GET ME OUT OF HERE! HOW TO LEVEL THE PLAYING FIELD IN SMALL CLAIMS PIP ACTIONS ONE PROPOSAL FOR SETTLEMENT AT A TIME

by David Gagnon

Editor's Note: [Although small claims court was not designed for lawsuits involving two represented and often sophisticated parties, the jurisdictional amounts involved in PIP suits — as distinguished from the fees and costs of the suits — often make small claims court a legally appropriate venue. This article describes the steps necessary for a defense practitioner to protect the client's interest by invoking the Rules of Civil Procedure and offering a proposal for settlement.]

When you have been waiting for hours for the clerk to read through the painfully long list of litigants in small claims court, considering the following question may help you pass the time more easily: why is a suit for personal injury protection benefits involving two attorneys filed in small claims court at all? Small claims court is not designed for litigation involving attorneys, full discovery, or the interpretation of insurance contracts. Instead, small claims court is better suited for simple civil disputes between citizens. This article challenges the propriety of filing PIP actions in small claims court, even when a relatively low jurisdictional amount is at issue. It also offers a suggestion on how to level the playing field when you find yourself in the small claims arena: by filing a proposal for settlement.

Small Claims Court Is Not An Appropriate Forum For Cases Involving Attorneys and Insurance Contracts.

Since PIP generally involves relatively low limits,[1] jurisdiction is often technically proper in small claims court.[2] There are many advantages to the plaintiff's bar for filing suit in small claims court. Initially, small claims court is designed "to provide an open forum for the speedy resolution of disputes over minor claims."[3] Naturally, many plaintiff's attorneys enjoy speedy resolutions for cases they bring; if they are to be paid, it usually will not happen until the end of the lawsuit. Florida Rule of Small Claims Procedure 7.090(d) dictates that every case brought in small claims court must be set for trial within 60 days from the date of the pretrial conference.[4] This, coupled with bare-bones discovery rules, makes small claims court extremely advantageous for a plaintiff's attorney.

However, the informal environment of small claims court was not designed for litigation where both parties are represented. Instead, small claims court is "a tribunal that purposefully operates pursuant to a more relaxed set of procedural rules in order to provide every citizen a fair opportunity to have his or her day in court...."[5] The Rules of Small Claims Procedure are designed with the pro se litigant in mind, expressly tailored for the purpose of peacefully resolving disputes for citizens lacking legal expertise. In short, small claims court is designed for the case of "Little Old Lady v. Washer Repairman," and not for insurance litigation. Indeed, "small claims courts are designed to be a People's Court in which technical rules of pleadings must not obscure the greater purpose of justice for all."[6]

Some judges agree. For example, in *Treasure Coast Injury and Wellness Centre, P.L. v. Progressive Express Insurance Co.*[7] , a county court judge considered the issue of attorneys' fees in a PIP suit originating in small claims court. After noting that the presence of attorneys makes the case "more complicated than necessary," the court stated:

> The progression and resolution of this case, in a small way, points out the need for some kind of tort reform. This court would settle for just a little reform, such as a rule banning attorneys from small claims court.[8]

Another court noted during a fee dispute that

"since the damages sought were at or below the jurisdictional limit for small claims court, plaintiff did not need attorney representation and could have represented himself."[9]

Plaintiff's attorneys throughout the state, of course, argue that their clients are entitled to speedy resolution of PIP disputes as a matter of law, regardless of whether the clients are represented. They believe that their clients are entitled to bring their PIP suits in small claims court because the PIP statute is designed for virtually automatic payment of claims.[10]

While that may be true, PIP suits still do not necessarily belong in small claims court rather than county court. Of course, in a very small amount of cases, PIP cases really do need to resolve quickly; an insured may have been denied legitimate care, or may be waiting for wages in a dire financial situation. However, there are two primary reasons why allowing PIP suits in small claims court is still a bad idea, despite the rare case where it could be beneficial.

First, many PIP suits filed in Florida are filed by medical providers as assignee of the individual insured. As a matter of course, medical providers throughout the state are obtaining an assignment of benefits form from the patient early in the care. Additionally, the HCFA 1500 form submitted to insurers by medical providers in Florida to obtain compensation for care rendered has a section (box number 27) specifically designated to indicate whether the medical provider has accepted an assignment from the insured. These assignments essentially give medical providers the right to pursue the insurance claims directly against the insurer without involving the insured in any potential conflict.[11]

With many PIP suits proceeding in the name of a corporate medical provider, there is no indigent insured waiting patiently by the mailbox for his benefits check to arrive from his insurance company. Therefore, the argument that these cases must be brought to resolution within 60 days fails.[12] Where care has been completely denied to an individual insured, or where many weeks or months of lost wages are at issue, the amount in controversy will likely be above the small claims jurisdictional limit in any event. Thus, in a case where quick resolution is truly an issue, many times that case will not even be eligible for filing in small claims court.

