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Liability

The Menendez Holding on PIP Pre-Suit Demands and its Consequences to Insurers *by Andrew L Chiera, Esq.*


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On April 22, 2010 the Supreme Court of Florida issued its revised opinion in the case of *Menendez v. Progressive Express Insurance Co.*, 2010 WL 1609785 (Fla.). The *Menendez* opinion reviewed a Third District Court of Appeal decision (979 So.2d 324) which was found to be in direct conflict with the decisions set forth in *State Farm Mutual Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995) and *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985); as well as the decisions of the First District Court of Appeal in *Walker v. Cash Register Auto Ins. of Leon County, Inc.*, 946 So.2d 66 (Fla. 1st DCA 2006), and *Stolzer v. Magic Tilt Trailer, Inc.*, 878 So.2d 437 (Fla. 1st DCA 2004). The statute at issue in both the Supreme Court and Third DCA opinion was Fla. Stat. §627.736(11), which requires the submission of a demand letter prior to suit.

Prior to the release of the revised opinion, the Third DCA's opinion in *Menendez* was a powerful, binding opinion used frequently by litigators specializing in Personal Injury Protection ("PIP") defense. A Motion for Summary Judgment and/or a Fla. Stat. §57.105 Motion could be expected in any case where it appeared that the Plaintiff attorney had failed in part or in whole to comply with the pre-suit demand requirements set forth in Fla. Stat. §627.736(11) (2003-2007) [now §627.736(10) (2008)]. The *Menendez* opinion was cited consistently for the proposition that "where a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, not abatement, is the proper remedy." *Id*. at 333.

The pre-suit demand requirement therefore allowed the insurer an opportunity to review a claim prior to the initiation of suit, and provided one last chance to pay a claim without exposure to Plaintiff attorney's fees. PIP defense attorneys would therefore argue for dismissal of cases if the pre-suit demand was deficient in any way including, but not limited to:

- Failing to wait the statutorily required timeframe prior to filing suit;
- Failing to serve a demand letter that stated the amount claimed as due and owing with specificity and/or accuracy;
- Failing to attach an Assignment of Benefits (provider suit) or Revocation of Assignment of Benefits (insured suit); and
- Failing to send the demand to the designated address

Ultimately, the Florida Supreme Court held that "the statutory pre-suit notice provision is not 'procedural' and should not be given retroactive application. Consequently, we conclude that the Third District erred in holding that requiring the insureds to comply with the pre-suit notice requirements of the statute did not 'violate the general rule against retrospective operation." Thus, the impact of the original Third DCA *Menendez* decision, which was undoubtedly pro-defense, has been neutralized at best, and reversed at worst.

Read more . . . . P. 3

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Workers' Compensation

Pruitt v. Southeast Personnel Leasing by *David S. Gold, Partner*


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In this case the First District Court has continued the trend of earlier opinions which have greatly restricted the Claimant's right to select an alternate physician. In doing so, the Court specifically distinguished its earlier ruling in Harrell v. Citrus County which implied that the Claimant had a broad right to select the alternate physician. This ruling is very favorable to the Employer/Carrier and continues the trend in the case law restricting the Claimant's right to pick a physician.

In Pruitt, the Claimant filed a PFB asking, in part, for an alternate physician. The E/C responded to the PFB but failed to specifically address the request for the alternate physician. The Claimant took no action when the E/C failed to respond to the request and never selected an alternate physician of his own. Several months later, at a mediation, the E/C agreed to authorize an alternate physician and later scheduled an appointment with Dr. Donshik. The Claimant attended several appointments with Dr. Donshik who ultimately found that the complaints were unrelated to the industrial accident. As a result of Dr. Donshik's opinion, the E/C then denied further medical treatment. At the Final Hearing, the Claimant argued that the E/C had forfeited its right to select the alternate physician by failing to respond to the initial request within 5 days as required by F.S. 440. The JCC found that while the E/C had failed to respond within 5 days, the Claimant had likewise failed to exercise the right to select a physician. Since the E/C had complied with the later mediation agreement by authorizing Dr. Donshik, and the Claimant had accepted Dr. Donshik as the alternate by receiving treatment, the Claimant no longer had a right to select the alternate physician.

