

II. UNINSURED MOTORIST BENEFITS

A. (§17.16) Background

Oregon statute has mandated uninsured motorist (“UM”) coverage in some form since 1959. In 1967, the legislature enacted a comprehensive UM statute. In whatever form, the UM statutes have been disputed, construed, and revised regularly. Today’s provisions are found in ORS 742.500 - ORS 742.542. These statutes require UM coverage in all motor vehicle liability policies issued for delivery in Oregon or policies issued by a carrier doing business in Oregon with respect to a motor vehicle principally used or garaged in Oregon. ORS 742.502(1). The coverage may not be less favorable than the provisions of the statutes. ORS 742.504 (introductory paragraph).

This chapter is premised on the statutory minimum policy. It is important to compare the provisions of a particular insurance policy with the statutes. If the policy provides less coverage than required, the statute controls. ORS 742.504. If the policy provides more coverage than required, the policy controls. If permissible language favoring the carrier is not in the policy, the language is not applicable. *See Vega v. Farmers Ins. Co.*, 323 Or 291, 918 P2d 95 (1996).

B. Definitions

1. (§17.17) Uninsured Motorist Coverage

“Uninsured motorist coverage” means coverage insuring the insured, or the heirs or legal representative of the insured, for all sums that they “shall be legally entitled to recover as damages for bodily injury or death caused by accident and arising out of the ownership, maintenance or use of an uninsured motor vehicle in amounts or limits not less than the amounts or limits prescribed” by statute. ORS 742.500(1). The coverage applies only to accidents occurring during the policy period and within the United States of America, its territories or possessions, or Canada. ORS 742.504(3).

Whether the injured claimant is “legally entitled” to recover from the tortfeasor can become a sticky issue when the tortfeasor would ordinarily be liable except for a particular immunity. One writer explains:

Frequently the nature of the relationship between the insured and the tortfeasor is such that the tortfeasor is immune from the rendition of a judgment against him or may have personal or procedural defenses to the assertion of a cause of action against him. Generally speaking, if the nature of the relationship is such that a cause of action is not created as a result of the tortfeasor’s negligent conduct, the insured is not considered to be “legally entitled” within the

contemplation of the policy, but if a cause of action is created, the insured is considered “legally entitled” although a personal defense or procedural restriction bars its enforcement.

2 IRVIN E. SCHERMER, AUTOMOBILE LIABILITY INSURANCE §37:1 (3d ed 1995 & supp 2003). Examples of a relationship granting immunity include the workers’ compensation exclusive remedy bar and governmental immunity. Such personal defenses as statute of limitations bar, bankruptcy discharge bar, dismissal of tort action bar, and res judicata bar would not necessarily bar recovery of UM benefits. *See* SCHERMER, *supra*.

If the injury to the insured arose out of or in the course of his or her employment, the insured would be entitled to workers’ compensation benefits and the exclusivity of remedy provision in the workers’ compensation law would prevent him or her from being “legally entitled” to recover from a coworker. In such event the insured would have no right to recover from his or her underinsured motorist carrier for injury arising out of the operation of an uninsured vehicle by a coworker. *See Cope v. West American Ins. Co.*, 309 Or 232, 785 P2d 1050 (1990).

Similarly, when the Oregon Tort Claims Act, ORS 30.260 to ORS 30.302, limits the amount that the injured party is “legally entitled to recover,” that amount has been paid by the negligent government entity, and the underinsured motorist (UIM) insurer has promised to pay only the amount that the injured party is “legally entitled to recover,” the injured party has no right to recover UIM benefits. *Surface v. American Spirit Ins. Co.*, 154 Or App 696, 962 P2d 717 (1998) *affirmed* 335 Or. 356, 67 P.3d 938 (2003) (affirmed by an equally divided court).

The tortfeasor’s potential personal or situational defenses are another matter. For purposes of UM or UIM coverage, it is enough that a claimant was once “legally entitled” to recover damages against the tortfeasor. A claimant does not forfeit UM coverage when the statute of limitations expires with regard to an action against the tortfeasor. The tortfeasor’s personal defense does not frustrate the claimant’s right under contract to the claimant’s own UM insurance. *See Vega v. Farmers Ins. Co.*, 323 Or 291, 918 P2d 95 (1996).

VEGA v. FARMERS INS. CO., 323 Or 291, 918 P2d 95 (1996). Plaintiffs’ personal injury action was dismissed when the tortfeasor died and plaintiffs failed to substitute his personal representative as defendant. The limitations period expired. Plaintiffs then demanded UM/UIM benefits from their insurer and prevailed in a declaratory action on coverage. Among other things, the insurer contended that plaintiffs were not “legally entitled” to recover against the tortfeasor after the underlying limitations period expired for the negligence action against the tortfeasor. 323 Or at 307. The court held that claimant need show only that a claim would have been viable at the time of the accident.

2. (§17.18) Motor Vehicle

The statutory definition of “motor vehicle” is “every self-propelled device in, upon or by which any person or property is or may be transported or drawn upon a public highway.” ORS 742.500(2). The statute specifically excludes the following vehicles:

- (1) Devices used exclusively on stationary rails or tracks;
- (2) Certain motor trucks as defined in ORS 801.355 when the insured has employees who operate the trucks and the employees are covered by workers’ compensation law, disability benefits law, or any similar law; and
- (3) Farm-type tractors or self-propelled equipment designed for use principally off public highways. ORS 742.500(2).

Motorcycles are motor vehicles. *Garrow v. Pennsylvania Gen. Ins. Co.*, 288 Or 215, 218, 603 P2d 1175 (1979). Snowmobiles, dune buggies, go-carts, three-wheelers, and motorized wheelchairs probably are not motor vehicles required to carry uninsured motorist coverage as part of any liability policy because they are “self-propelled equipment designed for use principally off public highways.” ORS 742.500(2)(c); *see, e.g., State Farm Mut. Auto. Ins. Co. v. Beck*, 84 Or App 509, 734 P2d 398 (1987) (three-wheeler was not a motor vehicle required to carry UM coverage); *Safeco Insurance Co. v. Christensen*, 248 Or 550, 436 P2d 270 (1968) (motor trucks with drivers with workers’ compensation coverage were not motor vehicles required to carry UM coverage).

In *Beck v. Unigard Ins. Co.*, 271 Or 261, 531 P2d 907 (1975), the court determined that a UM policy that excluded “a farm type tractor or other equipment designed for use principally off public roads” did not apply to injury caused by an uninsured race car at a racetrack. Although the race car originally was designed for public roads, it was modified to create a superstock racer. Neither the statute nor the policy required that the vehicle be farm-type equipment: “Farm tractors are only one kind of equipment designed for use principally off public roads.” *Beck v. Unigard Ins. Co.*, *supra*, 271 Or at 265.

“Vehicle” is defined in ORS 742.504(2)(k) to exclude “devices moved by human power or used exclusively upon stationary rails or tracks.”

3. (§17.19) Public Highway

The term *highway* is defined in ORS 801.305 as “every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures within the

boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right.”

4. (§17.20) Insured

The insured and the heirs or legal representative of the insured are entitled to recovery under the uninsured motorist statutes. An “insured” is defined in ORS 742.504(2)(a) as including:

- (1) The named insured in the policy;
- (2) Any person designated as named insured in the schedule;
- (3) The spouse of any such named insured, while a resident of the same household;
- D. Any child residing in the household of the named insured if the insured has acted as a parent to the child whether or not related by blood, marriage or adoption;
- (5) Relatives of either the named insured or the resident spouse, while such relatives are residents of the same household, provided they do not own a vehicle not described in the policy; and
- (6) Any other person while occupying an insured vehicle, provided the actual use thereof is with the permission of the named insured. *Farmers Insurance Exch. v. Colton*, 264 Or 210, 213 n 1, 504 P2d 1041 (1972).

If the named insured in the policy is someone other than a husband and wife who are residents of the same household, “the named insured shall be only a person so designated in the schedule.” ORS 742.504(2)(a)(A).

Whether a person is a resident of a household of a named insured is generally a fact question. *Waller v. Rocky Mtn. Fire & Casualty*, 272 Or 69, 71-72, 535 P2d 530 (1975); *Federated Amer. Ins. v. Childers*, 45 Or App 379, 382, 608 P2d 584 (1980).

QUERY: Is the residency of a child a fact question? Oregon’s reported cases, which treat “household resident” as a fact question, concern family members who are over age 18. *See, e.g., Federated Amer. Ins. Co. v. Childers*, cited in Book §17.5 (college student). Outside the Insurance Code, ORS 108.015(2) provides that the domicile of a child of divorced parents is the domicile of the parent with legal custody. *Cf. Lorenz v. Royer*, 194 Or 355, 241 P2d 142, 242 P2d 200 (1952) (traditional rules). By definition, domicile assumes a physical residence. *Zimmerman*

v. Zimmerman, 175 Or 585, 590, 155 P2d 293 (1945). In effect, the statute makes a child's legal residence a question of law. In the real world, a child's legal residence and physical residence are often inconsistent. If an insurance policy does not expressly avoid the effects of a custody decree, should Oregon's domicile statute effectively extend a policy's coverage of "household residents" to a child of a custodial parent despite the child's physical residence elsewhere? In an unreported decision, the United States District Court for Oregon adhered to the line of "adult cases" and deemed ORS 108.015(2) to be inapplicable. *AMCO Ins. Co. v. Winstead et al.*, Case No 93-6249-TC (1995).

Generally, courts have held that "a child may be temporarily absent from the household, or indeed may have more than one residence, without necessarily losing the protection afforded to a 'resident of a household' under an insurance policy." *Federated Amer. Ins. v. Childers*, *supra*, 45 Or App at 383.

