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OFFER OF JUDGMENT ATTORNEY'S FEES

by Ted Babbitt

In Fla. Patient's Compensation Fund v Rowe, 472 So.2d 1145 (Fla. 1985), the Supreme Court adopted the Federal "lodestar approach" in determining the amount of a court awarded attorney's fee. This procedure requires the Court to make a determination of the number of hours reasonably spent on the case multiplied by a reasonable hourly rate. This calculation constitutes the "lodestar" which can then be multiplied by a contingency risk factor based upon the likelihood of success at the time counsel began representation. That contingency risk factor can be between 1.5 and 2.5 times the original "lodestar." Standard Guar. Ins. Co. v Quanstrom, 555 So.2d 828 (Fla. 1990).

A difference has arisen among the Districts as to whether attorney's fees awarded under the offer of judgment statute, §768.79, can include a contingency risk multiplier or not. The Fifth District has ruled that a trial court may not legally utilize a contingency risk multiplier in such cases. Allstate Insurance Co. v Sarkis, 809 So.2d 6 (Fla. 5th DCA 2001). The First and Second Districts have ruled to the contrary and held that a multiplier is authorized under Fla. Stat. 768.79. Lewis v Bondy, 752 So.2d 1225 (Fla. 1st DCA 2000) and Pirelli Armstrong Tire Corp. v Jensen, 752 So.2d 1275 (Fla. 2nd DCA 2000).

The Fourth District has now sided with the First and Second Districts and held that a contingency risk multiplier can appropriately be used in offer of judgment cases. Island Hoppers, Ltd. v Keith, 27 F.L.W. D1257 (Fla. 4th DCA,

May 29, 2002), was a wrongful death claim arising out of a drowning during a scuba charter. The eventual verdict in that case exceeded by well over 25% the amount of the offer of judgment and the trial court entered an attorney's fee award which included a contingency risk multiplier of 2.3 citing numerous issues which made the case extremely difficult to win from a plaintiff's perspective. In affirming the attorney's fee award, the Fourth District relied on its prior holding in Collins v Wilkie, 664 So.2d 14 (Fla. 4th DCA 1995). That case expressly held that the offer of judgment statute authorized a contingency multiplier in determining a reasonable fee.

In approving the calculation of attorney's fees the Court recognized but disagreed with the opinion of Chief Judge Schwartz in Gonzalez v Veloso, 731 So.2d 63 (Fla. 3rd DCA 1999). In that case, Judge Schwartz questioned whether an attorney could ever truly testify that at the time of accepting employment, there was a probability of obtaining a contingency risk multiplier. The Fourth District held:

> "We find no inconsistency in holding competent counsel can 'anticipate' the eventual filing of a 768.79 offer of judgment, 'anticipate' the possible entitlement to fees if the statutory prerequisites are met, and 'anticipate' the possibility said fee award will be multiplied. Accordingly, we find no logical inconsistency in application of the *Quanstrom* requirements to the offer of judgment context, and move to consider the application of said requirements to the instant case.

Prior to its decision in Allstate v Sarkis, supra, the Fifth District had held that a contingency risk multiplier would only be appropriate where there was evidence that at the time the attorney accepted representation the attorney would not have taken the case were it not for the probability of obtaining a contingency

multiplier. Strahan v Gauldin, 756 So.2d 158 (Fla. 5th DCA 2000); Internal Medicine Specialist, P.A. v Figueroa, 781 So.2d 1117 (Fla. 5th DCA 2001). The Second District, while holding that a multiplier is appropriate under the offer of judgment statute, has also specifically held that the record must contain evidence establishing the factual requirement previously accepted by the Fifth District. Allstate Ins. Co. v Materiale, 787 So.2d 173 (Fla. 2nd DCA 2001). While the Fourth District does not expressly hold that such factual evidence must be present in the record, it is important to note that in the Island Hopper case that evidence was in the record and it is doubtful that the award would have been affirmed had it not been present.

The Fourth District has certified conflict jurisdiction between its opinion in Island Hopper and the Fifth District's opinion in Allstate v Sarkis but until the Supreme Court decides this conflict, the contingency risk multiplier is still appropriate outside of the Fifth District.

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