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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

MAY 2008

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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MED PAY / PIP SUBROGATION SPECIAL EDITION



NEW MED PAY / PIP SUBROGATION CHART AVAILABLE!

Perhaps no area of insurance subrogation has been the subject of more confusion, discussion, dissension, and conflicting answers and resources than Med Pay and PIP subrogation. Automobile insurance carriers seeking information on whether or not such benefit payments can be subrogated in one state or another have been left staring at obscure and conflicting charts depicting a simple "Yes" or "No" column for each coverage. Not only have most of the charts in the public domain been inaccurate about whether or not subrogation is available in various instances, but the question of whether Med Pay or PIP benefits can be subrogated most frequently cannot be answered with a simple "Yes" or "No".

In response to numerous requests from clients, Matthiesen, Wickert & Lehrer, S.C. has finished compilation of the most complete and definitive Med Pay / PIP Subrogation chart to be found anywhere. Many of the older charts found elsewhere have failed to keep current with the latest changes in the law, and few provide statutory and case law for a carrier's ability, or inability, to subrogate. Our new chart does.

There is a lot of new law out there not reflected in the old charts. Utah just amended vast sections of its Insurance Code, including portions dealing with PIP. Texas' optional PIP statute was revamped effective

April 1, 2007. The Oregon PIP statute was rewritten effective January 1, 2008, with notice provisions and interinsurer reimbursement procedures. And of course, there is Colorado, where Governor Bill Ritter on June 5, 2008, signed into law new Med Pay legislation dramatically affecting a carrier's ability to subrogate for Med Pay benefits.

The new Med Pay / PIP chart can be found on our website at www.mwl-law.com. It is located on our homepage sidebar under *Subrogation Resources* and is entitled "*Med Pay/PIP Subrogation In All 50 States*". You can also click on the button at the end of this article to view this chart on our website. This new chart provides an overview of subrogation rights for PIP and/or Med Pay-type benefits paid under the automobile insurance laws of all 50 states. A (+) symbol next to a state indicates a no-fault state, while a (o) symbol indicates a PIP or similar first-party benefit (Med Pay) add-on state. A "Y" for "yes" indicates there are some subrogation or reimbursement rights available. A "N" for "no" indicates there are no subrogation or reimbursement rights available. An asterisk after the "Y" or "N" indicates that there are additional details or limitations which must be looked at in the column to its right. A (-) in the column indicates that the insurers in that state do not routinely offer such coverage or that the coverage is unavailable. A (?) indicates that the law is unsettled as to whether the benefit can be subrogated or that an argument can be made either way. Below are few sample states we have pulled from our new chart.



MED PAY / PIP SUBROGATION IN ALL 50 STATES			
STATE	MED PAY	PIP	AUTHORITY / ADDITIONAL INFORMATION
OR o	-	Y	<p><u>MED PAY</u>: Coverage not applicable.</p> <p><u>PIP</u>: Carrier has reimbursement rights for PIP benefits to extent of total benefits paid exceeding insured's economic damages. O.A.R. §742.544. Subrogation/Reimbursement available under O.A.R. §742.534 (interinsurer reimbursement), O.A.R. §742.536 (injured party must give notice to insurer of claim or legal action, and insurer can give notice of election to seek reimbursement within 30 days, and this constitutes a lien), or O.A.R. §742.538 (if interinsurer reimbursement not available and no lien election made by insurer, insured must hold recovery in trust and will be reimbursed, less share of costs and attorneys' fees) (Eff. 1/1/08). O.A.R. §742.520(6).</p> <p><u>MADE WHOLE</u>: Doctrine applies. <i>Koch v. Spann</i>, 92 P.3d 146 (Or. App. 2004).</p> <p>o "Add-on" PIP state. \$15,000 limits of PIP coverage required.</p>
UT +	Y	N*	<p><u>MED PAY</u>: Med Pay coverage can be offered in addition to the PIP benefits.</p> <p><u>PIP</u>: *U.C.A. § 31A-22-309(6) confers "limited, equitable right to seek reimbursement in arbitration" against 3P's carrier only (includes disputes over fault and/or coverage), unless 3P carrier has tendered policy limits. Carrier receiving reimbursement must reimburse funds within 15 days after notice from at-fault carrier if reimbursement funds are needed to settle 3P liability claim. <i>Regal Ins. Co. v. Canal Ins. Co.</i>, 93 P.3d 99 (Utah 2004).</p> <p><u>MADE WHOLE</u>: Can be overridden with policy language. <i>Hill v. State Farm Mutual Auto Ins. Co.</i>, 765 P.2d 864, 866 (Utah 1988); <i>Birch v. Fire Ins. Exch.</i>, 2005 WL 2298130 (Utah App. 2005).</p> <p>+ No-fault state. Monetary threshold. \$3,000 min. PIP limits. No 3P suit against another insured vehicle for non-economic damages allowed unless (1) death; (2) dismemberment; (3) permanent disability or impairment/ (4) disfigurement, or (5) medical expenses more than \$3,000.</p>

