falls as he is walking down the center aisle. This is an accident which occurs while the person is in the process of "alighting from" a vehicle, and is therefore covered by the explicit definition of "maintenance or use." Minn.Stat. § 65B.43, subd.3. Benefits allowed.

## 5. Homeowner and Auto Coverages

Homeowner's liability insurance generally excludes claims arising from the operation, maintenance or use of a motor vehicle. In some cases, "maintenance or use" has been evaluated in the context of a joint claim for both auto and homeowner coverage. The cases below do not involve claims for no-fault benefits, but they are cited because they discuss issues related to the maintenance and use of motor vehicles. (The definition of "motor vehicle" in a homeowners' policy is broader than the no-fault definition.)

Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917 (Minn. 1983). (The issue involves liability coverage.) Live embers were placed in a barrel and the barrel was then transported in an open pickup truck. Sparks flew from the barrel causing fires along the highway. Two separate acts of negligence existed (placing the embers and transporting them.) The resulting damage was caused by the maintenance or use of a motor vehicle.

West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co., 384 N.W.2d 877 (Minn. 1986). The case construes "maintenance or use of a motor vehicle" in the context of a homeowners policy exclusion. A passenger is having a disagreement with her boyfriend while he is driving his car. She grabs the steering wheel to try to have him turn the car or bring it to a stop. The car goes out of control and the driver is injured. Homeowners as well as auto coverage applies to the claims of the driver. The homeowners policy exclusion concerning the operation of a motor vehicle did not apply to a passenger who was actually interfering in the operation of the vehicle.

North Star Mut. Ins. Co. v. Johnson, 352 N.W.2d 791 (Minn. Ct. App. 1984). Failing to secure arms of a farm sprayer before pulling it with pickup truck is an independent act of negligence not related to operation or use of the truck. Farm policy exclusion will not ban claim based on this negligence.

Jorgenson v. Auto Owners Ins. Co., 360 N.W.2d 397 (Minn. Ct. App. 1985) A gasoline container was placed in the trunk of a car which had defective wiring. A spark caused a fire when the trunk was opened. Placing the gasoline near a known source of ignition was a non-vehicle related cause of the injuries, so homeowners (as well as auto coverage) exists.

Pennsylvania General Ins. Co. v. Cegla, 381 N.W.2d 901 (Minn. Ct. App. 1986). A motorcyclist is injured when a roll of wire mesh falls from a moving pickup truck onto the highway. Failing to secure the wire mesh is a non-vehicle related act, allowing homeowner's insurance coverage.

Braun v. Waseca Mut. Ins. Co., No. C8-90-68, 1990 WL 81401 (Minn. Ct. App. June 22, 1990). Two boys are helping their grandmother by using their pickup truck to tow the grandmother's tractor back to her farm. They stop on the roadway to reconnect the towing chain. It is dark, and a car runs into the tractor. The issue is whether or not the homeowner's coverage of the grandchildren will apply. Plaintiff claims that the boy's failure

to warn on-coming traffic of the hazard in the roadway is an independent act of negligence unrelated to maintenance of the tractor. The court holds that the motor vehicle exclusion in this homeowner's policy will apply, because there is no independent act of negligence unrelated to maintenance of the tractor.

State Farm Ins. Co. v. Seefeld, 481 N.W.2d 62 (Minn. 1992). A four-wheel ATV was pulling a two-wheel utility trailer which had been designed and built by Mr. Seefeld. A passenger in the utility trailer is injured when the trailer comes loose from the ATV. A claim is made against Mr. Seefeld based upon negligent design and construction of the trailer. However, because the injury could have occurred only through the use of a motor vehicle pulling the trailer, the motor vehicle exclusion in the homeowners' policy bars the claim against Mr. Seefeld's homeowner's insurance.

## 6. Cases Involving Fires

Generally, people injured by fires may have no-fault claims if a vehicle is involved in causing the fire. In addition to Waseca Mut. v. Noska and Jorgenson v. Auto Owners (discussed above in part 5), the following cases involve fires.

Associated Indep. Dealers, Inc. v. Mut. Service Ins. Co., 229 N.W.2d 516 (Minn. 1975). (The issue involves liability coverage.) An individual was burned when acetylene cutting equipment ignited a fire as it was being used. A portion of the equipment being used was inside a van as the fire ignited. There is no causal connection between the use of the van and the fire.

St. Paul Fire & Marine Ins. Co. v. Sparrow, 378 N.W.2d 12 (Minn. Ct. App. 1985). The claimant was injured in a fire that occurred in a "concession wagon." The wagon is a four-wheeled vehicle covered by a commercial auto policy. However, the fire in the wagon was in no way related to the use of the wagon as a vehicle.

Strand v. Illinois Farmers, 429 N.W.2d 266 (Minn. Ct. App. 1988). A car in a garage was leaking gasoline. When a garage door opener was used, fumes from the gasoline were ignited. No-fault coverage exists.

Thougan v. Auto-Owners Ins. Co., 310 N.W.2d 116 (Minn. 1981). A five year old left alone in the front seat of a family vehicle is burned while playing with matches. The vehicle is only the situs of the accident, so no-fault coverage is denied.

Economy Fire and Cas. Ins. Co. v. Bertamus, No. CX-89-2205, 1990 WL 52608 (Minn. Ct. App. May 1, 1990). Husband and wife parked their pickup camper at a lake. The next morning, while lighting the gas stove in the camper, an explosion occurred. The camper was not being used for transportation purposes but as a "temporary residence" and was the mere "situs of the injury."

In Kivel v. Milwaukee Guardian Ins. Co., No. C9-94-1285, 1994 WL 637816 (Minn. Ct. App. Nov. 15, 1994), the court denied no-fault benefits for injuries from a refrigerator which

exploded inside a motor home. The motor home itself was not an active accessory in causing the injury, and the injury was not related to the vehicle's being used for transportation purposes.

## 7. Carbon Monoxide Cases

The issue in these cases is whether or not the vehicle emitting the carbon monoxide fumes is being used for transportation purposes when the accident occurs.

Classified Ins. Corp. v. Vodinelich, 368 N.W.2d 921 (Minn. 1985). An individual commits suicide by closing the garage door and leaving the car motor running inside the garage. The individual's children are accidentally killed as the carbon monoxide escapes from the attached garage into the house. Reversing a court of appeals decision, the Supreme Court finds that the deaths of the children are not related to the use of the motor vehicle for transportation purposes.

In Norwest Bank Minnesota, N.A. v. State Farm, 588 N.W.2d 743 (Minn. 1999), a husband pulls his wife's car into the garage attached to their house and accidentally forgets to turn off the engine. The husband and wife are killed due to carbon monoxide poisoning. According to the Supreme Court, the deaths do arise out of the use of a motor vehicle for transportation purposes. The "arising out of" language does not require that the accident and the injury occur at the same time, but rather that one act originates from or grows out of another. 588 N.W.2d at 747. Here, the accident occurred when the husband forgot to turn off the engine after using the vehicle for transportation purposes.

Shea v. Dairyland Ins. Co., No. C1-91-2450, 1992 WL 122651 (Minn. Ct. App. June 9, 1992). Person died of carbon monoxide poisoning after either falling asleep or passing out in his truck, which was in garage with the motor running. The issue is whether or not, after reaching its destination, the truck was being used for transportation purposes. The court grants no-fault coverage, seeing no reason to deny coverage because the injury occurred at the end of the trip rather than during the trip. However, in Alexis v. State Farm Mut. Auto. Ins. Co., 696 N.W.2d 109, when two men were found dead in the back of a Chevy Suburban, it appeared likely that they had intended to sleep in the vehicle, and no-fault benefits were denied because the family could not meet their burden of proving that the vehicle was being used for transportation purposes. In Alexis, a concurring opinion suggests that, while the outcome in the case is required by existing precedents, the result is not actually consistent with the intent of the legislature in passing the No-Fault Act.

Opay v. Metropolitan Property & Cas. Co., No. C8-95-11, 1995 WL 407437 (Minn. Ct. App. July 11, 1995). A teenager arrives home with some friends after a night of drinking. The friends stay overnight. One of the friends remains in the car to sleep there. The keys are left in the ignition. The friend who is left in the car overnight apparently starts up the engine to stay warm. The car is in the garage, and she dies of carbon monoxide poisoning. Starting the engine for warmth does not constitute the use of a motor vehicle for transportation purposes. The risk of asphyxiation is not a risk associated with motoring.

Wiczek v. Shelby Mut. Ins. Co., 416 N.W.2d 768 (Minn. Ct. App. 1987). The death, by carbon monoxide poisoning, of an occupant of a camper when the gas heater malfunctioned did not arise out of the use of a motor vehicle when the trailer had been unhitched from the car and was being used as a temporary residence overnight.

In Alexis v. State Farm Mut. Auto. Ins. Co., 696 N.W.2d 109 (Minn. Ct. App. 2005), a man had gone fishing with his cousin. The two of them were found dead in a Chevy Suburban parked in the garage at home. They had last been seen in the garage at 9:00 p.m. and their bodies were discovered at about 8:00 the next morning. There was no evidence to establish why they had turned on the vehicle in the closed garage. In the absence of evidence to establish a transportation purpose for the vehicle, no-fault benefits were not available.

#### 8. Other Cases: People Not Occupying Motor Vehicles

State Farm v. Beauchane, No A-14-0986, 2015 WL 1514925 (Minn. Ct. App. April 6, 2015) involved a liability insurance claim. A man is taking down a dead tree on his property. He ties one end of a rope to the tree and the other end to the trailer hitch on his Silverado. He parks the Silverado in the middle of the street with its flashers on. As he goes to perform another task, a motorcycle comes along. The motorcycle operator goes around the Silverado, then sees the rope and loses control of the motorcycle. Does the liability policy on the Silverado apply to the claim against the Silverado owner? Applying the *Klug* factors, the truck was being used for transportation purposes and is a cause of the injury. Coverage exists.

Dougherty v. State Farm Mutual Ins. Co., 699 N.W.2d 741 (Minn. 2005), involved an incident in which a woman was injured after her car got stuck in a snowbank about 100 yards from her apartment. The weather was well below zero, and she apparently had been drinking. She falls, and it takes her about a half hour to get to her home. She suffers frostbite, which leads to the amputation of some fingers. The Court grants no-fault benefits reasoning that the hazards of winter driving are a fundamental part of the driving experience in Minnesota. The injured person had not completed her use of the vehicle when the accident occurred. The injury was a natural consequence of the use of the vehicle.

An earlier unreported decision, Clapp v. Nat'l Family Ins., No. C0-91-2374, 1992 WL 95890 (Minn. Ct. App. May 12, 1992), involved similar injuries. In Clapp, the claimant fell on a winter day while trying to transfer himself from his wheelchair to his vehicle. By the time he was able to crawl back to his house, he suffered frostbite. No-fault benefits were available because the initial accident occurred while he was attempting to enter the vehicle.

Haagenson v. Nat'l Farmers Union Property and Cas. Co., 277 N.W.2d 648 (Minn. 1979). The injured party was assisting someone whose car went into a ditch. Testimony indicates that he slipped while opening the passenger door on the vehicle; he was electrocuted as he came into contact with downed electrical wires. Coverages exists. The court infers that the injured person was entering the vehicle in order to try to drive the vehicle out of the

ditch.

Benike v. Dairyland Ins. Co., 520 N.W.2d 465 (Minn. Ct. App. 1994). A car goes off the road and hits a utility pole. Power lines are down. A passerby stops his car and comes to help. He comes in contact with the power line. No-fault benefits are granted. There is no independent act breaking the causal link between the car accident and the injury.

Kolkin v. American Family Ins., 347 N.W.2d 538 (Minn. Ct. App. 1984). A snowmobile operator was injured when he ran into a car which had been left partially on a roadway at night without any lights left on. Coverage exists. On these facts, the vehicle is an "active accessory" to the collision. But in Perron v. State Farm, No. C9-93-955, 1993 WL 339064 (Minn. Ct. App. Sept. 7, 1993), a passenger on snowmobile was injured when the snowmobile slid into a parked car, and it was held that the injury did not arise out of use of a motor vehicle. In Perron, the vehicle involved was legally parked.

Weise v. Western Nat'l, No. C3-97-745, 1997 WL 644963 (Minn. Ct. App. Oct. 21, 1997). An individual on an ATV collided with a parked car on a narrow two-lane gravel road. Judge allowed the case to go to the jury. The ATV was three feet wide. There was approximately four feet from edge of car to center of roadway. The jury found that the vehicle did not obstruct the roadway so was not an active accessory in causing the injury.

In Waldbillig v. State Farm Ins. Co., 321 N.W.2d 49 (Minn. 1982), a person injured while operating a backhoe mounted on a truck bed was denied no-fault coverage.

Progressive Cas. Ins. Co. v. Hoekman, 359 N.W.2d 685 (Minn. Ct. App. 1984). A salesperson visiting a client slides into the client's garage door, forcing the door up about a foot. The car is moved. While trying to close the garage door a few minutes later, the homeowner has the garage door collapse on him. Coverage exists. But for the car striking the garage door, it would not have collapsed. The car was a contributing and necessary cause of the injuries.

Timmers v. State Farm Mut. Auto. Ins. Co., 374 N.W.2d 338 (Minn. Ct. App. 1985). The claimant was trying to put a new dimmer switch into his truck. The injury actually occurred about forty feet away from the truck while he was using his drill on a drill press table. There is no relationship between the maintenance of the motor vehicle and the injury.

Hedlund v. Milwaukee Mut. Ins., 373 N.W.2d 823 (Minn. Ct. App. 1985). A man drives his pickup truck into a field in order to jump-start his tractor. The tractor was in gear and, when started, lurched forward and injured the man's son. The tractor is not a vehicle for no-fault purposes. Nevertheless, the court of appeals finds a causal connection between the injury and the use of the pickup truck for transportation purposes. In Minnesota, jump-starting a vehicle is a risk associated with motoring.

Baker v. American Family Mut. Ins. Co., 460 N.W.2d 86 (Minn. Ct. App. 1990). A person whose car went into a ditch left the vehicle and subsequently died due to sub-zero temperatures. She was found in an unheated storage shed in a nearby farm. The issue in

this case involved the availability of no-fault coverage in the Assigned Claims Plan. For purposes of the appeal, the parties stipulated that the death arose from the use of the motor vehicle.

Kern v. Auto-Owners Ins. Co., 526 N.W.2d 409 (Minn. Ct. App. 1995). A pedestrian is injured by building materials which are blown from the back of a parked pickup truck. The truck owner had purchased the materials, had put them in the back of the truck, and had then driven to a grocery store to stop for groceries. No-fault benefits are awarded. There is a close causal relationship between the injury and the use of the pickup truck to transport materials.

Myhre v. Northland Ins. Co., No. C7-95-792, 1995 WL550943 (Minn. Ct. App. Sept. 19, 1995). The operator of a dump truck is about 20 feet away from his vehicle asking for directions when he is hit by a piece of excavation equipment. In denying no-fault benefits, the court of appeals notes that the no-fault claim here fails all three parts of the Klug standards since the vehicle was not involved in causing the injury, there was an act of independent significance causing the injury, and the vehicle was not being used for transportation purposes when the driver was hurt.

Steinfeldt v. AMCO Ins. Co., 592 N.W.2d 877 (Minn. Ct. App. 1999). A man driving at night on a divided highway pulls over to assist people involved in an accident on the other side of the roadway. He gets out of his vehicle and jumps over the barrier in the middle of the highway. The point from which he jumped was an overpass, and he fell fifty feet to the ground. No-fault benefits are denied. There is no causal relationship between the man's injuries and the use of a motor vehicle. The court of appeals distinguishes this case from the power line cases (see Benike v. Dairyland Ins. Co., 520 N.W.2d 465 (Minn. Ct. App. 1994) discussed above) in which the accident itself had created the hazard that caused the injury.

## 9. Other Cases: People Occupying Motor Vehicles

Minn. Stat. § 65B.43 subd. 3 does exclude from no-fault coverage conduct in the business of maintaining a motor vehicle “unless the conduct occurs off the business premises.” In Castillo v. American Standard Ins. Co. of Wis., 889 N.W. 2d 591 (Minn. Ct. App. 2017) a man died of carbon monoxide when he was repairing a tire in the cargo bay of his truck and was using a generator that leaked the deadly fumes. The court construed the term “business premises” to include the truck because the man conducted most of his repair business by driving to the location of a customer and doing work in the truck. Since he was on “business premises,” the exclusion applied to his no-fault claim.

Engeldinger v. State Auto and Cas. Underwriters, 236 N.W.2d 596 (Minn. 1975). (The issue involves liability coverage, i.e. was the driver negligent in the operation or use of the motor vehicle.) A driver leaves intoxicated passenger in a car. The passenger freezes to death. The car is simply the situs of the injury.

Moss v. State Farm Mut. Auto. Ins. Co., No. C1-90-1837, 1991 WL 30341 (Minn. Ct. App.

March 15, 1991). Person injured during use of his truck in a pulpwood loading operation. The truck's use at the time of the injury was as a power source to operate the loader, not for transportation purposes. Injured person claims State Farm admitted in writing that his injuries were covered by his No-Fault insurance. Insurance coverage is based on contract and cannot be created by estoppel. The letter from State Farm does not independently establish coverage. The policy, not a conditional response based on insufficient facts, is determinative.

VanGuilder v. Allstate Ins., 494 N.W.2d 901 (Minn. Ct. App. 1993). Person in passenger seat of a moving vehicle is injured when a rock comes through the open window and hits him in the head. The rock was thrown by a power lawn mower that was cutting grass near the road. Finding that the motion of the vehicle was an "indispensable contributing factor" in causing the injury, the court awards no-fault coverage.

Horace Mann Ins. Co. v. Goebel, 504 N.W.2d 278 (Minn. Ct. App. 1993). Man went to get something from his van after he brought it to service station for repair. While he's in van, it is raised from floor by hydraulic lift. He's injured when exiting. Issue is whether claim is barred by Minn. Stat. § 65B.43, subd. 3 exclusion of coverage for conduct within course of business of servicing motor vehicles. Court holds that the exclusion applies only to employees.

Konchal v. Western Nat'l Mut. Ins. Co., 511 N.W.2d 447 (Minn. 1994). Person claims to have hurt back when she twists inside car to reach for door handle. The court of appeals had allowed coverage because it was the use of the vehicle that necessitated the motion. The Supreme Court reverses and denies coverage.

In LaValley v. Nat'l Family Ins. Corp., 517 N.W.2d 602 (Minn. Ct. App. 1994), a man ran into other vehicles and a building while driving his car. He was in cardiac arrest and unconscious after the accident and died without regaining consciousness. His treating physician could not determine whether or not the collision caused the heart attack or the heart attack caused the collision. The lower court awarded no-fault benefits after placing the burden of proof on the insurance company. This decision is reversed. The claimant must prove that the death was caused by a motor vehicle accident. The case is remanded for further proceedings.

Phillips v. Minnesota Mut. Fire & Cas. Co., No. C8-95-753, 1995 WL 497445 (Minn. Ct. App. Aug. 22, 1995). In a parked car, a front seat passenger reaches over to turn on the ignition so that he can listen to the radio. The car has a manual transmission, is in gear, and lurches forward causing an injury. This constitutes "use" of the vehicle and the injury is one in which damages should be allocated to the use of the vehicle.

## B. Motor Vehicle

Minn. Stat. § 65B.43, subd. 2 defines "motor vehicle." The term includes vehicles having at least four wheels (1) that are designed for use primarily on public roads in transporting persons or property and (2) that are required to be registered under

Minnesota Statutes Chapter 168. The term "motor vehicle" also includes a trailer when the trailer is connected to or being towed by a motor vehicle. (A separate definition of the term "motor vehicle" is found at Minn. Stat. § 168.002, subd. 18, but the definition at § 65B.43, subd. 2 applies with respect to claims under the No-Fault Act.)

Minn. Stat. §168.09 describes the registration requirement. Some "special mobile equipment" as defined in §168.002 subd. 31 is exempt from registration under §168.012, and such equipment may therefore fall outside of the scope of the no-fault definition of a motor vehicle. See discussion in Anderson v. St. Paul Fire & Marine, 427 N.W.2d 749 (Minn. Ct. App. 1988), in which a rotary snowplow (a snowblower mounted on a truck) was a "motor vehicle," not "special mobile equipment."

There are a variety of vehicles that are not required to be registered pursuant to Minn. Stat. §168.012 subd.1. Vehicles owned by the federal government, and municipal fire apparatuses including support vehicles, and clearly marked police patrols and ambulances are all exempt from the registration requirement by Minn. Stat. §168.012 subd.1(b). Although these types of vehicles are intended for use on the public highways and would be subject to registration if owned by private citizens, Chapter 168 does not require registration. Since the no-fault statute is not ambiguous in defining as "motor vehicle," only those vehicles required to be registered pursuant to Chapter 168 fall within the definition. Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003) held that a clearly marked police car is not a "motor vehicle" for purposes of the No-Fault Act. (As will be discussed in subsequent sections of this article, a number of consequences occur when a vehicle that does not have to be registered under Chapter 168 is excluded from the definition of "motor vehicle": (1) A pedestrian struck by such a vehicle will not have any no-fault claim since the accident did not arise from the use of a motor vehicle. (2) When the driver of such a vehicle is a defendant, the plaintiff will not have to prove any tort threshold under Minn. Stat. §65B.51. (3) When the driver of such a vehicle is a defendant, there will not be any offset at trial for no-fault benefits paid, and the no-fault insurer will have a subrogation claim against the defendant under Minn. Stat. §65B.53 subd. 3.)

The Metropolitan Council argued that its publically owned buses should also be excluded from the definition of "motor vehicle," but the argument was rejected. Although the buses might not actually have registered license plates, they are not among the categories of vehicles specifically exempted from registration requirements in Minn. Stat. Ch. 168. They remain motor vehicles for purposes of the No-Fault Act. State Farm Mut. Auto. Ins. Co. v. Metropolitan Council, 854 N.W.2d 249 (Minn. Ct. App. 2014).

The definition of a "motor vehicle" also excludes a motorcycle, or any other vehicle with fewer than four wheels. Minn. Stat. § 65B.43, subd. 2. Likewise, a farm tractor and other motor vehicles which are not required to be registered for use on the highway under Minn. Stat. Ch. 168 are not within the no-fault statutory definition of a "motor vehicle." See Great American Ins. Co. v. Golla, 493 N.W.2d 602 (Minn. Ct. App. 1992).

A motor vehicle insurance policy may include broader coverage than required by No-Fault

Act, so it is important to check specific policy language whenever the statute does not mandate coverage. See, for example, Pavel v. Norseman Motorcycle Club, Inc., 362 N.W.2d 5 (Minn. Ct. App. 1985). Some motor vehicle insurance policies will define a “motor vehicle” to include any motorized vehicle while it is being used on a public roadway, so that an ATV or a farm tractor or a marked police car might qualify as a “motor vehicle” under the insurance policy, depending on the location of the vehicle at the time of the accident.

