IN THE SUPREME COURT OF THE STATE OF OREGON

TRAVIS BATTEN,
Plaintiff

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant.

United States District Court for the District of Oregon
Case No. 319CV01200MC

ESTATE OF JOHN WESLEY COUNTS,
Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant.

United States District Court for the District of Oregon
Case No. 119CV01299CL

CESAR RIVERA,
Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant.

United States District Court for the District of Oregon
Case No. 319CV01325SI

LORI CHISHOLM,
Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant.

United States District Court for the District of Oregon
Case No. 319CV2027IM

SC S067887

DEFENDANT'S OPENING BRIEF with JOINT EXCERPT OF RECORD

Certified Question from the United States District Court, District of Oregon,
Honorable Marco Hernandez, Chief Judge

(litigant information on next page)

October 2020

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I. Introduction

This case is before this Court on a certified question from the United States District Court for the District of Oregon, the resolution of which is needed to resolve competing Motions for Summary Judgment in four pending cases. State Farm contends that its anti-stacking policy provisions are valid and enforceable under existing Oregon law.

II. Statement of the Case

A. Nature of Action and Relief Sought

These appeals each involve a breach of contract action concerning the amount of uninsured motorist ("UM") or underinsured motorist ("UIM") benefits available from multiple car policies issued by Defendant State Farm Mutual Automobile Insurance Company ("State Farm") that were in effect at the time of the subject motor-vehicle accidents in each case. The State Farm car policies in each case contained anti-stacking provisions that provided the UM or UIM limits in the multiple policies will not be added together to determine the most that will be paid. Instead, the anti-stacking provisions provided that the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the multiple policies.

Plaintiffs, on the other hand, are contending the anti-stacking provisions in the State Farm car policies are void and unenforceable. They want

to stack or add together the UM or UIM benefits available under each policy to determine the maximum amount payable. Plaintiffs are also each seeking their attorney fees pursuant to ORS 742.061(1).

State Farm responded to each action by filing a Counterclaim seeking declaratory relief that the UM/UIM anti-stacking provisions are valid and enforceable. State Farm contends that the maximum amount that may be paid as UM or UIM benefits, in each case, is limited to the single highest applicable limit provided by any one of the combined policies.

B. Nature of Judgment

No Judgment has been entered in these cases concerning the legal issue in dispute. The parties in each case jointly sought the United States District Court for the District of Oregon to certify the question presented to this Court after briefing was completed on competing Motions for Summary Judgment in each case. No hearing or trial has yet occurred concerning this issue in any of these cases.

C. Appellate Jurisdiction and Timeliness of Appeal

This Court has jurisdiction pursuant to ORS 28.200.

D. Question Presented on Appeal

This Court accepted the following certified question from the United States District Court for the District of Oregon:

/ / /

> Are anti-stacking provisions regarding uninsured and underinsured motorist coverage, such as the following provision in the State Farm motor-vehicle liability policies, enforceable under ORS 742.500 to 742.506?
>
> **If Other Uninsured Motor Vehicle Coverage of Any Kind Applies**
>
> 1. If Uninsured Motor Vehicle Bodily Injury Coverage and Property Damage provided by this policy and Uninsured Motor Vehicle Coverage of any kind provided by one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury*** or ***property damage***, then:
>   a. such Uninsured Motor Vehicle Coverage limits of such policies will not be added together to determine the most that may be paid; and
>   b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

E. Summary of Argument

This Court accepted the certified question in this case to address whether a clear and unambiguous provision in the State Farm car policies that states that, when multiple policies issued by State Farm to the same insured cover the same injury, the UM or UIM coverages will not be added together and the maximum amount that may be paid as UM or UIM benefits is the single highest applicable limit provided by any one of the combined policies.

The answer to this question is found in ORS 742.506, which controls how multiple policies interact to provide UM or UIM coverage. ORS 742.506 provides that if there is no repugnancy between the terms of multiple policies, then the policy language controls. There is no repugnancy between the policies in the cases involved in this appeal, so under ORS 742.506, the policy language controls to limit the maximum amount that may be paid to the single highest limit provided by any one of the combined policies.

