

IN THE SUPREME COURT OF THE STATE OF OREGON

JESSICA VOGELIN,

Plaintiff – Appellant – Petitioner on Review,

v.

AMERICAN FAMILY MUTUAL INSURANCE
COMPANY,

Defendant – Respondent – Respondent on Review.

SC No. S056655

CA No. A132051

TC No.: 0502-01571

Defendant’s Brief on the Merits

Review of a decision of the Court of Appeals
on appeal from a judgment of the Multnomah County Circuit Court,
by the Honorable Dale R. Koch, Judge

Date of Decision: August 13, 2008
Author: Armstrong, J.
Concurring: Haselton, P.J., and Rosenblum, J.

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I. INTRODUCTION

The issue in this underinsured motorist (UIM) case is how to calculate the benefits owed. Plaintiff contends that the benefits equal the difference between her damages and her recovery from the tortfeasor's insurer. Defendant contends, and the lower courts held, that the benefits equal the difference between the limit of plaintiff's uninsured motorist (UM) coverage and her recovery from the tortfeasor's insurer. For the reasons that follow, this court should agree with defendant and the lower courts.

II. ISSUE ON REVIEW

In computing UIM benefits, should payments by the tortfeasor's insurer be subtracted from the insured's damages or from the limit of the insured's UM coverage in cases where, as here, the damages exceed that limit?

III. PROPOSED RULE OF LAW

UIM coverage is "gap-filling," not "floating." It fills the gap between the limit of the tortfeasor's liability coverage and the limit of the insured's UM coverage, guaranteeing that the insured will recover the UM limit no matter whether the tortfeasor has some insurance or no insurance. UIM coverage does not float atop the tortfeasor's insurance to provide an extra layer of coverage unrelated to the UM limit, which is how such coverage operates in some other states. Therefore, in cases where the insured's damages exceed the UM limit, the

UIM benefits equal the difference between that limit and payments by the tortfeasor's insurer, not the difference between the insured's damages and those payments.

IV. SUMMARY OF MATERIAL FACTS

Plaintiff was insured by defendant under an auto policy that provided UM and UIM coverage, both with limits of \$100,000. On November 24, 2003, while the policy was in force, plaintiff was struck by a car driven by [redacted] who was insured under a policy that carried \$25,000 in liability coverage. Plaintiff made a claim against [redacted] and collected the limit of his coverage. She then brought this action for UIM benefits under her policy with defendant. ER 1-2 (Complaint, ¶¶ 1-5); ER 5 (Answer, ¶ 1).

The jury found that plaintiff had suffered \$304,035.70 in damages in the accident with [redacted] ER 14. After the verdict, the trial court awarded plaintiff \$75,000 in UIM benefits, which it calculated by subtracting [redacted] payment (\$25,000) from the limit of plaintiff's UM coverage (\$100,000). ER 10.

On appeal, plaintiff argued that the trial court erred in computing the UIM benefits. According to plaintiff, the court should have subtracted [redacted] payment from her damages (\$304,035.70) and then awarded her the difference (\$279,035.70) up to the limit of the UM coverage (\$100,000). In other words, she argued that the trial court should have awarded her \$100,000 in UIM benefits.

The Court of Appeals rejected that argument, based on this court’s first opinion in *Mid-Century Ins. Co. v. Perkins*, 344 Or 196, 217, 179 P3d 633, *modified on recon*, 345 Or 373, 379, 195 P3d 59 (2008), referred to hereafter as *Perkins I*, which said that “UIM benefits are intended to fill the gap between the limit of an insured’s UM coverage and the amount that he or she actually receives from another motorist.” *Perkins I*, 344 Or at 217. Relying on that statement, the Court of Appeals agreed with the trial court that plaintiff was entitled to just \$75,000 in UIM benefits, representing the difference – or gap – between her UM limit and the payment by _____ insurer. *Vogelin v. American Family Mutual Ins. Co.*, 221 Or App 558, 565, 191 P3d 687, *rev allowed*, 345 Or 503 (2008).

After the Court of Appeals rendered its decision, this court issued its second opinion in *Mid-Century Ins. Co. v. Perkins*, referred to hereafter as *Perkins II*, which withdrew the language in *Perkins I* upon which the Court of Appeals relied. *Perkins II*, 345 Or at 379. The court explained that the issue whether UIM coverage is intended to be gap-filling, as *Perkins I* put it, is “best left to a case where the issue is presented and has been fully briefed and argued.” *Id.* at 379. As it happens, that case is this case, which this court agreed to review just one month after *Perkins II*. *Vogelin*, 345 Or 503, 200 P3d 147 (2008).

