




MEMORANDUM

October 15, 2015

To: All Concerned Parties

From: Brian Fordham 

Subject: PIP Primary to Medicaid

Many Medicaid recipients do not have automobile insurance because of limited financial resources. When they are a pedestrian, and injured in an incident involving a motor vehicle, they often do not have their own Personal Injury Protection (PIP) coverage. In a couple of circumstances we found that third party PIP insurers had challenged their obligation to pay the accident related medical expenses of the Medicaid recipient, resulting in the Medicaid program in Oregon paying some or all related medical expenses.

The PIP carriers cited ORS 742.526(1)(e) and a decision by the Oregon Court of Appeals in *Farmers Insurance Company of Oregon v Wickham*, 86 Or App 100 (1987).

Part of the Governor's Health Care Modernization Initiative in Oregon includes a substantial increase in Oregon's Medicaid program. The number of Oregonians now covered by Medicaid has increased substantially.

Medicaid is a joint federal/state program. The federal government, depending on the individual, provides from about 60% to 100% of the funds for Medicaid expenditures in Oregon. To receive those funds Oregon has to comply with federal law.

One of the basic premises of Medicaid, according to the federal government in Section 3900.1 of its State Medicaid Manual is, "Medicaid is payer of last resort." Otherwise, the state risks losing federal funds.

42 USC 1396b (o) reads:

(o) Restrictions on authorized payments to States

Notwithstanding the preceding provisions of this section, no payment shall be made to a State under the preceding provisions of this section for expenditures for medical assistance provided for an individual under its State plan approved under this subchapter to the extent that a private insurer (as defined by the Secretary by regulation and including a group health plan (as defined in section 1167(1) of title 29), a service benefit plan, and a health

maintenance organization) would have been obligated to provide such assistance but for a provision of its insurance contract which has the effect of limiting or excluding such obligation because the individual is eligible for or is provided medical assistance under the plan.

42 CFR 433.136(1) defines a "private insurer" as, "Any commercial insurance company offering health or casualty insurance to individuals or groups (including both experience-rated insurance contracts and indemnity contracts) . . ."

That federal provision was originally part of the federal Omnibus Reconciliation Act of 1993 (OBRA).

The first Oregon legislative session after OBRA was the 1995 session. In that session the Oregon legislature enacted ORS 743.847. For our purposes the relevant subsection of ORS 743.847 is subsection (3),

"A health insurer is prohibited from considering the availability or eligibility for medical assistance in this or any other state under Medicaid when considering eligibility for coverage or making payments under its group or individual plan for eligible enrollees, subscribers, policyholders or certificate holders."

In 2005 Congress enacted the Deficit Reduction Act of 2005 (DRA). Section 6035 of DRA made a number of changes to the Medicaid statute intended to strengthen state Medicaid programs' ability to identify and collect from third party payers that are legally responsible to pay claims primary to Medicaid. One of those changes was to clarify which specific entities are considered "third parties" and "health insurers" that may be liable for payment and that cannot discriminate against individuals on the basis of Medicaid eligibility.

In response to this change in federal law the Oregon legislature enacted SB 153 (2007). SB 153 modified ORS 743.847 by expanding the definition of "health insurer" and "insurer" to include other entities that may have third party liability. As revised, "health insurer" and "insurer" now specifically include "...or other party that is by statute, contract or agreement legally responsible for payment of a claim for a health care item or service." ORS 743.847(1)(a).

This would appear to include third party PIP coverage since it pays for health care items or services, and, but for the availability of Medicaid, would pay the medical expenses of an uninsured pedestrian injured in a motor vehicle accident.

Furthermore, the legislative history related to SB 153 (2007), as the minutes from both the Senate Committee on Health Policy and Public Affairs and the House Committee on Health Care indicate that the intent of SB 153 (2007) was to bring state law into compliance with the provisions of the DRA. In fact, the notes from the House Committee meeting indicate that the committee members discussed the importance of compliance with Section 6035 of the DRA. Section 6035 of DRA is the provision which clarified the liability of third parties for health care services provided to Medicaid recipients.

To the extent that ORS 743.847 and 742.526 appear in conflict,

1. Generally, when the courts are confronted with seemingly conflicting statutes the court will try to read the statutes together in a fashion which allows both to be enforced as fully as possible.
2. ORS 743.847 was enacted well after ORS 742.526, and generally a more recent statute is favored over an older statute.
3. The Oregon Court of Appeals decision in *Wickham* was decided in 1987. ORS 743.847 was enacted several years later in 1995. So, the *Wickham* case is not applicable.
4. The legislative intent of ORS 743.847 seems clear, in that Oregon is to comply with federal Medicaid requirements.
5. In light of the totality of facts is very likely that the courts would hold that while ORS 742.256 (1) (e) may be applicable to "governmental benefits," it is not going to be applicable to Medicaid benefits.

A plain reading of ORS 743.847 plus a review of legislative history makes it clear that it was the intent of the Oregon legislature that PIP is not excess over Medicaid and must be paid before Medicaid. For Oregon to take any contrary position in this matter risks the disbursement of significant federal funding to support Medicaid in Oregon.

A handwritten signature in black ink, appearing to read "Edward F. Johnson". The signature is written in a cursive, flowing style with a long horizontal tail stroke.