The changes to the UM/UIM statutes enacted by the legislature with Senate Bill 411 did not address the issue in this case. The legislature was only concerned with stacking the UIM limit on top of the tortfeasor's liability limit. Senate Bill 411 was never intended to address the issue presented here: whether multiple UM or UIM coverages at the same level of coverage (primary-primary and excess-excess) stack on top of each other. Further, Senate Bill 411 did not change the mandate in ORS 742.506 that the policy language controls when there is no repugnancy between the policies.

The text and context of the UM/UIM statutes indicate that the legislature intended the terms of the policy to control the insurer's liability for all damages under multiple policies issued by the same insurer to the same insured. Both ORS 742.504(2)(j)(C) and 742.506 provide that the legislature intended the policy language to control, and nothing in Senate Bill 411 changes that conclusion. Because ORS 742.506 controls, and the legislature intended the

terms of the policy to control, this Court should affirmatively declare that the UM/UIM anti-stacking provisions in the State Farm car policies are enforceable under ORS 742.500 to 742.506 to limit the maximum amount that may be paid as UM or UIM benefits to the single highest applicable limit provided by any one of the policies.

F. Summary of Facts

The facts material to this appeal set forth below are undisputed. Each case involves a motor-vehicle accident that caused injury resulting in damages to Plaintiffs.[1] In *Batten*, Plaintiff Travis R. Batten was injured while occupying a non-owned vehicle.[2] In *Estate of Counts*, John Wesley Counts was injured as a pedestrian while riding his bicycle.[3] In *Rivera* and in *Chisholm*, Plaintiffs Cesar Rivera and Lori Chisholm were both injured as pedestrians while walking.[4] The tortfeasor in each case was underinsured (or uninsured in the case of Plaintiff Cesar Rivera), and Plaintiffs submitted UM or UIM claims

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[1] TCF, Plaintiff's Complaint, ¶ 4 at 2, Filed July 16, 2019, *Batten v. State Farm Mut. Auto. Ins. Co.*, D Or (319CV01200MC, Dkt. No. 1-2); TCF, Plaintiff's Amended Complaint, ¶ 3 at 1-2, Filed August 1, 2019, *Estate of Counts v. State Farm Mut. Auto. Ins. Co.*, D Or (119CV01299CL, Dkt. No. 1-3); TCF, Plaintiff's Complaint, ¶ 5 at 2, Filed July 26, 2019, *Rivera v. State Farm Mut. Auto. Ins. Co.*, D Or (319CV01325SI, Dkt. No. 1-2); and TCF, Plaintiff's Complaint, ¶ 4 at 2, Filed November 12, 2019, *Chisholm v. State Farm Mut. Auto. Ins. Co.*, D Or (319CV2027IM, Dkt. No. 1-2).

[2] TCF, Compl, ¶ 2 at 1, *Batten*.

[3] TCF, Am Compl, ¶ 3 at 1-2, *Estate of Counts*.

[4] TCF, Compl, ¶ 2 at 2, *Rivera*; and TCF, Compl, ¶ 2 at 1-2, *Chisholm*.

to State Farm.[5] In each case, Plaintiffs were insured under multiple policies for UM or UIM coverage, and sought the "stacked" UM or UIM limits of the policies.[6]

The State Farm car policies at issue in each case all contained a contractual provision that provides, when multiple car policies issued by State Farm to the same insured applied to the same injury, the maximum amount that may be paid as UM or UIM benefits to Plaintiffs was limited to the single highest applicable limit provided by any one of the policies.[7] By operation of these UM/UIM anti-stacking provisions, State Farm paid each Plaintiff the single highest applicable limit under one of the policies and denied any further UM or UIM benefits were owed under the remaining policies.[8]

Plaintiffs separately filed these actions in the Circuit Courts of

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[5] TCF, Compl, ¶ 5 at 2, *Batten*; TCF, Am Compl, ¶ 6 at 2, *Estate of Counts*; TCF, Compl, ¶ 3 at 2, *Rivera*; and TCF, Compl, ¶ 5 at 3, *Chisholm*.

