

NO. A09-1138

State of Minnesota
In Supreme Court

Gregory Latterell, trustee for the heirs
of Jared Travis Boom, decedent,

Appellant,

vs.

Progressive Northern Insurance Company and
AIG Insurance Company,

Respondents.

BRIEF OF RESPONDENT AIG INSURANCE COMPANY

Michael A. Bryant (#218583)
BRADSHAW & BRYANT, PLLC
1505 Division Street
Waite Park, MN 56387
(320) 259-5414

Attorney for Appellant

Michael M. Skram (#340145)
Matthew M. Johnson (#27723X)
JOHNSON & CONDON, P.A.
7401 Metro Boulevard, Suite 600
Minneapolis, MN 55439-3034
(952) 831-6544

*Attorneys for Respondent
AIG Insurance Company*

Curtis D. Ruwe (#313257)
ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
(612) 339-3500

*Attorneys for Respondent
Progressive Northern Insurance Company*

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT4

STANDARD OF REVIEW5

ARGUMENT6

I. BASED ON THE APPLICATION OF THE PLAIN LANGUAGE OF THE NO-FAULT ACT,
 APPELLANT’S EXCLUSIVE SOURCE OF UIM BENEFITS IS THE PROGRESSIVE POLICY.
 ACCORDINGLY, THE DISTRICT COURT AND COURT OF APPEALS’ HOLDINGS
 SHOULD BE UPHELD 6

 A. IF PROGRESSIVE’S POLICY EXCLUSION IS INVALIDATED 7

 B. IF PROGRESSIVE’S POLICY EXCLUSION IS VALIDATED 7

II. EVEN IF APPELLANT IS ENTITLED TO ASSERT THE UIM CLAIM AGAINST AIG, THE
 AIG POLICY ISSUED TO ANN AND GREGORY LATTERELL CONTAINS VALID POLICY
 EXCLUSIONS, PROHIBITING THE UIM CLAIM 13

 A. LACK OF INSURED STATUS UNDER AIG POLICY 13

 B. OWNED, NON-INSURED VEHICLE EXCLUSION 15

 C. BUSINESS-USE EXCLUSION 17

CONCLUSION..... 19

TABLE OF AUTHORITIES

CASES:

West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009)8-12

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006) 6

Auto-Owners Ins. Co. v. Forstrom, 684 N.W. 2d 494 (Minn. 2004) 6

Burkstrand v. Burkstrand, 632 N.W.2d 206 (Minn. 2001) 6

Am. Family ins. Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000) 6

Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000) 11,12

Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993) 5

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 5

Stewart v. Ill. Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007) 6,15,16

Ittel v. Pietig, 705 N.W.2d 203, 209 (Minn. Ct. App. 2005) 12

Engler v. Wehmas, 633 N.W.2d 868 (Minn. Ct. App. 2001) 5

Jirik v. Auto-Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999) 11

Ill. Farmers Ins. Co. v. Eull, 594 N.W.2d 559 (Minn. Ct. App. 1999)..... 17,18

STATUTES:

Minn. Stat. § 65B.49 subd. 3a(5) 7,8,10,11

Minn. Stat. § 65B.43 subd. 5 14

Minn. Stat. § 65B.49 subd. 3a(7)..... 15,16

STATEMENT OF ISSUES

- I. Based on the application of the unambiguous language Minn. Stat. § 65B.49 subd. 3a(5), the District Court and the Minnesota Court of Appeals held Appellant's exclusive source of UIM benefits is the Progressive polic. Appellant failed to produce any legal basis to contradict these holdings and substantiate his claim for UIM benefits from AIG. Is Appellant entitled to recover UIM benefits from AIG?**

The District Court held: No. UIM coverage is only available, if at all, from the Progressive policy.

The Minnesota Court of Appeals Affirmed.

Apposite authority: Minn. Stat. § 65B.49 subd. 3a(5); West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009); Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000); Ittel v. Pietig, 705 N.W.2d 203 (Minn. Ct. App. 2005); Jirik v. Auto-Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999).

