

PIP BASICS

Disputes about fault can eliminate or delay payment of damages for injuries resulting from automobile accidents. Personal Injury Protection (PIP) benefits provide for prompt payment regardless of fault. *See* ORS 742.520. While the terms and limits of PIP coverage vary from policy to policy, ORS 742.520 through ORS 742.544 establish the minimum requirements. ORS 742.532.

WHO IS COVERED

Every Oregon motor vehicle liability policy must provide PIP coverage for the insured, the insured person's family members, passengers, and pedestrians who are struck by the insured vehicle. ORS 742.520(1). The benefits required vary with the person's status.

CIRCUMSTANCES UNDER WHICH PIP COVERAGE APPLIES

PIP benefits for the insured person or a family member residing in the same household generally apply to injury or death resulting from the "use, occupancy or maintenance of any motor vehicle." Although there must be a causal link between injury and "use, occupancy or maintenance" of a vehicle, that issue has been reexamined. *See* Carrigan v. State Farm Mutual Auto. Ins. Co., 326 Or 97, P2d (1997) (PIP does not exclude all injuries inflicted by gunshot; allowing coverage for driver shot during carjacking while both insured and carjacker were outside vehicle); Worldwide Underwriters Ins. Co. v. Jackson, 121 Or App 292, 855 P2d 166, rev den 318 Or 26 (1993) (injuries from drive-by shooting did not arise out of

"use"). PIP benefits do not apply, however, with respect to uninsured motor vehicles owned by the insured, motorcycles or mopeds not owned by the insured while being ridden by the insured, and any other motor vehicle not within the definition of "private passenger motor vehicle." ORS 742.520(2)(a). A temporary substitute vehicle that does not otherwise come within these exceptions has PIP coverage under the driver's policy. *Utah Home Fire Ins. Co. v. Colonial Ins. Co.*, 300 Or 564, 712 P2d 1112 (1986).

For passengers other than the insured or family members, PIP benefits apply only to their "use, occupancy or maintenance" of the insured vehicle. *See* State Farm Ins. Co. v. Berg, 70 Or App 410, 689 P2d 959 (1984), rev den 298 Or 553 (1985) (discusses meaning of "occupying"); *Marcilionis v. Farmers Ins. Co.*, 318 Or 640, 871 P2d 470 (1994) (same, in context of uninsured motorist coverage). This same condition applies to pedestrians (other than the insured or same-household family members) who are covered only when they are struck by the insured vehicle. ORS 742.520(2)(b). "Pedestrian" now includes a person in a wheelchair. Or Laws 1997, Ch 344, § 1.

WHAT PIP COVERS

Because policies vary, it is essential to check for benefit levels and conditions more favorable than the minimum statutory requirements. The minimum PIP benefits include:

- **Medical expenses** that are "reasonable and necessary" up to \$15,000 "incurred within one year" of the date of injury. ORS 742.524(1)(a).

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DISCLAIMER

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• **Loss of income**, when disability continues for at least 14 days, at 70 percent of the lost income level, up to a maximum payment of \$1,250 per month and a maximum aggregate total of 52 weeks. ORS 742.524(1)(b).

• **Essential services**, when the injured person is not usually employed, up to a maximum of \$30 per day for a total of 52 weeks. ORS 742.524(1)(c).

• **Funeral expenses** up to \$2,500 “incurred within one year” of the person’s injury. ORS 742.524(1)(d).

• **Child care** at \$15 per day if the injured person is hospitalized for at least 24 hours, up to a maximum of \$450. ORS 742.524(1)(e).

Ordinarily, under the collateral source rule, employer-provided benefits such as payment for sick leave, holidays, and vacation do not act as setoffs reducing PIP benefits. *Dickson v. Hollinger*, 262 Or 113, 496 P2d 912 (1972); *but see* ORS 742.526(1)(e) (PIP benefits for pedestrians [other than the insured and family members] are “excess over any other collateral benefits”).

