

VI. PERSONAL INJURY PROTECTION COVERAGE (“PIP”)

A. (§17.61) Introduction

At one time, no-fault insurance for automobile accidents gained widespread interest throughout the country. Roger C. Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 OR L REV 287 (1977). In its ideal form, no-fault coverage would provide first party benefits regardless of fault. It would typically pay a modest limit of medical bills or wage loss, and it would preclude a personal injury tort claim unless the injured person proved certain serious injury or dismemberment. *See, e.g.*, DC Code §§31-2404; Fl Stat §627.730 *et seq.*; Haw. Rev. Stat §§431:10C-102 to 431:10C-308.5; NY Ins Law §§5101 to 5108. As time wore on, some states abandoned no-fault and returned to a lesser form or to the tort system alone. *See, e.g., former* Colo Rev Stat Ann §§10-4-701 *et seq.* (repealed 2003); *former* Conn Gen Stat Ann §§38a-365 to 38a-369 (repealed 1994); Ga Code Ann §33-34-1 (repealed 1991). Today, twenty-four states plus the District of Columbia have statutes that offer or mandate some form of no-fault-like insurance coverage. Twenty-six states have no such statutes, choosing to leave the parties free to ignore or to contract for “medical payments” coverage.

Oregon’s answer to the threat of no-fault insurance was the personal injury protection (“PIP”) law. *See* ORS 742.520-742.542; *House State and Federal Affairs Committee Minutes* 2 (Apr 14, 1971). The purpose of PIP was to reduce litigation, to provide prompt payment of claims, and “to ensure that all insured drivers, their families and guests, and pedestrians injured by them, would recover medical and economic losses subject to limits purchased without regard to fault.” *Monaco v. U.S. Fidelity & Guaranty Co.*, 275 Or 183, 187-188, 550 P2d 422 (1976); *Senate Judiciary Committee Minutes* 2 (May 19, 1971); *House Judiciary Committee Minutes* 8 (Apr 17, 1973).

B. (§17.62) Vehicles Requiring Coverage

Every motor vehicle liability policy issued for delivery in Oregon that covers any private passenger motor vehicle must provide the statutory benefits. ORS 742.520. The words “motor vehicle” are defined in ORS 742.520(7)(a) as:

[A] self-propelled land motor vehicle or trailer, other than:

- (A) A farm type tractor or other self-propelled equipment designed for use principally off public roads, while not upon public roads;
- (B) A vehicle operated on rails or crawler-treads; or
- (C) A vehicle located for use as a residence or premises.

“Private passenger motor vehicle” is defined in ORS 742.520(7)(e) as:

[A] four-wheel passenger or station wagon type motor vehicle not used as a public or livery conveyance, and includes any other four-wheel motor vehicle of the utility, pickup body, sedan delivery or panel truck type not used for wholesale or retail delivery other than farming, a self-propelled mobile home, and a farm truck.

A named-operator policy, also called a nonowner policy, insures a particular person, not a particular vehicle. The broad definition from the UM statutes of *insured motor vehicle* applies to the PIP law and a temporary substitute vehicle has PIP coverage under the driver’s policy. *Utah Home Fire Ins. Co. v. Colonial Ins. Co.*, 300 Or 564, 715 P2d 1112 (1986).

Under ORS 742.520(2)(a), the named insured and family members residing in the same household are entitled to PIP benefits from the use, occupancy, or maintenance of any motor vehicle except the following:

1. One owned by any such which is not covered for PIP benefits;
2. A motorcycle or moped not owned by any such when the injury or death results from such person’s operating or riding upon it;
3. A motor vehicle not a passenger motor vehicle when the injury or death results from such person’s operating or occupying such.

Under ORS 742.520(2)(b) a passenger occupying or a pedestrian struck by the insured vehicle is covered for PIP benefits.

In *Carrigan v. State Farm Mutual Auto Ins. Co.*, 326 Or 97, 949 P2d 705 (1997), the court held that an insured person was entitled to PIP benefits when he was shot 30 feet from the car in the course of a “car-jacking.” His injuries resulted from the use of a motor vehicle within the meaning of ORS 742.520(2).

C. Mandated Benefits

1. (§17.63) Medical Expenses

Reasonable and Necessary Expenses

Minimum coverage required by ORS 742.524(1)(a) is for “all reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the person’s injury, but not more than \$15,000 in the aggregate for all such expenses of the person.” The statute does not define and no Oregon case has been found interpreting the word *incurred*. Some PIP endorsements contain language limiting expenses to those “incurred for medical services furnished within one year.”

Expenses of medical, hospital, dental, surgical, ambulance, and prosthetic services are presumed reasonable and necessary unless the provider of those services is notified of denial of the charges within 60 calendar days after the insurer receives from the provider notice of the claim for the services. Any time during the first 50 calendar days after the insurer receives notice of claim, the provider must answer in writing, within 10 business days, questions from the insurer regarding the claim. The 60-day period is suspended if the provider does not supply written answers to the insurer within 10 days, and does not resume until the answers are supplied. ORS 742.524(1)(a).

The interpretation of “all reasonable and necessary expenses” was at issue in *Strawn v. Farmers Ins. Co.*, Multnomah Case Number 990809080, a class action case that was on appeal at the time of this writing. Using a computerized database, Farmers sorted bills by service categories and deemed charges reasonable when the charge was at or less than the 80th percentile of similar bills. Later, the insurer adjusted its payment range to include all within the 90th percentile, then later the 99th percentile of charges. Plaintiff, the lone class representative, sought reimbursement for medical bills of about \$427 which PIP failed to pay. The jury returned a verdict for the class of almost \$1.5 million and \$8 million in punitive damages.