## C. Exclusions

### 1. Motorcycles

The No-Fault Act limits no-fault coverage for motorcycles in two ways. (1) A motorcycle itself is not a motor vehicle for purposes of the No-Fault Act. Minn. Stat. § 65B.43, subd. 2. If the accident involves only the motorcycle, the occupants of the motorcycle who are injured do not have a claim for no-fault benefits because there has not been an accident involving a “motor vehicle.” (2) If a motorcycle is struck by a car, one might expect this to be a motor vehicle accident giving rise to a no-fault claim. However, Minn. Stat. § 65B.46, subd. 3, explicitly provides that, even when occupants of a motorcycle suffer injury in an accident involving a motor vehicle, such injuries do not “arise out of the maintenance or use of a motor vehicle” for purposes of the No-Fault Act.

It is possible for the owner of a motorcycle to purchase no-fault coverage for the motorcycle, and coverage would then exist under the terms of the contract. Few motorcycles have this optional coverage due to the cost.

The term “motorcycle” is defined at Minn. Stat. § 65B.43, subd. 13. Basically, the definition includes motorized bicycles and machines with fewer than four wheels powered by an engine over 5 horsepower. (This definition differs from the definition of “motorcycle” in Minn. Stat. §168.002, subd. 19.) The no-fault definition means that a three wheel all-terrain vehicle with more than 5 horsepower motor would be a “motorcycle” for purposes of no-fault claims. Odegard v. St. Paul Fire and Marine Ins. Co., 449 N.W.2d 476 (Minn. Ct. App. 1989), footnote 1. There also may be scooters or motorcycles with engines under 70 cc which are not technically “motorcycles” for no-fault purposes because the engine is less than five horsepower. If such a vehicle were struck by a car, a no-fault claim would exist. See discussion in Mickelson v. Travelers Ins. Co., 491 N.W.2d 303 (Minn. Ct. App. 1992).

The No-Fault Act was amended in 1987 to allow a pedestrian struck by a motorcycle to claim no-fault benefits. Minn. Stat. § 65B.46, subd. 1. Before the 1987 change in the statute, a pedestrian hit by a motorcycle was denied no-fault benefits because no motor vehicle was involved. Feick v. State Farm Ins. Co., 307 N.W.2d 772 (Minn. 1981).

### 2. Other Exclusions

#### a. Intentional Injuries

A person causing or attempting to cause injury to self or another person is disqualified from receiving no-fault benefits. Minn. Stat. § 65B.60. The victim of the intentional act, however, would receive benefits. McIntosh v. State Farm Mut. Auto. Ins. Co., 488 N.W.2d 476 (Minn. 1992).

b. Races

No-fault benefits will not be given for injuries in the course of "an official racing contest" or in "practice or preparation" for such a race. Minn. Stat. § 65B.59. However, an injury to a racer in a parking lot after the race was covered by no-fault. Jopp v. Auto Owners Ins. Co., 376 N.W.2d 535 (Minn. Ct. App. 1985).

c. Theft – Partial Exclusion

Minn. Stat. § 65B.58 allows a person who "converts a motor vehicle" to collect no-fault benefits only from an insurance contract under which the "converter" is an insured. The "converter" is barred from claiming no-fault benefits from the policy on the converted car or from any other source (e.g., the Assigned Claims plan).

d. Certain State Facility Patients and Persons Convicted of Crimes

Minn. Stat. §§3.738 and 3.739 provide that any injury or death claim by certain patients and certain persons in the criminal court system must be handled under the claim procedures created in these statutes. No other legal or statutory remedy for such claims is available.

D. Location of Accident

1. Within Minnesota

Minn. Stat. § 65B.46 subd. 1 states that every person injured in a motor vehicle accident occurring in Minnesota has a right to no-fault benefits. This general provision of the law applies to Indian reservations within the state, even though the vehicles licensed on the reservation are not subject to the insurance requirements on the No-Fault Act. State Farm Mutual Ins. Co. v. Thunder, 605 N.W.2d 750 (Minn. Ct. App., 2000).

A person lacking insurance coverage may have to seek no-fault benefits from the Assigned Claims Plan, discussed below in Section II – D. Someone disqualified from Assigned Claims benefits may have no source of no-fault coverage, even though the accident occurred in Minnesota.

As noted in the Assigned Claim plan discussion, the exclusions in that program apply only to adults. Except in certain cases of theft, a person under age 18 who is injured in a Minnesota motor vehicle accident should obtain payment of no-fault claims from some source.

## 2. Outside of Minnesota

No-fault benefits will be available to a Minnesota insured who is injured in a motor vehicle accident anywhere in the United States, a United States possession, or in Canada. Minn. Stat. § 65B.46, subd. 2. The insurance policy may extend basic economic loss coverage to additional geographical areas if the policy does so expressly.

The driver and any other occupant of a vehicle insured under Minnesota law will generally be entitled to no-fault benefits. However, a company that owns five or more vehicles regularly used in the business of transporting persons or property need not extend no-fault coverage to drivers and other occupants of the vehicles for accidents outside of Minnesota. Minn. Stat. § 65B.46, subd. 2 (2).

## II. Who Pays No-Fault Benefits?

Minn. Stat. § 65B.47 provides the priorities for determining which insurance company must pay no-fault benefits. (The priorities for payment of uninsured or underinsured insurance coverage are established by a different statute; these UM and UIM priorities differ substantially from the no-fault priorities. See Minn. Stat. § 65B.49, subd. 3a(5).)

In circumstances when a person is covered by more than one no-fault policy, benefits are generally payable only once. The company making payments may then seek partial reimbursement on a prorata basis from the other responsible insurer(s). Minn. Stat. § 65B.47, subd. 5; Bemboom v. Dairyland Ins., 529 N.W.2d 467 (Minn. Ct. App. 1995).

If a visitor to Minnesota is insured under a motor vehicle policy issued in another state, the out-of-state insurance policy may be obligated to provide no-fault benefits when the accident occurs in Minnesota. The out of state company may be required to pay Minnesota no-fault benefits for a Minnesota accident (1) if the insurance company does business in Minnesota and (2) if the vehicle insured in the out of state insurance policy is present in Minnesota at the time of the collision. See Minn. Stat. § 65B.50, and Western Nat'l Mut. Ins. Co. v. State Farm Mut. Ins. Co., 374 N.W.2d 441 (Minn. 1985).

In most cases, an insured person will receive no-fault benefits from the policy under which that individual is an insured. There are, however, some exceptions to this general rule.

### A. Summary of Priorities

The priorities set forth in Minn. Stat. § 65B.47 are most easily understood by viewing subdivision 4 of the statute as a statement of the general rule that, as a practical matter, is most often applicable to no-fault claims: the injured person generally get no-fault benefits from the policy under which the injured person is insured. As a practical matter, the higher priorities created by subdivisions 1, 2 and 3 of the statute function as the exceptions to this general rule.

The no-fault priorities are set forth in the statute as follows:

Subd. 1: A person occupying a motor vehicle "while the vehicle is being used in the business of transporting persons or property" must go to the insurance on that occupied vehicle for no-fault. If there is no coverage for the occupied vehicle, the no-fault claim may then be made to the injured person's own company.

Subd. 2: When a vehicle is "furnished by the employer," an employee or a resident relative of the employee who injured while occupying this vehicle must go to the insurance on that employer furnished vehicle. If there is no insurance coverage for the employer furnished vehicle, the no-fault claim may then be made to the injured person's own company.

Subd. 3: Any person who is not occupying a motor vehicle (e.g. a pedestrian, bike rider, etc.) and who is injured by a vehicle described in Subdivision 1 or 2 must go to the

insurance on that vehicle for no-fault benefits. If the vehicle covered by the priority in Subdivision 1 or 2 does not have insurance, the no-fault claim may then be made to the injured person's own company.

Subd. 4: Most accidents do not involve employer furnished vehicles or vehicles in the business of transporting persons or property. Consequently, subdivisions 1, 2 and 3 do not apply to most accidents. The provisions of Subdivision 4 are the ones that most often determine which company pays benefits. Under Subdivision 4, a person goes first to the policy under which the injured person is an insured (either as a named insured or as the resident relative of a named insured).

If an injured person is not insured under any policy of motor vehicle insurance (either as a named insured or as a resident relative), the person may seek coverage from the vehicle occupied at the time of the accident. If the injured person was not occupying a vehicle at the time of the accident, and if the injured person is not insured under any motor vehicle insurance policy, the person may seek no-fault coverage from any vehicle involved in causing the injury.

If there is no insurance coverage from any of these sources, the injured person can apply to the Assigned Claims Plan for no-fault benefits.

## B. The Business Vehicle Exceptions

### 1. Business of Transporting Persons or Property

The first priority established by Minn. Stat. § 65B.47, subd. 1 involves vehicles "being used in the business of transporting persons or property." The driver or other occupant of such a vehicle, or a pedestrian struck by such a vehicle, looks to the insurance on this vehicle for coverage.

Over the years, the legislature has created a number of exceptions to the types of vehicles that are covered by this first statutory priority. Under Minn. Stat. § 65B.47, subd. 1a, the first priority created by Subdivision 1 does not apply to commuter vans, to vehicles transporting children to school or to a school sponsored activity, or to vehicles used in a family day care program. See AMCO Ins. Co. v. Independent School District 622, 627 N.W.2d 683 (Minn. Ct. App. 2001). With respect to buses involved in accidents within Minnesota, the first priority does not apply when the no-fault claim is for a Minnesota resident who is personally insured in another policy.

Taxi cabs as a category of vehicle are not excluded from the scope of Minn. Stat. § 65B.47, subd. 1, but taxi passengers are removed from coverage under this first priority by Minn. Stat. § 65B.47, subd. 1a(5). (Therefore, a pedestrian struck by a taxi being used to transport persons or property would be required to go to the taxi's insurance for no-fault benefits, even though a passenger in the taxi would be exempt from this requirement.)

Case law has clarified the intended scope of the phrase “in the business of transporting persons or property.” A person delivering mail in his own privately owned vehicle is using the vehicle in the business of transporting property. When he collides with a snowmobile, the insurance on his vehicle is the first priority for the payment of no-fault claims for the injured snowmobile operator. Mid-Century Ins. Co. v. American Family Ins. Co., No. C4-00-832, 2000 WL 1468282 (Minn. Ct. App. Oct. 3, 2000). However, a rental car is not involved in the business of transporting persons simply because the driver is paying to use the vehicle. The focus of the law is on the manner in which the vehicle is being used. So long as the renter of the vehicle is using the car for personal use and is not engaged in the business of transporting persons or property, the priority of Minn. Stat. § 65B.47, subd. 1 does not apply. American Family Ins. Co. v. Hertz Corp., No. C2-02-901, 2003 WL 115365 (Minn. Ct. App. Jan. 14, 2003).

In Illinois Farmers Ins. Co. v. The League of Minnesota Cities Ins. Trust, 617 N.W.2d 428 (Minn. Ct. App. 2000), a woman fell while exiting a bookmobile owned by the City of Rochester. Her own company paid no-fault benefits and then sought reimbursement from the insurance coverage on the bookmobile arguing that the vehicle was being used in the transportation of property and was therefore the first priority for payment. The court held that the bookmobile was not being used to transport property at the time of the accident. (The court’s opinion implies that there should not have been any no-fault claim in this case, since the bookmobile was parked and was being used as a library rather than for any transportation purpose at the time of the accident.)

In Dakota Fire Ins. Co. v. Hartford Fire Ins. Co., 558 N.W.2d 524 (Minn. Ct. App. 1997), 15 people were traveling in a 15-person van which was involved in a serious collision. The van did not come within the definition of a “commuter van” or a “bus.” The owner argued that it had simply leased the vehicle to the school sponsoring the trip, did not supply a driver, and had no control over the travel schedule. The court holds that, regardless of the degree of control, the van was being used in the business of transporting persons. Public policy means that the people in such a business should bear the risks of no-fault claims. Consequently, the occupied vehicle has first priority for payment of no-fault benefits to all injured occupants of the vehicle.

In Home Mut. Ins. Co. v. Snyder, 356 N.W.2d 780 (Minn. Ct. App. 1984), the injured party (Strike) was accompanying his father-in-law (Snyder) while Snyder delivered certain crops to customers in Iowa. The priority of Minn. Stat. § 65B.47, subd. 1 applies since the truck was being used in the business of transporting property. The court rejects Home Mutual's contention that subdivision 1 applies only to vehicles that are "for hire," e.g., cab or trucking companies. See also Madden v. Home Ins. Co., 367 N.W.2d 676 (Minn. Ct. App. 1985).

In Peterson v. Colonial Ins. of California, 493 N.W. 2d 152 (Minn. Ct. App. 1992) , Plaintiff was an independent contractor (not an employee) in an undercover operation being conducted by the sheriff. Since the sheriff's vehicle is not in the business of transporting either persons or property, the first priority does not apply. The independent contractor goes to her own company for no fault benefits.

## 2. Employer-Furnished Vehicles

Minn. Stat. § 65B.47, subd. 2 applies to vehicles furnished to an employee by an employer. If the employee or some resident relative of the employee is injured while occupying such a vehicle, the insurance on this occupied vehicle is the first priority for payment of no-fault benefits. This provision does not apply to commuter vans.

An independent contractor is not an employee for purposes of this no fault priority. Peterson v. Colonial Ins. of California, 493 N.W. 2d 152 (Minn. Ct. App. 1992).

With respect to occupants of the employer-furnished vehicle, the priority applies to employees and to the resident relatives of an employee. The daughter of an employee who did not reside with him was not covered by Minn. Stat. 65B.47, subd. 2. Although she was occupying the company car, she must go to her own company for her no-fault benefits. Kelsey v State Farm Mut. Auto. Ins. Co., 365 N.W. 795 (Minn. Ct. App. 1985).

When a pedestrian is struck by an employer-furnished vehicle, the injured pedestrian must go to the insurance on this vehicle, even though the injured pedestrian has no relationship to the employer or to the employee. Minn. Stat. § 65B.47, subd. 3.

For this statutory priority to apply, the vehicle does not necessarily need to be involved in the course of the employer's business. In Subdivision 1, the law applies "while the vehicle is being used in the business of transporting persons or property." There is no comparable requirement in Subdivision 2 dealing with employer furnished vehicles. See Meister v Western Nat'l Mut. Ins. Co., 479 N.W.2d 372 (Minn. 1992) and the analysis of the lower court in Meister at 465 N.W. 2d 428 (Minn. Ct. App. 1991).

For the "employer furnished vehicle" priority to apply, the vehicle in the accident must be a vehicle furnished by the employer. The fact that the person is injured while engaged in a business activity is not relevant if the person is occupying a vehicle that the employer does not own. Richardson v. Ludwig, 495 N.W.2d 869 (Minn. Ct. App. 1993).

In Auto Owners Ins. Co. v. Great West Cas., 695 N.W.2d 646 (Minn. Ct. App. 2005), the owner of a used car lot is accepting delivery of used cars that he has purchased. He was injured as one of the used cars was being unloaded from a trailer. One insurance company insured the trailer from which the used car was being unloaded, and a different insurance company insured the used car. The court of appeals decides that the trailer was simply the locus of the accident but that the stalled used car was cause of the injury. Consequently, the coverage on the used car must provide no-fault benefits. The discussion assumes that the personal insurance of the injured person is not the first priority for payment of the no-fault claims.

## 3. Driver or Other Occupant

Subdivisions 1 and 2 apply to the "driver or other occupant" of certain business vehicles. The term "driver" may apply to someone who is outside of the vehicle. Balderrama v

Milbank Mut. Ins. Co., 324 N.W.2d 355 (Minn. 1982). See also Caron v. Illinois Farmers Ins. Inc., No. C6-98-1270, 1999 WL 10238 (Minn. Ct. App. Jan. 12, 1999). Under this case law, being the “driver” of a vehicle creates a status which may continue even after the driver exits the vehicle.

After the Balderrama decision gave a broad meaning to the word “driver,” some cases held that the term “occupant” might also be expanded to apply to a person who had exited from the vehicle. It does appear to be somewhat silly to argue that someone who is in fact not occupying a vehicle is nevertheless an “occupant.” This strained interpretation of the statute was created in order to deny uninsured motorist (UM) coverage to people who had violated the law by failing to buy insurance for vehicles that they owed. UM coverage could be denied to the owner of an uninsured vehicle only if the owner was “occupying” the uninsured vehicle at the time of the accident. See Horace Mann Ins. Co. v. Neuville, 465 N.W.2d 432 (Minn. Ct. App. 1991.) The strained legal analysis in cases like Neuville was rejected by the Minnesota Supreme Court in Allied Mut. Ins. Co. v. Western Nat’l Mut. Ins. Co., 552 N.W.2d 561 (Minn. 1996).

### C. The General Rule

#### 1. Priority of Coverage

##### a. Person with insurance

Subdivision 4 of Minn. Stat. § 65B.47 provides the general rule applicable to most no-fault claims. A person injured in a motor vehicle accident generally looks to her or his own insurance company for benefits. Subdivision 4 states that a person with insurance goes to the insurance policy “under which the person is insured.” § 65B.47 subd. 4(a). A person can be insured either as a named insured or as a resident relative of a named insured.

##### b. Person without insurance

What happens when a person injured in a motor vehicle accident is not covered as an “insured” on any policy, either as a named insured or as a resident relative of a named insured? Subdivision 4 of Minn. Stat. § 65B.47 creates two categories of claims for persons who do not have a policy under which they are insured.

(1) The “driver or other occupant of an involved motor vehicle” must go to the insurance policy (if any) “covering that vehicle.” § 65B.47 subd. 4(b). As noted above in the discussion of “Driver or Other Occupant,” a person may remain in the status of a “driver” even after exiting from the vehicle. Balderrama v. Milbank Mut. Ins. Co., 324 N.W.2d 355 (Minn. 1982).

(2) A person without insurance who is not the driver or occupant of a motor vehicle at the time of the injury (i.e., a pedestrian, bike rider, etc.) may go to the insurance policy covering any involved motor vehicle. § 65B.47 subd. 4(c).

It should be noted that the statute gives a pedestrian injured in a motor vehicle accident involving multiple vehicles more options for no-fault coverage than it gives to the “driver or other occupant” of a vehicle. A pedestrian can seek no-fault coverage from any involved vehicle, while the “driver or other occupant” is limited to the coverage on the occupied vehicle. See Campeau v. State Farm, No. CX-96-2403, 1997 WL 292146 (Minn. Ct. App. June 3, 1997).

A municipality that is responsible for payment of no-fault benefits cannot deny claims based upon the financial liability limits set by tort immunity statutes. Loven v. City of Minneapolis, 626 N.W.2d 198 (Minn. Ct. App. 2001).

## 2. Who is an Insured?

In order to get no-fault benefits under priority 4(a), a person must be an "insured" under some policy. Status as an "insured" may be established by the no-fault statute, or by the insurance policy language, or by case law.

The no-fault statute defines "insured" at Minn. Stat. § 65B.43, subd. 5. Generally, the term "insured" includes (1) a person named as insured in the policy and (2) any resident relative of the named insured, so long as the resident relative is not identified by name as an insured in any other policy.

The statute also extends status as an “insured” to a minor child in the custody either of the named insured or of a resident relative of the named insured. A foster child over age 18 is not a minor and therefore will not be included as a resident relative under the statutory definition of an “insured.” Allstate Ins. Co. v. Tate, 389 N.W.2d 512 (Minn. Ct. App. 1986); Park v. Government Employees Ins. Co., 396 N.W.2d 900 (Minn. Ct. App. 1986).

Policy language can expand the statutory definition of an "insured". See Burgraff v. Aetna Life and Cas. Co. 346 N.W.2d 627 (Minn. 1984); Bemboom v. Dairyland Ins. 529 N.W.2d 467 (Minn. Ct. App. 1995).

Case law has established that employees may be considered "insured" when occupying a vehicle covered by a policy that identifies a corporation as the "named insured". Murphy v. Milbank Mut. Ins. Co. 438 N.W.2d 390 (Minn. Ct. App. 1989). Likewise, the sole proprietor of a company may be covered as an insured by a policy that identifies the named insured either the company or the individual “doing business as” a company. General Cas. of Wisconsin v. Outdoor Concepts, 667 N.W.2d 441 (Minn. App. 2003); Gabrelcik v. National Indemnity Co., 131 N.W.2d 534 (Minn. 1964).

### a. Resident Relative Issues

Not all resident relatives automatically meet the statutory definition of an “insured.” Under the statutory definition of an “insured,” a resident relative becomes an insured only if the resident relative is not identified by name as an insured on some other policy. See Gaalswyck v. General Cas. Co. of Wisconsin, 372 N.W.2d 435 (Minn. Ct. App. 1985),

holding that a husband with his own policy was not an insured on his wife's policy.

Generally, a resident relative has to be someone related by blood or marriage to the named insured. (Consequently, when a corporation is the sole named insured, there will be no "resident relatives.")

In Mickelson v. American Family Mut. Ins. Co., 329 N.W.2d 814 (Minn. 1983), a man had lived with a woman for about seven years. They were not married. She was the sole named insured on a policy of insurance. He was not an insured on this policy even though he was the owner of the vehicle identified in the policy.

Rademacher v. Ins. Co. of North America, 330 N.W.2d 858 (Minn. 1983) involved a nun who was injured as a pedestrian. The insurance policy covering cars owned by her religious community did not name her as an insured. She was not an insured on the policy covering her community. (She does get no-fault benefits under Minn. Stat. § 65B.47, subd. 4 from the vehicle that struck her.)

Factual disputes concerning resident relative coverage generally arise in determining whether or not the injured relative is actually residing with the named insured. In State Farm Auto. Ins. Co. v. Short, 459 N.W.2d 111 (Minn. 1990), the court of appeals adopted a three part test to determine residency. Citing Fireman's Ins. Co. of Newark, N.J. v. Viktora, 318 N.W.2d 704 (Minn. 1982), the Court determined that to be a resident relative the relatives must be (1) living under the same roof (2) in a close, intimate and informal relationship, (3) with the intended duration likely to be substantial. A case-by-case determination will have to be made in situations involving a relative who may be temporarily absent from the home or involving some other questions of residency. See Morgan v. Illinois Farmers Ins. Co., 392 N.W.2d 37 (Minn. App. 1986); Krause v. Mut. Service Cas. Co., 399 N.W.2d 597 (Minn. App. 1987). Mut. Service Cas. Ins. Co. v. VanDoren, 424 N.W.2d 791 (Minn. App. 1988).

A child of divorced parents may be a resident of more than one household. Mut. Service Cas. Ins. Co. v. Olson, 402 N.W.2d 621 (Minn. Ct. App. 1987). Legal custody does not necessarily determine residency. American Family Mut. Ins. Co. v. Thiem, 503 N.W.2d 789 (Minn. 1993). Prospective intentions concerning custodial arrangements for a child should be irrelevant in determining the child's residence at the time of the injury. Thiem, 503 N.W.2d at 791.

