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FLORIDA AUTO GLASS CLAIMS: A CRACKED SYSTEM

By Dale Parker and Brendan McKay

If you have auto insurance in Florida and notice a crack or chip in your windshield, you can typically call your insurer, get a referral to a glass company that has an agreement with your insurer, and have the damage repaired with no out-of-pocket costs. However, glass shops that are not part of an insurer's network will sometimes offer to do work and then sue for the difference between what they charge and what the insurer will pay. This article identifies some of issues that typically arise in such cases, and makes some proposals for resolving them.

A Tale of Three Drivers:

The Florida sun beamed down on the cars zipping down the highway. Rocks shot out of the back of a large truck and struck several windshields. Drivers cursed and asked "Now what do I do?"

The first driver saw a crack in her windshield. She stopped to get gas, pulled out her insurance card, and dialed the number for windshield claims. She spoke to a nice young lady who explained the process for replacing her windshield and scheduled the work to be done at her office. The insurance carrier guaranteed the work at no out of pocket cost to her.

The second driver also stopped to get gas and decided to use the drive-thru car wash. A nice young man walked up, pointed to a crack in the windshield, and said "I wouldn't want you to get a ticket for driving with unsafe glass." He explained that his company replaced windshields at no cost to the car owner. They "worked with" all of the major auto insurers and would be happy to submit the paperwork. All the driver had to do was to sign a simple form.

The third driver also pulled into the carwash. The same nice young man walked up and said "I wouldn't want you to get a ticket for driving with unsafe glass." The driver looked and looked at her windshield but could not see any

damage. The nice young man explained that some windshields get small chips which can cause the glass to shatter and his company specialized in fixing these chips. "We work with all of the major auto insurers and would be happy to submit the paperwork." All she had to do was to sign a simple form.

Filing a Glass Claim Through the Carrier

The Florida Legislature does not want Floridians driving with cracked and broken windshields. Section 627.7288, *Florida Statutes*, requires auto insurers to repair or replace broken windshields without application of policy deductibles.¹ In essence, properly insured drivers can get a new windshield at no out of pocket cost.

Many of Florida's auto carriers set up processes to comply with the law and to speed up the handling of windshield glass claims. Generally, these involve the insured calling in the claim and speaking to a glass claims specialist. The carriers set up vendor networks with local glass shops to respond to these claims. The "in network" glass shops and the carriers agree on specified rates for different services and the insured gets her glass problem fixed. The first driver in our story went through this process.

ABOUT THE AUTHORS...



DALE PARKER graduated from Dartmouth College in New Hampshire with a double major in 1987. He took a year off to work and put his wife through graduate school. Afterward, Dale came back home to Florida and went to the University of Florida College of Law where he was the editor in chief of the *Journal of Law and Public Policy*. Dale graduated with honors in 1991. Dale is a shareholder at Banker Lopez Gassler. He chairs the firm's state wide PIP/SIU Practice Group board. Dale has tried 100 civil trials, is a Board certified civil trial lawyer and is AV rated by Martindale Hubbell.



BRENDAN MCKAY received his undergrad degree from the University of Florida where he majored in Criminology and minored in History. He received his law degree from the Levin College of Law at the University of Florida. Brendan is an attorney at Banker Lopez Gassler P.A. He practices in the area of insurance defense. Specifically, he has focused on first and third party personal injury claims, property damage claims, and insurance fraud. Since Brendan began practicing law, he has spent extensive time and specialized in defending first-party windshield only property damage claims against insurers. Brendan has been involved in defending these particular claims almost since their inception and has been at the forefront of developing case law on the key issues in the state of Florida.

Going Out of Network

Some glass shops simply do not want to be part of the carriers' glass vendor network. Many of these shops contract with and are paid by the insureds directly. To use a health care analogy, glass shops which participate in the carrier's vendor programs are "in network." Non-participating glass shops are "out of network."

Some glass shops circumvent the carrier's system and then try to claim the benefits of coverage under the insured's policy. These "out of network" vendors have driven an explosion of windshield litigation in Florida.

Glass Claims in Small Claims Court

The typical windshield lawsuit is filed in small claims court. The allegations are generally vague; the complaint often fails to include the documents necessary to allow the court and the carrier to determine what is actually owed. Many complaints appear to be recycled from old PIP suits. Most completely fail to state the policy language under which the glass shop claims coverage. Despite these deficiencies and the fact that the plaintiff vendor chose not to go through the carrier's process, all of the complaints claim an entitlement to attorney fees and costs for "being forced to file suit."

