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OFFICE OF APPELLATE COURTS

No. A17-1921

State of Minnesota
In Court of Appeals

Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.,

Appellants,

and Maria Vlachou-Hahn, individually and as parent and natural guardian of Eva Vlachou-Hahn, a minor,

Plaintiffs,

vs.

Nationwide Mutual Insurance Company and AMCO Insurance Company,

Respondents,

and Michael A. Zimmer, as Special Administrator of the Estate of Marcus Hahn, deceased, and PV Holding Corporation,

Defendants,

vs.

Diego Velazquez Sanchez, Jose Raul Cabrea Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez, a minor, and Dante Lopez Velazquez, a minor,

Third-Party Defendants.

BRIEF AND ADDENDUM OF APPELLANTS

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

William R. Sieben (#100808)
James S. Ballentine (#209739)
Matthew J. Barber (#397240)
SCHWEBEL, GOETZ & SIEBEN, P.A.
5120 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 377-7777

Attorneys for Plaintiffs Maria Vlachou-Hahn and Eva Vlachou-Hahn

Sylvia Ivey Zinn (#164379)
BRENDEL & ZINN, LTD.
8519 Eagle Point Blvd., Suite 110
Lake Elmo, MN 55042
Telephone: (651) 224-4959

Attorney for Respondents Nationwide Mutual Insurance Company and AMCO Insurance Company

B. Jon Lilleberg (#220772)
Peter M. Leiferman (#396270)
LILLEBERG & HOPEWELL, PLLC
5200 Wilson Road, Suite 325
Edina, MN 55424
Telephone: (612) 255-1134

Attorneys for Defendants Michael Zimmer, Special Administrator for Estate of Marcus Hahn, and PV Holding Corporation

Jody Martineau
Rachel Sperling
LEONARD MARTINEAU LEONARD
6465 Wayzata Blvd., Suite 780
Minneapolis, MN 55426
Telephone: (952) 567-2488

Attorneys for Third-Party Defendants Diego Sanchez, Martha Lopez, and Dante Velazquez

Matthew B. Gross
QUARNSTROM & DOERING P.A.
109 South 4th Street
Marshall, MN 56258
Telephone: (507) 537-1441

Attorney for Respondent Jose Ortega Raul Cabrera Ortega

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HOLDING BELOW: The trial court stayed the Minnesota action.

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II. Did the trial court err by refusing to enjoin Respondents from prosecuting a California action brought to avoid application of Minnesota law to a Minnesota accident, when the Minnesota action involves more parties, different causes of action, more issues, and is the only action which can provide all parties complete relief?

RAISED BELOW: Appellants and Plaintiffs moved to enjoin Respondents from prosecuting the California action.

HOLDING BELOW: The trial court refused to enjoin the California action.

MOST APPOSITE AUTHORITIES:

Maslowski v. Prospect Funding Partners LLC, 890 N.W.2d 756 (Minn. App. 2017), *review denied* (Minn. May 16, 2017)

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Minnesota Mutual Life Insurance v. Anderson, 410 N.W.2d 80 (Minn. App. 1987)

STATEMENT OF THE CASE

On August 29, 2015, a vehicle driven by Marcus Hahn collided with a vehicle driven by Third-Party Defendant Diego Sanchez near Wilmar, Minnesota. Hahn was driving a vehicle rented from Appellant Budget Rent A Car System (Budget). Hahn died, and his wife Maria and daughter Eva sustained injuries. Multiple occupants of the Sanchez vehicle were injured.

At the time of the accident, Hahn, a California resident, was insured on a primary basis under a personal auto policy with Respondent AMCO Insurance Company and under an umbrella policy with Respondent Nationwide Insurance Company.[1] The Budget rental agreement provides the liability limits required by the Minnesota No-Fault Act. Hahn also elected excess rental liability coverage under a policy issued by Appellant ACE American Insurance Company (ACE).

In August 2016, the Vlachou-Hahns retained Minnesota counsel and notified Nationwide of their claims. On November 9, 2016, Nationwide filed for preemptive declaratory judgment in California. Two weeks later, on November 21, 2016, the Vlachou-Hahns commenced action in Minnesota.

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[1] For brevity's sake, Appellants will refer to Respondents AMCO Insurance Company, and its parent company, Nationwide Insurance Company, together as "Nationwide." References to the specific policies will be to the "AMCO Policy" and to the "Nationwide Policy."

After several rounds of amendments to the pleadings in both actions, and a third-party action in Minnesota against all six occupants of the Sanchez vehicle, the parties brought cross-motions in August 2017. Budget and the Vlachou-Hahns moved to enjoin the California matter; Nationwide moved to stay the Minnesota action. The trial court granted Nationwide's motion based on the "first-filed rule."

Appellants and Plaintiffs contend the first-filed rule is not a "rule" at all, and does not apply. Further, the California action should be enjoined, because: (1) the courts are not of concurrent jurisdiction; (2) the issues and claims in the two actions are different; (3) the Minnesota action contains more parties; and (4) only the Minnesota action can provide complete relief. Further, Minnesota's strong interest in having its law apply to accidents occurring within its borders negates any concerns regarding comity towards California, which is the principle behind the first-filed rule. Finally, the equities favor proceeding in Minnesota, as Nationwide is patently attempting to avoid application of Minnesota law, which makes its coverage primary for all injury claims arising from the accident.

On October 4, 2017, the district court granted Nationwide's motion to stay, and refused to enjoin Nationwide from prosecuting the California action. The district court did not address the fact that the parties are not the same and the issues are not the same – both being required for the first-filed

rule to apply. The district court did not address the capacity of the Minnesota action to dispose of the other where California cannot. The district court did not consider whether Minnesota's stated interest of applying its law to accidents occurring within this state trumped any concern for comity towards California. The district court did not address how the first-filed rule could apply when the courts (Minnesota and California) do not have concurrent jurisdiction. It essentially ruled that the California action was filed first, so the Minnesota action would be stayed.

The district court seemed to give great weight to the fact the California action had "progressed further," despite the fact the only real difference between the two actions was that Nationwide had a summary judgment motion (subsequently denied) scheduled *after* it filed the motion to stay in Minnesota. Yet, that should not be a consideration when, as here, the essential elements of the first-filed rule are all absent.

Appellants appeal.

STATEMENT OF FACTS

I. The Underlying Accident and the Parties:

This action involves an August 29, 2015 automobile accident near Willmar, Minnesota involving vehicles driven by Marcus Hahn and Diego Velazquez Sanchez. (Document Index No. [Doc.] 37, Ex. 3). Two days earlier,

Hahn rented the vehicle he was driving through Budget. (*Id.*, Ex. 4). PV Holding Corporation is the title owner of the vehicle. (Doc. 21, Ex. 1 at ¶ 10).

Sadly, Hahn died in the accident. (Doc. 37, Ex. 3). His passengers, his wife Maria and his daughter Eva Vlachou-Hahn (together, the Vlachou-Hahns), were injured. (*Id.*; Doc. 21, Ex. 1). Six people occupied the Sanchez vehicle: Third-Party Defendants Diego Velazquez Sanchez, Jose Raul Cabrea Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez, a minor, and Dante Lopez Velazquez, a minor. (Doc. 37 at ¶¶ 5-10; Doc. 37, Ex. 3). Multiple occupants of the Sanchez vehicle also sustained injuries. They have retained counsel to pursue claims as well. (*Id.*)

II. Relevant Insurance and Priority of Coverage:

A. Hahn's Personal Coverage.

Hahn was insured by AMCO under a Personal Auto Policy ("AMCO Policy"), which provided primary coverage with limits of $500,000 per accident. (Addendum [Add.] 20-21; Doc. 45, Ex. A at ¶ 12). Nationwide insured Hahn under a Personal Umbrella Policy ("Nationwide Policy"), with limits of $2,000,000 per accident. (Add. 23-24; Doc. 45, Ex. A at ¶ 15). Both policies contain a "family member" exclusion, which excludes coverage for claims between persons living together who are related by blood, adoption or marriage. (Doc. 45, Ex. A at ¶¶ 13-14, 16-17).

B. Rental Coverage.

Budget's rental agreement provides the statutorily-required ("30/60") limits of $30,000 per person and $60,000 per accident. (Doc. 37, Ex. 4); Minn. Stat. § 64B.49, subd. 3(1). Hahn also elected excess rental coverage under a policy with ACE with limits of $1,000,000 per person and $2,000,000 aggregate. (Docs. 7 at ¶ 14 (Doc. 34)). The ACE policy also includes a "family member" exclusion. (*Id.*)

III. Coverage Disputes:

There are numerous Minnesota rules and statutes at play. *First*, because the accident occurred in Minnesota, and AMCO and Nationwide are both licensed in Minnesota, both are subject to Minnesota Statute § 65B.50, subdivision 1:

> Every insurer licensed to write motor vehicle accident reparation and liability insurance in this state shall . . . file with the commissioner and thereafter maintain a written certification that it will afford at least the minimum security provided by section 65B.49 to all policyholders, except that in the case of nonresident policyholders it need only certify that security is provided with respect to accidents occurring in this state.

Minn. Stat. § 65B.50 (emphasis added); *see also Founders Ins. Co. v. Yates*, 888 N.W.2d 134 (Minn. 2016) (holding that even a vehicle insurer not licensed in Minnesota is obligated to provide coverage required by the Minnesota No-Fault Act for accidents in Minnesota).

Second, the Minnesota No-Fault Act dictates that both the AMCO Policy and Nationwide Policy are primary to all coverage issued through Budget and ACE. "The plan of reparation security covering the owner of a rented motor vehicle [Budget and ACE] is excess of *any* residual liability coverage [the AMCO Policy and Nationwide Policy] insuring an operator [Hahn] of a rented motor vehicle." Minn. Stat. § 65B.49, subd. 5a(j) (2007) (emphasis added). Thus, the AMCO Policy has the primary obligation to defend and indemnify the Hahn Estate from the claims by Hahn's wife and daughter, as well as those by the occupants of the Sanchez vehicle. *Id.*

Regarding the "Sanchez claims," under Minnesota law the personal auto insurance Hahn placed with AMCO is primary; the Nationwide Policy provides the "first layer" of excess coverage for those claims; the Budget coverage is next; and ACE is last. Minn. Stat. § 65B.49, subd. 5a(j)

Third, Minnesota law prohibits "family member" exclusions which would result in the absence of the statutorily-mandated limits. *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 833-34 (Minn. 1979) (held, family member exclusions in primary auto policies are unenforceable under the Minnesota No-Fault Act). In California, however, there appears to be no such rule. *Safeco Ins. Co. v. Gibson*, 211 Cal. App. 3d 176 (Ct. App. 1989) (upholding family member exclusion); (*see also* Doc. 45, Ex. A at ¶¶ 14, 29). "Family member" exclusions on an excess or umbrella level, however, are

enforceable. *Bundul v. Travelers Indemnity Co.*, 753 N.W.2d 761 (Minn. App. 2008).

IV. Procedural History:

In August of 2016, the Vlachou-Hahns notified Nationwide that they had retained counsel and intended to pursue claims against Marcus Hahn's Estate. (Doc. 45, Ex. A at ¶ 22). On November 9, 2016, Nationwide commenced a declaratory judgment action in Los Angeles County, California action against the Hahn Estate, the Vlachou-Hahns, and Budget. (*Id.*) According to Nationwide, it did so to preempt the Vlachou-Hahns' "imminent" lawsuit:

> In August of 2016, Maria and Eva [Vlachou-Hahn] retained the law firm Schwebel Goetz & Sieben to represent them with respect to liability claims against the Estate. . . . Although Maria and Eva have not yet filed suit against Mr. Hahn's estate, counsel for Maria and Eva has indicated that such a lawsuit is imminent and the damages are claimed are covered by the [AMCO] Personal Auto and [Nationwide] Personal Umbrella policies, despite each policy's family member exclusion.

(Doc. 45, Ex. A at ¶ 22) (emphasis added).

Under Minnesota law, the AMCO and Nationwide policies are primary over Budget and ACE, and AMCO's family member exclusion is unenforceable. Minn. Stat. § 65B.49, subd. 5a(j); *Hime*, 284 N.W.2d at 833-34. In California, however, Nationwide can seek a declaration that it is not

obligated to indemnify or defend the Hahn Estate from any claims. (Doc. 45, Exs. A, B). Period.[2]

On November 21, 2016, two weeks after Nationwide commenced the California action, the Vlachou-Hahns commenced the Minnesota state court action. (Doc. 3). The action named the Hahn Estate, Budget, and PV Holding Corporation. On January 20, 2017, the Vlachou-Hahns amended their Complaint to add Budget, ACE, AON Risk Services Northeast,[3] and Nationwide as party defendants. (Doc. 4). This is the first time ACE was named as a party in either lawsuit. The Amended Complaint alleged three causes of action:

- A count for negligence against the Hahn Estate.
- A count seeking a declaration that the various "family exclusions" are unenforceable under Minnesota law.

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[2] In a footnote to its California Complaint, Nationwide claimed it did not add the occupants from the Sanchez vehicle as parties because priority of coverage for those claims was supposedly not an issue. (*Id.*) California likely has no jurisdiction over the Third-Party Defendants, who are Minnesota residents. (Doc. 37, Ex. 3).

[3] AON Risk Services Northeast serves as ACE's insurance broker.

- A count seeking a declaration that PV Holding Corporation is vicariously liable for the negligence of Hahn as the owner of the rental vehicle.[4]

(Doc. 4).

On March 20, 2017, the Vlachou-Hahns served a Second Amended Complaint in Minnesota to add AMCO as a Defendant. (Doc. 5).

On April 19, 2017, Nationwide added ACE as a party defendant in California. (Doc. 45, Ex. 2).

On July 7, 2017, in the Minnesota action, Budget served a Cross-Claim and Counterclaim seeking: 1) a declaration that the AMCO Policy has the primary duty to defend and indemnify the Hahn Estate; and 2) equitable contribution from Nationwide for all costs incurred to defend the Hahn Estate. (Doc. 37, Ex. 1). Notably, Budget added "Does 1-6" as Third-Party Defendants and explained that the "Does" were the six occupants of the Sanchez vehicle. (Doc. 37, Ex. 1 at ¶ 8 ("the other vehicle involved in the accident was occupied by six individuals who sustained injuries (Does 1-6).")).

On July 27, 2017, Budget, having identified the six occupants named as Third-Party Defendants. (Doc. 37, Ex. 2). This is required under Minn. Stat.

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[4] *But see* 49 U.S.C. § 30106(a) (the Graves Amendment) ("An owner of a motor vehicle that rents or leases the vehicle to a person ... shall not be liable under the law of any State ... by reason of being the owner of the vehicle"); *Meyer v. Nwokedi*, 777 N.W.2d 218, 228 (Minn. 2010) (the Graves Amendment preempts vicarious liability claims under Minn. Stat. § 169.09, subd. 5a, as applied to rental-vehicle owners).

§ 555.11, as anyone with an interest in, or who would be affected by the declaration sought, must be parties in order for the court's declaration to be binding. To date, Nationwide has not attempted to add the occupants of the Sanchez vehicle to the California lawsuit. (*See* Doc. 45; Add. 11-15, Cal. Register of Actions).

V. Motions and the District Court Order:

On July 19, 2017, two days after Budget filed its counterclaim and cross-claims (which included the Third-Party Defendants), Nationwide moved to stay the Minnesota action. (Doc. 15). Budget and the Vlachou-Hahns then filed a cross-motion to enjoin Nationwide from proceeding with the California action pending the outcome of the Minnesota action. (Doc. 47, 52).

On August 10, 2017, Nationwide moved for summary judgment in the California action. (Add. 8-10, Cal. SJ Motion).

By Order dated October 4, 2017, the district court ruled on the parties' cross-motions and:

- Stayed the Minnesota action based on the so-called "first-to-file rule"; and
- Refused to enjoin the California action.

(Add. 1-7, Order; Doc. 64).

Following the Order, on October 27, 2017, the California court denied Nationwide's summary judgment motion. (Add. 13, Proceedings Held).

Thereafter, Budget and ACE moved to stay the California action. (Add. 14, Register of Actions). The hearing on Budget and ACE's motion is set for April 27, 2018. (Add. 11, Future Hearings).

SUMMARY OF ARGUMENT

The district court's decision to stay the Minnesota action, and refuse to enjoin the California lawsuit should be reversed for three distinct reasons.

First, the district court erroneously applied the first-filed rule. The rule only applies in cases of concurrent jurisdiction. Minnesota and California courts are not concurrent. And, in any event, California does not have jurisdiction over the Third-Party Defendants. Moreover, declaratory judgment actions brought to preempt damages claims are not entitled to "first-filed" deference.

Second, the district court failed to consider the three-part test for both a stay and anti-suit injunction. The tests are the same. Both require that:

(1) The parties be the same;

(2) The issue(s) be the same; and

(3) Resolution of the first action be dispositive of the action to be enjoined.

Minnesota Mut. Life Ins. v. Anderson, 410 N.W.2d 80, 81-81 (Minn. App. 1987); *First State Ins. Co. v. Minnesota Mining & Mfg. Co.,* 535 N.W.2d 684 (Minn. App. 1995), *review denied* (Minn. Oct. 18, 1995).

Here, the trial court did not apply this standard to either Nationwide's motion to stay, or Appellants' and Plaintiffs' motions to enjoin. An "apples-to-apples" comparison proves as much:

1. "The parties must be the same"

Minnesota:	California:
▪ Marcus Hahn Estate	▪ Marcus Hahn Estate
▪ Maria and Eva Vlachou-Hahn	▪ Maria and Eva Vlachou-Hahn
▪ Nationwide and AMCO	▪ Nationwide and AMCO
▪ Budget	▪ Budget
▪ ACE	▪ ACE
▪ PV Holding Corp.	
▪ Aon Risk Services NE	
▪ Diego Velazquez Sanchez, Jose Raul Cabrea Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez and Dante Lopez Velazquez	

2. "The issue[s] must be the same"

Minnesota:	California:
▪ Declaratory judgment to determine AMCO's and Nationwide's obligation to defend and indemnify the Hahn Estate from tort claim by Maria and Eva Vlachou-Hahn based on the "family member" exclusion ▪ Maria and Eva Vlachou-Hahns' personal injury claims against the Hahn Estate ▪ Maria and Eva Vlachou-Hahns' vicarious liability claims against PV Holding ▪ Budget's equitable contribution claim against AMCO and Nationwide ▪ Appellants' declaratory judgment claim to determine coverage priorities of each insurer for Maria and Eva Vlachou-Hahns' tort claims against the Hahn Estate ▪ Declaratory judgment to determine ACE's obligation to defend and indemnify the Hahn Estate from claims by Maria and Eva Vlachou-Hahn based on the "family member" exclusion ▪ Appellants' declaratory judgment claim to determine coverage priorities of AMCO, Nationwide, Budget and ACE for Third-Party Defendants' tort claims against the Hahn Estate	▪ Declaratory judgment to determine AMCO's and Nationwide's obligation to defend and indemnify the Hahn Estate from tort claims of Maria and Eva Vlachou-Hahn based on the "family member" exclusion ▪ Declaration as to priority coverage under the Budget Contract, ACE Policy, AMCO Policy and Nationwide for Maria and Eva Vlachou-Hahn's claims

3. "Capacity of one action to dispose of the other"

Minnesota:	California:
Yes. Resolution of the Minnesota action will determine all insurance coverage and injury issues by and between all of the parties. Final adjudication of the Minnesota action will render the California action moot.	**No**. Final adjudication of the California action will require continued litigation in Minnesota to determine coverage priorities for the Vlachou-Hahns and Third-Party Defendants' claims, Appellants' claims for equitable contribution against Nationwide and AMCO, and resolution of the Vlachou-Hahns' and Third-Party Defendants' tort claims.

Third, the district court misplaced concerns for judicial comity as a basis to defer to California. Yet, deference to a foreign court is contingent on whether its laws are contrary to Minnesota's. Where the laws are different, and application of the foreign state's law is against Minnesota's stated interests, judicial comity does not apply. Application of California law here cuts against Minnesota's interest in compensating tort victims, and enforcing insurers' obligations to provide the benefits required by the No-Fault Act for accidents occurring in Minnesota, and in what order of priority. Ignoring all of this, the trial court's judicial inquiry stopped at which action was filed first.

In short, the district court misapplied Minnesota law and its decision should be reversed.