Beginning with policies issued or renewed in 2004, the Oregon legislature effectively declared that “reasonable” means no more than the amount the medical provider charges the general public or the amount no greater than that amount provided by the workers’ compensation fee schedule. ORS 656.248 (2003 Or Law ch 813, §§ 4 & 5). The Insurance Division construed the legislation to mean that PIP will pay the *lesser* of the provider’s standard charge or the prescribed fee schedule. Ins. Div. Bulletin INS 2003-7 (February 13, 2004 & November 10, 2003).

Oregon’s legislature resolved the uncertainty that gave rise to *Strawn* by joining Hawaii, New Jersey, New York, Pennsylvania, and Utah in the use of fee schedules to determine the amount of a bill that PIP pays. *See* Haw Rev Stat §10C:308.5(c) & (f); NJ Stat Ann §39:6A-4.6(a); NY Ins Law §5108; 75 Pa Cons Stat §1797; Utah Code Ann §31A-22-307(2)(b).

Medicare Overlap

Medicare is not required to pay for any services to the extent that payment may be expected to be made under an automobile policy. This is so even though state law or the policy itself states that PIP benefits are secondary to Medicare. 42 CFR §411.32. Medicare’s reimbursement claim has priority over a hospital and physician lien, and the hospital or other health care provider must reimburse Medicare for payments it might receive from the insurer up to the amount of the Medicare payment. If the insurer, including a PIP insurer, fails to

reimburse Medicare, Medicare may bring an action for reimbursement and the beneficiary is required to cooperate. 42 CFR §§411.23-411.24.

Oregon's hospital and physician lien law is located at ORS 87.555-87.585. A valid lien requires reimbursement by the PIP carrier subject to the priority of Medicare. Payment to the injured person or that person's representative after receipt of a certified copy of notice of lien renders the carrier liable to the hospital or physician. ORS 87.580.

Effect of Medical Liens

The medical services lien law, ORS 87.555–87.585, was amended in 1999. Hospitalization and medical services are placed on a par. The amendments eliminate the requirement that notice of lien be sent with return receipt requested. The time period in which the health care provider must file notice of lien is extended from 15 days to 30 days following discharge. An insurance policy on which a health care provider has a lien includes PIP coverage or similar no-fault medical insurance but excludes health insurance. Notice of lien on an insurer is filed in the hospital's county and served on the insurer. The notice need not be served on an insured party responsible for an accident if the insurer is served. The responsibility for prorating insurance payments is transferred from the provider to the insurer. ORS 87.580 is repealed. An action arising under the amended law must be commenced within 180 days after the date of payment by the insurer to the injured person or the person's heirs or personal representative.

2. (§17.64) Funeral Expenses

ORS 742.524(1)(d) provides that the coverage must include reasonable and necessary funeral expenses incurred within one year after the date of the person's injury, to the sum of \$2,500. No cases have been found interpreting the words "funeral expenses."

3. (§17.65) Loss of Income

If the injured person is usually engaged in a remunerative occupation, ORS 742.524(1)(b) provides coverage for 70% of lost income from work during the period of disability if the disability continues for at least 14 days. However, the required payment is \$1,250 per month and the required payment period is an aggregate of 52 weeks. The benefits terminate on the date the injured person is able to return to the person's usual occupation. Income includes, but is not limited to salary, wages, tips, commissions, professional fees, and profits from an individually owned business or farm. ORS 742.524(1)(b).

No loss of income benefits are payable to the personal representative of a covered person killed in an accident. *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 300, 613 P2d 32 (1980) (the legislature used *disability* to mean inability, while living, to perform one's

usual work; therefore, no disability benefits were payable when the injured party died). Such benefits may be payable, however, if the policy provisions are more liberal than the statute. See *Western Fire Insurance Co. v. Wallis*, 289 Or 303, 613 P2d 36 (1980) (dictum).

4. (§17.66) Child Care

If the injured person is a parent of a minor child and is required to be hospitalized for a minimum of 24 hours, benefits of \$15 per day for child care are payable, with payments to begin after the initial 24 hours of hospitalization and to remain for as long as a person is unable to return to work, if engaged in a remunerative occupation, or for as long as a person is unable to perform essential services that the person would have performed without income, if not usually engaged in a remunerative occupation, but not to exceed \$450. ORS 742.524(1)(e).

5. (§17.67) Essential Services

If the injured person is not usually engaged in a remunerative occupation and if the period of disability continues for at least 14 days, ORS 742.524(1)(c) provides coverage for expenses reasonably incurred for essential services in lieu of those the injured person would have performed without income during the period of disability. This benefit ends when the injured person is reasonably able to perform such essential services, and need not exceed \$30 per day or be paid for more than 52 weeks. The typical example would be a homemaker who incurred expenses for a housekeeper during the period of disability. Another example would be a retired or partially disabled person, able to perform certain essential services before injury, but disabled from doing so because of the injury.

6. (§17.68) Authorized Deductibles

Deductibles of up to \$250 are permitted for medical expenses, loss of income, and essential services with respect to the insured person and members of the insured's family residing in the same household. ORS 742.524(2).

