

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).

RESPONDENT WEST BEND MUTUAL INSURANCE COMPANY'S BRIEF

PALMER • O'DEA, LLC.
Richard D. O'Dea (#221429)
Ralph S. Palmer (#83719)
220 Rosedale Towers
1700 Highway 36 West
Roseville, MN 55113
(651) 633-9367

And

THE CODY LAW GROUP, CHTD.
David K. Cody (#17590)
Degree of Honor Building, Suite 1001
325 Cedar Street
St. Paul, MN 55101
(651) 294-0094

*Attorneys for Appellants
Thomas and Connie Oczak*

BASSFORD REMELE,
A Professional Association
Dale M. Wagner (#113554)
Louis J. Speltz (#152912)
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
(612) 333-3000

*Attorneys for Respondent
West Bend Mutual Insurance Company*

LIND, JENSEN, SULLIVAN &
PETERSON, P.A.
William L. Davidson (#201777)
150 South Fifth Street, Suite 1700
Minneapolis, MN 55402
(612) 333-3637

*Attorneys for Appellant
Allstate Insurance Company*

HARPER & PETERSON, P.L.L.C.

Paul D. Peterson, Esq.

Lori L. Barton (#332070)

3040 Woodbury Drive

Woodbury, MN 55129-9617

*Attorney for Amicus Curiae Minnesota
Association for Justice*

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LEGAL ISSUES

- I. Did the lower courts err in determining that the excess underinsured motorist coverage available to the injured person under Minn. Stat. §65B.49, subd. 3a(5) was provided by the policy that identified him as an insured as defined in Minn. Stat. §65B.43, subd. 5?

Apposite Authority:

Minn. Stat. §65B.49, subd. 3a(5)

Minn. Stat. §65B.43, subd. 5

Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000)

Stewart v. Illinois Farmers Ins. Co., 727 N.W.2d 679 (Minn. 2007)

- II. Did the lower courts err in determining that the injured person's employer's insurer did not provide co-primary underinsured motorist coverage where the vehicle being occupied by the injured person at the time of the accident was not described and no limit of underinsured motorist coverage was stated for that vehicle in the employer's policy?

Apposite Authority:

Minn. Stat. §65B.49, subd. 3a(5)

Thommen v. Illinois Farmers Ins. Co., 437 N.W.2d 651 (Minn. 1989)

Davis v. American Family Mutual Ins. Co., 521 N.W.2d 366 (Minn. App. 1994)

- III. Did the lower courts err by declining to conduct a closeness to the risk analysis where Minn. Stat. §65B.49, subd. 3a(5) establishes the priority of coverages and where the involved other insurance clauses are reconcilable?

Apposite Authority:

Minn. Stat. §65B.49, subd. 3a(5)

Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657 (Minn. App. 1992)

STATEMENT OF THE CASE

West Bend Mutual Insurance Company (West Bend) commenced a declaratory judgment proceeding requesting the district court to determine the source of excess underinsured motorist (UIM) coverage available to Thomas and Connie Oczak. Mr. Oczak was injured in a motor vehicle accident that occurred on July 13, 2000. West Bend's position is that, under Minn. Stat. §65B.49, subd. 3a(5), Allstate Insurance Company (Allstate) provides the excess underinsured motorist coverage applicable to the Oczaks' claims.

The facts material to the issue presented are undisputed. All three parties made motions for summary judgment in the trial court. The trial court granted summary judgment declaring that Allstate provides the excess underinsured motorist coverage applicable to Mr. Oczak's accident. The Court of Appeals affirmed.

STATEMENT OF FACTS

1. Thomas Oczak and Connie Oczak are husband and wife and reside in Ramsey County, Minnesota. Thomas Oczak was an employee of North End 66, Inc. The business of North End 66 included servicing and repairing motor vehicles for customers.

2. On July 13, 2000, Thomas Oczak was injured in the course and scope of his employment with North End 66, Inc. as he was driving a 1990 Toyota Camry owned by Justin Kelly, a customer of North End 66.

3. Thomas and Connie Oczak allege that the owner and operator of the other vehicle involved in the July 13, 2000 accident, Marc Schermerhorn, was negligent and

underinsured. Marc Schermerhorn had liability coverage with an applicable limit of liability of \$100,000.