V. SUMMARY OF ARGUMENT

The trial court did not err in the way that it computed the UIM benefits – by subtracting _____ payment from the limit of the UM coverage rather than from

plaintiff's damages. That limit-minus-payment equation is prescribed by the 2001 version of ORS 742.502(2)(a) – the version in effect at the time of the accident – which provides that “[u]nderinsurance benefits shall be equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies.” In that equation, the “uninsured motorist coverage benefits” cannot exceed the limit of the UM coverage, because that is the most the insurer can ever owe under that coverage. Thus, in cases where, as here, the damages exceed the UM limit – often referred to as an “excess case” – the “uninsured motorist coverage benefits” equal that limit, not the damages. And that means that, in computing UIM benefits in an excess case, the payment by the tortfeasor's insurer should be deducted from the UM limit rather than the insured's damages, just as the trial court and Court of Appeals held.

That conclusion is not inconsistent with *Bergmann v. Hutton*, 337 Or 596, 604, 101 P3d 353 (2004), as plaintiff contends. *Bergmann* concerned offsets for workers' compensation payments in UIM cases involving insureds who are injured on the job. The effect of such payments is governed by ORS 742.504(7)(c)(B), which, *Bergmann* held, provides for an offset from the damages, not the limit. But *Bergmann* did not apply that holding to payments by the tortfeasor's insurer, because there was no issue in that case about the effect of such payments. Nevertheless, the court in *Bergmann* explained that ORS 742.502(2)(a) “provides the general formula for calculating UIM benefits,” 337 Or at 601, and that nothing in its interpretation of ORS 742.504(7)(c)(B) and the workers' compensation

offset rendered that equation “inoperable,” *see id.* at 608, a point the court reaffirmed in *Perkins I.* 344 Or at 217. Thus, in the present case, *Bergmann* supports defendant’s position, not plaintiff’s.

The legislative history to ORS 742.502 confirms that UIM coverage was not meant to compensate the insured for damages above the UM limit, but merely to eliminate the deficiency between that limit and the tortfeasor’s payment in cases where the tortfeasor has less liability coverage than the insured’s UM coverage. An interim committee of the legislature drafted the legislation that mandated UIM coverage in Oregon policies and created the benefits equation in ORS 742.502(2)(a). The minutes of the committee’s hearings make clear that UIM coverage was supposed to be gap-filling, assuring that the insured’s total recovery, in UIM benefits and payments by the tortfeasor’s insurer, would equal the UM limit – in other words, that the insured would receive compensation equal to the UM limit no matter whether the tortfeasor had some insurance or no insurance. UIM coverage was not intended to float above, or stack on top of, the UM limit, when the damages high. Thus, in computing UIM benefits, the payment by the tortfeasor’s insurer should be subtracted from the UM limit, not from the insured’s damages, in cases involving above-limit damages. The lower courts did not err in so holding.

VI. ARGUMENT

The issue on review is how to calculate plaintiff's UIM benefits. At the outset, the court should note that this issue is one of statutory construction, not contract interpretation, even though plaintiff is seeking benefits under an insurance policy, because UIM coverage is prescribed by statute. As explained more fully below, a policy can provide more coverage than the statute prescribes, but not less. In this case, however, there is no difference between what the policy provides and what the statute prescribes – at least, plaintiff does not contend that the policy's coverage is more generous than the statutory coverage. And so this UIM case, like so many others, *see, e.g., Bergmann*, reduces to an interpretation of the UIM statutes, not the policy provisions. This brief begins, then, with a summary of those statutes.

A. Background – UM and UIM Coverage

To understand UIM coverage, you first have to understand UM coverage, of which UIM coverage is just a part. UM coverage began in Oregon in 1979, when the legislature enacted ORS 742.502 (then numbered ORS 742.789), which requires that every auto policy provide UM coverage, defined as insurance against the risk of injury or death in an accident caused by the operator of an “uninsured motor vehicle.” Or Laws 1967, ch 482, §§ 1, 2. The same legislation enacted ORS 742.504 (then numbered ORS 742.792), which provides that UM coverage must be no less favorable to the insured than if the terms of that statute were set

forth in the policy verbatim. In effect, ORS 742.504 provides a “model” UM policy. *See Vega v. Farmers Ins. Co.*, 323 Or 291, 302, 918 P2d 95 (1996).