[6] TCF, Defendant's Answer, Affirmative Defenses and Counterclaim to Complaint, ¶ 6 at 2, Filed August 14, 2019, *Batten* (Dkt. No. 3); TCF, Defendant's Answer, Affirmative Defenses and Counterclaim to Complaint, ¶ 6 at 3, Filed, August 27, 2019, *Estate of Counts* (Dkt. No. 5); TCF, Defendant's Answer, Affirmative Defenses and Counterclaim to Complaint, ¶ 6 at 3, Filed August 21, 2019, *Rivera* (Dkt. No. 2); and TCF, Defendant's Answer, Affirmative Defenses and Counterclaim to Complaint, ¶ 6 at 3, Filed December 20, 2019, *Chisholm* (Dkt. No. 3).

[7] TCF, Answer, ¶ 14 at 4, *Batten*; TCF, Answer, ¶ 12 at 5, *Estate of Counts*; TCF, Answer, ¶ 12 at 4-5, *Rivera*; and TCF, Answer, ¶ 13 at 4-5, *Chisholm*.

[8] TCF, Answer, ¶ 15 at 5, *Batten*; TCF, Decl. of Ralph C. Spooner in support of State Farm's Motion for Summary Judgment, ¶¶ 5-6 at 2, Filed January 17, 2020, *Estate of Counts* (Dkt. No. 15-1); TCF, Answer, ¶ 13 at 5, *Rivera*; and TCF, Answer, ¶ 14 at 5, *Chisholm*.

Oregon.[9] In each case State Farm removed the action to the United States District Court for the District Court of Oregon and filed a Counterclaim for Declaratory Relief asking the court to declare the UM/UIM anti-stacking provisions in the State Farm car policies enforceable under Oregon law.[10] After the parties briefed the issue in each case by filing competing Motions for Summary Judgment, the United States District Court for the District of Oregon certified the question presented in this appeal to this Court, which this Court accepted.

III. The UM/UIM anti-stacking provisions in the State Farm car policies are enforceable under ORS 742.500 to 742.506.

A. Preservation of Error

State Farm's arguments are preserved in its Motions for Summary Judgment, Responses to Plaintiffs' Motions for Summary Judgment, and its supporting Replies filed in each case.[11] State Farm moved for summary judgment against all claims asserted by Plaintiff and on State Farm's

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[9] TCF, Compl, *Batten*; TCF, Am Compl, *Estate of Counts*; TCF, Compl, *Rivera*; and TCF, Compl, *Chisholm*.

[10] TCF, Answer, ¶¶ 13-18 at 4-5, *Batten*; TCF, Answer, ¶¶ 10-16 at 4-6, *Estate of Counts*; TCF, Answer, ¶¶ 11-16 at 4-6, *Rivera*; and TCF, Answer, ¶ 13 at 4-5, *Chisholm*.

[11] TCF, Dkt Nos. 14, 20 and 22 in *Batten*; TCF, Dkt Nos. 15, 20 and 21 in *Estate of Counts*; TCF, Dkt Nos. 8, 12 and 13 in *Rivera*; and TCF, Dkt. Nos. 5, 12 and 13 in *Chisholm*.

Counterclaim for Declaratory Relief. State Farm argued that summary judgment was appropriate because the UM/UIM anti-stacking provisions in the State Farm car policies were enforceable under ORS 742.500 to 742.506 to limit the maximum amount that may be paid as UM or UIM benefits to each Plaintiff to the single highest applicable limit provided by any one of the combined policies, which State Farm already paid to each Plaintiff.

