

Badger Mutual can be limited to its facts

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On July 10, the Wisconsin Supreme Court ruled that an unambiguous clause in an insurance policy, which is specifically-approved by statute, can be rendered invalid if the remainder of that policy does not adequately explain the coverage in which the clause at issue appears. *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98. However, the decision relied heavily on the particular nuances of the underinsured motorist ("UIM") benefit provisions within the American Merchants policy at issue, and therefore appears likely to be one which will be considered largely limited to its facts.

The plaintiff was rendered a quadriplegic when the vehicle in which he was a guest passenger slid on a piece of ice and rolled over. The driver had liability limits of \$100,000 per person. American Merchants issued a policy to the injured plaintiff with UIM limits of \$250,000 per person.

An issue presented was whether the reducing clause, which was in conformity with § 632.32(5)(i), Wis. Stats., operated to effectively reduce the UIM limits by the \$100,000 limits on the driver's liability policy, or whether the remainder of the policy rendered the reducing clause ambiguous and unenforceable, thereby making the entire \$250,000 available to the plaintiff. A four-justice majority of the Supreme Court ruled that the remainder of this particular policy made the reducing clause ambiguous and unenforceable.

The majority leaned heavily on several peculiar nuances in the American Merchants policy. While the Court noted that UIM coverage was not mentioned within a "Quick Reference Index Sheet" that included the declarations and Parts A through F of the policy and that UIM coverage was identified by endorsement, the provisions the Court found most troubling were contained on a page which attempted to explain the "Availability of Underinsured Motorists Coverage" in Wisconsin.

While the policy itself informed readers to ignore this page if UIM coverage had been purchased, the explanation itself offered a vague provision which explained that, "the at fault driver may not have enough liability insurance to pay all the bodily injury damages you and your passengers have sustained ..." and that the coverage would, "pay the remainder of the bodily injury damages up to the limit of liability you select for underinsured motorist coverage."

This explanation, the Court ruled, sent a "false signal" to the insured that was at odds with the effect of the reducing clause. While, as noted above, the Court found other problems with the dearth of references to UIM coverage in the declarations and index pages, the greatest discussion within the opinion focused on the vague provision attempting to explain the UIM coverage a potential insured might desire to purchase.

The decision itself noted that the "Availability of Underinsured Motorist Coverage" provision, in particular, created ambiguity, and no less than 3 additional references to that provision are included in the majority's reasoning for the holding.

Auto policies with UIM coverage or endorsements typically do not contain similar explanations which contravene the purpose of reducing clauses — to put the insured in the same position he or she would have been in had the tortfeasor purchased liability coverage

with limits equal to or greater than the UIM limits of liability. The explanation offered by American Merchants suggested that the UIM coverage available for purchase would operate as excess coverage wholly over and above whatever liability limits were available.

Any policy which does not contain such a contradictory explanation would appear to not create an ambiguity in the reducing clause. Because of the unique nature of the American Merchants policy in this regard, this decision should not have the widespread impact that many might expect.

Finally, the majority's motivation for holding the policy's reducing clause unenforceable appears to be to send a message to insurers to make certain that no provision exists which could be interpreted as rendering the UIM coverage offered, excess coverage over and above available liability limits.

While the decision does not in any way hold that greater efforts are necessary, a better practice for insurers would be to include a provision within any notices of UIM availability, and within the policy declarations, index, definitions, coverage provisions or endorsement, which clearly explains to an insured that UIM coverage is intended to put the insured in the same position that he or she would be in had the underinsured motorist purchased liability coverage equal to the UIM limits.

The explanation could even go further by noting that the UIM limit represents a dollar amount of protection, at least a portion of which will come from sources other than the UIM insurer, such as the tortfeasor, his or her liability carrier, or a worker's compensation or disability benefits insurer. Finally, any insurer that wishes to include such an explanation should also include examples of how the UIM coverage available would work in a few illustrative hypotheticals.

In sum, this opinion does not in any way suggest that other UIM policies which do not match the peculiar nuances of the American Merchants policy at issue are unenforceable with regard to reducing clause provisions which are in conformity with § 632.32(5)(i), Wis. Stats. Indeed, as long as an auto policy does not contain language which suggests that UIM coverage operates as excess coverage over and above other sources of recovery which might apply, it appears that this decision would be inapplicable.

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