Let's look at some of the questions facing Florida's judges in today's glass claims.

Pleadings and Motion to Dismiss Stage

Who Can Sue?

Florida allows an insured to assign her rights to collect insurance benefits to a third party.² The legal document is typically called an Assignment of Benefits. The legal impact and enforceability of the Assignment of Benefits is a question of law to be decided by the trial judge.³

To claim benefits from an auto carrier, an "out of network" glass

shop needs a valid assignment of benefits from the insured. Typically, vendors ask the insured to sign a paper or electronic document before the work is performed. The vendors then submit this to the carrier along with the request for payment.

Some insureds have testified that they did not sign any forms at all.⁴ Others have said that the signature on the form submitted by the glass shop is not theirs.⁵ If these facts are established, the trial judge must determine whether these facts invalidate the written assignment of benefits.⁶ Typically, those cases are promptly dismissed once those facts are discovered by the parties, usually through the sworn testimony of the insured and alleged assignor.⁷ If the case is not dismissed, then the argument usually shifts to a claim that there is an equitable assignment based on the insured's alleged "intent" to assign benefits to the Glass Shop.⁸ Absent a valid assignment of benefits, either written or equitable, the trial judge can dismiss the lawsuit due to Plaintiff's lack of standing.⁹

Why Does This Look Like a PIP Suit?

Complaints in glass cases typically allege that the carrier "failed to pay a reasonable amount for the repairs," or that the glass shop charged a reasonable amount and the carrier breached by not paying the "reasonable" amount in full.¹⁰ It appears that this language is drawn from old PIP complaints.

Judges should be wary of requests to apply PIP standards and case law to breach of contract glass cases. Although PIP claims involve a breach of contract action, PIP claims are not creatures of pure contract. Statutory standards such as "usual and customary" and time limits for payment are imposed by statute.¹¹ In fact, the terms of section 627.736 are deemed to be incorporated into every PIP policy.¹² Thus, Florida PIP carriers must comply with section 627.736 even if the PIP policy varies from the statutory scheme established by section 627.736.¹³

Automobile glass claims are creatures of pure contract. The Florida legislature has not created a statutory scheme for processing glass claims. The parties to the automobile policy are free to contract to mutually agreeable terms.¹⁴ Out of network glass shops filing suit under assignments of benefits are bound by those contractual terms.¹⁵ Bare allegations of breach of contract based upon non-contractual terms such as "usual and customary" and "reasonable time" can properly be stricken from the complaint.¹⁶

Trial judges deserve to see the actual contract language at issue before they are asked to determine whether or not a claim for breach of contract has been properly stated. A claim for breach of contract needs to identify the terms of the contract which the plaintiff believes were breached.¹⁷ Requiring the plaintiff to cite the relevant contract language at the beginning of the lawsuit will help the court rule on discovery issues and to address the sufficiency of the evidence at summary judgment.

Once the plaintiff states a valid cause of action for breach of contract, the trial judge can move on to rule on the boundaries of proper discovery.

Discovery and Deposition Stage

Does The Policy Language Bar the Claim?

The typical Florida auto insurance policy clearly states what the carrier will pay for glass repair and replacement. The "Limit of Liability" language defines the carrier's responsibility to pay for property damage, including damage to windshields.

One carrier's policy outlines the following Limit of Liability for payment of auto glass claims:

LIMIT OF LIABILITY

The limit of our liability for loss:

2. will not exceed the cost to repair or replace the property,

or any of its parts, with other of like kind and quality.

...

6. for glass repair or replacement, is not to exceed the prevailing competitive price. This is the price we can secure from a competent glass repair facility conveniently located to you at the time you make your claim. Although you have the right to choose any glass repair facility or location, the limit of liability for loss to window glass is the cost to:

- a) repair; or
- b) replace

such glass but will not exceed the prevailing competitive price. If the glass is replaced, then the cost will be paid at the prevailing competitive price for replacement. At your request, we will identify a glass repair facility that will perform the repairs at the prevailing competitive price.¹⁸

Essentially, the claim cannot exceed the "in network" vendor's charge to repair or replace the glass.

Since glass claims are breach of contract claims, the threshold question is whether or not the carrier did what the policy said it would do. If the carrier paid in accordance with the "Limit of Liability" language in the policy, the carrier did not breach its contract. Although policy language differs from carrier to carrier, payment in accordance with the stated policy language should bar the "out of network" vendor's claims that the vendor must be paid the full billed amount. The trial judge will want to look at this issue early on as it may allow for a quick disposition of the lawsuit.

Is the Price Right?