Please note that this chart addresses not only the right of subrogation, but also whether and to what extent the made whole doctrine affects the insurer's right of subrogation and/or reimbursement.



Click here to view this chart on our website. For specific questions on Med Pay and PIP subrogation, please contact Michael Sinnen at msinnen@mwl-law.com.

MED PAY / PIP SUBROGATION SPECIAL EDITION



THE DIFFERENCE BETWEEN MED PAY AND PIP

The two terms are thrown around as though they each have specific and limited meanings, each etched in stone. "Med Pay" and "PIP". But what are they exactly? Does an insured need both?

Our new Med Pay / PIP Subrogation chart provides information beyond simply whether or not Med Pay or PIP is subrogable in a particular state. It provides information on what case decision or state statute allows subrogation or reimbursement, or prohibits one or the other. It also identifies which states are "modified no-fault" states, which are "traditional tort" states, and which states give consumers an option between the two. If you live in a no-fault state, chances are there is little reason to pay for both Med Pay and PIP coverage. Although such decisions should be made only after a thorough discussion with your insurance agent, the fact is that PIP usually provides coverage equal to and beyond that of Med Pay.

Both PIP and Med Pay cover the medical bills of the insured and his/her passengers. In the case of an accident, obtaining Med Pay benefits usually requires going to the doctor or hospital first, paying for your treatment up front, and then sending your medical receipt to the auto insurer for reimbursement under its Med Pay provisions. Some carriers let the insured decide whether to use Med Pay or the insured's own health insurance carrier. The health insurer might want or require you to use Med Pay first. It depends on the policy and/or plan language.



Med Pay and PIP are used for immediate and short-term health care in the event of an accident. Once the usually-small limits are exhausted, your health insurance plan kicks in. In no-fault states like Pennsylvania or New York, no-fault PIP benefits are primary in case of an automobile accident. In such states, there is really very little reason to purchase both Med Pay and PIP coverage – assuming they're both offered. PIP provides coverage equal to and beyond that of Med Pay – although PIP often has a deductible, while Med Pay does not.

Med Pay coverage covers reasonable and necessary medical expenses resulting from an accident, together with surgical, dental, and chiropractic treatment, if necessary. It also covers hospitalization, ambulance costs, X-rays, nursing services, prosthetic devices, and funeral expenses. PIP usually covers the same things Med Pay does. However, it also covers psychiatric, physical and occupational therapy, and rehabilitation expenses – depending on the policy language. In addition, PIP also provides compensation for lost wages, work-loss benefits, and even a small death benefit in some cases. While Med Pay can sometimes help offset the deductible that comes with PIP benefits, it is usually unnecessary and redundant.

SUBROGATING MED PAY AND PIP BENEFITS

By Michael R. Sinnen



Michael R. Sinnen

Subrogating Medical Payment (Med Pay) and Personal Injury Protection (PIP) benefit payments in automobile accident cases has become big business within the insurance industry, involving hundreds of millions of dollars. Unfortunately, these cases are not treated this way by most subrogation firms seeking to handle your subrogation files. What's worse, they are often not treated this way by many insurance companies, who consistently ignore subrogation potential in these files or fail to act on it once recognized. Understanding Med Pay and PIP subrogation and the 51 bodies of law which govern both its successes and failures is an important first step toward increasing a company's recoveries and improving its bottom line.