In *Joseph v. Utah Home Fire Ins. Co.*, 313 Or 323, 835 P2d 885 (1992), the court held that a child reared by an insured, but not related by blood, marriage, or formal adoption, qualified as a foster child and therefore as an insured for purposes of uninsured motorist coverage. The 1993 Legislature amended ORS 742.504(2)(a) to comport with the *Joseph* holding.

Under ORS 742.504(4)(b), UM coverage does not apply "to bodily injury to an insured while occupying a vehicle (other than an insured vehicle) owned by, or furnished for the regular use of, the named insured or any relative resident in the same household, or through being struck by such a vehicle."

In *Allstate Insurance Co. v. Minugh*, 274 Or 273, 545 P2d 597 (1976), a policy of liability insurance covered "any other person using such automobile with the express but not the implied permission of the named insured, provided [the actual use] is within the scope of such permission." 274 Or at 275. The insured gave his son permission to drive the car with a specific direction not to let anyone else use it. The son let another person use the vehicle. The court found there was no coverage. As a result, neither the driver nor any other occupant of such a vehicle would be entitled to UM coverage.

Meyer v. American Economy Insurance Co., 103 Or App 160, 796 P2d 1223, *rev. denied*, 310 Or 547 (1990), held that an employee and principal shareholder of the insured corporation was not entitled to UM coverage under the corporation's liability policy for injuries sustained by him when an uninsured motorist struck him while he was riding his own bicycle on personal business. The corporation was the only named insured in the policy though it defined insured as "you or any family member." A corporation cannot suffer bodily injury or have family members. 103 Or App at 162.

5. (§17.21) Occupying

The term *occupying* a vehicle means “in or upon or entering into or alighting from.” ORS 742.504(2)(i). In *Mackie v. Unigard Insurance Co.*, 90 Or App 500, 752 P2d 1266 (1988), the court interpreted “occupying,” borrowing from *State Farm Ins. Co. v. Berg*, 70 Or App 410, 415, 689 P2d 959, *rev. denied*, 298 Or 553 (1985). It found that, for UM coverage as well as PIP coverage, “[a] person remains an ‘occupant’ of a vehicle until the person has completed all acts reasonably expected to be performed under the circumstances or reasonably incidental to the disembarking process and commences a new course of conduct.” In *Marcilionis v. Farmers Ins. Co.*, 318 Or 640, 646, 871 P2d 470 (1994), the Oregon Supreme Court gave a “natural, plain, and ordinary meaning” to the term *occupying*.

MACKIE v. UNIGARD INSURANCE CO., 90 Or App 500, 752 P2d 1266 (1988). Plaintiff drove her car to her father’s home to attend a birthday party. She parked, turned off the lights and engine, got out of the car, shut the door, then walked to the rear of the car to remove a package from the trunk. She inserted the key and opened the trunk and at that moment was struck by a car driven by an uninsured motorist. Plaintiff was covered by two policies providing UM coverage, that of her own car and that of her mother’s car; both policies provided for proration. Her mother’s Unigard policy provided for an exclusion as permitted by ORS 742.504(4)(b) if she was occupying the vehicle. The trial court held she was occupying the vehicle and entered judgment for defendant. *Held*: Affirmed. Plaintiff had left the inside of the car but, rather than embarking upon a new course of conduct, she opened the trunk for the purpose of retrieving a birthday gift. This was reasonably incidental to leaving and alighting from the car so she was occupying her car when struck by the uninsured motorist.

MARCILIONIS v. FARMERS INS. CO., 318 Or 640, 871 P2d 470 (1994). A woman hailed plaintiff and, when he stopped, threw his car keys into the street. A speeding car struck plaintiff. The insurer of plaintiff’s car denied UM coverage. The court of appeals followed its decisions that had given “broad meaning” to the term *occupying*, and found for plaintiff. *Held*: Reversed. A plain meaning of the term *occupying* required that, for coverage to exist, plaintiff must have been “in,” “upon,” or “entering into” the vehicle.

6. (§17.22) Insured Vehicle

ORS 742.504(2)(b) defines an *insured vehicle* as:

(A) The vehicle described in the policy or a newly acquired or substitute vehicle, as each of those terms is defined in the public liability

coverage of the policy, insured under the public liability provisions of the policy; or

(B) A nonowned vehicle operated by the named insured or spouse if a resident of the same household; provided the actual use thereof is with the permission of the owner of such vehicle and such vehicle is not owned by nor furnished for the regular or frequent use of the insured or any member of the same household.

The statute specifically excludes any type of trailer unless it is a described vehicle in the policy. ORS 742.504(2)(c).

Farmers Ins. Co. v. Paepier, 110 Or App 77, 822 P2d 140 (1991), denied a passenger UM coverage under the driver's policy, because the passenger owned the vehicle and it was available for her regular use. As a passenger, the car owner became an insured under the driver's policy, but her car could not be deemed "an insured car" under the driver's policy.

In *North Pacific Ins. Co. v. Anderson*, 110 Or App 269, 821 P2d 444 (1991), the court held that the defendant, who was driving one of his employer's vehicles and involved in an accident with an uninsured motorist, was not entitled to coverage under the UM provision of his policy with the plaintiff. The defendant's employer had a fleet of trucks and the defendant drove various trucks from time to time. The defendant contended that the phrase "furnished for regular use" required a permanent right of control and discretion to use the vehicle as desired, in place of or in addition to his own vehicle. The court held there was nothing in the statutory language that requires that a vehicle must be totally under the insured's control and available for both personal and business use in order to be "furnished for regular use." *North Pacific Ins. Co. v. Anderson, supra*, 110 Or App at 272.

UM coverage required by statute is not subject to qualification by a driver restriction endorsement purporting to exclude coverage. *Hartford Accident v. Dairyland Ins. Co.*, 274 Or 145, 545 P2d 113 (1976).

7. (§17.23) Uninsured Vehicle

"Uninsured vehicle" is defined in ORS 742.504(2)(d) and (e) as:

(1) A vehicle as to which there is no collectible automobile bodily injury liability insurance or bond in at least the amount of \$25,000 per person or \$50,000 per accident. Failure to discover with reasonable efforts within 90 days from the accident the existence of a valid and collectible policy or bond raises a disputable presumption that the vehicle is uninsured;

- (2) A vehicle having requisite coverage but with coverage denied by the carrier;
- (3) A vehicle having requisite coverage but with the carrier within two years of the accident being declared bankrupt or having a receiver appointed or becoming insolvent;
- (4) A hit-and-run vehicle as defined in ORS 742.504(2)(f); or
- (5) A phantom vehicle as defined in ORS 742.504(2)(g).

“Uninsured vehicle,” under ORS 742.504(2)(e), does not include:

- (1) An insured vehicle (e.g., the policyholder’s own car);
- (2) A vehicle owned or operated by a self-insurer (e.g., car rental agencies);
- (3) A vehicle owned by the United States, Canada, a state, a political subdivision, or an agency of any of such government;
- (4) A land motor vehicle or trailer if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle;
- (5) A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads; or
- (6) A vehicle owned by or furnished for the regular or frequent use of the insured or any member of the household of the insured (e.g., a car which the policyholder uses but for which the policyholder did not purchase insurance).

The car that is insured under the insured’s policy cannot be deemed an underinsured vehicle so as to provide the insured UIM benefits. The question arises when a passenger brings a claim against the driver of the same vehicle, the liability limits and UIM limits are above the statutory minimum, and a liability exclusion reduces the driver’s liability coverage to the statutory minimum. For example, the passenger who could recover only \$25,000 in liability proceeds would like to demand the balance of \$100,000 UIM coverage. The policy, however, will exclude the insured car from the definition of an underinsured vehicle. *Wright v. State Farm Mutual Auto. Ins. Co.*, 152 Or App 101, 952 P2d 73 (1998), *rev. allowed*, 328 Or 275 (1999); *see State Farm Mutual Ins. Co. v. Whitlock*, cited in Book §17.8.

Early decisions liberally defining uninsured vehicle, such as *Bowsher v. State Farm Fire Co.*, 244 Or 549, 419 P2d 606 (1966), are no longer applicable because of the specific exclusion described in (6) above. In *State Farm Mut. Ins. v. Whitlock*, 59 Or App 303, 650 P2d 1042 (1982), *rev. denied*, 294 Or 461 (1983), the decedent was fatally injured while

riding as a passenger in her own vehicle but was excluded from liability coverage by a “family-household exclusion.” The court held that unavailability to the decedent of liability coverage did not render the vehicle an “uninsured vehicle” unless the policy provided coverage broader than required. The court pointed out that “It is now clear that, under [ORS 742.504], unlike former ORS 736.317(2) [under which the *Bowsher* case was decided], the focus is on the *vehicle* involved in the accident, not the resulting injury and claim.” *State Farm Mut. Ins. v. Whitlock, supra*, 59 Or App at 307.

Cole v. Farmers Ins. Co., 108 Or App 277, 814 P2d 188 (1991), held that the insured owner of an automobile that was run down by his own automobile being driven by a thief was not entitled to recover under UM coverage, because under the statute and the policy “uninsured vehicle” does not include a vehicle owned by the insured.

8. (§17.24) Hit-and-Run or Phantom Vehicle

A hit-and-run or a phantom vehicle may be an “uninsured vehicle” if:

- (1) The identity of the operator or owner cannot be ascertained;
- (2) The insured or someone on behalf of the insured reports the accident within 72 hours to the appropriate officer or department; and
- (3) The insured or someone on behalf of the insured files with the insurer, within 30 days, a statement under oath that the insured has a cause of action arising out of the accident for damages against the person or persons whose identity is unascertainable and setting forth the facts. ORS 742.504(2)(f)-(g).

A hit-and-run vehicle classification requires a vehicle that causes bodily injury arising out of physical contact with the insured or with a vehicle occupied by the insured. The insured must make the damaged vehicle available for inspection. ORS 742.504(2)(f). Substantial compliance, as distinguished from strict compliance with conditions precedent, generally suffices. *Sutton v. Fire Insurance Exch.*, 265 Or 322, 325, 509 P2d 418 (1973).

