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I. INTRODUCTION

The purpose of this article is to review the priorities for payment of underinsured and uninsured motorist benefits. The article discusses the applicability of a "closeness to the risk" analysis in

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making determinations regarding insurance benefits when multiple policies apply to a claim for underinsured and uninsured benefits.

Recently, the Minnesota Court of Appeals considered the issue of multiple excess insurance policies applicable to the same underinsured motorist claim. In each of the two cases, the injured claimant had access to two separate, excess insurance policies—a policy insuring the injured claimant as a named insured, and a policy insuring the claimant by virtue of resident relative status. In each of the two decisions, and for the first time in Minnesota, the courts used a "closeness to the risk" analysis to deny an injured individual access to coverage from an applicable insurance policy.

There is no precedent for using this "closeness to the risk" analysis as was done in *Frishman v. Illinois Farmers Insurance Co.*,[1] and *Heinen v. Illinois Farmers Insurance Co.*[2] Each case deprived an injured person of benefits from an applicable policy under which he was an insured. In the decades of prior decisions employing "closeness to the risk" as a legal principle, courts have used the doctrine only to establish the sequence in which the applicable insurance policies would be applied. These two decisions represent an unprecedented misuse of the "closeness to the risk" analysis in an area where such an analysis has been statutorily precluded by Minnesota Statutes section 65B.49, subdivision 3a(5).

This article reviews the underinsured (UIM) and uninsured (UM) priorities as enacted in 1985 as well as the "closeness to the risk" doctrine as used in sequencing cases in Minnesota. Is it appropriate to consider "closeness to the risk" for excess UIM or UM claims in light of section 65B.49 subdivision 3a(5)? If such an analysis were used, does it actually clarify which of the policies in question is truly "closer to the risk"?

II. BRIEF HISTORICAL BACKGROUND

A. Underinsured Coverage (UIM)

It is important to know something of the historical background of underinsured (UIM) coverage in order to determine which of the past Minnesota Supreme Court decisions have been superseded

1. No. C3-94-1654, 1995 WL 34842 (Minn. Ct. App. Jan 31, 1995).
2. 566 N.W.2d 378 (Minn. Ct. App. 1997).

by statutory changes.

1. 1972 to 1974

Minnesota Statutes section 65B.25 required that UIM coverage be "made available" by insurance companies.[3] UIM at this time was a "difference of limits" coverage. The UIM coverage actually available to an injured claimant would be calculated by first deducting liability insurance limits from the UIM limits.[4] There was no statutory scheme for the priority of payment.

2. 1975 to April 12, 1980

On January 1, 1975, the Minnesota No-Fault Act took effect. Insurers were now required to offer optional UIM coverage.[5] The coverage was changed from "difference of limits" to an "add on" or "excess" coverage.

Because the statute required an offer of UIM coverage, the courts would impose UIM coverage as a matter of law if an insurance company could not show that it had made a commercially reasonable offer of UIM coverage.[6] In response to *Holman*, the legislature revised the statute. However, the statute still did not contain a priority scheme for payment of underinsured benefits in situations where an insured was injured while not occupying his or her own vehicle.

The courts determined the priority for payment of UIM and UM coverage in the absence of a statutory priorities scheme.[7] *Integrity Mutual Insurance Co. v. State Automobile & Casualty Underwriters Insurance Co.* determined the priority for payment for UIM coverage, and also set forth the legal principles to be applied when two insurance policies covering an accident contain conflicting excess insurance clauses.[8]

3. April 12, 1980 to October 1, 1985

During this period, Minnesota statutes did not mention UIM

3. *See* Jacobson v. Illinois Farmers Ins. Co., 264 N.W.2d 804 (Minn. 1978).
4. *See* Lick v. Dairyland Ins. Co., 258 N.W.2d 791 (Minn. 1977).
5. *See* MINN. STAT. § 65B.49. subd. 6(e) (repealed 1980).
6. *See* Holman v. All Nation Ins. Co., 288 N.W.2d 244 (1980).
7. *See* Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co., 307 Minn. 173, 239 N.W.2d 445 (1976).
8. *See id.*

coverage. Judicial decisions continued to clarify the nature and scope of the coverage.[9]

4. October 1, 1985 to August 1, 1989

In 1985 significant legislative changes were made. UIM coverage was once again made part of the statute governing motor vehicle insurance. During this period, UIM was part of a single combined coverage with uninsured motorist (UM) coverage. It was a "difference of limits" coverage. The statute governing underinsured and uninsured motorist claims during this period was Minnesota Statutes section 65B.49, subdivision 3a.

