IN THE SUPREME COURT OF MISSOURI

MARK KARSCIG, et al	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	**Supreme Court No.: SC-90080**
AMERICAN FAMILY MUTUAL INSURANCE COMPANY	)	
	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE MISSOURI INSURANCE COALITION

Michael A. Dallmeyer #26513
Keith A. Wenzel # 33737
HENDREN ANDRAE, LLC
221 Bolivar Street, Suite 300
Jefferson City, MO 65102
Telephone: 573-636-8135
Fax: 573-636-5226

ATTORNEYS FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINTS RELIED ON

I. MISSOURI INSURANCE COALITION (MIC) IS AN INSURANCE TRADE ASSOCIATION THAT PROMOTES THE INTERESTS OF ITS MEMBERS – PROPERTY AND CASUALTY (P&C) INSURERS THAT WRITE ALL LINES OF P&C INSURANCE THROUGHOUT THE COUNTRY INCLUDING AUTOMOBILE LIABILITY INSURANCE. MIC RECOGNIZES THAT THE AFFIRMATION OF THE LOWER COURT RULING IN THIS CASE IS IMPORTANT BECAUSE HOW INSURANCE CONTRACTS ARE INTERPRETED WILL HAVE A SUBSTANTIAL EFFECT ON THE EXPECTATIONS OF BOTH INSURERS AND POLICYHOLDERS IN MISSOURI.

IN THE SUPREME COURT OF MISSOURI

MARK KARSCIG, et al	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	**Supreme Court No.: SC-90080**
AMERICAN FAMILY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Respondent.	)	

I

MISSOURI INSURANCE COALITION (MIC) IS AN INSURANCE TRADE ASSOCIATION THAT PROMOTES THE INTERESTS OF ITS MEMBERS – PROPERTY AND CASUALTY (P&C) INSURERS THAT WRITE ALL LINES OF P&C INSURANCE THROUGHOUT THE COUNTRY INCLUDING AUTOMOBILE LIABILITY INSURANCE. MIC RECOGNIZES THAT THE AFFIRMATION OF THE LOWER COURT RULING IN THIS CASE IS IMPORTANT BECAUSE HOW INSURANCE CONTRACTS ARE INTERPRETED WILL HAVE A SUBSTANTIAL EFFECT ON THE EXPECTATIONS OF BOTH INSURERS AND POLICYHOLDERS IN MISSOURI.

ARGUMENT

MIC is a property-casualty insurance trade association representing over 85 insurers writing business in Missouri. MIC promotes the economic, legislative, and

public standing of its members, provides a forum for discussion of issues of common concern to its members, and keeps members informed of pertinent regulatory, legislative and judicial developments. As such, MIC is very interested in the Court's interpretation of the Motor Vehicle Financial Responsibility Law.

To address a problem of financially irresponsible tortfeasors on the highways, the Missouri Legislature imposed mandates directly on vehicle owner, and secondarily on vehicle operators through the Motor Vehicle Financial Responsibility Law (MVFRL) §303.010 RSMO et seq.

Compliance with the MVFRL law rests with the vehicle owners/operators. Failure to have proof of financial responsibility will prevent licensing of vehicles, and penalties will be imposed to those who are in an accident and cannot demonstrate financial responsibility. See § 303.025 RSMo.

As courts and everyone have recognized, the viability of this system depends on a viable insurance marketplace, and the legislature assumed the market would offer one or more products to allow individuals to meet their legal obligations.

Under the MVFRL insurance companies play a supporting role to the extent they choose to offer products for which a certificate of insurance/financial responsibility is issued. The MVFRL defines two types of policies, either of which will satisfy the law, and prescribes the minimum required attributes of each but expressly declines to regulate, dictate or prescribe policy terms and conditions over and above the minimum required attributes. The MVFRL contains no mandate that any insurance company offer auto policies, or that insurance companies offer both types defined in the statute.

The only requirement is that any motor vehicle liability policy issued as proof of financial responsibility must meet one of the two prescribed minimum set of attributes, i.e. owner's policy or operator's policy. See § 303.170 RSMo - § 303.190 RSMo. Any attempt to impose a contractual mandate on insurers must find its basis in the legislative definition of either an owner's or operator's policy. Virtually all motor vehicle liability policies written in Missouri are owner's motor vehicle liability policies that identify a specific vehicle.

Under present law, the legislature has made a judgment that twenty-five thousand dollars because of bodily injury to or death of one person in any one accident, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident is a sufficient demonstration of financial responsibility by owners/operators and a sufficient amount of resources to provide basic compensation to the injured. We can certainly debate the wisdom of that, but the matter is entrusted to elected officials. Persons unable to change that at the ballot box currently have a viable alternative called underinsured motorist coverage. In a tribute to the ingenuity of the insurance market and risk sharing, people who want more protection on the highway than the legislature has seen fit to require can go into the marketplace and buy underinsured motorist coverage to insure themselves. That creates a pool of resources to share risk and pay claims.