A phantom vehicle classification requires a vehicle that causes bodily injury to an insured without physical contact and requires corroboration by competent evidence other than testimony of the insured or any person having an uninsured motorist claim resulting from the accident. ORS 742.504(2)(g). For a discussion of the necessary corroboration and the notice requirement, see *Farmers Insurance Exch. v. Colton*, 264 Or 210, 504 P2d 1041 (1972).

In *To v. State Farm Mutual Ins.*, 319 Or 93, 873 P2d 1072 (1994), the court added that a claimant who released his claim against the UM insurer could become a witness to corroborate that an accident was caused by a phantom vehicle. The court construed ORS

742.504(2)(g) to require only that the corroborating witness may not have a UM claim at the time of the witness's testimony.

TO v. STATE FARM MUTUAL INS., 319 Or 93, 873 P2d 1072 (1994). Claimants reported that a phantom truck crossed the center line and caused their driver to lose control. Before the decision in a declaratory action, one passenger released his claim against the UM insurer and became a witness. The court of appeals reversed the trial court's entry of summary judgment in favor of the insurer. *Held*: Affirmed. A majority held that ORS 742.504(2) should be read to exclude only a corroborating witness who continues to hold a UM claim at the time of the witness's testimony. In dissent, Justice Graber asked, "If one claimant later settles, did the insurer deny coverage wrongfully to the others?" 319 Or at 113.

When an insured fails to report a hit-and-run accident to the police within the specified time or to the insurance carrier within 30 days, the insured's failure is excused if the insured had no knowledge concerning the fact that it was a hit-and-run accident and could not have acquired such knowledge by the exercise of reasonable diligence. *Turlay v. Farmers Insurance Exch.*, 259 Or 612, 621-622, 488 P2d 406 (1971).

9. (§17.25) Caused by Accident

While ORS 742.504(1)(a) promises UM benefits for injuries "caused by accident," some injuries may be caused with abundant malice aforethought. From the viewpoint of the wrongdoer, the injury may be far from accidental. Even so, the question of "accident" is judged from the perspective of the victim for purposes of UM coverage, since the coverage's purpose is to compensate victims. *Davis v. State Farm Mut. Ins.*, 264 Or 547, 507 P2d 9 (1973).

The *Davis* language was cited with approval in *Snyder v. Nelson/Leatherby Ins.*, 278 Or 409, 415, 564 P2d 681 (1977). Although the *Davis* case was interpreting Michigan law, the Michigan language is virtually identical to the Oregon statute, and the same conclusion would likely be reached on an Oregon policy.

Even if the insured participates in staging an accident in order to collect collision coverage, a jury could determine that the insured did not engage in an act substantially certain to cause harm to himself. Consequently, an insured may recover UM/UIM benefits for an intentional wreck if the insured did not intend to get hurt. *Fox v. Country Mutual Ins. Co.*, 327 Or 500, 964 P2d 997 (1998).

10. (§17.26) Bodily Injury

The term *bodily injury* means “bodily injury, sickness or disease, including death resulting therefrom.” ORS 742.504(2)(h). Bodily injury does not include mental anguish without physical injury. *White v. Safeco Insurance Co.*, 68 Or App 11, 15-16, 680 P2d 700, *rev. denied*, 297 Or 492 (1984).

As against the tortfeasor, physical impact or injury is necessary to recover damages for emotional distress. *See Saechao v. Matsakoun*, 78 Or App 340, 717 P2d 165 (1986) (negligence claim failed in absence of evidence of impact). As against the UM insurer, the same principle should apply unless the policy allows broader coverage. *Cf.* ORS 742.504(1) (UM “sums” equated with “damages” recovered from tortfeasor).

11. (§17.27) Coverage Required

ORS 742.502 and 742.500(1) require UM coverage “in amounts or limits not less than the amounts or limits prescribed for bodily injury or death under ORS 806.070.” Those limits are \$25,000 per person and \$50,000 per accident. ORS 806.070(2).

After years of litigation over whether insurance agents had offered insureds the required chance to buy UM limits equivalent to the insureds’ liability limits, the 1993 Legislature amended ORS 742.502(2) simply to require insurers to provide the same limit for UM coverage as for liability coverage unless the insured elects lower limits in writing.

C. Damages Recoverable

1. (§17.28) General and Special Damages

ORS 742.504 requires that: “The insurer will pay all sums which the insured, the heirs or the legal representative of the insured shall be legally entitled to recover as general and special damages . . . because of bodily injury sustained by the insured.” ORS 742.504(1)(a).

2. (§17.29) Mental Anguish

In *White v. Safeco Insurance Co.*, 68 Or App 11, 15-16, 680 P2d 700, *rev. denied*, 297 Or 492 (1984), the court held that even though the wife of an injured insured was also an insured, her claim for mental anguish resulting from her husband’s injuries did not result from any bodily injury she had sustained. The wife’s claim therefore was not allowed.

3. (§17.30) Punitive Damages

No Oregon appellate court has ruled on whether punitive damages are recoverable. The statutes themselves say slightly different things. At ORS 742.500(1), the statutes define UM coverage in terms of “all sums which the insured . . . shall be legally entitled to recover

as damages for bodily injury or death.” At ORS 742.504(1)(a), the statutes require payment only of “general and special damages.” The statutory construction rule of *ejusdem generis* (a general provision should be limited to the things specifically named) seemingly precludes punitive damages if the narrower language is included in the policy.

The Oregon Supreme Court had held that *liability* policy language stating that “all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury” includes punitive damages. *Harrell v. Travelers Indemnity Company*, 279 Or 199, 202, 567 P2d 1013 (1977). Such provisions in an insurance policy were held ambiguous, requiring resolution of reasonable doubt against the insurance company. 279 Or at 204. The court pointed out that the insurance company easily could have removed the ambiguity by including an express exclusion from liability for punitive damages, but chose not to do so. 279 Or at 205.

The *Harrell* decision interpreted a liability policy that provided payment of “all sums which the insured shall become legally obligated to pay as *damages because of . . . bodily injury.*” *Harrell v. Travelers Indemnity Company, supra*, 279 or at 202 (emphasis added). The UM statutory language, however, is “all sums which the insured . . . shall be legally entitled to recover as *damages for bodily injury* or death.” ORS 742.500(1) (emphasis added). Punitive damages are not awarded for bodily injury or death. The Oregon Supreme Court in *Andor v. United Air Lines*, 303 Or 505, 517, 739 P2d 18 (1987), wrote: “Punitive damages . . . by definition are not part of a plaintiff’s compensation for what she has lost; they are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probable risks to others.” Under that definition, the broader statutory language of ORS 742.500(1) apparently does not provide recovery of punitive damages. *See Laird v. Nationwide Insurance Company*, 134 SE2d 206, 210 (SC 1964) (denying punitive damages).

Even if the court considered the statutory language to be ambiguous, however, it is language that the legislature has chosen rather than the insurer. Statutory ambiguities will not necessarily be resolved against the carrier; the language will be interpreted according to what the court finds to have been the legislative intent. *See Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299 n 2, 613 P2d 32 (1980).

4. (§17.31) Loss of Services and Medical Expenses of a Minor

No Oregon appellate decision has specifically considered payment for loss of services or the medical expenses of a minor, and it is not likely to arise frequently because PIP benefits generally pay for the medical bills. In Oregon any claim for lost earnings of a minor belongs to the parents. *See* ORS 30.010; *Whang v. Hong*, 206 Or 125, 133-134, 290 P2d 185, 291 P2d 720 (1955), *overruled on other grounds*, 274 Or 309 (1976). Upon the death of the child, the claim is brought by the estate. ORS 30.020. The claim for medical expenses

may be brought by a guardian ad litem for the child pursuant to a consent signed by the parents. ORS 30.810; *Palmore v. Kirkman Laboratories*, 270 Or 294, 305-306, 527 P2d 391 (1974).

5. (§17.32) Loss of Consortium

Coverage for loss of consortium is not required by the statute. The spouse who suffers the loss of consortium has not suffered a bodily injury. *White v. Safeco Insurance Co.*, 68 Or App 11, 15-16, 680 P2d 700, *rev. denied*, 297 Or 492 (1984).

6. Recovery Reduced by Amounts Paid

a. (§17.33) To Insured Under Liability Coverage of Policy

An insured may have a UM claim and a tort claim for damages against a named insured under the same policy. For example, when a claimant is riding as a passenger in an automobile involved in an accident with an uninsured motorist, the claimant is an insured under the driver's UM coverage. The claimant might also have a claim for damages against the driver, covered by the liability portion of the driver's policy. In such a situation, the amount paid under either the UM coverage or the liability coverage of the driver's policy reduces by that amount payment made under the other coverage if the policy so provides. ORS 742.504(7)(b); *Monaco v. U.S. Fidelity & Guar.*, 275 Or 183, 187, 550 P2d 422 (1976).

b. (§17.34) To Insured Under Personal Injury Protection Coverage

Originally, the payment of PIP benefits to an injured UM claimant would have been subtracted from UM benefits even if the claimant's true damages were well above the UM limits. Essentially, PIP once doubled as an early or advance UM benefits, no matter whether the claimant was made whole. *Bauder v. Farmers Ins. Co.*, 301 Or 715, 725 P2d 350 (1986). The 1987 legislature amended ORS 742.542 and effectively overruled the *Bauder* decision. 1987 Or Laws ch 632 §3. The 1997 legislature clarified that the statute also extended the same beneficial treatment to UIM claims. 1997 Or Laws ch 808, §10 (responding in part to *Yokum v. Farmers Ins. Co.*, 117 Or App 547, 844 P2d 937 (1993)).