PIP benefits are usually associated with no-fault insurance. From 1971 to 1976, in an effort to hold down the cost of automobile insurance, sixteen states enacted no-fault automobile insurance laws which featured two key components: (1) the compulsory purchase of first-party no-fault coverage for medical benefits and loss of income for drivers and passengers (usually referred to as Personal Injury Protection or PIP benefits); and (2) limited third-party tort liability of negligent drivers. Three other states enacted similar no-fault laws during this time period, without limiting tort liability. Instead of "Med Pay" or "PIP", some states use other terms for no-fault benefits, such as "Basic Reparation Benefits", but the concept is the same.

The no-fault experiment has received mixed reviews over the past 30 years. There have been no states since 1976 who have adopted no-fault and several states have completely repealed their no-fault laws. Advocates of no-fault argue that it reduces litigation costs and payment for non-economic (pain and suffering, etc.) damages and provides faster payment for losses. Opponents argue that no-fault unfairly benefits negligent drivers and points to statistics which show that rather than decreasing insurance premiums, it increases premiums. An excellent, albeit lengthy and somewhat technical, article on the merits of no-fault automobile insurance authored by Scott Harrington can be found at <http://www.allbusiness.com/finance/insurance-liability-insurance/452934-1.html>.

While PIP benefits are usually associated with "no-fault" automobile insurance, Med Pay benefits usually are not. Although subrogation of these two types of automobile insurance benefits has become big business, there is still significant misunderstanding and confusion as to these two types of benefits, and when and under what circumstances they can be subrogated.

Medical Payments (Med Pay) coverage under an automobile insurance policy pays for the medical expenses of an insured and his/her passengers after an accident. Automobile insurance laws vary from state to state, but this coverage generally includes accidents which occur while an insured is driving someone else's car with their permission, or injuries to the insured or his/her family members while they are pedestrians. Med Pay will pay no matter who caused the accident, although if someone else is at fault the automobile insurance company may have a right of subrogation.

Personal Injury Protection (PIP) coverage pays benefits for medical expenses and lost wages incurred by the insured and his/her passengers injured in an accident. It also covers funeral costs. PIP is required in Arkansas, Delaware, Florida, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, and Utah. It may or may not be subrogable, as set forth in the new chart on our website. It should also be remembered that some states may offer Med Pay but not PIP, or vice-versa.

No-fault automobile insurance laws involve the automobile carrier providing first-party medical and/or wage loss benefits, without regard to the fault of the insured, in exchange for the insured giving up some degree of freedom to sue the tortfeasor for pain and suffering and other non-economic damages. No state has “*absolute*” no-fault, where the driver completely relinquishes the right to bring a lawsuit against the tortfeasor for non-economic damages in exchange for first-party economic loss benefits (PIP, Med Pay, or similar benefits). Some states use other terms, such as “Basic Reparation Benefits”, but it’s the same concept. Michigan comes the closest. It provides unlimited no-fault coverage and makes it very difficult to sue for non-economic damages.

Today, state automobile insurance laws fall into four categories:

- (1) *traditional* tort liability system;
- (2) *add-on* states where the carrier pays no-fault PIP or Med Pay first-party benefits to insured, who retains the right to sue third-party;
- (3) *modified* no-fault states where the carrier pays no-fault first-party benefits but the insured’s rights to sue third-party are restricted; and
- (4) *choice* states where insureds are offered a choice between traditional tort system and a no-fault system.



Currently, 11 (eleven) states have “*modified*” no-fault automobile insurance laws, where first-party economic benefits are provided regardless of fault, and the right to sue for non-economic damages is allowed after satisfying a statutorily-defined (monetary, verbal or a combination of both) threshold. Michigan, New Jersey, New York and Pennsylvania have *verbal* thresholds - one which defines the precise injury or level of “serious injury” which must be met in order to sue. Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, North Dakota and Utah have *monetary* thresholds, where a specific dollar amount of medical expenses must be reached before being able to sue.

