INSURANCE – AMBIGUITY, UNCERTAINTY, OR CONFLICT: DEFINING "SIMILAR INSURANCE" IN AUTOMATIC TERMINATION CLAUSES

Nodak Ins. Co. v. Farm Fam. Cas. Ins. Co., 2023 ND 84, 990 N.W.2d 595.

ABSTRACT

In *Nodak Insurance Company v. Farm Family Casualty Insurance Company*, the North Dakota Supreme Court defined "similar insurance" within the context of an automatic termination clause as other insurance the insured obtained that is similar in type and amount of coverage. In *Nodak,* an intoxicated truck driver ran a stop sign and struck another automobile. Prior to the accident, the owners of the truck purchased a Farm Family Casualty Insurance Company policy on the vehicle and later purchased a subsequent policy with a concurrent policy period from Mountain West Farm Bureau Mutual Insurance Company. After the accident, Farm Family learned of the subsequent policy and denied coverage under the policy's automatic termination clause. Nodak Insurance Company, the insurer of the automobile, commenced this action seeking a declaratory judgment that the Farm Family policy was effective on the date of loss. The court concluded "similar insurance" was an ambiguous term. Relying on other jurisdictions' interpretation of the term, the majority ultimately *held* the subsequent policy was not "similar insurance" because its limits of liability were less than those carried under the Farm Family policy. Therefore, the automatic termination clause did not terminate coverage under the Farm Family policy.

I. FACTS 144
II. LEGAL BACKGROUND 146
A. AUTOMATIC TERMINATION CLAUSE GENERALLY 146
B. AMBIGUITY OF "SIMILAR INSURANCE" 147
C. THE PLAIN AND ORDINARY MEANING OF "SIMILAR INSURANCE" 148
D. JURISDICTIONAL SPLITS IN "SIMILAR INSURANCE" 148
III. ANALYSIS 152
A. MAJORITY OPINION 153
B. DISSENTING OPINION 155
IV. IMPACT 157
A. ADDITIONAL AVENUES OF RECOVERY IN PERSONAL INJURY CASES: AVOID PREMATURE USE OF YOUR CLIENT'S NO-FAULT BENEFITS 157
B. ADDITIONAL LIABILITY IMPOSED ON INSURERS: TIME TO REWRITE THE POLICY 157
C. MORAL HAZARD: HAS THE COURT REWARDED UNDERINSURANCE? 158
V. CONCLUSION 159

I. FACTS

On April 6, 2019, Samuel Hamilton ("Mr. Hamilton") was driving while intoxicated when he failed to stop at a stop sign and struck another automobile occupied by two minors.[1] The driver, H.W., suffered serious injuries, and the passenger, A.M., died.[2] Mr. Hamilton was a North Dakota resident and his parents (the "Hamiltons") were Montana residents.[3] The Hamiltons insured the truck Mr. Hamilton was driving at the time of the accident.[4] The Hamiltons had two automobile insurance policies on the vehicle.[5] The first policy was issued by Farm Family Casualty Insurance

1. Nodak Ins. Co. v. Farm Fam. Cas. Ins. Co., 2023 ND 84, ¶ 5, 990 N.W.2d 595, 598.
2. *Id.*
3. *Id.* ¶ 3.
4. *Id.* ¶ 4.
5. *Id.* ¶¶ 3-4.

Company ("Farm Family") when they were living in Vermont.[6] The policy was effective from October 19, 2018, to April 19, 2019.[7] The bodily injury coverage limits were $250,000 per person and $500,000 per accident.[8] The Hamiltons purchased a second policy for the vehicle when they moved to Montana from Mountain West Farm Bureau Mutual Insurance Company ("Mountain West").[9] The Mountain West policy was effective from December 2, 2018, to June 2, 2019, and provided bodily injury coverage limits of $100,000 per person and $300,000 per accident.[10]

Nodak Insurance Company ("Nodak") insured H.W. and A.M.'s vehicle.[11] Nodak brought an action against Farm Family in North Dakota district court.[12] Nodak sought a declaratory judgment that the Farm Family policy was in effect at the time of the accident and Mr. Hamilton's truck was not underinsured under North Dakota law.[13] Farm Family denied Nodak's claims, asserting its policy terminated when the Mountain West policy went into effect because the Farm Family policy had an automatic termination clause that precluded coverage when the insured purchased "similar insurance."[14] The automatic termination clause read: "If other insurance is obtained by you on your insured car, similar insurance afforded under this policy for that car will cease on the effective date of the other insurance."[15]

Nodak filed a motion for summary judgment.[16] The district court granted the motion in part, concluding the Farm Family policy was in effect and provided coverage for the accident.[17] The court further declared that the "truck . . . was not an 'underinsured motor vehicle'" under North Dakota law "and Farm Family and Mountain West must share pro rata in paying the loss."[18] Farm Family appealed the district court's judgment to the North Dakota Supreme Court.[19] Farm Family contended that the district court erred in determining the Farm Family policy was in effect at the time of the accident and afforded coverage.[20]

---

6. *Id.* ¶ 3.
7. *Id.*
8. *Id.*
9. *Id.* ¶ 4.
10. *Id.*
11. *Id.* ¶ 5.
12. *Id.* ¶¶ 6-7.
13. *Id.* ¶ 6.
14. *See id.*
15. *Id.* ¶ 12.
16. *Id.* ¶ 7.
17. *Id.*
18. *Id.* ¶ 8.
19. *See id.* ¶ 10.
20. *Id.* ¶ 10.

