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IN THE SUPREME COURT, STATE OF FLORIDA  
TALLAHASSEE, FLORIDA  
PETITION NUMBER 82,029  
APPEAL NUMBER: 2ND DCA 92-03806  
L.T. CASE NO. 90-2800CA

IN RE:

EEZZZZ-ON TRAILERS, INC.,  
et al.

Petitioner,

vs.

BANKERS INSURANCE COMPANY,

Respondent.

\_\_\_\_\_ /

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PETITIONER'S BRIEF ON THE MERITS

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CASE AUTHORITY CITED

Florida Statutes

Section 627.428, Fla.Stat. (1991) - - - - - 1,2,3,4,

OTHER AUTHORITIES CITED

<u>Cincinnati Ins. vs. Palmer</u> 297 So2d 96 (Fla. 4th DCA 1974), - - - - -	3
<u>Eezzzz-On Trailers, Inc. vs. Bankers Ins. Co.</u> Case Number 92-03806, Fla. 2nd DCA, June 9, 1993 - - - - -	3
<u>Government Employees Ins. v. Batthelia</u> 503 So2d 358 (5th DCA 1987) - - - - -	4
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<u>U.S. Security Insurance Co. vs. Cole</u> 579 So2d 153 (Fla. 2nd DCA 1991) - - - - -	3

STATEMENT OF THE CASE AND FACTS

Respondent BANKERS INSURANCE COMPANY filed a two count action against its insured the Petitioner EEZZZZ-ON TRAILERS, INC., seeking a declaratory judgment. One count of said action alleged that the policy of insurance issued by Respondent to Petitioner was obtained by false statements contained in the application for insurance and therefore void. The other count sought to avoid liability of a claim against the Petitioner alleging that the policy did not provide products completed coverage. Petitioner employed George A. Routh, Esquire, to defend it in the action, resulting in a judgment in favor of Petitioner. (A.1-7)

Subsequent to judgment the Petitioner sought attorney's fees for its counsel as authorized by Section 627.428, Fla.Stat. (1991). The trial court heard testimony and entered its Final Judgment of attorney's fees and cost wherein it awarded Petitioner's counsel fees for defense of the Petitioner in the action, but denied counsel fees to Petitioner's counsel for litigating entitlement to such fee.

Petitioner appealed to the Second District Court of Appeal that portion of the judgment which denied its counsel fees for litigating the issue of entitlement to such fee. The Florida Second District Court of Appeal entered its Per Curiam opinion affirming the trial court's judgment denying attorney's fees for litigating the issue of entitlement recognizing in such opinion conflict with that of all four of its sister courts. (A.8,9)

**SUMMARY OF ARGUMENT:**

Of the five Florida District Courts of Appeal four hold that an attorney is entitled to an attorney's fee for litigating such entitlement under Section 627.428, Fla. Stat., (1991). Only the Florida Second District Court of Appeal holds to the contrary, reasoning that since the client has no interest in the matter no fee should be allowed. This gives to the insurance carrier an unfair advantage in negotiating a reasonable fee at the conclusion of the litigation. We find therefore that counsel in the Florida Second District Court of Appeal are compelled to accept as settlement a fee less than that earned rather than engage in lengthy protracted litigation for which they cannot be compensated. It is convoluted reasoning that an obligation to pay attorney's fees under 627.428, Fla.Stat., (1991), should stop after judgment. The case continues until all matters plead are disposed of by the court which is inclusive of cost and reasonable attorney's fees. For as long as the litigation continues attorneys should be entitled to a fee under the statute.

## ARGUMENT

Section 627.428 Fla.Stat. (1991) provides in part:

"(1) Upon the rendition of a judgment or decree by any of the courts of this State against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

The Second District Court of Appeal has consistently held that an attorney cannot be awarded fees for time spent litigating entitlement to such fee. State Farm Mutual Automobile Ins. Co. vs. Moore, 597 So2d 805, 807 (Fla. 2nd DCA 1992); U.S. Security Insurance Co. vs. Cole, 579 So2d 153 (Fla. 2nd DCA 1991); Eezzzz-On Trailers, Inc. vs. Bankers Insurance Co., Case Number 92-03806, Fla. 2nd DCA, June 9, 1993 (A.8,9) The theory advanced by the court is that the client has no interest in the fee and therefore none should be awarded. Conversely the other four district courts of appeal have held to the contrary and have allowed counsel fee for litigating the issue of entitlement to such fees. Reasoning that the law of the State of Florida (Sec.627.428 Fla.Stat. (1991)) is written into and becomes a part of the insurance contract. And so long as there is litigation between the insurance company and its insured, they are litigating under the contract of insurance. Further, the Fourth District Court of Appeal in Cincinnati Ins. vs.

