

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 AND APPENDIX OF RESPONDENT
PROGRESSIVE NORTHERN INSURANCE COMPANY**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

I. Whether the lower courts properly found that the Minnesota No-Fault Act permits this business-use exclusion.

Description of how the issue was raised in the district court

Appellant and Respondent raised this issue in the district court in cross-motions for summary judgment pursuant to Minn. R. Civ. P. 56.03.

Concise statement of the district court's ruling

The Fourth Judicial District, the Honorable William R. Howard presiding, properly found this business-use exclusion is valid and precludes all coverage here.

Description of how the issue was preserved for appeal

Appellant preserved this issue for appeal by filing a timely notice of appeal pursuant to Minn. R. Civ. App. P. 103.01, subd. 1, within the time period required by Minn. R. Civ. App. P. 104.01, subd. 1.

Apposite cases

Smith v. Ill. Farmers Ins. Co., 455 N.W.2d 499 (Minn. App. 1990).

II. Whether the lower courts properly found that this business-use exclusion is unambiguous.

Description of how the issue was raised in the district court

Appellant and Respondent raised this issue in the district court in cross-motions for summary judgment pursuant to Minn. R. Civ. P. 56.03.

Concise statement of the district court's ruling

The Fourth Judicial District, the Honorable William R. Howard presiding, properly found the exclusion is unambiguous and precludes all coverage here.

Description of how the issue was preserved for appeal

Appellant preserved this issue for appeal by filing a timely notice of appeal pursuant to Minn. R. Civ. App. P. 103.01, subd. 1, within the time period required by Minn. R. Civ. App. P. 104.01, subd. 1.

Apposite cases

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

STATEMENT OF THE CASE

Jared Boom died as a result of a collision with a vehicle driven by Joshua Nelson on October 4, 2007. At the time of the accident, Mr. Boom was in route to deliver books as part of his employment as an independent contractor with National Dispatch of Albany, Inc. After settling his claim against Nelson, Gregory Latterell, as trustee for the heirs of Jared Boom, initiated a claim against Progressive Northern Insurance Company (“Progressive”) for underinsured motorist (“UIM”) benefits under the policy that covered the vehicle operated by Jared Boom at the time of the accident.

Progressive denied coverage under the policy pursuant to an exclusion that precludes coverage when the insured suffers bodily injury while operating a covered auto in the course of transporting persons or property for compensation or a fee (“the business-use exclusion”). On January 29, 2009, Progressive and Latterell filed cross-motions for summary judgment. Progressive’s motion was granted on April 30, 2009. The district court found that the business-use exclusion is valid and not prohibited by Minn. Stat. § 65B.49 subd. 3a., (2009) also known as the Minnesota No Fault Act (the “No-Fault Act”).

On June 24, 2009, Appellant timely filed a notice of appeal, contending that the district court erred as a matter of law. On March 2, 2010, the court of appeals affirmed the district court’s order, holding that the exclusion is both permitted by, and valid under, the No-Fault Act. The court of appeals held that because the exclusion is not prohibited by statute, the parties are free to contract accordingly. The court of appeals also held that the terms of the exclusion are clear and unambiguous.

On March 31, 2010, Appellant timely filed a petition for review contending that the court of appeals erred in affirming the district court's order. On April 19, 2010, Progressive timely opposed Appellant's petition for review, contending that Appellant failed to satisfy the criteria for review set forth in Minn. R. Civ. App. P. 117. On May 18, 2010, this Court granted Appellant's petition for review thereby giving Progressive this opportunity to explain why the lower courts' decisions should be affirmed. Based on the arguments and authorities stated herein, Progressive respectfully asks this Court to affirm the lower courts' decisions.

STATEMENT OF THE FACTS

The court of appeals accurately recited the facts underlying this appeal. *See Order and Opinion* at AA-10. In the interest of brevity and economy, Progressive does not repeat them except to note they are undisputed.

Progressive reproduces the relevant policy language and statutory provision for the convenience of the Court.

INSURING AGREEMENT – UNDERINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an **insured person** is entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:

1. Sustained by an **insured person**:
2. caused by an accident; and
3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**.

An **insured person** must notify us in writing at least 30 days before entering into any settlement with the owner or operator of an **underinsured motor vehicle**, or that person's liability insurer. In order to preserve our right of subrogation, we may elect to pay within 30 days any sum offered in settlement by, or on behalf of, the owner or operator of the **underinsured motor vehicle**. If we do this, you agree to assign to us all rights that you have against the owner or operator of the **underinsured motor vehicle**.

Any judgment or settlement for damages, which arises out of a lawsuit against an owner or operator of an **uninsured motor vehicle** or **underinsured motor vehicle** is not binding on us if we have not been given:

1. reasonable notice of the commencement of the lawsuit against the operator or owner of the **uninsured motor vehicle** or **underinsured motor vehicle**; and
2. an opportunity to defend our interests in that lawsuit.

