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NOTE

Underinsured Motorist Coverage Offsets: Plainly Stated or Inherently Ambiguous?

Owners Ins. Co. v. Craig, 514 S.W.3d 614 (Mo. 2017) (en banc)

*Kevin Buchanan**

I. INTRODUCTION

While forty-nine states and the District of Columbia require a certain level of automobile liability insurance to legally drive a car, not every car on the road is actually insured.¹ Furthermore, it is often the case that drivers cause accidents that result in damages far exceeding the level of insurance they carry.² To address these concerns, insurance companies offer uninsured motorist (“UM”) coverage policies and underinsured motorist (“UIM”) coverage policies.³ However, purchasers of these policies frequently run into problems when the policy falls short of providing coverage for the loss they suffered.

To illustrate, imagine that you purchase an insurance policy that provides UIM coverage with a limit of \$500,000. You are then involved in a car accident in which you suffer \$1,000,000 in damages. The at-fault driver also carries an insurance policy with a limit of \$500,000. You would expect that the at-fault driver’s policy in addition to your UIM coverage would take care of all of your damages. However, due to a short provision in your policy, your insurance company deducts the at-fault driver’s payment from what he has to pay you. Therefore, your insurance company pays you \$0, and you are left with \$500,000 in uncompensated damages even though you were under the impression that the UIM coverage you paid for would protect you under these circumstances.

The policy provision that insurance companies use to accomplish this deduction is called a “coverage offset.” In most cases, courts have chosen not to enforce coverage offsets that deduct from the policy limit. However, in *Owners Insurance Co. v. Craig*, the Missouri Court of Appeals, Southern District,

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1. See *Background on: Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Feb. 2, 2018), <https://www.iii.org/article/background-on-compulsory-auto-uninsured-motorists>; see also *infra* Part III.B.

2. See *infra* Part III.B.

3. See *infra* Part III.B.

went a different direction by enforcing such an offset.⁴ In opposition to the previous decisions by the Missouri Court of Appeals and the Supreme Court of Missouri, the court found the offset provision of an insurance policy to be unambiguous and, therefore, enforceable.⁵ The case was then transferred by the Southern District to the Supreme Court of Missouri.⁶ The Supreme Court of Missouri agreed with the Southern District and enforced the offset.⁷

Part II of this Note looks at the facts and holding of *Craig*. Part III examines some of the main principles of insurance policy interpretation and the purposes of uninsured and UIM coverage. Part IV looks at the majority and dissenting opinions in *Craig*. Finally, Part V argues in favor of the dissent and against the use of coverage offsets.

II. FACTS AND HOLDING

Vicki Craig and Chris Craig were both named insureds on an automobile insurance policy issued by Owners Insurance Company (“Owners”).⁸ The effective dates of the policy were October 31, 2013, to October 31, 2014.⁹ The policy, which the Craigs paid the premiums for, provided UIM coverage.¹⁰ The policy limit for UIM coverage was \$250,000 per person and \$500,000 per occurrence.¹¹ The “Coverage” provision of the UIM policy provided:

We will pay compensatory damages, including but not limited to loss of consortium, that any insured is legally entitled to recover from the owner or operator of an underinsured automobile for bodily injury

4. *Owners Ins. Co. v. Craig*, No. SD 34053, 2016 WL 3964628, at *1 (Mo. Ct. App. July 19, 2016), *transferred en banc* to 514 S.W.3d 614 (Mo. 2017).

5. *Id.* at *6.

6. *Owners*, 2016 WL 3964628, at *9.

7. *Owners*, 514 S.W.3d at 615.

8. *Owners*, 2016 WL 3964628, at *2.

9. Brief of Appellant Owners Ins. Co. at *2, *Owners*, 2016 WL 3964628 (No. SD 34053).

10. *Owners*, 2016 WL 3964628, at *2–3. According to the “Definitions” provision of the policy, an “Underinsured automobile” means:

b. . . . an *automobile* to which a *bodily injury* liability bond or liability insurance policy applies at the time of the *occurrence*:

(1) with limits of liability at least equal to or greater than the limits required by the Motor Vehicle Financial Responsibility Law of Missouri; and

(2) such limits of liability are less than those stated in the Declarations for [UIM] Coverage.

Id. at *2 (emphasis added) (alteration in original).

11. *Id.* at *3.

sustained by an insured person while occupying an automobile that is covered by SECTION II – LIABILITY COVERAGE of the policy.¹²

The policy contained a “Limit of Liability” section, which stated:

a. The Limits of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only. Under no circumstances do we have a duty to pay you or any person entitled to Underinsured Motorist Coverage under this policy the entire Limits of Liability stated in the Declarations for this coverage.¹³

The next paragraph of the “Limit of Liability” section contained the offset language, which stated:

b. Subject to the Limits of Liability stated in the Declarations for Underinsured Motorist Coverage and paragraph 4.a. above, our payment for Underinsured Motorist Coverage shall not exceed the lowest of:

(1) the amount by which the Underinsured Motorist Coverage Limits of Liability stated in the Declarations exceed the total limits of all bodily injury liability bonds and liability insurance policies available to the owner or operator of the underinsured automobile.

(2) the amount by which compensatory damages, including but not limited to loss of consortium, because of bodily injury exceed the total limits of all bodily injury liability bonds and the liability insurance policies available to the owner or operator of the underinsured automobile.¹⁴

On or about March 1, 2014, while stopped at a red light, Vicki Craig was injured when the vehicle she was driving was struck by another vehicle driven by Tlir Hnin Thang.¹⁵ As a result of this incident, the Craigs incurred damages exceeding \$300,000.¹⁶ Mr. Thang was insured by Shelter Insurance Company.¹⁷ Mr. Thang’s insurance policy had a per person bodily injury liability limit of \$50,000, which was paid to the Craigs.¹⁸ This left the Craigs with over \$250,000 in uncompensated damages.¹⁹

12. *Id.* at *2.

13. Brief of Appellant Owners Ins. Co., *supra* note 9, at *4.

14. *Id.* at *4–5.

15. *Owners*, 2016 WL 3964628, at *3.

16. *Id.* The parties agreed that the Craigs’ damages exceeded \$300,000. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

On or about July 16, 2014, the Craigs made a demand for Owners to pay the \$250,000 per person UIM limit under the policy, “which [the Craigs] asserted was the amount to which they were entitled under the Policy’s UIM coverage provision.”²⁰ The parties agreed that the damages caused by Ms. Craig’s accident exceeded the combined limits of Ms. Craig’s UIM coverage and Mr. Thang’s insurance policy.²¹ Therefore, in November 2014, Owners agreed to pay the Craigs \$200,000, “representing the \$250,000 per person UIM limit with a deduction of the \$50,000 payment [the Craigs] received from Shelter on behalf of Mr. Thang, and which all parties agree is owed under the terms of the [p]olicy.”²² Based upon a provision in the policy, Owners sought to take an offset from the UIM limits for the \$50,000 paid by Mr. Thang’s policy.²³ Whether Owners owed the Craigs an additional \$50,000 of UIM coverage under the terms of the policy was disputed.²⁴ The parties agreed that this issue should be decided by the trial court in a declaratory judgment action.²⁵

The trial court granted summary judgment in the Craigs’ favor, finding the policy “ambiguous in regard to the set-off issue” and “interpret[ing] the ambiguity in favor of [the] [i]nsureds.”²⁶ The trial judge “found that the policy was ‘replete’ with references to the declarations page as the location of the various coverages and limits purchased by the insured.”²⁷ Furthermore, the trial judge “noted that the declarations page had a place for explanation of coverages, but chose not to identify anything in regard to the UIM limits set forth therein.”²⁸ The trial court therefore awarded the disputed \$50,000 to the Craigs.²⁹ Owners subsequently appealed the trial court’s judgment.³⁰

On appeal, the Missouri Court of Appeals, Southern District, in an opinion written by Judge Burrell and joined by Judge Lynch, reversed the trial court’s grant of summary judgment in favor of the Craigs and remanded the matter.³¹ In doing so, the court held that the UIM limit and the offset provisions in the insurance policy were not ambiguous.³² The court concluded that when viewed as a whole, the policy language concerning the UIM limit and the offset was not ambiguous.³³ While the declarations page of the policy lacked any caveat or disclaimer regarding UIM coverage, “it did not state that it was the

20. *Id.*

21. Brief of Respondents Vicky Craig and Chris Craig at *2, *Owners*, 2016 WL 3964628 (No. SD 34053).

22. *Owners*, 2016 WL 3964628, at *3.

