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INTRODUCTION LEGISLATIVE AND JUDICIAL INTERACTION IN INSURANCE LAW

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In North Dakota the legislature and the judiciary interact to create the law of the state. This interaction is especially prominent in insurance law. The importance of the legislature's actions is indicated by section 1-01-06 of the North Dakota Century Code, which provides that "there is no common law in any case where the law is declared by the code."¹ Therefore, when the legislature enacts an insurance statute, the courts must apply and interpret the particular provision. The interaction can also happen the other way; following a court decision applying and interpreting an insurance provision, the legislature can react by passing a law clarifying its intent or otherwise affecting the court's decision. Such legislative reaction to a court decision is illustrated by the case of *St. Paul Mercury Insurance Co. v. Andrews*.²

Eileen Andrews was a passenger in an uninsured vehicle when she was injured in a one car accident.³ The Andrews insured their three automobiles under one policy with St. Paul Mercury Insurance Company.⁴ St. Paul paid the Andrews \$15,000 in basic no-fault benefits, and \$25,000 in uninsured motorist benefits, but

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1. N.D. CENT. CODE § 1-01-06 (1975).

2. 321 N.W.2d 483 (N.D. 1982).

3. *St. Paul Mercury Ins. Co. v. Andrews*, 321 N.W.2d 483, 484-85 (N.D. 1982).

4. *Id.* at 484.

refused to pay an additional \$30,000 and \$50,000 under those respective provisions.⁵ The issue before the North Dakota Supreme Court was whether the no-fault and the uninsured motorist coverages could be "stacked" to provide additional benefits up to the extent of Eileen's injuries.⁶

The court concluded that the North Dakota statute concerning basic no-fault benefits prohibited stacking, but that the uninsured motorist statute did not prohibit stacking.⁷ The court also concluded, however, that the language of the insurance policy clearly prohibited any stacking and that, since the contract did not violate any established public policy, it was enforceable.⁸ Justice Pederson, writing for the majority, stated that "[s]ome of the courts that have addressed various aspects of 'stacking' have arbitrarily stated that 'public policy' prohibits 'stacking,' while other courts have arbitrarily stated that 'public policy' permits 'stacking' We reiterate our suggestion that legislative attention is warranted."⁹

Thus, the court was unwilling to decide such an important area of public policy without legislative input. In the following legislative session, the legislature reacted to the court's appeal by enacting legislation that specifically prohibited the stacking of coverage under basic no-fault provisions¹⁰ and uninsured motorist provisions.¹¹ By so doing, the legislature provided the judiciary

5. *See id.* at 485.

6. *Id.* at 484. "Stacking" is a term used by the courts when considering coverage under more than one policy providing insurance for an accident (the stacking of policies), or when considering one policy providing insurance for an accident and the policy insures more than one motor vehicle (the stacking of coverages). *See Wasche v. Milbank Mut. Ins. Co.*, 268 N.W.2d 913, 914, 917 (Minn. 1978) (the maximum coverages for no-fault basic economic loss benefits under two insurance policies were "stacked," permitting the insured to recover benefits to the extent of actual losses up to the combined policy limits of both policies); *Roepke v. Western Nat'l Mut. Ins. Co.*, 302 N.W.2d 350 (Minn. 1981) (permitted the "stacking" of no-fault insurance coverages on six vehicles insured under a single policy).

7. 321 N.W.2d at 489.

8. *Id.*

9. *Id.*

10. *See* N.D. CENT. CODE § 26.1-41-14 (Supp. 1985). Section 26.1-41-14 of the North Dakota Century Code provides as follows:

When an injured person is provided basic no-fault benefits by an insurance policy issued in compliance with this chapter, the injured person is covered only to the extent of the basic no-fault benefits provided on the secured motor vehicle involved in the accident. If any person is injured while occupying an unsecured motor vehicle, basic no-fault benefits are only available to the extent of the applicable basic no-fault benefits provided to the injured person as the owner of a secured motor vehicle or as a relative of the owner of a secured motor vehicle. In either instance, basic no-fault benefits on any secured motor vehicle may not be added or stacked upon basic no-fault benefits available from any other source.

Id.

11. *See id.* § 26.1-40-14(2). Subsection 26.1-40-14(2) of the North Dakota Century Code provides as follows:

with a clear public policy statement to follow in the future.

