



UIM Benefits: No UIM Coverage Without “Underinsured Driver”

— by Jeffrey D. Eberhard

Bergmann Revisited

In what might have been one of the most anticipated opinions of the year for those of us in the insurance industry, the Oregon Court of Appeals held in Mid-Century Insurance Company v. Perkins, — P.3d —, WL 3616466 (Or. App, December 13, 2006) held that underinsured motorist claims (UIM) require an "underinsured" party. Ever since the release of the Oregon Supreme Court's Bergmann v. Hutton decision in 2004, plaintiff's attorneys have argued that UIM coverage "stacks" on top of liability coverage whenever damages exceed liability policy limits, even when the at-fault driver is not "underinsured" relative to the injured party. The Perkins holding rejects this argument in cases where liability limits equal or exceed UIM limits and also provides support for the argument that stacking does not apply to other UIM claims either.

Elijah Perkins was injured in an automobile accident caused by another driver. Although he received the full liability policy limits (\$100,000) from the other driver's insurance carrier, he still had unreimbursed damages from the accident. Perkins filed a claim for underinsured motorist benefits from his own insurer (Mid-Century). Under the terms of the Mid-Century policy, an underinsured vehicle was defined as "a motor vehicle that is insured for an amount less than the UIM motorist limits." Mid-Century denied the claim because the responsible driver's \$100,000 liability limit was not less than Perkins' UIM coverage limits (\$100,000) - in other words, there was no "underinsured vehicle" involved in the accident. Perkins disagreed and therefore Mid-Century filed a declaratory judgment action against Perkins.

Although the trial court initially agreed with Mid-Century, on reconsideration (following the release of Bergmann v. Hutton in 2004), the court held that UIM policy limits could no longer be compared to the liability limits to determine whether UIM coverage existed. Instead, the trial court applied the Bergmann rationale and required that liability

policy limits be subtracted from plaintiff's total damages. Any damages remaining after this subtraction could give rise to a UIM claim. The effect of this interpretation was to allow UIM coverage to "stack" on top of liability coverage. Mid-Century appealed.

The Court of Appeals reviewed the history of UM/UIM coverage in Oregon, as well as the statutory text of ORS 742.502(2)(a) and 742.502(3) - statutes which, in the words of the court, "define the circumstances giving rise to 'underinsurance coverage'". The court then held that the statutory language was unambiguous and provided that Perkins was only entitled to UIM benefits if the tortfeasor was "underinsured", meaning the tortfeasor's policy limits are less than Perkins' underinsured motorist coverage. The appellate court noted that nothing in Bergmann required a different result, and quoted dicta from Bergmann for the proposition that the Bergmann court did not intend to remove the ORS 742.502 definitions from the determination of UIM coverage. The case was reversed and remanded for entry of judgment in favor of the insurer.

(Note that under the 2005 amendments to ORS 742.502, the tortfeasor is "underinsured" if the amount recovered from the tortfeasor's liability policy is less than the UIM policy limits. See footnote 7. This typically occurs where there are multiple claimants that collectively exhaust the liability policy limits).

Although Perkins is a home run for the insurance defense industry, stay tuned, as the plaintiff's bar will almost certainly seek review from the Oregon Supreme Court. ❖

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