II. LEGAL BACKGROUND

Insurance coverage disputes commonly arise from an ambiguous term in a policy.[21] Undefined terms require judicial inquiry into the plain and ordinary meaning of the term.[22] This often leads to differences in judicial interpretation. In particular, there is a split amongst jurisdictions in interpretating the term "similar insurance" within the automatic termination provision of an automobile insurance policy.[23]

A. AUTOMATIC TERMINATION CLAUSE GENERALLY

Automatic termination provisions are common in automobile insurance policies.[24] The typical automatic termination clause provides for cancellation by substitution when the insured purchases other insurance on the covered automobile.[25] When this situation arises, any similar insurance provided by the original policy will terminate on the effective date of the subsequent policy.[26] However, "there is conflicting authority as to whether the act [of purchasing a second insurance policy on the covered automobile] constitutes an effective cancellation of the first policy."[27]

According to the North Dakota Century Code, with respect to the termination of a concurrent policy:

> Notwithstanding the failure of an insurer to comply with sections 26.1-40-01 through 26.1-40-12, if an insured obtains a replacement policy providing equal or more extensive coverage for a motor vehicle covered in both policies, the first insurer's coverage of that motor vehicle may be terminated either by cancellation or nonrenewal. The termination is effective on the effective date of the second policy providing duplicate replacement coverage. Upon termination, the insured is entitled to a refund of the premium and written notice must be mailed or delivered to the named insured.[28]

---

21. *See, e.g.*, *id.* ¶ 18.
22. *See id.* ¶ 11.
23. *See* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 119 (Iowa 1998); S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 536 S.E.2d 689, 690 (S.C. Ct. App. 2000); Emps. Mut. Cas. Co. v. Martin, 671 A.2d 798, 801 (R.I. 1996); Franklin v. Kimberly, No. 01A01-9701-CV-00009, 1997 WL 379173, at *3 (Tenn. Ct. App. July 9, 1997); Motors Ins. Corp. v. Bodie, 770 F. Supp. 547 (E.D. Cal. 1991). The court in *Nodak* ultimately defines similar insurance as "similar in type and in amount" like the *Victoria*, *Courtney*, *Martin*, and *Bodie* courts. *See Nodak*, 2023 ND 84, ¶ 14, 990 N.W.2d 595, 598.
24. WILLIAM J. SCHERMER & IRVIN E. SCHERMER, *Cancellation by Insured–Insured's Replacement of Policy as Cancellation; the "Automatic Termination" Clause*, *in* 1 AUTO. LIABILITY INS. § 8:7 (4th ed. 2004).
25. *Id.*
26. *Id.*
27. *Id.*
28. § 26.1-40-09 (West 2017).

Automatic termination clauses are not repugnant to statutory provisions governing how insurers may cancel policies.[29] In essence, they are creatures of "other insurance" provisions that preclude coverage when other insurance policies are in effect.[30] "Cancellation of a policy pursuant to an automatic termination provision is not ineffective where the statute requires written notice of cancellation, since the statute is not intended to apply to an automatic termination provision."[31] Moreover, the automatic termination clause language must be carefully reviewed to determine whether the first policy is terminated by operation of the second policy.[32]

B. AMBIGUITY OF "SIMILAR INSURANCE"

When "similar insurance" is not defined in an automobile insurance policy, a majority of courts have held that the term is ambiguous.[33] In *Ziegelmann v. TMG Life Insurance Company*, the North Dakota Supreme Court established the rules for interpreting insurance policies.[34] Interpreting an insurance policy on appeal is a question of law.[35] To determine whether coverage exists, the North Dakota Supreme Court independently evaluates an insurance contract and attempts to construe the language of the policy to effectuate the parties' intentions at contract formation.[36]

In interpreting insurance contracts, the court first looks to the language of the contract.[37] The North Dakota Supreme Court held there is no room for interpretation when the language of the insurance contract is clear and unambiguous on its face.[38] When coverage turns on a undefined term in the contract, the court will apply the plain and ordinary meaning of the term.[39] Courts have long recognized insurance contracts are adhesion contracts; thus, contract ambiguity is construed to the benefit of the insured.[40] However, North Dakota courts will not interpret an undefined term as to rewrite the policy, imposing liability on the insurer for coverage that is expressly

