Liability


The proposed Florida Senate Bill 1806 (and related, identical House Bill 1439), if passed, will represent a major blow to rental car companies and their customers. This bill to amend Fla. Stat. §324.021 will essentially bypass Graves Amendment preemption of vicarious liability of rental car companies, and will impose liability on vehicle lessors whose lessees are uninsured or underinsured according to the new statutory requirements.

A Brief History
Under Florida’s Dangerous Instrumentality Doctrine, vicarious liability is imposed upon the owner of a motor vehicle who voluntarily entrusts the motor vehicle to an individual, whose negligent operation causes damage to another. 1 The Graves Amendment (49 U.S.C. § 30106) is a part of the Transportation Equity Act, signed into law as of August 10, 2005. The Graves Amendment expressly eliminated vicarious liability of vehicle lessors, who were not actively negligent and engaged in no criminal wrongdoing.

Read more . . . P. 4

Liability

SB 1694 and Florida PIP Tort Reform by Andrew Chiera, Esq.

The Florida Motor Vehicle No-Fault Law (hereinafter referred to as the PIP statute) was last amended in October 2007 with some amended provisions not taking effect until January 1, 2008. Chief among the amendments to the “new” PIP statute was the addition of a fee schedule in Fla. Stat. §§627.736(5)(a)2. – 627.736(5)(a)5. Prior to the addition of the PIP fee schedule, any disputed claim would require a determination as to what constituted a “reasonable charge” for services rendered to PIP insureds. Without question the legislature’s goal was to reduce litigation by standardizing the reimbursable amounts paid under PIP coverage.

However, Plaintiffs bar foiled the legislature’s goal by filing suits specifically challenging the application of the PIP fee schedule. The most common argument made by Plaintiff’s is that an insurer cannot apply the PIP fee schedule unless its policy explicitly advises the insured that the fee schedule will apply to all payments made under PIP coverage. The Plaintiff’s arguments were fueled by the fact that §627.736(1)(a) describes mandatory coverage of 80% of all reasonable expenses, while §627.736(5)(a)2. states that the insurer “may” apply the PIP fee schedule. The issue of “mandatory versus permissive” is currently pending on appeal in the Fourth District Court of Appeal.

It is generally known that the real issue driving all PIP litigation is Plaintiff’s attorney’s fees. It is not uncommon for a Plaintiff attorney to seek an award of $500.00 per hour in

Read More . . . P. 3
Workers’ Compensation

The Disappearance of the Workers’ Compensation Statute of Limitations

by Rey Alvarez, WC

Managing Attorney.

What happens to those cases in which the claimant treats two or three times and then disappears? Normally, those cases vanish and eventually are time barred by the statute of limitations. However, with recent case law on statute of limitations, those cases may not be time barred.

As we all know, the Workers’ Compensation statute of limitations is found in Florida Statute §440.19. It indicates that “Except to the extent provided elsewhere in this section, all employee petitions for benefits under this chapter shall be barred unless the employee…unless the petition is filed within 2 years after the date on which the employee knew or should have known that the injury or death arose out of work performed in the course and scope of employment.

The statute of limitations can be tolled if there is “…payments of any indemnity benefit or the furnishing of remedial treatment care, or attendance pursuant to either a notice of injury or a petition for benefits shall toll the limitations period set forth above for 1 year from the date of such payment. This tolling period does not apply to the issues of compensability, date of maximum medical improvement, or permanent impairment.”

However, not filing a petition for benefits within the time periods above does not bar the employee’s claim unless the carrier advances the defense of a statute of limitations in its initial response to the petition for benefits.

Florida Statute §440.19 goes on to indicate that if a “…claimant contends that an employer or its carrier is estopped from raising a statute of limitations defense and the carrier demonstrates that it has provided notice to the employee in accordance with FS 440.185 and that the employer has posted notice in accordance with FS 440.055, the employee must demonstrate estoppel by clear and convincing evidence.”

Pretty easy language, easy to understand and apply to most scenarios. Until recently, you looked at the date of the accident and the last date of medical treatment and the last payment of indemnity and compared the dates to the above statute and you either had a statute of limitations defense or you didn’t. Recent case law has changed that.

