RISSMAN, BARRETT, HURT, DONAHUE & MCLAIN, P. A.

ATTORNEYS AT LAW

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
ROBERT D. BARTELS
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS

OF COUNSEL
ROBERT J. JACK

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

207 S. 2nd STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

AMY L. BAKER
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JAMES E. FAVERO III
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
VICTORIA S. LUNA
LAURA F. LYTLE
DARIEN M. MCMILLAN
ERIC F. OCHOTORENA
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
D. BLAKE REHBERG
KELLEY A. RICHARDS
JUAN A. RUIZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

FLORIDA LAW WEEKLY

MAY 13, 2011

INSURANCE – FLORIDA INSURANCE GUARANTY ASSOCIATION EXEMPT FROM STATUTE ALLOWING ATTORNEY'S FEES FROM PREVAILING INSURED – ANSWER AND AFFIRMATIVE DEFENSES WERE NOT A DENIAL OF INSUREDS CLAIM

Florida Insurance Guaranty Assoc. v. Ehrlich, 36 Fla. L. Weekly D939 (Fla. 4th DCA May 4, 2011)

Insureds filed a claim with Florida Insurance Guaranty Association (FIGA) after their own insurance company became insolvent. A suit was filed against FIGA to safeguard against the impending statute of limitations deadline. FIGA moved for more time to complete the investigation of the claim but the trial court ordered FIGA to answer the complaint within 10 days.

In its answer, FIGA raised as an affirmative defense the insureds failure to comply with the provisions of the coverage pertaining to conditions for filing suit. By raising this as an affirmative defense, FIGA argued that no valid coverage existed.

The matter was settled before a verdict was reached and the insureds moved for attorney's fees and costs. The insureds claim was based on F.S. § 627.428 which entitles insureds to reasonable fees and costs when prevailing in litigation against an insurance company. The trial court based their decision of entitlement to attorney's fees and costs on an interpretation of FIGA's affirmative defenses constituting "affirmative action." Under F.S. § 631.70, FIGA was excused from paying attorney's fees and costs if the insured prevails unless "when the association denies by affirmative action, other than delay, a covered claim or a portion thereof."

The 4th DCA ruled that because FIGA was required by the trial court to answer the complaint, they had no option but to assert a defense. Further, the affirmative defense was not a denial of the claim but a "legitimate defense under the claim" and FIGA did not deny the claim but "delayed" paying until it sufficiently investigated the claim. The award for attorney's fees and costs was reversed under the exemption of F.S. § 631.70.

INSURANCE – DENIAL OF PERSONAL INJURY PROTECTION CLAIM WHERE PRESUIT DEMAND LETTER WAS PREMATURE AND WAS PROPER UNDER F. S. § 627.736 – COMPLIANCE WITH STATUTORY REGULATIONS ON DEMAND LETTERS

MRI Associates of America, LLC v. State Farm Fire and Casualty Co., 36 Fla. L. Weekly D960 (Fla. 3d DCA May 4, 2011)

MRI Associates appealed a decision by the circuit court sitting in appellate capacity that reversed the trial court's final judgment in favor of MRI. Before filing suit, MRI sent an itemized claim form which was denied. State Farm hired an expert to perform a "paper peer review" of the claim and determined the MRIs were not a necessity. MRI then sent a presuit demand letter with itemized costs for two MRIs which also included an itemized list if the claim was paid at 80%.

MRI filed suit after State Farm's refusal to pay medical bills under assignment from insured. The county trial court

found for MRI holding that their claim was satisfactory under F.S. § 627.736 which penalizes insurers who fail to pay valid claims. State Farm appealed and the circuit court appellate panel reversed and remanded in favor of State Farm on the basis that the review was grounds to deny the claim and the demand letter was premature.

The 3d DCA agreed with the appellate panel of the circuit court. They held that the presuit demand letter was premature because it failed to state the specific amount owed and therefore, payment was not due.

In reaching the decision, the 3d DCA found that the specificity and precision required by F.S. § 627.736 promoted prompt payment of insurance claims by the insurer and that the amount at issue was to be determined early in the claims process. The circuit court appellate panel decision was affirmed.

TORTS – SUMMARY JUDGMENT IMPROPER BASED ON PRESUMED NEGLIGENCE OF THE PLAINTIFF – QUESTIONS OF FACT AS TO SHARED LIABILITY AND APPORTIONMENT OF DAMAGES STILL EXIST

McGill v. Perez and Dion's Nursery & Transportation Services, Inc., 36 Fla. L. Weekly D966 (Fla. 2d DCA May 6, 2011)

McGill appealed summary judgment in a rear-end collision for defendant Perez. While both drivers were operating commercial vehicles for their employers, Perez was rear-ended shortly after turning onto a highway in front of McGill. Summary judgment was based on affidavits in support and opposition and depositions. The magistrate entered summary judgment as a matter of law.

The 2d DCA disagreed with the decision of the magistrate. The 2d DCA held that the affidavits and depositions of McGill demonstrated that there were genuine issues as to several essential facts of the case. Specifically, the parties disagreed about the presence of fog, the wetness of the road, whether Perez's truck lights were operating properly, and

whether Perez failed to properly yield. The 2d DCA held that summary judgment was therefore improper since it was possible McGill could demonstrate Perez was at fault for portions of the accident.

Furthermore, the 2d DCA cited ***Sims v. Christinzio***, 898 So. 2d 1004, 1007 (Fla. 2d DCA 2005) holding that if facts can show negligence of the following driver in a rear-end accident then they could show negligence of the leading driver as well. Based on these arguments, the 2d DCA reversed the summary judgment. The suit was remanded for further proceedings in the circuit court.

RBM/KQS/tsr