No. _____

In the Supreme Court of the United States

Daniel Graff,

Petitioner,

vs.

Brighthouse Life Insurance Company, also known as Brighthouse Financial Life Insurance Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitutions of the United States and Minnesota expressly guaranty certain rights and set up a separation of powers between the legislative, judicial and executive branches of government. Minnesota's Constitution has a remedies clause which expressly provides "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs".

The Constitution of the United States also sets up a division of powers between the Federal Government and the states.

This diversity case deals with the statutory construction by a Federal Court of a state law – a statute silent on whether it provides a private right of action.

The Eighth Circuit, in affirming the district court, resolved the statutory silence by giving absolute deference to an agency of state government under the premise that the powers delegated to the agency to regulate the business entrusted to it were an alternative enforcement mechanism to a private right of action. A ruling which: (i) did not employ state law in ascertaining legislative intent; (ii) did not apply the mainstream of decisions of the Minnesota Supreme Court bearing on due process, and on the right to remedial relief for a wrong; and (iii) abdicated judicial power without constitutional sanction.

Therefore, the questions presented are:

1. Whether a Federal Court, in disregard of state law and of rules in decisions made by the highest court in a state, can interpret a statute such that it can

extinguish Constitutional rights.

2. Whether a Federal Court, in disregard of state law and of rules in decisions made by this Court and by the highest court in a state, can interpret a state law such that it results in the upsetting of the separation of powers under a state constitution.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff – appellant below) is Daniel Graff.

Respondent (defendant – appellee below) Brighthouse Life Insurance Company, also known as Brighthouse Financial Life Insurance Company.

CORPORATE DISCLOSURE STATEMENT

Not required for Petitioner because Petitioner is an individual not a corporation. See Fed. R. App. P. 26.1.

STATEMENT OF RELATED PROCEEDINGS

None.

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PETITION FOR WRIT OF CERTIORARI

Life insurance can be a very important investment tool, and policies of life insurance can also be very complicated. In its filings with the district court, Respondent demonstrated just how complicated they can be. In this regard, instead of simply referring to provisions in a policy issued to Petitioner to explain how it worked, it felt compelled to use approximately 25% of its briefing space to describe the intricacies of the policy, which had to be supplemented by referencing materials from an outside source. App. 33-38

The inherent complexity in interpreting the language in many life insurance products resulted in the Minnesota legislature enacting a plain language law the explicit stated purpose of which is to have life insurance policies be readable and understandable to persons of average intelligence, experience, and education.

Under the plain language law, the legislature delegated to an agency of government, the Commissioner of the Department of Commerce, the authority to review and approve life insurance policies. A life insurance policy could not be sold in Minnesota unless it was approved by the Commissioner. While the law contemplated an actual review process to be performed by the Commissioner, it also explicitly provides for an alternative approval procedure wholly dependent on collateral documents prepared by the insurer-applicant.

The consumer protection law is silent on

whether it provided a private right of action or a remedy for its violation. Against this backdrop, the Petitioner filed a declaratory judgment action in order to obtain a determination from a court of his rights under a policy sold to him.

While there has been no discovery in this case, uncontroverted extrinsic evidence was put into the record without objection indicating the Department of Commerce no longer maintained any records covering the period of time when the policy issued to the Petitioner would have been approved. Consequently, it is not known if the Commissioner ever even considered or reached a conclusion as to the readability of the form of policy issued to Petitioner.

Nor is there anything in the record describing the procedures used by the Commissioner to approve a policy. Hence, there is no evidence showing whether the Commissioner employed the provision in the law permitting him to simply accept at face value the certifications of filers regarding the readability of the insurer's policy form so as to have it approved for readability purposes – a decision that can be made free of any structural constraints or safeguards.

The Eighth Circuit resolved the statutory silence by giving total deference to an agency of government. In arriving at its decision, the 8th Circuit: (a) did not apply a state statute to be used to ascertain legislative intent when the words of a law are not explicit; and (b) it disregarded the mainstream of decisions of the Minnesota Supreme Court. In other words, the Eighth Circuit did not properly apply state law in this diversity case; and it took a step towards

administrative absolutism.

While this matter deals with a rather simple law, by reason of the decision by the Eighth Circuit, it has produced choices for this Court to make on matters of monumental significance under our constitutional government. Matters dealing with structure. Matters bearing on separation of powers and federalism.

Thus, this Court should review the Eighth Circuit's ruling because to countenance it runs the risk of compromising our constitutional structure.

OPINIONS BELOW

The Eighth Circuit's opinion is reproduced at App. 2-14. The district court's opinion is reproduced at App. 15-32.

JURISDICTION

The Eighth Circuit entered its opinion on August 1, 2024, and it entered its denial of Petitioner's Petition for Rehearing En Banc on September 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Minnesota Statutes Sections 72C.01 to 72C.13

STATEMENT OF CASE

A. Legal Framework

In 1977 Minnesota enacted the Readability of Insurance Policies Act (the "Act"). Minn Stat. § 72C.01 et. seq. The expressly stated purpose of the Act "is to provide that insurance policies and contracts be readable and understandable to a person of average intelligence, experience, and education." To accomplish that purpose, "[a]ll insurers shall be required *** to use policy and contract forms which are written in simple and commonly used language; which are logically and clearly arranged, are printed in a legible format, and which are generally understandable." *Id.*

The Act is a stand-alone statute – it is not a subdivision or subsection of another law. The

legislature did not express any intent within the Act to make it a part of a comprehensive law governing insurance. *Id.*

The commissioner ("Commissioner") of the Minnesota Department of Commerce (the "DOC") is delegated with the power to enforce the insurance laws of Minnesota. As a condition to selling an insurance policy, an insurer is required to filing a policy form for the Commissioner's approval under the Act, and insurers are also required to make filings of policy forms under Minn. Stat. § 60A.03, subd. 2.

A form submitted for approval under the Act is to be accompanied by the results of a Flesch scale readability analysis and test score of more than 40, and by a certification by the filer that the policy form is in its judgment readable based on the factors in the Act. Minn. Stat. § 72C.10.

The Commissioner is to disapprove any submission if it is not accompanied by a satisfactory Flesch test result, and the applicant's certification. *Id.* The Commissioner is to also disapprove any form that does not otherwise comply with the requirements of the Act. *Id.* A policy form is automatically approved 60 days after its filing unless disapproved by the Commissioner. *Id.*

There is no provision in the Act requiring the Commissioner to determine if it is understandable to a person of average intelligence, experience and education. *Id.* Nor does the Act provide that the approval of a form constitutes a determination it is "readable and understandable". *Id.* There are no

administrative enforcement, remedy or penalty provisions in the Act. *Id.*

B. Factual Background.

In 2004 Petitioner purchased a Flexible Premium Adjustable Life Insurance Policy (the "Policy") from The Travelers Life and Annuity Company ("Travelers"), a predecessor of Respondent. App. 4 & 16. The insured is Petitioner's father. The stated death benefit under the Policy is $800,000, and its maturity date is November 28, 2026. App. 16.

In April 2022, Respondent sent Petitioner materials that described such things (i) the scheduled due date for premium payments; (ii) the total premium payments that had been paid; (iii) the policy's then current surrender value; and (iv) the old and new level of premium payments. Petitioner was also advised that from then on through the maturity date of the Policy, instead of paying an annualized premium of approximately $35,000, he would have to pay approximately $165,000 a year in order to keep the Policy in place and if he failed to make a premium payment, the Policy would terminate.

Thus, if Petitioner is able to maintain the Policy through its maturity date (and assuming the insured did not pass away in the interim), he will have had to pay premiums totaling approximately $1,600,000 for a Policy whose stated value was $800,000. App. 4 & 16.

Following receipt of the materials from Respondent, attempts were made to obtain from the DOC all of the filings of Travelers dealing with the

Policy so as to determine if it was approved by the Commissioner. App. 39-43. Those attempts were futile because the DOC no longer had the documents. *Id.* Consequently, there is no record of whether Travelers ever (i) filed a form of the Policy and related certifications with the DOC, or (ii) received verification from the DOC that the form of the policy issued to Petitioner was ever approved.

C. Proceedings below.

1. The District Court. In March 2023 Petitioner filed a Declaratory Judgment action in state court. App. 15. In the main, Petitioner sought a determination as to whether the policy complied with the Act (i.e.: whether it was readable and understandable). *Id.* There were three counts in the Complaint all of which were predicated on whether the policy issued to Petitioner complied with the Act. *Id.*

Respondent removed the case to federal court based on diversity and on the amount in controversy. *Id.* On removal, Respondent filed a motion to dismiss all counts under Federal Rule 12(b)6 alleging the Complaint, on its face, failed to contain "enough facts to state a claim to relief". *Id.*

The district court granted Respondent's motion and dismissed all three Counts, with prejudice. It concluded: (i) the Act provided for no private right of action; and (ii) the claims were time barred; and (iii) Petitioner's rights were governed by a contract and not the Act. App. 31.

On the matter germane to this Petition, the

district court determined there was no private right of action under the Act. Its opinion was predicated on the following phrase:

> [a] "statute 'does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication' ". *Graphic Commc'ns Local 1 B Health & Welfare Fund v. CVS Caremark Corp.*, 850 N.W.2d 682, 689 (Minn. 2014). App. 26.

In its Order, the district court characterized the foregoing phrase as the law in Minnesota. *Id.* Inasmuch as there was no explicit private right of action under the Act, by default the district court proceeded to determine whether one existed by implication. *Id.*

The district court ruled there was implied no private right of action because the legislature gave the Commissioner the power to enforce insurance statutes, including the Act. App. 26.27. A power which included allowing the Commissioner to take action when "an insurer has used a policy that fails to use easily readable and understandable language as required" by the Act. App. 26.

The district court illustrated the Commissioner's use of this power since 1977 by referencing two unreported administrative actions that resulted in consent decrees. App. 26-27.

The district court acknowledged Petitioner

raised a separation of power issue in its submissions. The district court determined the constitutional argument was "unconvincing" because it was "built upon a flawed foundation" in that it presupposed the insurance laws of Minnesota "are silent on the enforcement mechanisms for the policy-language readability requirement". App. 27-28.

In summary fashion, the district court concluded by saying the legislature "did not give a right of action to private plaintiffs either explicitly or by implication". App. 28.

2. The Court of Appeals. In a ruling authored by Circuit Judge Shepherd, the Eighth Circuit affirmed the district court's dismissal of the case with prejudice. App. 14.

The stated objective of the Eighth Circuit was to determine if the "legislature 'implicitly intended' to afford a private right of action against an insurer for violating the requirements of the Act. App. 7. The Eighth Circuit cited dictum in *Findling v. Grp. Health Plan, Inc.*, 998 N.W. 2d 1, (Minn. 2023) as effectively relieving it of having to use "statutory interpretation principles and methodologies used by the United States Supreme Court" in *Cort v. Ash*, 422 U.S. 66 (1975) to determine if the Minnesota legislature "implicitly intended" to provide Petitioner with a private right of action under the Act. App. 6-7.

Thus, instead of using a "test" to ascertain legislative intent, it predicated its ruling on "'the language of the statute in question and its related sections,' mindful that courts are 'reluctant to

recognize a private cause of action where one does not clearly exist in the statute'". *Id.*

In its opinion, the Eighth Circuit said the purpose of the Act was accomplished by and through the administrative approval process set forth in the Act wherein the Commissioner was "charged with the exclusive duty and authority to certify that a policy complies with the Act's readability, legibility and formatting requirements". App. 7. A process which, in the Eighth Circuit's view, forbade the Commissioner from approving a policy that "runs afoul of any of the requirements prescribed by the legislature". App. 7-8.

The Act was interpreted by the lower court so as to give to the Commissioner the exclusive responsibility to enforce the Act. App. 8-9. To that end, the opinion is replete with references to the enforcement powers the legislature delegated to the Commissioner. App. 7-11. This included referencing the two unreported administrative actions cited by the district court in its opinion as support for the proposition that those powers were "frequently" used by the Commissioner to enforce the Act since it was adopted into law in 1977. App. 10.

The Eighth Circuit determined that it was not constrained to only look at the Act when ascertaining legislative intent. App. 9. In this regard, it concluded that Petitioner's "attempt to assert a private right of action" had to be viewed "in the context of Minnesota's comprehensive regulatory scheme and the historical deference the courts of Minnesota accorded to the Commissioner in enforcing" the insurance laws. App. 9-10. This method of interpreting legislative intent

allows courts to look at other "relevant statutes" in order to "survey" of the extensive enforcement authority delegated to the Commissioner by the legislature. App. 9-10. One such statute which was viewed by the Eighth Circuit as endowing the Commissioner to enforce the act was referenced in the opinion of the Eighth Circuit. App. 8.

To reinforce the view that the Commissioner had the exclusive right to enforce the Act the Eighth Circuit said the legislature "did not intend to alter the insurance regulatory landscape" by permitting a private right of action because it "would require us to add words to the statute that the Legislature did not supply". App. 10. It also would have created "additional rights" beyond those expressly enumerated. *Id.* Therefore, silence was construed as meaning the legislature either did not have a civil lawsuit is mind, or it deliberately omitted to provide for it. App. 10-11. In that context, it concluded that the "Commissioner, through his authority to ensure compliance with the Act's requirements, functions as the 'alternative enforcement mechanism' to a private lawsuit"; and the record in the case revealed "no evidence that the Act's administrative remedies are inadequate". *Id.*

REASONS FOR GRANTING THE PETITION

This is a diversity case which, except for the parties, is not particularly noteworthy but for this important issue: what is the proper relationship with state court jurisprudence when a federal court rules on legal issues in a diversity case? It is imperative that this Court preserve the historically sound relationship between the state and federal courts.

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern". *Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938).

Justice Frankfurter wrote of *Erie* that it "was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." *Guaranty Trust Co. v. York* 326 U.S. 99, 109 (1945).

The "*Erie Doctrine"* has gone through some refinements since 1938. That being said, "Erie and its progeny recognize that the choice of law to be applied in the federal courts in diversity cases is an important question of federalism, and that the constitutional power of states to regulate the relations among their people does overlap the constitutional power of the federal government to determine how its courts are to be operated". 20 Wright & Kane, *Federal Practice and Procedure* at 519.

The state law subject to interpretation in this case is Minnesota's Readability of Insurance Policies Act (the "Act"); a plain language law in which the legislature did not foreclose, or provide for, a private right of action. App. 44-47. An ambiguity.

The Eighth Circuit, in an opinion authored by Judge Shepherd, denied Petitioner a private right of

action under the premise that the Commissioner of the Minnesota Department of Commerce ("Commissioner") through the use of his enforcement powers functions as the "alternative enforcement mechanism" to a private right of action.[1] App. 11.

Minnesota's canons of statutory construction were not used in order to ascertain legislative intent; nor were relevant declarations of the Minnesota Supreme Court.

Thus the "*Erie Doctrine*" was not followed, and as an immediate consequence it resulted in a ruling which: (i) abolished rights guaranteed to Petitioner under Minnesota's Constitution; and (ii) disturbed Minnesota's separation of powers. Therefore, a review of the questions presented to this Court in this case is essential for purposes of reconciling the constitutional powers of two sovereigns.

I. Petitioner's Constitutional Right to a Remedy was abolished.

A. Introduction – The Constitutional Issue.

Unlike the United States Constitution, the Minnesota Constitution begins in Article I with the

[1] There were three counts in Petitioner's Complaint. They all derived from whether the policy issued to him complied with the Act. The issue in this Writ focuses on the first Count of the Complaint. The other two Counts, being derivatives of the first Count, will stand or fall on whether there is a private right of action under the Act. If there is a private right of action, then, the claims under those Counts should be revived as a matter of course.

Bill of Rights. App. 58. One of those guaranteed and fundamental rights is placed squarely at issue in this case. Minnesota's Constitution provides for a "certain remedy in law" and it is found in the "remedy clause" at Article 1 Section 8 – a constitutional provision setting forth a fundamental right reserved by the people of Minnesota for themselves. App. 60.

A right that cannot be abridged by any legislative act, administrative agency or the adoption of a common law federal doctrine. It is a restraint on legislative power, and it was adopted for that purpose. *See Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 351 (Or. 2001).

B. Minnesota's Canons of Construction were not used to ascertain legislative intent.

"The Framers appreciated that the laws judges would necessarily apply in resolving * * * disputes would not always be clear". *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024). Reflecting the same mindset of the Framers, the Minnesota legislature provided courts with statutory guidance for the interpretation of its laws. App. 91-94. *See* Minn. Stat. Chap. 645; *Alpine Glass, Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659, 664-65 (8th Cir. 2011); *Vaidyanathan v. Seagate US LLC*, 691 F.3d 972, 977 (8th Cir. 2012). *See also Chapman v. Davis*, 45 N.W.2d 822, 825 (Minn. 1951) (legislative intent "may be ascertained by considering * * * the object to be attained, and consequences of a particular interpretation"); *Grier v. Grier's Estate*, 89 N.W.2d 398, 403 (Minn. 1958); and *State v. Indus. Tool & Die*

Works, Inc., 21 N.W.2d 31, 38 (Minn. 1946).

Interpreting law is what judges do. *Loper*, 144 S. Ct. at 2257. This Court has made clear that courts are to exhaust statutory construction tool kits in dealing with an ambiguity in the law. *See, e.g. Kisor v. Wilke*, 588 U.S. 558, 575 (2019).

In its decision, the Eighth Circuit improperly freed itself from having to use Minnesota's canons by citing as authority language the Minnesota Supreme Court expressed in *Findling v. Grp. Health Plan, Inc.* 998 N.W.2d 1, 21, n.19 (Minn. 2023). App. 6-7. The *Findling* Court renounced the use of a test described in *Cort v. Ash*, 422 U.S. 66 (1975) to determine if a private right of action may be implied. *Id.* In rejecting the "Cort Test", the *Findling* Court said "we are not in any way bound by the statutory interpretation principles and methodologies used by the United States Supreme Court when we interpret Minnesota statutes". App. 6-7

First, this case DOES NOT involve the interpretation of a federal statute – we are dealing with a state law. Secondly, in a diversity case, the "principles and methodologies" prescribed by state law and/or used by the state supreme court in interpreting legislative intent have to be used. *See Academy Bank, N.A. v. Amguard Ins. Co.*, 116 F.4th 768 (8th Cir. 2024); *see also* Minn. Stat. Chap. 645; *Alpine Glass, Inc.*, 643 F.3d at 664-65; *Vaidyanathan*, 691 F.3d at 977.

