



**PIP**  
**Preclusive Effect of Arbitration on Future Litigation**  
— by Jeffrey Eberhard

In Oregon, the vast majority of disputes between insurers and beneficiaries regarding personal injury protection benefits (PIP) are sent to arbitration. Although arbitration decides only the dispute between the parties, there remains a question as to whether the arbitration decision may be used to preclude a civil action between one of the parties to the arbitration and a third party. In essence, the question is whether a third party may use an arbitration decision to prevent one of the parties to the arbitration from bringing a claim.

In Barackman v. Anderson, \_\_\_ P.3d \_\_\_ (3/31/05), the Oregon Supreme Court addressed this issue. In Barackman, plaintiff and defendant were involved in an auto accident. Plaintiff maintained that, in the collision, she injured her back, neck and fractured two teeth.

Plaintiff filed for PIP benefits from her insurer. After the insurer denied PIP benefits for plaintiff's dental injuries, plaintiff requested arbitration. The arbitration panel concluded that the collision was not the cause of plaintiff's dental injuries and denied her PIP benefits for dental treatment.

Plaintiff then filed a personal injury action against defendant. Defendant asserted the affirmative defense that the arbitration decision precluded plaintiff from seeking compensation for the injury to her teeth. Plaintiff moved for summary judgment in response to that defense. The trial court granted summary judgment and a jury awarded plaintiff damages, including compensation for her dental injuries. Defendant appealed.

On appeal, the Oregon Court of Appeals reversed. The court found that the arbitration decision precluded plaintiff from recovering damages for the injuries to her teeth. Plaintiff appealed.

The Oregon Supreme Court affirmed, but limited its decision because the parties failed to address whether the PIP arbitration decision would satisfy the five requirements for preclusion under Nelson v. Emerald People's Utility Dist., 318 Or. 99, 103 (1993). In Nelson, the Court held that in order for a determination in a prior proceeding to preclude an issue in a subsequent proceeding, the following factors must be met: 1) the issue in the two proceedings was identical; 2) the issue was litigated and essential to the final decision in the prior proceeding; 3) the party sought to be precluded had a fair and full opportunity to be heard on that issue; 4) the party sought to be precluded was a party to the prior proceeding; and 5) the prior proceeding was the type of proceeding that the court will give preclusive effect to. Id. at 103. Since plaintiff did not address the Nelson requirements, the Court limited its decision to plaintiff's arguments.

Plaintiff first argued that the legislature, when enacting the PIP arbitration statute, ORS 742.522(1), did not intend that it would preclude subsequent civil actions. Although the text of the statute did not indicate that the legislature intended to authorize the preclusive use of PIP arbitrations, the Court determined that the statute was neutral on the issue of preclusion. Accordingly, the Court found plaintiff failed to demonstrate that the words of the statute reflected a legislative intent to prohibit the use of issue preclusion to arbitration decisions.

Next, plaintiff argued that she had little incentive to contest the denial of her dental treatment in the arbitration because the amount of damages was less than what she could obtain in the civil action. The Court found that the forum of arbitration did not prevent plaintiff from offering more proof to prevail on her PIP claim and any decision that she made as to how much she needed to contest the

insurer's claims was strictly her decision. Thus, her decision not to fully contest the insurer's claims would not prevent the arbitration decision from precluding her civil action against defendant.

Finally, plaintiff argued that granting preclusive effect to the arbitration decision would deprive her of her right to a jury trial under Article I, section 17 of the Oregon Constitution. The Court, however, stated that the constitutional right to a jury trial could be waived. Since plaintiff voluntarily chose to arbitrate her claim, she voluntarily waived her right to a jury trial, and any preclusive affect of the arbitration would not violate the Oregon Constitution.

Unfortunately, the case was not decided based on the five Nelson requirements. Thus, the issue of whether a PIP arbitration will preclude a subsequent civil action may still be up in the air. However, it is now clear that preclusion does not violate the legislative intent of ORS 742.522(1) or a plaintiff's right to a jury trial under the Oregon Constitution. ❖

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