CHAPTER 4

Must You Repay PIP?

Rules on Recovery of Personal Injury Protection Payments

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I. PIP Recovery From Liability Insurance

A. Intercompany Reimbursement

1. Scenario: The Clean Check

PIP insurer sends its insured – your client, plaintiff – an ambiguous letter, by regular mail, saying the PIP insurer expects the negligent driver's liability insurer to make direct reimbursement but adding that the PIP insurer reserves all rights to recover its PIP payments by lien or subrogation.

Plaintiff sends the PIP insurer a copy of the settlement demand letter ... or sends a copy of the personal injury complaint.

Plaintiff settles for the negligent driver's liability limit of $25,000 and insists on a "clean check" payable only to plaintiff (and attorney) – not including the PIP insurer on the check.

Plaintiff has no underinsured motorist claim. Either liability limits match or exceed plaintiff's UIM limits; or the settlement fully pays plaintiff's damages.

As the second anniversary of the accident approached, the PIP insurer filed for intercompany arbitration but the insurers tolled the proceeding awaiting the tort claim.

Upon settlement, the PIP insurer demands the liability insurer reimburse PIP. Or, the PIP insurer demands the plaintiff disgorge or repay a part of the settlement.

2. Intercompany Reimbursement Rule

Generally, a PIP insurer may seek direct reimbursement from a liability insurer when the PIP insurer has asked the other insurer for reimbursement, has not elected a PIP lien against the injury lawsuit, and has included language of reimbursement in its own policy with the insured. ORS 742.534(1). Intercompany reimbursement is reduced by the plaintiff's percentage of fault. ORS 742.534(2). Intercompany disputes are settled or arbitrated. ORS 742.534(3).

Caveat: If the plaintiff receives a *joint* check that includes the PIP insurer's name – or otherwise settles agreeing to set aside a portion of the liability settlement payable to the PIP insurer – the PIP insurer is entitled to the money as direct intercompany reimbursement. The PIP insurer owes plaintiff no portion of the PIP reimbursement as attorney fees. *Garrett v. State Farm Mut. Ins. Co.*, 112 Or App 539, 829 P2d 713 (1992).

3. Limit-Limit on Direct Reimbursement

Having exhausted its liability limits with a "clean check" payable only to plaintiff – and absent a true statutory PIP lien under ORS 742.536 – the liability insurer owes the PIP insurer no PIP reimbursement. Under ORS 742.534(1) payments to the plaintiff and PIP together cannot exceed the liability limit. Faced with the plaintiff's demand for a "clean check" as the price of a release of the tortfeasor, the liability insurer can exhaust its limits in payment to the plaintiff, ignoring the PIP insurer's reimbursement demand. *Farmers Ins. Co. v. American Fire & Cas. Ins. Co.*, 117 Or App 347, 844 P2d 235 (1992) *review denied* 315 Or 643 (1993).

4. Election-Limit by Direct Reimbursement: No Lien

Having asked for intercompany arbitration, and perhaps just by asking reimbursement, a PIP insurer has "become a party to an intercompany reimbursement proceeding" and cannot seek recovery of a portion of the liability proceeds as a PIP lien. ORS 742.536(2). The PIP insurer cannot turn to recoup the PIP from plaintiff as a lien.

5. Election-Limit by Direct Reimbursement: No Subrogation

Having shown that the intercompany arbitration option was available, the PIP insurer arguably cannot seek a claim for "subrogation" to the settlement money in plaintiff's hands. Subrogation is available only if the "interinsurer benefit of ORS 742.534" is unavailable. ORS 742.538.

Plaintiffs will argue that the precondition for subrogation is the unavailability of the intercompany *process* in a case. PIP insurers may argue that the absence of unspent money in the liability policy makes intercompany arbitration futile, thereby satisfying the statutory precondition to subrogation.

Plaintiffs will argue that subrogation should not be available as an informal and belated "lien" when the interinsurer benefit could have been pursued earlier or when the insurer could have filed a timely true statutory PIP lien under ORS 742.536. *See, e.g.,* Order, *Takano v. Farmers Ins. Co.*, Multnomah Case No 0012-12473 (Frank Bearden, J) (July 13,

2003) (denying PIP insurer subrogation when insurer sat on its hands earlier); Letter Opinion, *State Farm Fire & Cas Co. v. Wolf*, Coos Case No 07CV0388) (Paula Bechtold, J.) (denying subrogation recovery).

Legislative history seems to indicate that the current version of the PIP subrogation statute at ORS 742.538 is a reworded reiteration of the prior version of the statute. That is, the reference to the unavailability of the interinsurer benefit is a slightly broader way to refer to the same problem of the unavailability of the intercompany *process* in a case. *Cf.* 1975 Or Laws, Ch 784, § 9; and its Ex H, pp 1, 4-6, to HB 3199 (referring to the intercompany "process") *with* 1971 Or Laws, Ch 523, § 8, and its HB 1300 (referring to non-cooperating, out-of-state insurers). When the interinsurer process was available, subrogation should not be a PIP insurer's means to a belated, pseudo-lien.

Our state appellate courts have faced but not answered the question whether the lack of money left in liability insurance, after settlement, makes the interinsurer benefit of ORS 742.534 "unavailable." *State Farm Mut. Auto. Ins. Co. v. Hale*, 215 Or App 19; *Mid-Century Ins. Co. v. Turner*, 219 Or App 44, 56 n 4, 182 P3d 855 (2008). Our federal district court has opined that the interinsurer arbitration provision *is* available, even if the money is not, so as to preclude a belated resort to subrogation. *Providence Health Plan v. Charriere*, 666 F Supp2d 1169, 1180-81 (D Or 2009).

(In our scenario, no PIP reimbursement should occur.)

B. The PIP Lien

1. Scenario: A True Statutory Lien

The plaintiff's lawyer sends the PIP insurer by certified mail a copy of personal injury complaint or of the demand letter to the liability insurer for liability limits of $100,000. Or the PIP insurer gains actual knowledge of the plaintiff's claim.

Within 30 days from receipt or knowledge, the PIP insurer sends by certified mail a notice of lien to the plaintiff and to the defendant – with a copy to the correspondence side of the court file, if any.

2. Lien Rule

When the PIP insurer has not been a party to an interinsurer proceeding and has lien language in its policy, the insurer has the option to elect a lien. With a timely certified letter or personal service, the PIP insurer acquires a true lien on the personal injury proceeds. ORS 742.536(2).

Unlike intercompany reimbursement (where the personal injury claim is separate), the injured party, subject to a PIP lien, *must* include, as damages sought, the sums paid by PIP benefits.[1] ORS 742.536(3)(b).

Unlike intercompany reimbursement, the PIP insurer must give up a proportionate share of the PIP sum for plaintiff's attorney fees and costs. ORS 742.536(3)(a).

Unlike intercompany reimbursement, the lien statute makes no provision for a reduction in the amount of money subject to the PIP lien by reason of plaintiff's fault. Likewise, the lien statute is indifferent to whether a jury actually awards plaintiff any or all of the economic damages that were paid by PIP. In this way, a PIP lien operates like a lien of a medical provider. It simply must be paid.