We shall not be bound by any judgment other than a final judgment rendered as the result of a trial, after any appeals taken from that judgment.

EXCLUSIONS – READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART III.

Coverage under this Part III [UIM coverage] will not apply:

1. to **bodily injury** sustained by any person while using or **occupying**:
 - a. a **covered auto** while being used to carry persons or property for compensation or a fee, including, but not limited to, pickup or delivery of magazines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools; or

* * *

(See Appellant's Addendum at AA-2 - AA-4.)

Minn. Stat. § 65B.49 subd. 3a. (2002):

Subd. 3a. Uninsured and underinsured motorist coverages.

(1) No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless separate uninsured and underinsured motorist coverages are provided therein. Each coverage, at a minimum, must provide limits of \$25,000 because of injury to or the death of one person in any accident and \$50,000 because of injury to or the death of two or more persons in any accident. In the case of injury to, or the death of, two or more persons in any accident, the amount available to any one person must not exceed the coverage limit provided for injury to, or the death of, one person in any accident.

(2) Every owner of a motor vehicle registered or principally garaged in this state shall maintain uninsured and underinsured motorist coverages as provided in this subdivision.

(3) No reparation obligor is required to provide limits of uninsured and underinsured motorist coverages in excess of the bodily injury liability limit provided by the applicable plan of reparation security.

(4) No recovery shall be permitted under the uninsured and underinsured motorist coverages of this section for basic economic

loss benefits paid or payable, or which would be payable but for any applicable deductible.

(5) 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. 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.

If at the time of the accident the injured person is not occupying a motor vehicle or motorcycle, the injured person is entitled to select any one limit of liability for any one vehicle afforded by a policy under which the injured person is insured.

(6) Regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, in no event shall the limit of liability for uninsured and underinsured motorist coverages for two or more motor vehicles be added together to determine the limit of insurance coverage available to an injured person for any one accident.

(7) 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.

(8) The uninsured and underinsured motorist coverages required by this subdivision do not apply to bodily injury of the insured while occupying a motorcycle owned by the insured.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

If the facts are undisputed, the Court need only review how the district court applied the law in interpreting the policy language. *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.*, 433 N.W.2d 82, 84-85 (Minn. 1988). Both the interpretation of language in an insurance policy and the interpretation of a statute are questions of law, subject to de novo review. *Hammer v. Investors Life Ins. Co. of N. Am.*, 511 N.W.2d 6, 8 (Minn. 1994).

II. THE BUSINESS-USE EXCLUSION IS A VALID EXCLUSION UNDER THE MINNESOTA NO-FAULT ACT.

Parties to insurance contracts are free to contract as they see fit, subject to statutory restrictions. *Smith v. Ill. Farmers Ins. Co.*, 455 N.W.2d 499, 501 (Minn. App. 1990) *pet. for rev. denied* (Minn. July 13, 1990). Exclusions to coverage in both liability and UM/UIM coverages have been enforced in Minnesota for over 20 years. *See Lynch v. Am. Family Mut. Ins. Co.*, 626 N.W.2d 182 (Minn. 2001). The court of appeals has consistently reasoned that exclusions are valid and enforceable because the No-Fault Act does not expressly prohibit them. There is no basis to depart from this sound reasoning now.

The lower courts recognized that the No-Fault Act does not expressly prohibit exclusions and properly refused to imply such a prohibition from the Act's silence. The lower courts' decisions were supported and compelled by the Minnesota Court of Appeals decision in *Smith v. Illinois Farmers Insurance*, 455 N.W.2d 499 (Minn. App.

1990). Indeed, the rationale of *Smith* applies equally here and should be adopted by this Court.

Smith considered a UM/UIM coverage exclusion for accidents occurring in Mexico. *Id.* at 501. The *Smith* appellants claimed that the district court erred when it denied coverage. *Id.* Recognizing that the exclusion was not *expressly* prohibited by the UM/UIM provision in the No-Fault Act, the appellants argued that the prohibition should be *implied* because *other* section of the No-Fault Act included a provision permitting territorial limitations. *Id.* Those other provisions, which governed basic economic benefits and residual liability coverage, only required coverage in the United States, its territories, and Canada. *Id.* The UM/UIM provision contained no such limitation. *Id.* at 501. And importantly, none of the three provisions addressed exclusions for accidents occurring outside of the U.S. at all. *Id.* The *Smith* appellants essentially argued that the territorial limitation in the other two coverages, and the UM/UIM provision's silence, created a ban on the exclusion in UM/UIM coverage. *See id.* The court of appeals flatly rejected this argument as "flawed," stating, "[e]xclusions of coverage for accidents occurring outside the United States, its territories and possessions, and Canada are nowhere prohibited under the statute." *Id.* The court properly refused to read any prohibition into the statute or to hold the statute's silence amounted to an implied prohibition. *Id.*

Appellant here attempts to undercut the strength of *Smith's* application by misstating its holding. Appellant asserts that the territorial limitation in *Smith* was identical to the restrictions contained in the No-Fault Act, providing the basis for the

court's holding. (See Appellant's Br. at 11.) While the *Smith* court notes this fact in dicta, the basis for its holding is:

Finding no express or implied statutory prohibition on a territorial exclusion clause for accidents occurring in Mexico, our task is to enforce the contract according to its terms.

