

**16 Fla. L. Weekly Supp. 666a**  
**Online Reference: FLWSUPP 167PANDY**

**Insurance -- Personal injury protection -- Notice of loss -- CMS-1500 claim forms that contain incorrect date of accident failed to provide insurer with notice of covered loss -- Insurer may raise defense of lack of notice of loss at any time -- Where notice of loss was not provided, bills did not become overdue, and demand letters were premature -- Further, demand letters containing incorrect date of accident were invalid and failed to satisfy condition precedent to filing suit**

ROSE HEALTHCARE CENTER, INC., f/k/a Rose Chiropractic Centre, P.A., as assignee of Jitendra Kumar Pandya, Plaintiff, vs. INFINITY INSURANCE COMPANY; LEADER INSURANCE COMPANY n/k/a INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 06-CC-7465, Division 71-PIP. May 8, 2009. Antoinette D. Plogstedt, Judge. Counsel: Aaryn Fuller, Bogin, Munns & Munns, Orlando. Melissa K. McCullough, DeLand.

*SUMMARY FINAL JUDGMENT*

THIS CAUSE having come before this Court on INFINITY INSURANCE COMPANY; LEADER INSURANCE COMPANY n/k/a INFINITY AUTO INSURANCE COMPANY (hereinafter referred to as "INFINITY"), Motion for Final Summary Judgment, and the Court having heard the argument of counsel, and being otherwise fully advised in the premises, finds as follows:

INFINITY filed its Motion for Final Summary Judgment asserting the following two issues:

Issue I. INFINITY is not on notice of a covered loss as required by section 627.736(4)(b), Florida Statutes. Because no notice of a covered loss has been submitted, no payments are due and owing for treatment rendered by the PLAINTIFF. If no charges are due and owing due to a lack of notice, INFINITY is entitled to Final Summary Judgment as a matter of law.

Issue II. PLAINTIFF'S demand letters fail to satisfy the statutory requirements of section 627.736(11), Florida Statutes (2005) as a matter of law. Since the demand letters fail to satisfy the statutory requirements, PLAINTIFF has failed to satisfy a statutory condition precedent in advance of filing this PIP suit. Since the PLAINTIFF has failed to satisfy a statutory condition precedent to filing suit, INFINITY is entitled to Final Summary Judgment as a matter of law.

This Court will address the movant's two issues below.

*ISSUE I: INFINITY IS NOT ON NOTICE OF A COVERED LOSS AS REQUIRED BY SECTION 627.736(4)(B), FLORIDA STATUTES*

*FACTS*

1. It is undisputed that on or about May 25, 2006, PLAINTIFF filed this PIP suit, as assignee of Jintendra Kumar Pandya, against INFINITY for unpaid medical bills for dates of service September 5, 2005 through November 26, 2005, and in support therefor attached CMS-1500 forms that were previously submitted as part of the underlying claim at issue in this suit.
2. PLAINTIFF filed its current Amended Complaint of October 2, 2008 seeking payment of charges for medical services rendered as a result of injuries suffered by the Assignee of Benefits in an automobile accident alleged, in a Florida accident report related to this matter, to have occurred on August 29, 2005.
3. PLAINTIFF has alleged standing through the assignment of benefits that was signed by Jintendra Kumar Pandya and executed in favor of Rose Healthcare Center, Inc. on September 9, 2005.
4. It is undisputed that every CMS-1500 form submitted to INFINITY bears the date of September 5, 2005 in Box 14 (date of occurrence/date of accident).
5. It is undisputed that there is no evidence that any covered accident occurred on September 5, 2005.
6. All evidence indicates that the subject accident occurred on or about August 29, 2005; however, this date does not appear on the CMS-1500 forms.
7. INFINITY has responded to PLAINTIFF that the claim at issue in this suit was *under investigation*.
8. Dr. Rose, the treating physician and part owner of PLAINTIFF, testified in his deposition that the date of accident is just as important as anything else on the CMS form.
9. Thus, PLAINTIFF acknowledges that this portion of the CMS-1500 form is significant and important.
10. INFINITY, in its initial Answer to the initial Complaint, notified PLAINTIFF that there was a failure to comply with a statutory condition precedent, despite the fact that

PLAINTIFF'S initial Complaint did not even plead or allege that an accident had occurred.

11. INFINITY then raised, in its Answer, Defenses, and Affirmative Defenses to PLAINTIFF'S Amended Complaint, that there was an issue with the sufficiency of the CMS-1500 forms and that no notice had been provided to INFINITY of a covered loss for which payment was due.

### *ANALYSIS*

Section 627.736(4)(b), Florida Statutes states, in pertinent part, that:

(b) Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.