4. The Justin Kelly motor vehicle that Thomas Oczak was driving at the time of the July 13, 2000 accident was insured with Mutual Service Insurance Company (MSI) and had UIM coverage with a limit of \$100,000. Mr. Oczak was an insured under the MSI policy for UIM purposes because he was occupying the Kelly vehicle at the time he sustained injury (Oczak App. at p. 62).

5. The Oczaks have received the \$100,000 liability limit on the Schermerhorn vehicle and the \$100,000 UIM limit on the Kelly vehicle.

6. The Oczaks claim that their damages exceed the \$200,000 they have received.

7. At the time of the July 13, 2000 accident, Allstate had in effect an automobile insurance policy insuring a motor vehicle owned by the Oczaks (Allstate App. 92-149).¹ The Allstate policy provided UIM coverage with a limit of \$300,000 (App. 95). Both Thomas Oczak and Connie Oczak were listed as named insureds under the Allstate policy (App. 94).

8. At the time of the July 13, 2000 accident, West Bend had in effect a garage business owner's liability policy insuring North End 66, Inc. (App. 20-91). The West Bend policy contained commercial automobile coverage on certain motor vehicles owned by North End 66. The West Bend policy provided UIM coverage with a limit of \$500,000 (App. 38). North End 66, Inc. was listed as the named insured under the West Bend policy (App. 38).

¹ All further appendix references are to the appendix provided with Allstate's Brief.

Additional policy provisions of the Allstate and West Bend policies will be discussed in the context of the arguments that follow.

STANDARD OF REVIEW

Because this case involves the interpretation of a statute and of insurance contracts, the standard of review is *de novo*. *Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598, 600 (Minn. 2001).

ARGUMENT

I. MINN. STAT. §65B.49, SUBD. 3a(5) REQUIRES THAT THE EXCESS UIM COVERAGE BE PROVIDED BY THE POLICY UNDER WHICH THE INSURED PERSON IS “INSURED” AS DEFINED BY MINN. STAT. §65B.43, SUBD. 5

A. Case Law Interpretation of Minn. Stat. §65B.49, subd. 3a(5).

The issues in this case are controlled by Minn. Stat. §65B.49, subd. 3a(5). The function of Subd. 3a(5) is to connect an injured passenger’s total UIM benefit recovery to the limit specified for the motor vehicle the person occupied. *Schons v. State Farm Mut. Auto. Ins. Co.*, 621 N.W.2d 743, 747 (Minn. 2001). Where the person is occupying a motor vehicle at the time of the injury, Subd. 3a(5) sets forth the priority for UIM coverages and the maximum amount recoverable in three sentences:

- (1) If at the time of the accident, the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured motorist coverages available to the injured person is the limit specified for that motor vehicle.

- (2) 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.
- (3) 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.

This Court construed the word “insured” as used in the second sentence of Subd. 3a(5) in *Becker v. State Farm Mut. Auto. Ins. Co.*, 611 N.W.2d 7 (Minn. 2000). In that case, Becker was injured in an accident in the course and scope of her employment as a truck driver through the negligence of the driver of an underinsured vehicle. Pursuant to the first sentence of the statute, Becker initially obtained the \$50,000 of available UIM coverage from her employer’s commercial auto insurer, *i.e.*, the vehicle she was occupying at the time of the accident. The named insured under that policy was her employer.

Becker then sought to recover excess UIM coverage from her personal automobile insurer, State Farm, through which she had UIM coverage of \$100,000. State Farm denied Becker’s claim, contending that Becker was an insured under her employer’s policy on the truck she was occupying at the time of the accident and, therefore, she could only receive UIM coverage from the employer’s policy. In other words, State Farm contended that the second sentence of Subd. 3a(5) was not applicable and, therefore, no excess UIM coverage was available. Becker, on the other hand, asserted that she was not an insured under the employer’s commercial auto policy. She asserted

that the word “insured” as used in §65B.49, subd. 3a(5) means an insured within the definition of that term in §65B.43, subd. 5.² Thus, she argued that under the second sentence of subd. 3a(5), she was entitled to seek excess UIM coverage under her personal auto policy with State Farm. This Court noted that the resolution of the case turned on the proper definition of the word “insured” as used in Subd. 3a(5). 611 N.W.2d at 11.