7. (§17.69) Reduction of Benefits by Workers' Compensation

The statute provides that PIP benefits may be reduced or eliminated, if so provided in the policy, when the injured person is entitled under the law of any state or of the United States to receive workers' compensation benefits or any other similar medical or disability benefits. ORS 742.526(2); see *Farmers Ins. Co. v. Ownby*, 40 Or App 15, 594 P2d 834 (1979) (referring to insurer's potential to reduce benefits).

D. (§17.70) Persons Covered

PIP coverage is required for the person insured, members of that person's family residing in the same household, passengers occupying the insured motor vehicle, and pedestrians struck by that vehicle. ORS 742.520.

1. (§17.71) Passengers Occupying the Vehicle

PIP coverage extends to passengers occupying the insured motor vehicle. ORS 742.520(1). Occupying means "in, or upon, or entering into or alighting from" the vehicle. ORS 742.520(7)(c). The coverage as to all passengers occupying the insured vehicle is primary. ORS 742.526(1)(b).

2. (§17.72) Driver of Covered Vehicle

If the driver is neither the person insured nor a family member, PIP coverage would not necessarily extend to the driver because he or she was not a "passenger." *Mid-Century Ins. Co. v. Utah Home Fire Ins. Co.*, 58 Or App 210, 648 P2d 68, *rev. denied*, 293 Or 653 (1982). Many PIP endorsements extend coverage to the driver by using the word *occupant* instead of *passenger*, but limit the coverage to a permissive user. This would appear not to violate the statutory requirements if the driver was not a family member. *See* §17.74, *infra*.

3. (§17.73) Insured and Family Members as Occupants

The statute provides that PIP benefits with respect to the insured and family members injured while occupying a motor vehicle not insured under the policy are excess. ORS 742.526(1)(d). Such persons would have no coverage whatsoever if the uninsured motor vehicle is owned by such persons, or if it is a motorcycle or moped not owned by any of such persons when the injury or death results from such person's operating or riding upon such, or if such person is operating or occupying a motor vehicle that is not a private passenger motor vehicle. ORS 742.520(2)(a).

4. (§17.74) Pedestrians

The statute defines pedestrian as a person not occupying a self-propelled vehicle. ORS 742.520(7)(d). If the person is in, upon, entering into, or alighting from such vehicle, he or she is "occupying" a vehicle and is not a pedestrian. ORS 742.520(7)(c). Benefits are required only if a pedestrian is physically struck by the insured vehicle. ORS 742.520(1). Apparently, this limitation would not apply to the person insured and family members. *See State Farm Ins. Co. v. Berg*, 70 Or App 410, 689 P2d 959 (1984), *rev. denied*, 298 Or 553 (1985) (meaning of "occupying" a vehicle).

PIP coverage for the insured and family members injured as pedestrians is primary. ORS 742.526(1)(c). There is no requirement that they be physically struck by the vehicle.

ORS 742.520(2)(a) requires only that the injury or death result from the use, occupancy, or maintenance of a motor vehicle except for certain specified vehicles.

PIP benefits with respect to “[p]edestrians injured by the insured motor vehicle, other than the insured and members of family residing in the same household, shall be excess over any other collateral benefits to which the injured person is entitled, including but not limited to insurance benefits, governmental benefits or gratuitous benefits.” ORS 742.526(1)(e). This is the only situation in which PIP benefits are excess over such collateral benefits.

In 1982 the Oregon Attorney General had ruled that as to an uninsured pedestrian, PIP benefits were to be first exhausted, then Motor Vehicle Accident Fund coverage, and then Adult and Family Services Division medical assistance. 43 Op Att’y Gen 1 (Or 1982). The Oregon Court of Appeals ruled to the contrary in *Farmers Ins. Co. of Oregon v. Wickham*, 86 Or App 100, 739 P2d 30 (1987). PIP benefits to a pedestrian under the driver’s policy are limited to the excess of expenses over “governmental benefits,” and medical assistance payments made by the state pursuant to ORS chapter 414 were such benefits.

In *Farley v. Farmers Insurance Co. of Oregon*, 83 Or App 99, 730 P2d 598 (1986), the court of appeals held that a potential claim for the driver’s UIM coverage is not a collateral or insurance benefit and the driver’s PIP coverage must be paid after the pedestrian’s PIP coverage is exhausted. Collateral benefits are benefits to which the claimant is entitled regardless of fault, and that is not the case with UIM benefits, which depend on fault.

5. (§17.75) Family Members

The statute does not define “family” or “residing in the same household.” This statutory language was considered in *Garrow v. Pennsylvania Gen. Ins. Co.*, 288 Or 215, 220, 603 P2d 1175 (1979), in which the court concluded that to qualify, the claimant must live under the same roof as the named insured. Evidence as to whether the person pays room and board or depends on the named insured for sustenance would be important in determining whether that person is a family member, as would the contemplated permanency of the arrangement and a prior independently established household. The burden of proof is on the claimant. In a footnote, the court cited *Allen v. Multnomah County*, 179 Or 548, 553, 173 P2d 475 (1946), as holding that *family* and *household* are often interchangeably used; that, as a noun, *household* is composed of persons who dwell together as a family; that *family* is an elastic term and is a collective body of persons living in one house and under one manager. *Garrow, supra*, 288 Or at 220-221 n 3. In *Kenner v. Schmidt*, 252 Or 218, 222, 448 P2d 537 (1969), the court indicated that the term *family* may, under different circumstances, include more than the husband, wife, and their children. *But see Mutual of Enumclaw v. Rohde*, 170 Or App 574, 13 P3d 1006 (2000) (under liability coverage no duty to defend adult son and wife in second house on property).