#### b. Occupying an Uninsured Vehicle

Generally, once a person has status as an "insured" on one policy of motor vehicle insurance, the basic economic loss coverage from this policy will apply even if the insured vehicle is not involved in the accident.

In Iverson v. State Farm Mut. Auto. Ins. Co., 295 N.W.2d 573 (Minn. 1980), Daniel Iverson owned two cars. A 1975 vehicle was insured. A 1967 car was not insured. He died while operating the uninsured car. No-fault benefits were awarded to his survivors, despite

exclusions contained in the State Farm policy, because Iverson was a named insured in the policy on the 1975 vehicle.

Under the language of the statute and the holding in Iverson, a household with one insured vehicle will provide no-fault benefits to the named insured and to all resident relatives, even though the insured person is injured while occupying an uninsured vehicle.

Despite statutory changes in the No-Fault Act since the 1980 decision in Iverson, the holding in Iverson continues to be the law. In Laffen v. Auto Owners Ins. Co., 429 N.W.2d 264 (Minn. Ct. App. 1988) a young man driving his own uninsured vehicle was able to collect no-fault from his parents' policy as a resident relative. See also Hudson v. Mutual Service Cas. Co., No. C1-92-62, 1992 WL 145319 (Minn. Ct. App. June 30, 1992) in which a young man operating his own uninsured car was able to get no-fault benefits from his mother's car because he was a resident relative. (A different set of standards applies to claims for uninsured or underinsured motorist coverage.)

#### D. Assigned Claims

Some people injured in motor vehicle accidents will not have any insurance coverage available to pay no-fault benefits. For such individuals, Minn. Stat. §§ 65B.63 and 65B.64 require that an insurance company be assigned to provide basic no-fault benefits. This Assigned Claims Plan, however, does exclude no-fault coverage for certain uninsured claimants.

The Assigned Claims Plan benefits denies coverage to the owner of a private passenger motor vehicle for which insurance is required if, at the time of the motor vehicle accident, the owner did not have insurance for this vehicle. Adult members of the owner's household are also disqualified from benefits, if "they dwell and function together with the owner as a family." See Minn. Stat. § 65B.64, subd. 3. Green v. American Family Mut. Ins. Co., 428 N.W.2d 126 (Minn. Ct. App. 1988). The current disqualification language in the statute was adopted in 1989. Conclusions from earlier court decisions may be superseded by the statutory changes. See Kaysen v. Federal Ins. Co., 268 N.W.2d 920 (Minn. 1978) and Kruse v. Minnesota Assigned Claims Bureau, 371 N.W.2d 602 (Minn. Ct. App. 1985).

It should be noted that this statutory disqualification applies only to adult household members, not to any minor children in the household (or to mentally incompetent adults). Minn. Stat. § 65B.64 subd. 3. See State Farm Mut. Ins. Co. v. Thunder, 605 N.W.2d 750 (Minn. Ct. App. 2000) where no-fault death benefits were available under the assigned claims plan for the children of the decedent.

An uninsured adult may be disqualified from Assigned Claims even though the vehicle he owns is insured by some other person. In Mickelson v. American Family Mut. Ins. Co., 329 N.W.2d 814 (Minn. 1983), a man was injured as a pedestrian by an uninsured motorist. He was not named as an insured in any policy. He sought benefits under the Assigned Claims Plan. Mickelson did own a pickup truck, and this vehicle was insured under a policy purchased in the name of Carol Mueller, the woman with whom he was

living. Mickelson's driving record was so bad that a substantial additional premium would have been required in order to have him named as an insured in the policy. On these facts, he was disqualified from Assigned Claims benefits.

A similar disqualification was applied in Saengkeo v. Minn. Auto. Assigned Claims, 877 N.W.2d 568 (Minn. Ct. App. 2016), even though the equities were quite different. In Saengkeo, a man co-signed on a loan with his girlfriend who was buying a Ford Explorer. He was on the title as a co-owner. They split up and the former girlfriend was the sole user of the vehicle and had it fully insured. The court concluded that a literal application of the statute would disqualify this man from the assigned claims plan, and that this disqualification also applied to the man's brother, who was injured as the passenger in an uninsured vehicle.

The Assigned Claims Plan may provide benefits to a Minnesota resident who is injured in another state. In Baker v. American Family Mut. Ins. Co., 460 N.W.2d 86 (Minn. Ct. App. 1990), a woman from Minnesota drove her uninsured car into North Dakota. The car left the roadway due to icy roads, and the woman froze to death. A claim is brought on behalf of her minor son. The court finds that the Assigned Claims Plan does extend outside the State of Minnesota. (The no-fault claimant is a minor child, the son of the dead woman, and he is judged to be insured through the Assigned Claims Plan. No disqualification is claimed in this case with respect to the survivor's claim, even though the dead woman herself (if she had been injured rather than killed) would have been disqualified from Assigned Claims for owning an uninsured car.)

The Assigned Claims Plan also applies to accidents on Minnesota Indian reservations, even though the mandatory insurance provisions of the No-Fault Act do not apply to vehicles registered on the reservation. State Farm Mut. Ins. Co. v. Thunder, 605 N.W.2d 750 (Minn. Ct. App. 2000)

Claimants have attempted to avoid the disqualification by arguing that the uninsured car that they owned was not operable or intended for use and therefore did not have to be insured under Minn. Stat. § 65B.48. See LaBrosse v. Aetna Cas. & Surety Co., 383 N.W.2d 736 (Minn. Ct. App. 1986); Kvitek v. State Farm Mut. Auto. Ins. Co., 438 N.W.2d 425 (Minn. Ct. App. 1989). Harris v. American Family Mut. Ins. Co., 480 N.W.2d 690 (Minn. Ct. App. 1992). A 1990 amendment to Minn. Stat. § 65B.64, subd. 3 states that the owner of the uninsured vehicle has the burden of demonstrating that he or she did not contemplate the operation or use of the vehicle.

In 1990, Minn. Stat. § 65B.64, subdivisions 1 and 3 were amended to disqualify non-residents of Minnesota from assigned claims benefits if the non-resident is the owner of an automobile and does not carry the minimum insurance coverage required by the state in which the vehicle is registered.

Under a literal reading of this statute, a Wisconsin resident with an uninsured vehicle should not be disqualified from the Assigned Claims Plan because of that vehicle, since there is no mandatory insurance in Wisconsin. However, Minn. Stat. § 65B.48 subd. 1

requires an out of state owner to maintain insurance required by Minnesota law whenever the out of state vehicle is within the state of Minnesota. Consequently, the Assigned Claims Plan will deny coverage to an adult out of state resident injured in Minnesota if the injured adult's out of state vehicle is in Minnesota when the injury occurs.

An insurance company that pays no-fault benefits under the Assigned Claims Plan is entitled to statutory interest for overdue payments from a company that should have provided coverage in the first instance. American Family v. Universal Underwriters, 438 N.W.2d 701 (Minn. Ct. App. 1989).

#### E. Out-of-State Insurance Policies

What happens when a person from another state is injured while visiting in Minnesota? Assume that the person has automobile insurance, but that this insurance does not provide no-fault benefits.

Minn. Stat. § 65B.50 subd. 2 imposes no-fault coverage (and the minimum of \$30,000 in liability insurance) when the insured vehicle is in Minnesota. The Minnesota Supreme Court in Founders Insurance Co. v. Yates, 888 N.W.2d 134 (Minn. 2016) held that the statute was unambiguous in imposing this obligation notwithstanding an contrary provision in the policy. In Founders, the vehicle's owner moved from Illinois to Minnesota in October 2013 and was involved in a collision in Minnesota in December of that year. Founders did not do business in Minnesota, did not have a "conformity" clause requiring it to comply with the laws of other states, and provided only \$1,000 in medical payment coverage. No-fault coverages under Minnesota law were nevertheless imposed by the statute. (The Supreme Court does not address any potential constitutional issues that could arise from imposing this coverage, since that issue was not presented in the Founders case.)

The Founders decision reverses a thirty year old precedent of the court of appeals in Burgie v. League General Ins. Co., 355 N.W.2d 466 (Minn. Ct. App. 1984). Burgie had found § 65B.50 subd. 2 to be ambiguous and had interpreted the statute "read as a whole" to impose no-fault coverage only on companies that did business in Minnesota.

For no-fault (and minimum liability coverage of \$30,000) to be imposed, it is sufficient to have the insured vehicle within the state. The insured vehicle does not need to be involved in the accident. Reed v. Continental Western Ins. Co., 374 N.W.2d 436 (Minn. 1985) and Western Nat'l Mut. Ins. Co. v. State Farm Mut. Ins. Co., 374 N.W.2d 441 (Minn. 1985).

When no-fault coverage is imposed by Minnesota law on an out-of-state policy, the amount of coverage is the amount specified in the Minnesota statutes. See State Farm Mut. Ins. Co. v. Feldman, 359 N.W.2d 57 (Minn. Ct. App. 1984). In Feldman, the injured party was from Colorado and held a policy of Colorado motor vehicle insurance. Under the terms of the Colorado policy, the medical benefits provisions did not apply to the Minnesota accident. Minnesota law, however, mandated coverage. Once coverage was imposed, the limit of medical coverage was the \$20,000 specified in Minnesota law, not the \$50,000 provided under the terms of the Colorado policy. See also Rydberg v. American Family

Mut. Ins. Co., 453 N.W.2d 67 (Minn. Ct. App. 1990); and Peterson v. United Services Auto. Assoc., 493 N.W.2d 570 (Minn. 1992).

### III. What Benefits are Available

Under Minn. Stat. § 65B.44, basic economic loss benefits include \$20,000 for medical expenses and an additional \$20,000 for income loss, replacement services, funeral expense loss, and survivors' losses.

The maximum amount covered for funeral benefits is \$5,000.

Prior to October 1, 1985, only \$10,000 in coverage was mandated for income loss and replacement services. Prior to August 1, 1985, the maximum for funeral expenses was \$1,250.

#### A. Medical Expenses

Coverage generally exists for “loss suffered through injury,” Minn. Stat. § 65B.44, subd. 1, and includes the reasonable cost of necessary medical care. Minn. Stat. § 65B.44, subd. 2 lists a variety of medical goods and services which must be covered. The law explicitly refers to some items which are not routinely covered by most health insurance, including the cost of sign language interpreting and translation services, the cost of transportation to and from medical treatment, and the cost of services recognized and permitted under the laws of the state for persons who rely on spiritual means alone for healing in accordance with their religious beliefs. A 2002 amendment to Minn. Stat. §65B.44 subd. 1 prevents a no-fault insurer from imposing a managed care HMO as a means of fulfilling its obligation to provide no-fault medical coverage.

Not everything prescribed by a doctor is necessarily covered by the medical expense benefit. In Gilder v. Auto-Owners Ins. Co., 659 N.W.2d 804 (Minn. App. 2003), the court held that the cost of a mattress and box spring prescribed by a chiropractor for a patient with back problems was not an expense covered by the no-fault statute.

No-fault covers only those expenses related to treatment. If a doctor is seen to aid in preparation for a trial, not for treatment, no-fault does not have to pay for such an examination. Krummi v. Mut. Service Ins. Co., 363 N.W.2d 856 (Minn. Ct. App. 1985). The court did acknowledge that the cost of getting a second medical opinion may, in some cases, be a qualifying expense. See also Hudson v. Auto-Owners, No. C6-90-1106, 1990 WL 146593 (Minn. Ct. App. Oct. 12, 1990).

When a person suffers an adverse reaction to a medication, the treatment for symptoms related to that reaction are covered by no-fault so long as the medication was prescribed for treatment of an injury suffered in the motor vehicle accident. Dahler v. Auto-Owners Ins. Co., No. A14-0343, 2014 WL 146593 (Minn. Ct. App. Dec. 8, 2014).

No-fault will not pay for services when no actual out-of-pocket expenses are incurred. In Great West Cas. Co. v. Kroning, 511 N.W.2d 32 (Minn. Ct. App. 1994) a woman took care of her husband at home so that he could avoid being placed in a nursing home while recovering from a severe neck injury. Although there was no question that no-fault would

have had to pay for the cost of care in a nursing home, it did not have to pay for the reasonable value of the services which the man's wife provided because no actual expense was incurred.

In Tillery v. League General, 584 N.W.2d 780 (Minn. Ct. App. 1998), a father donated an organ to his son, who had been injured in a crash. The father asked to have his costs in donating the organ covered by his personal no fault insurance. Because the father was not injured in the crash, the father's no-fault policy did not provide coverage.

The no-fault statute requires coverage for the "reasonable" costs of "necessary" care. There can always be factual disputes as to whether the costs being billed are "reasonable" and as to whether treatment which does not completely cure an injury remains "necessary." In a workers' compensation case, Hopp v. Grist Mill, 499 N.W.2d 812 (Minn. 1993), medical expense coverage was held to apply for palliative measures useful to prevent pain and discomfort even though the treatment would not effect a greater cure. Early litigation after the passage of the No-Fault Act indicated that the same legislative policies underlie both no-fault and worker's compensation, so the same analysis from Hopp v. Grist Mill may apply to no-fault cases. See Record v. Metropolitan Transit Commission, 284 N.W.2d 542 (Minn. 1979). See also American Family Ins. Group v. Udermann, 631 N.W.2d 424, 426 (Minn. App. 2001) confirming that, to the extent that the No-Fault Act and the Workers' Compensation Act provide for compensation for personal injuries arising from motor vehicle accidents, the two acts are in pari materia and must be construed together. A factual issue can always exist as to whether or not the symptoms are so severe and the treatment so beneficial as to make the treatment necessary.

## 1. Issues Relating to Psychological Treatment

In Anderson v. Amco Ins. Co., 541 N.W.2d 8 (Minn. Ct. App. 1995), a no fault insurer was not obligated to pay for psychiatric care related to "panic attacks" when the attacks did not arise out of any physical injury suffered in the motor vehicle accident. Injury is defined to mean "bodily harm." Minn.Stat. § 65B.43, subd. 11. In this case, there was no claim that the mental impairment was related to bodily harm or injury.

It would be incorrect to conclude that no-fault in all cases will exclude the cost of psychological treatment. For example, a person whose face is badly disfigured by injuries from a motor vehicle accident would, under the standards in Anderson v. Amco, certainly qualify for appropriate psychological treatment related to this bodily harm. Likewise, the need for psychological treatment related to a post-traumatic stress disorder (PTSD) should be covered when it arises from some significant physical trauma in the accident. (And, with respect to PTSD, current medical literature indicates that the disorder itself is a physical injury related to altered brain chemistry.)

## 2. Issues Relating to Pre-existing Conditions

What coverage exists when an individual is injured in more than one accident or has a pre-existing medical problem at the time of the motor vehicle accident? So long as the new

injury from the motor vehicle accident is one cause of the need for treatment, no-fault from this most recent accident will pay for 100% of the cost of treatment. There will be no apportionment between old and new claims.

The case law on this topic can be confusing, but the basic analysis must now be made according to standards explained in Pususta v. State Farm Ins. Co., 632 N.W. 2d 549 (Minn. 2001). If the motor vehicle accident is a direct cause of the need for treatment, either because of an entirely new injury or because of an aggravation of the pre-existing condition, the no-fault carrier for the accident pays 100% of the cost for treatment. When there is a pre-existing condition, the issue is whether or not the claimant's medical expenses are "attributable" to injuries suffered in the motor vehicle accident or are "attributable" to the pre-existing condition. Under Pususta, the issue comes down to one of direct cause: "The arbitrator must determine the extent to which the medical expense relates to an injury that was a natural and reasonable incident or consequence of the use of the vehicle." 632 N.W.2d at 556 (Minn. 2001). If the aggravation from the motor vehicle accident is not a direct cause of the need for treatment, the no-fault insurer is not required to pay for the treatment.

In Pususta, the claimant had a horse-back riding accident in 1992 which injured her neck and back. In 1994, her chiropractor said that she should get 24 visits a year on a regular basis for her neck and back injuries. In December 1997, she aggravated her neck and back injuries in an auto accident. State Farm stopped paying benefits in April 1998 based on an IME. State Farm argued that it should not have to pay for the 24 visits per year that the claimant required before the auto accident. The arbitrator, however, made State Farm pay more, saying that he lacked authority to engage in "apportionment."

The Supreme Court in Pususta disagreed with the arbitrator's use of the word "apportionment." See footnote #3, 632 N.W.2d at 552. In the Supreme Court's analysis, the issue was not one of apportionment; rather, the sole issue involved causation. Medical expenses are "attributable" to a motor vehicle accident whenever the injuries from the accident are a direct cause of the need for treatment. According to the court, the arbitrator has authority to determine the fact issue of whether or not some of the claimant's medical expenses were attributable to the horse-back riding accident. "Accepting the insured with the conditions she had does not mean that the insurer is liable for the expenses that the pre-existing condition, running its normal course, would itself have caused if there had been no aggravation." 632 N.W.2d at 556. The court remanded the claim to the arbitrator to award those reasonable medical expenses for treatment of injuries caused by, or aggravated by, the auto accident.

After Pususta, issues of "apportionment" should now arise only when there has been more than one motor vehicle accident and the no-fault coverage from the more recent accident has been exhausted. In Scheibel v. Illinois Farmers Ins. Co., 615 N.W.2d 34 (Minn. 2000), on remand 631 N.W.2d 428 (Minn. Ct. App. 2001), the claimant was rear-ended in March 1996 and saw a doctor once in April. He was then rear-ended again in May 1996, which substantially aggravated his injuries. In November 1996, he had surgery on his back involving a spinal fusion. He incurred over \$30,000 in medical expenses related to the

surgery. Farmers Insurance provided no-fault coverage for both accidents. It paid \$3,500 on the policy covering the first accident and then paid the full \$20,000 in coverage for the second accident. These payments left about \$6,500 in unpaid medical expenses.

In arbitration, the arbitrator found that the surgery was causally related to both accidents. The arbitrator apportioned 35% of the loss to the first accident and 65% to the second accident. The Supreme Court held that, after the \$20,000 in medical expense benefits from the second accident were exhausted, the claimant was entitled to recover the unreimbursed portion of his medical expenses from the remaining no-fault coverage on the first accident. However, the claimant had to show that the medical treatment at issue was related to injuries from the first accident in order to claim such benefits. Scheibel v. Illinois Farmers Ins. Co., 615 N.W.2d 34 (Minn. 2000). The case was remanded for further proceedings on this issue of causation.

The court of appeals, following remand of the case by the Supreme Court, adopted the findings from the original arbitration holding that 35% of the expenses were attributable to the first accident. The court of appeals then multiplied the total loss (\$30,000) by 35% and held that Farmers is liable for this amount, minus the \$3,500 already paid, from the first policy. In doing so, the court of appeals said, “We give tacit approval of apportionment in no-fault cases involving the aggravation of a pre-existing injury from a prior accident.” 631 N.W.2d at 431.

It is important to note that the “apportionment” in Scheibel is now an exception to the more general rule of “attribution” (i.e. direct causation) in Pususta. Pususta maintains the logic of the supreme court’s earlier decision in Great West Cas. Co. v. Northland Ins. Co., 548 N.W.2d 279 (Minn. 1996), which said that a no-fault insurer accepted an insured “with whatever physical condition he may have had at that time.” 548 N.W.2d at 281. Under Pususta and Great West, if the new motor vehicle accident aggravates a pre-existing condition, and if this aggravation can be shown to be a direct cause of the need for treatment, 100% of this treatment is covered by no-fault. There is no apportionment.

In Scheibel, apportionment becomes necessary because insurance from the first motor vehicle accident should not be made liable for treatment which was due exclusively to an aggravation from a subsequent accident. Scheibel accepted the premise that no-fault insurance from the second accident will pay for 100% of necessary treatment whenever an aggravation from the second accident is a direct cause of the need of treatment. Apportionment becomes necessary only when coverage from the second accident is exhausted and claims then revert to the remaining coverage from the first accident.

In Khawaja v. State Farm Ins. Co., 631 N.W.2d 101 (Minn. Ct. App. 2001), State Farm paid about \$3,900 in medical expenses to a person injured in a 1994 accident. In 1996, the person was injured in a second motor vehicle accident. Titan Insurance provided no-fault coverage for the second accident. Khawaja eventually settled his no-fault claim against Titan for \$19,900. He then incurred an additional \$8,000-\$10,000 in medical expenses and submitted these to State Farm. The court of appeals remands the case for arbitration so that the arbitrator can apply the Scheibel v. Illinois Farmers standards. According to the

court, State Farm must get a credit for medical expenses actually paid by Titan, plus a credit for any additional amount which “could have been but was not recovered” from Titan under the policy from the second accident. Consequently, State Farm is entitled to a credit for the full \$20,000 in medical expense coverage, although the claimant settled with Titan for less than this policy limit.

As a practical matter, these legal standards in Pususta and Scheibel create questions of fact which often cannot be answered in any scientific fashion. What sense does it really make to say that a single neck surgery was 35% attributable to one accident and 65% attributable to a second accident? With what degree of certainty can a doctor determine how well an injured person would eventually have recovered from the first injury had she not suffered a new aggravating injury? Pususta, by abandoning “apportionment” and adopting a “direct cause” standard, does reduce to some extent the need to rely on arbitrary percentages. When an aggravation from a new motor vehicle accident is a direct cause of the need for treatment, no-fault coverage exists and pays for the treatment without apportionment.

Even under Pususta, however, both treating doctors and independent medical examiners will be asked to figure out when the need for treatment is caused by the new aggravation and when treatment is related solely to a pre-existing condition. Arbitrators, it is hoped, will inject elements of fairness and common sense in resolving the inevitable factual disputes over causation.

### 3. Issues Involving No-fault and Other Health Insurance

#### a. Workers' Compensation Is Primary

A person who is injured in a motor vehicle accident while working may be eligible both for workers' compensation and for no-fault benefits. In such cases, Minn. Stat. § 65B.61 makes workers compensation primary for payment of claims arising from the accident. Workers' compensation is primary, however, only with respect to those benefits “paid or payable under a workers' compensation law.” Minn. Stat. § 65B.61, subd 1.

Basically, no-fault coverage continues to exist, even when there is a workers' compensation claim arising from the same accident. The law simply provides that workers' compensation benefits are primary. Consequently, no-fault claims may arise with respect to medical expenses (or other no-fault claims) which are not “paid or payable” through workers' compensation.

No-fault cannot delay in making payment when workers' compensation benefits are disputed. In Raymond v. Allied Prop. & Cas. Ins. Co., 546 N.W.2d 766 (Minn. Ct. App. 1996), there was disagreement over whether the accident occurred during the course of employment, and the workers' compensation claim was being disputed. No-fault was nevertheless obligated to make prompt payment on the medical expense claims.

