IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

FOUNTAIN IMAGING OF WEST PALM BEACH, LLC (a/a/o CHARLOTTE JENNINGS)

Appellant,

v.

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Appellee.

_____/

APPELLATE DIVISION (CIVIL)
CASE NO.: 502006AP000025XXXXMB
L.T. Case No.: 502004SC009911XXXXMB
Division: 'AY'

opinion filed: MAR 3 0 2007

Appeal from the County Court in and for Palm Beach County, Judge Sandra Bosso-Pardo.

For Appellant, Steven Kuveikis, Esq., 120 South Olive Avenue, Suite 202, West Palm Beach, FL 33401 and David M. Lores, Esq., 224 Datura Street, Suite 1205, West Palm Beach, FL 33401.

For Appellee, Nancy Gregoire. Esq., One Financial Plaza, 9th Floor, 100 S.E. Third Avenue, Ft. Lauderdale, FL 33394 and Matt Hellman, Esq., 8751 West Broward Blvd., Suite 400, Plantation, FL 33324.

Affirmed. (MAASS and ROSENBERG, JJ., concur.)

Fountain Imaging of West Palm Beach, LLC appeals a summary judgment entered in Progressive Express Insurance Company's favor. We find Fountain Imaging's claims and presuit demand letter insufficient as a matter of law, and affirm

Charlotte Jennings was injured in an October 31, 2003 car accident and sought chiropractic care. She filed claims with Progressive Express Insurance Company, her PIP carrier, which were paid. Jennings submitted to an examination, at Progressive's request, on April 28, 2004. ***See*** Fla.

Stat. §627.736(7). Based on its results, Progressive concluded that future diagnostic testing was not clinically necessary.

On June 22, 2004, Jennings had cervical and .lumbar MRI's at Fountain Imaging of West Palm Beach, LLC, to which she assigned her PIP benefits. Fountain Imaging sent Progressive two claims, seeking $1,500 for each MRI. Progressive denied the claims. Fountain Imaging sent Progressive a presuit demand letter pursuant to Fla. Stat. §627.736(11). The letter demanded that Progressive pay "1,500 + $1,500 $3,000 (subject to Medicare Fee Schedule);" $4.88 postage; interest; and a 10% penalty on the claimed amount, subject to a $250.00 cap, "in full" to avoid liability for attorney's fees, and attached the two claim forms previously submitted.

Progressive refused to pay, and Fountain Imaging filed suit. Progressive filed a motion for summary judgment, claiming the presuit demand letter failed to comply with Fla. Stat. §627.736(11) because it failed to state the "exact amount" owed. The trial court entered final summary judgment for Progressive, reasoning that Fla. Stat. §627.736(11) requires notice of the amount due. Fountain Imaging timely appealed.

The Florida Motor Vehicle No-Fault Act, Fla. Stat. §627.7261, *et seq.*, encourages the speedy payment of medical bills arising out of an auto accident by subjecting an insurer who pays late to penalties and imposing attorney's fees if suit is required. *See United Automobile Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2002). In return, though, the Act is very specific about the information to be supplied an insurer before a payment is deemed overdue.

PIP benefits are not due until receipt of *" . . . the amount of expenses and loss incurred which are covered by the policy . . . "* Fla. Stat. §627.736(4) (emphasis supplied). The claim must be submitted on a standardized form, properly completed. Fla. Stat. §627.736(5)(d). An insurer is

not required to pay if the bill ". . . does not substantially meet the applicable requirements . . ." Fla. Stat. §627.736(5)(b)1.d. Payments are *overdue* "if not paid within 30 days after the insurer is furnished written notice . . . *of the amount of [a covered loss]."* Fla. Stat. §627.736(4)(b) (emphasis supplied). Overdue payments bear statutory interest from the date the claim was originally made. Fla. Stat. §627.736(4)(c). Suit may not be initiated until a demand letter is sent. The letter may not be sent until the payment is *overdue.* It must include an "itemized statement specifying each exact amount," though "(a) completed form satisfying the requirements of (5)(d) . . . may be used . . ." Fla. Stat. §627.736(11). *An* insurer has 15 days after receipt of the notice to pay the overdue claim, interest, and a 10% penalty, subject to a $250.00 cap. Fla. Stat. §627.736(11)(d). If it does, the insurer is not obligated to pay attorney's fees. Fla. Stat. §627.736(11)(d). *See United Auto Ins. Co. v. Rodriguez,* 808 So. 2d 82, 87 (Fla. 2001).