23. Brief of Respondents Vicky Craig and Chris Craig, *supra* note 21, at *2.

24. *Owners*, 2016 WL 3964628, at *3.

25. *Id.*

26. *Id.*

27. Brief of Respondents Vicky Craig and Chris Craig, *supra* note 21, at *3.

28. *Id.*

29. *Id.*

30. *Owners*, 2016 WL 3964628, at *3.

31. *Id.* at *6.

32. *Id.*

33. *Id.*

sole expression of UIM coverage, and it referenced other forms, including the UIM endorsement.”³⁴ The court determined that the UIM endorsement “plainly stated” that the UIM limit was for “reference purposes only” and that Owners did not have a duty to pay the entire UIM limit under any circumstances.³⁵ Rather than pay the UIM limit, the court found that the policy language unambiguously stated that Owners would provide “the *lesser* of (1) the amount paid on behalf of the operator of the underinsured vehicle subtracted from the UIM limit; or (2) the amount that the compensatory damages exceeded that paid on behalf of the operator of the underinsured vehicle would be Owners’ payment obligation.”³⁶

Furthermore, the court emphasized that the Supreme Court of Missouri has held that the declarations page of an insurance policy only states the policy’s essential terms in an abbreviated form.³⁷ However, when reading the insurance policy as a whole, it becomes “clear that a reader must look elsewhere to determine the scope of coverage.”³⁸

The court further rejected the Craigs’ argument that offset provisions are precluded by the Supreme Court of Missouri’s decision in *Manner v. Schiermeier* based on the Southern District’s decision in *Beshears v. Shelter Mutual Insurance Co.*³⁹ The court found that this argument interpreted *Manner* and *Beshears* too broadly.⁴⁰ The court reasoned that, while other decisions regarding UIM coverage are instructive, “they are not dispositive in the absence of identical policy language.”⁴¹ The court followed *Jones* in enforcing an insurance policy according to its terms when finding the policy unambiguous.⁴² Furthermore, the court agreed with the precedent in *Warden v. Shelter Mutual Insurance Co.* that “[a]n insurance contract may be written in such a way as to reduce the amount paid as damages under UIM coverage by subtracting the at-fault driver’s contribution from the UIM limit instead of the total damages suffered.”⁴³

In the dissenting opinion, Judge Rahmeyer found the language of the insurance policy to be ambiguous.⁴⁴ Judge Rahmeyer emphasized that “the insurance company did not advise the consumer that they will never receive what they purchased.”⁴⁵ While Owners “offered an amount of coverage as shown

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (quoting *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. 2014) (en banc)).

39. *Id.* at *4.

40. *Id.*

41. *Id.* at *5 (quoting *Long v. Shelter Ins. Cos.*, 351 S.W.3d 692, 702 (Mo. Ct. App. 2011)).

42. *Id.*

43. *Id.*

44. *Id.* at *9 (Rahmeyer, J., dissenting).

45. *Id.*

on the declaration page,” it “paid an entirely different amount.”⁴⁶ The Craigs paid “for \$250,000 per person/\$500,000 per occurrence in underinsured motorist coverage, not \$250,000 minus the \$50,000.”⁴⁷ With the offset, “[t]he carrier will never pay the full amount on the declaration page when the negligent driver is an insured driver because that driver has the statutory amount of liability insurance.”⁴⁸ Although not necessary for her analysis of the ambiguity of the policy, Judge Rahmeyer further noted in a footnote that on its website, Owners purported to offer consumers UIM insurance to “[p]rotect[] you and your passengers from losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages.”⁴⁹ Therefore, “[t]he Craigs, as reasonable consumers, did not get what was promised.”⁵⁰ Accordingly, Judge Rahmeyer concluded that the policy was ambiguous and the trial court did not err in finding the policy ambiguous.⁵¹ Additionally, Judge Rahmeyer “certif[ied] that the majority opinion [was] contrary to a previous decision of an appellate court of this State and [therefore] transfer[ed] [the] case to the Supreme Court of Missouri pursuant to Rule 83.03, Missouri Court Rules (2016).”⁵² The Supreme Court of Missouri agreed with the Southern District, again reversing the trial court’s judgment and remanding.⁵³

III. LEGAL BACKGROUND

A. Insurance Policy Interpretation

Under the “plain meaning” rule of interpretation, absent any ambiguities, insurance policies are interpreted according to their plain meaning.⁵⁴ A policy’s plain meaning “is the single meaning, if any, to which the language of the [policy] is reasonably susceptible when applied to the claim at issue, in the context of the insurance policy as a whole, without reference to extrinsic evidence regarding the meaning of the term.”⁵⁵ This is the rule unless the court concludes that “extrinsic evidence shows that a reasonable person in the policyholder’s position would give the term a different meaning.”⁵⁶ Such a “meaning must be more reasonable than the plain meaning in light of the extrinsic

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at *9 n.1.

50. *Id.* at *9.

51. *Id.* at *8–9.

52. *Id.* at *9.

53. *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 618 (Mo. 2017) (en banc).

54. See Mark A. Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371, 375 (2015).

55. RESTATEMENT OF THE LAW OF LIAB. INS. § 3(1) (AM. LAW INST., Proposed Final Draft 2017).

56. *Id.* § 3(2).

evidence, and it must be a meaning to which the language of the term is reasonably susceptible.”⁵⁷ In Missouri, “[w]hen interpreting the language of an insurance policy, [the court] gives a term its ordinary meaning, unless it plainly appears that a technical meaning was intended.”⁵⁸

Aside from the plain meaning rule, one of the most important principles of insurance law “is captured by the maxim *contra proferentem*, which directs that ambiguities in a contract be interpreted ‘against the drafter,’ who is almost always the insurer.”⁵⁹ Of course, to apply *contra proferentem*, the language of an insurance policy must first be determined to be ambiguous.⁶⁰ When the language is determined to be unambiguous, “an insurance policy must be enforced according to its terms.”⁶¹

Courts find insurance policies to be ambiguous “when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy.”⁶² Furthermore, “[l]anguage is ambiguous if it is reasonably open to different constructions.”⁶³ In accordance with *contra proferentem*, “when parties attach different meanings to a word or phrase, the meaning of the party with less reason to understand the other side’s meaning is to be preferred.”⁶⁴

The doctrine of reasonable expectations “can be a component of *contra proferentem*, entitling an insured to the coverage that she would reasonably expect when confronted by an ambiguous policy term.”⁶⁵ In this way, the doctrine “is only a rule of interpretation: when two interpretations exist as to what an insured might expect a policy to mean, and one is inapt or absurd while the other is reasonable, the reasonable one is selected.”⁶⁶ Alternatively, the doctrine of reasonable expectations “can function independently of *contra proferentem* by providing coverage in the face of unambiguous policy language to the contrary.”⁶⁷

57. *Id.*

58. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. 1997) (en banc).

59. Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996) (footnote omitted); *see also* *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947) (Hand, J.) (“[I]nsurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion.”).

