IN THE SUPREME COURT OF FLORIDA
500 SOUTH DUVAL STREET
TALLAHASSEE, FLORIDA 32399
(904) 488-0125

WILLIAM BELL, et al.,

Petitioners,

v. CASE NO.: 90,321

U.S.B. ACQUISITION COMPANY, INC., etc., et al.

Respondents.
_____/

U.S.B. ACQUISITION COMPANY, INC., etc., et al.

Petitioners,

v. CASE NO.: 90,426

ALLEN G. STAMM, et al.

Respondents.

_____/

RESPONDENTS' ANSWER BRIEF AND CROSS-PETITION

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PREFACE

U.S.B. ACQUISITION COMPANY, INC. n/k/a U.S. BLOCK CORPORATION and WALTER R. SJORGEN, SR. although technically Petitioners in one of the pending matters before the Court, will refer to themselves as Respondents/Cross-Petitioners in this consolidated matter in order to avoid confusion. References to documents contained in Respondents/Cross-Petitioners' Appendix shall be referred to as (A.____)

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STATEMENT OF THE CASE AND FACTS

This matter comes before the Court as a consolidated proceeding in which two petitioners each have sought review of a March 12, 1997 decision of the District Court of Appeal, Fourth District of Florida.

Case No. 90,321

This case arises out of a Petition filed by WILLIAM BELL and THOMAS LAGANO, seeking review of the March 12, 1997 Opinion which contains a certification by the Fourth District Court of Appeal of the question:

> Is a contingency risk multiplier inapplicable to a court awarded attorney's fee where the only authority for fees is predicated on a contractual provision and not a statute?

Case No. 90,426

This case arises out of a Petition filed by U.S. BLOCK CORPORATION and WALTER R. SJOGREN, JR. seeking to invoke the conflict jurisdiction of this Court to review different rulings made in the same March 12, 1997 Order. The conflicts claimed concern decisions of other districts on the issues of: 1) whether a review of a trial court's order on attorney's fees after remand can be reviewed by appeal as opposed by motion under Appellate Rule 9.400(c) if the appeal includes additional issues other than the assessment of attorney's fees; and 2) whether the five-day mailing rule applies to motions filed under Florida Appellate Rule 9.400(c) in conferring jurisdiction to the District Courts of Appeal.

Essential Facts Common to Both Petitions

Background

The underlying action began as a claim by U.S.B. ACQUISITION COMPANY, INC. d/b/a U.S. BLOCK CORPORATION and WALTER R. SJOGREN, SR. (collectively referred to as the "Buyers") against Allen G. Stamm, WILLIAM BELL and THOMAS LAGANO (collectively referred to as the "Sellers"). The claim arose out of the purchase by the Buyers of the assets of U.S. BLOCK CORPORATION which was formerly owned by the Sellers. Following a dispute between the parties, the Buyers filed an action seeking rescission, breach of contract and fraud alleging that the Sellers misrepresented the state of the company and potential profits for the future.[1]

The Sellers filed a separate action alleging breach of promissory notes and a guarantee that had been executed by the Buyers in favor of the Sellers for the purchase of the assets.[2] The two actions were consolidated and a jury trial was held on the consolidated matters.

The jury trial resulted in a verdict in favor of the Buyers and against the Sellers for almost $1 million, and also awarded the Sellers sums due under the promissory notes, which sums were to be offset by the award to the Buyers.

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[1] The Complaint was later amended to include counts for trespass, conversion and tortious interference arising out of the Sellers entering the premises and removing trucks and equipment following the Buyers stopping payments on promissory notes given to the Sellers as part of the sale.

[2] The Sellers additionally sought to foreclose on a secured interest, replevin, appointment of receiver and declaratory judgment action for return of an escrow deposit.

On post-trial motions including a Motion for Directed Verdict, the trial court reduced the jury verdict that had been entered in favor of the Sellers by $800,000.00 finding that at trial, the Buyers argued the incorrect measure of damages. Among other findings made in the Final Judgment ("Final Judgment I") entered after the post-trial motions was a finding by the trial court that the Buyers were not in default under the promissory notes by virtue of the fact the Buyers had been paying into the court registry those sums due under the promissory notes as the installments accrued pursuant to an earlier order of the trial court.

