Florida P.I.P. Litigation: Hot Topics, Trends and the Future of P.I.P.

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CONNECTING KNOWLEDGE WITH NEED SINCE 1979

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MATERIALS PROVIDED BY:

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three Fourth Amendment cases before the United States Supreme Court. In March of 2004, Mr. Neimand joined the Office of the General Counsel of the United Automobile Insurance Company in its appellate department handling PIP appeals and is presently Chief Appellate Counsel.

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Section I

P.I.P. 2008: Legislative Cure or Boondoggle?

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PIP 2008: *LEGISLATIVE CURE OR BOONDOGGLE?*

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CURE

cure
noun, verb, cured, cur·ing.
–noun 1.a means of healing or restoring to health; remedy.
2.a method or course of remedial treatment, as for disease.
3.successful remedial treatment; restoration to health.
4.a means of correcting or relieving anything that is troublesome or detrimental: *to seek a cure for inflation.*
5.the act or a method of preserving meat, fish, etc., by smoking, salting, or the like.
6.spiritual or religious charge of the people in a certain district.
7.the office or district of a curate or parish priest. ***–verb (used with object)***
8.to restore to health.
9.to relieve or rid of something detrimental, as an illness or a bad habit.
10.to prepare (meat, fish, etc.) for preservation by salting, drying, etc.
11.to promote hardening of (fresh concrete or mortar), as by keeping it damp.
12.to process (rubber, tobacco, etc.) as by fermentation or aging. ***–verb (used without object)*** 13.to effect a cure.

BOONDOGGLE

boon·dog·gle

noun, verb, ***-gled, -gling.***

–noun 1.a product of simple manual skill, as a plaited leather cord for the neck or a knife sheath, made typically by a camper or a scout.

2.work of little or no value done merely to keep or look busy.

3.a project funded by the federal government out of political favoritism that is of no real value to the community or the nation. *–verb (used with object)*

4.to deceive or attempt to deceive: *to boondoggle investors into a low-interest scheme. –verb (used without object)*

5.to do work of little or no practical value merely to keep or look busy.

THE PROBLEM AREAS

- Reimbursement
- Fee Schedule
- Utilization
- Reserve
- Death Benefits
- Substantive v. Procedural

WHAT SERVICES ARE REIMBURSABLE?

THE STAUTE SAYS:

(a) Medical benefits.—Eighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services. However, the medical benefits shall provide reimbursement only for such services and care that are lawfully provided, supervised, ordered, or prescribed by a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, or a chiropractic physician licensed under chapter 460 *or* that are provided by any of the following persons or entities:

1. A hospital or ambulatory surgical center licensed under chapter 395.
2. A person or entity licensed under ss. 401.2101 to 401.45 that provides emergency transportation and treatment.
3. An entity wholly owned by one or more physicians licensed under chapter 458 or chapter 459, chiropractic physicians licensed under chapter 460, or dentists licensed under chapter 466 or by such practitioner or practitioners and the spouse, parent, child, or sibling of that practitioner or those practitioners.
4. An entity wholly owned, directly or indirectly, by a hospital or hospitals.
5. A health care clinic licensed under ss. 400.990 to 400.995 that is:

a. Accredited by the Joint Commission on Accreditation of Healthcare Organizations, the American Osteopathic Association, the Commission on Accreditation of Rehabilitation Facilities, or the Accreditation Association for Ambulatory Health Care, Inc.;

or

b. A health care clinic that:

(I)Has a medical director licensed under chapter 458, chapter 459, or chapter 460;

(II)Has been continuously licensed for more than 3 years or is a publicly traded corporation that issues securities traded on an exchange registered with the United States Securities and Exchange Commission as a national securities exchange; and

(III)Provides at least four of the following medical specialties:

(A) General medicine.

(B)Radiography.

(C)Orthopedic medicine.

(D)Physical medicine.

(E)Physical therapy.

(F)Physical rehabilitation.

(G)Prescribing or dispensing outpatient prescription medication.

(H)Laboratory services.

LAWFULLY PROVIDED, SUPERVISED . . .

- Reimbursable services after January 1, 2008 must have been:
- *Lawfully provided,*
- *Supervised, ordered, or prescribed* by a physician licensed
  - under chapter 458 (Medical Practice) or
  - chapter 459 (Osteopathic Medicine), or
  - a dentist licensed under chapter 466, or
  - a chiropractic physician licensed under chapter 460.

THE PRACTICE GROUPS WITH THE WEAK LOBBYISTS!

This includes, among others, persons licensed under the following practice acts:

- **ch. 457, F.S. (acupuncture),**
- **ch. 462, F.S. (naturopathy),**
- **ch. 463, F.S. (optometrists),**
- **ch. 467, F.S. (midwifery),**
- **ch. 480, F.S. (massage therapists),**
- **ch. 484, F.S. (opticians and hearing aid specialists),**
- **ch. 486, F.S. (physical therapists),**
- **ch. 490, F.S. (psychology),**
- **ch. 491, F.S. (clinical counselors),**
- **part I of ch. 468, F.S. (speech language pathology and audiology),**
- **part III of ch. 468, F.S. (occupational therapists),**
- **part X of ch. 468, F.S. (dietetics), part XIII of ch. 468, F.S. (athletic trainers),**
- **part XIV of ch. 468, F.S. (orthotics, prosthetics, and pedorthics), and**
- **s. 464.012, F.S. (advanced registered nurse practitioners).**

Stand-alone physical therapists, occupational therapists, massage therapists, acupuncturists, etc. not affiliated with a hospital do not meet the requirement of "healthcare clinic" in order to be reimbursed under PIP.

WHAT IF?

- What if a clinic is owned by an acupuncturist governed under chapter 457 of the FSS and another person who has no medical credentials.
- Patients treating at the facility treat several times without any supervision of a physician, treatment ordered by a physician or prescribed by a physician for the first 4-5 treatments.
- Treatments rendered involve your typical hot/colds, massage, therapeutic exercises, acupuncture etc,
- Later, a properly licensed physician governed under FSS 459 comes to the clinic and does an E&M on the patient. He then prescribes or recommends treatment of the patient at the same facility.
- Now the questions?
  - Are the services from the acupuncturist physical therapy modalities reimbursable?
  - If so, at what point are they reimbursable?

OR

EMERGENCY SERVICES OR A HOSPITAL

Medically necessary services provided by a select group of providers are reimbursable under personal injury protection insurance in Florida:

- **A hospital or ambulatory surgical center licensed under ch. 395, F.S.**
- **Emergency transportation and treatment by a person or entity licensed under s. 401.2101—401.45, F.S.**
- **An entity wholly owned, directly or indirectly, by a hospital or hospitals.**

OR

WHOLLY OWNED MEDICAL BUSINESS

An entity wholly owned by one or more physicians licensed under:

- Chapter 458 or
- Chapter 459, or
- Chiropractic physicians licensed under chapter 460, or
- Dentists licensed under chapter 466, or
- By such practitioner or practitioners and the spouse, parent, child, or sibling of that practitioner or those practitioners.

REMEMBER THE LIST OF PRACTITIONERS WITH WEAK LOBBYISTS?

This group of practitioners licensed under the following practice acts cannot bill as a wholly owned practice:

- ch. 457, F.S. (acupuncture),
- ch. 462, F.S. (naturopathy),
- ch. 463, F.S. (optometrists),
- ch. 467, F.S. (midwifery),
- ch. 480, F.S. (massage therapists),
- ch. 484, F.S. (opticians and hearing aid specialists),
- ch. 486, F.S. (physical therapists),
- ch. 490, F.S. (psychology),
- ch. 491, F.S. (clinical counselors),
- part I of ch. 468, F.S. (speech language pathology and audiology),
- part III of ch. 468, F.S. (occupational therapists),
- part X of ch. 468, F.S. (dietetics), part XIII of ch. 468, F.S. (athletic trainers),
  part XIV of ch. 468, F.S. (orthotics, prosthetics, and pedorthics), and
- s. 464.012, F.S. (advanced registered nurse practitioners).

OR

LICENSED HEALTH CARE CLINICS:

A health care clinic licensed under ss. 400.990-400.995 that is:

a. Accredited by the Joint Commission on Accreditation of Healthcare Organizations, the American Osteopathic Association,

b The Commission on Accreditation of Rehabilitation Facilities, or

c. Accreditation Association for Ambulatory Health Care, Inc.;

OR

HEALTH CARE CLINICS

- Licensed health care clinics that:
  - Have a medical director that is a Florida licensed physician, osteopath, or chiropractor;
  - Have been continuously licensed for more than 3 years or are publicly traded corporations; and
  - Provide at least four of the following medical specialties: general medicine, radiography, orthopedic medicine, physical medicine, physical therapy, physical rehabilitation, prescribing or dispensing outpatient prescription medication, or laboratory services.

"THE FORM"

- https://www.flrules.org/gateway/RuleNo.asp?id=69O-170.0155

What's In A Word?

- "and" or "or"
- 627.736 (1) (a) … [h]owever, the medical benefits shall provide reimbursement only for such services and care that are lawfully provided, supervised, ordered, or prescribed by a [M.D.], [D.O.], dentist or [D.C.] …
- **OR** that are provided by **ANY** of the following persons or entities…
- The OR should have been an *and?*
- This clause arguably negates every other requirement of the new PIP law because virtually anyone can provide services under doctors' orders.

FEE SCHEDULES

DETERMINING MAXIMUM REIMBURSEMENT

Maximum reimbursement amounts are related to the type of provider who rendered the service to the insured.

THE SIMPLE FEES: ER SERVICES AND HOSPITAL CARE

- Under the new statute PIP reimbursement is limited to 80 percent of the following schedule of maximum charges:
  - For emergency transport and treatment (ambulance, emergency medical technicians): 200 percent of Medicare;
  - For emergency services and care provided by a hospital: 75 percent of the hospital's ***usual and customary*** charge;
  - For emergency services and care and related hospital inpatient services rendered by a physician: the ***usual and customary*** charges in the community;
  - For hospital inpatient services: 200 percent of Medicare Part A;
  - For hospital outpatient services: 200 percent of Medicare Part A;

MEDICARE PART A

Medicare Part A (hospital insurance) covers medically necessary inpatient care in hospitals, including critical access hospitals, and skilled nursing facilities (not custodial or long-term care). It also covers hospice care and some home health care.

OTHER THAN ER AND HOSPITAL SERVICES AND CARE

For all other medical services: 200 percent of Medicare Part B, not to be lower than the 2007 Medicare fee schedule.

But, which of the 2007 fee schedules!

MEDICARE PART B

- Medicare Part B (medical insurance) covers medically necessary doctors' services and outpatient medical and surgical services and supplies, diagnostic tests, ambulatory surgery center facility fees for approved procedures, and durable medical equipment.
- Part B also covers *outpatient* mental health care, outpatient occupational and physical therapy, home health care, and various preventive medical screenings.

WHICH MEDICARE FEE SCHEDULE?

- The new PIP statute fails to give any definition to what is meant by the "applicable" Medicare Part B fee schedule.
- Medicare Part B has a number of fee schedule amounts for particular services in that the fee schedule provides allowable amount for non-facility price, facility price, non-facility limiting charge, and facility limiting charge.
- The good news: the legislature fixed it in SB 2012!

SENATE BILL 2012

Summary:

- Currently, insurers are allowed to limit reimbursement for benefits payable under no-fault to 80 percent of 200 percent of the Medicare Part B fee schedule for specified medical services, supplies and care.
- SB 2012 clarifies the law relating to insurer reimbursement for medical services under Florida's no-fault law.
- The bill clarifies that insurers' reimbursement for medical services would be based on 200 percent of the applicable Medicare Part B fee schedule "for participating physicians."

Medicare Fee Caps: MRIs

Medicare has two scenarios that call for a reduction of the allowed amount under the Medicare Participating Fee Schedule:

- Under Medicare, if more than one technical component is billed, then from the second one on there will be a 25% reduction in the allowed fee.
- Additionally, Medicare says that when the TC procedure is billed separately from the professional component, the OPPS cap applies.
- Note the cap applies only the the TC component, and not the professional component!

WHAT MEDICARE DOES NOT COVER

Medicare Parts A and B do not cover the following procedures:

- Acupuncture;
- Chiropractic services, except to correct subluxations;
- Cosmetic surgery;
- Custodial care;
- Dental care and dentures;
- Diabetic supplies;
- Routine eye care;
- Routine foot care exams;
- Hearing aids and exams; hearing tests; I
- Laboratory tests (screening);
- Long-term care;
- Orthopedic shoes;
- Routine or yearly physical exams;
- Prescription drugs;
- Preventive vaccinations;
- Screening tests;
- Travel

IF NOT PAYABLE BY MEDICARE, CHECK WORKERS' COMP

If medical care is not reimbursable under Medicare, the insurer may limit reimbursement to 80% of the maximum reimbursement under the workers' compensation fee schedule as determined under s. 440.13, F.S., and rules adopted pursuant to that section.

CPT AND HCPCS

- The provider may bill under the appropriate Current Procedural Terminology (CPT) or Healthcare Common Procedure Coding System (HCPCS) codes.
- Note that one or the other may yield a higher payout!

"BUNDLED SERVICES" UNDER MEDICARE

- Medicare considers certain services to be "bundled" services.
- Bundled services are those which would have to be performed as part of the core services and so the fee allowed under the core service cover that secondary service.
- An example would be hot/cold packs.

EXAMPLE: ELECTRICAL MUSCLE STIMULATION

- Medicare Part B recognizes HCPCS code G0283 (electric muscle stimulation, other than wound care). A medical provider who billed a G0283 would be entitled to reimbursement at a rate of 200 percent of Medicare Part B.
- In turn, the Florida's workers' compensation fee schedule such as 97014 (electric muscle stimulation) are not recognized by Medicare Part B. A medical provider who billed a 97014 under the applicable rules would likely be reimbursed at a rate of 80 percent of the Florida workers' compensation fee schedule.

HOT PACKS AND COLDS PACKS

Hot and Cold packs

- Medicare does not reimburse for hot or cold packs and considers them incidental services to any other major office procedure (global versus bundling).
- The ACA considers Medicare's policy to be specific to Medicare and advocates that it should not apply to other health care payers.
- Workers' compensation does have 97010 listed for $10.00.

HYDROBED THERAPY

Hydrobed therapy:

- The Florida Chiropractic Assn. recommends the use of CPT 97039, unlisted procedure, for the use of the hydrobed therapy.
- This is consistent with the ACA's Chiropractic Coding Solutions Manual and the ACA's talking points on their website.
- Medicare does not pay for this code;
- Florida Workers Compensation does pay for this code.

- If services, supplies, or care are not reimbursable under Medicare or workers' compensation the insurer is *not required* *(but may the insurer pay?)* to provide reimbursement.
- If services, supplies, or care are not reimbursable under Medicare or workers' compensation the provider may not bill the insured for reimbursement unless PIP is exhausted.

NO BALANCE BILLING

- Other than the 20% co-pay, the medical provider may not balance bill the insured for treatment and services for which they receive reimbursement from an insurer that applies the PIP fee schedule.
- Also, once PIP benefits are exhausted, the PIP fee schedule does not apply to treatment and services for which the provider bills the patient or the patient's health insurer.

Coders' Relief Act

- *Expect creative coding*
- *Expect overutilization*
- *Watch out of questionable services*

CPT CODE: 97124: Massage Therapy

- EXAMPLE #1: **CPT CODE: 97124: Massage Therapy, (kneading, effleurage, petrissage, tapotement)**
  Using Code 97124: Massage Therapy
  You would be able to bill at 200% of the 2007 Medicare base, which equates to $45.48. Of that billed $45.48, you would be reimbursed at 80% or $36.38. You are then responsible for balance billing the 20% ($9.10) co-pay to the patient. *I know, I can hear you now saying, "there is no way we can make it on this low amount of reimbursement." However, the above figure is for one unit or 15 minutes of time. Most LMT's work in excess of this and are allowed to bill 4 units of this procedure when treatment is prescribed as medically necessary and with complete and proper documentation. That* **being the case;** 1 hour (4 units) of Massage Therapy (97124) billed at $45.48 per unit or $181.92, which will be reimbursed at 80% by insurer & would bring you $145.54. Remember the 20% co-pay balance of $36.38 still due from the patient. Not as bad as you thought it would be is it?

CPT CODE: 97140: Manual Therapy Techniques

- EXAMPLE #2: **CPT CODE: 97140: Manual Therapy Techniques: (Including manual traction, myofascial release, manual lymphatic drainage)**
  Using Code 97140: Manual Therapy Techniques.
  You would be able to bill at 200% of the Medicare base, which equates to $53.00. Of that billed $53.00 you would be reimbursed at 80% or $42.40. You are then responsible for billing the 20% co-pay of your billed amount ($10.60) to the patient. This example is for 1 unit of time. That being the case; 1 hour (4 units) of Manual Therapy Techniques (97140) billed at $53.00 per unit equals $212.00, reimbursed at 80% by insurer would bring you $169.60, with the 20% co-pay balance of $42.40 still being due from the patient.

Resources

- Medicare (www.cms.hhs.gov/apps/ama/license.asp?file=/pfslookup/02_PFSsearch.asp)
- Centers for Medicare & Medicaid Services, *Medicare & You, 2007:* Http://www.medicare.gov/publications/pubs/pdf/10050.pdf.
- For the workers' compensation fee schedule (www.fldfs.com/WCAPPS/CPT/CPT_Agree8.asp)

THE $5000 RESERVE

THE PARTICULARS: PRIORITY OF PAYMENTS

Priority of Payment for Physicians Rendering Care in a Hospital

- The insurer must reserve $5,000 of PIP benefits for payment to licensed physicians, osteopaths, or dentists rendering emergency care or inpatient care at a hospital.
- The funds must be reserved for 30 days after the insurer receives notice of an accident that is potentially covered by PIP benefits, after which time the unclaimed amount of the reserve may be used to pay claims from other providers.
- The required time to pay claims to other providers is tolled to the extent that the PIP benefits not held in reserve are insufficient to pay the claim.

Applies only to physicians rendering lawful treatment, not ER services:

- c) Upon receiving notice of an accident that is potentially covered by personal injury protection benefits, the insurer must reserve $5,000 of personal injury protection benefits for payment to physicians licensed under chapter 458 or chapter 459 or dentists licensed under chapter 466 who provide emergency services and care, as defined in s. 395.002(9), or who provide hospital inpatient care.
- The amount required to be held in reserve may be used only to pay claims from such physicians or dentists until 30 days after the date the insurer receives notice of the accident. After the 30-day period, any amount of the reserve for which the insurer has not received notice of a claim from a physician or dentist who provided emergency services and care or who provided hospital inpatient care may then be used by the insurer to pay other claims.
- The time periods specified in paragraph (b) for required payment of personal injury protection benefits shall be tolled for the period of time that an insurer is required by this paragraph to hold payment of a claim that is not from a physician or dentist who provided emergency services and care or who provided hospital inpatient care to the extent that the personal injury protection benefits not held in reserve are insufficient to pay the claim. This paragraph does not require an insurer to establish a claim reserve for insurance accounting purposes.

MULTIPLE PIP LOGS?

- The 'reserve" may require insurers to maintain multiple PIP logs:
  - Reserve payments,
  - Regular payments,
  - Pending payments.

  After the reserve period is over (30 days), how should claims be paid?

WHAT ABOUT THE DEDUCTIBLE?

- Apply the deductible while still reserving $5000 solely of ER and inpatient services!

UTILIZATION

THE PARTICULARS: UTILIZATION LIMITS CALLED FOR MY STATUTE

- The insurer may **not** apply any utilization limits that apply under Medicare or workers' compensation.
- Also, the insurer must reimburse any health care provider rendering services under the scope of his or her license, regardless of any restriction under Medicare that restricts payments to certain types of health care providers for specified procedures.
- Medical providers are not allowed to bill the insured for any excess amount when an insurer limits payment as authorized in the fee schedule, except for amounts that are not covered due to the PIP coinsurance amount (the 20% co-payment) or for amounts that exceed maximum policy limits.

The bill neither authorizes nor prohibits insurers from applying utilization limits, but does clarify that the section of law authorizing the fee schedule does not allow the insurer to apply any utilization limits that apply under Medicare or workers' compensation.

NEWS RELEASE • *Insurance Research Council*

Soaring Diagnostic and Chiropractic Treatment Costs Drive Florida No-Fault Claim Costs Higher

Recent growth in the frequency and cost of diagnostic tests and chiropractic treatment have helped fuel rapid growth in personal injury protection (PIP) claim costs in Florida, according to a new study from the Insurance Research Council (IRC).

The average total claimed PIP economic loss, consisting primarily of medical expenses, increased 18 percent, from $8,289 in 2002 to $9,769 in 2005. Average claim payments increased 24 percent, from $4,606 to $5,712.

During the same period, the general rate of inflation was 9 percent, and the rate of inflation for medical services was 13 percent.

http://www.ircweb.org/news/20070302.pdf

THE NUMBERS!

- PIP claimants 2002 compared to 2005
- Average claimed economic loss $8,289 compared to $9,769
- Average claimed economic loss - neck
- or back sprain most serious injury 6,855 compared to 9,162
- Average total PIP payment 4,606 compared to 5,712

CHIROPRACTIC OVERUTILIZATION

- The study also documents the use and cost of chiropractic treatment. The percentage of PIP claimants receiving chiropractic treatment grew from 33 percent in 2002 to 44 percent in 2005.
- The cost implications of this trend were magnified by rapidly increasing charges from chiropractors.
- Average total chiropractor charges for PIP claimants grew 35 percent over the three-year period, from $4,837 to $6,510.

DEATH BENEFITS

(c) *Death benefits.*--Death benefits equal to the lesser of $5,000 or the remainder of unused personal injury protection benefits per individual. The insurer may pay such benefits to the executor or administrator of the deceased, to any of the deceased's relatives by blood or legal adoption or connection by marriage, or to any person appearing to the insurer to be equitably entitled thereto.

DEATH BENEFITS: DECEDENTS FAMILY MAY GET NOTHING!

The bill clarifies current law that the PIP death benefit is $5,000, or the remainder of unused PIP benefits, whichever is less.

SHOULD I OR SHOULDN'T I PAY THE DEATH BENEFITS?

In determining whether to payout death benefits consider:

- Hospital liens,
- Assignments of benefits.

Section 19

Section 19. This act revives and reenacts, with amendments, the Florida Motor Vehicle No-Fault Law, which expired by operation of law on October 1, 2007. This act is intended to be *remedial and curative in nature and to minimize confusion* concerning the changes made by this act to ss. 627.730-627.7405, Florida Statutes. Therefore, the Florida Motor Vehicle No-Fault Law shall continue to be codified as ss. 627.730-627.7405, Florida Statutes, notwithstanding the repeal of those sections contained in s. 19, chapter 2003-411, Laws of Florida. "reviving and reenacting ss. 627.730, 627.731, 627.732, 627.734, 627.737, 627.739, 627.7401, 627.7403, and 627.7405, F.S., and reviving, reenacting, and amending ss. 627.733 and 627.736, the Florida Motor Vehicle No-Fault Law, notwithstanding the repeal of such law provided in s. 19, chapter 2003-411, Laws of Florida"

Section 21

- Section 21. Application of the Florida Motor Vehicle No-Fault Law.—
- (1) Any person subject to the requirements of ss. 627.730-627.7405, Florida Statutes, the Florida Motor Vehicle No-Fault Law, as revived and amended by this act, must maintain security for personal injury protection as required by the Florida Motor Vehicle No-Fault Law, as revived and amended by this act, beginning on January 1, 2008.
- (2) Any personal injury protection policy in effect on or after January 1, 2008, *shall be deemed to incorporate the provisions* of the Florida Motor Vehicle No-Fault Law, as revived and amended by this act.

Section 23

- Section 23.
- This act shall take effect upon becoming a law, except that sections 8 through 20 of this act shall take effect January 1, 2008.

Questions and Answers

What's good about the new statute?

Thanks

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Section II

Medicare Fee Schedules

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Physician Fee Schedule Look-up

Overview

Physician Fee Schedule Search

Documentation and Files

Physician Fee Schedule Search

Get Pricing by Range of HCPC for Locality: 0059003

Searching Criteria	
Year	*2008*
HCPC From	*99201*
HCPC To	*99205*
Modifier	*All modifiers*
Carrier Locality	*0059003 Fort Lauderdale, FL*
Fields Option	*Default Fields*

5 records found.

HCPC	Modifier	Short Description	Proc Stat	Carrier/ Locality	Non-Facility Price	Facility Price	Non-Facility Limiting Charge	Facility Limiting Charge	Conv Fact	NA Flag for Trans Non-Fac PE RVU	NA Flg for Fully Imp Non-Fac PE RVU	NA Flag for Trans Facility PE RVU	NA Flag for Fully Imp Fac PE RVU	Not Used For Medicare	OPPS Non-Facility Payment Amount	OPPS Facility Payment Amount
99201		Office/outpatient visit, new	A	0059003	$37.36	$23.22	$40.82	$25.36	38.087						NA	NA
99202		Office/outpatient visit, new	A	0059003	$64.04	$44.54	$69.97	$48.66	38.087						NA	NA
99203		Office/outpatient visit, new	A	0059003	$94.51	$68.89	$103.25	$75.26	38.087						NA	NA
99204		Office/outpatient visit, new	A	0059003	$143.27	$113.45	$156.53	$123.94	38.087						NA	NA
99205		Office/outpatient visit, new	A	0059003	$179.84	$147.34	$196.48	$160.97	38.087						NA	NA

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Get Pricing by Range of HCPC for Locality: 0059003

Searching Criteria	
Year	*2008*
HCPC From	*99211*
HCPC To	*99215*
Modifier	*All modifiers*
Carrier Locality	*0059003 Fort Lauderdale, FL*
Fields Option	*Default Fields*

5 records found.