The interaction between the legislature and the judiciary also results from the courts' interpretation and application of existing statutes. This interaction is illustrated by *Milbank Mutual Insurance Co. v. Dairyland Insurance Co.*¹² In *Milbank* the defendant, Dairyland, appealed from a summary judgment in which the district court had concluded that Dairyland had a duty to defend the insured, Hagstrom, under its automobile insurance policy, and that the plaintiff, Milbank, had no such obligation under its farm owner-ranch owner's policy.¹³

Hagstrom had an automobile insurance policy with Dairyland and a farm owner-ranch owner's policy with Milbank.¹⁴ He was sued when a third party was injured while unloading hay bales from Hagstrom's truck which was parked on Hagstrom's farm.¹⁵ Dairyland's automobile policy provided for the payment of damages for bodily injuries that arose "out of the ownership, maintenance or use of a car or other motor vehicle," but did not contain a definition of that phrase.¹⁶ Dairyland contended that the definition set forth in subsection 26-41-03(11) of the North Dakota Century Code should be read into the insurance policy, and that, based on the statute, the district court had erred in concluding that Dairyland was obligated to defend Hagstrom.¹⁷

The court approached the problem as one of statutory

Any motor vehicle liability insurance policy which provides uninsured motorist coverage, as specified in subsection 1, must provide that an insured or named insured is only protected to the extent of the coverage provided on the vehicle covered by the policy and involved in the accident. If no such vehicle is involved, coverage is only available to the extent of the applicable uninsured motorist coverage provided on any of the insured or named insured's vehicles. In either instance, coverage on any other vehicle may not be added or stacked upon the applicable coverage.

Id.

12. 373 N.W.2d 888 (N.D. 1985).

13. *Milbank Mut. Ins. Co. v. Dairyland Ins. Co.*, 373 N.W.2d 888, 889 (N.D. 1985).

14. *Id.* at 890.

15. *Id.* A negligence action was commenced against Hagstrom to recover damages for the third person's injuries. *Id.* Milbank and Dairyland denied liability; however Milbank provided Hagstrom with a defense under a reservation of rights agreement. *Id.* Milbank then commenced a declaratory judgment action seeking a declaration of its and Dairyland's rights and obligations under their respective policies. *Id.*

16. *Id.*

17. *Id.* at 890-91. The former § 26-41-03(11) of the North Dakota Century Code is now codified at § 26.1-41-01(13). The subsection provides as follows:

"Operation of a motor vehicle" means operation, maintenance, or use of a motor vehicle as a vehicle. Operation of a motor vehicle does not include conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the injury occurs off the business premises, or conduct in the course of loading and unloading the vehicle unless the injury occurs while occupying it.

construction and examined the legislature's intent as expressed in the language of the statute.¹⁸ The court concluded that nothing in the language of the statutory provision or any other statute mandated that the statutory definition be incorporated into the insurance policy.¹⁹ Since the legislature did not desire mandatory application of the statutory definition, and since there was no public policy that necessitated incorporation of the provision,²⁰ the court interpreted the policy without reference to the statutory definition.²¹ The court construed the phrase used in the policy to include the unloading of a truck.²² Thus, the court resolved the conflict by interpreting the statutory provision in a manner consistent with the legislature's intent.

In addition to the insurance statutes, other sections of the Century Code also affect insurance law in North Dakota. North Dakota's financial responsibility laws have had a tremendous impact on automobile insurance policies.²³ In *Richard v. Fliflet*²⁴ the North Dakota Supreme Court concluded that North Dakota's financial responsibility laws apply to voluntarily purchased liability insurance policies.²⁵

In *Fliflet* a third party, Linde, applied for automobile insurance on Daniel Bye's car.²⁶ Bye had been convicted of driving while intoxicated and sought to avoid paying higher insurance premiums.²⁷ Linde represented to State Farm that he was the owner of the car and obtained the insurance.²⁸ In January 1983, Fliflet borrowed Bye's car and was involved in an accident.²⁹

18. 373 N.W.2d at 891-92.

19. *Id.* at 892.

20. See generally *Richard v. Fliflet*, 370 N.W.2d 528 (N.D. 1985) (public policy required the incorporation of a statutory provision preventing rescission of insurance policies into policies purchased pursuant to the financial responsibility laws).

21. 373 N.W.2d at 892-93.

22. *Id.* at 893.