MEDICAL BILLS

Under 2003 legislation, medical bills to the PIP insurers are fixed at the lesser of the amount that the medical provider charges the general public or the amount provided by the workers’ compensation fee schedule. ORS 742.525; ORS 656.248. In effect, the workers’ comp fee schedule determines what amount is “reasonable.” Medical provider cannot “balance bill” the patient for any additional sum. *Id.*

EXCLUSIONS

Insurers may exclude from coverage any otherwise-covered individual who “intentionally causes self-injury” or who participates in a “prearranged or organized racing or speed contest.” Additionally, loss of income and essential services benefits need not be provided for injured pedestrians (other than the insured or family member) who are injured in an accident outside the state. ORS 742.530.

WHEN PIP BENEFITS MUST BE PAID

Insurers are required to pay PIP benefits promptly after proof of loss has been submitted, regardless of the existence of a potential tort action. ORS 742.520(4), (5). An insurer that denies payment

of PIP benefits must provide written notice of denial. ORS 742.528. Medical expenses are presumed to be reasonable and necessary unless the insurer gives notice of denial within 60 days of notice of a bill. ORS 742.524(1)(a).

DISPUTES

Disputes between the insurer and the beneficiary about denial or the amount of benefits may be decided by arbitration if both parties agree at the time of the claim. ORS 742.520(6). Attorney fees are not recoverable in arbitration.

The insurer’s consent to arbitrate and acceptance of coverage will defeat the claimant’s right to recover attorney fees in court, assuming that the insurer consented within six months of the proof of loss. ORS 742.061(2). It is not known whether the insurer may initially refuse to arbitrate and belatedly consent to arbitrate before the expiration of six months; nor is it known whether the insured’s institution of litigation after an initial refusal would estop the insurer from consenting to arbitrate and defeat fees.

STACKING OF PIP BENEFITS

ORS 742.526 specifies when PIP coverage is primary and when it is excess. Those provisions appear to allow “stacking” of PIP benefits when more than one policy applies. *See Porter v. Utah Home Fire Insurance Co.*, 58 Or App 729, 650 P2d 130 (1982). Some policies, however, may purport to limit total PIP payments available under all policies to the highest limit under any one policy. In *Anderson v. Farmers Ins. Co.*, 188 Or App 179, 71 P3d 144 (2002), the court held that, when an insurer had issued separate policies on an insured’s several cars, the policy would stack, despite the policy language to the contrary. The policies stacked to the full face amount of each of three \$25,000 policies. They did not merely stack to the extent of the first \$25,000 policy plus the statutory minimum coverage of \$10,000 for the latter two excess policies.

RELATIONSHIP WITH WORKERS’ COMP BENEFITS

Insurers are also permitted to include policy provisions that reduce or eliminate PIP benefits when the injured person is entitled to receive workers’ compensation (or other similar benefits). ORS

742.526(2). However, when entitlement to workers' compensation is in dispute, there remains some disagreement about whether a PIP insurer that provides benefits may seek to recover if workers' compensation benefits are eventually awarded. *See* 1 Insurance, § 19.60 (Oregon CLE 1996).

RELATIONSHIP WITH UM/UIM BENEFITS

The PIP benefits provided by a motor vehicle insurance carrier to its own insured may reduce the damages its insured can recover for the same accident under uninsured motorist (UM) coverage. However, the PIP benefits paid do not reduce the UM policy limits. ORS 742.542. For example, if the UM limit is \$50,000 and the insured receives \$10,000 in PIP, the insured would be entitled to the full UM limit if his or her total damages were \$60,000 or more. The same provision also applies to underinsured motorist coverage (UIM) with respect to accidents occurring on or after October 4, 1997. Or Laws 1997, Ch 808, §§ 10, 11 (amending ORS 742.542 and effectively overruling *Yokum v. Farmers Ins. Co.*, 117 Or App 546, 844 P2d 937 (1992), rev den 317 Or 272 (1993)).

It is not yet established whether this "make whole" formula of ORS 742.542 prevails over the "make half" formula of ORS 742.544 concerning PIP reimbursement. Claimants will contend that the more favorable formula of ORS 742.542 should prevail whenever an injured person has received PIP benefits from their own UM/UIM insurer. PIP insurers will tend to ignore the promise of ORS 742.542 and demand ordinary reimbursement under ORS 742.544 (discussed below). An answer may come in 2006 with an appeal in *Gaucin v. Farmers Ins. Co.* The Deschutes County Circuit Court sustained the PIP insurer's view and rejected the insured's plea to be "made whole."

