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LEGAL UPDATE

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Liability

Policy Limits Tender Under 624.155 Does Not Preclude Common Law Third-Party Bad Faith Action by Brian E. Pabian, Esq.

In *Macola v. Government Employees Insurance Co.*, 2006 WL 3025757 (Fla. Oct. 26, 2006), the Florida Supreme Court recently held, as a matter of first impression, that an insurer's tender of the policy limits to the insured in response to the insured's filing of a civil remedy notice, pursuant to section 624.155, Florida Statutes (2005), after the initiation of the lawsuit against the insured but before the entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith.

The injured third party, Michelle Macola, and the insured, Inge Quigley, brought a common law third-party bad faith action against the insurer, GEICO. The insured's husband negligently caused an automobile accident that resulted in personal injuries and property damage to Macola. Macola requested a settlement from GEICO for the bodily injury liability limit of $300,000 under the policy and $1,377.81 for property damage. GEICO did not accept this settlement offer. Macola then filed suit against Quigley for personal injuries. After the suit was filed, but before the entry of an excess judgment, Quigley filed a statutory Civil Remedy Notice of Insurer Violation ("civil remedy notice") with the Department of Insurance against GEICO, alleging a failure to settle with Macola for the policy limits when GEICO had an opportunity to do so.

Within 60 days after the civil remedy notice was filed, GEICO sent Quigley's counsel a letter, enclosing a check for the bodily injury policy limits and a policy release, and claiming that the tender of these limits cured the civil remedies complaint. Counsel for Quigley acknowledged receipt of the check and release from GEICO, but did not accept GEICO's offer. Ultimately, Macola's suit against Quigley proceeded to trial and the court entered a final judgment against Quigley for $1,541,941 for Macola's personal injuries. Thereafter, Macola filed a common law third-party bad faith suit against GEICO, alleging breach of duty of good faith to settle. GEICO removed the case to federal court.

Quigley filed a separate common law third-party bad faith suit against GEICO in federal court, and the two cases were consolidated. GEICO filed a consolidated motion for summary judgment, arguing that it had cured any statutory third-party bad faith claim by tendering the bodily injury liability limit within 60 days of the filing of the civil remedy notice.

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Recent Verdicts

Inside this issue of Legal Update, the firm reports a Summary Judgment for Violation of Employee Rights and 3 Defense Verdicts for Product Liability, Premises Liability and Vehicular Liability.

Marcus Zunner v. Florida Pool Products, Inc. and Wal-Mart Stores, Inc. (Pinellas County). $55M Sought- $130,000 verdict.

Daniel Santaniello, Anthony Petrillo and Paul Jones, the defense team for Florida Pool Products, received a major win on November 2, 2006 for a one month product liability trial in Pinellas County. Wal-Mart and Florida Pool Products, Inc. were co-defendants in the trial of a 3 year old boy who was rectally impaled resulting in a colostomy on a dive stick that had been recalled by the Consumer Product Safety Commission. Plaintiff asked the jury for **$15 million** in compensatory damages and further sought punitive damages in the amount of **$32-40 million.** The Jury found the family and others 85% at fault, resulting in a net verdict of $10,200 against our client and punitive damages of $120,000, well below a 7 figure Offer of Judgment.

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In this months issue...

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Workers' Compensation

Limitation on Suspension of Benefits Based on Claimant Fraud by Brian C. Karsen, Esq.

Pavilion Apartments and Claims Center v. Wetherington, 31 Fla. L. Weekly D2772 (November 6, 2006). In recent years, carriers have increasingly made use of the "fraud defense" in denying claims and suspending benefits in cases where claimants have engaged in certain unlawful activities as detailed in 440.105, Florida Statutes. 440.105(4)(b) states in part: "It shall be unlawful for any person: 1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter. 2. To present or cause to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim." 440.09(4)(a) further provides: "An employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105..."

In practice, carriers have been making the decisions as to what constitutes "fraud" when determining whether to suspend or deny benefits, without first having secured any official ruling, based on the actions of individual claimants. A Notice of Denial is then typically filed per 440.20(3), which requires a carrier notify the claimant "upon suspension or cessation of payment for any reason..." This First District Court of Appeals case states the Florida Workers' Compensation Act contains no authority for an Employer/Carrier to make such a unilateral determination that a claimant has violated sections 440.09 and 440.105, Florida Statutes.