Of particular importance, for purposes of this article, the statute created a new system of priorities to determine which underinsured (or uninsured) motorist policies would apply to an individual's underinsured and uninsured motorist claims. This is set forth in Minnesota Statutes section 65B.49, subdivision 3a(5). The priorities set forth by the statute are identical for payment of both underinsured and uninsured claims, which is discussed below.

5. August 1, 1989 to present

Since August 1, 1989, UIM coverage has been a separate coverage which must be included in every Minnesota motor vehicle insurance policy. It is once again an "add on" coverage. The priorities for this coverage continued to be governed by Minnesota Statutes section 65B.49, subdivision 3a.

B. Uninsured Coverage

Minnesota passed legislation in 1967 which required uninsured (UM) coverage for all vehicles registered or principally garaged in the state. After adoption of the Minnesota No-Fault Act in 1975, UM coverage remained a mandatory coverage in every insurance policy issued or delivered in Minnesota.

1. October 1, 1985 to present

As indicated above, effective October 1, 1985, significant

9. *See* Sobania v. Integrity Mut. Ins. Co., 371 N.W.2d 197 (Minn. 1985); Sibbert v. State Farm Mut. Auto. Ins. Co., 371 N.W.2d 201 (Minn. 1985); Hoeschen v. South Carolina Ins. Co., 378 N.W.2d (Minn. 1985); Amco Ins. Co. v. Lang, 420 N.W.2d 895 (Minn. 1988).

changes were made regarding UM and UIM coverage. One such change—the creation of a priority scheme for payment of both UM and UIM benefits—is at Minnesota Statutes section 65B.49, subdivision 3a(5).

C. *Post-1985 Statutory Priorities: UM and UIM Claims*

Minnesota Statutes section 65B.49, subdivision 3a(5) which explicitly sets forth the statutory system of priorities for UIM and UM coverages, provides:

> 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 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.[10]

The statutory provision provides a reasonably simple structure for determining which company pays UIM or UM benefits. The two coverages are discussed together because the priority for payment of the two coverages is identical. Where issues of priority are decided, courts have typically relied on precedent involving one coverage to resolve issues on the other coverage. Applying the statutory priorities scheme is most easily described by posing two questions.

Question #1: Was the person injured while occupying a vehicle?

If the person was not occupying a vehicle, the UIM or UM

10. MINN. STAT. § 65B.49, subd. 3a(5) (1996).

claim may be made against any one policy providing coverage. No additional claim may be made.

If the person was occupying a vehicle, the UIM or UM claim must go first to the coverage on the occupied vehicle. The second question is then posed to determine if any additional claim may be made.

Question #2: Was the injured person insured by the policy covering the occupied vehicle?

If the injured person is an insured on the policy covering the occupied vehicle, there can be only one UM or UIM claim. This single claim must go to the policy on the occupied vehicle.

However, If the injured person is not an insured on the policy for the occupied vehicle, the legislature allows this person to seek additional excess coverage from another policy which covers the injured person. It is this opportunity to seek excess coverage which the *Heinen* decision incorrectly limits.[11]

III. APPLICATION OF STATUTORY PRIORITIES

An illustration of the facts giving rise to the type of claim at issue in *Heinen* is instructive. An eighteen-year-old claimant is riding in a friend's car. The car has no insurance. The friend is careless and goes off the road. The claimant is seriously injured and has a valid uninsured motorist claim. The eighteen-year-old claimant is a named insured in his own auto insurance policy and has limits of $30,000. The claimant is also insured as a resident relative under his parent's policy, with $100,000 in UM coverage.[12]

THE ISSUE: since the claimant is not an insured on any policy covering the occupied vehicle, is he able to elect a UM claim against his parents' policy?

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11. *See generally* Heinen v. Illinois Farmers Ins. Co., 566 N.W.2d 378 (Minn. Ct. App. 1997).

12. If the parents' insurance policy contained the statutory definition of the term "insured," *see* Minn. Stat. § 65B.43 subd. 5, then the eighteen-year-old would not be covered by the parents' policy. Under the statutory definition, a person named in his or her own policy is not covered as "insured" based upon status as a resident relative.

