

What You Need to Know About PIP and UM/UIM Claims

If you handle motor vehicle cases, you need to be familiar with personal injury protection (PIP) benefits and uninsured motorist (UM) and underinsured motorist (UIM) coverage. This article addresses these issues from both a plaintiff and defense perspective and discusses minimum coverage, time limitations, order of benefits, application of coverage, and proof of loss.

Personal Injury Protection (PIP) Benefits

PIP benefits are available for a person's injury or death resulting from the "use, occupancy or maintenance of any motor vehicle." ORS 742.520(2)(a). PIP is a "no-fault" insurance, so coverage is available even if the injury was caused by the person seeking benefits.

PIP is required for every "motor vehicle liability policy issued for delivery in this state that covers any private passenger motor vehicle." Coverage is provided for the insured, members of the insured's family or children living in the same household, passengers occupying the insured vehicle, and pedestrians hit by the insured vehicle. ORS 742.520(2)(b). However, not all vehicles are included.

PIP Benefits Available

PIP must allow for "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." ORS 754.524(1)(a). The minimum amount of coverage in Oregon is \$15,000 per person. *Id.* Medical expenses are presumed reasonable and necessary unless the medical provider is given a denial within 60 days after the insurer receives

notice of a claim for services from the provider. ORS 742.524(1)(a). The insurer is required to conduct a reasonable investigation "based on all available information" before denying a claim. ORS 746.230(1)(d). See *Ivanov v. Farmers Ins. Co.*, 344 Or 421 (2008) (reversing grant of summary judgment for Farmers on grounds that insurer is required to establish that denials were based on reasonable investigation).

The amount allowed for medical expenses under Oregon PIP policies is the lesser of the amount normally charged to members of the public or the amount in the workers' compensation fee schedule (available at <http://tinyurl.com/pipinfo>). Hospital charges are subject to adjusted cost-to-charge ratios specified in a fee schedule published pursuant to ORS 656.248. Hospitals are permitted to charge (1) the amount of the charges multiplied by the cost-to-charge ratio, or (2) 90% of the charges, whichever is greater. ORS 742.525(2).

In addition, PIP provides the following wage-loss benefits: "If the injured person is usually engaged in a remunerative occupation and if disability continues for at least 14 days," the benefits paid will be "70 percent of the loss of income from work during the period of the injured person's disability until the date the person is able to return to the person's usual occupation. This benefit is subject to a maximum payment of \$3,000 per month and a maximum payment period in the aggregate of 52 weeks." ORS 742.524(b). PIP also provides coverage for essential services, funeral expenses, and child care if certain conditions are met. See ORS 742.524(c)-(e).

DISCLAIMER

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Which PIP Policy Applies?

PIP is primary for anyone in the insured vehicle. If the occupant of the vehicle has another motor vehicle policy, that policy is secondary. If another family member in the same household as the injured person has another motor vehicle policy, that policy is the next to cover the injured person. If the injured person has health insurance, it is available after all PIP policies are exhausted.

For individuals who are struck by a vehicle as a pedestrian or on a bicycle, the PIP medical benefits are available in the following order:

- Individual's motor vehicle policy;
- Motor vehicle policy of family members living in individual's household;
- Individual's health insurance, other governmental benefits, or gratuitous benefits;
- Motor vehicle policy of vehicle that struck individual.

Pedestrians (and bicyclists) are entitled to PIP wage-loss benefits as well.

If the injured person is entitled to receive workers' compensation or other medical or disability benefits, PIP can be eliminated by the policy. ORS 742.526(2). However, the insured may be entitled to medical and wage benefits through a PIP policy if not provided by workers' compensation.

PIP Proof of Loss

A proof of loss is important because it starts the clock ticking for attorney fees. In *Scott v. State Farm Mutual Ins. Co.*, 345 Or 146 (2008), the court reiterated that "[a]ny event or submission that would permit an insurer to estimate its obligations" is sufficient for proof of loss. *Id.* at 155. In *Scott*, the court determined that a PIP application for benefits that (1) provided information to enable the insurer to determine whether the policyholder was entitled to benefits under the insurance contract and (2) included an authorization to collect health insurance information, was sufficient. *Id.* at 156. In a more recent case involving homeowner's insurance, a phone call to the insurer's agent concerning the damage was sufficient. *Parks v. Farmers Ins. Co.*, 347 Or 374 (2009).

