FLORIDA'S PILL MILL LAW: A BLESSING OR A BURDEN FOR VICTIMS OF MEDICAL MALPRACTICE?

By Jonathan Chambers

Overview of House Bill 7025

House Bill 7025, entitled "Prescription Drugs," was enacted on July 1, 2011.[1] This new law represents an aggressive reaction by the Florida Legislature to the state's severe pill mill problem. As indicated in the bill, Florida physicians alone purchased more than eighty-five percent of all oxycodone in the United States in 2006.[2] Additionally, ninety-eight of the top one-hundred oxycodone dispensing doctors in the country practice medicine in Florida.[3] House Bill 7025 seeks to tighten the reins on pain clinics by imposing strict registration requirements.[4] The bill also effectively creates a statutory standard of care for doctors operating pain clinics. For example it requires doctors to perform physical examinations, follow written protocols, conduct an assessment of a patient's risk for "aberrant behavior," create a treatment plan, obtain a patient's informed consent, and also meet specific criteria in maintaining medical records.[5] Perhaps most striking, however, is that the bill criminalizes certain practices. Among the bill's provisions triggering criminal penalty is the dispensing of pills from the premises of a pain clinic.[6] It also makes it a felony for a doctor to dispense more than a seventy-two hour supply of pain medicine to "any patient who pays for the medication by cash, check, or credit card in a [pain clinic]."[7] The significance of this¬—insofar as litigation is concerned—is that patients may be on the receiving end of criminal conduct and also victims of medical malpractice. The looming question is whether an insurance carrier can deny coverage for claims against pill mill doctors given the underlying criminal activity

Application of the Presuit Screening Process to 7025 Claims

Florida law requires that certain presuit screening requirements be met before a claim for medical negligence can be filed.[8] Section 766.106(1)(a), *Florida Statutes*, defines "claim for medical negligence" or "claim for medical malpractice" as a claim "arising out of the rendering of, or the failure to render, medical care or services." The trend in the case law is that claims involving criminal acts are for "medical negligence" if they allege injury which resulted under the "pretense of medical care."[9] One leading case on the issue of criminality and medical negligence is *Paulk v. National Medical Enterprises Inc.*[10] In *Paulk*, the plaintiffs alleged that several hospitals operated as a criminal enterprise, including claims that the hospitals treated patients "without medical necessity."[11] The *Paulk* court decided that such claims were for medical negligence and therefore subject to the presuit screen process.[12] Notably, the court had "no difficulty in deciding that fraudulent rendering of unnecessary medical care and services is encompassed by the term 'arising out of the rendering of . . . medical care or services . . . .'"[13]

When this precedent is applied to a claim involving a House Bill 7025 violation it appears clear that such claims will be subject to the presuit screening requirements. As noted above, pill mills are by their very nature engaged in treating patients "without medical necessity." A violation of the bill is also inherently committed under the "pretense of medical care" because pill mill doctors provide patients with medication under the guise of legitimate treatment for pain. Because of these characteristics of pill mills, a claim alleging violations of House Bill 7025 will likely be a claim for medical negligence insofar as Florida's presuit requirements are concerned. Thus, plaintiffs will have to comply with the lengthy and potentially costly presuit screening process.

1. Fla. HB 7025 (2011).
2. *Id.* § 28.
3. Bob Lamendola and Amy Pavuk, *Scott Signs Clinic Bill: Florida Will Shed Title as Oxy-Express*, ORLANDO SENTINEL, June 4, 2011, at A6.
4. Fla. HB 7025, § 3
5. Id.
6. *Id.* § 4.
7. *Id.*; Fla. Stat. § 465.0276 (2010).
8. Fla. Stat. § 766.106(2) (2010).
9. Burke v. Snyder, 899 So. 2d 336, 340 (Fla. 4th Dist. Ct. App. 2005).
10. 679 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1996).
11. *Id.* at 1289.
12. *Id.* at 1290.
13. *Id.*

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Does a 7025 Violation Destroy Insurance Coverage?