However, in Gauthier v. FIU a June 22, 2010 First District Court of Appeals decision, not obtaining an MMI date or not paying an impairment rating can toll the statute of limitations. The Gauthier case involved a 2005 date of accident. The employer/carrier refused to pay for an August 2008 medical appointment because the claimant had not been to the doctor since June 2007. Looking at Florida Statute §440.19, it appears that the employer/carrier in that case had a pretty good statute of limitations case.

However, employer/carrier in Gauthier had never obtained an MMI date or an impairment rating. The employer/carrier had attempted to get an MMI date, but was unsuccessful. The Court held that employer/carrier is estopped from relying on a statute of limitations defense because claimant showed by uncontested evidence that the employer/carrier failed to act when it was under a duty to do so and that claimant was misled to her detriment due to the employer/carrier’s omission. The Court stated that “an employer is under a continuing obligation, once it has knowledge of an employee’s injury, to place needed benefits in the hands of the injured worker.” This, according to the 1DCA in Gauthier, requires an employer to “offer or furnish benefits when the employer knows, or reasonably should know from facts properly and diligently investigated, that such benefits are due.” The end result is that the statute of limitations is tolled until the claimant has been placed at MMI and paid impairment benefits.

In order to alleviate apparent noncompliance issues with the authorized treating physicians, the Court went on to say that “an employer has the option, if necessary, of obtaining a date of MMI and a PIR from a doctor other than the employee’s treating physician.”

This case is limited in scope as it only applies to statute of limitation cases in which the claimant has not been placed at MMI. However, in those cases, the statute of limitations period appears to have been extended.

It is important for the employer/carrier to stay on top of these potential statute of limitations cases and ensure that the claimant is at least rendered at MMI and paid impairment benefits. The attempts to get the claimant at MMI should start right away. If a claimant misses two appointments or hasn’t been to a doctor for 2 or more months, the calls and letters to the authorized treating doctors should start.

Read More . . . P. 5
Liability continued.
Florida PIP Tort Reform

counties such as Miami-Dade. This creates a strong incentive for Plaintiff attorneys to file suit, even if the disputed benefits are less than $100.00. Fortunately, on March 3, 2011 Senator Garrett Richter filed SB 1694 with the Florida Senate. The bill seeks to amend the PIP statute and was approved by a 6 to 5 vote by the Banking and Insurance Committee on April 12, 2011. The bill will next be considered by the Judiciary Committee, although a date has not yet been scheduled.

The full, original bill text proposed by Sen. Richter is available online at http://www.flsenate.gov, and there is a similar bill pending which was filed by Senator Bogdanoff under SB 1930. This article will address five significant components of Senator Richter's originally drafted bill. It is imperative to note that the Banking and Insurance Committee approved a drastically amended version of SB 1694, whereby the only remaining proposed amendment is the cap on Plaintiff’s attorney’s fees, as discussed in depth below. However, the proposed bill must be considered by two additional Committees, and at that time SB 1694 can be amended to reincorporate any of the originally proposed legislation.

First, the bill would amend Fla. Stat. §627.731 – Legislative Intent – to specifically allow insurers to apply the PIP fee schedule “regardless of their express inclusion in an insurance policy, and an insurer is not required to amend its policy to implement and apply such provisions, schedules, or procedures.” Unfortunately, the proposed bill does not state if insurers may apply the PIP fee schedule as of January 1, 2008. In the absence of such language, the ability to apply the fee schedule without amending the policy would only be prospective, meaning that the fee schedule would apply to all charges as of the date Senator Richter’s bill becomes law.

Next, SB 1694 also seeks to amend the PIP statute to specifically allow insurers to use the investigative tool of Examination Under Oath (“EUO”). Senator Richter includes a provision for EUO’s in §627.731 and §627.736(6) and would classify attendance at an EUO as a condition precedent to payment of PIP benefits. The proposed amendment would subject insureds, claimants, and assignee medical providers to EUO’s. This is a drastic change from the current law inasmuch as EUO’s have been held to be unenforceable provisions against assignee medical providers. See Marlin Diagnostics v. State Farm Mut. Auto. Ins. Co., 897 So.2d 469 (Fla. 3rd DCA 2004).

The third major change proposed by Senator Richter regards an insured’s failure – as opposed to unreasonable refusal – to appear for an Independent Medical Examination (“IME”), and the effect thereof. Currently under Florida law, an insured must unreasonably refuse to appear for an IME, and such unreasonable refusal would only bar recovery of subsequent PIP benefits. Moreover, mere failure to appear is not equivalent to unreasonable refusal, and the insurer has the burden of proving the unreasonableness of the insured’s refusal to submit to an IME.

