

Effective Techniques for Arbitrating No-Fault Claims

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ARBITRATING NO-FAULT CLAIMS

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ARBITRATING NO-FAULT CLAIMS

I. INTRODUCTION

Any practitioner handling automobile claims in Minnesota must have a solid understanding of the no-fault system. Practitioners on both sides of the fence agree that the stakes involved in a no-fault claim have significantly increased over the last several years. While there are still some nominal claims being arbitrated, a larger percentage of these claims now seem to involve amounts far in excess of the \$10,000.00 jurisdictional limit. Minn. No-Fault Arb. R. 6. The savvy Plaintiff (Claimant) practitioner keeps a close watch on the amount of medical bills or wage loss accruing following a denial of benefits by the insurer so that he/she can time the filing of the Petition for Arbitration within the jurisdictional limit set for the American Arbitration Association (“AAA”) to avoid waiver issues while also letting the claim continue to accrue up to the time of the hearing. See *Karels v. State Farm Ins. Co.*, 617 N.W.2d 432 (Minn. Ct. App. 2000)(when a claim for no-fault benefits is within the jurisdictional limit for arbitration under Minn. Stat. § 65B.525, subd. 1, at the time the petition is filed, the later addition of claims beyond that limit does not defeat jurisdiction and does not constitute prohibited claim splitting if the additional claims accrued after the filing of the petition.) See also *Regenscheid v. Farm Bureau Mut. Ins. Co.*, 652 N.W.2d 261 (Minn. 2002)(a no-fault insurer does not waive the jurisdictional limit by proceeding with an arbitration if the insurer objects in writing to the arbitration of claims in excess of the jurisdictional limit, pursuant to Minn. No-Fault Arb. R. 34).

An insurer, under our current system of AAA arbitration cannot compel arbitration of a disputed claim, and thus has little control over an accruing claim. By the time a claim ends up in arbitration, it often exceeds the value an insurer pays out on many bodily injury settlements. These claims must be taken seriously, and handled in an experienced professional matter, and should be managed similarly to any district court lawsuit.

To maximize success in no-fault arbitration, defense counsel must be able to quickly identify the key issues in dispute, determine and make appropriate recommendations to allow the insurer to resolve or proceed to arbitrate the claim, investigate the claim, gather the appropriate information, and utilize available procedural strategies. The following outline is intended to provide some guidance toward effectively increasing the chances of success at arbitration.¹

¹ The author wishes to credit Theodore J. Smetak, Greg Johnson, Eugene C. Shermoen, Karen Melling van Vliet, and Paula Duggan Vraa for their various contributions to fine tuning the way we handle no-fault claims over the years, as each of them has, in some fashion contributed to some of the topics set forth in these materials.

II. ESSENTIAL ELEMENTS OF A NO-FAULT CLAIM

When preparing and evaluating any claim for no-fault arbitration, it is important to ensure the four essential elements for a no-fault claim have been met:

A. Injury Resulting in Loss

Minn. Stat. § 65B.43, subd. 11 defines injury as *bodily harm* or death. Minn. Stat. § 65B.43, subd. 7 defines loss as *economic* detriment. Things like pain and suffering and loss of earning capacity are not economic losses, and are not compensable as no-fault benefits.

B. Caused by an Accident

Minn. Stat. § 65B.46 requires, like most no-fault insurance policies, an “accident” before no-fault benefits are payable. Minn. Stat. § 65B.42 requires the accident be an “automobile accident.” See *McIntosh v. State Farm Mut. Auto. Ins. Co.*, 488 N.W.2d 476 (Minn. Ct. App. 1992) (discussing what is an “accident” within the confines of the No-Fault Act).

C. Arising from Maintenance or Use

The injury must arise out of the “maintenance or use” of a motor vehicle. Minn. Stat. § 65B.46. “Maintenance” and “use” questions are very fact specific, and often result in litigation. See, *Assoc. Ind. Dealers, Inc. v. Mut. Svc. Ins. Co.*, 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975); *Classified Ins. Corp. v. Vodinelich*, 368 N.W.2d 921 (Minn. 1985) (use of a motor vehicle to commit suicide but also causing deaths of others), and *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987). The Minnesota Supreme Court developed a three-pronged analysis for analyzing “maintenance or use” cases which have now become known as the *Klug factors*:

1. Was there a sufficient causal connection between the use of the automobile and the injury?
2. Was there an act of independent significance which broke the causal link between the use and the injuries?
3. Was the use of the vehicle for transportation purposes?²

² For a comprehensive extensive analysis of maintenance and use and other no-fault or automobile insurance issues, please refer to Theodore J. Smetak, et al., the *Minnesota Motor Vehicle Insurance Manual* (3d. Ed. 2000).

There are a vast number of cases analyzing the issue of maintenance or use, and they are very fact specific and should be consulted if you are confronting a question of maintenance or use. See Smetak, *The Minnesota Motor Vehicle Insurance Manual* (3d. Ed. 2000), and 2001 - 2004 *Supp.* See also, *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62 (Minn. 1992); *Illinois Farmers Ins. Co. v. Duffy*, 618 N.W.2d 613 (Minn. Ct. App. 2000); *Midwest Family Mutual Insurance Company v. Schmitt*, 651 N.W.2d 843 (Minn. Ct. App. 2002).

Prior to 1996 and the Supreme Court's decision in *Allied Mut. Ins. Co. v. Western Nat'l Mut. Ins. Co.*, 552 N.W.2d 561 (Minn. 1996), a fact specific analysis was applied to each case involving occupancy of a vehicle. The court would have to decide whether there was a reasonable proximity between the person and his/her vehicle when the injury occurred. If there was a reasonable proximity, then the injured party was eligible for no-fault benefits. However, that proximity test or analysis has now been refined by insurance policy language, Minn. Stat. §65B.43, subd. 3, and also by *Allied*, 552 N.W.2d 561. Minn. Stat. § 65B.44, subd. 1 says a person is only entitled to no-fault benefits if they are injured arising out of the maintenance or use of a motor vehicle. Maintenance or use of a motor vehicle is defined as:

[a] vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicle unless the conduct occurs off the business premises, or (2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.

Minn. Stat. §65B.43, subd. 3. Minn. Stat. §65B.43, subd. 3 eliminates eligibility for no-fault benefits for a person who is simply standing outside of a vehicle but has not yet attained the status of entering into, alighting from or occupying. *Allied* and *Marklund v. Farm Bureau Mut. Ins. Co.*, 400 N.W.2d 337 (Minn. 1987), *rev'g* 391 N.W.2d 65 (Minn. Ct. App. 1986) both say the court must also apply the insurance policy's definition of occupancy to decide what conduct or status qualifies to meet eligibility for benefits. If the policy says a person must be physically in the vehicle, physically upon the vehicle, physically stepping out of, or stepping into the vehicle to qualify for no-fault benefits, that policy definition controls. *Allied*, 552 N.W.2d 561; *Marklund*, 400 N.W.2d 337.

In *Allied*, the Minnesota Supreme Court determined the Plaintiff, who was struck by another vehicle while she was standing next to the vehicle waiting for her companion to unlock the door and allow her entry as a passenger, was not occupying the vehicle when she was injured. 552 N.W.2d 561. Thus, she was disqualified from collecting no-fault benefits. The court expressly held that the proximity to the vehicle or the “geographic perimeter” test is no longer the focus of the court’s analysis in deciding maintenance and use. *Id.* Rather, the language found in the insurance policy will control. If the policy language requires a person to be physically entering into, alighting from, or occupying a vehicle to qualify for no-fault benefits, that is where the analysis ends. No longer will a person be able to qualify simply by being reasonably close to the vehicle. In *Allied*, the Supreme Court did away with the idea that to “occupy” means any “reasonable geographic perimeter around a vehicle or a continuing relationship between a vehicle and the claimant.” *Id.* at 563, *citing Horace Mann Ins. Co. v. Neuville*, 465 N.W.2d. 432, 433 (Minn. Ct. App. 1991). The court strongly rejected the “geographic perimeter” and “continuing relationship” tests created by various earlier Court of Appeals decisions³ decided prior to *Allied* in 1996.

Prior to *Allied*, there was a line of cases extending from 1989 to 1996 in which the Court of Appeals analyzed the “occupancy” issue in terms of a two-factor test which focused on: (1) whether the accident took place within a “reasonable geographic perimeter” of the insured vehicle, and (2) whether the injured person maintained a “continuing relationship” with that vehicle. Smetak, *Minnesota Motor Vehicle Insurance Manual*, p. 17.⁴ “The focus of the two-factor test was on the ‘immediate relationship between the [injured person] and the vehicle within a reasonable geographic perimeter.’” *Id.*, *citing Klein v. U.S. Fidelity & Guar. Co.*, 451 N.W.2d 901, 903 (Minn. Ct. App. 1990), *review denied*, (Minn. Mar. 27, 1990). In *Allied*, the Supreme Court now says “geographic perimeter” is not the test, but rather “the plain-language definition

³ The phrase “entering into” is to be given its plain, popular, and ordinary meaning; a person 10 feet away from a vehicle is not “entering into” a motor vehicle for purpose of deciding coverage under an automobile insurance policy even if that person intends to get into the vehicle once he reaches it. *Ostendorf v. Arrow Ins. Co.*, 288 Minn. 491, 182 N.W.2d 190 (1970); *cf. Haagenson v. National Farmers Union Property & Cas. Co.*, 277 N.W.2d 648 (Minn. 1979)(an individual reaching for the pickup truck door who was electrocuted by a downed power line, was “entering into” the vehicle). These are additional examples of the line of “geographic perimeter” and “continuing relationship” cases now bright lined by the Supreme Court’s definition of “occupancy” in *Allied*, 552 N.W.2d 561.

⁴ See also *Geiser v. Home Indem. Co.*, 484 N.W.2d 256 (Minn. Ct. App. 1992); *Dohman v. Housely*, 478 N.W.2d 221 (Minn. Ct. App. 1991)[further citations omitted]; *Conlin v. City of Eagan*, 482 N.W.2d 519 (Minn. Ct. App. 1992); *Horace Mann Ins. Co. v. Neuville*, 465 N.W.2d 432 (Minn. Ct. App. 1991), *review denied*, (Minn. Mar. 27, 1991); *Klein v. U.S. Fidelity & Guar. Co.*, 451 N.W.2d 901 (Minn. Ct. App. 1990), *review denied*, (Minn. Mar. 27, 1990); *State Farm Mut. Auto. Ins. Co. v. Levinson*, 438 N.W.2d 110 (Minn. Ct. App. 1989).

of “occupying” in the insurance policy” is what applies. *Smetak* at p. 18, citing *Allied Mutual*, 552 N.W.2d 561. Indeed, the court explained “the policy definition is plain and straightforward and affords no excuse for creating some recondite definition which can be molded to fit whatever conclusions is convenient.” *Id.* at 563. The court noted that the earlier line of cases created too much ambiguity in trying to measure the closeness of a person to the exterior of the vehicle. *Id.*, at 563-64.

Several cases followed which applied the new bright line rule in *Allied* which requires the injured party to be physically occupying the vehicle, physically entering into, or physically exiting the vehicle. A person who is not actually in a vehicle, or at least getting into or out of a vehicle, is not “occupying” the vehicle. *Id.* at 564. Applying the post-1996 change set forth in *Allied*, the Court of Appeals decided *Short v. Midwest Family Mut. Ins. Co.*, 602 N.W.2d 914 (Minn. Ct. App. 1999) to hold that a tow truck driver while walking toward the lift controls at the rear of his truck was not “occupying” the truck, and therefore could not collect underinsured motorist benefits from the policy covering the tow truck. While *Short* might have qualified as an “occupant” under the old “geographic perimeter” and “continuing relationship” test prior to *Allied*, the Court of Appeals held that now under *Allied*, the fact that the tow truck driver was “near to” or “in proximity to” the tow truck was insufficient to qualify him for coverage. *Id.* The Court of Appeals applied the policy definition of “occupying” literally which required that the tow truck driver either be “in, upon, getting in, on or off” the tow truck. *Id.* See also *Sullivan v. City of Minneapolis*, 570 N.W.2d 8 (Minn. Ct. App 1997)(rejecting occupancy for a police officer injured while chasing a fleeing suspect on foot disqualifying him for uninsured motorist benefits); *Harbold v. National Cas. Co.*, 1997 WL 40720 (Minn. Ct. App. Feb. 4, 1997) (woman was not occupying a vehicle after she had already alighted from her vehicle after she stepped out of her van onto the icy path, had both feet on the ground, closed the door, let go of the van, turned toward her apartment building, took a step, slipped on ice, and fell injuring herself); *Cartwright v. Illinois Farmers Ins. Co.*, 1998 WL 612918 (Minn. Ct. App. Sept. 15, 1998)(holding a person injured standing outside of a truck after the truck had slid into a ditch, was not “occupying” the truck for purposes of coverage); and *Hines v. St. Paul Ins. Co.*, 1996 WL 330532 (Minn. Ct. App., June 18, 1996), *review granted*, (Minn. Aug. 6, 1996), *remanded*, (Minn. Aug. 29, 1996), *opinion after remand*, 1997 WL 3390 (Minn. Ct. App. Jan. 7, 1997), *petition for review granted and summarily rev’d*, (Minn. Mar. 4, 1997)(highway construction worker standing outside his truck and using a jackhammer connected to the truck was not “occupying” the truck). Injuries that stem from the *maintenance or use* of a motor vehicle are often troublesome and are very fact-specific. See *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987). Injuries involving the *use* of a vehicle may not be compensable by no-fault because they were not caused by an “accident”. Similarly an injury

that arises out of an accident by a car thief, or someone who is racing, are excluded from no-fault coverage by Minn. Stat. § 65B.58. Injuries caused by a motor vehicle accident that occur while the person is in the course and scope of his/her employment are covered by the No-Fault Act's priority scheme which makes worker's compensation the primary source of coverage for the injured employee. Minn. Stat. § 65B.61, subds. 2 and 2a. However, the no-fault insurer can be required to coordinate benefits. See *Klinefelter v. Crum and Forster Ins. Co.*, 675 N.W.2d 330 (Minn. Ct. App. 2004)(but the no-fault arbitrator is not bound by an administrative law judge's decision on the worker's compensation benefits where there was a denial of work. comp. benefits and the claim was then submitted to the no-fault insurer).