Palmer, 297 So2d 96 (Fla. 4th DCA 1974), observed:

"Upon such a suit being filed, the relief sought is both the policy proceeds and attorney's fees, and so long as the insurer fails to voluntarily pay any part of the relief sought, it continues to contest the policy, and thus even though the claim at that point is limited to the recovery of attorney's fees, it is none the less a claim under the policy." (Emphasis supplied)

The reasoning of the Second District Court of Appeal is flawed heavily in favor of the insurance company. In the Second District and after an insured has prevailed, a carrier can feel free to in bad faith decline to pay a reasonable fee to the insured's counsel without fear of an additional fee for the litigation of entitlement. A situation develops wherein a carrier can announce, take such fee as we offer otherwise we will keep you in court for the next year litigating your entitlement to a fee expending time for which you will not be compensated. This cannot be the legislative intent of Sec. 627.428 Fla. Stat. (1991).

Florida courts have often held that Section 627.428 Fla. Stat. (1991) which requires insurance carrier to pay its insurance attorney's fees to be a penalty statute. Government Employees Ins. v. Batthelia, 503 So2d 358 (5th DCA 1987) The purpose of the statute is to cause an insurance carrier to fairly adjust and pay claims without causing the insured to resort to litigation. Can any less argument be made as regards to the obligation to fairly adjust and pay the insured's attorney's fee for litigating entitlement to such fee. As noted by this Court the purpose of the statute is to discourage a contesting of claims. Insurance Co. of

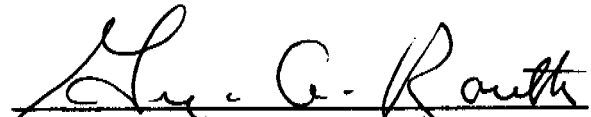


North America v. Lexow, 602 So2d 528 (Fla. 1992) The same argument can be applied to the payment of counsel fees for the insured. A holding that the insurance carrier is responsible for payment of the insured's counsel fees for litigating entitlement, likewise discourages the carriers wrongfully contesting the award of a reasonable fee.

**RELIEF SOUGHT:**


Petitioner request the Court approve the decisions of the First, Third, Fourth and Fifth District Courts of Appeal for the proposition that attorney's fees are recoverable for litigating entitlement to such fees, and disapprove the contrary view of the Second District Court of Appeal. Remand the case with directions that the trial court determine a reasonable attorney's fee for Petitioners attorney for litigating the issue of entitlement to such fee, inclusive of his appellate labors.

Respectively submitted,

  
George A. Routh, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been furnished by regular U.S. Mail to Steven A. Strickland, Esquire, 605 South Boulevard, Tampa, Florida 33606 this 3<sup>rd</sup> day of November, 1993.

  
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IN THE SUPREME COURT, STATE OF FLORIDA  
TALLAHASSEE, FLORIDA  
PETITION NUMBER 82,029  
APPEAL NUMBER: 2ND DCA 92-03806  
L.T. CASE NO. 90-2800CA

IN RE:

EEZZZZ-ON TRAILERS, INC.,  
et al.

Petitioner,

vs.

BANKERS INSURANCE COMPANY,

Respondent.

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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APPENDIX

Final Judgement of Attorney's Fees and Cost 1-7  
Dated June 9, 1992

Second District Court of Appeals Opinion 8-9  
Filed June 9, 1993, Per Curiam

IN THE CIRCUIT COURT IN AND FOR PASCO COUNTY, FLORIDA  
CASE NO. 90-2800CA  
DIVISION "H"

BANKERS INSURANCE COMPANY,

Plaintiff,

vs.

EEZZZZ-ON TRAILERS, INC.,  
SUSAN SMITH AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF GARALD D. SMITH, JR.,  
Deceased, and RICHARD WILLIS and  
MARTHA WILLIS, his wife,

Defendants.