B. Standard of Review

On review of competing Motions for Summary Judgment, the Court analyzes whether there are any disputed issues of material fact and whether either party is entitled to judgment as a matter of law. *Portfolio Recovery Associates, LLC v. Sanders*, 366 Or 355, 357, 462 P3d 263 (2020). When, as in this case, the material facts are not in dispute, then the Court must determine which party has correctly applied the law to the undisputed facts. *See Powell v. Bunn*, 185 Or App 334, 340, 59 P3d 559 (2002), *rev den*, 336 Or 60 (2003).

C. Argument

1. ORS 742.506 requires the policy language to control.

ORS 742.506 controls the interaction of multiple UM or UIM policies, and specifically requires the policy language to control when the terms of all the policies involved are not repugnant to each other. ORS 742.506, which was not substantively amended by Senate Bill 411 (*see* Senate Bill 411,

Or Laws 2015, ch 5 § 6 (App-10)), is dispositive on this issue.

In interpreting statutes, Oregon courts follow the analytical framework discussed in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) and in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The Court first reviews the text and context of the statute, and then, if appropriate, the legislative history, followed by various cannons and maxims of statutory construction. *Dowell v. Oregon Mut. Ins. Co*., 361 Or 62, 67, 388 P3d 1050 (2017). The best evidence of what the legislature intended is always the text of the statute. *Gaines*, 346 Or at 171. The text of the statute is the only material the court can be sure the majority of the legislature approved. *Id.*

ORS 742.506 states that, in the UM/UIM context, insurance follows a primary/excess model as set forth by ORS 742.504(9). The statute also explicitly carves out that the policy ***shall*** control when the provisions of all policies are not repugnant. In this case, the UM/UIM anti-stacking provisions are identical in each policy and operate without repugnancy.

ORS 742.506 states as follows:

> Notwithstanding the contrary provisions of any policy, the provisions of ORS 742.504(9) shall control allocation of responsibility between insurers, **except if all policies potentially involved expressly allocate responsibility between insurers, or self-insurers,**

> **without repugnancy, then the terms of the policies shall control**.

(Emphasis added). The latter half of the statute explicitly states that if all policies operate without repugnancy, then the language of the policy shall control.

The UM/UIM anti-stacking provisions in the State Farm car policies state as follows:

> **If Other Uninsured Motor Vehicle Coverage of Any Kind Applies**
>
> 1. If Uninsured Motor Vehicle Bodily Injury and Property Damage Coverage provided by this policy and Uninsured Motor Vehicle Coverage of any kind provided by one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury*** or ***property damage***, then:
>   a. such Uninsured Motor Vehicle Coverage limits of such policies will not be added together to determine the most that may be paid; and
>   b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

ER 29 (underline emphasis added; bold/italic emphasis in original).[12] These

[12] All citations to the policy language are to the State Farm car policy numbering 274 2245-A12-37E, issued to Travis R. Batten to cover a 1978 Ford F150 in *Batten*, as provided at ER 1-62. The policy language at issue in each

contractual provisions operate unambiguously and without repugnancy to limit the maximum amount that may be paid as UM or UIM benefits to each Plaintiff under the State Farm car policies to the single highest applicable limit provided by any one of the policies. There is no reason that the mandate in ORS 742.506 that the policy terms shall control does not apply in these cases.

For instance, in *Erickson v. Farmers Ins. Co. of Oregon*, 331 Or 681, 683, 21 P3d 90 (2001), the plaintiff was injured in a motor-vehicle accident caused by an uninsured motorist while she was a passenger in a vehicle owned and driven by her ex-husband. Both plaintiff and her ex-husband were insured by separate insurance policies issued to them separately by the same insurer. *Id.* After striking exclusionary language in the plaintiff's policy that would have denied coverage while occupying any non-owned vehicle that had its own insurance, this Court effectively applied the second part of ORS 742.506 when holding that the pro rata language in both policies were not repugnant and permitted the UM coverages to stack. *Erickson*, 331 Or at 687.

