

DISSENTING OPINION BY WATANABE, J.

I respectfully dissent as to the partial majority opinion in Part II.B.2., upholding the validity of Liberty Mutual's excess "other insurance" clause.

As is typical of insurance policies nationwide, the PEMCO, H/S, and Liberty Mutual policies in this case all included provisions that limited or eliminated each respective insurer's liability for UM or UIM payment in the event that "other insurance" was available to cover an insured's loss. Such "other insured" clauses have spawned a tremendous amount of litigation across the country and have been the focus of much legal commentary. See, e.g., Annotation, *Uninsured Motorist Insurance: Validity and Construction of "Other Insurance" Provisions*, 28 A.L.R.3d 551 (1969); John James Ciavardoni, 3 No-Fault and Uninsured Motorist Automobile Insurance § 31.40 (2008); Alan I. Widiss and Jeffrey E. Thomas, 1 Uninsured and Underinsured Motorist Insurance ch. 13, at 795-905, and 3 Uninsured and Underinsured Motorist Insurance ch. 40, at 371-418 (3d ed. 2005); Paul A. Morello, Jr., *The Problem of Multiple Uninsured Motorist Coverages: Who Pays?*, 62 Conn. B.J. 358 (1988); R. J. Robertson, Jr., *"Other Insurance" Clauses in Illinois*, 20 S. Ill. U. L.J. 403 (1996).

"Other insurance" clauses generally fall into one of three categories or any combination thereof:

(a) excess; (b) escape; and (c) pro-rata. An "excess" other insurance clause generally provides that if there is other valid and collectible insurance which covers the loss, the excess policy is applicable if the loss exceeds the policy limits of the primary insurer. An "escape" other insurance clause generally provides that the existence of other [UM] insurance extinguishes the insurer's liability to the extent of that other insurance. A "pro-rata" other insurance clause generally provides that if there is other valid and collectible insurance which covers the loss, the insurer is liable only for its pro-rata share of the loss, that is, the proportion that the particular policy limits bears to the total applicable policy limits.

Morello, 62 Conn. B.J. at 358-59 (footnotes omitted).

In this case, the PEMCO, H/S, and Liberty Mutual insurance policies all contained similar "excess" and "pro-rata" other insurance clauses. Construing these clauses, the circuit court determined that because the PEMCO and H/S policies insured

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Tolfree, whose vehicle was involved in the accident, the plain language of the PEMCO and H/S policies rendered the excess clauses therein inapplicable, and, therefore, the PEMCO and H/S policies provided Labrador primary UM coverage. The circuit court also concluded that because Liberty Mutual's policy covered the Labrador family and none of the vehicles covered under that policy was involved in the accident, Liberty Mutual's policy provided Labrador "excess" UM coverage and Labrador must exhaust PEMCO's \$100,000 UM-policy limits and H/S's \$50,000 UM-policy limits before pursuing Liberty Mutual's \$140,000 stacked-UM policy. The circuit court also concluded that Liberty Mutual's "excess" other insurance clause was not void as contrary to public policy:

Arguments can be made that Liberty Mutual's other insurance provision under which it justifies its excess position is not enforceable as a matter of public policy. First, under Hawaii law, UM coverage is intended to cover the person regardless of what vehicle he or she is injured in. *Dawes v. First Insurance Co. of Hawaii Ltd.*, 77 Hawaii 117, 123 (1994). Second, Labrador's parents actually paid Liberty Mutual for the UM coverage to be afforded to Labrador. In contrast, Tolfree or her father made payment for the UM coverage to be afforded to Labrador under the [H/S] and PEMCO policies. The legislative policy of providing UM benefits to insureds who purchase UM coverage should not be hindered by coverage disputes arising from the existence of multiple policies providing the same coverage. See e.g.: *Schmidt v. City of Gladstone*, 913 S.W.2d 937 (Mo. App. W.O. 1996).