E. Duplicate Coverage

1. (§17.76) Primary and Excess Coverage

Today's statute, found in ORS 742.526, sets forth which applicable policy is primary and which policy or policies are excess. These are discussed in the immediately preceding sections.

2. (§17.77) Stacking Coverage

PIP endorsements contain language to the effect that regardless of the number of persons or organizations insured, policies applicable, vehicles involved, or claims made, the liability for PIP benefits is limited to the amounts specified in the declarations. The endorsements usually include a condition that, regarding any loss to which the policy or any other policy issued to the insured by the company also applies, no payment will be required that will result in a total payment in excess of the highest applicable limit of liability under any one such policy. Such provisions are intended to prohibit stacking.

For some time, it has been questioned whether such provisions would be upheld. Luvaas, "Insurance," *Torts* § 17.70 (OSB CLE 1992) (prior edition). It has been understood that, if nonstacking provisions are omitted from the policies, or if held unenforceable, then the insured would appear to be entitled to PIP benefits for medical expenses up to the total amount thereof incurred within the cumulative coverages on his or her policies. *See Porter v. Utah Home Fire Insurance Co.*, 58 Or App 729, 650 P2d 130 (1982). If 70% of loss of income exceeds \$1,250 per month, it would appear that additional benefits might be obtainable by virtue of the additional coverages. The same rule probably applies to excess expenses reasonably incurred for essential services and child care.

In *Anderson v. Farmers Ins. Co.*, 188 Or App 179, 71 P3d 144 (2003), the court held that a common anti-stacking clause was unenforceable. Farmers had issued the insured three policies on three cars. The policy on the car in which the insured was injured was deemed primary, while the policies on the other cars were deemed excess. Each provided \$25,000 in PIP coverage. Farmers conceded that, because ORS 742.520 mandated PIP in each policy, that each must provide something. Farmers contended that each added policy provided only the then mandated minimum PIP limit of \$10,000. The court first held that the anti-stacking language was indeed impermissible, and, second, that each policy afforded a potential full \$25,000 in PIP coverage. Because the policy contained no savings language to limit added PIP to \$10,000, the declared coverage of \$25,000 per policy would apply.

3. (§17.78) Uninsured Motorist Coverage

The statute provides that payment by an insurer of PIP benefits to its own insured shall be applied in reduction of the amount of damage that the insured may be entitled to recover from the carrier under uninsured motorist coverage for the same accident, but may not be applied in reduction of the uninsured motorist coverage policy limits. ORS 742.542. This statute was upheld in *Monaco v. U.S. Fidelity & Guar.*, 275 Or 183, 189, 550 P2d 422 (1976).

The 1997 legislature amended ORS 742.542 to extend the limitation on the PIP offset against UM benefits so as to similarly protect UIM benefits. This amendment modifies the literalist holding in *Yokum v. Farmers Ins. Co.*, 117 Or App 546, 844 P2d 937 (1992).

F. Exclusions from Coverage

1. (§17.79) Self-Injury; Racing Contests

The statute provides that the insurer may exclude from PIP coverage any injured person who (1) intentionally causes self-injury; or (2) participates in or practices or prepares for any prearranged or organized racing or speeding contest. ORS 742.530(1).

2. (§17.80) Pedestrian Injured Outside Oregon

The insurer may exclude from the coverage for the benefits provided for lost earnings and essential services any person injured as a pedestrian in an accident outside Oregon other than the insured or a member of that person's family residing in the same household. ORS 742.530(2).

3. (§17.81) Nonpermissive Use

While policies generally provide that PIP coverage exists only if the vehicle is being used with permission of the insured, no such provision is contained in the statute.

4. (§17.82) Insured or Household Member in Owned Uninsured Vehicle

Under ORS 742.520(2)(a)(A), in the case of the insured and members of the insured's family residing in the same household, there is no coverage for injury resulting from the use, occupancy, or maintenance of any motor vehicle owned by any of such persons but not covered by a policy providing PIP benefits with respect to its use, occupancy, and maintenance.

The 1999 legislature amended ORS 742.520(2)(a)(A) to provide that PIP benefits under a motor vehicle liability insurance policy are not available with respect to a vehicle if the vehicle is owned or furnished or available for regular use by any of the insured persons and is not described in the policy.

G. (§17.83) Statute of Limitations for PIP Claims

The statute does not indicate the time limit within which a claim for PIP benefits must be made. It appears that a six-year statute of limitations would apply, either as an action on a contract, ORS 12.080(1), or as an action on a liability created by statute, ORS 12.080(2). However, if a claim was not made before the running of the tort statute of limitations, ORS 12.110(1), the carrier would be greatly prejudiced in any attempt to recover reimbursement.

H. (§17.84) Proof of Loss

PIP benefits must be paid promptly after proof of loss has been submitted to the insurer. ORS 742.520(4). A proof of loss form setting forth the rights and duties of the claimant and of the carrier appears to be properly required. The carrier would also be entitled to require the claimant to execute and deliver to the carrier such instruments and papers as may be appropriate to secure the rights and obligations of the carrier under ORS 742.538(6). Among the instruments that the insured having received benefits must furnish to the insurer is notice of any claim or legal action against an alleged tortfeasor. This notice may be given by personal service or by registered or certified mail. Service of a copy of the summons and complaint or a copy of other process served in connection with the legal action is sufficient notice to the insurer.