Insurers who choose to use the statutory definition of "insured" in their policies would be able to avoid the possibility of being selected for the excess claims. *See* Gaalswyck v. General Cas. Co., 372 N.W.2d 435 (Minn. Ct. App. 1985). Insurers who choose not to follow the statutory definition are bound to provide the coverage set forth in the insurance policy. *See generally* Burgraff v. Aetna Life & Cas. Co., 346 N.W.2d 627 (Minn. 1984).

It is argued that the coverage which identifies the claimant as a named insured should provide the applicable source of benefits, rather than any other policy which insures the claimant as a resident relative. There is nothing in the explicit statutory language to support this argument. Minnesota Statutes section 65B.49 subdivision 3a(5) provides in part: "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.*"[13] This statutory language makes no distinction between a policy which insures the injured person by name and a policy which insures the person by virtue of status as a resident relative.

A plain reading of the statute indicates that the legislature set up a priority system keyed to the occupancy of a vehicle. When a claimant occupies a vehicle which covers the claimant as an "insured," the claimant is always limited to this coverage. Once a person is outside of the covered vehicle, however, the legislature does nothing to limit this person's choice of coverage.

When enacting the current priority system in 1985, the legislature certainly knew that some insurers might extend coverage beyond the requirements of statutory mandates. Minnesota Statutes section 65B.49, subdivision 7 states:

> Additional benefits and coverage not prohibited. Nothing in section 65B.41 to 65B.71 shall be construed as preventing the insurer from offering other benefits or coverages in addition to those required to be offered under this section.[14]

Additionally, courts have consistently held that if the policy affords broader coverage than required by the Act, the insured is entitled to coverage under the terms of the policy as written.[15]

Aside from claims by an injured person who occupies a vehicle for which the person is an "insured," the legislature allows an injured person to claim excess coverage on any applicable excess UM or UIM policy.

This issue was addressed in *Nerud v. National Family Insurance Co.*[16] In *Nerud*, a man was injured in a one-car accident while occu-

13. MINN. STAT. § 65B.49, subd. 3a(5) (1996) (emphasis added).
14. *Id.*, subd. 7.
15. *See* Austin Mut. Ins. Co. v. Templin, 435 N.W.2d 584 (Minn. Ct. App. 1989).
16. No. CX-94-1702, 1994 WL 695040 (Minn. Ct. App. December 13, 1994).

pying his friend's uninsured car. Since he had no coverage from the occupied vehicle, he was entitled to UM coverage from one other policy in which he was otherwise insured pursuant to Minnesota Statutes section 65B.49, subdivision 3a(5). He was an insured under two policies. He was a named insured in a policy for his own car which had $30,000 in UM coverage. He was also defined as an insured by virtue of his resident relative status under his parents' $100,000 UM endorsement because of a broader definition of "insureds." The court of appeals held that the parents' policy had to provide the $100,000 in UM coverage when he made a claim against this policy.

More recently, however, two Minnesota Court of Appeals decisions reached the opposite result.[17] The courts in those decisions purported to rely on a "closeness to the risk" analysis in reviewing the issue. For the first time in Minnesota, the courts relied upon a "closeness to the risk" analysis to diminish the amount of insurance coverage available to injured claimants.[18]

Prior to these decisions, the "closeness to the risk" doctrine was used only to establish the sequence in which the applicable insurance policies would be applied. Courts use it to determine the sequence of coverage for multiple insurance policies containing "other insurance" or "excess insurance" clauses, and which applied to the same loss. The doctrine was never before employed to diminish available insurance coverage or to deprive injured claimants of access to applicable insurance policies.

IV. CLOSENESS TO THE RISK ANALYSIS IN MINNESOTA

When establishing the sequence of coverage among insurance companies covering the same risk, Minnesota courts typically use a two-step analysis. First, the courts attempt to read each policy's "other insurance" clause so as to reconcile them. If the policies cannot be reconciled, the second step is to establish the sequence of coverage for the loss among the several policies by considering the "closeness to the risk" or the overall insuring intent of each insurance policy. The courts use this analysis to determine the sequence of payment among the multiple insurance policies.

17. *See* Frishman v. Illinois Farmers Ins. Co., No. C3-94-1654, 1995 WL 34842 (Minn. Ct. App. Jan 31, 1995); Heinen v. Illinois Farmers Ins. Co., 566 N.W.2d 378 (Minn. Ct. App. 1997).