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This paragraph does not preclude or limit the ability of the insurer to assert that the claim was unrelated, was not medically necessary, or was unreasonable or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5). *Such assertion by the insurer may be made at any time, including after payment of the claim or after the 30-day time period for payment set forth in this paragraph.* (emphasis added).

Section 627.736(4)(b), Florida Statutes (2005).

Further, section 627.736(5)(d), Florida Statutes states, in pertinent part, that:

(d) . . . . For purposes of paragraph (4)(b), an insurer shall not be considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph, and unless the statements or bills are *properly completed* in their entirety as to all material provisions, with all relevant information being provided therein. (emphasis added).

Section 627.736(5)(d), Florida Statutes.

The definition of “properly completed”, for purposes of section 627.736, has been defined in section 627.732(13):

(13) “Properly completed” means providing truthful, substantially complete, and substantially accurate responses as to all material elements to each applicable request

for information or statement by a means that may lawfully be provided and that complies with this section, or as agreed by the parties.

Section 627.732(13), Florida Statutes.

This court must give full weight to section 627.732 (11): it is unambiguous and must be strictly construed. [\*Chambers Med. Group Inc. v. Progressive Express Ins. Co.\*](#), 12 Fla. L. Weekly Supp. 556 (13th Jud. Cir. Ct., March 18, 2005).

As noted above in subsection (4)(b), INFINITY is within its right to attest and to assert that there was a violation of the statutory requirements of subsection (5) and that the services were not reasonable, related, or necessary. This assertion, as noted in (4)(b), may be made at any time, including after payment of the claim or after the 30-day time period set forth for payment.

In [\*South Florida Chiropractic Rehab v. United Services Automobile Assoc.\*](#), the court found that the failure to properly complete the HCFA form, which is necessary to the orderly and timely payment of PIP benefits by an insurer, justifies an order for final summary judgment for the insurer. 16 Fla. L. Weekly Supp. 193a (Palm Beach Cty. Ct., 15th Jud. Cir. November 4, 2008).

Similarly, this Court has previously ruled the effect of submitting improperly completed HCFA (or CMS-1500) forms. In [\*Magic Chiropractic Clinic v. Progressive American Insurance Company\*](#), 14 Fla. L. Weekly Supp. 796a (Orange Cty. Ct., 9th Jud. Cir., June 18, 2007) the Court granted final summary judgment for the insurer/defendant when the plaintiff failed to place defendant on notice of a covered loss by failing to provide properly completed HCFA or CMS-1500 forms as required by section 627.736(5)(d), Florida Statutes (2005).

Similar issues with regard to improperly completed CMS-1500 forms were addressed in several other recent cases.

In [\*Atwood Neurospinal Clinic, P.A. v. Progressive Express Insurance Company\*](#), the plaintiff/medical provider had several issues with the HCFA forms submitted as part of a claim. 10 Fla. L. Weekly Supp. 1034a (Collier Cty. Ct., 20th Jud. Cir., October 2, 2003). The *Atwood* court granted summary judgment because the HCFAs submitted and the records did not establish compliance with section 627.736, Florida Statutes and did not provide notice of a covered loss. *Id.* Among other problems, Box 14 contained an incorrect date of injury and was specifically cited by the court. *Id.*

In [\*Reese v. Progressive Express Insurance Company\*](#), the plaintiff/medical provider submitted HCFA forms without the proper date of injury in Box 14. 13 Fla. L. Weekly

Supp. 344b (Duval Cty. Ct., 4th Jud. Cir., December 5, 2005). The court found that because the defendant/insurer never received a HCFA indicating a loss attributable to the correct date of injury, the Defendant had not received reasonable proof of such loss. *Id.* Without reasonable proof of a covered loss, no bills were due and payable under section 627.736(4) and defendant was granted final summary judgment on this issue.

A court cannot find waiver of a statutory requirement exists when there is a deficiency in the HCFA or CMS-1500 form and there is specific statutory language that such deficiency may be asserted, even after payment. See *Finlay Diagnostic Center v. Progressive*, 13 Fla. L. Weekly Supp. 610b (Dade Cty. Ct., January 31, 2006). In *Finlay*, the court defined waiver as the “voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right.” *Id.* (citing *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)). INFINITY has done nothing that could be construed as a waiver of this issue.

Additionally, in *R & C First Medical Center v. Progressive American Insurance Company*, this Court held that a defendant has not waived its defense of lack of notice of a covered loss pursuant to subsection (5) of section 627.736 because of the express terms contained in subsection (4)(b) that the insurer may assert a defense of lack of “written notice of the fact of a covered loss” at any time. 15 Fla. L. Weekly Supp. 372a (Orange Cty. Ct., 9th Jud. Cir., December 13, 2007).