Smith, 445 N.W.2d at 502.

The *Smith* court's analysis provides the proper frame-work for this Court to analyze the business-use exclusion here. The extent of an insurer's obligation to its insured is governed by the language of the contract to which the parties agreed so long as the policy does not omit legally required coverage or contravene applicable statutes. *Frey v. United Servs. Auto. Ass'n*, 743 N.W.2d 337, 341 (Minn. App. 2008). Because the No-Fault Act does not expressly or impliedly prohibit this exclusion, it is valid.

Appellant also attempts to distinguish *Illinois Farmers Insurance Company v. Eull*, 594 N.W.2d 559 (Minn. App. 1999), which enforced a similar business-use exclusion in a liability coverage part, by pointing to "distinct differences" between liability and UM/UIM coverage. Appellant correctly notes that liability coverage is considered third-party coverage while UM/UIM is considered first-party. See *Lynch v. Am. Family Mut. Ins. Co.*, 626 N.W.2d 182, 188 (Minn. 2001). But Appellant never elaborates as to why this distinction helps determine this exclusion's validity. Progressive submits this distinction has no bearing on the question before the Court because it is the language of the Act that controls the analysis under either first-party or third-party coverages.

Cases addressing the difference between first-party and liability coverage have done so primarily in the context of coverage conversion. *See Lynch*, 626 N.W.2d 186-188. The difference between liability and UIM coverage is noted there because coverage conversion permits an individual to increase more expensive liability insurance by purchasing less expensive UIM coverage. *Id.* Importantly, however, even in the context of coverage conversion, where this distinction purportedly matters, this Court *still defers* to the language in the policy because the Act is silent on the matter. *See id.*

There is, nevertheless, nothing in the No-Fault Act or in our decisions concerning coverage conversion that prohibits an insurer from writing UIM coverage that allows conversion. . . . [B]ecause the . . . policy unambiguously allows recovery of UIM benefits in these circumstances *and the No-Fault Act does not explicitly or impliedly prohibit* parties to an automobile insurance contract from agreeing to terms that allow coverage conversion, Lynch is entitled to his UIM benefits under the American Family policy.

Id. at 190. (emphasis added).

There is no basis to conclude that this exclusion is impliedly prohibited simply because it is contained in first-party coverage. Both coverages are mandated by the No-Fault Act. *See* Minn. Stat. § 65B.49 (2009). And just as with liability coverage, the Act is entirely silent with regard to exclusions.

Business-use exclusions are common and define the scope of the risk undertaken. *See Eull*, 594 N.W.2d at 562. The court of appeals has recognized that commercial use expands the risk beyond that contracted for and provides a sound basis for the exclusion. *Id.* “The use of a car for commercial activities such as pizza delivery increases the risk of an accident beyond that usually anticipated in the private use of a passenger car.” *Id.* at

561. Here, just like the business use of a vehicle increases the chances that the insured will be involved in an accident triggering the liability insurance, the risk that the insured will be involved in an accident triggering the UM/UIM coverage increases.

The right of parties to contract as they see fit should be preserved and only disrupted if a specific provision precludes the operation of the policy language. The lower courts properly held that the business-use exclusion is not prohibited by the No-Fault Act and is therefore a valid exclusion. The No-Fault Act does not abolish an insurer's right to include common exclusions of coverage, and permits insurers to fairly define the risk undertaken. The lower courts' holdings should be affirmed.

III. THIS EXCLUSION IS CLEAR AND AMBIGUOUS AND THE LOWER COURTS SHOULD BE AFFIRMED.

Appellant continues to assert here that the policy phrase "compensation or fee" is ambiguous. (See Appellant's Br. at 13.) Appellant also continues to assert that this purported ambiguity requires the exclusion to be stricken from the policy, an assertion which finds no support in Minnesota law. *See Mitsch v. Am. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. App. 2007). Insurance provisions found to be ambiguous are construed in the manner most favorable to the insured. *See id.* Here, this exclusion is triggered under any possible interpretation. The lower courts properly held that the exclusion is clear and unambiguous, and those decisions should be affirmed.