3. Lien Fussiness

Insurer beware. The statutory PIP lien must be elected within 30 days of receipt of notice that plaintiff has made a claim. ORS 742.536(2). Presumably, this is to allow plaintiff the certainty with which to calculate a net recovery when negotiating a settlement. A late lien notice should not be valid. *See Medean v. Moeller*, 246 Or App 717, __ P3d __ (December 7, 2011) (refusal to allow late filing for reduction of judgment for PIP reimbursement); *cf. CIT Group / Equipment Financing, Inc. v. Kendall*, 151 Or App 231, 948 P2d 332 (1997) (late service of attorney fee petition after 14 days defeated recovery of fees).

Insured beware. The terms "makes a claim" or "claim", however, are defined with reference to giving a specific amount of the claim. ORS 742.536(4). Think "dollar amount" ($). At the least, a routine demand for "policy limits" (even if not yet known) would give plaintiff a plausible argument to have made a demand for a "specific amount."

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[1] See plaintiff's option, in cases of intercompany reimbursement, to omit damages paid by PIP and to avoid a consequent reduction in judgment for PIP reimbursement, discussed later, in Part III.E. *Brus v. Goodell*, 119 Or App 74, 849 P2d 552 (1993).

A plaintiff attorney's routine letter to a PIP insurer, advising of representation or asking copies of PIP medical records, might *not* qualify as notice of a personal injury "claim". The plaintiff would be forced into a creative argument about substantial compliance with plaintiff's duty to notify. Plaintiff might stretch to argue that the PIP insurer should have a duty to investigate akin to the insurer's duty to investigate when given only a casual "proof of loss." *Cf. Parks v. Farmers Ins. Co.*, 347 Or 374, 227 P3d 1127 (2009) (telephone calls triggering insurer's obligation to investigate and sufficing as proof of loss).

(In our scenario, the PIP lien must be paid.)

C. PIP Subrogation

1. Scenario: Real Subrogation

The negligent driver's liability insurer does not participate in the intercompany reimbursement process hosted by Arbitration Forums, Inc.

The PIP insurer does not elect a PIP lien, because it chose not to; because plaintiff chose not to pursue a personal injury claim; or because plaintiff's lawyer forgot to notify the PIP insurer of the personal injury claim.

The PIP insurer requests in writing that the plaintiff recoup a portion of damages from the negligent motorist or liability insurer a sum to repay PIP benefits.

2. The Subrogation Rule

If the interinsurer benefit was not available and if the PIP insurer has not elected a lien, then the PIP insurer may assert that the insured plaintiff holds PIP money in trust or may request in writing that the insured plaintiff pursue and recover PIP benefits as damages from the negligent driver in a subrogation claim. ORS 742.538(1), (2) & (4).

If taking settlement proceeds, the PIP insurer must yield a portion of its PIP sum in payment of plaintiff's attorney fees and costs. ORS 742.538(1). This resembles the lien rule. ORS 742.536(2).

3. Subrogation Limitation

The subrogation option is controlled by the terms of the statute, not by the terms of the policy. ORS 742.538(7).

The subrogation option should not be available if the intercompany reimbursement procedure had been available in a particular claim. ORS 742.538 (preamble). The option of subrogation should not be a means to effect a late pseudo-lien after the lapse of the statute's 30 day period in which to elect a true lien. See text *supra*, I.A.5., "Election-Limit by Direct Reimbursement: No Subrogation."

(In our scenario, true subrogation should recover PIP.)

D. The Math Limitation on Ordinary PIP Repayment

1. Scenario: Made Half, Not Whole

The PIP insurer pays $15,000 in medical bills and $10,000 in lost wages and sends the insured a certified letter electing a PIP lien on any personal injury claim. The tortfeasor's liability insurance pays its $25,000 limits.

The injured insured has total medical bills of $15,000, lost wages of $10,000, diminished future earning capacity of $25,000, and noneconomic damages of $25,000.

2. Comparing Insurance and Only Economic Damages

Where plaintiff has no UM/UIM claim against her own insurer, ORS 742.544 provides some small help in some situations. It is not a "make-whole" statute. At best, it is a "make half" statute. This provision limits PIP repayment to the excess, if any, of all insurance benefits over plaintiff's economic (but only economic) damages. The point is to assure that, before any PIP is repaid, plaintiff receives enough combined PIP, liability insurance, and UIM insurance (from *another* insurer) to pay at least her economic damages. The statute provides in part:

> (1) 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 31.510 suffered by that person.

(ORS 742.544, emphasis added.) Because "economic damages" means everything provable in an ordinary case under ORS 31.510, plaintiff can prove up economic damages beyond the current bills, including, for example, future lost earning capacity.

"Total insurance benefits" includes liability insurance, the PIP insurance, and potentially any applicable underinsured motorist benefits (but see Part II.D. below in *Conner* discussion). ORS 742.544(1)(a)-(c).

In many cases, the numbers involved will permit PIP repayment, since the PIP coupled with the liability proceeds, which usually include something for noneconomic damages, will exceed routine economic damages. (See, e.g., Ex 1, PIP Reimbursement Table, pp 4-16.)

With the enactment of ORS 742.544, we have come a long way from the outdated statement 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, 70, 821 P2d 424 (1991) (overruled by ORS 742.544).

Insurers, however, have invoked ORS 742.544 – which is a mere mathematical limit on repayment – as if it were a substantive right in itself to repayment. It is not. Only ORS 742.534 (direct intercompany reimbursement), ORS 742.536 (true statutory PIP liens), and ORS 742.538 (subrogation when permitted) provide substantive authority for PIP recovery. *Gaucin v. Farmers Ins. Co.*, 209 Or App 99, 146 P3d 370 (2006); *Farmers Ins. Co. v. Conner*, 219 Or App 337, 182 P3d 878 (2008).

(In the scenario above, insurance proceeds happen to equal, not exceed, economic damages. No reimbursement is allowed.)

E. No Common Law Means of PIP Recovery

1. Scenario: All But the Kitchen Sink

Plaintiff sends her PIP insurer a certified letter notifying it of her money demand against the tortfeasor (or includes a copy of the complaint) but the PIP insurer does not reply within 30 days to opt for a PIP lien.

The PIP insurer writes that it expects direct intercompany reimbursement, denies that it is "electing" any one recovery option, and declares that it reserves a right to all means of PIP recovery, reminding the insured of her duty to hold money in trust and to do nothing to interfere with PIP recovery.

Plaintiff files a complaint against the tortfeasor for noneconomic damages and only unreimbursed economic damages. Plaintiff refuses a settlement with the PIP insurer on the check. The liability acquiesces and sends a "clean check" payable only to plaintiff.

PIP insurer admits it has not pursued any statutory means of PIP recovery, but the insurer sues plaintiff and her lawyer for breach of the policy, money had and received, breach of the settlement agreement, and breach of fiduciary duty.

2. PIP Recovery By the Book – Only

PIP insurers are prone to view PIP recovery as a fundamental right inherent in the PIP scheme. A PIP insurer may argue that the injured insured's receipt of liability limits with a "clean check" payable only to the insured leaves no money for direct intercompany reimbursement and therefore breaches an insurance policy's requirement that the insured do nothing to prejudice the PIP insurer's rights of recovery. The PIP insurer may claim that the injured insured is liable for "money had and received," for breach of a settlement's release promising payment of bills or liens, or for breach of a fiduciary duty to hold moneys in trust.