Thus, INFINITY has not waived its right to assert this as a defense to this suit. PLAINTIFF and Dr. Rose are correct that all portions of the form are significant.

### *FINDINGS*

This court finds that an important, significant, and statutorily required section of the CMS-1500 forms was not properly completed as to all material provisions when PLAINTIFF submitted the insufficient CMS-1500 forms to INFINITY with an incorrect date of accident provided thereon. INFINITY has not waived this as a defense and may raise it at any time. Because the CMS-1500 forms were not completed in their entirety as to all material provisions as noted above, INFINITY was never placed on legal notice of a covered loss or the amount of same as required by sections 627.736(4)(b) and 627.736(5)(d), Florida Statutes. Therefore, the Court finds that INFINITY is entitled to final summary judgment as a matter of law as to Issue I.

### *ISSUE II. PLAINTIFF'S DEMAND LETTERS FAIL TO SATISFY THE STATUTORY REQUIREMENTS OF SECTION 627.736(11) (2005) AS A MATTER OF LAW*

Based on the above ruling as to lack of notice to INFINITY, the demand letters are premature as a matter of law. Demand Letters are to be submitted to a carrier only when the claim becomes overdue. See § 627.736(11), Florida Statutes (2005). The demand letters here were premature as the claim had not become overdue based on the failure to properly complete the CMS-1500 forms. Notwithstanding this prematurity, the Court will address the validity, or lack thereof, of the demand letters upon which PLAINTIFF relies, as follows:

*FACTS* 1. It is undisputed that Plaintiff issued a series of pre-suit demand letters in relation to this suit dated November 11, 2005; November 14, 2005; and on April 3, 2006.

2. None of these demand letters include an itemized statement specifying each exact amount claimed to be due from the insurer.

3. The demand letters and the attached documents fail to demand an exact amount due: the demand letters do not specify an exact amount due, and neither the demand letters nor the supporting documents demand payment of the statutory 80% of the charges instead of 100% for treatment rendered by the Plaintiff medical provider.

4. As to the November 11 and November 14 letters, while the date of loss is the same on both letters (September 5, 2005), neither of the letters provides a date of loss that corresponds with the accident report form related to the alleged covered accident (August 29, 2005).

5. As to the November 14 demand letter, the date of loss corresponds with the date of loss on the attached CMS-1500 forms (September 5, 2005), however that does not correspond with the correct date of loss (August 29, 2005).

6. As to the April 3, 2006 letter, while the date of loss on the demand letter corresponds to the accident report form (August 29, 2005), the date on the letter does not correspond to the date of loss indicated on the attached CMS-1500 forms (September 5, 2005).

### *ANALYSIS*

According to section 627.736(11), Florida Statutes (2005), as a statutory condition precedent to filing a suit for PIP benefits, a demand letter in compliance with this statute must be submitted to the insurance company.

The PLAINTIFF submitted as part of its claim, and now relies upon as a basis for this suit, three demand letters which had incorrect information or information which did not correspond with supporting documentation of treatment rendered.

The failure to satisfy the condition precedent of submitting a proper demand letter prior to filing a suit for PIP benefits will result in an order for summary judgment. *See e.g. [Florida Emergency Physicians Kang and Associates v. Progressive Express Insurance Company](#)*, 12 Fla. L. Weekly Supp. 479a (January 24, 2005).

### *FINDINGS*

This Court finds that PLAINTIFF, when it submitted demand letters that did not specify an exact amount due and owing, and had an accident date that did not correspond with, depending on the letter, either the date of the accident or with the supporting documents of treatment rendered, failed to satisfy the requirements of section 627.736(11), Florida Statutes (2005).

As a result, PLAINTIFF has not provided sufficient notice of a covered loss such that no payment is due.

PLAINTIFF failed to fulfill the statutory requirements for submission of a sufficient demand letter when it failed to provide notice of a covered loss as explained in sections 627.736(4)(b) and (5)(d), Florida Statutes, by providing information that was insufficient to establish a connection between the treatment and any covered loss for which payment was required.

INFINITY has taken no action that could be construed to constitute waiver of the condition precedent requiring submission of a statutorily sufficient demand letter prior to litigation of this PIP matter.

Therefore, the court finds that the Plaintiff failed to satisfy a statutory condition precedent to filing suit by failing to submit a pre-suit demand letter in compliance with section 627.736(11), Florida Statutes (2005), and that the failure to satisfy this statutory condition precedent is fatal to Plaintiff's cause of action.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that a Summary Final Judgment is hereby entered for the Defendant; it is further ORDERED AND ADJUDGED that the Plaintiff shall take nothing by this action and Defendant shall go hence without day. This Court reserves jurisdiction to award attorney fees and costs and any other relief the Court may deem proper.

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