I. (§17.85) Arbitration Between Claimant and PIP Carrier

Disputes between insurers and beneficiaries about the amount of PIP benefits, or about the denial of PIP benefits, may be decided by arbitration but only if mutually agreed at the time of the claim. ORS 742.520(6). Such voluntary arbitration becomes binding on the parties. ORS 742.522. Costs to the insured of the proceeding must not exceed \$100, with all other costs borne by the insurer. Costs do not include attorney fees or expenses incurred in producing evidence or witnesses or making transcripts of the arbitration proceedings. ORS 742.522(2); *see also* ORS 742.061 (no fees on claim on policy in court if no coverage dispute, etc.). Companies are frequently using only one arbitrator at this time because the cost of three can be considerable.

PIP arbitration may have preclusive effect on a subsequent personal injury claim. In *Barackman v. Anderson*, ___ Or App ___, ___ P3d ___, 2004 WL 303659 (2004), a PIP arbitration had determined that the plaintiff's teeth had not been injured in the accident. In

the subsequent personal injury claim, the defendant interposed the decision as an affirmative defense. Although plaintiff protested that the parties were different, the court was unpersuaded, since plaintiff had been a party, and since the preclusive effect of arbitrations “has not been seriously doubted for decades.” A summary judgment striking the defense was reversed.

J. Reimbursement

1. (§17.86) Health Insurers, Almost Like PIP Insurers

The statute provides for interinsurer reimbursement to an authorized health insurer if it has paid benefits, has requested reimbursement, has not claimed a lien, and is entitled to reimbursement by its policy. ORS 742.534. Oregon authorized health insurers who have paid benefits for an insured injured in a motor vehicle accident have the same rights but not necessarily the same limitations as PIP carriers who have paid PIP benefits. *Cf.* ORS 742.544 (limiting reimbursement of PIP insurers but not health insurers). Another statute adds that any provisions in a motor vehicle liability or health insurance policy giving subrogation rights shall be construed and applied in accordance with the provisions of such section. ORS 742.538(7).

2. (§17.87) Interinsurer Reimbursement

Every authorized motor vehicle liability insurer whose insured is or would be held legally liable for damages for injuries sustained in a motor vehicle accident by a person for whom personal injury protection benefits have been furnished by another such insurer, or for whom benefits have been furnished by an authorized health insurer, must, if the other carrier is so entitled by its policy, reimburse the other carrier for such benefits on request unless a lien has been claimed. ORS 742.534(1). The benefits will be diminished in proportion to the comparative negligence of the claimant and may not exceed legally recoverable damages. ORS 742.534(2). Disputes as to liability and amount of reimbursement are decided by arbitration. ORS 742.534(3). Findings and awards made in such arbitration proceeding are not admissible in court. ORS 742.534(4).

Most liability insurers have entered into the Automobile Accident Reparations Statute Subrogation Arbitration Agreement. Article X of this agreement provides that the hearing of a matter pending before an arbitration panel will be deferred because of pending claims or suits arising out of the same accident, unless the companies waive such deferment. Such deferment is not required by the PIP statute. Nonsignatories to the agreement may require a prompt arbitration, and signatories may require such of nonsignatories. Under ORS 742.534, only Oregon authorized carriers under Oregon policies are entitled to this reimbursement. Others are entitled only to subrogation. ORS 742.538.

If the claimant has allowed the statute of limitations to bar a cause of action against the alleged tortfeasor, the right to interinsurer reimbursement is apparently lost. *West American Ins. Co. v. Nationwide Mutual*, 39 Or App 525, 530, 593 P2d 796 (1979). The court supported its conclusion by quoting the carrier's rights and the claimant's duties as set forth in the subrogation statute, ORS 742.538.

The 1987 legislature amended ORS 742.534(1) by adding language to say, "Reimbursement under this subsection, together with the amount paid to injured persons by the liability insurer, shall not exceed the limits of the policy issued by the insurer." 1987 Or Laws ch 632, §2. This language clarified to some extent the uncertainty within the insurance industry as to the extent of the duty to reimburse. As a result, the liability insurer may rely on its liability limits. The sum of its PIP reimbursement and liability payments to the injured party is not required to exceed those liability limits. ORS 742.534(1). Notwithstanding a demand for intercompany reimbursement of PIP benefits, the liability insurer may pay all of its liability proceeds to the injured party and refuse to reimburse PIP benefits to the injured party's PIP insurer. *Farmers Ins. Co. v. American Fire & Casualty*, 117 Or App 347, 844 P2d 235 (1992). The liability insurer thus may maximize its settlement potential with the injured party while reducing the risk of personal liability of the insured tortfeasor.

CAVEAT: The *American Fire* decision did not involve a true PIP lien under ORS 742.536. The decision is limited to direct interinsurer reimbursement under ORS 742.534.

CAVEAT: The trial court in *American Fire* held that the injured party holds the liability proceeds in trust and must reimburse the PIP insurer. This aspect of the case was not reviewed on appeal. See ORS 742.538 (subrogation statute). The insured party should have chosen to argue that subrogation was unavailable according to ORS 742.7538, because subrogation is available only if direct interinsurer reimbursement is unavailable, and, until the limits were paid out, direct reimbursement had been available. There is as yet no appellate decision on such an argument.