- II. If the Appellant is allowed to make his alternative UIM claim against AIG, is Appellant entitled to benefits even though he does not qualify as an insured according to the statutory definition of insured and AIG's valid UIM policy exclusions?**

The trial court held: No. AIG's policy exclusion would serve to deny coverage.

The Minnesota Court of Appeals did not address the issue.

Apposite authority: Minn. Stat. § 65B.49 subd. 3a(7); Minn. Stat. § 65B.43 subd. 5; Stewart v. Ill. Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007); Ill. Farmers Ins. Co. v. Eull, 594 N.W.2d 559 (Minn. Ct. App. 1999)

STATEMENT OF THE CASE

This case stems from an automobile accident on or about October 4, 2007, in which Jared Travis Boom ("Decedent") was fatally injured. Gregory Latterell, trustee for the heirs of Decedent ("Appellant"), received liability insurance benefits from the at-fault

party and now seeks underinsured motorist (“UIM”) benefits from Defendant Progressive Northern Insurance Company (“Progressive”), or in the alternative, from Defendant AIG Insurance Company (“AIG”).¹ Progressive insured the Decedent and AIG insured the Decedent’s mother, Ann, and step-father Gregory Latterell. However, both Defendants have denied the claims based on applicable statutory language and valid policy exclusions.

After considering cross-motions for Summary Judgment, Hennepin County District Court Judge William R. Howard on April 27, 2009, issued his Findings of Fact, Conclusions of Law and Order for Judgment with Memorandum concluding:

1. Plaintiff could only seek UIM coverage from Progressive.
2. UIM coverage from Progressive is excluded by Part III 1.a. of Progressive’s personal auto policy.
3. The Progressive and AIG policy exclusions for use of an auto to carry persons or property for compensation or a fee are valid exclusions to UIM coverage.

See, AA 4-5.

On March 2, 2010, the Minnesota Court of Appeals affirmed the District Court, stating that Progressive’s policy exclusion is valid under the Minnesota No-Fault Act. Moreover, Appellant was prohibited from claiming UIM benefits from the AIG policy

¹ The proper party to the case is actually “The Insurance Company of The State of PA.” See, Appellant’s Appendix at A-4. However, claims for that insurer were handled by “AIG Personal Lines Claims” at the time the claim was initially asserted. See, Appellant’s Appendix at A-15. For the purposes of this litigation and appeal process, however, the parties will continue to identify the insurer as AIG. Should the case be remanded to the District Court, a motion to amend the caption will be asserted.

pursuant to the Minnesota No-Fault Act, because the Decedent was an insured on the policy covering the occupied vehicle at the time of the accident. See, AA18

Appellant requested this Court review the case. The Petition for Further Review was granted on May 18, 2010.

STATEMENT OF FACTS

The following facts are relevant to the Court's analysis as plainly stated in the District Court's Findings of Fact. See, AA 1-4. The parties do not object to these undisputed facts:

1. The Decedent was involved in a motor vehicle accident on October 4, 2007, resulting in his death.
2. Decedent was transporting books for delivery to the Kerkhoven Library within the course and scope of his subcontractor role for National Dispatch of Albany, Inc.
3. Plaintiff recovered \$100,000 from the at-fault driver's liability insurance carrier.
4. Decedent was a listed driver and a household resident on a personal auto policy issued by Progressive Direct that covered the 1998 Dodge Grand Caravan owned and operated by the Decedent at the time of the accident.
5. At the time of the accident, Decedent was living with his mother, Ann, and step-father, Gregory Latterell, who were insured under an automobile policy issued by AIG.
6. The Progressive insurance policy includes UIM coverage with limits of \$100,000.
7. Plaintiff seeks UIM benefits under the terms of the Progressive policy.
8. Plaintiff also seeks UIM benefits under the terms of the AIG policy if the Decedent is not covered by the Progressive policy.
9. Both insurance policies contain exclusionary language that may serve to prohibit Plaintiff's recovery.