SB 1694 would amend §627.736(7) to allow insurers to deny payment of all PIP benefits incurred after the date of the first IME request. Furthermore, under the proposed legislation, failure to appear for an IME would raise a rebuttable presumption that the failure was unreasonable. Thus, the Defendant would have the initial burden of proving an IME no-show and once satisfied the burden would shift back to the Plaintiff to prove that the failure to show was reasonable. This is a marked difference from the current state of the law regarding burdens of proof.

Fourth, and perhaps most importantly, Senator Richter proposes a cap on Plaintiff’s attorneys fees calculated as the lesser of $10,000.00 or three times any disputed amount recovered by the attorney. To illustrate the dramatic effect this provision would have, consider the following hypothetical. A Plaintiff files a declaratory action in Miami-Dade which seeks a judgment as to whether or not an insurer can apply the PIP fee schedule when the subject policy makes no reference to the PIP fee schedule. The Plaintiff propounds typical form written discovery and takes the deposition of the adjuster before filing a Motion for Summary Judgment.

At issue is a single MRI bill for CPT Code 72141, which was billed at $1,800.00 and allowed at 200% of Medicare Part B’s non-facility price of $1,011.00. Assume that the Plaintiff incurs 30 hours and ultimately prevails at summary judgment. The Plaintiff timely files a Motion for Attorney’s fees and is awarded $475.00/hour for a total of $14,250.00 in fees for successfully litigating over $631.20 in disputed PIP benefits.

Read More . . . P. 5
By its terms, the Graves Amendment does not apply to a state’s laws which impose financial responsibility or insurance standards on the owner of a vehicle, or which impose liability on rental car companies for failure to meet the state’s financial responsibility or liability insurance requirements. 49 U.S.C. § 30106(b). However, Florida courts have held that Section 324.021(9)(b)(2) is not a “financial responsibility law” to which the Graves Amendment expressly does not apply; therefore, preemption of vicarious liability of rental car companies has previously been upheld. 3

Anticipated Effects

Under subsection (9)(b)(2) of the proposed amendment, a lessor, who leases a motor vehicle for a period of less than one year, has a continuing duty to ensure that the lessee obtains at least $500,000 combined property damage liability and bodily injury liability coverage. If the lessee is uninsured or obtains less than the minimum required liability coverage, the lessor will be held liable up to $100,000 per person, $300,000 per incident, and $500,000 for property damage, plus an additional $500,000 in economic damages; nevertheless, the lessor is entitled to a reduction of the additional economic damage liability by any amounts recovered from the lessee or vehicle operator.

However, subsection (9)(b)(2) also provides that “if the lessee does not obtain coverage consistent with this subparagraph, the lessor shall be deemed liable for any amounts not recovered from the lessee arising out of the use of the motor vehicle or the acts of the operator in connection therewith.” (emphasis added). This provision is somewhat vaguely worded in light of the stated liability limits of 100/300/50 with additional $500,000; presumably, the lessor would be liable for any amounts not recovered from the lessee, up to the specified limits.

The clear intent of proposed Senate Bill 1806 is to bypass Graves Amendment preemption of vicarious liability for rental car companies. This is accomplished in several ways. First, the bill deletes references in the current version of subsection (9)(b)(2) to liability imposed on rental companies solely by virtue of ownership of the motor vehicle; the removal of such language imposing vicarious liability would, by itself, make the Graves Amendment inapplicable. As if in response to the seminal cases which hold §324.021 (9)(b)(2) is not a financial responsibility law, the proposed bill amends subsection (9)(c) to clarify that (9)(b)(2) contains “financial responsibility and insurance requirements”, and is not merely a cap on damages. 4

Similarly, the statute would be amended to add subsection (7)(e), which states that proof of financial responsibility with respect to leased motor vehicles shall be in the amounts set forth in subsection (9)(b); therefore, there would be no question whether the statute is a “financial responsibility law.” Finally, as discussed above, the proposed bill also requires that lessees possess $500,000 combined property and bodily injury liability coverage, and imposes liability on the lessor for failure to ensure that such insurance requirement is met. Therefore, pursuant to 49 U.S.C. §30106(b), the Graves Amendment would not apply.

