IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 86,969

3rd DCA NO.: 94-02424

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner

vs.

KUNBOK LEE and GISUN LEE,

Respondent.
_____/

PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioners, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY, seek discretionary review of the Third District's opinion, filed November 1, 1995, which reversed the trial court's order granting Petitioners' Motion to Dismiss Respondents' suit to recover PIP benefits stemming from an automobile accident. (A.1)[1]

The automobile accident at issue occurred on December 18, 1988 in Dade County, Florida (A.4-5). The Respondents' minor daughter died on January 23, 1989 after receiving care at Jackson Memorial Hospital (A.5). The complaint alleged that Jackson Memorial Hospital made a demand for PIP benefits from Petitioners on or about February 14, 1989 (A.5). In their Initial Brief filed with the Third District, Respondents claim Petitioners denied that demand on or about February 18, 1989 (A.17).

On February 14, 1994, Respondents filed a complaint for payment of the medical expenses incurred at Jackson Memorial Hospital under the insurance contract with Petitioners. Petitioners moved to dismiss the complaint on the ground that the action was barred under the statute of limitations, which began to run on the date of the accident and lapsed on December 18, 1993 (A.9). The Third District reversed the lower court's order of

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[1] The opinion is attached hereto and made a part of the Appendix previously filed on or about December 1, 1995, pursuant to Rule 9.220, Fla.R.App.P. All citations to the Appendix will be indicated by the symbol "A." followed by the appropriate page number.

dismissal, and adopted the holding of Levy v. Travelers Ins. Co., 580 So. 2d 190 (Fla. 4th DCA 1991), i.e., that the statute of limitations runs from the date of the insurer's denial of PIP benefits (A.1-2). The Third District expressly rejected the holding in Fladd v. Fortune Ins. Co., 530 So. 2d 388 (Fla. 2d DCA 1988), that the statute of limitations in a PIP suit runs from the date of the accident (A.2).

SUMMARY OF THE ARGUMENT

The trial court correctly granted Petitioners' Motion to Dismiss. The initial act which gave rise to the Respondent's claim for PIP benefits was the alleged accident of December 18, 1988. This Court held in State Farm Mutual Insurance Co. vs. Kilbreath, 419 So. 2d 632 (Fla. 1982) that the statute of limitations runs from the date of the accident. Additionally, in Lumberman's Mutual Casualty Co. v. August, 530 So. 2d 293 (Fla. 1988), this Court held that the statute of limitations in a UM action is governed by contract law, not by tort law, because it arises out of an insurance contract. Therefore, the fact that a PIP suit is based, in part, on an insurance contract does not distinguish the suit from a UM action for statute of limitations purposes.

Just as the conditions precedent to filing a UM action were determined in Kilbreath not to be the starting point for the statute of limitations, a notice of claim for PIP benefits submitted to the insurer and the denial of that claim also should not trigger the statute of limitations. In the instant case, therefore, Respondents' notice of claim submitted to State Farm on February 14, 1989, and State Farm's written denial of that claim on February 18, 1989, were mere conditions precedent to the filing of the suit for PIP benefits; such procedures did not by themselves give rise to a cause of action.

Because State Farm promptly denied the claim, never made any payments pursuant to the claim and did nothing to cause Respondents

to rely on such payments, State Farm should not be estopped from asserting that the statute of limitations began to run on the date of the accident rather than on the date of the denial of the claim for PIP benefits. The Complaint, filed February 14, 1994, was, therefore, properly dismissed.

ARGUMENT

THE DISTRICT COURT'S HOLDING, THAT THE STATUTE OF LIMITATIONS FOR A PIP SUIT COMMENCES TO RUN ON THE DATE THE INSURANCE COMPANY FAILS TO PAY, CONFLICTS WITH THIS COURT'S HOLDING IN KILBREATH THAT THE STATUTE OF LIMITATIONS TO ENFORCE AN INSURANCE POLICY COMMENCES ON THE DATE OF THE ACCIDENT.

As stated by this Court in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So. 2d 632 (Fla. 1982), "The statute of limitations... begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insuring agreement." 419 So. 2d at 633. Although the particular insurance provision involved in Kilbreath was for uninsured/underinsured motorists (UM) insurance, the Court's emphasis was not upon the type of insurance involved[1] but upon the general proposition that the Plaintiff's claim for insurance benefits "stems from the plaintiff's right of action against the tortfeasor." 419 So. 2d 634 (quoting Kilbreath vs. State Farm Mutual Automobile Insurance Co., 401 So. 2d 846, 847 (Fla. 5th DCA 1981) (Sharp, J., dissenting)).