On appeal, the First District upheld the JCC's ruling noting that while the statute provides a Claimant an absolute right to an alternate physician, the statute does not give the Claimant an absolute right to select the physician. Only when the E/C fails to timely authorize the alternate physician does the Claimant get the right to select. If the Claimant then fails to select, the E/C then retains the right to name the alternate physician. In the instant case, once the Claimant entered into the mediation agreement requiring the E/C to authorize an alternate physician, the Claimant then lost the right of selection. The Court acknowledged that this opinion appears to contradict the earlier holding in Harrell v. Citrus County. In that case the Court had held that the E/C had to actually name a specific alternate physician in order to stop the 5 day rule from running. In other words, simply saying the E/C will agree to an alternate physician without naming the physician was not enough. However, the Court noted that unlike the Claimant in Pruitt, the Claimant in Harrell had specifically requested a physician once the E/C had failed to respond to the original request within the required 5 days and had refused treatment from the alternate physician named by the E/C. Thus, the Claimant in Harrell had preserved the right to name the alternate physician whereas the Claimant in Pruitt had not done so.

So, in Pruitt the First District has once again clarified the very limited circumstances under which a Claimant will be allowed to name an alternate physician. The Claimant's right to name an alternate physician will only arise under very specific circumstances. Under Pruitt, once obtained the Claimant's right to select the alternate physician is not absolute. A failure by the Claimant to exercise the right of selection will result in E/C regaining control over the selection of an alternate physician for the Claimant.

DEFENSE VERDICTS

Barret v. Defendant Mall, Premises Liability, Orange County, Paul S. Jones and Leena T. Joseph, 4/22/10.

Mong & Harp v. Defendant Store, False Imprisonment and Malicious Prosecution claims, Palm Beach County, Daniel Santaniello and Anthony Merendino, 4/8/2010.

Velazquez v. McCain, Vehicular Liability, Hillsborough County, Anthony J. Petrillo, 2-26-10.

Vital v. Defendant Store, Premises Liability, Collier County, Jack Luks and Charles Rowley, 2/25/2010.

Kendle v. Defendant Mall, Premises Liability, Seminole County, Paul Jones and Joseph Scarpa, 2/16/10.

Federal Insurance Company v. Bonded Lightning Protection Systems, Product Liability, Palm Beach County, Daniel Santaniello, Paul Jones and Anthony Merendino, 1/21/10.

SUMMARY JUDGMENTS

Appellant Marie Barlatier v. Appellee Mall, Premises Liability, Third District Court of Appeal / Miami-Dade County, James Waczewski, Final Summary Judgment, 4/21/2010.

Ramgadoo v. United Auto**,** PIP, Orange County, Paul Jones and Katherine Kmiec, Summary Disposition, 1/14/2010.

Freda Hall v. Defendant Mall, Premises Liability, Manatee County, Anthony Petrillo and Jennifer McFarland, 12/23/2009.

Consequences of Menendez Opinion cont.

In addition to losing a valuable tool for attacking non-compliant pre-suit demand letters, there is an even more significant consequence of the new *Menendez* opinion. Without question, the Florida Supreme Court held that the addition of the pre-suit demand requirement was a substantive change which violated the rule against impairment of the obligation of contracts. However, this holding has a potentially devastating impact on the way that most demand letters are presently responded to by insurers.

Currently, when most pre-suit demands are received by the insurer, they are diaried to be sent out within the 30 days set forth under the *amended* 2008 PIP statute. However, given the new *Menendez* opinion, which found that the demand requirement could not be applied retroactively, it would seem almost certain that an across the board policy of responding to new demands within 30 days is potentially disastrous.

Suppose for a moment that an insured is involved in an accident in 2006, on a policy which was incepted in October, 2006. The insured subsequently receives treatment from November 2006 through April 2007, and the bills are either denied or paid at a reduced rate (i.e. less than 80% of the amount billed). Subsequently, on May 3, 2010 the insurer receives a pre-suit demand letter from a Plaintiff attorney demanding payments for the aforementioned services.

The insurer, upon receipt notes the calendar that a response must be sent out no later than June 2, 2010. Let us assume further that the insurer has made a business decision to pay the claim, in order to avoid litigation and exposure to Plaintiff attorney's fees. Consequently, on June 2, 2010 the insurer issues payment on the disputed benefits, plus the applicable penalty, interest, and postage.

Unfortunately, recall that in 2006 the insured only had to wait 15 days from the receipt of its demand to file suit. More unfortunately, recall that there is now a Florida Supreme Court case which held that the postponing of the insured's ability to bring suit is a substantive change, which is forbidden. Therefore, let us assume that the Plaintiff attorney is familiar with the law and its consequences, and filed suit on May 19, 2010 – the 16th day after its demand was received by the insurer. Assume further that this suit was not served until June 8, 2010. Thus, the payment that was issued on June 2, 2010 was actually a confession of judgment which now entitles the Plaintiff attorney to reasonable fees and costs!