23. See generally N.D. CENT. CODE chs. 39-16, 39-16.1 (1980 & Supp. 1985). Chapters 39-16 and 39-16.1 of the North Dakota Century Code contain North Dakota's financial responsibility laws. Chapter 39-16 imposes penalties against a motor vehicle owner or operator who has been involved in an accident and does not establish that he is financially capable of responding in damages if he should be found liable for bodily injuries or property damage sustained by any person in the accident. *Id.* ch. 39-16. Chapter 39-16.1 requires a motor vehicle owner or operator, who has been involved in an accident, or who has been convicted of certain traffic violations, to establish proof of financial responsibility to respond in damages for property damage and bodily injury which may occur as a result of future accidents. *Id.* ch. 39-16.1.

24. 370 N.W.2d 528 (N.D. 1985).

25. *Richard v. Fliflet*, 370 N.W.2d 528, 535 (N.D. 1985). For a complete discussion of *Fliflet*, see Comment, *Automobile — Insurance — The Requirements of North Dakota's Financial Responsibility Laws Are Applicable to All Automobile Liability Insurance Policies*, 62 N.D.L. REV. (1985) (authored by Melanie Kopperud).

26. 370 N.W.2d at 529.

27. *Id.* at 536 (VandeWalle, J., dissenting).

28. *Id.* at 529.

29. *Id.*

When State Farm learned that Linde did not own the car, it rescinded the policy, returned the entire premium, and denied liability coverage for the accident.³⁰ The issue before the court was whether State Farm could properly rescind the policy after the accident based on Linde's misrepresentation that he owned the vehicle.³¹

In reaching its conclusion, the court reviewed its prior decision in *Hughes v. State Farm Mutual Automobile Insurance Co.*³² In *Hughes* the court held that a household or family exclusion clause³³ in an automobile liability insurance policy violated North Dakota's public policy of protecting innocent accident victims from financial hardship, as expressed in the financial responsibility laws.³⁴ It therefore incorporated subsections 1, 2, and 3 of section 39-16.1-11 of the North Dakota Century Code, which define the coverage required in a motor vehicle liability insurance policy, into voluntarily purchased liability insurance policies.³⁵ The court in *Hughes*, however, did not reach the issue of whether subsection 39-

30. *Id.*

31. *Id.* at 530.

32. 236 N.W.2d 870 (N.D. 1975).

33. A household or family exclusion clause provides that there is no liability coverage for injuries sustained by the insured or members of the insured's family residing in the insured's household in an accident caused by the negligent operation of a motor vehicle by the insured or the insured's family member. *Hughes v. State Farm Mut. Auto. Ins. Co.*, 236 N.W.2d 870, 877 (N.D. 1975).

34. *Id.* at 885.

35. *Id.* Section 39-16.1-11 of the North Dakota Century Code provides as follows:

1. A 'motor vehicle liability policy' as said term is used in this chapter means an owner's or an operator's policy of liability insurance, certified as provided in sections 39-16.1-09 and 39-16.1-10 as proof of financial responsibility, and issued, except as otherwise provided in section 39-16.1-10, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.
2. Such owner's policy of liability insurance:
 - a. Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and
 - b. Shall insure the person named therein and any other person, as insured, using such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.
3. Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle, either unlimited, or limited by excluding certain classes or types of motor vehicles, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

16.1-11(6) of the North Dakota Century Code, which provides that the insurance carrier's liability becomes absolute upon the occurrence of an accident, was incorporated into voluntarily purchased liability insurance policies.³⁶

The court in *Fliflet* examined the financial responsibility laws in an attempt to determine whether the legislature intended to incorporate subsection 39-16.1-11(6) of the North Dakota Century Code into voluntarily purchased liability insurance policies.³⁷ The court again recognized that the overriding purpose of the financial responsibility laws was "to protect innocent victims of motor vehicle accidents from financial disaster."³⁸ The court determined that this purpose would be defeated if an insurer were allowed to rescind a policy after the occurrence of an accident.³⁹ Furthermore, the court concluded that since subsection 39-16.1-11(6) of the North Dakota Century Code was a specific provision, it prevailed over other statutory provisions generally applicable to insurance contracts.⁴⁰ Therefore, State Farm could not properly rescind the insurance policy.⁴¹

Justice VandeWalle dissented, stating that he doubted that "it was the intent of the Legislature, and therefore the public policy of this State, to in any manner encourage the falsification of insurance applications."⁴² During the next session, the legislature may very well consider whether automobile insurance policies can be rescinded by an insurance company when there has been a material misrepresentation by the insured.