Whether the vehicle was being for transportation purposes also creates issues, particular when the vehicle is parked or idling, or perhaps temporarily abandoned. See *Alexis v. State Farm Mut. Auto. Ins. Co.*, 696 N.W.2d 109 (Minn. Ct. App. 2005)(insured was not using his automobile for transportation purposes when was found dead from carbon monoxide poisoning, lying in the back seat of his automobile, which was parked in the closed garage with the keys in the ignition); cf. *Norwest Bank Minn., N.A. v. State Farm Mut. Auto. Ins. Co.*, 588 N.W.2d 743 (Minn. 1999)(decedents were using their vehicle for transportation purposes when they accidentally left their car running in the garage and went inside for the night, fell asleep and died of carbon monoxide poisoning); see also *Thougan v. Auto-Owners Ins. Co.*, 310 N.W.2d 116 (Minn. 1981).

Acts of independent significance typically involve criminal activities, shootings, hunting accidents, suicides, or other circumstances. However, the Supreme Court says that alcohol intoxication is not an act of independent significance sufficient to destroy the link between the use of the vehicle for transportation purposes and an eventual injury from frostbite. See *Dougherty v. State Farm Mut. Ins. Co.*, 699 N.W.2d 741 (Minn. 2005). After a night of drinking at a bar, the claimant in *Dougherty* drove about 10 blocks to her apartment and got her car stuck in a snowdrift when she was about within just over 300 feet of her apartment. Weather and windchill were below zero, and yet claimant got out of the car, locked her keys, hat, and gloves inside, and attempted to walk the remaining distance to her apartment. In the process, she had to use her hands and arms to push herself through a snowbank created by a snowplow. Once on the other side of the snowbank, she slipped and fell on the ice in the parking lot adjacent to her apartment building and was apparently unable to regain her footing. So, she crawled on the ice, and then apparently fell asleep near her garage. After a half hour or so, she woke up, and banged on her door so her daughter would let her in. Some of her fingers had to be amputated due to frostbite. Walking through the *Klug* factors, the court found a causal connection between the injury and the maintenance or use of the vehicle is established because the injury was a natural and reasonable incident or consequence of the vehicle's use (e.g. encountering a snowbank and icy parking lot). *Id. citing N. River Ins. Co. v. Dairyland Ins. Co.*, 346 N.W.2d 109, 113 n.2 (Minn. 1984). The court rejected State Farm's argument that intoxication constituted an act of independent significance, justifying its

decision by saying the No-Fault Act is to provide benefits regardless of fault. Further, that nothing within the language of the No-Fault Act excludes coverage for drivers whose intoxication causes the accident.

1. Exclusions to Maintenance or Use

Minn. Stat. §65B.43, subd. 3 provides two specific exclusions from maintenance or use:

(1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or **(2)** conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.

a). Within the Business of Repairing Vehicles

Conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles does not qualify for motoring insurance coverage, but this exclusion only applies to employees of the business and not patrons. *Horace Mann Ins. Co. v. Goebel*, 504 N.W.2d 278 (Minn. Ct. App. 1993).

b). Loading or Unloading

Injuries that occur while loading or unloading a motor vehicle are excluded unless the conduct occurs while occupying, entering into or alighting from the vehicle. But, if language in the insurance policy provides coverage for loading or unloading that is broader than the statute, the insurance policy language will control. See e.g. *Galle v. Excalibur Ins. Co.*, 317 N.W.2d 368 (Minn. 1982); *Grinnell Mut. Reinsurance Co. v. Bunne*, 1998 WL 297510 (Minn. Ct. App. June 9, 1998); *Himle v. American Family Mut. Ins. Co.*, 445 N.W.2d 587 (Minn. Ct. App. 1989), review denied, (Minn. Nov. 1989); *Krupenny v. West Bend Mut. Ins. Co.*, 310 N.W.2d 133 (Minn. 1981); and *Petrick v. Transport Ins. Co.*, 343 N.W.2d 876 (Minn. Ct. App. 1984).

D. Involvement of a Motor Vehicle

Minn. Stat. § 65B.43, subd. 2 defines “motor vehicle” as “every motor vehicle, other than a motorcycle or other vehicle with fewer than four wheels, which (a) is required to be registered pursuant to Chapter 168. . .”

However, be aware that if you determine the vehicle in question does not meet the statutory definition, you must also review the applicable insurance policy definition. If a vehicle is not required to be registered, it will likely not be required to carry no-fault coverage. *Cf. Mutual Service Casualty Insurance Company v. League of Minnesota Cities Insurance Trust*, 659 N.W.2d, 755 (Minn. 2003) *reversing* 646 N.W.2d 546 (Minn. Ct. App. 2002) (certain government vehicles are not “motor vehicles” for no-fault purposes; a marked police car does not fall within the definition of “motor vehicle” found at 65B.43 subd. 2); but see *State Farm Mut. Auto. Ins. Co. v. Metropolitan Council, et al.*, 854 N.W.2d 249 (Minn. Ct. App. 2014), rev. denied Dec. 16, 2014 (holding that buses operated by metropolitan council are “motor vehicles” for purposes of the No-Fault Automobile Insurance Act). See also *North Star Mut. Ins. Co. v. Raincloud*, 563 N.W.2d 270 (Minn. Ct. App. 1997), *review denied*, (July 10, 1997)(an ATV is not a “motor vehicle”); *Great American Ins. Co. v. Golla*, 493 N.W.2d 602 (Minn. Ct. App. 1992)(a farm tractor is not a “motor vehicle”); *Anderson v. American Cas. Co. of Reading, Pa.*, 504 N.W.2d 467 (Minn.), *rev’d* 497 N.W.2d 302 (Minn. Ct. App. 1993)(a bulldozer is not a “motor vehicle”); *Western Nat. Ins. Group v. City of Effie*, 1995 WL 34813 (Minn. Ct. App. Jan. 31, 1995)(a parade vehicle is not a “motor vehicle”). But, certain trailers if attached to a motor vehicle that qualifies may be vehicles. See *North River Ins. Co. v. Dairyland Ins. Co.*, 346 N.W.2d 109 (Minn. 1984); *Galle v. Excalibur Ins. Co.*, 317 N.W.2d 368 (Minn. 1982); *Wiczek v. Shelby Mut. Ins. Co.*, 416 N.W.2d 768 (Minn. Ct. App. 1987); *Holzemer v. Millers' Mut. Ins. Co. of Illinois*, 359 N.W.2d 291 (Minn. Ct. App. 1984).

III. COVERAGE AND LEGAL ISSUES

Oftentimes coverage and legal issues have not been raised until claimant files the Petition for Arbitration. One of the first inquiries for defense counsel should be whether or not the no-fault claim involves coverage or legal issues. One of the many hurdles insurers face when defending no-fault arbitration claims is the failure to raise legal or coverage issues until the time of the hearing. Claimant will prefer to keep the claim in arbitration as it is a more favorable venue for them. When legal or coverage issues are raised at arbitration, claimant’s counsel will try to “spin” them as factual issues to maintain the arbitrator’s jurisdiction and ability to decide the claim.

Legal questions, policy and coverage issues, or those claims which involve interpretation of or application of the Minnesota No-Fault Act are not subject to

arbitration. *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419 (Minn. 1988). Similarly, if an arbitrator does not determine all of the issues presented to the arbitrator, the arbitrator exceeds his/her authority. *Olson v. Auto-Owners Ins. Co.*, 659 N.W.2d 283 (Minn. Ct. App. 2003). The right to claim no-fault benefits depends on whether the injury was caused by an accident. This requirement is found in the Minnesota No-Fault Act, as well as most policies of no-fault insurance. See Minn. Stat. § 65B.46, subds. 1 and 2. Unlike bodily injury, underinsured, and uninsured motorist claims which view an “accident” from the perspective of the victim or injured party, an “accident” in a no-fault claim is to be viewed from the perspective of the tortfeasor. See *Petersen v. Croft*, 447 N.W.2d 903 (Minn. Ct. App. 1989); *Wilson v. State Farm Mutual Auto Ins. Co.*, 451 N.W.2d 216 (Minn. Ct. App. 1990). If the injury occurred while the vehicle was being used, but was not caused by an “accident” there is likely to be no coverage.

When a coverage issue or legal question is spotted at the outset, defense counsel can cultivate a procedural advantage and avoid arbitrating a claim that should be litigated in District Court. Coverage and legal issues are beyond the scope of an arbitrator’s authority. While a no-fault arbitrator’s authority is limited to deciding fact questions, a no-fault arbitrator *may* decide legal questions, but the arbitrator’s decisions on legal questions are subject to de novo review by the court. *Gilder v. Auto-Owners Ins. Co.*, 659 N.W.2d 804 (Minn. Ct. App. 2003); *Weaver v. State Farm Ins. Co.*, 609 N.W.2d 878 (Minn. 2000). These issues properly belong before the District Court.

The following is a quick checklist⁵ to help identify and focus on the appropriate issues, and to sift out those that are legal or coverage:

A. Type of Claimant

- Driver
- Occupant
- Pedestrian

Whether or not no-fault coverage is available under the insurer’s policy often depends upon whether the injured person is an insured under the policy. Claimant’s status as a driver, occupant or pedestrian will govern where they go for coverage in accordance with the priority system of the Minnesota No-Fault Act. See Minn. Stat. § 65B.47.⁶

⁵ Refer to the No-Fault File Checklist which contains a condensed listing of issues for quick assessments of these issues. In my office, we like to attach this list to the inside cover of our files so the attorney and paralegals can keep these concepts in mind when handling no-fault files.

⁶ For ease of reference, refer to the laminated No-Fault Priority Chart.

If the named insured on the policy is a business or other commercial entity, the injured party may not qualify as an “injured person” under that particular policy for no-fault benefits, and would be required to go elsewhere for coverage. See Minn. Stat. § 65B.47.

The general rule requires most persons injured in an accident while using or maintaining a vehicle to go to their own policy of insurance (where they are a named insured) for no-fault coverage, or to the policy where they are a resident relative. Minn. Stat. § 65B.47. An “insured” is defined in both Minn. Stat. § 65B.43, subd. 5, and the insurance policy.

B. Type of Vehicle

- Work vehicle
- Commercial
- Personal
- Does it meet the definition of “motor vehicle” as defined in the statute?

Minn. Stat. § 65B.46, subd. 1 and most, if not all, policies of no-fault insurance require the injury to arise out of the *maintenance or use* of a motor vehicle. Certain types of vehicles change the priority scheme of no-fault insurance and this could result in your defending an insurer who is not the appropriate source for no-fault benefits. This analysis may allow you to shift coverage elsewhere, and if appropriate, to assert a claim for reimbursement of no-fault benefits which should have been paid by another insurer who was higher in priority or is “closer to the risk”. Priority for payment of no-fault benefits is set forth in Minn. Stat. § 65B.47. If a business vehicle is involved in the accident, the insurer of that vehicle may have priority over the insured’s personal auto policy if the facts fit within the provisions of § 65B.47, subds. 1, 2, or 3. Minn. Stat. § 65B.47, subd. 6.

Look carefully at accidents involving types of vehicles other than an automobile or a truck; it is possible that no-fault coverage may not apply because the accident does not involve a “*motor vehicle*” as that term is defined by Minn. Stat. § 65B.43, subd. 2. For example, motorcycles are not motor vehicles for purposes of no-fault coverage under the No-Fault Act, although they may be included in the definition of “motor vehicle” in some no-fault policies. See Minn. Stat. § 65B.46, subd. 3, and Minn. Stat. § 65B.43, subd. 13. Keep in mind that while trailers can be considered “motor vehicles” under the No-Fault Act while they are connected to, or being towed by, a motor vehicle, tractors are not. See *e.g.*, *North River Ins. Co. v. Dairyland Ins. Co.*, 346 N.W.2d 109 (Minn. 1984); *Galle v. Excalibur Ins. Co.*, 317 N.W.2d 368 (Minn. 1982); *Wiczek v. Shelby Mut. Ins. Co.*, 416 N.W.2d 768 (Minn. Ct. App. 1987); *Great American Ins. Co. v. Golla*, 493 N.W.2d 602 (Minn. Ct. App. 1992).

Don't forget to confirm the vehicle was actually insured under your policy (the policy at issue) at the time of the accident.

C. Use of Car at Time

Beyond the aforementioned issues of maintenance and use, and whether the person was injured while maintaining or using the vehicle, the specific use of the vehicle involved must be closely looked at. All of these questions involve legal issues which are not subject to arbitration. *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419 (Minn. 1988).