3. (§17.88) Lien Rights of PIP Carrier

The statute provides a PIP insurer with a second option to recoup PIP. It provides that when an authorized motor vehicle insurer has furnished PIP benefits or an authorized health insurer has furnished benefits for a person injured in a motor vehicle accident, if such injured person makes a claim or institutes legal action for damages, the insurer may have a lien on such claim or action. ORS 742.536. The injured person must give notice of the claim or legal action to the insurer by personal service or by registered or certified mail. ORS 742.536(1). Service of a copy of the summons and complaint or of other process served in connection with such action is sufficient. In such case, a return showing service shall be filed

with the clerk of the court. “Claim” refers to a written demand made and delivered for a specific amount of damages. ORS 742.536(4).

Only if the insurer has not been a party to an interinsurer reimbursement proceeding under ORS 742.534 and is entitled by the terms of its policy to a lien may the insurer elect to claim a lien. It must give written notice of such election within 30 days from the receipt of notice or knowledge of such claim or legal action, to the person making the claim or instituting the legal action and to the person against whom the claim is made or the legal action instituted. Such written notice must be by personal service or by registered or certified mail. In the case of legal action, a return showing service of such notice of election must be filed with the clerk. ORS 742.536(2).

If the insurer serves the written notice and the return, if applicable, it has a lien for benefits furnished, minus its pro rata share of expenses, costs, and attorney fees incurred. ORS 742.536(3)(a). In such event, the injured person is obliged to include as damages the PIP benefits so furnished and the action must be maintained in the name of the injured person. ORS 742.536(3)(b)-(c). The lien is probably available only to a carrier under an Oregon policy of motor vehicle liability insurance or health insurance. *See* ORS 742.536(1).

Failure to prove the economic damages or comparative negligence would not reduce the lien. The first fruits of judgment, minus proportionate fees and costs, would go to the lienholder, as in the case of subrogation. This was the intent of the law as revealed by *House Labor and Business Affairs Committee Minutes Ex H* (Apr 22, 1975). A lien also offers the insurer an opportunity for reimbursement without reduction for comparative fault or failure of proof.

4. (§17.89) Subrogation Rights of PIP Carrier

Most liability carriers and authorized health insurance carriers provide for subrogation rights in their policies. Any such provisions of an Oregon policy are construed and applied in accordance with the provisions of ORS 742.538. ORS 742.538(7).

Oregon’s PIP subrogation statute modifies common-law subrogation in several respects. Under ORS 742.538, subrogation is permitted only if interinsurer reimbursement is not available, a lien has not been elected, and the policy contains a subrogation clause. The injured person (1) holds for the benefit of the insurer all rights of recovery to the extent of benefits furnished, (2) is required to do whatever is proper to secure such rights, and (3) is forbidden to do anything to prejudice such rights. ORS 742.538(2)-(3). The injured person may be obliged to take action in his or her name to recover such benefits from the responsible person to the extent of benefits furnished, and through any representative chosen by the carrier who has no conflict of interest with the insured. ORS 742.538(4). The injured person

is required to execute and deliver instruments required to secure the rights of the insurer. ORS 742.538(6).

Presumably, the subrogation interest would be a first charge against any judgment for personal injuries, regardless of whether it included the benefits received as damages, and regardless of comparative fault. At ORS 742.538(1), the statute provides: “The insurer is entitled to the proceeds of any settlement or judgment . . . to the extent of such benefits furnished by the insurer less the insurer’s share of expenses, costs and attorney fees.” In *McIntire v. Gray*, 39 Or App 861, 864-865, 593 P2d 1273 (1979) (discussed in §17.81, *supra*), the court of appeals stated: “It appears to us that under [ORS 742.538], the claimant is subject to reduction of his ‘settlement or judgment’ by the amount of PIP benefits paid by his own insurer regardless of whether he requests special damages if the other party is uninsured.” Although dictum, this language appears to conform with the intent of the PIP law and with common-law subrogation.

5. (§17.90) Reduction of Judgment for PIP Benefits

Like an Advance Payment of Liability Limits

If judgment is entered against a party whose liability carrier has already reimbursed the plaintiff’s PIP carrier under ORS 742.534, the plaintiff’s judgment must be reduced by reason of such benefits. ORS 18.510(2). The amount of the advance payment, diminished in proportion to the comparative negligence of the plaintiff, may be submitted by the liability carrier in a manner similar to a “cost bill.” ORCP 68 C(4) now provides for a 14-day time period after entry of judgment to file and serve a statement of attorney fees and costs and disbursements.

The Check Is In the Mail

Although a liability insurer has not actually paid its PIP reimbursement, the tortfeasor can win a reduction of judgment under ORS 18.510(2) if the defense attorney or liability insurer unconditionally attests that a PIP reimbursement will be made. *Dougherty v. Gelco Express Corp.*, 79 Or App 490, 719 P2d 906 (1986). The statute’s past-tense reference to a reimbursement that “has been” paid is not to be read too literally. It suffices to say “the check is in the mail.” It will not suffice, however, if the defense attorney merely attests that the liability insurer will “proceed” with intercompany arbitration. The promise is too uncertain. In intercompany arbitration, the liability insurer could conceivably dispute the size of the reimbursement, comparative fault, or other issues. *See* ORS 742.534(3). An uncertain promise to reimburse PIP amounts will not warrant a reduction in judgment. *See Heintz v. Baxter*, 120 Or App 603, 853 P2d 320 (1993).