ARGUMENT

I. Standards of Review.

Whether to grant a stay of proceedings or whether to enter an anti-suit injunction is within the district court's discretion. *St. Paul Surplus Lines Ins. Co. v. Mentor Corp.*, 503 N.W.2d 511, 515 (Minn. App. 1993); *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 767 (Minn. App. 2017), *review denied* (May 16, 2017).

A district court abuses its discretion if it disregards "either the facts or the applicable principles of equity." *First State Ins. Co. v. Minnesota Min. & Mfg. Co.*, 535 N.W.2d 684, 687 (Minn. App. 1995) (quoting *Cramond v. AFL–CIO*, 267 Minn. 229, 234, 126 N.W.2d 252, 257 (Minn. 1964)).

II. The District Court Abused Its Discretion By Staying The Minnesota Action Because The "First-Filed Rule" Does Not Apply As A Matter Of Law.

A. The rule does not apply because the California and Minnesota courts do not have concurrent jurisdiction.

This Court in *Maslowski*, *Medtronic*, and *Mentor* held that the first-to-file "rule" is only applicable in cases of concurrent jurisdiction. *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 448-49 (Minn. App. 2001); *Maslowski*, 890 N.W.2d at 768 (citing *Mentor*, 503 N.W.2d at 515). The general rule of deference to the court to first acquire jurisdiction "does not apply when the same cause of action is pending before courts that do not share concurrent jurisdiction, ***such as courts of different states***."

Maslowski, 890 N.W.2d at 768 (citing *Mentor*, 503 N.W.2d at 515) (emphasis added).[5] In cases without concurrent jurisdiction, the first-filed lawsuit should not be given deference and "the actions may proceed independently of each other and the rules of res judicata will generally be applied with regard to the first suit to be concluded." *Id.*

Put simply, Minnesota state courts do not share concurrent jurisdiction with California state courts. The first-filed rule does not apply; the stay never should have been granted. Further, the Third-Party Defendants are not parties to the California lawsuit and it lacks jurisdiction over these individuals – abolishing any conceivable argument the two courts have concurrent jurisdiction.

B. The first-filed rule should not be invoked by a party that files an anticipatory declaratory judgment action.

Concurrent jurisdiction aside, applying the first-filed rule is improper because Nationwide filed the California action for the sole purpose of circumventing the Vlachou-Hahns' forum selection. Courts are reluctant to resolve disputes through the artificial device of a declaratory judgment action

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[5] The first-to-file rule "has never been applied, and in fact it was never meant to apply where the two courts involved are not courts of the same sovereignty." *Leomporra v. Jet Linx Aviation, Inc.*, No. CIV 09-770 (DSD/AJB), 2009 WL 1514517, at *2 n.2 (D. Minn. June 1, 2009) (quoting *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 n.10 (3d Cir. 1981).

in anticipation of an action for legal damages. *E.g. Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1225 (3d Cir. 1989) ("Courts ... seek to prevent the use of the declaratory action as a method of procedural fencing, or as a means to provide another forum in a race for res judicata.") (*quoting* 6A J. Moore, J. Lucas & G. Girtheer, Jr., *Moore's Federal Practice* ¶ 57.08[5], at 57-50 (2d ed. 1987)). Indeed, "frequent, attempted abuses of the declaratory action in this area make the exercise of judicial discretion particularly important." *Id.*; *see also U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 489 (8th Cir. 1990) (noting that party against which first-filed declaratory judgment action was filed, whose second-filed action sought damages, "could be considered the 'true plaintiff'").

This case is akin to *Great American Insurance Co. v. Houston General Insurance Co.*, 735 F. Supp. 581 (S.D.N.Y. 1990), which involved a coverage dispute between Houston General and its reinsurer, Great American. After the insured's initial demand for payment went unheeded, Houston General sent Great American a second demand and, as here, threatened litigation by a date certain. Before that date, Great American commenced an anticipatory declaratory judgment action against its insured in New York. Houston General subsequently filed its own action in Texas. Houston General then moved to dismiss the New York action. *Id.* at 582-83.

After careful consideration of the policy behind the Declaratory Judgment Act, the court dismissed Great American's suit. The court determined that the reinsurer should not be rewarded for attempting to preempt a suit by its insured. *Id.* at 586; *accord Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438 (Minn. App. 2001) (no deference given to earlier filed declaratory judgment action because to do so would reward a party who acts "in a calculated and systematic manner ... to deprive the [Minnesota] court of its jurisdiction") (internal citations omitted); *UBS Fin. Servs., Inc. v. Ingraham*, No. CIV.A. 09-2502-KHV, 2010 WL 6754383, at *3 (D. Kan. Apr. 8, 2010) (when a declaratory judgment action "appears to be a reaction to the imminent filing of a state court case," the court "places no weight" on the earlier filing of the declaratory judgment action).

Here, Nationwide commenced the California action after the Vlachou-Hahns advised of an "imminent" lawsuit for damages. Indeed, Nationwide stated its preemptive intent: counsel for Maria and Eva has indicated that such a lawsuit is ***imminent*** and the damages claimed are covered" by the AMCO and Nationwide policies. (Doc. 45, Ex. A at ¶ 22) (emphasis added). The Vlachou-Hahns then filed two weeks later. The trial court ignored this, and should not have applied the first-filed rule to a preemptive declaratory judgment action.

III. The District Court Erred By Entering A Stay Based On The First-Filed Rule And By Refusing To Enjoin The California Action.

A. The district court applied an incorrect legal standard and failed to consider the "rule's" threshold requirements.

Assuming, *arguendo*, the first-filed rule had bearing on this case, the district court failed to apply the applicable law. The first-filed "rule" is "not truly a rule at all, but a principle, a 'blend of courtesy and expediency,'" – and, respectfully, missed by the district court – should be considered only when the threshold elements are present. *Medtronic*, 630 N.W.2d at 449 (quoting *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 291 (Minn. 1991)). The three-part test to apply the first-filed rule is identical to the three-part test for an anti-suit injunction.

Application of the first-filed principle – for a stay or anti-suit injunction – require each of the following:

(1) The parties must be the same;

(2) The issue(s) must be the same; and

(3) Resolution of the first action must be dispositive of the action to be enjoined.

Minnesota Mut. Life Ins. v. Anderson, 410 N.W.2d 80, 81-81 (Minn. App. 1987) (quoting *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F.Supp. 946, 955 (D. Minn.), *aff'd*, 664 F.2d 660 (8th Cir.1981)); *First State,* 535 N.W.2d at 687 (identical factors apply when considering an anti-suit injunction).

Despite the straightforward nature of this test, *none* of the three are present here. Conversely, all of the parties and issues in the California action are present in the Minnesota action, and *only* Minnesota has the capacity to dispose of the other action.

1. The Minnesota action has far more parties.

The trial court did not address this. This is a reversible error, as it is undisputed that the Minnesota and California actions involve different parties. Each of the parties to the California suit are present here, however, the Minnesota action includes eight additional parties (the six occupants of the Sanchez vehicle, PV Holding, and AON Risk Services Northeast).

Nationwide argued below that the Sanchez occupants were added in response to its motion to stay. This is demonstrably false. Appellants filed and served their cross-, counter-claim and third-party claims, specifically identifying "Does 1-6" (the Sanchez occupants) ***before*** Nationwide's motion. Thereafter, the "Does" were identified, and Budget served Third-Party Complaints naming them individually.

Moreover, so what? The fact is that, at the time of the trial court's decision, there were several more parties to the Minnesota action than in California. These were necessary parties under the Minnesota Declaratory Judgment Act. Minn. Stat. § 555.11. That alone compels reversal.

2. The claims in the separate actions are not the same.

Undoubtedly, the two actions involve different claims. Yet, the district court found they involved the "same issues." This is incorrect. While the claims in the Minnesota suit are present in the California suit, even a cursory review of the pleadings demonstrates the different claims here:

- The Vlachou-Hahns' personal injury claims;
- Declaratory judgment counts as to priority of coverage for all claims – the Vlachou-Hahns and Sanchez occupants' claims alike;
- A declaratory judgment county as to AMCO's and Nationwide's priority vis-à-vis Budget and ACE under Minn. Stat. § 65B.49, subd. 5a(j), for all claims; and
- Budget's claim for equitable contribution from AMCO as co-primary insurers.

3. Resolution of the California action will not and cannot be dispositive of the Minnesota lawsuit.

Perhaps the most obvious reversible error is the trial court's failure to consider this factor. The capacity to provide "**comprehensive solution of the general conflict**" is paramount because the whole point of both an anti-suit injunction and the first-filed rule is to avoid "piecemeal litigation." *Anderson,* 410 N.W.2d 80, 82 (Minn. App. 1987) (emphasis added).

First State is directly on point. In that case, three insurers brought a declaratory judgment action in Minnesota against 3M to resolve coverage disputes concerning bodily injury claims from 3M's silicone breast implants. 525 N.W.2d at 686. 3M initiated a separate action concerning the same

issues, against the same insurers, in Texas. The insurers moved to enjoin the Texas lawsuit.

The Minnesota district court granted the injunction, finding that the parties and issues in both lawsuits were similar. *Id.* Critically, the district court found that "the Minnesota action was more comprehensive than the Texas action, because it would not only determine the coverage and duty to defend obligations of all the insurance carriers, but also would allocate responsibility among them." *Id.* at 687.

The court of appeals affirmed. *Id.* at 687-688. The panel found the first factor was satisfied because, as here, the "Minnesota action includes all the parties to the Texas action," but in "the Texas action, however, 3M sued only some of its insurers[.]" *Id.* at 687. The second factor was met because both cases concerned the issue of coverage. *Id.* Lastly, this court found the third factor dispositive. The Minnesota action was the more comprehensive of the two because it would resolve "**all parties and all factual and legal questions**." *Id.* (emphasis added). Simply, the Minnesota action would "bind all insurance carriers on the issues of coverage and duty to defend and will facilitate an allocation of insurance obligations" whereas the Texas lawsuit could not. *Id.*

As in *First State*, this action will resolve *all* coverage disputes between the insurers, including the priority and allocation of coverage between both

the Vlachou-Hahns and six Sanchez vehicle occupants. *See also Minneapolis Employees Ret. Fund v. Intercap Monitoring Income Fund III*, No. C5-93-835, 1993 WL 459902 at *3 (Minn. App. Nov. 9, 1993) (anti-suit injunction affirmed simply because "Minnesota action is the more comprehensive in this case") (Add. 25-27). Dovetailing the additional claims and parties in the Minnesota lawsuit is that the mere resolution of the California claims will leave the parties waiting to resolve additional issues and claims. On the other hand, if the California action had been enjoined, when this lawsuit is resolved, the California action will be moot. But the Order, as it stands, will necessitate duplicative, "piecemeal litigation" in direct contravention of *Anderson,* 410 N.W.2d at 82, and *Mentor*, 503 N.W.2d 511.

In *Mentor*, a Minnesota corporation that manufactured breast implants in California filed a declaratory judgment action in California state court against certain of its insurers, including a Minnesota insurer, regarding coverage for breast implant claims. 503 N.W.2d 511. A month later, the Minnesota insurer filed and served a declaratory judgment action against only the insured and subsequently sought and obtained an order barring the insured from prosecuting the California action. In reviewing the propriety of enjoining the California action, this court noted that exercise of the "discretionary power" to enjoin was "dependent on the similarities between

the two litigations" and whether "the parties and issues are common to both actions, and whether one action will be dispositive of the other." *Id.* at 516.

This court reversed, holding that the injunction was improper because: (1) it was "doubtful that the Minnesota action [could] dispose of the California action" since there was no indication that the eight additional insurance companies that were involved in the California action could "be made to appear in the Minnesota action"; (2) the "issues in the California and Minnesota action [were] not the same" since the Minnesota action involved only defense and indemnity obligations of the insured's primary carriers whereas the California action involved additional obligations of its excess carriers; and (3) it was "not a case in which it [was] necessary for one court to take control of the litigation to ensure an orderly and just resolution." *Id.* at 516.

This case is *Mentor* in reverse. It is the California action that cannot dispose of all of the claims because (1) the Sanchez occupants, as Minnesota residents with no known connection to California, cannot be hailed into that court, and (2) the issues are not the same, because the Minnesota action involves more and different claims. Respectfully, the district court should have followed *Mentor*, applied the three factors, and enjoined the narrower California proceeding, not stay the much broader Minnesota action.

B. The district court erred by considering judicial comity without considering Minnesota's interests and other equitable principles.

The trial court prematurely considered principles of judicial comity, equity, judicial economy, and the possibility of multiple determinations, without first considering whether the threshold requirements of the first-filed "rule" were even met in the first place. *Maslowski* makes clear that the additional factors are only relevant *if* the three-element test is met in the first instance. 890 N.W.2d at 767; *see also State ex rel. Minnesota Nat. Bank of Duluth v. Dist. Court, Fourth Judicial Dist.*, 195 Minn. 169, 173, 262 N.W. 155, 157. Assuming the district court had found the three preconditions to the first-filed rule satisfied – an impossible task – the district court erred by applying principles of comity without first considering Minnesota's interests.

Judicial comity is the respect a court of one state shows another in giving effect to the other's laws and judicial decisions. *Maslowski*, 890 N.W.2d at 768. This "informal policy of deference" does not apply, however, where the laws of that state are contrary to the strong interest of Minnesota and its well-established legislative and judicial policies. *Id.*

The district court summarily concluded, without explanation, that *Maslowski* is "distinguishable on its facts." But that case is actually quite apposite. In *Maslowski*, a litigation finance company initiated a lawsuit in New York to enforce a litigation funding agreement with a Minnesota

resident based on a forum selection clause. *After* the New York suit was filed, the plaintiff initiated a lawsuit in Minnesota to have the agreement declared unenforceable. She thereafter moved to have the New York lawsuit enjoined. The finance company moved to have the Minnesota action stayed based on the first-filed rule.

First, the district court found the three elements were met. *Id.* at 767-68. Next, on the issues of comity and equity, the district court noted the strong difference of opinion between Minnesota and New York courts on the issue of champerty. *Id.* at 786. Because of Minnesota's strong public policy against champerty, the district court declined to defer to New York. *Id.*

Even though the New York action was "first-filed," this court affirmed because Minnesota's strong anti-champerty interest trumped any interest in deferring to New York's contrary rule of law. *Id.* at 769.

Here, Minnesota has a strong interest in having its laws – including the Minnesota No-Fault Act – apply to accidents occurring in this state. "The overriding Minnesota interest is compensating tort victims." *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 8 (Minn. App. 2003). This policy applies to equally injured nonresidents who – like the Vlachou-Hahns – are injured in this state. *Milkovich v. Saari*, 295 Minn. 155, 171, 203 N.W.2d 408, 417 (1973) (applying Minnesota law to a nonresident plaintiff injured in this state). Indeed, *Milkovich* based its holding on Minnesota's interest in

ensuring that "injured persons not be denied recovery on the basis of doctrines foreign to Minnesota." *Id.*; *accord Danielson*, 670 N.W.2d at 9 ("fair compensation [is] the better policy."); *Christian v. Birch*, 763 N.W.2d 50 (Minn. App. 2009); *see also Jepson v. General Cas. Co. of Wisconsin*, 513 N.W.2d 467, 472 (Minn. 1994) ("We have even refused to apply our law when the law of another state would better serve to compensate a tort victim.") (citing *Bigelow v. Halloran*, 313 N.W.2d 10, 12-13 (Minn. 1981)).

Adding to this general interest is the expressed purpose of the Minnesota No-Fault Act: "to relieve the severe economic distress of uncompensated victims of automobile accidents within this state[.]" Minn. Stat. § 65B.42(1). To accomplish this purpose, Minnesota specifies specific levels of coverage each policy must provide. Minn. Stat. § 65B.49, subd. 3. This interest served as the basis for the holding in *Hime v. State Farm*.

Hime involved an intra-family injury claim arising from a Minnesota accident involving nonresidents and a Florida auto policy. Like this case, the Florida policy included a "family member" exclusion that would have barred the nonresidents' claims altogether. Rather than blindly defer, the supreme court held: 1) Minnesota law applies to an accident occurring in Minnesota; and 2) Minnesota public policy forbids even out-of-state auto policies, such as

AMCO's, from excluding coverage based solely on blood or martial relations.[6] 284 N.W.2d 829, 234 (Minn. 1979). Allowing Nationwide to avoid its obligations altogether is antithetical to Minnesota's policy and precedent.

Further, Minnesota has a stated policy of requiring the personal auto policies of the renter (Hahn) to provide primary coverage over that covering the owner. Minn. Stat. § 65B.49, subd. 5a(j).

Taken together, Minnesota need not and should not defer to California on any of these issues. This is especially true when Nationwide and AMCO, insurers licensed in Minnesota, agreed to provide the coverage required under the Minnesota No-Fault Act for accidents occurring here. Minn. Stat. § 65B.50, subd. 1.

The district court also failed to consider and apply the relative equities. *Hawkins v. Ireland*, 64 Minn. 339, 344, 67 N.W. 73, 75 (1896) (stating that Minnesota courts may restrain parties from pursuing actions in other state courts "whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage over other citizens"); *Doerr v. Warner*, 247 Minn. 98, 109-10, 76 N.W.2d 505, 514 (1956) (upholding anti-suit injunction partly

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[6] Minnesota has since made clear that such exclusions in excess policies are enforceable when the statutorily-required limits are provided on a primary basis. *See Bundul*, 753 N.W.2d 761 (Minn. App. 2008).

because trustee acted in "calculated and systematic" manner to deprive Minnesota court of jurisdiction); *Maslowski*, 890 N.W.2d at 767. Indeed, an attempt to evade Minnesota law is in and of itself inequitable. *Maslowski*, 890 N.W.2d at 767 (anti-suit injunction proper where litigation financer attempted to evade Minnesota's policy against champerty); *Freick v. Hinkly*, 122 Minn. 24, 26-27, 141 N.W. 1096 (1913) (the "most common ground" to enjoin a foreign lawsuit is when the "foreign suit will result in evading the effect of some local law"). This alone requires reversal. *First State*, 535, N.W.2d at 687 (the district court abuses its discretion if it disregards "either the facts of the applicable principles of equity.")

CONCLUSION

The trial court's rulings are based on the first-filed rule. Because the rule does not apply as a matter of law, the trial court's rulings should be set aside.

Nationwide's motives are transparent – it wants the California action to evade its obligations to the Hahns and the Sanchez claimants. Given Minnesota's strong interest against such a result, Appellants respectfully request the Court reverse the district court's October 4, 2017 Order, lift the stay of the Minnesota action, and direct the district court to enjoin Nationwide from proceeding with the California action.

Respectfully submitted,

Dated: January 16, 2018

s/ Robert E. Kuderer

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711
bob.kuderer@ezkm.net
thomas.brock@ezkm.net

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

CERTIFICATION OF COMPLIANCE

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a 13-point, proportionately spaced font, and the length of this document is 6,497 words. This document was prepared using Microsoft Word 2013 software.

s/ Robert E. Kuderer
Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711
bob.kuderer@ezkm.net
thomas.brock@ezkm.net

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

ADDENDUM

INDEX TO ADDENDUM

Filed in Fourth Judicial District Court
10/4/2017 11:27 AM
Hennepin County, MN

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Maria Vlachou-Hahn, and Eva Vlachou-Hahn, a minor, by her mother and natural guardian Maria Vlachou-Hahn,

Plaintiffs,

v.

Michael A. Zimmer, as Special Administrator for the Estate of Marcus Hahn, deceased, Budget Rent A Car System, Inc., PV Holding Corp., ACE American Insurance Company, AON Risk Services Northeast, Inc., Nationwide Mutual Insurance Company, and AMCO Insurance Company,

Defendants,

And

Budget Rent A Car System, Inc., PV Holding Corp., ACE American Insurance Company, and AON Risk Services Northeast, Inc.,

Defendants and Third-Party Plaintiffs,

v.

Diego Velazquez Sanchez, Jose Raul Cabrera Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez, a minor, and Dante Lopez Velazquez, a minor.

Third-Party Defendants.