Insurance carriers control costs by negotiating rates for glass work. "Out of network" glass shops often charge much more than "in network"

shops. If local glass shops are ready, willing, and able to do the work at a set price, why should a carrier be forced to pay more to an "out of network" glass shop? Lawyers for the "out of network" glass shops often want to conduct discovery into the correctness of the prices paid by the carrier.¹⁹ The trial judge will need to decide if "reasonableness" of pricing is a legitimate issue in the context of a glass breach of contract case. Unless the contract at issue makes "reasonableness" an issue, the court can properly deny discovery into pricing.²⁰

Was the Glass Really Damaged?

Florida insurance policies provide coverage for damages arising from accidents. If there is no damage, then no benefits are owed. Some insureds have testified that their windshields were not damaged and did not need to be repaired or replaced.²¹ If a carrier paid for the vendor's services, the carrier can counterclaim against the glass shop for unjust enrichment.²²

Was the Work Really Done?

Many "out of network" vendors find their clients at the carwash or the mall parking lot and they do not give the insurance carriers notice of the pending repairs. If that happens, the carriers do not have an opportunity to inspect the glass to determine whether it needs to be repaired or replaced. Many of these glass shops do not keep the damaged glass for post-repair inspection.²³ They seldom have records identifying where they purchased the installed windshield from.²⁴ Absent some evidence, how can a trial judge determine if the work was really done?

Many insurance policies require parties making claims to give proper notice of claim to the carrier prior to filing suit seeking benefits under the policy. Duties under the policy do not transfer to the assignee, and in this context, glass shops unless the assignee agrees to assume the duty.²⁵ Even though in most cases the duty

to provide proper notice to the carrier under the policy does not transfer to the glass shop, that duty is not extinguished and can subject the suit to dismissal.²⁶ If proper notice of the claim is not provided by the insured in accordance with the policy provisions and the insurer is prejudiced, then the failure to satisfy the notice provision can operate as a bar to recovery under the policy.²⁷

What about the Motor Vehicle Repair Shop Act?

Section 559.904, *Florida Statutes*, requires a written estimate for automobile repairs in excess of \$100. The typical windshield replacement costs substantially more than \$100.²⁸ If several chips are repaired, the bill will exceed \$100.²⁹ Most "out of network" vendors do not give the insureds a written estimate before doing the work.³⁰ In many cases, the invoice or written estimate is not presented to the insured until after the work is completed. Although the courts have not yet ruled on whether post-replacement notice satisfies the requirements of section 559.904, the plain language of the statute requires the written estimate to be provided to the customer prior to the repairs being performed. If the proper notice is not given, the damages are capped at \$100.00.³¹

A Modest Proposal for Achieving Judicial Economy

1. **Require plaintiffs to cite the controlling portion of the breached contract.**

The Florida Bar mandates that an attorney shall not bring a case unless there is a basis in law or fact for doing so.³² At a minimum, lawyers should be required to have read and know the policy provisions they are alleging the carrier breached. If the lawyers can allege that the actions of the carriers "forced them to file suit," then the lawyers should be able to cite with particularity the portions of the contract they believe were violated by the carrier. Requiring the

complaint to contain the violated policy language will allow the trial court to rule at summary judgment and to determine the reasonable scope of discovery.

2. Resolve cases through Summary Disposition/ Summary Judgment motions.

Florida's Small Claims Rules allow for Summary Disposition.³³ Once the trial judge requires the plaintiff to cite the relevant portion of the contract, the court can then determine as a matter of law if the contract was breached. If the court feels that some discovery is required, the trial judge can narrow the scope of the discovery to those issues relevant to determining whether the "limit of liability" clause of the insurance contract was breached. Once any required discovery is complete, the court can determine as a matter of law whether or not a breach of contract exists.³⁴ Summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to summary judgment as a matter of law.³⁵ A motion for summary judgment is proper when the record materials show that the non-moving party cannot prove the claim alleged as a matter of law.³⁶

3. Prohibit fishing expeditions on pricing and timing of payment.

Reasonable Rate: Many glass complaints claim that the carrier failed to pay a "reasonable rate" or failed to pay the "usual and customary rate." If the policy does not provide for those types of payments, then those concepts should not be part of a breach of contract lawsuit.³⁷ Plaintiff may wish to use these PIP standards, but they simply are not applicable to a glass claim. The sooner the trial judge throws these issues out, the sooner the carrier can focus its discovery and move for summary judgment on the larger "limit of liability" defense.