18. *See id.*

The supreme court in *Integrity Mutual Insurance Co. v. State Automobile & Casualty Underwriters Insurance Co.*[19] set forth the legal principles to be applied when two insurance policies covering an accident contain conflicting excess insurance clauses. The court there stated:

> Often two or more companies would be fully liable for a loss but for their respective other insurance clauses, and many times those clauses conflict in their provisions. When it is clear that two or more companies are among themselves liable to the insured for his loss but the apportionment among the companies cannot be made without violating the other insurance clause of at least one company, then the courts must look outside the policies for rules of apportionment. One approach, known as the *Lamb-Weston* doctrine, is to require, when 'other insurance' clauses conflict, that the loss be prorated among the insurers on the basis of their respective limits of liability. *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P.2d 110 (1959).
>
> The approach of the Minnesota court has traditionally been more complex than the *Lamb-Weston* doctrine. In *Federal Ins. Co. v. Prestemon*, 278 Minn. 218, 231, 153 N.W.2d 429, 437 (1967), we stated that the better approach is to allocate respective policy coverages in light of the total policy insuring intent, as determined by the primary policy risks upon which each policy's premiums were based and as determined by the primary function of each policy. The Minnesota courts examine the policies and determine whether the insurers are concurrently liable on the risk, or one is primarily liable and another only secondarily liable. If they are concurrently liable, each must pay a pro rata share of the entire loss. *Woodrich Const. Co. v. Indemnity Ins. Co. of North America*, 252 Minn. 86, 89 N.W.2d 412 (1958); *Commercial Cas. Ins. Co. v. Hartford Accident & Ind. Co.*, 190 Minn. 528, 252 N.W. 434, 253 N.W. 888 (1934). On the other hand, if one insurer is primarily liable and the other only secondarily, the primary insurer must pay up to its limit of liability, and then the secondary insurer must pay for any excess up to its own limit of liability. *Eicher v. Universal Underwriters*, 250 Minn. 7, 83 N.W.2d 895 (1957). In addition, some coverages may be neither primary nor secondary, but tertiary in their appli-

19. 307 Minn. 173, 239 N.W.2d 445 (1976).

cation.

> *The nub of the Minnesota doctrine is that coverages of a given risk shall be 'stacked' for payment in the order of their closeness to the risk.* That is, the insurer whose coverage was effected for the primary purpose of insuring that risk will be liable first for payment, and the insurer whose coverage of the risk was the most incidental to the basic purpose of its insuring intent will be liable last. If two coverages contemplate the risk equally, then the two companies providing those coverages will prorate the liability between themselves on the basis of their respective limits of liability.[20]

In *Integrity*, the court determined the sequence of applicable uninsured motorist coverage. The issue was the priority for payment as between two applicable UM policies containing conflicting "other insurance" clauses; which of the two policies should be "stacked for payment first." The injured person had been killed while occupying a car owned and insured by his father. The father owned two automobiles, both of which were covered under the same policy. The decedent owned three vehicles, all insured under a single policy.

The supreme court determined that the coverage of the involved vehicle was primary because most closely related to the risk. The next closest coverages were those covering the decedent's own three cars because that policy contemplated coverage for him while driving another vehicle as incidental to its main coverage. The coverage on the father's uninvolved vehicle was held to be furthest from the risk and therefore, the last coverage to be subject to payment.

The "closeness to the risk" analysis was used in this decision only to determine the sequence of the applicable UM coverages. *Integrity* was decided before the 1985 legislative changes which both eliminated stacking and added an explicit priority scheme.[21] With no statutory priority scheme in place, the *Integrity* court had to make a priority determination for payment of the two UM policies which covered the decedent. After the enactment of section 65B.49, subdivision 3a(5), which specifically describes the priority for payment for a UM or UIM claims, a "closeness to the risk" analysis would no longer be appropriate. The statute creates its own priority system and should preempt any application of a

20. *Id.* at 173, 239 N.W.2d at 446 (emphasis added).
21. *See* MINN. STAT. § 65B.49, subd. 3a(5) (1996).

"closeness to the risk" analysis. Minnesota courts have applied the *Integrity* rule in a number of subsequent decisions.[22]

A. *The Elements of the Closeness to the Risk Analysis*

In *Auto Owners Insurance Co. v. Northstar Mutual Insurance Co.*,[23] the supreme court set forth three general factors for consideration in making a "closeness to the risk" determination.