The several statutory means of PIP recovery or PIP offset (discussed below) are the only permissible means of PIP recoupment. A policy's broad statement about "doing nothing to prejudice" the PIP insurer's right of recovery is unenforceable, since it is overreaching. It is less favorable to the insured than the prescribed means of recovery. ORS 742.021(1); *Mid-Century Ins. Co. v. Turner*, 219 Or App 44, 182 P2d 855 (2008).

Absent true lien, the plaintiff is not unjustly enriched by taking the liability proceeds without repaying PIP. No "money had and received" claim lies. Absent unusual circumstances, a PIP insurer is not an intended third-party beneficiary of the release or settlement agreement that promises to indemnify the liability insurer from liens. And, the PIP insurer cannot claim that the plaintiff has breached a fiduciary duty by taking all the liability proceeds, even when it frustrates the ability to receive direct intercompany reimbursement. *Mid-Century Ins. Co. v. Turner*, 219 Or App 44, 182 P2d 855 (2008).

The circumstances in each case are unique and critical. The possibility remains that the plaintiff and PIP insurer *can* reach an arrangement – perhaps an unwitting contract – to recover PIP for the insurer (as if an informal lien or pseudo-subrogation). Plaintiff *can* voluntarily agree to hold a portion of liability proceeds equivalent to PIP in trust awaiting determination of an underinsured motorist claim (but see PIP offset from damages in Part II

below). They may feel their arms twisted when such an insurer makes such a demand as a dubious "condition" of approval for an underlying settlement.[2]

A careful plaintiff will want to be clear in communications with the PIP insurer about plaintiff's role and how PIP may be recovered. Oregon insurers *have* been known to sue both their own policyholders *and* plaintiffs' attorneys when PIP recovery is frustrated. *See, e.g., Turner*, 219 Or App 44; *see also State Farm Mut. Auto. Ins. Co. v. Hale*, 215 Or App 19, 168 P3d 285 (2007) (denying PIP recovery on unique facts).

3. Beware of ERISA

Health insurers, governed by the Employee Retirement Income Security Act (ERISA), may assert federal preemption of state strictures on PIP liens and subrogation. *See, e.g., Cavanaugh v. Providence Health Plan*, 699 F Supp2d 1209 (D Or 2010); 29 USC § 1144(a).

Under federal law, insureds will litigate whether the insured is "made whole" and whether the plan clearly provides against a "made whole" principle. *Cavanagh,* 699 F Supp2d at 1223-29; *Barnes v. Independent Auto Dealers Ass'n*, 64 F3d 1389, 1394 (9th Cir 1995) (make whole principle); *Providence Health System-Washington v. Bush*, 461 F Supp2d 1226 (WD Wash 2006) (whether the made-whole rule applies to insurer's right of reimbursement).

(In our scenario, no PIP or "damages" are recovered from plaintiff by the PIP insurer.)

II. PIP Offset From UIM Damages

A. Scenario: Damages Beyond Insurance

Plaintiff suffers over $100,000 in combined economic and noneconomic damages. Plaintiff recovers the negligent driver's $25,000 liability limit, and she benefits by $25,000 in PIP for medical bills and wage loss paid by plaintiff's own insurer. Her insurer has filed a PIP lien on the personal injury action.

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[2] Logically, the only relevant issue, when a plaintiff seeks a UIM insurer's consent to a tort settlement, is the extent of liability insurance and the assets of the tortfeasor. *See* ORS 742.504(4)(e) (insurer's right to seek info on tortfeasor when considering whether to give consent).

Plaintiff happens to have $50,000 in UM/UIM coverage with her own insurer. She asserts a UIM claim. Her insurer concedes it would owe $25,000 in net UIM benefits ($50,000 UIM limit minus $25,000 liability proceeds).

However, her PIP/UIM insurer argues it owes no new money. Her insurer argues that either (a) it is entitled to enforce its PIP lien to take $25,000 recovery from the $25,000 underlying liability payment; or (b) it is entitled to subtract its PIP payment as an offset from its potential $25,000 UIM benefit.

B. ORS 742.542: The Offset Possibility

When plaintiff has an uninsured or an underinsured motorist claim, the UM/UIM insurer is potentially entitled to subtract its own PIP payments from net UM/UIM benefits (netted after liability limits subtracted). This avoids double-recovery for the same damages. The rule is reflected in the opening portion of ORS 742.542:

> Payment by a motor vehicle liability insurer of personal injury protection benefits for *its own* insured shall be applied in reduction of the amount of damages that the insured may be entitled to recover from the insurer under uninsured or underinsured motorist coverage for the same accident ... .

(Emphasis added). This does not tell us what to do when an insurer has claimed a PIP lien against the liability proceeds; nor does this tell us what to do when plaintiff's damages exceed the combined insurance.

C. ORS 742.542: The Stacking Possibility

The rest of ORS 742.542 provides that the PIP offset ...

> ... may not be applied in reduction of the uninsured or underinsured motorist coverage policy limits.

In plain English, this means stacking PIP and UM/UIM coverage is possible. That is, when plaintiff's total damages (economic *and* noneconomic) exceed the UM/UIM policy limit, then the PIP offset is subtracted from the true damages, *not* the UM/UIM limit, such that the plaintiff recovers the net UIM benefits. The PIP offset becomes a nullity.

Today, this stacking possibility applies to both UM and UIM claims. *See* 1997 Or Laws, Ch 808, §10 *overriding Yokum v. Farmers Ins. Co.*, 117 Or App 546, 844 P2d 947 (1993).

D. ORS 742.542: Make-Whole Trumps PIP Lien

Plaintiff's right to be made-whole has another implication. If PIP and UIM must stack in order to pay all damages to make a plaintiff whole, then the PIP (UIM) insurer *cannot* enforce its PIP lien. *Farmers Ins. Co. v. Conner*, 219 Or App 337, 182 P3d 878 (2008). In effect, the right-to-stack in order to be made whole, trumps the PIP insurer's claim of PIP repayment. This is true regardless whether the PIP insurer seeks a PIP offset from prospective UIM benefits or from the liability proceeds.

The meaning is not written in Oregon statutes, but the effect is simple. When plaintiff asserts a UIM claim, then the PIP insurer *should wait* on collecting any PIP lien (or logically any direct intercompany reimbursement) until the resolution of the UIM claim. The UIM claim will determine if it is true that plaintiff's total damages exceed UIM limits so as to require stacking and nullify a PIP offset or PIP lien.

(In the scenario above, the PIP offset of $25,000 is subtracted from $100,000 damages, leaving $50,000 UIM limits untouched. Subtracting only the $25,000 liability proceeds will leave $25,000 net UIM benefits.)

III. Reduction in Judgment for Intercompany Reimbursement

A. Scenario: Check in the Mail

Plaintiff's evidence included some economic damages paid by the plaintiff's PIP insurer ($15,000). No special pleading or jury instructions were crafted around damages paid by PIP benefits.

The jury returned a verdict for plaintiff for $25,000, consisting of $10,000 in economic damages and $15,000 in noneconomic damages. Defendant bore all fault.

Defendant files an affidavit of his liability adjuster attesting to an unconditional promise to repay plaintiff's PIP insurer its intercompany reimbursement demand of $15,000. Defendant asks that the promised reimbursement be treated as an advance payment that reduces the form of judgment from $25,000 to $10,000.

