

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

MERCURY INSURANCE COMPANY
OF FLORIDA,

Appellant,

APPELLATE DIVISION (CIVIL)
CASE NO: 502009AP000016XXXXMB
L.T.: 502008SC010401XXXXSB
DIVISION: 'AY'

v.

MED MANAGE GROUP, INC.
A/A/O MICHAEL BERGEY,

Appellee.

Opinion filed: **APR 08 2010**

**Appeal from the County Court in and for Palm Beach County,
Judge James L. Martz.**

For Appellant: Hinda Klein, Esq., 3440 Hollywood Blvd., Second Floor,
Hollywood, FL 33021.

For Appellee: Lindsay Porak, Esq., 1900 N.W. Corp. Blvd., Suite 301 W,
Boca Raton, FL 33431.

AFFIRMED.

The Appellant, Mercury Insurance Company of Florida ("Mercury"), appeals the trial court's final judgment entered in favor of the Appellee, Med Manage Group, Inc. ("Med Manage"), awarding Med Manage Four Hundred Twenty Dollars and 00/100 (\$420.00) in Personal Injury Protection ("PIP") insurance benefits. Mercury's insured was treated at Med Manage by Dr. Steven Burack, D.O. ("Dr. Burack"), a Florida osteopathic doctor licensed under chapter 459, Florida Statutes, for injuries relating to a motor vehicle accident involving the insured. The insured assigned his rights and benefits under his insurance policy to Med Manage. Med Manage submitted to Mercury a Health Insurance Claim Form ("HCFA" or "CMS 1500") for the treatment rendered by Dr. Burack to the insured on the date of treatment. According to

this HCFA form, the amount due from Mercury was eighty percent (80%) of \$525.00 or \$420.00. Dr. Burack's full name and physician license number was typed in box 31 of this HCFA form.

Mercury responded to this HCFA form by sending Med Manage a "Notice to Produce Records Under F.S. 627.736(6)(b)" ("Notice to Produce"). This Notice to Produce requested "documentation, including a completed Office of Insurance Regulation approved form (OIR-B1-1809), to verify that Med Manage was in compliance with section 627.736(1)(a), Florida Statutes." Med Manage failed to directly respond to Mercury's Notice to Produce, and instead sent Mercury a demand letter pursuant to section 627.736(10), Florida Statutes. Mercury, in response to the demand letter, claimed that because Med Manage failed to submit form OIR-B1-1809, Med Manage's demand is premature.

Med Manage filed a breach of contract claim against Mercury, seeking PIP benefits for the services rendered to the insured on the date of treatment. Mercury filed its Motion for Summary Judgment, arguing that Med Manage's bill was not overdue because Med Manage failed to comply with Mercury's Notice to Produce. The trial court denied Mercury's Motion for Summary Judgment, and subsequently entered its final judgment order in favor of Med Manage. Mercury then filed this instant appeal.

PIP benefits are overdue if not paid within thirty (30) days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. § 627.736(4)(b), Fla. Stat. (2009). Med Manage, as the assignee of the insured, claims that it provided Mercury with written notice of the covered loss and the amount due to it in its submission of the HCFA form. Mercury's Notice to Produce requested "documentation to verify that you are in compliance with F.S. 627.736(1)(a) and therefore eligible for payment for payment of PIP benefits. This must

include, but is not limited to, the properly completed Office of Insurance Regulation approved form (OIR-B1-1809)." Section 627.736(1)(a), provides in pertinent part:

[T]he medical benefits shall provide reimbursement only for such services and care that are lawfully provided, supervised, ordered, or prescribed by a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, or a chiropractic physician licensed under chapter 460 or that are provided by any of the following persons or entities:

1. A hospital or ambulatory surgical center licensed under chapter 395.
2. A person or entity licensed under ss. 401.2101-401.45 that provides emergency transportation and treatment.
3. An entity wholly owned by one or more physicians licensed under chapter 458 or chapter 459, chiropractic physicians licensed under chapter 460, or dentists licensed under chapter 466 or by such practitioner or practitioners and the spouse, parent, child, or sibling of that practitioner or those practitioners.
4. An entity wholly owned, directly or indirectly, by a hospital or hospitals.
5. A health care clinic licensed under ss. 400.990-400.995 * * *

* * *

The Financial Services Commission shall adopt by rule the form that must be used by an insurer and a health care provider specified in subparagraph 3., subparagraph 4., or subparagraph 5. to document that the health care provider meets the criteria of this paragraph, which rule must include a requirement for a sworn statement or affidavit.