1. Exclusions to No-Fault Benefits

The No-fault Act contains four specific exclusions to no-fault benefits. Injuries that arise from stolen (converted) motor vehicles; races; intentional injuries; and motorcycles are excluded from coverage. Therefore, it is important when analyzing entitlement by the claimant to collect no-fault benefits to know what use the car was being put to at the time of the injury.

a. Car thief

Minn. Stat. §65B.58 precludes coverage from the stolen vehicle, and only allows the claimant (thief) to go to a policy under which he/she is actually a named insured.

b. Racing

Injury or death resulting from racing will not qualify for no-fault benefits under any policy of insurance nor under the Minnesota Assigned Claims Plan. See Minn. Stat. §65B.64, subd. 1(b). This section also disqualifies injuries which result from "practice or preparation" for official racing contests. See *Jopp v. Auto-Owners Ins.*, 376 N.W.2d 535 (Minn. Ct. App. 1985)(claimant was not injured "in the course of an official racing contest because he was injured in the public parking lot immediately after the race while pushing his inoperable racing car through the lot toward its trailer and was struck by a spectator's vehicle.)

c. Intentional Acts

The No-Fault Act specifically precludes no-fault benefits for injuries stemming from accidents which are intentional in several respects:

A person intentionally causing or attempting to cause injury to self or another person is disqualified from basic or optional economic loss benefits for injury arising from those acts, including benefits otherwise due the person as a survivor. If a person dies as a result of intentionally causing or attempting to cause injury to self, survivors are not entitled to basic or optional economic loss benefits for loss arising from the death. A person intentionally causes or attempts to cause injury if the person acts or fails to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow. A person does not intentionally cause or attempt to cause injury (1) merely because the act or failure to act is intentional or done with the realization that it creates a grave risk of causing injury or (2) if the act or omission causing the injury is for the purpose of averting bodily harm to the person or another person.

Minn. Stat. § 65B.60 mandates that a person causing or attempting to cause injury to self or another person is disqualified from no-fault benefits. According to the statute, a person intentionally causes or attempts to cause injury if they act or fail to act intending to cause injury and know that injury is substantially certain to follow.

Minn. Stat. § 65B.605 bars claims for bodily injury or property damage by persons who are purportedly injured or suffered a loss as a result of a peace officer pursuit.

If a person intends to cause harm to themselves or another, they may be excluded from no-fault benefits. See *Brandenberg v. Auto-Owners Ins. Co.*, 352 N.W.2d 97 (Minn. Ct. App. 1984)(conflicting evidence as to whether claimant had intentionally injured herself by jumping from a moving vehicle); *Classified Ins. Corp. v. Vodinelich*, 368 N.W.2d 921 (Minn. 1985), *rev'g*, 354 N.W.2d 63 (Minn. Ct. App. 1984)(mother committed suicide by idling her automobile in a closed garage); *Alexis v. State Farm Mut. Auto. Ins. Co.*, 696 N.W.2d 109 (Minn. Ct. App. 2005)(carbon monoxide death from car idling).

d. Motorcycles

A motorcycle is not a motor vehicle, a person can purchase an insurance policy that includes no-fault coverage for injuries while on a motorcycle. See Minn. Stat. §65B.46, subd. 3. Some insurance policies give a broader definition, and this may require coverage where the statute would not. But, a pedestrian who is injured as a result of being struck by a motorcycle will be entitled to receive no-fault benefits. Minn. Stat. § 65B.46, subd. 1.

D. Priority of Payment for No-Fault Benefits

Determining which insurer is the primary source of payment for no-fault benefits falls under Minn. Stat. §65B.47:

Subd. 1. In case of injury to the driver or other occupant of a motor vehicle, if the accident causing the injury occurs while the vehicle is being used in the business of transporting persons or property, the security for payment of basic economic loss benefits is the security covering the vehicle or, if none, the security under which the injured person is an insured.

Subd. 1a. Exemptions. Subdivision 1 does not apply to:

- (1) a commuter van;
- (2) a vehicle being used to transport children as part of a family or groupfamily day care program;
- (3) a vehicle being used to transport children to school or to a school- sponsored activity;
- (4) a bus while it is in operation within the state of Minnesota as to any Minnesota resident who is an insured as defined in section 65B.43, subdivision 5;
- (5) a passenger in a taxi; or
- (6) a taxi driver, provided that this clause applies only to policies issued or renewed on or after September 1, 1996, and prior to September 1, 1997.

Subd. 2. In case of injury to an employee, or to the employee's spouse or other relative residing in the same household, if the accident causing the injury occurs while the injured person is driving or occupying a motor vehicle other than a commuter van furnished by the employer, the security for payment of basic economic loss benefits is the security covering the vehicle or, if none, the security under which the injured person is an insured.

Subd. 3. In the case of any other person whose injury arises from the maintenance or use of a motor vehicle described in subdivision 1 or 2 who is not a driver or occupant of another involved motor vehicle, the security for the payment of basic economic loss benefits is the security covering the vehicle, or if none, the security under which the injured person is an insured.

Subd. 4. In all other cases, the following priorities apply:

(a) The security for payment of basic economic loss benefits applicable to injury to an insured is the security under which the injured person is an insured.

(b) The security for payment of basic economic loss benefits applicable to injury to the driver or other occupant of an involved motor vehicle who is not an insured is the security covering that vehicle.

(c) The security for payment of basic economic loss benefits applicable to injury to a person not otherwise covered who is not the driver or other occupant of an involved motor vehicle is the security covering any involved motor vehicle. An unoccupied parked vehicle is not an involved motor vehicle unless it was parked so as to cause unreasonable risk of injury.

Subd. 5. If two or more obligations to pay basic economic loss benefits are applicable to an injury under the priorities set out in this section, benefits are payable only once and the reparation obligor against whom a claim is asserted shall process and pay the claim as if wholly responsible, but the reparation obligor is thereafter entitled to recover contribution pro rata for the basic economic loss benefits paid and the costs of processing the claim. Where contribution is sought among reparation obligors responsible under subdivision 4, clause (c), proration shall be based on the number of involved motor vehicles.

Subd. 6. Where a reparation obligor pays basic economic loss benefits which another reparation obligor is obligated to pay under the priority provided in this section, the reparation obligor that pays is subrogated to all rights of the person to whom benefits are paid.

Subd. 7. Unless a policyholder makes a specific election to have two or more policies added together the limit of liability for basic economic loss benefits for two or more motor vehicles may not be

added together to determine the limit of insurance coverage available to an injured person for any one accident. An insurer shall notify policyholders that they may elect to have two or more policies added together.

Determining who is primary for coverage for no-fault benefits depends on the type of vehicle involved, the claimant's status - whether the claimant is an insured, a driver, an occupant, or a pedestrian. Minn. Stat. §65B.47. See also *Murphy v. Milbank Mut. Ins. Co.*, 320 N.W.2d 423 (Minn. 1982). Typically, a claimant will submit a claim for no-fault benefits to his/her own personal automobile insurer. If the claimant is not an "insured" under a personal automobile insurance policy, the claimant will then look to the insurer of the motor vehicle involved in the accident. If the claimant is an occupant, he/she will submit the no-fault claim to the insurer of the vehicle he/she is riding in or occupying at the time of the accident. If the claimant is not occupying a vehicle, meaning he/she is a pedestrian, the claimant may submit the no-fault claim to any motor vehicle involved in the collision.

But, analyzing priority does not only depend on the status of the individual, it also depends upon the type of vehicle involved, and the purpose for which that vehicle is being used. If the vehicle is being used for a business purpose, the priority shifts the obligation for payment of no-fault benefits away from the personal automobile policy to the business insurer. See Minn. Stat. §65B.47, subds. 1, 2, and 3. See e.g. *Mid-Century Ins. Co. v. American Fam. Ins. Co.*, 2000 WL 1468282 (Minn. Ct. App. Oct. 3, 2000)(a person delivering mail in his own privately-owned vehicle is using the vehicle in the business of transporting property, so when that vehicle collided with a snowmobile, the insurance on the automobile was the first priority for the payment of no-fault claims for the injured snowmobiler); *Illinois Farmers Inc. Co. v. The League of Minnesota Cities Ins. Trust*, 617 N.W.2d 428 (Minn. Ct. App. 2000)(the insurer for a stationary bookmobile was not primary for no-fault benefits when a woman was injured while alighting from the bookmobile because the bookmobile was not being used in the business of transporting property at the time of the accident); *AMCO Ins. Co. v. Independent Sch. Dist. No. 622*, 627 N.W.2d 683 (Minn. Ct. App. 2001)(the personal no-fault insurer of an injured bicyclist who collided with a bus transporting children had to afford no-fault benefits to the injured bicyclist because a vehicle used to transport children to school is exempt from the higher priority level established for vehicles used in the business of transporting persons or property). (See separate laminated priority chart for a quick reference).

IV. PREPARING TO ARBITRATE THE NO-FAULT CLAIM

Never underestimate the value of preparation and documentation in a no-fault claim. There are times when the claims all begin to look alike, but when you separate the layers, and start digging into the documents, you find subtle and in some cases substantial differences. One of the most important parts of defending a no-fault claim is gathering records. Oftentimes it feels like you are doing claimant's counsel's job, but in reality, you are preparing the most crucial aspect of your case.

Claimant in a no-fault arbitration holds the burden of proof to show the ultimate burden of entitlement to benefits. *LaValley v. Nat'l. Family Ins. Corp.*, 517 N.W.2d 602 (Minn. Ct. App. 1994). The burden of proof lies with the party claiming benefits under the No-Fault Automobile Insurance Act, to show by a preponderance of the evidence that the claimant is eligible for benefits. *Alexis v. State Farm Mut. Auto. Ins. Co.*, 696 N.W.2d 109 (Minn. Ct. App. 2005). There is a distinction between the burden of going forward and the burden of proof. The insured seeking no-fault benefits carries the same initial burden as every other claimant, which is to demonstrate that there is a basis for a claim for covered benefits. Once claimant meets that burden, it then shifts to the insurer to show some basis for denial or, at least, contested grounds. If the insurer fails to meet its burden, claimant necessarily prevails. However, if the insured creates a disputed claim, the ultimate burden of proof of entitlement to no-fault benefits rests with the claimant. *Id.* See also *Kelly v. American Family Ins. Co.*, No. C0-93-449, 1993 WL 369050 (Minn. Ct. App. Sept. 21, 1993).

Claims should and can be denied for improper documentation and support. The key to efficient handling and resolution of no-fault claims is documentation. Claimants' attorneys usually appreciate that insurers must justify payments they make with documentation verifying compensability of the claim. Claimants' attorneys can resolve their clients' no-fault claims most effectively by providing the insurer with all appropriate documentation as early as possible. A surprising number of claims end up in arbitration because they simply have not been properly documented to justify the insurance company's payment. From respondent's perspective, documentation is vital to the successful handling of the claim as well as to success in arbitration. Medical and employment records may reveal additional factual defenses and identify additional sources for exploration and investigation. Conversely, a failure to disclose information may be used effectively against the claimant in arbitration. Defense counsel's request should not be viewed as unreasonable or invasive, because the information sought is nothing more than that which the claimant will need to present at arbitration to prove up the claim. Claimant's strategy should be to provide the insurer and defense counsel with proof of the claim at the earliest date possible. When claimants fail or refuse to provide proper

documentation, it is often assumed by the insurer and defense counsel alike that the claim is not meritorious. Claimants' failures can often feed one of the most obvious defense arguments: claimant has failed to prove the compensability of his or her claim.

A. Medical Expense Claims

Medical expense claims are governed by Minn. Stat. §65B.44, subd. 2 which provides:

(a) Medical expense benefits shall reimburse all reasonable expenses for necessary:

(1) medical, surgical, x-ray, optical, dental, chiropractic, and rehabilitative services, including prosthetic devices;

(2) prescription drugs;

(3) ambulance and all other transportation expenses incurred in traveling to receive other covered medical expense benefits;

(4) sign interpreting and language translation services, other than such services provided by a family member of the patient, related to the receipt of medical, surgical, x-ray, optical, dental, chiropractic, hospital, extended care, nursing, and rehabilitative services; and

(5) hospital, extended care, and nursing services.

(b) Hospital room and board benefits may be limited, except for intensive care facilities, to the regular daily semiprivate room rates customarily charged by the institution in which the recipient of benefits is confined.

(c) Such benefits shall also include necessary remedial treatment and services recognized and permitted under the laws of this state for an injured person who relies upon spiritual means through prayer alone for healing in accordance with that person's religious beliefs.

(d) Medical expense loss includes medical expenses accrued prior to the death of a person notwithstanding the fact that benefits are paid or payable to the decedent's survivors.

(e) Medical expense benefits for rehabilitative services shall be subject to the provisions of section 65B.45.

Minn. Stat. §65B.44, subd. 2

1. Elements Required:

- Reasonable
- Necessary
- Directly Related

In accordance with the No-Fault Act, in order to be compensable, the medical expense must be for treatment which is reasonable, necessary and directly related to the subject accident. Minn. Stat. § 65B.44, subd. 2. Remember there must be an actual physical injury. Claims for psychological or mental health treatment are not compensable without physical injury. *Anderson v. AMCO Ins. Co.*, 541 N.W.2d 8 (Minn. Ct. App. 1995).