Under that model, the insurer must pay all sums which the insured is legally entitled to recover as damages from the owner or operator of an “uninsured vehicle,” ORS 742.504(1)(a), defined as a vehicle without liability coverage, or with coverage in amounts less than required by the Financial Responsibility Law (the FRL), ORS ch 806, usually referred to as the “minimum limits.” ORS 742.504(2)(k)(A). The insurer’s obligation is not unlimited. It is not liable beyond the “limits of liability” stated in the policy’s declarations. *See* ORS 742.504(7)(a). And it is entitled to certain offsets, including one for payments under the workers’ compensation law. ORS 742.504(7)(c)(B).

Initially, ORS 742.502 required that UM coverage have limits equal to or greater than the FRL’s minimum limits. Later, it was amended to require that the insurer offer higher limits whenever the policy provided liability coverage with higher limits. *See* Or Laws 1975, ch 390. Later still, the legislature changed the statutory scheme from opt-in to opt-out; it required that the insurer provide, not just offer, as much UM coverage as liability coverage unless the insured elected otherwise. *See* Or Laws 1987, ch 632, § 1 (codified at ORS 742.502(3)). But, throughout these changes, UM coverage was still subject to the model policy in ORS 742.504, and the goal of the coverage was still the same: to allow insureds to protect themselves against injury by a motorist who has no liability insurance. It “place[d] the injured policyholder in the same position he would have been in if

the tortfeasor had had liability insurance.” *Peterson v. State Farm Ins. Co.*, 238 Or 106, 111-12, 393 P2d 651 (1964).

Thus designed, UM coverage created an anomaly: the insured could be better off – financially speaking – when injured in an accident with a tortfeasor who had *no* insurance than one who had *some*. Take, for example, an insured that had \$100,000 in UM coverage and was injured in an accident caused by another driver. If the other driver had no liability insurance – that is, if the other driver was uninsured – the insured could recover up to \$100,000 in UM benefits, assuming the insured’s damages went that high. On the other hand, if the other driver had some liability insurance, even as little as, say, \$25,000, the insured could not collect any UM benefits because the other driver would not be uninsured within the meaning of ORS 742.504. In that situation, the insured would recover just \$25,000, the limit of the other driver’s liability coverage.

To eliminate this anomaly, the 1981 legislature created UIM coverage, the purpose of which, as discussed more fully below, is to guarantee that an insured who is injured in an accident will receive compensation equal to the UM limit no matter whether the tortfeasor has some insurance or no insurance. To that end, the legislature amended ORS 742.502 to require that offers of UM coverage above the minimum limits include offers of “underinsurance coverage,” defined as “coverage for damages or death caused by accident and arising out of the ownership, maintenance or use of a motor vehicle that is insured for an amount that is less than the insured’s uninsured motorist coverage.” Or Laws 1981, ch

586, § 1. The same legislation included an equation for computing UIM benefits – an equation based on the difference between the potential UM benefits and payments by the tortfeasor’s insurer: “Underinsurance benefits shall be equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies.” *Ibid.* The 1981 legislation did not go on to provide a model UIM policy, as ORS 742.504 provided a model UM policy. It provided, instead, that “underinsurance coverage shall be subject to ORS 742.504.” *Ibid.* (now codified at ORS 742.502(4)).

In the years that followed, the legislature made other changes in ORS 742.502. *See* Or Laws 1983, ch 338, § 966; Or Laws 1987, ch 632, § 1; Or Laws 1993, ch 709, § 11; and Or Laws 1997, ch 808, § 1. But the definition of UIM coverage remained the same – namely, “coverage for damages or death caused by accident and arising out of the ownership, maintenance or use of a motor vehicle that is insured for an amount that is less than the insured’s uninsured motorist coverage.” And the equation for computing UIM benefits also remained unchanged: “Underinsurance benefits shall be equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies.” Thus, in 2003, when plaintiff had her accident, ORS 742.502 read as follows:

“(1) Every motor vehicle liability policy insuring against loss suffered by any natural person resulting from liability imposed by law for bodily injury or death arising out of the ownership, maintenance or use of a motor vehicle shall provide therein or by

endorsement thereon uninsured motorist coverage when such policy is either:

“(a) Issued for delivery in this state; or

“(b) Issued for delivery by an insurer doing business in this state with respect to any motor vehicle principally used or principally garaged in this state.

“(2)(a) A motor vehicle bodily injury liability policy shall have the same limits for uninsured motorist coverage as for bodily injury liability coverage unless a named insured in writing elects lower limits. The insured may not elect limits lower than the amounts prescribed to meet the requirements of ORS 806.070 for bodily injury or death. *Uninsured motorist coverage larger than the amounts required by ORS 806.070 shall include underinsurance coverage for damages or death caused by accident and arising out of the ownership, maintenance or use of a motor vehicle that is insured for an amount that is less than the insured’s uninsured motorist coverage. Underinsurance benefits shall be equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies.*

“* * * * *

“(3) Underinsurance coverage shall be subject to ORS 742.504 * * *.”

