

## *Some judicial clarification in an otherwise murky area*

PIP reimbursement is one of those esoteric and ever-changing legal issues that nobody likes to think about. Now, unfortunately, thinking is required, because of a recent decision by the Oregon Court of Appeals. The good news is that this decision, in the case of *Gaucin v. Farmers Ins. Co.*, has at least clarified some aspects of PIP reimbursement in the context of UIM claims, and tells you what to avoid if you want PIP reimbursement. The following will discuss some practical applications of this decision.

Consider this scenario: Your PIP insured is in a modest accident, caused by an insured tortfeasor with a minimum 25/50 liability limit. The PIP insured receives PIP medical and wage loss benefits totaling \$17,500 and asks for your consent to enter into a liability settlement for the liability insurer's \$25,000 policy, and wants to make a UIM claim against his larger UIM policy (gone are arguments that the insured can make a UIM claim when the liability and UIM policies have equal limits—at least unless the Oregon Supreme Court grants review and changes the holding of the Court of Appeals decision in *Mid-Century Ins. Co., v. Perkins*, decided in December—which rejected extension of the *Bergmann v. Hutton* decision in this situation).

In this scenario, you might reasonably conclude that the total “value” of your insured’s injury claim (economic plus noneconomic damages) does not exceed the \$25,000 liability limit or, if it does, it does not exceed it by much. You may feel like telling the insured’s attorney that he or she should reimburse PIP from the liability settlement, but knowing what that particular plaintiff attorney has told you in the past when you have asked for this in other claims, you may just ask the attorney to hold the PIP “in trust” pending the outcome

## PIP Reimbursement in Context of UIM Claims

— by Jay D. Enloe

of the UIM claim in binding arbitration.

The insured’s attorney may or may not go along with this proposal. If the PIP is held in trust pending resolution of the UIM claim, then at the end of the case when the arbitrator decides that the insured’s total damages are, for example, \$30,000, you might logically think you will be reimbursed PIP in the amount of \$12,500 (since PIP benefits of \$17,500 plus half of the \$25,000 liability settlement will equal \$30,000). Of course, if the insured had just agreed to reimburse \$12,500 of the PIP and forego the UIM claim in the first place, you and the insured’s attorney could have avoided the time and trouble of having to jump through the expensive hoops of binding arbitration. But...that would be too simple. It is the rare plaintiff attorney these days who does not want to “take a shot” at the UIM coverage when there has been a liability settlement for policy limits. After all, there is little expense for insured (whose attorney has the case on a contingency fee) to take the UIM claim to binding arbitration, since there is no exposure to owing defense costs or attorney fees and the insured’s obligation for arbitrator fees is limited by statute to \$100.

If the insured’s attorney accepts your proposal, and agrees to hold a portion of the liability settlement equal to the PIP benefits “in trust” for the purpose of reimbursing any PIP benefits which exceed the insured’s total damages, then all is well and the end of this story should be as logically described above. After spending large amounts litigating the UIM claim in binding arbitration, you will at least get back some amount of PIP reimbursement, which will help defray the cost of defending the UIM claim.

A potential problem exists if the insured’s attorney does not agree to hold the PIP in trust pending the outcome of the UIM claim. There

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have been situations in which the insurer tells the insured's attorney, by letter, that it wants the attorney to hold the PIP in trust, but the attorney does not respond to the request, one way or another. In that case, the insurer's request may be the only communication on the subject in the file. Often, this is in a letter that consents to the liability settlement. There seems to this writer to be an open question about the legal effect of conditioning consent to settle on holding the PIP in trust, at least when the insured's attorney does not expressly agree to the proposal. If such a condition turns out to not be recognized by law, then silence by the insured's attorney in the face of such a proposal arguably may not equal an enforceable agreement to reimburse PIP at the conclusion of the case.