But wait, you say, we weren't even served until June 8, 2010 – how could we have confessed judgment? Under Florida law, the date of service of suit is irrelevant; the date of filing controls. Therefore, you can confess judgment on a case when you don't even know you have been sued! It is only a matter of time before the Plaintiff bar realizes this consequence, and begins filing suits on the 16th day for pre-2008 policies in the hope of getting confessions of judgment. True, a case which is essentially brand new would not entitle the Plaintiff to fees exceeding $3,000.00 (and in most cases much less), and therefore it is not in the Plaintiff attorney's best interest to get a confession of judgment prior to the incurrence of any significant attorney's fees. But, this is nevertheless a windfall to Plaintiff attorneys, and another "gotcha" tactic that must be noted and prevented.

So what can be done to prevent unintended confessions? As the insurer, you have superior knowledge over the Plaintiff attorney. You have access to the policy inception date, and you know without question when it was incepted, and thus which timeframe (15 or 30 days) applies. As such, it is of critical importance that the demand be marked and responded to accordingly. Let us suppose that you cannot find the policy, what should you do then? The next best option is to go by the date of loss – assuming it has been correctly provided by the Plaintiff attorney. While this is not the best course of action, it is certainly a viable alternative. Finally, you could answer all demands within 15 days irrespective of the policy inception date, although this may prove to be too cumbersome. Regardless, it is absolutely imperative that due care be given to avoid paying unnecessary attorneys fees. The only way to ensure this is to properly identify demands which must be responded to in 15 days and demands which must be responded to in 30 days.

What about "gap period" policies which were incepted after October 1, 2007 but nevertheless included PIP coverage? That answer is not so straightforward, and would depend largely on the language of the subject policy. Arguably, a demand might not even be required if the PIP coverage was purely contractual, and the policy is silent as to a pre-suit demand requirement. However, a good rule of thumb would require payment within 15 days if it is not absolutely clear that the 30 day requirement applies. After all, it's always better to be safe than sorry!

In sum, the *Menendez* opinion has not only weakened pre-suit demand defenses during litigation,

but has also created a potential windfall to shrewd Plaintiff attorneys. As the insurer, you must use the advantage of having access to the policy prior to litigation. Clearly, if the claim is not going to be paid, then this discussion is only relevant to the raising of an improper defense that suit was filed prematurely. Nevertheless, it is always important to stay on the cutting edge of PIP case law and potential defense issues so as to minimize potential exposure to unnecessary attorney's fees. For a copy of the complete Law Alert, please visit our home page, www.**LS-LAW**.com.

Law Alert: Section 744.301, Florida Statutes. The Enforceability of Pre-Injury Releases Executed By Parents On Behalf Of Minors by Daniel Santaniello, Managing Partner and Doreen Lasch, Esq.

The Florida legislature enacted a substantial amendment to Section 744.301, Florida Statutes on April 24, 2010. This new legislation reverses the *Kirton* decision which held that parents and guardians cannot execute enforceable pre-injury releases on behalf of minors in commercial activities. The new law now allows parents and natural guardians to effectively execute pre-injury releases for their minor children, but only for those dangers inherent in the activity. The decision does not apply retroactively. The statute does not shield commercial owners and operators from injury caused by **their own negligence.** Underwriting may advise insureds of the new law so that their release language complies with the new Act. For a copy of the complete Law Alert on Section 744.301, please visit our home page, www.**LS-LAW**.com.

Law Alert: Section 768.0755, Florida Statutes. New Florida Slip and Fall Statute, Effective July 1, 2010 by Anthony Petrillo, Tampa Partner and Jennifer Seitz, Esq.

House Bill 689, which was signed into law by Governor Charlie Crist on April 14, 2010 represents a major victory to business owners and their insurers. This tort reform bill repeals Florida Statute §768.0710 and creates Florida Statute §768.0755 in its place, essentially reinstating slip and fall law in Florida as it existed prior to *Owens*. Effective July 1, 2010, Florida Statute §768.0755 will provide that *a slip and fall plaintiff must once again prove the business establishment had actual or constructive knowledge of the dangerous condition*. As prior to *Owen*, constructive knowledge may be proven by circumstantial evidence that: the dangerous condition existed for such a length of time that in the exercise of ordinary care, the business owner should have known of the condition; or, the condition occurred with regularity and was therefore foreseeable. It is unclear whether Florida Statute §768.0755 will apply to all currently pending cases or only to actions accruing on or after July 1, 2010. For a copy of the complete Law Alert on Section 768.0755, please visit our home page, www.**LS-LAW**.com.

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