Appeal I

The Buyers thereafter filed an appeal of Final Judgment I with the Sellers cross-appealing. ("Appeal I") The Buyers argued that the trial court had erred in granting the post-trial Motion for Directed Verdict on the issue of Plaintiffs' operating losses which reduced the verdict by $800,000.00 and also appealed the denying of their Motion for Attorney's Fees. The Sellers' Cross Appeal was based on the claim that the trial court had erred in denying their motions for directed verdict on a breach of contract claim and the tortious interference claim, and also appealed the denying of their claim for attorney's fees.

The Fourth District on August 9, 1995 affirmed the trial court's actions as to the reduction of the verdict and reversed the trial court's actions regarding the tortious interference claim, breach of contract claim and attorney's fees claim for the

Sellers.[3] The effect of the Opinion was to affirm the reduction of offsets which had been granted in favor of the Buyers, together with other offsets, and award attorney's fees to the Sellers. The Fourth District remanded the cause back to the trial court for entry of a Final Judgment consistent with its decision. The Fourth District found no other errors in Final Judgment I, and did not reverse the trial court's ruling that the Buyers were not in default on the promissory notes by virtue of the deposit of payments into the court registry.

Thereafter, a hearing was held for entry of a final judgment consistent with the Opinion of the Fourth District. On August 26, 1996, the trial court entered a final judgment ("Final Judgment II") awarding damages to the Sellers in an amount equal to the amount due under the promissory notes less the set-offs which had been approved by the Fourth District in Appeal I. (A.7-10) The trial court also included within Final Judgment II prejudgment interest at various statutory rates of 8%-12% from 1992 through 1996. The Buyers filed a timely Notice of Appeal on September 25, 1996 from Final Judgment II contesting the amount of prejudgment interest awarded. (A.4-10)

Thereafter, on October 3, 1996, the trial court also entered final judgments on attorney's fees awarding $230,000.00 to ALLEN STAMM; $80,000.00 to Robert L. Saylor, Esquire for services rendered to THOMAS LAGANO; and, $42,500.00 to Mary Alice Gwynn, Esquire for services rendered to WILLIAM BELL. (A.14-16)

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[3] U.S.B. Acquisition Company, Inc. v. Stamm, 660 So.2d 1075 (Fla. 4th DCA 1995).

Additionally on the same day, the trial court entered the final order awarding appellate attorney's fees in the amount of $42,500.00 in favor of Basil E. Dalack, Esquire for his representation of THOMAS LAGANO and WILLIAM BELL on appeal. (A.17-19) The trial court under the authority of Command Credit Corporation v. Mineo, 664 So.2d 1123 (Fla. 4th DCA 1995) determined that it could not add a contingency fee multiplier in favor of any counsel.

A chronology of the remaining events will aid the Court in understanding the issues before it:

DATE	EVENTS
09/25/96	Buyers file Notice of Appeal of Final Judgment II seeking review of the amount of prejudgment interest awarded. (Case No. 96-3200). (A.4-10)
11/04/96	Buyers file Notice of Appeal seeking review of the two attorney's fee judgments entered on October 3, 1996. (Case No. 96-3695) (A.11-19)
11/06/96	Basil Dalack as Attorney for BELL and LAGANO files Motion for Review of Attorney's Fees requesting the Fourth District to recede from Command Credit Corporation v. Mineo attaching judgment entered October 3, 1996 (A.20-25)
11/14/96	Mary Alice Gwynn and Robert Saylor file Notice of Cross Appeal in Case No. 96-3695. (A.26-27)
11/20/96	Buyers file Motion to Consolidate the two pending appeals. (Case Nos. 96-3695 and 96-3200). (A.28-30)
11/21/96	Buyers respond to Dalack's Motion for Review stating that the substance of the motion was already part of the pending appeal which had been filed two days prior to Dalack filing his Motion for Review. (A.31-33)
12/02/96	Fourth District consolidates Case Nos. 96-3200 and 96-3695. (A.34-35)