C. The consequences resulting from the failure to use Minnesota's canons of statutory construction were profound.

"[C]onsequences flow from a justices' interpretation in direct and immediate ways". The *Constitution of the United States: Contemporary Ratification*, William J. Brennan, Jr., Associate Justice Supreme Court of the United States, Georgetown University, Washington, D.C., October 12, 1985.

One of Minnesota's canons provides that a court is to consider "consequences of a particular interpretation". App. 93. The abolishment of a private right of action under the Act without reservation was immediate and profound, and it directly conflicted with declarations of the Minnesota Supreme Court in which it said there must be a "reasonable substitute" for the extinguishment of a right to sue. *See Haney v. Int'l Harvester, Co.* 201 N.W.2d 140, 145 (1972); and *Schermer v. State Farm Fire & Cas.*, 721 N.W.2d 307, 316-17 (Minn. 2006). Minnesota adopted the "reasonable substitute" standard from *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917) – a case in which the Supreme Court said that in abolishing "all rights of action * * * without setting up something adequate in [its] stead", due process may be violated. *Id.*

The courts in *Haney* and *New York Central* both dealt with workers' compensation matters. In both cases, the tradeoff to the abolishment of a right of action was the certainty of receiving workers'

compensation benefits (i.e.; a "reasonably just substitute".) The Eighth Circuit made multiple references in its opinion to the enforcement powers the Commissioner has under Minnesota's comprehensive scheme of insurance regulation. App. 7-11. But critical to *Haney* and *Schermer*, it did not identify any provision in the Act, or in any other state law for that matter, which provided Petitioner with a "reasonable substitute" in exchange for the abolishment of his right of action. *Id.* Thus, the emphasis the lower court put on the enforcement powers of the Commissioner generally clearly was an attempt to demonstrate that administrative oversight would be sufficient to assure persons in Minnesota who purchase life insurance that their policies would be readable and understandable as required by the Act.

There has not been any discovery in this case. Thus, there is nothing in the record evidencing the procedures used by the Commissioner to approve policies of insurance under the Act.[2] App. 39-43. To that end, there is nothing in the record even demonstrating the Commissioner actually reviewed the form of policy issued to the Petitioner. *Id.* And, aside from two unreported administrative enforcement actions, neither of the lower courts could point to one lawsuit brought by the Commissioner wherein he attempted to enforce the Act against an

[2] Nor is there anything in the record proving that the structural standards set forth in the Act will result in contracts that are readable and understandable. This legislative approach has all the makings of applying principals of science to rhetoric. i.e.; If you do "A", it will always result in "B". Sentence structure, formatting standards, and choice of words may be readable, but their use may not always result in something understandable.

insurer.[3] App. 1-32. Thus, from Petitioner's point of view, the vast enforcement powers of the Commissioner are akin to fool's gold. For in and of themselves they are certainly not the equivalent to the certainty of receiving workers' compensation benefits in exchange for the giving up of the right to sue an employer for a workplace incident causing an injury. To illustrate how meaningless it is to rely on the use of the enforcement powers of the Commissioner as a way of remedying a wrong, if insurance company X is punished for issuing a policy to Y that violated the Act, it provides no relief whatsoever for Z even if the policy issued to Y is similar in type to one issued to Z.

Moreover, even if the Commissioner is given every conceivable power imaginable to enforce the Act, if those powers are not used against an insurer who issued a policy in violation of the Act, or if a person cannot compel the Commissioner to use those vast regulatory powers to bring an insurer to bear who violated the Act, then a person's constitutional right to a remedy has been effectively abolished.[4] Which is where we are now.

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[3] One administrative action was resolved in 2018, the other in 2020. Two unreported administrative actions in the 47 years that the law has been on the books. From those two incidents, the Eighth Circuit concluded that "the Commissioner has *frequently* exercised his authority to enforce" the Act (emphasis added).

[4] The likelihood of the Commissioner initiating any action against an insurer when he had already approved a policy form under the Act is more than remote. Especially if the Commissioner views his responsibility under the Act in the same vein as the Eighth Circuit when it said in its ruling, "the Commissioner is forbidden from approving a proposed policy that runs afoul of any of the requirements prescribed by the legislature". In other words, in approving a form, the Commissioner has rendered his verdict as to its readability and understandability.

At the end of the day, outside of very few limited areas, none of which exist here, "we have no license to deprive the American people of their constitutional right to an independent judge *** or to the procedural protections at trial that due process normally depends." *Securities and Exchange Commission v. Jarkesy*, 144 S. Ct. 2117, 2149 (2024). (Gorsuch, J. concurring opinion). Constitutional rights "exist to 'protect the individual'". *Id.* at 2250.

The are additional consequences in denying a private right of action under the Act which are profound under our constitutional system of government. In this regard, we are left with a situation which precludes a review of the actions of an agency of government. That in turn results in ignoring an important check on the exercise of government power. Moreover, in the scheme of things, it also means the agency becomes the court of last resort in its own case on matters of its own legal interpretation of the Act, thereby undermining the promise of due process of law under the Constitution.

D. Governing Precedent from the Minnesota Supreme Court that was never considered.

Under *Erie*, a federal court is obligated to apply governing precedent from the Minnesota Supreme Court. *See Academy Bank, N.A.*, 116 F.4th at 768. In this case, relevant precedent was not considered.

For starters, several cases were ignored dealing with the dismissal of claims brought under Minnesota's Uniform Declaratory Judgment Act – the procedural device used by Petitioner in his state court filing in March, 2023. Minn. Stat. §§ 555.01-16.

A declaratory judgment action may be obtained to define the parameters of a statute. 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 57.4 (6th ed.). It is a procedural device where "any person * * * whose rights, status, or other legal relations are affected by a statute * * * may have determined any question of construction or validity arising under the * * * statute and obtain a declaration of rights, status, or other legal relations thereunder." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011); Minn. Stat. § 555.02.

A declaratory judgment case must present a justiciable controversy. *Id.* Certain elements must exist in order to use the declaratory judgment act for its stated purposes. *Weavewood, Inc. v. S&P Home Inv., LLC*, 821 N.W.2d 576, 579-80 (Minn. 2012). The claimant must have a right to bring an action under the applicable substantive law; and the right of action cannot be barred by the statute of limitations. *Id.* Should either of the prerequisites be absent, a court lacks jurisdiction to adjudicate the controversy and the case should be dismissed *without prejudice* (emphasis added). *See S. Minn. Constr. Co., Inc. v. Minn. Dep't of Transp*., 637 N.W.2d 339, 344 (Minn. Ct. App. 2002); *Hoeft v. Hennepin Cnty*, 754 N.W.2d 717, 722-23 (Minn. Ct. App. 2008). See also the Eighth Circuit's own ruling wherein it said "([d]ismissal for lack of jurisdiction is not an adjudication on the merits and * * * should be without prejudice." *Ahmed v. United States*, 147 F.3d 791, 797 (8th Cir. 1998) (citing Fed. R. Civ. P. 41(b)).

The District Court dismissed Petitioner's declaratory judgment action, with prejudice. The Eighth Circuit affirmed the District Court's judgment.

The dismissal with prejudice clearly conflicts with principles of Minnesota law as declared by the Minnesota Supreme Court. Under *Erie*, the Eighth Circuit was obligated to apply that governing precedent. *See Academy Bank,* 116 F.4th at 768.

In terms of substantive law, the Eighth Circuit "did not pause to consider (or even mention)" meaningful precedents where Minnesota courts permitted a cause of action even though the statutes in question did not expressly allow for one. *Loper*, 144 S. Ct. at 2290 (quoting Gorsuch J. concurring opinion).

In *Watson v. United Serv. Auto. Assoc.*, 566 N.W.2d 683 (Minn. 1997) the insured sued to obtain fire insurance coverage under a law which did not create an express right for a policy holder to bring a private cause of action. Yet the Supreme Court of Minnesota concluded the fire policy must be reformed. *Id.* at 692.

Pertinent to this case in regards to how wrong it is under Minnesota law for a court to give absolute deference to the Commissioner, *Watson* held that if the Commissioner did use his enforcement powers and approve a policy, it did not make its provisions legal. *Watson* said in no uncertain terms that if an insurance contract violates the requirements of Minnesota statutes the Commissioner has no power to ratify illegality. *See Watson,* 566 N.W.2d at 692 ("The commissioner is an administrative official with no power to alter the meaning and intention of the language of the legislature.").

In *Am. Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113 (Minn. 1983) the Minnesota Supreme

Court considered a policyholder's claim that a household exclusion in a homeowner's insurance policy violated a law; but again, the policyholder's suit was permitted even though the statutes in question did not expressly allow a private cause of action. *Id.* at 115-16. Moreover, and especially germane to this case, the Court understood that having a strong regulatory presence and allowing a private right of action are not mutually exclusive.

While not a decision of the Minnesota Supreme Court, the Minnesota Court of Appeals considered a matter also germane to this case. It dealt whether an exclusion in an aircraft liability policy violated a state law. *See RLI Inc. Co. v. Pike*, 556 N.W.2d 1, 2 (Minn. Ct. App. 1996), *review denied* (Minn. Jan. 29, 1997). While neither of the statutes under review created an express right for a policyholder to bring a private right of action, the appellate court nonetheless resolved the policyholder's illegality claim. *Id.*

Kersten v. Minn. Mut. Life Ins. Co., 608 N.W. 2d 869, 874 (Minn. 2000) is one more Minnesota Supreme Court case establishing the role of the courts, rather than the Commissioner, in ensuring that contracts conform to Minnesota law. The *Kersten* Court said that while the opinions of the Commissioner "on matters of insurance may be helpful when interpreting insurance regulation" it was "not bound by those interpretations". *Id.*, citing *Estate of Atkinson v. Minnesota Dep't of Human Servs.*, 564 N.W.2d 209, 213 (Minn. 1997).

E. Misapplication of Precedent from the Minnesota Supreme Court.

Expressions from several Minnesota Supreme Court cases were used as authority for the argument that the legislature did not intend to provide Petitioner with a private right of action under the Act. App. 7-11. That being said, the mainstream idea in each of the cases was ignored. To wit:

> *Graphic Commc'ns Local 1 B Health & Welfare Fund v. CVS Caremark Corp.*, 850 N.W.2d 682 (Minn. 2014) was cited as advancing the proposition that "courts are 'reluctant to recognize a private cause of action where one does not exist in the statute'". App. 7. However, while the *Graphic* Court did determine one part of a comprehensive law governing pharmacies did not create a private cause of action, another subsection of the law being reviewed did. *See id.* at 692. Thus, *Graphic* reflects the principle wherein when the legislature "includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion. *See Russello v. United States*, 464 U.S. 16, 23 (1963).
>
> *Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081 (8th Cir. 2012) was cited as advancing the proposition that the courts

in Minnesota are unwilling to diminish the powers delegated to the Commissioner by declining to create judicial avenues "to enforce the state's" statutes (i.e.; a private right of action). *Id.* at 1085. However, the *Palmer* Court pointed to regulations which allowed "insureds to * * * seek remedies, and also allow the Commissioner to levy civil and criminal penalties * * *." *Id.* at 1086. Therefore, *Palmer* recognized that the litigants were afforded ways to obtain relief through regulatory channels. Consequently, an aggrieved person was not completely foreclosed from pursuing a remedy for a perceived wrong. (*Palmer* found a "reasonable substitute" or it applied "*Russello*" – take your pick.)

Findling was cited as a case where the Minnesota Supreme Court decided not to allow persons "to seek enforcement of their rights under" a statute in the form of a private lawsuit either expressly, or by implication. *Findling,* 998 N.W.2d at 16. However, just as in *Graphic* and *Palmer*, *Findling* looked at the law in its entirety and found that it "expressly [provided] other, non-lawsuit, mechanisms for enforcing * * * rights".) *Id.* at 18.

Becker v. Mayo Found., 737 N.W.2d 200 (Minn. 2007) was cited as support for the proposition that "a statute does not give rise to a civil cause of action

unless the language of the statute is explicit or it can be determined by clear implication." *Id.* at 207. That being said, *Becker* did provide for a criminal penalty for the failure to comply with its reporting requirements, and from that predicate the *Becker* Court determined that the "plain language of the statute indicates that the legislature chose to impose criminal, but not a civil, penalties on mandatory reporters who fail to report." *Id.* at 209. This reflects a rather expansive application of *Russello*.

That brings us to *Morris v. Am. Fam. Mut. Ins. Co.*, 386 N.W. 2d. 233 (Minn. 1986). The precedential value of *Morris* has to be read in light of *Findling* where the Minnesota Supreme Court went out of its way to diminish the significance of *Morris* for its precedential value. *Findling* said *Morris* did not bear on its decision. *Findling,* 998 N.W.2d at 12-14. *Morris* was viewed as an outlier because it (*Morris*) had to deal with a "confluence of unique historical factors that influenced" the Supreme Court's decision in *Morris*. *Id.* at 14. Dismissively, *Findling* found "nothing in *Morris*" that convinced them that the *Findling* plaintiffs did not have a private right of action. *Id.* [5]

[5] The Supreme Court of Minnesota saw no precedential value in *Morris* in a controversy which dealt with whether the claimants had a private right of action under the law being reviewed. The

The mainstream currents pronounced by the Minnesota Supreme Court in *Graphic, Palmer, Findling,* and *Becker* destroy a narrative that the courts in Minnesota, without qualification, deny persons the right to bring an action by implication in order to address grievances.

F. Erie and the Division of Powers under the United States Constitution.

Judges are constrained to law-finding rather than lawmaking. *Loper*, 144 S. Ct. at 2276. They do so by focusing their work on the statutory text, its linguistic context, and various canons of construction. *Id.* at 2285. This approach embraces the Framer's understanding of the judicial function as declared by Chief Justice Marshall in *Marbury v. Madison* – it is "to say what the law is". *Id.* at 2257, citing 1 Cranch 137, 177 (1803).

When a federal court in a diversity case distorts the mainstream of decisions of a state supreme court, it not only fails to apply Erie, but it also simultaneously ventures into the realm of lawmaking.

Court's views on *Morris* were not "stray remarks". *See Loper*, 144 S. Ct. at 2277. In this regard, *Findling* devoted close to three pages of dictum on *Morris*. *See Findling,* 998 N.W.2d at 15-18. Further, in an opinion concurring in part and dissenting in part, Justice Anderson said the [*Findling*] court undercut "if not outright reverses, our prior precedent in *Morris*". *Id* at 29. In this context, it is remarkable that instead of viewing *Morris* as damaged goods, it was depicted as being the "law" in Minnesota on whether silence conferred on an agency the exclusive power to interpret law. *Morris* was also extensively relied on in dismissing Petitioner's claim for a breach of the implied covenant of good faith and fair dealing under Count Two of his Complaint.

In this case, the decision of a federal court extinguished Petitioner's right to a remedy under Minnesota's Constitution. A decision which not only interfered with the activities of a state, but as Justice Frankfurter alluded to, it also upset the "proper distribution of judicial power between State and the federal courts". *Guaranty Trust*, 326 U.S., at 109.

G. Relevant and Material Evidence was Ignored.

"[W]hen judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop". *Loper*, 144 S. Ct. 2281 (Gorsuch J. concurring opinion).

Under Rule 401, evidence is relevant if: "the fact is of consequence in determining the action". *See* Fed. R. Evid. 401(b). At the district court level, extrinsic evidence was put into the record without objection as to its probative value. App. 39-43.

The foundation for the opinion that Petitioner did not have a private right of action under the Act rested on the belief that the enforcement powers when exercised by the Commissioner were suitable for purposes of assuring the citizens of Minnesota that all life insurance policies issued in the state would be readable and understandable thereby obviating another enforcement tool. App. 11.

The Eighth Circuit did not point to anything in the record evidencing the procedures actually used by the Commissioner to review and approve policies for purposes of the Act. Nor did it point to anything in the

record showing the Commissioner of ever having reviewed, let alone approved, the form of policy issued to Petitioner.[6]

On the other hand, evidence was introduced into the record without objection revealing a material fact bringing into question whether the foundation to the Eighth Circuit's opinion even exists (i.e.; that the Commissioner actually exercised his powers). App. 39-43. Thus, it is not known if the "perquisite to the issuance" of the form issued to Petitioner was accomplished. App. 8 & App. 39-43.

Courts are to look at the facts and the law and then make a decision. *Loper*, 144 S. Ct. at 2281. The failure to consider a material fact at the very heart of the argument advanced by the Eighth Circuit strongly suggests that instead of examining the facts as against the law, an assumption was made that the Commissioner reviewed the form of policy issued to Petitioner and the decision to deny Petitioner a private right of action under the Act was based on that assumption. For if consideration would have been given to the material fact put into evidence, at a minimum, one would like to believe it would have required a reversal and remand of the case to the District Court in order to determine if the form issued to Petitioner was ever even reviewed for its

[6] This includes failing to point to anything in the record showing whether the Commissioner approved policy forms by routinely taking advantage of the provision in the Act wherein a policy form is automatically approved in 60-days if a filing is accompanied by the results of a Flesch test and a certification by an insurer that the submission is readable. If that is the typical protocol used by the Commissioner to approve policy forms, that would mean the insurer is the one passing judgment on the readability of a form, and not the Commissioner.

readability, let alone approved.

H. Summation.

The first of the two questions presented to this Court in this case is whether a Federal Court, in disregard of state law and of rules in decisions made by the highest court in a state, can interpret a statute such that it can extinguish Constitutional rights. The short answer is "yes", but only if state law is not applied and court rulings are ignored.

This gets back to *Erie* and its importance. As alluded to by Justice Frankfurter, *Erie* is critical to maintaining comity between states and the federal government because it gives a federal court the moral authority to say what the laws of a state are in a diversity case. That moral authority is voided if statutory law is ignored, or if state supreme court decisions are either ignored or distorted. In this regard, distorting the true meaning of a case is tantamount to ignoring it.

Under Erie, a federal court in a diversity case is to apply state law. See *Academy Bank, N.A.*, 116 F.4th at 768. Under Minnesota case law, where a state statute is involved, the forum state's treatment of its own legislation must be followed. *In re Peters Company, Inc.* 532 B.R. 100, 118 (2015), citing *Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp.*, 729 F.3d 846, 852 (8th Cir. 2013); *Finstuen v. Crutcher*, 496 F.3d 1139, 1148 (10th Cir. 2013); *Gershman v. Am Cas. Co. of Reading PA,* 251 F3d 1159, 1162 8th Cir. 2001. In this case, state law was not used or applied; nor were the mainstream of decisions of the Minnesota Supreme Court followed.