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FINAL JUDGMENT OF ATTORNEY'S FEES AND COST

This matter was before the Court for assessment of attorney's fees and cost against the Plaintiff BANKERS INSURANCE COMPANY. The Plaintiff BANKERS INSURANCE COMPANY initiated this action requesting a declaratory judgment as to the validity of its policy of insurance issued to the Defendants BENJAMIN AND JUNE STUDER, d/b/a EEZZZZ-ON TRAILERS, INC., and EEZZZZ-ON TRAILERS, INC. (BANKERS INSURANCE COMPANY vs. BENJAMIN AND JUNE STUDER, 3/A/EEZZZZ-ON TRAILERS, INC., EEZZZZ-ON TRAILERS, INC., Circuit fil No. 89-004023 CA, Pasco County, Florida). Plaintiff subsequently took a voluntary dismissal of that action and refiled adding a second count and thereafter by amendment adding other parties Defendant. (Captioned case) To this action the Defendant EEZZZZ-ON TRAILERS, INC., filed a Counter/Claim. After extensive discovery, depositions, etc., BENJAMIN AND JUNE STUDER, his wife were dropped as party Defendants. Thereafter BANKERS INSURANCE COMPANY paid for its insured Defendant EEZZZZ-ON TRAILERS, INC., the policy limits

of its insurance policy and again filed a voluntary dismissal of the action. Payment of the policy limits and dismissal of the action a second time was "the functional equivalent of a confession of judgment of a verdict in favor of the insured", and the attorney for the Defendant EEZZZZ-ON TRAILERS, INC. was therefore entitled to an attorney's fee. Losicco vs. Aetna Casualty Insurance Company, 588 So 2nd 681 (Fla. App. 3rd DCA 1991)

The Court received testimony from JUNE STUDER, officer of Defendant EEZZZZ-ON TRAILERS, INC. Ms. STUDER testified that the contract of employment for counsel for EEZZZZ-ON TRAILERS, INC., as well as for she and her husband BENJAMIN STUDER, was contingent upon success; that such fee was to be paid by Plaintiff, BANKERS INSURANCE COMPANY and under no condition was she, her husband, or Defendant EEZZZZ-ON TRAILERS, INC. to be responsible for attorney's fees. That neither she, her husband BENJAMIN STUDER or EEZZZZ-ON TRAILERS, INC., had money to pay attorney's fees and could not have responded to money damages in the event their defenses were unsuccessful.

George A. Routh, Attorney for Defendants EEZZZZ-ON TRAILERS, INC., BENJAMIN STUDER and JUNE STUDER, his wife, testified that he was employed by said Defendants under a contingency fee contract. That he sought fees as follows:

"153 hours up to Second Notice of Voluntary Dismissal (08-05-91)  
153 hrs @ \$175.00 = \$26,775 X 2.5 = \$66,937.50  
Interest from 08-05-91 = 299 days X \$22.00 = \$ 6,578.00  
\$66,937.50 principal plus \$ 6,578.00 interest = \$73,515.50

16.8 hours Arguing Counter/Claim (01-24-91)  
16.8 hrs @ \$175.00 = \$2,940 X 2.5 = \$7,350.00  
Interest from 01-24-92 = 126 days X \$2.42 = \$ 304.92  
\$7,350.00 principal plus \$ 304.92 interest = \$7,654.92

38.4 hours litigating right to attorney's fees  
38.4 hrs @ \$175.00 = \$6,720.00

Attorney Routh testified to and put into evidence copies of detailed time records which supported the time alleged to have been expended. Attorney Routh stated that he had been a Florida Lawyer for approximately thirty (30) years. That he specialized in commercial trial work and while he bills certain of his title insurance company clients less, his standard billing rate is \$175.00 per hour and that \$175.00 an hour was the standard rate in the area for representation by other attorneys of his experience, etc. That he was unable to mitigate nonpayment of a fee; that the amount involved was substantial; that the results obtained for his clients was favorable, and that success was unlikely at the outset. Attorney Routh asked that a 2.5 multiplier be added to the fee awarded for litigating the action up to the time of the second voluntary dismissal by the Plaintiff, as well as for fee awarded for advancement of his client's Counter/Claim. He sought no interest or multiplier for hours expended in litigating his right to attorney's fees.

Attorney David W. Bianchi who represented one of the Defendants in the action and to whom the full policy limits were paid, testified that Attorney Routh, counsel for the Defendant EEZZZZ-ON TRAILERS, INC., "did a very good job..."; that "the coverage defenses that BANKERS raised were legitimate, and I thought that if BANKERS prevailed the STUDERS would have this gigantic verdict rendered against them and there is no way in this world they were going to be able to pay it..."; and "that at the



outset, just based on my review of the insurance policy and the pleadings, that the likelihood that the STUDERS prevailing was remote..." Attorney Bianchi added that the tenacity or aggressive action of counsel for Defendant EEZZZZ-ON TRAILERS, INC., in the action, caused or contributed to the end result that BANKERS INSURANCE COMPANY finally concluded coverage and paid the policy limits. In conclusions, Attorney Bianchi testified that in his opinion to any fee awarded there should be a 2.5 multiplier added.