Watch for claims brought by claimant seeking reimbursement for payments made by health insurers. Some health insurers are contractually subrogated to the claimant's right to medical expense benefits. If this is the case, the health insurer may have the exclusive right to recover medical expense benefits from the no-fault insurer, not the claimant. *Strand v. Illinois Farmers Ins. Co.*, 429 N.W.2d 266, 270-71 (Minn. Ct. App. 1988).

The No-Fault Act provides that medical expense benefits shall reimburse all reasonable expenses for necessary medical "services", including "prosthetic devices". In *Gilder v. Auto-Owners Ins. Co.*, 659 N.W.2d 804 (Minn. Ct. App. 2003), the Court of Appeals addressed the issue of what constitutes a "service" or "prosthetic device", and concluded that the mattress and box spring are not "services". The Court of Appeals stated: "Minn.Stat. § 65B.44, subd. 2(a)(1), does not require reimbursement for any reasonable and necessary expense for an item that provides relief; it requires reimbursement only for reasonable expenses for necessary specifically identified services and prosthetic devices." *Id.* at 808.

An actual cost or expense must be incurred before medical expenses are compensable as a no-fault benefit. The No-Fault Act does not provide reimbursement for the *value* of medical services or products. See *Great West Cas. Co. v. Kroning*, 511 N.W.2d 32 (Minn. Ct. App. 1994)(value of time expended by a spouse for nursing services to an injured spouse after discharge from the hospital were not compensable because no cost was incurred, even though similar services provided in a nursing home may have been compensable).

Medical expense benefits are payable monthly as the loss accrues, or when expense is actually incurred by the injured person. Minn. Stat. §65B.54, subd. 1.

Medical expenses must result from a physical injury. *Anderson v. AMCO Ins. Co.*, 541 N.W.2d 8 (Minn. Ct. App. 1995)(loss resulting from psychological or mental impairment is not covered by the No-Fault Act absent any physical injury).

Costs of medical examinations that are not conducted for the purposes of medical treatment are similarly not compensable. See *Krummi v. MSI Ins. Co.*, 363 N.W.2d 856 (Minn. Ct. App. 1985)(an exam that was not necessary for treatment, but instead was obtained to aid in trial preparation is not payable as a no-fault medical expense benefit).

Issues of causation are often the subject of arbitration. The motor vehicle accident must be at least a probable factor in producing the injury at issue. See *Ruppert v. Milwaukee Mut. Ins. Co.*, 392 N.W.2d 550 (Minn. Ct. App. 1986). The no-fault insurer is responsible for paying only those losses caused by the accident, and not due in part to other causes. Anything that is non-auto related can be carved out as unrelated, and should not be paid by the no-fault insurer. See *Rodgers v. Progressive Specialty Ins. Co.*, 499 N.W.2d 61 (Minn. Ct. App. 1993)(court held that where a treating physician assigns 50 percent of treatment to a pre-existing accident and 50% to the covered automobile accident, the no-fault carrier is only responsible for the percentage allocated to the accident in question). After *Rodgers*, came *Great West Cas. Co. v. Northland Ins. Co.*, 548 N.W.2d 279 (Minn. 1996), and 6th Minnesota Supreme Court questioned the propriety of apportioning causation as was done in *Rodgers*. In *Great West*, the claimant had injured his left

shoulder in a 1988 automobile accident, and his no-fault insurer paid for the expense. In 1991, he again dislocated his shoulder while at work, and the worker's compensation insurer paid for the medical bill, but claimed the injuries were partially caused by the earlier car accident and brought a claim for subrogation against the no-fault insurer. The Supreme Court held that only one accident can be deemed to be the cause of injury for purposes of subrogation among no-fault insurers and the statute was not meant to provide a right of subrogation where one carrier claims it overpaid benefits because the physical condition was caused by more than one accident.

After *Great West*, came *Scheibel v. Illinois Farmers Ins. Co.*, 615 N.W.2d 34 (Minn. 2000). Scheibel was injured in two separate motor vehicle accidents two months apart. The first accident resulted in a neck injury for which chiropractic treatment was sought. The second accident resulted in neck surgery and disability from work. The same no-fault insurer was involved in both accidents, and the policy limits for medical benefits for the second accident were exhausted. Arbitration was filed and the arbitrator determined that 35% of the medical expenses (and wage losses) were attributable to the first accident and 65% to the second. The Supreme Court determined that if a claimant is injured in two separate accidents and both contribute to the need for treatment or income losses, the no-fault carrier for the second accident is responsible to pay up to its policy limit regardless of whether the first accident was a greater contributing cause. However, if the first accident was a contributing factor to the need for treatment or income losses, and the limit for the second accident is exhausted, the claimant may return to the insurer for the first accident if he still has losses attributable to the first accident. Both accidents contributed to Scheibel's injuries, both occurred within a short time of each other and injuries were hard to separate out being cumulative in nature, and both accidents contributed to the medical expense and income losses.

Subsequent to *Scheibel*, the Supreme Court revisited the issue of apportionment in cases involving prior non-motor vehicle injuries in *Pususta v. State Farm Ins. Co.*, 632 N.W.2d 549 (Minn. 2001). In *Pususta*, the claimant sought no-fault benefits from her insurer for injuries that she sustained in an automobile accident. At the time of the accident, the claimant was receiving chiropractic treatment for back and neck injuries she had sustained five years earlier in a horse riding accident. Claimant alleged that following

the car accident, her pain worsened and her chiropractor concluded that the accident exacerbated her pre-existing injuries. Claimant had argued that her insurer could not apportion her benefits. But, the Minnesota Supreme Court said neither of its decisions in *Great West* nor *Scheibel* prohibited from apportioning whether the particular medical expenses for which the claimant sought reimbursement resulted from the car accident injuries versus the horse accident injuries. The Court found that some of the medical expenses arose within the no-fault system and some outside. Therefore, the Court remanded the case back to the arbitrator with an express instruction to award only those reasonable medical expenses for treatment of injuries caused by, or aggravated by, the automobile accident. Further, the Court expressly mandated that the medical expenses for the injuries caused by the horse-riding accident should be denied. Based on *Pususta*, a no-fault arbitrator should deny payment of medical expenses that are not related to a car accident.

2. Information to be Obtained

The No-Fault Act places an affirmative obligation upon the claimant to provide all information necessary for the insurer to properly evaluate the claim. Minn. Stat. § 65B.56, subd. 1 provides in part as follows:

An injured person shall also do all things reasonably necessary to enable the obligor to obtain medical reports and other needed information to assist in determining the nature and extent of the injured person's injuries and loss, and the medical treatment received.

At the outset of the case, defense counsel for respondent should request a complete and detailed itemization of all medical expenses claimed as allowed by Rules 5(e) and 12 of the Minnesota No-Fault Arbitration Rules. This request should include copies of all medical bills, prescriptions, and mileage logs. In order to ascertain what medical records claimant intends to rely on at the arbitration hearing, defense counsel should also request complete copies of all medical records relating to the claim at issue, and should also request separate executed authorizations directed to all medical providers claimant has seen

in the seven years prior to the accident in accordance with Rule 12(2) of the Minnesota No-Fault Arbitration Rules.

When assessing and evaluating records that are coming in, defense counsel should be looking for opinions regarding permanent injury, causation of the injury, and apportionment of injuries between other accidents/injuries and/or other prior conditions.

a. Prior Medical Records

Medical treatment will not be compensable unless it is related to an automobile accident. Therefore, it is proper to inquire into claimant's prior physical condition. Prior medical records can be useful to confirm the existence of a pre-existing condition or direct causation to the accident/claimed injury, support the independent examiner's conclusions, and/or to impeach claimant's credibility.

b. Independent Medical Exams

If defense counsel has any input on the independent medical examination to be performed, respondent is best advised to avoid examiners that are generally reputed to be less than impartial in their evaluations. No-fault claims that cannot be resolved will generally end up in arbitration before a local attorney who is familiar with the various physicians and examiners. If that arbitrator is primarily engaged in handling claimants' cases, the arbitrator is likely to give little or no weight to the opinion of a doctor viewed as a "defense" practitioner.

The same holds true for claimants, however. They too would be wise to choose more neutral, and less "plaintiff" practitioners. Certain practitioners' opinions have the same lack of impact on the respondent insurer or its defense counsel when evaluating a no-fault claim because of this perceived bias. Choosing a more neutral practitioner from a claimant's perspective can affect the view toward settlement, and may increase the likelihood of resolution short of arbitration.

c. Cooperation and Suspension

The Minnesota No-Fault Act specifically provides that an injured party shall submit to a physical examination by a physician or physicians selected by the no-fault insurer as may reasonably be required. Minn. Stat. § 65B.56, subd. 1. The statute further imposes an affirmative obligation on the claimant to “do all things reasonably necessary” to assist the no-fault carrier in evaluating the claim. In addition to the statutory duty to cooperate, most automobile insurance policies include a contract provision requiring the insured’s cooperation and submission to a physical examination. The policies typically provide that, as a condition precedent to asserting a claim for benefits, the insured must fulfill his or her obligation to attend an examination. Minn. Stat. § 65B.56, subd. 1 does *not* limit the insurer to one examination. Additional examinations may be permitted as reasonably required.

An insurer requesting an IME for a no-fault claim as allowed by Minn. Stat. § 65B.56, subd. 1 should “notify the insured of all of the insured’s rights and obligations under that statute including the right to request, in writing, and to receive a copy of the report of the examination.” Minn. Stat. § 72A.201, subd. 6(12).

If claimant refuses to attend an independent medical examination, respondent can suspend payment of further no-fault benefits. A claimant’s failure to cooperate may be viewed as a breach of the insurance contract. Minn. Stat. § 65B.56, subd. 1 provides that evidence of noncompliance is admissible in any subsequent hearing or trial for no-fault benefits or in any suit or arbitration. Minn. Stat. § 65B.56, subd. 1 also provides a claimant’s refusal to cooperate in an examination or failure to cooperate in furnishing information as authorized by the statute is admissible evidence of in any suit or arbitration.

In cases where the claimant fails to attend a scheduled independent medical examination, the admissibility of a claimant’s non-cooperation is not the exclusive sanction for the failure to attend an IME. *Neal v. State Farm Mut. Ins. Co.*, 529 N.W.2d 330 (Minn. 1995). The *Neal* Court

indicated that the insurance policy itself might provide an alternative basis for suspension of benefits.

In *Neal*, the court specifically held that in cases where the insured fails to attend a scheduled IME, the insurer may suspend (rather than terminate) its payment of no-fault benefits until the claimant has submitted to a requested physical examination that is scheduled within the statutory guidelines. However, whether the refusal to attend the IME was justified, and whether a failure to attend an IME is reasonable or unreasonable is a factual finding within an arbitrator's authority. *Weaver v. State Farm Ins. Co.*, 609 N.W.2d 878(Minn. 2000), *reh'g denied*, (May 24, 2000)

An insurer need not necessarily pay all outstanding expenses to secure cooperation with an IME, although it is usually good practice to do so unless there is existing information supporting the non-compensability of the expenses. *Id.*

A claimant's refusal to submit for an examination under oath (EUO) may also be grounds for denying his/her no-fault claim. See *Metropolitan Prop. and Cas. Ins. Co. v. King*, 2003 WL 21008323 (Court File No. C9-02-1737) (Minn. Ct. App. May 6, 2003) (unpublished)(Court of Appeals notes EUO provisions have been in insurance contracts for more than 100 years, noting that nothing in the No-Fault Act prohibits EUOs because insurers are required to investigate claims). See also *Western Nat'l. Ins. Co. v. Thompson*, 797 N.W.2d 201 (Minn. 2011) (EUO request must be reasonable).

B. Disability and Income Loss Claims

Disability and income loss benefits are governed by Minn. Stat. §65B.44, subd. 3, which states:

Disability and income loss benefits shall provide compensation for 85 percent of the injured person's loss of present and future gross income from inability to work proximately caused by the nonfatal injury subject to a maximum of \$500.00 per week. Loss of income includes the costs incurred by a self-employed person to hire substitute employees to perform tasks which are necessary to maintain the income of the injured person, which

are normally performed by the injured person, and which cannot be performed because of the injury.

If the injured person is unemployed at the time of injury and is receiving or is eligible to receive unemployment compensation benefits under chapter 268, but the injured person loses eligibility for those benefits because of inability to work caused by the injury, disability and income loss benefits shall provide compensation for the lost benefits in an amount equal to the unemployment compensation benefits which otherwise would have been payable, subject to a maximum of \$500.00 per week.

Compensation under this subdivision shall be reduced by any income from substitute work actually performed by the injured person or 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.

For the purposes of this section "inability to work" means disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which the injured person is or may by training become reasonably qualified. If the injured person returns to employment and is unable by reason of the injury to work continuously, compensation for lost income shall be reduced by the income received while the injured person is actually able to work. The weekly maximums may not be prorated to arrive at a daily maximum, even if the injured person does not incur loss of income for a full week.

For the purposes of this section, an injured person who is "unable by reason of the injury to work continuously" includes, but is not limited to, a person who misses time from work, including reasonable travel time, and loses income, vacation, or sick leave benefits, to obtain medical treatment for an injury arising out of the maintenance or use of a motor vehicle.

Minn. Stat. §65B.44, subd. 3. Complete documentation is required by the insurer to evaluate the nature and extent of an income loss and justify reimbursement of the same. Minn. Stat. §65B.43, subd. 6 defines "income" to include:

. . .salary, wages, tips, commissions, professional fees, and other earnings from work or tangible things of economic value

produced through work in individually owned businesses, farms, ranches or other work.

