

OREGON LAW UPDATE

A Brave New World: ORS 742.538 Prerequisites Apply to Health Insurers

case in point ...

From the Desk of Jeff Eberhard: This update discusses how health insurers, like PIP providers, are required to satisfy the prerequisites of ORS 742.538 to obtain subrogation reimbursement, regardless of policy language. The net effect of this case is unclear – but in the short term, liability insurers should be aware that health insurers may have forfeited any right to reimbursement unless they made a timely and proper demand for inter-insurer reimbursement.

Claims Pointer: Subrogation under ORS 742.538 is only available to a health insurer if subrogation recovery through inter-insurer reimbursement under ORS 742.534 or lien under ORS 742.536 is not available. Further, any provision in a health insurance policy that requires the insured must reimburse the health insurer is void.

Providence Health Plan v. Winchester, in the Court of Appeals of the State of Oregon, A142272, --- P3d ---- (September 12, 2012).

Lindsey Winchester was walking down a street when she was struck by a motor vehicle. She suffered extensive injuries to her head and leg, incurred \$116,219.73 in medical expenses and sustained \$422,000 in other economic damages. Lindsey subscribed to Providence Health Plan. Under its policy with Lindsey, Providence paid \$86,417.25 in medical expenses on her behalf. The driver who struck Lindsey had a liability insurance policy with State Farm that provided \$25,000 liability coverage. Lindsey also had a policy with State Farm with limits of \$15,000 in PIP and \$100,000 in UIM coverage. In December of 2006, Providence notified Lindsey in writing that under the “Third Party Liability/ Subrogation” policy provision Lindsey should hold recovery from State Farm in trust for Providence. In 2008, Lindsey reached a settlement with State Farm for the policy limits of both the driver’s and her UIM policy.

Providence filed for a judgment declaring that Lindsey was obligated under her health insurance policy to repay it. Lindsey counterclaimed seeking a declaration that ORS 742.538 controlled Providence’s reimbursement rights and Providence was not entitled to recover under its policy. Both parties filed cross-motions for summary judgment with the trial court and Providence’s was granted while Lindsey’s was denied.

Lindsey appealed arguing that ORS 742.534, ORS 742.536 and ORS 742.538 provided methods for Providence to seek reimbursement and that those statutory provisions trumped any inconsistent language found in Providence’s policy. Regarding ORS 742.538, Lindsey contended Providence had not met two of the statute’s prerequisites to reimbursement, namely that Providence had failed to pursue inter-insurer reimbursement through ORS 742.534. Providence argued that it could require reimbursement from Lindsey because its policy provided a remedy in addition to the one provided in ORS 742.538 and that it had met the statutory prerequisites.

The Oregon Court of Appeals concluded that ORS 742.538 superseded any contrary insurance policy provisions under which Providence sought reimbursement. The Court agreed with Lindsey that Providence failed to satisfy at least one prerequisite to recovery under ORS 742.538: that the inter-insurer reimbursement benefit of ORS 742.534 be unavailable. The Court found that when Providence asserted its right to subrogation, nearly two years prior to Lindsey settling her claim with State Farm, inter-insurer reimbursement was still available to it. Thus, the Court held, Providence did not properly assert its subrogation rights and was not entitled to reimbursement.



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