B. PIP Reimbursement as an Advance Payment

Under ORS 31.555(2), the liability insurer's reimbursement of the PIP insurer can be just treated like an advance payment from the liability insurer to the plaintiff, which permits the court to reduce the judgment against the defendant. The statute provides:

> If judgment is entered against a party who is insured under a policy of liability insurance against such judgment and in favor of a party who has received benefits that have been a basis for a reimbursement payment by such insurer under ORS 742.534, the amount of the judgment shall be reduced by reason of such benefits in the manner provided in subsection (3) of this section.

Under ORS 31.555(3), the defendant submits appropriate affidavits or documentation under ORCP 68C(4) like a cost bill. Because the statute specifies the cost bill procedure, the defendant must file within 14 days of entry of judgment. ORCP 68C(4)(a).

Insurers will often toll requests for intercompany reimbursement awaiting a tort verdict. Defense attorneys cannot afford to wait. The 14 day period is enforced. *Medean v. Moeller*, 246 Or App 717, __ P3d __ (2011).

In *Medean v. Moeller*, 246 Or App 717, __ P3d __ (2011), the liability insurer had actually reimbursed the PIP insurer its $8,413 before judgment. The jury awarded $9,327 in economic damages and a similar $9,327 in noneconomic damages. Defendant subtracted its PIP repayment and tendered a net check to plaintiff. Plaintiff refused. Defendant sought a reduction in judgment, now a year after judgment, in hopes of avoiding a double recovery. Although the trial court allowed a reduction, the Court of Appeals reversed. The insurer may have an obligation to reimburse, but, unless the defendant acts within time limited by ORS 31.555 and ORCP 68C(4), the defendant still owes the full judgment.

Query: The court may enlarge the time for doing any act provided under the rules. ORCP 15D. Could a cautious defendant, within 14 days of judgment, move that the court enlarge the time in which to file to reduce the judgment, in order to allow any needed information to be completed?

C. The Future Tense

Although the statute speaks in the past tense about a reimbursement that has been made, the statute still operates if the defense attorney or liability insurer attests that a PIP reimbursement unconditionally *will be made*. *Doughtery v. Gelco Express*, 79 Or App 490, 719 P2d 906 (1986). This is one occasion when it will suffice to say the check is in the mail.

D. Weasel Words

It will not suffice, however, if the defense attorney merely attests that the liability insurer will "proceed" with intercompany arbitration. That statement is not an unconditional promise to pay a sum certain. It will not warrant a reduction in judgment. *Heintz v. Baxter*,

120 Or 603, 853 P2d 320 (1993). In an arbitration, the liability insurer could potentially dispute the size of the reimbursement or comparative fault, so as to make uncertain how much will actually be paid. *See* ORS 742.534(3).

E. Discerning the Jury's Verdict

It may not matter that the jury's verdict did not literally award dollars for the same damages that PIP benefits paid.[3] When the plaintiff asks the jury for damages that PIP benefits paid, the defendant will be entitled to a reduction of judgment, even if the plaintiff can suggest by the numbers awarded that the jury chose not to award the particular damages covered by PIP benefits. *Dougherty v. Gelco Express*, 79 Or App at 495-96. The defendant gets the benefit of the doubt.

Even if the plaintiff's attorney, in closing, asks the jury not to award as damages those bills that were paid (by PIP), the judgment still will be reduced. *Mitchell v. Harris*, 123 Or App 424, 859 P2d 1196 (1993). The court will not speculate that the jury did not include "PIP damages." *See also Wade v. Mahler*, 167 Or App 350, 1 P3d 485 (2000) (allowing reduction over plaintiff's objection where her verdict form would not necessarily have avoided uncertainty about PIP damages awarded).

However, if the court instructs the jury not to award as damages those losses which happen to have been paid by PIP benefits, then judgment will *not* be reduced by reason of PIP reimbursement. *Brus v. Goodell*, 119 Or App 74, 849 P2d 552 (1993). In this instance, where pleadings, evidence, or jury instructions ruled out the chance for PIP being among damages, then no reduction will be made.

(In our scenario above, the judgment will be reduced by the $15,000 PIP to be repaid – despite the jury's award of only $10,000 as economic damages.)

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[3] It helps to remember that, if a PIP lien or subrogation were pursued, the PIP insurer receives reimbursement regardless whether the award in litigation was founded in noneconomic damages or in economic damages other than those paid by PIP benefits. With those means of PIP recovery, the statute makes no effort to assure consistency between the judgment and the underlying PIP benefits. *Cf.* ORS 742.536 & ORS 742.538.

IV. Conclusion: Must You Repay PIP?

A. Yes?

You likely must repay PIP ...

1. Pass-Through Intercompany Reimbursement

... *if* the PIP insurer properly invoked direct intercompany reimbursement (ORS 742.534), the liability insurer put the PIP insurer jointly on the settlement check, plaintiff's total insurance proceeds sufficiently exceed economic damages (ORS 742.544), and plaintiff has no UIM claim; or

2. True Timely PIP Lien

... *if* the PIP insurer gave timely written notice of a true statutory PIP lien, plaintiff's total insurance proceeds sufficiently exceed economic damages (ORS 742.544), and plaintiff has no UIM claim; or

3. Real Subrogation

... *if* the PIP insurer gives written notice of subrogation, the interinsurer process of ORS 742.534 was not available, plaintiff's total insurance proceeds sufficiently exceed economic damages (ORS 742.544), and plaintiff has no UIM claim; or

4. UIM Offset

... *if* the PIP insurer invokes PIP as a subtraction or offset from "damages" in plaintiff's UIM claim and total proven economic and noneconomic damages do not exceed the UIM policy limit (such that no "stacking" is possible); or

5. Reduced Judgment

... *if,* within 14 days after judgment, defendant files for a reduction in judgment for PIP already paid or unconditionally promised as repayment, plaintiff's total insurance proceeds sufficiently exceed economic damages (ORS 742.544), and plaintiff has no UIM claim.

B. No?

You likely do not owe PIP repayment ...

1. Failure to Perfect Statutory Recovery

... *if* the PIP insurer has not properly invoked one of the three statutory means of PIP recovery and plaintiff has not intentionally waived the irregularity; or

2. Large Economic Damages

... *if* plaintiff proves that one of the three statutory means of PIP recovery should be frustrated because plaintiff's economic damages equal or exceed the total insurance paid in the claim (ORS 742.544); or

3. PIP + UIM Stacking

... *if*, in a UIM claim, plaintiff invokes her right to forestall ordinary PIP repayment until resolution of her UIM claim (*Conner*), and plaintiff proves her economic and noneconomic damages are larger than UIM limits, such that PIP and net UIM benefits must "stack" in order to make her whole (ORS 742.542).

C. Tips?

With PIP recovery adjusters, be clear, be up front, and confirm in writing. With clients, warn, take no unnecessary risks, and confirm in writing.