Income is not restricted to money earned from a job, but also includes "tangible things of economic value" produced through work. See *Guenther v. Austin Mut. Ins. Co.*, 398 N.W.2d 80 (Minn. Ct. App. 1986), *review denied*, (Minn. Feb. 1987), the trial court found that room, board and financial aid for schooling provided by a parent in exchange for farm work constituted "tangible things of economic value" produced through work, and therefore income. "Tangible things of economic value" may include insurance benefits, disability coverage, and pensions. See *Hoper v. Mutual Serv. Cas. Ins. Co.*, 359 N.W.2d 318 (Minn. Ct. App. 1984)(dealing with "tangible things of economic value" in the context of survivors' economic loss benefits). But, things like scholarships that do not earn an income for the claimant are not covered. See *Roquemore v. State Farm Mut. Auto Ins. Co.*, 610 N.W.2d 694 (Minn. Ct. App. 2000)("tangible things of economic value" do not include scholarships given by a university in exchange for playing sports).

1. Elements Required

- Disability
- Causing by an Accident
- Inability to work
- Actual loss of income

To qualify for disability and income loss benefits, the claimant must be *unable to work* within the meaning of the statute. Minn. Stat. § 65B.44, subd. 3. Disability is generally measured by reference to the injured party's regular employment at the time of the accident. *Latzig v. Trans America Insurance Company*, 412 N.W.2d 329 (Minn. Ct. App. 1987). Therefore, there must be a limitation in the claimant's ability to return fully to that employment. The statute requires the income loss must result from a disability which produces an inability to work:

For the purposes of this section "inability to work" means disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which the injured person is or may by training become reasonably qualified.

Minn. Stat. § 65B.44, subd. 3. Disability which prevents the claimant from returning to his/her regular employment qualifies as an inability to work under the statute. See *Latzig*, 412 N.W.2d 329; *Bregier v. National Family Ins. Co.*, 411 N.W.2d 892 (Minn. Ct. App. 1987); *Chacos v. State Farm Mut. Auto. Ins. Co.*, 368 N.W.2d 343 (Minn. Ct. App. 1985), *review denied*, (Minn. Aug. 1985); *Rindahl v. National Farmers Union Ins. Cos.*, 373 N.W.2d 294, 298 (Minn. 1985). A person who is only partially disabled, may qualify for partial income loss benefits. See *Chacos*, 368 N.W.2d 343; *Bregier*, 411 N.W.2d 892.

Wage loss or income loss benefits are only payable for the period of time that the claimant is unable to work because of the physical disability stemming from the car accident. Once the claimant is released to return to work without physical disability, entitlement to benefits ends, even though the income loss may continue. See *Darby v. American Family Ins. Co.*, 356 N.W.2d 838 (Minn. Ct. App. 1984)(claimant was medically released to return to work but his job was no longer available and he had difficulty in obtaining other work, but he was not entitled to income loss benefits because the unavailability of a job did not constitute an inability to work); *cf. Koller v. American Family Mut. Ins. Co.*, 366 N.W.2d 684 (Minn. Ct. App. 1985)(claimant was entitled to income loss benefits after he was released to work with restrictions which prevented him from returning to his former regular employment).

Evidence of disability requires a medical opinion that claimant is restricted from his or her employment in some fashion. See *Koller*, 366 N.W.2d 684. Therefore, the insurer or defense counsel should request copies of all medical disability statements or medical records that support the claimed disability. Determination of a disability requires documentation of the nature and extent of claimant's regular employment including a job description, number of work hours and rate of pay, attendance records (if available), and a specific statement from the treating doctor as to the nature and length of disability.

2. Salaried/Hourly Employee Claimants

Proof of income loss for the salaried or hourly employee is relatively straightforward. Defense counsel should request employment records from the claimant's employer, including a

job description, scheduled working hours, rate of pay, disability slips provided to the employer, and absenteeism or attendance records. The days missed following the accident should be supported by statements of medical disability. Similar patterns of absenteeism *before* the accident should be cause for further investigation.

Determining the loss of income requires a comparison of either (1) the claimant's employment and wage at the time of the accident; (2) a definite offer of employment at a certain wage that was offered prior to the accident; or (3) a consistent history of employment such that a "specific future period" of employment at a certain wage can be "reasonably predicted." See *Keim v. Farm Bureau Ins. Co.*, 482 N.W.2d 823 (Minn. Ct. App. 1992)(claimant was temporarily unemployed at the time of the accident, but he proved that he had been employed in the same type of business for 11 years, had seasonal and periodic layoffs and also proved that he would have returned to that employment had he not been injured).

If the claimant makes the same or more money after the accident as he/she was earning at the time of the accident, there is no entitlement to wage loss benefits. See *Erickson v. Great Am. Ins. Cos.*, 466 N.W.2d 430 (Minn. Ct. App. 1991)(Erickson worked two jobs before the accident, and as a result of her disability was unable to perform one of the jobs. She then changed her remaining job to one which paid her more than the two pre-accident jobs combined, so no wage loss benefits were owed because there was no loss of income).

Income loss benefits are designed to compensate loss of income that *would have* been earned, rather than what *could have* been earned. See *McKenzie v. State Farm Mut. Auto. Ins. Co.*, 441 N.W.2d 832 (Minn. Ct. App. 1989). The Court of Appeals in *McKenzie* emphasized that income loss benefits are not loss of earning capacity, and benefits must be based on solid probabilities not speculation. "We perceive a legislative concern that benefits be calculated on some direct, certain basis which will discourage abuse and will enable benefits to be paid promptly and with a minimum of fuss." *Rindahl v. National Farmers Union Ins. Cos.*, 373 N.W.2d 294, 299 (Minn. 1985).

a. Mitigation/Failure to Find Substitute Work

If a person is able to return to some, but not all of his/her regular job duties, or is able to perform other “suitable” work but they fail to undertake substitute work, the income they could have earned can and should be deducted from any income loss benefit being claimed. See *Prax v. State Farm Mut. Auto. Ins. Co.*, 322 N.W.2d 752 (Minn. 1982).

The statute expressly provides:

Compensation under this subdivision shall be reduced by any income from substitute work actually performed by the injured person or 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.

3. Self-Employed Claimants

Although self-employed claimants are entitled to disability and income loss benefits, their claims are often difficult to calculate. In the same vein, their claims are often more difficult for their attorneys to substantiate or prove lost income. The most often cited problems in dealing with self-employed claimants are:

- Irregular incomes
- Fluctuating incomes
- Lack of documentation
- Numerous methods of calculation

Lost work time alone without lost income will not qualify for income loss benefits under the No-Fault Act. *Rotation Eng. & Mfg. v. Secura Ins. Co.*, 497 N.W.2d 292 (Minn. Ct. App. 1993)(sole stockholder in a company who was injured and missed over 300 hours was unable to make a claim for no-fault wage loss benefits because he failed to establish any loss of actual income, continued to receive his full salary, and his company made no claim that it lost revenue or had to hire

additional help during his absence). *Cf. Neutgens v. Westfield Group*, 724 N.W.2d 311 (Minn. Ct. App. 2006)(sole shareholder drew a salary before the automobile accident, but stopped drawing a salary after the accident because his injuries prevented him from returning to work in his pre-accident capacity, and inability to work was undisputed).

a. Proving/Disproving a Self-Employed Claim

- Reduction in gross income
- Cost incurred in hiring substitute employees
- Loss of tangible things of economic value

(1). Claims for Reduction in Gross Income

A self-employed claimant is required to prove an actual calculable economic loss with reasonable certainty. *Arons v. Allstate Ins. Co.*, 363 N.W.2d 832 (Minn. Ct. App. 1985); *Rindahl v. Nat'l. Farmers Union Ins. Co.*, 373 N.W.2d 294 (Minn. 1985). If claimant seeks to recover a reduction in gross income, defense counsel should request personal and business income tax returns for years prior and subsequent to the accident along with financial statements, balance sheets, and any other business records that indicate the income and costs to the business.

- What was the *gross weekly income before* the accident.
- Was there a reduction in *gross income after* the accident.

Proof required in self-employed income loss claims must be concrete, not speculative. *See Arons v. Allstate Ins. Co.*, 363 N.W.2d 832 (Minn. Ct. App. 1985)(income loss benefits were denied as speculative where claimant introduced receipts and expenses from her dog grooming business, but while the receipts were allocated between claimant's dog grooming business and her husband's breeding business, the expenses were not similarly allocated.)

(2). Claims for Costs of Substitute Employees

If the claimant seeks to recover costs for substitute employees, defense counsel should request verification of payment made to the employees and documentation of the work that the employee was hired to perform and proof that it was formerly performed by the claimant owner. If the claimant owner had regularly employed other employees prior to the accident, defense counsel should request payroll records to compare the nature and extent of the employees' duties before and after the accident. This will eliminate a no-fault insurer from inadvertently subsidizing claimant's business operations beyond their obligation to replace the injured owner's labor.

- Obtain a detailed list of hours and duties performed by substitute employees.
- If employees were previously employed, obtain documentation of their prior hours and duties.
- Compare the claimed costs to the prior labor costs.

(3). Claims for Loss of Tangible Things of Economic Value

These claims are not presented very often, because they have a tendency to align more with the tort/bodily injury claim. When presented, be sure to pin claimant's counsel down on how it is he/she calculates the loss. You will often find these claims fall under a reduction in gross income, or costs incurred in hiring replacement employees. You may be best to argue that the claim is speculative and should be denied because it lacks documentation or proof. *Arons*, 363 N.W.2d at 832.

4. Unemployed Claimants

It is not impossible for an unemployed claimant to qualify for income loss benefits, but the claim will require solid

documentation. Like the self-employed claimant, the unemployed claimant must prove likelihood of employment and an actual calculable income loss with reasonable certainty. Impairment or lost earning capacity claims are general damages to be recovered in the tort action, and are not compensable no-fault benefits. *Wilson v. Sorge*, 256 Minn. 125, 97 N.W.2d 477 (1959).

To establish a loss of actual income, the unemployed claimant must provide reasonable proof that the claimant would have had employment at some definite time at an established rate of pay but for the accident. See *Demning v. Grain Dealers Mut. Ins. Co.*, 411 N.W.2d 571 (Minn. Ct. App. 1987).

- Determine claimant's employment and wage at the time of the accident;
- Did claimant have a definite offer of employment at a certain wage existing at the time of the accident; or
- Was there a consistent history of employment such that a "specific future period" of employment at a certain wage can be "reasonably predicted." *Keim v. Farm Bureau Ins. Co.*, 482 N.W.2d 823 (Minn. Ct. App. 1992).

Defense counsel should request all prior employment records, unemployment records from the Department of Economic Security, income tax returns, and any other documentation of the claimant's earnings history. Counsel should also request evidence of job offers outstanding on the date of the accident and all job searches and applications made after the accident. If claimant refuses or is unable to provide this documentation, defense counsel should take advantage of that fact in arbitration. Denial is appropriate where claimant cannot or will not produce reasonable documentation or independent testimony regarding probable employment.

C. Replacement Service Claims

Replacement service benefits are designed to compensate an injured person for usual and necessary substitute services which the injured person cannot perform because of a motor vehicle accident. Minn. Stat. § 65B.44, subd. 5 provides:

Replacement service loss benefits shall reimburse all expenses reasonably incurred by or on behalf of the nonfatally injured person in obtaining usual and necessary substitute services in lieu of those that, had the injured person not been injured, the injured person would have performed not for income but for direct personal benefit or for the benefit of the injured person's household; if the nonfatally injured person normally, as a full time responsibility, provides care and maintenance of a home with or without children, the benefit to be provided under this subdivision shall be the reasonable value of such care and maintenance or the reasonable expenses incurred in obtaining usual and necessary substitute care and maintenance of the home, whichever is greater. These benefits shall be subject to a maximum of \$200 per week. All replacement services loss sustained on the date of injury and the first seven days thereafter is excluded in calculating replacement services loss.

1. Elements Required

- caused by an injury arising out of the maintenance or use of a motor vehicle
- not for services performed to produce income
- replace *necessary* services
- *usually and ordinarily performed* by the claimant for the benefit of his/her household

As with all no-fault/basic economic loss benefits, the benefit being sought must have arisen because of an injury which arose out of the maintenance or use of a motor vehicle. They are paid out of the same coverage as disability income loss. Replacement service claims are the most often scrutinized by insurers because of the ease with which they may be

manipulated or overstated. Claimant must prove the replacement service being performed was “usual and necessary”. A no-fault insurer is required to compensate expenses that are occasioned by a motor vehicle accident only.

According to the Minnesota Court of Appeals, “necessary” means “absolutely essential” or “indispensable”. *Pauls v. Depositors Ins. Co.*, 1997 WL 406297 (Minn. Ct. App. 1997). Defense counsel should require documentation of the type of service required, the dates upon which the service was provided, identification of the individual providing the service, and verification of the amount paid. If the claim seems unreasonable, defense counsel should consider interviewing the provider of the replacement service or requesting a subpoena for that person’s attendance at the arbitration.