However, the Court declines to adopt these arguments because Liberty Mutual's excess insurance provision does not reduce the UM benefits payable to Labrador, but merely sets forth priorities for payments under multiple policies.

Labrador argues on appeal that the circuit court erred when it denied her motion for partial summary judgment and determined that Liberty Mutual's liability for UM payments to Labrador was "in excess" of the PEMCO and Sentinel policies. She challenges the decision on the grounds that the provision is against public policy.

For the reasons that follow, I would conclude that the excess "other insurance" clause in Liberty Mutual's policy invalidly limited Liberty Mutual's UM liability, as defined by Hawaii statutes and case law, is against public policy and is, therefore, void and unenforceable.

1.

Initially, it is important to note that Hawai'i statutes and administrative rules do not currently establish any priorities regarding which UM- or UIM-insurance policy must be exhausted first when multiple overlapping insurance coverage is available to cover the same liability.

In contrast, other statutes pertaining to motor vehicle insurance do establish priority of coverages. For example, HRS § 431:10C-305(b)(1) (2005) provides that "[e]xcept as provided in paragraph (2), personal injury protection benefits shall be paid primarily from . . . (A) [t]he insurance on the vehicle occupied by the injured person at the time of the accident; or (B) [t]he insurance on the vehicle which caused accidental harm if the injured person is a pedestrian (including a bicyclist)." HRS § 431:10C-305(b)(2) provides generally that "[a]ll personal injury protection benefits shall be paid secondarily and net of any benefits a person is entitled to receive because of the accidental harm from workers' compensation laws[.]"

The silence of the legislature and the state insurance commissioner on this issue is, in my opinion, instructive.

2.

Although "insurers have the same rights as individuals to limit their liability and to impose whatever conditions they please on their obligation," Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000) (internal quotation marks and brackets omitted), the Hawai'i Supreme Court has emphasized repeatedly that insurers may not limit their liability "in contravention of statutory inhibitions or public policy." Id.

In Walton v. State Farm Mutual Automobile Insurance Co., 55 Haw. 326, 331, 518 P.2d 1399, 1402 (1974), for example, the supreme court invalidated an "other insurance" clause in a UM policy which limited the insurer's liability to "the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance." Id. at 327 n.1, 518 P.2d at 1400 n.1. The plaintiff

in Walton had been seriously injured as a passenger in a car that collided with a car driven by a UM. Id. at 326, 518 P.2d at 1399. The plaintiff recovered \$10,000 from the insurer of the driver of the car he was riding in, the maximum recoverable under the driver's UM policy. Id. at 326, 518 P.2d at 1399-1400. The plaintiff obtained a final judgment for \$25,000 against the UM, who then filed for bankruptcy. Id. at 326-27, 518 P.2d at 1400. The plaintiff then sought to collect \$10,000 in UM benefits from his own UM insurer, which refused coverage, based on an excess insurance clause.¹ Id. at 327, 518 P.2d at 1400. The insurer claimed that under the "other insurance" clause, it was excused from making any payment since the plaintiff's UM coverage was for \$10,000 and the plaintiff had collected \$10,000 in UM benefits from the driver's insurer. Id. at 327-28, 518 P.2d at 1400.

The supreme court, in adopting the "majority rule," held that the "other insurance" clause at issue violated HRS § 431-448 (1968),² the predecessor to HRS § 431:10C-301(b)(3),

¹ The insurance provision at issue in Walton stated as follows:

Under coverage U [UM provisions] with respect to *bodily injury* to an insured while occupying a motor vehicle not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance. [Emphasis in the original.]

Walton, 55 Haw. at 327 n.1, 518 P.2d at 1400 n.1.

² At the time Walton was decided, HRS § 431-448 provided, in relevant part, as follows:

Automobile liability; coverage for damage by uninsured motor vehicle. No automobile liability or motor vehicle liability policy . . . shall be delivered, issued for delivery, or renewed in this State . . . unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 287-7, under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage in writing.