Court File No: 27-CV-17-9143
Judge Joseph R. Klein

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS NATIONWIDE MUTUAL INSURANCE COMPANY AND AMCO INSURANCE COMPANY'S MOTION TO BIFURCATE AND STAY PROCEEDINGS, DENYING PLAINTIFFS' MOTION FOR ANTI-SUIT INJUNCTION, AND DENYING DEFENDANTS AND THIRD-PARTY PLAINTIFFS BUDGET RENT A CAR SYSTEM, INC., PV HOLDING CORP., ACE AMERICAN INSURANCE COMPANY, AND AON RISK SERVICES NORTHEAST, INC.'S MOTION FOR TEMPORARY INJUNCTION

On August 22, 2017, the above-captioned matter came before the Honorable Joseph R. Klein, Judge of District Court, on (1) Defendants Nationwide Mutual Insurance Company and AMCO Insurance Company's Motion to Bifurcate and Stay Proceedings, (2) Plaintiffs' Motion for Anti-Suit Injunction, and (3) Defendants and Third-Party Plaintiffs Budget Rent A Car System,

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10/4/2017 11:27 AM
Hennepin County, MN

Inc.'s, PV Holding Corp.'s, ACE American Insurance Company's, and AON Risk Services Northeast, Inc.'s Motion for Temporary Injunction. Attorney Matthew Barber appeared on behalf of Plaintiffs. Attorney Sylvia Zinn appeared on behalf of Defendants AMCO Insurance Company and Nationwide Mutual Insurance Company. Attorney Peter Leiferman appeared on behalf of Defendants PV Holding Corp. and Michael Zimmer, as Special Administrator for the Estate of Marcus Hahn. Attorney Robert Kuderer appeared on behalf of Defendants and Third-Party Plaintiffs ACE American Insurance Company, AON Risk Services Northeast, Inc., and Budget Rent A Car System, Inc. All Third-Party Defendants waived their appearances.

Based upon the evidence adduced, the arguments of counsel, and all the files, records, and proceedings herein, the court makes the following:

ORDER

1. Defendants Nationwide Mutual Insurance Company and AMCO Insurance Company's Motion to Bifurcate and Stay Proceedings is hereby **GRANTED IN PART AND DENIED IN PART.**
2. Plaintiff's Motion for Anti-Suit Injunction is hereby **DENIED.**
3. Defendants and Third-Party Plaintiffs Budget Rent A Car System, Inc., PV Holding Corp., ACE American Insurance Company, and AON Risk Services Northeast, Inc.'s Motion for Temporary Injunction is hereby **DENIED.**
4. The attached memorandum of law is incorporated herein.

BY THE COURT:

Dated: October 4, 2017

Joseph R. Klein
Judge of District Court

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Hennepin County, MN

FINDINGS OF FACT

This lawsuit arises from a motor vehicle accident which occurred on August 29, 2015. At the time of the August 29, 2015 accident, Marcus Hahn, a California resident, was driving a rental car which he had rented from Budget Rent A Car System, Inc. ("Budget"), on August 27, 2015. Plaintiffs' Second Amended Complaint alleges that Marcus Hahn failed to stop at a stop sign at the intersection of Kandiyohi County Road 7 and Highway 12 prior to entering the intersection, striking an automobile on Highway 12 driven by Diego Velazquez Sanchez and occupied by Third-Party Defendants Jose Raul Cabrera Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez, and Dante Lopez Velazquez. As a result of the accident, Marcus Hahn was fatally injured. Maria Vlachou-Hahn and Eva Vlachou-Hahn were passengers in the vehicle driven by Marcus Hahn and sustained injuries in the accident. One or more of the Third-Party Defendants claim injuries from the accident.

At the time of the accident, Marcus Hahn was insured under personal auto policies and the Budget Rental Agreement. Marcus Hahn was insured under a Personal Auto Policy issued by AMCO Insurance Company ("AMCO"), Policy No. , and a Personal Auto Policy issued by Nationwide Mutual Insurance Company ("Nationwide"), Policy No. . The rental vehicle that Marcus Hahn obtained from Budget was owned by PV Holding Corp., and was insured with ACE American Insurance Company ("ACE"). AON Risk Services Northeast, Inc., ("AON") serves as the broker for ACE.

PROCEDURAL HISTORY

On November 9, 2016, Nationwide initiated a lawsuit in California seeking a declaratory judgment that it has no duty to defend or indemnify Hahn's Estate. On November 21, 2016, Maria Vlachou-Hahn commenced the present lawsuit in Minnesota on behalf of herself and her minor

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daughter, Eva Vlachou-Hahn, against Defendants Estate of Marcus Hahn (Nationwide's insured), Budget, and PV Holding Corp. On January 20, 2017, Plaintiffs amended their Complaint. On March 20, 2017, Plaintiffs served a Second Amended Complaint. On April 19, 2017, Nationwide filed its First Amended Complaint in the California lawsuit.

CONCLUSIONS OF LAW

Defendants Nationwide and AMCO argue that this court should apply the first-filed rule and stay the present action, so that only the California action proceeds at this time. Additionally, Defendants Nationwide and AMCO argue that the coverage and liability portions of this action should be bifurcated.

Defendants and Third-Party Plaintiffs Budget, ACE, and AON (collectively, "the Budget Defendants") ask the court for an anti-suit injunction to enjoin Nationwide from proceeding with the California action until the Minnesota action is resolved, on the basis that the Minnesota action contains additional issues and parties that are not involved in the California action.

Plaintiffs also argue that the court should enjoin further litigation in the California action because the Minnesota action contains additional issues and parties that are not involved in the California action.

1. The Minnesota Action Should Be Stayed Pending Resolution of the California Action.

"The first-filed rule provides that when two courts have concurrent jurisdiction, the first to acquire jurisdiction generally has priority to decide the case." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 448–49 (Minn. Ct. App. 2001) (citing *Minn. Mut. Life Ins. v. Anderson*, 410 N.W.2d 80, 82 (Minn. Ct. App. 1987)). The first-filed rule is not meant to be a rigid, mechanical, or inflexible rule, but it should be applied in a way that serves sound judicial administration. *Id.* at 449. The Minnesota Supreme Court has described the first-filed rule as a

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principle blending courtesy and expediency. *Id.* (citing *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 291 (Minn. 1996)). In determining whether to defer to another court, a district court is to consider judicial economy, comity between courts, and the cost to and convenience of the litigants. *Id.*

The possibility of multiple litigation and conflicting results weighs in favor of deference to California. In the California action, the court has issued a scheduling order including a final status conference and trial date, discovery has been served, and a hearing on a motion for summary judgment has been scheduled for October 27, 2017. Parallel litigation is taking place in California, exposing some of the parties in this action to multiple litigation or determinations on the insurance coverage issues relative to the various policies involved in the claims asserted by the Hahn family. Because the California action has proceeded further, this factor weighs in favor of staying the Minnesota litigation.

Judicial comity is an informal policy of deference, wherein the court of one state shows respect to another state or jurisdiction in giving effect to the other's laws and judicial decisions. *Id.* The California court has not withdrawn from this matter, and instead has issued a scheduling order and scheduling a hearing on a motion for summary judgment. The court finds that considerations of comity does not preclude the court from permitting the California action to proceed while staying the Minnesota action.

The costs and convenience of the litigants weighs in favor of deference to California. The parties have been actively involved in the California litigation, which was filed prior to the Minnesota litigation and has proceeded further than the Minnesota litigation. The parties involved in the California action have demonstrated their ability to litigate in either state. The court finds that this factor weighs in favor of deference to the California action.

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Plaintiffs and the Budget Defendants have cited to *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756 (Minn. Ct. App. 2017) in support of their opposition to Nationwide's and AMCO's motion. In *Maslowski*, the district court refused to enforce a forum-selection clause in a contract requiring that any action regarding the agreement be brought in New York, and also enjoined the defendant from litigating in New York. 890 N.W.2d 756, 759. That case involved a Minnesota plaintiff who had entered into a contract, which contained the forum-selection clause, with the defendant company that provided funds to the plaintiff in exchange for an interest in her personal injury action. *Id.* at 759. The defendant company sued the plaintiff in New York for breach of contract, and the plaintiff sued the defendant company in Minnesota claiming that the contract violated Minnesota's anti-champerty law. *Id.* at 760. The Minnesota Court of Appeals held that the forum-selection clause was unenforceable, and upheld an anti-suit injunction enjoining after determining that the defendant company admittedly attempted to avoid Minnesota's law against champerty. *Id.* at 762–69. This court finds that the *Maslowski* decision is distinguishable on its facts, and does not render the first-filed rule inapplicable in the present case.

Because the California action was initiated prior to the Minnesota action, the California action has proceeded further, and the two actions involve identical issues, this court finds that application of the first-filed rule is appropriate. For these reasons, the court grants Defendants Nationwide's and AMCO's Motion to Stay Proceedings is hereby Granted. Because the court has granted Defendants Nationwide's and AMCO's Motion to Stay Proceedings in the present action filed in Minnesota, the court will not address Defendants Nationwide's and AMCO's Motion to Bifurcate at this time. Furthermore, as the court has granted Defendants Nationwide's and

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AMCO's Motion to Stay Proceedings, the motions brought by Plaintiffs and Defendants and Third-Party Plaintiffs are hereby denied.

JRK

KAREN L. UNO, State Bar #117410
DAVID P. BOROVSKY, State Bar #216588
BECHERER KANNETT & SCHWEITZER
1255 Powell Street
Emeryville, CA 94608
kuno@bkscal.com
dborovsky@bkscal.com

Attorneys for Plaintiffs
NATIONWIDE MUTUAL INSURANCE COMPANY
and AMCO INSURANCE COMPANY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

NATIONWIDE MUTUAL INSURANCE COMPANY and AMCO INSURANCE COMPANY, Plaintiffs, vs. MARIA VLACHOU-HAHN, Individually and as Administrator of the Estate of MARCUS HAHN, EVA HAHN (a minor); AVIS BUDGET GROUP, INC., ACE AMERICAN INSURANCE COMPANY; and DOES 1-10, inclusive; Defendants.	Case No.: BC639694 **PLAINTIFFS' NOTICE OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION** Date: October 27, 2017 Time: 8:30 a.m. Dept. 55 Reservation No. 170428215107

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 8:30 a.m. on October 27, 2017 in Department 55 of the above-referenced court, located at 111 No. Hill Street, Los Angeles, California 90012 plaintiffs will and hereby does move the court, pursuant to Code of Civil Procedure §437(c), for summary judgment in favor of plaintiffs NATIONWIDE MUTUAL INSURANCE COMPANY ("NATIONWIDE")and AMCO INSURANCE COMPANY ("AMCO") and against all defendants and for costs of suit incurred herein and such other relief as may be just. This motion is made on the grounds that as a matter of law and undisputed fact the "family member"

exclusions in the AMCO Personal Auto Policy and the Nationwide Personal Umbrella Policies each bar coverage for the ***Vlachou-Hahn*** personal injury lawsuit filed against Mr. Hahn's Estate, and AMCO and Nationwide owe no duty to defend or indemnify the Estate of Marcus Hahn in the same as a result.

In the alternative, plaintiffs will move the Court for an order adjudicating its first, second, and third causes of action, on the following grounds:

Plaintiffs First Cause Of Action – Declaratory Relief As To The Family Member Exclusion In The AMCO Personal Auto Policy - Plaintiffs seek summary adjudication on their first cause of action—i.e. that AMCO owes no duty to defend or indemnify the Estate or any other insured against claims for damages asserted in the ***Vlachou-Hahn*** complaint, because the AMCO Policy's "family member" exclusion bars coverage for the same.

Plaintiffs Second Cause Of Action – Declaratory Relief As To The Family Member Exclusion In The Nationwide Personal Umbrella Policy - Plaintiffs seek summary adjudication on their second cause of action—i.e. that Nationwide owes no duty to defend or indemnify the Estate or any other insured against claims for damages asserted in the ***Vlachou-Hahn*** complaint, because the Nationwide Policy's "family member" exclusion bars coverage for the same.

Third Cause Of Action – Declaratory Relief As To Priority Of Insurance Coverage For The Accident – In the event that the Court determines that Minnesota law applies to this coverage dispute then the Court should declare that: (1) "family member" exclusions are only unenforceable up to the Minnesota financial minimum limits; and (2) the AMCO and Nationwide policies are "excess to" the underlying Budget Contract and the ACE Policy which afford such limits, and therefore the "family member" exclusions in the AMCO and Nationwide policies are enforceable.

Plaintiffs therefore seek an order that the final judgment in this action shall, in addition to any matters determined at trial, award judgment as established by the above adjudications.

This motion is based on this Notice, the enclosed Memorandum In Support, the Separate Statement of Undisputed Material Facts, the Declarations of Abigale Reimer and David Borovsky, and the exhibits thereto, the Request for Judicial Notice and exhibits thereto, the Index

Becherer Kannett & Schweitzer
2200 Powell St. Suite 805 Emeryville, CA 94608 510-658-3600

of Evidence in Support of Motion, as well as the files and records in this action, arguments of counsel at the hearing of this matter, and upon such other evidence that may be presented at the hearing of this matter.

Dated: August 10, 2017

BECHERER KANNETT & SCHWEITZER

By: KAREN L. UNO
DAVID P. BOROVSKY
Attorneys for Plaintiffs
NATIONWIDE MUTUAL INSURANCE COMPANY and AMCO INSURANCE COMPANY

Becherer Kannett & Schweitzer

2200 Powell St. Suite 805 Emeryville, CA 94608 510-658-3600

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Case Access

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CASE INFORMATION

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Case Number: BC639694
NATIONWIDE MUTUAL INSURANCE COMPANY ET AL VS MARIA VLACHOU-H

Filing Courthouse: Stanley Mosk Courthouse

Filing Date: 11/03/2016
Case Type: Ins Coverage (not Complex) (General Jurisdiction)
Status: Pending

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FUTURE HEARINGS

Case Information | Register of Actions | Future Hearings | Party Information | Documents Filed | Proceedings Held

04/27/2018 at 08:30 am in Department 55 at 111 North Hill Street, Los Angeles, CA 90012
Motion for Stay of Proceedings

07/20/2018 at 08:30 am in Department 55 at 111 North Hill Street, Los Angeles, CA 90012
Final Status Conference

07/30/2018 at 09:00 am in Department 55 at 111 North Hill Street, Los Angeles, CA 90012
Court Trial - Short Cause

PARTY INFORMATION

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ACE AMERICAN INSURANCE COMPANY - Defendant/Respondent

AMCO INSURANCE COMPANY - Plaintiff/Petitioner

AVIS BUDGET GROUP INC. - Defendant/Respondent

DOES 1 TO 10 - Defendant/Respondent

HAHN EVA - Minor Plaintiff

KRUPPE MICHAEL A. ESQ. - Attorney for Deft/Respnt

LEVIN ROBERT S. ESQ. - Attorney for Deft/Respnt

NATIONWIDE MUTUAL INSURANCE COMPANY - Plaintiff/Petitioner

UNO KAREN L. ESQ. - Attorney for Plaintiff/Petitioner

VLACHOU-HAHN MARIA - Defendant/Respondent

DOCUMENTS FILED

Case Information | Register of Actions | Future Hearings | Party Information | Documents Filed | Proceedings Held

Documents Filed (Filing dates listed in descending order)
Click on any of the below link(s) to see documents filed on or before the date indicated:
11/21/2016

01/02/2018 Opposition Document (TO EX PARTE APP FOR ORDER SHORTENI NG TIME)
Filed by Attorney for Pltf/Petnr

12/18/2017 Joinder (in opposition of defts avis budget group, inc and ace american ins co's motion for an order staying the instant c alif litigation pending appeal in related minnesot a litigation)
Filed by Attorney for Deft/Respnt

12/14/2017 Notice of Motion (FOR ORDER STAYING THE LITIGATION PENDING APPEAL IN RELATED MINNESOTA LITIGATION)
Filed by Attorney for Deft/Respnt

11/03/2017 Notice of Ruling
Filed by Attorney for Deft/Respnt

10/20/2017 Declaration (OF DAVID BOROVSKY IN SUPPORT OF PLFFS REPLY IN SUPPORT OF MSJ)
Filed by Attorney for Pltf/Petnr

10/20/2017 Miscellaneous-Other (INDEX OF FOREIGN AUTHORUTIES IN SUPPORT OF MOTION FOR SUMMARY JUDG MENT)
Filed by Attorney for Pltf/Petnr

10/20/2017 Reply/Response (TO OPPOSITION BY DEFT AVIS BUDGET GROUP TO MOTION FOR SUMMARY JDGT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION)
Filed by Attorney for Pltf/Petnr

10/20/2017 Request for Judicial Notice (SUPPLEMENTAL REQUEST FOR JUDICIAL NTC IN SUPPORT OF PLFFS MSJ)
Filed by Attorney for Pltf/Petnr

10/11/2017 Joinder (in opposition of defts avis budget group and ace american insurance to plffs msj)
Filed by Attorney for Deft/Respnt

10/06/2017 Objection Document (TO PLFFS EVIDENCE ATTACHED TO PLFF S MSJ OR IN THE ALT, MSA)
Filed by Attorney for Deft/Respnt

10/06/2017 Statement of Facts (OF UNDISPUTED AND DISPUTED MATERIA L FACTS IN OPPOSITION TO PLFFS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUD)
Filed by Attorney for Deft/Respnt

10/06/2017 Request for Judicial Notice (IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT)
Filed by Attorney for Deft/Respnt

10/06/2017 Miscellaneous-Other (index of foreign auThorities in SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT)
Filed by Attorney for Deft/Respnt

10/06/2017 Opposition Document (TO PLFFS MOTION FOR SUMMARY JDGT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION)
Filed by Attorney for Deft/Respnt

10/06/2017 Declaration (OF CHRISTIAN MOLLOY IN OPPOSITION TO PLFFS MSJ OR IN THE ALTERNATIVE SUMMARY ADJUDICATION)
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08/14/2017 Declaration (OF ABIGALE REIMER IN SUPPORT OF PLFFS SUMMARY JUDGMENT)
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08/14/2017 Miscellaneous-Other (IN SUPPORTOF MSJ OR IN THE ALTER-N ATIVE, SUMMARY ADJUDICATION)
Filed by Attorney for Pltf/Petnr

08/14/2017 Statement of Facts (SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLFFS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICA- TION)
Filed by Attorney for Pltf/Petnr

08/14/2017 Motion for Summary Judgment (OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION)
Filed by Attorney for Pltf/Petnr

08/14/2017 Miscellaneous-Other (INDEX OF EVIDENCE IN SUPPPORT OF PLFFS MOTION FOR SUMMARY ADJUDICATION)
Filed by Attorney for Pltf/Petnr

08/14/2017 Request for Judicial Notice (IN SUPPORT OF PLFFS MSJ)
Filed by Attorney for Pltf/Petnr

08/14/2017 Declaration (OF DAVID BOROVSKY IN SUPPORT OF PLFFS' MSJ)
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05/04/2017 Answer to First Amended Complaint
Filed by Attorney for Deft/Respnt

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Filed by Attorney for Pltf/Petnr

04/19/2017 Summons Filed (first amended)
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04/19/2017 First Amended Complaint (for declaratory relief)
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04/10/2017 Stipulation and Order (stipulation and order to allow plaintiffs to file a first amended complaint for declaratory relief;)
Filed by Attorney for Deft/Respnt

02/24/2017 Statement-Case Management
Filed by Attorney for Deft/Respnt

02/22/2017 Statement-Case Management
Filed by Attorney for Pltf/Petnr

02/16/2017 Statement-Case Management
Filed by Attorney for Deft/Respnt

01/31/2017 Demand for Jury Trial
Filed by Attorney for Deft/Respnt

01/31/2017 Answer
Filed by Attorney for Deft/Respnt

12/21/2016 Answer
Filed by Attorney for Deft/Respnt

11/29/2016 Notice-Case Management Conference
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11/29/2016 Ord Apptng Guardian Ad Litem (FOR EVA HAHN)
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11/28/2016 Proof-Service/Summons
Filed by Attorney for Pltf/Petnr

Click on any of the below link(s) to see documents filed on or before the date indicated:
TOP 11/21/2016

11/21/2016 Ntc and Acknowledgement of Receipt (MARIA VLACHOU-HAHN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARCUS HAHN)
Filed by Attorney for Pltf/Petnr

11/15/2016 Application-Miscellaneous (FOR EVA HAHN GUARDIAN AD LITEM(FAXED))
Filed by Attorney for Pltf/Petnr

11/03/2016 Complaint

Click on any of the below link(s) to see documents filed on or before the date indicated:
TOP 11/21/2016

PROCEEDINGS HELD

Case Information | Register of Actions | Future Hearings | Party Information | Documents Filed | Proceedings Held