Attorney Stephen Cole, a Florida Board Certified Civil Trial Lawyer, also testified for said Defendant's counsel. Attorney Cole stated that he had reviewed the Court files, billing statement of counsel, as well as conferred with counsel concerning the case. That upon his review counsel for the Defendant EEZZZZ-ON TRAILERS, INC., was employed under a pure contingency fee contract. That neither Defendant EEZZZZ-ON TRAILERS, INC., JUNE STUDER or her husband BENJAMIN STUDER had sufficient funds to pay attorney's fees or respond to a large money judgment. That the amount in controversy was substantial; the Defendant EEZZZZ-ON TRAILERS, INC. was successful in the case and that the probability of success at the outset was remote. Attorney Cole concluded that the market required a multiplier factor and in his opinion a 2.5 multiplier should be added to any fee awarded. Attorney Cole testified that for counsels efforts in the case up until the Plaintiff BANKERS INSURANCE COMPANY filed its second voluntary dismissal on August 5, 1991, the reasonable hours expended were 153 hours. That a reasonable hourly rate was \$175.00, to which there should be added a 2.5 multiplier factor. That in his opinion for counsel's efforts

to this point he should be awarded a fee of \$66,937.50. That for his efforts advancing the Counter/Claim for Defendant EEZZZZ-ON TRAILERS, INC., 16.8 hours was reasonable, \$175.00 an hour was a reasonable rate and a multiplier of 2.5 was proper and therefore a fee of \$7,350.00 was appropriate. And, that for litigating his entitlement to fee counsel for Defendant EEZZZZ-ON TRAILERS, INC., had expended 38.4 hours which he found to be reasonable, and \$175.00 per hour was a reasonable hourly rate. That no multiplier was in order so a fee of \$6,720.00 would by computation be required.

In opposition to the request for fees Plaintiff BANKERS INSURANCE COMPANY offered the testimony of Bart A. Riley, a general practitioner with offices in Pasco County, Florida. Attorney Riley detailed his years of experience and informed the Court that in his expert opinion 136 hours would be a reasonable number of hours attributed to defense counsel for defense of the action up to the time of the second voluntary dismissal by Plaintiff on August 5, 1991. That a reasonable hourly rate would be \$150.00 and that this was the prevailing standard rate in West Pasco County, Florida. Attorney Riley stated that a multiplier of 1.5 should be added to any fee assessed. Plaintiff BANKERS INSURANCE COMPANY offered no evidence concerning the claim for fees by counsel in pursuing the Counter/Claim, or fees for litigating entitlement to fees.

The Court finds George A. Routh, counsel for the Defendant EEZZZZ-ON TRAILERS, INC., is entitled to a fee. Losicco vs. Aetna Casualty Insurance Company, 588 So 2nd 681 (Fla. App. 3rd DCA 1991) The Court finds that the reasonable number of hours expended by

counsel is 136, and that the reasonable hourly rate in the area of West Pasco County, Florida is \$150.00 per hour. Upon review of the case, as well as the testimony of experts, the Court finds that counsel for Defendants EEZZZZ-ON TRAILERS, INC., was employed upon a purely contingency fee basis and that the likelihood of success in defense of the action was at the outset remote. The economic position of the Defendant EEZZZZ-ON TRAILERS, INC., was marginal and an adverse judgment would have been economically devastating. The amount involved was substantial and Defendant EEZZZZ-ON TRAILERS, INC. prevailed in the action. The Court therefore concludes that the market requires a multiplier factor of 2. (See State Farm Mutual Automobile Insurance Company vs. Moore, 17 FLW D175 (Fla. App. 2nd DCA, January 3, 1992); Florida Patients Compensation Fund vs. Rowe, 472 So 2nd 1145 (Fla. 1985); Standard Guarantee Insurance Co. vs. Quanstrom, 555 So 2nd 828 (Fla. 1990); and In re Estate of Platt, 586 So 2nd 328 (Fla. 1991) Under the guidelines of Inaco vs. State Farm Fire and Casualty Co., 550 So 2nd 92 (Fla. App. 1st DCA 1989) the Court concludes that interest on the fee awarded is appropriate. The Court declines to award any fee to counsel for advancement of the Defendants Counter/Claim. As required of this Court by U.S. Security Insurance Co. vs. Cole, 579 So 2nd 153 (Fla. 2nd DCA 1991) the Court is also compelled to decline an award of attorney's fee for time spent litigating the issue of entitlement to attorney's fees. It is therefore