This Court resolved the issue as follows:

We hold that the correct interpretation of “insured” as used in Minn. Stat. §65B.49, subd. 3a(5) is limited to those persons specifically listed in Minn. Stat. §65B.43, subd. 5; that is, the named insured, or spouse, minor or resident relative of the named insured, in the policy of the occupied vehicle.

611 N.W.2d at 13.

Accordingly, because Becker was not “insured” under her employer’s policy, *i.e.*, she did not fall within the statutory definition of insured, she could seek excess UIM coverage under her own auto policy with State Farm.

The court of appeals followed *Becker* in *Stewart v. Illinois Farmers Ins. Co.*, 727 N.W.2d 679 (Minn. App. 2007). In that case, Stewart was injured when an uninsured driver of another vehicle struck Stewart’s vehicle while he was driving in the course and

² Minn. State. §65B.43, subd. 5 provides:

“Insured” means an insured under a plan of reparation security as provided by sections 65B.41 to 65B.71, including the named insured and the following persons not identified by name as an insured while (a) residing in the same household with the named insured, and (b) not identified by name in any other contract for a plan of reparation security complying with sections 65B.41 to 65B.71 as an insured:

- (1) a spouse;
- (2) other relative of a named insured, or
- (3) a minor in the custody of a named insured or of a relative residing in the same household with the named insured. . . .

scope of his employment for Quicksilver Express. Stewart owned the vehicle he was driving at the time of the accident but the vehicle was insured under Quicksilver's policy, which had an uninsured motorist (UM) coverage limit of \$50,000 per person.

Stewart's wife owned a vehicle that was not involved in the accident; that vehicle was insured by Illinois Farmers. Stewart's wife was the named insured under that policy and Stewart was insured as a spouse. The Illinois Farmers policy had a UM coverage limit of \$100,000 per person.

Stewart received the \$50,000 UM limit from Quicksilver's policy. He then sought excess UM coverage from his wife's policy. Illinois Farmers argued that Stewart was barred from recovering excess UM under his wife's policy because Stewart was an insured under Quicksilver's policy. *Id.* at 727 N.W.2d 686. Illinois Farmers based this argument on the fact that Quicksilver's policy listed Stewart's vehicle as a covered auto and Stewart was identified as the vehicle owner in a separate endorsement.

The court of appeals rejected Illinois Farmers' argument. Merely being identified in a policy does not make the individual an insured under the policy. Additional insured status is not equal to named insured status. Accordingly, the court held that because Stewart was not a statutorily defined insured under his employer's policy, he was not barred from recovering excess UM benefits from Illinois Farmers. *Id.* at 727 N.W.2d 688.

The *Becker* and *Stewart* cases strongly support West Bend's position that the excess UIM coverage should come from a policy on which the injured person is an insured as defined in Minn. Stat. §65B.49, subd. 3a(5).

B. Considerations of Legislative Intent.

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Minn. Stat. §645.16. In enacting 65B.49, subd. 3a(5), the legislature clearly intended that an injured person who fortuitously happens to be occupying a vehicle with low UIM limits at the time of injury should not be deprived of the benefit of a higher limit in a policy purchased by the injured party (or a family member). Thus, in that situation, subd. 3a(5) gives the injured person the benefit of the higher limit of coverage that he or she purchased. In this way, Subd. 3a(5) gives the injured person control over the amount of UIM coverage that will be available in the event of an accident at the hands of an underinsured motorist. As stated by one commentator:

The ability to seek surplus UM/UIM coverage was designed to allow policyholders to pre-select the minimum level of insurance coverage that would be available for any given accident. Without such a provision, an insured's ability to protect and safeguard his or her destiny would be subject to the insuring responsibility of other motor vehicle owners and operators over whom the injured person has no control.

Theodore J. Smetak, *Underinsured Motorist Coverage in Minnesota: Old Precedents in a New Era*, 24 Wm. Mitchell L. Rev. 857, 936-37 (1998).