10. Both Progressive and AIG contend UIM benefits are not recoverable under their respective policies.

SUMMARY OF ARGUMENT

Appellant's claim against AIG is in the alternative, effective only if Progressive owes no UIM coverage to Appellant. If Progressive's policy exclusion is invalidated by this Court, Appellant agrees he is statutorily prohibited from seeking excess UIM benefits from AIG.

However, Appellant argues that if Progressive's policy exclusion is valid, then the Decedent was not insured for UIM under that policy and Appellant is entitled to seek UIM benefits from AIG, based on the Decedent's status as a resident relative. Consistent with the failed arguments before the District Court and the Minnesota Court of Appeals, Appellant offers no statutory analysis, case law, or other support for his proposition. The plain application of the unambiguous language in Minnesota Statute 65B§49 subd.3a(5) prohibits the claim against AIG.

First, this Court has held subd. 3a(5) indicates primary UIM benefits can only come from the policy covering the occupied vehicle. It is undisputed the AIG policy does not list the occupied vehicle as an insured vehicle. Second, subd. 3a(5) allows excess benefits only when the injured person is not an insured on the policy covering the occupied vehicle. This Court has already held that the definition of "insured" in Subd.3a(5) specifically includes the named insured on the policy covering the occupied vehicle and that definition does not change depending on the context of the case. Therefore, even if Progressive's exclusion results in no coverage, the Decedent remains

“an insured” on the policy covering the occupied vehicle. Accordingly, as the District Court found and the Minnesota Court of Appeals affirmed, the plain and unambiguous language of the No-Fault Act prohibits Appellant from seeking UIM benefits whether primary or excess, from AIG. This Court should hold similarly and affirm the lower courts’ decisions.

Finally, even if there is no coverage under Progressive’s policy and Appellant’s unsupported alternative argument is accepted by this Court, Appellant’s claims as to AIG still fail as a matter of law. The unambiguous definition of “insured” in the No-Fault Act and the application of AIG’s valid policy exclusions serve to prohibit the recovery of UIM benefits under the undisputed facts of this case.

STANDARD OF REVIEW

On an appeal from summary judgment, this Court asks two questions: whether there are any genuine issues of material fact and whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citations omitted).

A reviewing court “need not defer to the district court’s application of the law when the material facts are not in dispute.” Engler v. Wehmas, 633 N.W.2d 868, 872

(Minn. Ct. App. 2001) (citing, Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (Minn. 1989)). “When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo.” Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634, 638 (Minn. 2006) (citing, Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn. 1998)).

This case involves the interpretation of both statutory and insurance contract language. The interpretation of statutes and insurance contracts are questions of law that the Minnesota Supreme Court Reviews de novo. Auto-Owners Ins. Co. v. Forstrom, 684 N.W.2d 494 (Minn. 2004). When interpreting statutory language, words and phrases are given their plain and ordinary meaning. Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000). When language of a statute is unambiguous, its plain meaning is given effect. Burkstrand v. Burkstrand, 632 N.W.2d 206 (Minn. 2001). Clear and unambiguous language in an insurance policy must be given its usual and accepted meaning. See, Stewart v. Illinois Farmers Ins. Co., 727 N.W.2d 679, 684 (Minn. Ct. App. 2007). Exclusions in an insurance policy must be given the same consideration as the rest of the policy. Id. As long as an exclusion does not violate applicable statutes, the extent of coverage is governed by the contract. Id.

ARGUMENT

- I. **BASED ON THE APPLICATION OF THE PLAIN LANGUAGE OF THE NO-FAULT ACT, APPELLANT’S EXCLUSIVE SOURCE OF UIM BENEFITS IS THE PROGRESSIVE POLICY. ACCORDINGLY, THE DISTRICT COURT AND COURT OF APPEALS’ HOLDINGS SHOULD BE UPHELD.**

The plain language of the No-Fault Act specifically prohibits Appellant's alternative claim for benefits from the AIG policy regardless of this Court's analysis of Progressive's policy exclusion.