Uninsured Motorist (UM)/ Underinsured Motorist (UIM) Insurance

Together, these two types of coverage permit an insured to obtain all sums that he or she is "legally entitled to recover as damages for bodily injury or death caused by accident and arising out of the ownership, maintenance or use of an uninsured motor vehicle." ORS 742.500(1). UM coverage is

required for every policy in the state in amounts equal to the amount of liability coverage, unless the insured elects a lesser amount in writing. ORS 742.502(2)(a). UIM coverage is in an amount equal to the UM coverage less the amount recovered from other motor vehicle liability policies or other sources. ORS 742.502(2)(a).

Each UM policy must provide coverage in the amount of liability coverage, which requires a minimum of \$25,000 per person and \$50,000 per accident. ORS 742.502(2)(a). If the insured elects lower limits, a statement to that effect must be signed within 60 days of making the election. ORS 742.502(2)(b).

Several circumstances will be excluded from UIM or UM motorist coverage. It is important to examine the policy to determine the specifics. You must comply with the terms of the policy to have coverage. ORS 742.504(8). In addition, if the injured party fails to get written consent from the UIM carrier before proceeding with settlement or prosecution to judgment of an action against a party legally liable, the injured party may be precluded from making a UIM claim. ORS 742.504(4)(a). However, this exclusion is considered a "condition of forfeiture" and applies only if the insurer can show it was prejudiced by the failure to obtain written consent and that the failure to obtain written consent was unreasonable. *Federated Serv. Ins. Co. v. Granados*, 133 Or App 5, rev den, 321 Or 512 (1995); *Armintrout v. Transportation Ins. Co.*, 137 Or App 86, rev den, 322 Or 361 (1995). Failure to exhaust the available policy limits is prima facie evidence of prejudice. All this can be avoided by obtaining written consent in advance. UM and UIM protection also often excludes coverage for other vehicles owned by the insured or furnished for the regular use of the insured (or members of the insured's household). ORS 742.504(4)(b). You cannot extend your coverage to uninsured vehicles if you have opted not to insure them.

Reduction by Amounts Received from Other Sources

Amounts payable under UM or UIM coverage are reduced by (1) sums paid on account of the bodily injury by or on behalf of the owner or operator of the uninsured vehicle or any other person jointly or severally liable, including amounts paid under bodily injury liability coverage; and (2) the amount paid and present value of all amounts payable under any workers' compensation law or disability benefits law. ORS 742.504(7)(c). These offsets apply to the insured's damages, not to the policy limits. *Bergmann v. Hutton*, 337 Or 596, 101 P3d 353 (2004) (offsetting damages by workers' compensation payments, but not reducing policy limits of UIM); but see *Vogelin v. American Family Mut. Ins. Co.*, 346 Or 490, 213 P3d 1216 (2009) (holding that ORS 742.504(7)(c)(A) requires payments made on behalf

of a tortfeasor to be deducted from insured's total damages, but that ORS 742.502(2)(a) requires tortfeasor's motor vehicle liability payments to reduce UM/UIM policy limits). PIP benefits paid to an insured are applied to reduce the amount of damages, but cannot reduce the UM/UIM policy limits. ORS 742.542.

In order to recover UIM benefits, you must comply with ORS 742.504(4)(d). This requires that one of the following occurs:

- The limits of liability have been exhausted by judgment or settlements to the injured person or other persons;
- The limits have been offered in settlement, and the insurer has refused consent and the insured protects the insurer's right of subrogation to the claim against the tortfeasor;
- The insured gives credit to the insurer for the unrealized portion of the limits as if the full limits had been received if less than the limits have been offered and the insurer has consented; or
- The insured credits the insurer for the unrealized portion of the liability limits as if the full limits had been offered in settlement and the insurer has refused consent and the insured agrees to protect the insurer's right of subrogation to the claim against the tortfeasor.

If none of these events occurs, a UIM claim does not yet exist.