This Court has also had occasion to consider the legislative intent behind §65B.49, subd. 3a. After stating its holding in *Becker*, the Court stated:

This interpretation is consistent with those provisions of Minn. Stat. §65B.49, subd. 3a(1)-(2) (1998), that permit individuals to protect themselves and family members by paying for UM/UIM coverage to which they can turn in the event they are injured while riding in someone else's vehicle covered by a policy with lower limits. Our decision also comports with the underlying goal of the UM/UIM scheme as enacted in 1985. That

scheme gives motor vehicle owners the ability to select and purchase the amount of UM/UIM coverage they desire in excess of the mandatory minimums, and then access that coverage in the event they are injured while occupying a vehicle owned by someone who has purchased only the minimum UM/UIM coverage, subject to the limitations of section 65B.49, subd. 3a.

The ability to protect and safeguard one's own destiny is lost if it is held that the excess UIM comes from a policy under which the injured party is not an insured as defined insured by Minn. Stat. §65B.43, subd. 5. The position of the appellants and the Minnesota Association for Justice (MAJ) that excess UIM coverage should come from an employer's policy, rather than the injured party's own policy, eliminates the insured's control and creates the very randomness the legislature sought to avoid in enacting Subd. 3a(5). Their position should be rejected for that reason.

In this particular case, the limit of coverage under the injured party's own policy is less than that the limit of coverage under the employer's policy. In many instances, however, the opposite will be true; *e.g.*, *Becker* and *Stewart* to name a couple of obvious examples. The ruling most consistent with the legislative intent is that the injured party should look to his or her own pre-selected UIM coverage. This ruling would also further the legislative intent of favoring the public interest over a private interest. *See*, Minn. Stat. §645.17(5).

Considerations of legislative intent strongly support a determination that the excess UIM coverage should come from a policy on which the injured person is an insured as defined in Minn. Stat. §65B.49, subd. 3a(5).

C. Application of Subd. 3a(5) to the Facts of this Case.

The first sentence of Subd. 3a(5) “directs injured occupants to seek UIM coverage initially from the insurer of the motor vehicle they occupied at the time of the accident and establishes as limits of liability those specified in the policy on the occupied vehicle.” *Becker*, 611 N.W.2d at 11. This means that the Oczaks correctly initially sought UIM coverage from MSI since it was the insurer of the Justin Kelly automobile, *i.e.*, the motor vehicle Mr. Oczak was occupying at the time of the accident.

The second sentence of Subd. 3a(5) provides that if the injured person is not an “insured” of the occupied motor vehicle, “the injured person may then be entitled to seek excess insurance protection through another automobile insurance policy in which the injured person is insured.” *Becker*, 611 N.W.3d at 11. In this case, Mr. Oczak was an insured under the Kelly vehicle form UIM purposes but was not a statutorily defined insured.³ Therefore, Mr. Oczak is entitled to seek excess UIM coverage through another automobile insurance policy in which he is otherwise insured.

Both Mr. and Mrs. Oczak clearly meet the §65B.43, subd. 5 definition of “insured” under the Allstate policy because they were the named insureds in that policy. Specifically, the Allstate policy provides:

NAMED INSURED(S)
Connie Marie & Thomas R. Oczak
5573 St. Albans Circle
Shoreview, MN 55126-4796

³ Justin Kelly, the owner of the involved motor vehicle, was the named insured under the MSI policy insuring his vehicle. No one contends that Mr. Oczak was related to Mr. Kelly in any of the ways described in Minn. Stat. §65B.43, subd. 5.

(App. 94).

Accordingly, the Allstate UIM coverage here is in precisely the same position as was the State Farm UIM coverage in *Becker*.

West Bend provided UIM coverage in the commercial auto portions of the policy it issued to Mr. Oczak's employer, North End 66, Inc. However, that UIM coverage is not available to the Oczaks in this particular case.⁴ Mr. Oczak was not occupying any of the vehicles insured under the West Bend policy at the time he was injured. In addition, Mr. Oczak does not meet the statutory definition of "insured" under the West Bend policy. The only named insured under that policy was North End 66. While driving a customer's vehicle, Mr. Oczak was an additional insured under the West Bend policy similar to the situations in *Becker* and *Stewart*. Therefore, in this factual situation, any excess UIM coverage must come from Allstate who covered Mr. Oczak as a named insured rather than West Bend which only covered him as an additional insured.