PIP Reimbursement - "Make Half" Limitation's Math
ORS 742.544

Benefits Paid		Economic Damages	
Underinsured Motorist Benefits *	0	Medical	30,000
		Burial	0
Liability Insurance Received	50,000	Lost Income	5,000
		Future Earnings	10,000
PIP Benefits Received	20,000	Domestic Svcs	0
		Loss to Estate	0
Any Other Payments Received	0	Reputation	0
		Loss / Use	0
		Repairs	5,000
		Other	0
Total	70,000	Total	50,000
"Excess" (benefits minus economic damages)			20,000
PIP Reimbursement (lesser/PIP or "excess") **			20,000

* This scenario assumes that there is no UIM claim against the PIP insurer. *But see Farmers Ins. Co. v. Conner*, 219 Or 337, 182 P3d 878 (2008) ("make whole" math of ORS 742.542 trumps "make half" math of ORS 742.544 reimbursement).

** The "excess" insurance here happens to be precisely the amount necessary to permit PIP reimbursement. Noneconomic damages are not considered.

ORS 742.534. Reimbursement for benefits paid by other insurers

(1) Except as provided in ORS 742.544, 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, shall reimburse such other insurer for the benefits it has so furnished if it has requested such reimbursement, has not given notice as provided in ORS 742.536 that it elects recovery by lien in accordance with that section and is entitled to reimbursement under this section by the terms of its policy. 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.

(2) In calculating such reimbursement, the amount of benefits so furnished shall be diminished in proportion to the amount of negligence attributable to the person for whom benefits have been so furnished, and the reimbursement shall not exceed the amount of damages legally recoverable by the person.

(3) Disputes between insurers as to such issues of liability and the amount of reimbursement required by this section shall be decided by arbitration.

(4) Findings and awards made in such an arbitration proceeding are not admissible in any action at law or suit in equity.

(5) If an insurer does not request reimbursement under this section for recovery of personal injury protection payments, then the insurer may only recover personal injury protection payments under the provisions of ORS 742.536 or 742.538.

ORS 742.536. Notice of claim to insurer; recovery of benefits furnished; lien

(1) When an authorized motor vehicle liability insurer has furnished personal injury protection benefits, or an authorized health insurer has furnished benefits, for a person injured in a motor vehicle accident, if such injured person makes claim, or institutes legal action, for damages for such injuries against any person, such injured person shall give notice of such claim or legal action to the insurer by personal service or by registered or certified mail. Service of a copy of the summons and complaint or copy of other process served in connection with such a legal action shall be sufficient notice to the insurer, in which case a return showing service of such notice shall be filed with the clerk of the court but shall not be a part of the record except to give notice.

(2) The insurer may elect to seek reimbursement as provided in this section for benefits it has so furnished, out of any recovery under such claim or legal action, if the insurer has not been a party to an interinsurer reimbursement proceeding with respect to such benefits under ORS 742.534 and is entitled by the terms of its policy to the benefit of this section. The insurer shall 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 claim or instituting legal action and to the person against whom claim is made or legal action instituted, by personal service or by registered or certified mail. In the case of a legal action, a return showing service of such notice of election shall be filed with the clerk of the court but shall not be a part of the record except to give notice to the claimant and the defendant of the lien of the insurer.

(3) If the insurer so serves such written notice of election and, where applicable, such return is so filed:

(a) The insurer has a lien against such cause of action for benefits it has so furnished, less the proportion, not to exceed 100 percent, of expenses, costs and attorney fees incurred by the injured person in connection with the recovery that the amount of the lien before such reduction bears to the amount of the recovery.

(b) The injured person shall include as damages in such claim or legal action the benefits so furnished by the insurer.

(c) In the case of a legal action, the action shall be taken in the name of the injured person.

(4) As used in this section, "makes claim" or "claim" refers to a written demand made and delivered for a specific amount of damages and which meets other requirements reasonably established by the director's rule.

ORS 742.538. Subrogation; rights of insurer; duties of injured person

If a motor vehicle liability insurer has furnished personal injury protection benefits, or a health insurer has furnished benefits, for a person injured in a motor vehicle accident, and the interinsurer reimbursement benefit of ORS 742.534 is not available under the terms of that section, and the insurer has not elected recovery by lien as provided in ORS 742.536, and is entitled by the terms of its policy to the benefit of this section:

(1) The insurer is entitled to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of the injured person against any person legally responsible for the accident, to the extent of such benefits furnished by the insurer less the insurer's share of expenses, costs and attorney fees incurred by the injured person in connection with such recovery.

(2) The injured person shall hold in trust for the benefit of the insurer all such rights of recovery which the injured person has, but only to the extent of such benefits furnished.

(3) The injured person shall do whatever is proper to secure, and shall do nothing after loss to prejudice, such rights.

(4) If requested in writing by the insurer, the injured person shall take, through any representative not in conflict in interest with the injured person designated by the insurer, such action as may be necessary or appropriate to recover such benefits furnished as damages from such responsible person, such action to be taken in the name of the injured person, but only to the extent of the benefits furnished by the insurer. In the event of a recovery, the insurer shall also be reimbursed out of such recovery for the injured person's share of expenses, costs and attorney fees incurred by the insurer in connection with the recovery.

(5) In calculating respective shares of expenses, costs and attorney fees under this section, the basis of allocation shall be the respective proportions borne to the total recovery by:

(a) Such benefits furnished by the insurer; and

(b) The total recovery less (a).

(6) The injured person shall execute and deliver to the insurer such instruments and papers as may be appropriate to secure the rights and obligations of the insurer and the injured person as established by this section.

(7) Any provisions in a motor vehicle liability insurance policy or health insurance policy giving rights to the insurer relating to subrogation or the subject matter of this section shall be construed and applied in accordance with the provisions of this section.

ORS 742.542. Payment of personal injury protection benefits

Payment by a motor vehicle liability insurer of personal injury protection benefits for its own insured shall be applied in reduction of the amount of damages that the insured may be entitled to recover from the insurer under uninsured or underinsured motorist coverage for the same accident but may not be applied in reduction of the uninsured or underinsured motorist coverage policy limits.

ORS 742.544. Reimbursement for payment of personal injury protection benefits

(1) 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 31.710 suffered by that person. As used in this section, "total amount of benefits" means the amount of money recovered by a person from:

(a) 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.

(2) Nothing in this section requires a person to repay more than the amount of personal injury protection benefits actually received.

ORS 31.555. Reduction of judgment by amount of advance payment; partial satisfaction

(1) If judgment is entered against a party on whose behalf an advance payment referred to in ORS 31.560 or 31.565 has been made and in favor of a party for whose benefit any such advance payment has been received, the amount of the judgment shall be reduced by the amount of any such payments in the manner provided in subsection (3) of this section. However, nothing in ORS 12.155, 31.560 and 31.565 and this section authorizes the person making such payments to recover such advance payment if no damages are awarded or to recover any amount by which the advance payment exceeds the award of damages.

(2) If judgment is entered against a party who is insured under a policy of liability insurance against such judgment and in favor of a party who has received benefits that have been the basis for a reimbursement payment by such insurer under ORS 742.534, the amount of the judgment shall be reduced by reason of such benefits in the manner provided in subsection (3) of this section.

(3)(a) The amount of any advance payment referred to in subsection (1) of this section may be submitted by the party making the payment, in the manner provided in ORCP 68 C(4) for the submission of disbursements.

