With Differing Court Rulings on Pre-Suit Notice of Intent, Florida Insurers Left Guessing

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On October 27, 2023, Florida's 5th District Court of Appeal ruled that a personal injury protection pre-suit demand letter needs to include only a billing ledger and does not need to state the exact amount that the plaintiff will be seeking in litigation. *Mercury Indem. Co. of Am. v. Cent. Fla. Med. & Chiropractic Ctr., Inc.*, No. 5D22-603, 2023 WL 7096641 (Fla. 5th DCA 2023).

By doing so, the court certified conflict with two Florida appellate courts that have ruled expressly opposite. *Thompson, P.A. v. GEICO Indemnity Company*, 347 So. 3d 1 (Fla. 4th DCA 2022) and *Rivera v. State Farm Mut. Auto. Ins. Co.*, 317 So. 3d 197 (Fla. 3d DCA 2021).

Florida Statute § 627.736(10) requires a medical provider to send a pre-suit demand letter, specifically a "written notice" of an intent to sue, as a condition precedent for filing an action for benefits. Should an insurer cure this written demand, then no action may be brought against them. However, at risk for an incorrect demand response is often hefty attorney's fees and costs against the insurer.

What was once meant to be a simple premise with a straightforward purpose to reduce litigation has now become quite the guessing game for insurers, as plaintiffs will often demand an amount much higher than what they are entitled to under the PIP statute and what they actually seek in litigation.

In the 5th District's *Mercury* opinion, Mercury Indemnity argued that a plaintiff's pre-suit demand letter that sought $1,597.91 in benefits was defective because the true amount sought in litigation was actually much lower. In support of its position, Mercury leaned on the recent *Rivera* and *Thompson* opinions, which held that demand letters must be "precise" and be the "exact amount" the plaintiff actually seeks in suit.

The court's *Mercury* opinion disagreed.

The *Mercury* opinion dissected § 627.736(10)(3)'s language that a pre-suit demand require "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The court held that the grammatical breakdown of the sentence refuted Mercury's notion that it was entitled to pre-suit notice of the amount it would sued over. The court found that, due to the commas in the statute, the term "claimed to be due" only relates to the types of benefits at issue and had no connection to the earlier clause "each exact amount."

That meant that the "exact amount" only references the amount of the original billed amount in the claim and not what the plaintiff is claiming to be underpaid on the claim, the court said.

The court then dismissed Mercury's final contention that the purpose of the pre-suit demand letter is to reduce litigation and put insurers on notice of what is at issue. The *Mercury* opinion stated that despite what might "make sense," the statute's purpose cannot overcome its plain language. After which, the 5th District certified conflict with the *Thompson* and *Rivera* rulings.

In contrast to *Mercury*, the premise in *Thompson, P.A. v. GEICO Indemnity Company* was simple. The plaintiff in *Thompson* sent a pre-suit demand letter seeking $2,978.99 or $4,524.28 if there was medical payment coverage. However, then the plaintiff filed suit, alleging only an amount "not exceed[ing] One Hundred Dollars." The 4th District Court of Appeal held that "627.736(1)(b)(3) requires precision in an "itemized statement specifying each exact amount" in order to "discourage gamesmanship" of the system. The court also noted the similarly conflicted Rivera case in its reasoning.

Unfortunately, the facts in the *Rivera* opinion were wildly different from the other cases. *Rivera* involved a claimant who submitted several pre-suit demand letters for mileage reimbursement. However, none of the letters included the correct destination nor was there any specific price for each individual trip. At best, the claimant included this total mileage, an average mileage per trip, and his cost per mile request. The 3rd District Court of Appeal quickly found this pre-suit notice defective, and went on to elaborate on the language of the statute finding the term "an itemized statement specifying each exact amount" to require "precision" in the amount sought.

Quoting from a lower court opinion, the 3rd DCA noted that, "If the intent of § 627.736(10) is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to make a precise demand so that the insurer can pay and end the dispute before wasting the court's and the parties' time and resources."

If the PIP insurer must guess at the correct amount and is wrong, "then the provider sues and exposes the insurer to attorney's fees," the court added. "Before being subject to suit and attorney's fees, the insurer is entitled to know the exact amount due as fully as the provider's information allows."

Should the *Mercury* opinion and conflict question now go to the Florida Supreme Court, the top court will have a difficult decision on its hands. Either follow the *Rivera* and *Thompson* line of reasoning, which has the potential to streamline PIP litigation, or follow the de facto status quo in *Mercury*, which leaves insurers with an almost unwinnable guessing game.

Insurers should be prepared for either outcome and be vigilant when examining pre-suit demand letters for emerging litigation trends and novel reimbursement arguments. When responding to a pre-suit demand, care should be taken to extinguish any potential damages and put the insurance company in the best possible position for the unknown.

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