Three (3) states - New Jersey, Pennsylvania and Kentucky - have “*choice*” no-fault. Under choice no-fault systems, drivers have the choice of being covered under either a pure no-fault policy, where you cannot sue third parties for non-economic damages and are immune from such suits yourself; or a modified no-fault policy, where you can sue other drivers who have also chosen to retain their tort rights, and they can also sue you. If a no-fault driver is in an accident with a modified no-fault driver, they are both unable to sue the other party.

Nine (9) states have automobile insurance systems which offer *add-on* no-fault benefits. They are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, Virginia, and Washington. These states offer PIP or similar benefits in varied amounts and under varied conditions.

The rest of the states operate under a *traditional* tort liability system where there are no limitations on the right to sue negligent third parties.

In no-fault states, there is little reason for an insured to purchase both Med Pay and PIP coverage, because PIP provides coverage equal to and beyond Med Pay (although PIP often has a deductible and Med Pay does not). Some states provide one but not the other. The recent trend has steered away from no-fault systems. The most recent state to convert from a no-fault system back to a traditional tort system is Colorado, which did so on July 1, 2003.

For information on insurance limits, proof of insurance, and required/optional coverage available in each state, please see <http://www.dmv.org/al-alabama/car-insurance>. In a majority of states, statutes mandating PIP and uninsured motorist (UM) coverage typically specify that the “named insured” and “any insured named in the policy” has the right to reject such coverage.

Nine (9) states have automobile insurance systems which offer *add-on* no-fault benefits. They are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, Virginia, and Washington. These states offer PIP or similar benefits in varied amounts and under varied conditions. The rest of the states operate under a *traditional* tort liability system.

Our new chart entitled “*Med Pay / PIP Subrogation In All 50 States*” provides an overview of subrogation rights for PIP and/or Med Pay-type benefits paid under the automobile insurance laws of all 50 states. If you should have any state specific Med Pay or PIP subrogation questions, please contact Michael Sinnen at msinnen@mwl-law.com.

MED PAY / PIP SUBROGATION SPECIAL EDITION

COLORADO NO-FAULT SHUFFLE



No-fault dies hard. Colorado repealed its no-fault insurance scheme in 2003, because it wasn't doing what it was supposed to do – holding down the cost of insurance. Some legislators, however, are having a difficult time administering last rites to the antiquated and dysfunctional system of no-fault insurance. This spring, the drama ramped up once again, as lawmakers fought to reinstitute a form of choice Med Pay benefits with significant obstacles to third-party litigation and subrogation.

The Colorado Med Pay see-saw finally came to rest last month, and it appeared subrogation was once again the illegitimate target. Colorado's legislature entertained three separate Med Pay subrogation bills in the legislative session which recently concluded. Two of the bills were introduced in the Colorado State Senate, SB11 and SB211, and a third bill in the Colorado House, HB1009. When HB1009 and SB11 were introduced, neither bill contained anti-subrogation language. When SB211 was introduced, it contained anti-subrogation language which was amended out of the bill in the Senate House and Human Services Committee. As the legislative session neared its close, at the last minute, both HB1009 and SB11 were amended in the Committee to ADD “anti-subrogation” language. Ultimately, SB11, as amended, was passed by the Colorado House and Senate and was signed into law by



Colorado Capital Building

Colorado's Governor on June 5, 2008. SB11 amounts to the last death throes of the no-fault gang, still bitter and depressed at the no-fault law repeal. SB11 amends C.R.S. § 10-4-635 in the following significant ways.