This leads to the second argument against PIP suits being allowed in small claims court. As indicated above, the amount at issue in the great majority of PIP cases is often comparatively low. However, the amount in controversy is only a fraction of the question in PIP, since there is also a provision for the payment of attorney's fees if a PIP plaintiff is successful in obtaining benefits.[13] Although the jurisdictional limit for small claims court is exclusive of fees and costs, the potential exposure to an insurance company defendant is very high. Despite this exposure, the insurer is left to fight this battle in a plaintiff-oriented forum with less ability to take full advantage of its defenses under small claims procedure. Naturally, it is this provision for the payment of fees and costs by the insurer if the plaintiff prevails in the PIP action that can motivate some attorneys to take PIP cases at all.[14] Accordingly, a plaintiff's attorney can receive quick resolution of a PIP case and a potentially large amount of attorney's fees, without the burden of protracted litigation, by bringing the case in small claims court.

How To Level The Playing Field If You Are In Small Claims Court By Filing A Proposal For Settlement.

What can a defendant insurer do to strike back in small claims court? Defendants in circuit court actions sometimes have the option of removing the case to federal court when the jurisdictional amount exceeds $75,000.00 and there is diversity jurisdiction.[15] However, insurance companies dragged into small claims court by plaintiffs eager for quick resolution do not have the option of removing the case to circuit or even county court, a more appropriate forum for a dispute that will likely involve full discovery.

Historically, an insurance company defendant could do little to level the playing field in small claims court. Rule 7.020, Florida Rules of Small Claims Procedure (2005), allows a party to move to invoke the rules of civil procedure so that all discovery and expert witness rules will be made available. However, while most plaintiff's attorneys will agree to invoke most of the rules of civil procedure, they will rarely agree to include Rule 1.442, which, along with section 768.79, Florida Statutes, allows the parties to file a proposal for settlement. Thus, when sued in small claims court, insurers rarely enjoyed the bargaining power a strategically-filed proposal for settlement could bring.

With no real method for obtaining fees, and facing the possibility of having to pay plaintiff's attorney's fees if even a nominal amount of benefits were awarded, some insurers have made the business decision to simply settle claims. Even if insurers ultimately won the PIP suit, there was his-

torically no realistic method for them to obtain fees and costs from the other side.

The road leading to a defendant being able to file proposals for settlement in small claims PIP actions has been long and perilous. The first major victory came in the case of *U.S. Security Insurance Company v. Cahuasqui.*[16] In *Cahuasqui*, the Plaintiff sought PIP benefits in county (not small claims) court.[17] The defendant insurance company filed a proposal for settlement pursuant to Rule 1.442 and section 768.79.[18] Ultimately, the jury in the underlying case found that the plaintiff had made a misrepresentation on the insurance application and, accordingly, was not entitled to PIP benefits.[19] Upon motion by the insurance company for attorney's fees pursuant to its proposal for settlement, the trial court decided that the proposal for settlement statute was inapplicable to PIP actions. The court then certified as a matter of great public importance the following question:

> Is the proposal for settlement/offer of judgment statute, F.S. 768.79, applicable to PIP actions?[20]

The Third District Court of Appeal accepted jurisdiction and answered the question in the affirmative, finding that the proposal for settlement statute was applicable to PIP claims.

In so doing, the *Cahuasqui* court looked to the plain language of section 768.79, stating:

> Prior to 1990, the offer of judgment statute provided that it applied in "any action to which this part applies." However, in 1990, the legislature amended the offer of judgment statute so that it applied "[i]n *any* civil action for damages filed in the course of this state." (Emphasis added.) The plain meaning of the statute, as amended, is that it applies to *all* civil actions for damages.[21]

The court additionally noted that the purpose behind the offer of judgment statute was to encourage early termination of litigation by requiring litigants to realistically assess the value of their claims.[22]

