

Nos. A07-248 and A07-357

State of Minnesota  
 In Supreme Court

West Bend Mutual Insurance Company,

*Respondent,*

vs.

Allstate Insurance Company,

*Respondent (A07-248),  
 Appellant (A07-357),*

Thomas Oczak and Connie Oczak,

*Appellants (A07-248),  
 Respondents (A07-357).*

BRIEF OF AMICUS CURIAE MINNESOTA ASSOCIATION FOR JUSTICE

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## **I. INTRODUCTION**

This *Amicus* brief is respectfully submitted on behalf of the Minnesota Association for Justice. For the reasons stated below, submitted in addition to the arguments and authority cited by the Appellants in their respective briefs, the decision of the Court of Appeals should be reversed and remanded with directions to enter judgment in favor of Appellants on the issues involved in this appeal.

To allow the decision below to stand would result in an absurd and impermissible construction of the primary statute involved in this action, Minnesota Statutes § 65B.49, Subdivision 3(a)(5), and would further run the risk of nullifying the excess UIM insurance provisions in that statute, in direct conflict with this Court's previous decision in *Becker v. State Farm Mut. Auto. Ins. Co.*, 611 N.W.2d 7 (Minn. 2000).

## **II. LEGAL ISSUE**

1. Whether the specific categories of persons identified in the definition of "insured" under Minnesota Statutes §65B.43, Subdivision 5 should be the definition of "otherwise insured" in the second sentence of Minnesota Statutes §65B.49, Subdivision 3(a)(5) and/or the third sentence of that paragraph, when to define the term in this manner will often result in a nullification of the legislature's intent to provide excess UM/UIM coverage to policyholders in Minnesota?

**The Court of Appeals held that the same definition applies to "insured" as applies to the term "otherwise insured" and the third sentence of the statute.**

### **III. LEGAL ANALYSIS**

#### **A. MINNESOTA STATUTES §65B.49, SUBD. 3(a)(5) AND PRINCIPLES OF STATUTORY CONSTRUCTION**

Minnesota Statutes §65B.49, Subd. 3(a)(5) provides:

If at the time of the accident the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured motorist coverage available to the injured person is the limit specified for that motor vehicle. However, if the injured person is occupying a motor vehicle of which the injured person is not an insured, the injured person may be entitled to excess insurance protection afforded by a policy in which the injured party is otherwise insured. The excess insurance protection is limited to the extent of covered damages sustained, and further is available only to the extent by which the limit of liability for like coverage applicable to any one motor vehicle listed on the automobile insurance policy of which the injured person is an insured exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle.

Minn. Stat. §65B.49, Subd. 3(a)(5) (2008).

A court is guided by certain presumptions and rules of statutory construction when it is presented with the task of interpreting a statute. The pertinent rules that apply to this analysis include the instruction that an Act of the legislature should be construed so as to give meaning to all of its provisions whenever possible. Minn. Stat. §645.16 (2008). In addition, under Minnesota Statutes §645.17, it is further presumed that the legislature does intend its Acts to have a result that is not "...absurd, impossible of execution, or unreasonable" and that the entire statute enacted is intended to "...be effective and certain." Minn. Stat. §645.17, Subd. (1) and (2) (2008).

**B. *BECKER V. STATE FARM MUT. AUTO. INS. CO.*, 611 N.W.2d 7 (MINN. 2000), NULLIFICATION OF THE STATUTE, AND THE RIGHT TO EXCESS UM/UIM COVERAGE**

It is ironic that the Court of Appeals relied on the *Becker* decision in reaching the result below, since the problem that this Court identified and solved with its decision in *Becker* reappears in this case due to the erroneous analysis of the Court of Appeals. The primary problem identified by this Court in *Becker* was nullification of the “excess” UIM provision in the statute, in direct contravention of the rules of statutory construction. Nullification was avoided when the term “insured” in the second sentence of the statute, which modifies the “occupied” motor vehicle language in the first sentence, was defined consistent with the definition of “insured” under Minnesota Statutes §65B.43, Subdivision 5. In this case, however, the Court of Appeals has extended that definition to the third sentence of the statute, which does not refer to the “occupied” motor vehicle, but rather to the term “otherwise insured,” found at the conclusion of the second sentence. By extending that definition, the Court of Appeals inadvertently threatens the nullification eliminated by the decision of this Court in *Becker*.

As this Court discussed in *Becker*, there are three basic components to the UM/UIM priority statute, 65B.49, Subdivision 3(a)(5). First, the initial sentence of the statute requires injured occupants of vehicles to start with the insurance coverages available for the occupied vehicle. *Becker*, 611 N.W.2d at 11. Next, the second sentence of the statute directs that, if the injured person is not an “insured” under the policies

covering the “occupied” vehicle, then the injured person is entitled to “excess” coverage through any other policy under which the injured person is “otherwise insured.” *Id.* Finally, the third sentence of the statute then limits the recovery under a policy or policies where the injured party is “otherwise insured” to the “extent of covered damages sustained” and to the degree that “like coverage” from another policy “of which the injured person is an “insured” exceeds the coverage available from the “occupied” vehicle. *Id.*

This Court in *Becker* pointed out that the second sentence modifies the first to the extent that it identifies when an injured person may pursue “excess” UM/UIM coverage—when the person is not an “insured” under the occupied vehicle. The Court in *Becker* correctly noted that unless the definition of “insured” under this portion of the statute relating to the “occupied” vehicle is limited to the specific terms outlined in Minnesota Statutes §65B.43, Subd. 5, there would never be “excess” UM/UIM coverage because a more expansive definition of “insured” would nullify the language of the statute that followed. *Id.* at 12; *see also* fn 6.