§ 627.736(1)(a), Fla. Stat. (2009).

Pursuant to section 627.736(1)(a), Florida Statutes, the Financial Services Commission adopted form OIR-B1-1809, which must be used by the entities described in subparagraph 3, 4, or 5. Mercury claimed that its Notice to Produce was made under section 627.736(6)(b), Florida Statutes. Section 627.736(6)(b), Florida Statutes, requires physicians, hospitals, clinics, or other medical institutions, if requested by an insurer:

to furnish a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce his or her or its records regarding such history, condition, treatment, dates, and costs of treatment.

In *Hialeah Medical Corp. A/A/O Sunride Mora v. Mercury Insurance Company of Florida*, 16 Fla. L. Weekly Supp. 958a (Fla. Miami-Dade Cty. Ct. July 17, 2009), the Miami-Dade County Court found that Mercury was entitled to have the provider complete form OIR-B1-1809 and demonstrate how it is eligible to receive payment for PIP benefits under section 627.736(1)(a), Florida Statutes, even though treatment was ordered by a medical doctor. The Court found that Mercury's request for the provider to complete OIR-B1-1809 went to "costs" under section 627.736(6)(b). *Id.* The Court cited to the Fourth District Court of Appeal decision in *Kaminester v. State Farm Mutual Automobile Insurance Co.*, 775 So. 2d 981 (Fla. 4th DCA 2000). The Court in *Kaminester*, however, explained that "[t]he plain meaning of 'costs' is obviously the expenses the provider itself incurred to charge what it has charged . . . The right of the PIP carrier is to discover information as to what it actually costs the provider to provide the treatment or services." *Id.* at 985. Clearly, Mercury's request for documentation to verify that Med Manage was in compliance with 627.736(1)(a) does not go to "costs" under section 627.736(6)(b), Florida Statutes.

Accordingly, Med Manage provided Mercury with written notice of the covered loss and the amount due to it in its submission of the HCFA form. Mercury's Notice to Produce failed to request information as to the history, condition, treatment, dates, and costs of such treatment, or whether the items were reasonable and medically necessary, and therefore not within the scope of section 627.736(6)(b), Florida Statutes. Consequently, Med Manage was relieved from

responding to the request. Additionally, Dr. Burack is not an entity listed in subparagraph 3, 4, or 5 under section 627.736(1)(a), Florida Statutes. Med Manage is entitled to the medical benefits at issue because such services and care were lawfully provided, supervised, ordered, or prescribed by Dr. Burack, a licensed physician under chapter 459, Florida Statutes. See § 627.736(1)(a), Fla. Stat. (2009).

APPELLATE ATTORNEYS' FEES

Med Manage filed its motion for appellate attorneys' fees pursuant to section 627.428(1), Florida Statutes, which provides that:

[u]pon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Accordingly, Med Manage, the prevailing party on appeal, is entitled to reasonable appellate attorneys' fees. *See Cont'l Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 377 (Fla. 2008) (“[T]hird parties who claim policy coverage through an assignment are entitled to an award of fees under section 627.428.”)

Based upon the foregoing, it is hereby ORDERED AND ADJUDGED that the final judgment order in favor of MED MANAGE is AFFIRMED. MED MANAGE'S Motion for Appellate Attorneys' Fees is GRANTED and the matter is remanded to the trial court to determine the reasonable amount thereof.

MCCARTHY, COX and FINE, JJ., concur.