- (1) Carriers are required to offer Med Pay coverage of at least \$5,000 in every policy. Insureds may affirmatively reject such coverage. C.R.S. § 10-4-635(a).
- (2) Carriers providing Med Pay benefits may not recover against any owner, user or operator of a motor vehicle or any person or organization legally responsible for the acts or omissions of such person in any action for damages for benefits paid under such Med Pay coverage. An insurer shall not have a direct cause of action against an alleged tortfeasor for benefits paid under Med Pay coverage. C.R.S. § 10-4-635(3)(a).
- (3) The bill provides that nothing in subsection C.R.S. § 10-4-635(3)(a) shall be construed to afford an insurer a cause of action against a person for whom or to whom Med Pay coverage benefits were paid, except in a case where the benefits were paid by reason of fraud. C.R.S. § 10-4-635(3)(b)(III).
- (4) The Collateral Source Doctrine is not affected, which means that insureds will be allowed to recover against tortfeasors for damages which have already been paid for by Med Pay coverage. C.R.S. § 10-4-635(3)(b)(I).

While these amendments are certainly problematic for auto carriers attempting direct subrogation, it should be noted that there is no specific restriction in the statute that would prevent a med pay carrier from seeking contractual reimbursement from its insured for amounts paid in Med Pay benefits. It appears the legislature was attempting to put limits on reimbursement recoveries, but we don't believe the language of the bill will be sufficient to accomplish that goal.



We are recommending to our clients writing business in Colorado that they include reimbursement language in their policies and seek reimbursement from their insureds where the insureds have made third-party recoveries, notwithstanding the passage of SB11. This position makes both good sense and good public policy, because, pursuant to C.R.S. § 10-4-635(3)(b)(I), if a carrier could not seek contractual reimbursement from its insured, then the insured would enjoy a double recovery – something subrogation was designed to prevent. In addition, there is nothing in the specific language of the amendment which, in our opinion, abrogates a carrier's contractual right of reimbursement. The bill merely states that it, in and of itself, does not create a cause of action against a person for whom or to whom Med Pay coverage benefits were paid. It does not affirmative proscribe such a right of reimbursement.



These amendments will take effect on January 1, 2009, and will apply to policies issued, delivered or renewed after January 1, 2009. We can expect future litigation over the sloppy wording of these last minute amendments and their effect on an insurer's right of contractual reimbursement.

Please Gary Wickert at gwickert@mwl-law.com if you have any questions regarding the application of this new law.



DID YOU KNOW....



Hawaii has a statute which extends the statute of limitations for filing personal injury suits involving automobile accidents. Section 430:10C-315 is an obscure and relatively unknown statute which could extend the statute of limitations in subrogation suits involving workers' compensation benefits or automobile insurance PIP payments well beyond the usual two-year statute of limitation for personal injuries set forth in § 657-7. The magic statute is found in the Insurance Code, Motor Vehicle section, rather than the Civil Remedies Title where the rest of the statutes of limitation are found. Section 42:10C-315 says that any lawsuit arising out of a motor vehicle accident should be brought within the later of: (1) two years from the date of the accident; (2) two years after the date of the last payment of motor vehicle insurance benefits, or (3) two years after the date of the last payment of workers' compensation benefits. If you've missed a subrogation opportunity in the Aloha State because the statute of limitations has run – you might want to look again.



SIMPLE REFERRAL OF MED PAY / PIP SUBROGATION FILES



For Med Pay and PIP subrogation claims in which there is third-party subrogation potential, referral of such files to Matthiesen, Wickert & Lehrer can be easily accomplished utilizing one of our File Referral Forms found on our website. The link to access these forms can be found on our homepage sidebar, under File Referral Forms. Simply click on the appropriate link to access our auto subrogation file referral form, fill out the file referral form as completely as possible and attach it to the file you are forwarding to us. This form requests all the information necessary to allow us to effectively hit the ground running once we receive your subrogation file. No cover letter is necessary when using our file referral forms. You can send the file digitally, by fax, or by regular mail. As always, our review of files, large and small, for subrogation potential, is free. We promptly acknowledge all files received by us, simply to let you know we have received them, and then, in a timely manner, we thoroughly review the file and provide you with our opinion on subrogation potential. If you have questions, regarding these file referral forms and/or entrustment of subrogation matters to Matthiesen, Wickert & Lehrer, please contact Jamie Breen at jbreen@mwl-law.com or Gary Wickert at gwickert@mwl-law.com.

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