This Court should, like in *Erickson*, apply the second part of ORS 742.506 because the UM/UIM anti-stacking provisions in the State Farm car policies contain no repugnancies as applied. Because ORS 742.506 controls, the UM/UIM anti-stacking provisions in the State Farm car policies are enforceable

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case is the same and does not substantially differ from the policy provided in the Excerpt of Record.

to limit the maximum amount that may be paid as UM or UIM benefits to the single highest applicable limit provided by any one of the policies.

2. Senate Bill 411 did not address this issue.

The legislature did not address this issue when enacting Senate Bill 411. Instead, the only impact of Senate Bill 411 is that ORS 742.504(9) is now irrelevant in deciding this issue.[13]

What Senate Bill 411 did was change the way UIM benefits were calculated from a "limits-limits" comparison to a "limits-damages" comparison. *See* Or Laws 2015, ch 5 §§ 1-3 (App-1-9). To accomplish this result, Senate Bill 411 redefined UIM coverage as the damages the insured is legally entitled to recover from the tortfeasor and that arise from the ownership, maintenance or use of an underinsured vehicle. *See* ORS 742.502(2)(a), as amended by Or Laws 2015, ch 5 § 2 (App-2). Prior to Senate Bill 411, an insured was only entitled to UIM benefits to the extent the UIM limit exceeded the tortfeasor's liability limit. *Vogelin v. American Family Mut. Ins. Co.*, 346 Or 490, 506, 213 P3d 1216 (2009). After Senate Bill 411, an insured is now entitled to "stack" the UIM limit on top of the tortfeasor's liability limit.

However, what Senate Bill 411 did not do was make any

[13] For the Court's convenience, the appendix contains the enrolled version of Senate Bill 411 (App-1-10), and ORS 742.504(9) as it existed both before (App-11) and after (App-12-13) the enactment of Senate Bill 411.

substantive changes to ORS 742.506 (*see* Or Laws 2015, ch 5 § 6 (App-10)), the statute that, as discussed previously, controls how multiple UM/UIM policies interact to provide coverage. Senate Bill 411 also did not make any changes to ORS 742.504(2)(j)(C) (*see* Or Laws 2015, ch 5 § 3, App-5), which limits the insurer's liability for all damages to the terms of the policy. Nothing in Senate Bill 411 altered the legislative intent that the policy language controls the interaction of multiple UM or UIM policies when the terms of those policies are not repugnant to each other.

The summary judgment memoranda contains references to various exhibits and copies of testimony provided by letter to the committees considering Senate Bill 411 prior to its enactment.[14] Stacking, in these materials, clearly referred to stacking the UIM limit on top of the tortfeasor's liability limit. Nowhere in any of these materials does stacking refer to what the Plaintiffs seek to accomplish here: the stacking of UM or UIM benefits from multiple policies issued by the same insurer to the same insured. Plaintiffs are unable to cite to anything contained in the legislative record that indicates that

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[14] TCF, Defendant State Farm's Reply in support of State Farm's Motion for Partial Summary Judgment at 6-7, Filed February 21, 2020, *Batten* (Dkt. No. 22); TCF, Defendant State Farm's Reply in support of State Farm's Motion for Summary Judgment at 5-7, Filed February 21, 2020, *Estate of Counts* (Dkt No. 21); TCF, Defendant State Farm's Reply in support of State Farm's Motion for Summary Judgment at 5-7, Filed February 21, 2020, *Rivera* (Dkt. No. 13); and TCF, Defendant State Farm's Reply in support of State Farm's Motion for Summary Judgment at 6-7, Filed February 21, 2020, *Chisholm* (Dkt. No. 13).

the legislature even contemplated this issue. Simply put, the legislature did not.

Previous decisions from the Court of Appeals upheld provisions similar to the UM/UIM anti-stacking provisions in the State Farm car policies as enforceable under former ORS 742.504(9)(a) and (b). *VanWormer v. Farmers Ins. Co.*, 171 Or App 450, 456, 15 P3d 612 (2000); and *Heffner v. Farmers Ins. Co. of Oregon*, 213 Or App 289, 295, 162 P3d 277, *rev den*, 343 Or 555 (2007). Senate Bill 411 removed that language from the statute. *See* Or Laws 2015, ch 5 § 3 (App-7-8). However, the removal of the particular language relied upon by the courts in *Heffner* and in *VanWormer* does not render the UM/UIM anti-stacking provisions at issue here unenforceable. Instead, the changes by Senate Bill 411 merely render ORS 742.504(9) irrelevant in deciding this issue.