A. IF PROGRESSIVE'S EXCLUSION IS INVALIDATED.

If Progressive's policy is invalidated and Progressive is required to provide UIM benefits, then the No-Fault Act prohibits an excess UIM claim against AIG. See, Minn. Stat. § 65B.49 Subd. 3a(5). Appellant agrees with this legal conclusion, making the claim against AIG only if the claim versus Progressive fails. If this Court holds that Appellant prevails against Progressive, then the claim against AIG must fail as a matter of law based upon the plain language the statute and Appellant's own admission during this litigation. This argument requires no further elaboration.

B. IF PROGRESSIVE'S POLICY IS UPHELD.

The Court need only address Appellant's alternative theory if Progressive's policy exclusion is upheld. Appellant argues that if Progressive's policy exclusion is valid, then Appellant is afforded "both literally and figuratively no coverage" from the Progressive policy. See, Appellant's Brief at 19. Accordingly, Appellant argues "[n]o coverage from the primary policy should allow the insured to pass to the next available coverage under the statutory scheme." Id. Even though the Minnesota Court of Appeals pointed out in its March 2, 2010 opinion, Appellant offered no support for the argument, See, AA-17, Appellant's Brief is similarly devoid of any supporting authority for this argument. Instead, Appellant's counsel interprets the clear and unambiguous language of the Act in a manner that is wholly inconsistent with this Court's prior application of the statutory

language. The clear and unambiguous language of Minn. Stat. Sect. 65B.49 Subd. 3a(5) limits an injured insured's claim for UIM benefits to the insurance policy covering the occupied motor vehicle. The Hennepin County District Court agreed with this analysis. The Minnesota Court of Appeals affirmed it. This Court should similarly dismiss any claim Appellant may have as to AIG.

The No-Fault Act provides that primary UIM benefits are extended by the policy covering the vehicle the injured person was operating or occupying at the time of the accident. West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693, 697-98 (Minn. 2009). The injured person might also be entitled to excess UIM coverage from another policy. Id. Minnesota Statute Section 65B.49 subd. 3a(5) provides, in part:

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. 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.

Minn. Stat. § 65B.49 Subd. 3a(5).

The first sentence of Subd.3a (5) provides primary UIM coverage. West Bend, 776 N.W.2d at 698, citing, Hanson v. Am. Family Mut. Ins. Co., 417 N.W.2d 94, 96 (Minn. 1987). This primary coverage is provided by the insurance policy covering the occupied vehicle.

“In previous cases, we have explained that the first sentence of subdivision 3a(5) generally operates ‘to require the injured occupant to look *first and exclusively* to the policy limits on the occupied vehicle’ for UM or UIM benefits.”

Id. at 699, quoting, Vue v. State Farm Ins. Cos., 582 N.W.2d 264, 267 (Minn. 1998).

The second and third sentences of Subdivision 3a(5) reference excess UIM coverage. See, Minn. Stat. § 65B.49 Subd. 3a(5) and West Bend, 776 N.W.2d at 698. The statute provides for the “possibility of excess UIM coverage.” See, West Bend, 776 N.W.2d at 700. The statute provides that an injured person may seek additional UIM coverage from another personal insurance policy, but only if the injured person is not an “insured” under the policy covering the occupied vehicle. Id.

It is unclear as to whether Appellant believes the alternative claim against AIG is for primary or excess UIM coverage. Regardless, the plain language of the Act prohibits the claim against AIG. If Appellant is arguing AIG should provide primary UIM benefits, then Appellant’s counsel misconstrues more than twenty-five years of UIM litigation in this state.

As this Court stated in West Bend:

Before the 1985 amendment, we considered UM/UIM insurance coverage as tied to the person. Injured persons generally could ‘aggregate or stack the UM or UIM coverages under any insurance policy’ in which they were identified as a covered person or insured. The 1985 Amendment ‘reflect[ed] a broad policy decision to tie uninsured motorist and other coverage to the particular vehicle involved in the accident.’ In other words, after the 1985 amendment, primary UIM coverage follows the vehicle, rather than the person.