If Appellants have their way a robust marketplace for self-purchased underinsured coverage will gradually wither as people decide (especially in tough economic times) that

maybe they can take their chances with stacking to get more compensation for their injuries. Once again, dollars drain out of the system and you have the same number of injured claimants chasing after fewer/smaller pools of risk-sharing money. No change in the insurance law or insurance marketing is going to reduce the number of drivers, cars, or accidents. People have to go places and they will continue to do so. The only question is how much of a financial buffer is in place to meet the needs of those injured on the highways.

In this case, Appellants are asking the Court to reverse prior court cases and to reform Respondent's insurance policies issued to its policyholders for allegedly violating MVFRL, and in so doing, strike valid unambiguous language from Respondent's contracts.

MIC would argue that Respondents' contracts of insurance are in compliance with the MVFRL and the law in this area has been well established. The interrelationship of the MVFRL and insurers ability to exclude coverages in specifically identified instance has been previously litigated. The cases with respect to this issue occurred in the mid to late 1990's.

Appellants assert that the MVFRL and this Court's decision in *American Standard Insurance Company v. Hargrave* 345 S. W. 3d 88 (Mo banc 2001) require that every owner and operator motor vehicle liability policy issued in this State provide minimum liability limits. There has been no allegation or contention that any of the Respondent's policies do not provide minimum liability limits but rather the issue is whether they all provide coverage in this case. This Court has previously dealt with this very issue.

The Supreme Court, En Banc, in 1995 provided clear direction to insurers and policy holders with respect to the requirements of the MVFRL. In the case of *First National Insurance Company of America vs. Clark,* 899 S.W.2d 520, (Mo. 1995), the Court held "the public policy of this State is satisfied when there is an owner's policy of liability insurance sufficient to meet the minimum requirements of Missouri's financial responsibility law, §303.025. It is sufficient to say that because there was an owner's policy in effect, no operator's policy of liability insurance on the same vehicle is required by the Missouri financial responsibility law. Thus, the exclusion in the operator's provision … will be enforced as written." *Clark*, 899 S. W. 2nd at 523.

Appellants' rely heavily on the case of *American Standard Insurance Company v. Hargrave,* 34 S. W. 3d 88 (Mo. 2001) implying that the *Hargrave* decision reversed the *Clark* decision. MIC would argue that the *Hargrave* decision had no impact upon the *Clark* decision. The Supreme Court in the *Hargrave* case did not cite the *Clark* decision, or refer to the *Clark* decision because there was no need. The facts in the *Clark* case and the *Hargrave* case are clearly distinguishable.

Unlike the facts in the *Clark* case or in the present case, in the *Hargrave* case there were two different insurance companies providing automobile liability insurance purporting to provide coverage for a single incident. In that case, one insurance company attempted to avoid payment of a claim because another insurance company already provided coverage and paid a claim for the same incident. American Standard relied on the household exclusion contained in its policy to deny coverage. Respondent has thoroughly discussed the household exclusion and that discussion will not be repeated

here. The Court determined in the *Hargrave* case that both insurance companies' policies were required to comply with the MVFRL.

In the present case, as was the case in the *Clark* decision, multiple coverages are being provided by one insurance company. Further, Respondent does not rely on a household exclusion to deny coverage but rather rely on the non owned exclusion. Since Respondent's policies provide the required minimum requirement under the MVFRL its contracts excluding stacking of coverage should be enforced.

Sound underwriting and pricing of insurance requires predictability and visibility as to the actual risk being taken on by contract. Insurers who are unable to do that because of unforeseen risks caused by abrupt and apparently retroactive legal changes have roughly three options: a) cut losses and withdraw from the market in favor of less hostile markets; b) raise premiums going forward to cover both future risk and new retroactive risks; or c) in severe/sudden cases, go insolvent and shift the problem to someone else.

The term insurance is undefined under Missouri Statutes. Black's Law Dictionary defines insurance as "a contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation usually called the "insurer" or "underwriter;" the other, the "insured" or "assured;" the agreed consideration, the "premium;" the written contract, a "policy;" the events insured against, "risks" or "perils;" and the subject, right or interest to be protected, the "insurable interest." A contract whereby one undertakes to indemnify another against loss, damage, or liability

arising from an unknown or contingent event and is applicable only to some contingency or act to occur in future. An agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the other party upon destructions, loss, or injury of something in which other party has an interest."

Insurance companies for a specified consideration agree to compensate insureds for specified losses. These specified losses are set forth in the insurance contract issued by the insurance company to the insured.

Insurance companies establish their insurance premiums to be charged policyholders based upon the risks being assumed by the company. An accurate establishment of premium is dependent upon an insurer's ability to accurately calculate the risks it is assuming from the insureds.

Insurance is premised on risk sharing among all of the insurance company's policyholders. Some policyholders will have claims while others will not. If an insurance company's risks are increased, the premiums charged to policyholders will need to be adjusted upwards in order to cover the additional exposure.

When an insurance company establishes its premiums it does so based upon the specific losses being insured. If the insurance company pays losses not specified or covered in an insurance contract, the insurer's calculation of insurance premiums to be charged to policyholders will be insufficient to cover its losses and its ability to pay losses in the future will be impaired.

