

NO. A08-1315

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State of Minnesota  
**In Court of Appeals**

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Larry Benjamin Johnson,

*Appellant,*

vs.

Brian Cletus Cummiskey and Margaret Kathryn Cummiskey,  
and Illinois Farmers Insurance Company,

*Respondents.*

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**BRIEF OF AMICUS CURIAE  
MINNESOTA ASSOCIATION FOR JUSTICE**

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## **LEGAL ISSUE**

**What is the amount of the UIM coverage Mr. Johnson purchased?**

The trial court ruled it was to be reduced by the coverage received from the liability policies.

### **Apposite Statutes:**

Minn. Stat. 65b.49, subd. 4a.

## STATEMENT OF THE CASE

This is an appeal from the district court's grant of summary judgment. The Court concluded Mr. Johnson was not entitled to the full UIM coverage.

The Court reasoned that Mr. Johnson could only receive UIM coverage after the liability recovery was deducted.

The brief of Amicus Curiae, the Minnesota Association for Justice, is addressed to the issue of whether Mr. Johnson may recover his full UIM coverage.

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(1) The following disclosure is made pursuant to Rule 129.03, Minnesota Rules of Civil Appellate Procedure: This brief was prepared solely by Michael A. Bryant of Bradshaw & Bryant, PLLC, and no party to this litigation authored any portion of this brief. No person or entity other than Amicus Curiae and Bradshaw & Bryant, PLLC made any financial contribution to the preparation or submission of this brief.

## **STATEMENT OF THE FACTS**

Amicus Curiae, Minnesota Association for Justice, agrees with the facts contained in Appellant Larry Johnson's "Statement of the Facts."

## ARGUMENT

The issue before this Court is whether Mr. Johnson may recover all of his UIM Benefits. Based upon past precedent and the primary purpose and goal of UIM coverage purchased in Minnesota, Amicus Curiae, the Minnesota Association for Justice, submits that Mr. Johnson and others similarly situated should be allowed to receive their full UIM coverage purchased.

**I. A UIM BUYER/INSURED WOULD HAVE REASONABLE EXPECTATIONS OF FULL COVERAGE.**

The doctrine of reasonable expectations allows a court to impose liability on an insurer for misleading a policyholder. Under this doctrine, the objectively reasonable expectations of the insured are protected even where a painstaking study of the policy provisions would have negated the policyholder's expectations. *Atwater Creamery v. Western Nat'l Mut. Ins.*, 366 N.W.2d 271, 277 (Minn. 1985). "The reasonable-expectations doctrine gives the court a standard by which to construe insurance contracts without having to rely on arbitrary rules which do not reflect real-life situations and without having to bend or stretch those rules to do justice in individual cases." *Id.* at 278.

The *Atwater* case is the seminal case in this area. In *Atwater*, Atwater was insured under a burglary policy with Western. *Id.* at 274. The policy contained an "evidence of forcible entry" requirement. *Id.* Atwater was burglarized; however, no signs of forcible entry were present. *Id.* Thus, Western denied coverage. *Id.* The *Atwater* court followed the doctrine of reasonable expectations in making its ruling. It looked at the fact that the definition of burglary constituted a hidden exclusion from coverage, and "no one purchasing something called burglary insurance would expect coverage to exclude skilled burglaries that leave no visible marks of forcible entry or exit." *Id.* at 276. In addition, the court looked at such factors as unequal bargaining power between the parties, the fact that most lay people lack the necessary skills to

read and understand insurance policies, and that most people purchasing insurance rely on the agent or the company to provide a policy to meet their needs. *Id.* at 277.

In the present situation, Mr. Johnson was issued a motorcycle insurance policy, which he expected to provide \$100,000.00 in UIM coverage. As a lay person, Mr. Johnson could be found to have reasonably relied on what the policy said he had for coverage. It is highly likely that any individual, who also has automobile insurance, would believe that his/her UIM coverage on his/her motorcycle would provide coverage for damages that exceed the policy limits of the underinsured driver instead of a difference in limits policy, which is what Farmers claims.

## **II. THE TRIAL COURT'S SUMMARY JUDGMENT RULING IS INCONSISTENT WITH THE DOCTRINE OF ILLUSORY COVERAGE.**

Under the doctrine of illusory coverage, an insurance contract should be construed so as not to be a delusion to the insured. *Motor Vehicle Casualty Co. v. Smith*, 247 Minn. 151, 157, 76 N.W.2d 486, 490-91 (1956). In *Jostens, Inc. v. Northfield Ins. Co.*, the Court of Appeals viewed "the concept of illusory coverage as an independent means to avoid an unreasonable result when a literal reading of a policy unfairly denies coverage." *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. 1995), *rev. denied* (April 27, 1995). Here, the UIM coverage provided is illusory. On paper, Mr. Johnson's policy provides \$100,000.00 of UIM coverage; however, an endorsement to his policy, a "difference of limits" clause, limits this amount. In reality, Mr. Johnson is paying a premium for \$100,000.00 in

UIM coverage when the maximum amount of benefits he could ever be paid is \$66,000. Thus, Farmers is providing Mr. Johnson \$66,000.00 in coverage but calling it \$100,000.00 in coverage and charging him for \$100,000.00 in coverage. This reading of the policy provides an unreasonable and unfair result.

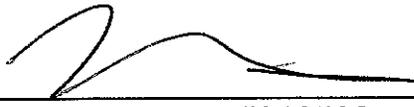
**III. THE COVERAGE FOR UIM UNDER THIS POLICY COULD NEVER BE FULL COVERAGE.**

A reading of the reduction clause makes for some very different possibilities. Since Minnesota has minimum liability coverage of \$30,000, we know for sure that the policy with the exclusion could never be worth more than \$70,000. (**100,000 - 30,000**). Beyond that, with a liability coverage of \$100,000 or greater, the UIM policy is worth absolutely 0 in coverage. Thus, despite a consumer paying a UIM premium for a policy with a number on the declaration sheet for UIM, that number actually depends on what the liability carrier has for coverage. This is a decision that the consumer has no role in, and in an odd twist, actually leads to that consumer receiving less of their own paid for protection if the liable party has purchased more coverage. Such a result seems contrary to the whole nature of Insurance law in Minnesota.

**CONCLUSION**

Based upon the foregoing reasons, Amicus Curiae submits UIM case law and statutory reasoning requires Mr. Johnson to receive total UIM benefits under his policy. The decision of the District Court should be reversed.

Dated: 9/5/08

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**CERTIFICATION OF  
BRIEF LENGTH**

Brian Cletus Commiskey and  
Margaret Kathryn Cummiskey, and  
Illinois Farmers Insurance Company,

Respondents.  
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I hereby certify that this brief conforms to the requirements of Minnesota Rules of Appellate Procedure 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 360 lines and 1,278 words. This brief was prepared using Corel WordPerfect 12.

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