

# Twins Cities Claims Association: Updates on Rule 68, Good Faith Law, and Joint & Several Liability

Presented by:

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## The “New” Rule 68

- The rule was amended two years ago.
- More advantageous for plaintiffs.

# The New Rule 68:



What was not changed?

- Timing
  - An offer may be made at any time 10 days prior to trial
  - Acceptance period is still 10 days
  - Offer remains irrevocable during the 10 day period
  - If the offer is not accepted within 10 days, it is withdrawn
- Multiple offers may be made
- Failure to accept the offer is not admissible (except to determine costs and disbursements)

# The New Rule 68: What Was Changed?

- Plaintiffs have a financial incentive to make Rule 68 demands early—recovery of “double costs”
- “Total Obligation” vs. “Damages Only” Offer—must specify “Total Obligation”
- Consequences of Rejecting a Rule 68 Offer or Demand



# Consequences of Rejection



# REJECTION

When No Doesn't Mean Maybe

# Consequences of Rejection

- If the Judgment is less than the offer:
  - Defendants can no longer recover all of their costs and disbursements as before.
  - BUT, the defendant is relieved of paying the plaintiff's costs and disbursements incurred after the date of service of the offer.
  - BUT, the plaintiff will still recover her costs and disbursements up to the date of service of the defendant's offer.

# Examples:



- Example 1:
  - Defendant offers \$15,000 Total Obligation on September 1, 2009.
  - Plaintiff rejects the offer.
  - Jury awards \$10,000 on November 1, 2009.
  - Defendant gets: All costs and disbursements after September 1, 2009 AND does not have to pay plaintiff's costs and disbursements incurred after September 1, 2009.
- Lesson: Make a **reasonable** offer as early as possible

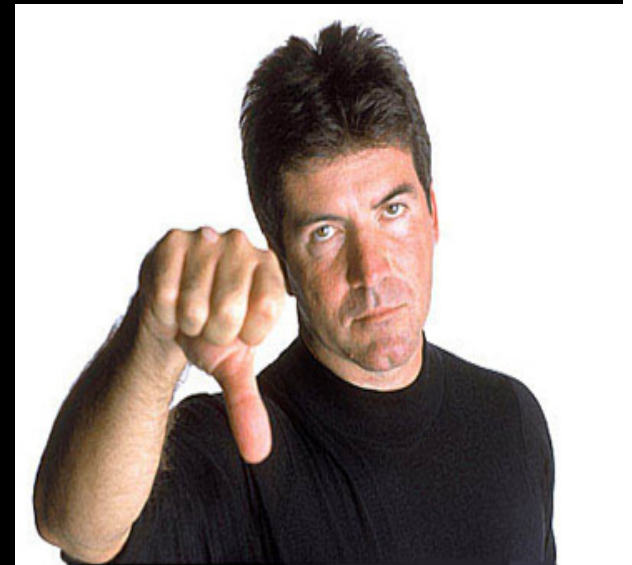
## Examples:



- Example 2:
  - Plaintiff demands \$50,000
  - Defendant rejects demand
  - Plaintiff gets: The costs and disbursements always awarded to the prevailing party AND an amount equal to the costs and disbursements incurred after the service of the rejected offer (“double recovery”)

# What have been the results of the new Rule 68?

- Clearly, plaintiffs have benefited from the rule change.
- Settlement offers have increased to take into account cost exposure.
- Discovery regarding costs incurred is required.



# Double costs?



- Remains a threat.
- Unaware of any cases in which the award of double costs under the new rule has been challenged.

# The “New” Good Faith Law

- Minn. Stat. § 604.18
- Effective since August 1, 2008
- Applies to all causes of action that accrued on or after the effective date.
- Establishes a standard of conduct for handling and resolving first party claims.

# Minnesota's Good Faith Law: Minn. Stat. § 604.18

## **What must the Insured demonstrate for the amendment to be allowed? Subd. 2:**

- (1) *the absence of a reasonable basis for denying the benefits of the insurance policy; and*
- (2) *that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy.*
- (b) A violation of this section shall not be the basis for any claim or award under chapter 325D or 325F.
- (c) An insurer does not violate this subdivision by conducting or cooperating with a timely investigation into arson or fraud.

