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# HANDLING REALLY small claims

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**ABOUT THE SPEAKER**

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## THE PROBLEM

You're contacted by a prospective client (PC) about an injury claim. The client has been rear-ended so liability looks good. The impact appears sufficient to cause the physical complaints the prospective client has. But then you discover the problem: the PC has recovered and is honest enough both to make a good impression and to admit he has recovered. You have maybe $3,000 or $4,000 in bills for treatment of the soft tissue injury. Less than that if the insurance company is able to take advantage of the "paid v. incurred" statute.[1] (More on that later.) Should you take the case?

My recommendation, up to now was probably not. The insurance company simply will not pay you enough for the pain and suffering the PC has had and will offer you the medical expense or maybe even less. It is simply too small a case to be economically feasible. And the insurance adjuster knows that. He will offer you $1,500 or $2,000 on a take-it-or-leave-it basis.

I think I've figured out a way to make those cases economical to handle and maybe persuade the insurance companies they should get reasonable. Let me tell you how I am handling those cases.

## SMALL CLAIMS COURT JURISDICTION

Oklahoma Small Claims Courts currently have a maximum jurisdictional limit of $7,500. As this is being written, there is a proposed statute in the Legislature (Senate Bill 617) to increase that to $10,000. If you can figure out a way to get as much as $7,500 or certainly $10,000, you can make those economical, but you have to handle them just right.

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[1] 12 O.S. 3009.1

A problem with doing that is that (at least in my county - Oklahoma) small claims dockets tend to be very long. If I have to go to small claims court I am likely to spend all morning or all afternoon sitting through a docket-full of collection cases.

What I think we can do is to concentrate those cases with one lawyer in each county. I can go to Small Claims Court with 25 cases and not spend much if any more time than if I have one or two cases on the docket. As we will discuss, a fairly large percentage of these cases settle and those which remain to be tried tend to be the ones which are probably worth the $7,500 Small Claim limit. We'll talk more later about how to concentrate these cases.

The rules of evidence apply in Small Claims cases but are somewhat leniently applied. 12 O.S. §. 1761 provides: "The hearing and disposition of such actions shall be informal with the sole object of dispensing speedy justice between the parties."

We've also gotten some help over the years with statutes which, while not specially intended to apply to Small Claims cases, are very helpful. More on that later too.

Unless the defendant demands a jury, all Small Claims cases are tried to the judge, rather than to a jury. This makes the small claims docket move along fairly rapidly. That's part of what enables me to try 10 or 15 of them in a morning or an afternoon.

By filing all my Small Claims cases at once, I can get them set all the same day. In our county, the clerk simply keeps filing cases until they get a certain number set for trial on a particular morning or afternoon. Keeping the filings together keeps you from having to go over and try some in the morning, some in the afternoon and some more on later days of the week.

**SOME STATUTES WHICH HELP YOU GREATLY IN SMALL CLAIMS CASES**

Over the years, the Legislature has enacted some statutes which, while not necessarily intended to help in small claims cases, help greatly to make these cases. For example, 12 O.S. §. 3009 provides:

> Upon the trial of any civil case involving injury, disease or disability, the patient, a member of the patient's family or any other person responsible for the care of the patient, shall be a competent witness to identify doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the patient upon a showing by the witness that such bills were received from a licensed practicing physician, hospital, ambulance service, pharmacy, drug store, or supplier of therapeutic or orthopedic devices, and that such expenses were incurred in connection with the treatment of the injury, disease or disability involved in the subject of litigation at trial. Such items of evidence need not be identified by the person who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary.

With this statute, your client or your client's parents can identify the medical bills and do away with the need for a doctor to testify they are reasonable, necessary or caused by the wreck.

Another statute of great help to you in handling injury claims in small claims court is 12 O.S. §. 2803:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . .(24) A verified or declared written medical report signed by a physician, provided:
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> a. the report is used in an action not arising out of contract in which the claim of the plaintiff is not in excess of Twenty-five Thousand Dollars ($25,000.00),
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> b. the report contains a history of the plaintiff, the complaints of the plaintiff, the physician's findings on examination, and any diagnostic tests, description and cause of the injury, and the nature and extent of any permanent impairment. All opinions expressed in the report must be based upon a reasonable degree of medical probability, and
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> c. the medical report must be verified or contain a written declaration, made under the penalty of perjury, that the report is true.

This statute comes into play because of cases holding that you cannot recover damages for pain and suffering in an injury case with subjective injuries, unless there is expert medical testimony as to the cause of the pain of which the injured patient complains. The same is true of any recovery for permanent disability. I have an orthopedic expert who examines and gives me a letter opinion to fulfill this requirement.

**WHAT USUALLY HAPPENS IN THE SMALL CLAIMS INJURY CASE**

I usually get these cases after the adjuster has made an offer of somewhere around $1,000, in a case in which the medical expense incurred is $3,000 or $4,000. I don't try to negotiate these cases before filing suit on the rationale that the case has already been negotiated, without success.

