IN THE SUPREME COURT OF FLORIDA

73,263

FILED
SID J. WHITE
NOV 1 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN RE:

AMENDMENT TO
RULES OF CIVIL PROCEDURE

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PETITION OF THE CIVIL PROCEDURE RULES COMMITTEE OF THE FLORIDA BAR, SUBMITTING PROPOSED AMENDMENT TO RULE 1.442

The Civil Procedure Rules Committee of the Florida Bar (the "Committee"), pursuant to Rules 2.130(e) and (f) of the Florida Rules of Judicial Administration, petitions the Court as follows:

(a) to amend Rule 1.442, Fla.R.Civ.P. (the offer of judgment rule), by adopting the Committee's proposed rule, a copy of which is attached to this Petition as Exhibit "1" (together with the present rule, to be deleted in its entirety under the proposal, and committee note); and

(b) for a determination that Sections 768.79 and 45.061, Fla.Stat. (legislative enactments that establish other procedures for offers of judgment) are unconstitutional, because they violate Article II, Section 3 and Article V, Section 2 of the Florida Constitution, which prohibit the legislature from usurping the judiciary's exclusive power to adopt rules for practice and procedure in the courts;

together with such other relief as the Court may deem proper.

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att: ① - ⑤

BACKGROUND

A. The Problem

Florida law currently provides no less than three separate and conflicting procedures for offers of judgments.[1] One form is among the Rules of Civil Procedure adopted by this Court. Rule 1.442, Fla.R.Civ.P. (see Exhibit "1").

The two other procedures have been generated by recent legislative enactments. See Section 768.79, Fla.Stat. (1986) ("Offer of judgment and demand for judgment"); and Section 45.061, Fla.Stat. (1987) ("Offers of settlement").[2] It is the proliferation of these conflicting rules, from different branches of government, together with the need to create a single, improved procedure, that necessitate this petition.

B. The Existing Rule of Civil Procedure

The existing Rule 1.442 provides a procedure by which a party defending against a claim can offer, before trial, that judgment be entered against him for an amount of money or as otherwise specified. If the offer is rejected and the ultimate judgment entered for the claimant is less favorable than the offer, then, as a sanction for failing to accept the offer, the claimant is required to pay all ensuing costs of the offeror.

The intent of Rule 1.442 is to encourage the settlement of

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[1] A non-conflicting provision is also contained in Section 73.092, Fla.Stat. (eminent domain), which incorporates Rule 1.442.

[2] For the convenience of the Court, copies of the statutes are attached hereto as Exhibits "2" and "3," respectively.

litigation whenever possible by imposing a sanction against a party who fails to accept a timely offer that is more favorable than the offeree's ultimate recovery. See Cheek v. McGowan Elec. Supply Co., 511 So.2d 977, 981 (Fla. 1987).

The existing procedure is limited in its ability to accomplish this purpose because (among other things): (1) the procedure is available only to parties defending against claims; and (2) the sanction of costs is too insignificant to deter offerees from proceeding to trial.

C. The Legislative Enactments

In an apparent attempt to put teeth into the offer of judgment procedure, the legislature stepped into the area and enacted its own versions of offers of judgment.

The first version was part of the 1986 tort reform legislation dealing with negligence and medical malpractice actions, the subjects of Parts I and II of Chapter 768.[3]

Section 768.79 expands on the existing procedural rule both by enabling any party to make the offer (a "demand for judgment" by a claimant and an "offer of judgment" by a respondent), and by enhancing the sanction by adding attorneys' fees to "reasonable costs."

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[3] Curiously, the offer of judgment procedure is provided under Part III (entitled, "Damages"), expressly applicable to "any action for damages, whether in tort or in contract." § 768.71(1). Thus its sweep would appear to exceed the general scope of the legislation in which it was included. The statute also provides that if any provision in Part II "is in conflict with any other provision of the Florida Statutes, such other provision shall apply." § 768.71(3). There is no consideration of conflict with the Florida Rules of Civil Procedure.