Insurance policies are construed as a whole and unambiguous language is given its plain and ordinary meaning. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). When language in an insurance contract is

ambiguous, or reasonably subject to more than one interpretation, it is construed in the manner most favorable to the insured. *Mitsch v. Am. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. App. 2007) (citing *Progressive Specialty Ins. Co. v. Widness ex rel. Widness*, 635 N.W.2d 516, 518 (Minn. 2001); *Hammer v. Investors Life Ins. Co. of N. Am.*, 511 N.W.2d 6, 8 (Minn. 1994)). This exclusion is triggered under any possible interpretation because the undisputed facts here are that Mr. Boom's sole duties were to deliver books, and he was in fact, delivering books. (See Appellant's Br. at 6.) Ambiguities found in other cases arose from the particular facts in those cases. See *Progressive Cas. Ins. Co. v. Metcalf*, 501 N.W.2d 690, 691 (Minn. App. 1993) and *Closner v. Ill. Farmers Ins. Co.*, No. A08-0512, 2009 Minn. App. Unpub. LEXIS 20 (Jan. 6, 2009 Minn. App.) .

In *Progressive Cas. Ins. Co. v. Metcalf*, the court found that the term "fee" was subject to two interpretations. It held "'fee' could refer to a per trip charge" or to "wages paid to an employee for driving." *Metcalf*, 501 N.W.2d at 692. The insured driver received the same hourly wage whether he was conducting deliveries or performing his other duties. *Id.* Because there was no charge for delivery, the court found the first interpretation to be inapplicable because there was no "fee" or "per trip charge." *Id.* Additionally, the driver received the same wage whether he was driving his car or performing other duties; thus, the alternative interpretation, "wages paid for driving," was also not met, and the wages paid could not be considered a "fee" within the meaning of the exclusion. *Id.* Under either interpretation of the exclusion, it was inapplicable to the facts at hand in *Metcalf*. The court of appeals applied similar reasoning to the term "for a

charge” in *Closner v. Ill. Farmers Ins. Co.*, No. A08-0512, 2009 Minn. App. Unpub. LEXIS 20 (Jan. 6, 2009 Minn. App.).

Unlike both drivers in *Closner* and *Metcalf*, Mr. Boom’s wages were tied directly to the transportation of property. Mr. Boom was paid per day for driving the route and delivering the books, thus there was a delivery “fee.” (See Appellant’s Br. at 6.) Additionally, Mr. Boom received his wage only for delivering books, thus, meeting the second interpretation. (See *id.*) Therefore, even if the term “fee” were found to be ambiguous, there is no interpretation that renders the exclusion inapplicable in this instance. Jared Boom was transporting property for a “fee” within the meaning of this exclusion.

What is more, this exclusion extends to use of vehicles while being used to transport property for “*compensation or a fee*” and, as recognized by the lower courts, is intentionally much broader in scope. See *e.g.*, *Strader v. Progressive Ins.*, 230 S.W.3d 621 (Mo. Ct. App. 2007); *Crawford v. Progressive N. Ins. Co.*, 646 N.W.2d 854 (Wis. Ct. App. 2002) (unpublished); *Campbell v. Lion Ins. Co.*, 710 A.2d 576 (N.J. 1986). In *Strader v. Progressive Insurance*, the Missouri Court of Appeals held an identical exclusion barred coverage for a mail carrier whose personal vehicle was destroyed while en route. 230 S.W.3d at 623, 628. The stipulated facts there were that the insured was carrying mail and that she was being paid as a mail carrier at the time of the accident. *Id.* at 623. The *Strader* court, adopted Webster’s Dictionary definition of “compensation” and held that the term extended to wages. *Id.* at 625. The holding in *Strader* supports a broader reading of this exclusion than that given to the exclusion in *Metcalf*. Because

this exclusion includes the term “compensation,” as opposed to limiting it only to a “fee,” if the insured receives any compensation whether through wages or otherwise, coverage is excluded.

“Compensation or a fee” is unambiguous language that must be given its plain and ordinary meaning. *See Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997) (citing *Henning Nelson Const. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986)). It is undisputed that Jared Boom was delivering books at the time of the accident for “compensation or a fee.” There is no reasonable interpretation of this exclusion that renders it inapplicable to the facts and the lower courts’ ruling should be affirmed.

CONCLUSION

For the foregoing reasons, Progressive Northern Insurance Company respectfully requests this Court affirm the district court's ruling that the exclusion is a valid exclusion to UIM coverage and unambiguously precludes coverage in this matter.

Respectfully submitted,

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Dated: 7-16-10

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Respondent Progressive conforms to Minn. R. Civ. App. P. 132.01, subd. 3(a)(1), for a brief produced with proportionally spaced font.

There are 4,255 words in this Brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this Brief was Microsoft® Office Word 2007.

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