

# BLR NEWSLETTER

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell, Leeper & Roper

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### PIP DEDUCTIBLE

By Mary Grace Dyleski

In Sarasota Spine Specialist, P.A., as assignee of Linda Johanning v. Progressive Express Ins. Co., 10 Fla. L. Weekly Supp 921 (County Court, 12<sup>th</sup> Cir., September 2, 2003), the Court considered Defendant's Motion for Summary Judgment on the issue of Defendant insurer's application of the medical provider's bill to the deductible, which had not yet been met at the time the bill was submitted.

The Court granted summary judgment and found that even though Progressive had reduced the bill and applied the reduced amount to the deductible, even if Progressive had not reduced the bill, the full amount would properly have been applied to the deductible as it had not been met at the time the bill was submitted. The Court pointed out that even if the reduction of the Plaintiff's bills was found to be unreasonable by the trier of fact, the English Rule governed the order of payment. Consequently the filing of the lawsuit, subsequent to the deductible having been met, did not entitle the Plaintiff to recover under the benefits portion of the policy for the medical bill that was previously submitted and applied to the deductible.

Based on this Court's ruling, an insurer is entitled to apply bills to the deductible according to the order in which the bills are received, the Plaintiff or provider cannot later submit a bill in an effort to have it paid when it was applied to the deductible upon its original submission.

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### CIVIL RIGHTS - PROCEDURAL DUE PROCESS

By Michael J. Roper

In Foxy Lady Inc. v. City of Atlanta, 16 Fla. L. Weekly Fed C1206 (11<sup>th</sup> Cir. October 16, 2003), the court reaffirmed its prior ruling in McKinney v. Pate, 20 F.3d 1550 (11<sup>th</sup> Cir. 1994) (en banc) which held that even if a procedural deprivation occurred during an administrative hearing, such a claim would not be cognizable under Section 1983 if the state provides a means by which to remedy the alleged deprivation. In Foxy Lady, supra, Plaintiff contended that the City's ordinances governing revocation of liquor licenses did not provide them the right to subpoena witnesses, and accordingly violated their procedural due process rights. The Court noted that it was not appropriate to look to the actual involvement of state courts or whether they were asked to provide a remedy in this specific case at hand. Instead the review should focus on the "existence of an opportunity" to seek a state law remedy. In this instance, state law afforded Plaintiffs the right to file a petition for writ of certiorari to review the city's determination, and accordingly the 11<sup>th</sup> Circuit found that there was an adequate post-deprivation process in place under state law. Accordingly no cognizable federal procedural due process claim existed.

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**FLORIDA SUPREME COURT  
CIVIL SETTLEMENT DOESN'T  
BAR RESTITUTION**

By Michael M. Bell

A civil settlement and release of liability do not preclude a judge from ordering a criminal defendant to pay restitution to his or her victim, the Florida Supreme Court unanimously ruled October 9.

“The criminal sanction of restitution and the civil remedy of damages further distinct societal goals,” Justice Barbara J. Pariente wrote for the court. “Unlike a civil claim for damages, the purpose of restitution is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.”

The ruling upheld the 5<sup>th</sup> District Court of Appeal’s decision in **Kirby v. State** and resolved conflict with the 2<sup>nd</sup> DCA’s opinion in **State v. Vandonick**.

In November 1999, Gary Kent Kirby, an off-duty Palatka police officer, made a turn into oncoming traffic and his vehicle struck motorcyclist Harold Baxley.

Baxley settled with Kirby’s insurance company for the policy limit of \$25,000.00. He did so before trial because he needed money to pay his medical bills. But the settlement was not enough to cover Baxley’s out-of-pocket medical expenses, deductibles or lost wages.

A criminal court jury found Kirby guilty of driving under the influence and causing serious bodily injury. The trial judge sentenced him to five years’ probation - a downward departure partly given because of the victim’s need for restitution and partly because this was Kirby’s first offense. The trial court ordered restitution and held a subsequent hearing to determine the amount.

Kirby contested restitution because the civil settlement agreement contained a release of liability.

The state conceded the point, but argued that it was not a party to the civil settlement agreement and therefore had a statutory right to seek restitution. The trial court disagreed, denying restitution based both on the release and on **Vandonick**, which held that the right to restitution is foreclosed by a settlement and release in a civil case. The state appealed and won before the 5<sup>th</sup> DCA.

Ruling on Kirby’s appeal from that decision, Justice Pariente quoted from **People v. Bernal**, a 2002 California case: “Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.”

Under the law, Baxley cannot receive a double recovery. A judge will be able to order Kirby to pay as restitution only the difference between the insurance settlement and Baxley’s additional expenses.

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**SOVEREIGN IMMUNITY**

By Joseph A. Tsombanidis

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**The less people know  
about how sausages  
and laws are made, the  
better they’ll sleep at  
night.**

**- Otto Von Bismarck**

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