Before Senate Bill 411, former subsection (9)(b) governed the interaction of multiple policies when like coverages collided (primary-primary and excess-excess). *See* ORS 742.504(9) (2013) (App-11). The "catch-all" nature of the provision also meant that it was the only provision in ORS 742.504 that governed the interaction of multiple policies when the insured sought UM or UIM coverage as a pedestrian. As explained by Judge DeVore in The Oregon Law Commission Braves Controversies in Auto Insurance, 44 Willamette Law Review 253, 262-63 (2007), former subsection (9)(b) was written to provide clarity that UM or UIM coverages at the same level of

coverage were combined proportionally.

The legislative record does not support that the legislature intended to mandate the stacking of multiple UM or UIM coverages at the same level of coverage when it removed former subsection (9)(b) from ORS 742.504. As introduced, the original bill only removed the anti-stacking language from former ORS 742.504(9)(b) (2013). *See* Senate Bill 411 as introduced at ER 70-71. The legislature left intact the pro rata language that, as previously discussed, operated to proportionally combine like UM or UIM coverages. Had the legislature enacted Senate Bill 411 as introduced, this language would have required multiple UM or UIM coverages at the same level of coverage to stack (or combine) proportionally up to the stated limit in the Declarations page of each policy. *See Erickson v. Farmers Ins. Co. of Oregon*, 331 Or 681, 687, 21 P3d 90 (2001) (holding that pro rata language in the applicable policies allowed the UM coverages to stack). However, that is not what the legislature decided to do.

Instead, the legislature amended the original bill in committee with the Dash 1 amendment. Rather than leave in the pro rata language that specifically dealt with this issue, the Dash 1 amendment completely removed former subsection (9)(b) from ORS 742.504. *See* Dash 1 amendment at ER 74, lines 13-15. Thus, by removing former subsection (9)(b) in its entirety, the legislature removed both the anti-stacking language that courts previously relied

upon to uphold anti-stacking provisions and the pro rata language that would have required the policies to stack absent the anti-stacking language.

This legislative action preventing the result sought by Plaintiffs is clear and unambiguous. There is no longer any provision in ORS 742.504 that governs how multiple policies at the same level of coverage (primary-primary or excess-excess) interact to provide UM or UIM coverage. There is also no longer any provision in ORS 742.504 that governs how multiple policies interact to provide UM or UIM coverage to insureds seeking coverage as pedestrians under multiple UM or UIM policies. Thus, the Court must look elsewhere to determine the legislature's intent.

3. The UM/UIM anti-stacking provisions in the State Farm car policies are enforceable under ORS 742.504.

State Farm paid, in each of these cases, the single highest applicable limit provided by any one of the policies, and because the relevant text and context of the UM/UIM statutes require the terms of the policies to control, the UM/UIM anti-stacking provisions in the State Farm car policies are enforceable under ORS 742.504.

To determine the enforceability of a provision for UM or UIM coverage, this Court compares the coverage provided by the policy against the coverage provided by a fictitious policy containing only the provisions set forth in ORS 742.504. *Vega v. Farmers Ins. Co. of Oregon*, 323 Or 291, 302, 918

P2d 95 (1996). This "fictitious policy" has been referred to by this Court as a comprehensive model UM or UIM policy. *Id.* at 300. If the coverage provided by the policy is neutral or more favorable than the coverage provided by the model UM or UIM policy, then the provision is enforceable. *Id.*

This framework is derived from the preamble of ORS 742.504 which states as follows:

> "Every policy required to provide the coverage specified in ORS 742.502 shall provide uninsured motorist coverage that in each instance is no less favorable in any respect to the insured or the beneficiary than if the following provisions were set forth in the policy. However, nothing contained in this section requires the insurer to reproduce in the policy the particular language of any of the following provisions:"

This preamble makes it clear that the statute calls for a comparison of the disputed provision to the coverage provided by the statute in its entirety. Nothing in ORS 742.504 requires the disputed provision to be "authorized" by a specific provision in ORS 742.504.

a. The UM/UIM coverage of the State Farm car policies is limited to the single highest applicable limit provided by any one of the combined policies.