It may be possible in some circumstances for a person who has been denied workers

compensation benefits to present an enforceable no-fault claim for medical expenses or for lost income. In Klinefelter v. Crum and Forster Ins. Co., 675 N.W.2d 330 (Minn. Ct. App. 2004), a worker was injured on the job while using his own car. His workers' compensation benefits were terminated when he changed doctors without getting prior consent. He lost a workers' compensation appeal. In a no-fault arbitration, the no-fault insurer was held liable for medical payments and wage loss. Workers' compensation is primary and duplicate recoveries are to be awarded, but the unsuccessful workers' compensation litigation did not bar a no-fault claim in this case because the workers' compensation forum did not provide a full and fair opportunity to litigate the merits of the no-fault claim. Likewise, in Hehn v. Allied Insurance, 2011 WL 1119911 (Minn. Ct. App. March 29, 2011), a workers' compensation hearing decision denied an income loss claim on the grounds that the accident had caused only a temporary aggravation of a pre-existing condition, but this decision did not prevent a valid no-fault award for the lost wages.

Workers' compensation currently limits payment for chiropractic services more than no-fault might. If the chiropractic care covered by workers' compensation is exhausted, no-fault coverage should apply if additional chiropractic care is deemed necessary. However, a claimant cannot waive applicable workers' compensation benefits in a settlement and then transfer responsibility for chiropractic bills to no-fault. American Family Ins. Group v. Udermann, 631 N.W.2d 424 (Minn. Ct. App. 2001). See also Payzant v. State Farm Mut. Auto. Ins., 2005 WL 1432390 (Minn. Ct. App. June 21, 2005); LaNasa v. State Farm Mut. Auto. Ins. Co., 2005 W.L. 1331725 (Minn. Ct. App. June 7, 2005).

If no-fault does make payments that should have been covered by workers' compensation, the no-fault insurer may have some limited rights to seek reimbursement from workers' compensation. See Section IV – B, below, dealing with no-fault subrogation claims. Reimbursement may also be sought directly from the injured worker, if the worker eventually does recover workers' compensation benefits for a loss paid by no-fault. See Section VI – B for additional cases dealing with the relationship between Workers' Compensation and No-Fault.

#### b. No-fault Is Primary over Other Health Insurance

Minn. Stat. § 65B.61 subd. 1 makes no-fault primary when benefits, other than workers' compensation, are available from any other source. The payment of no-fault benefits may not be denied on the grounds that some other insurance has, under the terms of its contract, already made payment for the same loss. Wallace v. Tri-State Ins. Co. of Minn., 302 N.W.2d 337 (Minn. 1980).

Because the no-fault insurance is primary, the no-fault insurer remains obligated to pay for the actual medical expenses incurred (assuming the bill is "reasonable"). The no-fault insurer may not reduce the amount of its obligation to its insured on the grounds that some other medical insurance paid the bills at a discounted rate. Stout v. AMCO Ins. Co., 645 N.W.2d 108 (Minn. 2002). In Stout, the injured party sued the no-fault insurer and obtained a jury award for medical expenses. The medical bills had been paid at a discounted rate through other insurance. Nevertheless, the no-fault insurer was required to

pay the full amount of the medical bill. Nothing in the No-Fault Act provides that a loss, once accrued, can subsequently be reduced through the involvement of the injured person's health insurance.

However, in Strand v. Illinois Farmers Ins. Co., 429 N.W.2d 266 (Minn. Ct. App. 1988), the no-fault insurer reached a compromise settlement with a health insurance company on its subrogation claim, and the court then held that the injured party was left without a legal interest in asserting a claim for any additional amount. In Strand, the court viewed the issue as one of subrogation rather than as an issue of coordination of benefits. It is likely that the court of appeals decision in Strand is superseded by the analysis given by the Supreme Court in Stout v. AMCO. See also American Family Ins. Group v. Kiess, 680 N.W.2d 552 (Minn. Ct. App. 2004), review granted, but not with respect to this issue, 697 N.W. 2d 617 (Minn. 2005), footnote 2.

## B. Disability and Income Loss

Minn. Stat. § 65B.44, subd. 3 requires coverage of \$20,000 for lost income. Income loss is payable at 85% of gross income up to a maximum of \$500 per week.

The statute explicitly states that weekly income benefits may not be pro-rated to daily maximums. For example, the \$500 per week maximum does not convert into a maximum of \$100 per day. An individual missing one day of work may receive up to the \$500 maximum benefit, even though the individual works the remaining four days of the week.

Generally, an individual may collect income loss benefits when an injury from the accident causes a disability, and the disability causes a loss of income related to employment. In Roquemore v. State Farm Mut. Auto. Ins. Co., 610 N.W.2d 694 (Minn. Ct. App. 2000), a young man lost a college football scholarship due to injuries from an accident. Although this involved a significant financial loss, earning the scholarship was not the type of "work" covered by no-fault insurance.

A person who misses some time from work in order to obtain medical treatment (e.g. physical therapy) will be eligible for no-fault benefits if the person loses income, sick leave or accumulated vacation. This claim includes both time lost for treatment and time for reasonable travel to and from treatment. Minn. Stat. § 65B.44, subd 3.

### 1. Inability to Work

The first step in establishing a claim for income loss is proving a disability that causes the loss.

In Darby v. American Family Ins. Co., 356 N.W.2d 838 (Minn. Ct. App. 1984), an individual who was scheduled to start a new job was disabled in a motor vehicle accident. When he had recovered sufficiently to return to work, the job was no longer available. He accepted other employment at a lower wage. He was not entitled to no-fault benefits because the

income loss was no longer being caused by an inability to work. (This income loss, though not compensable under no-fault, could be claimed as damages against any party whose negligence caused the initial disability.)

If the disability limits a person to part time work or to light duty work, the injured person may claim no-fault benefits for the partial loss of income. Prax v. State Farm Mut. Auto. Ins. Co., 322 N.W.2d 752 (Minn. 1982)

The statute provides for income loss benefits caused by an "inability to work." Minn. Stat. § 65B.44, subd. 3. However, one need not be totally disabled to meet this statutory requirement. Disability that prevents a claimant from returning to the insured's regular employment qualifies as "inability to work" within the meaning of the No-Fault Act. Latzig v. Transamerica Ins. Co., 412 N.W.2d 329 (Minn. Ct. App. 1987); Bregier v. Nat'l Family Ins. Co., 411 N.W.2d 892 (Minn. Ct. App. 1987). In Chacos v. State Farm Mut. Auto. Ins. Co., 368 N.W.2d 343 (Minn. Ct. App. 1985), the court again states that a "partially disabled person may be unable to work within the meaning of Minn. Stat. § 65B.44, subd. 3," 368 N.W.2d at 346. If work is available within the person's work restrictions, this is relevant only to the amount of lost income.

In Pulju v. Metropolitan Property & Cas., No. CX-95-723, 1996 WL 91655 (Minn. Ct. App. March 5, 1996), a person who was able to return to her regular employment following the accident was not considered "disabled" when she started her own business and was unable to perform some portions of the work.

## 2. Obligation to Take Available Work

The law allows the insurance company to reduce income loss benefits "by income the injured person would have earned in available appropriate substitute work which the injured person was capable of performing but unreasonably failed to undertake." Minn. Stat. § 65B.44, subd 3. See Mayer v. Erickson Decorators, 372 N.W.2d 729 (Minn. 1985).

An employee who is capable of working subject to the limitations of his physical impairment is required to cooperate with rehabilitation efforts, and, when those efforts are aimed at finding work, is required to make a reasonably diligent effort to obtain employment. See Kelly v. American Family Ins. Co., No. C0-93-449, 1993 WL 369050 (Minn. Ct. App. Sept. 21, 1993) confirming that an injured person must take reasonable steps to reduce income loss through available substitute work or suffer a reduction in compensation from the no-fault insurer.

In Koller v. American Family Mut. Ins. Co., 366 N.W.2d 684 (Minn. Ct. App. 1985), the injured party suffered a permanent injury to his left wrist and left foot which made him unable to return to his prior occupation as a truck driver. His physician did, however, clear him for other forms of work. The insurance company cut off no-fault benefits. The injured party was making some efforts to obtain retraining. The District Court Judge extended no-fault disability benefits for an additional six months or until the completion of retraining, whichever came first. The policy language permitted the company to reduce disability

benefits if the injured party would have been able to obtain substitute work and "unreasonably failed to undertake" such work. The District Court decision extending benefits for six months is upheld.

### 3. Insureds Age 65 Years and Older

Minn. Stat. § 65B.44 subd. 3a provides that, after an insured reaches age 65 (or age 60 if retired and receiving a pension), the insured may elect not to have disability and income loss coverage. The insurance company must provide notice of this right at least annually once the insured is age 60. If the insured elects not to have the coverage, rates must be adjusted. An election by the insured not to have the coverage remains in effect until revoked by the insured.

The current statutory system was enacted after American Fam. Ins. Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000) enforced an earlier version of the law and imposed a number of burdensome administrative tasks on insurance companies.

### 4. Calculation of Income Loss Benefits

No-fault pays 85% of present and future gross income loss, up to the maximum of \$500 per week. For salaried employees, this is fairly simple to calculate. For self-employed, unemployed, and other workers with unusual circumstances, the calculation can be more difficult. As a general rule, the starting point is to determine what the injured person would be earning if the injury had not occurred. From this amount, the insurer deducts the amount which the person actually earns or reasonably should be earning.

#### a. Unemployed

What if the injured person was unemployed at the time of the motor vehicle accident? If unemployment benefits are lost because the person is no longer available for work, no-fault pays the amount which unemployment insurance would have paid, up to \$500 per week.

If the unemployed person at the time of the accident either had a definite offer of employment, or had consistently been employed so that a specific future period of employment could reasonably be predicted, loss of income benefits can be awarded. Keim v. Farm Bureau Ins. Co., 482 N.W.2d 823 (Minn. Ct. App. 1992).

In Cloud v. Allstate, No. CO-94-641, 1994 WL 586928 (Minn. Ct. App. Oct. 25, 1994), a person claimed wage loss based upon mileage reimbursement from a volunteer job. Tax returns, however, did not document any net income from the volunteer work. Claimant suggests that she is suffering a loss of "gross income", but the court rejects this analysis as being contrary to the common use of the term "income". Claimant is permitted to re-file the claim only if she can demonstrate that her gross receipts from mileage reimbursement actually did exceed her expenses. See also Arons v. Allstate Ins. Co., 363 N.W.2d 832 (Minn. Ct. App. 1985) in which a self-employed person was denied a wage loss claim when

she could not demonstrate from past records the relationship between gross receipts and business expenses.

In Demning v. Grain Dealers Mut. Ins. Co., 411 N.W.2d 571 (Minn. Ct. App. 1987), claimant had a long work history but, four months prior to an automobile accident, left work due to multiple sclerosis. At trial she proved that she had planned to return to full-time work a few months after the accident but these plans were interrupted by the back surgery occasioned by the injuries sustained in the accident. Having shown a loss of income due to an injury caused by the accident, she was eligible for no-fault benefits.

In McKenzie v. State Farm Mut. Auto. Ins. Co., 441 N.W.2d 832 (Minn. Ct. App. 1989), disability and income loss benefits were awarded based on a future anticipated loss. Evidence supported the conclusion that a part-time secretary would have returned to full-time employment after her graduation from college. See also, State Farm v. Zitzloff, No. C9-98-484, 1998 WL 481888 (Minn. Ct. App. Aug. 18, 1998), in which the court of appeals affirms an arbitration award granting wage loss benefits from a 1996 accident even though the claimant had not yet returned to work following an injury and surgery from a 1994 accident.

#### b. Self-Employed

The principles for a self-employed person are the same as for any other claimant, but it is often difficult to establish the amount of lost income. However, the statute is explicit in covering the cost of hiring a substitute employee.

In Rotation Engineering & Manuf. Co. v. Secura Ins., 497 N.W.2d 292 (Minn. Ct. App. 1993), it was stipulated that the owner of a company lost over 300 hours of work due to injuries from a motor vehicle accident. However, he did not hire any substitute employee to perform his tasks, his salary was unchanged, and the company showed no loss of revenue. Consequently, he did not have any no-fault claim. No-fault pays only for loss of income, not for loss of work.

Likewise, in Rindahl v. Nat'l Farmers Union Ins. Co., 373 N.W. 2d 294 (Minn. 1985), a woman who gave up a small part time project raising pigs on her farm due to her injuries could not collect loss of income benefits because she could not demonstrate any loss of income. The Rindahl decision does state that a decline in gross income from a business can be considered a loss of "other earnings from work" which would be an "economic detriment" covered by no-fault. 373 N.W.2d at 300.

Relying on Rotation Engineering and Rindahl, an insurance company argued that the owner of a company would be ineligible for no-fault benefits unless injuries from the motor vehicle accident caused a decline in the company's gross income. It was argued that an arbitrator exceeded his authority in awarding income loss benefits of \$20,000 to a company owner who lowered his own salary after being injured. The court rejected the argument that a reduction in gross business income is the only means by which a self-employed person can prove income loss. Neutgens v. Westfield Group, 724 N.W.2d 311 (Minn. Ct.

App. 2006). In Neutgens, the company owner had taken a salary prior to the accident. There was evidence to establish both his injury and the decline in his ability to perform his previous duties. He had stopped drawing his usual salary. It was within the arbitrator's authority to determine if the reduction in his salary did indeed reflect economic detriment resulting from the accident.

Two 1995 decisions also upheld arbitration awards for loss of income by self-employed individuals. In Banishoraka v. Credit General Ins. Co., No. CX-95-611, 1995 WL 450496 (Minn. Ct. App. Aug. 1, 1995), a self-employed taxi cab driver was injured. He eventually opened up a limousine service which he could operate within his restrictions. An arbitrator apparently held that his average weekly earnings had diminished by about \$250 per week. Wage loss in excess of \$8,000 was awarded.

The second 1995 decision involving a self-employed person is Walden v. Western Nat'l Ins. Co., No. C3-95-529, 1995 WL 479697 (Minn. Ct. App. Aug. 15, 1995). In Walden, a young woman was self-employed as a cosmetologist. As a result of her injuries she was able to work only 32 hours rather than 40 hours. Her no-fault insurance carrier cut off her wage loss when (about a year after the accident) her earnings from the 32 hour work week began to equal the earnings she had prior to the accident from working 40 hours. An arbitrator awarded \$5,675 in income loss benefits at a no-fault arbitration. The court of appeals finds that, based upon the individual's past history of full time work, the arbitrator could reasonably conclude there was a loss of income. The arbitration award was upheld.

Similarly, a truck driver who was injured during the first year of operating his own business could claim wage loss when he became unable to drive following an accident, even though he had earned only a nominal net income in the business before being injured. Upholding an arbitration award of \$14,000, the court of appeal confirmed that an arbitrator has clear statutory authority to determine gross income in order to establish the amount of an income loss. Dahly v. Great West Cas. Co., No. C1-96-1219, 1996 WL 679689 (Minn. Ct. App. Nov. 26, 1996).

c. Offsets for Other Payments

i. Workers' Compensation Benefits

Minn. Stat. § 65B.61, subd.1 makes workers' compensation benefits primary in those cases when both no-fault and workers' compensation apply. Under the statute, the benefits are not stacked or combined. Basically, the statute requires that the amount of potential no-fault benefits be calculated and that this amount then be reduced by the amount that workers' compensation pays. A person with \$300 in weekly income would receive \$200 from workers' compensation. Since no-fault would pay \$255 on this claim (85% of 300), the person is entitled to a \$55 no-fault payment to supplement workers' compensation. This statutory system was established in 1980 and reversed previous procedures required by the court in Record v. MTC, 284 N.W.2d 542 (Minn. 1979). See Hoben v. City of Minneapolis, 324 N.W.2d 161 (Minn. 1982).

In Patrin v. Progressive Rehabilitation Options, 497 N.W.2d 246 (Minn. 1993), a woman was working and was also collecting temporary partial disability benefits from a workers' compensation claim. She was then injured in a motor vehicle accident (not work related), and she became totally disabled. She lost both earned income and workers compensation benefits. No fault was calculated based on the total loss of income, including both earned income and workers compensation.

A no-fault carrier is entitled to intervene in a workers' compensation proceeding to seek reimbursement for benefits paid. Freeman v. Armour Food Co., 380 N.W.2d 816 (Minn. 1986). But a no-fault carrier does not have standing to bring an independent action against a worker's compensation carrier where no-fault benefits were paid in error and the employee has no intention of commencing a worker's compensation claim. Colonial Ins. Co. of California v. Minnesota Assigned Risk Plan, 457 N.W.2d 209 (Minn. Ct. App. 1990). However, in Allied Property & Cas. v. Raymond, No. C3-97-1166, 1998 WL 51457 (Minn. Ct. App. Feb. 10, 1998), the no-fault insurer did obtain a judgment against an injured person who first received no-fault benefits through an arbitration award and then obtained a workers' compensation award which duplicated these no fault benefits.

If a person has been injured in more than one accident, he remains entitled to no-fault income loss benefits so long as the injury from the motor vehicle accident is disabling. Griebel v. Tri-State Ins. Co. of Minnesota, 311 N.W.2d 156 (Minn. 1981). In Griebel, an individual was temporarily disabled due to a workers' compensation related back injury. He then had a leg injury in an automobile accident which was also disabling. The workers' compensation payment (two-thirds of weekly wage) could be supplemented by no-fault benefits (85% of weekly wage) so that the total payment would be the higher no-fault amount.

#### ii. Sick Leave or Disability

In Hoeschen v. Mut. Service Ins. Co., 359 N.W.2d 677 (Minn. Ct. App. 1984), the court reviewed a no-fault wage loss claim of a person who was receiving sick leave benefits. The court remanded this aspect of the case for a factual finding as to whether or not the injured person was using "depletable sick leave benefits." Double compensation (sick leave plus no-fault) is permitted if the injured person is depleting an accumulated reserve of sick leave benefits.

The treatment of sick leave, disability benefits, and vacation time has been discussed in liability cases when trying to determine which "collateral source" payments should be deducted from a jury's damage award. Since the policy in these cases (like the policy in no-fault) is to prevent double recovery, they may have some precedential value in no-fault cases. See Bruwelheide v Garvey, 465 N.W.2d 96 (Minn. Ct. App. 1991).

#### iii. Other Earned Income

The statute provides that compensation for income loss is reduced by any income from substitute work actually performed by the injured person. Minn. Stat. § 65 B.44, subd.3.

In Erickson v. Great American Ins. Co., 466 N.W.2d 430 (Minn. Ct. App. 1991), a woman held two part time jobs. The second job involved cleaning houses. Due to her disability, she could not return to this work. However, she did find new full time work during the day. Once this happened, her post-accident gross income became greater than her pre-accident gross income. Consequently, she did not qualify for additional no-fault benefits for income loss. (The court notes that Erickson is not seeking to recover income loss benefits based on a foregone opportunity to work at a higher income. Such losses could be compensable. See McKenzie v. State Farm, 441 N.W.2d 832, 835 (Minn. Ct. App. 1989).)

But, see Northrup v. State Farm, No. C7-98-1049, 1998 WL 846548 (Minn. Ct. App. Dec. 8, 1998). In this case, a man was employed by his sons as both an independent consultant and as a laborer. After an accident, he was unable to return to work as a laborer, but he still earned a higher total income after the accident through this consulting work. Despite the increase in income, the court states that a genuine issue of material fact exists as to whether the injured person lost labor or income because of his injury.

#### C. Funeral Expenses

Reasonable expenses not in excess of \$5,000 may be paid for funeral and burial expenses of an individual killed in a motor vehicle accident. Minn. Stat. § 65B.44, subd. 4.

In Forcier v. State Farm Mut. Auto. Ins. Co., 310 N.W.2d 124 (Minn. 1981), the Supreme Court construes "necessary funeral expenses" to include the cost for flowers, vocalists, and organists.

#### D. Replacement Services

An injured individual is entitled to reimbursement for expenses reasonably incurred to obtain usual and necessary substitute services to replace those which the injured person would have performed for himself or his household. If the injured person normally, as a full-time responsibility, provides care and maintenance of a home, replacement services can be measured by the reasonable value of the care and maintenance. The maximum benefit is \$200 per week. Replacement services can be obtained beginning the eighth day following an injury. Minn. Stat. § 65B.44, subd. 5. For a person who normally maintains a home, the replacement services for care and maintenance of the home can be based on the reasonable value of that work, whether or not there is actually any out-of-pocket expense involved. Under all other circumstances, the expense will actually have to be "incurred." Presumably, an individual can incur an expense by agreeing to make a payment for the replacement services and need not actually make the payment prior to submitting a claim to the insurance company.

The payment of replacement services comes from the same coverage as payment of disability income loss. The total coverage is \$20,000.

In Nadeau v. Austin Mut. Ins. Co., 350 N.W.2d 368 (Minn. 1984), the husband of an injured woman was denied payment for replacement services because there was no proof that expenses had actually been incurred and there was no attempt to prove that the injured individual had been a full-time homemaker.

In Rindahl v. Nat'l Farmers Union Ins., 373 N.W.2d 294 (Minn. 1985), replacement services were paid under the following circumstances. The injured individual worked 40 hours per week at a job outside the home and in addition worked about eight hours a week on the family farm. It was further acknowledged that she had routinely worked 28 hours per week providing household services for her family. The court held that this person "normally, as a full-time responsibility," had provided services for her family 28 hours each week. She was therefore entitled to be compensated based upon the reasonable value of the replacement services even though no out-of-pocket expenses had actually been incurred. The supreme court indicates that in each home there will be one person who has "primary responsibility for management of the household." With respect to replacement services for this person, payment should be made based on the reasonable value of the replacement services, whether or not expense is incurred. In Rindahl, the Supreme Court affirmed an award based on a \$4 per hour value, even though no substitute help was hired and no expense was incurred.

Schroeder v. Western National Mut. Ins. Co. 865 N.W.2d 66 (Minn. 2015) involved a 2012 collision injuring a fifty-nine year old single woman who lived alone. She met the definition of a person with primary responsibility for management of the household. She had a spinal surgery. She could not perform her usual household services because she was totally disable for about four months and partially disabled for an additional month. She did not have family living nearby and no one actually performed replacement services for her. The Supreme Court upheld an arbitrator's award of \$3,400 for replacement services because the applicable statutory language entitled the injured person to receive "the reasonable value of such care and maintenance" that she was unable to perform. The applicable portion of the statute contains no requirement that the replacement or substitute services actually be performed.

Xiong v. Western National Mut. Ins. Co., 2005 WL 3372779 (Minn. Ct. App. December 13, 2005), reaffirms the conclusion that a primary homemaker may submit a claim for the reasonable value of services that she had provided to members of the household, even though there is no incurred expense or other economic loss related to the replacement service.

The issue of whether or not a claimant is a homemaker as a "full time responsibility" will depend on the facts of the individual case. See Guenther v. Austin Mut. Ins. Co., 398 N.W.2d 80 (Minn. Ct. App. 1986). In this case, a woman with her small child who was residing with her parents was found not to be a full-time homemaker.

