

NO. A08-1315

State of Minnesota
In Court of Appeals

Larry Benjamin Johnson,

Appellant,

vs.

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

Respondents.

**BRIEF OF RESPONDENT
ILLINOIS FARMERS 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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LEGAL ISSUES

- I. Whether the District Court Properly determined that a Minnesota motorcycle insurance policy that included optional UIM coverage was to be enforced as written, and need not comply with the provisions of Minn.Stat. §65B.49 applicable to mandatory UIM coverage.

The Trial Court Held: That the policy in question provided the coverage required by law and would be enforced as written, rejecting Appellant's request to reform the optional UIM coverage to comply with the requirements of mandatory UIM coverage.

Aguilar v. Texas Farmers Ins. Co., 504 N.W.2d 791 (Minn.Ct.App. 1993).

Hedin v. State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407 (Minn.Ct.App. 1984).

Warthan v. Am. Fam. Mut. Ins. Co., 592 N.W.2d 136 (Minn.Ct.App. 1999),
rev. den'd (July 28, 1999)

Minn.Stat. §§65B.41-.71 (The Minnesota No-Fault Act).

STATEMENT OF THE CASE

The instant appeal arises out of a coverage dispute between Appellant Larry Johnson and Respondent Illinois Farmers Insurance Company (“Illinois Farmers”). Johnson was involved in an accident while operating a motorcycle he owned, and was insured through Illinois Farmers under a Minnesota motorcycle insurance policy.

Johnson brought suit in Le Sueur County District Court against the tortfeasors (the Cumiskey Respondents) and against Illinois Farmers as a result of the accident. Johnson settled with the tortfeasors and sought underinsured motorist (“UIM”) benefits from Illinois Farmers. Johnson received \$66,000 in UIM benefits from Illinois Farmers under the policy, but claims the policy should be reformed to provide him with a total UIM payment of \$100,000 instead of \$66,000.

The Honorable Richard C. Perkins heard arguments on the issue via summary judgment motion, and on June 12, 2008 granted judgment in Illinois Farmers’ favor. The District Court found reformation inappropriate, and that the policy is to be enforced as written providing \$66,000 in UIM benefits. Appellant Johnson has appealed that ruling, and the “Minnesota Association for Justice” (“MAJ”) has joined this appeal as an *amicus curie*, aligned with Johnson’s position.

STATEMENT OF FACTS

As indicated in Appellant's brief, the relevant facts are undisputed. While operating his motorcycle on or about July 23, 2005, Johnson was involved in an accident with an automobile operated by Respondent Brian Cummiskey. (A.3).¹ At the time, Johnson insured his motorcycle with Illinois Farmers, with an E-Z Reader Motorcycle Policy Minnesota (2nd ed.), policy no. 167957725 (hereinafter the "Policy"). (A.4, A.7-A.39).

Johnson brought suit against the Cummiskeys for the accident, and settled with them for \$34,000. (A.4). Johnson then sought UIM benefits for the accident from Illinois Farmers. (A.4). Johnson and Illinois Farmers stipulated that (Brian) Cummiskey was at fault for the accident, and that Johnson's damages exceed \$134,000. (A.4-5).

The Policy has UM/UIM limits of up to \$100,000 per person. (A.10). The terms of such coverage are set forth in a UM/UIM endorsement specific to Minnesota, Minnesota Endorsement §1314 (2nd ed.). (A.28-29). The endorsement, in relevant part, explains the terms of UM/UIM coverage as follows:

Uninsured (Underinsured) Motorist Coverage

Limits of Liability...

4. We will pay an **insured person** for unpaid **damages** resulting from a **motor vehicle accident** where the amount the **insured person** is legally entitled to recover against the owner of the **uninsured (underinsured) motor vehicle** exceed such owner's **bodily injury** policy limit, but not more than:

¹ References to Appellant's Appendix shall be: (e.g) "A.1"; to Respondent's Appendix: "R.1"; and to *Amicus Curie's* Appendix: "AC.1".