Proceedings Held (Proceeding dates listed in descending order)

01/04/2018 at 08:30 am in Department 55, Malcolm Mackey, Presiding
Exparte proceeding - **Granted**

10/27/2017 at 08:30 am in Department 55, Malcolm Mackey, Presiding
Motion for Summary Judgment - **Denied**

03/08/2016 at 08:30 am in Department 55, Malcolm Mackey, Presiding
Conference-Case Management - **Trial Date Set**

REGISTER OF ACTIONS

Case Information | Register of Actions | Future Hearings | Party Information | Documents Filed | Proceedings Held

Register of Actions (Listed in descending order)

Click on any of the below link(s) to see Register of Action Items on or before the date indicated:
11/29/2016

01/04/2018 at 08:30 am in Department 55, Malcolm Mackey, Presiding
Exparte proceeding - **Granted**

01/02/2018 Opposition Document (TO EX PARTE APP FOR ORDER SHORTENI NG TIME)
Filed by Attorney for Pltf/Petnr

12/18/2017 Joinder (in opposition of defts avis budget group, inc and ace american ins co's motion for an order staying the instant c alif litigation pending appeal in related minnesot a litigation)
Filed by Attorney for Deft/Respnt

12/14/2017 Notice of Motion (FOR ORDER STAYING THE LITIGATION PENDING APPEAL IN RELATED MINNESOTA LITIGATION)
Filed by Attorney for Deft/Respnt

11/03/2017 Notice of Ruling
Filed by Attorney for Deft/Respnt

10/27/2017 at 08:30 am in Department 55, Malcolm Mackey, Presiding
Motion for Summary Judgment - **Denied**

10/20/2017 Reply/Response (TO OPPOSITION BY DEFT AVIS BUDGET GROUP TO MOTION FOR SUMMARY JDGT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION)
Filed by Attorney for Pltf/Petnr

10/20/2017 Miscellaneous-Other (INDEX OF FOREIGN AUTHORUTIES IN SUPPORT OF MOTION FOR SUMMARY JUDG MENT)
Filed by Attorney for Pltf/Petnr

10/20/2017 Declaration (OF DAVID BOROVSKY IN SUPPORT OF PLFFS REPLY IN SUPPORT OF MSJ)
Filed by Attorney for Pltf/Petnr

10/20/2017 Request for Judicial Notice (SUPPLEMENTAL REQUEST FOR JUDICIAL NTC IN SUPPORT OF PLFFS MSJ)
Filed by Attorney for Pltf/Petnr

10/11/2017 Joinder (in opposition of defts avis budget group and ace american insurance to plffs msj)
Filed by Attorney for Deft/Respnt

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Filed by Attorney for Deft/Respnt

10/06/2017 Objection Document (TO PLFFS EVIDENCE ATTACHED TO PLFF S MSJ OR IN THE ALT, MSA)
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Filed by Attorney for Deft/Respnt

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Conference-Case Management - **Trial Date Set**

Click on any of the below link(s) to see Register of Action Items on or before the date indicated:
TOP 11/29/2016

NEW SEARCH

"Spawn" by Evan Young
2003 1st Place Teen

KAREN L. UNO, State Bar #117410
DAVID P. BOROVSKY, State Bar #216588
BECHERER KANNETT & SCHWEITZER
1255 Powell Street
Emeryville, CA 94608
kuno@bkscal.com
dborovsky@bkscal.com

Attorneys for Plaintiffs
NATIONWIDE MUTUAL INSURANCE COMPANY
and AMCO INSURANCE COMPANY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

NATIONWIDE MUTUAL INSURANCE COMPANY and AMCO INSURANCE COMPANY,

Plaintiffs,

vs.

MARIA VLACHOU-HAHN, Individually and as Administrator of the Estate of MARCUS HAHN, EVA HAHN (a minor); AVIS BUDGET GROUP, INC., ACE AMERICAN INSURANCE COMPANY; and DOES 1-10, inclusive;

Defendants.

Case No.: BC639694

DECLARATION OF ABIGALE REIMER IN SUPPORT OF PLAINTIFFS' SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: October 27, 2017
Time: 8:30 a.m.
Dept. 55

Reservation No. 170428215107

I, Abigale Reimer, declare:

1. I am a Large Loss Litigation Specialist III for AMCO Insurance Company, Nationwide Mutual Insurance Company (collectively "Plaintiffs"), and other affiliated companies.

2. I have personal knowledge of the facts stated in this declaration and would competently testify thereto if called in this case as a witness at trial. This declaration is submitted in support of Plaintiffs' Motion for Summary Judgment, or in the alternative, Summary

Adjudication.

3. In my role as Large Loss Litigation Specialist, my job responsibilities include adjusting and handling litigation involving insurance coverage issues, and working with counsel appointed by AMCO, Nationwide, and other affiliated companies in connection with the same. As a result of my position, I have access to claim files maintained by AMCO, Nationwide, and other affiliated companies through the companies' paperless claim file system, which contains records kept in the ordinary course of business by AMCO, Nationwide, and affiliated companies.

4. I have access to and have reviewed the claim file for claim No. , and I am the Large Loss Litigation Specialist assigned to handle this claim. This claim file generally pertains to the insurance coverage questions for the claims that are at issue in this declaratory relief lawsuit: the bodily injury claims of Maria Vlachou-Hahn and Eva Hahn against the Estate of Marcus Hahn, under AMCO Personal Auto Policy No. and Nationwide Personal Umbrella Policy No.

5. Attached hereto as Exhibit A is a true and certified copy of AMCO Personal Auto Policy No. . This policy is part of the claim file for claim No.

6. Attached hereto as Exhibit B is a true and certified copy of Nationwide Personal Umbrella Policy No. PA This policy is part of the claim file for claim No.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 3, 2017 in Denver, Colorado.

ABIGALE REIMER

Becherer Kannett & Schweitzer
2280 Powell St. Suite 805 Emeryville, CA 94608 510-658-3600

EXHIBIT A

Certification

I, Diondre Williams

As a duly authorized Nationwide Insurance associate entrusted with oversight of the system of record from which this copy was produced, based upon information and belief; certify under the penalty of perjury that this attached copy of the Declaration and or Policy pages on policy number was made at or near the time of certification, as part of regularly conducted business activities, and is a true and accurate copy of the official record kept as part of regular business activities.

Date: March 30, 2017

Signature

Diondre Williams
Signature

Sr Proccessor
Title

Allied Insurance

Your Policy Declarations

Personal Auto Policy
Policy Period: Jan 14, 2015 - Jan 14, 2016
Policy Number:
Account Number

For coverage definitions and descriptions, visit www.alliedinsurance.com

Insured Vehicles and Schedule of Coverages

2007 Volv Xc90
VIN YV4CN982671357595

Coverages	Limits of Liability		Premium
Bodily Injury Liability	$500,000 Per Person $500,000 Per Occurrence		$442.22
Property Damage Liability	$100,000 Per Occurrence		$304.48
Medical Payments	$5,000 Per Person		$58.56
Uninsured Motorist Bodily Injury	$500,000 Per Person $500,000 Per Accident		$192.38
Comprehensive	Actual Cash Value	Less A $500 Deductible	$129.20
Collision	Actual Cash Value	Less A $500 Deductible	$552.08
Waiver Of Collision Deductible			$7.58
Loss Settlement Endorsement - Oem Parts	See Endorsement		$83.18
		Total for this Vehicle	$1,769.70

Loss Payee - Volvo Financial Service

1970 Ford F250
VIN F25YRJ55855

Coverages	Limits of Liability		Premium
Bodily Injury Liability	$500,000 Per Person $500,000 Per Occurrence		$392.82
Property Damage Liability	$100,000 Per Occurrence		$213.38
Medical Payments	$5,000 Per Person		$75.76
Uninsured Motorist Bodily Injury	$500,000 Per Person $500,000 Per Accident		$146.60
Uninsured Motorist Property Damage Liability	$3,500 Per Occurrence		$11.20
		Total for this Vehicle	$839.76

2012 Bmw X3 28i
VIN 5UXWX5C53CL727211

Coverages	Limits of Liability		Premium
Bodily Injury Liability	$500,000 Per Person $500,000 Per Occurrence		$367.68
Property Damage Liability	$100,000 Per Occurrence		$265.66
Medical Payments	$5,000 Per Person		$53.70
Uninsured Motorist Bodily Injury	$500,000 Per Person $500,000 Per Accident		$148.42
Comprehensive	Actual Cash Value	Less A $500 Deductible	$133.20
Collision	Actual Cash Value	Less A $500 Deductible	$627.64
Waiver Of Collision Deductible			$6.16
Rental Reimbursement	$30 Per Day/$900 Maximum		$24.70
Loss Settlement Endorsement - Oem Parts	See Endorsement		$93.62
		Total for this Vehicle	$1,720.78

Loss Payee - Bmw Financial Service

Policy Level Schedule of Coverages

Allied Extra Coverages	See Endorsement		
		Total for Policy Coverages	$0.00

EXHIBIT B

Certification

I, Jon King, as a duly authorized Nationwide Insurance associate entrusted with oversight of the system of record from which this copy was produced, based upon information and belief, certify under the penalty of perjury that this attached copy of policy was made at or near the time of certification, as part of regularly conducted business activities, and is a true and accurate copy of the official record kept as part of regular business activities.

Signature Date: August 22, 2016

Jon King
Print Name

Sr. Processor, Imaging
Title

Allied Insurance
a Nationwide Insurance® company

29543

RENEWAL

PERSONAL UMBRELLA LIABILITY INSURANCE POLICY
NATIONWIDE MUTUAL INSURANCE CO
DES MOINES IA 50391-1100
1-800-282-1446

Policy Number:
Account Number:
Item:

PERSONAL UMBRELLA LIABILITY

1. Named Insured: HAHN, MARCUS

2. Address: 1105 GARFIELD AVE
VENICE CA 902914936

Agent: SAVE-ON INSURANCE SERVICES INC

Address: 10835 SANTA MONICA BLVD STE209
LOS ANGELES CA 90025 78 84 29543 0000

3. Policy Term: From 01/14/15 to 01/14/16 12:01 A.M. Standard Time
at the address of the Named Insured as stated above.

In return for the payment of the premium, and subject to all the terms of this policy, we agree with you to provide the insurance as stated in this policy.

4. Coverage	Limit of Liability		Premium
Personal Umbrella	$1,000	Retained Limit	
Liability	$2,000,000	Occurrence Limit	$426.28

5. Schedule of Underlying Insurance: See Endorsement PA 00 01

6. Forms and Endorsements:

PA0001	1011	PA1200	0104	IN0000	0409	IN0001	0203
10940	0789	PA300CA	0909	IN0100	0110		

Previous Policy Number:

Countersigned By _____
Authorized Representative

1993 WL 459902
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

MINNEAPOLIS EMPLOYEES RETIREMENT FUND, et al., Respondents,

v.

INTERCAP MONITORING INCOME FUND III, et al., defendants and third-party plaintiffs, Appellants,

WESTINGHOUSE ELECTRIC CORPORATION, Defendant and Third-Party Plaintiff,

v.

Robert L. TRUSHENSKI, Third-Party Defendant.

No. C5-93-835.

Nov. 9, 1993.

District Court, Hennepin County; Allen Oleisky, Judge.

Attorneys and Law Firms

Sally A. Johnson, Eric E. Jorstad, Minneapolis, C. Garold Sims, Denver, CO, for appellants.

David A. Ranheim, James K. Langdon, II, Minneapolis, for respondent.

Considered and decided by KALITOWSKI, P.J., and AMUNDSON and SCHULTZ,* JJ.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHULTZ, Judge.

*1 Appellants argue the trial court abused its discretion when it enjoined them from proceeding with an action in Colorado state court. We affirm.

FACTS

In 1986-87, representatives of appellants Intercap Monitoring Income Funds (Intercap) solicited an $11.5 million investment from the Minneapolis Employees Retirement Fund (MERF). MERF is a public corporation that oversees the investment of the pension funds for its 8,000 retired and present public employees. Upon investment, MERF became a limited partner of Intercap Monitoring Funds I, II, and III. Intercap, a Colorado corporation, acquires, creates and owns security alarm monitoring contracts that generate renewable monthly revenue for investors. Intercap manages and services the investment accounts and distributes the net profits to its limited partners.

Since the investment, MERF contends the funds have been poorly managed because the initial investment is now worth only a fraction of its initial value. By May 1990, the parties had negotiated a preliminary agreement to resolve the problems with the investment, but they never finalized it. Intercap first brought an action against MERF in Colorado seeking to enforce the preliminary agreement; the Colorado court dismissed the action, holding it anticipatory, unlikely to resolve the dispute, and duplicative. MERF brought an action against Intercap and its Chief Executive Officer/Chair of the Board John W. Walsh, Jr., in federal court, district of Minnesota. When that action was dismissed for lack of diversity jurisdiction, MERF brought an identical action in Minnesota state court in February 1991.

MERF's action against Intercap and Walsh alleges breach of contract, breach of fiduciary duty, tortious interference with contract, conversion, declaratory judgment and an accounting. Intercap asserted counterclaims that MERF failed to comply with the settlement agreement, acted to prevent Intercap from receiving payments under servicing agreements with another company, breached fiduciary duties and engaged in self-dealing by engaging in the improper sale of stock of another company, and interfered with an investment agreement between one of the Intercap funds and another company. Intercap moved to dismiss the Minnesota action for lack of jurisdiction. The trial court denied the motion, and this court affirmed in an order opinion.

In December 1992, Intercap brought another action in Colorado state court seeking to exercise long-arm jurisdiction over James M. Hacking, a Minnesota resident and the new executive director of MERF. In that action, Intercap alleges Hacking attempted to drive Intercap and Walsh out of business when he intentionally interfered with Intercap's contracts with security brokers who had marketed interests in several other affiliates of Intercap, slandered Walsh and engaged in "outrageous conduct" against him, and intentionally interfered with contractual relations among the Intercap group.

MERF moved in Minnesota court to enjoin Intercap from proceeding in the Colorado action. After hearing, the trial court granted the motion on the grounds that the two cases raise essentially the same issues, involve essentially the same parties, and arise from the same conflict.

DECISION

***2** Intercap contends the trial court abused its discretion when it enjoined Intercap from proceeding in the Colorado action. We cannot agree.

> When a court obtains jurisdiction over a case it has the authority to determine all relevant issues, and in exercising that power the court may restrain the prosecution of other suits raising the same issues until a final judgment is issued.

Minnesota Mut. Life Ins. v. Anderson, 410 N.W.2d 80, 81 (Minn.App.1987). Under that authority, a trial court may enjoin a party over whom it has jurisdiction from proceeding in another forum so long as the court determines that the parties and issues are the same, and the first action, once decided, will be dispositive of the action to be enjoined. *Id.* at 81-82. Intercap argues that the parties as well as the issues of the Colorado action are different from those in the Minnesota action. Our detailed review of the record, however, reveals that those distinctions are merely semantic.

A. Parties

In the Colorado action, Intercap has sued Hacking "individually" with no mention of MERF. The allegations against Hacking arise out of his role and conduct as an officer and employee of MERF, however. MERF is thus arguably liable for Hacking's conduct and would be an interested party in the Colorado action. *See, e.g., Kay v. Peter Motor Co.,* 483 N.W.2d 481, 485 (Minn.App.1992) (culpability of employee/officer will be imputed to corporation and form basis for corporate liability).

B. Issues

In deciding whether to enjoin another related action, the trial court should determine which action would "serve best the needs of the parties by providing a comprehensive solution of the general conflict." *Minnesota Mut. Life Inc.,* 410 N.W.2d at 82 (quoting *Hypro, Inc. v. Seeger-Wanner Corp.,* 292 F.Supp. 342, 344 (D.Minn.1968)). The Minnesota trial court viewed the general conflict in this case and determined:

> Although every issue raised in each of the individual actions is not identical, these [two] actions are so closely connected in law and fact that the similarities outweigh the differences.
>
> ---
>
> It would be inequitable to force [MERF] to defend in two separate fronts when all disputed issues could easily be resolved in the current forum.

In the Colorado action, Intercap focuses on Hacking's acts as they affected the affiliated Intercap funds and Mr. Walsh and alleges intentional interference with contract, slander, and outrageous conduct. Undoubtedly, those allegations arose out of activities that were intertwined with the business practices underlying the allegations in the Minnesota action: breach of contract, breach of fiduciary duty, tortious interference with contract, conversion, an accounting, failure to comply with the settlement agreement, conspiracy to prevent Intercap from receiving payments under servicing agreements with another company, engaging in the improper sale of stock of another company, and self-dealing.

***3** The nature of this case is very complex given the interrelationships between the Intercap funds, Walsh, MERF as an investor, MERF as a limited partner, Hacking as MERF's executive director, and other companies who have either invested or sought to invest in Intercap. Given this complexity, the Colorado action

is only one small piece of the puzzle. We find it doubtful that the Colorado court could resolve any of the issues in a vacuum without the full set of facts which the Minnesota litigation is producing. The Minnesota action will be dispositive of the Colorado action.

Intercap argues further that a recent decision from this court compels a reversal of this case. *See St. Paul Surplus Lines Ins. Co. v. Mentor Corp.*, 503 N.W.2d 511, 516 (Minn.App.1993). Again, we disagree. Contrary to Intercap's interpretation, *Mentor* supports an affirmance in this case because the Colorado action would "intrude" on the Minnesota action that is in the process of determining integrally related issues. *See id.* Furthermore, *Mentor* is factually distinguishable from this case. *Mentor* involved simultaneous declaratory judgment actions in Minnesota and California state courts between a Minnesota corporation and a St. Paul-based insurance company. Both parties filed suit in different states within a month of each other. *Id.* at 513-14. The California trial court refused to stay the action and allowed the case to proceed. *Id.* at 514. The California action was more complex because it raised claims that were not raised in the Minnesota action. *Id.* at 516. In addition, Minnesota had jurisdiction over only one of the named defendants in the California action. *Id.*

In contrast to *Mentor,* Intercap brought its Colorado action in December 1992, nearly two years after MERF had initiated this action in Minnesota. The Colorado state court stayed the action pending the outcome of the Minnesota proceeding. The Minnesota action is the more comprehensive in this case, and it included all parties except Hacking. Hacking is a Minnesota resident, however, and Intercap has agreed to join him as a party in the Minnesota action.

The trial court did not abuse its discretion when it enjoined Intercap from proceeding with the Colorado action.

Affirmed.

All Citations

Not Reported in N.W.2d, 1993 WL 459902

End of Document

FILED
January 18, 2018
OFFICE OF APPELLATE COURTS

No. A17-1921

State of Minnesota
In Court of Appeals

Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.,

Appellants,

and Maria Vlachou-Hahn, individually and as parent and natural guardian of Eva Vlachou-Hahn, a minor,

Plaintiffs,

vs.

Nationwide Mutual Insurance Company and AMCO Insurance Company,

Respondents,

and Michael A. Zimmer, as Special Administrator of the Estate of Marcus Hahn, deceased, and PV Holding Corporation,

Defendants,

vs.

Diego Velazquez Sanchez, Jose Raul Cabrea Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez, a minor, and Dante Lopez Velazquez, a minor,

Third-Party Defendants.

ERRATA SHEET TO BRIEF OF APPELLANTS

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

STATEMENT OF THE ISSUES

Page No.	Correction
Pg. 1	RAISED BELOW – second line: "…filed an action [delete being filed] in California two weeks before the Minnesota action was commenced."

ARGUMENT

Pg. 19	Second paragraph; third line: stated its preemptive intent: [insert quotation marks] "counsel for Maria and Eva has indicated that …."
Pg. 22	**2. The claims in the separate actions are not the same.** Fourth bullet point: "A declaratory judgment count [not county] as to AMCO's and Nationwide's priority …."

Respectfully submitted,

Dated: January 18, 2018

s/ Robert E. Kuderer

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711
bob.kuderer@ezkm.net
thomas.brock@ezkm.net

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

CERTIFICATION OF COMPLIANCE

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a 13-point, proportionately spaced font. This document was prepared using Microsoft Word 2013 software.

s/ Robert E. Kuderer

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711
bob.kuderer@ezkm.net
thomas.brock@ezkm.net

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

APPELLATE COURT FILE NO. A17-1921

STATE OF MINNESOTA

IN COURT OF APPEALS

Maria Vlachou-Hahn, et al.,

Plaintiffs,

vs.