The scope of "usual and necessary services" is not defined by statute or by Minnesota case law. But in Lenz v. Depositors Ins. Co., 561 N.W.2d 559 (Minn. Ct. App. 1997), the court concluded that "usual and necessary" services include automobile repairs if the

injured insured normally performed such repairs in the past. This decision is consistent with holdings in other no-fault jurisdictions. See Fandray v. Nationwide Mut. Ins. Co., 459 A.2d 801 (Pa. Super. Ct. 1983); and Adkins v. Auto Owners Ins. Co., 306 N.W.2d 312 (Mich. Ct. App. 1981).

#### E. Survivor's Economic Loss

When an individual is killed in a motor vehicle accident (or dies within one year of the accident date due to injuries sustained in the accident), survivors can be paid up to \$500 per week for the economic benefit which these dependents would have received had the individual not suffered the injury causing death. Minn. Stat. § 65B.44, subd. 6.

In determining the amount of economic loss, the insurance company may consider the decedent's economic consumption as well as the economic contributions. Racine v. AMCO Ins. Co., 605 N.W.2d 773 (Minn. Ct. App. 2000).

The statute creates a presumption that a spouse and a minor or disabled child will be considered a surviving dependent if they had resided with the insured individual at the time of the accident. In Peevy v. Mut. Services Cas. Ins. Co., 346 N.W.2d 120 (Minn. 1984), the Court awarded these economic loss benefits to the spouse of a deceased individual even though they had not been residing together at the time of the collision, because the surviving spouse had been receiving monthly support payments and was therefore a "surviving dependent." This case leaves open the question as to whether or not an unrelated individual who was in fact dependent upon the individual who died could claim survivors' economic loss benefits.

The question left open in Peevy was resolved in Auto-Owners Ins. Co. v. Perry, 730 N.W.2d 282 (Minn. Ct. App. 2007). A man killed in a motor vehicle accident had lived in a relationship with a woman for seven years and had provided support. The Auto-Owners insurance policy, however, explicitly limited survivor's benefits to a surviving spouse and to the decedent's children. Consequently, the claim of the surviving companion was denied. The explicit language of the contract was enforceable because it did not deny any coverage that was clearly mandated by the no-fault statute.

The child of a decedent born to the wife after his death is entitled to survivors' benefits. Dahle v. Aetna Cas. & Surety Ins. Co., 352 N.W.2d 397 (Minn. 1984).

In Hoper v. Mut. Service Cas. Ins. Co., 359 N.W.2d 318 (Minn. Ct. App. 1984), the Court held that there could be no award of survivors' economic loss benefits without some proof as to the actual value of labor furnished by the deceased individual.

School Sisters of Notre Dame at Mankato Minn., Inc. v. State Farm Mut. Auto. Ins. Co., 476 N.W.2d 523 (Minn. Ct. App. 1991) held that a non-profit corporation could not be considered a dependent because (1) a corporation does not fit within the category of dependents described in Minn. Stat. § 65B.44, subd. 6 and (2) the perpetual nature of a corporation is inconsistent with loss of dependency and the termination of benefits as

required by Minn. Stat. § 65B.44, subd. 6.

#### F. Survivor's Replacement Services Loss

Under Minn. Stat. § 65B.44, subd. 7, up to \$200 per week can be paid for expenses "reasonably incurred" by surviving dependents for ordinary and necessary services in lieu of those the deceased would have performed. The benefits are to be calculated by deducting expenses which the survivors avoid by reason of the decedent's death. It should be noted that payment is only for expenses reasonably incurred. There is no provision for payment of the reasonable value of services unless some expense is actually incurred. See Hoper v. Mut. Service Cas. Ins. Co., 359 N.W.2d 318 (Minn. Ct. App. 1984).

Survivor's replacement services are not be limited to household tasks but cover all ordinary and necessary services which the decedent would have performed. In Motschenbacher v. New Hampshire Ins. Group, 402 N.W.2d 119 (Minn. Ct. App. 1987), a man and wife owned a restaurant and liquor store. When the husband was killed, his wife operated the businesses and eventually sold them. She collected economic loss benefits based upon lost profits, and she was also entitled to receive a payment of survivor's replacement services for losses related to the hiring of a substitute employee.

#### G. Rehabilitation

Rehabilitative services are covered as part of medical expense benefits. Minn. Stat. § 65B.44 subd. 2. The scope of the services covered is described in Minn. Stat. § 65B.45.

Minn. Stat. § 65B.45 includes rehabilitation within no-fault benefits if the rehabilitation is "reasonable and appropriate for the particular case, its cost is reasonable in relation to its probable rehabilitative effects, and it is likely to contribute substantially to medical and occupational rehabilitation." As a practical matter, an insurance company will voluntarily pay for a vocational program only in order to save wage loss payments. For example, an individual with a work history limited to jobs involving heavy lifting could be out of work indefinitely with a serious back injury. An insurance company could be persuaded to offer vocational training in order to get the person back to work at another job.

The only reported case concerning rehabilitation benefits is Guenther v. Austin Mut. Ins. Co., 398 N.W.2d 80 (Minn. Ct. App. 1986). A young woman who had temporarily dropped out of school returned to school following an automobile collision. She made a rehabilitation claim asking for occupational training benefits for courses at Bemidji State University. The trial court entered summary judgment denying these benefits. The case was remanded for trial for a factual determination as to whether or not the requested courses were reasonable and appropriate. An inference may be drawn suggesting that payment of the rehabilitation services would be required if the plaintiff were to prevail in proving that the course was reasonable and appropriate.

#### H. Stacking of No-Fault Benefits

## 1. Stacking is Optional

Since October 1, 1985, a person insured by more than one policy of no-fault insurance may collect on only one, unless the policyholder has made "a specific election to have two or more policies added together." Minn. Stat. § 65B.47, subd. 7.

Prior to October 1, 1985, stacking of no-fault policies had generally been mandated by case law. Since the 1985 amendments, it has become optional.

As discussed below, the insurance company does have an obligation to notify its customers of the right to stack no-fault benefits.

## 2. How Stacking Works

Stacking of benefits allows an individual to make claims against each policy which is stacked. For example, with respect to wage loss, total coverage would be \$40,000 if two policies are stacked, and maximum weekly coverage will be \$500 rather than \$250 for weekly wage loss. Peterson v. Iowa Mut. Ins. Co., 315 N.W.2d 601 (Minn. 1982). See also Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978).

The fact that a person is insured under more than one policy does not necessarily mean that the person is allowed to stack the no-fault benefits. For example, a minor child living in a household together with both a parent and a sibling would be insured as a resident relative under each policy of insurance issued to a member of the household. However, establishing that the child is covered by more than one no-fault policy will not mean that the child can stack the benefits from the multiple policies. Rather, according to Minn. Stat. § 65B.47 subd. 5, one insurance company will make the no-fault payments, and any other company insuring the child will then make pro rata reimbursement to the company which paid the no-fault benefits. The injured person is entitled to receive no more than the limits of a single policy. See Bemboom v. Dairyland Ins., 529 N.W.2d 467 (Minn. Ct. App. 1995).

Only a person who is an insured on each of the stacked policies is entitled to stacked benefits. In Johnson for Cormier v. State Farm, 556 N.W.2d 214, (Minn. 1996), an injured passenger did not have personal insurance and did not reside with any relative who had insurance. When he was injured in a motor vehicle accident, he properly claimed no fault benefits from the occupied vehicle. However, even though the vehicle's owner had three insured vehicles and had elected stacking, the passenger could not stack the additional no fault benefits because he was not an insured on the policies for the additional vehicles. The same result occurred in Sugden v. State Farm Mut. Auto. Ins. Co., No. C9-99-1564, 2000 WL 290405 (Minn. Ct. App. March 21, 2000). A man stacked insurance on each of his five vehicles. His daughter was listed as the primary driver for one of the vehicles. Being named as a driver, however, is not the same as being an "insured" on the policy. Because she was not a named insured or resident relative, she was not entitled to stack benefits. See also Weiss v. Farmers Ins. Group, 302 N.W.2d 353 (Minn. 1981) and Koons v. Nat'l Family Ins. Co., 301 N.W.2d 550 (Minn. 1981).

Once stacking is purchased, those insured under the stacked policies should have access to the excess benefits that were purchased, whether or not they were occupying an insured vehicle when involved in a motor vehicle accident.

Even when stacking is purchased, case law confirms that the injured person cannot stack coverages across the different “priority” categories created in Minn. Stat. § 65B.47. An individual injured in an employer furnished vehicle must go to that vehicle for basic economic loss claims and will not be able to stack coverage purchased for personal vehicles. Murphy v. Milbank Mut. Ins., 320 N.w.2d 423 (Minn. 1982)

In Meister v. Western Nat’l Mut. Ins. Co., 479 N.W.2d 372 (Minn. 1992), a family had purchased higher limits of no-fault coverage (\$40,000 in medical rather than the standard \$20,000) from Western National. A family member was seriously injured when he fell from an employer furnished vehicle. MSI covered the employer’s vehicle and this company paid basic economic loss benefits of \$20,000 in medical expenses. The injured family member then sought an additional \$20,000 from Western National. The Supreme Court reaffirmed the principle that an injured person could not stack coverages across the priority categories created in § 65B.47. So, the \$40,000 coverage on the family vehicle could not be stacked with the coverage on the employer furnished vehicle. Nevertheless, the court concluded that the injured person could access the additional \$20,000 purchased on the Western National policy. The court held that higher limits purchased for the family vehicle constituted “additional first party coverage.” The court held that giving access to the “additional benefits” did not constitute stacking and was therefore not barred by the 1985 anti-stacking provisions relating to basic economic loss benefits. Western National was obligated to pay the additional \$20,000 in medical coverage that had been purchased.

### 3. Notice of Right to Stack

Minn. Stat. § 65B.47, subd.7 states “an insurer shall notify policyholders that they may elect to have two or more policies added together.”

If a company fails in its obligation to give the required notice, stacking may be imposed as a matter of law. See Meister v. Western Nat’l Mut. Ins. Co., 479 N.W.2d at 379.

What must an insurer do in order to meet this statutory obligation to “notify”? In Meister v. Western Nat’l Mut. Ins. Co., 479 N.W.2d 372 (Minn. 1992), the court had stated in dicta that an old line of cases which described a company’s duty to “offer” certain optional automobile insurance coverage would be relevant in outlining the duties of an insurer to “notify.” However, in Pecinovsky v. AMCO Ins. Co., 613 N.W.2d 804 (Minn. Ct. App. 2000), the court held that “the word ‘notify’ connotes a lesser duty on the insurer than does the word ‘offer.’” 613 N.W.2d at 809. In this case, Mr. Pecinovsky signed an insurance application in 1989, and the application had a check mark in a box indicating that stacking was declined. In addition, AMCO had over the years sent mailings to the insured in which the availability of stacking was disclosed. Mr. Pecinovsky testified that he had not checked

the box declining stacking, and that the meaning of stacking had never been explained to him. Although a jury determined that AMCO had not made an effective “offer” of stacking, the court of appeals ruled as a matter of law that AMCO had fulfilled its statutory obligation to “notify” Mr. Pecinovsky of his right to elect stacking.

If a failure to “notify,” as required by Minn. Stat. § 65B.47, subd.7, can be established, the failure may give rise to a claim against the insurance agent. See Johnson v. Urie, 405 N.W.2d 887 (Minn. 1987). However, a release of the agent in a partial settlement will also release the insurer from any vicarious liability. Reedon of Faribault, Inc. v Fidelity & Guaranty Ins. Underwriters Inc., 418 N.W. 2d 488 (Minn. 1988).

#### IV. No-Fault Issues at Trial.

Minn. Stat. § 65B.51 limits the damages which can be claimed in certain motor vehicle tort claims. It is therefore important to understand the circumstances in which the limitations of the statute apply.

The limitations created by this portion of the statute are triggered only when all of the following conditions are met:

- (1) the injured person's cause of action is based on negligence;
- (2) the negligence involves the operation, maintenance or use of a motor vehicle;
- (3) the motor vehicle is one with respect to which "security has been provided as required by sections 65B.41 to 65B.71."

When Minn. Stat. § 65B.51 applies, it limits damages in two ways. First, it requires the court to deduct from any recovery the value of no-fault benefits which the injured person has received. Second, it permits the injured person to recover damages for "non-economic detriment" (e.g. pain, emotional distress) only if the injured person has suffered a serious injury. A serious injury exists if any one of the following thresholds is met: (1) over \$4,000 in expenses for medical treatment (excluding the cost of diagnostic x-rays) or (2) a permanent injury, or (3) a permanent disfigurement, or (4) 60 days of disability. (See Jury Instruction Guides -- Civil, 4th Edition, Instruction 65.40 for a description of each threshold.)

Minn. Stat. § 65B.51 should be viewed as creating three separate considerations: (1) What facts trigger the application of Minn. Stat. § 65B.51 in plaintiff's liability claim for damages? (2) When the law applies, how are its "tort thresholds" applied to limit an award for non-economic damages? (3) When the law applies, what calculations are used to deduct no-fault benefits from the economic damages awarded to the plaintiff in the tort claim?

##### A. Tort Thresholds

1. Application of Tort Thresholds
  - a. Motorcycles

The tort threshold limitation applies only to injuries arising from use of a motor vehicle. Minn. Stat. § 65B.46, subd. 3 indicates that injuries suffered by a person on a motorcycle do not arise out of the maintenance and use of a motor vehicle. Consequently, the occupant (operator or passenger) of a motorcycle would not have to reach any tort threshold to bring a claim for non-economic losses. There is simply no statutory provision that imposes threshold requirements on claims brought by a person injured while occupying a motorcycle.

Likewise, under § 65B.51 subd. 5, when the operator of a motorcycle negligently causes an accident, the person bringing a claim against the motorcycle operator need not meet a tort threshold. "Affording motorcycle drivers the protection of the thresholds would frustrate the

legislative goal of retaining a fault-based system of tort recovery for injuries caused by motorcycles.” Braginsky v. State Farm Mutual Auto. Ins. Co., 624 N.W.2d 789, 795 (Minn. Ct. App. 2001).

#### b. Economic Losses

A plaintiff does not have to meet any tort threshold in order to recover economic or out-of-pocket losses. Minn. Stat. § 65B.51, subd. 3 explicitly states that tort thresholds apply only with respect to claims for “noneconomic detriment.”

With respect to economic losses, damages can generally be recovered from a negligent party for those economic loss not paid or payable by a no-fault carrier. Minn. Stat. § 65B.51, subd. 2. See Nemanic v. Gopher Heating and Sheet Metal, Inc., 337 N.W.2d 667 (Minn. 1983).

An award for future medical expenses or for future wage loss is an economic loss which is not subject to the tort threshold requirements. See Kyute v. Auslund, 668 N.W.2d 698 (Minn. App. 2003); Pemberton v. Theis, 668 N.W.2d 692 (Minn. App. 2003); Johnson v. State Farm, 574 N.W.2d 468 (Minn. Ct. App. 1998).

#### c. Uninsured Motorist

When an uninsured motorist is the defendant, the plaintiff does not have to meet any tort threshold. The threshold statute by its own terms applies only to actions involving a “motor vehicle with respect to which security has been provided,” i.e., to a vehicle with liability insurance. Minn. Stat. § 65B.51, subd. 1. Moreover, Minn. Stat. § 169.797 indicates that the owner of a motor vehicle or motorcycle who fails to obtain required liability insurance shall not be relieved of tort liability by the No-Fault Act.

Although no threshold is required in a direct lawsuit against the negligent uninsured driver, a tort threshold is required if the plaintiff brings an uninsured motorist contract claim directly against an insurance company. Johnson v. State Farm, 574 N.W.2d 468 (Minn. Ct. App. 1998). (This decision does appear to ignore the plain meaning of the applicable statutory language.)

#### d. Certain Non-Auto Claims

The threshold requirements apply only to claims based on negligence in the operation or use of a motor vehicle. A claim based on strict liability, such as a dram shop claim, is not required to meet a threshold. Minn. Stat. § 65B.51, subd. 1. See Fette v. Peterson, 404 N.W.2d 862 (Minn. Ct. App. 1987); Fox v. City of Holdingford, 375 N.W.2d 44 (Minn. Ct. App. 1985); Newmaster v. Mahmood, 361 N.W.2d 130 (Minn. Ct. App. 1985).

Under Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003), marked police cars and other unregistered vehicles are not “motor

vehicles.” Consequently, negligence claims arising from the use of such vehicles would not be subject to the tort thresholds.

e. Contribution Claims

Tort thresholds do not have to be met for a defendant in a law suit to assert a contribution claim against a negligent driver. For example, a person injured by a drunken driver has a claim against a bar which illegally served alcohol to the driver. The bar would not have to prove that the injured person met a threshold in order to sue the drunk driver on a contribution claim. Moose Club v. LaBounty, 442 N.W.2d 334 (Minn. Ct. App. 1989).

2. Threshold Requirements

If an action is commenced before a threshold is met, the plaintiff is subject to having the case dismissed with prejudice. In Marose v. Hennameyer, 347 N.W.2d 509 (Minn. Ct. App. 1984), the defendant obtained summary judgment dismissing the plaintiff's case with prejudice because the plaintiff could not produce any competent evidence substantiating the existence of a threshold.

In Kissner v. Norton, 412 N.W.2d 354 (Minn. Ct. App. 1987), the accident occurred in September, 1984. The Summons and Complaint was served in July, 1985. Thereafter, the plaintiff failed to cooperate in discovery. The defendant moved for summary judgment in December, 1986, on the grounds that the plaintiff has failed to meet a tort threshold. In opposition, the plaintiff produced a statement from the treating physician (dictated but not read or signed) stating that plaintiff has "a disability of her spine" related to the accident. Summary judgment was granted. The doctor's letter did not establish a permanent injury or sixty days of disability. No extension of time to gather additional evidence was granted because plaintiff had failed to comply with existing discovery orders.

a. Medical Expense That Exceeds \$4,000

Future medical expenses cannot be used to meet the \$4,000 threshold requirement for medical expenses, even though the statute refers to medical expenses paid or payable. Coughlin v. LaBounty, 354 N.W.2d 48 (Minn. Ct. App. 1984).

Certain past medical expenses are also excluded from consideration in meeting the \$4,000 threshold. Minn. Stat. § 65B.51, subd. 3 (a) (4) provides that “diagnostic X-rays” which are not for remedial purposes cannot be used to meet the tort threshold. In Rivard v. McGinnis, 454 N.W.2d 453 (Minn. Ct. App. 1990), plaintiff's tort threshold claim was based upon an award of \$4,245 in medical expense, but the award included \$595 for diagnostic x-rays. By statute, the cost of diagnostic x-rays is not included in calculating the medical expense. Minn. Stat. § 65B.51 subd. 3 (4).

Parties to a lawsuit sometimes dispute whether charges for diagnostic MRI or CT scans should be included in the \$4,000 threshold calculation or should be excluded as “diagnostic x-rays.” District courts in Minnesota have decided the issue both ways. One unpublished

appellate opinion, Safinia v. Kruse, No. C8-96-1623, 1996 WL 118200 (Minn. Ct. App. March 18, 1996), lumps together CT scans and MRIs as “diagnostic tests” and holds that both are to be excluded from the medical expense calculation. A literal application of the law, however, would exclude the only cost of a CT scan (which is an x-ray enhanced by computer imaging) but would not exclude the cost of an MRI (which is not based on x-ray technology). The statute does not exclude the cost of all diagnostic tests in calculating a tort threshold. It explicitly excludes only “diagnostic x-rays” and provides no basis for excluding the cost of other tests or examinations.

➔ **Practice Tip**

If the cost of an MRI is an important factor in meeting a tort threshold, it is appropriate to ask the medical experts some basic questions such as (1) Doctor, do you know what an x-ray is? and (2) Is an MRI an x-ray? Even a defense Independent Medical Examiner should admit that an MRI, which uses a magnet to align electrons, is not an x-ray. This will provide an evidentiary basis for arguing that the statutory exclusion for “diagnostic X-rays” does not include an MRI.



In Davis v. Olds, No. C0-94-400, 1994 WL 587933 (Minn. Ct. App. Oct. 25, 1994), the parties stipulated that a \$5,800 no-fault payment had been made for chiropractic and other medical expenses. After a trial, a jury awarded only \$800 for past medical. The jury's decision is upheld. The stipulation did not resolve the issues of medical expenses being reasonable or being caused by the accident. These are issues for the jury to resolve.

b. 60 Days of Disability

With respect to the sixty-day disability requirement, the Court in Lindner v. Lund, 352 N.W.2d 68 (Minn. Ct. App. 1984) stated that the sixty-day requirement is cumulative. It does not require sixty consecutive days of disability.

c. Permanent Injury or Disfigurement

Minn. Stat. § 65B.43, subd. 11 defines "injury" as "bodily harm to a person and death resulting from such harm."

The CIVJIG 65.40 describes a "permanent injury" as one from which it is reasonably certain that a person will not fully recover. The injury may improve or worsen, but the injury is reasonably certain to continue to some degree throughout a person's life.

A jury is not necessarily required to find the existence of a permanent injury, even if the defense does not call an expert witness to rebut testimony of a treating doctor. Cross-examination of plaintiff's expert and introduction into evidence of medical records may provide sufficient basis for a jury's finding of no permanent injury. Nemanic v. Gopher Heating & Sheet Metal, Inc., 337 N.W.2d 667 (Minn. 1983); Stanky v. MSI Ins. Co., No. C3-

92-113, 1992 WL 153097 (Minn. Ct. App. July 7, 1992).

A “disfigurement” is one which impairs or injures the appearance of a person. Jury Instruction Guides, Civil, 4th Edition, 65.40.

## B. No-Fault Deduction after Jury Verdict

No-fault offsets are an issue with respect to awards for economic losses. Minn. Stat. § 65B.51, subd. 1 provides that no-fault benefits shall be deducted from a verdict when the cause of action involves negligence in the operation, maintenance, or use of a motor vehicle. A number of issues have arisen concerning the application of the no-fault offset.

### 1. Procedures for Asserting the No-Fault Offset

The collateral source statute, Minn. Stat. § 548.251 (formerly §548.36), establishes the general procedure to be used when a defendant seeks to offset a damage award based on amounts which have already been paid to or on behalf of the plaintiff. The offsets, when applicable, are intended to prevent the plaintiff from receiving a double recovery for a single loss. To obtain an offset from a jury verdict, a defendant must make a motion requesting the offset within ten days of the entry of a verdict. Minn. Stat. § 548.36 subd. 2. Does this general procedural requirement of the collateral source statute apply to no-fault offsets?