There are two primary components of insurance coverage in civil litigation.[14] The first is the insurer's duty to provide the insured with a legal defense.[15] The second is the insurer's duty to indemnify the insured.[16] In determining if a defense must be provided the "liability insurance carrier must defend the insured *only* when the initial pleadings fairly bring the case within the scope of coverage."[17]

Thus, to trigger a defense, the allegations contained in a complaint in a pill mill case will have to show that the doctor's injury causing conduct was within the scope of his or her liability policy. In short, issues regarding insurance companies' duty to defend may not be complicated in pill mill cases. However, the issue of coverage does not stop there. This is because "[t]he duty to defend is far broader than the duty to pay."[18] Thus, a plaintiff's attorney relying on an eventual insurance company payout must look well beyond the relatively easy process of getting the insurance company on the other side of the lawsuit. The focus quickly shifts to whether or not the insurance company must indemnify the insured in the end.

Scope of "Professional Services"

Generally, malpractice policies limit coverage to damages caused by the insured's provision of "professional services" (or "medical treatment" etc.) To date, Florida cases concerning criminal acts, medical malpractice coverage, and the definition "professional services" have dealt with some form of sexual assault. In *Lindheimer v. St. Paul Fire & Marine Insurance Co.*,[19] the court held that a dentist's sexual assault of a patient did not arise out of the rendering of professional services even though the dentist intravenously administered Valium to the patient before assaulting her.[20] The court reasoned that the dentist stopped providing a medical service when he began the assault and thus the "sexual assault was not *causally connected* to the provision of professional services, regardless of the 'pretense of medical care used by the insured to catch his victim unaware.'"[21] This case provides a clear example of the formula to be used by Florida courts in coverage disputes involving criminal acts, including House Bill 7025 violations. Simply, coverage will not be available unless the doctor's criminal act is "causally connected" to the medical services rendered. Broken down further, courts will look to see whether the doctor's acts can be categorized. If there is no way to separate the criminal act from the medical treatment, courts will likely find that the criminal act was "causally connected" to the rendering of professional services.[22]

When a "professional services" dispute arises between a doctor and insurance company for claims including House Bill 7025 violations, the "causal connection" test should be met because it is virtually impossible to separate to criminal violation from the medical treatment. Thus, such violations will be deemed to arise out the rendering of "professional services" for purposes of liability coverage. Fortunately for insurance companies, however, avenues other than litigation over the scope of "professional services" exist. Insurance companies may include criminal act exclusions in policies given to doctors who practice in pain clinics. The introduction of criminal malpractice proof policies is likely going to produce a new a two-tiered analysis in coverage disputes involving House Bill 7025 violations.

First, courts will have to continue to engage in the traditional test to see if a doctor's violation is "causally connected" to the medical treatment provided. Courts should conclude that most House Bill 7025 violations arise out of the rendering of medical treatment. Assuming a court does so it will then have to decide if the policy's exclusionary clause relieves the insurance company of the duty to defend and indemnifying the insured.

This two-tiered analysis has been used in other states. The supreme court of New Jersey, for instance, applied tier one of the test when it held that a doctor's sexual assault of a patient during a gynecological exam was a "medical incident."[23] Thus, the claim would normally trigger coverage under an insurance policy. However, the court applied tier two of test when it examined the doctor's policy which contained "an exclusion for claims based on injuries from 'the performance of a criminal act' by the insured."[24] Because of this clause, the court held that insurance coverage was barred.[25] Thus, in New Jersey, criminal act exclusions are a viable defense for the insurer in medical malpractice cases, even when the criminal act falls within the scope of "professional services."

Aside from the various sexual assault cases, the closest a court has been to deciding a House Bill 7025 type issue came from Maryland. In *Medical Mutual Liability Insurance Society of Maryland v. Azzato*,[26] the court was presented with an issue concerning medical malpractice and the criminal distribution of controlled substances to a patient.[27] The doctor was found to have committed medical malpractice by a "Health Claims Arbitration panel."[28] The doctor's insurance company subsequently filed a declaratory judgment action claiming that it had no duty to indemnify the doctor.[29] The basis of the claim was that the doctor's insurance policy "specifically exclude[d] from . . . coverage injuries arising out of criminal acts performed by the insured."[30] Although the doctor argued that the insurance company was estopped from raising policy defenses because of the panel's prior finding of malpractice, the court held that the criminal acts clause barred coverage. Thus, the *Azzato* court concretely held that an insurer is liable to their insured only for "non-criminal malpractice" when the insurance policy contains a criminal acts exclusion. [31]