West Bend, 766 N.W.2d at 699 (citations omitted). The West Bend Court later confirms that the statute “contemplates that primary UIM benefits are available from the policy specifically covering the occupied vehicle.” Id. at 700. Further, the West Bend Court held it would be “wholly inconsistent” with the statute to interpret the first sentence of

subdivision 3a(5), which indicates primary UIM coverage is the limit specified for the occupied vehicle, to require any policy covering the person to provide primary UIM benefits; such an analysis would leave the excess language in sentences two and three with no meaning. *Id.* Any claim that AIG should provide primary UIM benefits is clearly erroneous. In fact, Appellant admits as much by admitting that if Progressive's policy exclusion is invalid, there can be no claim against AIG.

If there can be no primary UIM claim against AIG, then that means Appellant must be seeking excess UIM benefits from AIG. This seems to be Appellant's position, as the Brief indicates Appellant should move to the "next available coverage." *See*, Appellant's Brief at 19. However, in claiming excess UIM benefits from AIG, Appellant's counsel misconstrues the plain language of the Act. The second and third sentences of Subdivision 3a(5) reference the potential for excess UIM coverage. *See*, Minn. Stat. § 65B.49 Subd. 3a(5) and *West Bend*, 776 N.W.2d at 698. Specifically, the second sentence of subdivision 3a(5) states:

However, if the injured person is occupying a motor vehicle of which the 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.

Minn. Stat. § 65B.49 subd. 3a(5)(emphasis added). The statute provides for the "possibility of excess UIM coverage" if the injured person is not an insured under the policy covering the occupied vehicle. *West Bend*, 776 N.W.2d at 700.

The key determination is, therefore: if Progressive's policy does not provide coverage, then does the decedent still qualify as an "insured" under the Progressive

policy, such that he should be prohibited from seeking excess UIM benefits from another policy? AIG's answer to that question throughout this litigation has been clear: yes, the Decedent remains an "insured" under Progressive's policy and is prohibited from making the claim. As an example, the Decedent he could still recover Personal Injury Protection benefits from the Progressive policy for this same accident. Moreover, Appellant has offered no authority to support the argument that one valid policy exclusion means the policyholder is not an "insured" under the provisions of the rest of the policy.

Perhaps Appellant does not cite any authority because it is not in his favor. The applicable statutory language is clear and its meaning is plain. The Minnesota Legislature outlined the situations where excess claims are allowed: when an injured person is not an insured under the policy covering the occupied vehicle. Common sense dictates the converse is also true: if an injured person is an insured under the policy covering the occupied vehicle, the injured person is limited to the UIM benefits on the occupied vehicle and does not qualify for additional or excess UIM benefits from another policy. See, Minn. Stat. § 65B.49 subd. 3a(5); see also, Jirik v. Auto-Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999).

In addition, this Court has specifically considered the meaning of the word "insured" within subdivision 3a(5). West Bend, 776 N.W.2d at 702, citing, Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000). In Becker, this Court held that the meaning of "insured" under subdivision 3a(5) "is limited to the named insured, or spouse, minor, or relative of the named insured set forth in the policy of the occupied vehicle." Becker, 611 N.W.2d at 13. Accordingly, the Becker Court held that an

employee was not among the persons included in that definition, and she was therefore allowed to make the excess UIM claim against her personal insurance policy. *Id.* More importantly, in West Bend, this Court confirmed, “the meaning of ‘insured’ in subdivision 3a(5) does not change depending on the context.” West Bend, 776 N.W.2d at 703. That is, the definition does not change because a valid exclusion applies to deny benefits.

It is undisputed that the Decedent is the only named insured on the Progressive policy. By definition, he is an “insured” under the policy covering the occupied vehicle. The excess UIM provision in the statute only applies if the person is not an “insured” on the policy covering the occupied vehicle. Therefore, using the Becker and West Bend logic, the Decedent was an “insured” on the policy covering the occupied vehicle and Appellant is statutorily prohibited from seeking UIM benefits from AIG.