The amount of the excess UIM coverage for which the Oczaks are eligible is limited by the third sentence of Subd. 3a(5) 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 coverage available to the injured person from the occupied motor vehicle." This particular language also supports West Bend's position that the excess UIM coverage should come

⁴ Under Minn. Stat. §65B.49, subd. 3a, there are several situations in which an insurance policy may provide UIM coverage that covers the injured party but the coverage is not available to the person under the circumstances. These situations can arise under §65B.49, subd. 3(a)6 and 7 as well as 5.

from Allstate because it is nearly identical to the language construed in *Becker*. In this case, *the automobile insurance policy of which the injured person is an insured* is the Allstate policy. Thus, the maximum that the Oczaks can recover is the Allstate UIM limit (\$300,000) less the UIM limit on the occupied vehicle (\$100,000), or \$200,000.

D. The West Bend Policy is consistent with Subd. 3a(5).

The statutory scheme for prioritizing the availability of UIM coverage is tracked by the language of the UIM portion (App. 52-5) of the West Bend policy which states:

- b. If an “insured” sustains “bodily injury” while “occupying” a vehicle not owned by that person or while not “occupying” any vehicle, the following priorities of recovery apply:

First Priority	The policy affording Uninsured Motorists Coverage or Underinsured Motorists Coverage to the vehicle the “insured” was “occupying” at the time of the “accident”.
Second Priority	Any Coverage Form or policy affording Uninsured Motorists Coverage or Underinsured Motorists Coverage to the “insured” as a named insured or family member.

(App. 54).

Thus, like the statute, the West Bend policy provides that the first UIM coverage available is the limit specified for the occupied vehicle. Here, that is the UIM coverage provided by MSI on Justin Kelly’s Toyota. Also, like the statute, the policy provides that the second priority of UIM coverage available is that provided to the insured as a named insured or family member. Here, that is the Allstate UIM coverage.

II. WEST BEND DOES NOT PROVIDE CO-PRIMARY UIM COVERAGE.

The Oczaks and the MAJ assert that West Bend's UIM coverage is co-primary along with the UIM coverage provided in the MSI policy. This position is contrary to the clear language of Subd. 3(a)(5), well established case law, and the language of West Bend's policy. Additionally, the case that is primarily relied upon in making this argument, *Norton v. Tri-State Ins. Co.*, 590 N.W.2d 649 (Minn. App. 1999), is readily distinguishable from this case.

A. The Statutory Language Requires That Both the West Bend and Allstate UIM Coverages Be Considered Excess.

The first sentence of Subd. 3a(5) states:

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.**

(Emphasis added.)

The vehicle being occupied by Thomas Oczak at the time of the accident was a 1990 Toyota Camry owned by Justin Kelly. The UIM "limit specified for that motor vehicle" was the \$100,000 provided for in the MSI policy covering that vehicle.

No limit of liability for "that motor vehicle," *i.e.*, the Kelly's Toyota Camry, is specified in the West Bend policy (or the Allstate policy for that matter). Unlike the MSI policy, neither the West Bend nor the Allstate policy mention or describe the Toyota Camry. The West Bend policy describes several vehicles that are specifically insured under the policy (App. 43-4). Similarly, the Allstate policy describes the vehicle insured by Allstate (App. 95). Because the West Bend and Allstate policies do not provide a

limit of liability for, or specifically describe the occupied motor vehicle, neither provide primary UIM coverage for the involved injuries.

B. The Case Law Also Requires That the West Bend and Allstate UIM Coverage Be Considered Excess.

Subd. 3(a)(5) codifies the order of priority of UM and UIM coverage and requires an injured party who is a passenger in a vehicle owned by another to look first to the UIM coverage afforded by the vehicle driver's or owner's policy. *Davis v. American Family Mutual Ins. Co.*, 521 N.W.2d 366, 368-69 (Minn. App. 1994) (citing *Thommen v. Illinois Farmers Ins. Co.*, 437 N.W.2d 651, 653 (Minn. 1989)). In *Thommen*, this Court observed that the 1985 amendments to the No-Fault Act reflected a broad policy decision to tie uninsured and underinsured motorist to the particular vehicle involved in the accident (citing *Hanson v. American Family Mutual Ins. Co.*, 417 N.W.2d 94, 96 (Minn. 1987)). The court drew this conclusion from the very statute at issue here, Subd. 3a(5). The court stated:

Clearly, the statute requires *Thommen*, as an occupant of Kirschbaum's automobile, to look first to the UIM coverage afforded by the American Family policy issued to Kirschbaum.