Although different from Section 768.79 in a number of respects, Section 45.061 likewise extends the use of the offer of judgment procedure to all parties, and likewise enhances the sanction with attorneys' fees, as well as investigative costs and other expenses, together with interest that would have been earned (by a claimant whose offer was refused). This section makes no reference to the corresponding procedure in the tort reform legislation, although overlapping in coverage. Section 45.061 also applies, however, to claims for relief other than damages, which Section 768.79 does not.

The purpose of both statutes is clear from their face, and identical to the purpose of this Court in promulgating Rule 1.442, i.e., to discourage "unnecessary delay and needless increase in the cost of litigation" (see Section 45.061(2)). An evident problem with both statutes, however, is that while they make it more difficult for offerees to ignore reasonable offers of judgment, the sanction procedure is complicated, requires the exercise of judicial discretion under broad, enumerated standards, and opens the door to substantial post-judgment proceedings. In short, procedures designed to shorten litigation may serve, instead, to lengthen it.

D. The Resulting Confusion

The existence of two statutes and one rule governing the same procedure has already fostered confusion, among other things, as to the relation among, and the proper selection between, the different procedures. See M. Warren, Too Much of a

Good Thing: Offers of Judgment or Settlement in Florida, XIV The Advocate 2 (April 1988). Indeed, there are evidently lawyers who, in order to assure the attainment of all benefits from offers of judgment, simultaneously file offers under all three procedures.

THE COMMITTEE'S PROPOSAL: GENERALLY

A. The Timing of this Filing

After more than four years of debate, resulting in part from the complexity of the subject matter and in part from new issues presented by the intervening legislative enactments, the Civil Procedure Rules Committee of The Florida Bar has, through a succession of subcommittees, formulated a procedural rule, finally adopted at the September, 1988 meeting of the full Committee, as a proposal to replace both the current rule and the two statutes.

Because the proposal was not yet adopted in time to be included within the last four-year cycle, and because of the confusion generated by the existing, conflicting procedures, it was felt that this was a matter of sufficient emergency nature to be brought before this Court out of sequence; and indeed, the filing of this petition is also prompted by a direct request from the Court for filing on or before November 1, 1988.

B. The Committee's Objectives

The amendment is designed to simplify and increase the efficacy of the offer of judgment procedure by consolidating the three existing mechanisms into one, maintaining the bilateral

applicability of the procedure (by permitting any party, claimant or respondent, to invoke the provision, as in the statutes) and changing the sanction from costs (and attorneys' fees) to a fixed percentage of the offer.

The last of these changes is, perhaps, the most significant, and caused some controversy as the proposal was debated. It will be discussed at greater length below. The Committee's ultimate adoption of a fixed, percentage sanction was the result of a growing awareness that this kind of sanction would best and most efficiently serve the purposes of the Court's original rule.

That view was shared, after study of the proposal, by the Civil Rules Committee of the Florida Defense Lawyers Association, which has endorsed the proposal "as a means to bring clarity to this area while effectively meeting the goals that each of the existing procedures have attempted to reach."[4]

THE COMMITTEE'S PROPOSAL: ANALYSIS

A. Applicability

The types of actions to which Rule 1.442 would apply are unaffected by the amendment. The proposed rule would apply to all actions for money damages. The current rule applies to all actions except those for "dissolution of marriage, alimony, nonsupport or child custody." However, as stated in the Committee Note, the proposed rule would similarly not apply to these actions because they are not "actions for money damages."

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[4] Attached hereto as Exhibit "4" is a copy of a letter dated October 7, 1988, to the undersigned communicating this endorsement.

The proposed rule would overlap Section 768.79 (applicable to any action for damages whether in tort or contract), and Section 45.061 (applicable to all actions except class actions, shareholder derivative suits, and matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, and child custody).

B. Time Requirements

The current rule provides that an offer may be made at any time more than ten days before the trial begins. Similar to Sections 768.79 and 45.061, the amended rule would require that offers be served no sooner than sixty days after the offeree has filed its first paper in the action. This requirement protects new parties to the suit by affording a sufficient amount of time to investigate the nature of the litigation and evaluate the offer.

Similar to Section 45.061, the proposal also requires that an offer be served no later than sixty days prior to trial, except counteroffers may be served within fifteen days after service of an offer. This requirement is designed to prevent unprofessional practices immediately before trial.