Time Limitation

There is a statutory limitation on UM and UIM claims of two years from the date of the accident. ORS 742.504(12)(a). The two-year period applies to minors and there is no tolling of the two years. *Wright v. State Farm Mutual Auto. Ins. Co.*, 223 Or App 357 (2008) (holding that the two-year period was not tolled by child's minority). Within two years of the date of the accident, the insured must either settle the case, formally institute arbitration, or file against the insurer. If the case is against the uninsured/underinsured motorist, the insured must either file against the insurer or formally institute arbitration within two years of settlement or judgment of the underlying case. "Formally" instituting arbitration requires that "an insured or an insurer must expressly communicate to the other party that the initiating party is beginning the process of arbitrating a dispute." *Bonds v. Farmers Ins. Co.*, 349 Or 152, 154 (2010). A letter from the insurer consenting to arbitration is no longer sufficient. *Id.*

Reimbursement of PIP or Health Insurance Payments

There are three methods for an insurance company to recover PIP payments or health insurance payments made on behalf of an injured person: (1) interinsurer arbitration (ORS 742.534); (2) lien (ORS 742.536); or (3) subrogation (ORS 742.538).

Interinsurer arbitration allows "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," to be reimbursed by the insurer of the at-fault party. ORS 742.534. This is what insurers usually elect because the insurer does not have to pay attorney fees. Interinsurer arbitration is only permitted if (1) the PIP insurer is entitled to reimbursement by its policy; (2) the PIP insurer has not elected recovery by lien under ORS 742.536; and (3) the PIP insurer has requested reimbursement under ORS 742.534. ORS 742.534. The statute also specifies that the amount being paid back be reduced for any percentage of fault of the insured. Disputes between insurers are sent to arbitration.

An ORS 742.536 lien is available only when (1) the insurer is entitled by the terms of its policy; (2) the insurer has not elected to recover through interinsurer arbitration; and (3) a lien is elected in writing within 30 days of the receipt of notice or knowledge of the claim through personal service or registered or certified mail. ORS 742.536. The lien is against the cause of action up to the amount of the lien, but is reduced for the proportion of expenses, costs, and attorney fees incurred in connection with recovery of the lien. ORS 742.536. If the insurance company fails to elect recovery by lien within the 30-day timeline, it is not available.

Subrogation is available only when (1) the insurer is entitled by the terms of its policy; (2) the insurer has not elected to recover by lien; and (3) interinsurer reimbursement is not available. ORS 742.538; see *State Farm Mut. Auto Ins. Co. v. Hale*, 215 Or App 19 (2007) (discussing requirements). Under subrogation, the insurer is entitled to proceeds from a settlement or judgment from the person legally responsible for the accident, but the proceeds are reduced for the insurer's share of expenses, costs, and attorney fees. ORS 742.538(1).

Limitations of Reimbursement

ORS 742.544 limits reimbursement so that it is permitted "only to the extent that the total amount of benefits paid exceeds the economic damages as defined in ORS 31.710."

ORS 742.544. Total amount of benefits includes UIM benefits, liability insurance, PIP payments, and any other payments by or on behalf of the party whose fault caused the damages. ORS 742.544(1).

ORS 742.542 specifies that any PIP benefits paid for its own insured will reduce the amount of damages recoverable through UIM or UM benefits, but that it cannot be applied to reduce the policy limits. See *Farmers Ins. Co. v. Connor*, 219 Or App 337 (2008). In *Connor*, the total damages exceeded the UIM and PIP benefits. Farmers sought reimbursement of its PIP benefits based on the amount of economic damages as determined by the trial court. Based on the legislative history, the court determined that Farmers was not permitted to recover its PIP benefits because it would serve to reduce the policy limits.

Attorney Fees

ORS 742.061 allows a plaintiff to collect attorney fees in a PIP or UM/UIM claim in specific circumstances. “If settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state on any policy of insurance of any kind or nature, and the plaintiff’s recovery exceeds the amount of any tender,” the plaintiff is entitled to recover attorney fees unless the insurer satisfies specific conditions within six months of the date the proof of loss is filed with the insurer.

For PIP claims, the insurer must (1) accept coverage in writing and state that the only issue is the amount of benefits due the insured; and (2) consent to binding arbitration. ORS 742.061(2).

For UM/UIM claims, the insurer must (1) accept coverage in writing and state that the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured; and (2) consent to binding arbitration. ORS 742.061(3).

However, an insurer must be careful when denying specific claims. In *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, modified and adhered to on reconsideration, 343 Or 394 (2007), the PIP carrier denied payments for chiropractic treatment, claiming it was not related to the collision. This was interpreted as a dispute of coverage, not just benefits, so the plaintiff was entitled to attorney fees. Once a denial of benefits occurs, it is not necessary to wait the six-month period from the proof of loss required pursuant to ORS 742.061.

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