(Emphasis added.)

The 2003 legislature, meeting shortly before plaintiff’s accident, made further changes in the statute. *See* Or Laws 2003, ch 220, § 1. But those changes apply only to policies that were issued or renewed on the effective date of the legislation, January 1, 2004, *see id.* at § 2, and thus do not apply here. The legislature amended the statute again in 2005 and 2007. *See* Or Laws 2005, ch 235, § 1; Or Laws 2007, ch 287, §2. But, again, those amendments apply only to policies issued or renewed after the effective dates of that legislation, *see* Or Laws

2005, ch 235, § 2, and Or Laws 2007, ch 287, § 5, and thus do not apply here.

Therefore, in the balance of this brief, all citations to ORS 742.502 and 742.504 are intended as citations to the 2001 versions of those statutes, copies of which are appended to the brief (at App 21 *et seq.*) for the court's convenience.¹

B. The UIM Benefits Equation

The issue, again, is how to compute plaintiff's UIM benefits. ORS 742.502 provides the answer. As discussed above, that statute requires that every auto policy provide "underinsurance coverage." ORS 742.502(2)(a). It also contains an equation for calculating benefits under that coverage: "Underinsurance benefits shall be equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies." *Ibid.*

Under this equation, the calculation of UIM benefits is a two-step process. First, determine the "uninsured motorist coverage benefits." Second, reduce those benefits by the amount recovered from the tortfeasor's insurer. The remainder is the amount of UIM benefits owed.

ORS 742.502(2)(a) does not define "uninsured motorist coverage benefits" for these purposes. But the meaning of that phrase is obvious: it refers to the amount recoverable in a UM (not UIM) case -- in other words, it refers to the

¹ Plaintiff's brief quotes (on pages 4 and 10) the post-2005 version of the statute, which was not in force at the time of the accident and thus does not govern the terms of the policy under which she seeks benefits.

amount of UM benefits the insured would recover if the tortfeasor had no insurance at all. As noted earlier, that amount is equal to the insured's damages, ORS 742.504(1)(a), less any offsets for workers' compensation or other payments, ORS 742.504(c), *but only up to the limit of the UM coverage*. As ORS 742.504(7)(a) makes clear, the insurer has no above-limits liability. *See also Bergmann*, 337 Or at 608. No matter how great the damages or how small the offsets, the UM limit is the most the insurer can ever be held liable to pay in "uninsured motorist coverage benefits" and, therefore, is the most the insured can ever recover in such benefits. Thus, in a UM case where the damages exceed the UM limit and there are no offsets, the "uninsured motorist coverage benefits" equal the UM limit.

The same analysis should apply when calculating UIM benefits under ORS 742.502(2)(a). As used there, the "uninsured motorist coverage benefits" can never exceed the UM limit, even if the damages are higher than that. Thus, in a UIM case where, as here, the damages exceed the UM limit and there are no offsets, the "uninsured motorist coverage benefits" equal the UM limit for purposes of computing UIM benefits under ORS 742.502(2)(a). It follows that, in such a case, the UIM benefits equal the UM limit minus the tortfeasor's payment. They do not equal the damages minus the payment, as plaintiff argues.

Plaintiff's damages-minus-payment argument is based on the premise that, as used in the last sentence of ORS 742.502(2)(a), "uninsured motorist coverage benefits" means the same thing as damages. The flaw in that premise is that, in

drafting that sentence, the legislature didn't say damages – which is a familiar term, familiar enough that one would expect the legislature to have used it, if that is what it meant, rather than use a term four times as long. Indeed, the legislature *did* use that term – damages – in the immediately preceding sentence of the statute. That sentence, defining UIM coverage, was enacted at the same time as the sentence containing the benefits equation. *See* Or Laws 1981, ch 586. As enacted, the preceding sentence read: “Uninsured motorist coverage larger than the amounts required by ORS 806.070 shall include underinsurance coverage for *damages* or death caused by accident and arising out of the ownership, maintenance or use of a motor vehicle that is insured for an amount that is less than the insured's uninsured motorist coverage.” (Emphasis added.) The sentence still read that way in 2003, when the accident occurred that gave rise to this lawsuit. *See* ORS 742.502(2)(a) (2001).

