

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).

ALLSTATE INSURANCE COMPANY'S REPLY BRIEF

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Appellant Allstate Insurance Company (“Allstate”) submits this brief in reply to the arguments from Respondent West Bend Mutual Insurance Company (“West Bend”). Allstate also responds to the “co-primary” insurance argument from Appellants Thomas and Connie Oczak and amicus curiae Minnesota Association for Justice.

Argument and Authorities

I. The No-Fault Act does not prohibit West Bend from offering excess UIM coverage.

West Bend cannot show that the No-Fault Act prohibits West Bend from offering the coverage that it concedes it provides. West Bend admits that its policy (and Allstate’s) “provide[s] excess UIM coverage that may potentially be applicable” to this case. West Bend’s Brief at 14. Despite this admission, West Bend simply contends that the No-Fault Act somehow absolves West Bend of any responsibility for the coverage it sold. And it does so without showing how such a rule would serve any purpose underlying the Act.

Surprisingly, West Bend ignores two of the apposite cases Allstate cited and discussed in its initial brief: *Carlson* and *Lynch*. West Bend also disregards Minn. Stat. § 65B.49, subd. 7. Contrary to West Bend’s argument, this Court concluded that Minn. Stat. § 65B.49, subd. 3a(5) does not impose a definition of “insured” that determines who the Act covers. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 46 (Minn. 2008) (concluding that the Act is “intended as a list of priorities, rather than as a basic definition of the scope of mandated coverage”). This Court recognized “that subdivision 3a(5) is not intended to define mandatory minimum coverage.” *Id.* at 47.

Similarly, *Lynch* held that an insurer such as West Bend is free to provide more coverage than the No-Fault Act requires. See *Lynch v. American Fam. Mut. Ins. Co.*, 626 N.W.2d 182, 189-190 (Minn. 2001). West Bend simply cannot show that the coverage it chose to provide is prohibited under the Act. West Bend also offers no response to Allstate's argument regarding Minn. Stat. § 65B.49, subd. 7, which makes clear that insurers may provide coverage beyond what the Act requires. In doing so, West Bend fails to heed this Court's direction that provisions of the Act should not be construed in isolation from related sections of the Act. *State Farm Mut. Auto Ins. Co. v. Great West Cas. Co.*, 623 N.W.2d 894, 897 (Minn. 2001); *Western Nat'l Mut. Ins. v. State Farm Ins. Co.*, 374 N.W.2d 441, 445 (Minn. 1985) (noting importance of looking to related provisions of the Act).

West Bend asserts there may be times when a personal auto policy might provide greater excess UIM limits than an employer's policy. West Bend's Brief at 9. That is not the case here, and this possibility does not alter West Bend's obligation. Allstate does not contend that an employer's policy should always be the source of excess UIM coverage, and does not ask this Court to adopt such a rule. Instead, Allstate asks that injured persons not be foreclosed from seeking potential excess UIM coverage from insurers who write and issue such coverage. When there are multiple potential sources of recovery, this Court's long-standing precedent for apportioning which insurer is responsible should control. As discussed below, here West Bend and its greater excess UIM limits should be responsible.

West Bend argues that legislative intent shows its interpretation is the proper one. West Bend's Brief at 8-9. This reference to legislative intent is misplaced for several reasons. First, West Bend never raised this argument below. Second, West Bend neither argues, nor establishes, that the statute is ambiguous. If a statute is unambiguous, no construction is needed. *Harrison v. Harrison*, 733 N.W.2d 451, 453 (Minn. 2007). Because there is no ambiguity, there is no need to look to legislative intent. *Id.* Third, even if legislative intent should be examined, West Bend has not shown that the Legislature intended to exclude entirely a potential source of excess UIM coverage.

West Bend also asserts that public interests are to be favored over private interests. West Bend's Brief at 9 (citing Minn. Stat. § 645.17(5)). Yet, West Bend does not identify what competing public or private interests exist in this action, a simple private dispute as to which of two potential sources of excess UIM coverage are available to the Oczaks. To the extent there is any public interest at issue, that interest is to "promote full but not over-compensation of injured persons." *See Scheibel v. Illinois Farmers Ins. Co.*, 615 N.W.2d 34, 38 (Minn. 2000). Given this overriding purpose, the No-Fault Act should not be interpreted to foreclose entirely a potential source of excess UIM coverage absent clear and explicit statutory language – language that West Bend has not identified (and which does not exist).