Id. at 328, 518 P.2d at 1400.

because the clause "reduce[d] the benefits directly payable by the injured-insured's insurer to a sum below the statutory minimum" of "not less than \$10,000 because of bodily injury to . . . one person in any one accident." Id. at 329, 518 P.2d at 1401 (internal quotation marks omitted). In voiding the "other insurance" clause, the supreme court noted that the purpose of UM coverage is "to promote protection, through voluntary insurance, for persons who are injured by uninsured motorists who cannot pay for personal injuries caused by motor vehicle accidents[.]" Id. at 331, 518 P.2d at 1402 (quoting H. Stand. Comm. Rep. No. 194 on House Bill No. 26, which became HRS § 431-448, 1965 House Journal, at 582). This protective purpose, the supreme court said, would not be accomplished if an insured "has been damaged to the extent of \$25,000, and yet has been compensated therefor only to the extent of \$10,000." Id.

The supreme court also rejected the insurer's arguments that invalidating the "other insurance" provision of the policy would "permit inequitable 'stacking' or 'pyramiding' by allowing appellee-insured to be placed in a better position than he would have been had the [UM] been insured for the statutory minimum":

The simple reply is that there is no reason to conjecture about how much insurance the uninsured might have had, had he [or she] had any at all, by assuming that he [or she] would have had \$10,000. Any motorist might have more insurance than \$10,000, or, if he [or she] be a self-insurer, the hypothetical "other driver" might have had ability to satisfy judgments in excess of the statutory minimum of \$10,000. *Compensation for the injured party is the more important focus of inquiry. Therefore, there would be inequity only if insured tried to "pyramid" or "stack" several policy provisions to build up to a sum beyond his damage, and thus gain a windfall. But where the "pyramiding" or "stacking" would result in a sum equal to or less than insured's damage, to refuse to permit pyramiding would award the insurer the windfall, based on the none too compelling assumption that the uninsured would have only been insured to the statutory minimum. "This assumption is not required and we cannot accept it. What insured would have received from an uninsured motorist is purely a matter of speculation." Werley v. United Services Automobile Association, 498 P.2d 112, 119 (Alaska 1972).*

We believe that the majority rule is better grounded in logic and reason than is the minority view. In addition, two other, supplementary arguments have been adduced in defense of the majority position. First of all, permitting recovery under both [UM] coverages (but only until insured is indemnified for losses) avoids the potentially intricate

problems involved in deciding whether injured-insured's own, or host driver's own, "[UM]" coverage is considered the "excess" (or "secondary coverage") where both injured-insured and host driver have policy provisions such as those involved in the case at bar. Both insurers could, and sometimes have, disclaimed liability by pointing to the other insurer as the "primary" insurer. The key policy word is "available." It has been held that in such cases neither "other insurance" provision is valid. *Lamb-Weston, Inc. v. Oregon Auto Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959); *Werley v. United Services Automobile Association*, *supra*, at 116-120.

Secondly and most importantly, it has been held to be unconscionable to permit an insurer to collect a premium for coverage of a type that the insurer is obligated by statute to provide and then to permit the insurer to use language insurer itself devised to avoid liability. *Simpson v. State Farm Mutual Automobile Insurance Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Blakeslee v. Farm Bureau Mutual Ins. Co.*, 388 Mich. 464, 474, 201 N.W.2d 786, 791 (1972). More pithily stated: "insurer charged a premium for the coverage; it cannot be permitted to vanish as the pea in the shell game", *Kraft v. Allstate Insurance Company*, 6 Ariz. App. 276, 431 P.2d 917 (1967).

55 Haw. at 332-33, 518 P.2d at 1402-03 (emphases added; footnotes and brackets omitted).

3.