---

29. SCHERMER & SCHERMER, *supra* note 24.
30. *Id.*
31. *Id.*
32. *Id.*
33. *See* Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 550 (E.D. Cal. 1991); *see also* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 120 (Iowa 1998).
34. 2000 ND 55, ¶ 6, 607 N.W.2d 898, 900.
35. *Id.* ¶ 5 (citing Dundee Mut. Ins. Co. v. Marifjeren, 1998 ND 222, ¶ 8, 587 N.W.2d 191, 193).
36. *Id.* ¶ 6 (citing N.D. CENT. CODE § 9-07-03 (1943); Northwest G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 181 (N.D. 1994)).
37. *Id.* (citing Martin v. Allianz Life Ins. Co., 1998 ND 8, ¶ 9, 573 N.W.2d 823, 825).
38. *Id.* (citing *Martin*, 1998 ND 8, ¶ 9, 573 N.W.2d 823, 825).
39. *Id.* (quoting *Martin*, 1998 ND 8, ¶ 9, 573 N.W.2d 823, 825).
40. *Id.* (citing *Northwest*, 518 N.W.2d at 181).

precluded.[41] Additionally, the court will not "strain" the definition of the undefined term.[42] Rather, the court interprets insurance contracts as a whole, giving effect to each part of the agreement.[43]

C. THE PLAIN AND ORDINARY MEANING OF "SIMILAR INSURANCE"

Most courts utilize the dictionary to determine the plain and ordinary meaning of the undefined term.[44] In *Motors Insurance Corporation v. Bodie* the U.S. District Court for the Eastern District of California interpreted an insurer's automatic termination clause.[45] The clause read: "If you obtain other insurance on 'your covered auto,' any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance."[46] "Similar insurance" was not defined in the policy, so the court utilized the dictionary to determine the plain and ordinary meaning of the term.[47] The court found "similar" to mean "showing some resemblance; related in appearance or nature; alike though not identical."[48] The court concluded this vague definition rendered the term ambiguous and thus the ambiguity must be construed to the benefit of the insured.[49] Other courts have recognized the inherently vague definition of "similar" in the context of automatic termination clauses in lockstep with the federal district court.[50]

D. JURISDICTIONAL SPLITS IN "SIMILAR INSURANCE"

The concept is easily understood that when an individual obtains "similar insurance" the purchase of the second policy effectively terminates coverage under the first policy. However, jurisdictions differ as to what constitutes "similar insurance."[51] The first question courts often encounter is whether "similar insurance" means similar in type or similar in type *and*

41. *Id.* (citing *Martin*, 1998 ND 8, ¶ 9, 573 N.W.2d 823, 825).
42. *Id.* (citing *Martin*, 1998 ND 8, ¶ 9, 573 N.W.2d 823, 825).
43. *Id.* (citing Nodak Mut. Ins. Co. v. Heim, 1997 ND 36, ¶ 15, 559 N.W.2d 846, 850).
44. *See* Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 550 (E.D. Cal. 1991).
45. *Id.* at 548.
46. *Id.*
47. *Id.* at 550.
48. *Id.* (quoting AMERICAN HERITAGE DICTIONARY 1206 (1979)).
49. *Id.*
50. *See* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 120 (Iowa 1998); S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 536 S.E.2d 689, 693 (S.C. Ct. App. 2000).
51. The *Victoria*, *Martin*, *Courtney*, and *Bodie* courts held similar insurance means "similar in type and amount," while the *Franklin* court held "similar in type" or "similar in type and amount." *See Victoria*, 576 N.W.2d at 120-21; Emps. Mut. Cas. Co. v. Martin, 671 A.2d 798, 800-01 (R.I. 1996); *Courtney*, 536 S.E.2d at 693; Franklin v. Kimberly, No. 01A01-9701-CV-00009, 1997 WL 379173, at *3 (Tenn. Ct. App. July 9, 1997); *Bodie*, 770 F. Supp. at 550-51.

amount.[52] The majority of jurisdictions favor the notion that "similar insurance" means similar in type and in amount.[53]

In *United Fire & Casualty Company v. Victoria* the Iowa Supreme Court rejected an insurer's argument that policies with different limits of liability were similar.[54] In the case, the defendant purchased a policy from United Fire & Casualty Company with bodily injury coverage of $250,000 per person and $500,000 per accident.[55] Subsequently, the defendant purchased a concurrent policy with State Farm with bodily injury coverage of $100,000 per person and $300,000 per accident.[56] The Iowa Supreme Court reasoned that although an insurance professional may view the policies as similar, the "substantially lower" limits of the second policy would lead the average policy buyer to conclude the policies were not similar.[57] "When the consequences of buying a similar policy are so serious as to cause an automatic termination, an insured should be informed as to what constitutes 'similar' coverage."[58] The court found the term "similar insurance" to be ambiguous and construed the term through the eyes of an ordinary person, not an insurance professional.[59] Ultimately, the court found the disparity in liability limits critical in determining the policies were not similar in the context of the automatic termination clause.[60]