In the worst case scenario when an insurance company's ability to pay claims is impaired the insurance company will be placed in receivership leaving the policyholders

with very little recourse. Another option available to the insurance company would be to recalculate the premiums to recover funds sufficient to pay past claims and to cover the increased risks in the future. The other alternative available to insurance companies would be to rewrite the contracts of insurance to eliminate the additional risks in the future and adjust premiums to recover funds to pay past claims.

It is imperative to both the insurance companies and to the policyholders that the insurance company be able to identify the insurers' risks so as to avoid fluctuation in premiums. If an insurance company cannot accurately identify its exposure, it will be required to artificially establish insurance premiums higher than they should be because without certainty, the insurance company will have to make assumptions with respect to risks that were not anticipated and not considered in calculating the premiums.

In this case American Family Mutual Insurance Company (Respondent) issued automobile liability insurance to policyholders throughout the State of Missouri. Based upon Respondent's past loss experience, it calculated premiums to be charged to policyholders after identifying the specified risks it assumed. If Respondent must pay claims it did not identify or contract for, its premiums will need to be recalculated upward to cover these additional risks.

Insurance policyholders may avail themselves of a myriad of coverages made available to them by insurance companies. The policyholder may select a coverage that provides payment for losses from multiple risks or a policyholder may select a coverage which provides minimal protection. The premiums charges to policy holders are commensurate with the coverage selected by the policyholder. In order words, premiums

charged for more comprehensive automobile insurance will be higher than insurance premiums for insurance policies providing minimal coverage.

If a loss not contemplated or provided for in the insurance contract but is paid by Respondent, the policyholder has received a benefit for which they have not paid. Respondent will have to, therefore, recalculate the premiums for all policyholders and the policyholder not deriving the benefit will have their premiums adjusted to cover these unforeseen losses.

In order for Respondent to identify the risks it has assumed, it has written the contracts of insurance that are issued to Missouri policyholders to cover certain specific losses and exclude others. In developing its insurance contracts, Respondent relied upon, among other things, prior Court cases' interpretation of policy language so that it would specifically and accurately describe risks to be covered and those to be excluded.

Respondent as well as most other insurance companies writing automobile coverage in Missouri have written their contracts following the direction of this Court in the *Clark* decision. As such they have been able to specifically identify those risks that they are assuming and those that are excluded from coverage. As discussed above, the insurers have therefore been able to accurately establish premiums to be charged for coverage. Reforming Respondent's insurance policies will create additional exposure to Respondent, exposure for which it has not charged policyholders and an exposure not consistent with prior Court precedent.

The Court should follow the *Clark* decision and enforce the pertinent exclusion in Respondent's insurance policies. The legislature has chosen to impose its will on the

Missouri auto insurance market only in very limited respects. It is not the role of the court to either second-guess the legislative choices or create some judicial mandate. In large part, insurance companies are mere conduits for those who pay in premium. It may be possible in the short term to extract some wealth from insurance companies to solve perceived social problems, but ultimately those costs will migrate back to the policyholders who pay the bills. If the legislature had intended the system asserted by Appellants, the legislature would have said something different and Missouri courts would have been saying something different for the last 15 years. A decision for appellants will disrupt settled expectations, disserve the rule of law, and ultimately penalize the responsible, law-abiding citizens of Missouri.

CONCLUSION

The Court should AFFIRM the decision of the Court of Appeals.

Respectfully submitted,

HENDREN ANDRAE, L.L.C.

_____

Michael A. Dallmeyer #26513
Keith A. Wenzel #33737
221 Bolivar Street
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135/(573) 636-5226 (Facsimile)
madallmeyer@hendrenandrae.com
kwenzel@hendrenandrae.com

IN THE SUPREME COURT OF MISSOURI

MARK KARSCIG, et al	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	**Supreme Court No.: SC-90080**
AMERICAN FAMILY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Amicus Curiae, and for their Certificate of Compliance, states as follows:

1. The undersigned does hereby certify that Substitute Brief of Amicus Curiae filed herein complies with the page limits of Rule 84.06(b) and contains 2,902 words of proportional type.

2. Microsoft Word was used to prepare Substitute Brief of Amicus Curiae.

3. The undersigned does hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

_____

Keith A. Wenzel

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document mailing a true copy thereof on this ____ day of July, 2009, via prepaid U.S. Mail, to:

Andrew Gelbach
109 E. Market
PO Box 375
Warrensburg, MO 64093
Attorney for Appellant

William Vandever
712 Broadway
Kansas City, MO 64105
Co-Counsel for Appellant

William Cownie
PO box 1276
Lees Summit, MO 64063
Attorney for Appellant

David Frye
Bldg. 82 Suite 1000
10851Mastin Blvd
Overland Park, KS 66210-1669
Attorney for Respondent

Leland Dempsey
Ashley Baird
1100 Main St. Ste. 1860
Kansas City, MO 64105
Attorney for Amicus Curiae
Missouri Association of Trial Lawyers

_____
Keith A. Wenzel