

**Online Reference: FLWSUPP 3208WATT**

**Insurance -- Property -- Insured's action against insurer -- Conditions precedent -- Presuit notice -- Supplemental claim -- Whether insured complied with section 627.70152's presuit notice requirements is properly considered on motion to dismiss -- Where notice of intent to initiate litigation was submitted prior to insurer issuing coverage determination regarding supplemental claim, notice is invalid, and lawsuit is premature**

AKEYIA WATTS, Plaintiff, v. EDISON INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 24-CA-004622. September 23, 2024. Alane Laboda, Judge. Counsel: Bryce James Uy, for Plaintiff. Dayana Hernandez, Salehi, Boyer, Lavigne, Lombana, P.A., Coral Gables, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

**THIS CAUSE** came before the Court on September 16, 2024, upon Defendant's *Motion to Dismiss, or in the Alternative, Abate Premature Litigation* (“Defendant's Motion”) and the Court after considering oral arguments of the parties, the motions, the court file, the Complaint, applicable law, and being otherwise advised in the premises, the Court finds as follows:

**ORDERED AND ADJUDGED:**

The Court **GRANTS** the Defendant's Motion to Dismiss and finds as follows:

1. Defendant argues that the Court cannot consider the motion because they pled in their Complaint that they complied with all conditions precedent to filing suit. However, the Court finds that based on the plain language of section 627.70152 and Florida Rule of Civil Procedure 1.130(b), as well as all of the pleadings and pertinent case law, this Court determines that it is proper for it to consider whether Plaintiffs' notice complied with section 627.70152.
2. Specifically, section 627.70152(5), Florida Statutes, provides in pertinent part that “[a] court must dismiss without prejudice any claimant's suit relating to a claim for which a notice of intent to initiate litigation was not given as required by this section . . . .” (Emphasis added). That the statute requires courts to “dismiss without prejudice” for failure to submit a compliant notice of intent to initiate litigation establishes that compliance with the statute can be considered on a motion to dismiss. This is buttressed by the Florida Third District Court of Appeal's recent decision of first impression in *Citizens Prop. Ins. Corp. v. Walden*, No. 3D24 196, 2024 WL 4031549, at \*1, \*1 (Fla. 3d DCA Sept. 4, 2024) [49 Fla. L. Weekly D1815a], wherein the Court granted certiorari and quashed a trial court's order denying an insurer's motion to dismiss based on the plaintiff's failure to submit a section 627.70152 notice prior to suit. In so holding, the Walden Court relied on a “bevy of medical malpractice cases finding that a litigant's failure to satisfy the mandatory presuit procedures . . . satisfies the threshold jurisdictional inquiry” to satisfy certiorari jurisdiction, and held that “[s]ection 627.70152 cannot be meaningfully enforced on post-judgment appeal because the purpose of providing the presuit notice is to prevent the premature filing of a lawsuit” *Id.* (emphasis added); *accord Brundage v. Evans*, 295 So. 3d 300, 305 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D627a] (quashing trial court's order denying physician's motion to dismiss where plaintiff's statutory presuit notice of intent failed to include an expert opinion as required by section 766.106, Florida Statutes). Thus, as an order denying a motion to dismiss which meritoriously raises noncompliance with section 627.70152 is immediately appealable due to the irreparable harm of allowing the case to proceed, it follows that the issue is properly considered upon a motion to dismiss.
3. In the matter before the Court, the Plaintiff submitted a notice of the loss to Defendant on or about October 6, 2022. The Defendant then investigated the claim and issued an initial coverage determination by letter

dated November 19, 2022.

4. The coverage determination letter enclosed an estimate which provided coverage for damage observed to the right elevation of the property as well as the garage.
5. The Insured subsequently submitted a Notice of Intent to Litigate on June 4, 2024.
6. The Notice of Intent to Litigate was accompanied by an estimate dated April 17, 2024, which included a full roof replacement as well as repairs to the several of the property. Defendant's argue this is a supplemental claim as no claim was ever previously made for a full roof replacement and the first notice they had of same was at the time of the filing of the Notice of Intent.
7. Florida Statute 627.70131 states follows:

Within 90 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. The insurer shall provide a reasonable explanation in writing to the policyholder of the basis in the insurance policy, in relation to the facts or applicable law, for the payment, denial, or partial denial of a claim. If the insurer's claim payment is less than specified in any insurer's detailed estimate of the amount of the loss, the insurer must provide a reasonable explanation in writing of the difference to the policyholder. Any payment of an initial or supplemental claim or portion of such claim made 90 days after the insurer receives notice of the claim, or made more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later, bears interest at the rate set forth in s. 55.03. Interest begins to accrue from the date the insurer receives notice of the claim. See Florida Statute 627.70131(7)(a).

8. Further, in *Hernandez v. Citizens Property Insurance Corp.*, 278 So. 3d 797 (Fla. 3d DCA 2019), the court clarified that a supplemental claim occurs when new or additional damages are identified after the initial adjustment.

9. The Court finds that the Notice of Intent to Litigate was the first indication of an existing dispute following the initial adjustment of the claim and was the first time the Insured was provided with the abovementioned estimate.

10. As such, Florida Law provided Defendant until at least September 2, 2024 to provide a coverage determination on the Plaintiff's supplemental claim.

11. Florida Statute 627.70152(2)(a) requires a Complainant that “[a]s a condition precedent to filing a suit under a property of insurance policy, a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department. Such notice must be given at least 10 business days before filing suit under the policy, but may not be given before the insurer has made a determination of coverage under s. 627.70131.

12. Consequently, Florida Law clearly states that a Notice of Intent to Litigate must be given at least 10 business days before filing suit under the policy but may not be given before the Insurer has made a determination of coverage under s. 627.70131.

13. In this case the Notice of Intent to Litigate was submitted prior to Defendant's issuing a coverage determination regarding Plaintiff's supplemental claim.

14. Given that the Notice of Intent to Litigate is invalid as a matter of law, Plaintiff's lawsuit is premature as

they failed to comply with the strict requirements of Florida Statute 627.70152.

WHEREFORE the reason enumerated herein Defendant's Motion to Dismiss is **GRANTED**. This matter is hereby *dismissed without prejudice*.

\* \* \*