The supreme court has not hesitated to invalidate other provisions in insurance policies that limit an insurer's statutory liability. See, e.g., DeMello v. First Ins. Co. of Hawaii, 55 Haw. 519, 523 P.2d 304 (1974) (invalidating a UM-policy provision requiring "physical contact" between an insured vehicle and a hit-and-run vehicle before the insurer would pay UM benefits); Kau v. State Farm Mut. Auto. Ins. Co., 58 Haw. 49, 564 P.2d 443 (1977) (per curiam) (invalidating an exclusionary clause in a UM policy on grounds that the clause violated HRS § 431-448 by denying liability to an insured under the policy on the basis that at the time of the injury, the insured was not occupying an "owned motor vehicle" as defined in the policy); Nat'l Union Fire Ins. Co. v. Olson, 69 Haw. 559, 563, 751 P.2d 666, 668-69 (1988) (holding that a UM policy cannot restrict coverage to persons "occupying" a covered vehicle because HRS § 431-448 requires that UM insurance cover "the ownership, maintenance, or use of the vehicle"), overruled in part on other grounds, Dawes v. First Ins. Co. of Hawai'i, 77 Hawai'i 117, 131, 883 P.2d 38, 52 (1994); Sol v. AIG Hawai'i Ins.

Co., 76 Hawai'i 304, 309, 875 P.2d 921, 926 (1994) (holding invalid a policy provision dictating that the amount payable in UM benefits be reduced by any no-fault payments made under the policy because the provision was in conflict with the legislature's expressed intent to prevent a no-fault insurer from subrogating against optional UM benefits and state-insurance statute allowed duplicate recovery of optional UM benefits); Caberto v. Nat'l Union Fire Ins. Co., 77 Hawai'i 39, 45-46, 881 P.2d 526, 532-33 (1994) (invalidating, based on Sol, a clause requiring reimbursement of no-fault benefits paid from UIM benefits received; and holding that a clause requiring reduction in the payment of optional UM or UIM benefits based on the amount of workers' compensation benefits received was void because the clause defeated the purpose of optional additional coverage and resulted in a windfall to the insurer merely because the insured happened to be in the course and scope of his employment at the time of injury); Kaiama v. AIG Hawai'i Ins. Co., 84 Hawai'i 133, 136-37, 930 P.2d 1352, 1355-56 (1997) (invalidating, as against public policy, a family-member exclusion denying UIM coverage to a covered family member injured by negligence of another named insured); Taylor v. Gov't Employees Ins. Co., 90 Hawai'i 302, 312-13, 978 P.2d 740, 750-51 (1999) (holding void, as against public policy and the purposes of the no-fault insurance law, a clause requiring an insured to exhaust the full amount of a tortfeasor's liability insurance policy before seeking UIM benefits); and Mikelson v. United Servs. Auto. Ass'n, 107 Hawai'i 192, 208-10, 111 P.3d 601, 617-19 (2005) (invalidating an exclusion for BI and property damages sustained by a person while occupying a vehicle not insured under a UIM policy but owned by a named insured under the policy, as well as an exclusion for vehicles with "less than four wheels").

4.

In this case, Liberty Mutual's excess "other insurance" clause provided that "any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." The clause thus limited Liberty Mutual's liability

by requiring that UM policies covering vehicles not owned by its insured that are involved in an accident involving its insured must first be exhausted before Liberty Mutual's UM liability to its own insured would kick in. I don't believe that such a limitation of liability is allowed under Hawai'i law.