Appellant’s alternative argument either misconstrues the plain language of the Act or asserts some sort of public policy argument that the claim against AIG should be allowed. However, courts are not allowed to trump clear and unambiguous language of a statute with public policy arguments. *See, Ittel v. Pietig*, 705 N.W.2d 203, 209 (Minn. Ct. App. 2005). “[C]ourts are permitted to weigh the consequences of particular policies and the relative merit of competing interpretations only when a statute is ambiguous or does not convey a plain meaning.” *Id.* Here, the language is clear and unambiguous. Any change for public policy reasons is the responsibility of the legislature.

Appellant’s exclusive UIM remedy is the Progressive policy. Regardless of the Court’s determination as to Progressive’s business-use exclusion, Appellant cannot, as a

matter of law, make a claim for UIM benefits from AIG. If Progressive's exclusion is invalid, Progressive must provide primary UIM coverage and Appellant cannot make the excess UIM claim against AIG. If Progressive's policy exclusion is upheld, Appellant has no primary UIM claim because the AIG policy did not insure the occupied vehicle and Appellant has no excess UIM claim because the Decedent remains "an insured" under Progressive's policy.

II. EVEN IF APPELLANT IS ENTITLED TO ASSERT THE UIM CLAIM AGAINST AIG, THE AIG POLICY ISSUED TO ANN AND GREGORY LATTERELL CONTAINS VALID EXCLUSIONS, PROHIBITING THE UIM CLAIMS AGAINST AIG.

Appellant seeks UIM benefits from AIG only if the Court determines the Decedent is not covered by the Progressive policy. Even if the clear and unambiguous language in 65B.49 Subdivision 3a(5) addressed above does not prohibit the claims against AIG and if Appellant is not covered by the Progressive policy, there are three specific reasons why AIG's policy does not provide UIM coverage in this case: 1.) the Decedent does not qualify as an insured because he is identified by name on the Progressive policy; 2.) the AIG policy contains a valid non-listed vehicle policy exclusion; and 3.) the AIG policy contains a similar business-use exclusion as the one contained in Progressive's policy.

A. LACK OF INSURED STATUS UNDER THE AIG POLICY.

The parties have stipulated that the Decedent was a family member living at the home of AIG's named insureds. Under some situations, those facts may be sufficient for the Decedent to qualify as a resident relative insured under the AIG policy. Appellant has taken this position before the Court. However, the fact the Decedent was a named insured under the Policy issued by Progressive also means the Decedent is statutorily

prohibited from qualifying as an “insured” under the AIG policy. Therefore, Appellant, as trustee for the heirs and next of kin of the Decedent, has no standing to make the first-party claim against the AIG policy.

According to the Minnesota No-Fault Act:

‘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 a named insured.

Minn. Stat. 65B.43 Subd. 5 (emphasis added). Appellant argues that the Decedent was a relative residing in the same household with AIG’s named insured and, therefore, has standing to assert the UIM claim. However, Appellant does not consider section (b) of the definition.

Section (b) indicates that those persons identified by name on another policy complying with the No-Fault Act cannot be considered an insured under another policy, even if they may otherwise qualify as a spouse, minor, or resident relative. If the Court arrives at this point in its analysis it necessarily must have determined: that the Progressive policy complies with sections 65B.41 – 65B.71 and the exclusion is valid; even Appellant admits that is the only way the Court can contemplate the claim against AIG. Assuming this Court makes those determinations, Progressive’s policy must also

qualify under the requirements of Minn. Stat. 65B.43 Subd. 5. Accordingly, by definition, Appellant has no standing to assert the claim against the AIG policy.