ORDERED AND ADJUDGED:

1. For defense of the action of Plaintiff BANKERS INSURANCE COMPANY to its second voluntary dismissal on August 5, 1991, George

A. Routh, counsel for the Defendant EEZZZZ-ON TRAILERS, INC., is awarded a judgment against the Plaintiff BANKERS INSURANCE COMPANY in the amount of \$44,810.00. (136 hours X \$150.00 hour = \$20,400.00 X 2 multiplier = \$40,800.00 principal plus \$4,010.00 interest = \$44,810.00)

2. On the matter of attorney's fees for advancing the Counter/Claim of the Defendant EEZZZZ-ON TRAILERS, INC., and for time expended in litigating entitlement to fee, the Court declines to award attorney's fees.

3. The Defendant EEZZZZ-ON TRAILERS, INC., is given judgment of FOUR HUNDRED TWENTY FIVE AND 38/100 (\$425.38) DOLLARS, against the Plaintiff BANKERS INSURANCE COMPANY for cost expended in the cause. (See Affidavit of Cost filed herein by said Defendant)

4. George A. Routh, Attorney for Defendant EEZZZZ-ON TRAILERS, INC., is awarded a judgment of NINE HUNDRED AND NO/100 (\$900.00) DOLLARS, against the Plaintiff BANKERS INSURANCE COMPANY, representing the expert witness fee for his expert witness Stephen Cole, Esquire. (Fee computed at 6 hours X \$150.00 per hour = \$900.00.)

DONE AND ORDERED at New Port Richey, Pasco County, Florida  
this 9<sup>th</sup> day of June, 1992.

**/s/ W. LOWELL BRAY, JR.**

\_\_\_\_\_  
Circuit Judge

cc: George A. Routh, Esquire  
Steven A. Strickland, Esquire

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

EEZZZZ-ON TRAILERS, INC., )

Appellant, )

v. )

Case No. 92-03806

BANKERS INSURANCE COMPANY, )

Appellee. )

Opinion filed June 9, 1993.

Appeal from the Circuit Court  
for Pasco County;  
W. Lowell Bray, Jr., Judge.

George A. Routh, Clearwater,  
for Appellant.

Steven A. Strickland of  
Stuart & Strickland, P.A.,  
Tampa, for Appellee.

PER CURIAM.

This is an appeal from the trial court's order denying  
attorney's fees to appellant's EEZZZZ-ON's attorney. Appellee  
Bankers sued its insured EEZZZZ-ON asking the trial court to  
declare that EEZZZZ-ON was not covered under its liability  
insurance policy for an accident involving one of its trailers.

EEZZZZ-ON through its attorney defended the action. Bankers later voluntarily dismissed the action and paid EEZZZZ-ON the full amount of the policy limits and the trial court awarded EEZZZZ-ON an attorney's fee for services rendered until that point.

We determine that only one issue merits discussion, that is whether appellant's attorney was entitled to a fee for litigating the issue of attorney's fees. This court in State Farm Mutual Automobile Ins. Co. v. Moore, 597 So. 2d 805, 807 (Fla. 2d DCA 1992) held:

An attorney cannot be awarded fees for time spent litigating the issue of attorney's fees where the client, as prevailing party, has no interest in the fee recovered. U.S. Security Insurance Co. v. Cole, 579 So. 2d 153 (Fla. 2d DCA 1991).

In this case the insured as the prevailing party had no interest in the fee sought by appellant's attorney. Accordingly, we affirm.

We note as we did in Cole that our conclusion puts us in conflict with decisions of our sister courts. See, e.g., Sonara v. Star Casualty Ins. Co., 603 So. 2d 661 (Fla. 3d DCA 1992); State Farm Fire & Casualty Co. v. Palma, 585 So. 2d 329 (Fla. 4th DCA 1991); Ganson v. State, Dep't of Administration, 554 So. 2d 522 (Fla. 1st DCA 1989); rev'd on other grounds, 566 So. 2d 791 (Fla. 1990); Gibson v. Walker, 380 So. 2d 531 (Fla. 5th DCA 1980).

FRANK, A.C.J., PARKER, J., and SCHEB, JOHN M., (Senior) J.,  
Concur.