

NO. A07-1866

State of Minnesota
 In Supreme Court

Steven Brua individually; Roxanne Brua, individually;
 and Travis Brua, individually,

Respondents,

vs.

The Minnesota Joint Underwriting Association,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Under its plain terms, Minn. Stat. § 340A.409 does not mandate coverage for pecuniary loss claims. More importantly, the statute does not require separate stated limits for the other types of damage recoverable under the Civil Damages Act. For this reason, the MJUA policy provides more than the minimum coverage required by the statute, and certainly does not contravene the statutory requirements.

To overcome this reality, Respondents now ask this Court to rewrite Minn. Stat. § 340A.409 to require pecuniary loss in some unstated amount. This shift in position is no doubt necessitated by the fact Respondents are unable to justifiably claim the policy's coverage was, in any way, diluted under the facts here. Respondents request is fraught with problems and this Court should decline the invitation to rewrite the statute.

I. THE STATUTE DOES NOT REQUIRE SEPARATE STATED LIMITS OF INSURANCE FOR PECUNIARY LOSS.

The clear terms of Minn. Stat. § 340A.409 do not require insurance for pecuniary loss. As noted earlier, the statute's silence with respect to coverage for pecuniary loss is particularly significant because the legislature added the insurance requirements of Minn. Stat. § 340A.409 at the same time it added the "pecuniary loss" language to Minn. Stat. § 340A.801. *See* 1982 Minn. Laws ch. 528, §§ 2, 7 (A57-63). If the legislature had intended separate stated limits of

insurance for pecuniary loss under Minn. Stat. § 340A.801, it could have easily drafted the statute to so provide.

Respondents, for the first time since this case was filed, ask this Court to hold that section 340A.409 requires insurance coverage for “pecuniary loss” thereby requiring this Court to add in language that is noticeably absent from the plain wording of the statute. (Resp. Br. 12-15.) Further, Respondents skirt over a key issue raised by such a request – that is, if section 340A.409 requires coverage for pecuniary loss, what is the required stated limit for that coverage? Would it be \$50,000 per person/\$100,000 per occurrence? Would it be \$300,000? As section 340A.409 does not address such coverage (in any fashion), Respondents are essentially asking this Court not only write a requirement into the statute but to also create a limit for that coverage. Both matters are for the legislature.

While MJUA has offered potential explanations about the absence of such an insuring requirement which make logical sense in the statutory scheme (App. Br. 8-9), the bottom line is that for whatever reason, the legislature did not include such a requirement, and in absence of such language, this Court should decline to read in such language. Indeed, the MJUA’s position that the statute does not require separate stated limits for *any* of the categories of recoverable damages (as outlined below) makes the most sense, based upon the statutory language.

II. THE STATUTE DOES NOT REQUIRE SEPARATE STATED LIMITS OF INSURANCE FOR ANY OF THE CATEGORIES OF RECOVERABLE DAMAGE.

As two federal district courts have concluded, Minn. Stat. § 340A.409 does not require separate stated limits for any of the categories of recoverable damages. *See Peterson v. Scottsdale Ins. Co.*, 409 F. Supp. 2d 1139 (D. Minn. 2006); *Scottsdale Ins. Co. v. Wohlsol, Inc.*, No. 04-4980, 2005 WL 2972997 (D. Minn. Nov. 7, 2005) (A38-43). Any other interpretation would create inconsistent financial responsibility requirements under the statute, between the use of deposited cash and the use of an insurance policy. This is also supported by Minnesota Department of Public Safety, charged with enforcing the requirements, which advises applicants and other members of the public in its website that they only need a total of \$100,000 in liquor liability insurance coverage to demonstrate that they are financially responsible. *See* DPS website, www.dps.state.mn.us/alcgamb/alcenf/process.htm (last visited Feb. 18, 2009). (A32.)