# Minnesota's Good Faith Law: Minn. Stat. § 604.18

## What does the Insured get if bad faith is shown? Subd. 3:

- The court may award an insured the following taxable costs for a violation of subdivision 2:
- (1) *an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or \$250,000, whichever is less; and*
- (2) *reasonable attorney fees actually incurred to establish the insurer's violation of this section.*

Attorney fees may be awarded only if the fees sought are separately accounted for by the insured's attorney and are not duplicative of the fees for the insured's attorney otherwise expended in pursuit of proceeds for the insured under the insurance policy. Attorney fees must not exceed \$100,000.

- (b) An insured may not also recover punitive or exemplary damages or attorney fees under section [8.31](#) for a violation of this section.

## How can the insured file a claim under Minn. Stat. § 604.18?

- After filing suit, the insured must make a motion to amend the pleadings accompanied by one or more affidavits showing the factual basis for the motion.
- These motions can be opposed by submitting one or more affidavits showing there is no factual basis for the motion.

# What have the consequences of Minn. Stat. § 604.18 been so far?

- No case has defined “proceeds,” so there is still confusion over whether it means the policy limits or the verdict amount.
- From the cases found where Plaintiffs have tried to bring the claim:
  - Very few have been successful.
  - The burden is very high for Plaintiff.
  - Courts are taking these claims seriously and not allowing the flood of bad faith claims earlier feared.



## What have the consequences of Minn. Stat. § 604.18 been so far?

- With regard to UIM claims, in particular, one of the practical consequences has been a revival of the use of arbitrations to resolve these claims.
  - Takes them out of the good faith statute.
  - Eliminates the potential exposure for these additional damages.

# Sampling of district court cases discussing Minn. Stat. § 604.18

- *Herbert v. State Farm, Dakota County, Judge Michael A. Sovis, January 23, 2009*
  - Motion denied because the conduct alleged occurred prior to the effective date of the Good Faith Statute.
    - “The conduct governed by the Statute is an insurance company’s claims practices. Once a claim is denied and litigation begins any action taken thereafter by the insurance company unless clearly unrelated to litigation, is litigation strategy.”
  - Also denied because Plaintiff failed to meet her burden.
    - “The Bad Faith Statute’s standard of review is much higher than the standard within Rule 15 of the Rules of Civil Procedure.”

# Sampling of district court cases discussing Minn. Stat. §604.18

- *Gades v. Allstate, Hennepin County, Judge Robert Blaeser, September 30, 2008*
  - Incident happened on July 4, 2004; Plaintiff did not seek medical treatment until December 10, 2004.
    - Dispute over whether he was hit by the car or whether he charged after it, jumping on the windshield and caused his own injuries.
  - Court followed the standard from Anderson v. Continental Insurance Co., 271 N.W.2d 368 (Wisc. 1978) (noting that bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim).
  - Motion denied because the Court found the Defendant could reasonably doubt Plaintiff's injuries were the result of an accident.

# Sampling of district court cases discussing Minn. Stat. §604.18

- *Hristova v. American Family, Winona County, Judge Jeffrey D. Thompson, October 15, 2009*
  - Separate proceeding allowed under 604.18 but no reasons cited.
  - Plaintiff was injured when she fell off the hood of a vehicle operated by Hannah Glowczewski.
  - Plaintiff collected \$50,000 from BI carrier and was pursuing claim for UIM benefits (\$50,000 policy).
  - The relative negligence of the parties was attributed 20% to the Plaintiff and 80% to Hannah Glowczewski; damages awarded by the UIM jury totaled \$161,612.88.
  - Judge Thompson awarded costs under Rule 68.02 subd. b (2) and also held Plaintiff would receive a separate hearing to determine entitlement to “taxable costs” pursuant to Minn. Stat. §604.18.

# Sampling of district court cases discussing Minn. Stat. § 604.18

- *Turner v. American Family, Anoka County, Judge Stephen Askew, March 19, 2009*
  - Amendment allowed.
  - Plaintiff had \$61,000 in medical expenses; was paid \$50,000 on her BI claim and was seeking \$100,00 UIM benefits.
  - Attorney submitted an affidavit outlining anticipated future medical expenses, confirming \$5000 offer from American Family, and the company's attempt to discontinue no-fault benefits.
  - Defense counsel countered the motion with an affidavit and the IME report challenging the relatedness between accident and injuries.
  - Judge Askew found prima facie case had been established; refused to resolve factual disputes in deciding motion.
  - Reflects a different standard for reviewing the motion than what the statute contemplates.