By essentially making Graves Amendment preemption of vicarious liability of rental car companies a moot issue, proposed Senate Bill 1806 would increase such companies’ exposure in cases where the lessee does not have the statutorily required $500,000 combined liability coverage. The overall cost of renting a vehicle will likely increase if this bill is passed; not only will lessees directly incur the cost of obtaining this mandatory coverage, they will also pay higher rental prices which reflect the lessors’ increased cost of doing business (due to higher liability exposure). This will likely negatively affect the rental car industry, and possibly Florida tourism in general. For further information, please contact Anthony Petrillo, Tampa Partner (T: 813.226.0081 or e-mail AJP@LS-LAW.COM).

1 Aurbach v. Gallina, 753 So.2d 60, 62 (Fla. 2000).


3 Garcia v. Vanguard Car Rental USA, Inc, 510 F.Supp.2d 821 (M.D. Fla. 2007); Rosado v. DaimlerChrysler Financial Services Trust, 1 So.3d 1200 (Fla. 2nd DCA 2009).

4 See, Garcia v. Vanguard Car Rental USA, Inc; Vargas v. Enterprise Leasing Co., 993 So.2d 614 (Fla. 4th DCA 2008).
Liability cont.
Florida PIP Tort Reform

That is the result under the current state of the law. However, under Senator Richter’s proposed amendment, the same hypothetical Plaintiff attorney would be limited to recovery of $10,000.00 in attorney’s fees, or in other words the total award would be reduced by $4,250.00. Hopefully, a Plaintiff attorney would think twice about litigating a hypothetical case like this. Moreover, as the amount at issue decreases, the incentive to file suit also diminishes.

The final provision proposed by Senator Richter is the addition of an Arbitration provision to the PIP statute. Under SB 1694 the insurer would have the option of offering a policy that requires or allows the insurer or claimant to demand arbitration prior to litigation. Either party would still have the right to challenge the arbitration by filing an action in Circuit Court, but there would not be a de novo review of the record. If the insurer pays the arbitration award but the insured challenges the outcome in Circuit Court, there would be no entitlement to fees under Fla. Stat. §627.428.

We encourage you to review the bills proposed by Senator Richter and Senator Bogdanoff. Although the bills are similar, Senator Bogdanoff’s bill would amend and fortify numerous additional provisions of the PIP statute (i.e. strict compliance with the Standard Disclosure and Acknowledgment form and pre-suit demand letter subsections). In the event that there are any successful amendments to the PIP statute – minor or major – we will update you accordingly. For further information, please contact Andrew Chiera, Esq. (T:561.893.9088 or e-mail achiera@LS-LAW.com).

Verdicts & Summary Judgments

• Sherif Kodsy (Plaintiff/Appellee) v. Christian and Patricia Berian (Defendants, Appellants), Lemon Law, Fourth District Court of Appeal, 17th Judicial Circuit, Broward County, Jack Luks and Alison Marshall, Dismissal of Third Amended Complaint with prejudice for failure to state a cause of action, April 6, 2011.

• Steven Hill v. The Home Depot, False Imprisonment and Defamation, Broward County, Jack Luks and David Lipkin, Defense Verdict, 4/1/11.

• Sign Depot v. USLI, Breach of Contract, Orange County, James Waczewski and Leena Joseph, Final Summary Judgment ruling that there was no coverage under the client’s policy, March 22, 2011.

• Bonnie Dehler v. Coral Square Mall, Slip and Fall, Broward County, Jack Luks and David Lipkin. Defense Verdict, 3/10/11.

Welcome New Members

Paul S. Ginsburg, Junior Partner, joins the firm’s Miami office located on S.W. 27th Avenue. Paul is AV® Preeminent™ Rated by Martindale-Hubbell with more than 27 years of experience. His practice is devoted to Complex Tort Litigation matters. Paul has over 125 Jury Trials as First Chair.

Lysa M. Friedlieb, Junior Partner, joins the Palm Beach office located on Yamato Road. Lysa has 20 years of practice concentrating in Construction Defect, Product Liability, Premises, Vehicular, Wrongful Death, Maritime Law, Commercial Litigation, Professional Negligence cases and Dispute Resolution. She has worked for various private practices in South Florida representing businesses and insurers including major cruise lines and airline companies.

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