Id., at 437 N.W.2d 653.

Applied to this case, these cases mean that Oczak, as an occupant of the Kelly vehicle, must first look to the UIM coverage afforded by the MSI policy issued to Kelly. Under Subd. 3(a)(5), any other UIM coverage is "excess insurance protection."

C. West Bend's Policy Provides That Any UIM Coverage it May Provide With Respect to a Non-Owned Vehicle is Excess.

It is undisputed that at the time of the accident, the vehicle Thomas Oczak was occupying was not owned by either him or North End 66. The UIM section of the West Bend policy provides:

Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectable uninsured or underinsured motorist insurance providing insurance on a primary basis.

(App. 54 at (2)(b)).

Accordingly, the West Bend policy specifically provides that any UIM coverage it provides is excess when the involved vehicle is non-owned and there is a policy providing primary coverage as the MSI policy does here.

D. The Norton Case Does Not Support the Oczak's Contention that the West Bend UIM Coverage is Co-Primary.

The *Norton v. Tri-State Ins. Co.* case involved a factual situation very different from the one involved here. In *Norton*, the vehicle occupied by the injured party, a 1977 Chevrolet Caprice, had been sold to the injured party. The seller of the Caprice continued to carry insurance on the vehicle because the full purchase price had not yet been paid. The purchaser, who was the injured party, also carried insurance on the Caprice. Thus, both of the insurance policies involved in *Norton* specifically described and insured the Caprice. In applying the first sentence of Subd. 3a(5) to the facts of *Norton*, it was clear that both policies' UIM coverages were specified for "that motor vehicle."

Here, West Bend and Allstate provide excess UIM coverage that may potentially be applicable to the involved Toyota Camry as a non-owned vehicle. However, neither company's policy describes the Toyota Camry specifically or provides a limit of UIM for that vehicle. Therefore, this case is distinguishable from *Norton* and falls within the general rule established by the statute as interpreted in *Thommen* and *Davis*.

Finally, the co-primary argument made by the Oczaks and the MAJ makes no sense because if West Bend's UIM coverage is co-primary, then Allstate's UIM coverage is co-primary as well. Under the Allstate policy, an "insured auto" for UIM purposes includes a motor vehicle "not owned by you or a resident, if being operated by you with the reasonable belief that you have the owner's permission" (App. 137). This would include Kelly's Toyota Camry at the time of the accident. Because the Allstate UIM coverage is also available on the involved vehicle, under the reasoning of the Oczaks and the MAJ, this means that the MSI, West Bend and Allstate policies all provide co-primary UIM coverage. But this makes no sense and is contrary to the statute and legislative intent. As such, the co-primary argument should be rejected.

III. THE CLOSENESS TO THE RISK ANALYSIS DOES NOT APPLY WHERE A STATUTE AND CASE LAW GOVERN PRIORITIES AND WHERE THE "OTHER INSURANCE" CLAUSES ARE RECONCILABLE

A. Under Subd. 3a(5), Only the Allstate UIM Coverage is Available.

Allstate argues that the court should apply a "closeness to the risk" analysis to determine whether the West Bend or the Allstate policy provides the applicable excess UIM coverage. Again, West Bend believes that the statute itself, as interpreted in *Becker*, requires Allstate to provide the excess UIM coverage with respect to the Oczaks' claims.

Because Subd. 3a(5) resolves the question and only Allstate's coverage is available, there is no need to engage in a closeness to the risk analysis and this Court needs to go no further in resolving this case.

B. There is No Conflict Between the Policies' Other Insurance Clauses.

A second major flaw in Allstate's closeness to the risk argument is that it mistakenly relies on the incorrect "other insurance" clause in the Allstate policy. In its brief, Allstate quotes the other insurance clause at its Appendix page 119 (Allstate brief at pages 17-18). That clause states that Allstate's UIM is excess when there is UIM coverage under another policy and that Allstate will pay only after all other collectible insurance has been exhausted.