- a. The lesser of the difference between the limit of **uninsured (underinsured)** motorist coverage and the amount paid to the **insured person** by any party held to be liable for the **accident**; or
- b. the amount of damages sustained but not recovered.

(A.28-29, *emphasis original*).

Based on the Policy, Illinois Farmers' determined that Johnson is entitled to \$66,000 in UIM benefits (\$100,000 limit - \$34,000 received from liable parties). (A.4). Johnson sought to have the Policy reformed to provide the full \$100,000 limits, arguing that the Policy failed to provide UIM coverage as mandated under the Minnesota No-Fault Act (Minn.Stat. §§65B.41-65B.71, the "Act"). (Appellant's Brief at p.4; and A.51). The Trial Court granted Illinois Farmers summary judgment on this issue on June 12, 2008, holding that the policy was to be enforced as written. (A.48-A.51).

This appeal follows.

ARGUMENT

I. Response to Appellant's Argument.

A. Standard of Review.

Generally, "On appeal from a summary judgment it is the function of this court only to determine (1) whether there are any genuine issues of material fact and (2) whether the trial court erred in its application of the law." Betlach v. Wayzata Condominium, 281 N.W.2d 328, 330 (Minn. 1979). "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." Thiele v. Stich, 425 N.W.2d 580, 582-83

(Minn. 1988) (*citation omitted*). There are no disputed facts in this matter, leaving only the District Court's application of the law to those facts for review.

Under Minnesota law, insurance policy construction and interpretation is a matter of law for the court to decide. Kemper Ins. Co. v. Stone, 269 N.W.2d 885 (Minn. 1978). "[I]nterpretation of insurance contracts are subject to *de novo* review." Jorgensen v. Knutson, 662 N.W.2d 893, 897 (Minn. 2003) (*citation omitted*). In interpreting insurance policies, courts adhere to the rule that "parties are free to contract as they desire, and so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes, the extent of the insurer's liability is governed by the contract entered into." Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 882 (Minn. 2002), (*emphasis added*).

Statutory interpretation is also subject to *de novo* review. Jorgenson, 662 N.W.2d at 897. In addition, when interpreting a statute:

A statute should be interpreted, whenever possible, to give effect to all of its provisions; "no word, phrase, or sentence should be deemed superfluous, void, or insignificant." We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations. Finally, courts should construe a statute to avoid absurd results and unjust consequences. When construing a statute, our goal is to ascertain and effectuate the intention of the legislature.

American Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277-278 (Minn. 2000), (*citations omitted*).

B. The Policy Does Not Violate the Minnesota No-Fault Act.

The sole argument raised by Johnson on appeal is his contention that the Policy is unenforceable as written because it fails to comply with an applicable statute. Namely, Johnson contends that the motorcycle policy in question provides “less [UIM] coverage than the Act requires.” (Appellant’s Brief at p. 6). The problem with Johnson’s argument, and the reason the Courts in this and other cases have rejected same, is that the Act requires no UIM coverage at all for motorcycle policies. As there is no minimum requirement for UIM coverage for such policies, the Policy here cannot provide insufficient levels of such coverage by providing additional, optional UIM coverage on terms different than those required for mandatory UIM coverage.

1. UIM coverage is not required by law for motorcycle policies.

The Minnesota No-Fault Act (Minn.Stat. §§65B.41-65B.71, the “Act”) governs compulsory insurance for automobiles and motorcycles. In relevant part the Act requires insurance as follows:

Every owner of a **motor vehicle** of a type which is required to be registered or licensed or is principally garaged in this state shall maintain during the period in which operation or use is contemplated a plan of reparation security under provisions approved by the commissioner, insuring against loss resulting from liability imposed by law for injury and property damage sustained by any person arising out of the ownership, maintenance, operation or use of the vehicle. The plan of reparation security shall provide for basic economic loss benefits and residual liability coverage in amounts not less than those specified in section 65B.49, subdivision 3, clauses (1) and (2).

Minn.Stat. §65B.48, Subd.1, (*emphasis added*). This provision requires that “motor vehicle” policies include liability, no-fault (“residual liability”), and basic economic loss benefits. Id.