Michael A. Zimmer, as Special Administrator
For the Estate of Marcus Hahn, deceased, et al.

Respondents,

Budget Rent A Car System, Inc., et al.

Appellants,

vs.

Nationwide Mutual Insurance Company
and AMCO Insurance Company,

Respondents,

and

Budget Rent a Car System, Inc., et al.,

Defendants and
Third Party Plaintiffs,

PV Holding Corp.,

Defendant and
Third Party Plaintiff,

vs,

Diego Velazquez Sanchez, et al.,

Third Party Defendants.

BRIEF AND ADDENDUM OF RESPONDENTS NATIONWIDE MUTUAL INSURANCE COMPANY AND AMCO INSURANCE COMPANY

Sylvia Ivey Zinn (#164379)
Brendel, Zinn, Sofio & Oskie, PLLC
155 Wabasha St. So., Suite 125
St. Paul, MN 55107 55107
Telephone: (651) 310-9031

Attorney for Respondents Nationwide Mutual Insurance Company and AMCO Insurance Company

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER, MADSEN, P.A
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
Telephone: (763) 682-4550
Attorneys for Appellants, Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

William R. Sieben (#100808)
James S. Ballentine (#209739)
Matthew J. Barber (#397240)
Schwebel, Goetz & Sieben, P.A.
5120 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 377-7777
Attorneys for Plaintiffs Maria Vlachou-Hahn, Eva Vlachou Hah

Matthew B. Gross
Quarnstrom & Doering, P.A.
109 South 4th Street
Marshall, MN 56258
Telephone: (507) 537-1441
Attorney for Respondents Jose Ortega Raul Cabrera Ortega

Jody Martineau
Rachel Sperling
Leonard, Martineau, Leonard, PLLC
6465 Wayzata Blvd., Suite 780
Minneapolis, MN 55426
Telephone: (952) 567-2488
Attorneys for Third-Party Defendants Diego Sanchez, Martha Lopez and Dante Velazquez

B. Jon Lilleberg (#0220772
Peter M. Leiferman (#0396270
Lilleberg & Hopewell, PLLC
5200 Willson Road, Suite 325
Edina, MN 55424
Telephone: (612) 255-1130
Attorneys for Respondents Michael A. Zimmer, as Special Administrator of the Estate of Marcus Hahn, and PV Holding Company

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STATEMENT OF LEGAL ISSUES

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   Disposition at the Trial Court: Trial Court granted Respondent's request to Stay the Minnesota litigation.

   Apposite Authorities:

   Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438 (Minn. App. 2001).

2. Was it proper for the Minnesota District Court to deny Appellants' request for an Anti-Suit Injunction prohibiting the parties from continuing the declaratory judgment action previously commenced in the Superior Court of California?

   Disposition at the Trial Court: Trial Court denied Appellant's request for Anti-Suit Injunction.

   Apposite Authorities:

   Maslowski v. Prospect Funding Partners LLC, 890 N.W.2d 765 (Minn. App. 2017).

STATEMENT OF THE CASE

The issue before this Court is narrow and limited to the district court's denial of Appellants' request for an anti-suit injunction. Pursuant to Minn. R. Civ. App. P. 103.03(b), the denial of the request for an injunction is the only appealable issue. Appellants submit argument regarding the district court's grant of Respondent's motion to stay. The order of the district court granting the motion to stay is not appealable. However, to the extent the basis for the stay relates to the anti-suit injunction, the stay is discussed by Respondent. Appellant also submits in its brief substantive argument on the

interpretation and priority of the various insurance policies. The construction and application of insurance policies are issues that the district court was not asked to decide, and upon which no order or decision was made by the district court. The application and interpretation of the various insurance policies are not appealable issues. Pursuant to Minn. R. Civ. App. P. 103.04.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A motor vehicle accident occurred on August 29, 2015 in Minnesota involving a rental car operated by Marcus Hahn and an automobile operated by Diego Velazquez Sanchez. (Document Index No. [Doc.] 3). At the time of the accident, Marcus Hahn, Maria Vlachou-Hahn, and their daughter Eva Vlachou-Hahn were residents of California. (Doc. 64). The Hahns traveled to Minnesota where Marcus Hahn rented a vehicle from Budget. The rental vehicle was owned by P.V. Holding Corp. When he rented the vehicle from Budget, Marcus Hahn purchased an insurance policy through ACE to secure insurance coverage, in addition to the insurance on the rental vehicle which was provided by P.V. Holding Corp. The Hahn's personal liability insurance was provided by AMCO Insurance Company with an umbrella policy issued by Nationwide Insurance Company. The Hahn's policies with AMCO and Nationwide were written and obtained in California.

Shortly after the motor vehicle accident, the Hahns retained legal representation. To determine its rights and obligation under the California insurance policies, Nationwide Insurance Company and AMCO Insurance Company commenced a declaratory judgment action in the Superior Court of California by Summons and Complaint filed November 3,

2016. (Doc. 45). Plaintiffs Hahn interposed their Answer in the California matter on December 20, 2016; Avis and Budget interposed their Answer in the California matter on January 27, 2017; The Complaint was amended on April 19, 2017 to add ACE as a defendant; ACE Answered the California Summons and Complaint on May 2, 2017.

Through a Summons and Complaint dated December 21, 2016, Plaintiffs Hahn commenced a personal injury lawsuit in Minnesota. (Doc. 3). In addition to their personal injury action against the Estate of Marcus Hahn, Plaintiffs included a claim for declaratory judgment relief against Budget and PV Holding, the owner of the rental car Marcus Hahn was driving at the time of the accident. On January 19, 2017, the Hahn Plaintiffs issued their First Amended Complaint to name Respondent Nationwide as a defendant. (Doc. 4). On March 16, 2017 Plaintiffs Hahn issued their Second Amended Complaint to name Respondent AMCO as a defendant. (Doc. 5).

As the California matter proceeded, a Case Management Conference occurred on March 8, 2017. Summary Judgment motions were scheduled for hearing on October 27, 2017 and the California declaratory judgment action was set for trial to occur February 13, 2018. (Doc. 45; Respondent's Addendum [RA] 5).

Three months after the case management conference in the California declaratory judgment action, the Minnesota lawsuit was filed by Plaintiffs Hahn on June 13, 2017. (Doc. 6). On July 18, 2017 Respondents served and filed a Motion to Bifurcate and Stay Proceedings in the Minnesota action, given the declaratory judgment action underway in California. (Doc. 15). Subsequently, on July 26, 2017 Budget, ACE and AON commenced third-party claims against Diego Velazquez Sanchez, Jose Raul Cabrera Ortega, Sergio

Arturo Delgado, Martha Cristina Lopez, Paulina Lopez a minor, and Dante Lopez Velazquez, a minor, in the Minnesota action. (Doc. 20). By letter of August 15, 2017 counsel for Appellants requested the voluntary dismissal of AON and P.V. Holding as parties to the Minnesota action. (RA 1).

On August 4, 2017 Appellants filed a Motion for an Anti-Suit Injunction in the Minnesota action asking the Minnesota District Court to enjoin AMCO and Nationwide from continuing the California litigation. (Doc. 47). By agreement of the parties, Appellants' motion for Anti-Suit Injunction was consolidated for hearing with Respondents' motion for stay of proceedings. The motions were presented to the Honorable Joseph R. Klein by oral argument on August 22, 2017. By Order dated October 4, 2017, the district court granted Respondents' motion to stay, and denied Appellants' request for an anti-suit injunction. (Doc. 64; Appellants' Addendum [Add] 1).

This appeal was filed December 1, 2017. On December 11, 2017, Appellants filed a motion for stay of proceedings in the California declaratory judgment action. (RA 3).

STANDARD OF REVIEW

A decision to grant or deny a motion for an anti-suit injunction is within the sound discretion of the trial court. The order of the trial court, including trial court's decision on application of the first-filed rule, will be reversed only if the trial court abused its discretion. *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438 (Minn. App. 2001).

ARGUMENT

1. The District Court's Order to Stay the Minnesota Litigation was not an Abuse of Discretion and should be Affirmed.

As an initial matter, the order of the district court to stay the Minnesota litigation is an interlocutory order and not appealable. An appeal may be taken from an interlocutory order when 1) the decision is a final determination of a claim or right, 2) the issue is too important for review to be denied and 3) the issue is too independent of the cause of itself to require that appellate consideration be deferred. *Engvall v. Soo Line Railroad Company*, 605 N.W.2d 738 (Minn. 2000). The Order to Stay the Minnesota action does not meet this criteria. Significantly, the Order to Stay does not impede or prejudice the substantive rights of any party. The district court did not dismiss and was not asked to dismiss the Minnesota litigation. However, to the extent the order on the motion to stay is reviewed by this Court, it is addressed by Respondent.

A. The 'First-Filed' Rule was properly applied by the District Court and supports the Order to Stay.

Appellants' first criticism of the order to stay is based on the district court's application of the 'first-filed' rule. Respondents requested a stay of the Minnesota litigation asking the district court to consider application of the 'first filed' rule. There is no dispute that the California litigation was filed first and substantially underway before Respondents requested the stay of the Minnesota litigation. In fact, before the motion to stay the Minnesota litigation, the Minnesota plaintiffs had taken no steps to pursue the Minnesota action.

The first to file rule is a rule of judicial courtesy, not a strict rule of procedure. The district court applied the 'first filed' rule correctly, stating 'The first-filed rule is not meant to be a rigid, mechanical, or inflexible rule, but it should be applied in a way that serves sound judicial administration'. (Citing *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 448-49 (Minn. App. 2001); Add. 4). The district court then analyzed each factor set out by the Minnesota Supreme Court when applying the 'first-filed' rule. (Add. 5 & 6). The district court's analysis was proper and the court's conclusion was correct.

Appellants' then suggest that the 'first-filed' rule should never have been considered as the Minnesota District Court does not have concurrent jurisdiction with the Los Angeles Superior Court in California. According to the Minnesota Supreme Court, concurrent jurisdiction exists when two or more tribunals are authorized to hear and dispose of a matter and the choice of which tribunal is up to the person bringing the matter to court. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290-291 (Minn. 1996). When a concurrent jurisdiction issue exists, proceedings in one jurisdiction are typically stayed. *Id.* If this rule applies to actions pending in different nations, this rule of judicial courtesy and discretion should apply to district courts in different states. The trial court was correct to apply the factors of the 'first-filed' rule, and defer to the California declaratory judgment litigation which was substantially advanced as compared to the later commenced Minnesota declaratory judgment action.

Appellants insist that the district courts of two different states do not have concurrent jurisdiction, and therefore application of the 'first-filed' rule is incorrect. *St. Paul Surplus Lines Ins. Co. v. Mentor Corp.*, 503 N.W.2d 511, Minn. App. (1993). In

Mentor, this Court recognized that if two matters are pending in two different courts, one of the courts in its discretion may stay the proceedings before it to allow the proceedings before the other court to continue. *Id.* That is exactly what occurred in this case currently before this Court. The trial court, exercising its inherent jurisdiction over matters and litigants before the court, stayed the matter pending before the trial court in deference to the substantially advanced matter in California. In doing so, the trial court recognized and respected the fact that the California declaratory judgment action is taking place in the state where the parties to the contract reside, where witnesses to the contract transaction reside and do business, and where the contract was entered into. The Order to Stay the Minnesota action was not an abuse of discretion, and does not constitute the basis for reversal.

The Minnesota District Court and the Los Angeles Superior Court in California have jurisdiction over the parties and issues. Appellants were litigants in the California action prior to their commencement of the Minnesota litigation, never once objecting to the California action or alerting the California court to the prospect of their planned parallel proceeding in Minnesota. Interestingly, when the Minnesota action was commenced by Summons and Complaint dated December 21, 2016, Respondents were not even named parties. It was not until a second amended Complaint in March 2017 that all Respondents were named as parties to the Minnesota lawsuit; seemingly an afterthought. By that time, there had been significant procedural activity in the California litigation with dispositive motions set and trial of the California action scheduled for a date certain of February 13, 2018. (Doc 45; RA 5). When considering Respondent's motion to stay, it was appropriate for the district court to defer to the substantial process in the California action and stay the

Minnesota litigation. Importantly, the district court did not dismiss the Minnesota action or make any rulings detrimental to the substantive rights of any party. The Order of the district court should be affirmed.

Appellants suggest that the declaratory action in California was a 'race to the courthouse' in an effort of acquire jurisdiction which would thwart a later filed Minnesota claim. To rectify that claimed inequity Appellants argue that the discretion of the Minnesota district court should be overlooked and the rights of the litigants in the California action should be ignored. The law does not support Appellants' position. The United States District Court recognizes that forum shopping should not be rewarded, and a party that files a declaratory judgment action only as a pre-emptive strike may not be entitled to the deference of the 'first-filed' rule. *Scarlett v. White,* No. 16-cv-2925 (JRT/LIB) LEXIS 37343 (D. Minn. Feb. 22, 2017). The declaratory judgment action filed by Respondents in California is a substantive, detailed contract lawsuit involving multiple insurers. That contract lawsuit is a separate cause of action distinct from the personal injury action Appellants later commenced in Minnesota. The volume of law and arguments provided to this Court by Appellants supports the fact that the declaratory judgment action is complex litigation important to all parties in the California lawsuit.

If forum shopping exists at all in the present action, it is on the Appellants' part. Appellants vigorously participated in the California litigation without objection or protest before the California Court. Appellants then commenced a personal injury action in Minnesota and joined in that negligence claim, the contract dispute which was already commenced in California. Appellants did not advise the Minnesota Court of the previously

commenced litigation in California. When Respondents advised the Minnesota trial court that the contract declaratory judgment action was already in litigation and set for trial in California, Appellants joined third-party claims in Minnesota in an effort to convince the trial court that the Minnesota action is more comprehensive. Those third-party claims against the personal injury claimants have no bearing on the contract litigation of the declaratory judgment action.

The Minnesota District Court has discretion to stay a declaratory judgment action when the same declaratory judgment action is pending in a California court. See *Great American Insurance Company v. Houston General Insurance Company,* 735 F. Supp. 581 (S.D.N.Y. 1990). When the later filed suit is separate and distinct from the initial litigation as opposed to a continuation of the initial litigation, it is not an abuse of discretion for the trial court to stay the second action pending resolution of the first-filed suit. *United States Fire Insurance Company v. Goodyear Tire & Rubber Company*, 920 F.2d 487, 489 (8th Cir. 1990).

Appellants' next criticism of the district court's order to stay is to suggest that the Minnesota action contains more parties and therefore should take priority over the litigation initially commenced in California. Appellant's position is without merit. It is important to note the distinction in the California lawsuit which is a declaratory judgment action, and the later filed Minnesota lawsuit which is a personal injury claim based on negligence, coupled with a declaratory judgment action. If there were no California lawsuit, and all we had was the Minnesota action, the declaratory judgment action would be severed or bifurcated from the personal injury claim. This is done for two primary reasons: first, in

the trial of the personal injury claim, the jury is not to be told of the existence or absence of insurance coverage. MRE 411. Whether or not insurance is available is thought to be irreparably prejudicial to the parties, and irrelevant on the issues of damages and liability in the personal injury lawsuit. Cases in which a jury could be unfairly influenced by sympathy are appropriately suited for bifurcation. See *Burris v. Versa Prods. Inc. et. al.* No. 07-3938 (JRT/JJK) (D. Minn. Sept. 4, 2012).

Secondly, the two claims are separate and distinct causes of action that do not arise from the same transaction or occurrence. The personal injury action is a tort claim premised on negligence in the operation of a motor vehicle. The declaratory judgment action is a contract claim between the insured and the insurer. These are two very separate claims and are not joined together for resolution in one proceeding. Bifurcation promotes convenience when separable issues are "substantially different" and when counsel, witnesses, parties and jurors will not "face two trials with repetitious testimony." *ADT Sec. Servs., Inc. v. Swenson*, No. 07-2983 (JRT/AJB), WL 4396918 (D. Minn. Sept. 21, 2011).

Appellants argue that the Minnesota action is more inclusive, has more parties and more claims, and therefore is somehow more important that the California lawsuit. That is not true. The Minnesota declaratory judgment action is the same as the California declaratory judgment action. The parties are the same and the issues are the same. Appellants real concern is that California law is prejudicial to their position, and the California court is incapable of applying Minnesota law. That isn't correct either. In fact, the California Court denied Respondent's motion for summary judgment and in doing so advised the parties that the California court is aware of the choice of laws issue and the

application of Minnesota law to portions of the insurance contract and exclusions. (RA 12). Importantly, however, the interpretation and analysis of the insurance policies and the choice of laws issues that are fearful to Appellants are not before this Court and are not part of this appeal. Minn. R. Civ. App. P. 103.04. The construction, application and priority of the insurance policies was not presented to the trial court for resolution and is not part of the trial court's order.

The trial court did not abuse its discretion in granting Respondents motion to Stay the Minnesota lawsuit. The Order to Stay the Minnesota action should be affirmed.

2. The Trial Court did not Abuse its Discretion in the Denial of Appellant's Request for an Anti-Suit Injunction, and the Order of the Trial Court should be affirmed.

A. The subsequently filed personal injury lawsuit in Minnesota is not a basis to enjoin the parties from proceeding with the California declaratory judgment action.

The request to enjoin the parties from proceeding in the California declaratory judgment action was premised on Appellants' representation that the Minnesota lawsuit is more comprehensive as it includes more parties and more claims. That characterization is unfair and incorrect. The Minnesota lawsuit is a personal injury lawsuit alleging negligence in connection with a motor vehicle. The claim for declaratory judgment that has been pled in the Minnesota lawsuit is not properly part of the personal injury action and would be separated from the personal injury action before trial of either claim. MRE 411; *Burris v. Versa Prods. Inc. et. al.* No. 07-3938 (JRT/JJK) (D. Minn. Sept. 4, 2012).

The correct comparison is between the California declaratory judgment action commenced in November 2016 and the declaratory judgment action in Minnesota that was

commenced against Respondents in March 2017. The declaratory judgment actions are the same with respect to the parties and claims. Appellants suggest that AON Risk and PV Holding are not parties to the California Declaratory Judgment action, which creates a disparity between the two declaratory judgment actions. Prior to the motion arguments before the trial court, Appellants requested dismissal of AON and PV Holding from their Minnesota lawsuit, arguing that neither AON nor PV Holding were necessary or appropriate parties. (RA 1).

In the California declaratory judgment action, the court was asked to consider the issues Appellant later commenced in the Minnesota court. Appellants are actively participating in the California declaratory judgment action, addressing the same issues they now want the Minnesota court to address. The California court would have resolved those issues in the trial set for February 13, 2018 except for Appellants' motion to stay the California action, which was filed on December 11, 2017. (RA 3). According to the memorandum of the California Court regarding the denial of Respondent's motion for summary judgment, Appellants requested a stay of the California lawsuit during the October 2017 summary judgment arguments. The California court denied the request to stay the California lawsuit. (RA 10-12). Appellants then filed this appeal. Subsequent to this appeal, Appellants' filed a motion to stay the California declaratory judgment pending this appeal. (RA 3). Odd that Appellants suggest Respondents are forum shopping.

B. Appellants did not meet their burden of proof before the trial court to establish the basis for an injunction.

The district court may grant a temporary injunction if there is evidence to support an injunction, such as affidavits, deposition or oral testimony which demonstrates sufficient grounds. Minn. R. Civ. P. 65.02(b); *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438 (Minn. App. 2001). No evidence was presented to the trial court. The only affidavit submitted to the trial court is the Affidavit of Appellants' counsel Robert Kuderer, which attached pleadings from the Minnesota and California lawsuits. (Doc. 24). Appellants did not provide to the trial court sufficient evidence to establish the basis for the injunction.