Timing of the Payment: Another issue to be addressed early on in the lawsuit is the timing of the payment. Most carriers pay the "out of network" vendors the amount the carrier would have paid to "in network" vendors for the same services. Because the "out of network" bill is not submitted through the usual channels, payment may be received 30 to 60 days after submission. Adopting a page from the PIP playbook, plaintiffs often try to impose a 30-day deadline for payment of the bill. However, if the policy language does not require payment within a certain time frame, there is no basis for an independent breach of contract action for "untimely" payment.³⁸

4. Handle confession of judgment issues quickly.

Claims that the carrier confessed judgment often arise in glass cases. Florida law entitles a plaintiff to attorney fees if the plaintiff prevails in an action to recover benefits from an insurance carrier.³⁹ Paying benefits after the filing of a lawsuit for breach of contract in some instances can act as a confession of judgment triggering an entitlement to attorneys' fees. However, Florida law is clear that that a carrier does not confess judgment by paying benefits prior to the plaintiff's filing suit.⁴⁰ Florida courts have consistently held an award of attorneys' fees from an insurer is only authorized when the insurer has "wrongfully" withheld payment of the proceeds of the policy, "forcing the insured or beneficiary to resort to litigation."⁴¹

5. Allow proposals for settlement.

Section 768.79, *Florida Statutes*, and Florida Rule of Civil Procedure 1.442, allow a defendant to file a Proposal for Settlement to a plaintiff. Assuming that the full rules of civil procedure are in force, a carrier can file a proposal on the 91st day after suit was commenced. If the plaintiff does not accept the proposal and the carrier obtains a defense judgment, the carrier can seek to recover its

fees and costs from the "out of network" vendor. Allowing both parties to potentially recover attorneys' fees may help to speed a lawsuit toward settlement.

A Happy Ending for Our Three Drivers?

The first driver received a new windshield at no out of pocket cost. Her carrier guaranteed the work and she drove into the sunset singing a happy song.

Our other two drivers did not fare so well. Although they both got their windshields fixed, they did not get a guarantee from their carrier. Instead, they both became named plaintiffs in lawsuits and were subject to deposition and being called to testify at trial. The third driver's suit was complicated by his inability to provide evidence of actual damage to the windshield. If he had called his carrier and an "in network" provider had verified the presence of a small chip requiring replacement, he would have enjoyed a very different result.

¹ § 627.7288, Fla. Stat. (2015).

² *One Call Prop. Serv. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752-753 (Fla. 4th DCA 2015).

³ *Gables Ins. Recovery, Inc. v. Seminole Cas. Ins. Co.*, 10 So. 3d 1106, 1107 (Fla. 3d DCA 2009); see also *Birwelco-Montenay, Inc. v. Infilco Degremont, Inc.*, 827 So.2d 255, 256 (Fla. 3d DCA 2001).

⁴ *New View Auto Glass, LLC a/a/o Ernesto Vasquez v. State Farm Mut. Auto. Ins. Co.*, Case No. 15-SC-1031-1 (Fla. 20th Cir., Collier Cty.)

⁵ *Id.*

⁶ *Central Magnetic Imaging Serv., Inc. v. Progressive Express Ins. Co.*, 12 Fla. L. Weekly Supp. 520 (Fla. 6th Cir. (Appellate) 2004).

⁷ *Mark Lusnia d/b/a Atlas Auto Glass a/a/o Kasey Beaudin v. State Farm Mut. Auto. Ins. Co.*, Case No. 2013-SC-6150 (Fla. 9th Cir., Orange Cty.).

⁸ *Central Magnetic Imaging Serv., Inc.*, 12 Fla. L. Weekly Supp. at 520.

⁹ *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005).

¹⁰ *Mark Lusnia d/b/a Atlas Auto Glass a/a/o Dustin Hoff v. State Farm Mut. Auto. Ins. Co.*, Case No. 2013-SC-6074 (Fla. 9th Cir., Orange Cty.).

¹¹ 627.736(5), Fla. Stat. (2015); see also 627.736(4)(b).

¹² 627.7311, Fla. Stat. (2015).

¹³ *Id.*

¹⁴ *Hanover Ins. Co. v. Bramlitt*, 228 So. 2d 288, 290 (Fla. 1st DCA 1969).