Under a separate provision, the Act also mandates UM/UIM coverage for certain “motor vehicle” policies:

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.

Minn.Stat. §65B.49, Subd. 3a (*emphasis added*).

The next Subdivision of the statute requiring UIM benefits for “motor vehicles” is the one Johnson cites to, that provides such mandatory benefits have to be of the “add-on” variety. Minn.Stat. §65B.49, Subd. 4a. However, motorcycles are expressly excluded from the definition of “motor vehicles” under the Act: “‘Motor vehicle’ means every vehicle, *other than a motorcycle* or other vehicle with fewer than four wheels, which (a) is required to be registered pursuant to chapter 168. Minn.Stat. §65B.43, Subd. 2, (*emphasis added*).

The legislature has instead made the determination that motorcycle policies are only required to include liability insurance:

Motorcycle coverage. (a) Every owner of a motorcycle registered or required to be registered in this state or operated in this state by the owner or with the owner's permission shall provide and maintain security for the payment of tort liabilities arising out of the maintenance or use of the motorcycle in this state.

Minn.Stat. §65B.48, Subd. 5.

The Supreme Court has long recognized the fact that motorcycles are not “motor vehicles” under the Act. Feick v. State Farm Mut. Auto. Ins. Co., 307 N.W.2d 772, 774 (Minn. 1981); and Am. Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291, 293 (Minn. 1999). The Court has similarly recognized that under the Act, no UM/UIM coverage whatsoever is required for motorcycle policies: “The Act mandates UIM coverage for all motor vehicles. For purposes of the Act, motorcycles are not motor vehicles. Therefore, UIM coverage is not mandated for motorcycles.” Loren, 597 N.W.2d at 293; and see Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829, 831 (Minn. 1989), (court explaining that motorcycle was fully insured under Minnesota law while noting that policy “contained only liability coverage and did not have any provision for underinsured motorist coverage, since such coverage is not required for motorcycles in Minnesota.”).

Accordingly, the law is well settled that UIM coverage is not required at all for motorcycle policies, so a motorcycle policy that provides no UIM coverage whatsoever does not omit any coverage required by law. Loren, 597 N.W.2d at 293; and Roering, 444 N.W.2d at 831. Nor can such a policy violate any statutes by providing insufficient levels of UIM coverage, because the level of UIM coverage required for motorcycles under the Act is none. Id. Johnson cannot avoid enforcement of the Policy as written, and his request to reform the Policy was properly denied by the District Court below.

2. Mitsch is inapposite to the instant dispute.

Appellant Johnson acknowledges that UIM coverage is not mandatory for motorcycle policies. Nonetheless, he claims the optional UIM coverage in this case should be reformed, relying on the case of Mitsch v. Am. Nat’l Prop. & Cas. Co., 736

N.W.2d 355 (Minn.Ct.App. 2007), *rev. den'd* (Oct. 24, 2007). Mitsch is inapposite, as it did not consider in its analysis that UIM motorcycle coverage is not required under Minnesota law.

In Mitsch, the insured was injured in a motorcycle-automobile accident while a passenger on a motorcycle owned and insured by she and her husband. Id., at 356. The accident was caused by both the insured's husband (driving the motorcycle), and by the driver of the automobile. Id., at 356-357. The insured collected the liability coverages of the motorcycle and automobile policies, but still had additional damages. Id. The insured then sought UIM benefits under the motorcycle policy. Id.

The insurer denied the UIM claim. Mitsch, 736 N.W.2d at 357. Under the terms of the UIM coverage in the motorcycle policy from Mitsch, the policy paid an amount up to the UIM limits, reduced by "a payment made by the owner of the...underinsured motor vehicle...[and] (2) a payment made under the Liability Coverage...of this policy." Id. As the liability payments the insured claimant had received from the automobile and motorcycle policies exceeded the motorcycle policy's UIM limits, there were no UIM benefits available under the policy. Id.