II. Minnesota's Separation of Powers have been compromised by the Eighth Circuit's decision.

A. Introduction.

A three-judge panel heard oral arguments in this case on May 9, 2024 in St. Paul, Minnesota. App. 3. This Court decided *Loper* on June 28, 2024. In overruling *Chevron* and its doctrine, the opinion of this Court in *Loper* changed the entire landscape of law in regards to the deference courts are to give administrative agencies. The judicial importance of *Loper* simply could not be overlooked or underestimated. That being said, the Eighth Circuit, in its ruling giving absolute deference to an agency of government, never gave any consideration whatsoever to *Loper*. App. 3-12.

Moreover, no consideration was given to the declarations of the Minnesota Supreme Court on deference matters which mirrored *Loper* – declarations which preceded *Loper* by years.

B. Separation of Powers Under Minnesota's Constitution.

Minnesota's Constitution provides that the powers thereunder are to be divided in three distinct departments: legislative under Article IV, executive under Article V, and judicial under Article VI. Minn. Const. Art. III, Sec. 1. App. 64-76. Further, no person belonging to one of the departments can exercise of the powers belonging to the other except in those instances expressly provided in the constitution. App. 63-64.

C. The Eighth Circuit's decision.

In its decision, the Eighth Circuit expressly gave an agent of government (i.e.; the Commissioner) absolute deference to enforce the Act. App. 10-11. By default, this had to include the power to interpret its various provisions when going through the approval process. Drawing from the concurring opinion of Justice Thomas in *Loper*, this absolutism in the deference given to an agent of government compromises Minnesota's "separation of powers in two ways. It curbs the judicial power afforded" to the courts of the state, and at the same time, it expands the Commissioner's power beyond the limits provided in Minnesota's constitution. *See Loper*, 144 S. Ct. at 2274 (Thomas, J. concurring opinion).

The Minnesota Supreme Court has consistently held that under the state's separation of powers, no branch within the state can usurp or diminish the role of the other branch. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 365 (Minn. 2010), citing *State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn.1940); and *Shefa v. Ellison*, 968 N.W.2d 818, 834 (Minn. 2022), citing *ex. rel. Decker v. Montague*, 262 N.W. 684, 689 (1935). Consequently, at a minimum, a ruling giving absolute deference to an agency of government undermines the Minnesota Supreme Court's efforts to maintain the separation of powers under Minnesota's constitution.

Again, drawing from the concurring opinion of Justice Thomas in *Loper*, the deference given to an agency of a state prevents judges in the courts of Minnesota from exercising their independent

judgment to resolve the various ambiguities that exist under the Act. *See Loper*, 144 S. Ct. at 2274 (Thomas, J. concurring opinion). Thus, in giving the Commissioner total power to enforce the Act, Minnesota's judiciary is prevented from serving as a constitutional check on the state's executive department. *Id.*

Borrowing still more from Justice Thomas' concurring opinion in *Loper*, at the same time as the powers of the courts in Minnesota were diminished, the deference given to the Commissioner allowed him to exercise more powers under the Act than those given to him under Minnesota's constitution. *Id.* To that end, because Minnesota's constitution gives the executive branch only the executive power, an executive agency may only exercise that power, and no others. However, when the Commissioner is given the power to interpret the Act, it was accorded a power that belongs exclusively to the judicial department. Hence, we have a ruling which "wrests from [the] Courts [of Minnesota] the ultimate interpretative authority to 'say what the law is'" in the state, and placed it in the executive's hands". *Michigan v. EPA.*, 576 U.S.743, 761 (2015) (Thomas, J. concurring).

The deference given to the Commissioner is no small matter. For Minnesota's constitution, like the U. S. Constitution, imposes structural constraints on all three departments of government, and if those constraints are removed, the structure of Minnesota's constitution will unravel. *See Loper*, 144 S. Ct. at 2275. And "structure is everything". *Id.* (Concurring Opinion Justice Thomas J. quoting A Scalia, *Forward: The Importance of Structure in Constitutional*

Interpretation, 83 Notre Dame L. Rev. 1417, 1418 (2008)).

The separation of powers "forms the organizing principle of the Constitution and is fundamental to its operation." Larry P. Arnn, *The Founders' Key* at 32. Further, this Court has recognized that the separation of powers is a Constitutional principle protecting our personal liberty. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. *The Federalist No. 51* at 322 (James Madison) (Clinton Rossiter, ed., 1961).

D. Federalism.

There is hardly anything of more importance to our constitutional form of government – to our Republic – than the maintenance of comity between the state and the federal government. For our "Federalism" represents a system in which the federal government must always endeavor not to "unduly interfere with the legitimate activities of the States". *Younger v. Harris*, 401 U.S. 37, 44 (1971).

There is no federal question in this case. It deals with the interpretation of a state's plain language law dealing with an important investment product - life insurance - that is unclear. It also involves a complicated system regulating the insurance industry in a state. It is a controversy that has brought to the surface "tensions inherent in a system that contemplates parallel judicial processes".

20 Wright & Kane, *supra* at 407.

Tensions brought about by a decision which effectively abolished a constitutional right afforded to a person under Minnesota's Constitution; and, at the same time, it disturbed Minnesota's separation of powers. Thus, a decision in which Minnesota's activities were interfered with in a most profound way by a federal court.

There is a mechanism which can be used to address those tensions. "Since 1941 there has been considerable recognition of circumstances under which a federal court may decline to proceed though it has jurisdiction under the Constitution and the statutes." *Id.* at 406

In a summary of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) written by Justice Scalia in a 1989 case, he said: "Where timely and adequate state court review is available, a federal court * * * must decline to interfere * * * when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case at bar". *Id.* at 416 (citing Scalia summary in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)). It is respectfully submitted that this is the kind of case Justice Scalia was referencing in his summary of *Burford*.

In that vein, in 1960 the Supreme Court in *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960) ordered abstention in a common-law action for the first time. *Clay* was also unique "in that the Court ordered resort to the new device of certification of the state questions involved to the highest state court for decision." *20*

Wright & Kane, supra at 419. It made use of a Florida law permitting a federal court of appeals to certify a question of Florida law to the Florida Supreme Court. *Id.* Minnesota has its own version of a certification law. App. 89-91.

In *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) the Supreme Court endorsed the use of certification in a matter in which a state law is difficult to ascertain. *Id.* at 421. If *Lehman Brothers* were followed by this Court and thus issue an order directing the Eighth Circuit to have all of the state issues certified to the Minnesota Supreme Court for adjudication, it would "in the long run save time, energy, and resources and [most importantly in the scheme of things help] build a cooperative judicial federalism". See *Lehman,* at 391. It would also let a state decide how to interpret its own laws.

The importance of maintaining our Federalism is crucial to the maintenance of our constitutional system of government. For "Federalism * * * operates as a parallel to separation of powers. Like separation of powers, it provides an internal control on the government. It is the business of the states to check the power of the federal government, but also it is the business of the federal government to restrain the states. The Constitution presents the power of the states as the logical equivalent of separation of powers." Arnn, *supra* at 106.

E. Summation.

The second of the two questions presented to this Court in this case is whether a Federal Court, in disregard of state law and of rules in decisions made by this Court and by the highest court in a state, can

interpret a state law such that it results in the upsetting of the separation of powers under a state constitution.

The short answer to this question is the same as the first one. It is "yes"; but only if *Erie* is not applied.

III. This case is a vehicle to address an exceptionally important issue bearing directly on the life of our Republic.

If the issues this case presents are not addressed, then other courts could cite the Eighth Circuit's ruling when confronted with interpreting state laws bearing on rights of action and deference. Whether to affirm, clarify, or refine *Erie* – or certify the state questions to the Minnesota Supreme Court – this Court should not let stand the decision of the Eighth Circuit. For if countenanced by silence, it can be relied on by other courts which will then magnify the danger it poses to our constitutional system of government – to our Republic.

CONCLUSION

For all the foregoing reasons described above, this Court should grant the petition for certiorari.

Respectfully submitted,

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November 26, 2024

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3477

Daniel Graff,

Appellant,

v.

Brighthouse Life Insurance Company, also known as Brighthouse Financial Life Insurance Company,

Appellee.

Appeal from U.S. District Court for the District of Minnesota (0:23-cv-01112-KMM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 11, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3477

Daniel Graff,
Plaintiff – Appellant,

v.

Brighthouse Life Insurance Company, also known as Brighthouse Financial Life Insurance Company,
Defendant – Appellee.

Appeal from U.S. District Court for the District of Minnesota (0:23-cv-01112-KMM)

Before COLLOTON, Chief Judge, BENTON, and SHEPHERD, Circuit Judges.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in the cause is affirmed in accordance with the opinion of this Court.

August 01, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3477

Daniel Graff,

Plaintiff – Appellant,

v.

Brighthouse Life Insurance Company, also known as Brighthouse Financial Life Insurance Company

Defendant – Appellee.

Appeal from United States District Court for the District of Minnesota

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Submitted: May 9, 2024
Filed: August 1, 2024

Before COLLOTON, Chief Judge, BENTON and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Daniel Graff sued Brighthouse Life Insurance Company in Minnesota state court, alleging that the policy he purchased from Brighthouse failed to use language that was readable and understandable to a person of average intelligence, in violation of Minn.

Stat. § 72C.06 and the implied covenant of good faith and fair dealing. Graff also raised an unjust enrichment claim for the remaining premiums owed through the Policy's maturity date. Brighthouse removed the case to federal court based on diversity-of-citizenship jurisdiction, and the district court[1] subsequently granted its motion to dismiss the complaint for failing to state a claim. Having jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal.

I.

In 2004, an agent for Brighthouse solicited Graff to purchase a Flexible Premium Adjustable Life Insurance Policy for his 78-year-old father, Robert, under which Graff was named the beneficiary of an $800,000 death benefit. Robert is now 97, and Graff has remitted premiums totaling more than $874,000. If Robert lives to his 100th birthday—the date on which the Policy matures—then Graff will have been required to remit an additional $755,550 in premiums. In other words, Graff may ultimately contribute more than $1,600,000 to a policy that will, at most, pay out $800,000. Alternatively, Graff may elect to surrender the Policy before the maturity date and receive its cash value, which, as of 2022, was approximately $1,800.

Faced with these unfavorable prospects, Graff sued Brighthouse, alleging that the Policy violated the Minnesota Readability of Insurance Policies Act, Minn. Stat. § 72C.01 et seq., (the RIPA or the Act) and the implied covenant of good faith and fair dealing by explaining the calculation of premiums and cash value

[1] The Honorable Katherine M. Menendez, United States District Judge for the District of Minnesota.

in a manner that was not understandable to Graff or similarly situated persons of average intelligence. Graff also alleged that Brighthouse would be unjustly enriched by receiving the remaining premiums due on the Policy through the maturity date. Brighthouse removed the case to federal court and moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion and dismissed the complaint with prejudice, concluding that a private cause of action was unavailable under the RIPA, that the implied-covenant claim was untimely, and that Graff was not entitled to recover under a theory of unjust enrichment because a valid contract governed the parties' relationship pursuant to which Brighthouse was legally entitled to the remaining premiums. Graff renews his three claims on appeal.

II.

Graff first asserts that the district court erred in holding that the RIPA does not create a private cause of action in favor of insureds. We review the district court's grant of Brighthouse's motion to dismiss, and its interpretation of the Act, de novo. See Palmer v. Ill. Farmers Ins. Co., 666 F.3d 1081, 1083 (8th Cir. 2012). Whether the RIPA permits a private remedy is an open question under Minnesota law; therefore, we must "predict how the state's highest court would resolve [the] issue." Minn. Supply Co. v. Raymond Corp., 472 F.3d 524, 534 (8th Cir. 2006). "When interpreting a statute to determine if it creates a cause of action," the Minnesota Supreme Court does "not ask whether the statute imposes a limitation on an otherwise unlimited claim, but instead determine[s] whether the statute actually *provides* a cause of action to a particular class of persons."

Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 863 (Minn. 2010). To this end, "[a] statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication." Becker v. Mayo Found., 737 N.W.2d 200, 207 (Minn. 2007).

Here, the Act is devoid of language expressly creating a private cause of action to enforce the rights enumerated therein, and Graff acknowledges as much. He instead argues that a right of action is implicit because the RIPA is a consumer-protection law with the stated purpose of shielding insurance purchasers from the use of indecipherable policy language by insurers. Put differently, the Act creates a beneficial right for a class of persons for which there must be a remedy. See Ark. State Conf. NAACP v. Ark. Bd. Of Apportionment, 86 F.4th 1204, 1220 (8th Cir. 2023) (Smith, C.J., dissenting) ("The implication of a right of action is rooted in the Blackstonian principle . . . that 'where there is a legal right, there is also a legal remedy.'" (alteration in original) (citation omitted)).

As an initial matter, Graff appears to derive many of his arguments from the multi-factor balancing test articulated in Cort v. Ash, which the Supreme Court employed to determine whether a private cause of action may be implied in the absence of express federal statutory language establishing one, 422 U.S. 66, 78 (1975). However, the Minnesota Supreme Court has never adopted the Cort test and in fact has explicitly declined to do so. Findling v. Grp. Health Plan, Inc., 998 N.W.2d 1, 21 n.19 (Minn. 2023) ("[W]e are not in any way bound by the statutory interpretation principles and methodologies used by

the United States Supreme Court when we interpret Minnesota statutes.").[2] Instead, the objective of our inquiry in this case is to discern whether the legislature "implicitly intended" to afford a private party a right of action against an insurer for violating the requirements of the RIPA. See id. at 20. In doing so, we consider "the language of the statute in question and its related sections," mindful that courts are "reluctant to recognize a private cause of action where one does not clearly exist in the statute." Graphic Commc'ns Loc. 1B Health & Welfare Fund "A" v. CVS Caremark Corp., 850 N.W.2d 682, 691 (Minn. 2014).

Broadly, the purpose of the RIPA "is to provide that insurance policies and contracts be readable and understandable to a person of average intelligence, experience, and education." Minn. Stat. § 72C.02. Insurers are required to submit proposed policies to the State Commissioner of Commerce, who is charged with the exclusive duty and authority to certify that a policy complies with the Act's readability, legibility, and formatting requirements. Id. §§ 72C.06-08, 10. In making this determination, the Commissioner must consider various factors, such as "the simplicity of the sentence structure and the shortness of the sentences used"; "the extent to which references to other sections or provisions of the contract are minimized"; "the use of contrasting titles or headings for sections or similar aids"; and "the use of a more easily understandable format such as narrative or outline forms." Id. §§

[2] This Court has also questioned "the continued validity of the Cort analysis," citing Justice Scalia's observation that it has been effectively overruled. Roberts v. Wamser, 883 F.2d 617, 623 n.17 (8th Cir. 1989) (citing Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring)).

72C.06-08. Further, approval from the Commissioner is a prerequisite to the issuance, amendment, or renewal of any policy covered under the Act, and the Commissioner is forbidden from approving a proposed policy that runs afoul of any of the requirements prescribed by the legislature. Id. § 72C.10.

A plain reading of the statutory language thus reveals that the Commissioner of Commerce, not a private party, is the person responsible for enforcing the RIPA's requirements; nowhere does the Act allude to a private cause of action or otherwise contemplate that an aggrieved insured shares co-extensive enforcement powers with the Commissioner. That the legislature would charge the Commissioner with exclusive enforcement authority under the RIPA accords with the broad powers afforded to him under Minnesota's comprehensive scheme of insurance regulation. See Palmer, 666 F.3d at 1083-85 ("Minnesota has determined that its insurance market can best be regulated by the Commissioner's pursuit of fines and injunctive relief . . . ." (citation omitted)); see also Minn Stat. § 45.027 (enumerating the Commissioner's extensive enforcement powers). This Court "has long recognized the special role of the Minnesota Commissioner of Commerce" and has "declined to create a judicial avenue to enforce the state's statutes when the Minnesota legislature has not." Palmer, 666 F.3d at 1085.

In this vein, the Minnesota Supreme Court has repeatedly "refused to find a private cause of action to enforce a statutory right when the statute gives enforcement authority to a state agency," even in cases where the challenged provision contained stronger rights-creating language than that at issue

here. See Findling, 998 N.W.2d at 20-21 (finding that the Minnesota Health Care Bill of Rights did not create a private cause of action where the legislature vested oversight authority in the State Commissioner of Health, whose powers functioned as an "alternative enforcement mechanism" to promote the act's "goals of protecting patient rights"); CVS Caremark, 850 N.W.2d at 691-92 (finding that the Pharmacy Practice Act, which requires pharmacists to pass on drug-acquisition cost savings to purchasers, did not create a private cause of action in part because the legislature provided the State Board of Pharmacy with broad authority to enforce the act's requirements); Morris v. Am. Fam. Mut. Ins. Co., 386 N.W.2d 233, 235 (Minn. 1986) (finding that the Unfair Claims Practices Act did not create a private cause of action because the act "deals with administrative regulation of insurance practices by the Commissioner of Commerce and says nothing about a private person having a right to sue the insurer for a violation").

Graff resists this conclusion, asserting that a court may look only to the challenged statute when ascertaining the legislature's intent, and that a review of the RIPA shows the absence of any enforcement mechanisms, meaning that a private remedy must therefore be implied. We do not agree that we are so constrained. In Palmer, for example, this Court noted that a plaintiff's attempt to assert a private right of action under an insurance statute must "be considered in the context of Minnesota's comprehensive regulatory scheme and the historical deference Minnesota courts have accorded the Commissioner of Commerce in enforcing the law in this area." 666 F.3d at 1086. And in CVS Caremark, the Minnesota Supreme Court looked to "relevant

statutes" other than the Pharmacy Practice Act to survey the extensive enforcement authority of the State Board of Pharmacy. 850 N.W.2d at 691.

We also disagree with Graff's characterization of the Act as lacking an enforcement mechanism, as its provisions explicitly condition the issuance, amendment, or renewal of any insurance policy on the Commissioner's approval; if a proposed Policy does not comply with the RIPA's requirements, then the Commissioner is required by law to withhold his approval. Thus, contrary to Graff's assertion, enforcement authority falls squarely upon the Commissioner, who has previously exercised his power to levy fines against insurers whose policies violated the Act's readability and formatting standards. See Certificate of Auth. of Liberty Ins. Corp., NAIC No. 42404, 2020 WL 1952583 (Minn. Dep't Comm. Mar. 6, 2020); Certificate of Auth. of Allied Prop. & Cas. Ins. Co., NAIC No. 42579, 2018 WL 9787033 (Minn. Dep't Comm. Aug. 29, 2018).[3]

In sum, the Minnesota legislature did not intend to alter the insurance regulatory landscape with the enactment of the RIPA so as to permit a private cause of action. To hold otherwise "would require us to add words to the statute that the Legislature did not supply" and create "'additional rights' beyond those expressly enumerated." CVS Caremark, 850 N.W.2d at 691 (citation omitted); see also Becker, 737 N.W.2d at 209 ("The obvious conclusion must usually be that when the legislators

[3] It appears from these decisions that the Commissioner has frequently exercised his authority to enforce the RIPA and other insurance regulations by conducting post-issuance enforcement actions.

said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it." (citation omitted)). The Commissioner, through his authority to ensure compliance with the Act's requirements, functions as the "alternative enforcement mechanism" to a private lawsuit contemplated in Findling, 998 N.W.2d at 20. Although Graff maintains that the discretion granted to the Commissioner has resulted in an enforcement scheme insufficient to effectuate the RIPA's purpose, we find no evidence in the record that the Act's administrative remedies are inadequate. See Palmer, 666 F.3d at 1086. Therefore, we affirm the district court's dismissal of this claim.