Lee v. Hunt, 642 N.W.2d 57 (Minn. Ct. App. 2002), holds that the procedures of the collateral source statute do apply to no-fault offsets. In Lee v. Hunt, the defendant moved to amend a judgment for no-fault offsets two months after judgment had been entered. The court denied the motion because the time limits for such a motion, as established in the collateral source statute, had not been met. The court viewed as dicta and rejected statements in Wertish v. Salvhus, 558 N.W.2d 258 (Minn. 1997) indicating that the collateral source statute’s procedures should not apply to no-fault offsets. The decision in Lee holds that the collateral source statute and the No-Fault Act can and should be reconciled, with the collateral source statute providing procedures for implementing the offsets mandated by Minn. Stat. § 65B.51.

When a defendant obtains an offset under the collateral source statute, the total amount of the claimed offset is adjusted by the amount paid during the two years prior to the accident in order to procure the insurance that made the collateral source payment. Minn. Stat. § 548.251 subd. 2(2). In applying this general rule to no-fault benefits, Rush v. Jostock, 710 N.W.2d 570 (Minn. Ct. App. 2006) confirms that only the PIP portion of the premium, not the entire auto insurance premium, may be used by the plaintiff to reduce the collateral source offset.

In Do v. American Family Mut. Ins. Co., 779 N.W.2d 853 (Minn. 2010), an issued related to no-fault and collateral source offsets arose in an unusual context. Do was injured in a motor vehicle accident. American Family provided \$30,000 in no-fault coverage for

medical expenses. American Family voluntarily paid only \$865.50. In a jury trial related to no-fault and underinsured motorist benefits, a jury awarded \$39,000 for past medical benefits. Prior to this litigation, Do had settled his liability insurance claim for \$28,000. American Family claimed that its no-fault obligation should be offset by the liability insurance settlement. The Supreme Court rejected this claim. A liability insurance settlement with the tortfeasor's insurance company is not a "collateral source" within the meaning of Minn. Stat. § 548.251. American Family was obligated to pay the remainder of its \$30,000 in no-fault coverage for Do's past medical expenses.

## 2. Comparative Fault

Under Minn. Stat. § 65B.51, no-fault deductions are made first before any deduction for comparative fault under Minn. Stat. § 604.01. (Prior to the clarification of the statute in May, 1990, there were conflicting appellate court decisions with respect to the appropriate sequence for the two deductions.)

## 3. Amount of Deduction

A jury generally does not know about no-fault payments when awarding damages. In completing the special verdict form, a jury may award more or less than no-fault has actually paid for past medical expenses and wage loss.

What is the offset if a jury awards less than no-fault has paid? In Tuenge v. Konetski, 320 N.W.2d 420 (Minn. 1982), the no-fault off-set from total damages was limited to the \$3,000 which the jury actually awarded for past wage loss, even though no-fault had actually paid more (\$11,000). See also Fahy v. Templin, 361 N.W.2d 158 (Minn. Ct. App. 1985); Danielson v. Johnson, 366 N.W.2d 309 (Minn. Ct. App. 1985). Once the jury award for past wage loss was reduced to zero, there would be no additional deduction from other categories of damages based upon the additional wage loss payments made by no-fault.

What is the offset if a jury awards more than no-fault has paid? In Anderson v. Honaker, 365 N.W.2d 307 (Minn. Ct. App. 1985), a jury awarded \$6,800 in past wage loss. No-fault had paid only \$2,000. The defendant may deduct from the verdict only the \$2,000 actually paid by no-fault, and the defendant remained liable for the additional \$4,800. See also Kyute v. Ausland, 668 N.W.2d 698 (Minn. Ct. App. 2003)

With respect to the proper offset, there is interesting *dicta* in the Supreme Court's decision Vandenheuvel v. Wagner, 690 N.W.2d 753 (Minn. 2005). In this case, the jury awarded about \$30,000 in medical expenses when over \$40,000 was claimed. No-fault had paid \$20,000, and this entire amount was deducted from the \$30,000 award. The Supreme Court noted "Because neither party requested the jury to make specific findings of fact as to how much of the \$30,000 in medical bills were attributable to those paid by the no-fault carrier, the full \$20,000 in medical benefit paid by the insurance carrier . . . were deducted from the award." 690 N.W.2d, 754. The language suggests that a claimant may tailor the special verdict form to claim on a separate line those items not paid by no-fault. Subsequent decisions by the court of appeals, however, have rejected attempts by

plaintiffs to have a more detailed verdict form that would itemize individual no-fault claims. See Cook v. Blades, 2009 WL 2447501 (Minn. Ct. App. August 11, 2009), refusing to itemize weekly income losses, and Hogan v. Kothe, 2010 WL 2899964 (Minn. Ct. App. July 27, 2010), refusing a detailed itemization of medical expenses.

A plaintiff who had to incur attorney's fees in order to collect no-fault benefits in an arbitration could not have these costs used to reduce the amount of the no-fault deduction at trial. The amount paid by no-fault would be used to offset the jury award for past medical expenses. Pappas v. Cummings, 2009 WL 3078522 (Minn. Ct. App. Sept 29, 2009). (A different result was reached by the Supreme Court when considering the payment of attorney's fees in a workers compensation claim, see Graff v. Robert M. Swendra Agency, Inc. 800 N.W.2d 112 (Minn. 2011), but the underlying rationale in this workers compensation case does not apply to the no-fault arbitration system.)

Once the damages paid by no-fault have been calculated, the procedures of the collateral source statute must be applied if the defendant is to claim the no-fault offset. See the discussion of these procedures, above.

#### 4. Parties to Lawsuit

A defendant may want to add the no-fault insurance carrier to a lawsuit, arguing that no-fault is supposed to pay the medical and wage loss claims. However, the court in Benson v. Johnson, 392 N.W.2d 890 (Minn. Ct. App. 1986) held that the no-fault carrier could not be joined as a party to the tort litigation.

#### 5. Verdict Form

When no-fault deductions are going to be made, a special verdict form should be used to itemize the elements of the damage claim. In Otto v. Hennen, 395 N.W.2d 414 (Minn. Ct. App. 1986), only a general verdict form was used. The jury awarded a single amount, \$53,900. The defendant was then entitled to deduct the full no-fault payment of \$41,000, since there was no way to determine what part of the general damage award represented past medical and wage loss claims.

#### 6. Uninsured Plaintiff Who Lacks No-Fault Coverage

A plaintiff who illegally fails to insure his car may wind up without any no-fault coverage. Does the defendant in the tort litigation get an offset for what should have been paid by no fault?

Munoz v Kihlgren, 661 N.W.2d 301 (Minn. App. 2003) held that the defendant must pay the damages awarded by the jury without any deduction for payments which might have been made by no-fault. This decision was based upon the plain language of Minn. Stat. § 65B.51, subd. 2. which provided that a person may bring a negligence action for economic loss not paid or payable by no fault due to a lack of insurance coverage.

(Based on an earlier version of the statute, the court had held in Rehnelt v. Steube, 397 N.W.2d 563 (Minn. 1986) that a defendant did not have to pay damages to an uninsured motorist if the damages should have been paid by no fault. However, in 1989, the legislature amended the specific statutory language on which Rehnelt was based. Since 1989, if no-fault fails to make payment due to a lack of insurance coverage, the injured party may bring a negligence action to recover these losses.)

In reaching its decision denying any offset, the court in Munoz elected not to follow *dicta* in Ramsamooj v. Olson, 574 N.W.2d 751 (Minn. Ct. App. 1998) stating that the defendant is entitled to an offset for no fault benefits that would have been paid if the plaintiff had purchased the coverage as required by law.

## 7. Future Damages

The defendant does not get an offset when a jury awards future damages for medical expenses. Instead, the defendant in the tort action pays the damages, and the no-fault carrier gets a credit for the amount paid by the tortfeasor (minus a pro-rata share of costs and attorney's fees). Ferguson v. Illinois Farmers Ins. Group Co., 348 N.W.2d 730 (Minn. 1984).

In Pemberton v. Theis, 668 N.W.2d 692 (Minn. App. 2003), the injured plaintiff had at some point voluntarily settled all no-fault claims for a lump sum payment of \$2,331. In the subsequent tort claim, the district court used this lump sum no-fault settlement to offset a jury award of \$5,000 for future medical expenses. The court of appeals rejects the defendant's argument that entire award for future damages should be offset due to plaintiff's voluntary settlement of no-fault claims, because the release between the injured person and the no-fault insurer explicitly reserved plaintiff's rights to pursue the liability damage claim. The record before the court of appeals is unclear as to whether or not the lump sum payment of \$2,331 was intended to compensate the plaintiff for future medical expenses. In the absence of a more complete record, there is no basis for concluding that the district court erred in using this no-fault payment to offset the award for future medical expenses.

## C. Subrogation Claims by a No-Fault Insurer

In some circumstances, the injured person may be entitled to seek economic damages from a third party that would not be subject to the no-fault offset created by Minn. Stat. § 65B.51. In these cases, what rights would a no-fault insurer have in trying to recover for its past no-fault payments?

(Indemnity claims may arise when a person is injured by certain commercial vehicles. These claims differ from subrogation claims and are discussed in a later section of this article dealing with "Indemnity." See Section VII – A below.)

### 1. Statutory Subrogation: § 65B.53, subd. 2 and subd. 3

Minn. Stat. § 65B.53 generally governs the subrogation rights of no-fault carriers. (Minn. Stat. § 65B.64 subd. 2 controls subrogation for no-fault payments made under the assigned claims plan.)

The No-Fault Act originally permitted subrogation based on no-fault payments, but the provision of the law allowing subrogation (Minn. Stat. § 65B.51 subd. 1) was amended in 1977 to delete language allowing subrogation. Since 1977, the no-fault insurance carrier does not in most cases have any right of subrogation. Payments made by the no-fault carrier are simply deducted from the jury verdict, to the extent that the jury award would duplicate these past no-fault payments.

This is also true of payments made under the Assigned Claims Plan. In Banks v. Grant, 530 N.W.2d 864 (Minn. Ct. App. 1995), the Assigned Claims Plan tried to assert subrogation following a jury verdict against a tortfeasor. The court held that the normal no-fault deductions applied pursuant to Minn. Stat. § 65B.51, subd. 2, so that there was no recovery by the injured person to which a subrogation claim would apply.

Minn. Stat. § 65B.53, subds. 2 and 3 does identify two situations in which subrogation rights may exist for a no-fault insurer. The no-fault insurer may have a right of subrogation either (1) when the accident occurs outside the State of Minnesota or (2) when the claim is based on intentional tort, strict or statutory liability, or negligence other than negligence in the maintenance, use, or operation of a motor vehicle. In each of these two categories, however, the subrogation right of a no-fault insurer exists “only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss.” Minn. Stat. § 65B.53, subd. 2 and subd. 3. Under the terms of this statute, double compensation for the injured person must first occur in order for a subrogation claim to exist.

Because of this unique statutory language, the no-fault insurer has limited rights in asserting a statutory subrogation claims directly against a tortfeasor. “The no-fault insurer's right of subrogation under this section applies only against the insured. Milbrandt v. American Legion Post of Mora, 372 N.W.2d 702, 705 (Minn.1985). If the insured settles his or her claims against the tortfeasor, the insurer has a right to reimbursement from the insured to the extent that the settlement duplicates no-fault benefits already paid. Fox v. City of Holdingford, 375 N.W.2d 44, 47-48 (Minn.App.1985), pet. for rev. denied (Minn. Dec. 13, 1985). But, the insured has the latitude to structure the settlement to include only non-duplicative losses. Principal Financial Group v. Allstate Ins. Co., 472 N.W.2d 338, 342 (Minn.App.1991); Mueller v. Theis, 512 N.W.2d 907, 911 (Minn. App. 1994).

The statute does permit the no-fault insurer to seek reimbursement from the injured person if the injured person should receive a double recovery, collecting from the liability insurer for the same losses paid by no-fault. However, in Mueller v. Theis, 512 N.W.2d 907 (Minn. Ct. App. 1994), the court confirmed that an injured party is permitted to settle a case for only those damages which do not duplicate past or future no-fault benefits. In Mueller v. Theis, the insurance company did not provide any specific evidence of double recovery by the insured party and therefore had its subrogation claim against the insured dismissed.

Mueller v. Theis confirms that the rule established in Milbrandt remains good law. See also Milbank Ins. Co. v. Matthews, No. C7-94-1155, 1994 WL 615038 (Minn. Ct. App. Nov. 8, 1994).

In a 2005 decision, the court upheld the plaintiff's right to settle without including the no-fault payments even when the settlement occurred after a jury verdict that included damages subject to no-fault subrogation had been entered. In Mill v. Farm Bureau Mut. Ins. Co., 2005 WL 3527257 (Minn. Ct. App. December 27, 2005) a jury found a school district to be liable for negligent supervision of a student who then took a car and caused an injury. Following the verdict, the plaintiff accepted a settlement that did not include payment of amounts that had already been paid by the no-fault insurer, Farm Bureau. The court rejects the argument that the settlement was "collusive" and confirms the plaintiff's right to accept the post-verdict settlement. Subrogation does not apply because there has been no double recovery.

## 2. Statutory Subrogation: § 65B.47 subd. 6

On occasion, an insurance company may mistakenly pay no-fault benefits that should have been paid by a different company under the priorities established in Minn. Stat. § 65B.47. Minn. Stat. § 65B.47 subd. 6 says that the company mistakenly paying benefits "is subrogated to all rights of the person to whom benefits are paid."

In Farm Bureau Mut. Ins. Co. v. Nat'l Family Ins. Co., 474 N.W.2d 424 (Minn. Ct. App. 1991), a man was injured by an uninsured motorist while putting gas into his father's grain truck. The grain truck was insured by National Family. (It appears that the grain truck was considered an employer furnished vehicle and that the injury arose from the maintenance of this vehicle. National Family was therefore the first priority for no-fault payment.) The man's own no-fault insurer, Farm Bureau, paid over \$50,000.00 in no-fault benefits. The injured man settled all claims against National Family, including both uninsured motorist and potential no-fault claims, and he signed a release. Two months later, Farm Bureau notified National Family of a claim for no-fault reimbursement pursuant to Minn. Stat. § 65B.47, subd. 6. Citing Principal Financial Group v. Allstate, 472 N.W.2d 338 (Minn. Ct. App. 1991), the Court held that equitable concerns of subrogation do not apply in the no-fault context of basic economic loss benefits. Since Farm Bureau failed to notify National Family of its subrogation claim before the release was executed, Farm Bureau's subrogation rights were lost. See also Travelers Indemnity v. Vaccarri, 245 N.W.2d 844 (Minn. 1976).

## 3. Subrogation Claims not Governed by No-Fault Statute

In a few cases, no-fault benefits may be paid under the terms of a contract, even though the No-Fault Act did not mandate such coverage. In these circumstances, additional subrogation rights may exist according to the terms of the contract. In Pavel v. Norsemen Motorcycle Club, Inc., 362 N.W.2d 5 (Minn. Ct. App. 1986), an insurance contract included no-fault benefits for a pedestrian struck by a motorcycle. At the time of the accident, this

type of coverage was not required by the No-Fault Act. The company was able to assert a subrogation interest for no-fault benefits paid pursuant to the terms of the contract.

In an out of state accident, the no-fault insurance carrier may be able to assert subrogation rights under the law of the state where the accident occurred. In Nodak Ins. Co. v. Am. Fam. Mut. Ins. Co., 604 N.W.2d 91 (Minn. 2000), a North Dakota resident injured a Minnesota resident in a North Dakota motor vehicle accident. The injured party settled the liability claim. American Family then sought reimbursement of its no-fault payments from the tortfeasor's insurer. The Minnesota court applied North Dakota law and allowed the Minnesota resident's no-fault carrier to assert its subrogation claim. It must be noted, however, that this subrogation claim was made against the North Dakota insurance company for the North Dakota defendant, not against the recovery by injured person. Minnesota law, requiring proof of double recovery, would likely govern any direct dispute between the Minnesota insurance company and the Minnesota insured.

#### 4. No-Fault Subrogation and Dram Shop Claims

Much of the early litigation relating to subrogation arose in motor vehicle accidents caused by drivers who had consumed alcohol. In such cases, a claim against a bar might exist under the Civil Damage Act, Minn. Stat. § 340A.801. Under the present Civil Damage Act, subrogation claims are now barred by statute. Minn. Stat. § 340A.801, subd. 4.

Under present law, the defendant in a dram shop case would obtain an offset for no-fault benefits. This would be done pursuant to the collateral source statute, Minn. Stat. § 548.251. The collateral source statute would apply to payments made by motor vehicle insurance, and it would require an offset in order to prevent a double recovery by the plaintiff.

#### 5. No-Fault Subrogation and Workers' Compensation

When a worker is injured in a motor vehicle accident while on the job, workers' compensation is primary. However, if workers' compensation disputes a claim and fails to pay, no-fault benefits can be sought. In such cases, what rights does the no-fault insurer have to contest the workers' compensation denial and to seek reimbursement from workers' compensation?

Under the workers' compensation laws, a no-fault insurer (like any other third party payor) has no independent right to initiate litigation of a workers' compensation claim. Minn. Stat. § 176.361. The no-fault insurer may intervene if the injured person has initiated a workers' compensation claim, Freeman v. Armour Food Co., 380 N.W.2d 816, 819 (Minn. 1986), but the no-fault insurer would lack standing to initiate its own claim petition in the workers' compensation system. Freeman, 380 N.W.2d at 820.

The workers' compensation system provides the exclusive means of seeking payment from workers' compensation. A no-fault insurer may not litigate a claim for reimbursement by commencing an action against the workers' compensation insurer in district court. Colonial

Ins. Co. of California v. Minnesota Assigned Risk Plan, 457 N.W.2d 209 (Minn. Ct. App. 1990).

If an injured person does recover no-fault benefits and then recovers workers' compensation for the same loss, the no-fault insurer is free to claim reimbursement from the injured person based upon the workers' compensation recovery. Allied Property and Cas. v. Raymond, No. C3-97-1166, 1998 WL 51457 (Minn. Ct. App. Feb. 10, 1998).

## V. Claim Procedures

### A. Time Limits for Filing No-Fault Claims

Minn. Stat. § 65B.55 governs applications for no-fault benefits (other than applications to the Assigned Claims Bureau). This statute requires notice of a no-fault claim within six months after the accident. A late application must be considered by the insurance company unless the insurance company can show that it was actually prejudiced by the delay in applying. (The statute was amended after the court in Terrell v. State Farm, 346 N.W.2d 149 (Minn. 1984) had held the six-month time limit for no fault applications to be jurisdictional. Under Terrell, a late application barred any no-fault claim.)

For standards relating to an insurance company's attempt to prove actual prejudice (not specifically related to no-fault) see Reliance Ins. Co. v. St. Paul Ins. Co., 239 N.W.2d 922 (Minn. 1976). See also Williams v. League General Ins. Co., 1999 WL 809786 (Minn. Ct. App. 1999) denying coverage on a claim filed more than four years after the accident.

Late applications for the Assigned Claims Plan will generally be judged according to reasonableness. See Sullivan v. Grain Dealers Mut. Ins. Co. of Omaha, Nebraska, 361 N.W.2d 495 (Minn. Ct. App. 1985).

Once a claim is established, the general six year statute of limitations for contract claims will apply to no-fault claims. Minn. Stat. §541.05 subd. 1(1). The six year statute will generally begin to run when there is a denial of benefits, since this is when a cause of action first accrues. Entzion v. Illinois Farmers Ins. Co., 675 N.W.2d 925, (Minn. Ct. App. 2004).

### B. Insurer's Duty to Respond to Claims – Interest Penalty

Minn. Stat. § 65B.54, subd. 1 provides that basic economic loss benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of loss. Minn. Stat. § 65B.54, subd. 2 mandates that overdue payments bear simple interest at the rate of 15% per annum. The 15% interest penalty is not part of the \$20,000 in coverage for either medical expenses or income loss. It must be paid in addition to the \$20,000 in coverage. McGoff v. AMCO Ins. Co., 575 N.W.2d 118 (Minn. Ct. App. 1998).

The 15% interest penalty in the statute does not apply to claims relating to something other than basic economic loss benefits. In BuyRite Auto Glass, Inc. v. Progressive Cas. Ins. Co., 2012 WL 1149370 (Minn. Ct. App. April 9, 2012), the claim at issue involved unpaid glass repair. Pre-award interest was governed by Minn. Stat.549.09 so that no interest could be awarded on the claims, which were each for amounts less than \$7,500.

Reasonable proof of loss will require that the claimant provide evidence of a loss arising from the motor vehicle accident. Mere notification of a claim does not constitute proof of loss. See LaValley v. Nat'l Family Ins. Corp., 517 N.W.2d 602 (Minn. Ct. App. 1994). Even after there is a cut off of no-fault benefits, the insurance company is still entitled to receive

the statutorily required “proof of the fact and amount of loss” before interest on the unpaid claim will begin to accrue. American Family Ins. Group v. Kiess, 697 N.W.2d 617 (Minn. 2005). Notice and adequate proof of claim gives the company 30 days to pay the claim. Interest begins to accrue after 30 days, when payment on the claim is overdue.

Even when a company has acted in good faith in disputing its obligation to pay the claim, the interest penalty is mandatory, Haagenson v. Nat’l Farmers Union & Cas. Co., 277 N.W.2d 648 (Minn. 1979); Record v. Metropolitan Transit Co., 284 N.W.2d 542 (Minn. 1979); Pederson v. All Nation Ins. Co., 294 N.W.2d 693 (Minn. 1980). If a company acts in bad faith when denying the no-fault claim, the claimant has no right to additional punitive damages under Minn. Stat. § 549.20. Haagenson, supra. (Minn. Stat. §604.18 does provide some potential penalties for bad faith denials by insurance companies, but it does not apply in claims resolved by arbitration.)

When no-fault claims go to district court (either directly or in a motion to confirm a no-fault arbitration award), the district court may impose the 15% interest penalty until a judgment is entered. When 15% statutory interest is paid pursuant to Minn. Stat. § 65B.54, the claimant is not entitled to any additional award of pre-judgment interest under Minn. Stat. § 549.09. Burnice v. Illinois Farmers Ins. Co., 384 N.W.2d 615 (Minn. 1987). In Allied Property and Cas. v. Raymond, No. C3-97-1166, 1998 WL 51457 (Minn. Ct. App. Feb 10, 1998), it was confirmed that a district court had the authority, on its own motion, to add the statutorily mandated interest to an arbitration award, based upon the delay in payment from the date of the arbitration award until the time the judgment on the arbitration was entered.

Once a judgment is entered, additional interest claims are governed by post-judgment interest provisions of Minn. Stat. § 549.09 rather than an ongoing no-fault rate of 15%. Motschenbacher v. New Hampshire Ins. Group, 402 N.W.2d 119 (Minn. Ct. App. 1987). Liberty Mutual Ins. Co. v. Sankey, 605 N.W.2d 411, 414 (Minn. Ct. App. 2000).