C. Form of Offer

As set forth above, the proposal, like the statutory procedures, permits any party, claimant or respondent, to make an offer.

The present rule requires that an offer include taxable costs accrued to the date of the offer. In an effort to simplify

the offer of judgment procedure, the Committee deleted this requirement. The proposal is designed to avoid the need for any post-trial computations by the court to determine whether sanctions may be applicable. The Committee Note accompanying the proposed rule explains the manner in which such costs will be treated.

D. Service and Filing

Under the proposed rule, an offer must be served upon the parties to whom it is made, but only needs to be filed if it is accepted or if filing is necessary to enforce the provisions of the rule. The service and filing requirements under the current rule and under Section 45.061 are similar.

However, under Section 768.79, an offer is made by filing, not by service. This would defeat the purpose of non-disclosure of unaccepted offers and discourage offerors from using the procedure.

E. Acceptance of Offer

Each of the present offer of judgment rules allows a different amount of time for acceptance: 10 days (current Rule 1.442), 30 days (§ 768.79), and 45 days (§ 45.061). As a compromise among the three, the amended rule gives an offeree 30 days to accept an offer.

The amended rule also adds a provision for withdrawing offers, consistent with the common law of contracts. Under the amended rule, an offeror could withdraw an offer by serving a written withdrawal before a written acceptance is served.

Neither the current rule nor Section 768.79 have a withdrawal provision, although Section 45.061 appears to allow written withdrawals.

F. Trigger for Sanctions

Under the current rule, sanctions are available if there is a judgment more favorable than the offer. The proposed rule, following the approach of Sections 768.79 and 45.061, provides for sanctions if the judgment is less than 75% of an offer to pay or greater than 125% of an offer to accept an amount of money. Such leeway promotes fairness and permits the simplification of judicial administration of the rule (as is attempted by the "presumption" language in the present statutes) by eliminating the need for post-judgment judicial determinations of the reasonableness of the rejection of the offer. Sanctions are either applicable or they are not.

G. The Determination of Sanctions

As set forth above, the Committee has elected in its proposal to abandon the existing costs sanction of Rule 1.442 as an insufficient deterrent to the rejection of reasonable offers.

The Committee has also chosen to reject an attorneys' fees sanction, for the following reasons. First, the sanction becomes meaningless in cases in which attorneys' fees are already awardable. Second, the amount of attorneys' fees that would be expended following rejection of an offer can only be the subject of conjecture until after the fees are actually incurred. Thus, the amount of the sanction is not known to the offeree at the

time that he must decide whether to accept an offer. Third, in order to assess the sanction, the court is required to conduct an evidentiary hearing, subject to possible prior discovery, to determine the amount of fees that is "reasonable," adding time and expense and risking the creation of new appellate issues.

In contrast, the proposed rule provides for a sanction in the amount of 15% of the offer. The predetermined 15% of the offer allows the parties to calculate the exact amount of the potential sanction at the time the offer is received. It also provides a reasonable and easily determined basis for the court to determine the amount of the sanction, without a hearing and without any attenuation of the proceedings.

H. Evidence of the Offer

Under the proposed rule, as well as the three current procedures, evidence of an offer is generally inadmissible. The only exceptions are for proceedings to enforce an accepted offer or to determine the imposition of sanctions under the rule. This provision is consistent with that precluding the filing of unaccepted offers (see page 8, above).

THE MINORITY POSITION

The four members of the Committee voting against the proposal (it passed by a margin of 20 - 4) nevertheless agreed that Rule 1.442 should be amended and that the legislatively enacted offer of judgment procedures should be invalidated. They took issue only with the provision for sanctions.

Thus, the four minority members sought an amendment

identical in all respects to the pending proposal except advocating that sanctions should be awarded in the amount of all attorneys' fees and costs incurred by the offeror after rejection of the offer, rather than a percentage of the offer.