C. Appellant did not provide to the trial court a legal basis for the requested injunction.

There is no legal basis to support Appellants' assertion that the district court erred in failing to enjoin the parties from pursuing the California litigation. The case of *Maslowski v. Prospect Funding Partners LLC* 890 N.W.2d 765 (Minn. App. 2017), upon which Appellants rely, addresses a party's attempt to deliberately circumvent the authority and jurisdiction of Minnesota in the construction and enforcement of a contract deemed unenforceable in Minnesota. The facts in *Maslowski* involve a Minnesota plaintiff pursing a Minnesota personal injury action, who then entered into a contract with a New York company for money in exchange for the New York company having a right to proceeds from the Minnesota litigation. The contract entered into after commencement of the Minnesota personal injury litigation was a contract for champerty which is disfavored and

unenforceable in Minnesota. The Minnesota court concluded that the deliberate attempt to circumvent Minnesota's law against champerty should not be allowed. The facts and legal analysis of *Maslowski* does not support Appellants' motion that the district court enjoin the parties from proceeding in the California litigation. The trial court and the parties discussed *Maslowski* during the motion hearing, noting the distinction between *Maslowski* and Appellants requested injunction. (Doc. 69). Following the motion hearing, when information and evidence was presented to the trial court to distinguish *Maslowski* from the case before the trial court, Appellants did not provide any additional support or analysis to the trial court.

The only other legal basis offer by Appellants to the trial court is the case of *First State v. Minnesota Mining and Manufacturing*, 535 N.W.2d 684, (Minn. App. 1995). First State and other insurers commenced a declaratory judgment action against Minnesota Mining and Manufacturing (3M), seeking coverage determinations in connection with claims against 3M arising out of breast implant litigation. The declaratory judgment action was commenced in Minnesota, where 3M is located. After First State initiated its lawsuit, 3M commenced a declaratory judgment in action in Texas against First State. The Minnesota district court enjoined 3M from continuing the Texas litigation. Upon Appeal of the district court's decision to grant an injunction, this Court affirmed the standard that 'The decision whether to grant a temporary injunction is left to the district court's discretion and will be upheld on review absent a clear abuse of that discretion'. *Id*, citing *Carl Bolander & Sons v. City of Minneapolis*, 502 N.W.2d 203 (Minn. 1993). First State does not support Appellants' request for an anti-suit injunction.

This Court has set forth a three part test to determine if an anti-suit injunction is appropriate; substantial similarity of the parties, substantial similarity of the issues and capacity of the first action to dispose of the action enjoined. Appellants claim that the trial court refused to consider the three part test, requiring reversal. The trial court considered every element of this three part test. The trial court addressed the fact that the parties to the Minnesota action have been actively involved in the California action (Add. 5), the two actions involve identical issues (Add. 6) and the California litigation is advanced with the parties demonstrating their ability to litigate the issues. (Add. 5). Like the *First State* Court, the district court in this action applied the same factors and concluded that the court in which the action was first brought was the proper court to retain the action. The basis for the injunction in *First State* is the basis to deny the injunction in this matter.

In reality, the motion to stay and the request for an injunction are opposite sides of the same coin. The factors the trial court considered are essentially the same for the first-filed rule, motion to stay and request for injunction. The trial court discussed these issues at the motion hearing (Doc. 69), and addressed these issues in the Order and Memorandum. (Add. 1-7). The trial court considered the facts, the law and the equities and utilized its sound discretion in denying the request for an anti-suit injunction. As this Court noted in *First State*, even if a district court does not specifically address the factors, that does not constitute err for purposes of reversal. The Order of the trial court should be affirmed.

3. Construction and application of the insurance contracts are not before this Court on appeal.

The trial court was not asked to determine issues involving the insurance policies. Appellants present argument to this Court on conflicts of law, priorities of coverage, application of exclusions, vicarious liability and the Graves Amendment. None of those issues were presented to the trial court for ruling, and none of those issues are properly before this Court. It should be noted that the California court is aware of and has made rulings on these issues, in connection with the upcoming trial. (RA 9). The litigants who commenced the Minnesota lawsuit have made detailed arguments and are prepared for litigation in California on the issues involving application, interpretation and priority of the insurance policies. That is one of the reasons the district court granted the motion the stay the Minnesota action. (Doc. 64; Add. 1-7).

Interestingly, in granting the motion to stay the Minnesota action and denying the request for anti-suit injunction, the trial court considered that the California court has given no indication of an intent to withdraw from the proceeding litigation. In the recent order denying Respondents motion for summary judgment, the California judge reaffirmed his intention to retain and conclude the California litigation. (RA 7-15).

To the extent Appellants are advancing argument on construction of the insurance policies and the necessity to conform to Minnesota law, this Court recently ruled that Minnesota law does not require reformation of non-resident insurance policies where the policy does not conflict with the Minnesota No-Fault Statute. *Friese v. American Family Mutual Insurance Company*, (Minn. App. January 29, 2018) (RA 5). This Court has ruled

on the application of exclusions in umbrella policies and confirmed that household exclusions in non-resident umbrella policies are valid and not in violation of Minnesota statute. *Bundul v. Travelers Indemnity Company,* 753 N.W.2d 761 (Minn. App. 2008). Appellants make arguments regarding the application of the Graves Amendment. The Graves Amendment address the vicarious liability of the owners of rental cars, but does not change the priorities of coverage otherwise dictated by statute and the insurance contracts. *Meyer v. Nwokedi*, 777 N.W.2d 218 (Minn. 2010). Respondent addresses these issues only because these issues are raised by Appellants. The construction of the insurance policies has not been presented to the trial court for construction and analysis. No order on the construction and application of the insurance policies has been issued by the district court. The application and construction of the insurance policies is not before this Court.

CONCLUSION

The trial court thoroughly considered all issues of law, fact and equities of all parties in the court's grant of Respondent's motion to stay, and the court's denial of Appellants' motion for an anti-suit injunction. The Orders of the trial court were within the sound discretion of the trial court. Respondents respectfully request that this Court affirm the Order of the Minnesota District Court granting Respondent's motion to stay and denying Appellants' motion for anti-suit injunction.

Dated: February 13, 2018 BRENDEL, ZINN, SOFIO & OSKIE, PLLC

By: */s/ Sylvia Ivey Zinn*
Sylvia Ivey Zinn (#164379)
*Attorneys for Respondents Nationwide Mutual Insurance Company and AMCO Insurance Com*pany
155 Wabasha Street So., Suite 125
St. Paul, MN 55107
Telephone: 651-224-4959
Fax: 651-224-4547
szinn@brendelandzinn.com

CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). This brief was prepared using Microsoft Word for Mac, Version 15.32, which reports that the brief contains 4659/421 words/lines.

Date: February 13, 2017

BRENDEL, ZINN, SOFIO & OSKIE, PLLC

By ***/s/ Sylvia Ivey Zinn***
Sylvia Ivey Zinn #164379
155 Wabasha Street So, Suite 125
St. Paul, MN. 55127
Telephone: 651-310-9031
szinn@brendelandzinn.com

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ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.

One Corporate Center IV
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
Tel: (952) 582-4711
Fax: (952) 378-1814

Robert E. Kuderer
bob.kuderer@ezkm.net
(952) 582-4712

August 15, 2017

William R. Sieben
James S. Ballentine
Schwebel, Goetz & Sieben, P.A.

VIA ODYSSEY & EMAIL

B. Jon Lilleberg
Lilleberg & Hopewell, PLLC

Sylvia Ivey Zinn
Brendel & Zinn, Ltd.

Re: **Rule 115.10 Meet-and-confer**
Vlachou-Hahn v. Budget Rent A Car, Inc., et al.
Our File No.: 2800.38

Dear Counsel:

I am writing to request pursuant to Minn. R. Gen. Prac. 115.10 your agreement to dismiss Defendant and Third-Party Plaintiff Aon Risk Services Northeast, Inc. without prejudice. Enclosed is a proposed Stipulation for Dismissal Without Prejudice.

Aon does not appear to be a proper party to this lawsuit. Aon is an insurance broker. Aon did not play any role in the denial of liability coverage, issue any contracts of insurance or otherwise have any involvement in either the coverage determinations of ACE American. It has no indemnity obligations for any claims arising from the subject August 29, 2015 accident. Accordingly, none of the parties have a justiciable controversy with Aon. *See St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585 (Minn. 1977) (a declaratory judgment action requires a judicable controversy between the parties); *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. App. 2001) ("A declaratory action is a justiciable controversy if it (a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and

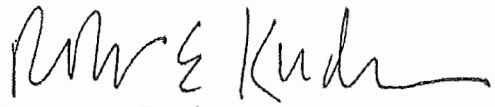
(c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.").

It also appears PV Holding should be dismissed. PV Holding is the owner of the subject rental vehicle (a 2015 Ford Fusion) which Budget rented to Mr. Hahn. The Graves Amendment expressly preempts and abolishes any state law which establishes vicarious liability of a rental car owner for the tortious conduct of its renting driver. 49 U.S.C. § 30106(a) ("An owner of a motor vehicle that rents or leases the vehicle to a person ... shall not be liable under the law of any State ... by reason of being the owner of the vehicle"). The Minnesota Supreme Court has held that the Graves Amendment preempts the Minnesota law establishing such vicarious liability, Minn. Stat. § 169.09, subd. 5a, as applied to rental-vehicle owners. *Meyer v. Nwokedi*, 777 N.W.2d 218, 228 (Minn. 2010). I bring it up only to handle both issues at the same time even though I do not represent PV Holding.

Please advise whether or not your clients are amenable to the enclosed stipulation for dismissal. I am happy to consider any arguments to the contrary.

Thank you very much.

Sincerely,



Robert E. Kuderer

REK:sdf
Enclosure

cc: All Counsel of Record (via Odyssey) (w/encl.)

Law Office of
Michael A. Kruppe
a professional corporation
Michael A. Kruppe, Esq. (State Bar No. 123026)
Christian D. Molloy, Esq. (State Bar No. 237035)
77-564A Country Club Dr., Suite 102
Palm Desert, California 92211
Tele: (760) 772-4273 Fax: (760) 772-4277

Attorneys for Defendants, AVIS BUDGET GROUP, INC. and ACE AMERICAN INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NATIONWIDE MUTUAL INSURANCE COMPANY and AMCO INSURANCE COMPANY,

Plaintiffs,

vs.

MARIA VLACHOU-HAHN, Individually and as Administrator of the Estate of MARCUS HAHN, EVA HAHN (a minor) and AVIS BUDGET GROUP, INC., and DOES 1-10, inclusive

Defendants.

Case No.: BC639694

DEFENDANTS AVIS BUDGET GROUP, INC.'S AND ACE AMERICAN INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION FOR AN ORDER STAYING THE INSTANT CALIFORNIA LITIGATION PENDING APPEAL IN THE RELATED MINNESOTA LITIGATION

Date: April 27, 2018 [Res. No. 171211273353]
Time: 8:30 a.m.
Dept. 55

[Filed Concurrently with Declaration of Christian Molloy, [Proposed] Order; Request for Judicial Notice]

Assigned For All Purposes To:
The Honorable Judge Malcolm Mackey
Department 55

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on April 27, 2018 at the hour of 8:30 a.m., or as soon thereafter as the matter may be heard in Dept. 55 of the above-entitled court located at 111 North Hill Street, Los Angeles, CA 90012,

Defendants, AVIS BUDGET GROUP, INC. and ACE AMERICAN INSURANCE COMPANY (hereinafter "Moving Defendants") will and do hereby move the court for an order staying and/or continuing of all matters in the instant litigation, which are directly linked to Moving Defendants' appeal in the related Minnesota litigation.

The motion will be based on this notice, the attached memorandum of points and authorities, the declarations of Christian D. Molloy filed with this motion and exhibits attached thereto, the concurrently filed request for judicial notice, the files and records in this action, and any further evidence or argument that the Court may properly receive at or before the hearing.

DATED: December 11, 2017

THE LAW OFFICE OF MICHAEL A. KRUPPE

By: _____

Michael A. Kruppe, Esq.
Christian D. Molloy, Esq.
Attorneys for Defendants, AVIS BUDGET and ACE AMERICAN INSURANCE COMPANY

NOTICE SENT TO:

Uno, Karen L., Esq.
1255 Powell Street
Emeryville CA 94608

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles
NOV 29 2016
Sherri R. Carter, Executive Officer/Clerk
By Myra Kinney, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

NATIONWIDE MUTUAL INSURANCE COMPANY ET
Plaintiff(s),
VS.
MARIA VLACHOU-H
Defendant(s).

CASE NUMBER
BC639694

NOTICE OF CASE MANAGEMENT CONFERENCE

TO THE PLAINTIFF(S)/ATTORNEY(S) FOR PLAINTIFF(S) OF RECORD:

You are ordered to serve this notice of hearing on all parties/attorneys of record forthwith, and meet and confer with all parties/attorneys of record about the matters to be discussed no later than 30 days before the Case Management Conference.

Your Case Management Conference has been scheduled for March 8, 2017 at 8:30 am in Dept. 55 at 111 North Hill Street, Los Angeles, California 90012.

NOTICE TO DEFENDANT: THE SETTING OF THE CASE MANAGEMENT CONFERENCE DOES NOT EXEMPT THE DEFENDANT FROM FILING A RESPONSIVE PLEADING AS REQUIRED BY LAW.

Pursuant to California Rules of Court, rules 3.720-3.730, a completed Case Management Statement (Judicial Council form # CM-110) must be filed at least **15 calendar days** prior to the Case Management Conference. The Case Management Statement may be filed jointly by all parties/attorneys of record or individually by each party/attorney of record. You must be familiar with the case and be fully prepared to participate effectively in the Case Management Conference.

At the Case Management Conference, the Court may make pretrial orders including the following, but not limited to, an order establishing a discovery schedule; an order referring the case to Alternative Dispute Resolution (ADR); an order reclassifying the case; an order setting subsequent conference and the trial date; or other orders to achieve the goals of the Trial Court Delay Reduction Act (Gov. Code, section 68600 et seq.)

Notice is hereby given that if you do not file the Case Management Statement or appear and effectively participate at the Case Management Conference, the Court may impose sanctions pursuant to LASC Local Rule 3.37, Code of Civil Procedure sections 177.5, 575.2, 583.150, 583.360 and 583.410, Government Code Section 68608 (b), and California Rules of Court 2.2 et seq.

Date: November 29, 2016

MALCOLM H. MACKEY, Judicial Officer

CERTIFICATE OF SERVICE

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Notice of Case Management Conference upon each party or counsel named above:

[✓] by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed herein in a separate sealed envelope to each address as shown above with postage thereon fully prepaid.

[ ] by personally giving the party notice upon filing the complaint.

Date: November 29, 2016

Sherri R. Carter, Executive Officer/Clerk
by M Kinney, Deputy Clerk

LACIV 132 (Rev. 07/13)
LASC Approved 10-03

Cal. Rules of Court, rule 3.720-3.730
LASC Local Rules, Chapter Three

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/08/16			**DEPT.** 55
HONORABLE Malcolm Mackey	JUDGE	E. VERNER	DEPUTY CLERK
HONORABLE #3	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. KINNEY, CA	Deputy Sheriff	NONE	Reporter

8:30 am	BC639694	Plaintiff Counsel	KAREN L. UNO (CC)via CourtCall
	NATIONWIDE MUTUAL INSURANCE		
	VS	Defendant Counsel	CHRISTIAN D. MOLLOY (X) ROBERT LEVINE (CC)via CourtCall
	VS		
	MARIA VLACHOU-HAHN ET AL		

NATURE OF PROCEEDINGS:

CASE MANAGEMENT CONFERENCE

Case Management Conference held.

TWO DAY ESTIMATED JURY TRIAL is set February 13, 2018 at 9:00 a.m. in Department 55. All sides demand jury.

FINAL STATUS CONFERENCE is set February 2, 2018 at 8:30 a.m. in Department 55.

Parties are ordered to meet and confer RE settlement. Settlement discussions are ordered concluded on or before January 31, 2018.

All named defendants, doe defendants, cross-defendants and roe defendants who have not been named, served or defaulted by June 1, 2018 are dismissed as of June 1, 2018.

Demand for exchange of experts pursuant to Code of Civil Procedure Section 2034 is deemed made this date.

Discovery to be concluded by January 15, 2018. Law and Motion to be concluded by January 29, 2018. All expert depositions to be concluded by three days prior to the Final Status Conference hearing.

Notice waived.

MINUTES ENTERED
03/08/16
COUNTY CLERK

Law Office of
Michael A. Kruppe
a professional corporation
Michael A. Kruppe, Esq. (State Bar No. 123026)
Christian D. Molloy, Esq. (State Bar No. 237035)
77-564A Country Club Dr., Suite 102
Palm Desert, California 92211
Tele: (760) 772-4273 Fax: (760) 772-4277

Attorneys for Defendants, AVIS BUDGET GROUP, INC. and ACE AMERICAN INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NATIONWIDE MUTUAL INSURANCE COMPANY and AMCO INSURANCE COMPANY, Plaintiffs, vs. MARIA VLACHOU-HAHN, Individually and as Administrator of the Estate of MARCUS HAHN, EVA HAHN (a minor), AVIS BUDGET GROUP, INC., ACE AMERICAN INSURANCE COMPANY and DOES 1-10, inclusive, Defendants.	Case No.: BC639694 NOTICE OF RULING Date: October 27, 2017 Time: 8:30 a.m. Dept.: 55 Assigned For All Purposes To: The Honorable Judge Malcolm Mackey Department 55

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, will please take notice that the Motion for Summary Judgment or Alternatively Summary Adjudication filed by Plaintiffs NATIONWIDE MUTUAL INSURANCE CO. and AMCO INSURANCE CO. came regularly for hearing on October 27, 2017 at 8:30 a.m. in Dept. 55 of the above-captioned court. Christian Molloy, Esq. appeared on behalf of Defendants AVIS BUDGET GROUP, INC. and ACE AMERICAN INSURANCE CO. David Borovsky,

Esq. appeared for moving plaintiffs. There were no other appearances.

The Court adopted its tentative ruling and denied plaintiffs' motion for summary judgment/adjudication. Attached hereto as Exhibit "A" is a copy of the tentative ruling which became the ruling of the Court, as informally produced by David Borovsky in accordance with the Court's instructions at the hearing (with handwritten markings in the produced copy that were not on the original).

DATED: November 2, 2017

THE LAW OFFICE OF MICHAEL A. KRUPPE

By: Michael A. Kruppe

Michael A. Kruppe, Esq.
Christian D. Molloy, Esq.
Attorneys for Defendants, AVIS BUDGET GROUP, INC. and ACE AMERICAN INSURANCE COMPANY

Confidential - Court Document

NATIONWIDE MUT. INS. CO. v. VLACHOU-HAHN BC639694

Hearing Date: 10/27/17, Dept. 55

#6: MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION.

Notice: Okay

Opposition

MP: Plaintiffs

RP: Defendants

Summary

On 4/19/17, plaintiffs NATIONWIDE MUTUAL INSURANCE COMPANY and AMCO INSURANCE COMPANY filed a Complaint, for Declaratory Relief, alleging that no coverage exists for an estate, under two policies issued by plaintiffs to Mr. Hahn-- AMCO Personal Automobile Policy, and Nationwide Personal Umbrella Policy, having an exclusion for "bodily injury" to the named insured or any "family member."

EXHIBIT A

MP Positions

Moving parties request summary judgment or adjudication, declaring that (1) the "family member" exclusions in the AMCO and Nationwide policies are valid and enforceable and bar coverage for Maria and Eva Hahn's claims, and (2) AMCO and Nationwide owe no duty to defend or indemnify the Estate against the Vlachou-Hahn complaint, on grounds including the following:

- California and not Minnesota law applies, because the AMCO and Nationwide policies were both issued in California, to California residents, covering vehicles garaged in California, and the Hahns had no expectation that any law besides California would apply in interpreting their policy.
  The "family member" exclusion is valid and enforceable under California law, and bars coverage for the personal injury claims of Maria and Eva, as it is undisputed that they resided together with Marcus Hahn in Venice, California at the time of the accident.
- Even if Minnesota law did apply, "family member" exclusions are only unenforceable up to the Minnesota financial minimum limits. Because the AMCO and Nationwide policies are "excess to" the underlying Budget Contract, and the ACE Policy, which afford such limits, the "family member" exclusions in the AMCO and Nationwide policies are enforceable.

RP Positions

Opposing parties request denying, on bases including the following:

- The Court should defer to the Minnesota pending action, where Minnesota has a greater interest in hearing the entire litigation.

  The only connection with California is that the named insured lived in California prior to the accident, as did the family member claimants. However, the accident occurred in Minnesota involving Minnesota vehicles and Minnesota third-party claimants. Minnesota has a clear interest in litigating all coverage disputes.

- To prevent prejudice the insured, the insurer's action for declaratory relief is properly stayed pending resolution of the third-party suit. [Montrose Chemical Corp. v. Superior Court (1993) 6 Cal.4th 287, 301; Scottsdale Ins. Co. v. MV Transportation (2005) 36 Cal.4th 643, 662].