Coverage Exclusions for Criminal Acts

Florida courts have not yet evaluated criminal act exclusionary clauses in medical malpractice coverage disputes. However, other types of coverage disputes with exclusionary clauses have been resolved. In P*rudential Property and Casualty Insurance Co. v. Swindal*,[32] the Supreme Court of Florida evaluated an intentional injury exclusion in a homeowners policy.[33] Specifically, the Court addressed the following question: "Does a . . . 'intentional injury' exclusion clause exclude coverage . . . where the insured committed an intentional act . . . but bodily injuries may have been caused accidentally and were not expected or intended by the insured to result?"[34] The Court focused on what constitutes an "intentional act" that would be subject to an insurance policy's exclusion.[35] The Court drew a distinction between the mere intent to act and the specific intent to cause harm. [36] In doing so, the Court reached its conclusion that, for purposes of intentional injury exclusions in homeowners insurance policies, an insurer must provide coverage unless it is shown that the insured subjectively intended to cause harm to a third party, regardless of whether or not the insured committed some intentional act. [37]

The *Swindal* dual intent rationale was later extended to apply to automobile insurance policies.[38] In *Allstate Indemnity Co. v. Wise*,[39] the insured caused injuries to various third parties during an automobile chase with a state trooper.[40] In a declaratory judgment action, the Second District Court of Appeals applied *Swindal* and held that while Allstate's insured intentionally drove his car during the car chase, he did not subjectively intend to cause injury to the various third parties.[41] The court used the following language to substantiate their ruling: "In *Swindal*, our supreme court reaffirmed that Florida law requires both an intent to act and a specific intent to injure in order to bring a loss within the ambit of an intentional act coverage exclusion."[42] In extending the law to apply to automobile policies, the court introduced public policy considerations. Specifically the court noted that "[t]he public policy of [Florida] strictly enforces minimum levels of insurance to protect the public."[43]

In a malpractice case including House Bill 7025 claims against a pill mill doctor, it is probable that a court will apply *Swindal* and *Wise* in determining if a criminal act exclusion bars coverage. It must be observed that neither *Swindal* nor *Wise* examined a professional liability policy nor a criminal act exclusion. Regardless, the underlying analysis may prove to be similar for malpractice coverage. Yet, the fact remains that public policy considerations are probably going to carry the most weight. In that light, a court will probably lean most heavily on the *Wise* court's recital of Florida's policy that insurance coverage be available to protect the public. Like *Wise*, which cited Florida's automobile financial responsibility law,[44] a court deciding a House Bill 7025 criminal act case will probably to look to Florida's medical malpractice financial responsibility law.[45] Section 458.320, *Florida Statutes*, entitled "Financial Responsibility," generally requires all doctors practicing in Florida to carry malpractice insurance.[46] The significance of this is that, as the court noted in Wise with automobile insurance coverage and third parites, a court in a House Bill 7025 case may hold that public policy favors malpractice insurance coverage for patients. Even though automobile insurance and medical malpractice insurance are different, the purpose and public policy behind each is the same. Both the driving of an automobile and the practice of medicine put the public at risk of injury. As such, the State of Florida requires persons who engage in those activities carry insurance. Presumably, a court would be reluctant to bar coverage when doing so would undermine this strong public policy—even if technically—the insurance policy purported to be "criminal-malpractice" proof.

Crime or Negligence?