At the first level of statutory construction, the text and context level, this court follows the rule that “use of a term in one section and not in another section of the same statute indicates a purposeful omission.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). Applying that rule here, this court should conclude that the use of “damages” in the third sentence of ORS 742.502(2)(a) and “uninsured motorist coverage benefits” in the fourth sentence

indicates that those don't mean the same thing, contrary to plaintiff's argument.²

If the legislature intended to make the insured's damages a part of the UIM benefits equation, it would have used that very term in the last sentence of ORS 742.502(2)(a) – or would have used the term “amount payable,” which appears in ORS 742.504, and which, *Bergmann* says, is synonymous with damages in this setting. *Bergmann*, 337 Or at 605.

To summarize, under ORS 742.502(2)(a), UIM benefits equal UM benefits minus payments by the tortfeasor's insurer. And, in an excess case, the UM benefits equal the UM limit. Therefore, in excess cases, the UIM benefits equal the UM limit minus the payments (assuming no offsets). In that respect, UIM benefits cover the shortfall between the limit of the tortfeasor's liability coverage and the limit of the insured's UM coverage.

Which is just what this court said in *Perkins I*. As explained earlier, this court concluded, in its first *Perkins* opinion, that UIM benefits are not available when the limit of the insured's UM coverage is no greater than the limit of the tortfeasor's liability coverage – that is, when there is no gap between them. 344 Or at 218. Indeed, the court in *Perkins I* actually used a gap-filling analogy. “UIM benefits,” the court said, “are intended to fill the gap between the limit of an insured's UM coverage and the amount that he or she actually receives from

² As noted earlier, plaintiff's brief quotes the post-accident version of ORS 742.502(2)(a), the 2005 version, in which “damages” has been changed to “bodily injury.” That might explain the error in her argument.

another motorist.” *Id.* at 217. On reconsideration, the court deleted that comment – not because it deemed the comment mistaken, but simply because it didn’t want to appear to be pre-judging the issue in this case, which was, even then, on its way here, the petition for review having been filed. *See Perkins II*, 345 Or at 379.

If there were any lingering doubt that UIM coverage is gap-filling – and, hence, that the tortfeasor’s payment is subtracted from the UM limit, not the insured’s damages, in calculating UIM benefits – the legislative history dispels it.

C. Legislative History

As explained earlier, UIM coverage began in 1981, when the legislature amended ORS 742.502 to require that auto insurers offer that coverage in addition to UM coverage. *See Or Laws 1981, ch 586, §1.* That legislation – which included the same definition of UIM coverage and the equation for computing benefits – was drafted by the 1980 Joint Interim Committee on the Judiciary. The committee’s intent is clear from the minutes of its hearings, which are reproduced in Appendix A to this brief. The goal was not, as plaintiff contends, to stack UIM benefits on top of payments by the tortfeasor in cases where the tortfeasor has less liability coverage than the insured’s damages. The goal, instead, was to guarantee that the insured would recover the amount of the UM coverage when the UIM benefits were combined with the tortfeasor’s payment. In other words, UIM coverage was designed to ensure that, no matter whether the tortfeasor had some insurance or no insurance, the insured’s total recovery would equal the UM limit.

All of this was explained succinctly by Frank Howatt, an assistant insurance commissioner, at a hearing on September 12, 1980, reported in the committee's minutes. He even used gap-filling terminology:

“FRANK HOWATT * * *

“In 1975, Commissioner Rawls requested, and the legislature passed, the requirement of [UM coverage]. A person buying insurance was entitled to buy, if requested, higher limits of uninsured motorist coverage than the 15/30 limits under the financial responsibility law up to the amount of liability insurance that the person was buying in his own policy. That meant that if a person carried \$100,000 of liability insurance, he could protect himself to that extent against uninsured drivers. The problem arises that if the other person is uninsured and a person has \$100,000 worth of [UM] coverage, he is entitled to collect \$100,000 under his own policy even though the damage was caused by the other person. If the other person has \$15,000 of insurance, the injured person would expect to recover \$85,000 from his own policy. Unless there is some special provision in the person's policy under uninsured motorist [coverage], the person would recover nothing. The \$15,000 that the other person has destroys the uninsured motorist coverage. *This [legislation] is an attempt to cover that gap where the other driver has some insurance but it is less than the amount of a person's own uninsured motorist coverage.* It is commonly called ‘under-insured motorist coverage’. * * *”

App 17 (emphasis added).

Howatt went on to say that “[t]he amount of insurance to be recovered [from the tortfeasor] would be an offset against the [UM] limit carried,” and that he “want[ed] the language [of the bill] to be obvious that *the intent is to cover this gap* that arises when the other party is not uninsured but he is insured and the first party's policy limit is higher[.]”