HCPC	Modifier	Short Description	Proc Stat	Carrier/ Locality	Non-Facility Price	Facility Price	Non-Facility Limiting Charge	Facility Limiting Charge	Conv Fact	NA Flag for Trans Non-Fac PE RVU	NA Flg for Fully Imp Non-Fac PE RVU	NA Flag for Trans Facility PE RVU	NA Flag for Fully Imp Fac PE RVU	Not Used For Medicare	OPPS Non-Facility Payment Amount	OPPS Facility Payment Amount
99211		Office/outpatient visit, est	A	0059003	$20.23	$8.76	$22.10	$9.57	38.087						NA	NA
99212		Office/outpatient visit, est	A	0059003	$38.51	$23.22	$42.07	$25.36	38.087						NA	NA
99213		Office/outpatient visit, est	A	0059003	$61.01	$43.04	$66.65	$47.02	38.087						NA	NA
99214		Office/outpatient visit, est	A	0059003	$91.88	$67.41	$100.38	$73.65	38.087						NA	NA
99215		Office/outpatient visit, est	A	0059003	$124.64	$97.11	$136.17	$106.09	38.087						NA	NA

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http://www.cms.hhs.gov/pfslookup/02_PFSsearch.asp

Physician Fee Schedule Search

Get Pricing by Range of HCPC for Locality: 0059003

Searching Criteria	
Year	*2008*
HCPC From	*99241*
HCPC To	*99245*
Modifier	*All modifiers*
Carrier Locality	*0059003 Fort Lauderdale, FL*
Fields Option	*Default Fields*

5 records found.

HCPC	Modifier	Short Description	Proc Stat	Carrier/ Locality	Non-Facility Price	Facility Price	Non-Facility Limiting Charge	Facility Limiting Charge	Conv Fact	NA Flag for Trans Non-Fac PE RVU	NA Flg for Fully Imp Non-Fac PE RVU	NA Flag for Trans Facility PE RVU	NA Flag for Fully Imp Fac PE RVU	Not Used For Medicare	OPPS Non-Facility Payment Amount	OPPS Facility Payment Amount
99241		Office consultation	A	0059003	$49.93	$33.48	$54.54	$36.58	38.087						NA	NA
99242		Office consultation	A	0059003	$92.96	$70.40	$101.56	$76.91	38.087						NA	NA
99243		Office consultation	A	0059003	$127.25	$97.81	$139.02	$106.86	38.087						NA	NA
99244		Office consultation	A	0059003	$185.18	$151.53	$202.30	$165.54	38.087						NA	NA
99245		Office consultation	A	0059003	$228.97	$190.73	$250.15	$208.37	38.087						NA	NA

5 Records successfully loaded.

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Physician Fee Schedule Look-up

Overview

Physician Fee Schedule Search

Documentation and Files

Physician Fee Schedule Search

Get Pricing by Range of HCPC for Locality: 0059003

Searching Criteria	
Year	*2008*
HCPC From	*72010*
HCPC To	*72148*
Modifier	*All modifiers*
Carrier Locality	*0059003 Fort Lauderdale, FL*
Fields Option	*Default Fields*

87 records found.

HCPC	Modifier	Short Description	Proc Stat	Carrier/ Locality	Non-Facility Price	Facility Price	Non-Facility Limiting Charge	Facility Limiting Charge	Conv Fact	NA Flag for Trans Non-Fac PE RVU	NA Flg for Fully Imp Non-Fac PE RVU	NA Flag for Trans Facility PE RVU	NA Flag for Fully Imp Fac PE RVU	Not Used For Medicare	OPPS Non-Facility Payment Amount	OPPS Facility Payment Amount
72010		X-ray exam of spine	A	0059003	$70.93	NA	$77.49	NA	38.087			NA	NA		$69.02	$69.02
72010	26	X-ray exam of spine	A	0059003	$22.09	$22.09	$24.13	$24.13	38.087						NA	NA
72010	TC	X-ray exam of spine	A	0059003	$48.85	NA	$53.37	NA	38.087			NA	NA		$46.94	$46.94
72020		X-ray exam of spine	A	0059003	$25.17	NA	$27.50	NA	38.087			NA	NA		$53.80	$53.80
72020	26	X-ray exam of spine	A	0059003	$7.61	$7.61	$8.32	$8.32	38.087						NA	NA
72020	TC	X-ray exam of spine	A	0059003	$17.56	NA	$19.18	NA	38.087			NA	NA		$46.19	$46.19
72040		X-ray exam of neck spine	A	0059003	$38.51	NA	$42.07	NA	38.087			NA	NA		$57.96	$57.96
72040	26	X-ray exam of neck spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087						NA	NA
72040	TC	X-ray exam of neck spine	A	0059003	$27.85	NA	$30.43	NA	38.087			NA	NA		$47.30	$47.30
72050		X-ray exam of neck spine	A	0059003	$54.91	NA	$59.99	NA	38.087			NA	NA		$93.43	$93.43
72050	26	X-ray exam of neck spine	A	0059003	$14.86	$14.86	$16.23	$16.23	38.087						NA	NA
72050	TC	X-ray exam of neck spine	A	0059003	$40.05	NA	$43.76	NA	38.087			NA	NA		$78.58	$78.58

http://www.cms.hhs.gov/pfslookup/02_PFSsearch.asp

72052		X-ray exam of neck spine	A	0059003	$68.65	NA	$75.00	NA	38.087	NA	NA	$95.37	$95.37
72052	26	X-ray exam of neck spine	A	0059003	$18.27	$18.27	$19.96	$19.96	38.087			NA	NA
72052	TC	X-ray exam of neck spine	A	0059003	$50.38	NA	$55.04	NA	38.087	NA	NA	$77.10	$77.10
72069		X-ray exam of trunk spine	A	0059003	$34.72	NA	$37.93	NA	38.087	NA	NA	$56.87	$56.87
72069	26	X-ray exam of trunk spine	A	0059003	$11.04	$11.04	$12.07	$12.07	38.087			NA	NA
72069	TC	X-ray exam of trunk spine	A	0059003	$23.68	NA	$25.87	NA	38.087	NA	NA	$45.82	$45.82
72070		X-ray exam of thoracic spine	A	0059003	$36.98	NA	$40.40	NA	38.087	NA	NA	$57.58	$57.58
72070	26	X-ray exam of thoracic spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087			NA	NA
72070	TC	X-ray exam of thoracic spine	A	0059003	$26.32	NA	$28.75	NA	38.087	NA	NA	$46.92	$46.92
72072		X-ray exam of thoracic spine	A	0059003	$41.55	NA	$45.40	NA	38.087	NA	NA	$58.33	$58.33
72072	26	X-ray exam of thoracic spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087			NA	NA
72072	TC	X-ray exam of thoracic spine	A	0059003	$30.89	NA	$33.75	NA	38.087	NA	NA	$47.67	$47.67
72074		X-ray exam of thoracic spine	A	0059003	$49.19	NA	$53.73	NA	38.087	NA	NA	$57.58	$57.58
72074	26	X-ray exam of thoracic spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087			NA	NA
72074	TC	X-ray exam of thoracic spine	A	0059003	$38.52	NA	$42.09	NA	38.087	NA	NA	$46.92	$46.92
72080		X-ray exam of trunk spine	A	0059003	$38.13	NA	$41.66	NA	38.087	NA	NA	$57.58	$57.58
72080	26	X-ray exam of trunk spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087			NA	NA
72080	TC	X-ray exam of trunk spine	A	0059003	$27.47	NA	$30.01	NA	38.087	NA	NA	$46.92	$46.92
72090		X-ray exam of trunk spine	A	0059003	$47.30	NA	$51.67	NA	38.087	NA	NA	$91.19	$91.19
72090	26	X-ray exam of trunk spine	A	0059003	$14.09	$14.09	$15.40	$15.40	38.087			NA	NA
72090	TC	X-ray exam of trunk spine	A	0059003	$33.20	NA	$36.27	NA	38.087	NA	NA	$77.10	$77.10
72100		X-ray exam of lower spine	A	0059003	$40.42	NA	$44.16	NA	38.087	NA	NA	$57.22	$57.22
72100	26	X-ray exam of lower spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087			NA	NA
72100	TC	X-ray exam of lower spine	A	0059003	$29.76	NA	$32.51	NA	38.087	NA	NA	$46.55	$46.55
72110		X-ray exam of lower spine	A	0059003	$56.44	NA	$61.66	NA	38.087	NA	NA	$92.68	$92.68
72110	26	X-ray exam of lower spine	A	0059003	$14.86	$14.86	$16.23	$16.23	38.087			NA	NA
72110	TC	X-ray exam of lower spine	A	0059003	$41.58	NA	$45.43	NA	38.087	NA	NA	$77.83	$77.83
72114		X-ray exam of lower spine	A	0059003	$72.86	NA	$79.60	NA	38.087	NA	NA	$95.00	$95.00
72114	26	X-ray exam of lower spine	A	0059003	$18.27	$18.27	$19.96	$19.96	38.087			NA	NA
72114	TC	X-ray exam of lower spine	A	0059003	$54.58	NA	$59.63	NA	38.087	NA	NA	$76.73	$76.73
72120		X-ray exam of lower spine	A	0059003	$51.10	NA	$55.82	NA	38.087	NA	NA	$89.24	$89.24
72120	26	X-ray exam of lower spine	A	0059003	$10.66	$10.66	$11.65	$11.65	38.087			NA	NA
72120	TC	X-ray exam of lower spine	A	0059003	$40.44	NA	$44.18	NA	38.087	NA	NA	$78.58	$78.58
72125		Ct neck spine w/o dye	A	0059003	$309.76	NA	$338.41	NA	38.087	NA	NA	$259.38	$259.38
72125	26	Ct neck spine w/o dye	A	0059003	$57.50	$57.50	$62.82	$62.82	38.087			NA	NA
72125	TC	Ct neck spine w/o dye	A	0059003	$252.25	NA	$275.59	NA	38.087	NA	NA	$201.88	$201.88
72126		Ct neck spine w/dye	A	0059003	$367.78	NA	$401.80	NA	38.087	NA	NA	$351.37	$351.37

72126	26	Ct neck spine w/dye	A	0059003	$60.17	$60.17	$65.74	$65.74	38.087			NA	NA
72126	TC	Ct neck spine w/dye	A	0059003	$307.60	NA	$336.06	NA	38.087	NA	NA	$291.19	$291.19
72127		Ct neck spine w/o & w/dye	A	0059003	$450.97	NA	$492.68	NA	38.087	NA	NA	$405.54	$405.54
72127	26	Ct neck spine w/o & w/dye	A	0059003	$63.59	$63.59	$69.47	$69.47	38.087			NA	NA
72127	TC	Ct neck spine w/o & w/dye	A	0059003	$387.38	NA	$423.21	NA	38.087	NA	NA	$341.95	$341.95
72128		Ct chest spine w/o dye	A	0059003	$309.38	NA	$337.99	NA	38.087	NA	NA	$259.38	$259.38
72128	26	Ct chest spine w/o dye	A	0059003	$57.50	$57.50	$62.82	$62.82	38.087			NA	NA
72128	TC	Ct chest spine w/o dye	A	0059003	$251.87	NA	$275.17	NA	38.087	NA	NA	$201.88	$201.88
72129		Ct chest spine w/dye	A	0059003	$368.16	NA	$402.21	NA	38.087	NA	NA	$351.75	$351.75
72129	26	Ct chest spine w/dye	A	0059003	$60.56	$60.56	$66.16	$66.16	38.087			NA	NA
72129	TC	Ct chest spine w/dye	A	0059003	$307.60	NA	$336.06	NA	38.087	NA	NA	$291.19	$291.19
72130		Ct chest spine w/o & w/dye	A	0059003	$449.82	NA	$491.43	NA	38.087	NA	NA	$405.54	$405.54
72130	26	Ct chest spine w/o & w/dye	A	0059003	$63.59	$63.59	$69.47	$69.47	38.087			NA	NA
72130	TC	Ct chest spine w/o & w/dye	A	0059003	$386.23	NA	$421.96	NA	38.087	NA	NA	$341.95	$341.95
72131		Ct lumbar spine w/o dye	A	0059003	$308.99	NA	$337.58	NA	38.087	NA	NA	$259.38	$259.38
72131	26	Ct lumbar spine w/o dye	A	0059003	$57.50	$57.50	$62.82	$62.82	38.087			NA	NA
72131	TC	Ct lumbar spine w/o dye	A	0059003	$251.49	NA	$274.75	NA	38.087	NA	NA	$201.88	$201.88
72132		Ct lumbar spine w/dye	A	0059003	$367.39	NA	$401.38	NA	38.087	NA	NA	$351.37	$351.37
72132	26	Ct lumbar spine w/dye	A	0059003	$60.17	$60.17	$65.74	$65.74	38.087			NA	NA
72132	TC	Ct lumbar spine w/dye	A	0059003	$307.22	NA	$335.64	NA	38.087	NA	NA	$291.19	$291.19
72133		Ct lumbar spine w/o & w/dye	A	0059003	$450.58	NA	$492.26	NA	38.087	NA	NA	$405.54	$405.54
72133	26	Ct lumbar spine w/o & w/dye	A	0059003	$63.59	$63.59	$69.47	$69.47	38.087			NA	NA
72133	TC	Ct lumbar spine w/o & w/dye	A	0059003	$386.99	NA	$422.79	NA	38.087	NA	NA	$341.95	$341.95
72141		Mri neck spine w/o dye	A	0059003	$565.79	NA	$618.13	NA	38.087	NA	NA	$440.61	$440.61
72141	26	Mri neck spine w/o dye	A	0059003	$79.59	$79.59	$86.95	$86.95	38.087			NA	NA
72141	TC	Mri neck spine w/o dye	A	0059003	$486.20	NA	$531.18	NA	38.087	NA	NA	$361.02	$361.02
72142		Mri neck spine w/dye	A	0059003	$691.35	NA	$755.30	NA	38.087	NA	NA	$512.73	$512.73
72142	26	Mri neck spine w/dye	A	0059003	$95.96	$95.96	$104.83	$104.83	38.087			NA	NA
72142	TC	Mri neck spine w/dye	A	0059003	$595.39	NA	$650.46	NA	38.087	NA	NA	$416.77	$416.77
72146		Mri chest spine w/o dye	A	0059003	$593.63	NA	$648.54	NA	38.087	NA	NA	$440.98	$440.98
72146	26	Mri chest spine w/o dye	A	0059003	$79.59	$79.59	$86.95	$86.95	38.087			NA	NA
72146	TC	Mri chest spine w/o dye	A	0059003	$514.04	NA	$561.58	NA	38.087	NA	NA	$361.39	$361.39
72147		Mri chest spine w/dye	A	0059003	$652.34	NA	$712.68	NA	38.087	NA	NA	$514.19	$514.19
72147	26	Mri chest spine w/dye	A	0059003	$95.96	$95.96	$104.83	$104.83	38.087			NA	NA
72147	TC	Mri chest spine w/dye	A	0059003	$556.38	NA	$607.85	NA	38.087	NA	NA	$418.24	$418.24
72148		Mri lumbar spine w/o dye	A	0059003	$587.53	NA	$641.87	NA	38.087	NA	NA	$435.26	$435.26
72148	26	Mri lumbar spine w/o dye	A	0059003	$73.87	$73.87	$80.70	$80.70	38.087			NA	NA

72148	TC	Mri lumbar spine w/o dye	A	0059003	$513.65	NA	$561.17	NA	38.087		NA	NA	$361.39	$361.39

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Get Pricing by Range of HCPC for Locality: 0059003

Searching Criteria	
Year	*2008*
HCPC From	*97001*
HCPC To	*97799*
Modifier	*All modifiers*
Carrier Locality	*0059003 Fort Lauderdale, FL*
Fields Option	*Default Fields*

40 records found.

*** Note - At least one of the HCPCs you requested is not priced by the 2008 Physician Fee Schedule and therefore does not appear in the table below.**

HCPC	Modifier	Short Description	Proc Stat	Carrier/ Locality	Non-Facility Price	Facility Price	Non-Facility Limiting Charge	Facility Limiting Charge	Conv Fact	NA Flag for Trans Non-Fac PE RVU	NA Flg for Fully Imp Non-Fac PE RVU	NA Flag for Trans Facility PE RVU	NA Flag for Fully Imp Fac PE RVU	Not Used For Medicare	OPPS Non-Facility Payment Amount	OPPS Facility Payment Amount
97001		Pt evaluation	A	0059003	$70.88	NA	$77.44	NA	38.087			NA	NA		NA	NA
97002		Pt re-evaluation	A	0059003	$37.74	NA	$41.23	NA	38.087			NA	NA		NA	NA
97003		Ot evaluation	A	0059003	$76.22	NA	$83.27	NA	38.087			NA	NA		NA	NA
97004		Ot re-evaluation	A	0059003	$45.01	NA	$49.17	NA	38.087			NA	NA		NA	NA
97012		Mechanical traction therapy	A	0059003	$14.48	NA	$15.82	NA	38.087			NA	NA		NA	NA
97016		Vasopneumatic device therapy	A	0059003	$14.87	NA	$16.25	NA	38.087			NA	NA		NA	NA
97018		Paraffin bath therapy	A	0059003	$7.62	NA	$8.33	NA	38.087			NA	NA		NA	NA
97022		Whirlpool therapy	A	0059003	$16.79	NA	$18.34	NA	38.087			NA	NA		NA	NA
97024		Diathermy eg, microwave	A	0059003	$5.33	NA	$5.82	NA	38.087			NA	NA		NA	NA
97026		Infrared therapy	A	0059003	$4.95	NA	$5.40	NA	38.087			NA	NA		NA	NA
97028		Ultraviolet therapy	A	0059003	$6.47	NA	$7.07	NA	38.087			NA	NA		NA	NA

97032	Electrical stimulation	A	0059003	$16.01	NA	$17.49	NA	38.087	NA	NA	NA	NA
97033	Electric current therapy	A	0059003	$23.27	NA	$25.43	NA	38.087	NA	NA	NA	NA
97034	Contrast bath therapy	A	0059003	$14.10	NA	$15.41	NA	38.087	NA	NA	NA	NA
97035	Ultrasound therapy	A	0059003	$11.43	NA	$12.49	NA	38.087	NA	NA	NA	NA
97036	Hydrotherapy	A	0059003	$24.80	NA	$27.10	NA	38.087	NA	NA	NA	NA
97110	Therapeutic exercises	A	0059003	$27.82	NA	$30.39	NA	38.087	NA	NA	NA	NA
97112	Neuromuscular reeducation	A	0059003	$28.60	NA	$31.25	NA	38.087	NA	NA	NA	NA
97113	Aquatic therapy/exercises	A	0059003	$33.19	NA	$36.26	NA	38.087	NA	NA	NA	NA
97116	Gait training therapy	A	0059003	$24.02	NA	$26.24	NA	38.087	NA	NA	NA	NA
97124	Massage therapy	A	0059003	$22.12	NA	$24.16	NA	38.087	NA	NA	NA	NA
97140	Manual therapy	A	0059003	$25.55	NA	$27.91	NA	38.087	NA	NA	NA	NA
97150	Group therapeutic procedures	A	0059003	$17.54	NA	$19.16	NA	38.087	NA	NA	NA	NA
97530	Therapeutic activities	A	0059003	$28.99	NA	$31.67	NA	38.087	NA	NA	NA	NA
97532	Cognitive skills development	A	0059003	$23.63	NA	$25.82	NA	38.087	NA	NA	NA	NA
97533	Sensory integration	A	0059003	$25.16	NA	$27.49	NA	38.087	NA	NA	NA	NA
97535	Self care mngment training	A	0059003	$29.37	NA	$32.08	NA	38.087	NA	NA	NA	NA
97537	Community/work reintegration	A	0059003	$26.31	NA	$28.74	NA	38.087	NA	NA	NA	NA
97542	Wheelchair mngment training	A	0059003	$26.69	NA	$29.16	NA	38.087	NA	NA	NA	NA
97545	Work hardening	R	0059003	$0.00	$0.00	$0.00	$0.00	38.087			NA	NA
97546	Work hardening add-on	R	0059003	$0.00	$0.00	$0.00	$0.00	38.087			NA	NA
97597	Active wound care/20 cm or <	A	0059003	$56.82	$38.08	$62.07	$41.60	38.087			NA	NA
97598	Active wound care > 20 cm	A	0059003	$69.79	$48.76	$76.25	$53.27	38.087			NA	NA
97605	Neg press wound tx, < 50 cm	A	0059003	$33.93	$26.28	$37.07	$28.71	38.087			NA	NA
97606	Neg press wound tx, > 50 cm	A	0059003	$36.96	$29.31	$40.38	$32.03	38.087			NA	NA
97750	Physical performance test	A	0059003	$28.97	NA	$31.65	NA	38.087	NA	NA	NA	NA
97755	Assistive technology assess	A	0059003	$33.15	NA	$36.22	NA	38.087	NA	NA	NA	NA
97760	Orthotic mgmt and training	A	0059003	$32.01	NA	$34.97	NA	38.087	NA	NA	NA	NA
97761	Prosthetic training	A	0059003	$28.20	NA	$30.81	NA	38.087	NA	NA	NA	NA
97762	C/o for orthotic/prosth use	A	0059003	$32.05	NA	$35.02	NA	38.087	NA	NA	NA	NA

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By the Committees on General Government Appropriations; Banking and Insurance; and Senator Posey

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A bill to be entitled

An act relating to motor vehicle insurance; amending s. 627.736, F.S.; revising the schedule of maximum charges on which an insurer may base a limited reimbursement for certain medical services, supplies, and care for injured persons covered by personal injury protection; specifying a minimum amount for the applicable fee schedule or payment limitation under Medicare for such reimbursements; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (5) of section 627.736, Florida Statutes, is amended to read:

627.736 Required personal injury protection benefits; exclusions; priority; claims.--

(5) CHARGES FOR TREATMENT OF INJURED PERSONS.--

(a)1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. In no event,

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however, may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies. With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

2. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:

a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.

b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.

c. For emergency services and care as defined by s. 395.002(10) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.

d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.

e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory

Payment Classification for the specific hospital providing the outpatient services.

f. For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of ~~applicable~~ Medicare Part B ~~fee schedule~~. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

3. For purposes of subparagraph 2., the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies, or care was rendered and for the area in which such services were rendered, except that it may not be less than the allowable amount under the participating physicians schedule of ~~applicable 2007~~ Medicare Part B ~~fee schedule~~ for medical services, supplies, and care subject to Medicare Part B.

4. Subparagraph 2. does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare or workers' compensation. An insurer that applies the allowable payment limitations of subparagraph 2. must reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider would be entitled to reimbursement under Medicare due to restrictions or limitations

on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes.

5. If an insurer limits payment as authorized by subparagraph 2., the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits.

Section 2. This act shall take effect upon becoming a law.

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Section III

Florida's 2007 P.I.P. Amendments
Navigating the New Insurance Maze

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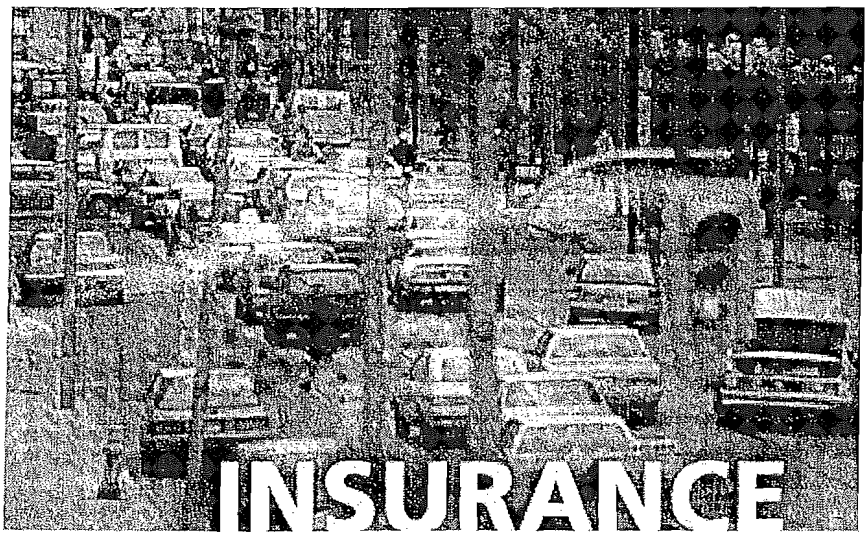
FLORIDA'S 2007 P.I.P. AMENDMENTS



Navigating the New Insurance Maze

CONFUSED ABOUT THE NEW INSURANCE LAWS?

A Few Key Changes:

—Medicare/Worker's Comp.-Based Fee Schedule

—Demand letter requirement expanded to 30 days

—Gap Period Without P.I.P.

—Consolidation of suits on same claim for same provider

—Higgins Case Broadens Declaratory Actions

—Limitation of certain provider's right to participate in PIP

—Chiropractor can't be medical director of non-physician-owned clinic (change to the chiropractic licensure statute – not the P.I.P. statute.

So is there new ammunition in these statutes to prosecute or defend insurance claims?

What's the best way to approach these new issues?

LITIGATING THE INSURANCE CLAIM

STEP 1 – Think out side the box

- Consider Alternative Causes of Action (like Declaratory Relief or breach of contract for failure to comply with statutory obligations) or declaratory relief to determine your obligations as to questionable pre-suit conditions (such as unreasonable or untimely EUO requests).

STEP 2 – Execute your plan

- Consider all of your possible causes of action (remember, under the new PIP law you may need to show good cause why all available claims were not brought in a single action to recover attorney's fees if you don't allege all available actions).
- Query: Is a breach of contract action really "available" if you don't have an EOB or other required information to assess whether you can honestly allege that you are owed money because of a breach of the insurance contract? Arguably, this would be "good cause" not to plead the breach of contract claim until the EOB or policy/dec page issue is resolved first. However, the theory is untested.

STEP 3 – Once you have resolved any issues concerning rights and obligations under the policy (and presumably obtained the information or judicial decree you need) assess what you are owed and sue for it.

DECLARATORY ACTIONS

Purpose: Generally used in insurance context to obtain judicial construction of ambiguities in the policy or statute

Benefits:

1) Swift, usually a summary judgment type process with little or no discovery;

2) Often not subject to Proposal for Settlement/Offer of Judgment if drafted carefully (not claiming damages);

3) For Plaintiff it clears the way for damages claim or tells you to stop pursuing case; and

4) For Defendant may allow you to pre-emptively attack key litigation issue before your client gets sued (also lets you control where suit is filed)

WHAT IS SUBJECT TO DECLARATORY RELIEF? (THE STATUTE)

86.011 Jurisdiction of trial court.--The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

(1) Of any immunity, power, privilege, or right; or

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

86.111 Existence of another adequate remedy; effect.--The existence of another adequate remedy does not preclude a judgment for declaratory relief. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.

