County Civil Court: INSURANCE – Personal Injury Protection - Appellant's pre-suit demand letter was statutorily sufficient under Section 627.736, Fla. Stat. (2012). The statute does not mandate that the demand letter state the exact amount of PIP benefits owed. Rather, the statute mandates only that the cost of the services provided be specified – reversed and remanded for further proceedings. *Tampa Bay Imaging, LLC. v. Mercury Indemnity Co. of America*, No. 13-000083AP-88B (Fla. 6th Cir. App. Ct. December 15, 2014).

IN THE CIRCUIT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

TAMPA BAY IMAGING, LLC
Appellant,

v. **Ref. No.: 13-000083AP-88B**
UCN:522013AP000083XXXXCI

MERCURY INDEMNITY COMPANY OF AMERICA
Appellee.

_____/

ORDER AND OPINION

Tampa Bay Imaging, LLC (Appellant-Assignee) appeals the trial court's order of summary judgment in favor of Mercury Indemnity Company of America (Appellee-Insurer) on the grounds that the assignment of benefits was invalid and that the pre-suit demand letter was statutorily insufficient under § 627.736(10), Fla. Stat. Because we find that the issue of assignment was waived and Appellant-Assignee's pre-suit demand letter was in compliance with § 627.736(10), we reverse.

BACKGROUND

On January 28, 2013, Lee Anglin (Patient) was involved in a car accident. At the time, Patient had an insurance policy in effect with Appellee-Insurer, which provided PIP coverage. On May 17, 2013, Patient went to Appellant-Assignee for treatment of injuries incurred in the January accident.

That same day, Patient executed an assignment in favor of Appellant-Assignee. The assignment, in part, reads:

> "I hereby irrevocably assign all rights and benefits to [Appellant-Assignee] for Personal Injury Protection, extended Personal Injury Protection, Medical Payment Coverage and/or other benefits with I may have in accordance with Florida Statute §627.736 and/or any applicable policy of insurance…This document constitutes an assignment of my rights and benefits under any applicable policy of insurance."

Patient listed an incorrect date of accident and an incorrect date of assignment. However, since the date that he acquired insurance from Appellee-Insurer, Patient had been involved in no accidents other than the one claimed in this case. Appellant-Assignee submitted a CMS 1500 claim form to Appellee-Insurer for the charges related to the MRI performed on May 17, 2013. On the form, Appellant-Assignee stated that the charges for the MRI were $1,850.00.

Appellee-Insurer paid $630.21 to Appellant-Assignee and issued an Explanation of Benefits (EOB). The first EOB allowed $787.76 on the claim and paid 80% of that amount (the $630.21). This EOB listed all the correct information, including the correct date of accident and the correct date that Appellant-Assignee rendered services to Patient.

On July 3, 2013, after receiving the first EOB, Appellant-Assignee, via certified mail, provided a pre-suit demand letter pursuant to § 627.736(10), Fla. Stat. It specifically noted that it was a demand letter under Florida Statutes, and also listed correctly the name of the policy holder, the name of the patient, the date of accident, the claim number, and address of the medical provider, the Appellant-Assignee. In addition, the demand letter enclosed copies of the assignment, the first EOB, and the CMS 1500 claim form.

On August 5, 2013, Appellee-Insurer responded to this demand with an additional medical payment of $10.28 (additional payment of $3.57, interest of $0.04, and $6.67, for penalty and postage). Enclosed in this response was a second EOB, which showed the allowed amount as $792.22, indicating that the Appellee-Insurer owed 80%: $633.78. This response did not assert that the demand had been legally deficient, nor did it indicate that the Appellee-Insurer was confused or

misled regarding the amounts it must pay to avoid litigation. The next day, Appellant-Assignee filed suit.

Both Appellant-Assignee and Appellee-Insurer served motions for summary judgment. The trial court granted summary judgment in favor of Appellee-Insurer on two grounds: (1) the assignment of benefits was invalid, and therefore, Appellant-Assignee lacked standing to sue because of the incorrect dates; and (2) the pre-suit demand letter was statutorily insufficient under § 627.736(10), Fla. Stat., because it did not specify the amount of benefits owed or account for the initial $630.21 payment pursuant to the first EOB.

ANALYSIS

I. The Assignment

Appellee-Insurer argues that the assignment is invalid because in both the assignment and the CMS 1500 claim form, Patient had listed incorrect dates of loss and assignment of benefits. However, Appellee-Insurer's arguments in regard to the assignment and claim form fail, because any defect in the assignment or CMS 1500 claim form was waived.