THE BOARD OF GOVERNORS' POSITION

Although there was insufficient time to present the proposal to the Board of Governors prior to filing this petition, the Board has already been alerted, a copy of this petition is being provided and the matter has already been set on the Board's November 18, 1988 agenda, following which the Court will no doubt be promptly advised of the Board's position.

ARGUMENT

POINT I

SECTIONS 768.79 AND 45.061 ARE UNCONSTITUTIONAL AND SHOULD BE INVALIDATED, LEAVING FLORIDA WITH ONLY ONE, JUDICIALLY ADOPTED OFFER OF JUDGMENT RULE

A. The Supreme Court has Exclusive Authority to Enact Procedural Rules.

The Florida Constitution expressly provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts." Fla. Const. Art. V, § 2(a). Moreover, Florida law is settled that this Court's authority under § 2(a) is exclusive and that the legislature therefore has "no constitutional authority to enact any law relating to practice and procedure." Markert v. Johnston, 367 So.2d 1003, 1005 n.8 (Fla. 1978); Avila South Condominium Association, Inc., v. Kappa Corp., 347 So.2d 599, 608 (Fla. 1977); Benyard v. Wainwright, 322 So.2d 473, 475

(Fla. 1975); In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204, 204 (Fla. 1973).

B. Offer of Judgment Rules Are Procedural, Not Substantive.

In general, substantive law prescribes duties and rights under the American system of government, and procedural law concerns the means and methods by which those duties and rights are applied and enforced. Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987) (holding that certain provisions of the Tort Reform and Insurance Act are substantive); In re Amendments to Rules of Civil Procedure, 458 So.2d 245, 247 (Fla. 1984) (invalidating a statutory provision that required supporting affidavits for the disqualification of judges because it was procedural); Cozine v. Tullo, 394 So.2d 115, 116 (Fla. 1981) (invalidating a statute relating to joinder of parties because it was procedural); Markert, 367 So.2d at 1005 (same); Avila, 347 So.2d at 608 (rule defining proper parties in lawsuit is procedural, not substantive); Huntley v. State, 339 So.2d 194, 196 (Fla. 1976) (rules relating to presentence investigation reports are procedural); and Clarification of Florida Rules of Practice and Procedure, 281 So.2d at 205 (regulation of voir dire examination is procedural).

The distinction between procedure and substance has often been viewed as the difference between the machinery and the product of the judicial process. Justice Adkins concluded in In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1973):

> Practice and procedure encompass the course, form, manner, means, method, mode, order process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

Id. at 66 (emphasis added); see also Avila, 347 So.2d at 599. Controlling the behavior of attorneys and litigants in settlement negotiations, and imposing sanctions for unreasonable behavior, is part of the "machinery," rather than the "product," of the judicial process. Thus, rules relating to offers of judgment are procedural, not substantive, and are the province of the judiciary, not the legislature.

C. The Court Should Invalidate the Offer of Judgment Statutes, Because They are Procedural.

Nevertheless, the legislature has encroached on the rule-making authority of the court by enacting two offer of judgment statutes. See §§ 768.79 and 45.061, Fla.Stats. These statutes are procedural in nature and therefore should be invalidated by the Court.

POINT II

THE PROPOSED AMENDMENT TO RULE 1.442 CAN AND SHOULD BE ADOPTED BY THE COURT

A. This Court has the Authority to Adopt Procedural Rules.

Under the Florida Constitution, this Court has the exclusive authority to adopt rules for practice and procedure. Fla. Const. Article V, Section 2.

B. This Court Has the Inherent Power to Impose Sanctions, Whether in the Form of Attorneys' Fees or Other Economic Sanctions, as a Means of Enforcing its Adopted Rules.

This Court has the inherent authority to impose sanctions, because sanctions are the only method by which the Court can enforce its adopted rules. Attorneys' fees, for example, are a form of sanction routinely provided in aid of enforcement of a great number of rules. See, e.g., Fla.R.Civ.P. 1.380 (sanctions, including attorneys' fees, for failure to make discovery in civil proceeding); Fla.W.C.R.P. 4.150 (sanctions including costs and attorneys' fees for violations of workers' compensation rules); Fla.R.Juv.P. 9.070 (i) (imposition of sanctions for failure to make discovery in juvenile proceedings); and Fla.R.App.P. 9.410 (sanctions including costs and attorneys' fees for violating appellate rules).