60. Geistfeld, *supra* note 54, at 371.

61. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. 2007) (en banc).

62. *Gulf Ins. Co. v. Noble Broad.*, 936 S.W.2d 810, 814 (Mo. 1997) (en banc); *accord Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. 1992) (en banc).

63. *Gulf*, 936 S.W.2d at 814; *accord Krombach*, 827 S.W.2d at 210.

64. ROBERT H. JERRY II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 135 (5th ed. 2012).

65. Geistfeld, *supra* note 54, at 371.

66. JERRY & RICHMOND, *supra* note 64, at 135.

67. Geistfeld, *supra* note 54, at 371.

There are three versions of the doctrine of reasonable expectations: the “whole transaction” version, the “fine print” version, and the “ambiguity” version.⁶⁸ Under the whole transaction version, courts “refus[e] to enforce the language of an insurance contract because doing so would frustrate the reasonable expectations of coverage that the insurer created outside of the written contract.”⁶⁹ Under the fine print version, courts “refus[e] to enforce the ‘fine print’ of an insurance contract because it limits a portion of the contract that is more prominent.”⁷⁰ Under the ambiguity version, courts “constru[e] an allegedly ambiguous term in favor of the insured in order to satisfy his reasonable expectations.”⁷¹ The ambiguity version is the most cautious version of the doctrine of reasonable expectations in that “[i]t is identical to the practice of construing ambiguities against the insurer,” satisfying the reasonable expectations of insureds as “an additional justification for doing so.”⁷² Missouri is among the states that follow the ambiguity approach.⁷³

Additionally, courts have interpreted insurance coverage terms liberally and interpreted exclusions narrowly.⁷⁴ Courts have also interpreted policy language consistently with a layperson’s understanding.⁷⁵ Furthermore, when possible, courts construe policies so as to achieve the purpose of providing “indemnity to the insured for the losses to which the insurance relates.”⁷⁶ The Supreme Court of Missouri has held that “[t]he meaning of the terms of an insurance policy is ordinarily tested by the common understanding and speech of men.”⁷⁷ When “there is a conflict between a technical definition and the meaning which would normally be understood by the average layman, the layman’s definition will be applied unless it plainly appears that the technical meaning is intended.”⁷⁸

68. Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1467 (1989).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1468.

73. *Id.* at 1467 n.32; see also *Lutsky v. Blue Cross Hosp. Serv., Inc.*, of Mo., 695 S.W.2d 870, 874 (Mo. 1985) (en banc) (exemplifying the “ambiguity” approach).

74. JERRY & RICHMOND, *supra* note 64, at 136; James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1004 (1992).

75. JERRY & RICHMOND, *supra* note 64, at 136; Fischer, *supra* note 74, at 1004.

76. Fischer, *supra* note 74, at 1004–05; accord JERRY & RICHMOND, *supra* note 64, at 136.

77. *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15, 27 (Mo. 1969).

78. *Id.*

B. Purposes of UM and UIM Coverage

In the United States, the District of Columbia and every state, with the exception of New Hampshire, have compulsory liability insurance statutes “requir[ing] drivers to have auto liability insurance before they can legally drive a motor vehicle.”⁷⁹ However, these statutes have not been effective in significantly reducing the number of uninsured drivers.⁸⁰ In 1993, sixteen percent of motorists nationwide were uninsured.⁸¹ As of 2015, nearly thirteen percent of motorists are still uninsured.⁸² There are a number of reasons why these statutes may be ineffective.⁸³ “[S]ome drivers with surcharges for accidents or serious traffic violations do not want to pay the high premiums that result from a poor driving record.”⁸⁴ For others, with the average annual automobile insurance premium being over \$800,⁸⁵ liability insurance is simply too expensive.⁸⁶ Additionally, there is difficulty in enforcing such statutes because “[w]ith the estimated percentage of uninsured drivers in the United States close to 13 percent, it is costly to track down violators of compulsory insurance laws.”⁸⁷

Furthermore, many insured motorists are often underinsured and do not carry enough insurance to cover the losses they may cause in an accident.⁸⁸ When an uninsured or underinsured motorist is involved in an accident, “the injured party’s only hope for recovery may depend on her own insurance policy.”⁸⁹ To address such situations, many states, including Missouri,⁹⁰ require motorists to purchase UM coverage.⁹¹ Other states require insurers to offer

79. *Background on: Compulsory Auto/Uninsured Motorists*, *supra* note 1.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See *Facts + Statistics: Auto Insurance*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-auto-insurance> (last visited Feb. 12, 2018) (noting “[t]he countrywide average auto insurance expenditure rose 2.7 percent to \$889.01 in 2015 from \$865.34 in 2014”). In 2015, the average auto insurance premium in Missouri was \$745.04. *Id.*

86. *Background on: Compulsory Auto/Uninsured Motorists*, *supra* note 1.

87. *Id.*

88. Stephen R. Bough & M. Blake Heath, *Current Issues in Underinsured and Uninsured Insurance Coverage in Missouri*, 68 J. MO. B. 208, 208 (2012).

89. *Id.*

90. MO. REV. STAT. § 379.203 (2016) (Missouri’s uninsured motorist statute).

91. See *Background on: Compulsory Auto/Uninsured Motorists*, *supra* note 1; see also ALAN I. WIDISS & JEFFREY E. THOMAS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 1.11 (rev. 3d ed. 2017) (“Forty-nine states now have legislation in effect which establishes various types of requirements for this coverage, and it has become an integral part of automobile insurance policies throughout the United States.”).

UM coverage but do not require drivers to purchase it.⁹² UM coverage was developed in an attempt “to eliminate the problems presented by financially irresponsible motorists.”⁹³ The rationale for UM coverage is “that the number of totally uncompensated injuries could be significantly reduced through . . . a . . . type of insurance that would indemnify purchasers for injuries caused by negligent uninsured motorists.”⁹⁴ In doing so, UM coverage allows “a person injured by an uninsured motorist [to] be compensated by her own insurer in an amount equal to what the uninsured tortfeasor’s liability insurer would have paid if the tortfeasor had carried liability insurance.”⁹⁵

Furthermore, in addition to UM coverage, more than thirty states have enacted statutory requirements “that mandate underinsured motorist insurance which affords more extensive coverage than that required by both the original uninsured motorist insurance legislation and the statutes that required supplementary uninsured motorist insurance.”⁹⁶ UIM coverage “provide[s] additional coverage for those injured by a negligent motorist where that motorist’s liability coverage does not fully pay for the injured party’s actual damage.”⁹⁷ Rather than insuring a particular vehicle, UIM coverage “is floating insurance that follows the insured.”⁹⁸ There are two main categories of UIM insurance statutes, although not all states have such statutes.⁹⁹

Under the “add-on” version of UIM insurance, the statute “makes the amount of the insured’s liability coverage an add-on to the amount of the tortfeasor’s liability coverage if the tortfeasor’s coverage is inadequate to reimburse the insured’s loss.”¹⁰⁰ In other words, the add-on version acts to indemnify “accident victims up to the applicable coverage limits for damages that are

92. See *Background on: Compulsory Auto/Uninsured Motorists*, *supra* note 1.

93. WIDISS & THOMAS, *supra* note 91, § 1.1.

94. *Id.*

95. JERRY & RICHMOND, *supra* note 64, at 959. “Generally the coverage pays for personal injury but not property damage.” *Id.*

96. WIDISS & THOMAS, *supra* note 91, § 31.5 (“Underinsured motorist insurance was developed to address (1) the inadequacies of uninsured motorist insurance . . . and (2) the shortcomings of higher limit uninsured motorist insurance that only applied to accidents caused by uninsured motorists.”); see also JERRY & RICHMOND, *supra* note 64, at 959. Missouri has not mandated UIM insurance. See MO. REV. STAT. § 379.204 (2016).