Likewise, in *Employers Mutual Casualty Company v. Martin* the plaintiff's automobile insurance policy provided $300,000 uninsured motorist and underinsured motorist coverage.[61] The plaintiff also purchased a second policy with uninsured/underinsured motorist limits of $100,000 per person and $300,000 per accident.[62] The Rhode Island Supreme Court held the difference in limits prevented the policies from being "similar."[63]

The South Carolina Court of Appeals also came to the same conclusion as the Federal District Court for the Eastern District of California, Rhode Island Supreme Court, and Iowa Supreme Court.[64] The South Carolina Court of Appeals held a subsequent automobile insurance policy differing in

52. *See Victoria*, 576 N.W.2d at 120-21.
53. *See id.*; *Martin*, 671 A.2d at 800-01; *Courtney*, 536 S.E.2d at 693; *Bodie*, 770 F. Supp. at 550-51.
54. 576 N.W.2d at 120-21.
55. *Id.* at 120.
56. *Id.*
57. *Id.*
58. *Id*.
59. *Id.*
60. *Id.* at 120-21.
61. Emps. Mut. Cas. Co. v. Martin, 671 A.2d 798, 801 (R.I. 1996).
62. *Id*.
63. *Id.*
64. S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 536 S.E.2d 689, 693 (S.C. Ct. App. 2000).

amount and kind of coverage is not "similar insurance" for the purposes of interpreting the first policy's automatic termination clause.[65]

The minority of jurisdictions have held that "similar insurance" means "similar in type" or "similar in type and in amount" of coverage.[66] In *Franklin v. Kimberly*, the insured purchased a policy from St. Paul Insurance Company for her automobile. The policy had uninsured motorist limits in the amount of $250,000 per person and $500,000 per accident.[67] While the St. Paul policy was still in effect, the insured passed away and her son took possession of the vehicle.[68] The insured's son took out a concurrent policy on the vehicle with lower uninsured motorist limits of $100,000 per person and $300,000 per accident.[69] While both policies were active, the son's wife was driving the insured vehicle when she was struck by an uninsured motorist and sustained personal injuries.[70] The St. Paul Insurance Company denied liability stating the automatic termination clause in the policy precluded coverage.[71] The automatic termination clause stated: "If you obtain other insurance on your covered auto, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance."[72]

On appeal, the St. Paul Insurance Company argued that the trial court erred in determining the automatic termination clause did not effectively terminate St. Paul's uninsured motorist exposure.[73] The court of appeals agreed, rejecting the notion that "coverage *in any amount* cancels the entire amount of that coverage in the original policy."[74] The court found that "similar insurance" may have multiple meanings, i.e., "similar in kind" or "similar in kind and amount."[75]

In addition to the jurisdictional split as to what constitutes "similar insurance," there is another split regarding whether the first policy must be similar to the second policy or whether the second policy must be similar to the first policy.[76] A majority of jurisdictions have held by implication that for

---

65. *Id.*

66. *See* Franklin v. Kimberly, No. 01A01-9701-CV-00009, 1997 WL 379173, at *3 (Tenn. Ct. App. July 9, 1997).

67. *Id.* at *1-2.

68. *Id.* at *1.

69. *Id.*

70. *Id.*

71. *Id.* at *2.

72. *Id.* at *1.

73. *Id.* at *2.

74. *Id.* at *3.

75. *Id.*

76. *See* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 120-21 (Iowa 1998) ("[A subsequent] policy with substantially lower limits would not likely be viewed as 'similar.'"); *but see Franklin*, 1997 WL 379173, at *3 ("[W]e hold that the insurance coverage in the two policies is similar only to the extent of the amount of coverage in the second policy.").

an automatic termination clause to terminate coverage, the subsequent policy must provide coverage equal to or greater than the first policy's coverage limit.[77]

Although not always explicitly stated, this pattern rule can be observed through the liability limits on automobile insurance policies throughout state and federal caselaw. In *Victoria*, the first policy carried a limit of $250,000 per person and $500,000 per accident while the second policy carried $100,000 per person and $300,000 per accident.[78] The court's holding strongly suggests that since the second policy was not equal to or greater than the amount of coverage afforded under the first policy, the policies were not similar.[79] Accordingly, the automatic termination clause was not triggered; each policy was in effect and afforded coverage for the loss.[80]

Additionally, in *Martin* the first policy provided uninsured and underinsured motorist limits of $300,000 per accident whereas the second policy provided limits of $100,000 per person and $300,000 per accident which would ordinarily result in a lower recovery for the insured.[81] There, the court's holding again reinforces the notion that if the second policy's coverage is not equal to or greater than the coverage provided by the first policy, the automatic termination clause cannot be enforced.[82] Had the court chosen to enforce the automatic termination clause, the insured would have received substantially less in recoverable damages.[83]

In *South Carolina Farm Bureau Mutual Insurance Company v. Courtney*, the first policy had limits of liability in the amounts of $100,000 per person, $500,000 per accident, and $25,000 for property damage.[84] The second policy had limits of $15,000, $30,000, and $25,000 for the same