### C. Claimant's Duty to Cooperate: Medical Examination / Statement under Oath

A standard provision of many motor vehicle insurance contracts may require a person submitting a claim to submit to an examination under oath. In Metropolitan Prop. & Cas. Ins. Co. v. King, 2003 WL 21008323 (Minn. Ct. App. May 6, 2003), a claimant refused to appear for a scheduled examination under oath. The company, claiming a breach of contract, denied benefits. The court upheld the denial and entered summary judgment in favor of the insurance company. Although an examination under oath may be required, the request for such an examination must be reasonably necessary to determine the nature and extent of the injury, the medical treatment or the loss. If a claimant refuses to cooperate in a statement under oath, both the reasonableness of the company’s request and the reasonableness of the refusal are questions of fact that may be decided by an arbitrator in a no-fault arbitration. Western National Ins. Co. v. Thompson, 797 N.W.2d 210 (Minn. 2011).

In addition to obligations created by contract, there are also certain duties to cooperate

specified in the No-Fault Act. Minn. Stat. § 65B.56, subd. 1 specifically provides that, at the request of an insurer, a claimant shall submit to an examination by a physician selected by the insurer. Under the statute, the exam is to be conducted within the statutory city of residence of the insured.

If a claimant unreasonably fails to attend a scheduled independent medical exam (IME), this unreasonable failure to cooperate will justify the insurance company's suspension of no-fault payments. Neal v. State Farm, 529 N.W.2d 330 (Minn. 1995). Generally, whether or not the insurer has made a reasonable request for an IME will be considered a question of fact which is subject to resolution in a no-fault arbitration. Weaver v. State Farm Ins. Co., 609 N.W.2d 878 (Minn. 2000).

Although the statute generally requires the IME to be conducted within the claimant's city of residence, a failure to do so does not automatically justify a failure to attend the IME. Ortega v. Farmers Ins. Group, 474 N.W.2d (Minn. Ct. App. 1991).

The most common conflict between claimant and insurer occurs when the company withholds payment of pending claims and schedules an IME. Is it reasonable for the claimant to refuse attendant at an IME until outstanding medical bills are paid? Any argument that a claimant can automatically refuse to attend an IME whenever some past bills are unpaid would be inconsistent with comments of the Minnesota Supreme Court in Weaver: "because nonpayment of some claims was contemplated by the legislature, it would appear the insured has no right based on the insurer's nonpayment to refuse a reasonably requested IME." 609 N.W.2d at 895.

The timing of a requested IME can be a factor in determining its reasonableness. In Swan v. Milwaukee Guardian Ins. Co., No. C5-99-332, 1999 WL 1057253 (Minn. Ct. App. Nov. 23, 1999), a claimant reasonably refused to attend an IME set for a week before a scheduled surgery.

The procedural history of a claim can also be significant in determining reasonableness. With respect to one of the claims consolidated for review in Weaver, the court noted that State Farm could not claim it was justified in suspending payments based on the refusal to attend an IME when State Farm had already denied benefits some months prior to requesting the IME. Weaver v. State Farm Ins. Co., 609 N.W.2d 878, 884, footnote 3 (Minn. 2000).

What options are available to an arbitrator reviewing a no-fault claim involving the failure to attend an IME? "If 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. If the arbitrator finds that the insurer is so prejudiced by the unreasonable failure to attend an IME that the insurer cannot defend against the claim, the arbitrator may proceed to deny benefits for which the IME is necessary. Where the arbitrator has determined that a request for an IME was unreasonable and the refusal reasonable, the arbitrator may or may not proceed to award benefits. For example, where the arbitrator finds that an IME is unnecessary, the arbitrator may proceed to award or deny benefits

based on the record presented.” Weaver v. State Farm Ins. Co., 609 N.W.2d 878, 885 (Minn. 2000).

If a claimant has refused to attend an IME and has commenced an arbitration, the insurer may ask the arbitrator to order the medical examination. Rule 12, Minnesota No-Fault Arbitration Rules.

The independent medical examiner is not a treating physician and does not form any doctor - patient relationship with the claimant. In Saari v. Litman, 486 N.W.2d 813 (Minn. Ct. App. 1992), the plaintiff brought an action against the doctor who examined him at the request of his no-fault insurer, alleging malpractice and battery. The Trial Court granted summary judgment for the doctor. The court of appeals affirmed the finding that no patient-physician relationship existed, and it also held that plaintiff was not entitled to damages under Minn. Stat. § 144.335 (1990) for the physician's refusal to release medical records pertaining to the examination.

#### D. Termination of Benefits and Lapse of Treatment

Minn Stat. § 65B.55, subd. 2 provides that an insurer may include in its policy a provision which terminates eligibility for no-fault benefits after a lapse of disability and medical treatment for twelve consecutive months. This disqualification is not mandated by the statute. Termination of benefits under such a provision is appropriate only if the disqualification language is in fact in the insurance contract.

It is an unfair claims practice for a company to cut off benefits due to a lapse in treatment unless the company provides advance notice of the cut off at least 60 days prior to the expiration of the twelve months. Minn. Stat. § 72A.201, subd. 6(11). However, a violation of this statute does not provide the injured plaintiff a private cause of action. An insured could likely argue in defending a claim at a no-fault arbitration that the insurer is estopped from raising the defense due to its failure to give a notice required by law. As a practical matter, many insurers are avoiding this potential unfair claims problem by advising the insured in an initial letter that no-fault benefits may lapse if the injured person goes without treatment and disability for more than one year.

A company may terminate benefits only if the claimant goes twelve consecutive months without treatment and without disability. Minn. Stat. § 65B.55, subd. 2 does not define the meaning of the term “disability” as used in this portion of the law. In Thomas v. Western Nat'l Ins. Group, 562 N.W.2d 289 (Minn. 1997), the court held that, in this portion of the No-Fault Act, the term “disability” is to be “interpreted by its plain and ordinary meaning.” The court further held that the arbitrator in that case did not err by defining the term “disability” in the lapse provision as “anything affecting the normal, physical and mental abilities of a person.” 562 N.W.2d at 290.

#### E. Arbitration of Disputes

Arbitration of no-fault disputes is administered through the American Arbitration

Association (AAA). (The Minnesota Supreme Court periodically considers requests by other organizations to administer the system, but AAA currently handles all no-fault arbitration claims.)

## 1. Jurisdiction

In 1985, binding arbitration of most no-fault disputes became mandatory under Minn. Stat. § 65B.525. (Prior to this time, arbitration was optional and was used infrequently.) The statute makes arbitration mandatory both for no-fault claims and for property damage claims under first party collision and comprehensive insurance coverages.

Mandatory binding arbitration has been found to be constitutional. Neal v. State Farm, 509 N.W.2d 173 (Minn. Ct. App. 1993), *rev'd in part* 529 N.W.2d 330 (Minn. 1995). See also Unger v. AAA, No. A-14-1885, 2015 WL 4715258 (Minn. Ct. App. Aug. 10, 2015), review denied Oct. 28, 2015. (The holding in Neal is affirmed and some procedural deficiencies are cited as preventing the constitutional issue from being more fully considered.)

An arbitrator may acquire jurisdiction over a claim even though there has not yet been a formal denial of the claim by the insurance company. In re the Claims for No-Fault Benefits Against Progressive Ins. Co., 720 N.W.2d 865 (Minn. Ct. App. 2006) review denied Nov. 22, 2006. In these consolidated Progressive Insurance Company claims, the company was investigating and litigating fraud claims against certain medical providers. However, there was no claim of fraud against the insured individuals who initiated the arbitration, and the existence of claim of less than \$10,000 was sufficient to vest the arbitrator with jurisdiction over the disputed medical bills.

### a. Jurisdictional Amount

Arbitration is mandatory only for claims which are \$10,000 or less “at the commencement of arbitration.” Minn. Stat. § 65B.525. (In 1991, the jurisdictional amount was raised from \$5,000 to \$10,000.) Jurisdiction will attach only if the amount of all pending claims at the time of the filing of the arbitration is less than \$10,000, even if a portion of the pending claim has not been formally denied until after the arbitration is commenced. Hippe v. American Family Ins. Co., 565 N.W.2d 439 (Minn. Ct. App. 1997).

If the claim is for less than \$10,000 at the time the arbitration is commenced, the arbitrator acquires jurisdiction. This jurisdiction will then apply to the entire no-fault claim, including claims which accrue from the time the arbitration is commenced until the time the hearing is actually held. So long as the pending claim is for less than \$10,000 when the arbitration is commenced by filing a request for arbitration, jurisdiction to arbitrate continues to exist even though when the arbitration hearing is held, some months later, the total claim may have grown to exceed \$10,000. Charboneau v. American Family Ins. Co., 481 N.W.2d 19 (Minn. 1992).

The interest on past due claims is not to be considered in calculating the \$10,000 jurisdictional limit. American Family Ins. Group v. Kiess, 680 N.W.2d 552 (Minn. Ct. App.

2004), review granted, but not with respect to this issue, 697 N.W. 2d 617 (Minn. 2005), footnote 2.

A claimant may not divide a single no-fault claim into separate parts in order to come within the jurisdictional limit. An arbitration under Minn. Stat. § 65B.525 is subject to the general prohibition against such a splitting of a cause of action. Charboneau v. American Family Ins. Co., 481 N.W.2d 19 (Minn. 1992); Grinnell Mut. Reinsurance Co. v. Arens, 478 N.W.2d 235 (Minn. Ct. App. 1992). However, when a claimant has no reason to know that bills arising after commencement of the arbitration are in dispute, the claimant is not splitting a cause of action by submitting these bills in a second arbitration. Peschong v. AMCO Ins. Co., No. C4-98-1882, 1999 WL 171508 (Minn. Ct. App. March 30, 1999). In Peschong, an arbitration was conducted concerning disputes over property damage and wage loss. There had never been a dispute concerning the payment of medical bills. Consequently, the insurer failed to establish that the claimant had split any cause of action by not submitting claims for unpaid medical expenses in the first arbitration. See also Heintz v. Farm Bureau Mut. Ins. Co., No. C9-00-1491, 2001 WL 118551 (Minn. Ct. App. Feb. 13, 2001).

A person is permitted to waive a portion of a potential claim in order to come within the \$10,000 jurisdictional limit. Brown v. Allstate Ins. Co., 481 N.W.2d 17 (Minn. 1992). A person who is waiving a portion of a potential claim for purposes of jurisdiction must specify the claims which are being presented and the claims which are being waived. Rule 6, Minnesota No-Fault Arbitration Rules.

Whether or not certain claims have been waived is generally an issue of fact. In Pauls v. Depositors Ins. Co., No. C6-97-13, 1997 WL 406297 (Minn. Ct. App. July 22, 1997), the insurer argued that claimant had waived claims to replacement services by failing to itemize such claims in the initial arbitration petition. The arbitrator awarded replacement services to the claimant. The replacement services claims had been routinely submitted but not formally denied until after the petition was filed. Claimant's attorney advised the company that replacement services would be an issue at the hearing. The court concluded that there is no waiver without actual or implied intent to waive a claim, and the court held that an arbitrator can consider waiver as an issue of fact. See also Heintz, in which no waiver was found for failure to present new pain clinic bills at the first arbitration when the first denial of payment for the bills did not occur until four months after the first arbitration award.

Issues involving the application of the \$10,000 jurisdictional limit to the consolidation of multiple claims are discussed below in the section dealing with the Assignment of Claims, Section V - F.

#### b. Issues of Insurance Coverage

An arbitrator generally has no jurisdiction over issues of coverage. For example, in AMCO Ins. Co. v. Ashwood-Ames, 534 N.W.2d 740 (Minn. Ct. App. 1995), the preliminary question of whether or not an accident had in fact occurred was a legal issue for a court to

decide and was not subject to arbitration. See also Myers v. State Farm Mut. Auto. Ins. Co., 336 N.W.2d 288, 291 (Minn. 1983); Vieths v. Illinois Farmers Ins. Co., 441 N.W.2d 575 (Minn. Ct. App. 1989); Safeco Ins. Co. v. Goldenberg, 435 N.W.2d 616 (Minn. Ct. App. 1989).

An insurance company may not avoid arbitration simply by labeling the denial of benefits as a dispute over “coverage.” A question of entitlement to payment of benefits will generally be subject to mandatory arbitration, and it is not to be determined in a declaratory judgment action. Viking Ins. Co. v. Clayburn, No. CX-97-371, 1997 WL 396220 (Minn. Ct. App. July 15, 1997).

### c. Issues of Law

In arbitrations involving the No-Fault Act, an arbitrator generally lacks authority to make binding decisions of law. Johnson v. American Family, 426 N.W.2d 419 (Minn. 1988); General Accident Ins. Co. v. MSI, No. C4-93-2267, 1994 WL 91189 (Minn. Ct. App. March 22, 1994). Great West Cas. Co. v. State Farm Mut. Auto. Ins. Co., 590 N.W.2d 675 (Minn. Ct. App. 1999).

In exercising jurisdiction over a claim for benefits, an arbitrator will be expected to apply established law to the facts which are presented. Karels v. State Farm Ins. Co., 617 N.W.2d 432 (Minn. Ct. App. 2000). However, a court will review *de novo* any issue of law considered in a no-fault arbitration. Johnson v. American Family, 426 N.W.2d 419 (Minn. 1988); General Accident Ins. Co. v. MSI, No. C4-93-2267, 1994 WL 91189 (Minn. Ct. App. March 22, 1994). Great West Cas. Co. v. State Farm Mut. Auto. Ins. Co., 590 N.W.2d 675 (Minn. Ct. App. 1999).

Because an arbitrator does not have authority to resolve legal issues, some insurers would argue that the arbitrator lacks the jurisdictional authority to make an award when there is a dispute over the applicable law. This argument is rejected in both Gilder v. Auto-Owners Ins. Co., 659 N.W.2d 804 (Minn. Ct. App. 2003) and Klinefelter v. Crum and Forster Ins. Co., 675 N.W.2d 330 (Minn. Ct. App. 2004). The arbitrator is authorized to make an award, and *de novo* review of any question of law may then be sought by a party to the arbitration.

A number of recent cases have involved disputes in which the insurance company wants to delay a no-fault arbitration as it pursues the litigation of claims against the medical provider. See In re Claims for No-Fault Benefits against Progressive Ins. Co., 720 N.W.2d 865 (Minn. 2006); Bernadino v. Allstate Ins. Co. 2011 WL 3654494 (Minn. Ct. App. Aug. 22, 2011); Saavedra v. Illinois Farmers Ins. Co., 2011 WL 2519214 (Minn. Ct. App. June 27, 2011); Rocha-Comacho v. Allstate Ins. Co., 2011 WL 2437499 (Minn. Ct. App. June 20, 2011). Because the claims at issue did not involve any claims of fraud or wrong-doing on the part of the injured claimant, the policy of the no-fault act favoring prompt resolution of claims authorized the arbitrators in these cases to issue awards despite the pending litigation.

#### d. Future Benefits

An arbitrator does not have jurisdiction to award future benefits. In Jarosz v. The Principle Financial Group, No. C7-90-2409, 1991 WL 70303 (Minn. Ct. App. May 7, 1991), an arbitrator's award purporting to deny all future chiropractic treatment was found to be beyond the scope of the arbitrator's authority. In LaValley v. Nat'l Family Ins. Corp., 517 N.W.2d 602 (Minn. Ct. App. 1994), the court of appeals reversed an award for future survivor's replacement services. An insured must actually incur expenses before a survivor's replacement service loss exists.

#### e. Other Jurisdictional Issues

Rule 13 of the Minnesota No-Fault Arbitration Rules provides that a claimant may withdraw an arbitration petition up until ten days prior to the hearing. In Regenscheid v. Farm Bureau Mut. Ins. Co., 652 N.W.2d 261 (Minn. 2002), the claimant sought to withdraw her petition five days prior to the hearing when she learned that her health insurer was asserting subrogation rights which brought the claim to an amount in excess of \$10,000. The insurance company objected in writing both to the withdrawal of the arbitration and to the inclusion of claims in excess of the \$10,000 jurisdictional limit. The refusal to allow withdrawal of the arbitration did not constitute a waiver of the jurisdictional limit, because the insurer had made a written objection (as required by Rule 34 of the Arbitration rules) to consideration of claims in excess of \$10,000.

An arbitrator who acquires jurisdiction over a claim may nevertheless lose jurisdiction if a decision is not issued within thirty days after the closing of the arbitration hearing. A rehearing before a new arbitrator would be required. Barneson v. Western Nat'l Mut. Ins. Co., 486 N.W.2d 176 (Minn. Ct. App. 1992), and Rule 30 Minnesota No-Fault Arbitration Rules.

### 2. Burden of Proof

Basic contract law requires that a party seeking to claim benefits under the contract has the burden of proving the facts essential to the enforcement of the contract. Nothing in the No-Fault Act alters this basic concept.

Wolf v. State Farm Ins. Co., 450 N.W.2d 359 (Minn. Ct. App. 1989) involved a no-fault claim for payment of chiropractic treatment. The insurance carrier had an independent medical examination by an orthopedic surgeon. The court held that adequate foundation existed for an orthopedist to render an opinion on the necessity for continuing chiropractic care. In this context, the court also indicated that, if the insured presents a reasonable proof of loss, the burden then shifts to the insurer to establish that the insured is not entitled to the benefits at issue. In this case, the testimony of the orthopedist was sufficient to meet that burden. But see Kelly v. American Family Ins. Co., No. C0-93-449, 1993 WL 369050 (Minn. Ct. App. Sept. 21, 1993) clarifying that the burden of proof at trial is still borne by the claimant.

In LaValley v. Nat'l Family Ins. Corp., 517 N.W.2d 602 (Minn. Ct. App. 1994), the court held that "the party claiming no-fault benefits bears the burden of proving by a preponderance of the evidence that there was an accident and that the accident arose out of the operation, use or maintenance of a motor vehicle." 517 N.W.2d at 604. In LaValley, a man driving a car died of a heart attack. The issue was whether the accident caused the heart attack or the heart attack caused the accident.

The casual connection between an injury and use of vehicle "need not be a proximate cause in the legal sense, it being sufficient that the injury is a natural and reasonable incident or consequence of the use of the vehicle." Haagenson v. Nat'l Farmers Union Property & Cas. Co., 277 N.W.2d 648, 652 (Minn. 1979).

### 3. Arbitration Procedures

The Minnesota Supreme Court has promulgated the Minnesota No-Fault Arbitration Rules governing procedures at no-fault arbitrations. The American Arbitration Association administers the no-fault arbitration process. A standing committee of twelve persons is appointed by the Supreme Court to review the no-fault arbitration system. These Rules were most recently amended effective March 2016.

Arbitration Rules 8, 9, 10, and 11 describe the process for selecting an arbitrator. The rules comply with Minn. Stat. § 572.10 subd. 2(c) in requiring an arbitrator to disclose potential conflicts. In order to assure that arbitrators experienced in handling no-fault claims are permitted to serve, Rule 10 states that an attorney who represents either claimants or insurance companies in no-fault matters is not, based on that fact alone, to be automatically disqualified from serving. Sundquist v. Mutual Ser. Cas. Ins. Co., No. C4-00-1348, 2001 WL 185020 (Minn. Ct. App. Feb. 27, 2001) refused to vacate an award on the grounds that the arbitrator was representing clients in unrelated claims against the insurance company, in the absence of evidence that the relationship affected the arbitrator's decision.

### 4. Effect of Award

Case law has made clear that arbitration awards will be binding despite policy language providing for a trial de novo. See Pierce v. Midwest Family Mut. Ins. Co., 390 N.W.2d 358 (Minn. Ct. App. 1986); Schmidt v. Midwest Family Mut. Ins. Co., 426 N.W.2d 870 (Minn. 1988). In 1989, the statute itself was amended to make arbitration binding.

A 1999 amendment to Rule 32 of the Rules of Procedure for No-Fault Arbitration explicitly establishes that the no-fault award shall not be the basis for a claim of estoppel or waiver in any other proceeding. Prior to this amendment, an adverse ruling in a no-fault case could establish collateral estoppel if the same issue were raised in a subsequent liability action. Ferguson v. Lehto, No. C8-90-1074, 1990 WL 119357 (Minn. Ct. App. Aug. 21, 1990).

In Hornamen v. State Farm Ins. Co., No. C5-94-845, 1994 WL 567639 (Minn. Ct. App.

Oct. 18, 1994), an arbitrator's general denial of no-fault claims did not collaterally estop the injured party from pursuing a subsequent arbitration involving additional no-fault benefits. The decision in the first arbitration did not specify the grounds for denying the benefits. Consequently, it was impossible for a reviewing court to determine what issues had been decided and collateral estoppel could not be applied.

## 5. Selection of Arbitrator

Rule 8 of the Minnesota No-Fault Arbitration Rules allows a party to object to a potential arbitrator after the arbitrator has been appointed. Rule 10 of the No-Fault Arbitration Rules requires an arbitrator to disclose conflicts of interest.

A party who knows of potential conflicts and who then participates in the arbitration without objection may waive the right to object after the arbitration award is issued. Andresen v. State Farm, No. C4-94-1422, 1995 WL 1490 (Minn. Ct. App. January 3, 1995).

In Unger v. AAA, No. A-14-1885, 2015 WL 4715258 (Minn. Ct. App. Aug. 10, 2015), the AAA Insurance Company challenged the impartiality of the arbitrator, who had disclosed that some of his clients had been treated by the medical providers whose bills were at issue and that he had brought claims against all major insurance companies operating in the Brainerd area. Neither the district court nor the court of appeals found this to be a basis for a finding of evident partiality. The court of appeals noted that the No Fault Arbitration Rules require that an arbitrator practice in this area of law and that it is not for the court to redesign the arbitration regime contemplated by these Rules. At \*7

## 6. Arbitrator's Authority

In most arbitrations, an arbitrator is authorized to rule on both legal and factual disputes, and the arbitrator's decision on such disputes is not subject to *de novo* review in the courts. In arbitrations involving the No-Fault Act, however, an arbitrator generally lacks authority to make binding decisions of law. Johnson v. American Family, 426 N.W.2d 419 (Minn. 1988); General Accident Ins. Co. v. MSI, No. C4-93-2267, 1994 WL 91189 (Minn. Ct. App. March 22, 1994). Great West Cas. Co. v. State Farm Mut. Auto. Ins. Co., 590 N.W.2d 675 (Minn. Ct. App. 1999). See the discussion above concerning issues of jurisdiction.

A no-fault arbitrator is without authority to award benefits which are not covered either by the no-fault statute or by the no-fault contract. Great West Cas. v. Kroning, 511 N.W.2d 32 (Minn. Ct. App. 1994). Likewise, an arbitrator generally lacks authority to resolve coverage disputes. Vieths v. Illinois Farmers Ins. Co., 441 N.W.2d 575 (Minn. Ct. App. 1989); Safeco Ins. Co. v. Goldenberg, 435 N.W.2d 616 (Minn. Ct. App. 1989).