97. Bough & Heath, *supra* note 88, at 210; see also *Hopkins v. Am. Econ. Ins. Co.*, 896 S.W.2d 933, 935 (Mo. Ct. App. 1995) (citing *Geneser v. State Farm Mut. Auto. Ins. Co.*, 787 S.W.2d 288, 289 (Mo. Ct. App. 1989)) (“Underinsured coverage is optional from a person’s own motorist carrier and pays for losses incurred because another negligent motorist’s coverage is insufficient to pay for the injured person’s actual losses.”).

98. Bough & Heath, *supra* note 88, at 210.

99. See JERRY & RICHMOND, *supra* note 64, at 967; WIDISS & THOMAS, *supra* note 91, § 32.2.

100. JERRY & RICHMOND, *supra* note 64, at 967; see also WIDISS & THOMAS, *supra* note 91, § 32.2 (“In many states, the statutory mandate is for coverage that will provide

not compensated by the tortfeasor's insurance."¹⁰¹ This kind of UIM coverage is typically broader and offers more coverage than the other version of UIM coverage, the "topping-off" version, because it "focuses . . . on providing resources to compensate the injured victim."¹⁰² Therefore, it is typically more expensive than the topping-off version.¹⁰³ New Mexico's UIM insurance statute, which mandates UIM insurance along with UM insurance,¹⁰⁴ follows the add-on approach.¹⁰⁵ In considering the state's UIM statute, the Supreme Court of New Mexico noted "that in expanding uninsured motorist coverage to include underinsured motorist coverage, the Legislature manifested the intent to compensate the innocent victims of inadequately insured drivers."¹⁰⁶

Under the topping-off version of UIM statutes, "if the injured person possessed liability insurance in excess of the liability insurance carried by the tortfeasor, and if the injured person's loss exceeds the limits of the tortfeasor's coverage, the injured person's own insurance picks up the difference."¹⁰⁷ In other words, the topping-off version puts the injured person in the position he or she would have been in "if the underinsured motorist had liability insurance with limits of liability equal to those of the applicable underinsured motorist insurance."¹⁰⁸

With topping-off coverage, insurers are able to "cap the UIM recovery at . . . what the insured would recover if the tortfeasor had no insurance."¹⁰⁹ This is done through an offset that the insurer "gets for any amounts paid by the tortfeasor or the tortfeasor's liability insurer to the insured-victim."¹¹⁰ While some states expressly authorize such offsets, "in the absence of such statutory authorization, the [offset] provisions are typically held to be invalid."¹¹¹ This is because of policy "stacking," which "is the ability of the insured to collect insurance coverage from multiple insurance policies."¹¹² In Missouri, "where multiple policies or multiple uninsured motorist coverages are in place, insurers are prohibited from including policy language precluding stacking of the coverage provided under multiple policies or coverage provisions."¹¹³ How-

compensation whenever the liability insurance available from the tortfeasor is not sufficient to provide complete indemnification for the injuries sustained by the insured.").

101. WIDISS & THOMAS, *supra* note 91, § 32.2.

102. JERRY & RICHMOND, *supra* note 64, at 967.

103. *Id.*

104. N.M. STAT. ANN. § 66-5-301 (West 2018).

105. WIDISS & THOMAS, *supra* note 91, § 32.2.

106. *Konnick v. Farmers Ins. Co. of Ariz.*, 703 P.2d 889, 891 (N.M. 1985).

107. JERRY & RICHMOND, *supra* note 64, at 967.

108. WIDISS & THOMAS, *supra* note 91, § 32.2.

109. JERRY & RICHMOND, *supra* note 64, at 967.

110. *Id.*

111. *Id.*

112. *Bough & Heath*, *supra* note 88, at 209.

113. *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. 2009) (en banc).

ever, in the context of UIM policy stacking, “if the policy language is unambiguous in disallowing stacking, the anti-stacking provisions are enforceable” because UIM coverage is not mandated in Missouri.¹¹⁴ Therefore, “the existence of the [underinsured motorist] coverage and its ability to be stacked are determined by the contract entered between the insured and the insurer.”¹¹⁵

Section 379.204 of the Missouri Revised Statutes pertains to the construction of UIM coverage policies.¹¹⁶ This is the only Missouri statute that explicitly pertains to UIM coverage.¹¹⁷ Passed in 1999, the statute “effectively set[s] the minimum amount of UIM coverage capable of being marketed and sold at \$50,000.”¹¹⁸ In doing so, the statute acts to prevent insurance companies from selling policies that will never provide any coverage because in order for UIM coverage to apply, the at-fault motorist will have at least \$25,000 in coverage.¹¹⁹ This effectively requires UIM coverage to act as an add-on when the policy limit is less than \$25,000. However, it mandates neither UIM insurance nor the offer of UIM insurance.

Furthermore, Missouri does not have any statutory requirements for UIM coverage in regard to stacking and offsets.¹²⁰ Nor does Missouri’s UIM statute require the add-on approach or the topping-off approach. As a result of Missouri lacking a statutory requirement, UIM coverage is subject to differing results on offsets depending on the language of the policy – specifically, to what extent the insurer has drafted it unambiguously to require an offset – “and the ability to convince the court of its similarity to the policy language in prior decisions or the ability to distinguish it.”¹²¹ Offset provisions “that deduct from coverage limits rather than from total damages are permissible when plain and unambiguous language is used.”¹²²

114. *Id.*

115. *Id.* (alteration in original) (quoting *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 383 (Mo. 1991) (en banc)).

116. MO. REV. STAT. § 379.204 (2016) (“Any underinsured motor vehicle coverage with limits of liability less than two times the limits for bodily injury or death pursuant to section 303.020 shall be construed to provide coverage in excess of the liability coverage of any underinsured motor vehicle involved in the accident.”). MO. REV. STAT. § 303.020 sets the minimum required motorist insurance limit at \$25,000. MO. REV. STAT. § 303.020(10) (2016).

117. David W. Reynolds, Comment, *Modernizing Underinsured Motorist Coverage in Missouri: Removing the Insurance Paradox Between Uninsured and Underinsured Coverage Via Legislative Action*, 57 ST. LOUIS U. L.J. 1049, 1067 (2013).

118. *Id.*

119. *See Miller v. Ho Kun Yun*, 400 S.W.3d 779, 791 (Mo. Ct. App. 2013) (“Confusion of the ordinary insurance purchaser of UIM coverage is legislatively recognized in Missouri, in that the Missouri General Assembly has adopted legislation to help protect the insurance consumer from purchasing ‘illusory’ coverage.”).

120. *See Bough & Heath, supra* note 88, at 210; *see also Ritchie*, 307 S.W.3d at 135 (“[U]nlike many other states, Missouri statutes do not . . . mandate [UM] coverage.”).

121. *Bough & Heath, supra* note 88, at 215.

122. *Id.* at 212.

The Missouri Court of Appeals, Western District, has expressed disdain for such provisions, holding in *Miller v. Ho Kun Yun* that unless “advised prior to purchase [of] exactly how *under* insured motorist coverage works, the policy holder may assume that it operates in a manner similar to *un* insured motorist coverage.”¹²³ In other words, policy holders may assume that UIM coverage acts as an add-on and “compensates bodily injury above and beyond anything received from the tortfeasor.”¹²⁴

C. Past Precedent Regarding UIM Coverage in Missouri

The Supreme Court of Missouri has been relatively consistent in not allowing insurers to offset UIM coverage in cases where the language of the policy was unclear or capable of being interpreted as ambiguous.

In 2009, the Supreme Court of Missouri addressed UIM insurance offsets in *Jones v. Mid-Century Insurance Co.*¹²⁵ In *Jones*, two plaintiff insureds sued their insurer seeking \$100,000 in UIM coverage under their insurance policy.¹²⁶ Although the trial court ruled that they were each entitled to only

123. *Miller*, 400 S.W.3d at 790.