(b) The amount of any benefits referred to in subsection (2) of this section, diminished in proportion to the amount of negligence attributable to the party in favor of whom the judgment was entered and diminished to an amount no greater than the reimbursement payment made by the insurer under ORS 742.534, may be submitted by the insurer which has made the reimbursement payment, in the manner provided in ORCP 68 C(4) for the submission of disbursements.

(c) Unless timely objections are filed as provided in ORCP 68 C(4), the court clerk shall apply the amounts claimed pursuant to this subsection in partial satisfaction of the judgment. Such partial satisfaction shall be allowed without regard to whether the party claiming the reduction is otherwise entitled to costs and disbursements in the action.

H

United States District Court,
D. Oregon.
PROVIDENCE HEALTH PLAN, an Oregon non-profit corporation, Plaintiff,
v.
Linda L. CHARRIERE, Defendant.

No. CV-08-872-HU.
Oct. 13, 2009.

Background: Health insurance plan brought action against health plan beneficiary under ERISA and for breach of contract. Both parties filed motion for summary judgment.

Holdings: After agreement to entry of final judgment by United States Magistrate, the District Court, Hubel, United States Magistrate Judge, held that:
(1) under Oregon law, plan was not entitled to reimbursement of benefits paid from $50,000 paid by third party's automobile insurer directly to plan beneficiary for bodily injury after plan elected to pursue inter-insurer reimbursement from insurer;
(2) under Oregon law, health plan was entitled to reimbursement of benefits paid from $50,000 in underinsured motorist's coverage that beneficiary's automobile insurer paid to beneficiary;
(3) beneficiary failed to create genuine issue of fact as to whether plan was entitled to reimbursement under doctrine of unclean hands;
(4) plan did not waive ERISA claim by seeking interinsurer reimbursement pursuant to Oregon law;
(5) beneficiary was not obligated under health insurance plan to reimburse plan for health insurance benefits paid from $50,000 beneficiary received from third party's automobile insurer in bodily injury benefits;
(6) beneficiary was obligated under health insurance plan to reimburse plan for benefits paid from $50,000 that beneficiary's automobile insurer paid in underinsured motorist benefits to beneficiary; and
(7) fact issue remained as to amount of costs and attorney fees incurred in obtaining underinsured motorist benefits from beneficiary's automobile insurer.

Health plan's motion for summary judgment granted in part and denied in part; plan beneficiary's motion for summary judgment granted in part and denied in part.

West Headnotes

[1] Labor and Employment 231H ⚿639

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)1 In General
231Hk639 k. Judgment and relief.
Most Cited Cases

A plaintiff seeking to remedy violations of ERISA could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession; a court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of an equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C.A. § 1132(a)(3)(B).

[2] Labor and Employment 231H ⚿639

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)1 In General
231Hk639 k. Judgment and relief.
Most Cited Cases

There are four criteria for a proper equitable action for constructive trust in an action to remedy

In *Hale,* the court noted that the settlement documents between the injured insured and the third-party tortfeasor's motor vehicle liability carrier had not been executed when the plaintiff attempted to assert its subrogation rights under O.R.S. 742.538. Thus, at that time, the settlement of the claim by the injured party against the tortfeasor's motor vehicle liability carrier had not occurred. As a result, the court concluded that interinsurance reimbursement remained "available" under O.R.S. 742.534, rendering subrogation under O.R.S. 742.538, unavailable. *Hale,* 215 Or.App. at 24, 168 P.3d at 288.

The record here shows that plaintiff attempted to invoke its rights under O.R.S. 742.534 to interinsurer reimbursement by writing letters to State Farm expressly referencing the statute and asserting its claim thereunder. Under subsection (1) of the statute, a request by a health insurer to the authorized motor vehicle liability insurer is discretionary, not mandatory. The statute gives the health insurer the option of requesting reimbursement directly from the motor vehicle liability insurer whose insured is or would be held legally liable for damages. *See* O.R.S. 742.534(1) (the motor vehicle liability insurer shall reimburse the health insurer if the health insurer has requested such reimbursement).

Nothing in the statute or the caselaw indicates that payment by the motor vehicle liability carrier to the insured person makes the arbitration proceeding set forth in O.R.S. 742.534(3), "unavailable." Subsection (3) provides for arbitration of disputes between insurers regarding "the amount of reimbursement required by this section." Because the "reimbursement required by this section" refers to payment from the motor vehicle liability carrier to the health carrier (or to the PIP carrier), the language in subsection (3) regarding "the amount of reimbursement required by this section" clearly includes the question of to whom the motor vehicle liability carrier should pay the amount owed under the bodily injury policy.

Given that plaintiff still has arbitration available to it under O.R.S. 742.534, it cannot rely on O.R.S. 742.538 for reimbursement. Nothing in *Hale* or *Mid-Century* suggests otherwise. Because plaintiff elected to pursue reimbursement under *1181 O.R.S. 742.534, the statute's arbitration provision, while perhaps unlikely to produce funds, remains available and plaintiff may not rely on O.R.S. 742.538. As a result, plaintiff is not, in "good conscience" entitled to the $50,000 paid by State Farm to defendant under Arthur's motor vehicle bodily injury policy.

C. UIM Coverage

[4] Notably, the plain language of O.R.S. 742.534 shows that interinsurer reimbursement is not available for UIM coverage paid to the injured insured. The statute requires reimbursement to a health insurer, if requested by the health insurer, from an "authorized motor vehicle liability insurer *whose insured is or would be held legally liable for damages for injuries sustained in a motor vehicle accident* ...." O.R.S. 742.534(1) (emphasis added). Defendant received UIM benefits as a result of her own insurance policy, not Arthur's. Defendant, not Arthur, was State Farm's insured for UIM payments. Defendant, however, is not an insured who is or would be held legally liable for her own damages sustained in the accident. Defendant is not responsible for her own injuries. Under the plain language of O.R.S. 742.534, the insurer of the insured who is "legally liable for damages for injuries sustained" is the insurer of the third-party tortfeasor under a liability policy.

As a result, although plaintiff attempted to invoke its right to interinsurer reimbursement under O.R.S. 742.534 for the UIM coverage, it could not have succeeded in obtaining such reimbursement because O.R.S. 742.534 does not apply to recovery of payments made as UIM coverage. Accordingly, arbitration of the disputed $50,000 paid as UIM coverage to defendant, is not available under O.R.S. 742.534(3).

Under O.R.S. 742.538, if interinsurer reim-

PAULA M. BECHTOLD
Circuit Court Judge
(541) 756-2020 ext. 537

NORTH BEND CIRCUIT COURT
Fifteenth Judicial District
Coos County
P. O. Box 865

North Bend Annex
1975 McPherson
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April 16, 2008

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Re: State Farm Fire & Casualty Co. v. Wolf, Case No. 07CV0388

The facts in this case were stipulated to by both parties as was the amount in controversy. The defendant was plaintiff's insured; defendant was injured in a vehicle accident, and plaintiff paid certain medical bills for defendant under his personal injury protection (PIP) coverage. Ultimately, defendant settled with the insurance company that insured the driver at fault for the accident. The settlement was for the full policy limits. By this suit, plaintiff hopes to be reimbursed by defendant for the PIP payments on his account in the amount of $8,211.67.[1]

The accident occurred on December 9, 2004.

On December 20, 2004, plaintiff advised defendant that he would need to reimburse plaintiff the PIP from any recovery he might receive for his claim.

