## Special Focus: Insurance Law

# UIM Loss of Use and Diminished Value

*by Paul Veillon*

Your client had the foresight to purchase UIM coverage with the expectation that the insurance company would pay for collision repair, provide a rental, and cover diminished value. The at-fault driver would have to do that, right? You may discover that your client's UIM carrier, instead, limits benefits for loss of use and diminished value or excludes them altogether. Those exclusions and limitations are arguably improper, but prosecuting the claims can be expensive, time-consuming, and risky.

Most UIM policies define "property damage" to mean "physical damage to the insured vehicle, and no other form of property damage." RCW 48.22.030(2) permits that definition. Many insurance companies interpret that definition to mean they owe only for the cost of repair. State Farm and American Family generally resist paying rental reimbursement; Progressive normally limits the daily and aggregate rental benefit; and Safeco and Mutual of Enumclaw usually exclude diminished value under UIM.

Most UIM insuring agreements promise that the carrier will pay "damages" that your client is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of "property damage." Likewise, RCW 48.22.030(2) requires that the "coverage is provided . . . for the protection of persons insured [under UIM policies] who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom" (emphasis added).

The underinsured motorist statute is liberally construed to allow persons injured by financially irresponsible motorists to recover from their insurers those damages that they would be entitled to recover from responsible parties. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 560 (1994), *review denied*, 124 Wn.2d 1010, 879 P.2d 292. Courts require UIM coverage to provide broad protection; consequently, courts consider contract principles, public policy, and legislative intent when deciding UIM cases. *McIllwain v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 439, 136 P.3d 135 (2006), review denied, 159 Wn.2d 1020, 157 P.3d 404; *Cherry v. Truck Ins. Exchange*, 77 Wn. App. 557, 892 P.2d 768 (1995), review denied, 127 Wn.2d 1012.

The terms and conditions of the insured's contract with the UIM carrier must be consistent with the statute and cases construing it. *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 86, 794 P.2d 1259 (1990). An exclusion that limits coverage mandated by statute is void. Id. at 87 ("'[W]here the [UIM] endorsement does not provide protection to the extent mandated by the [UIM] statute, the offending portion of the policy is void and unenforceable.' *Britton [v. Safeco Ins. of Am.]*, 104 Wn.2d 518, 531, 707 P.2d 125 (1985) (invalidating disability setoff); see also *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 552-53, 707 P.2d 1319 (1985) (invalidating 'consent to settle' clause)").

UIM coverage should generally include benefits for diminished value and loss of use both under the insuring agreement and under RCW 48.22.030(2). The repair bill, indisputably covered, is not "physical damage to the insured motor vehicle." Rather, the repair bill is an economic damage caused by physical damage to the insured motor vehicle. So why wouldn't out-of-pocket rental expenses, another economic damage, likewise be compensable? Why wouldn't non-economic damages like loss of use and diminished value be compensable?

Out of pocket rental expenses are economic damages under RCW 4.56.250(1) and WPI 30.16. Your client may recover general damages for the loss of use of his or her vehicle damaged even though no rental car charges were actually incurred; reasonable rental rates for similar vehicles are sufficient evidence of the amount of such damages. *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962). Washington law also expressly recognizes that inherent diminished value is a direct, foreseeable, and proximate result of collision-related physical damage to a motor vehicle. *Moeller v. Farmers Ins. Co. of Washington*, 155 Wn. App. 133, 229 P.3d 857 (Div. II 2010), *aff'd* 169 Wn.2d 2001, 234 P.3d 1172, (2011).

The *Ibrahim* Court[1] recently held that an underinsured motorist carrier is not required to pay "stigma damages." Those damages are not "caused by" ongoing "physical damage to the insured vehicle" despite a proper repair to the best of human ability. "Diminished value," on the other hand, arises from unavoidable "physical damage to the insured vehicle" that cannot be repaired regardless of a body shop's best efforts. Where, even after repair, an insured's vehicle still has "physical damage," and the insured suffers "damage" "caused by" that "residual physical damage," Washington's UIM statute requires the carrier to pay benefits to make the insured whole.

Your client's UIM carrier arguably must include diminished value and loss of use. The UIM insuring agreement probably requires, and RCW 48.22.030 certainly requires, your client's UIM carrier to pay "damages" that your client is legally entitled to recover from the owner or operator of an underinsured motor vehicle "because of" "property damage," i.e., "because of" "physical damage to the insured motor vehicle." Inherent diminished value is depreciation resulting from residual physical damage. The definition of "property damage" in the Moeller policy was the same as the definition of "property damage" in RCW 48.22.030. The insurance policy in Moeller was interpreted to cover direct and foreseeable consequences of property damage, and your client's policy requires the carrier to cover the damages he sustained "because of" property damage. The same reasoning applies to loss of use damages: the collision and resulting physical damage to your client's vehicle is the proximate and only cause of their needing to rent a vehicle or their suffering without a vehicle for the duration of the repair or total loss settlement process. Your client's insurance company cannot, through its contract or its practice, exclude benefits mandated under the policy and/or the governing statute.

Enforcing the insurance company's obligations to your client is challenging. The Insurance Fair Conduct Act remedies, including treble damages and attorneys' fee shifting, give your client a greater opportunity to economically enforce the carrier's obligations in legal proceedings than he or she would have in a pure breach of contract suit where court filing fees and other case costs would likely overwhelm the relief sought.

[1] *Ibrahim v. AIU Ins. Co.*, 177 Wn. App. 504, 312 P.3d 998 (Div 1 No. 69554-1-1 November 4, 2013).

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