To avoid this result, the insured argued that this "reducing" clause was unenforceable in that it violated the purpose of the No-Fault Act, and on the theory that under Minn.Stat. §65B.49, UIM coverage must be "add-on" (meaning UIM benefits could not be reduced by liability benefits paid) rather than "limits-less-paid" coverage. Id.

A Court of Appeals panel in Mitsch agreed, but with absolutely no consideration of the fact that UIM coverage is not required for motorcycles under the Act. Id. The Mitsch Court instead focused on whether the insured was attempting to improperly convert UIM coverage on her own policy to compensate for insufficient liability coverage she received on the same policy for her husband's negligence. Id., at 358-363. The court decided that she was not engaging in coverage conversion, and that therefore the reducing clause violated Minn.Stat. §65B.49, Subd. 4a and the Act's purpose of compensating injured motorists. Mitsch, 736 N.W.2d at 358-363.

None of the actors in Mitsch apprised the court that the very same statute that calls for UIM coverage to be of the "add-on" variety also states in no uncertain terms that UIM coverage is not required at all for motorcycles. See, Minn.Stat §65B.49, Subd. 3a, 4a. It was not addressed by the Mitsch District Court, Appellate Court, or by either party in their appellate briefings. Mitsch, 736 N.W.2d 355; and R.1; R.19; and R.37. The Mitsch Court failed to address this issue, and made no analysis of the legality of reforming policies to terms of coverage under the Act when such coverage is not required by the Act in the first place. Mitsch, 736 N.W.2d 355; and R.1; R.19; and R.37.

Minnesota Courts who have considered reformation of a policy to provide amounts or levels of coverage consistent with the Act for coverage not required by the Act for the policy have found reformation improper, and that the as-written coverages do not violate the Act.

In the case of Aguilar v. Texas Farmers Ins. Co., 504 N.W.2d 791 (Minn.Ct.App. 1993), a Texas insured was injured in Minnesota while a passenger in an underinsured

automobile. The insured recovered \$20,000 in liability benefits from the underinsured driver, and then sought UIM benefits under his own Texas policy. Aguilar, 504 N.W.2d at 792. The Texas policy had a \$25,000 UIM limit, with benefits to be reduced by any amounts received from the tortfeasor (similar to the instant Policy), resulting in \$5,000 available UIM benefits under the Texas policy. Id.

The insured sued in Minnesota Court, contending that the Texas policy was unenforceable as written with the “difference of limits” provision, and that it was necessary to “rewrite” the policy to provide the “add-on” UIM coverage specified under the Minnesota No-Fault Act so that the UIM benefits would not be reduced by the amount the insured recovered from the tortfeasor. Id., at 792-793.

The Aguilar Court disagreed that the as-written “difference of limits” UIM coverage violated the Act and refused to reform the policy. Aguilar, 504 N.W.2d 791. The Aguilar Court noted that the Minnesota No-Fault Act mandated liability and basic economic loss coverage for out-of-state insurers, but not UIM coverage. Id., at 793-794. Since UIM coverage was not required at all by the Act for the policy in question, there was no violation of the Act in providing UIM benefits on terms different than those specified under the Act. Id. The Court noted: “The Texas Farmers policy contained all of the statutorily-mandated coverages. Anything in addition to the statutorily-mandated coverages, such as UIM coverage, is a matter of contract between the parties. In this case, the contract calls for ‘difference in limits’ UIM coverage.” Id., at 794. The policy did not violate the Act by providing UIM benefits other than “add-on,” and the policy was to be enforced as written. Id.

The Court of Appeals reached a similar result in the matter of Hedin v. State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407, 409 (Minn.Ct.App. 1984). In Hedin, the Court held that where no UM coverage was required for non-residents under the Act, a lower level (\$15,000/\$30,000) of UM coverage provided under a non-resident's policy would not be re-written to meet the minimum level of UM coverage required for residents (\$25,000/\$50,000). Id. "If a non-resident operating a vehicle in Minnesota need not carry any [UM] coverage, it is unlikely the legislature intended non-residents to recover benefits beyond their own coverage." Id., at 409; and see also Warthan v. Am. Fam. Mut. Ins. Co., 592 N.W.2d 136 (Minn.Ct.App. 1999), *rev. den'd* (July 28, 1999), (where UIM coverage not required by law, UIM coverage with "limits-less-paid" instead of "add-on" coverage did not contravene the Act and would not be changed to "add-on" coverage).