> (1) Which policy specifically described the accident-causing instrumentality?
>
> (2) Which premium is reflective of the greater contemplated exposure?
>
> (3) Does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than the other policy, that is, is coverage of the risk primary in one policy and incidental to the other?[24]

Auto Owners involved a determination of the sequence of payment of two different liability policies, each covering a loss. In *Auto Owners*, a claim was made involving the negligent operation of a boat. The driver of the boat was not the owner, but was using the boat with the permission of the owner. The driver hurt two individuals who then sued both the driver and owner of the boat. The driver's homeowner's policy contained an excess insurance clause applicable to the boat accident. The owner of the boat had a general liability policy which specifically described the boat, and for which the owner paid an additional premium. Both policies contained "excess" or "other" insurance clauses.

The driver's homeowner's insurer brought a declaratory judgment action against the insurer of the boat owner. The supreme court concluded that the "excess clauses" in the policies conflicted and could not be reconciled, necessitating a "closeness to the risk" analysis to determine the sequence of payment of the two policies. Using the general factors cited above, the court held that coverage under the boat owner's general liability policy was closer than the homeowner's coverage, to the risk of the boat accident.

The court reasoned that the boat owner's policy specifically

22. *See, e.g.*, Doerner v. State Farm Mut. Ins. Co., 337 N.W.2d 394 (Minn. 1983); Hennekens v. All Nation Ins. Co., 295 N.W.2d 84 (Minn. 1980).

23. 281 N.W.2d 700 (Minn. 1979).

24. *Id.* at 704.

described the accident causing instrumentality, whereas the driver's homeowner's policy did not. The boat owner actually paid specific additional premiums for coverage on the boat. The driver's policy did not. Finally, the owner's policy contemplated with greater specificity, risk of liability for personal injury by use of a boat.

B. Closeness to the Risk in UM and UIM Cases

Before the October 1, 1985, legislative changes, which set forth the priority for payment for UM and UIM coverages, other Minnesota courts, relying on *Integrity* used a "closeness to the risk" analysis to determine the sequence for payment of UM and UIM coverages. In *Boroos v. Roseau Agency, Inc.*,[25] the plaintiffs were injured while riding in county vehicles. The county owned several automobiles which it insured with UIM coverage. Each plaintiff had a personal policy with no UIM coverage. The court cited *Integrity* for the procedure for determining priority of coverage when more than one insurer may be liable. The court concluded that the occupied (county) vehicle had first priority application with the personal policies of the injured occupants applicable thereafter.

The *Boroos* court stated:

> [A]t first view it would appear that *Integrity* mandates that the order of liability be as follows: 1) The Home for the first $50,000 covering the involved vehicle, 2) State Farm and Milbank to their policy limits, and 3) The Home for the remainder up to its total policy limits.
>
> Despite the similarity of the two cases, however, the difference lies in the "total policy insuring intent" of the policies. Because The Home's policy is ambiguous, we construe the policy against the insurer and hold that stacked coverage is provided by The Home policy which is "closest to the risk."[26]

After the 1985 enactment of Minnesota Statutes section 65B.49, subdivision 3a(5), the priority for payment of UIM and UM claims is statutorily mandated. Determinations concerning the sequence of applicability of UM and UIM claims is now governed by statute. A "closeness to the risk" analysis is now precluded and would neither be required nor appropriate.

25. 345 N.W.2d 790 (Minn. Ct. App. 1984).
26. *Id.* at 791.

C. *Recent Use of Closeness to the Risk in UIM and UM Claims*

In *Frishman v. Illinois Farmers Insurance Co.*,[27] the court concluded that the specific statutory priority scheme did not adequately determine which policy applied to a loss. Consequently, the court stated that the determination must be based upon a common law "closeness to the risk analysis." The court reached the opposite result as the same court in *Nerud v. National Family Insurance Co.*[28]

In *Frishman*, just as in *Nerud*, an individual was injured in a one-car accident. She was not an "insured" on the policy for the occupied vehicle, so under the second priority, sought UIM coverage from a policy in which she was otherwise insured pursuant to Minnesota Statutes section 65B.49, subdivision 3a(5). She was insured in two policies. She was a named insured in a policy for her own car which had $30,000 in UIM coverage. She was also defined as an insured by virtue of her resident relative status, in her parents' $50,000 UIM policy.