KEY DECLARATORY ACTION CASES

Higgins Case (Sup. Ct. Fla.) (attached): Broadens declaratory actions to address mixed issues of law and fact

U.S. Security Insurance Co. v. Cimino, 754 So. 2d 697 (Fla. 2000): Allows declaratory action to determine rights and obligations regarding attending an IME (specifically, whether the insured can bring an attorney and/or videographer to an Independent Medical Exam (IME) requested by the insurer)

Allstate Ins. Co. v. Holy Cross Hosp., Inc., 961 So. 2d 328 (Fla. 2007): Declaratory Action was brought to determine proper application of PPO provisions of F.S. s. 627.736(10). In other words, whether the insurers were permitted by F.S. s. 627.736(10) to take PPO reductions in PIP cases and, if so, whether the PPO reductions were properly applied in this case.

State Farm Mut. Auto Ins. Co. v. Nichols, 932 So. 2d 1067 (Fla. 2006): Declaratory Action to determine whether Proposal for Settlement may apply in PIP case.

DECLARATORY RELIEF CASES IN PIP HAVE BEEN USED FOR THE FOLLOWING:

1. **To determine the right to a copy of the insurance policy and declarations information.** See, e.g., *Integra Diagnostics v. Reliance Nat'l Ind.,* 8 Fla. L. Weekly Supp. 349c (County Court, Broward 2001); *Florida Orthopedic Center, P.A. v. United Auto. Ins. Co.,* 13 Fla. L. Weekly Supp. 1234 (County Court, Broward 2006); *Scott M. Jablon, D.C. v. United Auto. Ins. Co.,* 13 Fla. L. Weekly Supp. 643c (County Court, Broward 2006); *American Vehicle Ins. Co. v. Florida Emergency Physicians Kang & Assoc., P.A.,* 13 Fla. L. Weekly Supp. 973 (18th Circuit Appellate 2006); *Rural Metro Ambulance v. Liberty Mut. Ins. Co.,* 11 Fla. L. Weekly Supp. 69a (County Court, Broward 2003).
2. **To determine the right to record an Examination Under Oath.** *Brown v. United Auto. Ins. Co.,* 12 FLW Supp. 262 (Decision of Judge Robert Lee, Broward County 2005).
3. **To determine whether an insured may record or have attorney present at an IME.** *U.S. Security Insurance Co. v. Cimino,* 754 So. 2d 697 (Fla. 2000).
4. **To determine whether an insurer may unilaterally recode medical charges.** *Fidel Goldson, DC v. Progressive American Ins. Co.,* 15 FLW Supp. 633 (Decision of Judge Lisa Trachman, Broward County 2008).
5. **To determine right to EUO notices and proof of mailing.** *American Health & Rehab v. Progressive American Ins. Co.,* 13 FLW Supp.188 (Decision of Judge Giselle Pollack, Broward County 2005).

CASES LIBERALLY ALLOWING DECLARATORY RELIEF

Insurance -- Homeowners -- Declaratory judgments -- Coverage -- Declaratory judgment statutes authorize declaratory judgments in respect to insurance policy coverage and defense obligations in cases in which it is necessary to resolve issues of fact in order to decide the declaratory judgment action -- The determination of the issue of whether the declaratory judgment action or the underlying tort action against the insured should proceed first is within the discretion of the trial court weighing factors outlined by Court as well as factors of the particular case -- Trial court did not abuse discretion in allowing declaratory judgment action to be tried prior to underlying negligence action against insured

CHARLES B. HIGGINS, Petitioner, vs. STATE FARM FIRE AND CASUALTY COMPANY, Respondent. CHERYL L. INGALLS, etc., Petitioner, vs. STATE FARM FIRE AND CASUALTY COMPANY, Respondent. Supreme Court of Florida. Case Nos. SC01-291 & SC01-292. September 30, 2004. Two Cases Consolidated: Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 4D99-2989 (Palm Beach County). Counsel: John P. Wiederhold of Wiederhold, Moses and Rubin, P.A., West Palm Beach, on behalf of Charles B. Higgins; Theodore A. Deckert and Joseph K. Still, Jr., West Palm Beach, on behalf of Cheryl L. Ingalls, f/k/a Cheryl L. Steele, for Petitioners. Elizabeth K. Russo of Russo Appellate Firm, Miami, and Spencer M. Sax of Sachs, Sax and Klein, P.A., Boca Raton, for State Farm Fire and Casualty Company, Respondent.

(WELLS, J.) We have for review the decision of the Fourth District Court of Appeal in *State Farm Fire & Casualty Co. v. Higgins*, 788 So. 2d 992 (Fla. 4th DCA 2001) (en banc), which

certified a question to be of great public importance with regard to one issue and certified conflict with the decisions of the Third District Court of Appeal in *Irvine v. Prudential Property & Casualty Insurance Co.*, 630 So. 2d 579 (Fla. 3d DCA 1993), and *Burns v. Hartford Accident & Indemnity Co.*, 157 So. 2d 84 (Fla. 3d DCA 1963), with regard to a second issue. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

I. FACTS AND PROCEDURAL HISTORY

A. Trial Court

On July 2, 1995, Cheryl Ingalls filed a complaint against Charles Higgins, seeking damages for the intentional torts of assault and battery. The complaint alleged that Higgins had "willfully, intentionally, and with malice" committed the assault and battery on June 4, 1995, when he arrived drunk at the home of his estranged wife, Maureen Bradley, where he encountered both Bradley and Ingalls and engaged in the following conduct:

7. As [Ingalls] was standing before the front door of the home, [Higgins], without provocation or reason pushed [Ingalls] into the front door on the porch of the home and then upon her managing to get up [Higgins] grabbed her, threw her into a pile of wood on the porch, and again threw her down onto the porch. He then stuck his fist in her face, told her "I could kill you right now and get you out of my way now." He then slapped her in the face.

8. [Higgins] then went into the home and lunged after his estranged wife, Maureen Higgins. [Ingalls] again tried to talk with [Higgins] and calm him down. Without warning, provocation, or reason, [Higgins] grabbed [Ingalls'] wrist and threw her against the stairs in the home. As [Ingalls] came up from the stairs he grabbed her wrist again and threw her across the room where she struck a couch and fell on the floor.

Subsequently, Ingalls served an amended complaint that excluded the above specific allegations and simply alleged that Higgins came upon the property "while under the influence of and impaired by alcohol" and "violently threatened, touched and injured" her. The amended complaint also added a negligence claim against Bradley for failing to warn or protect Ingalls.

The property on which these alleged events occurred was covered by a homeowners policy issued to Higgins by State Farm Fire and Casualty Company. That policy provided coverage for bodily injuries "caused by an occurrence" and defined an "occurrence" as "an accident, including exposure to conditions, which results in . . . bodily injury; or . . . property damage; . . . during the policy period." Exclusions within the policy provided that there was no coverage for bodily injury "which is either expected or intended by an insured" or for bodily injury "to any person . . . which is the result of willful and malicious acts of an insured."

On the basis of his homeowners policy, Higgins demanded that State Farm defend and indemnify him in the action brought by Ingalls. In response, State Farm filed a declaratory action naming Higgins, Bradley, and Ingalls as defendants and seeking a determination as to whether it had a duty to defend and indemnify Higgins under the policy. State Farm argued that it had no such duty because the alleged conduct did not constitute an "occurrence" within the meaning of the policy and fell within both exclusions.

The circuit court consolidated the underlying action brought by Ingalls and the declaratory action brought by State Farm. After a settlement was later reached with Bradley, Ingalls again amended her complaint against Higgins. That second amended complaint excluded the prior assault and battery allegations and alleged simply that while Ingalls was on the property as a guest of Bradley, Higgins came upon the property, began to argue with Bradley, and "negligently injured" Ingalls during the course of that altercation.

As a result, State Farm amended its complaint for declaratory relief and argued that "despite the negligence label placed on Higgins' alleged conduct in the Second Amended Complaint in the underlying action, Higgins' alleged conduct was still of an intentional, willful, and malicious nature."

The declaratory action proceeded to a jury trial. In a special verdict form, the jury found that Higgins intended or expected to cause the injuries for which Ingalls was seeking damages and that Higgins willfully and maliciously caused those injuries. Post-trial, Ingalls moved for a new trial based on the remark of State Farm's counsel to the jury during opening statements that a settlement had already been reached between Ingalls and Bradley. The circuit court found that the remark violated section 768.041(3), Florida Statutes (1999), and granted a new trial. State Farm appealed, and Higgins and Ingalls cross-appealed on numerous points.

B. District Court

On appeal and cross-appeal, Judge Gross wrote for a unanimous *en banc* panel of the Fourth District Court of Appeal and addressed six issues, three of which are relevant to this review. Regarding the first relevant issue, the district court held that the trial court should have granted the motion of Higgins and Ingalls for directed verdict on the issue of State Farm's duty to defend the action against Higgins. *See Higgins*, 788 So. 2d at 995-96. Following established case law that a liability insurer's duty to defend a claim made against its insured must be determined solely from the allegations in the underlying complaint,1 the district court found that the allegations contained within the four corners of Ingalls' second amended complaint clearly placed the cause of action against Higgins within the duty-to-defend coverage of the policy. *See id.*

Regarding the second relevant issue, the district court held that the declaratory action was a proper vehicle to decide whether Higgins'

conduct was excluded from the duty-to-indemnify coverage of the policy. *See Higgins*, 788 So. 2d at 996-1002. The district court acknowledged case law holding that the declaratory judgment statute did not extend to actions in which the application of the language in an insurance policy to factual circumstances, rather than the language of an insurance policy itself, was in question. *See, e.g., Columbia Casualty Co. v. Zimmerman*, 62 So. 2d 338 (Fla. 1952); *Smith v. Milwaukee Ins. Co.*, 197 So. 2d 548 (Fla. 4th DCA 1967). However, the district court questioned the continued applicability of *Columbia Casualty and Smith* in view of a more recent trend in case law "in the direction of more freely allowing declaratory judgment suits as a vehicle for resolving fact issues deciding the existence of insurance coverage." *Higgins*, 788 So. 2d at 1001. The district court cited decisions by the First, Second, and Fifth District Courts of Appeal as examples of this trend and noted that the Fifth District in *Allstate Insurance Co. v. Conde*, 595 So. 2d 1005, 1008 (Fla. 5th DCA 1992), had certified the following question to this Court:

MAY THE INSURER PURSUE A DECLARATORY ACTION IN ORDER TO HAVE DECLARED ITS OBLIGATION UNDER AN UNAMBIGUOUS POLICY EVEN IF THE COURT MUST DETERMINE THE EXISTENCE OR NONEXISTENCE OF A FACT IN ORDER TO DETERMINE THE INSURER'S RESPONSIBILITY?

Recognizing that this Court had not definitively ruled on that question, the district court certified the same question. *Higgins*, 788 So. 2d at 1002.

Regarding the third relevant issue, the district court held that the trial court properly allowed the declaratory action to be tried prior to the resolution of the underlying liability action. *Id.* at 1002-06. The district court acknowledged two of its own prior decisions in which it concluded that an insurer's declaratory action seeking a determination of its duty to indemnify should have been deferred

until the insured's liability was determined. *See Home Ins. Co. v. Gephart*, 639 So. 2d 179 (Fla. 4th DCA 1994); *Marr Investments, Inc. v. Greco*, 621 So. 2d 447 (Fla. 4th DCA 1993). However, the district court chose to partially recede from those prior decisions and adopt what it considered the "better procedural approach" adopted by the Fifth District in *Conde*, which held that an insurer could properly bring a declaratory action to determine both the duty to defend and the duty to indemnify prior to a determination of the insured's liability in the underlying action so long as the injured plaintiff also was made a party to the declaratory action. *See Higgins*, 788 So. 2d at 1003-04. The district court found significant policy reasons supported this approach and held that it is a discretionary decision of the trial court to determine whether a declaratory action should be tried in advance of the underlying liability action. *See id.* at 1004-05. On this point, the district court also certified conflict with *Burns v. Hartford Accident & Indemnity Co.*, 157 So. 2d 84 (Fla. 3d DCA 1963) (insurer may not seek to have material issue from an underlying action predetermined in declaratory action), and *Irvine v. Prudential Property & Casualty Insurance Co.*, 630 So. 2d 579 (Fla. 3d DCA 1993) ("[T]he better process is to require the insurer to defend the action under a reservation of rights.").

Following the Fourth District's en banc decision, Higgins and Ingalls sought this Court's jurisdiction to review the decision on the grounds of both the certified question and certified conflict. The two review proceedings were consolidated.

II. ANALYSIS

The question certified by the Fourth District is:

MAY THE INSURER PURSUE A DECLARATORY ACTION IN ORDER TO HAVE DECLARED ITS OBLIGATION UNDER AN UNAMBIGUOUS POLICY EVEN IF THE COURT MUST

DETERMINE THE EXISTENCE OR NONEXISTENCE OF A FACT IN ORDER TO DETERMINE THE INSURER'S RESPONSIBILITY?

This question presents the issue of whether chapter 86, Florida Statutes (2003), Florida's declaratory judgments statute, authorizes declaratory judgments as to insurance policy obligations to defend and coverage for indemnity when it is necessary to decide issues of fact in order to determine the declaratory judgment. We conclude that the declaratory judgments statutes do authorize a declaratory judgment action to decide these issues. We recede from *Columbia Casualty Co. v. Zimmerman*, 62 So. 2d 338 (Fla. 1952), and the cases which relied upon it to the extent that the *Columbia Casualty* decision is in conflict with our answer to the certified question.

In respect to an insurer's obligation to defend, we first point out, as does the district court opinion below, that an insurer's obligation to defend is determined solely by the claimant's complaint if suit has been filed. *See Higgins*, 788 So. 2d at 995-96. This decision should in no way be as read as a rejection of the principle set forth in *National Union Fire Insurance Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 536 (Fla. 1977), that "[t]he allegations of the [underlying] complaint govern the duty of the insurer to defend." We approve the explanation of this obligation to defend as clearly explained by Judge Zehmer in *Baron Oil Co. v. Nationwide Mutual Insurance Co.*, 470 So. 2d 810 (Fla. 1st DCA 1985). Therefore, when suit is filed against an insured, there generally is no need for a declaratory action in respect to the insurer's obligation to defend.2

In respect to issues concerning the obligation to defend when there is no complaint and concerning insurance policy coverage for indemnity, we agree with the well-reasoned analysis of Judge Gross in the case below for the en banc Fourth District. We agree that the Court's use of declaratory judgments has evolved since this Court's decision over fifty years ago in *Columbia Casualty*. We conclude that in this decision we should give effect, for use in

insurance coverage disputes, to all of the sections of Florida's declaratory judgments statutes and not limit the application of those statutes in these disputes to only the one section relied upon in *Columbia Casualty*. We believe that declaratory judgments are and can increasingly be a valuable procedure for the resolution of insurance coverage disputes to the benefit of insurers, insureds, and claimants.

The sections of Florida's declaratory judgments statutes, chapter 86, Florida Statutes (2003), that we conclude are applicable to declaratory judgment actions regarding insurance coverage provide:

86.011 Jurisdiction of trial court. -- The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. . . . The court may render declaratory judgments on the existence, or nonexistence:

(1) Of any immunity, power, privilege, or right; *or*

(2) *Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. . . .*

86.021 Power to construe. -- Any person claiming to be interested or who may be in doubt about his or her rights under a . . . contract . . . or whose rights, status, or other equitable or legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under such . . . contract . . . or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

. . . .

86.051 Enumeration not exclusive. -- The enumeration in ss.

86.021, 86.031 and 86.041 *does not limit or restrict the exercise of the general powers conferred in s. 86.011* in any action where declaratory relief is sought. . . .

. . . .

86.071 Jury trials. -- *When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending.* To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. . . .

. . . .

86.101 Construction of Law. -- *This chapter* is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and *is to be liberally administered and construed.*

(Emphasis added.)

As originally enacted, the Declaratory Judgment Statute, chapter 7857, Laws of Florida (1919), was considered and its scope first defined in *Sheldon v. Powell*, 128 So. 258 (Fla. 1930). Later, that statute was replaced with the uniform Declaratory Judgment Act, chapter 21820, Laws of Florida (1943) (Act), which was considered and its scope defined in *Ready v. Safeway Rock Company*, 24 So. 2d 808 (Fla. 1946). In *Ready*, the Court stated that the amended Act enlarged the scope of substantive and remedial remedies and was a legislative attempt to extend procedural remedies to comprehend relief in cases where technical or social advances have tended to obscure or place in doubt one's rights, immunities, status, or privileges. *Id.* at 808-09. Although the Act was later transferred to chapter 86 of the Florida Statutes and a

few of its provisions were amended, *see* ch. 67-254, § 38, Laws of Fla., the language of the provisions quoted above and the purpose of the Act have remained largely unchanged since 1943.

In 1952, this Court issued its decision in *Columbia Casualty Co. v. Zimmerman*, 62 So. 2d 338 (Fla. 1952), in which it addressed the propriety of a declaratory action seeking a determination of whether under an automobile insurance policy an insurer was obligated to defend a pending suit against and indemnify a driver who the insurer asserted did not have the knowledge and consent of the vehicle's owner when the relevant accident occurred. The Court quoted that portion of the Act now found in section 86.021 and held:

There must be some doubt as to the proper interpretation of the written contract or as to the existence or non-existence of some right, status, immunity, power or privilege under the written contract, and that a construction thereof is necessary in order to determine the rights of a party having such doubt as to the meaning of the contract.

Columbia Casualty, 62 So. 2d at 340. Noting that the policy's exclusionary provision upon which the insurer relied was plain and unambiguous and that the only question the insurer sought to have determined in the declaratory action was a purely factual one, namely, whether the defendant was driving the insureds' vehicle with the knowledge and consent of the insureds, the Court concluded that a declaratory action was improper. *Id.* at 339-40.

As the Fourth District noted in the decision below, the *Columbia Casualty* Court did not refer to other portions of the Act that supported a broader interpretation of its scope. Specifically, the Court did not refer to:

(1) the part of the Act, now found in section 86.011(2), Florida Statutes, which provides that the court may render declaratory

judgments on the existence or nonexistence of any immunity, power, privilege, or right, or of "*any fact upon which the existence or nonexistence of such immunity, power, privilege or right does or may depend,* whether such immunity, power, privilege, or right now exists or will arise in the future" (emphasis added);

(2) the part of the Act, now found in section 86.051, which provides that the enumeration in section 86.021, upon which the Court relied in *Columbia Casualty*, does not limit or restrict the exercise of the general powers conferred in section 86.011;

(3) the part of the Act, now found in section 86.071, which provides for jury trials when an action under the Act concerns the determination of an issue of fact; or

(4) the part of the Act, now found in section 86.101, which provides that the Act is to be liberally administered and construed.

We agree with the Fourth District that sections 86.011(2), 86.051, 86.071, and 86.101 support the conclusion that an insurer may pursue a declaratory action which requires a determination of the existence or nonexistence of a fact upon which the insurer's obligations under an insurance policy depend. First, the use of the word "or" between subsections 86.011(1) and (2) clearly indicates that the courts have the general power to issue declaratory judgments not only in suits seeking a determination of the existence or nonexistence of any "immunity, power, privilege, or right" but also in suits *solely* seeking a determination of any fact affecting the applicability of an "immunity, power, privilege, or right." As the Fifth District correctly concluded in *Conde*, in suits for declaration as to insurance coverage, the insurer "is asking that the court, pursuant to section 86.011, determine 'the existence or nonexistence' of a 'fact [to wit: whether the shooting was intentional] upon which the existence or nonexistence of . . . immunity [lack of coverage] . . . does or may depend.' " *Conde*, 595 So. 2d at 1007. Second, although section 86.021, upon which

Columbia Casualty exclusively relies, grants to the courts the power to determine any question of "construction or validity" arising under a contract, section 86.051 states that the enumeration of powers in section 86.021 "does not limit or restrict the exercise of the general powers conferred in section 86.011." Therefore, we now conclude that the *Columbia Casualty* decision was too limiting of the scope of section 86.021 when read with this other section of the statutes. Third, the Legislature clearly contemplated fact-finding in declaratory actions. Section 86.071 expressly provides a mechanism for jury trials when an action under the Act concerns the determination of an issue of fact. Fourth and finally, section 86.101 clearly provides that chapter 86 is to be "liberally administered and construed." We recently stated in *Olive v. Maas*, 811 So. 2d 644, 648 (Fla. 2002), that there has been a "repeated adherence by Florida courts to the notion that the declaratory judgment statute should be liberally construed." This supports the conclusion that chapter 86 is not read as narrowly in recent decisions as it was in *Columbia Casualty*.

We also agree with the Fourth District's explanation that the *Columbia Casualty* court took a stricter view of the Act at a time before the efficiency and effectiveness of declaratory judgment actions had been developed. As the Fourth District stated:

The earlier Florida cases like *Columbia Casualty* . . . grew out of a legal climate where courts enforced more rigid pleading requirements and viewed causes of action as narrow pigeonholes within which litigants were required to fit their claims. Prior to 1967, Florida's law and equity courts were separate. *See Weinstein v. Aisenberg*, 758 So. 2d 705, 708 n.1 (Fla. 4th DCA 2000) (Gross, J., concurring). A declaratory judgment began in Florida as an action in equity. The predecessor to the Uniform Declaratory Judgments Act, was "limited in scope" and provided that anyone "interested under a deed, will, contract in writing or other instrument in writing may file a *bill in equity* for the determination of any question of construction arising under the instrument . . . ."

Ready v. Safeway Rock Co., 24 So. 2d 808, 809 (1946).

The 1943 Uniform Declaratory Judgments Act, Chapter 21820, Laws of Florida (1943), enlarged "the scope of substantive and remedial remedies over its predecessor." *Ready*, 24 So. 2d at 808. It blurred the distinction between law and equity by making the remedy available on the law side of the court, giving a law judge the "power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as a bill in equity." Ch. 21820, Laws of Fla. (1943). Faced with a new, potentially far-reaching cause of action, the early Florida cases were cautious in interpreting the new act. *See, e.g., Ready*, 24 So. 2d at 810-812 (Brown, J., concurring).

Higgins, 788 So. 2d at 1005 (footnote omitted). And while decisions by both the district courts3 and this Court4 have relied upon or reaffirmed the precedent of *Columbia Casualty*, in more recent years, the district courts and this Court have not rigidly adhered to the narrow application of the declaratory judgment statutes in *Columbia Casualty*.

The district court decision which initially certified the present question provides an informative discussion of the need to have the declaratory judgment statutes construed so that declaratory judgment actions are an available procedure to resolve insurance coverage controversies. In its en banc decision in *Conde*, the Fifth District receded from its own prior decision in *Vanguard Insurance Co. v. Townsend*, 544 So. 2d 1153 (Fla. 5th DCA 1989), in which it had relied upon *Columbia Casualty*'s narrow reading of the Act. In *Conde*, the defendant/insured, Osvaldo Conde, shot a woman and her two children. The woman sued Conde, alleging alternative counts of intentional wrongdoing and negligent conduct. Conde's insurer filed a declaratory action, claiming his conduct was intentional and thus not covered by his policy.5 The trial court held that the declaratory action was not available to determine the coverage issue. On appeal, the Fifth District

disagreed, stating:

In *Vanguard* we held that Chapter 86 can only be used to "settle the meaning of ambiguous language or clauses in an insurance policy."

. . . This interpretation limits Chapter 86 to little more than a codification of the parol evidence rule. Chapter 86 should not be read so narrowly. One of the reasons for permitting parties to have their rights (and obligations) under contract determined is to avoid protracted and unnecessary litigation . . . .

Allstate asks in its complaint that the court determine that no coverage existed because the shooting was intentional. This clearly invokes the court's jurisdiction under section 86.011(2) and *not* section 86.021.

In effect Allstate is asking that the court, pursuant to section 86.011 determine "the existence or nonexistence" of a "fact [to wit: whether the shooting was intentional] upon which the existence or nonexistence of . . . immunity [lack of coverage] . . . does or may depend[.]" The legislature has given the court the authority to do so.

Conde, 595 So. 2d at 1006-07 (footnote omitted) (alterations in original). In a footnote to this analysis, the Fifth District added:

In *Columbia Casualty Co. v. Zimmerman*, 62 So. 2d 338 (Fla. 1952), the court, limiting its consideration to what is now section 86.021 (the power to construe deeds, wills, contracts) denied the use of a declaration action to determine purely factual matters. The majority in [*Columbia Casualty*], perhaps because of the pleadings, did not consider the more expansive provisions of what is now section 86.011 which specifically authorizes the court to determine if a fact exists (intentional shooting) which would establish the existence of an "immunity, power, privilege or right" (lack of

coverage). If the legislature did not contemplate some fact finding in declaratory actions, it is curious why section 86.071 provides that "a determination of an issue of fact" may be submitted to a jury. Because of the general statements in [*Columbia Casualty*], however, we certify the question to the supreme court.

Conde, 595 So. 2d at 1007 n.4. Significantly, while the en banc decision in *Conde* was not unanimous on all points, no judge dissented from the decision to recede from *Vanguard* and reject *Columbia Casualty*'s narrow reading of the Act. Thus, we now have unanimous en banc decisions from both the Fourth and the Fifth Districts to allow the resolution of factual issues in these declaratory judgments.

Though the question certified in *Conde* was not decided by this Court, by implication we have recognized, without directly referring to *Columbia Casualty*, that a declaratory judgment action was an available procedure to decide insurance coverage in a case involving a determination as to the existence or nonexistence of a fact. *See Canal Insurance Co. v. Reed*, 666 So. 2d 888 (Fla. 1996). In *Canal Insurance*, we addressed the certified question of whether, when a third-party declaratory action6 results in an order requiring an insurer to provide liability coverage for its insured in an underlying action, the insurer may seek immediate review of the order prior to final resolution of the underlying liability action. We answered that question in the affirmative on the basis of section 86.011, which states that a declaratory judgment "has the force and effect of a final judgment." We concluded that a declaratory judgment is appealable as a final order and specified that this was true "regardless of whether the judgment is rendered in a separate declaratory judgment action or as part of a third-party action such as that is at issue here." *Canal Insurance*, 666 So. 2d at 891. Further, we stated that "[i]n reaching this conclusion, we emphasize that the coverage dispute could have been resolved under either of those procedural mechanisms." *Id.* The question which was resolved in the declaratory action was the fact question

of whether the injured party was an employee of the insured at the time of the accident and thus fell within an exclusionary provision of the policy. Following our decision in *Canal Insurance*, Florida Rule of Appellate Procedure 9.110, which governs inter alia appeal proceedings for review of final orders, was in fact amended to add subdivision (m), which states, "Judgments that determine the existence or nonexistence of insurance coverage in cases in which a claim has been made against an insured and coverage thereof is disputed by the insurer may be reviewed either by the method prescribed in this rule or that in rule 9.130." This amendment obviously contemplates declaratory judgments in insurance coverage disputes.