RECOVERY OF PIP BENEFITS BY PIP CARRIER

The PIP insurer is entitled to receive reimbursement of those PIP benefits by one of three methods: (1) requesting inter-insurer reimbursement, ORS 742.534; (2) obtaining a lien, ORS 742.536; or (3) exercising subrogation rights, ORS 742.538. Inter-insurer reimbursement is handled through arbitration. It permits the liability insurer to reduce the allowable PIP reimbursement proportionately based on relative fault. ORS 742.534(2). The lien and subrogation methods entitle the PIP insurer to the proceeds of

the judgment against the tortfeasor to the extent of the PIP benefits regardless of comparative fault. However, under the lien and subrogation methods, the insurer must pay its pro rata share of the insured's costs and attorney fees. ORS 742.536(3); ORS 742.538(4). The latter makes inter-insurer arbitration the usual method of choice for insurers. Although for a number of years the method chosen could become critical in "policy limits" cases, that is no longer an issue. *Farmers Ins. Co. v. American Fire & Casualty*, 117 Or App 347, 844 P2d 235 (1992), rev den 315 Or 643 (1993).

If a PIP insurer complies with recovery statutes, it is entitled to be reimbursed for PIP benefits paid when the total of all benefits paid to the injured person exceed his or her economic damages. *See* ORS 742.544. This rule replaces the rule announced in *Babb v. Mid-Century Ins., Co.*, 110 Or App 67, 821 P2d 424 (1991), rev den 313 Or 209 (1992). The current rule provides for repayment of PIP benefits only if the injured person's economic damages have been fully compensated. ORS 742.544. "Economic damages" is defined by the statute to include, among other things, medical expenses, loss of income, future impairment of earning capacity, damage to reputation that is economically verifiable, and costs to repair or replace damaged property. ORS 18.560(2)(a).

For example, if the injured person recovered \$100,000 from the liability carrier of the tortfeasor, received \$25,000 in PIP benefits, and had \$50,000 in economic damages, the PIP carrier would be entitled to reimbursement. The formula is as follows:

Total benefits received minus economic damage
= \$ available for PIP reimbursement.

In the example above, the formula is applied as follows:

\$125,000 minus \$50,000 = \$75,000. Total benefits (Liability plus PIP benefits) minus economic damages = \$ available for PIP reimbursement.

In our example, the PIP carrier paid \$25,000. Therefore, the insured person would have to repay the PIP carrier \$25,000 out of the "money available for PIP reimbursement." This would leave the injured person with \$50,000 as payment for economic damages and \$50,000 for other damages.

Using a variation of the same example, if the injured person recovered \$100,000 in liability coverage,

received \$25,000 in PIP benefits, and had \$115,000 in economic damages, the injured person would have to partially repay PIP benefits. The PIP carrier would receive \$10,000.

$\$125,000 \text{ minus } \$115,000 = \$10,000$. Total benefits (Liability plus PIP benefits) minus economic damages = \$ available for PIP reimbursement.

The same concept applies to proceeds paid by an underinsured motorist policy. If you assume the injured person received \$50,000 in liability proceeds, \$50,000 in underinsured motorist benefits, \$10,000 in PIP benefits, and had economic damages of \$125,000, the injured person would not have to repay PIP. The total benefits of \$110,000 would be as follows:

Liability proceeds	\$50,000
Underinsured Motorist Benefits	\$50,000
PIP Benefits	<u>\$10,000</u>
	\$110,000

The formula is:

$\$110,000 \text{ minus } \$125,000 = \$-15,000$ (or no \$ available for PIP reimbursement).

Total benefits received (Liability proceeds plus UIM benefits plus PIP) minus economic damages = \$ available to reimburse PIP.

As demonstrated above, the injured party benefits from maximizing proof of economic damages (including lost income and impaired earning capacity) to minimize the amount he or she must pay back to the PIP carrier.

RESOURCES

Excellent discussions on these topics can be found in Torts (OSB CLE 2006 Revision), Chapter 17, and 1 Insurance (OSB CLE 1996 Revision & 2003 Cum. Supp.), Chapter 19.

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