The court apparently reviewed Minnesota Statutes section 65B.49, subdivision 3a(5) and acknowledged that the statute contained the priorities scheme for UIM coverage. Instead of following the statutory priorities, the court attempted to support its conclusion by making a distinction between occupants and passengers. The court noted that because the claimant was occupying a motor vehicle but could not seek UIM benefits under the policy insuring the vehicle,

> she is entitled to seek excess UIM benefits afforded by "a policy" otherwise providing coverage for her.
>
> By contrast, the statute specifically declares that an injured person who is not an occupant of a motor vehicle is "entitled to select any one limit of liability" for any one vehicle afforded by a policy covering the injured person. Because the legislature omitted the same explicit right of selection for vehicle occupants who are not insured under the policy on the involved vehicle, we apply common-law principles to determine the priority of coverage.[29]

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27. No. C3-94-1654 1995 WL 34842 (Minn. Ct. App. Jan 31, 1995).

28. No. CX-94-1702, 1994 WL 695040 (Minn. Ct. App. December 13, 1994). The panel court of appeals in both *Frishman* and *Nerud* was composed of the same judges. The *Nerud* decision was issued on December 13, 1994. The *Frishman* decision was issued on January 31, 1995.

29. *See Frishman*, 1995 WL 3482, at *2.

The court stated that it was to "establish the priority among two potentially applicable policies affording UIM coverage to Frishman, and *Integrity's* closeness-to-the-risk analysis is the common law principle that governs this priority issue."[30] Without discussing any of the "closeness to the risk" factors set forth in *Auto Owners Insurance Co. v. Northstar Mutual Insurance Co.*,[31] the court simply concluded that the insurance policy which named the claimant, ($30,000) was "closer to the risk" than the policy which insured the claimant by virtue of her status as a resident relative of the named insured ($50,000). The court stated:

> The American Family policy specifically contemplated the possibility that the named insured, Frishman, would be injured while a passenger in a vehicle she did not own. The Illinois Farmers policy, on the other hand, only indirectly considered the possibility that Marvin Frishman's resident relatives would be injured in vehicles they did not own.[32]

This conclusion has no basis in law or fact. The *Frishman* court offered no explanation as to how it concluded the Farmers policy only "indirectly" considered the possibility that resident relatives would be injured in vehicles they did not own. Each policy of insurance explicitly covered the risk that insureds would be injured in vehicles they did not own. Each policy specifically indicated that coverage was provided under these circumstances. Neither policy is closer to this risk. No reasonable interpretation of that factor puts one of the policies "closer to the risk" than the other. The court offered no other analysis to support its conclusion that the policy naming the injured person was closer to the risk.

The *Frishman* court focused on the difference in the specific language in section 65B.49, subdivision 3a(5), between occupants of vehicles and pedestrians. The language pertaining to excess claims for occupants reads as follows:

> 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 which the injured person is an insured* exceeds the limit of liability of the coverage available to

30. *See id.*
31. 281 N.W.2d 700, 704 (Minn. 1979).
32. *See Frishman*, 1995 WL 3482, at *2.

the injured person from the occupied motor vehicle.[33]

The language pertaining to claims for pedestrians reads as follows:

> 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.*[34]

To the *Frishman* court, the fact that the statutory language regarding pedestrians indicates that the injured person is "entitled to select," whereas the language regarding occupants indicated that the excess coverage comes from coverage "applicable to any one motor vehicle listed on the automobile insurance policy which the injured person is an insured," meant that the claimant had no right to select which policy to make the claim. Somehow this caused the court to conclude that the statutory priorities scheme should not be used to determine the source of available coverage.

The *Frishman* court did acknowledge that the larger Illinois Farmers policy contained a broader definition of the term "insured" than required by statute. Had the Farmers policy used the statutory definition of insured, the explicit language of section 65B.49 subdivision 3a(5) would have mandated that the claimant submit her claim to the insurance policy which named her. But Farmers chose to afford greater coverage than statutorily mandated. This did not have a noticeable effect on the court's decision. Essentially, the court gave Farmers the benefit of a narrower definition of the term "insured" than written by Farmers in its own policy.

There was no need for a "closeness to the risk" analysis to determine which coverage applied in this case. The *Frishman* court in effect provided Farmers with the benefit of narrow definitional language which Farmers chose to forego. *Frishman* incorrectly deprived a claimant of applicable insurance coverage by relying on an analysis which has been statutorily precluded. Moreover, the only "closeness to the risk" factor discussed in the opinion provides no rationale for holding that the policy naming the injured person was in fact "closer to the risk."