First, pursuant to HRS § 431-10C-301(b)(3), a UM policy is "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles[.]" Other courts have construed similar statutory language as precluding an insurance company from circumventing the clear mandate of the statute by withholding the required protection through an "other insurance" clause. See, e.g., Sellers v. U.S. Fid. & Guar. Co., 185 So. 2d 689, 690-92 (Fla. 1966) (holding that a statute requiring that no automobile liability insurance shall be delivered unless coverage is provided "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of [BI]" operates to invalidate a condition in an insurance policy that limits the insurer's liability and is inconsistent with the statutory requirement); State Farm Mut. Auto. Ins. Co. v. Barnard, 156 S.E.2d 148, 149-50 (Ga. Ct. App. 1967) (holding that Georgia's Uninsured Motorist Act "is plain and unambiguous in requiring all liability policies to undertake to pay the insured 'all sums which he [or she] shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle[,]' and because "[t]here appears no latitude . . . for an insurer limiting its liability through 'other insurance'; 'excess-escape' or 'pro rata' clauses, . . . all inconsistent clauses in the policy to the controlling statutory language . . . must be judicially rejected"); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 462 (Miss. 1971) (holding that a statute similar to Hawaii's that describes what must be included in a UM policy "is mandatory on the insurer and this undertaking cannot be diminished by a provision in the policy" limiting the insurer's liability); Schmidt v. City of Gladstone, 913 S.W.2d

937, 940-41 (Mo. Ct. App. 1996) (holding that "Missouri's public policy prevents the enforceability of [insurer's] 'other insurance' clause" because "[t]he [UM] coverage required by Missouri law is not based on the vehicle in which the insured is operating or riding, but instead is personal coverage which follows the insured" and if the insurer's "qualification on liability were enforced, the bright line of the legislature's mandatory [UM] coverage would be impaired"); Vernon v. Harleysville Mut. Cas. Co., 135 S.E.2d 841, 843-44 (S.C. 1964) (stating that insurer's UM endorsement, which excluded coverage where there was "other insurance," was an invalid "limitation upon the statutory coverage required by [the South Carolina UM Act]"); Bryant v. State Farm Mut. Auto. Ins. Co., 140 S.E.2d 817, 820 (Va. 1965) (holding invalid an "other insurance" provision of a policy because it conflicted with the "plain language" of a statutory requirement very similar to Hawaii's and "[t]here is no limitation or qualification of this language anywhere in the statute, nothing at all to indicate that it does not mean what it says").

Second, the purpose of our UM statute is to provide a remedy where injury is caused by an uninsured motorist; or, as has been more frequently stated, to provide a remedy to the innocent victims of irresponsible motorists who may have no resources to satisfy the damages they cause. This recourse is provided, then, to cover the situation of a wrongful or tortious act of an uninsured motorist or a hit and run driver, or that of another unknown motorist.

. . . Ideally, the purpose is to place those insured in the same position they would have occupied had the tortfeasor carried liability insurance[.]

Dawes, 77 Hawai'i at 123, 883 P.2d at 44 (footnote and brackets omitted). In Dawes, the Hawai'i Supreme Court explained that

[t]wo general principles apply to UM insurance coverage. First, either "an insured or an insured vehicle must be involved in the accident in order to collect under the UM endorsement." 12A J. Couch, *Cyclopedia of Insurance Law* § 45:634, at 127 (R. Anderson and M. Rhodes 2d ed. 1981) [hereafter Couch] (emphasis added). This is because "the uninsured motorist policy is personal to the insured," Palisbo v. Hawaiian Ins. & Guar. Co., Ltd., 57 Haw. 10, 15, 547 P.2d 1350, 1354 (1976) (emphasis added), or, put differently, the UM coverage follows the insured's person. Accordingly,

the nature of [UM] insurance is such that an insured is covered whether or not he or she is injured while

in a vehicle which is insured under the policy. An insured under the policy is entitled to recover [UM] insurance benefits even though she is injured while operating a vehicle not covered by the policy.

Allstate Ins. Co. v. Morgan, 59 Haw. 44, 47-48, 575 P.2d 477, 479-80 (1978). Second, "almost all modern forms of UM coverage include *passengers*, or occupants, of an automobile injured by [a UM]; indeed an exclusion of them would, in most states, be invalid." 8C Appleman § 5080.45, at 255-56 (1981) (footnote omitted and emphasis added).