# Joint and Several Liability: Minn. Stat. § 604.02

- Statute revised in 2003.
- Under previous statute, any person could be held liable for 100% of a jury's verdict unless certain specified conditions were met.
- Amendment made several, versus joint, liability the general rule: a person is only responsible for damages proportionate to their own percentage of fault unless that person's apportionment of fault is 51% or greater. If a person's fault is 51% or greater, then and only then is that person jointly and severally liable for 100% of the jury's verdict.

# Joint and Several Liability: Minn. Stat. § 604.02

- Subd. 1 Joint Liability. When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
  - (A) A person whose fault is greater than 50 percent.

# First reported decision on revised Joint and Several Liability statute

- Staab v. Diocese of St. Cloud

- Facts:

- On April 9, 2005, Ann and Richard Staab attended an event at the Holy Cross Parish School in Kimball, MN. When they left the event, Ms. Staab suffered injuries when she fell out of her wheelchair that was being pushed by her husband.
    - Plaintiff sued Holy Cross Parish alleging she fell and was injured because they failed to protect her from an unreasonable risk of harm (an unseen drop-off at the doorway).



# Staab v. Diocese of St. Cloud— Jury Verdict

- Richard Staab was not a named defendant but was included on the verdict form at trial.
- The jury assigned:
  - 50% liability to Richard Staab and
  - 50% liability to Holy Cross Parish.
- The jury awarded damages of \$224,200.70. Judgment was entered against Holy Cross for this amount on March 25, 2009. The District Court ordered Holy Cross to pay the entire judgment on March 27, 2009.
- Holy Cross filed a Motion to Amend the Findings of Fact, Conclusions of Law, and Judgment, but the motion was denied.

# Staab v. Diocese of St. Cloud— Denial of Motion

- District Court Judge John Scherer
  - Determined Minn. Stat. § 604.02 did not apply.
    - Reasoning: Subdivision one only applies when “joint liability” is found. “Joint liability” only results from a judgment and because Richard Staab was not a party to the case, a judgment cannot be entered against him.
      - The only way for the Defendant’s liability for the entire award to be reduced would have been to commence a third party action against Mr. Staab and make him a party to the case.
      - Relied on Schneider v. Buckman, 433 N.W.2d 98 (Minn. 1988).

# The Appeal

- Holy Cross appealed the District Court's decision.
- Holy Cross argued that because the jury found Holy Cross exactly 50% at fault, Minn. Stat. § 604.02, subd. 1 makes Holy Cross only 50% responsible for the jury award.
- *Minn. Stat. 604.02 subd. 1:*
  - “When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award: (1) A person whose fault is greater than 50 percent (%)”

# The Appeal

- The appeal was based on the plain language of the revised joint and several liability statute.
  - The statute used the word “persons” not “parties.”
  - The term “liable” in the statute does not mean “liable for a judgment.”
- Plaintiff/Respondent argued that they had control over not only whom they sued, but from whom they collected.
  - If Defendant/Appellant did not want to be held liable for the entire jury verdict, they could sue Richard Staab.
- Unanswered question:
  - Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990) (questioning whether joint and several liability would apply if a defendant were to join another tortfeasor as an at-fault party since they would not be directly liable to the injured party).

# The Victory – March 30, 2010

- The Court of Appeals (Judge Klaphake) held that because Minn. Stat. § 604.02, subd. 1, provides for joint and several liability only against a tortfeasor “whose fault is greater than 50 percent,” Holy Cross could be held liable **ONLY** for 50% of the damages award.



# The Victory – March 30, 2010

- The Court also noted that, in light of the statutory change, it is questionable whether *Schneider v. Buckman* remains good law.
  - The reallocation provisions in subdivision 2 of the statute are only implicated after joint liability is established.
  - If there is no joint liability, then the percentage of fault attributed to the non-party is simply not collectible; it is not subject to reallocation.

# The Court of Appeals' decision is not likely to be the last word.

- It is anticipated that a petition for review will be filed with the Minnesota Supreme Court.
- It is also likely that the Minnesota Association for Justice will petition to be an amicus.
- MDLA will also be asked to petition to be an amicus again.

# Questions?



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