77. *See Victoria*, 576 N.W.2d at 120-21 (The original policy carried $250,000 per person and $500,000 per accident while the subsequent policy carried $100,000 per person and $300,000 per accident.); *see also* Emps. Mut. Cas. Co. v. Martin, 671 A.2d 798, 801 (R.I. 1996) (The original policy carried single-limit uninsured/underinsured motorist coverage in the amount of $300,000 while the subsequent policy carried $100,000 per person and $300,000 per accident limits.); S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 536 S.E.2d 689, 691 (S.C. Ct. App. 2000) (The original policy carried liability limits of $100,000 per person, $500,000 per accident, and $25,000 for property damage while the subsequent policy carried $15,000, $30,000, and $25,000 respectively.); Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 550 (E.D. Cal. 1991) (The first policy carried limits of $25,000 per person and $50,000 per accident while the second policy carried $15,000 per person and $30,000 per accident.).

78. *Victoria*, 576 N.W.2d at 120.

79. *See id.* at 120-21 (The policies were not "similar" because the subsequent policy providing coverage of $100,000 per person and $300,000 per accident did not equal or exceed the limits on the original policy.).

80. *See id*.

81. *Martin*, 671 A.2d at 801.

82. *See id*.

83. *Id*.

84. S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 536 S.E.2d 689, 690 (S.C. Ct. App. 2000).

coverage.[85] In keeping with other jurisdictions, the South Carolina Court of Appeals held that the policies were not similar.[86] This holding strongly suggests the automatic termination clause was not enforced because the second policy did not equal or exceed the liability limits of the initial policy.[87]

Finally, in *Bodie* the initial policy provided liability limits of $25,000 per person, $50,000 per accident, and $10,000 for property damage.[88] The subsequent policy provided limits of $15,000 per person, $30,000 per accident, and $10,000 for property damage.[89] The implicit pattern is again seen in the U.S. District Court for the Eastern District of California's holding.[90] There the court found the policies were not similar because the subsequent policy limits did not equal or exceed the liability limits on the original policy.[91] Therefore the policies were not similar insurance and the automatic termination clause did not terminate coverage on the first policy.[92]

A smaller number of courts have embraced the notion that the key inquiry in determining if the first policy's automatic termination clause is triggered is whether the first policy's coverage is greater than or equal to the second policy's liability limits.[93] In *Franklin* the first policy's liability limit was $250,000 per person and $500,000 per accident, and the second policy's limit was $100,000 per person and $300,000 per accident.[94] There, because the first policy provided coverage limits exceeding the second policy's coverage, the Tennessee Court of Appeals found the automatic termination clause terminated the "similar insurance" afforded under the first policy "to the extent of the amount of coverage in the second policy."[95]

III. ANALYSIS

In *Nodak Insurance Company v. Farm Family Casualty Insurance Company* the North Dakota Supreme Court defined "similar insurance" within the context of an insurance policy's automatic termination clause.[96]

---

85. *Id.*
86. *See id.* at 693.
87. *See id.*
88. Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 547-48 (E.D. Cal. 1991).
89. *Id.*
90. *See id.* at 550-51.
91. *Id.*
92. *Id.*
93. *See* Franklin v. Kimberly, No. 01A01-9701-CV-00009, 1997 WL 379173, at *3 (Tenn. Ct. App. July 9, 1997) ("[W]e hold that the insurance coverage in the two policies is similar only to the extent of the amount of coverage in the second policy."); *see also* Taxter v. Safeco Ins. Co. of Am., 721 P.2d 972, 974 (Wash. Ct. App. 1986) ("We conclude the [original] policy terminated to the extent the [subsequent] policy provided similar coverage.").
94. *Id.* at *1-2.
95. *Id.* at *3.
96. 2023 ND 84, 990 N.W.2d 595.

As an issue of first impression, the holding carries weight as the terms of an automatic termination clause are often dispositive in coverage disputes.[97] The majority and dissenting opinions considered the approach of several different jurisdictions in defining "similar insurance," differing in interpretation and application of Farm Family's automatic termination clause.

A. MAJORITY OPINION

Justice Bahr wrote the majority opinion. The North Dakota Supreme Court ultimately found that the Farm Family and Nodak automobile insurance policies were not similar so as to effectuate Farm Family's automatic termination clause.[98] In reaching its conclusion, the court held that "similar insurance" in an automatic termination clause "means the other insurance obtained by the insureds is similar 'in type and in amount.'"[99] As a result, the court found the Farm Family policy's bodily injury coverage limits, $250,000 per person and $500,000 per accident, and the Mountain West policy's coverage limits, $100,000 per person and $300,000 per accident, were not similar insurance.[100] In making these findings, the court relied primarily on caselaw from other jurisdictions.[101]

The North Dakota Supreme Court first resolved the question of whether the term "similar insurance" means "other insurance obtained by the insured[]" that is similar "in type" or similar "in type and amount."[102] The court relied on four cases from other jurisdictions to reach its conclusion.[103]

