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OFFER OF JUDGMENT – CONTINGENCY RISK MULTIPLIER
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While the avowed purpose of the Offer of Judgment statute and rule is to encourage settlement, the Courts continually wrestle with the factors to be considered in awarding attorney's fees based upon a failure to settle within the parameters of the Rule. The District Courts of this State have differed as to whether or not the contingency risk multiplier created by the Supreme Court in Standard Guarantee Ins. Co. v Quanstrom, 555 So.2d 828, 833 (Fla. 1990) and Florida Patient's Compensation Fund v Rowe, 472 So.2d 1145, 1151 (Fla. 1985) applied to a failure to accept an offer of settlement under RCP 1.442. The First District in Lewis v Bondy, 752 So.2d 1225 (Fla. 1st DCA 2000), the Second District in Doyle-Vallery v Aranibar, 838 So.2d 1198 (Fla. 2nd DCA 2003), the Fourth District in Collins v Wilkins, 664 So.2d 14 (Fla. 4th DCA 1995) and the Fifth District in Garrett v Mohammed, 686 So.2d 629 (Fla. 5th DCA 1996) all held that a contingency risk multiplier could validly be considered in assessing attorney's fees under RCP 1.442.

The Third District, however, in Gonzalez v Veloso, 731 So.2d 63 (Fla. 3rd DCA 1999) and in subsequent rulings severely limited the use of a contingency risk multiplier and questioned whether it could ever be used under these circumstances.

In Allstate Insurance Co. v Sarkis, 809 So.2d 6 (Fla. 5th DCA 2001), the Fifth District adopted the dissenting opinion of then Judge Casanueva in Pirelli

Armstrong Tire Corp. v Jensen, 752 So.2d 1275 at 1277 (Fla. 2nd DCA 2000) and receded from its prior holding supporting the use of the contingency risk multiplier under these circumstances. The Fifth District sitting en banc concluded that contingency risk multipliers were not to be considered in calculating attorney's fees based upon an offer of judgment.

In Sarkis v Allstate Ins. Co., 28 F.L.W. S740 (Fla. Oct. 2, 2003), the Supreme Court concludes that the Fifth and Third Districts are correct and adopts the reasoning of Judge Casanueva prior to his elevation to the Supreme Court. Justice Casanueva did not take part in consideration of the Supreme Court's opinion. The underpinning of the Supreme Court's opinion is that the use of a multiplier in Quanstrom was to increase the likelihood that difficult cases would be accepted by attorneys, thus promoting access to the Courts.

Quanstrom dealt with cases in which attorney's fees were awarded by contract or statute rather than pursuant to an offer of judgment provision.

"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*, 555 So.2d at 833, and *Rowe*, 472 So.2d at 1151. 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. See *Doyle-Vallery*, 838 So.2d at 1198-99 (Altenbernd, J., concurring). We agree with the Third District Court of Appeal's analysis in *Amisub* that *Quanstrom* specifically refers to obtaining counsel in the first instance. *Amisub*, 817 So.2d at 872-73). 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. *Quanstrom* and *Rowe* do not justify the use of a multiplier in awards of attorney fees authorized by section 768.79 and made in compliance with rule 1.442.”

Reasoning that a failure to accept an offer of judgment involves the application of a sanction rather than the initial acceptance of a case, the Court concluded that strict construction was required and that without specific authorization for the use of a multiplier, its use was not appropriate under either the applicable statute or rule.

Neither section 768.79 nor rule 1.442 authorizes the use of a multiplier in determining the amount of attorney fees as a sanction for the rejection of an offer. Applying a strict construction of the statute and rule, a multiplier therefore cannot be applied under Section 768.79 or rule 1.442, and the trial court’s application of a multiplier in this case was error. From our reading of the trial court’s “Judgment Award of Attorney’s Fees and Costs” in the present case, we do not see that the trial court used the factors of rule 1.442(h)(2) to determine the amount of the attorney fee award. Upon remand, the trial judge should use these factors in calculating the award, as well as the reasonable hourly rate and time, which the judge had already determined. A multiplier is not authorized.

Justice Pariente, in her dissent, points out that the existence of a multiplier is certainly a factor that an attorney considers when accepting or rejecting a case that will likely be tried. Where the amount in controversy may be small and the likelihood of success is uncertain, Court awarded attorney’s fees, including the

use of a multiplier can be important in determining whether the case will be accepted. Notwithstanding these practical issues, the law in Florida now clearly holds that in offer of judgment situations a contingency risk multiplier may not be considered by the Court in calculating the attorney's fee due.

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