The *Cahuasqui* court discussed at great length the position that most plaintiff's attorneys still take regarding the applicability of the proposal for settlement statute to PIP cases. Specifically, the plaintiff there argued that the "one way street" attorney's fees provisions contained within the PIP statute conflicted with the proposal for settlement statute. The Third District rejected that position, indicating that "the legislature did not state that section 627.428 was the *only* fee authorizing statute which applies in PIP cases, it merely provided that section 627.428 applies in any dispute between an insured and insurer under the Florida Motor Vehicle No-Fault Law."[23]

The plaintiff in *Cahuasqui* also argued that allowing proposals for settlement in PIP cases would deny insured individuals access to the courts by deterring the pursuit of valid claims.[24] The court again disagreed, stating:

> ...[t]he offer of judgment statute does not affect an insured's decision to bring suit. At best, it may affect an insured's decision as to whether to continue to litigate, rather than compromising the claim, *after* suit has been filed. Thus, the offer of judgment statute has less of a deterrent effect than a prevailing party fee provision which, according to the Supreme Court of Florida does not deny access to courts.[25]

Insurance defense lawyers across the state breathed a sigh of relief after the *Cahuasqui* decision, believing that they could now pursue proposals for settlement in small claims court. However, plaintiffs advanced a new argument: although proposals for settlement applied in PIP cases, *Cahuasqui* only addressed section 768.79, not Rule 1.442. Rule 1.442, in turn, was not included in the Florida Rules of Small Claims Procedure. Accordingly, they argued, *Cahuasqui* did not apply to small claims matters. Many plaintiff's attorneys brought a copy of *Ivey v. Allstate Insurance Company* to subsequent hearings when a defendant sought to invoke Rule 1.442 to a small claims matter and, no doubt, would point the court's attention to the following language:

> It is clear to us that the purpose of this provision is to level the playing field so that economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the court.[26]

The response is that the policy behind the attorney's fee provision in the PIP statute is entirely different from the policy behind a proposal for settlement.[27] In *Sills*, the First District correctly opined that "the purpose of Rule 1.442 is to encour-

age defendants to acquiesce in claims discovered during litigation to be meritorious and to shift to the claimant the financial burden of carrying on litigation beyond the point where an appropriate offer of judgment on the merits is made."[28]

Florida courts came a bit closer to closing the loophole between county court and small claims court when the Fifth District issued an opinion in *Nichols v. State Farm Mutual Automobile Insurance Company*.[29] In *Nichols*, the Fifth District held that the proposal for settlement statute and Rule 1.442 applied to PIP actions, adopting the reasoning of *Cahuasqui*.[30] However, the *Nichols* case similarly originated in county court rather than small claims court, and plaintiff's attorneys continued to argue against the filing of proposals for settlement in small claims actions where Rule 1.442 had not been invoked, despite the rejection of their policy arguments by two different District Courts of Appeal.

At long last, the First District Court of Appeal in *Tran v. State Farm Fire and Casualty Co.*[31] indicated once and for all that section 768.79 applied to actions pending in small claims court.[32] The language of the brief *Tran* decision was not as clear as insurers might have hoped. *Tran* did not specifically hold that proposals could be filed even if Rule 1.442 had not been invoked.[33] However, when *Tran* is read in conjunction with *Cahuasqui* and *Nichols*, that conclusion still is reasonably inferred.[34] Finally, defendants could file proposals for settlement in small claims cases.

Plaintiffs continued to argue that the *Tran* case only addressed section 768.79, and did not specifically hold that Rule 1.442 was unnecessary to file a proposal. Accordingly, they continued to fight against invoking Rule 1.442. However, multiple county courts have interpreted *Tran* as being applicable to small claims PIP matters even if Rule 1.442 is not invoked.[35] Accordingly, with a few exceptions, it seems settled that insurers can now file a proposal for settlement in small claims court.

Conclusion

If insurance companies hauled into small claims court to defend PIP claims consistently file a proposal for settlement, the result may be a chilling effect on plaintiffs filing suit there. As a matter of course, the first pleading filed in defense of a small claims action should be a Motion to Invoke the Rules of Civil Procedure in their entirety (if the plaintiff will not stipulate to their entry). Armed with the cases cited above, counsel should be able to invoke the rules, thus avoiding the possibility that a proposal for settlement will be stricken. Thereafter, the proposal should be filed 90 days from commencement of the suit, with a vigorous defense of the case. Will the plaintiffs next argue that we have to wait 90 days from the date Rule 1.442 was invoked? The battle continues.

1 PIP by definition generally does not exceed $10,000.00. However, in the author's experience, the amount in controversy rarely exceeds $2,500.00.