124. *Id.* at 790–91.

125. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690–91 (Mo. 2009) (en banc).

126. *Id.* at 689. The “Limits of Liability” section of the policy in question stated in part:

a. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of UNDERinsured Motorist Coverage stated in the policy, and *the most we will pay* will be the lesser of:

1. The difference between the amount of an insured person’s damages for bodily injury, and the amount paid to that insured person by or for any person or organization who is or may be held legally liable for the bodily injury; or

2. *The limits of liability of this coverage*

b. Subject to subsections a. and c.–h. in this Limits of Liability section, *we will pay up to the limits of liability shown in the schedule below as shown in the Declarations.*

Id. at 690. The “Limits of Liability” section further stated:

f. The amount of UNDERinsured Motorist Coverage we will pay shall be reduced by any amount paid or payable to or for an insured person;

i. by or for any person or organization who is or may held legally liable for the bodily injury to an insured person; or

ii. for bodily injury under the liability coverage of this policy

Id. The insurer argued that this subsection allowed for a reduction of the coverage. *Id.* at 691.

\$50,000 due to an offset from the plaintiffs' recovery from the tortfeasor, the Supreme Court of Missouri reversed, finding that the offset provision was ambiguous.¹²⁷ In doing so, the court found that even though one provision of the policy could be read to permit the offset, "two other provisions of the policy state[d] that coverage [would] be provided up to the full amount of the policy."¹²⁸ The court emphasized that "Missouri law is well-settled that where one provision of a policy appears to grant coverage and another to take it away, an ambiguity exists that will be resolved in favor of coverage."¹²⁹ Furthermore, "[t]his is particularly true where, as here, Mid-Century's interpretation of the policy language would mean that it never actually would be required to pay its insureds the full amount of underinsured motorist coverage its policy ostensibly provides."¹³⁰ The court noted that in order for Mid-Century's interpretation of the policy to be unambiguous, the term "[t]he limits of liability of this coverage" would need to be rewritten as "[t]he limits of liability of this coverage minus the amount already paid to that insured person."¹³¹ However, the court emphasized that it "does not rewrite insurance policies to add language."¹³²

In *Ritchie v. Allied Property & Casualty Insurance Co.*, another 2009 case, the Supreme Court of Missouri found that Allied, the insurer, was not entitled to an offset of the amount Ritchie, the insured, had collected from the tortfeasors.¹³³ Ritchie suffered \$1,800,000 in damages resulting from a car accident.¹³⁴ Ritchie had a UIM coverage policy with a limit of \$300,000 per accident.¹³⁵ Ritchie's policy contained a "Limit of Liability" provision, which read:

A. The limit of liability shown in the Declarations for each person for Underinsured Motorists coverage is our maximum limit of liability for all damages . . . for care, loss of services, or death arising out of 'bodily injury' sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit [of liability] for all damages for 'bodily injury' [resulting] from any one accident. This is the most we will pay regardless of the number of:

1. "Insureds;"

127. *Id.* at 689.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 690–91.

132. *Id.* at 691.

133. *See Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 139–41 (Mo. 2009) (en banc).

134. *Id.* at 134.

135. *Id.*

2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

B. The limit of liability shall be reduced by all sums:

1. Paid because of 'bodily injury' or by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy¹³⁶

Ritchie was only able to recover \$60,000 from the at-fault drivers.¹³⁷ The court ruled that Allied was obligated to pay the full \$300,000.¹³⁸

The court provided an illustration of when Allied would be entitled to an offset: “[I]f the Ritchies had suffered only \$140,000 in damages and had recovered \$60,000 from other tortfeasors, then the \$60,000 would be deducted from the total damages, and Allied would be responsible for only the remaining \$80,000, thereby avoiding a double recovery.”¹³⁹ However, Ritchie had \$1,740,000 in unsatisfied damages – far more than the policy limits.¹⁴⁰ In such cases, offset provisions do not apply unless they “plainly state[] that the amount payable in UIM coverage is the difference between the policy limits and the amount recovered from the tortfeasor.”¹⁴¹

In 2013, the Supreme Court of Missouri again addressed the issue in *Manner v. Schiermeier*.¹⁴² In *Manner*, the plaintiff insured sued the defendant insurers, claiming he was entitled to \$400,000 in UIM coverage under four policies he held with the insurers.¹⁴³ The plaintiff held one policy for the motorcycle he was riding at the time of his accident.¹⁴⁴ He held two more policies on two trucks he owned – one policy for each truck.¹⁴⁵ Additionally, he sought recovery on a fourth policy his father had on a motorcycle.¹⁴⁶ All four of the policies contained a “Limits of Liability” provision that read:

136. Substitute Brief of Appellants at *9–10, *Ritchie*, 307 S.W.3d 132 (No. SC 90085).

137. *Ritchie*, 307 S.W.3d at 134–35.

138. *Id.* at 141.

139. *Id.*

140. *Id.*

141. Bough & Heath, *supra* note 88, at 213.

142. *See Manner v. Schiermeier*, 393 S.W.3d 58, 62 (Mo. 2013) (en banc).

143. *Id.* at 60.

144. *Id.* at 60–61.

145. *Id.*

146. *Id.* at 61.

The limits of liability of this coverage as shown in the declarations apply, subject to the following:

1. The limit for each person is the maximum for all damages sustained by all persons as the result of bodily injury to one person in any one accident.

2. Subject to the limit for each person, the limit for each accident is the maximum for bodily injury sustained by two or more persons in any one accident.

We will pay no more than these maximums no matter how many vehicles are described in the declarations, insured persons, claims, claimants or policies or vehicles are involved in the accident.

The limits of liability of this coverage will be reduced by:

1. A payment made or amount payable by or on behalf of any person or organization which may be legally liable, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle¹⁴⁷

The trial court held that “owned-vehicle exclusions” in the policies unambiguously applied to the motorcycle that the plaintiff was riding at the time of his accident.¹⁴⁸ The owned-vehicle exclusion stated: “This coverage does not apply for bodily injury to a person: . . . While occupying, or when struck by, a motor vehicle that is not insured under this policy if it is owned by you or any resident of your household.”¹⁴⁹ The term “owned” was not defined by the insurer.¹⁵⁰ The insurers argued that the plaintiff “owned the [motorcycle] and that, because it was insured under a different policy than the ones insuring the other three vehicles, [the] owned-vehicle exclusion precluded coverage.”¹⁵¹ The trial court agreed with the insurers and held that this exclusion precluded UIM coverage.¹⁵²

On appeal, the Supreme Court of Missouri reversed and remanded, holding that “[t]he burden was on the insurers to prove that the owned-vehicle exclusion applied, which they failed to do.”¹⁵³ The court further held that the plaintiff could stack his four UIM coverages and “because his unrecovered damages exceed[ed] the total liability limits of the stacked policies, the insurers [were] not entitled to offset the amount recovered from other tortfeasors against

147. Brief of Appellant at *3–4, *Manner*, 393 S.W.3d 58 (No. SC 92408).

148. *Manner*, 393 S.W.3d at 60.

149. *Id.* at 61.

150. *Id.* at 60.

151. *Id.* at 61.