The second recent "closeness to the risk" case is *Heinen v. Illinois Farmers Insurance Company.*[35] It has exactly the same failings as

33. MINN. STAT. § 65B.49, subd. 3a(5) (1996) (emphasis added).
34. *Id.*
35. 566 N.W.2d 378 (Minn. Ct. App. 1997).

Frishman. In *Heinen*, Jamie Heinen was severely injured as a passenger in a friend's vehicle. He had UIM coverage as a named insured from his own car in the amount of $30,000. He was also covered as an insured under his parents $100,000 UIM policy by virtue of his resident relative status. Both policies were with Farmers. Each policy stated that, for claims arising from use of a non-owned vehicle, the policy "shall be excess over any other collectible insurance." The court of appeals held that a "closeness to the risk" analysis should be used because there was a conflict between the two policies providing coverage to Jamie Heinen.

The conclusion that the language of the policies conflicts is not likely correct. The statutory scheme requires a person to seek UM and UIM coverage first from the occupied vehicle. One other applicable policy will provide excess coverage. The language of the Farmers' policy should be read in light of the statute. Each applicable insurance policy simply follows the statute by identifying the Farmers' coverage as excess over the collectible coverage from the occupied vehicle. The conclusion which should follow is that each policy should pay a pro rata share of the UIM claim, because each is equally applicable to the single claim for excess insurance allowed by the statute. Nevertheless, the court deprived Heinen of the $100,000 in coverage which had been purchased in his parents' policy.

After first determining that the identical "other insurance" clauses conflicted, the court then pretended to follow the "closeness to the risk" factors set out in *Auto Owners v. Northstar.* The court stated:

> Although the Farmers policies provide overlapping coverage for the same risk, we conclude that Heinen's policy is closer to the risk because (1) Heinen's own insurance policy specifically describes the accident-causing instrumentality, describing the automobile in which he was a passenger, (2) Heinen has paid a premium for the policy under which he is insured, providing coverage for his own injuries, more closely contemplated a potential claim by him for UIM coverage, and (3) the premium charged is related to the contemplated risks.[36]

Given the statutory priorities scheme, the *Heinen* court should never have used a "closeness to the risk" analysis. Again, the legislature has precluded this analysis by enacting priorities for excess

36. *Id.* at 380.

claims. If Farmers uses the definition of "insured" as set forth at Minnesota Statutes section 65B.43, subdivision 5, the injured claimant is limited to the coverage on the policy naming him. This is the policy he bought and the statute would require him to submit his claim to this company. But Farmers chose not to use the statutory definition. Since Farmers used a broader definition of the term "insured," it provides broader coverage, including claims by resident relatives who are named in their own policies.[37] The injured claimant is an insured under the policy. The statute allows him to recover second priority benefits from the policy which insures him. No "closeness to the risk" analysis is appropriate.

Having incorrectly elected to use a "closeness to the risk" analysis, the *Heinen* court then goes on to misapply the "closeness to the risk" standards. On the facts in *Heinen*, neither of the two excess policies is closer to the risk than the other. The court's attempt to apply the doctrine actually supports the conclusion that neither of the identical policies was closer to the risk than the other.

Reviewing the factors from *Auto Owners*, and properly applying them to the policies illustrates this point.

1. Which policy specifically identifies the accident causing instrumentality?

Neither the Farmers policy naming Jamie Heinen, nor the policy insuring him as a resident relative identifies the "accident causing instrumentality." He was in a friend's car. The friend's car is not mentioned in either policy issued by Farmers. The Heinen court ignores the undisputed facts in the case and somehow concludes that Jamie Heinen's policy identified the "accident-causing instrumentality."

The court cited no language from either insurance policy to support its conclusion. Indeed, since each policy at issue was a standard Farmers auto insurance policy, it is likely that the policy language in each was identical. The Heinen court was simply incorrect in concluding that one policy identified the injury causing instrumentality.

If the first "closeness to the risk" standard were correctly applied, it would be concluded that the two Farmers' policies were equally applicable. Each provided identical excess insurance cov-

37. *See* Austin Mut. Ins. Co. v. Templin, 435 N.W.2d 584 (Minn. Ct. App. 1989).

erage.

2. Which premium is reflective of the greater contemplated exposure?

In *Heinen*, neither policy reflected greater exposure. Since one policy had higher UIM limits, it likely had a higher premium for the higher limits than the other policy. The premiums for each policy equally reflect the same contemplated exposure.