2 Rule 7.010(b) of the Florida Rules of Small Claims Procedure provides for jurisdiction in smalls claims cases for all actions where the demand does not exceed $5,000.00, exclusive of costs, interest, and attorneys' fees.

3 *See Metro Ford, Inc. v. Green*, 724 So. 2d 706, 707 (Fla. 3d DCA 1999) (citations omitted).

4 *See* Fla. Sm. Cl. R. 7090(d)(2005).

5 *See Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999).

6 See *Metro Ford, Inc.*, 724 So. 2d at 707 (*citing Donoghue v. Wallach*, 455 So. 2d 1085, 1086 n.1 (Fla. 2d DCA 1984)).

7 *Treasure Coast Injury and Wellness Ctr., P.L. v. Progressive Express Ins. Co.*, 11 Fla. L. Weekly Supp. 938b (Fla. 19th Cir. 2004).

8 *Id.*

9 *See Lee v. Weissman*, 11 Fla. L. Weekly Supp. 4186 (Fla. 17th Cir. 2003).

10 *See, e.g., Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683-684 (Fla. 2000) (stating "[w]ithout a doubt, the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption'"(*quoting Gov't Employees Ins. Co. v. Gonzalez*, 512 So. 2d 269, 271 (Fla. 3d DCA 1987)).

11 *See, e.g., State Farm Fire and Cas. Co. v. Ray*, 556 So. 2d 811, 813 (Fla. 5th DCA 1990)("Because an unqualified assignment transfers to the assignee all the interest of the assignor under the assigned contract, the assignor has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the assignee"); *see also Professional Consulting Servs., Inc. v. Hartford Life and Accident Ins. Co.*, 849 So. 2d 446, 447 (Fla. 2d DCA 2003) ("If her assignment to Professional was valid, Professional 'stands in her shoes' and has the same rights and status that she does") (citations omitted).

12 *See* Fla. Sm. Cl. R. 7.090(d).

13 *See* § 627.736(8), Fla. Stat.(2004).

14 *See generally Dejoinville v. Progressive Express Ins. Co.*, 10 Fla. L. Weekly Supp. 452a (Fla. 15th Cir. 2003).

15 *See generally* 28 U.S.C. § 1441(a) and 1446.

16 *U.S. Sec. Ins. Co. v. Cahuasqui*, 760 So. 2d 1101 (Fla. 3d DCA 2000).

17 *Id.*

18 *Id.* at 1103.

19 *Id.* at 1103-1104.

20 *Id.*

21 *Id.* at 1104 (citations omitted).

22 *Id.*

23 *Id.* at 1105 (emphasis supplied).

24 *Id.* at 1106.

25 *Id.* at 1107.

26 *Ivey*, 774 So. 2d at 684.

27 *See, e.g., Wisconsin Life Ins. Co. v. Sills*, 368 So. 2d 920, 922 (Fla. 1st DCA 1979).

28 *Id.; see also Hernandez v. Travelers Ins. Co.*, 331 So. 2d 329, 331 (Fla. 3d DCA 1976) ("Rule 1.442, RCP, is designed to induce or influence a party to settle litigation and obviate the necessity of a trial"); *Santiesteban v. McGrath*, 320 So. 2d 476, 478 (Fla. 3d DCA 1975).

29 *Nichols v. State Farm Mut. Auto. Ins. Co.*, 851 So. 2d 742 (Fla. 5th DCA 2003).

30 *Id.* at 745.

31 *Tran v. State Farm Fire and Cas. Co.*, 860 So. 2d 1000 (Fla. 1st DCA 2003).

32 *Id.*

33 The *Tran* court certified as being of great public importance the following question: "May an insurer recover attorney's fees under rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes, in an action by its insured to recover under a

personal injury protection policy?" The Florida Supreme Court did not accept the case. Although the certified question referenced both the rule and section 768.79, the holding of the First District referenced only section 768.79.

34 *See, e.g., Back Into Health Chiropractic Inc. v. Progressive Auto Pro Ins. Co.*, 11 Fla. L. Weekly Supp. 444a (Fla. 4th Cir. 2004).