We conclude that it is illogical and unfair to not allow insureds and insurers to have a determination as to whether coverage exists on the basis of the facts underlying a claim against an insurance policy. Why should an insured be placed in a position of having to have a substantial judgment against the insured without knowing whether there is coverage from a policy? Why should an insurer be placed in a position of either paying what it believes to be an uncovered claim or being in jeopardy of a bad faith judgment for failure to pay a claim? These are precisely the issues recognized by this Court in other contexts that are intended to come within the purpose of the declaratory judgment statute's "relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 404 (Fla. 1996). We agree with what Chief Justice Pariente stated as a judge of the Fourth District Court of Appeal, in *Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.*, 632 So. 2d 138, 141 (Fla. 4th DCA 1994):

Generally, an insurance carrier should be entitled to an expeditious resolution of coverage where there are no significant, countervailing considerations. A prompt determination of coverage potentially benefits the insured, the insurer and the injured party. If

coverage is promptly determined, an insurance carrier is able to make an intelligent judgment on whether to settle the claim. If the insurer is precluded from having a good faith issue of coverage expeditiously determined, this interferes with early settlement of claims. The plaintiff certainly benefits from a resolution of coverage in favor of the insured. On the other hand, if coverage does not exist, the plaintiff may choose to cut losses by not continuing to litigate against a defendant who lacks insurance coverage.

We therefore answer the certified question in the affirmative, hold that the declaratory judgment statutes authorize declaratory judgments in respect to insurance policy indemnity coverage and defense obligations in cases in which it is necessary to resolve issues of fact in order to decide the declaratory judgment action, and recede from *Columbia Casualty* to the extent that it is inconsistent with this holding.

Having approved the Fourth District's decision that the declaratory judgment statutes can be used to decide disputes in respect to insurance policy indemnity coverage and defense obligations, we believe that it is necessary to discuss the issue of whether the declaratory judgment action or the underlying action between the claimant and the insured is to proceed first. The issue of the timing of these two separate but related actions involves numerous fact-intensive considerations.

In *Canal Insurance*, we recognized that the question of whether to stay the underlying action through an appeal of the declaratory judgment was within the discretion of the trial judge. We stated:

Although we find that this declaratory judgment regarding a determination of insurance coverage is reviewable as a final order, we must also stress that such a judgment will not *automatically* result in a stay in the independent underlying cause of action. This is because the underlying personal injury action is separate and

distinct from the insurance coverage dispute. *The trial judge has the discretion to stay the underlying action between the parties pending resolution of the appeal or to permit it to continue concurrently with the appeal process.*

666 So. 2d at 892 (citation omitted) (second emphasis added).

In *Conde*, the Fifth District judges who wrote opinions each discussed matters which are of genuine concern in determining whether a declaratory judgment action as to insurance policy indemnity coverage should proceed ahead of the underlying tort actions. One consideration is what issues are involved in the two actions. In *Conde*, as in the instant case, the issue was whether the claim against the insured arose from acts by the insured which were intentional or negligent. The policies excluded claims based upon intentional wrongdoing. Judge Harris stated in *Conde*:

Because the complaint alleges facts that bring the action within the coverage of the policy and facts that exclude coverage, the insurer must defend its insured "at least until such time as the covered portions of the claim have been eliminated from the suit."[n.]

[n.] *C.A. Fielland, Inc. v. Fidelity & Casualty Co. of New York*, 297 So. 2d 122, 127 (Fla. 2d DCA 1974), *cert. denied*, 309 So.2d 6 (Fla.1975). Conde "purchased" not only an indemnity contract but also a contract to defend him from all claims -- even fraudulent -- *covered by the policy*. So long as the negligence count remains against him, the insurer must defend him. If, however, the cause of action against Conde is limited to the uninsured intentional act, he is entitled to neither indemnity nor defense.

But in this case there are not some claims that are covered and some that are not; the asserted claims are mutually exclusive. Either the claim is covered or it is not. Therefore, the insurer must provide defense until the coverage issue is resolved. In a case such as this -- alternative, mutually exclusive theories -- the indemnity

issue and the duty to defend issue are inextricable. The resolution of one necessarily resolves the other.

Conde, 595 So. 2d at 1006. Judge Harris concluded that an early resolution of this issue is essential. We do not go that far, but rather, we hold that this is a factor to which the trial judge should give weight in the exercise of discretion as to whether the insurance indemnity coverage issue should proceed ahead of the underlying tort action.

Another matter which must be weighed by the trial judge is whether proceeding to a decision as to the insurance indemnity issue will promote settlement and avoid the problem of collusive actions between claimants and insureds in order to create coverage where coverage does not exist under the true facts. Judge Griffin discusses this factor in her concurring opinion in *Conde*:

The problem is that such a pleading creates a perfect conspiracy between a plaintiff and the insured and the insurer has no remedy.

The plaintiff pleads negligence in a case like this because he wants a deep pocket from which to satisfy a judgment or, even better, to obtain a settlement. Normally when a defendant is sued on a theory that is inadequately pleaded, he gets the claim dismissed or, if the claim is invalid under controlling law, he gets a summary judgment. But in cases such as this the normal antidotes for invalid claims do not work. An insured defendant is often totally committed to the negligence pleading of the plaintiff because as long as the negligence claim is included in the complaint, the insured must be provided a defense on the intentional tort claim, a benefit he would not have if the spurious negligence claim were missing. It is also more likely the insurer will come up with the money to settle the entire case based on the cost of defending the negligence claim. In many of these cases, the defendant even has some relationship with the victim, or a sense of remorse, and thus has either an emotional or financial stake in having the plaintiff

succeed in recovering a judgment under a theory covered by insurance. In a case where neither the plaintiff nor the defendant wants the covered claim disposed of, it is most unlikely to disappear.

If the fictional covered claim is not disposed of, the insurer is faced with providing a defense of the entire action through trial, the cost of which is generally the impetus for paying sums to a plaintiff in settlement that would not be payable under the policy. Only the insurer is interested in quickly defeating the covered claims and the insurer has no forum to be heard.

Id. at 1009 (Griffin, J., concurring). In respect to settlements, all parties are in a better position to enter into settlement negotiations when the decision as to coverage has been put to rest.

On the other hand, Judge Sharp and Judge Diamantis make sound points which also should be weighed by a trial judge. Judge Sharp is clearly correct that there are cases with insureds who have resources independent of insurance and that it would be immaterial to the claimant whether the insured's conduct was covered or not covered by indemnity insurance. In those cases, as in all cases, the hardship of delaying the claimant in proceeding to judgment against the insurer must be weighed.

We agree with Judge Diamantis that the resolution of the timing issue in accord with *International Surplus Lines Insurance Co. v. Markham*, 580 So. 2d 251 (Fla. 2d DCA 1991), in which the court indicated that the duty to defend issue should be resolved early but the insurance indemnity action abated until after the underlying tort action is final, may be necessary in some cases. But, for the reasons stated above, we believe that there are factors which weigh in favor of trying the indemnity coverage issue first.

We conclude that there is too infinite a variety of circumstances for there to be a rule applicable in all cases. For that reason, we

continue to hold that the timing determination is within the discretion of the trial court weighing the factors we have outlined as well as the factors of the particular case.

In the present case, we approve the decision of the district court affirming the trial court's decision to have the indemnity coverage issue tried prior to the underlying tort action.

III. CONCLUSION

On the basis of sections 86.011(2), 86.051, 86.071, and 86.101, as well as with an understanding of the evolution of the declaratory action in Florida's jurisprudence, we answer the certified question in the affirmative and recede from *Columbia Casualty* and its progeny. For the foregoing reasons, we approve the Fourth District's conclusions regarding the motions of Higgins and Ingalls on the issue of State Farm's duty to defend, the propriety of the declaratory action as a means of determining State Farm's duty to indemnify, and the trial court's exercise of discretion in allowing the declaratory action to be tried prior to the resolution of the underlying liability action.

It is so ordered. (ANSTEAD, CANTERO and BELL, JJ., concur. QUINCE, J., dissents with an opinion, in which LEWIS, J., concurs. PARIENTE, C.J., recused.)

1*See, e.g., State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1077 n.3 (Fla. 1998).

2We note, however, that there are some natural exceptions to this where an insurer's claim that there is no duty to defend is based on factual issues that would not normally be alleged in the underlying complaint. One example would be when the insurer claims that the insured did not provide sufficient notice of the claim and therefore

breached an assistance and cooperation clause. In such circumstances, we believe the courts may entertain a declaratory action seeking a determination of a factual issue upon which the insurer's duty to defend depends.

3*See, e.g., Vanguard Insurance Co. v. Townsend*, 544 So. 2d 1153 (Fla. 5th DCA 1989); *New Amsterdam Casualty Co. v. Intercity Supply Corp.*, 212 So. 2d 110 (Fla. 4th DCA 1968); *Smith v. Milwaukee Insurance Co.*, 197 So. 2d 548 (Fla. 4th DCA 1967); *Burns v. Hartford Accident & Indemnity Co.*, 157 So. 2d 84 (Fla. 3d DCA 1963).

4*See Lambert v. Justus*, 335 So. 2d 818 (Fla. 1976); *Bergh v. Canadian Universal Ins. Co.*, 216 So. 2d 436 (Fla. 1968); *Travelers Indemnity Co. v. Johnson*, 201 So. 2d 705 (Fla. 1967).

5The *Conde* decision does not specify the type of policy at issue, but the facts suggest that the shootings may have occurred in Conde's home and that his homeowners policy was at issue.

6A "third party declaratory action" refers to the circumstances in which an insured defendant brings a third-party complaint for liability coverage against its insurer as part of the underlying personal injury action.

(QUINCE, J., dissenting.) I would answer the certified question in the negative and quash the Fourth District's decision. The Fourth District held that "a declaratory judgment is proper to determine the existence of insurance coverage, a ruling that is consistent with the modern trend according broad scope to the Declaratory Judgments Act, Chapter 86, Florida Statutes (2000)." *State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 994 (Fla. 4th DCA 2001). In other words, the Fourth District held that the declaratory judgment could determine issues of fact involving the underlying

civil lawsuit. *Id.* The majority agrees with the Fourth District, finding that the declaratory judgment statutes do authorize a declaratory judgment action to decide underlying issues of fact, thereby receding from *Columbia Casualty Co. v. Zimmerman*, 62 So. 2d 338 (Fla. 1952). Majority op. at 8-9.

I dissent because I believe that a declaratory judgment action is not proper when it involves determining the existence of an ultimate fact in the underlying litigation in order to declare the insurer's responsibility under an unambiguous policy. My view is consistent with *Zimmerman*, and the many decisions that have followed *Zimmerman*, which hold that for a declaratory judgment of an insurance policy to lie, there must be a question regarding construction of the policy, and not only fact issues for resolution. *See, e.g., Lambert v. Justus*, 335 So. 2d 818 (Fla. 1976); *Bergh v. Canadian Universal Ins. Co.*, 216 So. 2d 436 (Fla. 1968); *Travelers Indem. Co. v. Johnson*, 201 So. 2d 705 (Fla. 1967); *New Amsterdam Cas. Co. v. Intercity Supply Corp.*, 212 So. 2d 110 (Fla. 4th DCA 1968); *Smith v. Milwaukee Ins. Co.*, 197 So. 2d 548 (Fla. 4th DCA 1967). Thus, I would adhere to the precedent established by this long line of cases following *Zimmerman* and answer the certified question in the negative.

If a declaratory judgment action were proper, as the majority finds, then it should logically be deferred until resolution of the underlying negligence suit; otherwise, the insurer could take control of the pleadings and effectively amend the complaint. It is well-settled law in Florida that a liability insurer's obligation to defend a claim made against its insured must be determined solely from the allegations in the complaint. *See Nat'l Union Fire & Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 536 (Fla. 1977). The duty to defend arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage. *See McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. 4th DCA 1999). The duty to defend is broader than the duty to indemnify in the sense that the

insurer must defend even if the facts alleged are actually untrue or the legal theories unsound. *See West Am. Ins. Co. v. Silverman*, 378 So. 2d 28, 30 (Fla. 4th DCA 1979). "Once the insurer's duty to defend arises, it continues throughout the case unless it is made to appear by the pleadings that the claims giving rise to coverage have been eliminated from the suit." *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 812 (Fla. 1st DCA 1985). In the instant case, the district court correctly found that State Farm had a duty to defend.

Thus, all that remains to be decided in the declaratory judgment action in this case is a determination of State Farm's duty to indemnify. If an insurer has a duty to defend, "then any determination as to its duty to indemnify should be deferred until the issue of [the insured's] liability is decided." *International Surplus Lines v. Markham*, 580 So. 2d 251 (Fla. 2d DCA 1991). *But see Allstate Insurance Co. v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992) (en banc) (distinguishing *Markham* and finding that where alternative, mutually exclusive theories are alleged, the indemnity issue and the duty to defend are inextricable and the resolution of one necessarily resolves the other). Unlike *Conde*, however, the instant case is not an "all or nothing" case. While there are some cases that present facts which would allow the issue of the duty to indemnify to be decided in a declaratory action prior to the conclusion of the underlying suit, this is not one of those cases. *See, e.g., Britamco Underwriters, Inc. v. Central Jersey Invs., Inc.*, 632 So. 2d 138 (Fla. 4th DCA 1994) (holding that where the insurer seeks to determine issues of coverage *not dependent on the resolution of fact issues common to the underlying litigation*, it is entitled to litigate the coverage issue in a separate declaratory judgment action while simultaneously defending the insured under a reservation of rights); *see also Home Ins. Co. v. Gephart*, 639 So. 2d 179, 180 (Fla. 4th DCA 1994) ("Although some cases present facts that allow the issue of the duty to indemnify to be decided in a declaratory action prior to the conclusion of the underlying suit, the facts of the present case do

not present such a situation.").

Both the majority in this case and other states that have allowed this extension of a declaratory judgment action have done so espousing the principle that declaratory judgment jurisdiction should be liberally construed and administered. *See* § 86.101, Fla. Stat. (2003). However, such liberal constructions should only be done to further the purpose of declaratory actions. The purpose of such actions is to declare rights, status, and other equitable or legal relations. *See Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *State Farm Mut. Auto. Ins. Co. v. Marshall*, 618 So. 2d 1377 (Fla. 5th DCA 1993). Declaratory relief is not available to try disputed questions of fact rather than rights, status or relations of the parties. *See X Corp v. Y Person*, 622 So. 2d 1098 (Fla. 2d DCA 1993).

In this case, State Farm was in doubt of only one question: the ultimate issue in the underlying negligence suit. Because in this case there was no policy provision to construe, I would find that State Farm cannot bring that issue in its own declaratory judgment action. I would thus answer the certified question in the negative and quash the decision of the Fourth District which allows a declaratory judgment action on the issue of indemnity when such an action requires resolution of an issue of fact in the underlying lawsuit. To hold otherwise is to allow the defendant to have control over the litigation brought by the plaintiff. I do not believe that the declaratory judgment statute was intended to be used in this fashion. (LEWIS, J., concurs.)

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RECENT CASE ON BIFURCATION
(COVERAGE DEC ACTION FROM TORT ACTION)

33 Fla. L. Weekly D81a

Insurance -- Motor vehicle -- Passenger liability -- Coverage -- Declaratory judgment -- Insurer who has bona fide coverage dispute with its insured is permitted to litigate coverage issue in a separate declaratory judgment action while the underlying tort action is in progress -- Trial court's abatement of insurer's declaratory judgment action pending conclusion of underlying tort action constituted departure from essential requirements of law that will cause material injury to insurer that cannot be remedied on plenary appeal -- Petition for common law certiorari granted

PROGRESSIVE EXPRESS INSURANCE COMPANY, Petitioner, v. JOIE REED AND GREGORY GREENE, Respondents. 5th District. Case No. 5D07-2045. Opinion filed December 28, 2007. Petition for Certiorari Review of Order from the Circuit Court for Seminole County, Debra S. Nelson, Judge. Counsel: Daniel P. Osterndorf of Latham, Shuker, Eden & Beaudine, LLP, Orlando, for Petitioner. Joseph J. Mancuso of Joseph J. Mancuso, P.A. Casselberry, for Respondent Gregory Greene. No Appearance for Respondent Joie Reed.

(MONACO, J.) By its petition for common law certiorari, Progressive Express Insurance Company asks us to consider the issue of whether an insurer who has a *bona fide* coverage dispute with its insured is permitted to litigate the coverage issue in a separate declaratory judgment action, while the underlying tort action is in progress. The trial court at the request of one of the respondents abated the declaratory judgment action pending the conclusion of the underlying tort action. As we have concluded that to do so was a departure from the essential requirements of law that will cause material injury to the insurer that cannot be remedied on plenary appeal, we grant the petition. *See Britamco Underwriters, Inc. v. Central Jersey Invs., Inc.*, 632 So. 2d 138 (Fla. 4th DCA 1994).

The facts are relatively simple. Progressive issued a policy for

motor vehicle insurance with respect to a motorcycle owned by the respondent, Joie Reed. The policy contained an exclusion for bodily injury to any person "occupying a covered vehicle, other than the driver of the covered vehicle, unless you have paid a premium for Guest Passenger Liability coverage." According to Progressive, this coverage was rejected by Mr. Reed.

Subsequent to the issuance of the policy, Mr. Reed was involved in an accident while operating his motorcycle. The other respondent, Gregory Greene, was a passenger on the motorcycle at the time of the accident, and is alleged to have sustained injuries and damages as a result. Mr. Greene brought suit against Mr. Reed for negligence and specifically alleged in his complaint that he was a passenger on the motorcycle operated by Mr. Reed.

Mr. Reed requested insurance coverage to be provided by Progressive for the claim asserted by Mr. Greene. Progressive responded that it would provide a defense to the suit under a "reservation of rights," based on the exclusion of passenger liability insurance, and indeed Progressive provided counsel for Mr. Reed and is currently defending the suit.

Thereafter, Progressive filed a declaratory judgment action against Mr. Reed seeking a declaration that its policy did not provide coverage for the injuries to Mr. Greene because of the exclusion, and that as a result, Progressive did not have a duty to provide a defense. Mr. Greene was allowed to intervene in the suit, and the usual pleadings were filed by all parties. Among the motions filed by Mr. Greene was a request that the lower court abate the declaratory judgment action until the liability suit was resolved. Although Progressive scheduled a hearing on this issue, the trial court entered an order abating the declaratory judgment action pending resolution of the liability suit without a hearing having been held. Progressive timely sought a writ of certiorari from this court addressed to the abatement order.

We are guided in our analysis of this case by the opinion of the Florida Supreme Court in *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5 (Fla. 2004). There, the court held that the Declaratory Judgment Act, Chapter 86, Florida Statutes, supports the

conclusion that an insurance company may pursue a declaratory judgment action which requires a determination of the existence or nonexistence of a fact upon which depend its obligations as the insurer under a policy of insurance. Thus, it is clear that Progressive is authorized by the statute to seek a declaratory judgment on the coverage issue. *See also, Allstate Ins. Co. v. Conde,* 595 So. 2d 1005 (Fla. 5th DCA 1992).

More importantly, *Higgins* suggests that there are a number of factors that should be considered in deciding the timing of a declaratory judgment action vis-a-vis the tort action upon which the insured asserts coverage. Among these factors are:

(1) Whether the two actions are mutually exclusive;

(2) Whether proceeding to a decision on the indemnity issue will promote settlement and avoid the problem of collusive actions between the claimant and the insured in order to create coverage where there is none; and

(3) Whether the insured has resources independent of insurance, so that it would be immaterial to the claimant whether the insured's conduct was covered or not covered by indemnity insurance.

When we consider these factors, it is immediately apparent that the first two militate in favor of allowing the declaratory action to proceed. The actions are indeed mutually exclusive. In the words of the *Higgins* majority, "Either the claim is covered or it is not." *Higgins,* 894 So. 2d at 16. If Progressive were to succeed in its declaratory judgment action, it would be relieved of the obligation to defend the tort action. As to the second factor, certainly the contestability of the coverage issue may likewise impact settlement. *See also, Conde,* 595 So. 2d at 1009 (Griffin, J. concurring). *Higgins* aptly noted that, "all parties are in a better position to enter into settlement negotiations when the decision as to coverage has been put to rest." *Higgins,* 894 So. 2d at 17. While the third *Higgins* factor is less clear, we note that the high court said in discussing it that "the hardship of delaying the claimant in proceeding to judgment against the insured must be weighed." *Higgins,* 894 So. 2d at 17. Here, however, there is no necessity to delay either suit. There is nothing to suggest that the

underlying tort action cannot proceed at the same time as the declaratory action. In fact, no good reason has been brought to our attention for not allowing both cases to run their course without abatement.

We conclude, therefore, that the abatement of the declaratory judgment action is a departure from the essential requirements of law in that it puts Progressive in the illogical and unfair position of having to provide a defense when the coverage issue is still very much an open question. Accordingly, we grant the petition for certiorari and quash the order abating the declaratory judgment action brought by Progressive.

PETITION GRANTED. (GRIFFIN and TORPY, JJ., concur.)

FLORIDA RULES OF CIVIL PROCEDURE (1.110) AND DECLARATORY JUDGMENT STATUTE (CH. 86) PERMIT PLEADING IN THE ALTERNATIVE

What does this mean?

- Pleading a breach of contract or other claim does not in an of itself preclude you from pursuing declaratory action

- Coverage questions turning on policy construction are no longer the only actions subject to declaratory relief

- Some insurers are now bringing declaratory actions to void coverage under a policy for fraud and misrepresentation

PRE-SUIT DEMAND LETTERS

Key Changes in 2007:

1. Renumbered from 627.736(11) to 627.736(10) – so your demand letter should now read "This is a demand letter under F.S. s. 627.736(10). It is likely that most courts will not eliminate your right of access to the courts based on that minor technical issue – but why feed the ammunition.

2. Demand letters must now allow 30 days for insurer to pay the demand (under prior version insurer had 15 days; and before that it was 7 days).

THE DEMAND LETTER STATUTE
(F.S. s. 627.736(10))

(10) DEMAND LETTER.--

(a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice required shall state that it is a "demand letter under s. 627.736(10)" and shall state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

(c) Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the insurer if so requested by the claimant in the notice, when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this subsection. Each licensed insurer, whether domestic, foreign, or alien, shall file with the office designation of the name and address of the person to whom notices pursuant to this subsection shall be sent which the office shall make available on its Internet website. The name and address on file with the office pursuant to s. 624.422 shall be deemed the authorized representative to accept notice pursuant to this subsection in the event no other designation has been made.

(d) If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer. If the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, no action may be brought against the insurer if, within 30 days after its receipt of the notice, the insurer mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment in accordance with the notice and to pay a penalty of 10 percent, subject to a maximum penalty of $250, when it pays for such future treatment in accordance with the requirements of this section. To the extent the insurer determines not to pay any amount demanded, the penalty shall not be payable in any subsequent action. For purposes of this subsection, payment or the insurer's agreement shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment, or the insurer's written statement of agreement, is placed in the United States mail in a properly addressed, postpaid

envelope, or if not so posted, on the date of delivery. The insurer is not obligated to pay any attorney's fees if the insurer pays the claim or mails its agreement to pay for future treatment within the time prescribed by this subsection.

(e) The applicable statute of limitation for an action under this section shall be tolled for a period of 30 business days by the mailing of the notice required by this subsection.

(f) Any insurer making a general business practice of not paying valid claims until receipt of the notice required by this subsection is engaging in an unfair trade practice under the insurance code.

MEDIATION OF AUTO CLAIMS

(THE STATUTE)

Some insurers are asserting that they may demand mediation as a condition precedent to filing suit on a PIP claim based upon F.S. s. 627.745. The statute is noted in detail below and should be read carefully as it does not indicate ANYWHERE that pre-suit mediation is a condition precedent – conditions precedent are terms of legal significance – just look at F.S. s. 627.736(10) (the PIP pre-suit demand letter statute) which sets forth explicitly that the demand letter is a "condition precedent". Rather F.S. s. 627.745 indicates that the "applicable time for filing an action" is "tolled" by the mediation demand. "Tolling a statute of limitations" is a term of legal significance that is completely different from a "condition precedent." "Tolling gives you more time to file suit while you are attempting to use the voluntary mediation program. Remember, if the legislature is going to limit a right of access to courts it must do so clearly.

Additionally, claims for PIP benefits are generally claims for breach of contract damages – not claims for personal injuries or property damage. While your assignee medical provider may be suffering dealing with United Auto's claims department – the lawsuit for non-payment is not seeking pain and suffering or other personal injury damages.

627.745 Mediation of claims.--

(1)(a) In any claim filed with an insurer for personal injury in an amount of $10,000 or less or any claim for property damage in any amount, arising out of the ownership, operation, use, or maintenance of a motor vehicle, either party may demand mediation of the claim prior to the institution of litigation.

(b) A request for mediation shall be filed with the department on a form approved by the department. The request for mediation shall state the reason for the request for mediation and the issues in dispute which are to be mediated. The filing of a request for mediation tolls the applicable time requirements for filing suit for a period of 60 days following the conclusion of the mediation process or the time prescribed in s. 95.11, whichever is later.

(c) The insurance policy must specify in detail the terms and conditions for mediation of a first-party claim.

(d) The mediation shall be conducted as an informal process in which formal rules of evidence and procedure need not be observed. Any party participating in a mediation must have the authority to make a binding decision. All parties must mediate in good faith.

(e) The department shall randomly select mediators. Each party may once reject the mediator selected, either originally or after the opposing side has exercised its option to reject a mediator.

(f) Costs of mediation shall be borne equally by both parties unless the mediator determines that one party has not mediated in good faith.

(g) Only one mediation may be requested for each claim, unless all parties agree to further mediation.

(2) Upon receipt of a request for mediation, the department shall refer

the request to a mediator. The mediator shall notify the applicant and all interested parties, as identified by the applicant, and any other parties the mediator believes may have an interest in the mediation, of the date, time, and place of the mediation conference. The conference may be held by telephone, if feasible. The mediation conference shall be held within 45 days after the request for mediation.

(3)(a) The department shall approve mediators to conduct mediations pursuant to this section. All mediators must file an application under oath for approval as a mediator.

(b) To qualify for approval as a mediator, a person must meet the following qualifications:

1. Possess a masters or doctorate degree in psychology, counseling, business, accounting, or economics, be a member of The Florida Bar, be licensed as a certified public accountant, or demonstrate that the applicant for approval has been actively engaged as a qualified mediator for at least 4 years prior to July 1, 1990.