III.

Graff next asserts that the district court erred in finding that his common-law claim for breach of the implied covenant of good faith and fair dealing based on Brighthouse's violation of the RIPA was untimely. We do not reach this question, as our determination that the RIPA provides no private remedy is fatal to Graff's claim. That is, a plaintiff may not maintain a common-law claim premised on a violation of a statute for which there is no private cause of action. See Palmer, 666 F.3d at 1085. In Morris, the Minnesota Supreme Court explained that "when a statute creates a right which did not exist at common law and provides administrative remedies, those remedies are exclusive." 386 N.W.2d at 237 n.8. Courts have subsequently rejected attempts to use the alleged violation of an administrative statute as an element of a common-law cause of action. Palmer, 666 F.3d at 1085. There are many such examples:

> The court [of appeals has] refused to

> recognize a conversion claim based on the Minnesota Fair Labor Standards Act, a tortious interference with contract claim predicated on the Unfair Claims Practices Act, and an unjust enrichment cause of action challenging utility rates and brought outside the administrative procedure established by statute.
>
> In a case of special interest here, the court of appeals has expressly rejected a breach of contract claim based on the violation of an insurance regulation.

Id. (citing Olson v. Moorhead Country Club, 568 N.W.2d 871, 873-74 (Minn. Ct. App. 1997); Glass Serv. Co. v. State Farm Mut. Auto Ins. Co., 530 N.W.2d 867, 872 (Minn. Ct. App. 1995); H.J. Inc. v. Nw. Bell Corp., 420 N.W.2d 673, 676 (Minn. Ct. App. 1988); Schermer v. State Farm Fire & Cas. Co., 702 N.W.2d 898, 905 (Minn. Ct. App. 2005)).

The reasoning of Morris and its progeny is instructive: Graff's claim is grounded exclusively in the readability provision of the RIPA, see Minn. Stat. §72C.06, as his complaint alleges that Brighthouse's failure to use "easily readable and understandable language in the Policy" amounts to a violation of the implied covenant of good faith and fair dealing. On its face, then, Graff's claim "attempt[s] to circumvent Minnesota's administrative remedies and" once more "create a private right of action when the legislature has not." Palmer, 666 F.3d at 1086. Therefore, we affirm the district court's dismissal of this claim, albeit on different grounds. See Moffit v. State Farm Mut. Auto. Ins. Co., 11 F.4th 958, 960 (8th Cir. 2021)

("We may affirm the district court's dismissal on any basis supported by the record." (citation omitted)).

IV.

Finally, Graff asserts that the district court erred in dismissing his claim of unjust enrichment relating to the remaining premiums owed through the Policy's maturity date. We find no error. Under Minnesota law, equitable remedies, including recovery under a theory of unjust enrichment, "cannot be granted where the rights of the parties are governed by a valid contract." Loftness Specialized Farm Equip., Inc. v. Twiestmeyer, 742 F.3d 845, 854 (8th Cir. 2014) (citation omitted). Graff emphasizes that he did not plead a breach-of-contract claim but instead filed a declaratory judgment action alleging a violation of the RIPA. Accordingly, if a trier of fact determines that the Policy's terms are illegal, Graff argues that he must be permitted to claw back the premiums already remitted and be relieved of his remaining obligations. However, Graff does not contest—and his complaint indeed acknowledges—that the Policy establishes the rights of the parties and governs their dispute; the existence of this contract, which forms the basis of Graff's lawsuit, thus precludes any recovery pursuant to a cause of action for unjust enrichment. See Gisairo v. Lenovo (U.S.) Inc., 516 F. Supp. 3d 880, 893 (D. Minn. 2021) (applying Minnesota law) ("A claim for unjust enrichment fails when there is 'no dispute that a written contract governs the at-issue conduct.'" (citation omitted)).

Furthermore, Brighthouse will not be unjustly enriched, as it will receive the amounts to which it is entitled under the Policy. See Schaaf v. Residential

Funding Corp., 517 F.3d 544, 554 (8th Cir. 2008) (applying Minnesota law) ("[U]njust enrichment does not occur when a defendant 'is enriched by what he is entitled to under a contract or otherwise.'" (citation omitted)). If Graff chooses to retain the Policy, then he must remit additional premiums according to the terms of the parties' contract. We cannot say that it would be "morally wrong" for Brighthouse to accept what it is owed. Mon-Ray, Inc. v. Granite Re, Inc., 677 N.W.2d 434, 440 (Minn. Ct. App. 2004); Loftness, 742 F.3d at 854 ("[U]njust enrichment should not be invoked merely because a party has made a bad bargain."). We affirm the district court's dismissal of this claim.

V.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Daniel Graff, No. 23-cv-1112 (KMM/JFD)

Plaintiff,

v.

ORDER

Brighthouse Life Insurance Company, *also known as* Brighthouse Financial Life Insurance Company,

Defendant.

Plaintiff Daniel Graff filed this case against Defendant Brighthouse Life Insurance Company ("Brighthouse") in state court in Chisago County, alleging that the flexible premium adjustable life insurance policy Brighthouse issued him fails to use language that is easily readable and understandable to a person of average intelligence in violation of Minn. Stat.§ 72C.06 and the implied covenant of good faith and fair dealing in every contract. He also asserts an unjust-enrichment claim based on the allegation that the premium payments he would potentially be required to make under the policy through its maturity date would be unjust. Plaintiff seeks several forms of declaratory relief. Brighthouse removed the case to federal court on diversity grounds and now seeks dismissal of the Complaint for failure to state a claim. [Doc. No. 10.] The Court held a hearing on Brighthouse's motion on July 25, 2023. [Doc. No. 25.] For the reasons that follow, the motion to dismiss is granted.

I. Background

A. Mr. Graff's Allegations

In November 2004, an agent for The Travelers Life and Annuity Company ("Travelers") solicited Daniel Graff ("Mr. Graff") to apply for a Flexible Premium Adjustable Life Insurance Policy ("the Policy"). The insured under the Policy was Mr. Graff's father Robert Graff ("Robert"). [Compl. ¶¶ 1, 4, 12, Doc. No. 1-1.] Mr. Graff's application was approved, the Policy was issued on November 28, 2004, the Policy was delivered to him in Forest Lake, Minnesota, and he is the owner of the Policy. [*Id.* ¶¶ 5-6, 12.] Robert was 78 years old at the time the Policy was issued. [*Id* ¶ 13.] Travelers eventually became Brighthouse. [*Id* ¶ 8.]

The Policy includes a "maturity date" of November 28, 2026, which is when Robert turns 100 years old. [*Id.* ¶¶ 14-15.] The Policy includes a "death benefit" amount of $800,000, but since the Policy was issued, Mr. Graff has already paid premiums totaling over $874,000. [*Id.* ¶¶ 17, 19.] In 2022, Brighthouse provided Mr. Graff a Ledger that sets forth the likely premium payments he will be required to make through the maturity date to keep the policy current. [*Id* ¶¶ 20-22; Doc. No. 1-1 at 38-39.] Based on the information in the Ledger, if Robert lives to his 100th birthday, Mr. Graff will have paid additional premiums totaling $755,500. [Compl. ¶ 23; Doc. No. 1-1 at 38-39.] That would make the total of his premium payments at the maturity date approximately $1.6 million for a policy that has, at most, a payout of $800,000. [Compl. ¶ 25.]

The Policy is an insurance product that is commonly referred to as "universal life insurance,"

("ULI") which is a form of whole life insurance that "provides the policyholder with the choice of maintain the policy until the earlier of the maturity date (usually when the insured reaches the age of 100) or the insured's death." *PHT Holding II LLC v. N Am. Co. for Life and Health Ins.,* Case No. 4:18-cv-00368-SMR-HCA, 2023 WL 3714746, at* 1 (S.D. Iowa May 27, 2023). Unlike traditional whole life insurance policies, which require fixed monthly premium payments, ULI policyholders pay flexible premiums. *Fleisher v. Phonenix Life Ins. Co.,* 18 F. Supp. 3d 456,461 (S.D.N.Y. 2014). ULI policyholders can make minimum monthly premium payments if they wish, but ULI policies also offer a savings component from which monthly deductions can be drawn by the insurer to cover the cost of the premiums, while the balance of funds in the account earns interest as long it sits there. *Id.*

Mr. Graff's Policy operates along these lines. Premiums paid under the Policy are credited to the Policy's "Accumulation Value" from which Brighthouse takes a monthly "Deduction Amount" to cover the cost of insurance, and any remaining amount in the account earns interest at a minimum of three percent. [Doc. 1-1 at 16, 23, 25.] The Policy's "Cash Value" is the Accumulation Value after deducting whatever Mr. Graff owes to Brighthouse and a "surrender charge."

Documents attached to the Complaint show that for policy years one through ten, Mr. Graff opted to make somewhat lower, consistent premium payments by selecting a "Death Benefit Guarantee Rider." [Doc. No. 1-1 at 19.] The gross annual planned premium for years one through ten at the time the Policy was issued was $34,005.48, but paying the premiums at this amount meant the expectation was

that Mr. Graff's Accumulation Value would not grow at all. [Doc. No. 1-1 at 22.]

B. Mr. Graff's Claims

The Complaint includes three separate Counts. In Count One, Mr. Graff asserts that under Minn. Stat. § 72C.06, Brighthouse was required to use language in the Policy that is easily readable and understandable to a person of average intelligence and education. [Compl. ¶¶ 26-32.] However, he claims Brighthouse used language describing how premium payments are determined during the term of the Policy and the cash value of the Policy on its maturity date that was unclear and confusing. [*Id.* ¶¶ 30-31.] Count Two similarly claims that the Defendant's alleged failure to use readable and understandable language in the Policy constitutes a breach of the implied covenant of good faith and fair dealing.[1] [*Id.* ¶¶ 33-36.] Finally, in Count Three, Mr. Graff asse11s a claim for unjust enrichment. [*Id.* ¶¶ 37-40.] He alleges that the amount of the premium payments he will be required to make from the time he filed the

[1] Under Minnesota law, a cause of action for breach of the covenant of good faith does not exist independent of a breach-of-contract claim. *Medtronic, Inc. v. ConvaCare, Inc.,* 17 F.3d 252, 256 (8th Cir. 1994). This means that a "bad-faith motive in breaching a contract does not convert a contract action into a tort action." *Space Ctr., Inc. v. 451 Corp.,* 298 N.W.2d 443,452 (Minn. 1980). It does not mean, however, that a plaintiff has to show "'an express breach of contract claim'" to pursue a claim for breach of the implied covenant of good faith and fair dealing because the claim "'assumes the patties did not expressly articulate the covenant allegedly breached.'" *Grady v. Progressive Direct Ins. Co.,* 634 F. Supp. 3d 929, 939 (D. Minn. Nov. 30, 2022) (quoting *Cox v. Mortg. Elec. Registration Sys., Inc.,* 685 F.3d 663, 670 (8th Cir. 2012)).

Complaint until the Policy is paid up on its maturity date is unjust and a "reasonable man would not invest $1,600,000 in order to realize a maximum return of $800,000." [*Id.* 138.] Consequently, Mr. Graff claims that by requiring him to pay the total of the anticipated premiums through the maturity date, "Defendant will be unjustly enriched to the detriment of Plaintiff." [*Id.* 140.]

Mr. Graff seeks several forms of declaratory relief in his Complaint. First, he asks the Court to issue a declaration that requiring further premium payments under the Policy would be unjust and he is not required to remit further premium payments under the Policy in order to keep it in effect. Second, he asks the Court to issue declarations that the policy's language is not easily readable and that Brighthouse did not deal with him in good faith. Based on those declarations Mr. Graff asks the Court to declare the Policy null and void, upon which Brighthouse must return all premium payments he previously made. And finally, Mr. Graff asks the Court to issue a declaration that by requiring him to pay the remaining premiums through the policy's maturity date, Brighthouse will be unjustly enriched, so "the Policy is deemed paid up and no further premium payments are due to be paid by Plaintiff to the Defendant." [Compl., Prayer for Relief ¶¶ A-D.]

II. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). This standard does not require the inclusion of "detailed factual allegations" in a pleading, but the complaint must contain facts with enough specificity "to raise a right

to relief above the speculative level." *Id.* at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, so nor suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 555). In applying this standard, the Court must assume the facts in the complaint to be true and take all reasonable inferences from those facts in the light most favorable to the plaintiff. *Rydholm v. Equifax Info. Servs. LLC,* 44 F.4th 1105, 1108 (8th Cir. 2022); *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir. 1986). Courts do not accept as true the legal conclusions the plaintiff draws from the facts pled. *Glick v. W Power Sports, Inc.,* 944 F.3d 714, 717 (8th Cir. 2019).

III. Discussion

Brighthouse asks the Court to dismiss the Complaint for several reasons. First, Brighthouse contends that the claims in all three Counts are barred by the applicable statutes of limitations. Second, Brighthouse argues that all of Mr. Graff's claims are barred by the filed rate doctrine. Third, Brighthouse contends that the Counts One and Two fail to state a claim because there is no private right of action for a violation of Minn. Stat. § 72C.06, nor for breach of the covenant of good faith and fair dealing. Finally, Brighthouse argues that Counts Two and Three are subject to dismissal because the parties' relationship is governed by a valid contract and the terms of the Policy cannot be altered based on the asserted claims.

The Court concludes that Mr. Graff's Complaint must be dismissed for failure to state a claim. The statutory-readability claim in Count One must be dismissed because, on the face of the Complaint, it is barred by the statute of limitations

and because there is no private right of action. Plaintiff's good faith and fair dealing claim in Count Two is also untimely. Finally, the Court finds the Complaint fails to state a claim for unjust enrichment.[2]

A. Statute of Limitations

A complaint may be dismissed on statute-of-limitations grounds only where the applicability of the time bar is apparent on the face of the pleading. *Wong v. Wells Fargo Bank NA.,* 789 F.3d 889, 897 (8th Cir. 2015). "A complaint establishes the statute of limitations defense 'if all facts necessary to the affirmative defense clearly appear on the face of the complaint.'" *Willman v. Farmington Area Pub. Sch. Dist. (JSD 192),* No. CV 21-1724 (JRT/JFD), 2022 WL 4095952, at *2 (D. Minn. Sept. 7, 2022) (quoting *Goodman* v. *Praxair, Inc.,* 494 F.3d 458, 464 (4th Cir. 2007) (cleaned up)). "To determine whether a complaint is self-defeating based on a statute of limitations, a court must identify the relevant limitations period, the date the action was commenced, and the date the plaintiff's claims accrued." *Id.* at *3 (quotations omitted).

Here, the parties agree that the six-year statute of limitations under Minn. Stat. § 541.05. subd. 1(1), (2). applies to all of Mr. Graff's claims. [Def. Mem. at 9: Pl. Mero. at 8.] There is also no dispute that Mr. Graff commenced this action in state court on March 9, 2023. Therefore, the Court must examine whether Mr. Graff s causes of action accrued before March 9, 2017.

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[2] Because the Court reaches these conclusions, it declines to address Brighthouse's arguments concerning the filed rate doctrine.

Untimely Claims

Start with the claims in Counts One and Two. The statutory-readability claim in Count One is a cause of action for liability under Minn. Stat. § 72C.06, and such a claim accrues at the time of the alleged statutory violation. *See Parkhill v. Minn. Mut. Life Ins. Co.,* 174 F. Supp. 2d 951, 957 (D. Minn. 2000). Count Two's breach of the covenant of good faith and fair dealing that is implied in every contract is plainly a contract-based claim, and under Minnesota law, such a cause of action "accrues at the time of the breach even though actual damages occur later." *TCF Nat'l Bank* v. *Market Intelligence, Inc.,* 812 F.3d 701, 710 (8th Cir. 2016) (cleaned up).

Under these accrual rules, the claims in Counts One and Two of the Complaint are untimely. Both claims are based on the allegation that the Policy did not provide easily readable and understandable language. If there was a violation of Minn. Stat. § 72C.06, it occurred at the time the language in the Policy was provided to Mr. Graff. Likewise, if the covenant of good faith and fair dealing required the Policy to contain readable and understandable language, and the failure to provide it breached the covenant, that breach occurred when the Policy was provided to Mr. Graff. On the face of the Complaint, the Policy was executed and delivered to Mr. Graff in late November 2004, far more than six years before he filed suit in March 2023.

Discovery Rule

To escape the result of the accrual rules applicable to Counts One and Two, Mr. Graff seeks to toll the statute of limitations pursuant to the "discovery rule." He argues that his claims should not

be dismissed as untimely because his claims did not accrue until 2022 when he first became aware of Minnesota Statutes Chapter 72C and the Readability of Insurance Polices Act under and when Brighthouse provided him with the Ledger. [Pl. Mem. at 3-4, 8-9.] But this invocation of the discovery rule is unpersuasive for at least three reasons.

First, it is far from clear that the discovery rule applies to either the statutory-readability claim or the good faith and fair dealing claim. "The discovery rule tolls the statute of limitations until a plaintiff 'knew or reasonably should have known,' in the exercise of reasonable diligence, of the facts necessary to support his claim." *Ellering v. Sellstate Realty Sys. Network, Inc.,* 801 F. Supp. 2d 834, 841 (D. Minn. 2011) (quoting *Hempel* v. *Creek House Tr.,* 743 N.W.2d 305, 311 (Minn. Ct. App. 2007)) *(Ellering's* emphasis removed). Minnesota courts generally do not apply the discove1y rule to causes of action that do not involve allegations of fraud. *Ellering,* 801 F. Supp. 2d at 840 (citing *Hanson v. Johnson,* Civ. No. 02-3709, 2003 WL 21639194, at *3 (D. Minn. June 30, 2003)). Coutts in this District have expressed doubt that the discovery rule would apply to toll a limitations period on a claim based on a Minnesota statute that does not sound in fraud, *Ellering,* 801 F. Supp. 2d at 841, and have held that the discovery rule does not apply to a breach-of-contract action, *Untiedt's Vegetable Farm, Inc. v. Southern Impact, LLC,* 493 F. Supp. 3d 764, 768 n.6 (D. Minn. 2020) ("Minnesota applies the occurrence rule, not the discove1y rule, in determining when a claim for breach of contract accrues").