App 18 (emphasis added). In that situation, Howatt said, “the offset should be applied against that higher limit,” *id.*, not against the damages.

At a later meeting, on October 5, 1980, Howatt explained that, under UIM coverage, “[y]ou do not collect the full benefit under the uninsured [motorist coverage], you collect the difference between that and the other party’s insurance.” App 11. He might also have said that you don’t collect the difference between the insured’s *damages* and the other party’s insurance.

At that same meeting, the late Noam Stampher, counsel to the committee and author of the proposed legislation, explained the interplay of UM, UIM, and liability coverage: “Rather than stack them one on top of the other, it would track them[,] so that the underinsurance would fill the *gap* between the amounts received from the other party’s policies and the amount that the party is insured to under that person’s uninsured motorist coverage.” App 8 (emphasis added).

Senator Cook then gave an example of UIM coverage in operation, which includes an offset from the UM limit, not from the insured’s damages, whatever they might be:

“SEN. COOK responded that if he [*i.e.*, the tortfeasor] has the minimum policy and you have a 50/100 liability policy which gives you 50/100 in uninsured [motorist] coverage, this would mean that if he has only 15, you’ll also get an extra 35 on your own policy for uninsured [motorist] coverage. You could collect up to 15 on the third party and then up to 35 on your own.”

Id.

Representative Rutherford gave a similar example to explain the intended effect of UIM coverage:

“REP. RUTHEFORD said if the uninsured driver had no insurance whatsoever, you could recover under the uninsured motorist coverage. If he had 15,000 and you carried 50,000 of uninsured motorist [coverage], you could get 35,000 from your own policy.”

App 9.

It’s clear from these comments that UIM coverage was designed to be gap-filling – to guarantee that the insured’s total recovery, in payments from the tortfeasor’s insurer and from his own insurer, will equal the UM limit. Consistent with that intent, this court concluded in *Perkins I* that UIM benefits are not available when the limit of the UM coverage is no greater than the limit of the tortfeasor’s coverage. 344 Or at 216. In that situation, the tortfeasor’s coverage provides all the compensation needed to reach the UM limit.

Oregon’s version of UIM coverage was not designed, as plaintiff believes, to provide a floating layer of coverage atop the tortfeasor’s liability insurance, which is how UIM coverage operates in some other states, including Washington.³

³ A Washington statute, RCW 48.22.030, requires that every auto policy provided coverage for the damages that the insured is legally entitled to recover from the owner or operator of an “underinsured vehicle,” defined as one that is covered by less liability insurance than the insured’s *damages*:

“(1) ‘Underinsured motor vehicle’ means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a

In those states, UIM benefits are available – up to the UIM limit – whenever the insured’s damages exceed the limit of the tortfeasor’s insurance. To illustrate, consider an insured with \$100,000 in UIM coverage who suffers \$200,000 in damages in an accident with a motorist who has \$50,000 in liability coverage. In Washington, where UIM coverage floats, the insured will recover \$100,000 in UIM benefits, because his damages are that much more than the other driver’s insurance, and his UM limit is that high. So his total recovery, in UIM benefits and payments by the other driver’s insurer, will be \$150,000. In Oregon, by comparison, where UIM coverage fills the gap between the tortfeasor’s insurance and the UM limit, the insured will recover just \$50,000 in UIM benefits, for a total recovery of \$100,000, matching the UM limit.

covered person after an accident is less than the applicable *damages* which the covered person is legally entitled to recover.”

(Emphasis added.)

In *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wash 2d 799, 810, 959 P2d 657 (1998), the Washington Supreme Court explained that the “public policy underlying UIM [coverage] is creation of a second layer of *floating* protection for the insured.” (Emphasis added.) Whatever the limit of the tortfeasor’s insurance, the UIM coverage stacks on top of it.

As noted earlier, Noam Stampher, legal counsel to the Joint Interim Committee, drafted the 1981 legislation that created Oregon’s UIM law. He testified in hearings before the committee that “he did not use the Washington statute” as a model for the proposed bill. App 9.

D. *Bergmann v. Hutton*

Plaintiff relies on *Bergmann* to support her contention that UIM coverage floats. But that reliance is misplaced, as will be seen.