The court noted that Heinen had paid premiums for his own policy. The court does not explain why this fact has any possible relevance to the case. The identity of the person who paid the premium had nothing to do with the risks covered by each policy. Since the language in each policy is identical, there is no rational basis for concluding that the policies are intended to cover different risks.

In fact, both Farmers policies contemplated that they would be primary only if Heinen were injured while occupying the specific vehicle identified in each policy. Each UIM premium reflects the primary exposure tied to use of a specific vehicle. Each contemplates that secondary excess exposure will arise whenever the injury occurs outside of identified vehicle.

3. Does one policy contemplate the risk so that coverage of the risk is primary in one policy and incidental to the other?

It should be judged that the legislature has answered this question with respect to UM and UIM coverage. The coverage on the occupied car is primary and all other applicable coverage is excess. The Heinen court did not demonstrate that one of these policies, each with identical language, was closer to the risk. It concluded that "the premium charged is related to the contemplated risk." It cites absolutely no evidence concerning the underwriting standards used to identify the "contemplated risk." In reality, both policies explicitly contemplated providing primary coverage only when the injured person occupied the insured vehicle. Each policy equally contemplated a second priority UIM coverage, and this coverage was explicitly extended by each contract both to the named insured and to the insured family members. The risks contemplated by each policy were identical.

A sensible review of the "closeness to the risk" analysis in the *Heinen* case clearly indicates that the policies were equally close to the risk. This is because both policies fall in the same priority for coverage as mandated by section 65B.49, subdivision 3a(5). Using the "closeness to the risk" analysis does not demonstrate that the policy which named Jamie Heinen was any closer to the risk than

the policy insuring him by virtue of his resident relative status.

It is also clear that the *Heinen* court knew the Farmers policy with UIM limits of $100,000, included a broader definition of the term "insured" than required by statute. The court was certainly aware that the statutory priorities scheme would have required the claimant to make the claim with his own policy if Farmers had included the statutory definition.[38] The court explicitly stated that the Farmers policy offered broader UIM coverage than the minimum required by statute in using the broader definition of "insured."[39] Under *Austin Mutual Insurance Co. v. Templin*,[40] the court should have availed the insured to the broader coverage under the terms of the policy as written. Instead of requiring Farmers to provide the broader coverage it included, the court inexplicably afforded Farmers the benefit of the narrower statutory definition it did not include.

The *Heinen* decision appears to be a fairly clear example of judicial legislation. It appears that the *Heinen* court simply wanted the injured person to be limited to the coverage which he purchased. The court judged this to be fair since this would have been the result if the insurer had not chosen to broaden its coverage through an expanded definition of the term "insured." *Heinen* inappropriately attempted to apply the "closeness to the risk" analysis to justify its end. It then misapplied the analysis. It deprived an injured claimant from recovering insurance benefits for which premiums had been paid for the risk, and which clearly insured the loss for the claimant.

V. CONCLUSION

Heinen and *Frishman* are incorrect decisions because each misapplies the "closeness to the risk" doctrine. First, the doctrine never should have been used in these cases. Second, once used, it was inappropriately applied to the facts. The closeness to the risk doctrine should never result in denying an injured claimant access to applicable insurance coverage. There is no precedent in Minnesota for this use of the "closeness to the risk" doctrine.

More importantly, both decisions ignore the statutorily mandated priorities at section 65B.49, subdivision 3a(5). The statute

38. *See Heinen*, 566 N.W.2d at 380.
39. *Id.*
40. 435 N.W.2d 584 (Minn. Ct. App. 1989).

precludes any "closeness to the risk" analysis for excess UIM or UM claims. An insurance company has the option of avoiding the issues raised by *Heinen* and *Frishman* if the insurance company adopts in its UM and UIM policies the statutory definition of "insured" in Minnesota Statutes section 65B.43, subdivision 5. If an insurance company chooses to expand its UM and UIM coverages by using a broad definition of "insured" the courts should reasonably require the company to honor the terms of its contract and to provide the coverage which has in fact been purchased.

Requiring insurers to provide the coverage under the terms of the policy as written is imperative. It is consistent with the No-Fault Act and with settled Minnesota case law to allow injured claimants to recover from insurance policies which clearly cover them. It is not appropriate for courts to misapply a sequencing doctrine such as "closeness to the risk" to deprive injured individuals of insurance benefits.