Aguilar et al., stand for the proposition that where UM/UIM coverage is not mandated by law under the Act for a certain policy, it is no violation of the Act for optional or different UM/UIM coverage on that policy to deviate from the terms of mandated UM/UIM coverage. Where insurers offer a non-mandatory type of coverage above what is required under Minnesota law, the parties are free to contract as they see fit. See, e.g., Aguilar, 504 N.W.2d at 794.

Nor are these holdings inconsistent with the Act's general purpose of assuring compensation to victims of motoring accidents in the state. In the recent case of Mut. Service Cas. Ins. Co. v. League of Minn. Cities Ins. Trust, 659 N.W.2d 755, (Minn. 2003), the Supreme Court cautioned that the legislative purpose of the No-Fault Act was

not to provide universal relief for uncompensated motorists. The Court cited the Act's stated purpose from Minn.Stat. §65B.42(1), and then commented on same:

“To relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies * * * which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident” Minn.Stat. § 65B.42(1) (2002).

That purpose does not express an intent that no-fault benefits be universally provided, with no exceptions. In fact, the Act does not provide universal no-fault benefits but recognizes that there will be several classes of uncompensated victims of accidents with vehicles that might otherwise have been considered to be “automobiles,” such as motorcycles, school buses, farm tractors and all-terrain vehicles. See, Minn.Stat. §65B.43, subd. 2 (limiting the definition of “motor vehicle” to exclude motorcycles and vehicles not “required to be registered pursuant to chapter 168”).

Mut. Services, 659 N.W.2d at 762. Consistent with Aguilar, Hedin, and Warthan, the Supreme Court in Mut. Services went on to hold that a claimant could not reform a policy to obtain No-Fault benefits under a policy for a marked police car that had no such benefits, and that it did not violate the Act for a claimant to be unable to recover No-Fault benefits under the policy because such benefits were not required for marked police cars under the Act. Id.

The instant matter lines up on all fours with the above cases. UIM coverage was not required under the Act for the Policy. Illinois Farmers nonetheless offered optional UIM coverage on a “limits-less-paid” basis. The coverage was not mandated, and therefore does not violate applicable law (the Act). Nonetheless, Johnson now seeks to have the Policy reformed to provide the level of coverage (“add-on”) specified for mandatory UIM benefits.

It should be noted regarding the Minn.Stat. §65B.49, Subd. 4a “add-on” provision, that just as it makes no specific reference to motorcycle UM/UIM coverage, nor does it make any specific reference as to whether it applies to non-resident UM/UIM coverage. Nonetheless, the Courts in non-resident cases have found that as long as the policies in question contained the statutorily-mandated coverage required by the Act, there was no statutory violation and the policies would not be re-written to impose Subdivision 4a non-mandated “add-on” coverage onto the policies’ as-written coverages. Aguilar, 504 N.W.2d 791; and Warthan, 592 N.W.2d 136.

Johnson tries to rebut these facts and precedent with an unfounded hypothetical scenario, claiming that a pedestrian who owns no vehicle of any kind can purchase UIM coverage, and that the coverage under such a policy must be of the “add-on” variety. (Appellant’s Brief, at p. 9). Johnson provides absolutely no facts, statutory or case law to support the existence of such a policy in Minnesota, or his unsupported theory relating to same. While Farmers is aware the Act mandates certain insurance coverage be issued for owners of “motor vehicles” and motorcycles, Farmers is aware of no provision of the Act mandating policies or types of coverage for pedestrians who do not own vehicles of any kind. He has no legal or factual basis for the supposed illustration, and the Court should disregard same.

Under Johnson’s proposed interpretation, the legislature purportedly took the inconsistent position of placing minimum requirements on UIM coverage for motorcycle policies, after having previously made it the law that there are NO minimum requirements of UIM coverage for motorcycle policies. His proposed reading creates an

absurd result and a conflict between provisions, which is to be avoided under Minnesota law. American Family, 616 N.W.2d 273.