2. Within 4 years immediately preceding the date the application for approval is filed with the department, have completed a minimum of a 40-hour training program approved by the department and successfully passed a final examination included in the training program and approved by the department. The training program shall include and address all of the following:

a. Mediation theory.

b. Mediation process and techniques.

c. Standards of conduct for mediators.

d. Conflict management and intervention skills.

e. Insurance nomenclature.

(4) The department must adopt rules of procedure for claims mediation, taking into consideration a system which:

(a) Is fair.

(b) Promotes settlement.

(c) Avoids delay.

(d) Is nonadversarial.

(e) Uses a framework for modern mediating technique.

(f) Controls costs and expenses of mediation.

(5) Disclosures and information divulged in the mediation process are not admissible in any subsequent action or proceeding relating to the claim or to the cause of action giving rise to the claim. A person demanding mediation under this section may not demand or request mediation after a suit is filed relating to the same facts already mediated.

Insurance -- Personal injury protection -- Complaint -- Premature -- Demand for mediation -- Statute which provides that filing demand for mediation tolls requirements for filing suit for 60 days does not apply to first-party PIP claims

FAITH MEDICAL GROUP, INC., as assignee of Ana Brito, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami Dade County, Civil Division. Case No. 07-6579 CC 26 (3). May 7, 2008. Patricia Marino Pedraza, Judge. Counsel: Christian Carrazana, Panter, Panter & Sampedro, P.A., Miami, for Plaintiff. Paula Ferris, Office of the General Counsel, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE

DEFENDANT'S SECOND AFFIRMATIVE DEFENSE

THIS ACTION came before the Court on the 23rd day of April 2008 on Plaintiff's motion to strike Defendant's second affirmative defense; and upon hearing the arguments of counsel, the Court makes the following findings of fact and law:

1. This is a breach of contract action for personal injury protection benefits governed by § 627.736, *Florida Statutes,* (2007).

2. Defendant alleges as its second affirmative defense that suit was filed prematurely because Defendant requested pre-suit mediation pursuant to § 627.745, *Florida Statutes,* (2007).

3. Plaintiff served a reply alleging that Defendant's second affirmative defense fails to state a legal defense upon which relief may be granted because § 627.745 does not apply to first party breach of contract claims for no fault benefits.

4. Plaintiff now moves to strike said affirmative defense for failure

to state a legal defense.

5. Section 627.745(1)(a), *Florida Statues,* (2007) states:

"In any claim filed with an insurer for *personal injury* in an amount of $10,000 or less or any claim for property damage in any amount, arising out of the ownership, operation, use, or maintenance of a motor vehicle, either party may demand mediation of the claim prior to the institution of litigation." (emphasis added).

6. The statutory language under § 627.745 is plain and unambiguous; therefore, the statute must be construed by its plain and ordinary meaning. *See Metropolitan Dade County v. Milton,* 707 So.2d 913 (Fla. 3rd DCA 1998) ("When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning.") (citation omitted). The Court, in construing the statute by its plain and ordinary meaning, may refer to the dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to statutory terms. *See L.B. v. State,* 700 So.2d 370, 372 (Fla. 1997). The term *"personal injury"* under § 627.745 is not an ordinary term; but instead, a legal term which must be presumed to have been used by the legislature according to its legal meaning. *See Tampa v. Thatcher Glass Corp.,* 445 So.2d 578, 579, n.2 (Fla. 1984) (*"Terms of special legal significance are presumed to have been used by the legislature according to their legal meanings.*") (emphasis added). Personal injury is defined by the legal dictionary as "a hurt or damage done to a man's person, such as a cut or bruise, a broken limb, or the like, as distinguished from an injury to his property or his reputation. *The phrase is chiefly used in this connection with actions in tort for negligence.*" *Black's Law Dictionary,* 786 (6th Ed. 1990) (emphasis added).

7. A first party claim for no fault benefits is a breach of contract claim, *not* a personal injury claim in tort; therefore, § 627.745 is

inapplicable in the present case. *See Allstate Ins. Co. v. Kaklamanos,* 843 So.2d 885 (Fla. 2003) (Explaining that PIP actions are breach of contract actions; and thus are governed by contract principles.)

8. The Court has not overlooked § 627.745(1)(c), which states that an "insurance policy must specify in detail the terms and conditions for mediation of a *first party* claim." (emphasis added). Although a breach of contract suit for no fault benefits is a first party claim, a personal injury claim can be a first party claim. For instance, a personal injury claim involving UM benefits is a first party claim where the carrier stands in the shoes of the negligent tortfeasor. *See Sturdy v. Allied Mut. Ins. Co.,* 457 P.2d 34, 36 (Kan. 1969) ("[U]ninsured motorist coverage is protection afforded an insured by *first party* insurance against bodily injury inflicted by an uninsured motorist, after the liability of the uninsured motorist for the injury has been established.") (emphasis added); *Mercury Ins. Co. v. Moreta,* 957 So.2d 1242 (Fla. 2nd DCA 2007); *Ellsworth v. Ins. Co. of N. America,* 508 So.2d 395 (Fla. 1st DCA 1987). Thus, the statutory language under § 627.745(1)(c) does not necessarily imply that the statute applies to first party breach of contract claims for no fault benefits.

9. Defendant, on the other hand, argues that § 627.745 is enforceable in this case because the legislature did not expressly rule out breach of contract claims for no fault benefits. The Court disagrees. Section 627.745 only mentions claims for *personal injury* for $10,000,00 or less and property damage. The statute is silent as to first party breach of contract claims for no fault benefits. Under the doctrine of *expressio unius est exclusio alterius,* the mention of one thing excludes all others. *Moonlit Waters Apartments Inc. v. Cauley,* 666 So.2d 898 (Fla. 1996). The Court, by applying that doctrine here, finds that the legislature intended to exclude breach of contract claims for no fault benefits from the statute's ambit in light of the legislature's silence.

9. The Court is unpersuaded by the case law cited by Defendant.1 Defendant cites the First District's dicta in *Padilla v. Liberty Mutual Ins. Co.,* 832 So.2d 916 (Fla. 1st DCA 2002) where the Court mentioned that the insured's petition for a declaratory statement with the Department of Insurance is not a request for mediation under § 627.745. The First District's *dicta* in that respect does not address whether § 627.745 applies to breach of contract claims for no fault benefits. Further, the District Court's dicta is *not* lawbecause *Padilla* only addressed whether Department of Insurance has primary jurisdiction to determine the mileage reimbursement rate under PIP policies; and whether the Department could determine the proper amount of same that is payable under the PIP statute.2 "Words or comments in appellate opinions that are *not* a necessary part of the rationale or conclusion in that case are obiter dictum and have *no* precedential value or stare decisis effect." *Mouzon v. Mouzon,* 458 So.2d 341, 391 n. 18 (Fla. 5th DCA 1984) (emphasis added.). An appellate decision can only be considered precedent on a question that is duly considered and addressed by the appellate court. *Id.; See also Cruz v. State,* 437 So.2d 692, 698 (Fla. 1st DCA 1983) *disapproved on other grounds,* 548 So. 2d 656. ("[E]ven if an opinion is written, the decision may not be considered as precedent for a point not mentioned therein.") The *Padilla* Court did not decide whether § 627.745 is applicable to breach of contract actions for no fault benefits; and for that reason, Defendant's reliance on *Padilla* is misplaced.

10. In addition to *Padilla,* Defendant cites the dissenting opinion in *Fidelity Nat'l Ins. Co. v. Perera,* 2Fla. L. Weekly Supp. 508b (Fla. 11th Jud. Cir. App. 1994) where Judge Kreeger opined that § 627.745 applies to breach of contract claims for no fault benefits. A dissenting opinion, however, is not law. *Munnerlyn v. Wingster,* 825 So.2d 481, 483 (Fla. 5th DCA 2002).

ACCORDINGLY it is hereby ORDERED & ADJUDGED based on the foregoing analysis of fact and law that

Plaintiff's motion to strike Defendant's second affirmative defense is GRANTED.

1Despite the case law cited by Defendant, the Court finds that there is no controlling precedent on point; therefore, the Court's decision rests on the plain meaning of the statute.

2The *Padilla* Court held that the Department did *not* have primary jurisdiction to decide the matter; and consequently, the Department did not err in dismissing the insured's petition because the subject matter of the petition was currently pending in a court proceeding. *Id.* at919.

* * *

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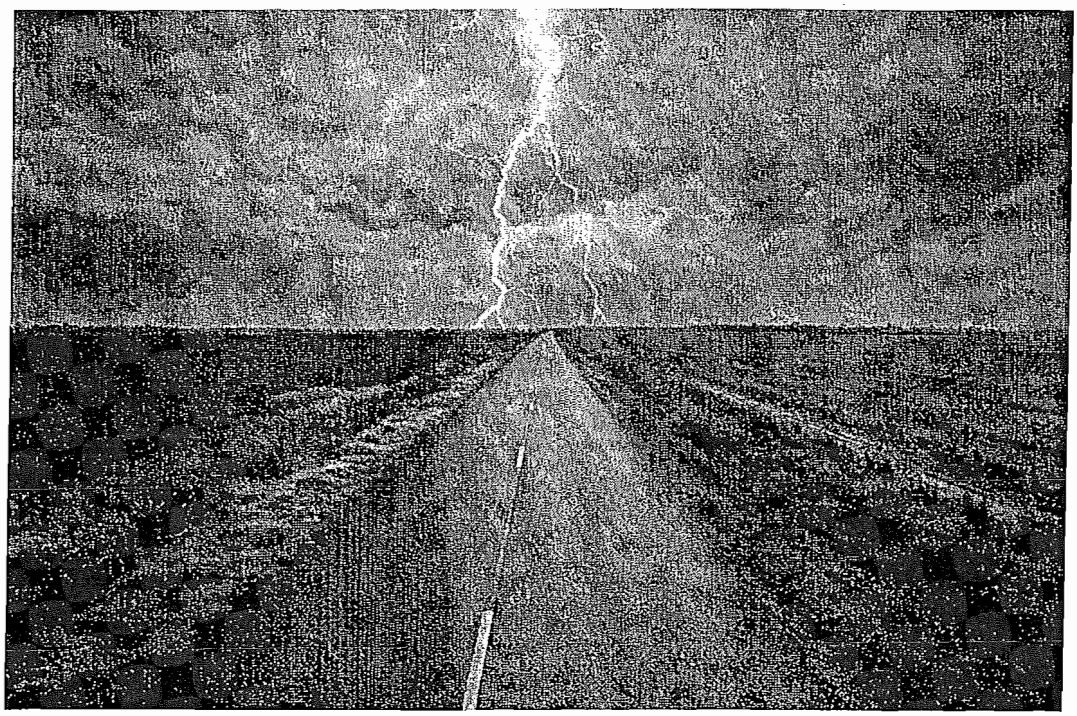

THANK YOU!

Section IV

Discovery in a P.I.P. Suit

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Discovery in a PIP Suit
By Cris Boyar

I. Basic Concepts of Discovery

The concept of full and fair discovery lies at the heart of our legal system. "Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." Hickman v. Taylor 329 U.S. 495, 507 (1947).

In United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958), the Court noted that "modern instruments of discovery . . . together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." Indeed, as another Court observed, "the very integrity of the civil justice system depends upon compliance with the discovery rules. Discovery cannot be a game of hide-and-seek." Hogue v. Frehauf 151 F.R.D. 635, 639 (C.D. Ill. 1993).

The Defendant should be precluded from making boiler plate objections based upon unsupported generalizations which are insufficient. In the case of Rosenberg v. Jons-Manbille Corp., 85 F.R.D. 292, 296 (E.D. PA. 1980), the Court overruled repeated objections that requests where "overly broad, burdensome, oppressive, and irrelevant." The Court said, "to voice a successful objection to an Interrogatory, [the Defendant] cannot simply intone this familiar litany. Rather, [the Defendant] must show specifically how . . . each Interrogatory is not relevant or how each question is overly broad, burdensome, or oppressive.

The Court could sanction if a party engages in this action. Sanctions serve two purposes: to punish the misconduct and deter future misconduct. United Nuclear Corp. v.

General Atomic Company, 629 P.2d 231 (N.M. 1980); Hockey League v. Metro Hockey Club, 427 U.S. 639 (1976).

II. The Work-Product Privilege Analysis

It is well settled that in determining whether the work product privilege protects statements and materials prepared by a party's investigator, they must have been prepared in the contemplation of litigation. Cotton States Mutual Insurance Company v. Turtle Reef Associates, Inc., 444 So.2d 595, 596 (Fla. 4th DCA 1984)(citing, Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st DCA 1981); Shawmut Van Lines, Inc. v. Small, 148 So.2d 556 (Fla. 3d DCA 1963)). "**Mere likelihood of litigation does not satisfy this qualification.**" Id. (emphasis added). If it is the ordinary course of business for an insurer to investigate the claim, then those statements and materials are discoverable. Trial courts are urged to make a finding on the specific issue of whether statements and materials are prepared in the contemplation of litigation. See, Selected Risks Insurance Company v. White, 447 So.2d 455 (Fla. 4th DCA 1984); See also, Airocar, Inc. v. Goldman, 474 So.2d 269, 270 (Fla. 4th DCA 1985).

In Liberty Mutual v. Kaufman, 885 So.2d 905 (Fla. 3d DCA 2004) the Court held an insurer objecting to discovery of information or document under the work product doctrine maintains the burden to show the materials were complied in response to some event which foreseeably could be made the basis of a claim against the insurer. The Court also held a where there is a fiduciary relationship between the insurer and an insured, courts may compel production in the insured's action against the insurer. The Court also held a work product privilege may be discoverable if the party seeking the discovery is able to show substantial need and the absence of the ability to obtain substantially equivalent by

other means. For this proposition see also Allstate Insurance v. American So. Home, 680 So.2d 1114, 1116 (Fla. 1st DCA 1996); Doe v. Allstate, 653 So.2d 371, 374 (Fla. 1995); Eastern Air v. United States, 716 So.2d 340 (Fla. 3d DCA 1998).

Lastly, if the materials and statements are to be used at trial, then regardless of whether a statement or material is protected by the work product privilege, disclosure is mandatory. Northup v. Acken, 865 So.2d 1267 (Fla. 2004).

> We conclude and specifically announce today that all materials reasonably expected or intended to be used at trial, including documents intended solely for witness impeachment, are subject to proper discovery requests under Surf Drugs, Dodson, and a host of lower court decisions, and are not protected by the work product privilege. Florida's dedication to the prevention of 'surprise, trickery, bluff and legal gymnastics' at trial holds no exception for impeachment materials.

Id. at 1271. (citing Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 111 (Fla. 1970). An example of such statement or material reasonably expected to be used at trial would be an Examination Under Oath as that is a sworn statement by a witness expected to be called at trial.

III. Adjuster Notes

Charles-Henry v. Progressive, 9 Fla. L. Weekly Supp. 139 (Fla. Orange Cty Court 2001)(Plaintiff entitled to adjusters notes that existed up until the adversarial process began). See also Oscar v. Progressive 9 Florida L. Weekly Supp. 324 (Fla. Polk Cty Court 2002) for the same proposition but this case involves face sheets); Orlando Pain v. Nationwide, 14 Florida Law Weekly Supp. 107 (Fla. Seminole Cty Court 2006).

TIG Insurance Corp. v. Johnson, 779 So.2d 339 (Fla. 4th DCA 2001)(Insurer waived work product and attorney client privilege by failing to prepare a privileged log). See also Cornick v. J.C. Penny Corp., 10 Fla. L. Weekly Supp. 421 (Fla. 17th Cir. Court 2003).

State Farm v. Valido, 662 So. 2d 1012 (Fla. 3d DCA 1995)(in a first party case the insured was not entitled to State Farm's claim files, manuals, guidelines, and documents concerning its claim handling procedures.) See also Smith v. Fortune Insurance Co., 5 Fla. L. Weekly Supp. 783 (Fla. Broward Cty Court 1998)(Court denied the Plaintiff's request for discovery of certain documents).

Ishikawa v. Allstate Insurance Co., 9 Fla. L. Weekly Supp. 472 (Fla. 13th Cir. Court 2002) insurer required to produce manuals, pamphlets, and videos given to adjusters in handling Florida PIP claims.

Dr. Brown v. Progressive, 9 Fla. L. Weekly Supp. 634 (Fla. Broward Cty Court 2002, Judge Wright)(insurer was required to produce computer notes because the adjuster relied on it at time of the deposition).

IV. Discovery related to an IME or Peer Review

First, the Defendant is obligated to respond to the expert discovery. Florida Rules of Civ. Proc. 1.340(a) states: "[W]ithout leave of court, any party may serve upon any other party written interrogatories to ***be answered (1) by the party to whom the interrogatories are directed***, or (2) if that party is a public or private corporation or partnership or association or governmental agency, ***by any officer or agent who shall furnish the information available to that party***." (emphasis added).

The Author's comment states in pertinent parts that: "Interrogatories under this rule may be addressed only to a party." The Plaintiff cannot send interrogatories to a non-party expert. "Interrogatories to parties under this rule are simpler and less expensive than the taking of a deposition by oral examination or written interrogatories, and are well adapted to actions involving small amounts of money and to obtaining simple facts or information that

will be helpful in determining whether other discovery procedures should be used." This reflects favorably on the use of interrogatories in lieu of an expert doctor deposition in a county court case.

The comments continue: "[A]n officer or agent, who has not sufficient information familiarity with the facts to answer the interrogatories either as of knowledge or on information, as may be the case in some large corporations, is required to make such inquiry as will enable him to supply the answers, when the information is accessible to the company on whose behalf he answers . . . . "

Now, we look at FRCP 1.280(b)(4)(a)(i) and (ii)(1-4). These are the approved economic expert information which a party is entitled to pursuant to *Elkins v. Syken,* 672 So. 2d 517(Fla. 1996); *Allstate v. Boecher,* 733 So. 2d 993 (Fla. 1999).

This position has been upheld in general ways by: *Allstate Insurance Company v. Hodges*, 855 So. 2d 636 (Fla. 2d DCA 2003); *Orkin Exterminating Company, Inc., v. Knollwood Properties, Ltd.,* 710 So. 2d 697 (Fla. 5th DCA 1998).

See also *Levi v. Lilly, 719 So.2d 354 (Fla. 4th DCA 1998)* where the Defendant was compelled to answer expert interrogatories that regarding issues that would only be in possession of the expert.

Allstate v. Edwards, 6 Fla. L. Weekly Supp. 583 (Fla. Orange County Cir. Court 1999) for a case where the court allowed discovery regarding the relationship between the insurer, the medical review company (Vendor) which schedules IMEs, and the physician who conducted the IME. See also Hayes v. State Farm, 9 Fla. L. Weekly Supp. 851 (Fla. Leon Cty Court 2003) and Rhodes v. State Farm, 13 Florida L. Weekly Supp. 370 (Fla. Sarasota County Court 2006) for more law on obtaining discovery from the IME vendors.

Southern Diagnostic v. Luz Bencosme, 833 So.2d 801 (Fla. 3d DCA 2002) the Court held the Plaintiff is entitled to discovery on the outside company - vendor - hired by the insurer to set up IMES. Germain v. Progressive, 9 Fla. L. Weekly Supp. 783 (Fla. Seminole Cty Court 2002)(IME company is required to produce amounts paid to doctor, reports generated to doctor etc).

State Farm v. Nu-Best Diagnostic, 10 Fla. L. Weekly Supp. 384 (Fla. 9th Cir. Court 2003) insurer ordered to produce all IME peer review reports of videofluoroscopy); A1 Open MRI v. Bristol, 14 Florida Law Weekly Supp. 1157 (Fla. Broward Cty 2007, Judge Pratt); Birnbaum v. Progressive, 13 Florida Law Weekly Supp. 906 b & c (Fla. Palm Beach Cty Court 2006)(expert Joe Costello must produce 3 years of IMEs and Peer Reviews); Belvis v. Allstate, 12 Florida L. Weekly Supp. 398 (Fla. Seminole Cty 2004) Peer review doctor ordered to produce IMEs and Peer Reviews; Central Magnetic Imaging v. United, 12 Florida L. Weekly Supp. 88 (Fla. Dade Cty Court 2004); Weiss v. Nationwide, 13 Florida L. Weekly Supp. 512a (Fla. Seminole Cty 2006); Diagnostic Medical v. Progressive, 13 Florida Law Weekly Supp. 829b (Fla. Hillsborough Cty Court 2006)(Insurer is obligated to produce IME reports and peer reviews of expert); Center for Orthopedic Surgery v. Progressive, 13 Florida Law Weekly Supp. 906c (Fla. Palm Beach Cty Court 2006); Sacht v. Safeco, 13 Florida Law Weekly Supp. 1222 (Fla. Palm Beach Cty Court 2006); Suhar v. Weiss and Nationwide, 14 Florida Law Weekly Supp. 250a (Fla. 18th Cir. Court 2006)(provider was obligated to maintain the requested information); Massie v. Progressive, 13 Florida Law Weekly Supp. 819a (Fla. Escambia Cty Court 2006); Meloskie v. Progressive, 12 Florida L. Weekly Supp. 767 (Fla. Escambia Cty Court 2005)(IME doctor struck where he did not respond to subpoena claiming the IME records were intermingled in

doctor's filing system); A1 Open MRI v. United, 15 Florida Law Weekly Supp. 291 (Fla. Broward Cty Court 2008, Spechler)(IME doctor required to produce last 3 years of reports).

Springer v. West, 769 So.2d 1068 (Fla. 5th DCA 2000)(the insurer's relationship with its expert is discoverable by the insured even when the insurer is a non party).

Lutz Chiro Clinic v. Allstate, 9 Fla. L. Weekly Supp. 486 (Fla. Hillsborough Cty Court 2002) insurer required to provide information regarding the IME doctor. Ciccarello v. State Farm, 8 Fla. L. Weekly Supp. 651 (Fla. Hillsborough Cty Court 2001)(Insurer must produce information regarding the relationship between the IME doctor and the insurer).

Forrester v. Nationwide,9 Fla. L. Weekly Supp. 57 (Fla. Hillsborough Cty Court 2001)(insurer had to provide amount paid to Co. that scheduled the IMEs, the amount paid to the doctor, and all IME reports generated by the defense doctor).

V. List of cases where the IME doctor was deposed or testified

The Defendant's expert must provide a list of each time he/she testified in the last three years. See *Orkin Exterminating Company, Inc., v. Knollwood Properties, Ltd.*, 710 So. 2d 697 (Fla. 5th DCA 1998). See also *Levi v. Lilly, 719 So.2d 354 (Fla. 4th DCA 1998)* where the Court held Dr. Petti was obligated to answer questions about how often he testifies in court and by deposition which significant additional detail. It was not sufficient for the expert to state he was unable to compile the requested information. In NDNC a/a/o Duncan v. United, 15 Florida Law Weekly Supp. 744a (Fla. Broward Cty Court 2008) where Judge Lee struck Dr. Glatzer for not maintaining the list of his cases).

In *Allstate Insurance Company v. Hodges*, 855 So. 2d 636 (Fla. 2d DCA 2003) the Court held information concerning the frequency of testifying is discoverable from the Defendant insurer. The Court opined this testimony is directly relevant to demonstrate to a

jury the bias of the witness.

Ramos v. Gallagher, 14 Florida Law Weekly Supp. 553 (Fla. 9th Cir. Court 2007)(expert must produce list of all cases where he was hired by the Defendant in the last three years).

VI. How often the expert cuts off benefits

These reports and the amount of time the expert states no additional treatment is reasonable is discoverable and relevant. The Third District Court of Appeal in the case of *Secada v. Weinstein*, 563 So.2d 172 (Fla. 3rd DCA 1990) held that the fact that a defense orthopedic expert, like the expert in ths case, had consistently and repeatedly testified that the injured plaintiffs he examined had suffered no permanent injury was "a perfectly proper subject of cross-examination to demonstrate his alleged bias and prejudice." *Id* at 173. (emphasis added). See also *Flores v. Miami-Dade County*, 787 So.2d 955 (Fla. 3rd DCA 2001) (Proper cross-examination of motorist's expert treating physician was not limited just to the compensation arrangements for the current case but extended to the expert's work in other cases.)

HIPAA - is not applicable to automobile insurance policies as they are not health plans. See http://www.hhs.gov/hipaafaq/providers/covered/364.html.

VII. Income Earned by the Expert for performing IMEs and Peer Review

In *Allstate Insurance Company v. Boecher,* 733 So.2d 993, 997 (Fla. 1999), the Florida Supreme Court made it clear that information regarding the frequency of an expert testimony and the corresponding payments to the expert is discoverable from the Defendant insurer in a personal injury action. This information is also discoverable from the insured's attorneys. *Allstate Insurance Company v. Hodges*, 855 So.2d 636, 640 (Fla. 2d

DCA 2003), citing with approval, *Morgan, Colling & Gilbert, P.A. v. Pope,* 798 So.2d 1 (Fla. 2d DCA 2001).

In *Rosario v. Wrecker*, 975 So.2d 1205 (Fla. 5th DCA 2008) the Court held a party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship. *Allstate Ins. Co. v. Boecher*, 733 So.2d 993, 997-98 (Fla.1999); *Sanchez v. Nerys*, 954 So.2d 630 (Fla. 3d DCA 2007).

In *Allstate Insurance Company v. Hodges*, 855 So. 2d 636 (Fla. 2d DCA 2003) the Court held information concerning the income earned as an expert witness is discoverable from the Defendant insurer. The Court opined this testimony is directly relevant to demonstrate to a jury the bias of the witness.

VIII. Reduction cases and Medicare

Spine and Rehab Medicine v. Dairyland, 14 Florida Law Weekly Supp. 167 (Fla. Hernando County Court 2006)(insurer is obligated to answer interrogatory asking for total amount paid by insurer for past 3 years to Mitchell Medical and EOBs for the geo zip for the 3 months before and after.

Brass and Singer v. Progressive, 9 Fla. L. Weekly Supp. 629 (Fla. Dade Cty Court 2002)(insurer could not take deposition about amount provider received from Medicare, Medicaid, Workers Comp and Private Health Insurers as it would not be relevant. Use this case for a motion in limine on a reduction case.

DiBlasio v. Progressive, 13 Florida L. Weekly Supp. 625 (Fla. Palm Beach Cty Court 2006)(Medicare is not is Federal medical fee schedule).

Medicare is the payer of last resort. 42 USCA 1395 and CFR 411.24.

Williams v. Allstate 10 Fla. L. Weekly Supp. 209 (Fla. Palm Beach Cty 2003)(insurer is required to produce copies of photographs and the repair estimate of the vehicle.