To properly invoke the doctrine of *negligence per se* a plaintiff must show: (1) that a statute imposes a duty to protect others; (2) that the defendant violated that statute; (3) that the plaintiff is in the class intended to be protected by the statute; (4) that the type of harm suffered is the type the statute was designed to prevent; and (5) that the breach proximately caused the plaintiff's injuries. [47] If a plaintiff satisfies these requirements then the defendant is negligent as a matter of law and the only issue left

14. *See e.g.*, State Farm Fire & Cas. Co. v. Tippett, 864 So.2d 31, 33 (Fla. 4th Dist. Ct. App. 2003) (citing State Farm v. Higgins, 788 So. 2d 992, 995 (Fla. 4th Dist. Ct. App. 2001); Psychiatric Assocs. v. St. Paul Fire & Marine Ins. Co., 647 So. 2d 134, 137 (Fla. 1st Dist. Ct. App. 1994) (citing Nat. Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977); Keen, 962 So. 2d at 1024 (citing U.S. Fire Ins. Co. v. Hayden Bonded Storage Co., 930 So. 2d 686, 691 (Fla. 4th Dist. Ct. App. 2006).
15. *Id.*
16. *Id.*
17. *Keen*, 962 So. 2d at 1024 (quoting State Farm Fire & Cas. Co. v. Tippett, 864 So. 2d 31, 35 (Fla. 4th Dist. Ct. App. 2003).
18. Id.; Psychiatric Assocs., 647 So.2d at 137 (citing State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co., 406 So.2d 1184, 1188 (Fla. 1st Dist. Ct. App. 1981).
19. 643 So.2d 636 (Fla. 3rd Dist. Ct. App. 1994).
20. Id. at 638–639.
21. Id. (quoting New Mexico Physicians Mut. Liab. Co. v. LaMure, 860 P.2d 734, 738 (N.M. 1993)) (emphasis added).
22. "Causally connected" should not be confused with concepts of legal causation. The test merely seeks to determine the proximity between the criminal act and a doctor's medical treatment.
23. Princeton Ins. Co. v. Chunmuang, 698 A.2d 9, 18 (N.J. 1997).
24. Id. (quoting the defendant's insurance policy).
25. Id.
26. 618 A.2d 274 (M.D. Ct. Spec. App. 1993).
27. Id.
28. Id. at 276.
29. Azzato, 618 A.2d at 277.
30. Id.
31. Id.
32. 622 So. 2d 467 (Fla. 1993).
33. Id. at 468.
34. Id.
35. Id. at 471.
36. Id.
37. Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 471 (Fla. 1993).
38. Allstate Indem. Co. v. Wise, 818 So. 2d 524, 525 (Fla. 2d Dist. Ct. App. 2001).
39. 818 So. 2d 524 (Fla. 2d Dist. Ct. App. 2001).
40. Id. at 525.
41. Id.
42. Wise, 818 So. 2d at 525.
43. Id.
44. Fla. Stat. § 324.011 (2010).
45. Fla. Stat. § 458.320 (2010).
46. Id.
47. deJesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198, 201 (Fla. 1973).

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to determine is that of damages.[48] Thus, the plaintiff is relieved of the burden of having to prove negligence as an issue of fact as the entire issue is settled by virtue of the defendant's statutory violation.

A medical malpractice case involving a House Bill 7025 violation appears to be ripe for an application of *negligence per se*. First, House Bill 7025 clearly states what duty is required by doctors in pain clinics. As to the second prong of the formula, a plaintiff will be able to show that a doctor violated this statute in any number of ways. For example, if a doctor does not create a treatment plan or maintain written medical records he or she is in violation of the bill. [49] A plaintiff therefore would not have to use expert testimony to establish that such treatment falls below the standard of care.

Next, for negligence per se to be used, the statute must be "designed to protect a particular class of persons from their inability to protect themselves."[50] House Bill 7025 appears to fit this definition. For one, the overall purpose of the bill is to control pill mills in order to prevent prescription drug abuse and ultimately the injuries that stem from such abuse. [51] The class therefore intended to be protected by the bill is persons who receive pain medicine from pill mill doctors. Such persons are, by the very nature of pain medicine and the way pill mills operate, unable to protect themselves because pain medicine is highly addictive. [52] The legislature was cognizant of this reality as evident in the bill's requirement that doctors screen patients for "aberrant behavior."[53] Thus, a plaintiff who was prescribed pain medicine by a pill mill doctor is going to be in the protected class. The third prong of the *negligence per se* formula will thereby be satisfied.