An arbitrator does have an obligation to rule on all of the claims which are presented at the arbitration. In Olson v. Auto-Owners Ins. Co., 659 N.W.2d 283 (Minn. Ct. App. 2003) an arbitrator made no ruling on one medical claim presented and stated that the claimant should be permitted to bring the claim again at a later date if new evidence became available. This portion of the decision was vacated as exceeding the authority of an

arbitrator, and the case was remanded for a substantive decision on the claim.

An arbitrator has the discretion to make evidentiary decisions concerning evidence proffered at a hearing. In Goven v. Viking Ins. Co. of Wisconsin, No. CX-97-404, 1997 WL 406593 (Minn. Ct. App. July 22, 1997), an arbitrator refused to admit an expert opinion at the hearing for lack of foundation since the expert was not qualified to give a medical opinion. The court upheld the arbitrator's ruling, indicating that it would "surely require at least as much deference" as a trial court.

An arbitrator may not award costs for testimony of expert witnesses, unless the expert appears at the request of the arbitrator. Kerber v. Allied Group Ins., 516 N.W.2d 568 (Minn. Ct. App. 1994).

Neither a judge nor an arbitrator has authority to award attorney's fees in no-fault cases. LaValley v. Nat'l Family Ins. Corp., 517 N.W.2d 602 (Minn. Ct. App. 1994).

## 7. Appealing an Arbitration Award

A no-fault arbitration award may be appealed to the district court. The procedures are set forth in Minnesota Ch. 572, the Uniform Arbitration Act.

There must be a final award by the arbitrator before an appeal can be commenced. In State Farm Mut. Auto. Ins. Co. v. Ahmed, 689 N.W.2d 306 (Minn. Ct. App. 2004), an arbitrator repeatedly extended opportunities for a claimant to attend an independent medical examination, and the claimant repeatedly failed to go to the scheduled exams. State Farm finally appealed the arbitrator's decision continuing the no-fault arbitration hearing. The court had no jurisdiction to review the arbitrator's interlocutory order, and State Farm's appeal of the arbitrator's order is dismissed. Judicial review can occur only after the final order is issued.

There is some potential controversy over how service of process must be made in appealing a no-fault arbitration award to the District Court. The No-Fault Arbitration Rules allow service of process by mailing the appeal documents to the other party or, if the party is represented, to the other party's attorney. However, Minn. Stat. § 572.23 governing arbitrations provides that "unless the parties have agreed otherwise," an application to reverse or modify an arbitration award "shall be served in the manner provided by law for the service of a summons in an action."

The No-Fault Arbitration Rules were amended in 1999 by the Minnesota Supreme Court to provide that service of process pursuant to Minn. Stat. § 572.23 shall be made as provided in Rule 29 of the No-Fault Arbitration Rules. Under Rule 29, each party shall be deemed to have agreed that papers, notices or process necessary for any court action in connection with an arbitration may be served by mail or facsimile. The 1999 amendment to Rule 29 makes explicit that "any court action in connection" with an arbitration includes an "application for the confirmation, vacation, modification or correction of an award issued."

Would it be reasonable to assume that the specific No-Fault Arbitration Rules, rather than the more general arbitration statutes, govern the appeal process in no-fault arbitrations? Decisions of the court of appeal cast some doubt on the proper answer to that question. See Leek v. American Express Prop. Cas., 591 N.W.2d 507 (Minn. Ct. App. 1999); Allstate Ins. Co. v. Allen, 590 N.W.2d 820 (Minn. Ct. App. 1999). These cases were decided prior to the 1999 amendments to the no-fault rules. Each case held that the arbitration statute had to be followed in order to gain review of a no-fault arbitration award. 591 N.W.2d at 511; 590 N.W.2d at 823. Moreover, the court held that the procedures set forth in the arbitration statute would supersede any different procedures for obtaining district court jurisdiction which might be found in the No-Fault Arbitration Rules. 591 N.W.2d at 510.

As a practical matter, the following approach seems to be appropriate. Minn. Stat. § 572.23 governing review of arbitration awards in the district court explicitly allows the parties to agree upon an appropriate method for serving appeal papers. If an appeal of an arbitration award is contemplated, it would be reasonable for the parties to reach a prompt written agreement allowing service of papers by mail, in conformity with the No-Fault Rules. In the absence of agreement, service pursuant to the rules of civil procedure would be prudent.

#### F. Direct Claims by Providers – Assignment of Claims

It is common practice for a medical provider to submit bills for payment to no-fault insurance and for the insurance company to make a direct payment to the provider. When a claim is denied by the no-fault insurer, does the medical provider have any options for directly contesting the insurance company's refusal to pay? A provider may opt to take an assignment of rights from the insured individual. The provider then may attempt to assert these contractual rights of the insured individual against the insurance company.

Similarly, some vendors that repair property damage to vehicles routinely take an assignment of insurance claims in order to be paid for the car repairs. Under the terms of the assignment, these providers then assert the rights of the insured when attempting to enforce a right to be paid under the terms of the motor vehicle insurance policy.

Three issues have been litigated with respect to assignments. (1) If the contract says that claims cannot be assigned, is the assignment unenforceable as being contrary to the contract? (2) In cases where the assignment is enforceable, is an individual claim for less than \$10,000 subject to mandatory arbitration? (3) If a number of assigned claims are subject to arbitration, can they be consolidated for arbitration without violating the \$10,000 jurisdictional limit?

##### 1. Anti-Assignment Contract Language

The Supreme Court provided some general guidelines concerning the assignment of claims against a policy of motor vehicle insurance in Stand Up Multipositional Advantage MRI, PA v. American Family Ins. Co., 889 N.W.2d 543 (Minn. 2017). Stand Up

Multipositional Advantage (SUMA) did MRI scans. Before doing a scan, SUMA required the patient to sign a document assigning to SUMA all rights and causes of action against any “Payer.” The document said that SUMA was not required to reduce its claim based upon attorney’s fees or costs that the patient might incur in any attempt to recover payment of SUMA’s bills. (SUMA also claimed a lien on any recovery under the Uniform Commercial Code.)

Based upon the rights in the assignment document, SUMA then sued American Family Insurance, together with eight patients and seven attorneys. American Family claimed that the assignment was unenforceable because of language in the insurance policy saying the “[i]nterest in this policy may be assigned only with [American Family’s] written consent.” American Family had not given consent to these assignments.

The Supreme Court held that American Family’s contract provision was enforceable. American Family was entitled to summary judgment dismissing SUMA’s claims against the company. The Court gave two alternative reasons for its conclusion.

One justification for enforcing the anti-assignment contract language was found in the general common law principle that such clauses are enforceable. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267 (Minn. 2004). (Travertine involved a management contract, not an insurance policy.)

The Court then provides a second reason for enforcing the contract. The Court acknowledges that in some cases an anti-assignment clause would not be enforceable because it conflicts with a statute or with clearly established public policy. Reviewing cases from other states, the Court acknowledges the existence of a general rule saying that assignments made prior to a “loss” will not be enforced. Under the No-Fault Act, a “loss” involving medical expenses occurs when the patient gets the bill for the medical services that have been provided. Consequently, the SUMA assignment occurred prior to the “loss” as defined in the No-Fault Act. Under the majority rule, the assignment is therefore not enforceable.

Because the anti-assignment clause was enforceable against SUMA under either of the two rationales, the Court did not find it necessary to determine which rule applies in the context of no-fault benefits.

In contrast to the SUMA decision, the decision in Star Windshield Repair, Inc. v. Western National Ins. Co., 768 N.W.2d 346 (Minn. 2009) allowed the assignment of claims for the cost of windshield repair despite the anti-assignment contract language. The opinion cited the extensive statutory regulation of such claims, which essentially removed the insured customer from the payment process. (Although the assignment at issue occurred prior to the billing for the service, the assignment for glass repair was considered to involve a “post-loss” claim. The decision in this case was unusual because three justices did not participate in the decision. The remaining four justices agreed on an outcome for the case, but they divided 2-2 concerning the rationale. Two justices upheld the assignments based upon the specific statutory scheme related to windshield repair. Two

other justices relied on more general principles that permitted the specific assignment of post-loss claims.) The 2009 Supreme Court decision would supersede the result in Auto-Owners Ins. Co. v. Star Windshield Repair, Inc., 743 N.W.2d 329 (Minn. Ct. App. 2008), where the anti-assignment language was enforced.

Some earlier lower court decisions have also discussed the assignment issue.

In Physicians Neck & Back Clinics, P.A. v. Allied Ins. Co., No. A05-1788, 2006 WL 2053142 (Minn. App. July 25, 2006), review denied Oct. 17, 2006, the court enforced the non-assignment language, and the direct claim by the medical provider was dismissed. Then, in Isles Wellness Inc. v. Progressive Ins. Co., 2009 WL 2928548 (Minn. Ct. App. Sept. 15, 2009), the court of appeals reasoned that assignment of specific claims arising after a loss had been incurred would be valid. (An earlier related case, Isles Wellness, Inc. v. Progressive Northern Ins. Co., 725 N.W.2d 90 (Minn. 2006), had not reached these issues but had determined only that claims would not be voided due to an alleged violation of statutes related to the corporate practice of medicine.) Likewise, Med. Scanning PA v. Metropolitan Property and Casualty Ins. Co., 2011 WL 2750708 (Minn. Ct. App. July 18, 2011), explicitly held that medical providers should be allowed to compel arbitration in the same vein as auto-glass repair companies.” Id. at \*3. The SUMA decision would replace the analysis given in these cases.

## 2. Mandatory Arbitration

The Minnesota Supreme Court considered issues related to the assignment and arbitration of claims for the cost of replacing damaged glass in Illinois Farmers Ins. Co. v. Glass Service Co. Inc., 683 N.W.2d 792 (Minn. 2004). The court held that the assigned claims remained subject to mandatory arbitration provisions of the No-Fault Act and remanded the cases to the lower court. (The validity of the underlying assignments was not at issue in this decision.)

If the claim is for an amount of less than \$10,000, the assignment of the claim remains subject to the mandatory arbitration provisions of the No-Fault Act.

## 3. Consolidation of Arbitration Claims

Illinois Farmers Ins. Co. v. Glass Service Co. Inc., 683 N.W.2d 792 (Minn. 2004) allowed the assignment of claims relating to glass replacement and held that they were subject to mandatory arbitration. The case was then remanded. On remand, the lower court was to determine whether or not some consolidation of such claims could be effected prior to arbitration in the no-fault system.

Following the remand in these glass cases, the district court did order the consolidation of claims. The No-Fault Standing Committee, in considering consolidated claims, then applied the statutory provision requiring that claims at the commencement of arbitration be for an amount of less than \$10,000. In applying the No-Fault Act, the Committee worked with the parties in these glass claims to provide a cost effective forum in which

aggregated claims of \$10,000 or less, with common underlying issues of fact, can be arbitrated.

It appears that the No-Fault Standing Committee retains a policy of refusing to accept a provider's request to schedule arbitration for consolidated claims that have been assigned to the provider unless such consolidation has been ordered by a district court, as it was in the Glass Service decision.

## VI. Relationship to Other Benefits

### A. Coordination Generally

Except for cases involving workers' compensation, the no-fault insurance carrier is the primary source of coverage for payment of medical expenses and loss of income benefits.

No-fault has been around long enough so that most health insurance and disability contracts explicitly provide that no-fault benefits are primary. Most health insurance carriers and many disability policies provide for subrogation against no-fault insurance carriers. The exact relationship between no-fault and these other forms of insurance can be determined only by reviewing the disability and health insurance contracts. See Wallace v. Tri-State Ins. Co., 302 N.W.2d 337 (Minn. 1980). Kleinwatcher v. Time Ins. Co., 302 N.W.2d 647 (Minn. 1981).

In Hoeschen v. Mut. Service Ins. Co., 359 N.W.2d 677 (Minn. Ct. App. 1984), medical expenses which had been paid by the United States Army were submitted to no-fault for payment. The Army asserted a claim for reimbursement only in the amount of \$6,000, although the actual expenses incurred were much higher. The court held that the injured party could receive a windfall for the duplicate payment, since the other alternative would be to provide the no-fault carrier with the windfall for not having to pay its contractual obligation.

The no-fault insurance carrier is entitled to a credit in circumstances where a jury awards a specific amount for future damages which would otherwise be covered by no-fault. See Ferguson v. Illinois Farmers Ins. Group, 348 N.W.2d 730 (Minn. 1984).

### B. Workers' Compensation Benefits

Minn. Stat. § 65B.61, subd. 1 provides that workers' compensation benefits are primary over basic economic loss benefits. The precise calculations which occur when an individual is entitled to both workers' compensation and no-fault wage loss benefits is discussed in earlier sections of this article dealing with no-fault benefits.

It should be noted that workers' compensation does not provide any payments for replacement services. In cases where replacement services are likely to be needed, it is appropriate to file an application for no-fault benefits, even though medical expenses and loss of income are going to be covered by workers' compensation, not by no-fault. The no-fault carrier will retain its obligation to pay replacement services claims.

In Allied Property and Cas. Co. v. Raymond, No. C3-97-1166, 1998 WL 51457 (Minn. Ct. App. Feb. 10, 1998), a no fault carrier was required to make payments when workers' compensation benefits were denied; however, after the injured person eventually succeeded in obtaining workers' compensation benefits for the same losses, the no fault insurer was then able to obtain a judgment against the injured party for recovery of the no fault payments that had been awarded in an arbitration.

Klinefelter v. Crum and Forster Ins. Co., 675 N.W.2d 330 (Minn. Ct. App. 2004) confirms that no-fault benefits must be paid after workers' compensation benefits have been denied. Klinefelter initially lost his work comp payments because he changed treating doctors without first getting permission. Klinefelter's unsuccessful workers' compensation appeal did not bar the no-fault claim, either through estoppel or through res judicata, because the claim in the workers' compensation forum did not provide a full and fair opportunity to litigate the no-fault claim.

Generally, however, a settlement of the workers' compensation claim will bar attempts to obtain no-fault benefits. American Family Ins. Group v. Udermann, 631 N.W.2d 424 (Minn. Ct. App. 2001). See also Payzant v. State Farm Mut. Auto. Ins., 2005 WL 1432390 (Minn. Ct. App. June 21, 2005); LaNasa v. State Farm Mut. Auto. Ins. Co., 2005 WL 1331725 (Minn. Ct. App. June 7, 2005).

### C. Medicare

Early language in the No-Fault Act indicated that Medicare benefits would be primary to no-fault. However, Congress changed the Medicare law in 1980 to make Medicare secondary to any no-fault coverage. It took until mid-1983 for the federal government to issue regulations implementing the federal law. Since mid-1983, however, it has been clear that no-fault is primary. If Medicare does pay a bill which should have been covered by no-fault, Medicare has the right to claim a subrogation interest against any no-fault coverage.

## VII. Miscellaneous Issues

### A. Indemnity

Under certain circumstances, the insurance carrier paying no-fault benefits has a right of indemnity against the driver who negligently caused the injury. A right of indemnity exists if the negligent driver was operating "a commercial vehicle of more than 5,500 lbs. curb weight." Minn. Stat. §65B.53, subd. 1. The indemnity right, however, is limited to collisions which occur within the State of Minnesota. State Farm Mut. Auto. Ins. Co. v. Great West Cas. Co., 623 N.W.2d 894 (Minn. 2001). Any rights of indemnity or contribution for accidents outside of Minnesota would be governed by the laws of the state in which the accident occurred.

Generally, a vehicle over 5,500 lbs. will be considered a commercial vehicle if it is a common carrier, or if it is used in the for-hire transportation of property, or if it is a vehicle designed and used for carrying more than 15 persons. Minn. Stat. § 65B.43, subd. 12.

Minn. Stat. § 65B.53, subd. 1 does exempt from the definition of a "commercial vehicle" any vehicle listed in § 65B.47, subd. 1(a). Generally, this includes commuter vans, vehicles being used for family daycare or for school sponsored activities, and buses being operated in the State of Minnesota.

If a right of indemnity does exist, it is enforceable only through compulsory arbitration between the two insurance carriers. Minn. Stat. § 65B.53, subd. 4. See Nat'l Indemnity Co. v. Mut. Service Cas. Co., 311 N.W.2d 856 (1981).

A pickup truck towing a trailer may meet the definition of a commercial vehicle if the combined weight is in excess of 5,500 lbs. Farmers Ins. Group v. General Cas. Companies, 446 N.W.2d 923 (Minn. Ct. App. 1989).

A six-year statute of limitations applies to indemnity claims. In Metropolitan Property & Cas. Ins. Co. v. Metropolitan Transit Commission, 538 N.W.2d 692 (Minn. 1995), the Supreme Court decided that the statute of limitations would begin to run on the date when the first no-fault payment is made. The six-year statute applies even in a death claim, since the indemnity claim is not created or controlled by the wrongful death act (where a three year statute of limitations would apply). State Farm v. Liberty Mut. Ins. Co., 678 N.W. 2d 719 (Minn. Ct. App. 2004).

In Great West Cas. Co. v. State Farm Mut. Auto. Ins. Co., 590 N.W.2d 675 (Minn. Ct. App. 1999), State Farm argued that the arbitrator should apply pure comparative fault in an indemnity procedure to reimburse State Farm for no-fault benefits it paid to its insurer. The arbitrator found that the truck driver was 10% at fault and ordered the truck's insurance company to reimburse State Farm 10% of the benefits that it had paid. The court of appeals reversed the arbitrator's award and held that the comparative fault principles of Minn. Stat. § 604.01 applied in indemnity proceedings. Because the injured person was more at fault than the truck driver, the truck driver was not liable for damages.

## B. Effect of Release in Liability or Uninsured Motorist Claim

A woman is injured as a passenger in her husband's car when it collides with another vehicle. A settlement with both drivers is reached and the written Release of the claim against the husband releases "any and all claims" against his "principals, agents and representatives." State Farm argues this Release constitutes a waiver of all future no-fault benefits. Citing Balderrama v. Milbank Mut. Ins. Co., 324 N.W.2d 356 (Minn. 1982), the Court found that a release of liability claims without an explicit reference to statutory no-fault benefits does not end the insurer's obligation to pay no-fault benefits. Goeske v. State Farm Mut. Auto. Ins. Co., No. C3-89-1588, 1990 WL 10688 (Minn. Ct. App. Feb.13, 1990).

Care should be taken, however, in the settlement of uninsured motorist or underinsured motorist claims, especially when the insurance carrier is also handling no-fault benefits. A release of uninsured or underinsured claims that explicitly releases the company for obligation for all future medical expenses might be read to bar future no-fault claims against the company. It is a good practice to note on a release for any liability, uninsured, or underinsured claim that the payment being made does not duplicate any claim for past or future no-fault benefits, paid or payable.

## C. Overpayments

Minn. Stat. § 65B.54, subd. 4 allows an insurance company to recover overpayments only when the overpayments are caused by "an intentional misrepresentation of a material fact."

Under this section of the law, an insurance company may either bring an action to recover the overpayments or may offset the overpayment against any other basic economic loss which would otherwise be due to the claimant. In Johnson v. United Services Auto. Assoc., 493 N.W.2d 570 (Minn. 1992), an insurance company made mistakes in calculating benefits and this caused an overpayment. The Supreme Court confirms the literal reading of the statute, indicating that, without an intentional misrepresentation, there is no right to recover the overpayment.

In Viking Ins. Co. v. Clayburn, No. CX-97-371, 1997 WL 396220 (Minn. Ct. App. July 15, 1997), the court determined that a claimant was entitled to arbitrate unpaid no-fault claims but that the insurer could nevertheless litigate in district court its claim for restitution of benefits which had been paid prior to the no-fault cut off.

Ohio Cas. Group v. Salo, No. C3-97-776, 1997 WL 739331 (Minn. Ct. App. Dec. 2, 1997). Insurer makes overpayments to insured who had returned to work without telling the insurer. There is no evidence that the insured lied or that the insurer asked the insured if he had resumed working. The court holds that there is no fraudulent misrepresentation and denies the company's request for reimbursement.

#### D. Effect on Insurance Premiums

As of 1992, Minn. Stat. § 72A.20, subd. 23(d) provides that a company may not use no-fault benefits paid as an underwriting standard if the applicant was 50% or less negligent in the accident causing the claims.

#### E. No-Fault Claims after a Jury Trial on the Liability Claim

State Farm Mut. Auto. Ins. Co. v. Lennartson, 872 N.W.2d 524 (Minn. 2015) reviewed two consolidated cases in which no-fault claims were made after a jury verdict had been returned on the underlying tort claim. In each case an arbitrator awarded no-fault benefits and the awards were affirmed by the Supreme Court.

In the Lennartson claim, a jury had awarded medical expenses and the liability insurance payment following the verdict had paid a bit over \$12,000 in medical expenses. These same bills were then claimed in a no-fault arbitration and the arbitrator awarded about \$11,800 for the bills and interest. Because there is no statutory provision requiring an arbitrator to offset no-fault claims and because existing precedents do not apply collateral estoppel between liability actions and no-fault arbitrations, the award is affirmed.

In the consolidated Foss claim, Ms. Foss had not received any net award for either wage loss or medical expenses in the jury trial. The subsequent no-fault arbitrator awarded a bit over \$12,000 for past medical expense and wage loss. This award was affirmed. The arbitrator was permitted to consider the jury findings, but they were not binding.

The Supreme Court determined that the plan language of the No-Fault Act did not bar the recovery for the medical expense loss and that principles of collateral estoppel did not bar recovery. The no-fault insurer is simply paying what the No-Fault Act requires. Public policy arguments concerning double recovery are issues for the Legislature, and the court will simply apply the plain language of the statute to the facts presented.

The Lennartson court acknowledged that an earlier decision, Ferguson v. Ill. Farmers Ins. Group Co. 348 N.W.2d 730 (Minn. 1984), had allowed a no-fault insurer a credit for future medical expenses that had been awarded as damages in the related tort action. The court said that *Ferguson* was to be distinguished on procedural grounds, because no-fault and negligence claims in *Ferguson* had been consolidated in one trial. 872. N.W.2d at 537.

Another pre-Lennartson decision, Nelson v. American Family Ins. Group, 651 N.W.2d 499 (Minn. 2002), involved a no-fault claim for wage loss brought after a jury verdict in related South Dakota tort litigation. The South Dakota jury had awarded over \$20,000 in damages for past wage loss. Nelson then brought a district court action in Minnesota for her wage loss under no-fault. The court observed that the no-fault insurer, if it had paid its \$20,000 in wage loss promptly, would have been able to assert a subrogation claim in the South Dakota tort litigation. If American Family as the no-fault insurer now paid Nelson \$6,666.67, (1/3 of the \$20,000 incurred by Nelson as attorney's fees), the result would put the parties "in the same financial position as in section 65B.53 subrogation." 651 N.W.2d, at 509. Given this logic, and given the explicit holdings in Lennartson, it would appear that

the result in Nelson will be limited to out-of-state accidents.

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