

Oregon Case Update



No Safe Harbor Protection in Dispute over Reasonable and Necessary Medical Services

From the desk of Josh Hayward: Under ORS 742.061(1), a first party plaintiff is entitled to attorney fees if their recovery at trial exceeds the amount tendered by the insurer. However, in PIP and UM/UIM disputes an insurer can protect themselves from the risk of attorney fees if they send a “safe harbor” letter that accepts coverage and agrees to binding arbitration on a limited set of issues. But where the insurer denies PIP benefits on the basis that medical services are not reasonable and necessary, will a safe harbor letter that accepts coverage and purports to limit the dispute to the amount of benefits due entitle the insurer to the safe harbor protection? Read on to find out.

Claims Pointer: In this case arising out of a dispute over Personal Injury Protection (“PIP”) benefits, the first party plaintiff brought suit after the insurer denied PIP benefits on the basis that additional medical services were not reasonable and necessary. The Oregon Court of Appeals held that while the insurer can protect themselves from attorney fee exposure by limiting the dispute to the amount of benefits due, a dispute as to whether medical services are reasonable and necessary is not a dispute about the amount of benefits due. This case provides an important clarification on the benefit of the safe harbor letter in the context of PIP benefits damages. In the future, we should expect plaintiff attorneys to submit much more detailed verdict forms asking the jury to specifically determine which medical treatments were related to the accident.

Berger v. State Farm, 290 Or App 485 (2018)

Plaintiff Douglas Berger (“Plaintiff”) purchased an insurance policy from State Farm Mutual Automobile Insurance Company (“State Farm”). The insurance policy contained PIP and uninsured motorist (“UM”) coverage, as required by Oregon’s statute. Plaintiff was later injured in an accident involving a hit-and-run vehicle. Plaintiff notified State Farm of the accident and his injuries. The next day, State Farm sent Plaintiff a safe harbor letter, which accepted coverage of the UM claim, and noted that liability and damages were the only remaining issues to be resolved. Plaintiff treated with a chiropractor and sought benefits for medical expenses and lost wages based on his PIP coverage. Over time, State Farm paid Plaintiff \$12,296.57 in medical expenses and \$15,271.86 in lost wages.

Approximately four months after the accident, at the request of State Farm, Plaintiff underwent an

Independent Medical Examination (“IME”) by a neurosurgeon and chiropractor. According to both doctors, Plaintiff no longer had signs or symptoms of an ongoing injury. Following the IME, State Farm sent Plaintiff a second safe harbor letter, specifically regarding PIP benefits. The letter stated that since both doctors had opined that Plaintiff reached maximum medical improvement, State Farm would discontinue paying for additional treatment or wage loss. The safe harbor letter also provided that (1) State Farm accepted coverage for the PIP claim, (2) the only dispute concerned the amount of PIP benefits owed, and (3) State Farm consented to binding arbitration. Plaintiff sued State Farm, and following trial, was awarded an additional \$2,703.47 in medical expenses and \$18,000 in lost wages. The trial court denied Plaintiff’s request for attorney fees, and Plaintiff appealed.

Among other issues, the Oregon Court of Appeals considered whether Plaintiff was entitled to attorney



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fees incurred in his action to recover PIP benefits. The court explained that under ORS 742.061, a first party plaintiff is entitled to attorney fees if the first party plaintiff's recovery at trial "exceeds the amount of any tender made by the [insurer] in such action." However, ORS 742.061(2) provides insurers with safe harbor protection and states that:

(2) Subsection (1) of this section does not apply to actions to recover personal injury protection benefits if, in writing, not later than six months from the date proof of loss is filed with the insurer:

(a) The insurer has accepted coverage and the only issue is the amount of benefits due the insured; and

(b) The insurer has consented to submit the case to binding arbitration.

(emphasis added). In other words, the insurer must send a letter that accepts coverage and consents to binding arbitration with the only issue being the amount of benefits due. If the insurer sends a letter that complies with those requirements, the insurer is entitled to safe harbor protection and will not be liable for attorney fees incurred in the PIP dispute.

State Farm argued that it was entitled to the safe harbor protection as its letter complied with ORS 742.061(2) by accepting coverage and consenting to binding arbitration on the issue of amount of PIP benefits owed to Plaintiff. The Oregon Court of Appeals disagreed. The court stated that while the letter "purported to limit the dispute to the amount of PIP benefits owed plaintiff, it did not have that legal effect." The court pointed out that State Farm had acknowledged, at trial and on appeal, that the basis for denying PIP payments to Plaintiff "was that further medical services were not

reasonable and necessary."

In support of its holding, the Oregon Court of Appeals relied on a previous Oregon Supreme Court decision, *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, *adh'd to as modified on recons*, 343 Or 394 (2007). In that case, the Oregon Supreme Court held that an assertion by the insurer that medical services are not reasonable and necessary would bring the dispute outside the safe harbor protection. A dispute over the "amount due" for purposes of the safe harbor protection would be a dispute over the dollar level of a claim for services submitted by a provider. In contrast, a dispute as to "whether the insurer should pay for services at all . . . [is a dispute] about the denial of benefits that extend[s] beyond 'amounts due.'" Relying on the Oregon Supreme Court's opinion, the court held that by denying PIP benefits on the grounds that additional medical services are not reasonable and necessary, the dispute exceeded the scope of the safe harbor protection. Accordingly, because Plaintiff's recovery on his PIP claim exceeded State Farm's tender, the Oregon Court of Appeals held that Plaintiff was entitled to attorney fees incurred in his claim for PIP benefits.

View full opinion at: <http://cdm17027.contentdm.oclc.org/cdm/fullbrowser/collection/p17027coll5/id/14473/rv/singleitem>

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