Replacement services were designed to apply only to services performed for the benefit of the claimant or his/her household. They do not apply to services being performed by the claimant to produce income. *Rademacher v. Ins. Co. of North Am.*, 330 N.W.2d 858 (Minn. 1983). Replacement services are not paid to an employer who hires substitute employees. A claimant who is forced, by reason of a motor vehicle accident, to hire a substitute employee(s) to perform services in claimant’s place may be entitled to reimbursement for the replacement workers, but paid as *wage loss* benefits, *not replacement service* benefits. *Rademacher*, 330 N.W.2d 858. Although ordinary and necessary services are not limited to routine household services and may extend to services which the injured person might normally be expected to perform as reflected in her prior history and usual practices, they do not include performance of non-necessary services which are non-essential to the household. *Lenz v. Depositors Insurance Company*, 561 N.W.2d 559 (Minn. Ct. App. 1997).

2. Two Ways to Qualify

a. Claimant Is the Person Who Is “Fully Responsible” for the Services (e.g., the Primary Caretaker of the Home)

In this case, *no proof of actual expense* is required and claimant is entitled to the reasonable value of the substitute services provided. Minn. Stat. § 65B.44, subd.

5. See *Nadeau v. Austin Mutual Ins. Co.*, 350 N.W.2d 368 (Minn. 1984).

“Full-time responsibility” means primary responsibility for the management of the household. *Rindahl v. National Farmers Union Ins. Cos.*, 373 N.W.2d 294 (Minn. 1985). Unless the claimant can prove that he/she normally performed these activities for which they seek replacement services, the claim must be denied. Whether or not claimant is the person fully responsible for the normal household services being provided depends upon the facts of each case. *Guenther v. Austin Mutual Ins. Co.*, 398 N.W.2d 80 (Minn. Ct. App. 1986). This is a question of fact. *Pauls v. Depositors Ins. Co.*, 1997 WL 406297 (Minn. Ct. App. 1997). Finally, if the claimant can prove that he/she is the primary caretaker of the home, then he/she shall be entitled to the “reasonable value of [household] care and maintenance” even if the services are not actually replaced. *Schroeder v. Western Nat. Mut. Ins.Co.*, 865 N.W.2d 66 (Minn. 2015). The reasonableness of the value of those services is still a fact question for the arbitrator after the claimant establishes that he/she is the primary caretaker of the home.

b. Claimant Is Not the Person Who Is Normally the Primary Caretaker

In this case, proof of *actual expense* is required. If claimant was not the person “fully responsible” for household duties prior to the subject motor vehicle accident, then claimant must prove actual expense incurred in order to obtain replacement service benefits. *Nadeau*, 350 N.W.2d 368. See *Hoper v. Mutual Serv. Cas. Ins. Co.*, 359 N.W.2d 318 (Minn. Ct. App. 1984); *LaValley v. Nat'l. Family Ins. Corp.*, 517 N.W.2d 602 (Minn. Ct. App. 1994).

3. Practical Tips

Although replacement service benefits are not taxable as income to the claimant, they may be taxable as income to the recipient. The unofficial word from both the Internal Revenue Service and the Minnesota Department of Revenue is that neither replacement service benefits nor wage loss benefits are taxable

as income to the claimant. See 26 U.S.C.A. §§ 63, 104-05 (1998) (§ 104(a)(1)(1) of the tax code mandates that compensation for injuries or sickness does not include wage loss benefits or amounts received as compensation for personal injuries). However, under § 63 of the tax code, compensation in the form of payment for replacement services should be considered as income to the recipient. As such, defense counsel should advise the respondent insurer to send to any person who receives compensation in the form of payment for replacement services performed IRS Form 1099 if they are paid compensation over \$600. The tax code treats income, from whatever source derived, as taxable. This often discourages those “questionable” claims.

You should attempt to obtain the following information:

From the person performing replacement services obtain full legal name, address (business and residence), social security or tax identification number, and any business names, if applicable. Let the recipient and claimant know that replacement services paid will be reported to the IRS.

Proof of replacement services should have been submitted monthly (or bi-monthly if the services are extensive), and not accumulated for significant periods of time and submitted to the insurer in one lump sum. This opens up arguments of prejudice, late notice, and other issues, particularly when it comes to claimed interest. Consider subpoenaing the person performing the services to the hearing.

From the claimant find out why substitute services are needed, whether other family members were helped out, and what claimant’s prior history or usual practices were before the subject motor vehicle accident for getting these same services done. Had claimant ever hired these services out in the past, and if so, under what circumstances? Were the services being sought *reasonably* incurred (or were other options available to replace what was needed)? Were the services *necessary*, and were they replacing *usual* and *ordinary* services which would have been performed by the claimant for the benefit of his/her household? Determine whether claimant’s injury actually prevented him/her from performing these ordinary, usual and necessary services him/herself.

Nail down how claimant is intending to present the claim. Whether he/she is claiming to be the person “*fully responsible*” for the household duties, is the claim being presented as actual expense, or reasonable value of services performed? If substitute services are being sought for things like household repairs, remodeling, and the like, consider arguing how long the work took (benefits are capped at \$200 per week, and should not be reimbursed for the entire job if claimant would have been limited to the weekly benefit). Also do not overlook that remodeling one’s home is a capital improvement, and thus, claimant will reap the benefit if he/she sells the home. These are arguably not “usual and necessary” services.

D. Notice

Failure to give proper notice of a claim for no-fault benefits, may bar entitlement:

A plan of reparation security may prescribe a period of not less than six months after the date of accident within which an insured or any other person entitled to claim basic economic loss benefits, or anyone acting on their behalf, must notify the reparation obligor or its agent, of the accident and the possibility of a claim for economic loss benefits. Failure to provide notice will not render a person ineligible to receive benefits unless actual prejudice is shown by the reparation obligor, and then only to the extent of the prejudice. The notice may be given in any reasonable fashion.

Minn. Stat. §65B.55, subd. 1. This means that if an insurer includes a provision within its policy (which nearly all do) that the claimant is required to notify the insurer within a specific period of time about a claim, and the claimant fails to do so, and can be ineligible for benefits if the insurer demonstrates prejudice. So long as the notice requirement in the policy is not less than six months from the date of the accident, it will be upheld. A showing of prejudice to the insurer as a result of late notice is required to bar entitlement. See *Reliance Ins. Co. v. St. Paul Ins. Cos.*, 307 Minn. 338, 239 N.W.2d 922 (1976). In *Terrell v. State Farm Ins. Co.*, 346 N.W.2d 149 (Minn. 1984), the Supreme Court enforced a six-month notice requirement which absolved the insurer from paying benefits, even though the insurer had suffered no prejudice from the late notice. So, the Legislature promptly amended the notice requirement to provide for a showing of prejudice. The showing of

prejudice was followed in *Andros v. American Family Mut. Ins. Co.*, 359 N.W.2d 46 (Minn. Ct. App. 1984), *review denied*, (Minn. Apr. 1985). Prejudice may be shown where the delay in notifying the insurer prevents insurer from having a prompt independent medical examination in order to evaluate a claim of disability or the need for medical treatment, or prevents an insurer from being able to investigate an accident, such as for uses of the vehicle, exclusions to coverage, or to evaluate other causes of an injury.

E. Lapse

A claimant who has a lapse in medical treatment and disability may similarly be barred from collecting no-fault benefits, as set forth in subdivision 2 of Minn. Stat. §65B.55:

A plan of reparation security may provide that in any instance where a lapse occurs in the period of disability or in the medical treatment of a person with respect to whose injury basic economic loss benefits have been paid and a person subsequently claims additional benefits based upon an alleged recurrence of the injury for which the original claim for benefits was made, the obligor may require reasonable medical proof of such alleged recurrence; provided, that in no event shall the aggregate benefits payable to any person exceed the maximum limits specified in the plan of security, and provided further that such coverages may contain a provision terminating eligibility for benefits after a prescribed period of lapse of disability and medical treatment, which period shall not be less than one year.

Minn. Stat. §65B.55, subd. 2. The treatment needed to prevent lapse must be medical treatment for injuries that arose from the original automobile accident for which compensation is sought. See *Overby v. American Family Mutual Ins. Co.*, No. C6-95-1108, 1996 WL12667 (Minn. Ct. App. 1996)(jury rejected claimant's use of home hot packs and stretching exercises as "treatment", finding instead that she had had a lapse in medical treatment, as she did not see any doctors for accident-related complaints for more than one year). The statute requires both a lapse in medical treatment and disability. The No-Fault Act does not provide a specific definition of disability for the purposes of §65B.55, subd. 2. But the Minnesota Supreme Court in *Thomas v.*

Western National Insurance Group, 562 N.W.2d 289 (Minn. 1997), held that “disability” for purposes of §65B.55, subd 2, is to be interpreted by its plain and ordinary meaning. The Court refused to adopt the definitions of disability set forth in either the disability and income loss or threshold provisions of the No-Fault Act. Minn. Stat. §65B.44, subd. 3 and §65B.51, subd. 3(4)(c), respectively. Two justices dissented noting that disability should require proof of physical or mental incapacity.

V. THE ARBITRATION PROCESS

It often appears to respondent insurers and defense counsel involved in arbitrating no-fault claims that the process is far more favorable to the claimant than to the respondent insurer. While there may be an element of truth to this, there are several strategies defense counsel can employ to maximize his or her chance of success in arbitration. No-fault Arbitration in Minnesota is governed by statute, Minn. Stat. §65B.525:

Arbitration procedure; rules of court.

Subd. 1. Except as otherwise provided in section 72A.327, the supreme court and the several courts of general trial jurisdiction of this state shall by rules of court or other constitutionally allowable device, provide for the mandatory submission to binding arbitration of all cases at issue where the claim at the commencement of arbitration is in an amount of \$10,000 or less against any insured's reparation obligor for no-fault benefits or comprehensive or collision damage coverage.

Subd. 2. The rules of court may provide that cases which are not at issue, whether or not suit has been filed, may be referred to arbitration by agreement of reference signed by counsel for both sides, or by the parties themselves. Such agreement of reference shall define the issues to be arbitrated and, shall also contain any stipulations with respect to facts submitted or agreed or defenses waived. In such cases, the agreement of reference shall take the place of the pleadings in the case and be filed of record.

Minn. Stat. §65B.525. The Minnesota No-Fault Rules of Arbitration set forth procedurally what must be done in the handling of no-fault arbitration claims. Arbitration is commenced by a claimant who challenges the denial of benefits by an insurer by filing a Petition for Arbitration and paying a filing fee. Rule 5(f) of the Minnesota No-Fault Arbitration Rules provides that within 30 days of the filing of the Petition, the claimant must also file an itemization of the benefits being claimed (most claimants will include this itemization with the Petition to avoid duplicate filings), and supporting documentation for the benefits being claimed. If medical expenses or replacement services are being claimed, claimant must detail the name of the providers or persons performing the services, the dates of services claimed, and the total amounts owing. Medical expense claims should be accompanied by actual bills showing dates of service, types of service provided, and the amounts owing. Replacement service claims should include a detailed listing/calendar of all services being performed, the person performing it, and should be accompanied by disability slips from a medical provider. Income loss claims must detail employers, rates of pay, dates of loss, method of calculation, and total amounts owing. See Minnesota No-Fault Arbitration Rule 5(f). Rule 6 states that if an amount of a claim is being waived to come within the jurisdictional limit of \$10,000.00, then the claimant must specify which amount is being waived within 30 days..

A. Jurisdictional Questions

Minn. Stat. § 65B.525, subd. 1, and Rule 5(a) of the Minnesota No-Fault Arbitration Rules provide for mandatory arbitration “for claims of \$10,000 or less at the commencement of the arbitration.” The amount in controversy is to be determined as of the date the claimant files a Petition for Arbitration or otherwise demands litigation of the no-fault claim. Rule 6 of the Minnesota No-Fault Arbitration Rules grants an arbitrator “jurisdiction to determine all amounts claimed including those in excess of \$10,000.” See *Charboneau v. American Family Ins. Co.*, 481 N.W.2d 19 (Minn. 1992), *aff’g* 467 N.W.2d 830 (Minn. Ct. App. 1991); *Karels v. State Farm Ins. Co.*, 617 N.W.2d 432 (Minn. Ct. App. 2000).

The no-fault arbitration rules state that the “total amount of the claim” must be \$10,000 or less on the date of filing to be subject to mandatory arbitration. “Total amount of the claim” includes *all* claims of any nature (medical, income, etc.) that are outstanding. See *Grinnell Mut. Reinsurance Co. v. Arens*, 478 N.W.2d 235 (Minn. Ct. App. 1991), *aff’d in part and rev’d in part*, 485 N.W.2d 145 (Minn. 1992)(a claim for no-fault arbitration includes the total or aggregate of all outstanding benefits such that a claimant cannot invoke mandatory arbitration by splitting her claims between two petitions which if combined would

exceed the jurisdictional limit for mandatory arbitration). Efforts to improperly secure mandatory arbitration of claims in excess of \$10,000 by splitting the claim into separate arbitrations for smaller sums have been rejected by Minnesota courts. See *Hippe v. American Family Ins. Co.*, 565 N.W.2d 439 (Minn. Ct. App. 1997)(the total amount of the claim includes all claims of any nature (medical, income, etc.) incurred that are outstanding whether or not they have been denied by the insurer). Rule 6 of the Minnesota No-Fault Arbitration Rules was also amended in 1999 to provide “[i]f the claimant waives a portion of the claim in order to come within the \$10,000 jurisdictional limit, the claimant must specify within thirty (30) days of filing the claims in excess of the \$10,000 being waived.” Thus, defense counsel should stay alert to ensure that claimant provides an itemization which sets forth with specificity the exact claims and amounts being waived in order to meet AAA’s jurisdictional limit. *Brown v. Allstate Ins. Co.*, 481 N.W.2d 17 (Minn. 1992)(where a claimant has an outstanding claim in excess of the jurisdictional limit, the claimant may voluntarily waive existing claims in excess of the limit to invoke mandatory arbitration.) Since splitting of claims is prohibited, a waiver of benefits precludes recovery of the waived benefits at any other time. Additionally, if the claimant waives a portion of her claim in order to remain come the jurisdictional limit, “the claimant must specify within thirty (30) days of filing the claims in excess of the \$10,000.00 being waived.” Minnesota No-Fault Arbitration Rule 6.