Discerning the Jury’s Verdict

In one situation, it may not matter that the jury's verdict did not literally award dollars for the same damages that PIP benefits paid. When the plaintiff asks the jury for damages that PIP benefits paid, the defendant is entitled to a reduction of judgment, even if the plaintiff can suggest by the resulting numbers that the jury chose not to award the particular damages covered by PIP benefits. If it is possible that PIP damages were awarded, then the defendant will receive a reduction of judgment. *Dougherty v. Gelco Express Corp.*, 79 Or App 490, 495–496, 719 P2d 906 (1986). The defendant gets the benefit of the doubt.

Even if the plaintiff's attorney asks the jury not to award as damages the bills that were paid (by PIP benefits), the judgment still will be reduced. The court will not speculate that the jury followed the attorney's request and excluded the PIP damages. *Mitchell v. Harris*, 123 Or App 424, 859 P2d 1196 (1993).

If, however, the court instructs the jury not to award as damages the losses that were paid by PIP benefits, then the judgment will not be reduced by reason of PIP reimbursement. *Brus v. Goodell*, 119 Or App 74, 849 P2d 552 (1993).

CAVEAT: The *Brus* decision involved interinsurer reimbursement under ORS 742.534. Nothing in ORS 742.534 requires that a plaintiff include PIP damages in the plaintiff's proof. Presumably, the insurers will handle those dollars outside the underlying case. The lien statute, however, expressly requires the injured party to include proof of damages paid by PIP in the underlying case. ORS 742.536(3)(b). Similarly, the subrogation statute requires that the injured person permit the PIP insurer to recover PIP benefits in the person's name and do everything necessary to recover them. ORS 742.538. An injured person could not employ the *Brus* approach, so as to refuse to prove PIP damages, if a PIP lien or subrogation claim existed.

CAVEAT: The *Brus* decision involved PIP reimbursement between two different insurers. It had nothing to do with a reduction of a driver's liability coverage by reason of PIP benefits that may have been paid by the same insurer as PIP benefits to an injured person, such as a passenger or pedestrian. An internal offset of PIP against the same policy's liability limits was upheld in *Edwards v. Bonneville Auto. Ins. Co.*, 299 Or 119, 699 P2d 670 (1985).

BRUS v. GOODELL, 119 Or App 74, 849 P2d 552 (1993). Plaintiff refrained from proving damages paid by PIP benefits. Without mentioning insurance benefits, the court instructed the jury not to award those losses. Defendant sought a reduction in judgment based on his insurer's promise to reimburse the PIP benefits. The trial court denied plaintiff's motion. *Held*: Affirmed. The court of appeals explained that ORS 18.510 is aimed at preventing double recoveries, not "halving" recoveries that merely make a plaintiff whole. 119 Or App at 78.

6. (§17.91) A Mathematical Limit on PIP Reimbursement

Until November 1, 1993, Oregon law made reimbursement of PIP benefits a mandatory obligation to whoever held the proceeds of a liability policy. The court of appeals had stressed that “the PIP insurer is entitled to be reimbursed before the victim may receive anything.” *Babb v. Mid-Century Ins. Co.*, 110 Or App 67, 821 P2d 424 (1991).

The 1993 Legislature replaced the *Babb* holding with a conditional formula. It dictates that: “A provider of personal injury protection benefits shall be reimbursed for personal injury protection payments made on behalf of any person only to the extent that the total amount of benefits paid exceeds the economic damages as defined in ORS 18.560 suffered by that person.” ORS 742.544(1). The legislation does not necessarily mean that an injured person will be made whole, but the person might be made “half.” Noneconomic damages are not considered in the formula; only economic damages are considered. However, economic damages will take priority over PIP reimbursement. Reimbursement will not begin to occur until insurance proceeds begin to exceed economic losses.

The key elements of the formula are (1) the “total amount of benefits paid” and (2) the “economic damages.” The statute defines the “total amount of benefits” as follows:

1. Applicable underinsured motorist benefits described in ORS 742.502(2);
- (b) Liability insurance coverage available to the person receiving the personal injury protection benefits from other parties to the accident;
- (c) Personal injury protection payments; and
- (d) Any other payments by or on behalf of the party whose fault caused the damages.

ORS 742.544(1). An older statute defines the term “economic damages” 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).

The effect of ORS 742.544(1) is to allow an injured person to retain more insurance benefits by limiting PIP reimbursement. Before the 1993 legislation, a severely injured person who received \$10,000 from her insurer in PIP benefits, \$25,000 in a liability settlement, and \$25,000 from her insurer in underinsured motorist benefits would still be required to reimburse the \$10,000 in PIP benefits to her insurer. It would not matter that her economic damages might be \$100,000. Her net would be \$50,000 after PIP reimbursement.

See Table 17-B. Today, the various insurance proceeds must exceed her economic damages in order to begin PIP reimbursement. No reimbursement would occur. See Table 17-D. And reimbursement will occur only to the extent that there is more insurance money than economic damages. PIP reimbursement may be partial. See Table 17-F. The reimbursement calculation lends itself to a table format. A blank form and several examples follow at the end of this chapter. Because the definition of economic damages includes more than medical bills, the injured person will want to maximize proof of economic losses to thwart PIP reimbursement.