Second, the fact that Mr. Graff did not know about the provisions of Minn. Stat. § 72C.06 until 2022 cannot be a basis for tolling. *See Herrmann* v. *McMenomy & Severson,* 590 N.W.2d 641, 643 (Minn.

1999) ("[I]n the absence of fraudulent concealment, the running of the statute is not tolled by ignorance of the cause of action."); *Larson v. Am. Wheel & Brake, Inc.,* 610 F.2d 506, 510 (8th Cir. 1979) (stating that "ignorance of legal rights does not toll a statute of limitations").

And third, even if the discovery rule did apply, the Complaint and the Policy attached to it make clear that Mr. Graff knew or should have known, in the exercise of reasonable diligence, of the facts necessary to support his claim in 2004 when the Policy was delivered to him. The Policy itself contains language describing how the premiums would be calculated and that they would increase over time. The fact that Brighthouse provided him with the Ledger in 2022 is inapposite.

In addition, Mr. Graff has presented no allegations to suggest that Brighthouse fraudulently concealed the facts underlying the claims in Counts One and Two. There are no facts alleged to suggest Brighthouse took "affirmative acts intended to, and [was] successful in, preventing discove1y of the cause of action." *Market Intelligence,* 812 F.3d at 711 (citing *Cohen v. Appert,* 463 N.W.2d 787, 791 (Minn. Ct. App. 1990)).

Accordingly, the Court concludes that Count One and Count Two of the Complaint must be dismissed for failure to state a claim because they are barred by the statute of limitations.

Unjust Enrichment

The Court declines to dismiss the unjust enrichment claim as barred by the statute of limitations. A cause of action for unjust enrichment accrues when damage occurs. *See Cordes v. Holt & Anderson, Ltd,* No. A0S-1734, 2009 WL 2016613, at *2

(Minn. Ct. app. July 14, 2009); *see also Fish Tale Credit LLC v. Anderson,* Court File No. 16-cv-4068 (JRT/LIB), 2017 WL 2729564, at* 10 (D. Minn. June 6, 2017), *R&R adopted* 2017 WL 2728404 (D. Minn. June 23, 2017). Brighthouse argues that the unjust enrichment claim accrued in 2004 because the Policy disclosed that the cost of insurance would increase over time and how the Cash Value of the Policy would grow. [Def. Mem. at 9-11.] But Brighthouse does not explain how that equates to when the alleged damage occurred for purposes of determining the accrual date of Mr. Graff s unjust enrichment claim. And Brighthouse relied principally on the Minnesota Court of Appeals' decision in *Cordes,* a case in which the damage at issue was the plaintiffs alleged "overpayment" of unreasonable or excessive legal fees to a former attorney.

It is unclear that Mr. Graff is claiming that every premium payment he made under the Policy amounts to unjust enrichment. In fact, it seems he is asse1iing that Brighthouse's potential retention of premium payments in excess of the recoverable $800,000 death benefit under the Policy would be unjust. There is some indication in the case law that an unjust enrichment claim based on overpayments accrues when the overpayments are made, and overpayments made within the six-year limitations period are not barred, while claims based on those made more than six years before commencement of the action are foreclosed. *Block v. Litchy,* 428 N.W.2d 850, 854 (Minn. Ct. App. 1988). In the end, Brighthouse has not persuaded the Court that the unjust enrichment ought to be dismissed on statute of limitations grounds. But the unjust enrichment claim is subject to dismissal for reasons discussed in Part III.C. below, so the somewhat novel issues raised by

the statute of limitation here need not be definitively answered.

B. Private Right of Action

Brighthouse also argues that the statutory-readability claim in Count One of the Complaint must be dismissed because there is no private right of action to enforce Minn. Stat. § 72C.06. The Court agrees, and, even if it had been timely filed, Mr. Graff s claim that the Policy violates the statute must be dismissed for this reason as well.

Under Minnesota law, a statute "does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication." *Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp.,* 850 N.W.2d 682, 689 (Minn. 2014). There is nothing in Minn. Stat.§ 72C.06 that explicitly provides for a private right of action. Mr. Graff concedes as much. [*See* Pl. Mem. at 14.]

Nevertheless, Mr. Graff suggests that the statute implies a private right of action because it does not expressly give the Minnesota Commissioner of Commerce administrative enforcement powers and is silent on enforcement mechanisms. [Pl. Mem. at 15-16.] This argument is not persuasive. The Minnesota Legislature gives the Commissioner the power to enforce insurance statutes, including Minn. Stat. § 72C.06. *See* Minn. Stat. § 45.027, subd. 1 (listing the broad general powers of the Commissioner). This includes the power to take action when the Commissioner determines that an insurer has used a policy that fails to use easily readable and understandable language as required by § 72C.06. *In re Cert. of Authority of Liberty Ins. Corp., NAIC No. 42404,* File No. 50600/SMK, 2020 WL 1952583, at *1

(Minn. Dep't Comm. Mar. 6, 2020); *cf In re Cert. of Authority of Allied Prop. & Cas. Ins. Co. (NAIC No. 42579),* No. 53924, 2018 WL 9787033, at *1 (Minn. Dep't Comm. Aug. 29, 2018) (consent decree regarding insurer's use of "policy language that was not clear"). Moreover, Chapter 72C requires insurers to follow statutory guidelines on readability, formatting, font choice, and other details, and to submit their policies to the Commissioner for approval. Minn. Stat. § 72C.10, subd. 1. The Commissioner is required to disapprove of a policy that does not comply with the statute's readability standards. Minn. Stat. § 72C.10, subd. 2(c). The statutory scheme is, overall, contrary to Mr. Graff's suggestion that there is a clear implication of a private right of action to enforce the requirements of Minn. Stat. § 72C.06.[3]

Mr. Graff suggests that failure to find a private right of action for enforcement of the readability requirements in Minn. Stat. § 72C.06 raises serious separation of powers concerns. [Pl. Memo. at 16-18

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[3] The Wisconsin Court of Appeals appears to be the only court to have addressed the issue of where the responsibility lies for enforcing the requirements of Minn. Stat. § 72C.06, and it similarly found that the Commissioner has that duty. *See Gross v. Lloyds of London Ins. Co.,* 347 N.W.2d 899, 903-04 (Wis. Ct. App. 1984), *rev'd on other grounds by* 358 N.W.2d 266 (1984). The *Gross* court addressed an argument that language in a policy failed to comply with the readability requirements of the statute and found the following:

> [T]he arbiter of the standards would appear to be the Minnesota Commissioner of Insurance, who, under the dictates of Minn. Stat. § 72C.10 (West 1984), either approves or disapproves of a proposed policy…It is apparent from the statutes cited that the application of the statutory criteria is an administrative task entrusted to the Minnesota Commissioner of Insurance."

Id.

(citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837 (1984), Article VI, Section 1 of the Minnesota Constitution, *The Federalist No. 78, Marbury v. Madison,* 5 U.S. 137 (1803), and *Boumediene v. Bush,* 553 U.S. 723 (2008)).] However, this argument is unconvincing because it is built upon a flawed foundation. It presupposes that Minnesota's insurance laws are silent on the enforcement mechanisms for the policy-language readability requirement, but as explained above, the Minnesota Legislature gave that enforcement power to the Commissioner. It did not give a right of action to private plaintiffs either explicitly or by implication. Count One of the Complaint must be dismissed for this reason.

C. Unjust Enrichment

Brighthouse contends that Mr. Graff's unjust enrichment claim should be dismissed because (1) the parties are governed by a valid contract, and (2) taken as true the allegations fail to show that Brighthouse received or obtained something of value that in equity and good conscience it should not retain. [Def. Mem. at 18-19.]

To state a claim for unjust enrichment, a plaintiff must allege that the defendant knowingly received a benefit to which the defendant was not entitled, and that it would be unjust under the circumstances for the defendant to retain that benefit. *See Gisairo v. Lenovo (United States) Inc.,* 516 F. Supp.3d 880, 893 (D. Minn. 2021). It is "an equitable remedy that plaintiffs may not pursue where the rights of the parties are governed by a valid contract." *Wilson v. Corning, Inc.,* 171 F. Supp. 3d 869, 880 (D. Minn. 2016) (quotation omitted); *Loftness Specialized Farm Equip., Inc. v. Twiestmeyer,* 742 F.3d 845, 854

(8th Cir. 2014) ("[E]quitable relief cannot be granted where the rights of the parties are governed by a valid contract.") (alteration in *Twiestmeyer).* "Unjust enrichment does not occur when a defendant is enriched by what he is entitled to under a contract or otherwise." *Id.* (cleaned up).

Here, the Complaint fails to state a claim for unjust enrichment for two reasons. First, as alleged by Mr. Graff in the Complaint, the Policy is a contract that governs the patties' relationship. There simply is "'no dispute that a written contract governs the at-issue conduct.'" *Gisairo,* 516 F. Supp. 3d at 893 (quoting *HomeStar Prop. Sols., LLC v. Safeguard Props., LLC,* 370 F. Supp. 3d 1020, 1029-30 (D. Minn. 2019)). Second, accepting the facts alleged in this case as true, the benefit Mr. Graff claims will unjustly enrich Brighthouse is the money he will pay to Brighthouse in additional premium payments if his father remains living through the Policy's maturity date. But this would mean only that Brighthouse would allegedly be "enriched by what [it] is entitled to under [the Policy]," and therefore negates Mr. Graff's unjust enrichment claim. *Twiestmeyer,* 742 F.3d at 854 (quotations omitted). For these reasons, the Court concludes that this Complaint fails to state a claim for unjust enrichment.

D. Plaintiff's Remaining Arguments

At oral argument, counsel for Plaintiff stressed that this is an action seeking declaratory relief and appeared to suggest that because that is so, the Court cannot dismiss Mr. Graff's claims on statute of limitations grounds or due to the absence of a private light of action for any of his claims. However, "claims for ... declaratory relief are barred to the same extent that the legal claims for substantive relief on which

they are based are barred." *Parkhill v. Minn. Mut. Life Ins. Co.,* 995 F. Supp. 983, 999 (D. Minn. 1998). Plaintiff cannot use the fact that he seeks various forms of declaratory relief to essentially eliminate the need to comply with the applicable statutes of limitations. And the Minnesota Declaratory Judgment Act itself cannot create a private right of action where one does not otherwise exist. *See Eggenberger v. W. Albany Twp.,* 90 F. Supp. 3d 860, 863 (D. Minn. 2015) ("'A party seeking a declarato1y judgment must have an independent, underlying cause of action based on a common-law or statut01y right.'") (quoting *Alliance for Metro. Stability v. Metro. Council,* 671 N.W.2d 905, 916 (Minn. Ct. App. 2003)).

At the hearing on Brighthouse's motion, counsel for the Plaintiff also provided the Court with hard copies of several authorities in support of Mr. Graff's position that his claims should not be dismissed.[4] For example, counsel provided copies of several sections of a leading treatise on Minnesota law addressing Minnesota Rule of Civil Procedure 57, declaratory judgments, Minn. Stat. § 555.01 et seq., and the requirement that a justiciable controversy exist. 2 Minn. Prac., Civil Rules Annotated §§ 57.1-57.12 (6th ed. 2023 update). In addition, counsel provided the Court copies of seven cases addressing the power of courts to issue declaratory judgments

[4] Plaintiff's counsel also provided the Court with copies of cases discussing accrual rules for application of the statute of limitations and the limited application of the discovery rule under Minnesota law. These included *In re Petters Co., Inc.,* 494 B.R. 413, 445-48 (D. Minn. Bankr. 2013), *Dalton v. Dow Chemical Co.,* 158 N.W.2d 580, 584 (Minn. 1968), and *Antone v. Mirviss,* 720 N.W.2d 331, 335-36 (Minn. 2006). These cases do not change the Court's conclusions that the claims in Counts One and Counts Two must be dismissed as time-barred.

when a justiciable controversy exists. These included *Montgomery v. Minneapolis Fire Department Relief Association,* 15 N.W.2d 122 (Minn. 1944), and *Holiday Acres No. 3 v. Midwest Federal Savings and Loan Association of Minneapolis,* 271 N.W.2d 445 (Minn. 1978). But these cases and commentaries do not contradict the Court's conclusion that claims for declaratory relief are not exempt from the limitations periods applicable to their corresponding underlying claims, nor do they suggest that a claim for declaratory relief can create a private right of action where none exists.

IV. Order

For the reasons explained above, **IT IS HEREBY ORDERED THAT**

1. Defendant's Motion to Dismiss [Doc. No. 10] is **GRANTED;** and
2. The Complaint is **DISMISSED WITH PREJUDICE.**

Let Judgment be entered accordingly.

Date: October 17, 2023

s/Katherine Menendez
Katherine Menendez
United States District Judge

UNITED STATES DISTRICT COURT
District of Minnesota

Daniel Graff, **JUDGMENT IN A CIVIL CASE**

Plaintiff,

v.

Case Number: 23-cv-01112-KMM-JFD

Brighthouse Life Insurance Company,

Defendant.

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. **Defendant's Motion to Dismiss** [Doc. No. 10] is **GRANTED**; and

2. The Complaint is **DISMISSED WITH PREJUDICE.**

Date: 10/17/2023

KATE M. FOGARTY, CLERK

* * *

For these reasons, and the reasons stated below, Defendant Brighthouse respectfully requests that this Court dismiss Plaintiffs Complaint with prejudice under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

I. Plaintiff's Universal Life Insurance Policy.

Plaintiff Daniel Graff is a Minnesota resident and business owner. (Compl. ¶ 3.) On November 28, 2004, Plaintiff purchased a Flexible Premium Adjustable Life Insurance Policy (the "Policy") from The Travelers Life and Annuity Company, now named Brighthouse Life Insurance Company. *(Id.* ¶¶ 4, 11.) The insured is Plaintiffs father, Robert Graff, who was 78 years old when the Policy was issued. *(Id.* ¶¶ 12, 13.)

The Policy is a type of insurance known as "universal life insurance," which provides for flexible premium payments and includes a savings component often referred to as the accumulation value. Julia Kagan, *What is Universal Life (UL) Insurance?,* INVESTOPEDIA (Feb. 21, 2023)[1] *see, e.g., Fleisher v. Phoenix Life Ins. Co.,* 18 F. Supp. 3d 456, 460-62 (S.D.N.Y. 2014) (explaining the features and operation of universal life insurance policies). Policy owners can choose (subject to certain limitations) the amount of premium they pay into the policy. At the very least, they must make premium payments such

[1] https://www.investopedia.com/terms/u/universallife.asp#toc-what-is-universal-life-ul-insurance.

that the accumulation value is large enough to cover the cost of insurance (including administrative costs). Amounts paid in excess of those costs accumulate and earn interest or index credits. *Id.* If the policy owner only minimally funds the policy, there will be little to no funds in the accumulation value. If the policy owner pays more premiums than necessary to simply cover the costs, the accumulation value generally grows over time. As the accumulation value grows, policy owners can withdraw funds, borrow funds, or use the policy's values to pay future premium payments. *Id.* The accumulation value is useable during the insured's lifetime but is often not included the death benefit. *Id.*

The same is true for the Policy at issue here, which is attached as Exhibit A to the Complaint.[2] Premiums paid by Plaintiff are credited to the Policy's "Accumulation Value." (Compl., Ex. A ("Policy"), at 6.) To cover the cost of insurance and expense amounts, Brighthouse charges a monthly "Deduction Amount" against the Accumulation Value, leaving the remaining cash value to grow at an interest rate guaranteed to be no less than three percent. *(id.* at 6, 3(A).) The "Cash Value" of the Policy "is equal to the Accumulation Value less any Indebtedness and applicable surrender charges[.]" *(Id.* at 7.)

Plaintiff elected to add a "Death Benefit Guarantee Rider" to the Policy at the time of policy issuance, which resulted in relatively lower periodic premiums ($34,005.48 per year for the first ten years) but which also meant that the Accumulation Value

[2] Plaintiff also attaches to the Complaint an Inforce Basic Ledger (the "Ledger") prepared by Brighthouse on April 27, 2022, which describes the Policy's financial status as of that date and the expected premiums through the Policy's maturity in 2026. *(Id.* ¶ 18, Ex. C.)

would only marginally increase. *(Id.* at 3(A), 3 (RIDERS), Death Benefit Guarantee Rider (ensuring the policy would not lapse "even if the Cash Value is insufficient to pay the Deduction Amount due").) *As explained in the Policy documentation,* the $34,005.48 premium amount was not projected to allow for any excess cash to accumulate over the first ten years of the Policy:

BENEFIT DESCRIPTION

TABLE OF VALUES

Policy Year	Amount Insured at End of Year	Gross Premium	Accumulation Value	Cash Value
1	800,000	34,005	0	0
2	800,000	34,005	0	0
3	800,000	34,005	0	0
4	800,000	34,005	0	0
5	800,000	34,005	0	0
6	800,000	34,005	0	0
7	800,000	34,005	0	0
8	800,000	34,005	0	0
9	800,000	34,005	0	0
10	800,000	34,005	0	0
11	0	0	0	0

(Id. at 3 (VALUES); *see also* Declaration of Susan Roussey in Support of Defendant's Motion to Dismiss ("Roussey Decl."), Exs. B, C (showing no Cash Value in the account prior to 2015).)[3] Plaintiff allowed the

[3] When addressing a motion to dismiss, courts "may consider the pleadings themselves, materials embraced by the pleadings,

Death Benefit Guarantee Rider to lapse in 2015. *(See* Roussey Deel. Exs. D, E.) At that point, the Policy had a minimal Accumulation Value and would lapse unless the Accumulation Value *was* sufficient to cover the monthly Deduction Amount. *(Id.; see also* Policy 6, 8.)