The method by which a sanction is determined (by a percent of the offer or by subsequently incurred attorneys' fees) should not convert a procedural matter into substantive law. Granted the distinction between substance and procedure is often difficult to determine. For years, courts in Florida and elsewhere have struggled to define the line between substantive law, which is the responsibility of the legislature, and procedural rules, which are the responsibility of the judiciary. The distinction is often elusive.

The most influential Florida decision defining the line between substance and procedure is the concurring opinion of Justice Adkins in In Re Florida Rules of Criminal Procedure, 272

So.2d 65 (Fla. 1973). There, Justice Adkins wrote:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or a rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

Id. at 66; see also Adams v. Wright, 403 So.2d 391, 393 (Fla. 1981).

The "nature of the problem" in the offer of judgment context is how best to encourage litigants and attorneys to settle, rather than to try, cases. This problem relates to the procedure by which disputes are resolved; it does not relate to the actual substance of the disputes or the law under which rights are determined.

For this reason, the Court, which is empowered to draw the line between substance and procedure, should place the economic sanction in the Committee's proposal on the procedural side.

C. The Percent Sanction, Together with the Other Changes, Will Materially Improve the Existing Rule.

In addition to the advantages to be gained from making the offer of judgment procedure available to all parties, the percentage sanction should also make the present rule significantly more effective. The existing sanction of costs is too insignificant to serve as a sufficient deterrent against proceeding to trial. By changing the sanction to 15% of the offered amount, the deterrent effect will be increased because

the amount of the sanction will be larger.[5]

Moreover, unlike attorneys' fees, the parties will be able to calculate the exact amount of the potential sanction at the time the offer is received, and thus be able to evaluate exactly the risk they take in rejecting the offer.

Finally, the ability to provide a sanction which eliminates the need for post-trial litigation over the reasonableness of attorneys' fees sought is consistent with and will materially advance the objectives of the offer of judgment rule itself, i.e., to most efficiently and quickly terminate litigation.

CONCLUSION

By invalidating the legislature's constitutionally defective offer of judgment rules, alone, this Court will immediately clarify an area of substantial confusion in which judicial and legislative rules abound and conflict, whether or not the proposed amendment is adopted.

By adopting the Committee's proposed amendment to Rule 1.442, which this Court is constitutionally empowered to do, the Court will greatly improve the efficacy of the existing rule, thereby accomplishing the objectives of the original rule and the two legislative enactments -- earlier and less expensive

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[5] The Court should not be concerned, however, that a sanction calculated in the manner proposed might be excessive. Measured against attorneys' fees, 15% is actually a somewhat conservative figure, well below standard contingency fees, for example, and not much above the presumptively reasonable 10% rate in § 687.05, Fla.Stat. See Dean v. Coyne, 455 So.2d 576 (4th DCA 1984); Sepler v. Emanuel, 388 So.2d 28 (3rd DCA 1980).

resolution of litigation in Florida courts.

WHEREFORE, the Petitioner prays that the foregoing Petition be, in all respects, granted.

NOTICE TO THE BAR

The proposed amendment will be published in the Florida Bar News before oral argument. The notice will request that any comments be in writing and submitted to the Court.

REQUEST FOR ORAL ARGUMENT

This Committee requests oral argument on the proposed amendment at a time convenient to the Court.

Dated: October 31, 1988.

THE FLORIDA BAR

By: _____
JOHN F. HARKNESS, JR.
Executive Director
Florida Bar Center
Tallahassee, FL 32301
(904) 222-5286

CIVIL PROCEDURE RULES COMMITTEE
OF THE FLORIDA BAR

By: _____
BRUCE J. BERMAN, Chairman
c/o Weil, Gotshal & Manges
701 Brickell Avenue, 21st Fl.
Miami, Florida 33131
(305) 577-3120

Of Counsel:

Clifford L. Somers, Chairman
Offer of Judgment
Subcommittee
Jamie A. Cole, Esq.
3323 Oak Dr.
Hollywood, FL 33021-
5424