West Bend also relies upon *Stewart v. Illinois Farmers Ins. Co.*, 727 N.W.2d 679 (Minn. Ct. App. 2007), a Court of Appeals decision that does not bind this Court. Because it was not a case with multiple potential sources of excess coverage, *Stewart* is distinguishable. It simply held that an injured party was not barred from seeking excess

uninsured motorist (UM) coverage from an insurer. *Id.* at 686 (citing *Becker v. State Farm Mut. Auto Ins. Co.*, 611 N.W.2d 7 (Minn. 2000)). *Stewart* did not hold that the Act prevents an injured person from pursuing a potential source of excess UM (or UIM) coverage. It also did not hold the statutory definition of “insured” was to be used in all parts of Minn. Stat. § 65B.49, subd. 3a(5). Despite West Bend’s contrary argument, this Court has decided that subdivision 3a(5) does not impose a definition of insured that sets forth the scope of mandated coverage. *Carlson*, 749 N.W.2d at 46-47.

Finally, West Bend has not shown what purpose is served in depriving someone from accessing excess UIM coverage that a policy provides. West Bend fails to justify foreclosing an injured person from ever recovering under a policy that provides greater excess UIM limits, and offers no reason to construe the Act to limit recovery of excess UIM coverage to policies purchased by an injured person or family members. Such a construction should fail as an absurd or unreasonable result. *See* Minn. Stat. § 645.17(1) (presuming the “legislature does not intend a result that is absurd . . . or unreasonable”). This Court should reverse and conclude that the No-Fault Act does not excuse West Bend from fulfilling its contractual responsibilities.

II. West Bend should be responsible for the Oczaks’ excess UIM claim because West Bend’s policy more closely contemplated the risk of accidents involving customer vehicles being driven than Allstate’s policy.

Thomas Oczak was injured in the course and scope of his employment while he was test-driving a customer’s car. As between the insurer for the garage that worked on the customer’s car, West Bend, and the insurer for the Oczaks’ personal vehicle, Allstate, West Bend should be held responsible for any excess UIM coverage that might be owed

because its policy more closely contemplated the risk of such driving conduct. Where multiple potential sources of recovery exist, this Court seeks to allocate coverage in light of the total policy insuring intent of the policies. *See Integrity Mutual Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co.*, 307 Minn. 173, 239 N.W.2d 445, 446 (1976) (addressing priorities of coverage in an uninsured motorist dispute). This Court should conclude that West Bend is responsible for providing excess UIM coverage to the Oczaks because its policy contemplated the risk from test-driving customer vehicles more closely than Allstate's policy.

A. The supposed lack of a conflict between the “other insurance” clauses is not dispositive and does not absolve West Bend of responsibility.

West Bend contends that a “closeness to the risk analysis applies *only if* a court first determines that the applicable policies’ other insurance clauses conflict.” West Bend’s Brief at 18 (emphasis added) (citing *Illinois Farmers Ins. Co. v. Depositors Ins. Co.*, 480 N.W.2d 657, 659 (Minn. Ct. App. 1992)). This contention is incorrect. Courts can and do allocate coverage even if there is no conflict. The lack of an “other insurance” clause, and thus by definition the lack of a conflict between the policies, does not preclude an examination of the total policy insuring intent of the respective policies. *See Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 711-12 (Minn. 1991); *see also Interstate Fire & Cas. Co. v. Auto Owners Ins. Co.*, 433 N.W.2d 82, 85 (Minn. 1988) (“this court does not simply look at the type of ‘other insurance’ clauses involved”). In any event, as noted below, there is a conflict.

B. Even if a conflict between “other insurance” clauses is required, a conflict exists between the West Bend and Allstate policies.

Contrary to West Bend’s assertion, the “other insurance” clauses in its and Allstate’s policies do conflict. Whether viewed as a case of an excess clause versus another excess clause, or an excess clause versus a pro rata clause, there is a conflict between the policies that justifies examining the total policy insuring intent of the policies to determine which one is responsible for excess UIM coverage.

West Bend’s UIM coverage “is excess in the event the accident involves a non-owned vehicle.” West Bend’s Brief at 18 (citing A.54 at b.(2)(b)). If there is more than one excess UIM coverage, then West Bend’s policy calls for proration. *Id.* (citing A.54 at b.(2)(ii)). West Bend correctly notes that Allstate’s policy provides that it is excess over other policies. A.140. Under either scenario, however, a conflict exists.

Policies that both have excess “other insurance” clauses conflict. *Illinois Farmers*, 480 N.W.2d at 659-660 (“when both policies claim to be excess . . . they are deemed to conflict”); *Federated Mut. Ins. Co. v. American Fam. Mut. Ins. Co.*, 350 N.W.2d 425, 426-27 (Minn. Ct. App. 1984) (“since both policies claim to be excess coverage, they are in conflict”). Similarly, a conflict also exists in cases with an excess clause and a pro rata clause. *See Integrity Mutual*, 307 Minn. 173, 239 N.W.2d at 447; *see also State Farm Mut. Auto Ins. Co. v. Levinson*, 438 N.W.2d 110, 115 (Minn. Ct. App. 1989) (addressing dispute as to UIM coverage; “an excess clause and a pro rata clause do conflict”).