The court agreed with the Iowa Supreme Court holding in *Victoria* that when the penalties of purchasing a similar policy are so drastic as to automatically terminate coverage, ambiguous words in an insurance contract should be interpreted through the eyes of an ordinary person and not the eyes of an insurance expert.[104] The North Dakota Supreme Court also agreed with the *Victoria* court that the disparity in liability limits between two policies is critical in determining whether the policies are similar for the purposes of the automatic termination clause.[105]

---

97. *See id.*
98. *Id.* ¶ 24.
99. *Id.* ¶ 18.
100. *Id.* ¶ 21.
101. *Id.* ¶¶ 14-18.
102. *Id.* ¶ 14.
103. *See id.* ¶¶ 15-17; *see also* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 120-21 (Iowa 1998); Emps. Mut. Cas. Co. v. Martin, 671 A.2d 798, 801 (R.I. 1996); S.C. Farm Bureau v. Courtney, 536 S.E.2d 689, 693 (S.C. Ct. App. 2000); Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 550 (E.D. Cal. 1991).
104. *Nodak*, 2023 ND 84, ¶¶ 14-15, 990 N.W.2d 595, 599-600; *see also Victoria*, 576 N.W.2d at 120-21.
105. *Nodak*, 2023 ND 84, ¶ 15, 990 N.W.2d 595, 600; *see also Victoria*, 576 N.W.2d at 120-21.

The court found the Rhode Island Supreme Court's holding in *Martin* instructive, namely that the gap in uninsured/underinsured motorist coverage between two policies is sufficient to make the policies not "similar insurance."[106] Additionally, the North Dakota Supreme Court relied on *Courtney*.[107] In *Courtney* the South Carolina Court of Appeals held the subsequent automobile insurance policy is not similar when it differs in type and amount of coverage.[108]

The North Dakota Supreme Court also found the U.S. District Court for the Eastern District of California's holding in *Bodie* compelling: an automatic termination clause is "not plain and clear" when coverage hinges on an undefined term.[109] The North Dakota Supreme Court was persuaded by this holding because the court believed it must apply the plain and ordinary meaning of "similar" in interpreting the insurance contract.[110]

Following its discussion of these cases, the North Dakota Supreme Court concluded that when an insurance contract does not define a term for which coverage hinges on, the court must apply the plain and ordinary meaning of the term.[111] From there, the court determined that since the Farm Family policy did not define "similar insurance" it will apply the plain and ordinary meaning of the term.[112] The court concluded "similar" meant "having characteristics in common: strictly comparable, . . . alike in substance or essentials," and "[r]elated in appearance or nature; alike though not identical."[113] On these findings, the court held that the term "similar insurance" as used "in the Farm Family policy mean[t] the other insurance obtained by the insureds [was] similar 'in type and in amount.'"[114]

Having defined the restrictive nature of the phrase "similar insurance," the court answered whether the Mountain West policy provided "similar insurance" "in type and amount" to the Farm Family policy.[115] Relying on the plain and ordinary language of the automatic termination clause, the court found the Mountain West policy did not afford "similar insurance" because

---

106. *Nodak*, 2023 ND 84, ¶ 16, 990 N.W.2d 595, 600 (citing *Martin*, 671 A.2d at 801) ("In that case, one policy provided coverage in the amount of $300,000 per accident, while the other policy provided coverage in the amount of $100,000 per person with a $300,000 limit per accident, resulting in a difference in the total amount of damages recoverable.").

107. *Id.* (citing *Courtney*, 536 S.E.2d at 693).

108. *Id.*

109. *Id.* ¶ 17 (quoting Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 550 (E.D. Cal. 1991)).

110. *Id.* ¶ 18.

111. *Id.*

112. *Id.*

113. *Id.* (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1161 (11th ed. 2005); AMERICAN HERITAGE DICTIONARY 1141 (2d Coll. ed. 1985)).

114. *Id.*

115. *Id.* ¶¶ 19, 21.

it was neither "strictly comparable" nor "alike in substance or essentials" as the dictionary definitions suggested.[116]

The court emphasized the amount of coverage under an automobile insurance policy is an essential part of the policy.[117] A policy that provides bodily injury liability limits in the amount of $100,000 per person and $300,000 per accident is not "strictly comparable" or "alike in substance" to a policy that provides the same type of coverage in the greater amount of $250,000 per person and $500,000 per accident.[118] The court declined to decide what disparity in coverage limits constitutes "similar insurance." Additionally, the court refused to consider if deductibles and premiums factor into whether two insurance policies are similar.[119]

Based on the plain language of the automatic termination clause, the North Dakota Supreme Court determined the Farm Family policy was in effect on the date of the accident because the insured had not obtained "similar insurance" under the policy.[120] "The two policies did not provide 'similar insurance' in that the reduction of liability limits from $250,000/$500,000 (Farm Family policy) to $100,000/$300,000 (Mountain West policy) is not 'similar insurance' so as to effect cessation under the provision."[121] Although subtle, the court's emphasis on the reduction of liability limits from the first to the second policy is reflective of other jurisdictions' holdings that an automatic termination clause will not be enforced when the second policy provides lower limits of coverage.[122]

