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December 7, 1988

Clerk of the Supreme Court
Case Number 73,263
Tallahassee, FL 32399-1927

Re: Proposed Rule 1.442 Offer of Judgment

Dear Clerk of the Supreme Court:

This letter is in response to the proposed Rule for Offer of Judgment set forth in the December 1, 1988 issue of the Florida Bar News.

First, the most obvious concern that I and other colleagues have regarding this particular Rule, is the effective date of the Rule. Without question, that needs to be addressed in any rule to be adopted.

Second, and more importantly, are the sanctions provisions set forth in sub-paragraph (g). Under that sub-paragraph, the sanctions set forth are mandatory. From a practical standpoint, the random percentages pulled out of the air seem rather unfair since the sanctions are mandatory. There should be some provision to allow the Court to determine whether or not an offer that was not accepted was done so "reasonably" or with "good cause". The provisions of §768.79 regarding the award of attorney's fees are suggestive of items which should be looked at before sanctions are awarded.

Another area which the proposed Rule ignores, as well as all other prior statues and Rules of Civil Procedure regarding the Offer of Judgment, is the impact of this rule on cases involving two or more defendants where joint and several liability will apply. Prior to the enactment of Fla. Stat. §768.81, the law in Florida was that a Court could not enter a judgment apportioning damages based on the apportioned fault rendered by the jury in the absence of a contribution claim between the multiple defendants. This issue was set forth by the Third District Court of Appeals in General Dynamics Corp. v. Wright Airlines, 477 So.2d 788 (Fla. 3d DCA 1985). However, with the enactment of §768.81,

the legislature provided that the apportionment of damages by the Court in entering judgment shall be based on the percentage of fault found by the trier of fact and not on the basis of the doctrine of joint and several liability. Obviously, this implies that the presence of a contribution claim is irrelevant in that scenario. However, sub-section (5) of the same statute specifically states that it only applies to those actions in which the total amount of damages exceeds $25,000.00. Therefore, in line with Florida law, even though a jury may apportion fault among two defendants and award damages less than $25,000.00, the Court cannot enter a judgment based on those percentages of fault unless a contribution claim is pending.

Although I take issue with sub-paragraph (5) even being a portion of Fla. Stat. §768.81, nonetheless, it is still present and needs to be dealt with in present litigation. In my insurance defense practice, I have numerous litigation where the total amount of damages simply will not exceed $25,000.00. Therefore, in those cases where there are two or more defendants in such a case, and a contribution claim is not filed until after judgment is entered, then the sanctions of the proposed Rule could have devastating effect on that particular defendant who has little to no liability. I presently, as a matter of course, always file my contribution claim in the pending litigation whenever I have a case which I feel will not exceed $25,000.00 in damages at trial. However, the proposed Rule can affect those who do not do that as a matter of practice.

For example, if a plaintiff makes an offer to accept $10,000.00 under sub-paragraph (g)(2), and the judgment comes back for $17,500.00, then the Court is required to increase the damage amount by 15 percent of the offer. If I represent a defendant who has, what I perceive to be, one to five percent liability and my co-defendant has the remaining 95 to 99 percent, you can see the effect this proposed Rule will have if there is no contribution claim pending. The obvious problem is that most plaintiff's attorneys send an Offer of Settlement for one amount to all defendants. Therefore, if I reject the example Offer of Judgment above because I only have one to five percent liability, I'm still on the hook for the entire amount of the judgment in addition to the sanctions of the proposed Rule since it is mandatory. In other words, based on sub-section (5) of Fla. Stat. §768.81, the mandatory provisions of the proposed Rule will have an unfair impact upon a minimal liability defendant in a case less than $25,000.00 if he inadvertently fails to file a contribution claim against his co-defendant or they against him.

I hope these comments have been helpful and I look forward to the Court's final decision.

Very truly yours,

Gregory S. Stark, Esq.

GSS/fkk