**HOW DO I HANDLE THE SMALL CLAIMS CASE**

I enter into a contract with the client, with the referring lawyer as co-counsel, for 40% with me advancing costs, which then come out of the client's portion of the recovery. Having co-counsel on the contract is what justifies me in sharing the fee with co-counsel in light of Oklahoma Rule of Professional Conduct 1.5:

> (D) A division of a fee between lawyers who are not in the same firm may be made only if:
> (1) the division is in proportion to the services performed by each lawyer or **each lawyer assumes joint responsibility for the representation**;
> (2) the client agrees to the arrangement and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

Since co-counsel is on the contingent fee contract, he or she has assumed "joint responsibility for the representation." I do that with all referral fee contracts, not just small claims.

I also get agreement from the prospective client that we will file the case in small claims court and restrict our recovery to the small claims limit. They also agree that I can wait until I have enough small claims cases to make it feasible to file a bunch of small claims cases.

Sometimes, although not always, I feel we can pretty well evaluate the case at the point we sign it up. If so, I get an agreement with the client that I have authority to settle the case if I can procure for the client a net recovery of X dollars. This saves a lot of haggling with the client while trying to settle a number of cases as we approach a busy small claims docket. The client also signs a legal intern authorization required by those rules.

I have an arrangement with the doctor I use to write a report (if the client doesn't already have one) that I will write one check a month for the cases we have concluded the preceding month, instead of writing one for each of the cases separately. I have the same arrangement with a process server who also gives me a volume rate for using him. I have a similar arrangement with my co-counsel, to whom I pay a 1/4 referral fee.

**HOW IS THE INSURANCE COMPANY LIKELY TO REACT**

I serve the small claims affidavit on the insured tort-feasor by certified mail or process server. I do not normally send a courtesy copy to the insurance adjuster, as I do in a normal injury case. The reason for this is that I want the suit papers to go from the insured to the insurance agent, to the claims department and then to the defense lawyer.

Often this means that the defense counsel actually gets the suit papers say on a Friday before the small claims docket on Monday or Tuesday. This becomes important because there are some things defense counsel can do to complicate your life if he or she gets the case more than a couple of days before the small claims trial.

For example, the defendant in a small claims case for more than $1,500 is permitted to demand a jury trial. However, per 12 O.S. §. 1761, the defendant must do so at least two working days ahead of the trial setting. If the defendant moves for a jury trial, your case will be set over for a jury trial, although the delay will usually be only a few days. However, you're in for another trip to the courthouse.

There's a common myth that a small claims defendant can simply demand a transfer of the case from the small claims to the CSC docket. However, that transfer is discretionary with the judge and, in our county, is not usually granted. There's another impediment to the defendant asking to transfer the case to CSC: if the transfer is granted, and the defendant does not prevail in the trial, the defendant has to pay the plaintiff's attorney fee. On the other hand, if the plaintiff loses, the plaintiff does not have to pay the defendant's attorney fee.

This provision has been held constitutional by the Supreme Court against an argument that the failure to make attorney fees available to either party made it an improper, special law.[2] Defendants tend to be less enthusiastic about transferring a case, knowing about this law.

**HANDLING "PAID V. INCURRED" IN SMALL CLAIMS COURT**

As mentioned above (and as you probably already knew) 12 O.S. §. 3009.1 greatly modified the personal injury practice by limiting recovery to the amount actually paid to satisfy medical bills, as opposed to the amount billed. However, to reach that result, the statute requires the defendant to produce a statement by the health care provider that, in consideration of the efforts of the injured plaintiff to recover the bill, the doctor or other health care provider agrees to accept the amount paid in full satisfaction of the bill.

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[2] *Thayer v. Phillips Pet. Co.*,1980 OK 95, 613 P.2d 1041.

Insurance companies are proving to have great difficulty getting those statements, even under the normal circumstances of a regular case. The only way I have seen defendants succeed in getting the required statement is to issue a subpoena to the health care provider to appear for a deposition on the subject but kindly offering to excuse the health care provider if the health care provider will just sign the attached sworn statement.

This is very difficult for the insurance company to do in a small claims case where there is no discovery and would be no time for discovery if there were. As a result, the whole amount of the bill comes in.

**AS A PRACTICAL MATTER**

So, what often happens is that we file the small claims case, serve it and nothing much happens until 2 to 4 days before the scheduled trial. I then begin to get frantic calls from defense counsel saying they have just received the suit papers and what can we do. At some point the discussion gets around to the possible solution that the case can be settled.

Those that don't get settled can actually be kind of fun to try. The last one I tried was a case in which a young woman was walking down a stairway at a kind of ratty apartment complex and the top step broke, sending her through the stairway. (She really wasn't heavy at all!) We had good pictures of the stair and the court was impressed with how ratty the stairs were. She had about $4,000 in medical but had had a complete recovery.

The court reasoned that with $4,000 in bills, all she was asking was about $3,500 for a couple of months of pretty severe pain between the time of the fall and the time the medical records showed she had recovered. The judge did the math and calculated that was only about $20 per day for pain. The result was a $7,500 judgment.

The one before that was a small insurance claim to which the insurance company, represented by a tall-building law firm, had a pretty good technical defense, but an awful human defense. That one resulted in a $7,500 award plus an attorney fee, pursuant to 36 O.S. §. 3629(B), the amount of which is pending on a motion for attorney fees.

Will all this result in loosening up the spigot of the insurance companies? I don't know, but I know I'm making some money from these cases and the lawyers who have sent me cases are making a little bit. And, we're all having fun!