Each State Farm car policy was purchased with the following contractual provision:

> **If Other Uninsured Motor Vehicle Coverage of Any Kind Applies**
> 1. If Uninsured Motor Vehicle Bodily Injury and Property Damage Coverage provided by this policy and Uninsured Motor Vehicle Coverage of any kind provided by one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury*** or ***property damage***, then:
>   a. such Uninsured Motor Vehicle Coverage limits of such policies will not be added together to determine the most that may be paid; and
>   b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

ER 29 (underline emphasis added; bold/italic emphasis in original). These provisions unambiguously limit the maximum amount of UM or UIM benefits that may be paid to each Plaintiff to the single highest applicable limit provided by any one of the policies. State Farm fulfilled its contractual obligation to each Plaintiff when it paid the single highest applicable limit provided by any one of the policies.

b. The legislature intended the policy language to control.

The relevant text and context of the UM/UIM statutes indicate that the legislature intended the policy language to control. The issue addressed by the UM/UIM anti-stacking provisions in the State Farm car policies is the interaction of multiple policies issued by the same insurer to the same insured.

The interaction of multiple insurance policies is addressed in ORS 742.504 at subsection (9). *See Erickson v. Farmers Ins. Co. of Oregon*, 331 Or 681, 685, 21 P3d 90 (2001) (identifying ORS 742.504(9) as the "other insurance" clause of ORS 742.504). However, as discussed previously, ORS 742.504(9) no longer addresses the issue presented here.

ORS 742.504(9)(a)(A) provides that the policy covering the occupied vehicle is primary, and subsection (9)(a)(B) provides that any other policy covering the occupant is excess to the vehicle's policy. ORS 742.504(9)(b) provides that the insured's personal policy is excess to any coverage provided to a vehicle used as a public or livery conveyance. No provision in ORS 742.504(9) addresses how multiple policies interact when the insured seeks UM or UIM coverage as a pedestrian under multiple policies, like in *Estate of Counts*, *Rivera*, and *Chisholm*. Further, no provision in ORS 742.504(9) addresses how multiple policies interact at the same level of coverage (primary-primary and excess-excess), such as, like in *Batten*, when an occupant of a non-owned vehicle seeks UM or UIM coverage under multiple excess policies.

Both *Vega* and ORS 742.504 require a comparison of the coverage afforded by the policy and the coverage afforded by the provisions of the model UM or UIM policy set forth in ORS 742.504. *Vega*, 323 Or at 299. Thus, to proceed with this analysis necessarily requires this Court to determine what

coverage the provisions of ORS 742.504 provides when the insured seeks UM or UIM coverage as a pedestrian under multiple policies, like in *Estate of Counts*, *Rivera*, and *Chisholm*, or when the insured seeks UM or UIM coverage under multiple excess policies, like in *Batten*.

Because the legislature removed the provision from ORS 742.504(9) that would have directly answered this question, the issue becomes one of statutory construction as to what the legislature intended. Having reviewed the text, the Court's next step is to analyze the context provided by other provisions of ORS 742.504 and other related statutes. *See Fresk v. Kraemer*, 337 Or 513, 520-21, 99 P3d 282 (2004) (stating that analyzing a statutes' context includes "other related statutes" and "the statutory framework within which the statute was enacted"). Both ORS 742.504(2)(j)(C) and 742.506 provide important context that the legislature intended the policy language to control this issue.

i. ORS 742.504(2)(j)(C) limits the "sums that the insured...is legally entitled to recover as damages" to the amount payable under the *terms of the policy*.