However, Allstate replaced the other insurance clause quoted in its brief with an entirely different clause in an endorsement attached to the Allstate policy. The endorsement, known as the "Minnesota Amendment of Policy Provisions—AU1502-9", can be found at pages 130 through 143 of Allstate's Appendix. The endorsement contains the other insurance clause that is applicable to this case. That clause states:

If the insured person was injured while occupying a vehicle you do not own which is insured for this coverage under another policy, this coverage will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, we will only pay the amount by which our limit of liability on this policy exceeds the limit of liability on that policy.

(App. 140).

Significantly, this other insurance clause does not contain the language providing that Allstate will pay UIM benefits only when all other collectible insurance has been

exhausted. Rather, it simply provides that the Allstate UIM coverage is excess over the UIM coverage on an occupied but non-owned vehicle. The clause does not state that the Allstate UIM coverage is excess to other excess UIM coverage. It is completely silent as to that issue.

The closeness to the risk analysis applies only if a court first determines that the applicable policies' other insurance clauses conflict. *Illinois Farmers Ins. Co. v. Depositors Ins. Co.*, 480 N.W.2d 657, 659 (Minn. App. 1992). Like the Allstate policy, West Bend's UIM coverage also provides that it is excess in the event the accident involves a non-owned vehicle (App. 54 at b.(2)(b)). West Bend's policy goes on to provide for proration when there is more than one excess UIM coverage (App. 54 at b.(2)(b)(ii)). Because Allstate's UIM coverage is completely silent as to what happens when the Allstate policy and another policy both provide excess UIM coverage, there is no conflict between the other insurance clauses. Accordingly, the closeness to the risk doctrine does not apply. Rather, if the Court was to conclude that West Bend's UIM coverage was applicable to this case, then the coverages would be prorated—\$400,000 of available UIM coverage prorated 3/8ths to Allstate and 5/8ths to West Bend.

C. If the Court Applies a Closeness to the Risk Analysis, it Should Conclude that the Allstate UIM Coverage is Closer to the Risk.

In any event, West Bend disagrees that application of a closeness to the risk analysis leads to the conclusion that West Bend's UIM coverage is primary to Allstate's UIM coverage. In conducting a closeness to the risk analysis, three questions are asked to determine which policy provides the primary coverage. These questions are:

1. Which policy specifically describes the accident-causing instrumentality;
2. Which premium is reflective of the greater contemplated exposure; and
3. Does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than the other policy—that is, coverage of the risk primary in the one policy and incidental to the other?

Heinen v. Illinois Farmers Ins. Co., 566 N.W.2d 378, 381 (Minn. App. 1997).

As to the first factor, neither the Allstate policy nor the West Bend policy specifically describe the accident-causing instrumentality, *i.e.*, the Schermerhorn vehicle. Moreover, neither the Allstate nor the West Bend policy specifically describe the vehicle Mr. Oczak was driving. The first factor favors neither policy.

As to the second factor, the premium for the UIM coverage in the Allstate policy for the six month period from June 2, 2000 to December 2, 2000 for \$300,000 of UIM coverage was \$27.30 (App. 95). The Allstate premium would have been \$54.60 on an annualized basis. In the West Bend policy, the only vehicles for which a UIM premium was charged were the 1987 Olds Regency 88, the 1996 Chevrolet one ton tow truck, and the 1988 Ford F150 pickup. The charges for UIM coverage for those three vehicles were \$29, \$19 and \$19 for 12 months, respectively (App. 43-4). These premiums were for UIM coverage of \$500,000 for an entire year. On an annual basis, Allstate charged a higher premium per vehicle and per dollar of UIM coverage than did West Bend. The Allstate premium structure reflects a greater contemplated exposure for UIM coverage. This factor supports a finding that the Allstate UIM coverage is primary to the West Bend UIM coverage.

As to the third factor, West Bend provides general liability coverage covering a multitude of risks while Allstate specifically and exclusively covers auto risks. West Bend covers business and related personnel. Allstate specifically covers Mr. and Mrs. Oczak. With respect to the West Bend policy, it is noteworthy that the general rule in Minnesota is that an individual occupying a non-scheduled vehicle is not an insured for coverage under a commercial automobile policy issued to a business entity. Coverage may be provided, however, when an additional premium is charged under a DOC (drive other car) endorsement. *Mikulay v. Home Indem. Co.*, 449 N.W.2d 464, 467 (Minn. App. 1989). See *Wakefield v. Federated Mutual Ins. Co.*, 344 N.W.2d 849, 852 (Minn. 1984) (nothing in the No Fault Act requires that business auto policies cover company employees while they are occupying non-owned autos).