- ¹⁵ *Lewis State Bank v. Travelers Ins. Co.*, 356 So. 2d 1344, 1347 (Fla. 1st DCA 1978).
- ¹⁶ Order Dismissing Plaintiff's Amended Complaint, *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass, v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.).
- ¹⁷ *Patton v. Carlson*, 132 So. 2d 793, 795 (Fla. 1st DCA 1961).
- ¹⁸ See *Superior Auto Glass of Tampa Bay, Inc. a/a/o Jeb Shaffer v. Geico Gen'l Ins. Co.*, Case No. 512014AP0007APAXWS (Fla. 6th Cir. (App. Div.), Pasco Cty.).
- ¹⁹ *GlassMax, Inc. a/a/o Jamaal Johnson v. State Farm Mut. Auto. Ins. Co.*, In the County Court of the Ninth Judicial Circuit in and for Orange County, Florida, Case No. 2016-SC-1210; see also *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.).
- ²⁰ Order on Defendant's Third Motion for Summary Judgment, *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.).
- ²¹ *New View Auto Glass, LLC a/a/o Ernesto Vasquez v. State Farm Mut. Auto. Ins. Co.*, Case No. 15-SC-1031-1 (Fla. 20th Cir., Collier Cty.).
- ²² *Id.*
- ²³ *Fry Enters., Inc. d/b/a Cornerstone Mobile Glass a/a/o Jacqueline Jones v. State Farm Mut. Auto. Ins. Co.*, Case No. 15-CC-002067 (Fla. 9th Cir., Hillsborough Cty.).
- ²⁴ *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.).
- ²⁵ See *Shaw v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010).
- ²⁶ See *id.* at 332; Order Granting Defendant's Motion for Summary Disposition and Final Judgment against Plaintiff, *Clear Vision Windshield Repair, LLC, a/a/o Patti Reagan v. Depositors Ins. Co.*, Case No. 15-SC-004055 (Fla. 20th Cir., Lee Cty.).
- ²⁷ See *Shaw*, 37 So. 3d at 332; *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1217-18 (Fla. 1985).
- ²⁸ *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.). (In this case, the glass shop billed \$1,000.52 for the windshield replacement.)
- ²⁹ *Cornerstone Network, Inc., a/a/o Tanya Laprarie v. State Farm Mut. Auto. Ins. Co.*, Case No. 15-04210-SP-26 (Fla. 11th Cir., Miami-Dade Cty.). (In this case, the glass shop repaired three chips and billed \$161.25 for those repairs.)
- ³⁰ See Affidavit of insured and alleged assignor, Ellen Opalecky, filed in *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.).
- ³¹ *Osteen v. Morris*, 481 So. 2d 1287 (Fla. 5th DCA 1986).
- ³² R. Reg. Fla. Bar 4-3.1.
- ³³ Fla. Sm. Cl. R. 7.135.
- ³⁴ *Superior Auto Glass of Tampa Bay, Inc. a/a/o Jeb Shaffer v. Geico Gen'l Ins. Co.*, Case No. 51-2010-SC-002045WS (Fla. 6th Cir., Pasco Cty).
- ³⁵ *Volusia Co. v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).
- ³⁶ *Hervey v. Alfonso*, 650 So. 2d 644 (Fla. 2d DCA 1995).
- ³⁷ Order on Defendant's Amended Third Motion for Partial Summary Judgment, *Mark Lusnia a/a/o Ellen Opalecky d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, Case No. 12-6187-SC (Fla. 6th Cir., Pinellas Cty.).
- ³⁸ *Mark Lusnia d/b/a Atlas Auto Glass v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 959a (Fla 9th Cir. (Orange Cty), Online Reference: FLWSUPP 2309MLUS, Case Nos. 2013-SC-161-O, 2013-SC-2280-O, 2013-SC-4866-O, 2012-SC-12027-O, and 2012-SC-6871-O. § 627.428, Fla. Stat. (2015).
- ³⁹ *Florida Life Ins. Co. v. Fickes*, 613 So. 2d 501, 503 (Fla. 5th DCA 1993).
- ⁴⁰ *Petty v. Fla. Ins. Guar. Ass'n*, 80 So. 3d 313, 316 (Fla. 2012) ("impos[ing] the obligation to pay a fee award upon an insurer that has wrongfully contested an insured's valid claim."); *Sunshine State Ins. Co. v. Davide*, 117 So. 3d 1142, 1145 n.4 (Fla. 3d DCA 2013); *Beverly v. State Farm Fla. Ins. Co.*, 50 So. 3d 628, 633 (Fla. 2d DCA 2010); *Leaf v. State Farm Mut. Auto. Ins. Co.*, 544 So. 2d 1049, 1050-51 (Fla. 4th DCA 1989); *Great Southwest Fire Ins. Co. v. DeWitt*, 458 So. 2d 398, 400 (Fla. 1st DCA 1984); *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 398 (Fla. 5th DCA 2007).

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