Construing a statute similar in all material respects to HRS §§ 431:10-213 and 431:10C-301(b)(3), the Connecticut Supreme Court aptly elaborated upon these general principles as follows:

Required [UM] coverage is "person oriented." The public policy embodied in the UM statute directs that uninsured motorist coverage be provided to insureds when they are not occupants of insured vehicles as well as when they are.

Our [UM] insurance statute provides coverage for "persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles." (Emphasis added.) The coverage attaches to the insured person, not the insured vehicle. Thus, this court has held that an injured party may receive the benefits of a policy even though not occupying a vehicle insured under that policy.

An insured's status at the time of the injury, whether passenger, pedestrian, or driver of an insured or uninsured vehicle, is irrelevant to recover under the statutorily mandated coverage. The coverage is portable: The insured and family members are insured no matter where they are injured. They are insured when injured in an owned vehicle named in the policy, in an owned vehicle not named in the policy, in an unowned vehicle, on a motorcycle, on a bicycle, whether afoot or on horseback or even on a pogo stick or in a rocking chair on one's front porch. [UM] statutes place no geographical limits on coverage and do not purport to tie protection against uninsured motorists to occupancy of an insured vehicle. [UM] protection [sic] of coverage for persons, not for vehicles.

Id. at 123-24, 883 P.2d at 44-45 (footnotes, brackets, and ellipses omitted).

Subsequently, in *Dines v. Pacific Insurance Co.*, 78 Hawai'i 325, 893 P.2d 176 (1995), the supreme court reiterated that

the following propositions are established elements of this state's insurance law: (1) UM insurance coverage is personal to the named insured; (2) the public policy underlying HRS § 431:10C-301(b)(3) mandates that the insured vehicle (*i.e.*, the "covered auto" named in the policy) need

not be involved in the accident in order for the named insured to be entitled to collect UM benefits; (3) UM coverage attaches to the named insured's person and not the insured vehicle; and, therefore, (4) a named insured, injured by an uninsured motorist from whom the named insured is legally entitled to recover damages, is entitled to UM coverage no matter where he or she is injured, whether the injury occurs while the named insured is (a) occupying an insured motor vehicle, (b) occupying an uninsured but owned motor vehicle, *Methven-Abreu v. Hawaiian Ins. & Guar. Co., Ltd.*, 73 Haw. 385, 394-96, 834 P.2d 279, 285-86, reconsideration denied, 73 Haw. 625, 838 P.2d 860 (1992); *Kau v. State Farm Mut. Auto. Ins. Co.*, 58 Haw. 49, 51, 564 P.2d 443 (1977), (c) occupying an unowned motor vehicle, (d) on a motorcycle, (e) on a bicycle, (f) on horseback, (g) on a pogo stick, (h) on foot, or (i) in a rocking chair on a front porch.

Id. at 328, 893 P.2d at 179.

Hawaii statutes and case law are thus clear that UM insurance coverage follows the named insured, not the vehicle. Liberty Mutual's excess "other insurance" clause, by requiring that other UM policies covering a vehicle involved in an accident provide primary coverage and Liberty Mutual's UM policy provide only secondary coverage, thus violated our statutes and case law and is, in my opinion, invalid and void.

5.

The Hawaii Supreme Court has recognized that

because insurance policies are contracts of adhesion and are premised on standard forms prepared by the insurer's attorneys, . . . they must be construed liberally in favor of the insured and any ambiguities must be resolved against the insurer. Put another way, the rule is that policies are to be construed in accord with the reasonable expectations of a layperson.

Guajardo v. AIG Hawaii Ins. Co., 118 Hawaii 196, 202, 187 P.3d 580, 586 (2008) (citations omitted); Allstate Ins. Co. v. Pruett, 118 Hawaii 174, 179, 186 P.3d 609, 614 (2008). In addition, "an insurer cannot 'conscript the insured as its "vicarious plaintiff" for the purpose of recovering, at substantial cost, funds that the insured already paid the insurer to bear the risk of providing in the event of an underinsured injury.'" Guajardo, 118 Hawaii at 205-06, 187 P.3d at 589-90 (quoting Granger v. Gov't Employees Ins. Co., 111 Hawaii 160, 168, 140 P.3d 393, 401 (2006)) (brackets omitted).