One of the items deducted monthly from the Accumulation Value is the cost of insurance. The Policy explains that the maximum cost of insurance rate will increase as the insured grows older:

MAXIMUM MONTHLY GUARANTEED COST OF INSURANCE RATES (MONTLY RATE PER $1000 OF COVERAGE AMOUNT)

Age	Maximum Rate	Age	Maximum Rate	Age	Maximum Rate	Age	Maximum Rate
78	5.23711	**84**	13.25080	**90**	21.84540	**96**	46.58980
79	5.82124	**85**	14.53240	**91**	23.59540	**97**	67.04150
80	5.97579	**86**	15.87430	**92**	25.57450	**98**	83.33330
81	6.13373	**87**	17.26970	**93**	28.00750	**99**	83.33330
82	6.25112	**88**	18.71940	**94**	31.40160		
83	12.04610	**89**	20.23600	**95**	36.79810		

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exhibits attached to the pleadings, and matters of public record" without converting the motion into one for summary judgment. *Illig v. Union Elec. Co.,* 652 F.3d 971, 976 (8th Cir. 2011) (quoting *Mills v. City of Grand Forks,* 614 F.3d 495,498 (8th Cir. 2010)). Plaintiffs Complaint repeatedly references his payment history and premiums due under the Policy, and thus the Court can consider the annual statements of account - detailing the premiums paid and account values over time - when deciding Brighthouse's motion to dismiss. *(See* Compl. ¶¶ 7, 19, 25, 30, 32, 34-35, 38-40.) Although this Court may consider the documents attached to the Declaration of Susan Roussey, granting Defendant's Motion is not dependent upon them.

RATE CLASS: MALE, STANDARD, NONSMOKER

THE RATES USED FOR THE COST OF INSURANCE DEDUCTION ARE GUARANTEED NOT TO EXCEED THE MAXIMUM RATES SHOWN ABOVE. THE RATES ARE BASED ON THE 1980 COMMISSIONERS STANDARD ORDINARY MORTALITY TABLE. THE COST INSURANCE IS DEDUCTED ON THE MONTHLY DEDUCTION DAY.

(Id at 3(COI).) The actuarial tables project that an individual's likelihood of dying in any given year increases as that individual ages. *(Id.* (stating the maximum rates are based on the 1980 Commissioners Standard Ordinary Mortality Table); *see also id* at 6 ("The maximum guaranteed cost of insurance rates ... are based on the Insured's age, sex and rate class[.]").) Plaintiffs annual statements confirm that the cost of insurance under the Policy increased each year. *(See* Roussey Decl. Exs. B, C, F, G.) Following the expiration of the Death Benefit Guarantee Rider in 2015, Plaintiff began making larger premium payments to cover the rising cost of insurance. *(See id.)*

The Policy provides an $800,000 death benefit payable upon the death of the insured, Robert Graff. (Compl. ¶7; *see also* Policy at 3(A).) Plaintiff elected the "Level Death Benefit Option" when executing the Policy, which is a fixed benefit equal to the greater of the stated amount ($800,000) or a multiple of the Policy's Accumulation Value at the time of the insured's death.[4] (Policy at 3(A), 5.)

[4] The multiple begins at 250% of the Accumulation Value before

The Policy has a maturity date of November 28, 2026, when Robert Graff will be 100 years old. (Compl. ¶¶ 14, 15.) Per the Policy's "Coverage Extension Rider," if the Policy is still active and paid up on the maturity date it will continue until the death of the insured with no further premium payments required. (Policy, Coverage Extension Rider; Compl. ¶¶ 16, 25 (recognizing that should the insured live to the age of 100 Plaintiff will receive the $800,000 death benefit).) Should Plaintiff wish to surrender the Policy before the maturity date, he will receive the Cash Value of the Policy (i.e., the Accumulation Value minus any outstanding debt).[5] (Policy 4, 7.)

II. Approval of the Policy by the Minnesota Commissioner of Commerce.

Pursuant to Minnesota law, Brighthouse's predecessor-in-interest was required to file a generic form of the Policy and its proposed rates with the Minnesota Commissioner of Commerce (the "Commissioner") for review and approval before it could be issued to Minnesota consumers. *See* Minn. Stat. §§ 70A.06 (filing requirement for insurance rates), 72C.10 (filing requirement for policy readability). Brighthouse's predecessor filed the…

* * *

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slowly reducing to 100% between the ages of 40 and 95. (Policy 3(A).) Since Robert Graff is currently 96 years old, calculating the Policy's Level Death Benefit Option is simplified: upon the insured's death, Plaintiff will receive the greater of the Policy's Accumulation Value or $800,000. *(Id.* at (3(A), 5.)

[5] The Policy included a "Surrender Charge" if Plaintiff surrendered the Policy within 15 years of issue. *(See* Policy 3(B).) That charge no longer applies.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Daniel Graff,

Plaintiff

Case No. 23-cv-01112-KMM-JFD

v.

Brighthouse Life Insurance Company,

Defendant.

DECLARATION OF CALVIN R. KUHLMAN

I, Calvin R. Kuhlman, declare under penalty of perjury and pursuant to 28 U.S.C. 1746, as follows:

1. I am the attorney for the Plaintiff, Daniel Graff in the above-referenced matter.

2. I submit this Declaration in connection with Plaintiffs Memorandum in Reply to Defendant Brighthouse Life Insurance Company's Motion to Dismiss.

3. Attached hereto and labeled as Exhibit A is a tn1e and correct copy of a letter sent via email and dated December 14, 2022 [with Policy attached thereto Redacted][1] that I directed to the Minnesota Department of Insurance.

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[1] Pursuant to Federal Rule of Civil Procedure 5.2, the policy number in the attached Exhibits has been redacted.

4. Attached hereto and labeled as Exhibit B is a true and correct copy of a letter sent via email and dated January 11, 2023 [with Policy attached thereto Redacted] that I directed to the Minnesota Department of Insurance.

5. In response to the letters sent to the Minnesota Department of Insurance under Exhibits A and B, I was advised in a telephone call that took place on or about January 13, 2023 with Kristi DeMarais, an employee in the Minnesota Department of Commerce, that copies of the documents requested in said letters were no longer maintained by the Department of Insurance.

6. Attached hereto and labeled as Exhibit C are true and correct copies of excerpts [Redacted] from the form policy attached as Exhibit A to the Declaration of Susan Roussey in support of Defendant's Motion to Dismiss.

7. The provisions in the form policy attached to the Declaration of Susan Roussey in support of Defendant's Motion to Dismiss which are at variance with the corresponding provisions in the Policy issued to the Plaintiff in 2004 are highlighted in yellow.

8. Attached hereto and labeled as Exhibit D are true and correct copies of excerpts [Redacted] from the Policy that correspond to those provisions in the fon11 appended to Exhibit C.

9. The provisions m the Policy which are at variance with the corresponding provisions in the form attached to the Declaration of Susan Roussey in support of Defendant's Motion to Dismiss are highlighted in yellow.

I declare under penalty of perjury that the foregoing is true and correct

Dated: May 21, 2023 s/
Calvin R. Kuhlman

EXHIBIT A

THE LAW FIRM OF CALVIN R. KUHLMAN
5200 WILLSON ROAD, SUITE 150
EDINA, MINNESOTA 55424
PHONE: (952) 836-2642
FAX: (952) 836-2730
ckuhlmanlaw@comcast.net

December 14, 2022

Sent via email only to
consumer.protection@state.mn.us

Minnesota Department of Insurance

RE: TRAVELERS LIFE AND ANNUITY
INSURANCE POLICY
INSURED: ROBERT D. GRAFF
OWNER: DANIEL M. GRAFF

To whom is may concern:

I am writing this letter on behalf of Daniel M. Graff ("Mr. Graff'). Mr. Graff is the Owner under the enclosed Adjustable Life Insurance Policy. The policy was issued to Mr. Graff in 2004. It is my understanding that since 2004 there were several changes in the identity of the insurer. To wit: MetLife Life and Annuity Company of Connecticut; MetLife Insurance Company of Connecticut; MetLife Insurance Company USA, and then to Brighthouse Life Insurance Company.

In any event, it is my understanding that as a condition to issuing an insurance policy in the State of Minnesota an insurance company is required to file a copy with the Minnesota Department of Insurance. The purpose of this letter is to ascertain if Travelers Life and Annuity made the requisite filing of the enclosed policy. If such a filing was accomplished, could you please provide me with a copy of that submission.

Thank you in advance for your timely response to this request.

If additional information if needed by your office, please advise me accordingly.

Yours truly,

s/_____
Calvin R. Kuhlman

c: Daniel Graff

EXHIBIT B

THE LAW FIRM OF CALVIN R. KUHLMAN
5200 WILLSON ROAD, SUITE 150
EDINA, MINNESOTA 55424
PHONE: (952) 836-2642
FAX: (952) 836-2730
ckuhlmanlaw@comcast.net

January 11, 2023

Sent via email only to
consumer.protection@state.mn.us

Minnesota Department of Insurance

RE: TRAVELERS LIFE AND ANNUITY
INSURANCE POLICY
INSURED: ROBERT D. GRAFF
OWNER: DANIEL M. GRAFF

To whom is may concern:

Under a letter dated December 14, 2022, a request was made as to whether an Adjustable Life Insurance Policy was filed with the Minnesota Department of Insurance, as required by law. A copy of the aforementioned letter, together with a copy of the subject policy is attached to this letter.

To date I have yet to receive a response to the request set forth in the letter of December 14, 2022. During the course of a phone call with a representative of the Minnesota Department of Insurance, I was led to believe that a response would be sent to me in a matter of weeks from the date of the request.

This is a matter of importance to my client, Danie] M. Graff; therefore, it would be appreciated if the request for information on the filing of the Adjustable Life Insurance Policy would be handled accordingly.

Yours truly,

s/
Calvin R. Kuhlman

c: Daniel Graff

CHAPTER 72C
READABILITY OF INSURANCE POLICIES

72C.01 CITATION.

Sections 72C.01 to 72C.13 may be cited as the "Readability of Insurance Policies Act."

History: *1977 c 345 s 1*

72C.02 PURPOSE.

The purpose of sections 72C.01 to 72C.13 is to provide that insurance policies and contracts be

readable and understandable to a person of average intelligence, experience, and education. All insurers shall be required by sections 72C.01 to 72C.13 to use policy and contract forms which are written in simple and commonly used language, which are logically and clearly arranged, which are printed in a legible format, and which are generally understandable. It is not the intent of sections 72C.01 to 72C.13 to mandate, require or allow alteration of the legal effect of any provision of any insurance policy or contract.

History: *1977 c 345 s 2*

72C.03 SCOPE.

Except as otherwise specifically provided, sections 72C.01 to 72C.13 shall apply to all policies or contracts of direct insurance, issued by persons authorized at any time to transact insurance in this state and including nonprofit health service plan corporations under chapter 62C, health maintenance organizations under chapter 62D, and fraternal benefit societies under chapter 64B. Sections 72C.01 to 72C.13 shall not apply to insurance as described in the master contract for any policy of group insurance when the group consists of ten or more persons. Sections 72C.01 to 72C.13 shall not apply to policies or contracts issued prior to July 1, 1980, under which there is no unilateral right of the insurer to cancel, nonrenew, amend or change in any way, unless the policy or contract is amended or changed by mutual agreement of the parties. Sections 72C.01 to 72C.13 shall not apply to an insurance policy or contract which is a security subject to federal jurisdiction, nor shall they apply to a new policy or contract written in language other than English.

History: *1977 c 345 s 3; 1980 c 353 s 1; 1985 c 49 s 41; 1992 c 564 art 1 s 54; 1995 c 186 s 18; 1996c 305 art 1 s 25*

72C.04 DEFINITIONS.

Subdivision 1. **Scope.** For purposes of sections 72C.01 to 72C.13, the following terms shall have the meanings given them.

Subd. 2. **Commissioner.** "Commissioner" means the commissioner of commerce or a designated agent.

Subd. 3. **Flesch scale analysis readability score.** "Flesch scale analysis readability score" means a measurement of the ease of readability of a policy or contract made pursuant to the procedures prescribed in section 72C.09.

Subd. 4. **Insurance policy or contract; policy.** "Insurance policy or contract" or "policy" means any written agreement within the scope of sections 72C.01 to 72C.13 whereby one person, for consideration, undertakes to indemnify another person or persons to a specified amount against loss or damages from specified causes, or to do some act of value to the insured in case of specified loss or damage. The agreements specifically include a nonprofit health service plan subscriber contract under chapter 62C, a health maintenance contract under chapter 62D, and a membership certificate in a fraternal benefit society under chapter 64B.

Subd. 5. **Insurer.** "Insurer" means every person entering insurance policies or contracts as a principal.

Subd. 6. **Legible type.** "Legible type" means a type face at least as large as ten-point modem type,

one point leaded.

Subd. 7. **Person.** "Person" means any individual, corporation, partnership, association, business trust or voluntary organization.

History: *1977 c 345 s 4; 1983 c 289 s 114 subd 1; 1984 c 655 art 1 s 92; 1985 c 49 s 41; 1986 c 444; 1992 c 564 art 1 s 54; 1995 c 186 s 19*

72C.05 COVER SHEET.

Subdivision 1. **Requirement.** All insurance policies or contracts described in section 72C.11, clauses (a) and (b) issued, amended or renewed after July 1, 1978 and before the filing requirements of section 72C.10 take effect shall contain as the first page or first page of text, if it is preceded by a title page or pages, a cover sheet or sheets as provided in this section.

Subd. 2. **Form and content.** The cover sheet or sheets shall be printed in legible type and readable language, as provided in section 72C.06, and shall contain at least the following:

(a) A brief statement that the policy is a legal contract between the policy owner and the company;

(b) The statement "READ YOUR POLICY CAREFULLY. This cover sheet provides only a brief outline of some of the important features of your policy. This is not the insurance contract and only the actual policy provisions will control. The policy itself sets forth, in detail, the rights and obligations of both you and your insurance company. IT IS THEREFORE IMPORTANT THAT YOU READ YOUR POLICY CAREFULLY."; and

(c) An index of the major provisions of the policy or contract and the pages on which they are found which may include the following items:

(1) the person or persons insured by the policy;

(2) the applicable events, occurrences, conditions, losses or damages covered by the policy;

(3) the limitations or conditions on the coverage of the policy;

(4) definitional sections of the policy;

(5) provisions governing the procedure for filing a claim under the policy;

(6) provisions governing cancellation, renewal, or amendment of the policy by either the insurer or the policy owner;

(7) any options under the policy; and

(8) provisions governing the insurer's duties and powers in the event that suit is filed against the insured.

Subd. 3. **Coverage summary.** The cover sheet may include, either as part of the index or as a separate section, a brief summary of the extent and types of coverage in the policy.

Subd. 4. **Filing and approval.** No cover sheet shall be used unless it has been filed with and approved by the commissioner. The cover sheet shall be deemed approved 30 days after filing unless disapproved by the commissioner within the 30-day period, subject to a reasonable extension of time as the commissioner may require by notice given within the

30-day period. The commissioner shall disapprove any cover sheet which does not meet the requirements of this section. Any disapproval shall be delivered to the insurer in writing, stating the grounds therefor.

Subd. 5. **Alternative compliance.** In lieu of the cover sheet required by this section, the insurer may file a policy or contract with the commissioner under the provisions of sections 72C.06 to 72C.08.

History: *1977 c 345 s 5*

72C.06 READABILITY.

Subdivision 1. **Requirement.** All insurance policies filed with the commissioner pursuant to section 72C.11 shall be written in language easily readable and understandable by a person of average intelligence and education.

Subd. 2. **Compliance factors.** In determining whether a policy or contract is readable within the meaning of this section the commissioner shall consider, at least, the following factors:

(a) the simplicity of the sentence structure and the shortness of the sentences used;

(b) the extent to which commonly used and understood words are employed;

(c) the extent to which legal terms are avoided;

(d) the extent to which references to other sections or provisions of the contract are minimized;

(e) the extent to which definitional provisions are incorporated in the text of the policy or contract; and

(f) any additional factors relevant to the

readability or understandability of an insurance policy or contract which the commissioner may prescribe by rule.

History: *1977 c 345 s 6*

72C.07 LEGIBILITY.

Subdivision 1. **Requirement.** All insurance policies covered by section 72C.11 shall be printed in legible type and in a type face style approved by the commissioner.

Subd. 2. **Compliance factors.** In determining whether a policy or contract is legible the commissioner shall consider, in addition to the requirements of subdivision 1 relating to type face size and style, the following factors:

(a) margin size;

(b) contrast and legibility of the color of the ink and paper;

(c) the amount and use of space to separate sections of the policy;

(d) the use of contrasting titles or headings for sections or similar aids; and

(e) any additional factors relevant to legibility which the commissioner may prescribe by rule.

History: *1977 c 345 s* 7; *1986 c 444; 1996 c 305 art 2 s 8*

72C.08 FORMAT REQUIREMENTS.

Subdivision 1. **Requirement.** All insurance policies and contracts covered by section 72C.11 shall

be written in a logical, clear, and understandable order and form and shall contain at least the following items:

(a) on the cover or first or an insert page of the policy a statement that the policy is a legal contract between the policy owner and the company and the statement, printed in larger or other contrasting type or color, "Read your policy carefully";

(b) an index of the major provisions of the policy or contract, which may include the following items:

(1) the person or persons insured by the policy;

(2) the applicable events, occurrences, conditions, losses or damages covered by the policy;

(3) the limitations or conditions on the coverage of the policy;

(4) definitional sections of the policy;

(5) provisions governing the procedure for filing a claim under the policy;

(6) provisions governing cancellation, renewal, or amendment of the policy by either the insurer or the policy owner;

(7) any options under the policy; and

(8) provisions governing the insurer's duties and powers in the event that suit is filed against the insured.

Subd. 2. Compliance factors. In determining whether a policy or contract is written in a logical, clear, and understandable order and form the commissioner shall consider the following factors:

(a) the extent to which each provision for coverage is stated separately in a self-contained section, including the conditions relating to or limiting that section's effect;

(b) the extent to which sections or provisions are set off and clearly identified by titles, headings, or margin notations;

(c) the use of a more easily understandable format such as narrative or outline forms; and

(d) any additional factors relevant to a logical, clear, and understandable format which the commissioner may prescribe by rule.

History: *1977 c 345 s 8*

72C.09 FLESCH SCALE ANALYSIS READABILITY SCORE, PROCEDURES.

A Flesch scale analysis readability score shall be measured as provided in this section.

(1) For contracts containing 10,000 words or less of text, the entire contract shall be analyzed. For contracts containing more than 10,000 words the readability of two 200 word samples per page may be analyzed in lieu of the entire contract. The samples shall be separated by at least 20 printed lines. For purposes of this clause a word shall be counted as five printed characters or spaces between characters.

(2)(a)(i) The number of words and sentences in the text shall be counted and the total number of words divided by the total number of sentences. The figure obtained shall be multiplied by a factor of 1.015.