In Pavilion Apartments, the employer/carrier made permanent total disability payments and furnished medical benefits to the claimant pursuant to compensable work-related accidents from 1993 and 1994. In 2004, the employer/carrier videotaped surveillance of the claimant over a period of seven months. After subsequently refusing to furnish a morphine pump as recommended by two authorized physicians, the employer/carrier took the updated deposition of the claimant in the course of the proceedings that followed. The employer/carrier then suspended benefits, arguing at trial that the claimant made false, incomplete or misleading statements during his deposition. The employer/carrier relied on the videotaped surveillance to demonstrate the claimant had exaggerated his limitations and lied about his activities, specifically his use of a cane. The judge of compensation claims ultimately found the employer/carrier did not meet its burden in establishing fraud. The First District agreed with the judge of compensation claims and affirmed the ruling. The employer/carrier was ordered to reinstate permanent total disability and supplemental indemnity benefits, with penalties and interest from the date they were suspended, and to furnish prescribed medical benefits.

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In its decision affirming the judge of compensation claims' ruling, the First District stated that "The Workers' Compensation Act contains no authority for the suspension of benefits based on a payor's unilateral determination that a claimant has violated sections 440.09 and 440.105, Florida Statutes (2004)." The Court went on to cite Isaac v. Green Iguana, Inc., 871 So.2d 1004, 1007 (Fla. 1st DCA 2004), in which it stated: "Section 440.09(4) contemplates that, before benefits may be denied pursuant to the statute, there must be a showing **[and an official determination]** that the claimant made "'oral or written statements concerning facts material to his claim that he knew were false, misleading or incomplete at the time the statements were made." This language was taken from an earlier decision in Village Apartments v. Hernandez, 856 So.2d 1140 (Fla. 1st DCA 2003). However, the language "and an official determination" was never included in the earlier rulings in Isaac and Village Apartments.

The First District now appears to be saying there shall be no denial or suspension of benefits based on claimant fraud until "an official determination" is made. An "official determination" would seem to indicate a ruling by a judge of compensation claims, administrative law judge, court or jury as stated in 440.09(4), though this is not specifically defined by the First District in the instant case. This represents a significant departure from the manner in which parties have previously handled fraud cases. However, the decision does not reference 440.20(3) which states "Upon making initial payment of indemnity benefits, or upon suspension or cessation of payment for any reason, the carrier shall immediately notify the injured employee...that it has commenced, suspended, or ceased payment of compensation." This statute implies that carriers do possess authority to make a determination of whether to suspend benefits for any reason.

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Liability, cont.

The district court granted GEICO's motion for summary judgment, and also concluded that, under the election of remedies notice, Quigley's filing of the civil remedy notice estopped the common law third-party bad faith action and, in the alternative, GEICO's tender of the policy limits constituted a full satisfaction of the common law claim.

The plaintiffs appealed, arguing that: (1) GEICO's tender of policy limits did not constitute an adequate cure and (2) even if it did cure the statutory third-party bad faith claim, it did not bar a common law third-party bad faith action. The Eleventh Circuit concluded that the district court erred in holding that Quigley's filing of the civil remedy notice constituted an election of remedies that estopped Quigley from pursuing a common law third-party bad faith action. The appellate court also certified these issues to the Florida Supreme Court for resolution.

In resolving the certified questions, the Supreme Court explained that section 624.155(3)(a), Florida Statutes, sets forth the notice provisions for a statutory bad-faith suit and requires as a condition precedent to bringing suit that both the insurer and the Department of Financial Services receive written notice of the alleged statutory bad faith violation. Additionally, under section 624.155(3)(d), the insurer has the opportunity to cure an alleged violation of its duty of good faith within 60 days after a claimant files notice. The Court also noted that, although the statute does not preempt a common law third-party bad faith action, a claimant is not entitled to a judgment under both the common law and statutory remedies.

Observing the distinction between third-party and first-party bad faith causes of action, the Court reasoned that allowing an insurer to preclude a third-party bad faith cause of action by tendering the policy limits to the insured when the underlying tort action is still pending would put the insured in a worse position because it would not eliminate the insured's exposure to an excess verdict. Additionally, the Court held that such a result would be inconsistent with the plain language of 614.155, which does not preempt a common law bad faith action. Therefore, the Court held that although the insurer's tender of the policy limits under section 624.155 after the lawsuit has been initiated against the insured but before the entry of an excess judgment could be used as evidence of good faith, it does not preclude a common law third-party bad faith action against the insurer because it does not eliminate the underlying tort action.

Workers' Compensation, cont.

Based on the instant case, an employer/carrier may now have to file a Motion to Suspend/Terminate Benefits (or a similarly-worded motion) and attend an evidentiary hearing to secure an "official determination" before taking steps to cut-off a claimant's benefits. Without taking such a step, an employer/carrier who suspends benefits might anticipate a claimant's attorney filing for a reinstatement of benefits pursuant to the instant case. 440.20(3), though, does appear to provide a carrier the authority to unilaterally suspend benefits for any reason, so long as notice is provided. Pursuant to this section then, a carrier may argue that it is acting within its statutory authority when determining whether fraud has been committed and continue to handle such cases in a similar manner.