Today under ORS 742.542, PIP benefits may be subtracted from potential UM or UIM benefits when necessary to avoid double payment of damages, but PIP benefits will otherwise be added or "stack" with UM and UIM benefits so as to make the claimant whole. If the value of the injury exceeds the UM/UIM limits, and if the PIP is subtracted from the claimant's true damages, then the result may or may not achieve a reduction in UM/UIM benefits, depending upon how much damages exceed UM/UIM limits. If the value of the injury is no greater than the UM/UIM limits, then, when the PIP is subtracted from the

claimant's damages, the PIP causes a dollar for dollar reduction in UM/UIM benefits. See DeVore, "Vega and SB 645," 34 *Willamette L. Rev.* 327 (Spring 1998).

c. (§17.35) By Other Persons Liable

The insured's UM coverage will be reduced, if the policy so provides, by the amount paid by or on behalf of the owner or operator of the uninsured vehicle and the amount paid by any other person or organization jointly or severally liable with the owner or operator. ORS 742.504(7)(c)(A); see *Monaco v. U.S. Fidelity & Guar.*, 275 Or 183, 187, 550 P2d 422 (1976).

Payments from the tortfeasor directly, not just the liability insurer, will reduce UM/UIM benefits. ORS 742.504(7)(c)(A); see, e.g., *Pitchford v. State Farm Mutual Auto. Ins. Co.*, 147 Or App 9, 934 P2d 616 (1997) (subtracting \$25,000 liability proceeds and \$5,000 tortfeasor's personal payment from UIM benefit). The payments are subtracted from the UM/UIM benefits, not from the potentially larger sum of the insured's damages above the UM/UIM limits. 147 Or at 13-14.

CAVEAT: A recent reinterpretation of the treatment of workers' compensation poses a question whether a reinterpretation of the treatment of liability insurance proceeds should follow. See Section 17.36 below.

d. (§17.36) Paid or Payable by Workers' Compensation

Any amount payable under the UM coverage will be reduced by "[t]he 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 any similar law." ORS 742.504(7)(c)(B). By its terms, this offset includes the present value of future benefits. *Id.*

In addition, "[t]his coverage does not apply so as to inure directly or indirectly to the benefit of any workers' compensation carrier, any person or organization qualifying as a self-insurer under any workers' compensation or disability benefits law or any similar law." ORS 742.504(4)(c).

Workers' compensation payments made to another person who was injured in the same accident and who claims UM/UIM benefits under the same policy do not reduce the injured person's UM/UIM benefits. Only the workers' compensation paid or payable to the individual person will reduce that person's UM/UIM benefits. In *Grijalva v. Safeco Ins. Co.*, 329 Or 36, 985 P2d 784 (1999), the liability policy and UIM policy both had consolidated single limits. Both policies were divided between the two injured claimants. Although the UIM insurer will not be required to pay more than its "per accident" limits, the insurer may

not subtract one person's liability recovery or workers' compensation payments from another person's UIM benefits.

It is only the *net* amount of workers' compensation benefits received by the claimant – *after* recognition of the claimant's payment of a workers' compensation lien – that is subtracted. *Harlow v. Allstate Ins. Co.*, 177 Or App 122, 33 P3d 363 (2001).

The “amount” from which workers' compensation is subtracted is the full measure of the amount of damages that the claimant suffered in the accident. In some situations, the “amount” that the injured person would be entitled to recover against the tortfeasor may be higher than the UM/UIM policy limits. In those situations, workers' compensation is subtracted from those total damages, not from the lesser UM/UIM limits or the prospective UM/UIM benefits suggested by those limits. *Bergmann v. Hutton*, 337 Or 596, 101 P3d 353 (2004). In effect, UM/UIM benefits can “stack” or be combined with workers' compensation, so as to make the claimant whole. Workers compensation would still be subtracted from proven damages, so as to avoid double recovery. This treatment of workers' compensation resembles the treatment of PIP benefits under ORS 742.542.

Language in the *Bergmann* decision indicates that, notwithstanding its interpretation of the “amount payable” in ORS 742.504(7)(c), the same result may not be extended to the treatment of liability insurance proceeds. The definition of underinsured motorist coverage in ORS 742.502 would still compel a subtraction of liability proceeds from UIM benefits rather than potentially larger damages. *Bergmann v. Hutton*, 337 Or at 608. At the time of this writing, the question whether to extend *Bergmann* to liability proceeds is pending before the Oregon Court of Appeal in *Mid-Century Ins. Co. v. Perkins*, Case Number CA A127522.

e. (§17.37) Payable Under Disability Benefits Law or Similar Law

No appellate cases have considered the application of ORS 742.504(7)(c)(B) to disability benefits or similar laws. The court held that medical assistance payments to an injured pedestrian were governmental benefits, which reduced the PIP benefits available, in *Farmers Ins. Co. of Oregon v. Wickham*, 86 Or App 100, 739 P2d 30 (1987).

D. Other Insurance

1. (§17.38) Primary and Secondary Overlapping Coverages

Oregon's statute offers model provisions on overlapping UM/UIM coverages that insurers may adopt in their policies. The statute implies more by what it does not say than what it does say. Most importantly, the statute implies that coverage under the UM/UIM policy in question shall be primary with regard to the named insured injured while occupying a vehicle that the insured owns. *See generally* ORS 742.504(9).

If an insured is injured while occupying a vehicle that the named insured does *not* own, then the UM coverage in question applies only as excess insurance over any other UM insurance available. The same is true if the insured is injured while occupying any public conveyance. Assuming the policies follow the statute's language, then such excess coverage is available only in the amount by which the policy in question exceeds the sum of the applicable limits of all such other insurance. *See* ORS 742.504(9)(a) & (c) (anti-stacking language).

If the insured is injured while occupying an uninsured vehicle or through being struck by an uninsured vehicle, and if the insured somehow is an insured under other available UM insurance, then the insured's damages are deemed not to exceed the higher of the applicable limits of liability of the policies. No insurer is liable for a greater proportion of the damages than the applicable limit of liability of the coverage under the policy bears to the sum of the applicable limits of liability of the policy and such other insurance. ORS 742.504(9)(b).

If all policies potentially involved expressly allocate responsibility between insurers or self-insurers, and the allocation is not repugnant to the UM statute, then the terms of the policies control. ORS 742.506. When there is repugnancy between the policies' respective other insurance clauses, ORS 742.506 declares that the provisions of ORS 742.504(9) "shall control allocation of responsibility between insurers." The import of ORS 742.506 is to mandate the effect and priority of coverages legislatively rather than employ a pro rata formula otherwise used when repugnancy of terms is found. *See Lamb-Weston v. Oregon Auto. Ins. Co.*, 219 Or 110, 341 P2d 110, 346 P2d 643 (1959). The mandate of ORS 742.506 was a legislative response to an earlier invocation of the *Lamb-Weston* principle. *Compare Byrns v. Allstate Ins. Co.*, 262 Or 462, 469, 498 P2d 762 (1972) (the legislature could speak more clearly to render *Lamb Weston* inapplicable) *with* 1979 Or Laws ch 842, §10 (now ORS 742.506).

Although ORS 742.506 may mandate the priority of overlapping coverage, it does not rescue an insurer who seeks to escape coverage entirely with an invalid provision while otherwise promising to pay pro rata. In *Erickson v. Farmers Ins. Co.*, 331 Or 681, 21 P3d 90 (2001), a passenger was covered under both her own policy and her husband's policy on his car. Her policy's "escape clause denied all coverage when she was a passenger in another car than her own, but was held to be invalid as contrary to mandated excess coverage under ORS 742.504(9). The policy's additional, "other insurance" clause simply promised to pay pro rata. The court announced that, when the "escape clause" was invalidated, there was no remaining repugnancy, and that, without repugnancy, ORS 742.506 did not apply. After *Erickson*, insurers would be well advised to adhere to ORS 742.504(9), and claimants would be well-advised to read the policies for potential stacking.

2. (§17.39) Stacking

At ORS 742.504(9) and 742.506, the statutes permit insurers to adopt language that can prevent stacking of coverage. Most policies generally contain clauses intended to avoid stacking in language like ORS 742.504(9)(a) and (b). *But see Erickson v. Farmers Ins. Co.*, 331 Or 681, 21 P3d 90 (2001) (invalid policy language).

“Other insurance” provisions of policies have been held effective to prevent stacking policy limits. *Thurman v. Signal Insurance Co.*, 260 Or 524, 530, 491 P2d 1002 (1971). In a case in which one policy had separate coverage for two automobiles, the court held that the insured’s recovery is limited to the coverage applicable to the automobile involved in the accident. *Castle v. United Pacific Ins.*, 252 Or 44, 448 P2d 357 (1968).

The non-stacking principle also applies when the named insured is injured but none of his or her insured vehicles is involved. In *Kennedy v. Amer. Hdw. Mut. Ins. Co.*, 255 Or 425, 467 P2d 963 (1970), the insured, an injured pedestrian, paid two premiums to insure two automobiles under the same policy. The insured claimed a double recovery because neither vehicle was involved in her accident but both policies covered injuries sustained as a pedestrian. The court found there was no multiple coverage and that the insured was entitled to collect on only one policy.

E. Claims—Requirements and Procedures

1. (§17.40) Statutes of Limitations

The final subsection in the model UM/UIM policy permits a policy to provide that no cause of action accrues to the insured under the UM/UIM coverage unless within two years from the date of the accident (1) the claim has been settled with the insurer; (2) the claimant and insurer have formally instituted arbitration proceedings; (3) the claimant has sued the insurer; or (4) suit for bodily injury has been filed against the uninsured motorist. The statute adds that, if the claimant first sues the tortfeasor, then the claimant has two years from settlement or judgment in which to institute arbitration or sue the UM/UIM insurer. ORS 742.504(12). The statute gives no definition for formally instituting arbitration. Conventional wisdom treats an attorney’s letter demanding arbitration as sufficient.