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[1]The actual PIP was $12,256.22; plaintiff is seeking recovery of that amount *less* attorney fees and costs as provided in ORS 742.538(4).

On July 13, 2005, plaintiff gave notice to the other insurance company of its "subrogation or reimbursement rights" as to the PIP paid on account of defendant.

On July 18, 2005, defendant's attorney sent a letter to plaintiff stating that defendant was assuming plaintiff would be seeking its PIP payment reimbursement directly from the other carrier unless he received a written request from plaintiff to pursue the PIP.

Plaintiff sent letters to both defendant and the other carrier on July 20, 2005, advising that it had a subrogation claim and was seeking recovery from the other carrier. In both the July 20 letter to defendant and a separate July 28, 2005 letter to defendant's attorney, plaintiff stated that defendant was to take no actions to jeopardize this PIP reimbursement or its subrogation claim.

On February 23, 2006, defendant made a demand on the other carrier for policy limits "plus PIP," and sent a copy to plaintiff along with a letter "confirming" that plaintiff had elected to pursue its own PIP reimbursement. Plaintiff received those letters but never responded to defendant. Nor did plaintiff file a lien for the PIP within 30 days as provided in ORS 742.536.

On March 1, 2006, plaintiff sent a letter to the other carrier requesting reimbursement of the PIP or contact to "discuss settlement."

On May 1, 2006, the defendant accepted the offer to settle the claim for policy limits of $50,000, and defendant agreed to hold the other carrier harmless from any claim by plaintiff for PIP reimbursement. Plaintiff was advised that same date by the other carrier of the settlement and that "its PIP lien" could not be considered. (No such election had been made by plaintiff as set forth in ORS 742.536.) Defendant's attorney notified plaintiff, by letter dated May 8, that plaintiff was considered to have elected interinsurer reimbursement and to have waived lien and subrogation rights. On May 9, defendant signed a release of all claims.

The question to be answered is whether plaintiff can recover the PIP from defendant under the contract between them, or if plaintiff is statutorily barred at this time.

There are three separate statutes which set forth three different ways an insurance company can recover its PIP payments: ORS 742.534 - the interinsurer reimbursement benefit, ORS 742.536 - the PIP lien, and ORS 742.538 - subrogation. The insurance contract between plaintiff and defendant mirrors those three methods of recovery and acknowledges that plaintiff can choose any one of the three options.

The defendant argues in this case that plaintiff is precluded from recovery under ORS 742.538 because (1) defendant gave proper notice as would allow a lien to have been asserted

under ORS 742.536, and (2) defendant advised plaintiff that he was assuming plaintiff was pursuing interinsurer reimbursement under ORS 742.534.

Plaintiff can only recover under ORS 742.538 if it has not elected recovery by lien "and the interinsurer reimbursement benefit of ORS 742.534 *is not available* under the terms of that section." There is no dispute that plaintiff has not elected recovery by lien. Therefore, this case turns on the meaning of "not available" in the subrogation statute.

Plaintiff cites two cases to support its position. Neither case, however, applies to the case at bar.

In *Babb v. Mid-Century Ins. Co.*, 110 Or. App. 67 (1991), insurer sought reimbursement directly from the other insurance company. The liability carrier instead issued a check in the amount of the policy limits payable to *both* the injured party and the PIP carrier. The parties agreed that the other insurance company could not be required to pay more than the policy limits. The injured party sought a declaration that the PIP carrier was not entitled to reimbursement under ORS 742.534(1), because her damages exceeded the liability carrier's policy limits. The court held that insurer was entitled to be reimbursed for its PIP payments directly from the settlement proceeds.

> "... ORS 742.534(1) mandates that, when an insurer seeks reimbursement from a tortfeasor's liability insurer for PIP benefits, the PIP insurer is entitled to be reimbursed before the victim may receive anything." *Babb*, 110 Or. App. at 71-72.

There are two facts which distinguish *Babb* from the current case: the proceeds were made payable to both parties and recovery was under ORS 742.534.[2]

The other case cited by plaintiff, *Farmers Ins. Co. v. American Fire & Casualty*, 117 Or App 347, 844 P2d 235 (1992), *rev den*, 315 Or 643 (1993), was similar to *Babb* in that the insurer had requested reimbursement from the other insurance company which instead paid directly the policy limits to the injured party, a passenger of the insured. The insurer filed its action against both the other insurance company and the injured party. The trial court granted a motion for summary judgment against the injured party and dismissed the claim against the other insurance company. Only the insurer appealed. This case again focused on ORS 742.534 and, affirming the trial court, held *only* that because the other insurance company had already paid its

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[2]In a direct response to *Babb*, ORS 742.544 was enacted to address the issue, not pertinent here, of economic damages exceeding the policy limits. That statute effectively overruled *Babb*. *Gaucin v. Farmers Ins. Co.*, 209 Or App 99, 108 (2006).

policy limits, it could not be required to reimburse the plaintiff insurer.[3] This case, as in *Babb*, based recovery on ORS 742.534, which is not the statutory basis for the current case.

In the current case, plaintiff is proceeding under ORS 742.538, which requires that the interinsurer reimbursement benefit of ORS 742.534 not be available Plaintiff argues that the benefit of ORS 742.534 is "not available" because policy limits have been paid to defendant. Therefore, as in *Babb* and *Farmers*, plaintiff contends it should be able to recover directly from defendant under the subrogation statute, ORS 742.538. However, as noted above, neither *Babb* nor *Farmers* involved the subrogation statute (ORS 742.538).

Defendant cites *State Farm Mutual Automobile Ins. Co. v. Hale*, 215 Or App 19 (2007), as authority for its position. In *Hale*, the plaintiff insurer sought reimbursement from its insured for PIP after the insured received policy limits in settlement from the other insurance company. Defendant had notified plaintiff of his intent to file a claim against the party at fault, citing the lien statute, and asking which method of PIP reimbursement the plaintiff was choosing. The plaintiff made a demand for reimbursement direct to the other insurance company and advised defendant to take no action whatsoever in connection with recovery of PIP. Plaintiff then sought binding arbitration with the other insurance company. The other insurer offered to settle with both plaintiff and defendant for policy limits. This offer was rejected by defendant who counter offered for the policy limits without the PIP deduction. The other insurer paid its policy limits to defendant, and the plaintiff withdrew its arbitration request.

Based on these facts, the court found that the interinsurer reimbursement benefit under ORS 742.534 *was* available to plaintiff, and therefore plaintiff could not recover from defendant under ORS 742.538:

> "As set forth below, we need not reach defendant's broader argument--that an insurer may not proceed under ORS 742.538 when the other insurer has paid its policy limits directly to an insured because interinsurer reimbursement under ORS 742.534 remains "available"--because we conclude that defendant is correct on the narrower grounds that he asserts. That is, we agree with defendant that, under the circumstances of this case, plaintiff did not properly assert its subrogation rights under ORS 742.538, because at the time it attempted to do so, no settlement had occurred, and, thus, interinsurer reimbursement remained "available" pursuant to ORS 742.534, rendering subrogation under ORS 742.538 unavailable." *Hale*, 215 Or App at 24.