Where, as here, MRI services are provided by an unaccredited facility, the "(a)llowable amounts that may be *charged. . .* to both the insured and the insurer may not exceed 175% of the CPI adjusted Medicare Part B participating physician fee schedule for 2001. Accredited facilities may recover up to 200%. Fla. Stat. §627.736(5)(b)5. Fountain Imaging charged and claimed $1,500 each for cervical and lumbar MRIs. Under Florida Statute §627.736(5)(b)5, as an unaccredited facility it could charge only $987.51 and $1,066.52, respectively.

In order to substitute a Florida Statute §627.736(5)(d) form for the "itemized statement specifying each exact amount . . ." in the demand letter, the form must satisfy (5)(d). Florida Statute §627.736(5)(d) requires the form to be properly completed, with all relevant information provided, in accordance with its instructions. Fountain Imaging's (5)(d) form, though, sought to charge Progressive $1,500 per MRI. These amounts, as a matter of *law,* were not reasonable. Fla.

Stat. §627.736(5)(b)5. Consequently, the (5)(d) form was *not* properly completed and Fountain Imaging could not, by statute, use it as a substitute for the itemized statement specifying the correct charges in its demand letter. Fla. Stat. §627.736(11). Compounding the error, Fountain never told Progressive whether it was accredited or unaccredited.

Looked at another way, Fountain Lmaging sued Progressive on a $3,000.00 claim. It concedes that claim was in error and, instead, should have been $2,054.03.[1] The claim either was or was not proper when the case was filed.[2] As a matter of law it was not.[3] The No-Fault statute creates a one-way street for attorney's fees. Fla. Stat. §627.736(8). Fountain Imaging should not be entitled to fees for litigating to compel payment of a claim 46% greater than the maximum amount it was entitled to. Instead, it should have claimed what it was owed or, at a bare minimum, provided Progressive with the information it needed to compute the amount owed, and sued only if that amount was not paid. Under Fountain Lmaging's reading of the statute, it could claim any sum in excess of a reasonable amount that it wanted, leaving Progressive to correctly guess the reasonable amount and pay it in order to avoid penalties and fees. If an insurer refuses to pay medical expenses that an insured believes are reasonable, the insured may sue, but he or she bears the burden of establishing that the charges are, in fact, reasonable . . . Presumably, insurance companies will be deterred from making inaccurate assessments of reasonableness by the penalty

[1] Actually, and assuming Fountain Imaging intended to charge the maximum statutorily permissible amount, the claim should have been for 80% of this amount. ***See*** Fla. Stat. §627.736(1)(a).

[2] Progressive's Answer specifically pled that the amount sought exceeded the allowable amount under Fla. Stat. §627.736(5)(b)5, and that the demand letter did not provide notice of the amount of the covered loss.

[3] Under Florida Statute §627.736(5)(b)1.d., an insurer is not required to pay a bill not substantially meeting the requirements of Florida Statute §627.736(5)(d). Where the statute imposes a numerical cap and the bill submitted exceeds that amount by 46%, the bill does not "substantially" meet the statute's requirements. We do not comment on whether a claim not subject to a statutory numerical cap that is ultimately found, as a matter of fact, to have exceeded a reasonable charge by an insubstantial amount may trigger a legal requirement to pay.

they face if they lose in court--payment of their policy holders' legal fees. *State Farm Mutual Automobile Ins. Co. v. Sestile*, 821 So. 2d 1244, 1246 (Fla. 2d DCA 2002) (citations omitted); *see*, also, *Derius v. Allstate Indemnity* Co., 723 So. 2d 271 (Fla. 4th DCA 1998), *rev. den.* 719 So. 2d 892 (Fla. 1998) (plaintiff in PIP case must prove reasonableness of amount sought). Indeed, insurance companies have an economic incentive not to contest reasonableness groundlessly, since they must pay their own counsel in any event.

We find that Fountain Imaging's claim and demand letter sought amounts that, as a matter of law, were not reasonable. Consequently, we affirm the trial court's summary judgment in Progressive's favor.