(ii) The total number of syllables shall be counted

and divided by the total number of words. The figure obtained shall be multiplied by a factor of 84.6.

(iii) The sum of the figures computed under (i) and (ii) subtracted from 206.835 equals the Flesch scale analysis readability score for the policy or contract.

(b) For purposes of clause (a) the following procedures shall be used:

(i) A contraction, hyphenated word, or numbers and letters, when separated by spaces, shall be counted as one word;

(ii) A unit of words ending with a period, semicolon or colon, but excluding headings, captions, and lists, shall be counted as a sentence; and

(iii) A syllable means a unit of spoken language consisting of one or more letters of a word as divided by an accepted dictionary. Where the dictionary shows two or more equally acceptable pronunciations of a word, the pronunciation containing fewer syllables may be used.

History: *1977 c 345 s 9; 1980 c 353 s 2*

72C.10 FILING REQUIREMENTS; DUTIES OF COMMISSIONER.

Subdivision 1. **Readability compliance; filing amt approval.** No insurer shall make, issue, amend, or renew any policy or contract after the dates specified in section 72C.11 for the applicable type of policy unless the contract is in compliance with the requirements of sections 72C.06 to 72C.09 and unless the contract is filed with the commissioner for

approval. The contract shall be deemed approved 60 days after filing unless disapproved by the commissioner within the 60-day period. When an insurer, service plan corporation, or the Minnesota Comprehensive Health Association fails to respond to an objection or inquiry within 60 days, the filing is automatically disapproved. A resubmission is required if action by the Department of Commerce is subsequently requested. An additional filing fee is required for the resubmission. The commissioner shall not unreasonably withhold approval. Any disapproval shall be delivered to the insurer in writing, stating the grounds therefor. Any policy filed with the commissioner shall be accompanied by a Flesch scale readability analysis and test score and by the insurer's certification that the policy or contract is in its judgment readable based on the factors specified in sections 72C.06 to 72C.08.

Subd. 2. **Contract or policy disapproval.** The commissioner shall disapprove any contract or policy covered by subdivision 1 if the commissioner finds that:

(a) it is not accompanied by a certified Flesch scale analysis readability score of more than 40;

(b) it is not accompanied by the insurer's certification that the policy or contract is in its judgment readable under the standards of sections 72C.01 to 72C.13;

(c) it does not comply with the readability standards established by section 72C.06;

(d) it does not comply with the legibility standards established by section 72C.07; or

(e) it does not comply with the format requirements established by section 72C.08.

History: *1977 c 345* s *10; 1986 c 444; 2006 c 255 s 61*

72C.11 APPLICATION OF FILING REQUIREMENTS; DUTIES OF COMMISSIONER.

Subdivision 1. **Policies and dates specified.** The filing requirements of section 72C.10 shall apply as follows:

(a) To all policies of private passenger vehicle insurance, as described in chapter 65B, and to all policies of homeowner's insurance as defined in the general custom and usage of the business or by a ruling of the commissioner or a court, which are made, issued, amended or renewed after July 1, 1979;

(b) To all policies of life insurance as defined in section 60A.06, subdivision 1, clause (4), to all certificates of a fraternal benefit society, as defined in section 64B.19, to all policies of accident and health insurance, as defined in section 60A.06, subdivision 1, clause (5), paragraph (a), to all subscriber contracts of nonprofit health service corporations as defined in section 62C.02, and to all health maintenance contracts as defined in section 620.02, which are made, issued, amended or renewed after July 1, 1980; the commissioner may grant delays of not more than one year in full or partial compliance of accident and health policies; and

(c) To all policies of any additional line or type of insurance within the scope of sections 72C.01 to

72C.13, as provided by any rule promulgated by the commissioner not later than July 1, 1981.

Subd. 2. **Commissioner's reports.** The commissioner shall make the following reports to the legislature:

(a) On or before February 1, 1979 a report detailing and evaluating the efforts made by the commissioner and insurers to implement the provisions of subdivision 1. clause (a). and particularly examining the feasibility and practicality of requiring accident and health and life insurance policies to comply with sections 72C.01 to 72C. 13 and in the time prescribed;

(b) On or before February 1, 1980 a report detailing and evaluating (1) the operation of and the extent of compliance with sections 72C.01 to 72C.13, (2) the efforts made by the commissioner and insurers to implement the provisions of subdivision 1, clause (b), and (3) the commissioner's intent regarding the extension of the application of sections 72C.01 to 72C.13 to other lines and types of insurance under subdivision 1, clause (c), and the reasons therefor.

History: *1977 c 345* s *11; 1980 c 353* s *3; 1Spl981 c 4 art J s 61; 1985 c 49* s *41; 1986 c 444*

72C.12 COMMISSIONER'S POWERS AND DUTIES.

In addition to the duties and powers enumerated elsewhere in sections 72C.01 to 72C.13 the commissioner shall have the power to promulgate rules consistent with sections 72C.01 to 72C.13 to effectuate its purpose.

History: *1977 c 345* s *12*

72C.13 CONSTRUCTION.

Subdivision 1. **Other insurance law.** Sections 72C.01 to 72C.13 shall not operate to relieve any insurer from any provision of law regulating the contents or provisions of insurance policies, except to the extent that the provisions prescribe the use of specific language which is inconsistent with sections 72C.01 to 72C.13.

Subd. 2. **Standard fire policy and standard provisions in accident and sickness policy; effect of authorized alterations.** No alteration in the language of the Minnesota standard fire insurance policy under section 65A.01 or the standard provisions of health insurance policies wider section 62A.04, as authorized by sections 72C.01 to 72C.13, shall be construed to limit or reduce an insured's or beneficiary's rights granted under those statutory provisions.

History: *1977 c 345 s 13*

CONSTITUTION OF THE STATE OF MINNESOTA

Adopted October 13, 1857

Generally Revised November 5, 1974

Preamble

We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution.

ARTICLE I
BILL OF RIGHTS

Section 1. **Object of government.** Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

Sec. 2. **Rights and privileges.** No member of this

state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Sec. 3. **Liberty of the press.** The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

Sec. 4. **Trial by jury.** The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict. The legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members.

[Amended, November 8, 1988]

Sec. 5. **No excessive bail or unusual punishments.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Sec. 6. **Rights of accused in criminal prosecutions.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes

defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.

[Amended, November 8, 1988]

Sec. 7. **Due process; prosecutions; double jeopardy; self-incrimination; bail; habeas corpus.** No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended unless the public safety requires it in case of rebellion or invasion.

Sec. 8. **Redress of injuries or wrongs.** Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Sec. 9. **Treason defined.** Treason against the state consists only in levying war against the state, or

in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

Sec. 10. **Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Sec. 11. **Attainders, ex post facto laws and laws impairing contracts prohibited.** No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

Sec. 12. **Imprisonment for debt; property exemption.** No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

Sec. 13. **Private property for public use.** Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

Sec. 14. **Military power subordinate.** The military shall be subordinate to the civil power and no standing army shall be maintained in this state in times of peace.

Sec. 15. **Lands allodial; void agricultural leases.** All lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited. Leases and grants of agricultural lands for a longer period than 21 years reserving rent or service of any kind shall be void.

Sec. 16. **Freedom of conscience; no preference to be given to any religious establishment or mode of worship.** The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Sec. 17. **Religious tests and property**

qualifications prohibited. No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.

ARTICLE II
NAME AND BOUNDARIES

Section 1. **Name and boundaries; acceptance of organic act.** This state shall be called the state of Minnesota and shall consist of and have jurisdiction over the territory embraced in the act of Congress entitled, "An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on equal footing with the original states," and the propositions contained in that act are hereby accepted, ratified and confirmed, and remain irrevocable without the consent of the United States.

Sec. 2. **Jurisdiction on boundary waters.** The state of Minnesota has concurrent jurisdiction on the Mississippi and on all other rivers and waters forming a common boundary with any other state or states. Navigable waters leading into the same, shall be common highways and forever free to citizens of the United States without any tax, duty, impost or toll therefor.

ARTICLE III
DISTRIBUTION OF THE POWERS OF GOVERNMENT

Section 1. **Division of powers.** The powers of

government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

ARTICLE IV
LEGISLATIVE DEPARTMENT

Section 1. **Composition of legislature.** The legislature consists of the senate and house of representatives.

Sec. 2. **Apportionment of members.** The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

Sec. 3. **Census enumeration apportionment; congressional and legislative district boundaries; senate districts.** At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

Sec. 4. **Terms of office of senators and representatives; vacancies.** Representatives shall be chosen for a term of two years, except to fill a vacancy. Senators shall be chosen for a term of four years, except to fill a vacancy and except there shall

be an entire new election of all the senators at the first election of representatives after each new legislative apportionment provided for in this article. The governor shall call elections to fill vacancies in either house of the legislature.

Sec. 5. **Restriction on holding office.** No senator or representative shall hold any other office under the authority of the United States or the state of Minnesota, except that of postmaster or of notary public. If elected or appointed to another office, a legislator may resign from the legislature by tendering his resignation to the governor.

Sec. 6. **Qualification of legislators; judging election returns and eligibility.** Senators and representatives shall be qualified voters of the state, and shall have resided one year in the state and six months immediately preceding the election in the district from which elected. Each house shall be the judge of the election returns and eligibility of its own members. The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house.

Sec. 7. **Rules of government.** Each house may determine the rules of its proceedings, sit upon its own adjournment, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member; but no member shall be expelled a second time for the same offense.

Sec. 8. **Oath of office.** Each member and officer of the legislature before entering upon his duties shall take an oath or affirmation to support the Constitution of the United States, the constitution of this state, and to discharge faithfully the duties of his office to the best of his judgment and ability.

Sec. 9. **Compensation.** The salary of senators and representatives shall be prescribed by a council consisting of the following members: one person who is not a judge from each congressional district appointed by the chief justice of the Supreme Court, and one member from each congressional district appointed by the governor. If Minnesota has an odd number of congressional districts, the governor and the chief justice must each appoint an at-large member in addition to a member from each congressional district. One-half of the members appointed by the governor and one-half of the members appointed by the chief justice must belong to the political party that has the most members in the legislature. One-half of the members appointed by the governor and one-half of the members appointed by the chief justice must belong to the political party that has the second-most members in the legislature. None of the members of the council may be current or former legislators, or the spouse of a current legislator. None of the members of the council may be current or former lobbyists registered under Minnesota law. None of the members of the council may be a current employee of the legislature. None of the members of the council may be a current or former judge. None of the members of the council may be a current or former governor, lieutenant governor, attorney general, secretary of state, or state auditor. None of the members of the council may be a current employee of an entity in the executive or judicial branch. Membership terms, removal, and compensation of members shall be as provided by law. The council must prescribe salaries by March 31 of each odd-numbered year, taking into account any other legislative compensation provided to legislators by the state of Minnesota, with any changes in salary to take

effect on July 1 of that year. Any salary increase for legislators authorized in law by the legislature after January 5, 2015, is repealed.

[Amended, November 8, 20 I6J

Sec. 10. **Privilege from arrest.** The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place.

Sec. 11. **Protest and dissent of members.** Two or more members of either house may dissent and protest against any act or resolution which they think injurious to the public or to any individual and have the reason of their dissent entered in the journal.

Sec. 12. **Biennial meetings; length of session; special sessions; length of adjournments.** The legislature shall meet at the seat of government in regular session in each biennium at the times prescribed by law for not exceeding a total of 120 legislative days. The legislature shall not meet in regular session, nor in any adjournment thereof, after the first Monday following the third Saturday in May of any year. After meeting at a time prescribed by law, the legislature may adjourn to another time. "Legislative day" shall be defined by law. A special session of the legislature may be called by the governor on extraordinary occasions.

Neither house during a session of the legislature shall adjourn for more than three days (Sundays excepted) nor to any other place than that in which the two houses shall be assembled without the consent of the other house.

Sec. 13. **Quorum.** A majority of each house constitutes a quorum to transact business, but a smaller number may adjourn from day to day and compel the attendance of absent members in the manner and under the penalties it may provide.

Sec. 14. **Open sessions.** Each house shall be open to the public during its sessions except in cases which in its opinion require secrecy.

Sec. 15. **Officers; journals.** Each house shall elect its presiding officer and other officers as may be provided by law. Both houses shall keep journals of their proceedings, and from time to time publish the same, and the yeas and nays, when taken on any question, shall be entered in the journals.

Sec. 16. **Elections viva voce.** In all elections by the legislature members shall vote viva voce and their votes shall be entered in the journal.

Sec. 17. **Laws to embrace only one subject.** No law shall embrace more than one subject, which shall be expressed in its title.

Sec. 18. **Revenue bills to originate in house.** All bills for raising revenue shall originate in the house of representatives, but the senate may propose and concur with the amendments as on other bills.

Sec. 19. **Reporting of bills.** Every bill shall be reported on three different days in each house, unless, in case of urgency, two-thirds of the house where the bill is pending deem it expedient to dispense with this rule.

Sec. 20. **Enrollment of bills.** Every bill passed by both houses shall be enrolled and signed by the presiding officer of each house. Any presiding officer refusing to sign a bill passed by both houses shall

thereafter be disqualified from any office of honor or profit in the state. Each house by rule shall provide the manner in which a bill shall be certified for presentation to the governor in case of such refusal.

Sec. 21. **Passage of bills on last day of session prohibited.** No bill shall be passed by either house upon the day prescribed for adjournment. This section shall not preclude the enrollment of a bill or its transmittal from one house to the other or to the executive for his signature.

Sec. 22. **Majority vote of all members to pass a law.** The style of all laws of this state shall be: "Be it enacted by the legislature of the state of Minnesota." No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature, and the vote entered in the journal of each house.

Sec. 23. **Approval of bills by governor; action on veto.** Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor. If he approves a bill, he shall sign it, deposit it in the office of the secretary of state and notify the house in which it originated of that fact. If he vetoes a bill, he shall return it with his objections to the house in which it originated. His objections shall be entered in the journal. If, after reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the governor's objections, to the other house, which shall likewise reconsider it. If approved by two-thirds of that house it becomes a law and shall be deposited in the office of the secretary of state. In such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered in the journal of

each house. Any bill not returned by the governor within three days (Sundays excepted) after it is presented to him becomes a law as if he had signed it, unless the legislature by adjournment within that time prevents its return. Any bill passed during the last three days of a session may be presented to the governor during the three days following the day of final adjournment and becomes law if the governor signs and deposits it in the office of the secretary of state within 14 days after the adjournment of the legislature. Any bill passed during the last three days of the session which is not signed and deposited within 14 days after adjournment does not become a law.

If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the bill the governor shall append to it a statement of the items he vetoes and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to the house in which the bill originated a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law notwithstanding the objections of the governor.

Sec. 24. **Presentation of orders, resolutions, and votes to governor.** Each order, resolution or vote requiring the concurrence of the two houses except such as relate to the business or adjournment of the legislature shall be presented to the governor and is subject to his veto as prescribed in case of a bill.

Sec. 25. **Disorderly conduct.** During a session each house may punish by imprisonment for not more than 24 hours any person not a member who is guilty of any disorderly or contemptuous behavior in its

presence.

Sec. 26. **Banking laws; two-thirds votes.** Passage of a general banking law requires the vote of two-thirds of the members of each house of the legislature.

ARTICLE V

EXECUTIVE DEPARTMENT

Section 1. **Executive officers.** The executive department consists of a governor, lieutenant governor, secretary of state, auditor, and attorney general, who shall be chosen by the electors of the state. The governor and lieutenant governor shall be chosen jointly by a single vote applying to both offices in a manner prescribed by law.

[Amended, November 3, 1998)

Sec. 2. **Term of governor and lieutenant governor; qualifications.** The term of office for the governor and lieutenant governor is four years and until a successor is chosen and qualified. Each shall have attained the age of 25 years and, shall have been a bona fide resident of the state for one year next preceding his election, and shall be a citizen of the United States.

Sec. 3. **Powers and duties of governor.** The governor shall communicate by message to each session of the legislature information touching the state and country. He is commander-in-chief of the military and naval forces and may call them out to execute the laws, suppress insurrection and repel invasion. He may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to his duties. With the advice and consent of the senate he may appoint

notaries public and other officers provided by law. He may appoint commissioners to take the acknowledgment of deeds or other instruments in writing to be used in the state. He shall take care that the laws be faithfully executed. He shall fill any vacancy that may occur in the offices of secretary of state, auditor, attorney general and the other state and district offices hereafter created by law until the end of the term for which the person who had vacated the office was elected or the first Monday in January following the next general election, whichever is sooner, and until a successor is chosen and qualified.

[Amended, November 3, 1998]

Sec. 4. **Terms and salaries of executive officers.** The term of office of the secretary of state, attorney general and state auditor is four years and until a successor is chosen and qualified. The duties and salaries of the executive officers shall be prescribed by law.

[Amended, November 3, 1998]

Sec. 5. **Succession to offices of governor and lieutenant governor.** In case a vacancy occurs from any cause whatever in the office of governor, the lieutenant governor shall be governor during such vacancy. The compensation of the lieutenant governor shall be prescribed by law. The last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office. In case the governor is unable to discharge the powers and duties of his office, the same devolves on the lieutenant governor. The legislature may provide by law for the case of the removal, death, resignation, or inability both of the governor and lieutenant governor to discharge the duties of governor and may provide by

law for continuity of government in periods of emergency resulting from disasters caused by enemy attack in this state, including but not limited to, succession to the powers and duties of public office and change of the seat of government.

Sec. 6. **Oath of office of state officers.** Each officer created by this article before entering upon his duties shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability.

Sec. 7. **Board of pardons.** The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons. Its powers and duties shall be defined and regulated by law. The governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment.

ARTICLE VI
JUDICIARY

Section 1. **Judicial power.** The judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.

[Amended, November 2, 1982]

Sec. 2. **Supreme court.** The supreme court consists of one chief judge and not less than six nor more than eight associate judges as the legislature may establish. It shall have original jurisdiction in such remedial cases as are prescribed by law, and

appellate jurisdiction in all cases, but there shall be no trial by jury in the supreme court.

The legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdiction as prescribed by law.

As provided by law judges of the court of appeals or of the district court may be assigned temporarily to act as judges of the supreme court upon its request and judges of the district court may be assigned temporarily by the supreme court to act as judges of the court of appeals.

The supreme court shall appoint to serve at its pleasure a clerk, a reporter, a state law librarian and other necessary employees.

[Amended, November 2, 1982]

Sec. 3. **Jurisdiction of district court.** The district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law.

