Practice Tips...

PIP Benefits - Getting What Your Client Paid For

Sooner or later we all sit down to a banquet of consequences.
Fernando de Rojas

When your client is injured by a negligent third party, it is your client's PIP benefits that pay doctors to rebuild the body and mind. But when your client requests the benefits he paid for (often for many years), some auto insurers use powerful tactics to deny those benefits. Insurers claim "rights" they do not have, and they take steps that could prejudice your client's third party recovery.

Robert K. Dawson

What follows are a few ideas for dealing with PIP claims, and a few things to think about.

The PIP Application Form

Shortly after receiving a claim for PIP benefits, the insurer will send a form to fill out that asks about the collision, injuries, and treating physicians. The insurer is entitled to this information.

However, PIP forms usually contain releases permitting the insurer to have direct contact with your client's physicians, and may contain language requiring multiple defense medical exams. The form may "require" an "assignment" of your client's claim to the extent of benefits paid, or may purport to grant subrogation claims to the insurer that are broader than permitted by law.

By what right does a PIP insurer go direct to the treating physician of a client who is represented by an attorney? The

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physician/client privilege is not even waived until "Ninety days after *filing an action* for personal injuries. . ." RCW 5.60.060(4)(b). Nor is ex parte contact with a client's treating physician permitted, at least in a third party claim. *Loudon v. Mhyre*, 110 Wn.2d 675 (1988). A PIP insurer is entitled to reasonable access to the information necessary to determine whether PIP benefits are owed to the insured, but the insurer is not entitled to ex parte contact with the insured's physicians.

When a PIP application form comes in, we fill out that portion of the form that provides details of the loss and treatment. We then void the medical and wage loss releases, and cross out any language that purports to require an "assignment," as well as any subrogation language which grants the insurer more than they are entitled to under Washington law.

We then return the form to the insurer with a letter saying that "we have voided the medical and wage loss authorizations since we will provide you that information and to ensure that there will be no ex parte contact with our client's physicians." We also make clear in our letter that we will give the insurer access to the medical information necessary to determine that benefits are payable. If the insurer says they need questions answered or a medical report, I tell them that if they will send their request to me, along with a letter saying they will pay the doctor's charges for providing the information, I will forward it to the client's treating physician. So far, I have had no insurer fail to pay benefits when we have used this procedure.

Denial of PIP Benefits Based on a "Records Review"

Sometimes a PIP insurer will deny benefits to the insured because their review of the records indicates that further treatment is unnecessary. If that happens to your client, I urge you to note the matter for a PIP arbitration or to file a lawsuit against the insurer. How to do that is described in the *Trial News* Practice Tips Column dated December, 1989.

PIP Defense Medical Exams

Maybe these things go in cycles, but it seems that lately there are more defense medical exams in PIP cases. Insurers seem to request such an exam when they feel the medical bills are "too high" or where the client is receiving "excessive" chiropractic care.

In a case where the insured is receiving chiropractic care, the PIP adjuster will often try to set up a defense medical exam with an orthopedic surgeon to write a report on the reasonableness or necessity of chiropractic care. Does anybody wonder what that report will say? My response is that an exam by a physician in an entirely different field, a field hostile to chiropractic care, is not going to be persuasive evidence on which to base a denial of first party benefits. When the insurer asks for such an exam, I note a PIP arbitration.

By the way, noting a PIP arbitration is a powerful tool to obtain PIP benefits that are owed. Seldom will an insurer really want to arbitrate the entitlement to PIP benefits.

If the insurer persists in asking for a defense medical exam, and they do so without seeking any information from the treating physician as to why the treatment is necessary, then you may be able to argue that the PIP insurer is not entitled to a defense medical exam. Here is how. Most PIP policies provide that "local rules of procedure and evidence apply." It seems to me that the insurer may compel a defense medical exam "only on motion for good cause shown and upon notice to the person to be examined," and specifying the time, place, manner, and scope of the exam. CR 35. If an insurer fails even to consult with the treating physician as to why treatment is necessary, then perhaps it will be difficult to show good cause for a defense medical exam. You may have to deal with policy language specifically authorizing a defense exam. I am not suggesting that you advise a client not to attend a PIP defense medical exam; only that it is an option to consider.

If the insurer persists in sending your client to an examiner who is likely to be hostile to the client's chosen treatment, this could harm your client's third party claim since a hostile report may be discoverable by the third party's attorney. If the first party insurer, who owes your client fiduciary duties, takes steps which make it more difficult to settle the third party claim, then you can remember the insurer's actions when it comes time to negotiate the subrogation repayment to the PIP insurer. The PIP insurer can't have it both ways, saying it is questionable whether PIP benefits should be paid, and then saying in the subrogation setting that the recovery of those benefits from the third party was so clear that the plaintiff attorney's actions did not benefit that recovery.

Lastly, if the defense medical exam occurs and the PIP insurer cuts off benefits based on a report that is critical of your client's need for care, then consider noting the matter for PIP arbitration. To recover PIP benefits you must prove by a preponderance that treatment is reasonable and necessary. Given that the PIP insurer owes fiduciary duties to your client, and that your client's health care is at stake, it is unlikely that a defense medical exam will be enough to result in a denial of first party benefits.

Conclusion

If your client needs medical care, and is entitled to PIP benefits he paid for, don't let the PIP insurer fail to pay those benefits. If the insurer wrongfully fails to pay benefits, then note the matter for arbitration or file suit. Help the insurer "sit down to a banquet of consequences."

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