If the total claim is in excess of \$10,000, the respondent insurer may voluntarily agree to arbitration or require that the claim be put in suit in District Court. Defense counsel should act quickly in determining whether or not the AAA has jurisdiction for mandatory arbitration on the claim. Defense counsel should immediately demand confirmation from the claimant’s attorney of the nature and amount of benefits claimed to be outstanding on the date of filing. Counsel should also notify the AAA in writing that the respondent insurer will not agree to participate in voluntary arbitration and will only participate in the arbitration once it is determined that the claim falls within the mandatory jurisdiction of American Arbitration Association. If claimant refuses to comply, defense counsel should move the District Court to stay arbitration and remove the matter to the District Court. A motion to stay is authorized by Minn. Stat. § 572.09(b).

1. Coverage Disputes

Coverage questions are not subject to mandatory arbitration. The Minnesota Supreme Court mandates that questions involving interpretation of the Minnesota No-Fault Act should be

tried in the District Court. *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419 (Minn. 1988). No-fault arbitration is *limited to factual issues* involving claims for no-fault benefits. *Weaver v. State Farm Ins. Co.*, 609 N.W.2d 878 (Minn. 2000), *reh'g denied*, (May 24, 2000). Disputes involving questions of law, interpreting the No-Fault Act, interpreting the No-Fault Arbitration Rules, or a policy of insurance are not proper before a no-fault arbitrator. See *Kerber v. Allied Group Ins.*, 516 N.W.2d 568 (Minn. Ct. App. 1994); *Barneson v. Western Nat'l Mut. Ins. Co.*, 486 N.W.2d 176 (Minn. Ct. App. 1992). Coverage issues must be raised timely, or they could be lost. *Ranzau v. Metropolitan Property & Cas. Co.*, No. C6-99-775, 1999 WL 1059633 (Minn. Ct. App. Nov. 23, 1999). However, if the parties mutually agree, these disputes can be heard in the arbitration forum (where the court interpreted the arbitration rule setting the time for the award). Questions such as whether there was an “accident” are coverage questions, and are not properly subject to determination by an arbitrator. *AMCO Ins. Co. v. Ashwood-Ames*, 534 N.W.2d 740 (Minn. Ct. App. 1995). Similarly, while questions such as whether an insurer’s request for an IME was reasonable, and whether claimant’s failure to attend was reasonable, are factual determinations for an arbitrator, the relief granted by an arbitrator is subject to *de novo* review by the district court. *Weaver*, 609 N.W.2d 878.

a. Declaratory Judgment Action

The insurer may institute a declaratory judgment action either before arbitration or after a petition for arbitration has been filed. Although more costly, this may be the best alternative if the coverage issue has implications for respondent insurer’s future exposure of uninsured or underinsured motorist benefits.

b. Motion to Stay Arbitration

A motion to stay arbitration may be made in the district court with or without the insurer instituting a declaratory judgment action as mandated by Minn. Stat. § 572B.07. The legal issue will necessarily be reviewed and determined by the court for purposes of granting or denying the motion to stay arbitration. Motions to Stay Arbitration are governed by Minn. Stat. §572B.07. Motions to modify, correct, vacate or stay arbitration follow district court rules, and the provisions found at Minn. Stat. §§572B.01 through 572B.31. Service of process of arbitration

motions and documents must be done in accordance with Minn. Stat. §572B.20 and Minnesota No-Fault Arbitration Rule 29.

c. Agreement to Arbitrate

Typically, while coverage issues and legal questions under the No-Fault Act should not be submitted to arbitration, it may be cost-effective to do so in certain situations. If the parties do agree to submit the matter to arbitration, they should do so under terms that preserve appealability of the decision. For example, a legal question could be submitted to arbitration if the parties agree to select the arbitrator by agreement, the arbitrator is required to follow Minnesota law and prepare specific findings of fact and conclusions of law as agreed by the parties, the arbitrator's award is reduced to judgment in the district court pursuant to Minn. Stat. § 572.21 preserving rights of appeal that would be applicable in a district court proceeding.

d. Statute of Limitations

The Court of Appeals has ruled that where neither the No-Fault Act nor the insured's policy expressly prescribed a period of limitations for bringing an action for the recovery of no-fault benefits, the claim is subject to the six-year contract statute of limitations set forth in Minn.Stat. §541.05, subd. 1(1). *Entzion v. Illinois Farmers Ins. Co.*, 675 N.W.2d 925 (Minn. Ct. App. 2004) The court also concluded that an action for no-fault benefits accrues – and the statute of limitations begins to run – when the insurer discontinues or denies benefits.

B. Denial of the Claim

The duties that a no-fault insurer has in conjunction with the handling of a no-fault claim are set forth in Minn. Stat. §65B.54:

Subd. 1. Basic economic loss benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as income loss, replacement services loss, survivor's economic loss, survivor's replacement services loss, or medical or funeral expense is incurred. Benefits are overdue if not paid within 30 days after the reparation obligor receives reasonable proof of the fact and amount of loss realized, unless the reparation obligor elects to accumulate claims for periods not exceeding 31 days and

pays them within 15 days after the period of accumulation. If reasonable proof is supplied as to only part of a claim, and the part totals \$100 or more, the part is overdue if not paid within the time provided by this section. Medical or funeral expense benefits may be paid by the reparation obligor directly to persons supplying products, services, or accommodations to the claimant.

Subd. 2. Overdue payments shall bear simple interest at the rate of 15 percent per annum.

Subd. 3. A claim for basic economic loss benefits shall be paid without deduction for the benefits which are to be subtracted pursuant to section 65B.61, if these benefits have not been paid to the claimant before the reparation benefits are overdue or the claim is paid. The obligor is entitled to reimbursement from the person obligated to make the payments or from the claimant who actually receives the payments.

Subd. 4. A reparation obligor may bring an action to recover benefits which are not payable, but are in fact paid, because of an intentional misrepresentation of a material fact, upon which the reparation obligor relies, by the claimant or by a person providing products or services for which basic economic loss benefits are payable. The action may be brought only against the person providing the products or services, unless the claimant has intentionally misrepresented the facts or knew of the misrepresentation. A reparation obligor may offset amounts the reparation obligor is entitled to recover from the claimant under this subdivision against any basic economic loss benefits otherwise due the claimant.

Subd. 5. A reparation obligor who rejects a claim for benefits shall give to the claimant prompt written notice of the rejection, specifying the reason. If a claim is rejected for a reason other than that the person is not entitled to the basic economic loss benefits claimed, the written notice shall inform the claimant that the claimant may file the claim with the assigned claims bureau and shall give the name and address of the bureau.

Subdivision 5 requires that a no-fault insurer who denies a claim for no-fault benefits must give the claimant written notice of the reason for the denial, because the claimant has a right to a reason for the denial so that he/she can either correct any errors in submission of the claim (if the claim has been rejected outright), or to seek arbitration (assuming there is no legal coverage dispute). Arbitration of No-Fault claims are administered by the American Arbitration Association (AAA). Rule 5(c) of the Minnesota No-Fault Arbitration Rules requires that the insurer advise the claimant in its denial letter of the right to demand arbitration. Rule 5(c) requires that the insurer advise the claimant that information on arbitration procedures may be obtained from AAA. The insurer must also advise the claimant in the denial letter whether or not the insurer is willing to submit a claim in excess of the \$10,000.00 jurisdictional limit to voluntary arbitration.

Following a denial of benefits, claimant still has an obligation to submit disputed claims to the insurer, so that the insurer has notice of the disputed claim. A failure to do so will result in forfeiture of any claims for an interest penalty. *American Family Ins. Group v. Keiss*, 697 N.W.2d 617 (Minn. 2005).

C. Discovery

The availability of discovery in no-fault arbitration is governed by Rule 12 of the Minnesota No-Fault Arbitration Rules which provides for the voluntary exchange of information including medical reports, medical authorizations, employment records, employment authorizations, supporting documentation as required by Rule 5, and other exhibits to be offered at the hearing. However, Rule 12 also provides that upon application and good cause shown by any party within 90 days the arbitrator may permit any discovery allowable under the Minnesota Rules of Civil Procedure for the District Courts.

Defense counsel should avail themselves of the informal discovery process, and utilize the arbitrator to resolve discovery disputes in accordance with Rule 12. Use of informal discovery motions and requests for an order for disclosures should also be utilized if respondent seeks information which is relevant to the claim, and access to the information is denied by claimant's counsel. The arbitrator has discretion to permit more extensive discovery in accordance with the Minnesota Rules of Civil Procedure.

A failure to cooperate with discovery can be used strategically at arbitration, particularly where information is relevant and goes to the

heart of the issue. Defense counsel should document its requests for informal discovery, and continue to follow up if the request is reasonable. If claimant continues to refuse to cooperate or to provide information, defense counsel may request an order compelling disclosure, an informal discovery conference with the arbitrator, and if necessary, request the arbitration be stayed or dismissed until such time as claimant cooperates. Do not overlook the arbitrator's authority to postpone a hearing in accordance with Rule 15.

D. Arbitrators

The arbitration hearing will be conducted before a single arbitrator. The arbitrator is selected through a process of elimination when AAA randomly selects four names of attorneys on its panel of arbitrators and submits them to the parties. Each party is permitted to strike one arbitrator, and then list the remaining arbitrators in order of their preference. Each party must return their proposed Arbitrator Strike List with the time specified by the AAA Case Manager. If a party does not return the list within the time specified, all proposed arbitrators will be considered acceptable to the party. The AAA then appoints the arbitrator from the two (or three) names that remain in accordance with the designated order of the mutual preference. See Minnesota No-Fault Arbitration Rule 8. After the arbitrator is appointed by AAA, he/she is required to disclose any circumstances likely to create a presumption or possibility of bias or conflict which may disqualify him/her as arbitrator in accordance with Rule 8 of the Minnesota No-Fault Arbitration Rule. Once an arbitrator makes his/her disclosure, both parties have seven (7) business days to object. In order to have an arbitrator removed, it is necessary to demonstrate specific factual evidence of bias. Any objections to the arbitrator are initially determined by the AAA, and if not resolved by the AAA, can be appealed to the No-Fault Standing Committee. See also *Andresen v. State Farm Ins. Co.*, No. C4-94-1422, 1995 WL 1490 (Minn. Ct. App. Jan 3, 1995). Failure to object to the appointed arbitrator based upon the post-appointment disclosure within seven business days constitutes waiver of any objections based on the post-appointment disclosure. No-Fault Arbitration Rule 10 provides that there is not a presumption of bias or conflict of interest where an attorney or the attorney's firm represents auto accident claimants against insurance companies, even if it is the same insurance company respondent involved in the pending arbitration. Further, there is no presumption of conflict or bias if an attorney or an attorney's firm represents or has represented insurance companies. But it is a financial conflict interest if, within the last year, the appointed arbitrator or the arbitrator's firm has been hired by the respondent to represent the

respondent or respondent's insureds in a dispute for which the respondent provides insurance coverage. And it is a financial conflict of interest if the appointed arbitrator received referrals within the last year from officers, employees or agents of any entity whose bills are in dispute in the arbitration or the arbitrator's firm has received such referrals.

E. The Arbitration Hearing

The arbitration hearing usually consists of brief opening statements by counsel, direct and cross examination of the claimant, submission of exhibits and summation of the case or closing arguments by counsel. Respondent should be thoroughly prepared for the hearing and consider the following suggestions to increase respondent's chances of success.

Rule 21 of the Minnesota No-Fault Arbitration Rules sets forth how the proceedings will occur:

The hearing shall be opened by the recording of the date, time and place of the hearing, and the presence of the arbitrator, the parties and their representatives, if any. Either party may make an opening statement regarding the claim. The claimant shall then present evidence to support the claim. The respondent shall then present evidence supporting the defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure, but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence. Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and description of the exhibits in the order received shall be made part of the record. There shall be no direct communication between the arbitrator and the parties other than at the hearing, unless otherwise advised by the arbitration organization or by agreement of the parties and arbitrator. However, an arbitrator may directly contact the parties, but such communication is limited to administrative matters. Any direct communication between the arbitrator and parties must be conveyed to the arbitration organization, except communications at the hearing. Pre-hearing exhibits can be sent directly to the

arbitrator, delivered in the same manner and at the same time to the opposing party. Parties are encouraged to submit any pre-hearing exhibits at least 24 hours in advance of the scheduled hearing. If the exhibits are not provided to opposing counsel and the arbitrator at least 24 hours before the hearing or if the exhibits contain new information and opposing counsel has not had a reasonable amount of time to review and respond to the information, the arbitrator may hold the record open until the parties have had time to review and respond to the material or reconvene the arbitration at a later date. Any other oral or written communication from the parties to the arbitrator shall be directed to the arbitration organization for transmittal to the arbitrator.

