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FILED
SID J. WHITE
NOV 29 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN THE MATTER OF THE PROPOSED AMENDMENT TO RULE 1.442, OFFER TO SETTLE

CASE NO.: 73,263

COMMENTS BY F. SHIELDS McMANUS

Pursuant to the notice contained in the November 15, 1988 edition of The Florida Bar News, the undersigned attorney, pro se, makes the following comments about the proposed amendment to Rule 1.442, Offer of Judgment.

I. Regarding sub-paragraphs (g) (1) & (2):

The use of 15% of the offer as the measure of the sanction unfairly discriminates against the Plaintiff, or any party seeking a judgment for damages. This is because the Defendant must make an offer which will likely exceed the damage award by 1/3, but the Plaintiff must make an offer which will likely be less than the expected damage award by 20%. Since the sanction is based upon 15% of the offer, the Defendant who guesses successfully will be awarded 15% of the inflated offer, while the Plaintiff who guesses successfully will receive 15% of the deflated offer. As a result, the Plaintiff will always be at risk of suffering a greater sanction than the Defendant.

For example, if a reasonable evaluation of a claim is $100,000, the Defendant should offer $133,333. ($100,000 is 25% less than $133,333.) The sanction for the Plaintiff who fails to properly evaluate the claim is $20,000 (15% of $133,333.33). In the opposite instance, if the Plaintiff evaluates the claim at $100,000 and offers to accept a judgment for $80,000 ($100,000 is 25% greater than $80,000), the sanction against the Defendant for not making the correct evaluation is $12,000 (15% of $80,000). The sanction against the Plaintiff is 2/3's larger than the sanction against the

Defendant (20,000/12,000 is 1.66%). This may constitute a denial of equal protection. The inequity increases if the damages awarded are extremely greater or lesser than the offer. A very low jury award will almost certainly result in the plaintiff owing a judgment to the defendant. On the other hand, a very high damage award will only result in a very modest sanction against the defendant.

This inequity can be corrected by adjusting the sanction percentage to counter-balance the high/low offers. Mathematically, the sanctions will be equal if the percentage in sub-paragraph (g)(1) is changed from 15% to 11.25%, and the percentage in sub-paragraph (g)(2) is changed from 15% to 18.75%. For example, using the $100,000 case example from above, a successful defendant who offered $133,333.33 would receive a sanction of $15,000, and a successful Plaintiff who had offered $80,000 would also receive a sanction of $15,000. While the raw percentages appear unfair, because of the opposite offers to which they are applied, the net sanction, as applied, is equal.

II. Regarding Costs:

The proposed rule makes no mention of costs. Apparently, the old rule of the prevailing party receiving costs would still apply. Perhaps this should be clarified.

One problem is that the offer of judgment rule fails to provide costs in the event of settlement. The party who correctly evaluates his case has to absorb his costs. This would especially discourage plaintiffs from accepting offers where they have incurred substantial costs. The solution is to return to the principle established in the former rule, that the offer includes the offer to pay costs. Another possibility is to include the judgment for costs in the "damages awarded" standard against which the offer is measured.

III. Regarding paragraph (g):

Similar to the rule regarding the Motion for New Trial, this rule makes a distinction between jury and non-jury matters. The time within which the motion must be made is 30 days after return of a verdict in a jury action but it is 30 days after the filing of the judgment in the non-jury action. This seems to create a trap for the successful party in a jury trial. More importantly, it also creates a computation problem in that the matter of collateral source set-offs, and perhaps other set-offs, are to be deducted from the verdict by the judge. This would most likely be done at post-trial hearings. If the sanction is to be based on whether or not the offer is a substantial percentage above or below the "damages awarded", then the final judgment in a jury trial, and not the verdict should be the standard against which the offer will be measured. (For reasons stated in paragraph II, should not costs also be included?) Therefore, it would seem the better rule to state that in both jury and non-jury actions, the motion is to be made within thirty days after the date of the filing of the judgment.

IV. Regarding paragraph (c):

It appears that the last sentence, which says that the offer shall include all damages of every sort, is in conflict with statements in sub-paragraph (g) (1) & (2) which refer to the necessity of stating the payment of punitive damages with particularity.

V. Regarding paragraph (d) & (f):

There appears to be an inconsistency between these two paragraphs in that the offer shall not be filed until accepted, however, the withdrawal of the offer is required to be "filed" before the written acceptance is "served". It is true that by filing the withdrawal of the offer, there will be less chance of debate about whether the offer was

withdrawn prior to acceptance; but since service is complete upon mailing, there is still room for mischief if the unscrupulous attorney were to back-date the acceptance service date upon discovering the offer had been withdrawn. The filing requirement would just seem to set a trap for the withdrawing offeror. It might be better that the word "filed" be changed to "served".

Respectfully submitted,

McMANUS, STEWART & FERRARO, P.A.
73 S. Flagler Avenue
P.O. Box 809
Stuart, FL 34995
Telephone: (407) 283-8191

By F. Shields McManus
F. Shields McManus
Florida Bar No. 148176

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Rutledge R. Liles, President, The Florida Bar, P.O. Box 420, Jacksonville, FL 32201 and Bruce Judson Berman, Chairman, Florida Bar Civil Procedure Rules Committee, Weil, Gotshal & Manges, 701 Brickell Avenue, Suite 2100, Miami, FL 33131-2801 by U.S. Mail this 23RD day of November, 1988.

McMANUS, STEWART & FERRARO, P.A.
79 South Flagler Avenue
Post Office Box 809
Stuart, Florida 34995
Telephone: (407) 283-8191

By F. Shields McManus
F. Shields McManus
Florida Bar No. 148176

FSM/icc