Getting back to the scenario above, suppose that at the end of the binding arbitration the insured's attorney takes the position that you did not properly pursue PIP reimbursement under the available statutes, according to the *Gaucin* case, so he or she is awfully sorry, but there will be no PIP reimbursement. In other words, the attorney tells you that while it has been fun going through binding arbitration with you, and while it is true the arbitrator decided your insured's total damages were only \$30,000, the insured is going to keep the entire \$25,000 liability settlement and not reimburse any of the \$17,500 in PIP benefits, with the net effect of the insured receiving \$42,500.

Where is the fairness here? Nowhere, of course, but the insured's attorney may be able to find support for this position in the *Gaucin* case. What *Gaucin* may tell us in this situation is that Oregon statutory procedures for PIP reimbursement do not provide for the "hold PIP in trust" type of procedure, at least absent an agreement by both parties. Under *Gaucin*, it may be that where there has been no express agreement the insurer is out of luck, unless the court or arbitrator finds there to have been an implied agreement to reimburse. An implied agreement might be easier to find if the alter-

native is that the insured will be over-compensated.

In *Gaucin*, Farmers had not used any of the three PIP reimbursement options provided for by ORS 742.534 (direct inter-company reimbursement), ORS 742.536 (lien), or ORS 742.538 (subrogation), but simply asked its insured for reimbursement (this was not in the context of binding arbitration, but rather the insured's total damages exceeded the UIM policy limit). When Farmers asked for PIP reimbursement, the insured said no thank you and filed for declaratory judgment. The trial court in Deschutes County held that PIP is to be reimbursed when the insurer asks for it. The Court of Appeals reversed, holding that since the insurer did not pursue any of the three statutory reimbursement procedures, it was not entitled to PIP reimbursement. In other words, simply asking its insured for PIP reimbursement was the wrong approach. The insured was allowed to keep the PIP.

In the context of a UIM claim in binding arbitration, if you have not already obtained direct reimbursement from the liability insurer, and have neither filed a lien in the claim brought by your insured against the tortfeasor, nor hired your own lawyer to pursue subrogation, you should try to reach an agreement with the insured's attorney to either reimburse the PIP now or to hold the PIP amount in trust, to be reimbursed at the conclusion of the case to the extent the insured's total damages are greater than the PIP plus the liability settlement. If you reach such an agreement, it should be put in writing, at the time it is reached, to avoid any misunderstanding down the road.

Of course, there are some situations in which you know the insured's total damages are going to exceed the combination of PIP benefits and the liability settlement, so you know there will be some UIM benefits owing. Take, for example, a situation where PIP pays \$25,000 and the total economic damages, for solid and incontrovertible out-of-pocket damages, are \$75,000. Assume a \$100,000 liability settle-

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ment and a \$250,000 UIM policy. Assume, also, that the total value of the case is \$150,000. In this situation, there is no practical reason to even request PIP reimbursement. If you do, and if you receive it, this will just reduce the amount of a credit you are entitled to after the binding arbitration award, by an amount equal to the reimbursement. In other words, if PIP is reimbursed, the credit against total damages will be \$75,000 (the net liability recovery). If there is no PIP reimbursement, the credit will be the entire \$100,000 liability recovery.

In either case, the insured will recover the same total damages. In neither case will be insured be entitled to collect twice the economic damages that were paid by PIP. At the conclusion of the binding arbitration, to the extent the insured has not received all of his or her damages, UIM benefits will be owed, up to policy limits. Reimbursement in this scenario will make no practical difference.

The lesson of *Gaucin* is that if you have not exercised your statutory reimbursement rights in one of the three ways provided under Oregon law, and if you have not reached an agreement with the insured's attorney that you will be reimbursed at the conclusion of the UIM arbitration to the extent damages recovered through PIP plus the liability recovery exceed the insured's total damages under the arbitration award, you may be out of luck, unless the court implies an agreement to reimburse PIP. On the other hand, if the insured's damages are sufficiently great that there is no question that some amount of UIM benefits will be owed regardless of the outcome, then the fact that you have not exercised your statutory reimbursement rights is of no practical consequence. ❖

— *If you have any questions about this, please feel free to contact the writer, by phone at 503-768-9600 or by email directed to [jay@lerlaw.com](mailto:jay@lerlaw.com).*