12/12/96 Court affirms trial court's award of fees from Dalack's Motion for Review, but refuses to recede from Mineo. (A.36)

12/27/96 Buyers file Motion for Rehearing/Clarification/Consolidation seeking to have the Fourth District reconsider its Opinion in light of the pending consolidated appeal. (A.41-60)

12/27/96 Dalack files Motion for Reconsideration En Banc and for certification of the multiplier issue set forth in Command Credit Corporation v. Mineo. (A.37-39)

03/12/97 Fourth District issues an Opinion certifying the question regarding multipliers and denying Buyers' Motion. (A.1-3)

The Fourth District Opinion

It is from the March 12, 1997 Fourth District Opinion that both parties filed petitions to invoke review by this Court. With respect to BELL'S and LAGANO'S Petition, they seek the Court's review of the certified question from the Fourth District in which it found that a contingency risk multiplier is inapplicable to a court awarded attorney's fee where the fee is predicated on a contractual provision and not a statute.

The Petition filed by U.S. BLOCK CORPORATION and WALTER SJOGREN seeks a conflict review on two issues:

a. the decision of the Fourth District conflicts with decisions of other districts on whether review of a trial court's order on attorney's fees after remand can be reviewed by appeal as opposed to a 9.300 motion if the appeal includes issues other than the assessment of attorney's fees. The Fourth District found in its order that the attempt by the Buyers to have the appellate attorney's fee motion reviewed in the ongoing separate consolidated

appeal in which that issue along with two other issues were raised and which were timely filed was improper. (A.2-3) The court found that the trial court's assessment of attorney's fees in this case was properly challenged only through a motion under Florida Rules of Appellate Procedure 9.400. (A.3) In doing so, the Fourth District found that the carved exception to this general rule, that is, that review can be included with other separate points on appeal did not apply. The Fourth District drew the distinction between the subject action and one in which a single final judgment forms the basis for review of both an attorney's fee award and other matters;

b. a second conflict suggested by the Buyers was the Fourth District's view of the five-day mailing rule and its impact on rules conferring jurisdiction to the District Courts of Appeal. In a footnote of its March 12, 1997 Opinion, the Fourth District Court of Appeal noted:

> [t]he two separate final orders awarding attorneys' fees were both entered and mailed on October 3, 1996. Allowing time for mailing, Mr. Dalack's Motion for Review was timely filed on November 6th. (A.3)

Dalack, on March 17, 1997, filed an Extraordinary Motion for Clarification of Opinion acknowledging himself of the potential conflict between cases holding that the mailing of a judgment does not extend the time for filing a notice of appeal. (A.64-71) Dalack attached a copy of the judgment showing a October 7, 1996 date, which was different from the October 3, 1996 judgment attached to his original motion. The Fourth District denied the Motion. (A.72)

Matters Before This Court

This Court has consolidated the Petitions invoking the jurisdiction of the Court filed by both parties into this consolidated matter.

SUMMARY OF ARGUMENT

Case No. 90,321

The Fourth District's Opinion in Command Credit Corporation v. Mineo and now certified in the subject action finding that a contingency risk multiplier is not applicable with attorney's fees arise from a contract as opposed to a fee shifting statute is well-founded and in line with prior Florida case law, as well as public policy. There is no authority for allowing a multiplier in contract cases, nor should the sanctity of contracts be disrupted by the rewriting of contracts by the courts.

Case No. 90,426

The Fourth District's March 12, 1997 Order creates a conflict with regard to the acknowledged exception under 9.400(c), Fla. R. App. P., with regard to a party's right to seek review of a trial court's order of attorney's fees awarded on remand through an appeal where the appeal contains additional issues other than the assessment of fees which arise from the same action. The Fourth District is unnecessarily narrowing the exception by limiting the exception to cases where all issues arise out of a single judgment. In doing so, the Fourth District conflicts with the First and Third Districts as well as its own prior precedent and defeats the public policy concerns that were resolved through the creation of the exception to Rule 9.400(c).