The Kilbreath opinion rejected the argument that conditions precedent with which the insured must comply prior to bringing the lawsuit should toll the statute of limitations: "These are remedies provided by the insurance policy which the insured must exhaust

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[1] For example, the Court's opinion was not fact-intensive: "The pertinent facts maybe stated briefly." Kilbreath, 419 So. 2d at 633. Moreover, the opinion did not concern itself with whether the statute of limitations was four years, as required for torts, or five years, as required for contracts. Id. at 633 n.2.

before he can sue the insurer, but the statute of limitations is not tolled during the running of these times." 419 So. 2d at 634. (emphasis in original). Such conditions precedent are mere "procedure[s] whereby the insured may recover his loss against his own insurer." Id. (emphasis in original).

In the instant case, the procedures for seeking PIP benefits under § 627.736, Florida Statutes, are exactly the type of "conditions precedent," "procedures," or "remedies" discussed in Kilbreath. Compliance with those procedures entitles the insured to sue if such claim is not accepted within thirty days or is later denied; the intent of these procedures is to promote settlement and avoid litigation, not to provide a cause of action. Williams v. Gateway Insurance Co., 331 So. 2d 301 (Fla. 1976) (legislative intent in enacting § 627.736 was to encourage settlement and minimize litigation).

The Second District's decision in Fladd v. Fortune Insurance Co., 530 So. 2d 388 (Fla. 2d DCA), review denied, 539 So. 2d 475 (Fla. 1988), correctly applied the Kilbreath holding to an action to recover PIP benefits: "A cause of action for a PIP claim, like a cause of action for uninsured/underinsured motorists benefits, stems from the plaintiff's right of action against the tortfeasor and, thus, arises on the date of the accident.'" 530 So. 2d at 391. (emphasis supplied). In their brief with the Third District, Respondents argued that the holding in Fladd was specifically dependent upon the fact that the insurance company had not sent a written denial to the claimant and that the decision "left open"

the proposition that the statute of limitations changes when the insurer sends a written denial of the claim (A.19). To the contrary, the Fladd decision was not concerned with whether denial of the claim came in the form of a written denial or by virtue of the insurer's failure to accept the claim within thirty days as required by § 627.736 (4)(b), Florida Statutes (1981).

The Fladd court was concerned with insurers who accept the claim for a period of years and then send a written denial. The court noted that situations may arise in which the insured had been "lulled into a sense of security or belief that no further action was necessary to ensure receipts of benefits legally due," e.g., where the insurer had been paying benefits "for a period up to five years," but then refused to pay any further. Fladd, 530 So. 2d at 391 n.1. In such cases, the carrier's own actions in causing the insured to wait for more than five years before filing suit, would arguably estop the insurer from asserting the five-year statute of limitations.

Such an estoppel type of argument was successfully made in Donovan vs. State Farm Fire and Casualty Co., 574 So. 2d 285 (Fla. 2d DCA 1991). In Donovan, the insured had received benefits from the insurer for three years until the insurer sent a letter declining to make further payments. The court in Donovan continued to recognize the general proposition in Fladd that the cause of action accrues on the date of the accident, but found an exception to that rule because of the fact that the insurer had originally accepted the claim and made continuous payments for several years

until arbitrarily sending a "specific refusal to pay a claim." 574 So. 2d at 286. See also Roth vs. State Farm Mutual Insurance Co., 581 So. 2d 981 (Fla. 2d DCA 1991); cf. Pierson vs. State Farm Mutual Automobile Insurance Co., 621 So. 2d 576 (Fla. 2d DCA 1993) (holding that the statute of limitations runs from the date of the accident, not from the date the insurer canceled the insurance contract prior to the accident).

The trend among the Fladd line of cases suggests a middle-ground approach which recognizes the date of the accident as the starting point for the statute of limitations, but finds exception to that rule under the following circumstances: (1) the insured made a claim for PIP benefits; (2) the insurer accepted the claim and made payments over a period of time, upon which the insured came to rely; and (3) the insurer thereafter made a specific refusal to make further payment on the claim. This approach will ensure Defendant's right to be protected by the statute of limitations, and will also preserve a Plaintiff's right to proceed if the Defendant's actions cause non-compliance with the statute.