Sec. 4. **Judicial districts; district judges.** The number and boundaries of judicial districts shall be established in the manner provided by law but the office of a district judge shall not be abolished during his term. There shall be two or more district judges in each district. Each judge of the district court in any district shall be a resident of that district at the time of his selection and during his continuance in office.

Sec. 5. **Qualifications; compensation.** Judges of

the supreme court, the court of appeals and the district court shall be learned in the law. The qualifications of all other judges and judicial officers shall be prescribed by law. The compensation of all judges shall be prescribed by the legislature and shall not be diminished during their term of office.

[Amended, November 2, 1982]

Sec. 6. **Holding other office.** A judge of the supreme court, the court of appeals or the district court shall not hold any office under the United States except a commission in a reserve component of the military forces of the United States and shall not hold any other office under this state. His term of office shall terminate at the time he files as a candidate for an elective office of the United States or for a nonjudicial office of this state.

[Amended, November 2, 1982]

Sec. 7. **Term of office; election.** The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.

Sec. 8. **Vacancy.** Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.

Sec. 9. **Retirement, removal and discipline.** The legislature may provide by law for retirement of all judges and for the extension of the term of any judge who becomes eligible for retirement within

three years after expiration of the term for which he is selected. The legislature may also provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice.

Sec. 10. **Retired judges.** As provided by law a retired judge may be assigned to hear and decide any cause over which the court to which he is assigned has jurisdiction.

Sec. 11. **Probate jurisdiction.** Original jurisdiction in law and equity for the administration of the estates of deceased persons and all guardianship and incompetency proceedings, including jurisdiction over the administration of trust estates and for the determination of taxes contingent upon death, shall be provided by law.

Sec. 12. **Abolition of probate court; status of judges.** If the probate court is abolished by law, judges of that court who are learned in the law shall become judges of the court that assumes jurisdiction of matters described in section 11.

Sec. 13. **District court clerks.** There shall be in each county one clerk of the district court whose qualifications, duties and compensation shall be prescribed by law. He shall serve at the pleasure of a majority of the judges of the district court in each district.

45.027 INVESTIGATIONS AND SUBPOENAS.

Subdivision 1. **General powers.** In connection with the duties and responsibilities entrusted to the commissioner, and Laws 1993, chapter 361, section 2, the commissioner of commerce may:

(1) make public or private investigations within or without this state as the commissioner considers necessary to determine whether any person has violated or is about to violate any law, rule, or order related to the duties and responsibilities entrusted to the commissioner;

(2) require or permit any person to file a statement in writing, under oath or otherwise as the commissioner determines, as to all the facts and circumstances concerning the matter being investigated;

(3) hold hearings, upon reasonable notice, in respect to any matter arising out of the duties and responsibilities entrusted to the commissioner;

(4) conduct investigations and hold hearings for the purpose of compiling information related to the duties and responsibilities entrusted to the commissioner;

(5) examine the books, accounts, records, and files of every licensee, and of every person who is engaged in any activity regulated; the commissioner or a designated representative shall have free access during normal business hours to the offices and places of business of the person, and to all books, accounts, papers, records, files, safes, and vaults maintained in the place of business;

(6) publish information which is contained in any order issued by the commissioner;

(7) require any person subject to duties and responsibilities entrusted to the commissioner, to report all sales or transactions that are regulated. The reports must be made within ten days after the commissioner has ordered the report. The report is accessible only to the respondent and other governmental agencies unless otherwise ordered by a court of competent jurisdiction; and

(8) assess a natural person or entity subject to the jurisdiction of the commissioner the necessa1y expenses of the investigation performed by the department when an investigation is made by order of the commissioner. The cost of the investigation shall be determined by the commissioner and is based on the salary cost of investigators or assistants and at an average rate per day or fraction thereof so as to provide for the total cost of the investigation. All money collected must be deposited into the general fund. A natural person or entity licensed under chapter 60K, 82, or 82B shall not be charged costs of an investigation if the investigation results in no finding of a violation. This clause does not apply to a natural person or entity already subject to the assessment provisions of sections 60A.03 and 60A.031.

Subd. la. **Response to department requests.** An applicant, registrant, certificate holder, licensee, or other person subject to the jurisdiction of the commissioner shall comply with requests for information, documents, or other requests from the department within the time specified in the request, or, if no time is specified, within 30 days of the mailing of the request by the department. Applicants,

registrants, certificate holders, licensees, or other persons subject to the jurisdiction of the commissioner shall appear before the commissioner or the commissioner's representative when requested to do so and shall bring all documents or materials that the commissioner or the commissioner's representative has requested.

Subd. 2. **Power to compel production of evidence.** For the purpose of any investigation, hearing, proceeding, or inquiry related to the duties and responsibilities entrusted to the commissioner, the commissioner or a designated representative may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records that the commissioner considers relevant or material to the inquiry.

A subpoena issued pursuant to this subdivision must state that the person to whom the subpoena is directed may not disclose the fact that the subpoena was issued or the fact that the requested records have been given to law enforcement personnel except:

(1) insofar as the disclosure is necessary to find and disclose the records; or

(2) pursuant to court order.

Subd. 3. **Court orders.** In case of a refusal to appear or a refusal to obey a subpoena issued to any person, the district court, upon application by the commissioner, may issue to any person an order directing that person to appear before the commissioner, or the officer designated by the commissioner, there to produce documentary evidence if so ordered or to give evidence relating to the matter

under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

Subd. 4. **Scope of privilege.** No person is excused from attending and testifying or from producing any document or record before the commissioner, or from obedience to the subpoena of the commissioner or any officer designated by the commissioner or in a proceeding instituted by the commissioner, on the ground that the testimony or evidence required may tend to incriminate that person or subject that person to a penalty of forfeiture. No person may be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter, or thing concerning which the person is compelled, after claiming the privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

Subd. 5. **Legal actions; injunctions.** Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any law, rule, or order related to the duties and responsibilities entrusted to the commissioner, the commissioner may bring an action in the name of the state in Ramsey County District Court or the district court of an appropriate county to enjoin the acts or practices and to enforce compliance, or the commissioner may refer the matter to the attorney general or the county attorney of the appropriate county. A permanent injunction or other appropriate relief must be granted based solely upon a showing that the person has engaged or is about to engage in an act or practice constituting a violation of

a law, rule, cease and desist order, or other order related to the duties and responsibilities entrusted to the commissioner. The terms of this subdivision govern an action brought under this subdivision, including an action against a person who, for whatever reason, claims that the subject law, rule, cease and desist order or other order does not apply to the person.

Subd. 5a. **Cease and desist orders.** (a) Whenever it appears to the commissioner that a person has engaged or is about to engage in an act or practice constituting a violation of a law, rule, or order related to the duties and responsibilities entrusted to the commissioner, the commissioner may issue and cause to be served upon the person an order requiring the person to cease and desist from violations.

(b) The cease and desist order must be calculated to give reasonable notice of the rights of the person to request a hearing and must state the reasons for the entry of the order. A hearing must be held not later than ten days after the request for the hearing is received by the commissioner. After the completion of the hearing, the administrative law judge shall issue a report within ten days. Within 15 days after receiving the administrative law judge's report, the commissioner shall issue a further order vacating or making permanent the cease and desist order. The time periods provided in this provision may be waived by agreement of the person requesting the hearing and the Department of Commerce and the person against whom the cease and desist order is issued. If the person to whom a cease and desist order is issued fails to appear at the hearing after being duly notified, the person is in default, and the proceeding may be determined against that person upon consideration of

the cease and desist order, the allegations of which may be considered to be true. Unless otherwise provided, all hearings must be conducted according to chapter 14. The commissioner may adopt rules of procedure concerning all proceedings conducted under this subdivision.

(c) If no hearing is requested within 30 days of service of the order, the cease and desist order will become permanent.

(d) A cease and desist order issued under this subdivision remains in effect until it is modified or vacated by the commissioner. The administrative proceeding provided by this subdivision, and subsequent appellate judicial review of that administrative proceeding, constitutes the exclusive remedy for determining whether the commissioner properly issued the cease and desist order and whether the cease and desist order should be vacated or made permanent.

Subd. 5b. **Enforcement of violations of cease and desist orders.** (a) Whenever the commissioner under subdivision 5 seeks to enforce compliance with a cease and desist order that has been made permanent, the allegations in the cease and desist order are considered conclusively established for purposes of a proceeding under subdivision 5 for permanent or temporary relief to enforce the cease and desist order. Whenever the commissioner under subdivision 5 seeks to enforce compliance with a cease and desist order when a hearing or hearing request on the cease and desist order is pending, or the time has not yet expired to request a hearing on whether a cease and desist order should be vacated or made permanent, the allegations in the cease and desist order are considered conclusively established for

purposes of a proceeding under subdivision 5 for temporary relief to enforce the cease and desist order.

(b) Notwithstanding this subdivision or subdivision 5 or 5a to the contrary, the person against whom the cease and desist order is issued and who has requested a hearing under subdivision 5a may within 15 days after service of cease and desist order bring an action in Ramsey County District Court for issuance of an injunction to suspend enforcement of the cease and desist order pending a final decision of the commissioner under subdivision 5a to vacate or make permanent the cease and desist order. The court shall determine whether to issue such an injunction based on traditional principles of temporary relief.

Subd. 6. **Violations and penalties.** The commissioner may impose a civil penalty not to exceed $10,000 per violation upon a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner unless a different penalty is specified. If a civil penalty is imposed on a health carrier as defined in section 62A.011, the commissioner must divide 50 percent of the amount among any policyholders or certificate holders affected by the violation, unless the commissioner certifies in writing that the division and distribution to enrollees would be too administratively complex or that the number of enrollees affected by the penalty would result in a distribution of less than $50 per enrollee.

Subd. 7. **Actions against licensees.** (a) In addition to any other actions authorized by this section, the commissioner may, by order, deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the commissioner, as described under section 45.011,

subdivision 4, or censure that person if the commissioner finds that:

(1) the order is in the public interest; and

(2) the person has violated any law, rule, or order related to the duties and responsibilities entrusted to the commissioner; or

(3) the person has provided false, misleading, or incomplete information to the commissioner or has refused to allow a reasonable inspection of records or premises; or

(4) the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.

(b)(1) The commissioner shall issue an order requiring a licensee or applicant for a license to show cause why the license should not be revoked or suspended, or the licensee censured, or the application denied and provide the licensee or applicant an opportunity to request a hearing under the contested case provisions of chapter 14. The order must: (i) state the reasons that an order is being sought and whether a civil penalty is sought; and (ii) inform the licensee or applicant that unless the licensee or applicant requests a hearing on the matter within 30 days of receipt of the order, it becomes final by operation of law and that a final order will be issued under paragraph (a). If a hearing is requested by the licensee or applicant pursuant to item (ii): (A) the commissioner shall, within 15 days of receiving the request, set the date and time for the hearing and

notify the licensee or applicant of those facts; and (B) the commissioner may modify, vacate, or extend the order, until the commissioner issues a final order under paragraph (a).

(2) The commissioner may, by order, summarily suspend a license pending final determination of an order to show cause issued under clause (1). If a license is suspended pending final dete1mination of an order to show cause and the licensee requests a hearing on the matter within 30 days of receipt of the order to show cause, a hearing on the merits must be held within 30 days of receipt of the hearing request. The summary suspension or summary revocation procedure does not apply to action by the commissioner against the certificate of authority of an insurer authorized to do business in Minnesota.

(c) All hearings must be conducted according to chapter 14. After the hearing, the commissioner shall enter a final order disposing of the matter as the facts require. If the licensee or applicant fails to appear at a hearing after having been duly notified of it, the person is considered in default, and the proceeding may be determined against the licensee or applicant.

(d) If an order becomes final because a person subject to an order does not timely request a bearing as provided in paragraph (b) or if the petition for judicial review is not timely filed after a hearing and a final order is issued by the commissioner as provided in paragraph (a), the commissioner may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The final order so filed bas the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(e) If a person does not comply with a final order under this section, the commissioner may petition a court of competent jurisdiction to enforce the order. The court may not require the commissioner to post a bond in an action or proceeding under this section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount up to $10,000 for each violation and may grant any other relief the court determines is just and proper in the circumstances.

(f) Except for information classified as confidential under sections 60A.03, subdivision 9; 60A.031; 60A.93; and 60D.22, the commissioner may make any data otherwise classified as private or confidential pursuant to this section accessible to an appropriate person or agency if the commissioner determines that the access will aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest. If the commissioner determines that private or confidential information should be disclosed, the commissioner shall notify the attorney general as to the information to be disclosed, the purpose of the disclosure, and the need for the disclosure. The attorney general shall review the commissioner's determination. If the attorney general believes that the commissioner's determination does not satisfy the purpose and intent of this paragraph, the attorney general shall advise the commissioner in writing that the information may not be disclosed. If the attorney general believes the commissioner's determination satisfies the purpose and intent of this provision, the attorney general shall

advise the commissioner in writing, accordingly.

After disclosing information pursuant to this provision, the commissioner shall advise the chairs of the senate and house of representatives judiciary committees of the disclosure and the basis for it.

Subd. 7a. **Authorized disclosures of information and data.** (a) The commissioner may release and disclose any active or inactive investigative information and data to any national securities exchange or national securities association registered under the Securities Exchange Act of 1934 when necessary for the requesting agency in initiating, furthering, or completing an investigation.

(b) The commissioner may release any active or inactive investigative data relating to the conduct of the business of insurance to the Office of the Comptroller of the Currency or the Office of Thrift Supervision in order to facilitate the initiation, furtherance, or completion of the investigation.

Subd. 8. **Stop order.** In addition to any other actions authorized by this section, the commissioner may issue a stop order denying effectiveness to or suspending or revoking any registration.

Subd. 9. **Powers additional.** The powers contained in subdivisions 1 to 8 are in addition to all other powers of the commissioner.

Subd. 10. **Rehabilitation of criminal offenders.** Chapter 364 does not apply to an applicant for a license or to a licensee where the underlying conduct on which the conviction is based would be grounds for denial, censure, suspension, or revocation of the license.

Subd. 11. **Actions against lapsed license.** If a

license lapses, is surrendered, withdrawn, terminated, or otherwise becomes ineffective, the commissioner may institute a proceeding under this subdivision within two years after the license was last effective and enter a revocation or suspension order as of the last date on which the license was in effect, or impose a civil penalty as provided for in subdivision 6.

Subd. 12. **Conditions of relicensure.** A revocation of a license prohibits the licensee from making a new application for a license for at least two years from the effective date of the revocation. The commissioner may, as a condition of reapplication, require the applicant to obtain a bond or comply with additional reasonable conditions of licensure the commissioner considers necessary to protect the public.

History: *1987 c 336 s 2; 1989 c 330s 2; 1990c 415 s l; 1991 c 306 s 1-6; 1992 c 564 art 1 s 2-8; 1993 c 145 s]; 1993 c 204 s 3-7; 1993 c 361 s 3; 1994 c 385 s 3; 1996 c 384 s 1,2; 1996 c 439 art 1 s 4,5; art 2 s l; 1997 c 7 art 2 s* 7; *1999 c 137 s 1,2; 2000 c 483 s 1; 1Sp2001 c 9 art 16 s 1; 2002 c 379 art 1 s 113; 2004 c 285 art 4 s l; 2004 c 290 s 20; 2009 c 37 art 2 s 5; 2010 c 384 s 2; 2013 c 135 art 3 s 3; 2014 c 198 art 4 s l; 2016 c 156 s 1*

480.065 UNIFORM CERTIFICATION OF QUESTIONS OF LAW.

Subdivision 1. **Definitions.** In this section:

(1) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(2) "Tribe" means a tribe, band, or village of Native Americans which is recognized by federal law or formally acknowledged by a state.

Subd. 2. **Power to certify.** The supreme court or the court of appeals of this state, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state if:

(1) the pending litigation involves a question to be decided under the law of the other jurisdiction;

(2) the answer to the question may be determinative of an issue in the pending litigation; and

(3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

Subd. 3. **Power to answer.** The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in

pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.

Subd. 4. **Power to reformulate question.** The supreme court of this state may reformulate a question of law certified to it.

Subd. 5. **Certification order; record.** The court certifying a question of law to the supreme court of this state shall issue a certification order and forward it to the supreme court of this state. Before responding to a certified question, the supreme court of this state may require the certifying court to deliver all or part of its record to the supreme court of this state.

Subd. 6. **Contents of certification order.** (a) A certification order must contain:

(1) the question of law to be answered;

(2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

(3) a statement acknowledging that the supreme court of this state, acting as the receiving court, may reformulate the question; and

(4) the names and addresses of counsel of record and parties appearing without counsel.

(b) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

Subd. 7. **Notice; response.** The supreme court of this state, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as

soon as practicable.

Subd. 8. **Procedures.** After the supreme court of this state has accepted a certified question, proceedings are governed by the rules and statutes of this state. Procedures for certification from this state to a receiving court are those provided in the rules and statutes of the receiving forum.

Subd. 9. **Opinion.** The supreme court of this state shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.

Subd. 10. **Cost of certification.** Fees and costs are the same as in civil appeals docketed before the supreme court of this state and must be equally divided between the parties unless otherwise ordered by the certifying court.

Subd. 11. **Short title.** This section may be cited as the "Uniform Certification of Questions of Law Act (1997)."

History: *1998 c 255 s 1*

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645.08 CANONS OF CONSTRUCTION.

In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute:

(1) words and phrases are construed according to rules of grammar and according to their common and

approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition;

(2) the singular includes the plural; and the plural, the singular; words of one gender include the other genders; words used in the past or present tense include the future;

(3) general words are construed to be restricted in their meaning by preceding particular words;

(4) words in a law conferring a joint authority upon three or more public officers or other persons are construed to confer authority upon a majority of such officers or persons; and

(5) a majority of the qualified members of any board or commission constitutes a quorum.

History: *1941 c 492 s 8; 1986 c 444*

645.16 LEGISLATIVE INTENT CONTROLS.

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

(1) the occasion and necessity for the law;

(2) the circumstances under which it was enacted;

(3) the mischief to be remedied;

(4) the object to be attained;

(5) the former law, if any, including other laws upon the same or similar subjects;

(6) the consequences of a particular interpretation;

(7) the contemporaneous legislative history; and

(8) legislative and administrative interpretations of the statute.

History: *1941 c 492 s 16*

645.17 PRESUMPTIONS IN ASCERTAINING LEGISLATIVE INTENT.

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

(1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;

(2) the legislature intends the entire statute to be effective and certain;

(3) the legislature does not intend to violate the Constitution of the United States or of this state;

(4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and

(5) the legislature intends to favor the public interest as against any private interest.

History: *1941 c ./92 s 17*