The option to file suit against the tortfeasor is defined in *Lindsey v. Farmers Ins. Co.*, 170 Or App 458, 12 P3d 571 P3d 571 (2000) to mean filing a complaint in the courthouse. The option does not require an effective commencement of the action by timely service within sixty days on the tortfeasor as per ORS 12.020(2). “Filing” does not mean “commencing.” Since the legislature knew its terms, the statute was given a “literal” interpretation. *But cf.* ORS 659A.875(2) with ORS 659A.880(3) (using “file” and “commence” interchangeably in employment claims).

If an insurer fails to use the statutory form language that allows a two-year limitation period, then the six-year contract limitation period will govern, and the cause of action will not accrue until the insurer breaches by refusing UM benefits. *Vega v. Farmers Ins. Co.*, 323 Or 291, 295–275, 918 P2d 95 (1996); *see also North River Insur. v. Kowaleski*, 275 Or 531, 534, 551 P2d 1286 (1976).

In *Sanderson v. Allstate Ins. Co.*, 164 Or App 58, 989 P2d 486 (1999), the trial court had dismissed a plaintiff’s direct action against her UIM insurer because she had not done one of the three things contemplated by ORS 742.504(12) before 1997 amendments: she had not filed an action against the tortfeasor within two years because she settled within two years, she had not reached agreement with the UIM insurer within two years, nor had she demanded arbitration within two years. The insurer contended she must demand arbitration within two years, even if she later withdrew the demand. The court of appeals recognized that a plaintiff who demanded arbitration would waive her right to a jury. A claimant, therefore, could not be required to demand arbitration in order to satisfy the time limit. Like the old statute, the policy said nothing about the option to sue the insurer. Lacking an *effective* two-year provision, the old policy form was held to permit an action to be brought within six years of denial of benefits.

2. (§17.41) Written Proof of Claim

A UM policy may provide that written proof of claim, under oath if required, must be made “as soon as practicable.” The proof must contain “full particulars of the nature and extent of the injuries, treatment and other details entering into the determination of the amount payable.” ORS 742.504(5)(a). The proof must be made on forms furnished by the insurer unless the insurer fails to furnish forms within 15 days of receiving notice of the claim.

A claim form might contain a hospital and medical waiver, waiver on income records, and full information on money received by virtue of PIP payments, UM payments, workers’ compensation payments, disability benefits, and settlements. A claim form might also contain a reminder to cooperate in securing the reimbursement rights of the carrier and a report on the status of any litigation, since the insured must do whatever is proper to secure the reimbursement rights of the carrier. ORS 742.504(11)(d).

It is not necessarily easy to fault the insured for missing information. In *General Acc. Fire and Life v. Shasky*, 266 Or 312, 512 P2d 987 (1973), the policy required that proof of claim be made as soon as practicable, like today’s statute. The insured promptly notified the insurer that he had been involved in an accident, but there was no provision in the form for any inquiry concerning uninsured motorists. The insured did not know of the uninsured status of the tortfeasor for several years. The court held that, because the insurer contended it was not responsible due to lack of prompt notice, the insurer had the burden of proving “that the

insured either knew or had reason to know, a substantial period of time prior to his giving notice . . . that [the tortfeasor] lacked coverage.” *General Acc. Fire and Life v. Shasky, supra*, 266 Or at 321.

UM claimants may now contend that, in order to deny coverage, the insurer must show that it was prejudiced by the delay in filing a late notice of claim, because the requirement for a timely proof of loss will be seen as a invoke a “condition of forfeiture.” See *Federated Service Ins. Co. v. Granados*, 133 Or App 5, 889 P2d 1312 (1995) (prejudice must be shown from failure to secure insurer’s consent to settlement).

If the insurer has failed to specify and provide a form, then the demand letter from the claimant’s attorney may serve as the proof of loss. In *Mosley v. Allstate Ins. Co.* 165 Or App 304, 996 P2d 513 (2000), the demand letter declared that the claimants were medically stationary, contained a demand for a sum certain, and enclosed medical records. The insurer protested that it lacked information needed to assess the claim at least until after the claimants gave recorded statements. Be that as it may, the attorney’s letter still sufficed as a proof of loss under the UM statute. Consequently, the insurer’s tender of payment came outside the six month period within which to make an offer to avoid paying the claimants’ attorney fees under ORS 742.061.

3. (§17.42) General Duty to Comply with the Policy

Oregon’s statute permits a UM policy to provide as a condition precedent to a claim that the insured fully complies with all the terms of the policy. ORS 742.504(8). This duty is enforceable as long as the terms of the policy are not less favorable than the statute to the insured. ORS 742.504 (introductory paragraph).

4. (§17.43) Litigation or Settlement With the Tortfeasor

A policy may provide that if, before the UM/UIM insurer makes payment, the insured brings any legal action for bodily injury against anyone legally responsible for the use of a vehicle involved in the accident, a copy of the summons and complaint or other process served must be forwarded immediately to the insurer. ORS 742.504(6). The insurer’s consent to the *filing* of the action is not required, but no judgment in the action is binding between the insured and the insurer on the issues of liability or damages. ORS 742.504(1)(b). The statute, however, does not work both ways. A judgment *against* the insured in the tort claim against the tortfeasor *is* preclusive in a later claim by the insured against the UM/UIM insurer. *Safeco v. Laskey*, 162 Or 1, 985 P2d 878 (1999).

In the event the insured settles with or prosecutes to judgment without the insurer’s written consent any action against any person or organization who may be legally liable, the UM coverage may be voided if the policy so provides. ORS 742.504(4)(a).

Settlement with the underinsured motorist is similar. For accidents occurring under policies issued or renewed after October 4, 1997, the insured claimant must exhaust the underinsured motorist's liability limits before bringing a claim against the insured's UIM insurer. ORS 742.504(4)(d). The UIM insurer, of course, must include an exhaustion clause in its policy in order to force the insured claimant to make demand against the tortfeasor first. An accident occurring under a policy issued or renewed on or before October 4, 1997, could give rise to a direct action against the UIM insurer without a requirement to make or enforce a claim against the tortfeasor. *Vega v. Farmers Ins. Co.*, 323 Or 291, 918 P2d 95 (1996).

Oregon's statute liberalizes the concept of exhaustion of the liability proceeds by providing several variations in the UIM scenario. Among them, the limits may be exhausted by payment either to the injured person or to others recovering against the same liability policy. An individual claimant need not recover all the liability proceeds personally when others take the balance of the liability limits. ORS 742.504(4)(d)(A).

The liability limits will also be deemed exhausted if the UIM carrier frustrates the settlement by refusing consent to a full-limits offer from the tortfeasor and if the injured claimant protects the UIM carrier's subrogation potential by refusing to give the tortfeasor a release. ORS 742.504(4)(d)(B). In this situation, no liability dollars will actually be paid but the claimant can proceed directly against the UIM carrier for the first dollar's value of an injury. ORS 742.504(7)(e).

The liability limits will also be deemed exhausted if the tortfeasor makes a settlement offer that is less than the liability limits if the injured claimant gives the UIM insurer a credit for the unpaid balance of the liability limits and the UIM insurer consents to the short settlement. ORS 742.504(4)(d)(C). The injured claimant cannot collect the credit for unpaid liability proceeds from the UIM insurer. ORS 742.504(7)(e).

Lastly, the liability limits will also be deemed exhausted if the tortfeasor makes a settlement offer that is less than the liability limits, to which the UIM insurer refuses consent, if the injured claimant gives a credit for the unrealized portion of the liability limits and protects the UIM insurer's subrogation limit by refraining from giving the tortfeasor a release. ORS 742.504(4)(d)(D). The claimant can bring a direct action against the UIM insurer to recover the first dollar's value of the injury but cannot recover the amount of the credit for the short settlement offer. ORS 742.504(7)(e).

If joint or concurrent acts of persons other than the uninsured motorist cause the insured's injuries, the insured may elect to claim UM benefits for the acts of the uninsured motorist or, in the alternative, with the written consent of the insurer, the insured may proceed with legal action against any or all possible parties. ORS 742.504(11)(c).

A joint tortfeasor who is insured cannot claim as an offset amounts paid to the insured plaintiff under the plaintiff's UM coverage. *See Shore v. Livengood*, 234 Or 280, 282, 381 P2d 492 (1963).

5. (§17.44) Insurer's Right to Discovery

The insured must submit to physical examinations by physicians selected by the insurer upon reasonable request of and at the expense of the insurer. ORS 742.504(5)(b). The insured must execute requested authorization to enable the insurer to obtain medical reports and copies of records upon request of and at the expense of the insurer. ORS 742.504(5)(b). A claimant must submit to examinations under oath by any person named by the insurer as often as reasonably required. ORS 742.504(5)(a).

6. (§17.45) Attorney Fees

The claimant cannot recover attorney fees in contractual arbitration of a UM/UIM claim. ORS 742.504(10). Nor can the claimant recover attorney fees in contract-based arbitration of PIP. ORS 742.522(2). Even so, the permitted disclaimer of any fee entitlement should be checked in each policy. After all, the statute is only a model set of provisions, and a policy must provide that there are no fees in arbitration. *See generally Vega v. Farmers Ins. Co.*, 323 Or 291, 918 P2d 95 (1996) (only a minimum model policy).

If it does not rule out fees, then ORS 742.061 may present a prospect for recovery of fees. As a general rule, a person making a claim on an insurance policy has a potential to recover fees. *Foles v. U.S. Fidelity & Guaranty Co.*, 359 Or 337, 486 P2d 537 (1971). In a suit on an insurance policy for a money judgment, the insured person is entitled to recover attorney fees from the insurer if the insured person recovers more in judgment than the insurer tendered within six months of a proof of loss. ORS 742.061; *Dockins v. State Farm Ins. Co.*, 329 Or 20, 985 P2d 796 (1999).