On this issue, it is significant that the West Bend policy references a symbol 30 for customer's vehicles (App. 67). North End 66 did not purchase that coverage for UIM purposes (See symbols for UIM coverage at App. 38). The UIM coverage provided by the West Bend commercial auto policy for non-owned customer vehicles is essentially gratuitous coverage. No specific premium has been charged for it.

On the other hand, the Allstate policy specifically provides UIM coverage to Thomas Oczak and Connie Oczak as named insureds. There is a specific premium charged for that coverage. Connie Oczak is also a claimant in this matter, and she has no connection whatsoever to the West Bend UIM coverage.

In the *Heinen v. Illinois Farmers* case, Heinen sustained personal injuries while riding as a passenger in a non-owned automobile. He first collected the liability policy

limits from the non-owned automobile driver's insurer. He then sought UIM coverage from the automobile policy issued by Farmers to his parents which had \$100,000 in UIM coverage. He also had his own policy with Farmers with \$30,000 in UIM coverage.⁵

The court of appeals concluded that the Farmers policy issued to Heinen with \$30,000 of UIM coverage was closer to the risk and was the policy that provided the UIM coverage under the circumstances of the case. In reaching this conclusion, the court stated:

Although, as in this case, an insurer can choose to offer broader UIM coverage than the minimum required by statute, Minn. Stat. §65B.49, subd. 7 (1996), the statutory definition reveals a legislative intent that the primary coverage should come from the policy in which the claimant is the named insured. *Id.* at 566 N.W.2d 378.

Here, both Thomas and Connie Oczak are named insureds under the Allstate policy while Thomas Oczak is only an additional insured under the West Bend policy. Therefore, the Allstate UIM coverage more closely contemplates injuries to the Oczaks at the hands of an underinsured tortfeasor and is closer to the risk than the West Bend UIM coverage.

CONCLUSION

The district court and the Court of Appeals properly applied Minn. Stat. §65B.49, subd. 3a(5) as interpreted in *Becker v. State Farm*. The legislature intended Subd. 3a(5) to protect an injured person who is occupying a non-owned automobile by giving the

⁵ Significantly, Heinen met the *Becker* and *Stewart* requirements, because he was found to be a resident of his parents' household and, therefore, was a section 65B.43, subd. 5 insured under both the Farmers policy insuring his parents and the Farmers policy insuring him.

person the right to seek additional UIM coverage under a policy that provides a higher limit of UIM coverage to the person as a §65B.43, subd. 5 insured. In this case, Thomas and Connie Oczak are entitled to the UIM coverage provided by MSI on the occupied vehicle and then they are entitled to the excess insurance protection through the policy purchased from Allstate.

The decision if the Court of Appeals should be affirmed.

Respectfully submitted,

BASSFORD REMELE, A Professional Association

Dated: August 25, 2008

By Dale M. Wagner

Dale M. Wagner (License #113554)
Louis J. Speltz (License #152912)
Attorneys for Respondent
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
(612) 333-3000

STATE OF MINNESOTA
IN SUPREME COURT

West Bend Mutual Insurance Company,

File No. A07-248 and A07-357

Respondent,

vs.

**WEST BEND MUTUAL
INSURANCE COMPANY'S
CERTIFICATE OF WORD COUNT
COMPLIANCE**

Allstate Insurance Company,

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

Thomas Oczak and Connie Oczak,

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

The undersigned, counsel for Defendant West Bend Mutual Insurance Company, in accordance with Minn. R. Civ. App. P. 132.01, subd. 3, certifies as follows:

(1) That West Bend Mutual Insurance Company's Brief was prepared in 13-point, proportionately spaced typeface, using Microsoft Word 2003; and

(2) That West Bend Mutual Insurance Company's Brief contain 5,584 words, based upon a word processing count that was designed to include all texts, including headings, footnotes, and quotations.

BASSFORD REMELE
A Professional Association

Dated: August 25, 2008

By *Dale M. Wagner*
Dale M. Wagner (License #113554)
Attorneys for Respondent West Bend Mutual Insurance Co.
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
(612) 333-3000
dalew@bassford.com