**C. THE OCCUPIED VEHICLE WAS A SCHEDULED VEHICLE UNDER WEST BEND’S GARAGE POLICY**

The briefs of the Appellants outline the admissions from West Bend that demonstrate the insuring intent of the Garage Policy issued to Mr. Oczak’s Company, North End 66. Garage policies are specifically designed to treat an ever-changing group

of vehicles as covered or scheduled vehicles under the policy. The Court of Appeals wrote, “Here, although the West Bend policy issued to ‘North End 66, Inc.’ provides \$500,000 that *generally extends to customer vehicles left with North End 66 for repair*, the contractual language *did not specifically identify* the Kelly vehicle as an insured vehicle.” *West Bend Mutual Ins. Co. v. Allstate Ins. Co.*, 2008 WL 1747826 at \*3 (Minn. Ct. App. 2008) [Emphasis added].

This analysis is misguided and ignores the approach taken by garage policies in identifying a class of insured vehicles (those left for repair with North End 66) rather than the individual vehicles left for repair. Imagine the administrative nightmare inherent in the overly technical analysis of the lower court, as the repair shop has to call the insurance agent repeatedly throughout each business day to specifically add to the policy each vehicle brought in by a customer for repair. How long would an insurer offering a garage policy put up with the administrative nightmare of processing and mailing a policy change for each vehicle brought in for repair in a given day, week or month?

The better approach is to recognize the reality of the garage policy issued in this case and of such policies generally: When the customer delivers the vehicle to the control of the garage for repair it joins a class of vehicles identified by the insurer and the insured as a covered vehicle. In this case, that means the vehicle occupied by Mr. Oczak was insured as a covered vehicle under the policy issued by West Bend and the UIM coverage offered by that policy should be treated as primary UIM under the first sentence

of section 65B.49, Subdivision 3(a)(5). If this approach is followed, there is no need for further analysis under the statute for the West Bend policy.

**D. IF THE OCCUPIED VEHICLE IS NOT CONSIDERED A SCHEDULED VEHICLE UNDER THE WEST BEND POLICY, THEN THE WEST BEND POLICY IS ONE UNDER WHICH MR. OCZAK IS “OTHERWISE INSURED”**

If this Court determines that the “occupied vehicle” was not a scheduled vehicle under the West Bend insurance policy, then the question turns to whether or not Mr. Oczak was an “insured” as that term is defined pursuant to *Becker* of the “occupied vehicle”. There is no dispute that Mr. Oczak was not an “insured” as defined by the statute under the MSI policy that all acknowledge applied to the “occupied vehicle” The Court of Appeals determined that Mr. Oczak did not meet the statutory definition of “insured” with respect to the West Bend Mutual policy, so if this Court decides that the West Bend policy did not provide coverage to the “occupied vehicle” as a scheduled vehicle, then the question turns to whether or not Mr. Oczak was “otherwise insured” under the West Bend policy so as to be able to obtain excess UIM coverage under that policy. West Bend has admitted that Mr. Oczak was “otherwise insured” under the garage policy it issued.

**E. THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE FINAL SENTENCE OF §65B.49, SUBDIVISION 3(a)(5)**

As noted above, it is the position of *Amicus Curiae MNAJ* that under the garage policy issued by West Bend, the vehicle occupied by Mr. Oczak was a “covered vehicle”

and that the West Bend policy, together with the MSI policy, should be the policies attributed to the “occupied vehicle” and together those policies form the primary UIM coverage for the Oczaks in this situation. See, *Norton v. Tri State Ins. Co. of Minnesota*, 590 N.W.2d 649, (Minn. Ct. Appeals 1999) review denied May 26, 1999.

However, in the alternative, if this Court determines that the West Bend policy did not directly cover the “occupied vehicle”, then the West Bend policy should be available to the Oczaks as a policy under which they are “otherwise insured”. The analysis would then turn to the third sentence of §65.49, Subdivision 3(a)(5). However, the Court of Appeals below erred in its analysis of the final sentence of the statute and the errors in this regard precluded the proper finding in this matter.

The Court of Appeals decision below has three fundamental problems which led to the erroneous decision below: First, the Court of Appeals failed to identify the “occupied vehicle” as a scheduled vehicle under the West Bend policy; Second, the Court of Appeals applied the definition of insured under *Becker* to a policy for an unoccupied vehicle, once having made the initial mistake of determining that the West Bend policy did not directly cover the “occupied vehicle;” and, Third, the Court of Appeals misinterpreted the third sentence of the statute, applying the definition of “insured” under *Becker*, which should be limited to analysis of the “occupied” vehicle, and instead used the statutory definition under *Becker*, when it should have been examining potential excess UIM coverage under vehicles that are “otherwise insured.”