Diblasio v. Progressive, 10 Fla. L. Weekly Supp. 262b (Fla. Palm Beach Cty 2003)(Motion to compel insurer to provide better answers to Interrogatories and Request for Production relating to data base concerning reasonable charges); Nadal Medical v. Dairyland, 14 Florida Law Weekly Supp. 490 (Fla. Hillsborough Cty Court 2007); Advanced Health Care v. Progressive, 13 Florida Law Weekly Supp. 351a (Fla. Orange Cty Court 2005); Alamonte Springs Imaging v. Progressive, 11 Florida Law Weekly Supp. 162a (Fla. Seminole Court Court 2003); Orlando Pain v. Progressive, 13 Florida Law Weekly Supp. 397b (Fla. Seminole Cty Court 2006); Sentry Casualty v. 1st Heath, 14 Florida Law Weekly Supp. 835 (Fla. 12th Cir. Court 2007); Progressive v. Florestal, 14 Florida Law Weekly Supp. 847 (Fla. 18th Cir. Court 2007)(Procedure Report); Nadal Medical v. Dairyland 14 Florida Law Weekly Supp. 895 (Fla. Hillsborough Cty Court 2007).

1st Health v. Sentry, 13 Florida Law Weekly Supp. 1210 (Fla. Sarasota Cty Court 2006)(insurer is obligated to provide software used to reduce medical bills).

D'eramo v. Progressive, 13 Florida Law Weekly Supp. 1236a (Fla. Seminole Cty Court 2006)(Insurer obligated to produce procedure reports showing codes and charges). Nadal Medical Center v. Dairyland, 14 Florida Law Weekly Supp. 108 (Fla. Hillsborough Cty Court 2006); Physicians Medical v. Affirmative, 14 Florida Law Weekly Supp. 486a (Fla. Duval County Court 2004).

Ocala Chiropractic v. Progressive 11 Florida L. Weekly Supp. 237 (Fla. Marion Cty Court 2004) Progressive ordered to produce significant discovery in a reduction case. See also Nadal Medical v. Dairyland, (Fla. Hillsborough County Court 2006);

Nadal Medical v. Dairyland Insurance, 14 Florida Law Weekly Supp. 176 and 177(Fla. Hillsborough Cty Court 2006) insurer shall provide data and what it paid other providers for same CPT Codes. See also Spine and Rehab v. Dairyland, 14 Florida Law Weekly Supp. 177 (Fla. Hillsborough County Court 2006); Bigley v. Progressive, 15 Florida Law Weekly Supp. 373 (Fla. Orange Cty Court 2007).

Advanced Health Care v. Progressive, 13 Florida L. Weekly Supp. 351 (Fla. Orange County Court 2006)(Progressive ordered to produce Procedure Reports which reflects what other providers charge). See also Nada Medical v.Dairyland, 13 Florida Law Weekly Supp. 1088 (Fla. Hillsborough Cty Court 2006); Progressive v. Four Corners Chiro Center, 15 Florida Law Weekly Supp. 218 (Fla. 10th Cir. Court 2008).

Gulf Coast Injury v. Progressive, 13 Florida L. Weekly Supp. (Fla. Hillsborough Cty Court 2006)(insurer ordered to answer Interrogatories as to checks issued, computer program used to review claim, training regarding program, description of data base etc); Nadal Medical v. Dairyland, 14 Florida Law Weekly Supp. 108 (Fla. Hillsborough Cty Court 2006)(data base stricken for failing to produce underlying data).

Section V

P.I.P. From the Appellate Prospective

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PIP FROM THE APPELLATE PROSPECTIVE

BY

MICHAEL J. NEIMAND

I. Appeals

A. Jurisdiction - County to Circuit Court

1. Article V, section 5(b) of the Florida Constitution confers jurisdiction on the circuit courts to hear appeals "when provided by general law." *See also Fla.R.App.P.* 9.030(c)(1)(A-C). The Florida legislature has only enacted a general law that establishes the jurisdiction of the circuit courts to consider final orders of lower tribunals in both civil and criminal cases. Section 26.012(1), Florida Statutes, states that the circuit courts shall have appellate jurisdiction of appeals from county courts except appeals of county court orders or judgments declaring invalid a state statue or a provision of the Florida Constitution.

2. As with final orders, a nonfinal order is appealable to the circuit court under article V, section 5(b) of the Florida Constitution if there is a general statute authorizing the appeal. Only the legislature, not the Supreme Court of Florida, has the authority to establish the appellate jurisdiction of the circuit courts to consider nonfinal orders of lower tribunals in both civil and criminal cases. *Blore v. Fierro*, 636 So.2d 1329 (Fla. 1994). There is no general statute authorizing an appeal to the circuit court from a nonfinal order of a county court. Fla.R.App.P. 9.130 only authorizes appeals of non final orders to the district courts of appeal and does not apply to appeals to the circuit court.

3. Circuit Courts have appellate jurisdiction to review by certiorari non-final orders of lower tribunals.

Fla.R.App.P. 9.100(c). Review by certiorari of a discovery order is appropriate when the order departs from the essential requirements of the law, causes a material injury to a petitioner throughout the remainder of the proceedings below and effectively leaves no adequate remedy on appeal. *Allstate Insurance Company v. Langston,* 655 So.2d 91 (Fla. 1995). Certiorari reviews lies from a trial court's denying a motion to dismiss for failure to state a cause of action for bad faith when irreparable injury may occur by premature discovery of an insurer's business records and claims files. *Vanguard Fire and Casualty Co. v. Golmon,* 955 So.2d 591 (Fla. 1st DCA 2006); *Hartford Insurance Co., v. Mainstream Construction Group*, 864 So.2d 1270 (Fla. 5th DCA2004).

B. Appellate Jurisdiction - County to District Court of Appeal

1. Section 26.012(1), Florida Statutes, states that the circuit courts shall have appellate jurisdiction of appeals from county courts except appeals of county court orders or judgments declaring invalid a state statue or a provision of the Florida Constitution.

2. Fla.R.App.P. 9.160 authorizes a county court to certify a question to be of great public importance directly to a district court. The district court has discretion to accept or reject jurisdiction. Once jurisdiction is accepted the district court can review the entire case. When jurisdiction is rejected, the appeal is returned to the circuit court.

3. District Court review of an appellate decision of the circuit court is authorized by Fla.R.App.P. 9.030(2)(B). A petition for second-tier certiorari may be granted only in those instances in which the lower court did not afford procedural due process or departed from the essential requirements of the law. *Allstate Insurance Company v. Kaklamanos*, 843 So.2d 885 (Fla. 2003). A failure to observe the essential requirements of law has been held

synonymous with a failure to apply the correct law. *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995). Relief may not be granted unless it is determined that the circuit court departed from the essential requirements of law with a resulting miscarriage of justice. *Ivey v. Allstate Insurance Company*, 774 So.2d 679 (Fla. 2000).

C. Procedure

1. The notice of appeal from a final judgment of the county court must be filed within 30 days of its rendition. Fla.R.App.P. 9.110(b). An order is rendered when a signed, written order if filed with the clerk of the lower court and if a motion for rehearing has been filed the ordered is not deemed rendered until the motion has been disposed of by a signed, written order if filed with the clerk of the lower court .

2. A petition for writ of certiorari must be filed within 30 days of rendition of the order reviewed. Fla.R.App.P. 9.100(c). When filing a petition to challenge a nonfinal order, a motion for rehearing does not toll the time for filing the petition.

D. Precedents

1. Circuit courts and county courts are bound by a decision of the district court of appeal in which it is located. When the only decision on point is from a district other than the one in which the lower court is located, the lower court is required to follow that decision. When there are two contrary decisions from districts other than the one in which the lower court is located, then the lower court has discretion in which district to follow. *Pardo v. State*, 596 So.2d 665 (Fla. 1992).

2. A per curiam appellate decision without a written opinion has no precedential value. *Department of Legal*

Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983).

3. Appellate decisions of a judicial circuit are binding on all county courts within the judicial circuit. *Fieselman v. State*, 566 So.2d 768 (Fla. 1990)

II. Attorney's Fees

A. When an insured prevails on an appeal and the order is for a new trial or reverses a final summary judgment, the insured is entitled to an order conditionally granting appellate attorney's fees, contingent on the insured being the prevailing party at the conclusion of the case. *Allstate Ins. Co. v De La Fe*, 647 So.2d 965 (Fla. 3d DCA 1994).

B. When an insured loses an appeal and the order is for a new trial or reverses a final summary judgment, the insured is not entitled to any appellate attorney's fees for the appeal which the insured lost. *Brass & Singer, P.A. v. United Automobile Ins. Co.*, 944 So.2d 252 (Fla. 2006).

III. Current Topics

A. Peer Reviews.

1. Timeliness. *United Automobile Insurance Company v. Rodriguez,* 808 So.2d 82 (Fla. 2001) held that an insurer is not automatically obligated to pay a claim within 30 days after receipt of the claim. Rather the insurer can contest the claim after 30 days, but accepts the risk that if the insured prevails, the insurer will have to pay interest on the claim and the insured's attorney's fees. When the insurer contests the claim after 30 days, the insurer can either deny the claim or continue to investigate the claim. *January v. State Farm Mutual Insurance Co.*, 838 So.2d 604, 607 (Fla. 5th DCA 2003). *United Automobile Insurance Company v. Bermudez,* 980 So.2d 1213 (Fla. 3d DCA 2008) holds that when the insurer contests the claim after 30 days and continues to investigate it must, in accordance with § 627.736(7)(a), obtain a medical report before it can deny the treatment

as not reasonable, related or necessary. This is the holding of *United Automobile Insurance Company v. Viles* 726 So.2d 320 (Fla. 3d DCA 1998) that *Bermudez* that reaffirmed. This is evident from footnote 4 of *Bermudez* where the Court, citing to *AIU Insurance Co. v. Daidone*, 760 So.2d 1110 (Fla. 4th DCA 2000), held the 30 day period in § 627.736(4)(b) does not apply to claims for unrelated, unreasonable or unnecessary treatment and such treatment may be challenged subsequent to the 30 day time limit set forth in said section.

2. Medical Report. *Bermudez* holds that a valid medical report is required where an insurer attempts to reduce, withdraw, or deny PIP benefits on grounds of reasonableness, necessity, or relationship. *Bermudez* certified conflict with *State Farm Mut. Auto. Ins. Co. v. Rhodes & Anderson, D.C., P.A.*, 2008 WL 786856 (Fla. 2d DCA Mar. 26, 2008) which held that §627.736(7)(a) is applicable only in circumstances involving the complete termination of payments to a physician rather than the denial of a single claim as it was presented. The parties in *Bermudez* did not invoke the jurisdiction of the Florida Supreme Court to resolve the conflict and rehearing is pending in *State Farm*.

3. Valid Report. In *Bermudez* the Third District reviewed the trial court's order granting summary judgment in favor of Bermudez. The trial court found that United did not satisfy the requirements for withdrawing benefits as forth in section 627.736(7)(a) because the peer review report was based solely on the reviewing doctor's review of Bermudez's medical records and was not supported by his own physical examination. The Third District reversed the trial court's order granting summary judgment. The Court analyzed section 627.736(7)(a), its 2001 amended version and the Senate Staff Analysis in arriving at its decision. The Court rejected the trial court's interpretation, based of the Senate Staff Analysis, that a physical examination by the physician issuing the

report was required before the withdrawal of benefits. The Court held that a "valid report" for the withdrawal of PIP benefits does not have to be based upon a physical examination conducted by the actual physician preparing the report. Instead, the Court held that under section 627.736(7)(a) a medical report issued for the withdrawal of PIP benefits may be based upon a physical examination of the insured that is conducted by either the physician preparing the report or another physician's examination.

3. Open Question. The issue currently being litigated is whether a valid report can be based on the treating physicians examination or must be based on an independent medical examination by the non reviewing physician. This issue is pending in the Third District in *United Auto. Ins. Co. v. Sante Fe Medical Center a/a/o Telmo Lopez,* 3D08-547 and *Partners in Health, Inc.,a/a/o Neocles Lebrun, v. United Auto. Ins. Co.,* 3D08-2080

B. PIP Log

1. Medical provider, as insured's assignee, was not entitled to presuit discovery of insurer's payout log for PIP benefits under § 627.736(6)(d) entitling injured person to copy of all information obtained by the insurer from employers and healthcare providers; the insurer generated the payout log, and the statute was completely inapplicable. *Southern Group Indemnity, Inc. v. Humanitary Health Care, Inc.*, 975 So.2d 1247 (Fla.3d DCA 2008) review dismissed 2008 WL 2415528 (Fla. Jun 5, 2008).

2. Can PIP payout log be obtained presuit through a different statute?

C. Presuit Demand Letters

1. Presuit demand letter applies to claims arising out of

automobile accident before effective date of the statute since it is a procedural and not a substantive change. The application of the demand letter requirement depends on the date of treatment and the filing of the lawsuit and not the date the policy was issued or the accident occurred. *Progressive Express Ins. Co. v. Menendez*, 979 So.2d 324 (Fla. 3d DCA 2008) review pending SC08-789.

2. A post suit demand letter does not cure the deficiencies of failing to file a presuit demand letter or filing an insufficient presuit demand letter. *Progressive Express Ins. Co. v. Menendez*, 979 So.2d 324 (Fla. 3d DCA 2008) review pending SC08-789.

3. Open Question. Based on a deficient presuit demand letter must a lawsuit be dismissed or abated? In either case if the insurer pays the benefits pursuant to the demand, it will not be liable for attorney's fees except for those under the demand letter section.

D. Explanation of Benefits

1. Failure to list late billing as a reason for denying benefits in the explanation of benefits does not waive the defense *United Auto. Ins. Co. v. Garrido*, 2008 WL 2811804 (Fla. 3d DCA July 23, 2008) rehearing pending.

2. Contrary. Failure to list the insufficient demand letter as a reason for denying benefits in the explanation of benefits waive the defense *United Auto. Ins. Co. v. Landau Radiology, Inc.*, No. 15 Fla. L. Weekly Supp 665b (Fla. 17th Cir. Ct. App. Mar. 27, 2008) certiorari pending 4D08-2196.

3. Contrary. Failure to list the lack of license number of HFCA form as a reason for denying benefits in the explanation of benefits waives the defense *United Auto. Ins. Co. v. Brown*, No. 07-11616 CACE 21 (Fla. 17th Cir.

Ct. App. July 24, 2008) rehearing pending.

E. Exhaustion and Escrow

1. When a insurer has reasonable proof via a medical report that it is only responsible for a portion of the first provider's treatment, the insurer can pay that amount and then exhaust the benefits by paying the next provider. The insurer does not have to set aside the portion of the bills that it did not pay the first provider since based on its medical report, the insurer acted in good faith when it paid only part of the treatment. *Progressive American Ins. Co. v. Stand-Up MRI of Orlando*, 2008 WL 269 5876 (Fla. 5th DCA July 11, 2008) rehearing pending.

F. IMEs

1. Insurer is not liable for PIP benefits for treatment of insured who failed without explanation to appear at two independent medical examinations where insured never provided a reason or excuse for the failure to appear. *United Auto. Ins. Co. v. Custer Medical Center*, 2007 WL 2480528 (Fla. 3d DCA Sept. 5, 2007) rehearing pending.

2. It is the date the independent medical examiner recommends suspending benefits and not the date the insurer sends out the letter that act as the suspension date. *United Auto. Ins. Co. v. Florida MRI, Inc.*, 15 Fla. L. Weekly Supp. 581a (Fla 17th Cir. Ct. App. Mar. 7, 2008).

3. An insurer does not as a matter of law waive its right to suspend PIP benefits as of the first missed IME based an a unilateral rescheduling of a second IME since the unilateral rescheduling is not an implicit admission that the insured missed the first IME reasonably. *United Auto. Ins. Co. v. Professional Medical Group*, 14 Fla. L. Weekly Supp. 1021a (Fla 11th Cir. Ct. App. Aug. 13, 2007); *United Auto. Ins. Co. v. Southeast Electro*

Neurodiagnostic, Inc., 14 Fla. L. Weekly Supp. 1102b (Fla 17th Cir. Ct. App. May 30, 2006).

4. IME cut off does not have to be plead as an affirmative defense since it goes to whether the treatment was reasonable, related or necessary which are the essential elements of the plaintiff's case. *United Auto. Ins. Co. v. Hialeah Medical Associates, Inc.*, 15 Fla. L. Weekly Supp. 123b (Fla 11th Cir. Ct. App. Dec. 14, 2007).

5. IME that suspends future treatment encompasses medical evaluations, diagnostic testing, therapy or treatment. *United Auto. Ins. Co. v. Miami Medical Group, Inc.*, 14 Fla. L. Weekly Supp. 1018a (Fla 11th Cir. Ct. App. Aug. 29, 2007).

G. Material Misrepresentation

1. Claims Process.

a. When an insurer seeks to deny a claim based on fraud or a material misrepresentation when making the claim, the fraud or misrepresentation must be made by the claimant. *Vasques v. Mercury Casualty Co.*, 947 So.2d 1265 (Fla. 5th DCA 2007).

b. When there is a willful false statement of a material fact, there is no requirement that an insurer show prejudicial reliance in order to enforce the contract provision refusing to provide coverage for any loss which occurred in connection with any material misrepresentation, fraud or concealment of material facts. *Lopes v. Allstate Indemnity Co.*, 873 So.2d 344 (Fla. 3d DCA 2004).

c. In this situation the only the claim is

denied and premiums do not have to be returned

2. Application Process.

a. An insurer has the unilateral right to rescind its insurance policy on the basis of a misrepresentation in the application for insurance. *Gonzales v. Eagle Ins. Co.*, 948 So.2d 1 (Fla. 3d DCA 2006).

b. An insurer is entitled, as a matter of law, to rely upon the accuracy of the information contained in the application and has no duty to make additional inquiry. *Independent Fire Insurance Company v. Arvidson*, 604 So.2d 854 (Fla. 4th DCA 1992). The only exception to this rule is when an insurer is on notice that information may be untruthful and then an insurer is bound by what a reasonable investigation would have shown. *Cox v. American Pioneer Life Ins. Co.*, 626 So.2d 243 (Fla. 5th DCA 1993).

c. When rescinding a policy the return of the unearned premium is not a condition precedent. *U.S. Security Ins. Co. v. Figueroa,* 917 So.2d 901 (Fla. 3d DCA 2005).

d. When an insurer seeks to rescind a voidable policy it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. *Gonzales v. Eagle Ins. Co.*, 948 So.2d 1 (Fla. 3d DCA 2006).

e. When there is a causal connection between the material misrepresentation, the

an insurer does not have to rescind the policy from its inception. Rather an insurer can keep the earned premiums and cancel the policy from the date of the claim and return only the unearned premiums. *Martinez v. General Ins. Co.*, 483 So.2d 892 (Fla. 3d DCA 1986).

f. When the premiums are financed, then pursuant to the assignment contained in the contract between the finance company and the insured, an insurance company can return the premiums directly to the finance company. However, when all of the premiums have been paid, the finance contract is completed and the premiums must be tendered or returned to the insured. *Amstar Ins. Co. v. Cadet*, 862 So.2d 736 (Fla. 5th DCA 2003).

g. A misrepresentation is material to support rescission where had the insurer known the true fact it would not have assumed the risk without an additional premium and the misrepresentation does not have to be causally connected to the loss. *Progressive American Insurance Co. v. Papasodero,* 587 So. 2d 500 (Fla. 2d DCA 1991). The court in *United Auto. Ins. Co. v. Miami Chiropractic Assoc' Inc., as assignee of George Brice,* 14 Fla. L. Weekly Supp. 360b (Fla. 11th Cir. App. Ct. Feb. 20, 2007) recognized this law but chose to ignore it and held that the material misrepresentation has to be causally connected to the loss.

h. The PIP statute did not abrogate an insurer's right to rescind a policy based on a material misrepresentation in the application

process. *United Auto. Ins. Co. v. Miami Chiropractic Assoc' Inc., as assignee of George Brice,* 14 Fla. L. Weekly Supp. 360b (Fla. 11th Cir. App. Ct. Feb. 20, 2007). This issue is pending in the Third District in *United Auto. Ins. Co. v. Salgado*, 3D07-461 and *United Auto. Ins. Co. v. Total Health Care of Fla., Inc.*, 3D 07-1079.

Section VI

P.I.P. Fee Hearings

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PIP FEE HEARINGS
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Every PIP complaint needs to have a paragraph seeking fees and costs pursuant to Florida Statute §627.428. Then once the Plaintiff secures a *judgment* in their favor a motion for fees and costs must be filed within 30 days after the judgment. A late filed motion for fees and costs may result in a waiver of fees. See P & R Smith v. Goyarrola, 864 So.2d 584 (Fla. 3d DCA 2004); Silver Springs Properties v. ERA, 874 So.2d 712(Fla. 4th DCA 2004); Seminole County v. Koziara, 881 So.2d 83, 84 n.2 (Fla. 5th DCA 2004). Sometimes the Defendant argues the motion must be filed within 30 days of the settlement. There is no case law to support this argument.

TIME SHEET

Once your prevail you must get your time sheet ready to be filed with the court. Your time sheet needs to be adequate, reasonable and accurate. Inadequate time sheets may result in your fees being reduced. See Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) . While not required, it is better to prepare your time sheet contemporaneously as you do the work. There is case law that allows you to recreate it later as long as it is not based on guesses. See Brake v. Murphy, 736 So.2d 745 (Fla. 3d DCA 1999).

You can seek time that is reasonable in light of your experience for each task. In other words, a seasoned lawyer that is seeking a high hourly fee should typically not ask for five hours for the preparation of a generic complaint for PIP benefits even if it took this many hours. Avoid using big blocks of time for each individual task. Instead, try to break down each individual task as much as possible. The more detail for each task the better.

Unless the Defendant is challenging entitlement to fees and costs, you cannot bill for those tasks related to securing your fees and costs. You can bill for pre-suit work provided the work was due to the unreasonable conduct of the Defendant. See United States Fidelity v. Rosado, 606 So.2d 628 (Fla. 3d DCA 1992).

The clock also does not stop simply because there is a stipulation to your fees. The only thing that stops is fees litigating the amount of fees. See Palma v. State Farm, 555 So.2d 836 (Fla. 1990).

Make sure you reserve sufficient time for a fee hearing. Hire your expert early. Typically one hour is sufficient. If you run out of time you may have to return.

Fee Discovery

Prior to attending the fee hearing the Plaintiff's attorney may want to perform discovery such as requesting the Defense attorneys' time sheets. See Palma v. State Farm, 555 So.2d 836 (Fla. 1990) (see the comments section); Finol v. Finol, 869 So.2d 666 (Fla. 4th DCA 2004) Brown Distributing Co. V. Marcel, 866 So.2d 160(Fla. 4th DCA 2004); Chrysler v. Weinstein, 522 So.2d 894 (Fla. 3d DCA 1988); Levinson v. State Farm, 10 Fla. L. Weekly Supp. 368 (Fla. Broward Cty Court 2003, Judge Skolnik); Spirelli Health Care (Coulanges) v. Progressive, Case number 04-13925 COCE (52)(Fla. Broward Cty Court 2006, Judge Spechler); Physicians Health Center v. Progressive, 11 Florida L. Weekly Supp. 567 (Fla. Marion County, 2004); Williams v. Allstate, 11 Florida L. Weekly Supp. 745 (Fla. Palm Beach Cty Court 2004); Anderson v. Brown, 30 FLW D949 (Fla. 1st DCA 2005). Butler v. Nationwide Mutual Fire Insurance Co., 5 Fla. L. Weekly Supp. 691 (Fla. Polk County Court 1998).

Keep in mind; however, if the Defendant stipulates to the Plaintiff's attorney's

entitlement to fees the Plaintiff may not recover for the time performing discovery or preparing for the fee hearing. If the Defendant spent more time than you litigating the case it was be demonstrative that your time is reasonable.

One week before the Fee Hearing

A reasonable time before the fee hearing you should make an effort to secure certain stipulations such as your costs, hourly rate, waiving experts, the hourly rate for the expert if experts are not waived, the date of the final judgment (this is the day your interest on fees begin) etc. It would be better if the Defendant informs you of those specific entries that are being disputed. This would serve to stream line the fee hearing and make it go significantly faster which is a win win for everyone concerned. All stipulations should be confirmed in writing.

Remember, you have the burden to establish your hours and your hourly rate but the Defendant has the burden the Defendant has the burden to demonstrate WITH SPECIFICITY which hours should be deducted. See Brake v. Murphy, 736 So.2d 745 (Fla. 3d DCA 1999).

Fee Hearing

The first thing that is typically done at the fee hearing is to introduce into evidence your fee agreement with your client. This may be waived by the Defendant especially if it was produced to the Defendant a few days before the fee hearing. Then introduce into evidence a copy of your time sheet. Typically, the Defendant will not object to these two items.

Then ask the court if you can give a brief opening statement explaining what

transpired in the case. It is suggested you give the court sufficient detail as to why the amount of hours being sought is reasonable in light of the manner in which the case was defended. Show the court the affirmative defenses, denials to the Request for Admissions, nominal offers of judgment, and anything else that was assist the court in determining your conduct was reasonable in the case including all weak points of your case. This is important as the Defendant will argue your case, regardless of the facts, is the run of the mill PIP suit. If possible show the court how you attempted to stipulate to issues and narrow the facts to avoid unnecessary litigation. Go slow. This is the best way to enlighten the court as to your specific case which the Court should use in generating the fee judgment.

Then go through your time sheet to explain the entries. There is no requirement to discuss each and every entry. Your expert can go into it with more detail if necessary.

Then testify as to your hourly rate. Go through your education and employment history. Testify as to your experience and expertise in the area of PIP. Show the court prior fee orders you have secured in other cases. See Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) for the eight (8) factors the court will consider when determining your hourly rate. Go through each one. They are:

1) The time, labor, novelty, difficulty of the question involved, and the skill requisite to perform the legal service properly;

2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3) The fee customarily charged in the locality for similar legal services;

4) The amount involved and the results obtained;

5) The time limitations imposed by the client or by the circumstances;

6) The nature and the length of the professional relationship with the client.

7) The experience, reputation, and ability of the lawyer performing the services; and

8) Whether the fee is fixed or contingent

Rowe is the case that states your hourly rate should be higher because the case is being taken on a contingency fee basis.