Under 1999 legislation, the insured has no such right to attorney fees if, in a UM/UIM claim, the insurer, within six month of the proof of loss, accepts coverage in writing; the only issues are the amount of benefits owing and the fault of the tortfeasor; and the insurer has consented to submit the case to binding arbitration. ORS 742.061(3). The statute does not seem to require mutual agreement to arbitrate, but seemingly the insurer's *consent* to arbitrate. Many insurers do promptly send a letter expressing their willingness to cooperate in binding arbitration on the traditional issues. An insured who then chooses to litigate a direct action in court, rather than arbitrate, may well *not* be entitled to attorney fees. *See* ORS 742.062(3).

CAVEAT: It is unclear from the statutory text whether the word "consent" means that the insurer accepts a claimant's offer to arbitrate. That is to say, it is

unclear whether the insurer's unilateral and unsolicited offer to arbitrate would suffice as "consent" under ORS 742.061(3)(b), since arbitration now presupposes two willing participants, and the claim might still be litigated in court. (See § 17.46 *infra*) Litigants may wish to check 1999 legislative history before staking too much on a first impression of the statute. *Cf.* ORS 174.020 (amended 2001 Or Laws ch 438 § 1; permitting a party to offer legislative history rather than relying on text or context alone).

Although perhaps less clear after the 1999 amendment, a claimant could proceed to arbitration without attorney fees and could still recover attorney fees when the matter moved into court. If the claimant and insurer disputed the entry of a judgment on the arbitration award, including disputes over offsets necessary to calculate that judgment, then the proceedings in court have been found to justify an award of attorney fees. *Wick v. Viking Ins. Co.*, 105 Or App 33, 803 P2d 1199 (1990).

Court-annexed arbitration is merely a substitute for court action. If the claimant would have had a right to attorney fees in court, then the claimant has a right to attorney fees in court-annexed arbitration. *Douglass v. Allstate Ins. Co.*, 152 Or App 216, 953 P2d 770 (1998).

Appeals from court-annexed arbitration could bring surprises. If an insured appealed an arbitration decision in the hope of a better result in a jury trial, the insured may owe the insurer's attorney fees for the trial that produces no better outcome. In *Wright v. Professional Services Industries, Inc.*, 153 Or App 102, 956 P2d 230, rev. denied, 327 Or 317 (1998), the court combined a one-sided fee statute on wage claims (ORS 652.200), which provides fees only to prevailing employees, with a statute on unsuccessful appeals from court-annexed arbitration (ORS 36.425(4)), and determined that the employee owed the employer's attorney fees for the trial, at which the employee fared no better. The same analysis may apply to the one-sided fee statute on claims against insurers. *Cf.* ORS 742.061 *with* 36.425(4). The results could be particularly surprising if the insured prevailed before the court's arbitrator, was entitled to fees under ORS 742.061, decided to appeal *de novo* for a jury trial, won the trial, but won no larger verdict. Although the insured would still recover damages in an insurance claim, ORS 36.425(4) would deny the insured even the attorney fees incurred through the arbitration, while imposing the insurer's fees after the arbitration. *See Wright v. Professional Services Industries, Inc., supra.*

Even when ORS 742.061 seems to promise an entitlement to attorney fees, the parties should also beware of the "near-miss" tender of settlement. Generally speaking, when fixing the amount of fees, the trial court may consider the reasonableness of a party's rejection of an opponent's settlement offer, which was *less* than the eventual recovery. An objectively unreasonable failure to accept a lesser settlement justified reduction of fees in a construction dispute from \$31,926 to \$10,000. *Erwin v. Tetreault*, 155 Or App 205, 964 P2d 277 (1998).

If the UIM insurer made a tender larger than the award, albeit after six months from the proof of loss, but less than 10 days before trial, and did so while offering to pay attorney fees to the date of the offer, then ORCP 54 E should terminate attorney fees incurred *after* the offer. When making belated offers of judgment, insurers should be careful to describe the tendered figure separate from “reasonable attorney fees” to date, which could be in an additional sum to be determined by the court. *See For Counsel, Inc. v. Northwest Web Co.*, 329 Or 246, 985 P2d 1277 (1999) (terminating attorney fees at date of declined offer when fees plus judgment together failed to exceed offer that included fees).

F. Arbitration

1. (§17.46) Requirement of Arbitration

After a 1997 amendment, arbitration is binding if the parties agree to arbitrate at the time of the claim. ORS 742.504(10). The amendment ended gamesmanship that had surrounded a party’s demand for arbitration. Prior to that time, arbitration was binding on the party who requested it, but was not binding on the party who interposed a right to a jury trial. *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 744 P2d 992 (1987); *Lind v. Allstate Ins. Co.*, 134 Or App 395, 895 P2d 327 (1995). And yet, arbitration was binding if both parties voluntarily proceeded to arbitrate without an objection. *Carrier v. Hicks*, 316 Or 341, 352–353, 851 P2d 581 (1993). Today, arbitration is simply a voluntary and mutual decision at the time of the claim. A form contract cannot mandate arbitration.

2. (§17.47) Scope of Arbitration

While ORS 742.504(10) refers to arbitrating liability and damages, the parties by agreement may broaden the scope of arbitration. Failure to object to a broader scope ordinarily constitutes a waiver. Without a waiver, questions whether there is an arbitrable dispute, whether the insured complied with conditions precedent in the policy, whether the claimant was an “insured,” whether the other owner or operator was an “uninsured motorist,” whether the vehicle was an “uninsured motor vehicle,” and whether the policy was in force and effect are ordinarily questions for litigation. This list is not exclusive.

Sometimes, the insurance policy contains a broader provision regarding what must be arbitrated. A broader provision would not be binding on the insured, but an objection is ordinarily deemed waived unless timely raised. In *Fawver v. Allstate Ins. Co.*, 267 Or 292, 516 P2d 743 (1973), the policy provided that all matters of disagreement would go to arbitration if the insured demanded arbitration. The insured, by demanding arbitration, submitted the question whether the vehicle was a phantom vehicle to the arbitrator and could not object to the decision.

Nonetheless, most insurance contracts provide for particular arbitration clauses rather than general arbitration clauses. Particular arbitration clauses contemplate arbitration of specific matters rather than all matters relating to the contract. *See Murtaugh v. American States Insurance Company*, 187 NE2d 518, 520 (Ohio App 1963). That is, most policies conform to the statute. The UM statute speaks of arbitrating the specific questions of (1) the negligence of the tortfeasor and (2) the damages recoverable from the tortfeasor. ORS 742.504(1)(a). Therefore, arbitration determines the extent of fault and the extent of injury. Arbitration should not determine whether a higher UM coverage limit was elected, which of two insurers might have coverage under their respective policies, or what conditions of coverage or forfeiture might apply to the case. *See Russell v. World Famous, Inc.*, 94 Or App 748, 751, 767 P2d 456 (1989) (commercial arbitrator not to determine other issues when charge is to determine “the amount of damages”); *Kentner v. Gulf Ins. Co.*, 66 Or App 15, 673 P2d 1354, *aff’d*, 298 Or 69 (1983) (determining which insurer was “responsible”—had coverage—was not within scope of fire loss appraisal). *See also Hartford Accident v. Novak*, 83 Wash2d 576, 586, 520 P2d 1368 (1974) (“authorities are uniform that the question of coverage is not an issue for arbitration”); *State Farm Fire & Cas. Co. v. Glass*, 421 So2d 759 (Fla App 1982) (UM coverage for court, not arbitrator); *Flood v. Country Mutual Insurance Company*, 242 NE2d 149, 151 (Ill 1968) (“vast majority” of jurisdictions hold arbitration is limited to fault and damages).

3. (§17.48) Procedure for Arbitration

Arbitration will take place “under the arbitration laws of the State of Oregon and any judgment upon the award . . . may be entered in any court having jurisdiction.” ORS 742.504(10). The cost to the insured of the proceeding must not exceed \$100, excluding attorney fees or expenses incurred in producing evidence or witnesses or making transcripts of the arbitration proceedings. At the election of the insured, the arbitration must be held either in the county where the insured resides, or where the cause of action against the uninsured motorist arose, or at any other place mutually agreed to by the insured and the insurer.

Various insurance policies provide different methods for choosing arbitrators. Some policies provide for one arbitrator; some provide that each party chooses one and the two chosen select a third; some provide for arbitration according to the rules of the American Arbitration Association. ORS 36.305 provides that a provision in a written contract regarding arbitration, provided the arbitration is held within Oregon, is valid, irrevocable, and enforceable. Under ORS 36.320, if the policy makes no provision for selecting the arbitrator or arbitrators or for filling a vacancy, then any party can apply to a court of record to appoint an arbitrator or arbitrators to act as if specifically named in the agreement. Unless otherwise provided in the insurance contract, the arbitration is by a single arbitrator. ORS 36.320. The power of arbitrators is very broad, including the power to compel attendance of witnesses,

to enforce production of documents, to administer oaths or affirmations, to adjourn, and to decide both the law and the facts involved. ORS 36.335.

The parties are bound by the award. Because of the broad power given to arbitrators in Oregon, judicial review of an arbitration award is strictly limited. *Brewer v. Allstate Insurance Co.*, 248 Or 558, 562-563, 436 P2d 547 (1968). This is so even though the court may not agree with the arbitrator's decision on the law. See ORS 36.355-36.365.

4. (§17.49) Consolidated Arbitration of Multiple Claims

An accident may involve several injured parties, with the tortfeasors' liability coverage inadequate to cover all the damages. UM coverage may be available to some of the injured parties. The claimants' race to the courthouse for the available liability coverage results in multiple litigation and extensive out-of-pocket expense and delay. In such a situation an arbitration agreement can sometimes be worked out whereby the policy limits are offered, any contributions by the tortfeasor are agreed upon and offered, and all parties agree to arbitrate the value of their cases and the method of payment. The agreement to arbitrate should include the following:

(1) *Agreed Statement of Facts:* The parties should stipulate to undisputed facts, including insurance coverages, contributions to be made by tortfeasors, PIP payments made, claims made, litigation filed, partial settlements made on covenants, complete settlements made on the basis of a release, and the like.