Additionally, the Fourth District's Opinion conflicts with other districts with respect to the five-day mailing rule and the invoking of jurisdiction upon the courts of appeal. By the Court allowing a five-day mailing rule to apply to motions filed pursuant

to Rule 9.400(c), the Court has created conflicts with the First and Third Districts as well as its own prior precedent which expressly state that the five-day mailing rule does not apply to the invoking of jurisdiction to the District Courts of Appeal from a final judgment.

ARGUMENT I

A CONTINGENCY FEE MULTIPLIER SHOULD NOT BE APPLIED TO AN ATTORNEY'S FEE AWARD ARISING OUT OF A CONTRACTUAL PROVISION AS DOING SO WOULD VIOLATE PRIOR COURT PRECEDENT IN A PUBLIC POLICY

In Command Credit Corporation v. Mineo, 664 So.2d 1123 (Fla. 4th DCA 1995), the Fourth District Court of Appeal in a well-reasoned opinion addressed the issue of whether a court ordered attorney's fees award predicated on a contractual provision and not a statute could contain a contingency fee multiplier. The court after analyzing prior case law and public policy concluded that "a contingency multiplier is not applicable where the only authority for a fee award is based on a contractual provision and not a statute." Mineo, 664 So.2d at 1125, 1126.

In reaching its conclusion in Mineo, the Fourth District analyzed this Court's opinions of Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), Standard Guarantee Insurance Company v. Quanstrom, 555 So.2d 828 (Fla. 1990), as well as State Farm Fire & Casualty Company v. Palmer, 555 So.2d 836 (Fla. 1990).

In Rowe, this Court established the loadstar formula to assist courts "directed by statute to set attorney's fees". Rowe, 472 So.2d at 1149, 1150. This Court, as noted by the Fourth District,

stated in Rowe that "[w]hen the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney's fee." Mineo, at 1124 quoting Rowe, 472 So.2d at 1151 (emphasis supplied in Mineo). Similarly, in Quanstrom, this court explained that it had adopted the Rowe approach in a personal injury action in which the "legislature had determined that the prevailing party, plaintiff or defendant, was entitled to attorney's fees." Quanstrom, at 831. As noted by the Fourth District Court, this Court in Quanstrom emphasized that "the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule." Mineo, 664 at 1124 quoting Quanstrom, 555 So.2d at 834 (emphasis supplied in Mineo). Thus, this court premised both opinions in Rowe and Quanstrom on the basis of statutorily awarded attorney's fees.

The Fourth District also analyzed this Court's opinion in Palmer (which had been relied upon by the appellee in Mineo) and recognized, just as this Court did, that in Palmer the authority for fees was pursuant to statute even though the action was a claim under an insurance contract. In Palmer, this Court specifically noted that the trial court's application of Rowe principles included the contingency multiplier under the authority of Section 627.428(1), Fla. Stat. Palmer at 837. The fee shifting in Palmer was authorized by statute and not by a private contractual agreement between the parties. Thus, even though the claim was brought under an insurance contract, it was the statute, not the contract, which shifted the fee obligation to the insurer and

triggered the trial court's authority to consider a Rowe contingency multiplier. Similarly in Quanstrom, where attorney's fees were incurred in litigating a claim under an insurance policy, the fee award was again predicated on an insurance statute and not on the contract.

Additionally, the Fourth District in Mineo examined Sun Bank v. Ford, 564 So.2d 1078 (Fla. 1990). The Fourth District noted that this Court in Sun Bank, which was a suit on a promissory note, expressly stated: "It is not and never has been contemplated that a court should utilize a contingent-fee multiplier to calculate a reasonable attorney's fee for an attorney in such an action." Mineo, 664 at 1125 (quoting Sun Bank, 564 So.2d at 1079).

Thus, after analyzing the reasoning of the above-referenced Florida Supreme Court cases, the Fourth District concluded that a contingency multiplier is not applicable where the only authority for a fee award is by contract and not statute.