35 *See, e.g., Knowles v. Progressive Express Ins. Co.*, 11 Fla. L. Weekly Supp. 3376 (Fla. 4th Cir. 2004); *Mark Pierce Chiropractic Clinic, P.A. v. Progressive Express Ins. Co.*, 11 Fla L. Weekly Supp. 338a (Fla 4th Cir. 2004); *Foyt v. Progressive Express Ins. Co.*, 11 Fla. L. Weekly Supp. 445a (Fla. 4th Cir. 2004); *Merritt v. Progressive Express Ins. Co.*, 12 Fla. L Weekly Supp. 238a (Fla. 10th Cir. 2004); *but see Robinson v. Progressive Casualty Ins. Co.*, 11 Fla. L. Weekly Supp. 738a (Fla. 18th Cir. 2004)(declining to enforce proposal for settlement when Rule 1.442 had not been invoked).

ABOUT THE AUTHOR...

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ELECTION NOTICE

The election of Officers and Board of Directors of the Florida Defense Lawyers Association will take place as part of the Association's Annual Meeting at The Biltmore Hotel, Coral Gables on Saturday, August 6, 2005, beginning at 8:00 am.

Nominations are being accepted for the positions of the Officers of the Association and Members of the Board of Directors. The chair of the Nominating Committee is FDLA Immediate Past President Ralph L. Marchbank, Jr.

If any member has an interest in serving as an Officer or Member of the Board of Directors, or would like to nominate any other member of FDLA for a position, please contact Ralph Marchbank at 941-366-4680 or rlmarchbank@dglawyers.com, or contact the FDLA office.

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THE *BARNES* DILEMMA RESOLVED? THE FLORIDA SUPREME COURT REQUIRES APPORTIONMENT OF ALL OFFERS TO MULTIPLE DEFENDANTS

that, because rule 1.442 requires apportionment but not that "an amount" be offered to each defendant, an offer might state specifically that no separate monetary offer is being made to one of two jointly liable defendants. The authors also pointed out that the rule does not require identical non-monetary conditions for multiple defendants.[11] However, in the absence of more guidance from the Florida Supreme Court regarding how to satisfy the rule when offering a settlement to defendants with the same potential liability, these suggestions and others remain to be tested.

Further litigation to test the contours of an appropriate proposal may not be the only consequence of the decision. Justice Pariente's concurrence noted that the current interpretation of rule 1.442 "may not be promoting settlements" and called on the Civil Procedure Rules Committee to revisit the issue of apportionment.[12] In 2004, that committee had proposed a change to rule 1.442 that would have excused apportionment of offers made to or on behalf of parties alleged to be vicariously or derivatively liable. The Florida Supreme Court rejected that proposal based on the authority of *Willis Shaw,* in effect treating offers from multiple parties identically with offers to multiple parties.[13] That case, however, did not involve vicarious or derivative liability, but an offer from plaintiffs with independent claims for relief. Rule 1.442 may compel a sort of symmetry between offers from multiple plaintiffs and offers to multiple defendants, but the real issue is that cases involving vicarious liability are fundamentally different from those involving independent liability. Ultimately, regardless of the drafting skills of Florida attorneys, it may take an amendment to rule 1.442 to bring an end to the *Barnes* dilemma.

1 V. Julia Luyster and Jennifer Lodge, *When is a Joint Proposal for Settlement a Valid Proposal for Settlement: Apportionment, Avoiding Ambiguity in Release Language, and The* Barnes *Dilemma*, Trial Advoc. Q., Winter 2005, at 12.

2 *Lamb v. Matetzschk*, 30 Fla. L. Weekly S467 (Fla. June 23, 2005).

3 See *id.* at S467-68 for a more thorough summary of the facts.

4 *Matetzschk v. Lamb*, 849 So. 2d 1141 (Fla. 5th DCA 2003), *aff'd*, 30 Fla. L. Weekly S467 (Fla. June 23, 2005).

5 *Barnes v. Kellogg Co.*, 846 So. 2d 568 (Fla. 2d DCA 2003).

6 849 So. 2d 276 (Fla. 2003).

7 *Lamb*, 30 Fla. L. Weekly at S468.

8 *Id.* at S469 (Pariente, J., specially concurring) (emphasis supplied).

9 *Id. See also id.* at S470 (Lewis, J., concurring in result only) ("I agree with the view that the language of the current rule is contrary to the manner in which most settlements are effectuated in actual litigation practice").

10 *Id.* at S468.

11 *See* Luster & Lodge, supra note 1, at 18.

12 *Lamb*, 30 Fla. L. Weekly at S469.

13 *See In re Amendments to the Florida Rules of Civil Procedure*, 858 So. 2d 1013, 1015 (Fla. 2003).