B. DISSENTING OPINION

Justice Tufte wrote the dissenting opinion. The justice "agree[d] with the majority that the dispositive issue [in the case was] the meaning of the term 'similar insurance' in the Farm Family policy's cancellation provision."[123] However, the dissent diverged from the majority in concluding more factors are needed to determine whether two policies are similar.[124] Specifically, Justice Tufte urged an assessment of "whether an average policy buyer would consider" the two policies reasonable substitutes in light of amounts of

116. *Id.* ¶ 21.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* ¶ 24.
121. *Id.*
122. *See id.*; *see also* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 120-21 (Iowa 1998); Emps. Mut. Cas. Co. v. Martin, 671 A.2d 798, 801 (R.I. 1996); S.C. Farm Bureau v. Courtney, 536 S.E.2d 689, 691 (S.C. Ct. App. 2000); Motors Ins. Corp. v. Bodie, 770 F. Supp. 547, 550 (E.D. Cal. 1991).
123. *Nodak*, 2023 ND 84, ¶ 28, 990 N.W.2d 595, 603 (Tufte, J., dissenting).
124. *Id.* ¶ 29.

coverage, premiums, and deductibles or "whether an insurance agent would quote [each policy] to a prospective buyer as plausible alternatives."[125]

The dissent quickly picked up on the pattern evident in the opinions the majority relied upon.[126] "[T]hese decisions appear to stand for the proposition that a reduction in coverage limits between the first policy and the second policy renders the second policy not 'similar insurance' with respect to the first."[127] Justice Tufte specifically pointed to the Iowa Supreme Court's holding in *Victoria*, which the majority relied on extensively, highlighting that the *Victoria* court "reject[ed] the argument that 'insured can obtain lower limits of liability under a second policy and still have similar coverage.'"[128] The dissent viewed the decisions from other jurisdictions as "suggest[ing] that if the second policy had higher limits, it would be 'similar insurance' and trigger the cancellation of the first policy."[129]

Justice Tufte instead viewed similarity not as mutually exclusive but rather as a "two-way street."[130] Whereby "if the second policy is similar to the first, then the first has to be similar to the second."[131] This distinction in perspective led the justice to assert that both the insurance policy buyer and seller's perspective of the term "similar insurance" must be considered.[132]

The dissent also disagreed with how the majority framed the automatic termination clause to require the second policy provide "similar insurance" to the first policy before termination of coverage occurs.[133] Rather, Justice Tufte stated the correct interpretation of the clause is that if other insurance is obtained on the automobile, any "similar insurance" afforded under the first policy is to be compared to the second.[134] As such, the justice argued the question is "whether the higher-limit first Farm Family policy is similar to the Mountain West policy," instead of the reverse as the majority framed.[135] Justice Tufte declined to provide a precise definition to the term "similar insurance."[136] Instead the dissent relied on *Franklin* to conclude "similar insurance" means "similar in kind" or "similar in kind and amount."[137]

---

125. *Id.*
126. *Id.* ¶ 30.
127. *Id.* (citing *Id.* ¶ 24 (majority opinion); *Victoria*, 576 N.W.2d at 120; *Courtney*, 536 S.E.2d at 690).
128. *Id.* (internal punctuation omitted) (quoting *Victoria*, 576 N.W.2d at 120).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* ¶ 31.
133. *Id.* ¶ 32.
134. *Id.*
135. *Id.*
136. *Id.* ¶ 33.
137. *Id.* (citing Franklin v. Kimberly, No. 01A01-9701-CV-00009, 1997 WL 379173, at *3 (Tenn. Ct. App. July 9, 1997)).

IV. IMPACT

By defining what constitutes "similar insurance" within the provisions of an insurance policy's automatic termination clause, the North Dakota Supreme Court created a new source of recovery for personal injuries. This definition may expose the state's insurers to additional liability while perhaps encouraging underinsurance.

A. ADDITIONAL AVENUES OF RECOVERY IN PERSONAL INJURY CASES: AVOID PREMATURE USE OF YOUR CLIENT'S NO-FAULT BENEFITS

The North Dakota Supreme Court defined "similar insurance" within the context of an automatic termination clause as "the other insurance obtained by the insureds is similar 'in type and in amount'" of coverage.[138] Implicit in the court's holding is the notion that if a subsequent policy's coverage limits are less than the limits on the original policy, the automatic termination clause will not terminate coverage.[139] Contrarily, if the subsequent policy's limits meet or exceed the first policy's coverage limits, the automatic termination clause will terminate similar coverage under the first policy.[140]

In the event the insured obtained a subsequent concurrent policy with lower limits of coverage, there becomes an additional avenue of recovery for client injuries by way of the first policy's coverages. In this case, if a client's injuries were caused by such an insured, premature use of the client's no-fault benefits can be avoided by first exhausting the bodily injury liability limits of the subsequent and original insurance policies to maximize recovery for a client's injuries. Similarly, if a client's injuries were the result of an uninsured or underinsured motorist and the client obtained a subsequent concurrent insurance policy with lower uninsured/underinsured motorist limits, there becomes an additional source of recovery via the original policy upon exhaustion of the subsequent policy.