152. *Id.*

153. *Id.* at 60.

those liability limits.”¹⁵⁴ In determining that such offsets are not permitted, the court emphasized that “[t]he policy promises to pay the listed limits of liability, not simply the listed limits of liability reduced by the amount paid by the tortfeasor.”¹⁵⁵ Allowing an offset “would permit the policy to promise to pay the full limits of liability and yet [those] limits never would be paid as the amount of liability promised always would be reduced by the recovery from the other driver.”¹⁵⁶ In a footnote, the court further explained:

This is because, if the amount recoverable under the insurance policy always is reduced by the amount collected by the tortfeasor, an insured never could recover the entire liability limit set out in the underinsured motorist endorsement because, by definition, an underinsured motorist is someone who paid something toward the insured’s damages, although not enough to satisfy those damages nor enough to exceed the insured’s underinsured motorist limits.¹⁵⁷

Missouri courts have further reached inconsistent results when considering identical offset provisions. Prior to the Supreme Court of Missouri’s decision in *Manner*, in *Lynch v. Shelter Mutual Insurance Co.*, the Southern District allowed an insurer to take an offset from coverage limits because the offset provision was “plain and unequivocal.”¹⁵⁸ The offset provision in *Lynch*, titled “Limit of Our Liability,” read:

The limit of liability for this Coverage will be the limit of liability stated for this particular endorsement number in the Declarations, subject to the following limitations: . . .

(2) The limit of liability stated in the Declarations will be reduced by all amounts paid or payable to the insured making the claim by, or on behalf of, all persons legally obligated to pay any portion of the damages to that insured . . .

(5) Regardless of the number of:

- (a) vehicles involved in the accident,
- (b) persons insured,
- (c) claims made, or

154. *Id.*

155. *Id.* at 66.

156. *Id.*

157. *Id.* at 66 n.8.

158. *Lynch v. Shelter Mut. Ins. Co.*, 325 S.W.3d 531, 539 (Mo. Ct. App. 2010).

(d) premiums paid,

the limits for this Coverage may not be added to, combined with, or stacked onto the limits of other underinsured motorists coverage to determine the total limit of underinsured motorists coverage available to any insured for any one accident.¹⁵⁹

In *Shelter Mutual Insurance Co. v. Straw*, the Southern District followed *Lynch* in enforcing an offset provision.¹⁶⁰ In *Straw*, the insured, Straw, suffered damages equaling or exceeding \$200,000 and had an insurance policy through Shelter with a UIM coverage limit of \$100,000.¹⁶¹ Straw received the \$100,000 policy limit from the tortfeasor.¹⁶² However, the court held that because the offset provision was unambiguous, Shelter did not have to pay Straw anything.¹⁶³ Conversely, in *Long v. Shelter Insurance Cos.*, the Western District found an offset provision, which was identical to that in *Straw*, to be ambiguous and, thus, not enforceable.¹⁶⁴

159. *Id.* at 534.

160. *See Shelter Mut. Ins. Co. v. Straw*, 334 S.W.3d 592, 595–97 (Mo. Ct. App. 2011).

161. *Id.* at 594. The “Limits of Our Liability” provision in the policy enabling the offset read:

(4) The limits are reduced by the amount paid, or payable, to the insured for damages by, or for, any person who:

(a) is legally liable for the bodily injury to that insured; or

(b) may be held legally liable for the bodily injury to that insured.

Id. at 595.

162. *Id.* at 594.

163. *Id.* at 596–98.

164. *See Long v. Shelter Ins. Cos.*, 351 S.W.3d 692, 705 & n.16 (Mo. Ct. App. 2011). The “Limits of Our Liability” provision read:

The limits of liability for this coverage are stated in the Declarations and are subject to the following limitations: . . .

(4) The limits are reduced by the amount paid, or payable, to the insured for damages by, or for, any person who:

(a) is legally liable for the bodily injury to that insured; or

(b) may be held legally liable for the bodily injury to that insured.

Id. at 702.

In 2015, the Missouri Court of Appeals, Southern District, addressed the issue of UIM offsets in *Beshears v. Shelter Mutual Insurance Co.*¹⁶⁵ In *Beshears*, the insurer, Shelter, claimed it was entitled to an offset “to reduce its limit of liability by the \$100,000 recovered from the tortfeasor’s insurer.”¹⁶⁶ John Beshears was injured and his wife, Sue Ellen Beshears, died when the car John was driving was hit by a car driven by the tortfeasor.¹⁶⁷ The tortfeasor had an insurance policy with limits of \$50,000 per person and \$100,000 per accident.¹⁶⁸ The policy limit, \$100,000, was paid to John as part of a settlement.¹⁶⁹ Thereafter, John “made a claim against Shelter for UIM coverage.”¹⁷⁰

The Beshears held a policy with Shelter that had limits of \$250,000 per person and \$500,000 per accident.¹⁷¹ Shelter and the Beshears stipulated that damages arising from the accident exceeded \$600,000.¹⁷² “Shelter paid \$200,000 to John for his personal injury claim and \$200,000 to John for Sue Ellen’s wrongful death claim.”¹⁷³ “Shelter determined that \$400,000 figure by reducing the stated \$500,000 per accident limit to account for the \$100,000 paid to John by” the tortfeasor’s insurer.¹⁷⁴ Shelter argued that the policy authorized this offset.¹⁷⁵ The language, which Shelter claimed this authorization came from, read:

The limits of liability for this coverage are stated in the Declarations and are subject to the following limitations: . . .

(4) The limits are reduced by the amount paid, or payable, to the insured for damages by, or for, all persons who:

(a) are legally liable for the bodily injury to that insured; or

(b) may be held legally liable for the bodily injury to that insured.¹⁷⁶

165. See *Beshears v. Shelter Mut. Ins. Co.*, 468 S.W.3d 408, 409 (Mo. Ct. App. 2015).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 410.

171. *Id.* at 409.

172. *Id.*

173. *Id.* at 410.

174. *Id.*

175. *Id.*

176. *Id.*

Relying on *Manner*, the court found that Shelter was not entitled to such an offset due to an “inherent ambiguity” in the language of the policy that permitted a promise to pay the full limits of liability but did not actually require paying those limits.¹⁷⁷

In 2017, the Supreme Court of Missouri again addressed UIM coverage offsets in the instant case, *Owners Insurance Co. v. Craig*, in which the court reached a different result.

IV. INSTANT DECISION

In the instant case, the Supreme Court of Missouri reversed the trial court’s grant of summary judgment in favor of the Craigs and remanded the matter.¹⁷⁸ In an opinion written by Judge Fisher, the court held that the UIM limit and the offset provisions in the insurance policy were not ambiguous.¹⁷⁹ Judge Draper dissented in a separate opinion, finding the policy ambiguous.¹⁸⁰

A. Majority

The court concluded that, when viewed as a whole, the policy language concerning the UIM limit and the offset was not ambiguous.¹⁸¹

The court found that, while “the declarations’ listed limit amount and other portions of the policy make bare, general references to the declarations containing the limit of liability,” the policy was unambiguous because “the declarations ‘are introductory only and subject to refinement and definition in the body of the policy.’”¹⁸² The court pointed out that the declarations page does not grant coverage but rather states “the policy’s essential terms in an abbreviated form, and when the policy is read as a whole, it is clear that a reader must look elsewhere to determine the scope of coverage.”¹⁸³

Citing *Manner*, *Ritchie*, and *Jones*,¹⁸⁴ the court noted that “an ambiguity exists when the policy contains both: (1) express language indicating the insurer will indeed pay up to the declarations’ listed limit amount; and (2) offset provisions ensuring the insurer will never be obligated to pay such amount.”¹⁸⁵ These two elements together create an ambiguity because “both statements cannot be true; either the insurer will sometimes pay up to the declarations

177. *Id.* at 412.

178. *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 615 (Mo. 2017) (en banc).

179. *Id.*

180. *Id.* at 618 (Draper, J., dissenting).

181. *Id.* (majority opinion).

182. *Id.* at 617 (quoting *Peters v. Farmers Ins. Co.*, 726 S.W.2d 749, 751 (Mo. 1987) (en banc)).

183. *Id.* (quoting *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. 2014) (en banc)).