Bergmann was insured under an auto policy that provided \$100,000 in UM and UIM coverage. *Bergmann*, 337 Or at 599-600. While the policy was in force, she was injured in an auto accident caused by Hutton, who had only \$25,000 in liability coverage, which Bergmann collected in full. *Id.* at 600. Because Bergmann was working at the time of the accident, she received over \$100,000 in workers' compensation benefits. She then made a claim for UIM benefits under her own policy. *Id.* Her insurer denied the claim based on ORS 742.504(7)(c)(B), which provides that "[a]ny amount payable under the terms of this coverage * * * shall be reduced by * * * [t]he amount paid * * * under any workers' compensation law * * *."⁴ The insurer took the position that, as used in this

⁴ ORS 742.504(7)(c) provides:

"Any amount payable under the terms of this coverage because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by:

"(A) All sums paid on account of the bodily injury by or on behalf of the owner or operator of the uninsured vehicle and by or on behalf of any other person or organization jointly or severally liable together with the owner or operator for the bodily injury, including all sums paid under the bodily injury liability coverage of the policy; and

"(B) The amount paid and the present value of all amounts payable on account of such bodily injury under any workers' compensation law, disability benefits law or similar law."

provision, “amount payable” refers to the limit of the UM coverage. Because the limit of that coverage was \$100,000, and because Bergmann had received more than \$100,000 in workers’ compensation benefits, the insurer argued that no coverage remained after offsetting those benefits from that limit. *Bergmann*, 337 Or at 600. Bergmann responded that, as used in ORS 742.504(7)(c)(B), “amount payable” refers to the amount payable by the tortfeasor under law, *i.e.*, the insured’s damages, not the amount payable by the insurer under the UM coverage, *i.e.*, the limit. Because her damages far exceeded her workers’ compensation benefits, Bergmann argued that she was entitled to at least some UIM benefits, even after an offset for that compensation. *Bergmann*, 337 Or at 601.

This court, sharply divided, sided with Bergmann. The four justices in the majority concluded that “amount payable” in ORS 742.504(7)(c)(B) refers to whatever sum the insured is legally entitled to recover from the owner or operator of the underinsured vehicle – in other words, it refers to the insured’s damages. *Bergmann*, 337 Or at 605. The majority thus held that Bergmann was entitled to recover UIM benefits despite her receipt of workers’ compensation, because her estimated damages (more than \$650,000) far exceeded that compensation (just over \$100,000). As the majority explained, when the workers’ compensation benefits are subtracted from the “amount payable” (read: damages) pursuant to ORS 742.504(7)(c)(B), the remainder is greater than the limit of the UM coverage. Thus, Bergmann was entitled to recover at least some UIM benefits, with the exact

amount depending on her actual damages. The court remanded the case to the trial court to determine those damages and, hence, the UIM benefits owed.

According to plaintiff, *Bergmann* establishes that, in calculating UIM benefits, payments by the underinsured motorist should be deducted from the insured's damages, not from the UM limit, just as workers' compensation payments are deducted from the damages, not the UM limit. As she observes, ORS 742.504(7)(c)(A) provides that the "amount payable" shall be reduced by payments from, among others, the operator of the "uninsured vehicle," just as ORS 742.504(7)(c)(B) provides that the "amount payable" shall be reduced by workers' compensation payments. "Amount payable," plaintiff says, must mean the same thing – damages, not limit – for both deductions. Thus, the offset for payments by the underinsured motorist should be taken from the insured's damages, plaintiff argues.

That argument might have some weight if ORS 742.504 stood alone. But it must be considered in context, which includes ORS 742.502 and its equation, in subsection (2)(a), for calculating UIM benefits. Under that equation, the tortfeasor's payment is subtracted from the UM limit, not the insured's damages, as explained above. ORS 742.502 also provides, in subsection (4), that "[u]nderinsurance coverage shall be subject to ORS 742.504." But the same legislation that enacted that provision also enacted the benefits equation in subsection (2)(a). *See* Or Laws 1981, ch 586, § 1. The legislature could not have intended that ORS 742.504 apply to UIM coverage in a way that is inconsistent

with that equation. It could not have intended to simultaneously create and nullify the limit-minus-payment formula and thus add a meaningless sentence to the end of ORS 742.502(2)(a). This court should thus conclude that UIM coverage is “subject to ORS 742.504” only to the extent that the provisions of that statute are not inconsistent with the provisions of ORS 742.502(2)(a).