(WINIKOFF, dissents.)

I respectfully dissent.

Fountain Imaging's presuit demand letter is legally sufficient. I do not read the statute to require that a medical provider's presuit demand letter is not required to state the "exact amount" owed when it attaches a completed, previously submitted form that satisfies the requirements of Fla. Stat. §627.736(5)(d).

Charlotte Jennings (the insured) was injured in a motor vehicle accident. She maintained a PIP policy with Progressive Express Insurance Company (Progressive). Progressive sent the insured for an Independent Medical Examination (IME). Based on the IME results, Progressive concluded that future diagnostic testing was not clinically necessary.

On June 22, 2004, Fountain Imaging of West Palm Beach, LLC (Fountain Imaging) performed two MRIs on the insured. The insured assigned her benefits to Fountain Imaging.

Fountain Imaging sent Progressive two Health Insurance Claim Forms (HCFA) for the MRIs. Progressive denied the claims based on the IME results.

Fountain Imaging sent Progressive a presuit demand letter The letter stated that it was a presuit demand letter pursuant to Fla. Stat. §627.736(11). It further stated the CPT codes for each MRI and that the amount due was "1,500 + $1,500 [=] $3,000 (subject to Medicare Fee Schedule). The demand letter requested that Progressive pay the claim "in full," and attached the two HCFA forms previously submitted and a report of the radiologist who interpreted the MRIs. Progressive responded that, "All benefits rendered or referred by a licensed chiropractor were suspended as of 5/13/04 based on results of an independent medical evaluation."

Fountain Imaging sued Progressive for its failure to pay medical bills. Progressive filed a motion for summary judgment, claiming the presuit demand letter failed to comply with Fla. Stat. §627.736(11) because it failed to state the "exact amount" owed.

The trial court entered final summary judgment for Progressive, reasoning that Fla. Stat. §627.736(11) requires a "payoff' type letter in order to provide adequate notice to an insurer. Fountain Imaging timely appealed.

Section 627.736(11)(a), Florida Statutes, provides that, "As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation." The written notice must state that it is a "demand letter under s. 627.736(11)" and must state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving the rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. . . . the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an ***itemized statement*** *specifying* ***each exact amount,*** the date of treatment, service, or accommodations, and the type of benefit claimed to be due. ***A completed form satisfying the requirements of paragraph (5)(d) . . . previously submitted may be used as the itemized statement.***

Fla. Stat. §627.736(11)(b)1.-3. (Emphasis added).

Section 627.736(5)(d), Fla. Stat., provides that, "All statements and bills for medical services rendered by any physician, hospital, clinic, or other person or institution shall be submitted to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form. . . ." Thus, the statute contemplates two alternative means by which a medical provider sending a presuit demand may advise the insurance company of the dates and types of service. The provider may ***either*** send an "itemized statement" created for the purpose of complying with the statute or a form satisfying the requirements of paragraph (5)(d) which was previously submitted. §627.736(11)(b)(3). The paragraph (5)(d) form includes the date of service, the type of service rendered, information regarding the identity of the insured, the date of the accident, ***and the amount churged for the*** *service.*

There is no dispute that Progressive received Fountain Imaging's presuit demand letter with a copy of the paragraph (5)(d) forms previously submitted. I believe that Fountain Imaging complied with Fla. Stat. §627.736(11) by attaching the previously submitted paragraph (5)(d) form as an alternative to providing an "itemized statement." ***See, also, Open MRI of Miami-Dude, Ltd. v. Progressive Express Ins. Co.,*** Case No. 04-9201 SP 23 (2) (Fla. 11th Jud. Cir. Dec. 5, 2005); ***A-1 Mobile MRI,*** *Inc. v.* ***United Automobile*** *Ins.* ***Co.*** 11 Fla. ***L.*** Weekly Supp. 1098b (Fla. 17th Jud. Cir. July 9, 2004); *Rapid* ***Rehabilitation, Inc. v. United*** *Automobile* ***Ins. Co.,*** 14 Fla. ***L.*** Weekly

Supp. 180a (Fla. 17th Jud. Cir. Dec. 4, 2006).

Consequently, I would reverse and remand the trial court's summary judgment in Progressive's favor for further proceedings consistent with this dissent.