The instant case, then, creates more questions than answers when dealing with the issue of claimant fraud. This issue will need to addressed further by the courts before a clearer understanding can be had on how to address such matters. In the meantime, adjusters will need to carefully discuss with their defense counsel the potential issues that might arise when suspending benefits due to claimant fraud. These discussions should also focus on the practices of the assigned judge of compensation claims in a particular claim as it is quite possible that such issues will be dealt with differently from jurisdiction to jurisdiction. Stay tuned for more updates on this important issue.

Defense Verdicts, cont.

Stagg v. Commodore Machine, Co. (Miami-Dade County). Jack D. Luks, Partner and Rusty A. Perez, Partner received a net verdict of $21,115 after set-offs on October 17, 2006 for an employee machine operation related incident in Miami-Dade County. The Plaintiff, an employee of Automated Plastics Group Industry, was operating an extruder machine when his arm was drawn into rollers associated with the machine's take off unit. The Plaintiff asked the Jury for $3.7M ($678,000 in specials; $3M in pain and suffering). The jury found Plaintiff 75% comparative negligence. The Defendant was entitled to a $1.12M set-off for a prior settlement and therefore the Plaintiff took nothing in this action. The Defense contended that the Plaintiff was properly trained, was himself negligent and the machine was reasonably safe if used properly.

Defense Verdicts, cont.

Canaday v. University of Central Florida Board of Trustees. Motion for Final Summary Judgment - Violation of Employee Rights under the Family and Medical Leave Act. Paul S. Jones, Partner obtained a ruling in favor of the Defendant on his Motion for Final Summary Judgment on August 22, 2006, in the United States District Court for the Middle District of Florida by the Honorable Gregory A. Presnell. The Plaintiff, Deborah Canaday, claimed in her Complaint that the Defendant, her employer, violated the provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. 2611, by first failing to advise the Plaintiff of her Federally-protected rights; then by denying her leave under said Act; and finally of terminating her by reason of excessive absenteeism, which the Plaintiff claimed should have been accommodated by FMLA leaves of absence. Numerous depositions were taken of the Plaintiff's supervisors; which evidence showed that contrary to the Plaintiff's allegations, she was advised of the availability of medical leave under the aforementioned Act. Further evidence showed that the Defendant strictly followed their own procedure for reprimands, predetermination and discharge of an employee; and at each stage of the process, the Plaintiff was given an opportunity to rectify the problem, but did nothing, nor did she ever formally request leave under the FMLA, but simply requested a three-month probationary period in which to determine if her new medications were taking effect. In Judge Presnell's Order, he found that the Plaintiff admitted that she was never denied benefits under the FMLA, nor did she request them. He further found that she admitted receiving notice of the availability of said benefits. For these reasons, Judge Presnell found no claim of interference with the Plaintiff's rights under the Family Medical Leave Act; and granted Final Summary Judgment in favor of the Defendant.

Garcia v. Rodriguez. Verdict rendered November 16, 2006. Paul Jones, Partner and William Peterfriend, Esq. received a major win for a vehicular liability in Broward County. The Jury awarded **$0** for total amount of damages for reasonable and necessary medical expenses sustained by Plaintiff. The jury answered No to the issue of permanency. The Plaintiff filed suit alleging that on January 25, 2004, Defendant violated a red light signal when exiting the Florida Turnpike onto Red Road. Defendant contended at trial Plaintiff violated the red light. Defendant further contended that Plaintiff was driving with alcohol on his breath after partying on South Beach the night prior to the accident. Plaintiff claimed that as a result of the subject accident, he sustained permanent scarring and permanent injuries to his neck. Plaintiff's treating physician Dr. Alex Cintron, D.C., testified that Plaintiff had a 5% impairment rating. Defendant's expert, Dr. Christopher Troiano testified that Plaintiff showed no signs of objective injury. At no time did Plaintiff seek treatment for his scarring. Plaintiff's medical bills totaled $12,700. Plaintiff stipulated to a $10,000 personal injury protection ("PIP") setoff. Plaintiff requested $25,000 for past medical bills, future medical bills as well as pain and suffering. The Jury found in favor Plaintiff 75% at fault regarding the accident, with Defendant 25% at fault. The Emergency Room physician, Dr. Jorge Enrique Guzman testified that he smelled alcohol on Plaintiff's breath while treating him in the hospital following the accident. Dr. Guzman further found that Plaintiff was not complaining of any injuries to his neck and back. The Jury did not find Defendant to be the legal cause of Plaintiff's damages.

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