The court will then allow the Defendant to cross examine you as to your hours and your hourly rate. Be prepared to be cross examined as to 1) any work that is form driven; 2) work that may be deemed secretarial; 3) work that is insufficiently described on the time sheet; 4) work that may be duplicative of work done by other lawyers in your office and done earlier in the case; 5) if applicable, your lack of experience in a PIP case; 6) the factors above; etc.

Then ask your expert to testify. Unless waived, the Plaintiff's attorney must bring an expert to the fee hearing. See Rodriguez v. Campbell, 720 So.2d 266 (Fla. 4th DCA 1998) and Tutor Time v. Mecabe,763 So.2d 505 (Fla. 4th DCA 2000). Sometimes it may be wise to waive experts if the parties can come to that agreement. It will speed up the hearing and most judges will appreciate the effort. This should not be done when a party is seeking a multiplier. Ask your expert to:

(1) support your argument the time you spent on the file was reasonable;

(2) explain why the hourly rate requested is reasonable by going through the elements in Rowe;

(3) explain why a multiplier is necessary and what amount of the multiplier would

be appropriate (see below);

(4) testify that he expects to be compensated for his time and that it was a burden for your expert to testify; and

(5) how many hours your expert is seeking to be paid for his time.

The expert must also be prepared for cross examination.

Multiplier

In some rare cases you may seek a multiplier. It would be wise to bring your client to testify that they had difficulty in securing counsel.

"In personal injury cases where the prevailing party's counsel is employed on a contingent fee basis, the trial court *must consider* a contingency risk factor when awarding a *statutorily-directed* reasonable attorney fee." Quanstrom at 831.. Must consider does not mean must apply. Id. In determining if the Court should award a multiplier in tort and contract cases, the trial court should consider the following:

(1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel;

(2) whether the attorney was able to mitigate the risk of nonpayment in any way; and

(3) whether any of the factors set forth in Rowe are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Quanstrom. at 834.

If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1.0 to 1.5 (a multiplier of one means no multiplier); if the trial court

determines that the likelihood of success was approximately even at the outset, the trial court may apply a multiplier of 1.5 to 2.0; and if the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5. Id.

Accordingly, if the Court determines a reasonable hourly fee is $200.00 per hour the Court will multiply $200.00 times the number of hours the Court determines is reasonable which is known as the "loadstar". Then the Court will multiply that figure by the multiplier to determine the new hourly rate.

A multiplier is not only available in contract and tort case but also for cases involving public policy enforcement cases. See Bell v. U.S.B. Acquistion, 734 So.2d 403 (Fla. 1999).

For a good discussion on the attorney's fee issue and the contingency multiplier see the following cases. Foreste v. Armor Insurance Co., 4 Fla. L. Weekly Supp. 490 (Fla. Palm Beach Cty Court 1996(this case provides a comprehensive explanation of attorney's fees and the multiplier) Laloi v. Progressive American Insurance Co., 4 Fla. L. Weekly Supp. 805 (Fla. Palm Beach Cty. Court 1997)(this case provides a comprehensive explanation of attorney's fees and the multiplier); United States Security Insurance Co. v. Lapour, 617 So. 2d 347, 348 (Fla. 3d DCA 1993)(A multiplier need not be applied in a "run-of-the-mill" PIP suit); Askowitz v. Susan Feurer Interior Design, Inc., 563 So. 2d 752 (Fla. 3d DCA 1990)(no multiplier where the litigant could afford competent counsel); Sun Bank of Ocala v. Ford, 564 So. 2d 1078, 1079 (Fla. 1990)(no multiplier used when the Plaintiff had no difficulty finding attorneys to represent them); Robinson 581 So. 2d at 231 (no multiplier when there is evidence to justify same); Danis Industries Corp. v. Ground Improvement

Technicques, Inc., 645 So. 2d 420, 421 (Fla. 1994)(The determination of a fee award against an insurer may include consideration of the fact that the insured has not prevailed on all issues as well as the degree to which this has extended litigation or increased costs); Rivers v. Integon General Insurance Corp., 4 Fla. L. Weekly Supp. 663 (Fla. Palm Beach Cty. Court 1997)(Misconduct, acts of omission, lack of cooperation by the Plaintiff himself which caused his own attorneys to expend additional time is not time for which the Defendant should be held responsible. Duplicative work is not compensable). Dorelus v. Allstate Indemnity Co. 4 Fla. L. Weekly Supp. 668 (Fla. Palm Beach Cty. Court 1997)(the Court awarded a 1.5 multiplier for a PIP suit where the insurer demanded an IME prematurely which in turn resulted in a premature cut off of benefits and the Plaintiff treated with a chiropractor and not a medical doctor); Lorjuste v. Armor Insurance Co., 4 Fla. L. Weekly Supp. 180 (Fla. Palm Beach Cty. Court 1996)(Court awarded a 2.0 contingency risk multiplier); United Auto Insurance. Co. v. Zulma, 661 So.2d 947, 948 (Fla. 4th DCA 1995) ("We conclude that once United Automobile settled the claim, Zulma was entitled to attorney's fees for the entire litigation period under section 627.428(1), Florida Statutes (1993)"); Joesph v. Allstate, 4 Fla. L. Weekly Supp. 325 (Fla. Palm Beach Cty. Court 1996)(Attorney may be entitled to pre-suit fees. Also the Court awarded a multiplier of 1.75); B & H Const. & Supply Co., Inc. v. District Bd. of Trustees of Tallahassee Community College, Florida, 542 So.2d 382, 390 (Fla. 1st DCA 1989)(No fees for work performed prior to the demand for arbitration); Dixie Insurance Co. v. Puzo, Case No. AP 93-9628 AY, AP 94-2673 AY, (Fla. Palm Beach County Court 1996)(A 2.0 multiplier was appropriate but the attorney was not entitled to fees for litigating entitlement to a multiplier); Simmons v. Royal Floral Distributors Inc., 724 So.2d 99 (Fla. 4th DCA 1998)(There must be evidence that a

contingent fee arrangement was necessary in order for the prevailing party to have obtained competent counsel in order for the Court to award a multiplier); Security National Insurance Co. V. Sein, 5 Fla. L. Weekly Supp. 523 (Fla. 17th Cir. Court)(A $45,348 award for attorneys fees was unreasonable when the jury awarded $3,000 in benefits); Nentwick v. United Automobile Insurance Co., 5 Fla. L. Weekly Supp. 779 (Fla. Palm Beach County Court 1998)(the Court awarded a multiplier of 1.5 in a rather straight forward case); Fortune Insurance Co. v. Randall, 6 Florida L. Weekly Supp. 373 (Fla. 10th Cir. Court 1999)(on the calculation of a reasonable fee); Labaton v. Mellert,772 So.2d 622 (Fla. 4th DCA 2000)(the court gave multiplier in a slip and fall case); Panza v. Progressive, 8 Fla. L. Weekly Supp. 795 (Fla. Hillsborough Cty Court 2001)(attorney entitled to a multiplier where there was a 100% recovery and the Defendant filed 8 affirmative defenses); NuBest v. State Farm, 9 Fla. L. Weekly Supp. 133 (Fla. Orange Cty Court 2001)(multiplier awarded on a VF case); Superior Insurance v. Pinnacle, 9 Fla. L. Weekly Supp. 203 (Fla. Orange Cty Cir. Court 2001)(Multiplier and paralegal fees awarded on $74.53 judgment); Smith v. Direct General Insurance Co., 9 Fla. L. Weekly Supp. 769 (Fla. Escambia Cty Court 2002)(paralegal fees awarded); State Farm v. Brock, 9 Fla. L. Weekly Supp. 212 (Fla. Orange Cir. Court 2001)(Multiplier awarded due to lack of property damage on a TMJ case); State Farm v. Trevino, 30 Florida L. Weekly D1239 (Fla. 2d DCA 2005) (there are no fees for arguing entitlement to a multiplier). For cases addressing multiple lawyers see Kurowski v. Krajewski, 848 F.2d 767, 776 (7th Cir 1988), Selzer v. Berkowitz, 477 F. Supp. 686, 690 (E.D.N.Y. 1979), Centex-Rooney Construction Co. v. Martin County, 725 So2d 1255, 1260 (Fla. 4th DCA 1999); Johnson v. Home Owners Insurance Co., 30 FLW D2834 (Fla. 4th DCA 2005)(2.0 multiplier was appropriate in a coverage case); United v. Reyes, 13

Florida L. Weekly Supp. 688 (Fla. 11th Cir. Court 2006)(no client needed at fee hearing to obtain a multiplier); Allstate v. Regar, 942 So.2d 969 (Fla. 2d DCA 2006)

The Defendant's turn

After you rest, the Defendant will put on their case. The Defendant may provide the Court with an opening. Then the Defendant will typically put on their expert to say things like the work was not necessary, secretarial, duplicative, and to say your hourly rate should be lower.

You get to cross examine their expert. Ask the Defendant's expert how much they charge per hour for serving as an expert; how much they charge when they are representing a Plaintiff; if he or she agrees a lawyer that takes a case on a contingency fee basis is entitled to a higher hourly rate; how often he testifies for the Defendant at fee hearings, if he ever litigated your exact , if he reviewed the defendant's file and time sheet, and if he knows how much the defendant's attorney bills per hour. Have the expert admit the Defendant gets paid win or lose and there is no risk of non payment. Ask what he bills for standard discovery and setting depositions. If he says nothing ask if that was pre arranged and incorporated into the hourly fee. Go over all the risks of doing Plaintiff's PIP work and all the problems with the file. Ask him if he knows what other PIP lawyers have been getting per hour. If the defendant's expert is not qualified move to strike him. If the Defendant's fee expert does defense work for the Defendant insurer move to strike him.

Don't forget you can object at fee hearings to the introduction to any exhibits.

The Fee Judgment

Make sure the fee judgement has sufficient findings of fact to justify the hours, the hourly rate and the multiplier, if applicable. See Blitz v. Reniassance, 647 So.2d 971 (Fla. 4th DCA 1995) where the Court held that trial court committed harmless error by not making specific findings of fact in support of its fee award. See also Diepen v. Brown, 33 FLW D338 (Fla. 5th DCA 2008)(the trial court was told to fix it).

Don't forget to ask for interest on your fees as of the day of the settlement or judgment until the time of the fee judgment. There is no reason to waive these additional fees.

Other cases to consider

The testimony of a supervising attorney for an associate along with evidence of time sheets as business records is sufficient to support an award of a reasonable attorney's fees. See Nants v. Griffin, 783 So.2d 363 (Fla. 5th DCA 2001) and Saussy v. Saussy, 560 So.2d 1385 (Fla. 2d DCA 1990); Banks v. Maxwell, 925 So.2d 473 D1058 (Fla. 4th DCA 2006)(paralegal and lawyers do not have to attend). For a case that states all of the lawyers need to attend see Island Hoppers v. Keith, 27 FLW D1257 (Fla. 4th DCA 2002)(if more than one attorney is seeking a fee they must all attend the fee hearing).

For case law that states you can use your current hourly rate see Solutia v. Forsberg, 221 F.Supp.2d 1280 (N.D. Fla. 2002). (A copy is in the scanned documents)

You can reopen a fee hearing after you close to provide the Court with additional evidence. See Amador v. Amador, 796 So.2d 1212 (Fla. 3d DCA 2001).

It is also a good idea to bring the cases of: Labaton v. Mellert, 772 So.2d 622 (Fla.

4th DCA 2000)(award of attorney fees not unreasonable if it exceeds the recovery), Cardservice International v. Beach Auction, 8 Fla. L. Weekly Supp. 288 (Fla. Dade Cty Cir. Court 2001) where the court held a fee is not unreasonable if it exceeds the recovery, and United v. Daniel, 11 Florida L. Weekly Supp. 617 (Fla. 11th Cir. Court 2004)(fee not unreasonable because it exceeds the judgment and the insurer waived a right to object to the Plaintiff's hours by not complying with the scheduling order); Madison v. Midland National Life Insurance Co., 648 So.2d 1226, 1228 (Fla. 4th DCA 1995)(where the court compensated the Plaintiff's attorney for travel time for taking out of state depositions); Wright v. Wright, 577 So.2d 1355 (Fla. 1st DCA 1991)(travel time is compensable); Hernandez v. Crigler, 31 FLW D3071 (Fla. 2d DCA 2006)(tolls, parking, and mileage is not compensable); Miller v. Hayman, 766 So.2d 1116 (Fla. 4th DCA 2000)(where the court draws the distinction between taxable costs as pertaining to section 57.104 which can be used to explain all time should be compensable under 627.428); United States Fidelity v. Rosado, 606 So.2d 628 (Fla. 3d DCA 1992)(where the court held the Plaintiff is entitled to fees for work performed prior to the filing of the lawsuit); Nants v. Griffin, 783 So.2d 363 (Fla. 5th DCA 2001)(paralegal received $50 per hour); Biscayne Roofing v. Palmetto Fairway, 418 So.2d 1109 (Fla. 3d DCA 1982) (the Court should not award an amount less than the uncontradicted expert testimony); Eve Garden v. Upshaw 801 So.2d 976 (Fla. 2d DCA 2001)(allowed travel time as a sanction); Centex-Rooney Construction v. Martin County, 725 So.2d 1255; (Fla. 4th DCA 1999)(Court allowed travel time); Houck v. Guettler & Sons, 450 So.2d 1267 (Fla. 1st DCA 1984)(travel time not allowed); S&H Fabricating & engineering, Inc. v. Wamley, 423 So.2d 435 (Fla. 1st DCA 1982)(travel time allowed); Gomez v. Prudential, 9 Fla. L. Weekly Supp. 526 (Fla. 13th Cir. Court 2002)(Attorney's file in a fee hearing is still protected as work product); Florida Life Insurance Co. V. Fickes, 613 So.2d 501 (Fla. 5th DCA 1993)(the purpose of §627.428 was to encourage prompt disposition of valid insurance claims without litigation and it is meant to discourage insurance companies from contesting valid claims); Casavan v. Lando O-Lakes, 526 So.2d

215 (Fla. 5th DCA 1988)(trial Court can rule on fees and costs even if there is an appeal filed); Watson v. Internet Billing Co., 29 Florida L. Weekly (Fla. 4th DCA 2004)(Expert testimony is required at a fee hearing); White v. Charboneau, 840 So.2d 1158 (Fla. 5th DCA 2003)(court can award fees and costs even if the Plaintiff does not prevail on every issue/count); Robbins v. Bates, 32 FLW D1126 (Fla. 1st DCA 2007)(copy costs obtained in discovery or filed with the court is taxable), Barcus v. State Farm, 14 Florida Law Weekly Supp. 823 (Fla. 18th Cir. Court 2007)(error for Court to award less hours than recommended by the expert for the insurer. The Court cited Larsen v. Larsen, 429 So.2d 725 (Fla. 3d DCA 1983); Brake v. Murphy, 736 So.2d 745 (Fla. 3d DCA 1999) the Defendant has the burden to demonstrate WITH SPECIFICITY which hours should be deducted.

Elder v. Islam, 869 So.2d 600 (Fla. 5th DCA 2004)(Court ordered mediation fees are taxable); Miller v. Hayman, 766 So.2d 1116 (Fla. 4th DCA 2000)(taxable costs guidelines are only guidelines).

Section VII

Attorney's Fees in P.I.P.

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Attorney's Fees in PIP
By Kevin B. Weiss

A. Authority for Attorney's Fees

If the insured, omnibus insured, or named beneficiary of a policy of insurance receives a judgment against an insurer then the Court will award attorneys' fees and costs. Under Florida Statute §627.428(1) an insurer is liable for attorney's fees only when it has wrongfully withheld the proceeds of the policy. Logue v. Clarendon National Insurance Co., 777 So.2d 1122 (Fla. 4th DCA 2001). §627.428 states:

> Upon rendition of a judgment or decree by any of the Courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate Court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Florida Statute Section 627.428: Provides for the recovery of attorney's fees and costs if the insured prevails. The underlying purpose of §627.428(1) is to "encourage prompt disposition of valid insurance claims *without litigation.*" Florida Life Ins. Co. v. Fickes, 613 So. 2d 501, 504 (Fla. 5th DCA 1993); Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420 (Fla. 1994) (the intent of §627.428 is to encourage early and fair settlements of valid claims). Insurance Co. of North America v. Lexow, 602 So. 2d 528 (Fla. 1992) (Florida courts have consistently held that the purpose of section 627.428 and its predecessor is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts.).

Florida statute 627.428 is by law, part of every insurance contract issued in the State of Florida and governs every legal action between insurers and their insured's (or assignees). Old Republic Insurance Co. vs. Monsees, 188 So.2d 893 (Fla. 4th DCA 1966); Orlando Candy Company vs. New Hampshire Fire Ins. Co., 51 F2d 392 (S.D. Fla., 1931); Pendas vs. Equitable Life Assurance Society of the United States, 176 So. 104 (Fla. 1937). The nature/type of the claim involving an insurance carrier is immaterial to a prevailing insured's entitlement to *fees.* Also, the issuance of a written opinion or the formal recovery of a money judgment is not determinative with regard to fee entitlement. See Arango v. United Automobile Insurance Co., 901 So. 2d 320, 321 (Fla. 3d DCA 2005); O'Malley v. Nationwide Mutual Fire Ins. Co., 890 So. 2d 1163, 1164 (Fla. 4th DCA 2004); and Travelers Indem. Ins. Co. v. Meadows MRI, LLP, 900 So. 2d 676 (Fla. 4th DCA 2005).

The Florida Supreme Court, in State Farm Fire and Casualty Ins. vs. Palma, 629 So.2d 830 (Fla. 1993) stated, "the statute (627.428) clearly provides that attorneys fees shall be decreed

against the insurer when judgment is rendered in favor of an insured or when the insured prevails on appeal." Eliminating any question as to what types of claims 627.428 intended to cover, the court noted, "Because the statute applies in virtually all suits arising under insurance contracts, we agree . . . [t]hat the terms of section 627.428 are an implicit part of every insurance policy issued in Florida. When an insured is compelled to sue to enforce an insurance contract because the insurance company has contested a valid claim, the relief sought is both the proceeds and attorneys fees pursuant to Fla. Stat. 627.428. The language of subsection (3) which provides that compensation or fees of the attorney shall be included in the judgment or decree rendered in the case also supports this conclusion."[1]

The seminal case on prevailing parties, adopted by Florida Courts[2], comes out of the U.S. Supreme Court. "The test is, however, whether the party 'succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

A claim for attorney's fees **must** be pled and the failure to so plead could constitute a waiver of the claim. Stockman v. Downs, 573 So. 2d 835 (Fla. 1991); Ringhaver Equipment Co. v. White Rose Nursery, 4 Fla. L. Weekly Supp. 374 (Fla. 13th Cir. Court 1996); Fortune Insurance Co. v. Cordero, 6 Fla. L. Weekly Supp. (Fla.. 11th Cir. Court 1999). Green v. Sun Harbor Homeowner's Association, 23 Fla. L. Weekly S438 (Fla. 1998)(failure to set forth a claim for attorney's fees in a motion does not constitute a waiver). For cases dismissed before the filing of an answer, a Defendant's claim for attorney's fees is to be made either in the Defendant's motion to dismiss or by a separate motion which must be filed within 30 days following a dismissal of the action or it will be waived). The pleading should also make reference to the specific statute. U.S. Security Insurance Co. v. Marquez, 5 Fla. L. Weekly Supp. 142 (Fla. 11th Cir. Court 1997). See also Fortune v. Urquijo, 6 Fla. L. Weekly Supp. 604 (Fla. Dade Cir. Court 1999)(pleading in the wherefore clause is sufficient).

The specific basis for fees does not need to be pled. Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002) ("We hold that the specific statutory or contractual basis for a claim for attorney's fees need not be specifically pled, and that failure to plead the basis of such a claim will not result in waiver of the claim.").

Exception: In Stockman, the Court recognized an exception to this rule: "Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or

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[1] The only claims for attorneys fees excluded by Florida law from 627.428 are life insurance policies and annuity contracts, if such suit was commenced prior to the expiration of 60 days after proof of the claim was duly filed with the insurer (627.428(2)). The Court went on, "As this court stated in Insurance Co. of North America vs. Lexow, 602 So.2d 528 (Fla. 1992), "if the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorneys fees."

[2] See Pappert v. Mobilinium Associates V, 512 So.2d 1096 (Fla. 4th DCA 1987) and *Smith v. Adler*, 596 So.2d 696 (Fla. 4th DCA 2002).

acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees." 573 So.2d at 838.

A party may waive the right to object to the failure to plead entitlement to attorney's fees. Stockman v. Downs, 573 So. 2d 835 (Fla. 1991); Ringhaver Equipment Co. v. White Rose Nursery, 4 Fla. L. Weekly Supp. 374 (Fla. 13th Cir. Court 1996).

Arbitrators cannot determine attorney's fees unless there is an express waiver by the parties. D.H. Blair & Co. Inc. V. Johnson et al., 697 So. 2d 912 (Fla. 4th DCA 1997).

Rule 1.525: Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

It is not sufficient for a party to plead entitlement to fees or costs only in their pretrial pleadings, such as in a complaint or an answer. A timely motion is also required. Further, a court's reservation of jurisdiction to determine fees and costs does not extend the time for service of a motion under rule 1.525. Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 600 (Fla. 2006). Rule 1.525 does not mandate service of a motion for attorneys' fees or costs only within a thirty-day window following the filing of the judgment. Barco v. Sch. Bd., 975 So. 2d 1116, 1119 (Fla. 2008). Supporting documentation for the fee is not required within 30 days. Silver Springs Props., L.L.C. v. ERA Murray Realties, Inc., 874 So. 2d 712 (Fla. 4th DCA 2004); P & R Smith Corp. v. Goyarrola, 864 So. 2d 584 (Fla. 3d DCA 2004).

B. Confession of Judgment

Where an insurer pays a disputed claim after the commencement of an action *and prior to dismissal*, an insured is entitled to attorney's fees under section 627.428(1), Florida Statutes, on the basis that the case was settled. Avila v. Latin American Property & Casualty Ins. Co., 548 So. 2d 894 (Fla. 3d DCA 1989). "When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured." Wollard v. Lloyd's & Cos. of Lloyd's, 439 So.2d 217, 218 (Fla. 1983). An insurer's good faith in bringing suit is not a factor. United Auto Insurance. Co. v. Zulma, 661 So.2d 947, 948 (Fla. 4th DCA 1995). If the dispute is within the scope of §627.428 and the insurer loses, the insurer is always obligated for attorney's fees. Id. citing Insurance Co. of N. Am. v. Lexow, 602 So.2d 528, 531 (Fla.1992).

In Wollard the Florida Supreme Court held:

> When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured. Requiring the plaintiff to continue litigation in spite of an

> acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, fails to protect any interest--the insured's, the insurer's or the public's--and discourages any attempt at settlement. This literal requirement of the statute exalts form over substance to the detriment of public policy, and such a result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result. (See page 218)

See also U.S. Fidelity and Guar. Co. v. Murray, 671 So.2d 812, 813(Fla. 4th DCA 1996)(insureds were entitled to fees when the insurer paid benefits in a declaratory judgment action); Lumbermen's Mut. Cas. Co. v. Percefull, 638 So.2d 1026, 1030 (Fla. 4th DCA 1994)(insured was entitled to fees on the issues the insured won on the appeal even thought the insured did not win on all of the issues); (Fla. 1983); Fewox v. McMerit Const. Co., 556 So.2d 419(Fla. 2d DCA 1989)(Statute provisions allowing recovery of attorney fees in "suits" involving insurers includes attorney fees incurred during arbitration proceedings, as well as proceedings in trial court); Brown v. Vermont Mut. Insurance. Co., 614 So.2d 574, 579 (Fla. 1st DCA 1993); Avila v. Latin American Property and Cas. Insurance. Co., 548 So.2d 894 (Fla. 3d DCA 1989); Fitzgerald & Co. v. Roberts Electrical Contractors, Inc., 533 So.2d 789 (Fla. 1st DCA 1988); Prygrocki v. Industrial Fire and Cas. Insurance. Co., 407 So.2d 345 (Fla. 4th DCA 1981); Smolder v. Ford Life Insurance. Co., 361 So.2d 222 (Fla. 1st DCA 1978); Cincinnati Insurance. Co. v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974); Alarcon v. Fortune Insurance Co., 5 Fla. L. Weekly Supp. 514 (Fla. 11th Cir. Court) (Payment was considered a confession of judgment even though the Plaintiff included the wrong policy number in the complaint).

Two very important cases:

> Allstate Insurance Co. v. Ivey, 774 So.2d 679 (Fla. 2000) where the court held "Allstate's payment after suit was filed operates as a confession of judgment."
>
> Palmer v. Fortune Insurance Co., 776 So.2d 1019 (Fla. 5th DCA 2001). "During the 30 day period [to authenticate the claim] there was no record activity showing that Fortune made an attempt to contact Palmer or any of the passengers in the Burch vehicle to confirm the address of the deceased. There was no record showing that Fortune made any independent attempts to directly obtain the police report from the source, rather than from Palmer's attorney."

C. Calculation of Attorney's Fees

Prior to negotiating an attorney's fee or attending a fee hearing you must review the case of Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990). In Quanstrom the Court carefully explains the proper way to calculate reasonable attorney's fees under the **lodestar approach** and the contingency fee multiplier. The lodestar amount represents the hours

expended multiplied by a reasonable hourly rate. Seminole County v. Delco Oil, Inc. 669 So.2d 1162 (Fla. 5th DCA 1996).

In determining a reasonable hourly fee for the attorney, the Court should apply those factors enunciated in Rule 4-1.5 of the Florida Bar Code of Professional Responsibility. Those factors are often referred to as the **Rowe** factors from the case of Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). The factors used to determine a reasonable hourly rate are:

(1) The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(4) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(5) The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, diligence and ability of the lawyer or lawyers performing the service and skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(8) Whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome or the representation.

The fee agreement entered into by and between the Plaintiff and the Plaintiff's attorney should not control because the Defendant did not participate in the fee arrangement. Quanstrom at 831. However, "in no case should the Court-awarded fee exceed the fee agreement reached by the attorney and the client." Id. See also Government Employees Insurance Co. v. Robinson, 581 So. 2d 230, 231 (Fla. 3d DCA 1991)("In no case should the Court-awarded fee exceed the fee agreement reached by an attorney and his client, except as a punitive measure"); Techmarine Lines v. Archer, 6 Florida L. Weekly Supp. 399 (Fla. 11th DCA 1999).