In Granger, the plaintiff-insured (Granger) sustained injuries in excess of \$100,000 when she was rear-ended by another driver (Chong). 111 Hawai'i at 162, 140 P.3d at 395. Chong had a liability policy limit of \$100,000; Granger had UIM coverage through her carrier, GEICO, and she informed GEICO of her intent to file a UIM claim. Id. Granger filed suit against Chong, and a proposed settlement was reached whereby Chong would pay Granger \$90,000 in exchange for a full release of all claims. Id. When informed of the settlement proposal, and after it had completed an assets-check evaluation of Chong, GEICO informed Granger that it could not consent to any BI settlement that fully released Chong from GEICO's subrogation interests. Id. Granger notified GEICO that Chong would withdraw her settlement offer if anything less than a full release was provided, and Granger requested that GEICO immediately pay her \$90,000, an amount equal to Chong's settlement offer. Id. at 162-63, 140 P.3d at 395-96.

Granger then filed suit for declaratory judgment against GEICO, arguing in part that: (1) "GEICO cannot refuse to consent to the settlement of the underlying action and thereby compel Granger to either pursue said underlying action to judgment or forfeit her rights to UIM coverage"; and (2) "GEICO must either consent to the settlement or assume Granger's position in the underlying action by paying her the amount she would have received from [Chong.]" Id. at 163, 140 P.3d at 396 (some brackets and ellipses omitted). The circuit court granted summary judgment in favor of GEICO. Id. at 164, 140 P.3d at 397.

On appeal, the supreme court upheld GEICO's right, after investigation, to refuse to consent to the settlement to protect its subrogation rights. Id. at 165-66, 140 P.3d at 398-99. The supreme court also held, however, that GEICO, having withheld its consent to the proposed settlement, "must put itself in the position of Granger's subrogee by paying her \$90,000.00, the amount of the Chong's offer." Id. at 166, 140 P.3d at 399.

The supreme court reasoned that "after the UIM insurer has a reasonable opportunity to consider the implications of a pending settlement, it must either allow the settlement to

proceed or tender to its insured a payment equal to the tortfeasors' settlement offer (up to the limits of the insured's UIM coverage)." Id. Thus, "GEICO should have been left to the task of estimating whether (1) 'buying' itself the right to sue for \$90,000.00 and then incurring the time and expense of litigation will net a more favorable outcome than (2) permitting the compromise and then reimbursing Granger for her compensable damages that exceed \$100,000.00[.]" Id. at 168, 140 P.3d at 401.

This is because, the court continued, although GEICO may in good faith "prolong the lawsuit against [Chong] for its own benefit[.]" id., it cannot both withhold consent to protect its subrogation rights and decline to pay an amount equal to the settlement offer because

we cannot allow GEICO to conscript Granger as its 'vicarious plaintiff' for the purpose of recovering, at substantial cost, funds that she already paid GEICO to bear the risk of providing in the event of an underinsured injury. See *Pitts v. Trust of Knueppel*, 282 Wis. 2d 550, 698 N.W.2d 761, 773 (2005) ("[T]he transfer of risk is the only reason that insureds pay premiums to insurers."); *Vogt [v. Schroeder]*, 383 N.W.2d [876, 882 (Wis. 1986)].

Id. (footnote omitted; emphases added). See also Guajardo, 118 Hawai'i at 205-06, 187 P.3d at 589-90 (citing Granger, and criticizing the auto insurer's asserted interpretation of its policy that would have required the insureds to pursue the tortfeasor to judgment in order to obtain their UIM benefits because this would "plainly put [the insureds] 'between the proverbial rock and a hard place'").