ORS 742.504(2)(j)(C) defines "sums that the insured...is legally entitled to recover as damages" as the amount of damages that:

/ / /

/ / /

> (C) Are no larger than benefits payable under *the terms of the policy* as provided in [ORS 742.504(7)].

(Emphasis added). The UM/UIM anti-stacking provisions at issue here are a term of each car policy that limits the amount payable under the policies to the single highest applicable limit. Because the "sums that the insured...is legally entitled to recover as damages" are subject to the terms of the policy, that would necessarily include the UM/UIM anti-stacking provisions at issue here.

Further, the reference to ORS 742.504(7) provides further context that the legislature intended the policy language to control. While ORS 742.504(7)(b)-(d) specifically refer to the "amount payable under the terms of this coverage" in the singular form, subsection (7)(a) makes no such reference to the amount payable under the terms of this coverage, and instead, subsection (7)(a) refers to the "insurer's liability for all damages" as stated in the "declarations." The legislature specifically referred to the insurer's liability for *all damages*. If the legislature wanted to limit the insurer's liability for just this particular policy, then the legislature would have used the term "this coverage" like in ORS 742.504(7)(b)-(d).

By the terms of ORS 742.504(2)(j)(C) and 742.504(7)(a), the legislature necessarily contemplated that "the insurer's liability for all damages" under multiple policies could be limited to the limit stated in the Declarations

page, similar to how the UM/UIM anti-stacking provisions in the State Farm car policies limit the amount payable to the single highest applicable limit. Thus, the UM/UIM anti-stacking provisions in the State Farm car policies should be enforceable.

ii. ORS 742.506 mandates that the policy terms control because there is no repugnancy between the applicable policies.

As set forth previously, ORS 742.506 mandates that the terms of the policy ***shall*** control when the provisions of all policies are not repugnant. The UM/UIM anti-stacking provisions in the State Farm car policies are identical in each policy and operate without repugnancy.

As discussed above, ORS 742.504 provides no direct answer with respect to how multiple policies interact to provide UM or UIM coverage at the same level of coverage (primary-primary or excess-excess) or when the insured seeks UM or UIM coverage as a pedestrian under multiple policies. ORS 742.506 provides that when multiple policies interact to provide UM or UIM coverage, the terms of the policies control as long as there is no repugnancy between the terms of all policies. In addition to controlling the outcome in this case, ORS 742.506 is an important textual clue that the legislature intended the terms of the policies to control when allocating responsibility among multiple policies as long as that language is not repugnant to each other.

Because ORS 742.506 controls and provides further context that

the legislature intended the policy language to control, the UM/UIM anti-stacking provisions in the State Farm car policies should be enforceable to limit the maximum amount that may be paid as UM or UIM benefits to the single highest applicable limit provided by any one of the policies.

IV. Conclusion

For the foregoing reasons, State Farm respectfully requests that this Court answer the certified question by declaring that the UM/UIM anti-stacking provisions in the State Farm car policies are enforceable under ORS 742.500 to 742.506 to limit the maximum amount payable as UM or UIM benefits to the single highest applicable limit provided by any one of the policies.

DATED this 16th day of October, 2020.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify this brief complies with the word-count limitation in ORAP 5.05, which word count is 5,432.

I certify that the size of the type in this brief is not smaller than 14 point for both text of the brief and footnotes.

DATED this 16th day of October, 2020.

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CERTIFICATE OF eFILING AND SERVICE

I hereby certify that I filed the foregoing **DEFENDANT'S OPENING BRIEF with JOINT EXCERPT OF RECORD** with the Appellate Court Administrator through the court's eFiling System on this date.

I hereby further certify that I served the foregoing **DEFENDANT'S OPENING BRIEF with JOINT EXCERPT OF RECORD** to the following participants in this case, who are registered users of the this court's eFiling system:

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through the court's e-Filing System and by e-mail at the participants' email address as recorded this date in the appellate eFiling system.

DATED this 16th day of October, 2020.

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