B. ADDITIONAL LIABILITY IMPOSED ON INSURERS: TIME TO REWRITE THE POLICY

The North Dakota Supreme Court's holding in *Nodak* is a reminder to define important terms within insurance policies. By the North Dakota Supreme Court defining "similar insurance" in a restrictive fashion,[141]

---

138. *Id.* ¶ 18.

139. *See id.* ¶ 24; *see also* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118, 120 (Iowa 1998).

140. *See Nodak*, 2023 ND 84, ¶ 24, 990 N.W.2d 595, 602.

141. *Id.* ¶ 19 ("The phrase 'similar insurance' is substantively different and significantly more restrictive than the phrase 'any other insurance policy.'").

insurers that do not define this term within their polices are subject to additional and likely unaccounted for liability when insureds obtain additional concurrent policies with lower limits. Insurers should consider clearly defining what constitutes "similar insurance" within the automatic termination clause in their policies to avoid any ambiguity that could be adversely construed against them. This would allow insurers to avoid unnecessary liability if the insured purchases a subsequent concurrent policy.

C. MORAL HAZARD: HAS THE COURT REWARDED UNDERINSURANCE?

When the North Dakota Supreme Court held "similar insurance" means insurance providing the same type and amounts of coverage to trigger termination by an automatic termination clause,[142] the court arguably protected the underinsured, a moral hazard.

> Moral hazard describes a behavioral reaction when a party is protected from the consequences of a risk. The protected party . . . may have a tendency to act less carefully because someone else will bear the consequence of any resulting loss. The less careful behavior makes [a loss] more likely [to] occur.[143]

In automobile insurance policies that do not define "similar insurance," the court's holding will likely contradict the insurer's purpose for having an automatic termination provision.[144] If the insurer intended for the termination clause to only apply when a subsequent concurrent policy exceeded the coverage afforded under the first policy, the insurer likely would have used more specific language to the narrow application of the provision.[145]

Insureds make a choice when they decide to obtain a second automobile insurance policy with lower coverage. They may do so because of cost or deductibles, as the dissent in *Nodak* suggests.[146] Perhaps for one of these reasons, the insured chose to purchase a policy with lower liability limits that would provide less coverage for negligent acts to injured parties. As demonstrated application of the court's holding in *Nodak*, the Hamiltons avoided the consequences of purchasing a second automobile insurance policy that provided less coverage for negligent actions.

---

142. *See id.* ¶¶ 18, 24.

143. Land O' Lakes, Inc. v. Emps. Mut. Liab. Ins. Co. of Wis., 846 F. Supp. 2d 1007, 1035 n.27 (D. Minn. 2012) (quoting 1-1 NEW APPLEMAN ON INS. LAW LIBR. ED. § 1.01[4][b] (2011)).

144. *See* Cal. Dairies Inc. v. RSUI Indem. Co., 617 F. Supp. 2d 1023, 1037 (E.D. Cal. 2009) (The "implied assertion that 'similar' should be defined as the 'same' or 'identical' defeats the purpose of the exclusionary provision at issue in this case: to avoid moral hazard.").

145. *See id.*

146. *Nodak*, 2023 ND 84, ¶ 31, 990 N.W.2d 595, 604 (Tufte, J., dissenting).

V. CONCLUSION

In a case of first impression, *Nodak Insurance Company v. Farm Family Casualty Insurance Company*, the North Dakota Supreme Court addressed what constitutes "similar insurance" in an automobile insurance policy's automatic termination clause.[147] The court held "similar insurance" in this context "means [that] the other insurance obtained by the insured[] is . . . similar 'in type and amount.'"[148] This distinction has key ramifications for practitioners in North Dakota. As a result of the court's decision, North Dakota plaintiffs' attorneys in automobile accident cases may have an additional avenue of recovery for their client in the event the tortfeasor purchased a subsequent concurrent policy with less coverage than their initial policy. This will allow the plaintiff's attorney to maximize recovery for their client by avoiding premature use of the client's no-fault benefits. Contrarily, North Dakota's insurance defense attorneys must be cognizant of the potential liability exposure from an automatic termination clause that is similar to the clause in *Nodak.* Rewording or clearly defining any termination provisions could help avoid additional liability.

Benjamin Lorentz∗

147. *Id.* ¶ 14 (majority opinion).

148. *Id.*

∗ 2025 J.D. Candidate at the University of North Dakota School of Law. I would like to thank my family, and in particular my father, for instilling in me the value of hard work, self-discipline and integrity. Additionally, I appreciate the NORTH DAKOTA LAW REVIEW for their time and courtesy in facilitating the publication of this case comment.