The interaction between the legislature and the judiciary has also had a substantial affect upon North Dakota's declaratory

36. 236 N.W.2d at 886. Subsection 39-16.1-11(6) of the North Dakota Century Code provides, in pertinent part, as follows:

6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
 - a. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

N.D. CENT. CODE § 39-16.1-11(6)(a) (Supp. 1985).

37. See *Richard v. Fliflet*, 370 N.W.2d 528, 532-35 (N.D. 1985).

38. *Id.* at 534.

39. *Id.* at 535.

40. *Id.* Section 1-02-07 of the North Dakota Century Code provides that when a special statutory provision conflicts with a general statutory provision, the special provision prevails. N.D. CENT. CODE § 1-02-07 (1975).

41. 370 N.W.2d at 535.

42. *Id.* at 536 (VandeWalle, J., dissenting).

judgment statute.⁴³ A motion for declaratory judgment is frequently used to determine issues arising under an insurance policy, particularly to resolve the issue of whether an insurance company has a duty to defend the insured.⁴⁴

In *United Pacific Insurance Co. v. Aetna Insurance Co.*⁴⁵ the North Dakota Supreme Court considered whether an action for a declaratory judgment regarding an insurance company's duty to defend an insured raised a justiciable controversy.⁴⁶ In *United Pacific* a separate action was underway to determine liability for an accident involving the insured.⁴⁷ The court concluded that since the issue of liability in the separate action had not yet been determined, the issue concerning which insurance company had the duty to defend the insured did not present a justiciable controversy.⁴⁸

Subsequent to *United Pacific*, the North Dakota Legislature amended section 32-23-06 of the North Dakota Century Code, which had made the entering of a declaratory judgment discretionary with the court.⁴⁹ Prior to the amendment, the statute provided that a court had the authority to refuse to enter a declaratory judgment if such action "would not terminate the uncertainty or controversy giving rise to the proceeding."⁵⁰ The amendment created an exception to a court's discretionary authority by providing that a court must enter a declaratory judgment in any action by or against an insurance company to determine whether the insurance company has a duty to defend.⁵¹ Thus, the legislature's reaction eliminated a court's discretion in entering declaratory judgments in actions regarding an insurance company's duty to defend.

These are but a few examples of the interaction between the legislative and the judicial branches in the realm of insurance law. This interaction is likely to continue. Thus, in predicting trends in insurance law, an analysis of judicial action must be coupled with

43. Chapter 32-23 of the North Dakota Century Code contains North Dakota's declaratory judgment provisions. See N.D. CENT. CODE ch. 32-23 (1976 & Supp. 1985).

44. See, e.g., *American Hardware Mut. Ins. Co. v. Dairyland Ins. Co.*, 304 N.W.2d 687 (N.D. 1981) (declaratory action used to resolve dispute between two insurance companies concerning which company was obliged to defend the insured).

45. 311 N.W.2d 170 (N.D. 1981).

46. *United Pac. Ins. Co. v. Aetna Ins. Co.*, 311 N.W.2d 170, 172 (N.D. 1981).

47. *Id.* at 171. Marvin Schelske, an employee of Cochran Electric, was injured when a truck leased or rented to Cochran by Martin Engineering tipped over. *Id.* Schelske brought a negligence action against Martin Engineering. *Id.* Martin then commenced a third party action against Cochran seeking contribution or indemnity if the court found Martin liable for damages to Schelske. *Id.*

48. *Id.* at 172.

49. See 1983 N.D. Laws 377 (amending § 32-23-06 of the North Dakota Century Code).

50. N.D. CENT. CODE § 32-23-06 (1976) (amended 1983).

51. *Id.* (Supp. 1985).

an analysis of what the probable legislative reaction will be.

Insurance is no longer a frill; it is an economic necessity used to protect an insured from adverse economic consequences. This symposium exposes only a few of the problems that confront the insurance industry today. For the insurance system to survive, the courts and the legislature must balance the interests of the insurance companies, the insureds, and the claimants. All should be treated fairly and none favored to the detriment of the other. Hopefully, discussions such as those stimulated by this symposium will contribute to the viability of the insurance system in North Dakota.