The statute restricts an insurer's attempt to subtract the PIP benefits that it paid to a passenger from the liability proceeds paid to the passenger on a claim against the driver. *North Pacific Ins. Co. v. Hamilton*, 153 Or App 332, 957 P2d 165 (1998) *reversed on other grounds* 332 Or 20, 22 P2d 165 (2001). In the past, the passenger's PIP benefits were treated as an offset against the liability coverage afforded the driver for the passenger's claim. *Edwards v. Bonneville Auto. Ins. Co.*, 299 Or 119, 121, 699 P2d 670 (1985). The Oregon Court of Appeals has determined, however, that ORS 742.544 overrules *Edwards*. A PIP offset within a single policy will be deemed a "reimbursement" and will be subject to the mathematical limitation of the statute. *North Pacific Ins. Co. v. Hamilton, supra*; see *Horlacher v. Mid-Century Ins.*, 143 Or App 564, 923 P2d 1317 (1996) (finding statute inapplicable to prior accident).

BABB v. MID-CENTURY INS. CO., 110 Or App 67, 821 P2d 424 (1991). Mid-Century paid its insured \$5,000 in PIP benefits and sought interinsurer reimbursement from Safeco, the liability insurer. Safeco wrote a joint check for its full liability limits payable to the injured party and Mid-Century. The injured party claimed her damages exceeded Safeco's liability limits. She sought a declaratory judgment entitling her to keep the liability proceeds without reduction by PIP reimbursement. The trial court granted summary judgment in favor of Mid-Century. *Held*: Affirmed. The court of appeals held that ORS 742.534 required PIP reimbursement regardless whether the injured party's damages are unpaid. *But see* ORS 742.544 (subsequent enactment).

7. (§17.92) Distinguishing PIP Offsets from PIP Reimbursements

The mathematical limitation on PIP reimbursement found in ORS 742.544 should be distinguished from the mathematical limitation on a PIP offsets found in ORS 742.542. In an ideal world, the PIP formula in ORS 742.544 limits PIP reimbursement as between the claimant and various policies, whereas the PIP formula in ORS 742.542 limits a PIP offset from UM or UIM benefits provided by the same one policy that provided PIP benefits. The PIP reimbursement formula of ORS 742.544 only promises to make an injured person "half" by assuring payment of economic damages before PIP reimbursement can occur. The PIP offset formula of ORS 742.542 fully promises to make the injured person whole by recognizing all the person's damages, both economic and noneconomic, and subtracting PIP

from damages only when necessary to avoid double payment of PIP and UM/UIM of the same damages. The two formulae have different purposes and different elements. Ideally, no one injury would trigger both formulae, and the two statutes would never conflict.

Unhappily, any serious underinsured motorist claim poses a risk of entanglement in both ORS 742.542 and ORS 742.544. By definition, an underinsured motorist claim presupposes that the tortfeasor has some liability coverage. A UIM policy promises an insured the right to be made whole with full payment of economic and noneconomic damages that the underinsured tortfeasor would pay. ORS 742.502(2), (3) & (5). The UIM policy promises that the claimant may stack PIP, liability proceeds, and UIM benefits when necessary to fully compensate economic and noneconomic damages. ORS 742.542. Yet, because liability dollars are paid, the UIM insurer is likely insist on one of the several means of PIP reimbursement, which are subject only to the make “half” limitation of ORS 742.544. If it succeeds, the PIP insurer would avoid the make whole formula of ORS 742.542 on PIP offsets. In a UIM claim, the insured will realize that both formulae might seem to apply to the same situation. After all, both formulae under ORS 742.542 and ORS 742.544 involve liability proceeds, UIM benefits, and PIP, and yet they have radically different results. It is only the self-serving insurer who insists on make “half” and sees no wrong in avoiding the make whole guarantee.

The legislative history of the reimbursement formula of ORS 742.544 suggests that the make whole formula of ORS 742.542 was intended to be paramount. In the last draft of the 1993 legislation, the word “uninsured” was dropped from the list of insurance benefits tallied in ORS 742.544 because drafters did not wish to affect the make whole protection afforded by ORS 742.542. At that time, ORS 742.542 only protected UM and, strangely, not UIM. In 1997, the make whole protection of ORS 742.542 was logically extended to UIM benefits, in part in reaction to the decision that denied make whole protection to UIM benefits. *See Yokum v. Farmers Ins. Co.*, 117 Or App 546, 844 P2d 937 (1992). Apparently, no one anticipated that insurers would choose to ignore ORS 742.542 in favor of ORS 742.544. Today, most policies contain both formulae. No reported decision yet reconciles them. Confronted with the conflicting statutes, one arbitrator declared them to be “legal hash.” *Wylene Hyndrix v. Farmers Ins. Co.* (before Newport arbitrator Jeffrey D. Waarvick; letter opinion August 11, 2003). Presumably, the insured would be given the benefit of the more favorable formula in the event of such ambiguity. *Cf. North Pacific v. Hamilton*, 332 Or 20, 22 P3d 739 (2001) (on a policy provision so ambiguous as to be incomprehensible).

8. (§17.93) Attorney Fees on PIP Reimbursement

An insured is not entitled to demand attorney fees out of the PIP reimbursement if the PIP insurer elected direct intercompany reimbursement from the liability carrier. *Garrett v. State Farm Mutual Ins. Co.*, 112 Or App 539, 829 P2d 713 (1992). An insured is entitled to demand attorney fees out of the liability proceeds that reimburse PIP if the PIP insure has

invoked a true lien under ORS 742.536. An insured is also entitled to demand attorney fees out of the liability proceeds that reimburse PIP if the PIP insurer recoups PIP by invoking its subrogation rights under the policy. ORS 742.538(1); *see, e.g., Mahler v. Szucs*, 135 Wash 2d 398, 957 P2d 623 (Wash 1998); *Guaranty National Ins. Co. v. Morris*, 611 P2d 725 (Utah 1980).