Minnesota No-Fault Arbitration Rule 21. If a party fails to appear, the arbitrator can allow the hearing to proceed, but the arbitrator shall require the party present to submit evidence just as would be done were the absent party present. See Minnesota No-Fault Arbitration Rule 22.

1. Witnesses

The arbitrator may require witnesses to testify under oath or affirmation. See Minnesota No-Fault Arbitration Rule 20. Witnesses are governed by Rule 23:

Witnesses, Subpoenas and Depositions

- a. Through the arbitration organization, the arbitrator may, on the arbitrator's initiative or at the request of any party, issue subpoenas for the attendance of witnesses at the arbitration hearing or at such deposition as ordered under Rule 12, and the production of books, records, documents and other evidence. The subpoenas so issued shall be served, and upon application to the district court by either party or the arbitrator, enforced in the manner provided by law for the service and enforcement of subpoenas for a civil action.
- b. All provisions of law compelling a person under subpoena to testify are applicable.
- c. Fees for attendance as a witness shall be the same as for a witness in the district courts.

If an arbitrator chooses to do so, or if a party requests it, witnesses may be excluded or sequestered. See Minnesota No-Fault Arbitration Rule 19.

Since claimant many times is the only witness at an arbitration hearing, defense counsel should prepare a careful and effective cross examination of the claimant. Never underestimate the importance of preparation, and the value of reading claimant's records. Most arbitrators are experienced attorneys who will rarely be impressed by theatrics or other tactics one might use before a jury. Listen closely to the statements of the claimant on direct examination, and take advantage of the claimant who has been under-prepared to point out inconsistencies, misstatements or exaggerations. Point out and illuminate those parts of claimant's records that help respondent's case. A careful cross examination is often the most crucial part of the hearing, since the arbitrator's ultimate decision may often rest upon claimant's credibility. Both parties will usually appear with evidence in the form of contradicting medical reports. Thus, claimant's demeanor and believability is pivotal. Furthermore, since defense counsel often does not call any witnesses, you must turn claimant into a witness who is equally valuable to respondent.

Although defense counsel often does not call any witnesses at an arbitration hearing, there are some cases where testimony from lay witnesses can be effective in defeating a claim. For example, testimony from lay witnesses who have observed claimant participating in physical activities inconsistent with the claimed "disability" can be very effective. The party who was involved in the collision with claimant can also be effective to show a nominal collision, or to testify about claimant's behavior at the scene. Defense counsel can also obtain live testimony or statements and/or affidavits from witnesses such as the other driver, co-worker, employer, neighbors, etc.

2. Exhibits

The admission of evidence is governed by Rule 24 of the No-fault Rules of Arbitration. Arbitrators are strongly encouraged to receive evidence:

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an

understanding and determination of the issues. The arbitrator shall be the judge of the relevancy and materiality of any evidence offered, and conformity to legal rules of evidence shall not be necessary. The parties shall be encouraged to offer, and the arbitrator shall be encouraged to receive and consider, evidence by affidavit or other document, including medical reports, statements of witnesses, officers, accident reports, medical texts and other similar written documents that would not ordinarily be admissible as evidence in the courts of this state. In receiving this evidence, the arbitrator shall consider any objections to its admission in determining the weight to which he or she deems it is entitled.

Minnesota No-Fault Arbitration Rule 24. No-fault arbitration is supposed to be informal, and arbitrators are encouraged to receive and consider evidence that may not necessary be admissible in court proceedings. Similarly, an arbitrator does have the authority to exclude evidence. Rule 24 of the Minnesota No-Fault Arbitration Rules; see also *Govan v. Viking Ins. Co. of Wisconsin*, No. CX-97-404, 1997 WL 406593 (Minn. Ct. App. June 22, 1997)(arbitrator had discretion to exclude evidence that lacked foundation).

Defense counsel should always prepare a statement of case which sets forth the factual issues, as well as the legal arguments. The statement of the case identifies for the arbitrator specific issues to be submitted, and also provides applicable case law and statutory sections for easy reference. If there is good case law upon which to base the defense, it is a good idea to include these cases as exhibits in the arbitration booklet.

The statement of case should be part of a comprehensive arbitration booklet which defense counsel submits on respondent's behalf. It should include all medical records and documentation to which counsel will refer in cross examination or argument at the hearing. It is helpful to the arbitrator if these documents are organized and either tabbed or numbered. It should include the no-fault payment record (in case claimants' counsel fails to verify what expenses were previously paid to avoid inadvertent overpayments of no-fault benefits in an

arbitration award), medical records, employment records, the application for benefits, any statements or affidavits that are helpful, photographs (particularly if property damage was minimal), the IME report, and copies of any case law or other treatises (such as the Chiropractic Guidelines) helpful to your case. If helpful, consider treatment calendars, or chiropractic charts.

Remember, the Rules of Evidence are not strictly enforced in AAA no-fault arbitrations. Therefore, counsel need not be concerned with foundational problems. Relevancy and materiality will be decided by the arbitrator, so you can be creative.

3. Court Reporter

No-Fault arbitrations are not recorded unless a party hires a court reporter for the hearing. Generally, a record is not necessary or cost effective. However, there are circumstances where the insurer and defense counsel should consider reporting the proceedings. If defense counsel suspects that a coverage issue or other legal question will be improperly raised, the insurer will need a record to challenge the arbitration award. Or, if the insurer has future exposure for uninsured, underinsured or liability claims by the no-fault claimant, the insurer may want a record to pin down the claimant on the facts. The record can be used later for impeachment if the facts start to change. You must give the other side at least 24 hours' notice of your intention to have a court reporter (or some other audio recording) present at the hearing. Minnesota No-Fault Arbitration Rule 17. And, the party requesting the transcript must pay the cost of the record. If the transcript is agreed by the parties, or is determined by the arbitrator to be the official record of the hearing, the transcript must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator. See Rule 17.

If the legal issue is first identified shortly before a scheduled arbitration, defense counsel may need to appear at the arbitration hearing to avoid any attempt to enter an award by default. Defense counsel would be advised to appear with a court reporter to create a record of the proceedings preserving the insurer's objections to consideration of the coverage issues. A record is crucial to challenging a subsequent judgment on the award in the district court. See *e.g. Safeco Insurance Co. v. Goldenberg*, 435 N.W.2d 616 (Minn. Ct. App. 1989). The insurer can then challenge the arbitrability of the issue in the district court. This is probably the least desirable of the alternatives. The insurer risks an adverse arbitration award being entered against it which could influence the district court in its consideration of the arbitrability issue.

VI. THE AWARD

The claim must be decided by the arbitrator, and an award issued within 30 days from the close of the hearing. If an arbitrator takes longer than 30 days he/she can lose jurisdiction of the case, and the complaining party may be entitled to a new hearing. *Barneson v. Western Nat'l Mut. Ins. Co.*, 486 N.W.2d 176 (Minn. Ct. App. 1992). An arbitrator has no authority to render an award for future claims or benefits. *Jarosz v. Principal Fin. Group*, No. C7-90-2409, 1991 WL 70303 (Minn. Ct. App. May 7, 1991). Attorneys' fees are not recoverable, as mandated by Rule 32 of the Minnesota No-Fault Arbitration Rules. Expert witness fees and certain costs are also not always appropriate, in accordance with Rules 32 and 41 of the No-Fault Arbitration Rules. See *Kerber v. Allied Group Ins.*, 516 N.W.2d 568 (Minn. Ct. App. 1994).

Rule 37 of the No-Fault Arbitration Rules was amended to preclude a no-fault arbitration award from being used as the basis for a claim of waiver or collateral estoppel in any *other* proceeding. Thus, it would seem a no-fault arbitration award could be used as a basis for collateral estoppel in another no-fault arbitration proceeding.

A. Costs and Interest

Although interest is mandatory on no-fault claims awarded, pursuant to Minn. Stat. §65B.54, subd. 2, interest is owing for only benefits found to be "overdue." Benefits are not "overdue" until 31 days after *reasonable proof* of the claim is submitted to the insurer. Minn. Stat. § 65B.54, subd. 1. If claimant has failed or refused to properly document the claim until the arbitration hearing, or submission of a petition for arbitration, an award of interest is not appropriate until 31 days after such time as

reasonable proof was provided, not from the time when the expense was incurred. Minn. Stat. § 65B.54. Therefore, defense counsel should be aware of the dates upon which claimant's proof was first submitted to the insurer or counsel, and bring this information to the arbitrator's attention when the claimant requests an award of interest. See *Motschenbacher v. New Hampshire Ins. Group*, 402 N.W.2d 119 (Minn. Ct. App. 1987). Defense counsel may need an affidavit from the insurance adjuster assigned to the file to establish foundation for the dates the company first received proof of the claimed bills.

Rule 32 of the Minnesota No-Fault Arbitration Rules leaves the issue of whether costs, expenses and most importantly, benefits are owing to the arbitrator's discretion. An arbitrator may deny or award any item of expense submitted. Claims for costs and expenses should be accompanied by supporting documentation to prove the expense was incurred for the preparation of arbitration or presentation of claimant's claim. Medical reports generated to address items of general damage which may also be used by a claimant in support of a bodily injury liability claim should not also be covered as costs or items of expenses incurred for the preparation of arbitration.

Rule 32 of the Minnesota No-Fault Arbitration Rules also provides that the arbitrator may, in the award, include arbitration fees, expenses, rescheduling fees and compensation as provided in sections 39, 40, 41 and 42. Rule 42 provides the specific expenses which can be awarded by an arbitrator. These include "required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator" Rules 39 through 42 make no mention of medical records, costs of arbitration booklets, or any other reports.

More recently, in *American Family Ins. Group v. Keiss*, 697 N.W.2d 617 (Minn. 2005), the Supreme Court held that no-fault benefits become overdue (meaning interest starts to accrue) thirty days after the claimant files a petition for arbitration, not thirty days after the bill is incurred, if the bill has never been submitted to the no-fault insurer before for payment. The court noted that under Minn. Stat. §§ 65B.41-.71 (2004), no-fault benefits are payable monthly as loss accrues, and loss accrues not when the injury occurs, but as the actual expense is incurred. Benefits are overdue if not paid within 30 days after the insurer "receives reasonable proof of the fact and amount of loss realized ." *Id.* The court went on to note that the "insured is obligated to provide a no-fault carrier with actual notice of a loss incurred in order to be eligible for mandatory interest when the insurer had previously discontinued the

insured's no-fault benefits pursuant to an independent medical examination." *Id.*

Note, that the 15 percent interest is a penalty to be paid in addition to the no-fault limits, and will be paid beyond the no-fault coverage limit. See *McGoff v. AMCO Ins. Co.*, 575 N.W.2d 188 (Minn. Ct. App. 1998).

No-fault claims do not include pre-judgment interest (that is why the statutory interest penalty is there). However, if a no-fault claim is reduced to a judgment in district court, post-judgment interest under Minn. Stat. §549.09 applies after judgment rather than the 15 percent interest set forth in Minn. Stat. §65B.54, subd. 2; see also *Motschenbacher*, 402 N.W.2d at 119.

Defense counsel should consult with the adjuster on the file to determine whether they would like to produce their own proposed interest. Generally, claimants will propose interest from the date of treatment simply because they are not aware when the insurance company actually received proof of the bills, even if the company received the bills a few days after the treatment. Although the difference in interest on a specific bill would be minimal, several instances of this can add up. Additionally, if the insurance company seeks to argue that they never received a bill until a certain date, it makes the Arbitrator's job much easier to see a proposed interest calculation from the Respondent. Finally, this proposal can assist in settling the interest calculation between the parties after the Arbitrator issues an award that directs the parties to calculate interest.\

B. Confirming, Vacating, Modifying or Correcting an Award

Rules 29 and 32 of the No-Fault Arbitration Rules were amended effective September 7, 1999 to no longer require motions or applications for confirmation, vacation, modification or correction of award to be served directly on claimant. Rather, as Rule 38 now provides, service of process is governed by Rule 29 and Minn. Stat. § 572B.05, and allows for service on the party's attorney or representative. Minn. Stat. §§ 572B.01 through 572B.31 set forth the procedures and basis for confirming, modifying, vacating or correcting an award.

VII. Conclusion

The size, scope and complexity of claims has increased over the years since mandatory arbitration came about. These cases used to be litigated in district

court, and given many of the issues involved today, district court does seem to be the more just venue. A jury is more likely to give careful consideration to the issues, application of the law, and to weigh and consider evidence. Too often, these cases are being heard by arbitrators who are practicing attorneys who are pressed for time, who get a one-time lump sum payment of \$300.00 to read arbitration books, hear evidence, conduct the hearing, and to render an award. Many times the arbitrator is also called upon to prepare a factual memorandum or to calculate amounts owing, amounts paid or interest. Many arbitrators take these cases very seriously and despite the monetary drawback, do not give them short shrift. Those arbitrators are to be commended, and we all wish there were more of them out there. Given the constraints on arbitrators, it behooves those of us who are practicing in this area to sign up to be arbitrators so that we increase the pool of qualified applicants. But, it is also our obligation to prepare these cases thoroughly and to advocate our respective positions in a detailed, concise and professional manner. Neither side benefits when they show up for arbitration unprepared, or with little evidence to justify their parties' position. Hopefully some of the tips in these materials will help.