Because the respective “other insurance” clauses conflict, it is appropriate to examine the

total policy insuring intent of each policy and determine whether West Bend or Allstate is closer to the risk.

C. West Bend's garage owner's policy contemplated the risk from driving customer vehicles more closely than Allstate's personal auto policy.

The primary function of West Bend's policy was to insure North End 66, Inc., and all the attendant risks of a garage-repair business. Those risks include employees test-driving and operating customer vehicles. The primary function of Allstate's policy was to insure the Oczaks' one personal auto, and to insure the Oczaks when they operate other vehicles for transportation use. The primary function of Allstate's policy was not to insure Mr. Oczak when he operated vehicles while working at North End 66. *See Auto Owners Ins. Co. v. North Star Mutual Ins. Co.*, 281 N.W.2d 700, 704 (Minn. 1979) (insurer of motorboat was closer to risk of a boating accident than a homeowner insurer); *American Fam. Ins. v. National Cas. Co.*, 515 N.W.2d 741, 746 (Minn. Ct. App. 1994) (policy covering daycare business closer to risk for claims from daycare activities than a homeowner insurer).

State Farm Mut. Auto Ins. Co. v. Zurich Ins. Co., 439 N.W.2d 751, 754 (Minn. Ct. App. 1989), also provides guidance. There, State Farm insured two vehicles normally used for everyday transportation. Zurich's policy covered six vehicles that were primarily designed for show, and not for transportation. *Id.* Where another vehicle was involved in an accident because of its primary use for transportation, as opposed to for show or exhibition, State Farm was held responsible. *Id.* Here West Bend, which sold a garage policy and accepted premiums to provide coverage (including UIM coverage) for

operating North End 66 (including test-driving customer vehicles), is closer to the risk than Allstate, which simply insured the Oczaks' personal auto that was not involved in the accident. *See Garrick*, 469 N.W.2d at 712.

Alternatively, Allstate suggests a remand to review the closeness to risk factors and total policy insuring intent of the policies. However, because the facts are undisputed and interpretation of the policies raises questions of law, this Court should undertake this review and avoid further delay to the Oczaks in resolving which insurer is responsible for providing excess UIM coverage.

III. West Bend correctly notes that both courts below properly rejected the Oczaks' argument seeking "co-primary" coverage from West Bend.

The Oczaks and the Minnesota Association for Justice argue that West Bend's UIM coverage is "co-primary" along with the primary UIM coverage that MSI provided as the insurer for the vehicle in the accident. The courts below correctly rejected this argument. Allstate agrees that West Bend's UIM coverage is not "co-primary." The Oczaks have never contended that Allstate is responsible as a "co-primary" insurer, and Allstate agrees with the Oczaks' alternative argument that West Bend is responsible for excess UIM coverage.

Under the priority system the Legislature created, the Act mandates that primary UIM coverage comes from the motor vehicle that the injured person was occupying at the time of the accident. Minn. Stat. § 65B.49, subd. 3a(5) (first sentence). *Thommen v. Ill. Farmers Ins. Co.*, 437 N.W.2d 651, 653 (Minn. 1989) ("look first to the UIM coverage afforded by the" insurer for the occupied vehicle). In this case, the insurer for the

occupied vehicle, MSI, was the primary UIM insurer. While the Oczaks may look elsewhere for excess UIM protection that other policies might provide, there is nothing in the Act or in this Court's decisions that support an argument for "co-primary" insurance.

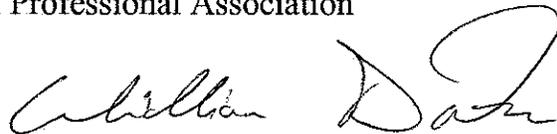
The sole case the Oczaks cite, *Norton v. Tri-State Ins. Co.*, 590 N.W.2d 649 (Minn. Ct. App. 1999), involved a unique factual scenario that does not exist here. Neither West Bend nor Allstate insured the motor vehicle that Mr. Oczak occupied at the time of the accident. Accordingly, neither is responsible as the primary UIM insurer.

Conclusion

West Bend should be held responsible for providing the excess UIM coverage it admits it sold. This Court should reverse and declare that the Oczaks are entitled to pursue excess UIM coverage from West Bend, and that it, and not Allstate, is responsible for the Oczaks' excess UIM claim in this case. Alternatively, this Court should reverse and remand so that the district court can examine which policy is closer to the risk of an accident where a garage employee is injured while operating a customer's vehicle during the course and scope of the employee's employment.

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