(2) *Agreed Procedure in Arbitration:* The arbitrator should be named. Upon the decision of the arbitrator on all issues, any litigation should be dismissed with prejudice and without costs, releases to the tortfeasors should be delivered, and any money deposited should be disbursed. Because of the danger of delay, statutes of limitations for all claims described should be waived and the claims merged into the agreement. Before arbitration, full discovery should be conducted promptly with all contentions and exhibits (bills, medical reports, policy reports, and the like) submitted to all counsel. The rules of arbitration should be set forth, including uniform arbitration rules of the appropriate county as may be agreed upon.

(3) *Issues to Be Determined by the Arbitrator:* The arbitrator should be asked to determine liability and coverage issues and valuation of claims. Parties to the agreement include all involved insurance companies, all tortfeasors, and all claimants. Attorneys for all parties should sign the document approving it as to form.

Inasmuch as any eventual UM claims will either be settled or be determined by arbitration, the claimant's attorneys are generally amenable to this economical procedure. The awards made are paid first by the liability carrier or carriers within appropriate limits and

then by the agreed-upon contribution of the tortfeasors. Any excess award, within limits and with appropriate offsets, is paid by the UM carriers.

III. UNDERINSURED MOTORIST BENEFITS

A. (§17.50) Historical Development

The development of Oregon's law on underinsured motorist coverage has an uncanny parallel to the development of uninsured motorist coverage. In 1959, the first UM statute was a bare-bones enactment only four paragraphs long. 1959 Or Laws ch 423, §1. Lacking suggested policy language, the statute left many coverage questions unanswered. As a result, questions about mandatory coverage were "frequently litigated." *Lund v. Mission Ins. Co.*, 270 Or 461, 464, 528 P2d 78 (1974). In 1967, the legislature responded by enacting a set of minimum UM coverage provisions. 1967 Or Laws ch 482, §§1-3. Although the 1967 provisions are as rusty as an old car, mandatory terms of UM coverage can now be found in ORS 742.500 to 742.504.

In 1981, the legislature added underinsured motorist coverage with a bare bones requirement reminiscent of the 1959 enactment of uninsured motorist coverage. Coverage terms were not detailed. The first UIM enactment required that an insurance agent make an offer of UIM coverage along with UM coverage in amounts up to the amounts of the insured's liability coverage. 1981 Or Laws ch 586, §1. The requirement that the insurer must make such an offer of UM and UIM coverage led to recurrent litigation over whether the offer had been made, made adequately, or made often enough. *See White v. Safeco Insurance Co.*, 68 Or App 11, 15, 680 P2d 700, *rev. denied*, 297 Or 492 (1984); *Blizzard v. State Farm Automobile Ins. Co.*, 86 Or App 56, 58, 738 P2d 983, *rev. denied*, 304 Or 149 (1987); *Zuber v. Safeco Ins. Co.*, 96 Or App 596, 773 P2d 800 (1989); *Merkhofer v. Safeco Ins. Co.*, 95 Or App 340, 342 n 3, 769 P2d 232, *rev. denied*, 308 Or 142 (1989); *Wood v. State Farm Mutual Automobile Ins. Co.*, 100 Or App 576, 787 P2d 504, *rev. denied*, 310 Or 133 (1990); *Pierce v. Allstate Ins. Co.*, 112 Or App 530, 829 P2d 1032, *rev. allowed*, 314 Or 391 (1992); *Beck v. Powell*, 113 Or App 318, 832 P2d 1254, *rev. denied*, 314 Or 175 (1992).

B. (§17.51) UIM Offer, Limits, and Meaning

In 1993, the legislature responded by reversing the consumer's choice. The legislature revised ORS 742.502 so as to require that UM/UIM coverage must be equal to the insured's own liability limits, which are often higher than the minimum limits, unless the insured signs a written statement electing lower UM/UIM limits. ORS 742.502(2)(b); 1993 Or Laws ch 709, §11. The insured must be given information about the coverage and the price for the coverage, and the statement remains in force, presumably from policy period to policy period, until the statement is rescinded. *Id.*

Today's UIM law still carries forward two elemental provisions from the 1981 enactment. First, the nearest thing to an insuring clause or a definition of UIM is the concluding sentence in ORS 742.502(2)(a) which provides, "Underinsurance benefits shall be equal to uninsured motorist coverage benefits less the amount recovered from other automobile liability insurance policies." *See also* ORS 742.502(3) (parallel language). The preceding sentence, which states that UM coverage larger than the required minimum limits must include UIM coverage, is merely a remnant of the same sentence that had once required offers of higher UM to include UIM. The remnant sentence was not and is not a definition of UIM itself. Second, the 1981 enactment tacked UIM coverage onto UM coverage with the blithe directive, "Underinsurance coverage shall be subject to ORS 742.504." ORS 742.502(4). Taken together, the collective implication of the two 1981 provisions is that UIM coverage is included within UM coverage.

Although ORS 742.502(4) points to ORS 742.504 as containing UIM terms, the reference is imperfect. It is apparent, for example, that the insuring clause for UM coverage found at ORS 742.504(1)(a) is not literally the insuring clause for UIM coverage. The UM insuring clause refers to the amount the UM insurer must pay by reference to the amount that the injured person could recover from the owner or operator of an "uninsured motor vehicle." ORS 742.504(1)(a) & (2)(d). It does not refer to an "underinsured motor vehicle." Consequently, the meaning of UIM must be found in ORS 742.502(a) and (3) with reference to the amount that could be recovered "less the amount recovered from other automobile liability policies."

Like ORS 742.502(4) and ORS 742.504, the preceding sections 17.16-17.49 on UM coverage will apply generally to UIM coverage. The important differences between the two coverages are twofold: (1) UIM benefits are not barred by the fact that the tortfeasor has required liability policy; and (2) UIM benefits will be reduced only by the amount "recovered" from other automobile liability insurance policies.

C. (§17.52) "Less the Amount Recovered"

Until amendments in 1997, the statute described underinsurance with reference to a tortfeasor's vehicle that is "insured for an amount that is less" than the injured person's UIM coverage. Former ORS 742.502(2)(a), (3). Until 1997, the threshold UIM question was a question of comparing two policies' limits. If the tortfeasor's liability limits on paper matched the injured person's UIM limits, then the other car was not "underinsured" even if a part of those liability limits were paid to another injured person. *Shisler v. Fireman's Fund Ins. Co.*, 87 Or App 109, 741 P2d 529 (1987). If the tortfeasor's liability limits on paper exceeded the injured person's UIM limits, then the other car was not "underinsured," even if the injured person recovered less than the UIM limits. *Dasteur v. American Economy Ins. Co.*, 127 Or App 686, 874 P2d 85 (1994).

As a result of the 1997 amendments, the legislature repaired the gap in UIM coverage that occurred when multiple parties divide liability limits but are denied UIM benefits because the limits match. To determine whether the tortfeasor is underinsured, the comparison is now between the UIM limit and the amount recovered by the injured claimant. ORS 742.502(2)(a). For example, a UIM policy on a family might provide only \$50,000 per person or \$100,000 per accident, matching the tortfeasor's liability limits in the same amounts, and frustrating UIM benefits under prior law. Under current law, if three persons divide the liability limits at \$33,333 each, then each would recover \$16,666 in UIM benefits, the difference between their recovery from the tortfeasor and their UIM limit. *See Takano v. Farmers Ins. Co.*, 184 Or App 479, 56 P3d 491 (2002) *review denied* 335 Or 195 (2003); *see also* DeVore, "Vega and SB 645," 34 *Willamette L. Rev.* 327 (Spring 1998).

The "amount recovered" is defined in detail to include PIP benefits paid or reimbursed on behalf of the injured claimant. The "amount recovered" represents the gross amount that the liability policy pays for the injured person's injuries. The "amount recovered" is not the net new dollars in the injured person's pocket. It is not the net recovery to the claimant after deduction of the attorney's contingent fee. ORS 742.502(5).

As before, if the liability insurer deducts a portion of its limits for PIP reimbursement to an injured person's PIP and UIM insurer, while paying the injured person only the net balance of liability limits, the deduction for PIP reimbursement does not render the tortfeasor "underinsured." *Yokum v. Farmers Ins. Co.*, 117 Or App 546, 844 P2d 937 (1992); ORS 742.502(5). Although the liability insurer reimburses PIP benefits to the injured person's insurer, the injured person has still received a full benefit from the liability policy. PIP benefits had paid the injured person's medical bills and wage loss. The liability policy repays the PIP insurer's advance payment of those bills, and the person recovers the net balance of liability limits.

CAVEAT: After enactment of ORS 742.544 in 1993, PIP reimbursement as in the *Yokum* case may not occur except to the extent that insurance benefits exceed a plaintiff's economic losses. *See infra* §17.91.

YOKUM v. FARMERS INS. CO., 117 Or App 546, 844 P2d 937 (1992). Plaintiff suffered damages of \$125,000. The tortfeasor's insurer exhausted its \$50,000 limits by paying \$25,000 in PIP reimbursement to Farmers, plaintiff's insurer, and by paying \$25,000 to plaintiff. Plaintiff's UIM limit was \$100,000. Farmers paid plaintiff \$50,000 in UIM benefits. Plaintiff demanded \$25,000 more, effectively the amount of PIP reimbursement. The trial court granted summary judgment in favor of Farmers. *Held*: Affirmed. After quoting ORS 742.502(2), which provides that UIM is equal to UM coverage "less the amount recovered from other automobile liability policies," the court of appeals found that \$50,000 had been recovered from the liability policy. Plaintiff's UIM benefits were properly \$50,000.