184. *See supra* Part III.C.

185. *Craig*, 514 S.W.3d at 617.

listed limit, or the amount it will pay always will be limited by the amount paid by the underinsured motorist.”¹⁸⁶ Considering the Craigs’ policy, the court determined that “no such internal inconsistency or contradiction” existed.¹⁸⁷ The court reasoned that, “unlike in cases such as *Jones*, the [Craigs’] policy contains no express language indicating the insurer will pay up to the declarations’ listed limit amount.”¹⁸⁸ The court further noted that the “Limits of Liability” section of the Craigs’ UIM policy stated that the declarations page “is ‘for reference purposes only’ and ‘[u]nder no circumstances’ will Owners have a duty to pay that entire amount.”¹⁸⁹ Therefore, the court determined that the Craigs’ policy takes the form of a policy that the Supreme Court of Missouri had previously found enforceable in *Ritchie*.¹⁹⁰

B. Dissent

In the dissenting opinion, while agreeing with the majority’s opinion holding that insurance companies may issue policies with offset clauses, Judge Draper found that the Craigs’ policy contained ambiguous provisions.¹⁹¹ Judge Draper emphasized that the offset provision in the Craigs’ policy “under any possible circumstance prevents [i]nsured from recovering the full amount of the UIM policy limits.”¹⁹² Unlike the offset provision “used to prevent double recovery” in *Jones*, Judge Draper found that the majority opinion “read the [offset] provision in Owners’ policy in isolation and failed to look at all of the provisions used in the UIM coverage policy.”¹⁹³ Judge Draper noted that, “[w]hile the ‘[limit of liability]’ provision seeks to set off any amount of recovery from the policy limits stated on the declarations page, the ‘[other insurance]’ provision clearly states that any coverage Owners provides is in excess of recovery from any other insurance provider.”¹⁹⁴ This language allows “Owners to set off any recovered amount from [i]nsured’s policy limits.”¹⁹⁵ Therefore, the insured “will never recover the full amount of the stated liability limits because there will always be some recovery from an underinsured motorist,” even though “the policy clearly provides that Owners’ coverage is in excess of any other insurance.”¹⁹⁶ Judge Draper further pointed out that “[t]he ‘reasonable expectation of an insurance buyer is to purchase protection against

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (alteration in original).

190. *Id.*

191. *Id.* at 618 (Draper, J., dissenting).

192. *Id.*

193. *Id.*

194. *Id.* at 619.

195. *Id.*

196. *Id.*

large losses, and cover when the other driver's insurance does not satisfy those losses."¹⁹⁷

Judge Draper reasoned that the Craigs "chose to pay for \$250,000 per person and \$500,000 per occurrence in UIM coverage, not \$250,000 minus the amount recovered from the underinsured driver who caused more damage than the driver was insured to pay."¹⁹⁸ Therefore, Judge Draper concluded that "[b]ecause Owners' policy appears in one section to provide any underinsurance coverage in excess of other coverage and another section prevents the full recovery of the declared policy limits without exception, there is an ambiguity."¹⁹⁹

V. COMMENT

A. Ambiguity in UIM Offset Provisions

In finding the offset provision policy language to be unambiguous, the Supreme Court of Missouri diverted from the past precedent of Missouri courts, which routinely found offset provisions to be ambiguous. By doing so, the Supreme Court of Missouri attempted to move Missouri into the group of states that allow offsets.

Admittedly, the Craigs' policy with Owners was quite clear in regard to the offset.²⁰⁰ It stated that the UIM limit was for reference purposes only.²⁰¹ The Supreme Court of Missouri emphasized that "[w]hile the Craigs point to the declarations' listed limit amount and other portions of the policy that make bare, general references to the declarations containing the limit of liability, the declarations 'are introductory only and subject to refinement and definition in the body of the policy.'"²⁰² Additionally, it stated what Owners would pay, which was described in the majority decision of the Southern District as "the lesser of (1) the amount paid on behalf of the operator of the underinsured vehicle subtracted from the UIM limit; or (2) the amount that the compensatory damages exceeded that paid on behalf of the operator of the underinsured vehicle would be Owners' payment obligation."²⁰³ Furthermore, the offset provision here is far more detailed than that in *Beshears*, which did not state that

197. *Id.* (quoting *Zemelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673, 679 (Mo. Ct. App. 1996)).

198. *Id.*

199. *Id.*

200. *Id.* at 617 (majority opinion).

201. *Id.*

202. *Id.* (quoting *Peters v. Farmers Ins. Co.*, 726 S.W.2d 749, 751 (Mo. 1987) (en banc)).

203. *Owners Ins. Co. v. Craig*, No. SD 34053, 2016 WL 3964628, at *6 (Mo. Ct. App. July 19, 2016), *transferred en banc to* 514 S.W.3d 614 (Mo. 2017).

the UIM limit was for reference purposes only.²⁰⁴ Moreover, the offset provision in *Beshears* did not state that the insurer had no duty to pay the policy limit under any circumstances.²⁰⁵ Read on its own, it is difficult to argue that the offset provision found in the Craigs' policy was ambiguous.

However, while the court adhered to the plain meaning of the policy, an argument could certainly be raised as to the offset provision not being plainly stated. This is a case in which "extrinsic evidence shows that a reasonable person in the policyholder's position would give the term a different meaning," due to the way in which Owners' website marketed UIM insurance.²⁰⁶ Although some courts may preclude considering extrinsic evidence under the parol evidence rule, Owners' website advertised UIM insurance as coverage when an underinsured tortfeasor "does not have enough insurance to pay for all losses and damages."²⁰⁷ After seeing such an advertisement, reasonable purchasers would assume that the coverage they are buying will cover all losses and damages up to the limits of the full UIM policy limit, not just up to the difference between the UIM policy limit and the tortfeasor's policy limit. In jurisdictions following the whole transaction version of the doctrine of reasonable expectations, this extrinsic evidence would certainly be enough to frustrate the reasonable expectations of the coverage, and the court would not enforce the language of the policy.²⁰⁸ Even in a jurisdiction that follows the ambiguity version of the doctrine of reasonable expectations, such as Missouri, the website would likely be found ambiguous.²⁰⁹ Owners purports to offer one thing but, in fact, provides another. This should be sufficient to overcome the presumption in favor of the plain meaning.²¹⁰

Furthermore, as noted in Judge Rahmeyer's dissent, insurance policies should be evaluated as a whole, and when done so here, additional ambiguity is created.²¹¹ Regarding the language of the declarations page, Judge Rahmeyer quoted the Western District in *Miller v. Ho Kun Yun*:

The law is also concerned with what an ordinary purchaser of insurance would be caused to believe about the coverage from review of the policy upon initial receipt of the policy, before an injury has occurred, while

204. See *Beshears v. Shelter Mut. Ins. Co.*, 468 S.W.3d 408, 410 (Mo. Ct. App. 2015).

205. See *id.*

206. RESTATEMENT OF THE LAW OF LIAB. INS., *supra* note 55, § 3(2); *Craig*, 2016 WL 3964628, at *9 n.1 (Rahmeyer, J., dissenting).

207. *Craig*, 2016 WL 3964628, at *9 n.1 (emphasis added).

208. See *Ware*, *supra* note 68, at 1467.

209. *JERRY & RICHMOND*, *supra* note 64, at 127. ("Sometimes . . . extrinsic information is inconsistent with or contradicts the written terms of the policy, thereby creating an ambiguity that must be resolved through techniques of interpretation."); see also *Ware*, *supra* note 68, at 1467.