To the contrary see Wolfe v. Nazaire, 23 Fla. L. Weekly D1708 (Fla. 4th DCA 1998)

where the appellate court held the trial court could properly award the prevailing party attorney's fees greater than the hourly rate specified in the contract between the Defendant and her attorney where the contract provided for a fee to be based on specified hourly rate or whatever may be awarded by a trial Court, whatever is higher.

Defense attorneys will likely be familiar with the case of Ziontz v. Ocean Trail Unit Owners Assoc., 663 So.2d 1334 (Fla. 4th DCA 1993) where the Court held a manifest injustice resulted where the attorney's fees were grossly disproportionate to the judgment. However, Plaintiff attorneys should note that an award is not unreasonable merely because the fee exceeds the recovery. Baker v. Varela, 416 So. 2d 1190, 1192 (Fla. 1st DCA 1982) and Martin Marietta Corporation v. Glumb, 523 So. 2d 1190 (Fla. 1st DCA 1988). The Florida Supreme Court recognized in State Farm v. Palma, 555 So. 2d 836 (the first time Palma was heard in the S. Ct.) that an insurance company can be held responsible to pay a significant amount in attorney's fees, even though the amount in dispute was much smaller. On page 838, the Court stated:

> We are fully cognizant of the great disparity between the monetary sum recovered in the case and the amount of the attorney's fee. However, the parties elected to go toe to toe over the issue and they brought to bear all of their skill and resources to try to win the day.
>
> Having chosen to stand and fight the Plaintiff, the insurance company made a "business judgment" for which it should have known a day of reckoning would come should it lose in the end.

D. Contingency Risk Multiplier

A multiplier is appropriate in cases where the insurance company contests a PIP case and the court finds that it would have been difficult if not impossible for PIP plaintiff to get proper legal representation on a contested PIP case without a contingency contract, and that attorneys of skill and reputation would not accept such cases without a contingency fee multiplier. The Court in Discovery Experimental and Development, Inc. v. Department of Health, 824 So.2d 195 (Fla. 2d DCA 2002) observed that the awarding of a multiplier is intended to promote access to the courts through the retention of effective counsel.

In Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla.1985), the supreme court cited increased access to courts and competent counsel as compelling policy rationales for enhancing fee awards by use of contingency risk multipliers. The court reasoned that the contingency risk factor is important to plaintiffs in personal injury cases because it facilitates access to the court system and the services of attorneys who might otherwise be unwilling to accept plaintiffs' cases. Id.

A contingency risk multiplier is not a statutory creation. The multiplier was established by the Florida Supreme Court in Standard Guar. Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla.1990). "In personal injury cases where the prevailing party's counsel is employed on a contingent fee basis, the trial court *must consider* a contingency risk factor when awarding a

statutorily-directed reasonable attorney fee." Quanstrom at 831. Must consider does not mean must apply. Id. In *Quanstrom,* the Florida Supreme Court ruled that attorney's fees cases could ordinarily be placed into one of three categories, including public policy cases, tort and contract cases, and family law and eminent domain cases. *Id.* at 833.

In determining if the Court should award a multiplier in tort and contract cases, the trial court should consider the following:

(1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel;

(2) whether the attorney was able to mitigate the risk of nonpayment in any way; and

(3) whether any of the factors set forth in Rowe are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Quanstrom. at 834.

If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1.0 to 1.5 (Plaintiff attorneys usually argue that a multiplier of one means no multiplier); if the trial court determines that the likelihood of success was approximately even at the outset, the trial court may apply a multiplier of 1.5 to 2.0; and if the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5. Id.

Accordingly, if the Court determines a reasonable hourly fee is $300.00 per hour the Court will multiply $300.00 times the number of hours the Court determines is reasonable. Then the Court will multiply that figure by the multiplier.

For a good discussion on the attorney's fee issue and the contingency multiplier see the following cases. Foreste v. Armor Insurance Co., 4 Fla. L. Weekly Supp. 490 (Fla. Palm Beach Cty Court 1996(this case provides a comprehensive explanation of attorney's fees and the multiplier) Laloi v. Progressive American Insurance Co., 4 Fla. L. Weekly Supp. 805 (Fla. Palm Beach Cty. Court 1997)(this case provides a comprehensive explanation of attorney's fees and the multiplier); United States Security Insurance Co. v. Lapour, 617 So. 2d 347, 348 (Fla. 3d DCA 1993)(A multiplier need not be applied in a "run-of-the-mill" PIP suit where no answer was filed); Askowitz v. Susan Feurer Interior Design, Inc., 563 So. 2d 752 (Fla. 3d DCA 1990)(no multiplier where the litigant could afford competent counsel); Sun Bank of Ocala v. Ford, 564 So. 2d 1078, 1079 (Fla. 1990)(no multiplier used when the Plaintiff had no difficulty finding attorneys to represent them); Geico v. Robinson 581 So. 2d at 230 (no multiplier when there is no evidence to justify same); Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420, 421 (Fla. 1994)(The determination of a fee award against an insurer may include consideration of the fact that the insured has not prevailed on all issues as well as the degree to which this has extended litigation or increased costs); Rivers v. Integon General Insurance Corp., 4 Fla. L. Weekly Supp. 663 (Fla. Palm Beach Cty. Court 1997)(Misconduct, acts of omission, lack of cooperation by the Plaintiff himself which caused his own attorneys to expend additional time is not time for which the Defendant should be held

responsible. Duplicative work is not compensable). Dorelus v. Allstate Indemnity Co. 4 Fla. L. Weekly Supp. 668 (Fla. Palm Beach Cty. Court 1997) (the Court awarded a 1.5 multiplier for a PIP suit where the insurer demanded an IME prematurely which in turn resulted in a premature cut off of benefits and the Plaintiff treated with a chiropractor and not a medical doctor); Lorjuste v. Armor Insurance Co., 4 Fla. L. Weekly Supp. 180 (Fla. Palm Beach Cty. Court 1996)(Court awarded a 2.0 contingency risk multiplier); United Auto Insurance. Co. v. Zulma, 661 So.2d 947, 948 (Fla. 4th DCA 1995) ("We conclude that once United Automobile settled the claim, Zulma was entitled to attorney's fees for the entire litigation period under section 627.428(1), Florida Statutes (1993)"); Joseph v. Allstate, 4 Fla. L. Weekly Supp. 325 (Fla. Palm Beach Cty. Court 1996)(Attorney may be entitled to pre-suit fees. Also the Court awarded a multiplier of 1.75); B & H Const. & Supply Co., Inc. v. District Bd. of Trustees of Tallahassee Community College, Florida, 542 So.2d 382, 390 (Fla. 1st DCA 1989)(No fees for work performed prior to the demand for arbitration); Dixie Insurance Co. v. Puzo, Case No. AP 93-9628 AY, AP 94-2673 AY, (Fla. Palm Beach County Court 1996)(A 2.0 multiplier was appropriate but the attorney was not entitled to fees for litigating entitlement to a multiplier); Simmons v. Royal Floral Distributors Inc., 23 Fla. L. Weekly D1181 (Fla. 4th DCA 1998)(There must be evidence that a contingent fee arrangement was necessary in order for the prevailing party to have obtained competent counsel in order for the Court to award a multiplier); Security National Insurance Co. V. Sein, 5 Fla. L. Weekly Supp. 523 (Fla. 17th Cir. Court)(A $45,348 award for attorneys fees was unreasonable when the jury awarded $3,000 in benefits); Nentwick v. United Automobile Insurance Co., 5 Fla. L. Weekly Supp. 779 (Fla. Palm Beach County Court 1998)(the Court awarded a multiplier of 1.5 in a rather straight forward case); Fortune Insurance Co. v. Randall, 6 Florida L. Weekly Supp. 373 (Fla. 10th Cir. Court 1999)(on the calculation of a reasonable fee); Labaton v. Mellert,772 So.2d 622 (Fla. 4th DCA 2000)(the court gave multiplier in a slip and fall case); Panza v. Progressive, 8 Fla. L. Weekly Supp. 795 (Fla. Hillsborough Cty Court 2001)(attorney entitled to a multiplier where there was a 100% recovery and the Defendant filed 8 affirmative defenses); NuBest v. State Farm, 9 Fla. L. Weekly Supp. 133 (Fla. Orange Cty Court 2001)(multiplier awarded on a VF case).

The Florida Supreme Court has emphasized that there must be evidence in the record of ``risk of nonpayment" to counsel and corresponding difficulty for the client to obtain competent counsel to justify the award of a multiplier. Bell v. U.S.B. Acquisition Co., 734 So. 2d 403, 409-10 (Fla. 1999); Quanstrom, 555 So. 2d at 834; see also Aries Ins. Co. v. Aleman, 27 Fla. L. Weekly D920b (Fla. 3d DCA Apr. 24, 2002) (``main focus of the court's inquiry in determining whether to apply a multiplier should be on the first factor listed in Quanstrom, i.e., whether the relevant market requires a contingency fee multiplier to obtain competent counsel").

For an excellent discussion of multipliers, see Holiday v. Nationwide Mut. Ins. Co., 864 So.2d 1215 (Fla. 5th DCA 2004) (the purpose of Florida statute 627.428 is to "discourage the contesting of valid claims...and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts.").

Progressive v. Schultz:

Progressive Express Ins. Co. v. Schultz, 948 So. 2d 1027 (Fla. 5th DCA 2007)

significantly impacted the award of multipliers. In Schultz, the Fifth District Court of Appeals issued a writ of certiorari as to a multiplier award of 2.5 that was issued by the County Court and upheld on plenary appeal by the Circuit Court sitting in its appellate capacity. The Schultz court found that there was insufficient evidence to support the Plaintiff's award of a 2.5 multiplier. Although Schultz did not and could not overrule Quanstrom, the Schultz decision has certainly had this type of impact on the trial courts. Nonetheless, Quanstrom remains binding precedent that the use of a fee multiplier in a first-party insurance case is permissible so long as the factors are met.

A significant problem in Schultz was the lack of testimony regarding Mr. Schultz's ability to obtain competent counsel for a what the District Court found to be "a run of the mill PIP dispute" involving expert opinion regarding medical treatment. Also, in Schultz, the Court found that the expert witness failed to address the required Quanstrom factors. It found that the only evidence regarding Schultz's ability to find competent counsel was provided by the Plaintiff's attorney:

> Because Mr. Schultz did not testify at the fee hearing, we have nothing to suggest that he had any difficulty obtaining competent counsel to pursue his PIP claim, other than Mr. Klausman's statement that the attorney handling Mr. Schultz's third-party liability claim was not interested in pursuing Mr. Schultz's PIP case.

(Id. at 1030).

Insurance companies and several courts have concluded that Schultz requires direct evidence from the Plaintiff with regard to the multiplier. The caselaw, however, only requires that the trial court hear evidence regarding the ability of the Plaintiff to obtain competent counsel. The question remains whether the evidence can be presented solely by the expert witness and the movant. Plaintiff attorneys have argued that expert testimony, standing alone, may be sufficient proof that the relevant market required a multiplier. Island Hoppers Ltd. v. Keith, 820 So.2d 967 (Fla. 4th DCA 2002) (reversed on other grounds).

E. Attorney's Fees for Litigating the Amount of Attorney's Fees

If an insurer settles a PIP case and agrees to pay the benefits, the insurer must decide if it is going to pay the Plaintiff's attorney's fees. If the insurer agrees to pay the Plaintiff's attorney's fees then it must stipulate the Plaintiff's attorney is entitled to fees. Otherwise, the Plaintiff's attorney will be entitled to fees for preparing for a fee hearing and attending the fee hearing.

At the fee hearing the Defense attorney will likely argue that the Plaintiff's attorney's fees stopped when the insurer stipulated the Plaintiff's attorney was entitled to attorney's fees pursuant to the holding of Lugassy v. Independent Fire Insurance Co., 636 So. 2d 1332, 1336 (Fla. 1994) and State Farm Fire and Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993).

In Lugassy, and Palma the Florida Supreme Court held attorney's fees may be awarded under §628.428 for litigating the issue of entitlement to attorney's fees, but not for litigating the amount of attorney's fees. Lugassy v. Independent Fire Insurance Co., 636 So. 2d 1332, 1336 (Fla. 1994) and State Farm Fire and Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993).

The Plaintiff attorney will likely argue that attorney's fees only become an issue at the conclusion of a case, "after all the counts of the complaint have been disposed of." See Specialty Insurance & Waterproofing Co., Inc. v. R & C of Orlando, Inc., 25 Fla. L. Weekly D2393 (Fla. 5th DCA 2000), citing Arango v. Cainas, 666 So. 2d 970, 971 (Fla. 3d DCA 1996).

F. Multipliers in Light of Sarkis

The Florida Supreme Court addressed the subject of multipliers in Sarkis v. Allstate Ins., 863 So. 2d 210 (Fla. 2003). Sarkis confronted whether Florida's offer of judgment statute, §769.79, Fla. Stat., permits trial courts to award multipliers to prevailing parties. The court held that multipliers were *not* available in such cases because the reason for an award of fees under Section 769.79 was to deter parties from rejecting reasonable offers to settle. The court distinguished insurance cases like Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla.1990), in which multipliers *are* available to prevailing parties:

> The reason for an award of attorney fees authorized as a sanction for the rejection of an offer to settle is very different from the reason that we authorized the use of a multiplier in *Quanstrom* and *Rowe*. In those cases, ***we authorized the use of a multiplier to promote access to courts by encouraging lawyers to undertake representation at the inception of certain cases***. We agree with the Third District Court of Appeal's analysis in *Amisub* that *Quanstrom specifically refers to obtaining counsel in the first instance*. It is self-evident that attorney fees awarded as a sanction under section 768.79 and rule 1.442 are awarded after an attorney has already been obtained and agreed to undertake the case, and thus the use of a multiplier is not consistent with the purpose of the fee-authorizing statute.

Sarkis, (emphasis added; citations omitted).

G. Attorney's Fees for Pre-Suit Work

USF&G v. Rosado, 606 So. 2d 628 (Fla. 3rd DCA 1992) (pre-suit work is compensable if the pre-suit work, particularly those legal services rendered prior to providing the insurer with proof of claims, was necessitated by the insurer's unreasonable conduct).

H. Multiple Attorneys

Where the billing statements of co-counsel are consistent with efforts to properly coordinate activities to save time and maximize the talents of each attorney to better represent the client, there is no duplication of effort and the attorneys made efficient use of their time and labor. Laloi v. Progressive American Insurance Co., 4 Fla. L. Weekly Supp. 805 (Fla. Palm Beach Cty. Court 1997). A party has the right to hire as many attorneys as it desires but the opposing attorney is not required to compensate for overlapping efforts, should they result. Zuckerman v. Hofrichter, 676 So. 2d 41 (Fla. 3d DCA 1996). Expert opinion must be presented especially where there is a claim of duplication of legal effort. Id.

I. Interest on Attorney's Fees

Once the confession of judgment occurs and the insurer stipulates to the Plaintiff's entitlement to attorney's fees the Plaintiff is entitled to interest on the attorney's fees. Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So.2d 929, 931 (Fla. 1996) and Orlando Regional Med. Ctr., Inc. v. Chmielewski, 573 So.2d 876 (Fla. 5th DCA 1990).

Interest ceases to accrue on amounts of attorney fees up to the amount for which an actual tender of payment is made. Id. In other words, to reduce the amount of interest paid to the Plaintiff, the insurer should pay that portion of the attorney fees it agrees the Plaintiff is entitled to receive. If the Plaintiff ultimately receives a higher fee award, that award should include interest from the date of entitlement to the date of payment. There is no interest due and owing on the amount previously paid by the insurer for the attorney's fee. Id. See also Bennett v. USAA Casualty Insurance Co., 5 Fla. L. Weekly Supp. 832 (Fla. Orange County Court 1998)(Attorney is entitled to interest from the date of settlement through date of hearing).

J. The Fee Hearing and Expert Witness Fees

All of the attorneys who worked on the file are not required to personally appear at the fee hearing. Nants v. Griffin, 783 So. 2d 363 (Fla. 5th DCA 2001). In Nants, the Court held:

> To support a fee award, there must be evidence detailing the services performed and expert testimony as to the reasonableness of the fee. See Saussy v. Saussy, 560 So. 2d 1385, 1386 (Fla. 2d DCA 1990). The applicant should present records detailing the amount of work performed and the time to perform each task. See Rowe, 472 So. 2d at 1150. "Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary." Id. Expert testimony is required to determine both the reasonableness of the hours and a reasonable hourly rate. See Markham v. Markham, 485 So. 2d 1299, 1301 (Fla. 5th DCA 1986). However, the attorney performing the work is not required to testify when there is competent evidence filed in support of the motion or introduced at the hearing detailing the services

performed. See Saussy, 560 So. 2d at 1386.

(Id. at 366).

The Nants Court relied on Saussy v. Saussy, 560 So. 2d 1385 (Fla. 2nd DCA 1990). In Saussy, more than one attorney claimed time in a fee hearing before the trial court. The trial court only awarded attorney's fees to the attorney who was present at the fee hearing. The appellate court reversed the denial of fees to the non-present attorney, finding that the trial court should have considered the absent attorney's affidavit and the expert witness's testimony regarding the affidavit. Id. at 1386. See also Banks v. Maxwell Bldg. Corp., 925 So. 2d 473 (Fla. 4th DCA 2006) (it was not necessary for all attorneys who worked on a case to testify at an attorney's fee hearing).

The parties to a fee hearing must bring experts to testify about the reasonableness of the fee and the need for a multiplier. Yakubik v. Board of County Com'rs of Lee County, 656 So.2d 591 (Fla. 2d DCA 1995)(The testimony of an expert witness concerning reasonable attorney's fees is necessary to support the establishment of the fees); Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla.1987); Palmetto Fed. Sav. & Loan Ass'n v. Day, 512 So.2d 332 (Fla. 3d DCA 1987); Nants v. Griffin, 783 So. 2d 363, 366 (Fla. 5th DCA 2001) (Expert testimony is required to determine both the reasonableness of the hours and a reasonable hourly rate); Rakusin v. Christiansen & Jacknin, P.A., 863 So. 2d 442 (Fla. 4th DCA 2003) (The existing case law requires the presentation of corroborating testimony from an expert witness regarding the reasonableness of attorney's fees); and Brake v. Murphy, 736 So. 2d 745 (Fla. 3rd DCA 1999) (Attorney fees cannot be assessed based solely on the testimony of the attorney claiming the fee, but rather expert testimony must be offered substantiating the fee).

The question then becomes is the Plaintiff's expert entitled to a fee for preparing for and attending the hearing pursuant to Florida Statute §92.231 which provides for an expert witness fees. Many cases support the taxation of expert witness fees by a prevailing party. See Rock v. Prairie Building Solutions, Inc., 854 So. 2d 722, 722 (Fla. 2d DCA 2003) ("Expert witness fees paid to the testifying expert are not discretionary if the attorney expects to be compensated for his testimony") and Straus v. Morton F. Plant Hospital Foundation, Inc., 478 So. 2d 472 (Fla. 2d DCA 1985)(the award of expert fees are discretionary only where the testifying attorney expert does not expect to be compensated for that testimony). See also Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995).

The Fifth District Court of Appeals has also issued an opinion supporting the award of an expert witness fee to a testifying fee expert. See Mangel v. Bob Dance Dodge, Inc., 739 So.2d 720 (Fla. 5th DCA 1999). Mangel was a consumer claim case in which one of the issues the Court addressed was whether to allow fees for the attorney's fee expert as a taxable cost, where the trial court had denied same. There, the Mangel Court stated in pertinent part:

> We do, however, find error in the court's refusal to allow fees for the fee expert as a taxable cost. The court concluded that such an item was not taxable. The record in this case shows that attorney Fountain did not agree to expend the six hours as a matter of

professional courtesy and that he has already been paid by Blau. Given the nature of the case, the size of the file, the amount of time it took to make the necessary file review, the fees issue involved and the attack on the reasonableness of the fees made by Bob Dance Dodge, an award of fees for the expert is appropriate under Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985).

(Id. at 725).

In any event, prior to the fee hearing the Plaintiff's expert should thoroughly review the file and prepare for the fee hearing. The expert will likely be cross examined on the facts of the case, as well as the applicable law.

K. Appellate Standard of Review

An Appellate court will not disturb the lower court's decision either as to the lodestar amount or the application of a contingency risk multiplier, absent a clear abuse of discretion. DiStefano Construction Inc. v. Fidelity and Deposit Company of Maryland, 597 So. 2d 248, 250 (Fla. 1992); Afrazeh v. Miami Elevator Company of America, 769 So. 2d 399, 401 (Fla. 3d DCA 2000); Quanstrom at 834. ``The trial court's findings of fact with regard to an award of attorney's fees are presumed to be correct, see Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium Association, 608 So. 2d 822, 828 (Fla. 4th DCA 1992), and the appellate court should not substitute its judgment for that of the trial court." Centex-Rooney Construction Company v. Martin County, 725 So. 2d 1255, 1258 (Fla. 4th DCA 1999).

L. Timely Payment

Florida Statute Section 627.4265 requires 12% interest of settlement proceeds if the insured does not tender settlement amounts within twenty (20) days of a written settlement. *See Mushinki v. Allstate*, 6 Fla. L. Weekly Supp. 442 (Fla. Cty. Ct. Collier County 4/13/99). Section 627.4265 states in no uncertain terms:

> In any case in which a person and an insurer have agreed in writing to the settlement of a claim, the insurer shall tender payment according to the terms of the agreement no later than 20 days after such settlement is reached ... if the payment is not tendered within 20 days, or such other date as the agreement may provide, it shall bear interest at a rate of 12 percent per year from the date of the agreement....

F.S. Section 627.4265 (2000).

Reasonable attorney's fees should be awarded for the filing and preparation of the Motion to Enforce, as well as any hearing hereafter. See Pepper's Steel & Alloys, Inc. v. United States of America, 28 Fla. L. Weekly S 455 (Fla. 2003) and Massaro v. American Int'l Ins. Co., 7 Fla. L. Weekly Supp. 297a (Fla. Cty. Ct. Collier Cty. 01/05/00).

M. Misc.

Prior to attending the fee hearing the parties may want to perform discovery such as deposing the attorneys, the parties, propounding discovery, and requesting the defense attorneys' billing sheets. See Butler v. Nationwide Mutual Fire Insurance Co., 5 Fla. L. Weekly Supp. 691 (Fla. Polk County Court 1998).
Some courts will not allow discovery of opposing counsel's time records. Florida law contemplates that where a party opposing a fee petition has challenged the reasonableness of the hours expended by counsel, "the fee records of opposing counsel can be considered relevant to an award of fees." Mangel v. Bob Dance Dodge, Inc., 739 So.2d 720, 724 (Fla. 5th DCA 1999) (citing Chrysler Corp. v. Weinstein, 522 So.2d 894 (Fla. 3rd DCA 1988)). Federal decisions from the Eleventh and other circuits follow this reasoning. See Henson v. Columbus Bank & Trust Co., 770 F.2d 1566, 1575 (11th Cir. 1985) ("because the defendant here has contested the reasonableness of the plaintiff's petition [for counsel's fees], we find that the district court abused its discretion in refusing to allow [petitioner] discovery of [opposing counsel's] records concerning hours expended and fees paid"); accord Coalition to Save Our Children v. State Bd. of Educ. of Del., 143 F.R.D. 61, 64 (D. Del. 1992) (noting "[t]he Third Circuit Court of Appeals has recognized that evidence of fees and expenditures of other parties may be relevant to the issue of reasonableness of the petitioner's fees"); See HCA Health Services v. Hillman, 28 Fla. L. Weekly D2758 (Fla. 2nd DCA December 3, 2003) (this Court found that opposing counsel's billing records are of limited relevance, and that the fees of the prevailing party cannot be predicated upon the fees of the opponent).

The Plaintiff's attorney should introduce into evidence an affidavit of his time and the time of any legal assistants and a copy of the contingency fee agreement. The failure to have a signed contingency fee agreement may result in **no** fees being awarded. D.H. Blair & Co. Inc. V. Johnson et al., 697 So. 2d 912 (Fla. 4th DCA 1997).

The court cannot determine the risk after the fact. Dreese v. Craftsman Auto Electric, 620 So.2d 1097 (Fla. 4th DCA 1993) (multiplier should still be awarded based on risk when case first accepted even if recovery was achieved thru default). The court is required to look at the risk as it appeared to the Plaintiff's attorneys at the outset when the case was accepted and not with the 20/20 hindsight of a Defendant's surrender. J.E. Stack v. Lewis, 641 So.2d 969 (Fla. 1st DCA 1994) (appellate attorneys' fees should include multiplier based on risk when case was first accepted).

It is also a good idea to review the following cases to a fee hearing: Madison v. Midland National Life Insurance Co., 648 So.2d 1226, 1228 (Fla. 4th DCA 1995)(where the court compensated the Plaintiff's attorney for travel time for taking out of state depositions); Miller v. Hayman, 766 So.2d 1116 (Fla. 4th DCA 2000)(where the court draws the distinction between taxable costs as pertaining to section 57.104 which can be used to explain all time should be compensable under 627.428); United States Fidelity v. Rosado, 606 So.2d 628 (Fla. 3d DCA 1992)(where the court held the Plaintiff is entitled to fees for work performed prior to the filing of the lawsuit); Nants v. Griffin, 783 So.2d 363 (Fla. 5th DCA 2001)(paralegal received $50 per hour); Biscayne Roofing v. Palmetto Fairway, 418 So.2d 1109 (Fla. 3d DCA 1982) (the Court should not award an amount less than the uncontradicted expert testimony).

Courts have authorized payment for travel time to and from the courthouse, recoverable as attorney's fees. Both are First District cases, and the language is easily used to extend fee entitlement to travel time re experts from out of town. S & Fabricating v. Wamley, 423 So. 2d. 435 (Fla. 1st DCA 1982), and Wright v. Wright, 577 So. 2d. 1355 (Fla. 1st DCA 1991).

The opponent of the fee has the burden of pointing out with specificity which hours should be deducted. The court cannot award an amount less than that sought where there was no evidence on the record indicating that the opposing party took exception to fees sought as being excessive, unreasonable, or unnecessary. RH Holdings LTD v. Barturen, 7 Fla. L. Weekly Supp. 243 (Fla. Dade Cty Cir. Court 2000).

Based on Florida Rule of Civil Procedure 1.525, it is recommended that as a practice, attorneys file their Motions for Attorney's Fees and Costs within thirty (30) days from the confession of judgment date. Many insurance companies are filing Motions to Strike based on Plaintiffs not filing their motions within thirty (30) days of the date of the confession of judgment. Plaintiffs argue that this rule

contemplates a case in which attorney's fees are not a part of the legal claim and should be inapplicable to PIP.