Similarly here, upholding the validity of Liberty Mutual's excess "other insurance" clause effectively shifts the burden and cost of recovery and litigation to Liberty Mutual's own insured, Labrador, whose parents had already paid a premium for UM and UIM coverage. Liberty Mutual has used its excess "other insurance" clause to refuse to compensate its own injured-insured for more than a decade and has thereby "conscript[ed Labrador] as its 'vicarious plaintiff' for the purpose of recovering, at substantial cost, funds that [her parents] already paid [Liberty Mutual] to bear the risk of providing[.]" Granger, 111 Hawai'i at 168, 140 P.3d at 401, "in

contravention of one of the legislature's stated goals . . . i.e., 'providing speedy and adequate protection to persons injured in motor vehicle accidents *at the least possible cost.*'" Guajardo, 118 Hawai'i at 206, 187 P.3d at 590 (quoting Taylor, 90 Hawai'i at 313 n.10, 978 P.2d at 751 n.10).

6.

The majority's decision to uphold Liberty Mutual's excess "other insurance" clause is also problematic from a public-policy standpoint.

The decision will no doubt promote piecemeal redrafting of "other insurance" clauses as insurers seek to reverse the results of this case or make their policies excess to other available policies. For example, since the Hawai'i Supreme Court has held that UM coverage attaches to the named insured's person and not the insured's vehicle, what is to prevent PEMCO and H/S from amending their policies to provide that where multiple UM policies are available, the UM policy covering the occupant of a vehicle involved in a motor vehicle accident shall be primary to any UM policy covering the specific vehicle involved in the accident. The proliferation of competing "other insurance" clauses that will surely become part of automobile insurance policies will undoubtedly lead to more litigation regarding the interpretation and application of these clauses. The uncertainty these competing clauses engender will invariably lead to higher premiums for Hawaii's citizens. See discussion: Robertson, 20 S. Ill. U. L.J. at 449-50.

Moreover, as this case amply demonstrates,³ upholding the validity of excess "other insurance" clauses will only serve to delay

settlement or trial in cases where the insured and the injured third-party claimants must await litigation between the insurers, each of whom claims that its insurance is excess and the other's is primary. As insurers attempt to avoid the costs of defense by being declared merely excess insurers, there is a great incentive to litigate the "other insurance" issues in a declaratory judgment action while the

³ Labrador was injured in 1994 when she had just entered her teen years. It is now almost fifteen years later, and because of the multiple disputes among the insurance carriers, she still has not been fully compensated for her undisputed injuries.

underlying claim is stayed pending resolution of the issue of which insurer provides primary coverage. Indeed, a Texas insurance administrator has said that this approach has "the insured sitting there in a cross-fire, being ping-ponged back and forth between two insurance companies" The costs of caring for injured persons, pending decision on which of several insurers must pay for primary coverage which is conceded to be due from someone, is an unnecessary and cruel burden to impose on injured persons, their families, and communities.

Id. at 450 (footnotes omitted).

I would:

(1) Reverse that part of the "Order Denying [Labrador's] Motion for Reconsideration; Motion re: Equitable Estoppel; Motion to Set Case for Trial, Filed June 27, 2002" filed on March 17, 2003, which denied [Labrador's] motion for reconsideration of the circuit court's ruling that the "other insurance" provision in Liberty Mutual's policy "was not unenforceable as a matter of public policy" but affirm the order in all other respects;

(2) Reverse that part of the "Order Denying [Labrador's] Motion for Partial Summary Judgment Against [Liberty Mutual], Filed 02/27/02, and Granting in Part and Denying in Part [Liberty Mutual's] Cross-Motion for Summary Judgment, Filed 03/08/02" filed on March 17, 2003, which determined that Liberty Mutual's policy was "excess" to the H/S policy but, in all other respects, affirm the order; and

(3) Vacate the Final Judgment filed on July 21, 2005 to the extent that it entered judgment partially in favor of Liberty Mutual based on the foregoing orders.

Corinne K A Watanabe