B. OWNED, NON-INSURED VEHICLE EXCLUSION.

In some situations, Minnesota law allows for a policy to exclude UIM benefits. Again, if the Court is even considering the specifics of the AIG policy, then it must have previously upheld Progressive's business-use exclusion with respect to UIM benefits. In addition, Minn. Stat. § 65B.49 subd. 3a(7), states:

The uninsured and underinsured motorist coverages required by this subdivision do not apply to bodily injury of the insured while occupying a motor vehicle owned by the insured, unless the occupied vehicle is an insured motor vehicle.

Minn. Stat. § 65B.49 subd. 3a(7). Policy exclusions consistent with this language have been upheld:

. . . the legislature amended [the No-Fault Act] to allow insurance companies to exclude certain vehicles from uninsured motorist coverage if the vehicle was owned by the policyholder, but not insured by the policyholder.

Stewart, 727 N.W.2d 679, 684 (Minn. Ct. App. 2007), citing Wintz v. Colonial Ins. Co. of Cal., 542 N.W.2d 625 (Minn. 1996) and Minn. Stat. § 65B.49 subd. 3a(7) (clarification in original).

The Minnesota Court of Appeals analyzed the application of such an exclusion in Stewart v. Illinois Farmers Ins. Co. In that case, a husband was injured in a motor vehicle accident, while occupying a vehicle he owned, but which was insured by his employer. Stewart, 727 N.W.2d at 684. He recovered UM benefits from his employer's policy and

sought excess UM benefits from the policy covering a vehicle owned by his wife and insured by Illinois Farmers. Id.² Stewart qualified as an additional insured under the Illinois Farmers policy, which excluded coverage for owned vehicles that were not insured under the policy. Id. at 682. This Court analyzed the application of Minn. Stat. § 65B.49 subd. 3a(7) and held that according to the plain reading of the statute, if the section applies, the vehicle at issue must be owned and uninsured. Id. at 685. In Stewart, that meant the exclusion did not apply because Stewart's vehicle was insured by his employer. Id. A different outcome is reached in this case, after applying the same analysis.

Here, the Decedent owned the vehicle insured by Progressive. Decedent may qualify as a resident relative under the AIG policy. The AIG policy contains exclusions to UIM coverage similar to the intent of Minn. Stat. § 65B.49 subd. 3a(7). See A-7. Specifically, the policy states there is no UIM coverage provided for an insured injured: “[w]hile occupying . . . any motor vehicle owned by that insured if the vehicle is not insured for coverage under Part C [UM/UIM].” Id. In Stewart, the Court of Appeals held this exclusion did not apply because the owned vehicle was insured, although it was insured by another entity, Stewart's employer. See, Stewart, 727 N.W.2d at 685. Thus, the exclusion applies when the vehicle is owned, but not insured.

Using that logic, the exclusion must apply in this case to prohibit the claims against the AIG policy. In order for this Court to even contemplate whether or not AIG's

² It is irrelevant to the analysis of this case that Stewart dealt with a claim for excess UM benefits and this case involves a claim for UIM benefits. The statutory provisions are the same and applies equally to UM and UIM cases.

policy provides UIM coverage to Appellant, this Court must first hold the occupied vehicle was uninsured. Otherwise, as argued above, if the vehicle was insured by Progressive, then Appellant would be excluded from making the UIM claim against AIG pursuant to the language contained in Minn. Stat. § 65B.49 subd. 3a(5). In fact, Appellant has asserted that very argument on page 19 of Appellant's Brief, when he argues: "Appellant, Gregory Latterell submits that zero coverage is in all affects, both literally and figuratively, no coverage." It is impossible for Appellant to argue Decedant was not insured with respect to subdivision 3a(5) but at the same time insured with respect to subdivision 3a(7).

According to Appellant's own argument, the vehicle is owned but not insured. Therefore, pursuant to the application of statute and using the Court of Appeals' analysis in Stewart, the statutory language of § 65B.49 subd. 3a(7) applies: AIG's UIM exclusion is valid and enforceable, and Appellant is prohibited from recovery.