Petitioners have sought to analyze the above-referenced opinions and conclude that the Fourth District's view is not supported by this Court's prior decisions. It is the Petitioners' position that this Court did not mean what it said in Sun Bank when the Court stated that it is not and never has been contemplated that a multiplier should be used to calculate a fee for an attorney in a contractual action based upon a promissory note. The Petitioners instead seek to ignore this express language, and instead rely upon the fact that the Court went on to explain that a contingency risk multiplier also would not be applied in the particular circumstances of Sun Bank because it did not appear that

the client would have difficulty in obtaining competent representation. Petitioners' position would render this Court's opinion meaningless as it would cause the opinion to contain inherent inconsistencies. Clearly in Sun Bank, when this Court used the language "in such an action", it was referring to the promissory note action which was being litigated. The additional language that the Court chose to use later in its opinion in referring to the lack of difficulty in obtaining counsel was further support for its position.

All the precedent that was available to the Fourth District in both Mineo and in the subject action provides for contingency fee multipliers to apply in statutorily awarded attorney's fees, and expressly prevents such an application in contractually awarded attorney's fees.

Such a position is consistent with contract law and public policy. If a contract between private parties means anything, it is that parties bargain for their respective positions, and upon agreement, execute the contract. It is not the Court's prerogative to rewrite contracts and in fact it is axiomatic that a Court is prevented from doing so. Home Development Company of St. Petersburg v. Bursani, 178 So.2d 113 (Fla. 1965). Thus, when parties bargain for an agreement which contains an attorney's fees provision, the parties are bargaining for just that, that a prevailing party merely is entitled to attorney's fees. If the contract is silent on the issue of contingency fee multiplier, such language cannot be added to the contract as such language was not contemplated by the parties when negotiating and entering into

their agreement. See, e.g., Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd., 608 So.2d 844 (Fla. 3d DCA 1992). The legislature has not created any statute to provide for a multiplier in a contractual fee award case, it is not the judiciary's role to create such a substantive right. Thus, the holdings of this Court and of the Fourth District in both Mineo and the subject action comport with public policy with regard to private parties and contracts.

CROSS-PETITION

ARGUMENT I

THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICTS OF THE STATE ON THE ISSUE OF WHETHER REVIEW OF A TRIAL COURT'S ORDER ON ATTORNEYS FEES AFTER REMAND CAN BE REVIEWED BY APPEAL AS OPPOSED TO MOTION IF THE APPEAL INCLUDES ADDITIONAL ISSUES OTHER THAN THE ASSESSMENT OF ATTORNEY'S FEES.

As noted in the Statement of the Case and Facts herein, following a mandate from Appeal I, the trial court entered Final Judgment II which awarded pre-judgment interest in varying rates from 1992 through 1996. A timely appeal was taken from this judgment on September 25, 1996, and was assigned Case Number 96-3200 by the Fourth District Court of Appeal. (A.4-10) Thereafter, on October 3, 1996, a final judgment on attorney's fees awarding $230,000.00 to ALLEN STAMM, $80,000.00 to Robert L. Saylor for services rendered to THOMAS LAGANO and $42,500.00 to Mary Alice Gwynn for services rendered to WILLIAM BELL was entered. (A.14-16) An additional Final Judgment was entered on the same day (October 3, 1996) awarding appellate attorney's fees in the amount of $42,500.00 to Basil E. Dalack, Esquire for his representation of

THOMAS LAGANO and WILLIAM BELL on appeal. (A.17-19) On November 4, 1996, the Buyers timely filed a Notice of Appeal seeking review of these two (2) judgments, which the Fourth District Court of Appeal assigned Case Number 96-3695. (A.11-19) On November 20, 1996, the Buyers moved to consolidate the appeal of Final Judgment II awarding pre-judgment interest (96-3200), with the appeal on the two (2) attorney fee judgments (96-3695), (A.28-30) which motion was granted with the Fourth District consolidating the cases on December 2, 1996. (A.34-35)

After consolidation, the appeal consisted of three (3) separate issues: 1) The review of the pre-judgment interest awarded; 2) the amount of attorney's fees awarded STAMM, Saylor and Gwynn; and 3) the amount of appellate attorney's fees awarded Dalack as appellate attorney for LAGANO and BELL.