At \*4 of the Order of the Court of Appeals, there are two components of the analysis of the third sentence of the statute that are in error. First, in analyzing the part of the sentence that reads, “... *like coverage applicable to any one motor vehicle listed on the automobile insurance policy ...*” (emphasis in original), the Court noted that the vehicle occupied by Mr. Oczak was not specifically listed on the West Bend policy. This analysis is flawed because the Court of Appeals ignores the fact that the language in the third sentence is serving to modify and limit the application of policies under which the person can obtain excess UIM coverage.

The language found in the statute and misinterpreted by the Court of Appeals is language that is designed to prevent the stacking of excess UIM coverage from a policy under which the injured person is “otherwise insured”. See Minn. Stat. §65B.49, Subdivision 3(a)(6). The purpose of that language is to force the injured party to choose one limit for excess UIM coverage and then to take all policies that may afford coverage and have them work off that one limit. Without this language, an injured person could arguably try to stack or add together all policies under which they are “otherwise insured” for the purpose of maximizing excess UIM coverage.

The Court of Appeals essentially turns in a circle when it determines that the fact that the “occupied vehicle” is not listed on the West Bend policy means it is not a primary source of UIM coverage, and then further concludes that it cannot be “otherwise insured” because, again, it is not specifically listed under the policy. The language in the third sentence should not in any way be applied to analyze the “occupied vehicle.” The analysis of whether one is a statutory insured in the “occupied vehicle” is limited to the

purpose of trying to determine if an injured person can seek any excess UIM coverage from a policy where the person is “otherwise insured.” To reintroduce an analysis of the occupied vehicle in the third sentence threatens to nullify in many situations the ability of a person to seek excess UIM coverage under a policy of which they are “otherwise insured”.

The next error that the Court of Appeals makes is to use the *Becker* definition of “insured” in the language of the third sentence of the statute that reads “... of which the injured person is an insured.” The Court of Appeals reasoned that the language was “nearly identical” to the language construed in *Becker*. The problem is that the language is located in a different sentence of the statute and, unlike the term “insured” in *Becker*, the definition of which needs to be applied when analyzing the “occupied vehicle,” the Court of Appeals reuses the definition in a sentence that is modifying policies under which an injured person is “otherwise insured.” This error is fatal to the analysis of the Court of Appeals and results in a great risk going forward that if the decision in this case is upheld, the excess UIM portion of the priority statute will be nullified.

As pointed out in *Becker*, the public policy underlying the priority statute at issue here is to ensure that an individual who purchases a higher level of uninsured or underinsured motorist coverage is able to access that coverage when needed to compensate for injuries. Therefore, the statute first looks at whether the injured person was a statutorily defined insured, because if the person had control over the amount of insurance coverage on the “occupied vehicle,” then they may be limited in their opportunity to pursue excess coverage under policies of which they are “otherwise

insured". If, however, it is concluded that the West Bend policy does not provide primary UIM coverage to the "occupied vehicle," then Mr. Oczak has no control over the amount of underinsured motorist coverage selected for that vehicle, and he should be allowed access to any policy under which he is "otherwise insured." The West Bend policy is one under which he is "otherwise insured," and he should be allowed access, as a matter of public policy, to that coverage in coordination with any other policies under which he is "otherwise insured."

As pointed out by Appellant Allstate in its brief, when there are two or more insurance policies covering a specific risk or vehicle, then "other insurance" clauses in the various policies come together to determine the coordination and payment of those coverages between the various policies involved. Under the priority statute, an injured person will not be able to take two or more policies and stack them on one another, but does have the opportunity to select the highest limit of coverage on any one vehicle for underinsured motorist coverage, and then pursue coverage from one or more companies up to that single selected limit, which presumably will always be the highest limit that was selected by the insuring party for any one vehicle. The decision of the Court of Appeals below completely eviscerates the public policy goal of the priority statute at Minn. Stat. §65B.49, Subdivision 3(a)(5) and the decision needs to be reversed.

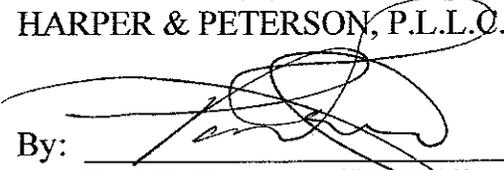
**IV. CONCLUSION**

For the reasons stated above, the decision of the Minnesota Court of Appeals should be reversed and the matter should be remanded to the trial court for further proceedings.

Respectfully submitted,

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Dated: 8-1-08

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Amicus Curiae* brief submitted on behalf of the Minnesota Association for Justice, conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1) for a brief produced with a proportionally spaced font.

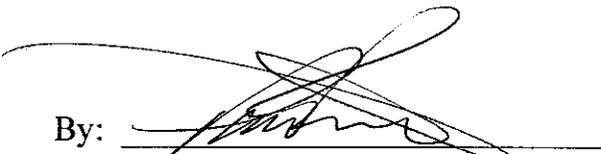
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