D. (§17.53) The Combined Single Limit

Insured's Combined Single UIM Limit

The statute provides that the limits of coverage per person or per accident may be provided in the policy's declarations page. ORS 742.504(7)(a). The statute does not suggest how courts should evaluate liability or UM/UIM policies that provide a combined single limit for claims per person and per accident. When the UIM policy has the single limit that is above the statutory minimum, the court treats it as if it were two limits. A single UIM limit of \$300,000, for example, is a per-person limit of \$300,000 and a per-accident limit of \$300,000. In *Mutual of Enumclaw Ins. Co. v. Key*, 131 Or App 130, 132, 883 P2d 875 (1994), the claimants had a single-limit UIM policy of \$300,000. The tortfeasor was insured for \$100,000 per person and \$300,000 per accident. One claimant recovered \$100,000 from the liability limits. The other's claim was still pending. Both claimants contended that they were entitled to \$100,000 each from the tortfeasor, plus \$300,000 from their UIM insurer. The court of appeals held that a single-limit UIM policy of \$300,000 per accident remained the maximum UIM benefit, and it would be reduced by the liability proceeds. Liability and UIM limits would not be stacked.

Tortfeasor's Combined Single Liability Limit

The tortfeasor's combined single limit can be problematic, too. In *Windsor Ins. Co. v. Judd*, 321 Or 379, 898 P2d 761 (1995), the tortfeasor had a single liability limit of \$60,000 per person and per accident. Multiple claims were made against the liability policy, and the claimant's decedent recovered only \$32,000. Because the claimant's decedent had UIM coverage of \$50,000 per person and \$100,000 per accident, the claimant sought UIM benefits for the difference between \$32,000 and \$50,000. The Oregon Supreme Court held, in this multiple-injury setting, that the tortfeasor's vehicle was "underinsured" because its per-accident liability limit (\$60,000) was less than the decedent's per-accident UIM limit (\$100,000). UIM coverage was available, and the claimant was entitled to the difference between the per person limit (\$50,000) and the amount recovered (\$32,000). *Windsor Ins. Co. v. Judd, supra*, 321 Or at 387–389.

E. (§17.54) Exhaustion of the Tortfeasor's Liability Limits

In 1997, the legislature addressed the missing fundamental element of UIM coverage – something known as "the exhaustion clause." Standard policies include an exhaustion clause which made the premise for UIM coverage a requirement that the injured claimant exhaust the available liability limits of the underinsured motorist. The legislature's attention was prompted by the decision in *Vega v. Farmers Ins. Co.*, 323 Or 291, 918 P2d 95 (1996), which held that the absence of an exhaustion clause in the statute's model policy, ORS 742.504, meant that insurers could not include the clause in their policies. Contrary to

convention, claimants could sue their UIM insurers without first exhausting tortfeasors' liability coverage. *Vega v. Farmers Ins. Co., supra*, 323 Or at 303. The legislature responded by adding a clause to the statute to permit insurers to enforce the exhaustion provision in their policies. ORS 742.504(4)(d)(A). Claimants must now sue the underinsured motorist first.

Oregon's statute liberalizes the concept of exhaustion of the liability proceeds by providing several variations. As always, an injured claimant may exhaust the liability limits by recovering all the proceeds in settlement or on judgment. The limits may be exhausted by payment either to the injured person or to others recovering against the same liability policy. An individual claimant need not recover all the liability proceeds personally when others take the balance of the liability limits. ORS 742.504(4)(d)(A).

The liability limits will also be deemed exhausted if the UIM carrier frustrates the settlement by refusing consent to a full-limits offer from the tortfeasor and if the injured claimant protects the UIM carrier's subrogation potential by refusing to give the tortfeasor a release. ORS 742.504(4)(d)(B). In this situation, no liability dollars will actually be paid but the claimant can proceed directly against the UIM carrier for the first dollar's value of an injury. ORS 742.504(7)(e).

The liability limits will also be deemed exhausted if the tortfeasor makes a settlement offer that is less than the liability limits if the injured claimant gives the UIM insurer a credit for the unpaid balance of the liability limits and the UIM insurer consents to the short settlement. ORS 742.504(4)(d)(C). The injured claimant cannot collect the credit for unpaid liability proceeds from the UIM insurer. ORS 742.504(7)(e).

Last, the liability limits will also be deemed exhausted if the tortfeasor makes a settlement offer that is less than the liability limits, to which the UIM insurer refuses consent, if the injured claimant gives a credit for the unrealized portion of the liability limits and protects the UIM insurer's subrogation limit by refraining from giving the tortfeasor a release. ORS 742.504(4)(d)(D). The claimant can bring a direct action against the UIM insurer to recover the first dollar's value of the injury but cannot recover the amount of the credit for the short settlement offer. ORS 742.504(7)(e).

IV. SUBROGATION RIGHT OF INSURER

A. (§17.55) Trust Agreement

A claimant must hold in trust for the benefit of the insurer all rights of recovery to the extent a UM or UIM claim is made or paid. ORS 742.504(11)(b); *see also* ORS 742.504(11)(c). If the insurer makes a written request, the claimant must take, through any representative not in conflict of interest with the claimant designated by the insurer,

necessary or appropriate action to recover the UM payment. The action must be taken in the name of the claimant, but only to the extent of the payment made. If the claimant recovers the money, the insurer must be reimbursed for expenses, costs, and attorney fees it incurred. ORS 742.504(11)(e).

The claimant must execute and deliver to the insurer appropriate instruments and papers to secure the rights and obligations of the claimant and the insurer. ORS 742.504(11)(f). A form of trust agreement is generally used.

B. (§17.56) Enforcement of Reimbursement Right

Frequently a completely uninsured driver or a driver with minimum coverage has few assets subject to execution and little prospect of future assets. It may be scarcely worth the time and money of either the claimant or the insurer to pursue the uninsured or underinsured tortfeasor. When the tortfeasor has insurance but coverage is denied, the claimant generally will not pursue the tortfeasor or liability insurer, particularly if the claimant's UM or UIM benefits are reasonably satisfactory. The insurer, however, still has the right to pursue reimbursement. The insurer generally must act promptly, must obtain the cooperation of its insured, and must have a clear understanding with the insured as to the costs of litigation and entitlement to any proceeds.

PRACTICE TIP: A trust agreement is likewise ordinarily required upon payment of PIP benefits. Form 17-1 is a form devised by a prior author that has been found over a period of time to be generally acceptable to carriers, the insureds, and the insureds' lawyers.

The carrier has no right to reimbursement except "in the event of payment to any person under this coverage." ORS 742.504(11). It is generally not feasible for the carrier to institute litigation for reimbursement of a claim that has not been paid. Usually there would be a conflict of interest in pursuing reimbursement before payment because the carrier would be interested in showing that the claimant was not hurt as claimed, that it was the claimant's fault, or that it was not the fault of the uninsured motorist. There is also danger of the tortfeasor filing a counterclaim, which would further complicate the matter. If the claim conceded to be worth more than the coverage available and the liability is clear, then there might be no conflict of interest in the company pursuing its rights prior to payment. Under such circumstances, however, the company would probably already have paid its policy limit.

Under ORS 742.504(12)(c), if the insured formally institutes arbitration proceedings within two years from the date of accident, the proceedings will continue even if the insured has not filed litigation against the uninsured motorist. This places the carrier in a very bad position as far as reimbursement is concerned. The carrier should ordinarily urge the insured

to file litigation promptly, since the carrier is not bound by the results of the litigation. ORS 742.504(1)(b).

V. OPTIONAL COVERAGE FOR PROPERTY DAMAGE

A. (§17.57) Requirement of Availability

Every motor vehicle liability insurer must have for sale coverage for property damage to an insured vehicle caused by an uninsured vehicle. The coverage offered must be at least the amount prescribed to meet the requirements of ORS 806.070, presently \$10,000. The policy need not cover the first \$300 damage caused by a hit-and-run or phantom vehicle. In other cases the first \$200 damage need not be covered. The coverage “does not include loss of use.” ORS 742.510(3)(b).

B. (§17.58) Covered Motor Vehicles

As used in ORS 742.508-742-510, “covered motor vehicle” means a private passenger motor vehicle or a self-propelled mobile home owned by the named insured for which a premium has been paid for coverage. ORS 742.508(1). “Insured vehicle” means a motor vehicle described in the declarations for which a specific premium charge indicates that underinsured motorists coverage is afforded but shall not include a vehicle while used as a public or livery conveyance. ORS 742.508(2). “Private passenger motor vehicle” means a four-wheel passenger or station wagon type not more than 12 years old and not used as a public or livery conveyance and includes any other four-wheel motor vehicle of the utility, pickup body, sedan delivery, or panel truck type not used for wholesale or retail delivery. ORS 742.508(3).

There is a long definition for “uninsured vehicle” in ORS 742.508 using the same language as ORS 742.504(2)(d).

C. (§17.59) General Applicability of Other Parts of the UM Statutes

It must be assumed that the legislature intended the requirements for claims, procedure, arbitration, and reimbursement rights to apply to this additional coverage. Those matters are not spelled out in the statute. Coverage applies only to the amount of damages the insured may be legally entitled to recover. ORS 742.510(3)(a).

D. (§17.60) Coverage Is UM Only

Apparently, this statutorily optional property damage coverage is only UM coverage and is applicable only if there is no collectible property damage insurance or bond in at least the minimum limit, presently \$10,000.

EXAMPLE: Insured's Mercedes-Benz, valued at \$40,000, is totally destroyed by a tortfeasor having collectible property damage insurance or bond of \$10,000 only. The insured collects nothing on the UM coverage although paying a premium for \$40,000 coverage. If the tortfeasor had no collectible property damage insurance or bond, the insured would collect \$40,000 on the UM coverage.

If carriers wish to sell this coverage, they might be well advised to word their policies to make it UIM coverage.