In the instant case, the Third District Court of Appeal expressly rejected the Fladd line of cases and adopted the Fourth District's holding in Levy vs. Travelers Insurance Co., 580 So. 2d 190 (Fla. 4th DCA 1991) that an action to recover PIP benefits against an insurer accrues upon the insurer's failure to pay the PIP benefits regardless of whether or not the insurer had initially accepted the claim. However, the Fourth District's decision was based upon a narrow interpretation of Kilbreath as applying to UM

claims and not to PIP claims, under the assumption that Kilbreath was "an exception brought about by the nature of the claim," i.e, that a UM claim is governed by tort law whereas a PIP claim is governed by contract law. Levy, 580 So. 2d at 191. That distinction overlooks and is contravened by this Court's holding Lumberman's Mutual Casualty Co. v. August, 530 So. 2d 293, 295 (Fla. 1988), that a UM action is governed by contract law for statute of limitations purposes, not by tort law:

> Although we recognize that an action to recover uninsured motorist benefits involves some aspects of a tort action, we agree with the conclusion of the Second District Court of Appeal in Burnett v. Fireman's Fund Ins. Co., 408 So. 2d 838 (Fla. 2d DCA), review denied, 419 So. 2d 1197 (Fla. 1982), that the rights and obligations of the parties under an insurance policy are governed by contract law since they arise out of an insurance contract.

The Fourth District's narrow interpretation of Kilbreath as an "exception" is further undermined by this Court's broad application of Kilbreath in Department of Transportation vs. Soldovere, 519 So. 2d 616 (Fla. 1988). In Soldovere, this Court, relying upon Kilbreath, held that the statute of limitations in an action against the Department of Transportation begins to run on the date of the accident, not on the date that the department denied the claim. The requirement that the plaintiff file a notice of claim under § 768.28(6), Florida Statutes (1981), was held to be a mere procedural condition that did not itself give rise to a substantive right of action. In support of that reasoning the Court construed Kilbreath broadly and rejected the Fourth District's narrow interpretation of Kilbreath:

> [Kilbreath] is more on point. Kilbreath brought an action on his auto insurance policy after the limitations had run. In the interim period, however, he requested arbitration as required by the insurance contract; Kilbreath claimed arbitration (or its waiver or denial) was a condition precedent to an action on the policy and thus the claim arose after compliance with the condition. This Court held that the claim arose at the time of the accident "since the right of action stem[med] from the Plaintiff's right of action against the tortfeasor." 419 So. 2d 33. We find no merit to the Fourth District's distinguishing [Kilbreath] because Soldovere involved a "statutorily mandated accrual date" rather than one determined by contract. 500 So. 2d 570. This appears to beg the question whether the procedural requirement affects the accrual date of the action.

519 So. 2d at 617. (emphasis added).

The rationale of the Florida Supreme Court in Kilbreath and Soldovere are similar to that of the Third District's opinion in Allstate Insurance Company vs. Metropolitan Dade County, 436 So. 2d 976 (Fla. 3d DCA 1983), which held that the statute of limitations begins to run on the date of the accident in a subrogation action brought by subrogee/insurer, not on the date the insurer paid benefits to the subrogor/injured party. The Court stated two important policy reasons for establishing the date of the accident as the date of commencement of the statute of limitations: (1) it encourages the insurer/subrogee to meet its obligations quickly, and (2) it fixes a maximum time period in which the potential defendant can expect to be sued. Similar policy concerns were expressed by this Court in Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976):

> The purpose of the statute of limitations is to protect unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution.

These policy considerations are important to the instant action. Two months after the accident of December 18, 1988, a claim was made for PIP benefits on February 14, 1989. Within four days of that claim, the insurer notified the claimant that the claim would be denied. Assuming the date of the accident triggered the statute of limitations, Plaintiffs had a full four years and 303 days to file suit. The insurer did nothing during this time to lull the Plaintiffs into a false sense of security by accepting the claim or promising to make payments on the claim. Their denial was prompt and unequivocal.

On the other hand, if this Court were to adopt the Levy holding that it is the denial of the claim which triggers the statute of limitations, regardless of the circumstances, the delay in filing suit potentially could reach unreasonable periods of time. To begin with, there would be no limit to the time that the Plaintiff could wait before making the initial claim for PIP benefits. Assuming that the Plaintiff was in an accident in January 1, 1991, waits until January 1, 1996, and receives an immediate denial of the claim that day, the insured would have until January 1, 2001 - ten years from the date of the accident - to file suit. By that time many of the witnesses may be dead or missing and the records of the treating physicians destroyed,

making it impossible to defend the claim. Such a possibility goes against the very purpose of the statute of limitations.

CONCLUSION

The statute of limitations is a fundamental precept of any legal community. While it is important to give the injured party ample opportunity to present his case, such opportunity must be limited. The line must be drawn somewhere. Petitioners' interpretation of Fladd and Kilbreath will protect both plaintiffs and defendants in an equitable manner. Accordingly, the trial court's order granting Petitioner's motion to dismiss should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief 29th day of December to: **ROBERT ROSENBLATT, ESQUIRE,** 66 West Flagler Street, Penthouse, Miami, Florida 33130.

Respectfully submitted,

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