Respondents try to argue that the wording of Minn. Stat. § 340.12, which has been repealed for over 25 years, provides evidence that Minn. Stat. § 340A.409 now requires separate stated limits of coverage. (Resp. Br. 18-19.) But the portions of section 340.12 that are cited by Respondents refer to certain elective (not mandatory) coverage that a municipality *could* require. (RA 10.) Further, section 340.12 was internally inconsistent, in that it appeared to permit the use of cash, bonds, or a liability policy of the same amount (\$3,000 to \$5,000) to satisfy its provisions (RA 10), yet permitted the municipality to demand

additional insuring requirements. *See Stabs v. City of Tower*, 229 Minn. 552, 557-58, 40 N.W.2d 362, 367 (1949) (noting that section 340.12 requires on-sale vendors to file with the clerk of the municipality “a surety bond or liability insurance policy in amount from \$3,000 to \$5,000,” as the local governing body shall determine). In other words, section 340.12 does not provide an accurate signpost on the requirements and meaning of section 340A.409.

III. EVEN IF SEPARATE STATED LIMITS OF INSURANCE WERE REQUIRED, THE MJUA POLICY COMPLIES WITH THE STATUTE.

The MJUA policy defines the term “bodily injury” to include “pecuniary loss,” and sets the limit for bodily injury (and thus any claim for pecuniary loss) at \$50,000 for each person and \$100,000 for each occurrence. (A15.) There is no ambiguity as to whether, and to what extent, the policy provides coverage for pecuniary loss and the policy should be enforced as written.

Respondents ask this Court to hold that the MJUA policy violates the statute because “the policy fails to provide the mandated coverage for *bodily injury*.” (Resp. Br. 4, 10-12) (emphasis in original). Yet the policy clearly provides the coverage the statute requires. To avoid this undisputed fact Respondents now claim the statute also requires coverage for pecuniary loss and they rely on a hypothetical fact scenario involving multiple claimants, some with “true” bodily injury claims (as Respondents contend the term must be defined) and some with pecuniary loss claims, to argue that inclusion of pecuniary loss within the bodily injury limit results in a dilution of coverage. Of course, such a

contention is not borne out by the terms of the statute. In addition, any dilution can only occur if the pecuniary loss claim is paid to the detriment of the so-called true bodily injury claim. Here, that is simply not the case. As a result, any assertion the policy limits were diluted (exhausted), by necessity, requires this Court to decide the issue based upon speculation about what could happen as opposed to what did happen.

This Court has been consistent in its desire to avoid the issuance of advisory opinions based upon hypothetical facts. *See Onvoy, Inc. v. Allete, Inc.*, 736 N.W. 611, 617-18 (Minn. 2007), *citing Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281, 290 N.W. 802, 804 (1940). Further, Minnesota appellate courts have been careful to ensure that each piece of the case presents a genuine conflict arising from rights emanating from a legal source. *See Hoeft v. Hennepin County*, 754 N.W.2d 717, 723-28 (Minn. App. 2008) (separately assessing each of four distinct, requested “declaration of rights” to ensure that each one met the requirements of justiciability).

Even if the statute requires coverage for pecuniary loss, the policy provided such coverage. Respondents are hard-pressed to complain that the policy is somehow void or coverage was omitted where they received the full benefit of the “required” pecuniary loss coverage and where they have no outstanding bodily injury claim that was left uncompensated.

CONCLUSION

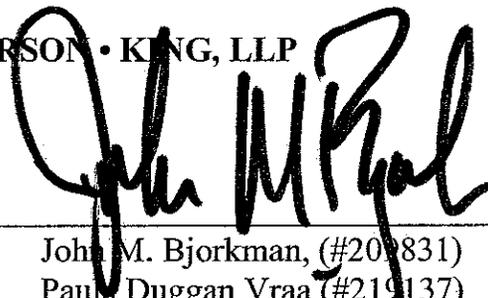
Minn. Stat. § 340A.409 does not require separate stated limits for pecuniary loss. The policy's inclusion of pecuniary loss within the limit of coverage for bodily injury is fully enforceable, and the lower courts erred in holding otherwise. The MJUA respectfully requests that this Court reverse the lower courts and remand for entry of judgment in the MJUA's favor.

Dated: April 8, 2009

Respectfully submitted,

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