Deficiencies in the CMS 1500 form or demand can be waived by pre-suit conduct. *Finlay Diagnostic Ctr. Inc. v. Progressive Am. Ins. Co.*, 15 Fla. L. Weekly Supp. 618b (Fla. Miami-Date County Ct. 2008). In *Finlay*, the medical provider of diagnostic x-ray testing sought payment for its services. The Insurer made only partial payment with an explanation of benefits. In response to the subsequent pre-suit demand letter, the insurer stood by its decision without raising any alleged deficiency in the claim form as a reason for the denial. The court concluded that because the insurer never complained about the deficiencies in the healthcare form and, pre-suit, actually paid part of the claim based upon the defective form, the insurer waived its right to argue that the insufficient form was a statutory bar to suit. *Id.* at 618b. *See also Medical Rehab & Wellness v. United Auto. Ins. Co.*, 19 Fla. L. Weekly Supp. 659a (Fla. Broward County Ct. 2011) (concluding that insurer waived defects by not raising those alleged defects in its response to the demand). Appellee-Insurer, before

suit was filed, never complained of any incorrect dates on the assignment or demand letter and therefore cannot argue against those scrivener errors as a statutory bar to suit.

The *Finlay* case is similar to the case at hand. Appellee-Insurer argues that it was confused by the discrepancy between the incorrect dates of assignment and the correct dates in the demand, but it is clear these were merely scrivener errors. The patient had not been in any other accident. Appellee-Insurer paid on the claim and responded to the pre-suit demand letter with an additional payment. It never expressed any confusion about the assignment until after suit was filed. Therefore, Appellee-Insurer waived any defects by its conduct.

II. The Demand Letter

The discussion of waiver as to the assignment would also be applicable to any defects as to the demand. However, although Appellee-Insurer asserts that the pre-suit demand letter was statutorily insufficient to provide notice to Appellee-Insurer that it had failed to pay a balance owed, this argument is without merit.

The PIP policy was in force from August 12, 2012, through February 12, 2013. Therefore, the 2012 version of § 627.736(10), Fla. Stat., (the "Demand Letter" provision) governs this matter. *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873, 876 (Fla. 2010).

Section 627.736(10), Fla. Stat. (2012) provides that "as a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer." Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b). *Id.* The "Demand Letter" provision, subsection (10), provides:

> The notice must state that it is a "demand letter under s. 627.736" and state with specificity: (1) the name of the insured upon which such benefits are being sought, including a copy of the assignment giving 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) To the extent applicable, 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

> accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement.

In this case, the pre-suit demand letter was statutorily sufficient. The demand letter states, "[t]his notice letter and demand for payment is sent pursuant to Florida Statute 627.736(10)." It states the name of the insured, the claim number, and the name of the medical provider. It correctly lists the address of the medical provider, the date of accident, and date services were rendered. Furthermore, enclosed with demand letter were copies of Appellee-Insurer's first EOB, the assignment, and the CMS 1500 claim form. Therefore, under the 2012 version of the Statute, Appellant-Assignee sent a statutorily sufficient pre-suit demand letter to Appellee-Insurer.

Appellee-Insurer argues that the Demand Letter provision requires Appellant-Assignee to state the exact amount (after calculating the proper fee schedule) that Appellee-Insurer needs to pay. However, nowhere does the statute mandate that one seeking payment must state the exact amount of PIP benefits owed. It mandates only that the cost of the service provided be specified. The demand letter did so. The insurer is in a better position than the assignee to calculate any PIP benefits available for a claim.

Appellee-Insurer cites the case of *North Florida Healthcare, Inc. v. USAA Casualty Insurance Company,* 18 Fla. L. Weekly Supp. 548a (Fla. Duval County Ct. 2011) to support its argument that scrivener errors in a demand letter or assignment provide a statutory bar to further payment or suit. However, *North Florida Healthcare* does not apply and does not persuade this court. In *North Florida*, the CMS 1500 claim form listed one amount for the services provided, but the pre-suit demand letter included a completely different amount for the same services. *Id*. In contrast, in the case at bar the Appellant-Assignee's charges were consistently reported in the CMS 1500 form and demand to be $1,850.00. The discrepancies were as to the dates alone, and they were never raised by Appellee-Insurer until after suit was filed.

Appellee-Insurer cannot now use the defects within the CMS form to avoid responsibility for the overdue payment. It paid the claim, in part, not once, but twice, without complaint. Appellant-Assignee rightly asserts that by paying the claim without advising Appellant-Assignee of defects that could have been corrected pre-suit, Appellee-Insurer waived the right to assert those deficiencies as a bar to suit. To hold otherwise in this case would allow Appellee-Insurer to circumvent the purposes of the statute by belatedly raising defects as a "gotcha."

CONCLUSION

Appellee-Insurer waived any potential defects within the assignment and the pre-suit demand letter was statutorily sufficient.

Accordingly, it is

ORDERED AND ADJUDGED that the decision of the trial court is reversed and the action is remanded for further proceedings not inconsistent herewith.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, on this _____ day of _____ 20___.

_____
PAMELA A.M. CAMPBELL
Circuit Judge, Appellate Division

_____
AMY M. WILLIAMS
Circuit Judge, Appellate Division

_____
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