- The motion fails to address the non-family member claimants. The Minnesota action includes additional parties, including claimants who were occupants of the Sanchez vehicle, and additional claims (e.g. Budget's claims for equitable contribution and declaratory judgment claims to resolve coverage priority as to the Vlachou-Hahn claimants, as well as third-party defendant claimants (non-family members).

- Priority of coverage is a complex issue pending before the Minnesota Court.

- As this Court lacks information from the Underlying Minnesota Action [both the negligence claim against Mr. Hahn as well as the Coverage Action] to rule out all other potential exclusions, the priority of insurance is a premature endeavor that should be handled by the Minnesota Court.

- AMCO/Nationwide do not address any other coverage issues with the Budget and ACE American coverage, and leave out the highly relevant "family member" exclusions contained in the Budget Contract and ACE Policy.

- Based on choice-of-law factors, the Court should rely upon the location where the accident occurred in Minnesota, and the problem that all other insurance contracts and the rental agreement are interpreted under Minnesota law. The Court should not apply California law to some portions of the AMCO policy, while applying Minnesota law to other portions.

  Plaintiffs have stated no basis to distinguish between the language of the various "family member" exclusions. Even if California law is applied, then the Budget Contract would

provide primary coverage up to the minimum state limits of $30,000 per person and $60,000 per accident (under Minnesota's financial responsibility statute).

The motion was served by overnight mail on August 10 with only 74 days' notice, if one adds two days and includes the Monday past the weekend.

Tentative Ruling

The motion and alternative motion are denied.

Triable Issues

The Court determines that moving parties partly failed to meet the burden of proof, and that there are triable issues of material fact, on issues including (1) whether Minnesota law applies to limit monetarily the extent of the family-member exclusions; and (2) whether plaintiffs' policies are only excess, depending upon whether the family exclusions apply to the other policies claimed to be primary (see, e.g., opposing separate statement, additional fact numbers 25 – 28, and proof referenced thereat).

Choice of Law

For purposes of this motion, only, this Court determines that Minnesota law applies, at least to the extent of the "family member" exclusions being unenforceable up to Minnesota's financial minimum limits, which allows a disposition on the motion, based on the above-referenced issues, without having to determine choice of law any further.

Some policy language, requiring application of Minnesota law (see separate statement, fact number 5), regarding the limit on the family exclusion, would indicate application of Minnesota law, at least to that extent. The following excerpt is analogous:

> Plaintiff contends that under the "government interest" approach to choice of law problems, the policy must be interpreted according to the laws of California, which prohibit stacking. Plaintiff argues that because California is the forum state, and the contract was made between California residents and a corporation doing business in California, California has an interest in enforcing the contract according to California law. (Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co. (1980) 103 Cal.App.3d 198, 205, 162 Cal.Rptr. 720; Tholen v. Carney (5th Cir.1977) 555 F.2d 479, 481, fn. 5.) However, unlike the cases cited by plaintiff, the contract between defendants and plaintiff expressly stated, in the out-of-state provision of paragraph 24, that when driving in a state which requires a nonresident to maintain insurance, defendants would be covered to the extent required by the law of that state.
>
> As stated above, the Minnesota act required basic economic loss coverage of $30,000. In 1979, the Minnesota Supreme Court held that the act entitled residents of Minnesota to stack benefits. In March 1980, the court held that nonresidents were also entitled to stack benefits. (Petty v. Allstate Ins. Co., supra, 290 N.W.2d at p. 766.) The defendants' policy was issued in August 1980.
>
> 23 It is well settled that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued. (Jordan v. Consolidated Mut. Ins. Co. (1976) 59 Cal.App.3d 26, 37, 130 Cal.Rptr. 446.) Therefore, plaintiff is obligated, under its agreement with the state of Minnesota and by the terms of its contract with defendants, to comply with Minnesota law as interpreted by the Minnesota court.

California Cas. Indem. Exch. v. Deardorff (1984) 157 Cal. App. 3d 548, 552. [Emphasis added.]

However, on other issues raised by the First Amended Complaint, not involving any shown conflict of laws, and indisputably involving California residents, California law may apply.

"Coverage questions are less likely to involve choice of law because most states have similar laws on interpretation of the insurance policy." Cal. Prac. Guide: Ins. Litig. (The Rutter Group 2017) § 15:594.

The facts of this reported opinion arguably are analogous, where the accident occurred in another state:

> The defendants were occupying a Hawaiian vehicle when the accident occurred in Hawaii. Hawaii, like California, has a significant interest in regulating motor vehicle insurance within its boundaries. The Hawaii Legislature has provided the means by which Hawaii's interest in such matters may be protected. Under Hawaiian law every motor vehicle registered or principally garaged in that state must carry a policy of no-fault insurance. Unless rejected in writing, a Hawaiian no-fault insurance policy **211 must provide uninsured motorist coverage. (Hawaii Rev.Stats. § 431-448, subd. (a).) The car in which defendants were riding at the time of their accident was covered by a policy of Hawaiian no-fault insurance and the owner of the car had declined uninsured motorist coverage. Hawaiian law and the policy expressed in that law were fully satisfied by the Liberty Mutual insurance policy in effect at the time of the accident. The fact that defendants had additional insurance, whether vehicular or otherwise, was fortuitous for them but is extraneous to the calculus of Hawaii's interest. Hawaii's interest centers on compliance with its own statutory requirements.5 Once those have been satisfied, Hawaii has little, if any, other interest in this case.
>
> California has the most significant contacts with the case. As we have noted, California Casualty is a California corporation licensed and doing business in California, which conducts no business in Hawaii. The defendants are California domiciliaries who reside and work here and were in Hawaii only temporarily. The vehicles for which defendants purchased insurance are registered, garaged, and principally used in California. The insurance policies at issue were purchased to fulfill California's financial responsibility law. California's more significant contacts to the case and the fact that the insurance policies were purchased in *1607 fulfillment of our law rather than Hawaiian law necessarily gives California the greater interest in the resolution of the case.6

California Cas. Indem. Exch. v. Pettis (1987) 193 Cal. App. 3d 1597, 1606–07.

As a matter of procedure, "upon a proper showing," courts may determine, via the summary judgment procedure, an issue of choice of law. Beech Aircraft Corp. v. Sup. Ct. (1976) 61 Cal. App. 3d 501, 516.

Justices "review the court's choice-of-law determination de novo to the extent it presents a purely legal question, but review any underlying factual determinations for substantial evidence." Samaniego v. Empire Today LLC (2012) 205 Cal.App.4th 1138, 1144.

Under Civil Code Section 1646, applicable to questions of contract interpretation, courts must apply the law of the jurisdiction where a contract was to be performed, or made, and not the governmental-interest analysis applicable to other choice-of-law issues. Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal.App.4th 1436, 1442.

Generally, the governmental interest analysis consists of three steps, as follows:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law 'to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state' [citation] and then ultimately applies 'the law of the state whose interest would be more impaired if its law were not applied.'"

McCann v. Foster Wheeler LLC (2010) 48 Cal.4th 68, 87-88. *Accord* Tucci v. Club Mediterranee (2001) 89 Cal. App. 4th 180, 189.

Nationwide v. Avis

Los Angeles County Superior Court Case No. BC639694

PROOF OF SERVICE

[California Code of Civil Procedure §§ 1013A(3) and 2015.5]

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am employed in the County aforesaid. I am over the age of eighteen years and not a party to the within entitled action; my business address is 77-564A Country Club Drive, Suite 102, Palm Desert, CA 92211.

On November 17, I served a true and correct copy of the within document described as NOTICE OF RULING on the interested parties in this action addressed as follows:

Karen L. Uno, Esq. David P. Borovsky, Esq. BECHERER KANNETT & SCHWEITZER 1255 Powell Street Emeryville, CA 94608 Tel.: (510) 658-3600 Fax: (510) 658-1151 Attorneys for Plaintiffs	Robert S. Levin, Esq. LEVIN & HOFFMAN, LLP 23622 Calabasas Road, Suite 253 Calabasas, CA 91302 Tel.: (818) 990-2370 Fax: (818) 876-8526 Attorneys for Defendant Maria Vlachou-Hahn and as Administrator of the Estate of Marcus Hahn and Eva Hahn

X VIA MAIL – In accordance with the regular mail collection and processing with the regular mail collection and processing practices of this business office, with which I am familiar, by means of which mail is deposited with the United States Postal Service at Palm Desert, California, that same day in the ordinary course of business, I deposited such sealed envelope for collection and mailing on this same date following ordinary business practices.

VIA PERSONAL DELIVERY – I caused such envelope to be delivered by hand to the offices of the addressee pursuant to California Code of Civil Procedure § 1011.

VIA OVERNIGHT DELIVERY – I caused such envelope to be delivered by hand to the office of the addressee via overnight delivery pursuant to California Code of Civil Procedure § 1013(c). Said document was deposited at the box regularly maintained by said express service carrier located at Parc Center Drive and Springfield , Palm Desert, California, on the date set forth above.

VIA FACSIMILE – I caused such document to be delivered to the office of the addressee via facsimile machine pursuant to California Code of Civil Procedure § 1013(e). Said document was transmitted from the LAW OFFICE OF MICHAEL A. KRUPPE in Palm Desert, California, on the date set forth above, and the original fax transaction report is attached hereto and incorporated herein by reference.

I declare, under penalty of perjury, under the laws of the State of California that the foregoing is true and correct. Executed on November 17, at Palm Desert, California.

Malisa Claxton

STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0908

Krista Friese,
Appellant,

vs.

American Family Mutual Insurance Company,
Respondent.

Filed January 29, 2018
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-CV-16-791

Charles D. Slane, Jennifer E. Olson, TSR Injury Law, Bloomington, Minnesota (for appellant)

Nathan Cariveau, Eden Prairie, Minnesota (for respondent)

Sharon L. Van Dyck, Van Dyck Law Firm, PLLC, Minneapolis, Minnesota (for amicus curiae Minnesota Association for Justice)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant Krista Friese challenges the district court's decision that granted summary judgment to respondent American Family Mutual Insurance Company and

enforced a policy provision reducing the amount of underinsured-motorist (UIM) coverage under a nonresident's policy based on the amount recovered from other available liability insurance. For two reasons, Friese argues that Minnesota law requires Minnesota-licensed insurers to provide "add-on" UIM coverage for all collisions that occur in Minnesota, therefore, the reducing clause is unenforceable. First, Friese claims the plain language of Minn. Stat. § 65B.50, subd. 1 (2016), supports her position, along with the Minnesota Supreme Court's recent decision in *Founders v. Yates*, 888 N.W.2d 134 (Minn. 2016). Second, Friese argues that American Family's policy has a conformity clause that requires it to provide add-on coverage consistent with Minnesota law. Based on long-standing precedent interpreting Minn. Stat. § 65B.50, we affirm.

FACTS

This declaratory judgment action was decided based on stipulated facts. On January 4, 2010, David Diede was driving on a Minnesota highway when he hit a vehicle that Friese occupied, but did not own. The vehicle she occupied was owned by a Wisconsin resident, garaged in Wisconsin, and insured under a policy issued in Wisconsin by American Family. Friese is a Wisconsin resident. American Family is licensed to do business in Minnesota. Diede's negligence caused the accident and, as a direct result, Friese was injured and sustained damages in excess of $100,000. Friese sued Diede and settled her claim against him for his auto liability policy limits of $50,000.

Diede is an underinsured motorist, as defined by the American Family policy (the policy). The policy's limit for UIM coverage is $100,000, but the policy contains a "reducing clause." It states:

> The limits of liability of the coverage will be reduced by: 1. A payment made or amount payable by or on behalf of any person or organization which may be legally liable, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle.

The parties agree that, if the reducing clause is enforced, Friese's UIM recovery would be reduced by $50,000, the amount that she received from Diede's policy.

Friese sued American Family seeking a declaratory judgment that the reducing clause is not enforceable because the Minnesota No-Fault Automobile Insurance Act requires American Family to provide add-on coverage. Minn. Stat. §§ 65B.41-.71 (2016). American Family contends that add-on coverage under the No-Fault Act does not apply to auto policies held by nonresidents.

In March and June 2017, the district court granted summary judgment in favor of American Family and held that the reducing clause was enforceable against Friese, therefore, she is entitled to recover $50,000 in UIM coverage from American Family.[1] This appeal follows.

DECISION

I. Minnesota law does not require American Family to provide add-on UIM coverage to Friese under a nonresident's auto policy.

Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Here, there

[1] In its March order, the district court described the proceedings as a "court trial," because the parties had submitted stipulated facts, briefing, and the only question before the court was whether American Family's reducing clause was enforceable against Friese. In June 2017, the district court approved the parties' stipulation that the March order was "properly construed" as one for summary judgment.

are no material facts in dispute; American Family and Friese stipulated to the underlying facts. Based on the undisputed facts, policy language, and Minnesota law, Friese contends the district court misinterpreted the No-Fault Act and erred in enforcing the reducing clause. Interpretation of a statute and an insurance policy based on undisputed facts raise questions of law subject to de novo review. *Jensen v. United Fire & Cas. Co.*, 524 N.W.2d 536, 538 (Minn. App. 1994), *review denied* (Minn. Feb. 3, 1995).

A. Add-on UIM coverage under the No-Fault Act and the nonresident policyholder exception

If the terms of an insurance policy conflict with or omit coverage required by the No-Fault Act, those policy terms will be held invalid. *Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52, 55 (Minn. 2001). The No-Fault Act's UIM coverage requirement has been interpreted as requiring add-on UIM coverage for Minnesota motor vehicles. *Mitsch v. Am. Nat. Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. App. 2007) (holding "Minnesota law mandates that all UIM coverage issued in the state be add-on coverage") (quoting Minn. Stat. § 65B.49, subd. 4a (2006)), *review denied* (Minn. Oct. 24, 2007).[2] Briefly, add-on coverage means that the amount of UIM coverage purchased is available to the insured/ claimant in addition to any applicable liability insurance coverage. *See* Minn. Stat.

[2] *Johnson v. Cummiskey*, 765 N.W.2d 652, 661 (Minn. App. 2009), distinguished *Mitsch*, stating that its broad declaration about add-on coverage included dicta because *Mitsch* did not consider whether the No-Fault Act required UIM coverage for motorcycles. *Johnson* went on to hold that the No-Fault Act does not require UIM coverage in motorcycle polices, therefore, the applicable policy would not be reformed by statutory requirements for add-on coverage. 765 N.W.2d at 662. *Johnson* did not suggest or imply that *Mitsch* incorrectly analyzed the No-Fault Act's requirement that Minnesota motor vehicles must have add-on UIM coverage.

§ 65B.49, subd. 4a (2016) (providing that "[w]ith respect to underinsured motorist coverage, the maximum liability of an insurer is the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle"). Based on the statutory mandate, this court has held that a reducing clause is unenforceable in a Minnesota automobile policy. *Mitsch*, 736 N.W.2d at 363.

Friese is seeking UIM coverage under a nonresident's policy and contends that, because American Family is licensed to do business in Minnesota, the policy's reducing clause violates the No-Fault Act. She relies on the plain language of Minn. Stat. § 65B.50, which states:

> Subdivision 1. **Filing.** Every insurer licensed to write motor vehicle accident reparation and liability insurance in this state shall, on or before January 1, 1975, or as a condition to such licensing, file with the commissioner and thereafter maintain a written certification that it will afford at least the minimum security provided by section 65B.49 to all policy holders, except that in the case of nonresident policyholders it need only certify that security is provided with respect to accidents occurring in this state.
> Subd. 2. **Contacts of liability insurance as security covering the vehicle.** Notwithstanding any contrary provision in it, every contract of liability insurance for injury, wherever issued, covering obligations arising from ownership, maintenance, or use of a motor vehicle, except a contract which provides coverage only for liability in excess of required minimum tort liability coverages, includes basic economic loss benefit coverages and residual liability coverages required by sections 65B.41 to 65B.71, while the vehicle is in this state, and qualifies as security covering the vehicle.

Minn. Stat. § 65B.50. The parties agree that subdivision 1 requires that insurers licensed in Minnesota must certify that they provide basic coverage, which the statute refers to as "minimum security." *Id.* But the parties disagree what coverage is required.

American Family contends that subdivision 1 contains a specific exception for nonresident policyholders that narrows the required coverage. The relevant language provides, "except that in the case of nonresident policyholders it need only certify that security is provided with respect to accidents occurring in this state." Minn. Stat. § 65B.50, subd. 1. Relying on precedent, American Family argues that "security" in the nonresident exception to subdivision 1 must be read by referring to subdivision 2, which provides that "every contract of liability insurance for injury, wherever issued . . . includes basic economic loss benefit coverages and residual liability coverages." Minn. Stat. § 65B.50, subd. 2. Subdivision 2 coverage includes basic no-fault benefits but does not include UIM insurance.

Friese argues "that security" in the exception refers to "minimum security," which is referenced earlier in the same sentence. Friese contends that minimum security is defined in subdivision 1, which states that licensed insurers must certify that they provide "at least the minimum security provided by section 65B.49 to all policyholders." Minn. Stat. § 65B.50, subd. 1. Based on *Mitsch* and the language in section 65B.49, subd. 4a, which mandates add-on coverage for UIM benefits, Friese argues that the policy's reducing clause is unenforceable.

Although Friese's reading of the plain language of subdivision 1 has some merit, this court is bound to follow relevant precedent that has interpreted these exact provisions

of the No-Fault Act. Since 1980, appellate courts have read both subdivisions of section 65B.50 together, and held that the "security" referenced in subdivision 1 for nonresident policyholders refers only to the required coverage in subdivision 2, which expressly refers to "every contract of liability insurance . . . wherever issued." *See Petty v. Allstate Ins. Co.*, 290 N.W.2d 764, 765-66 (Minn. 1980) (referring to subdivision 1 exception and holding "we look to Minn. Stat. § 65B.50, subd. 2, in order to determine what 'security' must be afforded to nonresident insureds operating an insured vehicle in Minnesota"); *Hedin v. State Farm Mut. Auto. Ins. Co.*, 351 N.W.2d 407, 408-09 (Minn. App. 1984) (holding "that the word 'security' as used in [subdivision 1 of section 65B.50] with respect to nonresident policyholders only refers to basic economic loss benefits required to be included under subdivision 2 of 65B.50."); *see also Aguilar v. Texas Farmers Ins. Co.*, 504 N.W.2d 791, 793-94 (Minn. App. 1993) (explaining that *Hedin*'s analysis applies to underinsured motorist benefits provided by an insurer, unlicensed in Minnesota, and holding the "No-Fault Act only requires basic economic loss benefits and residual liability coverage for nonresidents' policies").

In fact, this court previously has decided whether a Minnesota-licensed insurer may enforce a reducing clause in a nonresident's policy under section 65B.50. In *Warthan v. Am. Family Mut. Ins. Co.*, nonresident policyholders were injured in an accident in Minnesota, the parties agreed that a third party was at fault, and the nonresident policyholders received the policy limits from the third party's insurer. 592 N.W.2d 136, 137-38 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). The policyholders sought UIM coverage under their American Family policy, which was issued in Wisconsin and

had a reducing clause similar to the one in Friese's policy. *Id.* The policyholders argued the reducing clause was unenforceable in light of the add-on coverage required by Minnesota law. *Id.* at 138.

This court affirmed the district court's decision to enforce the reducing clause and rejected the policyholders' argument. *Id.* Relying on *Petty*, this court held that the "security" referenced in the nonresident policyholder exception in subdivision 1, "is the same security referenced in subdivision 2," which only requires "basic economic loss and residual liability coverage." *Id.* at 139. After referencing *Hedin* and *Aguilar*, this court summarized "the rule in Minnesota is that uninsured and underinsured motorist coverage are not required for nonresidents, and therefore if nonresidents have such coverage it need not comply with Minnesota law." *Id.*

Friese concedes that *Warthan* would be dispositive, but argues that a recent decision by the Minnesota Supreme Court is incompatible with *Warthan* because the court implicitly rejected and therefore limited precedent upon which *Warthan* relied. We disagree.

B. *Founders Ins. Co. v. Yates* did not decide, much less mandate, a different interpretation of the nonresident policyholder exception.