C. BUSINESS-USE EXCLUSION.

Finally, even if this Court holds the occupied vehicle is covered under the AIG policy, thereby defeating the plain language of multiple provisions of the No-Fault Act and other policy exclusions, the AIG policy also contains a valid business-use exclusion just like Progressive's policy. If Progressive is dismissed from the case based on its business use exclusion, then the same analysis should be applied to the AIG policy, as the applicable policies have similar language.

Business-use exclusions in automobile insurance policies are valid. See, Illinois Farmers Ins. Co. v. Eull, 594 N.W.2d 559 (Minn. Ct. App. 1999). In Eull, the Court of

Appeals confirmed insureds could not reasonably expect a personal passenger automobile policy to cover insured's use of car to deliver pizzas, and enforcement of business-use exclusion did not violate public policy. Id. at 561-562

The Progressive policy states UIM coverage does not apply to bodily injury sustained by any person using or occupying:

- a. a covered auto while being used to carry persons or property for compensation or fee, including but not limited to, pickup or delivery of magazines, newspapers, food, or any other products. . .

See, A-3.

Again, the only way the Court begins to consider the validity of AIG's exclusion is to first determine that Progressive's exclusion is valid. Similar to Progressive's policy, AIG's policy states AIG will not provide UIM coverage to bodily injury sustained by an insured:

3. While occupying your covered auto when it is being used to carry persons or property for a fee or any compensation, or while it is available for public hire. This exclusion (A.3) applies to, but is not limited to, delivery of goods to customers either on a wholesale or retail basis, such as:
 - a. Food;
 - b. Newspapers; or
 - c. Flowers.

It does not apply to share-the-expense car pool.

See, A7-8.

Appellant generally argues AIG's policy language was validated by the Minnesota Court of Appeals. See, Appellant's Brief at 16. Appellant fails to analyze AIG's policy language and merely states the clause is ambiguous the Court of Appeals was wrong. Id.

at 16-17. Appellant's statements completely misstate the Minnesota Court of Appeals' opinion. The opinion does not make one mention of AIG's policy language, because it determined the statute specifically prohibits Appellant's claim against AIG. See, AA-18.

Regardless, if Progressive is dismissed based on its business-use exclusion, then AIG should be dismissed as well. The undisputed facts confirm that the Decedent was operating his vehicle to deliver books, which was his job for which he received "a fee or any compensation." If the exclusion excludes coverage under the Progressive policy, then it should equally apply to the AIG policy. Appellant offers no authority to the contrary.

CONCLUSION

The claim against AIG is in the alternative, effective only if Progressive owes no UIM coverage for the Defendant. The unambiguous language of Minnesota Statute Section 65B.49 subd. 3a(5) specifically prohibits Appellant's primary and/or excess UIM claim against AIG. Appellant offers no authority in support of his analysis, which flies in the face of this Court's prior decisions and the holdings of the District Court and Court of Appeals below. Moreover, even if the claims against AIG are allowed, there are specific policy provisions contained in the AIG policy that exclude benefits. For the reasons asserted, Defendant AIG respectfully requests this Court affirm the lower courts' decisions and dismiss all claims as to AIG in their entirety.

Dated: 7-14-2010.

JOHNSON & CONDON, P.A.

By Michael M. Skram

Michael M. Skram (# 340145)

Matthew M. Johnson (#27723X)

Attorneys for AIG Insurance Company

7401 Metro Boulevard, Suite 600

Minneapolis, MN 55439-3034

Telephone: (952) 831-6544

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record, pursuant to Rule 1342.01, subd. 3(a) of the rules of Civil Appellate procedure, hereby certifies that the attached brief has been prepared using Microsoft Word, Times new Roman, with a font size of 13 pt. and a word count of 5,736.

Dated: 7/14/2010.

JOHNSON & CONDON, P.A.

By Michael M. Skram

Michael M. Skram (# 340145)

Matthew M. Johnson (#27723X)

Attorneys for AIG Insurance Company
7401 Metro Boulevard, Suite 600
Minneapolis, MN 55439-3034
(952) 831-6544