210. See RESTATEMENT OF THE LAW OF LIAB. INS., *supra* note 55, § 3(2).

211. *Craig*, 2016 WL 3964628, at *6; see also *Manner v. Schiermeier*, 393 S.W.3d 58, 65 (Mo. 2013) (en banc).

there remains time to adjust coverages in light of his or her understanding of the policy contents.²¹²

When the ordinary purchaser receives his insurance policy, he will normally read the declarations page to ensure that he is getting the coverage that he wants.²¹³ He will not necessarily read much more of the policy.²¹⁴ Therefore, the language of the declarations page is essential to determining the expectations of the insured.²¹⁵

Additionally, within the Craigs' policy, ambiguity does not come solely from the language of the offset provision. Rather, it comes from the conflict created when the policy promises "on the declaration page to provide the consumer with a certain amount of underinsured motorist coverage and then take[s] it away in the fine print of the multi-page insurance policy."²¹⁶ This is a duplicity in the policy that leaves the meaning of the policy uncertain.²¹⁷

As noted in Judge Draper's dissent, this is an inherent ambiguity because the policy claims to offer up to \$250,000 but will never actually pay \$250,000 because every underinsured motorist will have at least \$25,000 in coverage.²¹⁸ Such a determination is consistent with the Supreme Court of Missouri's decision in *Manner* and the Southern District in *Beshears*.²¹⁹ The language of the offset provision in the Craigs' policy allowed Owners to collect premiums from the Craigs based on a UIM coverage limit of \$500,000 per occurrence.²²⁰ Owners could argue that this premium accounts for the offset and a policy without the offset would require a higher premium. However, the ordinary consumer is unlikely to know how insurance premiums are calculated.

Even though the policy stated that "[u]nder no circumstances do[es] [Owners] have a duty to pay" the entire policy limit,²²¹ when paying premiums for such coverage, a reasonable insured would expect to receive that entire policy limit when his uncompensated damages exceed \$250,000. With damages exceeding \$300,000 from an accident caused by an underinsured motorist, the Craigs recovered Mr. Thang's policy limit of \$50,000. It is reasonable for the Craigs to expect that with \$250,000 in uncompensated damages, they could collect the same amount from the policy they bought for just that occasion.

212. *Craig*, 2016 WL 3964628, at *8 (quoting *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 791 (Mo. Ct. App. 2013)).

213. *Id.* (quoting *Miller*, 400 S.W.3d at 791).

214. *Id.* (quoting *Miller*, 400 S.W.3d at 791).

215. *Id.* (quoting *Miller*, 400 S.W.3d at 791).

216. *Id.*

217. *See Gulf Ins. Co. v. Noble Broad.*, 936 S.W.2d 810, 814 (Mo. 1997) (en banc); *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. 1992) (en banc).

218. *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 619 (Mo. 2017) (en banc) (Draper, J., dissenting).

219. *See Manner v. Schiermeier*, 393 S.W.3d 58, 66 (Mo. 2013) (en banc); *Beshears v. Shelter Mut. Ins. Co.*, 468 S.W.3d 408, 412 (Mo. Ct. App. 2015).

220. *Craig*, 514 S.W.3d at 619 (Draper, J., dissenting).

221. *Id.* at 615 (majority opinion).

B. Legislative Action

Allowing insurers to take offsets from the UIM coverage limits, rather than from the total damages, creates risks of insureds being unfairly surprised when they do not receive their expected payments under the insurance contract. This was the case in *Straw* in which, under a policy with a UIM coverage limit of \$100,000, the insurer was able to offset \$100,000 and pay the insured nothing, even though the insured suffered \$200,000 in damages.²²² This left the insured with \$100,000 in uncompensated damages. Not only did the insured not get what was promised, he did not get anything at all. Had the offset been taken from the total damages rather than the UIM coverage limit, the insured would have been compensated for all of his claimed damages.

The Supreme Court of Missouri's decision in *Craig* may lead to a decrease in the number of people who purchase UIM insurance. If consumers realize they may not receive the full policy limit even when their uncompensated damages exceed the policy limit, it is likely that fewer people will choose to purchase UIM insurance. Of course, it is also true that, with precedent supporting offset provisions, insurance companies may decrease premiums and more people will be willing to purchase the less expensive but narrower UIM insurance. Conversely, had the court reversed and declared another offset provision invalid, there is a possibility that insurance companies would have responded by increasing insurance rates and premiums, which could also lead to fewer people purchasing insurance.

Nevertheless, because the interpretation of similar offset provisions has been a continuing source of conflict in the courts, it may be better for the legislature to step in. Missouri's UM coverage statute and the public policy behind it "produce[] predictability of insurance payouts . . . along with [an] increase in financial support available should a catastrophic automobile accident handicap an insured."²²³ This "creates a sustainable balance between turning a profit as a business and providing a service genuinely needed by the public."²²⁴ However, the same cannot be said for UIM coverage, which is not covered by statute.²²⁵ Enactment of a more detailed UIM insurance statute in Missouri would help courts avoid further conflicts, in addition to helping insureds. Furthermore, decreased litigation over UIM policies could potentially reduce insurance companies' costs as well as court costs.

The Missouri legislature should consider enacting an expanded UIM insurance statute similar to that enacted in New Mexico, which requires insurance companies to offer UM and UIM insurance.²²⁶ The New Mexico statute

222. See *Shelter Mut. Ins. Co. v. Straw*, 334 S.W.3d 592, 594 (Mo. Ct. App. 2011).

223. Reynolds, *supra* note 117, at 1082.

224. *Id.*

225. *Id.*

226. N.M. STAT. ANN. § 66-5-301(West 2018).

classifies UIM coverage as a type of UM coverage.²²⁷ The New Mexico legislature's intention in expanding the definition of UM coverage was "to compensate the innocent victims of inadequately insured drivers."²²⁸

Should the Missouri legislature follow New Mexico's lead and statutorily classify UIM insurance as a type of UM insurance, insurance companies would be prohibited from using anti-stacking and offset provisions.²²⁹ Missouri's current UM statute allows for policy stacking.²³⁰ Therefore, UIM coverage and its ability to be stacked would no longer be "determined by the contract entered between the insured and the insurer."²³¹ This would make Missouri an add-on jurisdiction where the reasonable expectations of insureds would be better protected in the event that a tortfeasor's coverage does not fully reimburse the insured's loss.²³² Although insurance companies would likely respond by increasing premiums, those who purchase UIM coverage would be better protected in addition to having their expectations met.

This is the coverage the typical insurance purchaser expects when he buys UIM insurance. Furthermore, this approach is more consistent with the purpose of UIM insurance: to "provide additional coverage for those injured by a negligent motorist where that motorist's liability coverage does not fully pay for the injured party's actual damage."²³³ Although there is a high probability that fewer people will purchase UIM insurance if it becomes more expensive, those who purchase it deserve to receive the broad coverage they intend to buy rather than to spend their money on what ends up being an inferior policy.

VI. CONCLUSION

The decision of the Supreme Court of Missouri in *Owners Insurance Co. v. Craig* diverted from a line of Missouri cases that routinely found ambiguity in and refused to enforce UIM coverage offsets. In doing so, the court adhered to the plain meaning of the insurance policy but failed to protect the expectations of the policy holder who had paid for more than he received. With the continuing confusion regarding UIM coverage offsets, it may be time for the legislature to step in to prevent the continued occurrence of similar problems.

227. *Id.* § 66-5-301(B) ("The uninsured motorist coverage described in Subsection A of this section shall include underinsured motorist coverage for persons protected by an insured's policy.").

228. *Konnick v. Farmers Ins. Co. of Ariz.*, 703 P.2d 889, 891 (N.M. 1985).

229. *See Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. 2009) (en banc).

230. MO. REV. STAT. § 379.203 (2016).

231. *Ritchie*, 307 S.W.3d at 135.

232. *JERRY & RICHMOND*, *supra* note 64, at 967.

233. *Bough & Heath*, *supra* note 88, at 210.