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[3]The significance of this case appears to be the acknowledgment that the legislature "reversed" an earlier appellate decision which ruled the opposite (*Kessler v. Weigandt*, 299 Or 38 (1985)) by amending ORS 742.534.

> " .... even if plaintiff is correct (in the abstract) that exhaustion of a liability policy's limits renders interinsurer reimbursement under ORS 742.534 "not available" and allows an insurer to proceed against its insured under ORS 742.538, that is not what happened here. In this case, the sequence of events establishes that the interinsurer reimbursement benefit under ORS 742.534 *was* "available" to plaintiff." *Hale,* 215 Or App at 28.

> "Thus, at the time plaintiff dropped its efforts to seek reimbursement of PIP benefits under ORS 734.534 and announced its intention to pursue reimbursement from defendant pursuant to ORS 734.538, no settlement had yet occurred. One had been proposed--but whether defendant's claim against Farmers could be settled on those proposed terms depended entirely on plaintiff: Farmers was willing to settle only if plaintiff dropped its ORS 742.534 claim for interinsurer reimbursement, and defendant understood that he needed plaintiff's consent to the settlement in order to proceed with his UIM claim. *Hale,* 215 Or App at 29.

> "In short, plaintiff's explanation for why interinsurer reimbursement was "not available" under the terms of ORS 742.534 is simply that plaintiff *chose* to drop its claim for interinsurer reimbursement and allow the settlement to proceed. ... Plaintiff, having abandoned its pursuit of recovery under ORS 742.534, cannot simply switch over to ORS 742.538." *Hale,* 215 Or App at 29.

The current case turns on the definition of "not available." Is the benefit of the interinsurer reimbursement "no longer available" due to the insurance company's own choice to not pursue it? Defendant gave plaintiff notice of its demand for policy limits with sufficient time for plaintiff to have settled itself with the other insurance company or to have asserted its lien under ORS 742.536.

Hale is apparently the first case to attempt to analyze the meaning of "available." Plaintiff argues it is distinguishable from the case at bar because *Hale* specifically limited its decision to the circumstances of that particular case, i.e., withdrawal of the arbitration demand before settlement. In other words, the only reason reimbursement was not available under ORS 742.534 was because plaintiff chose to drop its claim. "Having abandoned ORS 742.534, cannot simply switch over to ORS 742.538." *Hale,* 215 Or App at 29.

However, is this a distinction without a difference? According to *Hale,* "not available" does not mean that "policy limits had been paid out." *Hale* did specifically avoid the larger question — which is precisely the issue in this case. Does it matter whether the insured "drops"

its interinsurance claim or does not pursue one in the first instance?[4] ORS 742.538 does not say — "if the insured chooses not to pursue interinsurance reimbursement...."

Two other points were made by the court in *Hale* which are significant in reaching a decision in this case. The court noted (as quoted in full above) that the *legislature's preferred method* for PIP reimbursement is to utilize ORS 742.534 or pursue a lien under ORS 742.536. Additionally, in a footnote, the court commented:

> "Plaintiff invokes *Farmers Ins. Co. v. American Fire & Casualty* [citation omitted] as support for its position. In that case [*Farmers*], however, we merely held that an insurer who had paid its policy limits directly to an injured insured, rather than providing PIP reimbursement to the injured insured's PIP carrier, was not required to exceed its policy limits and make an additional payment to the PIP carrier. *No issue was presented in that case as to whether, or how, the PIP carrier might be able to recover from its own insured.*" [emphasis added] *Hale*, 215 Or App at 28.

In conclusion, if plaintiff's position is correct that "not available" means policy limits have been paid, the result in *Hale* would have been opposite. The plaintiff had sufficient notice and ample time to file a lien before the settlement in the instant case. The plaintiff could have pursued interinsurer reimbursement before settlement, instead of after.

Plaintiff's claim for declaratory judgment is denied. Mr. Snelling shall prepare a form of general judgment, consistent with this opinion.

Paul M Bechtold

Circuit Judge

cj

[4]Interestingly, plaintiff filed a PIP arbitration claim under ORS 742.534 in October, 2006, five months after the settlement between defendant and the other insurance company.

OPINION, *TAKANO V. FARMERS INS. CO.*, MULTNOMAH COUNTY CIRCUIT COURT CASE NO. 0012-12473

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WILLIAM T. TAKANO, Plaintiff,	No. 0012-12473
vs.	OPINION
FARMERS INSURANCE COMPANY OF OREGON, Defendant.	

This matter came before the court on July 7, 2003 on cross summary judgment motions. The issues presented are whether plaintiff is entitled to prejudgment interest, attorneys fees and the full proceeds of funds already received or whether PIP reimbursement is available to defendant.

First, prejudgment interest was not pled and, further, it is not clear prejudgment interest is even available under the facts and circumstances of this case so plaintiff's motion is denied on this issue.

Plaintiff seeks attorney's fees under ORS 742.061. Plaintiff argues that defendant did not settle this case within 6 months of the date of "proof of loss" and that plaintiff was compelled to file this action for recovery of policy limits. Defendant also did not consent to arbitration as required by subsection (2) and (3) of 742.061 which could have prevented a recovery of attorneys fees under certain circumstances. Defendant argues that arbitration would have been futile since liability was not an issue and the damages exceeded policy limits. However, the statute requires consent to binding

arbitration as a predicate and even if arbitration would have been stayed and later dismissed, it would also have served to set forth the relative position of the parties including formal notification to everyone interested that PIP reimbursement was being claimed by defendant. Plaintiff has met the statutory requirement for recovery of reasonable attorneys fees.

Defendant seeks PIP reimbursement from plaintiff pursuant to ORS 742.538. This statute allows PIP reimbursement if interinsurer reimbursement is not available and defendant has not sought recovery by lien. This statute refers to ORS 742.534 which is a statute directed to the tortfeasors insurer - Country Companies here - requiring that they pay PIP reimbursement to defendant "if it has requested reimbursement." Defendant did not request reimbursement before Country Companies paid out the full policy limits to plaintiff.

ORS 742.538 gives defendant a right to reimbursement only if certain preconditions are met and those include 1) defendant has paid PIP benefits, 2) defendant has not elected lien recovery, 3) defendant is entitled to reimbursement under the terms of the policy and 4) interinsurer reimbursement is "not available."

Interinsurer reimbursement was always available until the full policy proceeds were paid by Country Companies under a settlement approved by defendant. The issue then becomes whether defendant can ignore all other ways to establish rights to reimbursement and then claim reimbursement post settlement because defendant's own actions have made interinsurer reimbursement "unavailable." Defendant argues there is no time limit on asserting this claim, but if all the relevant statutes are read in context all the preconditions, notice requirements, etc., of the various statutes would be meaningless if PIP reimbursement could simply be claimed after final settlement on the basis that defendant by it's own actions foreclosed all other

avenues of recovery.

Under the circumstances of this case I find that as a matter of law defendant is not entitled now to recover from plaintiff's liability monies the reimbursement of PIP benefits in the amount claimed.

Plaintiff to prepare judgment documents in conformance with this opinion and order.

DATED this 10th day of July, 2003.

CC: CLIENT(S)
INSTR:_____
DATE/BY:_____
☐ IF THIS BOX IS
CHECKED, PLEASE CALL
MR. WOLFE TO DISCUSS

FRANK D. BEARDEN
Circuit Judge