

Contractually Defining UIM Coverage

Nov 08 2024

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Practice Area: Insurance Coverage and Risk Management

Miller v. West Bend Mutual Insurance Company
No. 2023AP1697 (Wis. Ct. App. Oct. 22, 2024) (recommended for publication)

In *Miller v. West Bend Mutual Insurance Company*, the Wisconsin Court of Appeals considered whether Wisconsin law permits insurers to define “underinsured motor vehicle” to exclude government-owned vehicles in a UIM policy. No. 2023AP1697 (Wis. Ct. App. Oct. 22, 2024). The court answered in the affirmative and recommended the opinion for publication, thereby confirming that the 2011 amendments to Wisconsin’s auto insurance statutes provide insurers options for contractually defining UIM coverage.

Donald Miller was injured while driving his employer’s vehicle on a county road crossing under Interstate 94. As he was passing under the interstate, a snowplow owned by Eau Claire County pushed snow off of the interstate and onto Miller’s vehicle below. The snow caused the windshield to cave in and severely injure Miller. Miller recovered \$250,000 from the County, the County’s maximum liability under Wis. Stat. § 345.05(3). He then turned to West Bend Mutual Insurance Company (“WBMI”), his employer’s insurer, for additional amounts under UIM coverage.

The UIM coverage in the WBMI policy promised to “pay all sums the ‘insured’ is legally entitled to recover as compensatory damages from the owner or driver of an ‘underinsured motor vehicle.’” The definition of “underinsured motor vehicle” clarified that “‘underinsured motor vehicle’ does not include any vehicle...[o]wned by a governmental unit or agency.” WBMI therefore denied coverage on the basis that UIM coverage did not apply because the vehicle causing Miller’s damages, the county snowplow, did not fit within the definition of “underinsured motor vehicle.” Though Miller did not dispute that the plain language of the policy supported denial, he asserted that the exclusion of government-owned vehicles from the definition of “underinsured motor vehicle” violated Wisconsin law.

The court of appeals concluded that WBMI correctly denied coverage. The court relied heavily on the Wisconsin Supreme Court’s recent decision in *Brey v. State Farm Mutual Automobile Insurance Co.*, 2022 WI 7, 400 Wis. 2d 417, 970 N.W.2d 1. *Brey* concerned the enforceability of a requirement for UIM coverage that an insured personally sustain bodily injury. In the course of that analysis, the supreme court detailed the history of Wisconsin’s omnibus statute, Wis. Stat. § 632.32. The result of the most recent statutory changes was “increased coverage flexibility for insurers.”

The *Miller* court found this analysis dispositive: the current structure of the omnibus statute allows insurers broad discretion in how to structure UIM coverage, including the definition of an “underinsured motor vehicle”. Accordingly, WBMI’s definition excluding government-owned vehicles from the definition of “underinsured motor vehicle” is entirely permissible and enforceable under Wisconsin law.

Miller raised several bases to invalidate WBMI's definition, but the court of appeals rejected all of them. First, he read *Brey* and Wis. Stat. §§ 632.32(2)(d) and (4m)(d) to require policies to adopt one of two traditional approaches to defining an "underinsured motor vehicle": a limits-to-limits comparison (i.e., a vehicle is underinsured if the liability limits are less than the UIM limits), or a limits-to-damages comparison (i.e., a vehicle is underinsured if the liability limits are less than the UIM-insured's damages). Because excluding government-owned vehicles from the definition of "underinsured motor vehicle" was not consistent with either traditional approach, Miller asserted the definition was improper.

The court rejected this argument because Wis. Stat. § 632.32(4)(a) and (4m)(a) do not require UIM coverage be included in policies at all, so any mandates on UIM coverage must be explicitly in the statutes, not inferred from silence.

Next, Miller pointed to the court of appeals' decade-old decision in *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, 358 Wis. 2d 379, 856 N.W.2d 633. That case invalidated similar policy language under "strikingly similar" facts: a collision with a government-owned snowplow. However, *Hunt* does not control because it was decided under an older version of § 632.32 that imposed more stringent requirements on UIM coverage.

Finally, Miller asserted that the policy's definition of "underinsured motor vehicle" was "arbitrary and creates an absurd result" where coverage relied on the happenstance of the other vehicle. The court disagreed on both factual and legal grounds. Factually, the definition does not lead to an absurd result because the insured would not be able to recover more than statutory caps from the governmental entity. Legally, the omnibus statute has no provision prohibiting an arbitrary definition of "underinsured motor vehicle." Rather, "*Brey* signaled our supreme court's approval of West Bend's freedom to contractually define the scope of UIM coverage within its insurance policies without running afoul of Wis. Stat. § 632.32."

This decision reaffirms that the 2011 amendments to Wisconsin's motor vehicle insurance laws provide insurers with more flexibility to contractually define the scope of UIM coverage.

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