The court said as much in *Bergmann*. That case did not present the issue here – how to account for payments by the tortfeasor’s insurer – because Bergmann conceded that the payments to her should be deducted from the UM limit. *See* 337 Or at 603 n 7. Even so, this court responded to the insurer’s concern that if workers’ compensation payments are offset against damages in calculating UIM benefits, then payments by the tortfeasor’s insurer should be treated the same way – as an offset against damages, not limits. Allaying that concern, the court explained that ORS 742.502(2)(a), which it described as providing “the general formula for calculating UIM benefits,” 337 Or at 601, survived the court’s construction of ORS 742.504(7)(c):

“ORS 742.502(2)(a) essentially defines the limit of the insurer’s liability in the UIM context. That section provides that UIM benefits are ‘equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies.’ *Nothing in ORS 742.504(7)(c), and certainly nothing in the interpretation of that provision that we announce here, renders those provisions of the statute inoperable. * * **”

337 Or at 608 (emphasis added).

The court in *Bergmann* recognized, implicitly if not explicitly, that when the legislature enacted ORS 742.502(4) and thus made UIM coverage “subject to”

ORS 742.504(7)(c), it did not intend to override the simultaneously-enacted equation in ORS 742.502(2)(a) for calculating UIM benefits. Nor did it intend to change the nature of the new insurance, from gap-filling to floating. It would, of course, be inconsistent with that intent to deduct payments by the tortfeasor's insurer from the insured's damages rather than from the UM limit in calculating UIM benefits. To that extent that ORS 742.504(7)(c)(A) supports a deduction from damages, not limits, that provision does not apply to UIM coverage.

That is not a strange result. Other parts of ORS 742.504 clearly do not apply – indeed, *cannot* apply – to UIM coverage. These include the provisions for “phantom” and “hit-and-run” vehicles. *See* ORS 742.504(2)(b) and (g). UIM coverage, by its very nature, requires an identifiable and insured tortfeasor.⁵

In the end, this court should conclude that ORS 742.504(7)(c)(A) is another part of the UM model policy that does not apply to UIM coverage – at least not in full.⁶ That incongruity is the perhaps inevitable result of the legislature's decision

⁵ Similarly, some parts of the oft-amended ORS 742.504 no longer apply to UM coverage, which requires a tortfeasor without insurance. For example, ORS 742.504(4)(d), created in 1997, see Or Laws 1997, ch 808, § 2, provides that “underinsured motorist benefits” are not available unless the insured has “exhausted” the tortfeasor's insurance or been excused from doing so. Of course, if the tortfeasor has insurance, he is not an uninsured motorist.

⁶ The benefits equation in ORS 742.502(2)(a) applies to “amounts recovered from other automobile liability insurance policies.” ORS 742.504(7)(c)(A), on the other hand, applies to any payment “by or on behalf of” a tortfeasor and, hence, applies to payments that are not recovered under an auto policy. Thus, notwithstanding ORS 742.502(2)(a), ORS 742.504(7)(c)(A) will apply in a UIM case where there are non-insurance payments to the insured. That is not the situation here, however.

to take the easy route and “graft” UIM coverage on to the UM model, *see Mid-Century Ins. Co. v. Perkins*, 209 Or App 613, 623, 149 P3d 316, (2006), *aff’d* 345 Or 196, 195 P3d 59 (2008), rather than create a separate, UIM model.⁷

In any event, if there is any lingering inconsistency between ORS 742.502(2)(a) and ORS 742.504(7)(c)(A), the former provision, being more specific and later enacted, should control. As explained in *PGE*, at the first level of statutory construction, courts follow rules that “bear directly on the interpretation of the statutory provision in context.” 317 Or at 611. These rules include the mandate in ORS 174.020 that “[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.” *Id.* They also include the holding in *Anthony et al. v. Veatch et al.*, 189 Or 462, 481, 220 P2d 493, 221 P2d 575 (1950), that “[i]f earlier and later statutes are in irreconcilable conflict, then the earlier must yield to the later by implied repeal.” (Citations omitted.)

In sum, UIM coverage is “subject to” the model policy in ORS 742.504 only to the extent that the model provisions are not inconsistent with the definition of UIM coverage and the equation for computing UIM benefits that appear in ORS 742.502(2)(a). Thus, whatever the effect of ORS 742.504(7)(c)(A), UIM benefits

⁷ As Mr. Howatt, the assistant insurance commissioner, explained to the interim committee, the “intention is to avoid repeating all of the language that is now in the uninsured motorist law.” App 10.

cannot exceed the difference between the UM limit and the recovery from the tortfeasor's insurer.

E. Disposition of this Case

The jury found that plaintiff sustained over \$300,000 in damages in her accident with [redacted]. That exceeds the limit of the UM coverage in her policy with defendant, which is \$100,000. It also exceeds the payment by insurer – \$25,000. Therefore, in calculating the UIM benefits, the trial court properly subtracted that payment from that limit and gave plaintiff a judgment for the difference: \$75,000.

VII. CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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Certificate of Service

I certify that I mailed two copies of the attached brief to each of the following lawyers, at the addresses indicated, by first class mail, with postage prepaid, on April 16, 2009:

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