In *Founders Inc. Co. v. Yates*, an Illinois resident with an Illinois insurance policy was in a car accident in Minnesota. 888 N.W.2d 134, 135 (Minn. 2016). Founders provided Yates's automobile insurance and was not licensed to sell insurance in Minnesota. *Id.* Founders denied Yates's claim seeking no-fault benefits under Minnesota law, arguing that section 65B.50 only applied to Minnesota-licensed insurers. *Id.* Analyzing the "plain

language" of section 65B.50, the supreme court held that subdivision 2 "applies to all contracts of liability insurance for injury, wherever issued, including whether they were issued in Minnesota, Illinois, or some other place." *Id.* at 136. Founders argued that subdivisions 1 and 2 should be read together, and because subdivision 1 only applied to Minnesota-licensed insurers, subdivision 2 was similarly limited to Minnesota-licensed insurers. *Id.* The supreme court disagreed and concluded that, "Minn. Stat. § 65B.50, subd. 2, applies to an out-of-state insurer when its insured is in an accident in Minnesota and the insured vehicle is in Minnesota, even though the insurer is not licensed by the State of Minnesota to issue motor vehicle insurance." *Id.* at 137.

Friese argues that, after *Founders*, Minn. Stat. § 65B.50's subdivisions can no longer be read together, and must be read independently, with subdivision 1 applying to Minnesota-licensed insurers and subdivision 2 applying to insurers that are not licensed in Minnesota. Accordingly, Friese argues that "security" in subdivision 1, cannot "be defined by looking to subdivision 2," and must be defined by reference to subdivision 1, as "the minimum security provided by section 65B.49."

We agree with the district court that *Warthan* and *Petty* remain binding precedent. *Founders* predicated its decision on subdivision 2 of section 65B.50, not subdivision 1. *Id.* *Founders* clarified that subdivision 2 applies to all insurers if an insured is in an accident in Minnesota, but *Founders* does not address previous caselaw on the nonresident policyholder exception for Minnesota-licensed insurers. In reaching its conclusion in *Founders*, the supreme court did not analyze or even mention *Petty*, *Warthan*, or any other pre-*Founders* decision setting out no-fault coverage requirements for Minnesota-licensed

insurers. We are bound by existing precedent that has not been overruled. *Jackson ex rel. Sorenson v. Options Residential, Inc.*, 896 N.W.2d 549, 553 (Minn. App. 2017).

Finally, "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Even if we would reach a different conclusion were we writing on a blank slate, it is not our role to extend *Founders* and overrule caselaw. *Petty* and *Warthan* held that Minnesota-licensed insurers need only provide basic economic loss benefits coverage and residual liability coverage under nonresident policies; this holding is unaffected by *Founders*' holding that subdivision 2 applies to insurers that are not licensed in Minnesota.

Accordingly, we conclude that American Family was not required to provide add-on UIM coverage in this policy, the reducing clause may be enforced, and American Family was entitled to summary judgment as a matter of law.

II. The reducing clause is not in direct conflict with the No-Fault Act, and therefore, the conformity clause does not operate to rewrite the reducing clause.

Finally, Friese argues that the conformity clause in the American Family policy requires the entire policy to conform to Minnesota law, and consequently, the UIM endorsement should be rewritten to provide add-on coverage. A conformity clause in an insurance policy operates to substitute a statutory provision for a policy provision only where the two provisions are in direct conflict. *Atwater Creamery Co. v. W. Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 275 (Minn. 1985). Here, we have determined that the policy

complies with *Petty*, *Warthan*, and Minn. Stat. § 65B.50, and, therefore, does not conflict with Minnesota law.

We conclude, based on the relevant statutes and long-standing caselaw, that the district court correctly determined that Minnesota law does not require reformation of the UIM coverage in the American Family policy with regard to Friese's claim.

Affirmed.

Lilleberg & Hopewell, PLLC
Attorneys at Law

B. Jon Lilleberg
Direct Dial: 612-255-1130
Facsimile 612-255-1140
Email: bjl@lilleberg-hopewell.com

February 15, 2018

Clerk of Appellate Courts
Minnesota Court of Appeals
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155

VIA EMACS

RE: **Hahn et al. v. Zimmer et al.**
Appellate Court File: A17-1921
District Court File: 27-CV-17-9143
Our File: 7354-224

Dear Clerk of Appellate Courts:

This letter is to inform the Court that Respondents/Defendants, Michael A. Zimmer, as Special Administrator for the Estate of Marcus Hahn, deceased, and PV Holding Corp. will not be filing a brief in this matter.

If you have any questions or need anything further, please feel free to contact me.

Sincerely,

B. Jon Lilleberg
BJL/pml

CC: All Counsels of Record Via EMACS

No. A17-1921

FILED
February 23, 2018
OFFICE OF APPELLATE COURTS

State of Minnesota
In Court of Appeals

Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.,

Appellants,

and Maria Vlachou-Hahn, individually and as parent and natural guardian of Eva Vlachou-Hahn, a minor,

Plaintiffs,

vs.

Nationwide Mutual Insurance Company and AMCO Insurance Company,

Respondents,

and Michael A. Zimmer, as Special Administrator of the Estate of Marcus Hahn, deceased, and PV Holding Corporation,

Defendants,

vs.

Diego Velazquez Sanchez, Jose Raul Cabrea Ortega, Sergio Arturo Delgado, Martha Cristina Lopez, Paulina Lopez, a minor, and Dante Lopez Velazquez, a minor,

Third-Party Defendants.

REPLY BRIEF OF APPELLANTS

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

William R. Sieben (#100808)
James S. Ballentine (#209739)
Matthew J. Barber (#397240)
SCHWEBEL, GOETZ & SIEBEN, P.A.
5120 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 377-7777

Attorneys for Plaintiffs Maria Vlachou-Hahn and Eva Vlachou-Hahn

Sylvia Ivey Zinn (#164379)
BRENDEL & ZINN, LTD.
8519 Eagle Point Blvd., Suite 110
Lake Elmo, MN 55042
Telephone: (651) 224-4959

Attorney for Respondents Nationwide Mutual Insurance Company and AMCO Insurance Company

B. Jon Lilleberg (#220772)
Peter M. Leiferman (#396270)
LILLEBERG & HOPEWELL, PLLC
5200 Wilson Road, Suite 325
Edina, MN 55424
Telephone: (612) 255-1134

Attorneys for Defendants Michael Zimmer, Special Administrator for Estate of Marcus Hahn, and PV Holding Corporation

Jody Martineau
Rachel Sperling
LEONARD MARTINEAU LEONARD
6465 Wayzata Blvd., Suite 780
Minneapolis, MN 55426
Telephone: (952) 567-2488

Attorneys for Third-Party Defendants Diego Sanchez, Martha Lopez, and Dante Velazquez

Matthew B. Gross
QUARNSTROM & DOERING P.A.
109 South 4th Street
Marshall, MN 56258
Telephone: (507) 537-1441

Attorney for Respondent Jose Ortega Raul Cabrera Ortega

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I. The District Court Erred by Refusing to Enjoin the California Action and Staying the Minnesota Action.

A. The California and Minnesota Courts do not have concurrent jurisdiction.

As a threshold matter, the first-filed "rule" – upon which the district court based the stay of the Minnesota action – does not apply because there is no concurrent jurisdiction. (Appellants' Brief ("App. Br.") at 16-17); *see Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 767 (Minn. App. 2017), *review denied* (May 16, 2017) (citing *St. Paul Surplus Lines Ins. Co. v. Mentor Corp.*, 503 N.W.2d 511, 515 (Minn. App. 1993)) (first-filed rule does not apply where two actions are pending in "courts that do not share concurrent jurisdiction, such as courts of different states.").

Respondents argue "concurrent jurisdiction exists when two or more tribunals are authorized to hear and dispose of a matter." (Respondents' Brief ("Resp. Br.") at 6.) But the Minnesota action has six additional parties (the Third-Party Defendants), over whom California does not have personal jurisdiction, and additional claims (personal injury, priority of coverage for all claims, and equitable contribution). (*See* App. Br. 13-15, 21-25.) Thus, the California court does not have "concurrent" jurisdiction with Minnesota, as it cannot "dispose" of the matter. (*Id.*) Because jurisdiction is not concurrent, the district court erred as a matter of law by applying the first-filed rule.

B. The district court abused its discretion by failing to apply the three-factor test.

Respondents gloss over the paramount test governing whether an anti-suit injunction or stay is proper,[1] ostensibly because the district court did not substantively address the factors either. Under the test, the California action should be enjoined.

Respondents make a general assertion that the district court "analyzed each factor." (Resp. Br." at 6, 10.) With all due respect, it did not. The trial court's memorandum – and, for that matter, Respondents' brief – are devoid of even *reference to* the third factor, which is the capacity of one action to dispose of the other. *Minnesota Mut. Life Ins. v. Anderson*, 410 N.W.2d 80, 81-81 (Minn. App. 1987); *Mentor*, 503 N.W.2d at 516. This is key, because the entire purpose of an anti-suit injunction is to "determine which of the two actions will serve the best needs of the parties by providing a comprehensive solution of the general conflict" and "avoid piecemeal litigation." *Anderson*, 410 N.W.2d 80, 82 (Minn. App. 1987) (citation omitted); *First State*, 535 N.W.2d at 688.

Here, it is certain that the California action – even if litigated to the fullest extent possible – would still leave Minnesota to resolve: (1) Plaintiffs'

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[1] The three-part test for both an anti-suit injunction and a stay of proceedings is that: "(1) The parties **must** be the same; (2) The issue(s) **must** be the same; and (3) Resolution of the first action **must** be dispositive of the action to be enjoined." *Minnesota Mut. Life Ins. v. Anderson*, 410 N.W.2d 80, 81-81 (Minn. App. 1987) (citation omitted); *accord First State Ins. Co. v. Minnesota Mining & Mfg. Co.*, 535 N.W.2d 684 (Minn. App. 1995), *review denied* (Minn. Oct. 18, 1995).

and Third-Party Defendants' tort claims against the Hahn Estate; (2) Appellants' declaratory judgment count for a determination as to priority of coverage for the defense and indemnity obligations as to bodily injury claims; and (3) Appellants' claim against Nationwide for equitable contribution towards their defense costs for all bodily injury claims. (App. Br. 13-16, 20-25.)

Rather than confront California's inability to resolve the disputes of "all parties and all factual and legal questions," *First State*, 525 N.W.2d at 687, (which the Minnesota action will do), Respondents make a red herring argument that Plaintiffs' tort claim here is irrelevant and only the declaratory judgment counts matter. (Resp. Br. 9-10.) This is so, they argue, because the declaratory judgment counts could be bifurcated from the tort claims. (*Id.*) Yet, no Minnesota court has ever differentiated between the types of claims as a basis to ignore an obvious discrepancy in the number of issues in one action versus another for the purposes of an anti-suit injunction or stay.

But leaving bifurcation aside, the Minnesota action includes *distinct* declaratory judgment counts *and* additional parties, most notably the six Third-Party Defendants. *And* only Minnesota has the capacity to resolve all claims between all parties. (*Compare* Doc. 37, Ex. 1 (Respondents' pleaded claims), *and* Doc. 5 (Plaintiffs' pleaded claims), *with* Doc. 45, Exs. A, B (Respondents' pleaded claims). Thus, even without the tort claims, the "Minnesota action is more comprehensive because it will bind all insurance

carriers on the issues of coverage and duty to defend" both Plaintiffs' and Third-Party Defendants' claims, "and will facilitate an allocation of insurance obligations." *First State*, 535 N.W.2d at 688. The district court's failure to weigh that factor necessitates reversal.

Despite all of the above, Respondents make blanket assertions that somehow the "Minnesota declaratory judgment action is the same as the California declaratory judgment action," and "[t]he parties are the same and the issues are the same." (Resp. Br. 10.) They are not. In addition to the Minnesota action having more declaratory judgment counts and issues, critically absent from Respondents' brief is any substantive treatment of the six Third-Party Defendants, the proverbial "elephant in the room," that the district court did not even mention. (Add. 3-6.)

Respondents do not dispute that the Third-Party Defendants are required parties to this lawsuit. Minn. Stat. § 555.11 (only parties may be bound by a declaratory judgment). Imagine a future claim made by one of the Third-Party Defendants against Nationwide for bodily injury damages sustained in the accident. Nationwide expects to tell them, "we litigated in California without you, and your claim is denied." Then what? Presumably, the claimant would seek relief in Minnesota, arguing the California declaration is not binding because they were not a party.

Respondents claim their motion to stay the Minnesota action prompted Appellants to join the Third-Party Defendants. (Resp. Br. 8-9.) The claim defies logic. On **July 7, 2017**, Appellants asserted a Third-Party Complaint against the Third Party Defendants, the then as-of-yet unidentified "Does 1-6," and explained:

> 8. That the other vehicle involved in the accident was occupied by six individuals who sustained injuries (Does 1-6). These Defendants are currently unaware of the names of these individuals but declaratory relief is sought against them as set forth herein.

(Doc. 37, Ex. 1 at ¶ 8.) **Twelve days later, on July 19, 2017**, Respondents filed their motion to stay. (Doc. 15.) Thus, Respondents knew all about the third-party claims ***before*** filing their motion to stay. Respondents' motion to stay came nearly two weeks later.

Toward the end of their brief, Respondents finally address *First State*. (Resp. Br. 14-15.) *First State* holds the more comprehensive lawsuit takes precedence over an action that would result in piecemeal litigation. 535 N.W.2d at 687.

Respondents assert – without citation – that *First State* stands for the proposition "even if a district court does not specifically address the factors, that does not constitute err for purposes of reversal." (Resp. Br. 15.) To the contrary, the trial court in *First State* clearly applied each of the three factors:

> [The Minnesota district court] found that all parties to the Texas action are parties to the Minnesota action and that the issue of insurance coverage is identical factually and legally, and … found that the Minnesota action was more comprehensive than the Texas action, because it would not only determine the coverage and duty to defend obligations of all the insurance carriers, but also allocate responsibility among them.

Id. at 687. Respondents appear to confuse *First State*'s note that "Minnesota courts have not applied the traditional injunction factors to decisions on anti-suit injunctions," with its explicit holding that the more comprehensive action takes precedence. *Id.* at 688 (citing *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). No one is arguing the *Dahlberg* factors apply. *First State's* holding is inescapable: the trial court was required to apply the three-factor test. *Id.* at 687-88; *accord Mentor*, 503 N.W.2d 511; *Maslowski*, 890 N.W.2d at 767. Here, it did not.

At bottom, the Minnesota action involves more parties, more claims and more issues. It is the only action that can provide a comprehensive resolution to the parties. The district court ignored all of this. *First State*, 535 N.W.2d at 687 (it is an abuse of discretion for the district court to disregard "either the facts or the applicable principles of equity") (citation omitted). Consequently, the "first-filed rule" does not apply,[2] and the district court abused its discretion by denying Appellants' anti-suit injunction.

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[2] The first-filed "rule" only warrants a stay if the three factors are satisfied. *Anderson*, 410 N.W.2d at 81.

C. The district court did not address the equities.

Briefly, Respondents make no attempt to address the district court's failure to consider the relative equities. (*Compare* Resp. Br., *with* App. Br. 26-30.) Instead, Respondents essentially argue that because the California action was "substantially underway," the district court was somehow correct in staying the Minnesota action. Respondents, however, do not point to any authority holding that minor progress or a pending dispositive motion (which was denied later) is relevant to the judicial inquiry. And a prerequisite to applying the first-filed rule is application of the three-factor test, which did not happen. *Anderson*, 410 N.W.2d at 81-82.

Moreover, California's "substantial" progress was nothing more than a scheduling conference and a scheduled motion for summary judgment. Notably, Respondents filed that motion for summary judgment on August 14, 2017, which was nearly a month ***after*** they moved to stay the Minnesota lawsuit, and was ***after*** Appellants moved to enjoin the California action. (*Compare* Add. 12; *with* Doc. 15 (motion to stay filed July 19, 2017), *and* Doc. 15 (Appellants' motion to enjoin filed Aug. 9, 2017.) Put simply, even if the progress of one suit were relevant, there was no appreciable difference in the progress in either action. Indeed, the California action is procedurally where this action is presently: a motion to stay the California action.

Respondents next ask this Court to ignore its precedent that deference not be given to actions filed "in a calculated and systematic manner ... to deprive the [Minnesota] court of its jurisdiction," (Resp. Br. 6-8; App. Br. 17-19 (quoting *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 449-50 (Minn. App. 2001)). Rather than address that point, Respondents accuse Appellants of forum shopping.

Yet, Appellants did not file either action. And the record irrefutably establishes that Respondents filed the California action to preempt a Minnesota lawsuit because, *according to Respondents*, "counsel for [Plaintiffs] indicated that such a lawsuit is imminent." (Doc. 45, Ex. A at ¶ 22 (Respondents' Complaint)). By their own admission, Respondents acted in a "calculated and systematic manner" to avoid Minnesota, which would hold them first in coverage priority for all personal injury claims arising from the accident. As such, the first-filed rule does not apply. *Medtronic, Inc.*, 630 N.W.2d at 449-50. Furthermore, the equities are only relevant when the first three factors are satisfied, which they are not.

Respondents argue that, after the Order issued, the California court expressed intent to "retain and conclude" the action. (Resp. Br. 16). The California court said no such thing. Indeed, it cancelled the trial date and denied Respondents' motion for summary judgment in order to permit formal briefing on Appellants' request to stay the California action. (Resp. Add. 12.)

But Respondents neglect to mention that the primary basis for denial of the summary judgment motion was the outstanding choice-of-law issues and the instant motions pending before the district court.

II. Appellants Are Permitted To Cite Additional Authority On Appeal.

Respondents assert Appellants relied on *First State* and *Maslowski* before the district court, and, as such, cannot address other cases on appeal. (Resp. Br. 14-15.) First, that is contrary to the record. (Doc. 56, Appellants' Memorandum in Support (also citing *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438 (2001), *Anderson*, 410 N.W.2d 80, *Minneapolis Employees Ret. Fund v. Intercap Monitoring Income Fund III*, No. C5-93-835, 1993 WL 459902 (Minn. App. Nov. 9, 1993) (Add. 25-27)); (Doc. 36, pp. 10-13); Appellants' Memorandum in Opposition (citing including *Mentor*, 503 N.W.2d 511)). More importantly, there is no rule that only cases cited to the district court may be discussed on appeal.

III. The Stay Of The Minnesota Lawsuit Is Properly Before The Court.

Respondents maintain that this Court may only consider the district court's denial of Appellants' motion for an anti-suit injunction under Minn. R. App. 103.03(b), and cannot consider the stay of the Minnesota action. (Resp.

Br. 1, 5.)[3] Both aspects of the Order, however, are predicated on the first-filed rule and the three-factor test. Thus, if the district court is reversed on the anti-suit injunction, the stay must be reversed as well. Assuming otherwise would lead to the absurd result of the California action being enjoined, but the Minnesota action remaining stayed.

Put simply, the two rulings are different sides of the same coin, and can be addressed together in the interests of justice. Minn. R. Civ. App. P. 103.04.[4]

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request the Court reverse to the district court with instructions to enjoin the California action and lift the stay of the Minnesota action.

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[3] Respondents also claim that Appellants are attempting to appeal and argue substantive coverage issues. (*See* App. Br.) Obviously, this is not the case. Instead, these coverage issues are relevant to show why Respondents are taking the tack they are; and why judicial comity is inapplicable, and equities favor Minnesota courts to resolve this dispute. (*Id.* at 26-30); *Maslowski*, 890 N.W.2d at 767-69.

[4] This Court can also reverse the district court's denial of the anti-suit injunction with instructions to revisit the entry of the stay consistent with its opinion.

Respectfully submitted,

Dated: February 23, 2018

s/ Robert E. Kuderer

Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711
bob.kuderer@ezkm.net
thomas.brock@ezkm.net

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.

CERTIFICATION OF COMPLIANCE

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a 13-point, proportionately spaced font, and the length of this document is 2,291 words. This document was prepared using Microsoft Word 2013 software.

s/ Robert E. Kuderer
Robert E. Kuderer (#207652)
Thomas C. Brock (#395980)
ERICKSON, ZIERKE, KUDERER & MADSEN, P.A.
7301 Ohms Lane, Suite 207
Minneapolis, MN 55439
(952) 582-4711
bob.kuderer@ezkm.net
thomas.brock@ezkm.net

Attorneys for Appellants Budget Rent A Car System, Inc., ACE American Insurance Company, and AON Risk Services Northeast, Inc.