Johnson's position is essentially that the Legislature is not okay with "some" UIM coverage for motorcycle policies, even after we already know the Legislature is okay with no UIM coverage whatsoever. As set forth above, the courts have already considered and rejected this argument. Furthermore as the Mitsch Court was not apprised of that issue, the resulting decision is inapplicable to the present matter. The District Court below correctly applied the law in this case, and its decision should be affirmed. The Policy is to be enforced as written, under which Johnson is entitled to \$66,000 in UIM benefits for the accident in question.

II. Response to Amicus Curiae's Argument.

In addition to the arguments of Appellant Johnson, the "Minnesota Association for Justice" ("MAJ") has also joined as an *amicus curie*. As MAJ's arguments cannot change the facts or the law applicable to this case, the District court's Order should be affirmed.

A. The Doctrine of Reasonable Expectations Does Not Apply.

MAJ first argues for reformation by attempting to utilize the doctrine of reasonable expectations. Under the reasonable expectations doctrine, "whether an insured had an objectively reasonable expectation of coverage is a question of law." Christie v. Illinois Farmers Ins. Co., 580 N.W.2d 507, 509 (Minn.Ct.App. 1998), *citation omitted*. The reasonable expectations doctrine applies in matters involving ambiguous

policy language or “hidden exclusions.” Christie, 580 N.W.2d at 509, citing Atwater Creamery Co. v. W. Nat’l. Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985); and, see, Hubred v. Control Data Corp., 442 N.W.2d 308, 311 (Minn. 1989), (“[F]actors to be considered [in applying the reasonable expectations doctrine] are the presence of ambiguity, language which operates as a hidden exclusion, oral communications from the insurer explaining important but obscure conditions or exclusions, and whether the provisions in a contract are known by the public generally”).

The first problem with MAJ’s argument is that there has been no claim by Johnson that the terms of the UM/UIM coverage in the Policy are hidden or ambiguous, making the doctrine inapplicable. Christie, 580 N.W.2d at 509. The doctrine of reasonable expectations also does not eliminate the insured’s responsibility to read the policy. Atwater, 366 N.W.2d 271. MAJ contends that Johnson “could be found to have reasonably relied on what the policy said he had for coverage,” to provide \$100,000 in UIM benefits. (Amicus Brief, at p. 6). The Policy clearly provides “limits-less-paid” UIM coverage and there has been no allegations by Johnson to the contrary. According to MAJ, an insured is only required to read the declarations page to determine coverage. Since this is not the law in Minnesota, MAJ’s argument must be rejected.

B. The Policy Does Not Provide Illusory Coverage.

MAJ further argues that coverage under the policy is illusory. Under the doctrine of illusory coverage, “insurance contracts should, if possible, be construed so as not to be a delusion to” the insured. Jostens, Inc. v. Northfield Ins. Co., 527 N.W.2d 116, 118 (Minn.Ct.App. 1995), quoting Motor Vehicle Casualty Co. v. Smith, 76 N.W.2d 486,

490-91 (Minn. 1956). Illusory coverage is applied where the coverage indicated in a policy “turns out to be functionally non-existent.” Jostens, 527 N.W.2d at 11; and Kabanuk Diversified Investments, Inc. v. Credit General Ins. Co., 553 N.W.2d 65, 73 (Minn.Ct.App. 1996). This doctrine would apply where a policy purports to provide coverage but in fact provides none.

MAJ first argues that coverage is illusory here because the “limits-less-paid” (“difference of limits”) provision is contained in an endorsement. (Amicus Brief, at pp. 6,7). It is settled Minnesota law that in construing an insurance policy, one cannot ignore the endorsements. An endorsement to a policy is not a hidden exclusion, with the courts recognizing that in construing a policy, one must read the policy including any endorsements, and that endorsement language controls when determining coverage. Steele v. Great West Cas. Co., 540 N.W.2d 886, 888 (Minn.Ct.App. 1995). Furthermore “[a]mbiguity does not arise merely because a policy must be read with some care.” Id., (citation omitted).