The fourth prong of the *negligence per se* formula requires that a plaintiff show that the "suffered injury [be] of the type the statute was designed to prevent."[54] House Bill 7025 is designed to prevent prescription drug abuse and particularly the role pill mills play in encouraging that abuse.[55] Thus, any pill mill related injury—including addiction, and especially death—should be considered the type of harm designed to be prevented by the bill. A plaintiff suing a pill mill doctor for a pain medication related injury should therefore be able meet this requirement of the *negligence per se* formula.

Last, a plaintiff must show that the "violation of the statute was the proximate cause of his [or her] injury."[56] When determining if a defendant proximately caused a plaintiff's damages, Florida courts have stated that "the key question is one of foreseeability."[57] In that light, a plaintiff with a pain pill related injury will have to show that it was foreseeable that his injuries would occur as a result of the defendant's conduct. This should be straightforward. For example, say a doctor dispenses more than seventy-two hours worth of pain medicine—in violation of the bill—to a plaintiff.[58] That plaintiff then overdoses as a result of the quantity of pills dispensed. In this situation a reasonable doctor should have been able to foresee that dispensing more pills than allowed by law could lead to the plaintiff overdosing. The doctor's violation of the bill would therefore be the proximate cause of the plaintiff's injury. Accordingly, the last prong of the *negligence per se* formula would be met.

As indicated above, violations of House Bill 7025 which lead to injury will likely be *negligence per se*. Given the appropriate facts, each prong of the formula can be met. At the very least, the possibility of establishing that a pill mill doctor was negligent as a matter of law will open doors for plaintiff's attorneys. The prospect of litigating a case without having to hire expensive standard of care witnesses will be appealing. This appeal may make up for the risk plaintiff's attorneys will have to take when they decide to represent a plaintiff in a case where insurance coverage may not be available.

Conclusion

House Bill 7025 will have significant effects on medical malpractice litigation. Most of these effects have yet to play out. However, certain consequences are fairly predictable. For one, a claim against a doctor involving a House Bill 7025 violation will be a "claim for medical negligence" and therefore be subject to Florida's mandatory presuit screening process. In this regard, Florida's tort reform laws may produce unintended hardship on pill mill victims who seek civil justice.

Next, plaintiff's attorneys will have to calculate the financial risks associated with taking a pill mill case. The criminalization of certain medical practices with stir up Florida's fairly well settled approach to insurance coverage disputes. Suing a doctor with a standard policy which covers claims arising out the rendering of "professional services" will most likely result in coverage for House Bill 7025 violations. However, insurance policies with criminal acts exclusions will generate attention. While Florida precedent provides some insight as to how courts will treat criminal acts exclusions in pill mill cases, the answer is not readily apparent. What is settled is that such exclusionary clauses will be strictly construed against the insurer and in favor of coverage for the insured. It is also settled that public policy favors insurance coverage for the public. Thus, it is possible that criminal act exclusions will be held to be contrary to public policy in House Bill 7025 cases. This will be the case if courts decide that insurance coverage must be available to compensate victims of pill mill malpractice. However, it is also possible that courts will follow *Azzato* and bar coverage in House Bill 7025 cases by virtue of a criminal act exclusion. Ultimately, the decision will come down to public policy.

Last, House Bill 7025 violations are likely *negligence per se*. If courts agree, plaintiff's attorneys will be more willing to take pill mill cases because the doctrine presents an opportunity to litigate such cases without the financial risk associated with paying experts to testify at trial. This opportunity may even out the risk of insurance coverage being unavailable.

In sum, House Bill 7025 is an aggressive piece of legislation. Its effects on civil litigation are potentially large. It will be interesting to see whether the effects turn out to be more of a blessing or a burden for pill mill victims seeking justice for their injuries.

48. Id.
49. Id.
50. Id.
51. Fla. HB 7025, § 28.
52. Prescription Drugs Abuse and Addiction, NATIONAL INSTITUTE ON DRUG ABUSE (U.S. Dept. of Health & Human Services) (2005), at 2.
53. Fla. HB 7025, § 3.
54. deJesus, 281 So. 2d at 201.
55. Fla. HB 7025, § 28.
56. deJesus, 281 So. 2d at 201.
57. Lindsey v. Bell S. Telecomms. Inc., 943 So. 2d 963, 965 (Fla. 4th Dist. Ct. App. 2006).
58. Fla. HB 7025, § 3.

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