There is nothing in the record that Johnson read the Policy as required, nor that he was reasonably confused by ambiguous language or that he missed some purported “fine print.” Johnson’s only argument below and therefore on appeal is that the undisputed as-written language violates the Act. A reasonable insured cannot conveniently ignore the plain language of an endorsement in favor of the declarations page, and then claim the details of the coverage make the numbers on the declarations page illusory. As the UIM coverage was unambiguously written to clearly provide “limits-less-paid” coverage, and as the coverage was set forth in a controlling endorsement of the Policy, the doctrine of

reasonable expectations and illusory coverage are inapplicable, and the lower court's decision should be affirmed.

MAJ also claims, again without any evidence in the record, that Farmers charged Johnson a premium for "add-on" UIM coverage instead of a premium for "limits-less-paid" UIM coverage. (Amicus Brief at p. 7). This is another baseless claim. There is absolutely nothing in the record indicating that Farmers calculated its premium for the Policy using "add-on" coverage when the Policy clearly provides "limits-less-paid" UIM coverage.

MAJ further contends that the coverage is illusory because it claims the UIM limit of \$100,000 is an amount an insured could never actually recover under the policy. Amicus argues that "on paper," the Policy lists a limit of up to \$100,000 in UIM benefits, but in reality Johnson could only ever recover \$70,000 since any underinsured tortfeasor who might injure Johnson would theoretically have the \$30,000 per person liability minimum. (Amicus Brief at p. 6).

This is both irrelevant to the instant dispute of whether motorcycle UIM "limits-less-paid" coverage violates the Act, and incorrect as a matter of law. Minimum liability insurance requirements do not make the amount of UIM limits of \$100,000 illusory as providing at most \$70,000, and could provide up to \$100,000 in benefits regardless of the statutory minimum. MAJ ignores the risk that a UIM insured could be involved in an accident with multiple injured parties whose combined damages exceed the tortfeasor's liability coverage. See, e.g., Ballanger v. Toenjes, 362 N.W.2d 2 (Minn.Ct.App. 1985), (tortfeasor's policy provided \$50,000 total liability coverage for accident involving three

injured parties). In such a case the UIM insured may end up receiving less than the statutory minimum from the liability insurer (who can and has to allocate limited benefits among multiple injured parties²), and the UIM insurer is then responsible for its insured's un-recovered damages even if the insured has recovered less than the statutory per person minimum liability coverage. Id., at 4 (where insured ended up settling for less than statutory minimum (then \$25,000 per person), UIM insurer on hook for all un-recovered damages up to limits, not just those damages up to limits in excess of statutory minimum). This means that UIM benefits with an applicable limit of \$100,000 is not illusory. Where the UIM insured gets in an accident with an insured tortfeasor whose coverage is exhausted in a manner so that the statutory minimum is unavailable to the UIM insured, the insured's UIM coverage would provide up to \$100,000 in benefits. The coverage is not illusory, and the Policy is to be enforced as written.

² Minn.Stat. §65B.49, Subd. 3(3)(c).

CONCLUSION

Based on the foregoing, Respondent Illinois Farmers Insurance Company respectfully requests that this Court affirm the District Court's Order and Judgment in Respondent's favor, enforcing the policy in question as written.

Respectfully submitted,

Dated: 9/25/08



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No. A08-1315

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IN COURT OF APPEALS

Larry Benjamin Johnson,

Appellant,

vs.

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

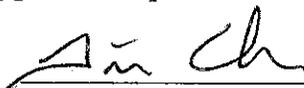
Respondents.

CERTIFICATION AS TO WORD COUNT

Pursuant to Rule 132.01, subd. 3(a) of Minnesota Rules of Civil Appellate Procedure, the undersigned hereby certifies that:

1. Respondent's Brief contains 4,837 words;
2. The software used is Microsoft Word 2003; and
3. The Brief complies with the typeface requirements.

Dated: 9/25/08



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