Meanwhile, as noted previously, after the Buyers filed their Notice of Appeal, Dalack as attorney for BELL and LAGANO filed a Motion for Review in Appeal I of the attorney's fee award requesting that the Fourth District recede from the Mineo case. (A.20-25) In response to this Motion, the Buyers noted that the review of attorney's fees was already part of the pending appeal which had been filed prior to the filing of Dalack's Motion for Review. (A.31-33) Notwithstanding the pending consolidated appeal, the Fourth District affirmed the award of fees, refused to recede from Mineo, and would not consider the Buyers' arguments on appeal. (A.36) On cross-motions for rehearing or reconsideration, the Buyers sought again to have the matters reviewed as part of the pending appeal, while Dalack as attorney for BELL and LAGANO sought

certification of the multiplier issue. (A.37-39;41-60) It was from these Cross-Motions that the Court issued its March 12, 1997 Opinion. (A.1-3)

The District Court of Appeal below found in its March 12, 1997 order that the attempt by Petitioners to have the appellate attorney's fees motion reviewed by separate appeal in which additional issues had been raised and which appeal had been filed timely was improper. The District Court's ruling, however, conflicts with the First District case of Underwood v. Elliot, 601 So.2d 317 (Fla. 1st DCA 1992) and Zaremba Florida Company v. Klinger, 557 So.2d 1131 (Fla. 3d DCA 1989).[4]

Both Underwood and Zaremba note that although a trial court's assessment of attorney's fees pursuant to an appellate court's order is properly challenged by Fla. R. App. P. 9.400, it is permissible to raise the challenge as a point on appeal where additional issues other than the assessment of attorney's fees are also raised.

In the subject action, a timely notice of appeal was filed for not only the assessment of appellate attorney's fees, but also for attorney's fees awarded to trial counsel by separate order dated the same day (October 3, 1996), with both orders being the subject of the appeal styled U.S. Block Corp., et al. v. William Bell, et al., Fourth District Court of Appeal, Case No. 96-3695. (A.11-19)

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[4] The ruling also conflicts with the Fourth District's own precedent which adopted the exception, Magner v. Merrill Lynch Realty/MCK, Inc., 585 So.2d 1040 (Fla. 4th DCA 1991), rev. denied, 598 So.2d 77 (Fla. 1992) and Starcher v. Starcher, 430 So.2d 991 (Fla 4th DCA 1983).

In addition, a separate order pertaining to prejudgment interest which had been awarded post-appeal arising out of the same case had been filed in the case styled U.S.B., et al. v. William Bell, et al., Fourth District Court of Appeal Case No. 92-3138. (A.4-10) These two appeals were consolidated for appeal purposes. (A.34-35)

Despite the fact that the appellate fees award was the subject of the consolidated appeal, the Fourth District Court of Appeal refused to consolidate Respondents' Motion for Review of the trial court order to which the Petitioners had responded and which matters were already the subject of the consolidated appeal.

The effect of the Court's order deprived Petitioners of their right to have the trial court's order awarding attorney's fees reviewed by the District Court of Appeal despite a timely notice of appeal being filed. The purpose of this exception developed by the district courts is clear. If there are other points of appeal other than review of the amount of attorney's fees awarded post-mandate, all the matters should be able to be raised in one single appeal. To do otherwise would result in multiple appeals, additional burdens and costs on all parties as well as the Court, and the possibility of inconsistent rulings.

Additionally, the Fourth District's attempt to distinguish between a single judgment and multiple judgments is illogical. Whether issues for appeal arise under one order or several orders, the points on appeal are appropriately appealed as one appeal as long as they arise out of the same case. For example, one appeal can be used to appeal non-final orders and final orders from the same case; and, one appeal is used to appeal several orders from

the same case. The purpose is one of judicial economy and fundamental fairness to prevent inconsistent rulings. The same holds true for purposes of reviewing attorney's fees awards along with other issues. That is why the district courts created the Rule 9.400 exception. Thus, the Fourth District Opinion clearly conflicts with the First and Third Districts and violates the aforementioned policy behind the existing opinions.

ARGUMENT II

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICTS OF THE STATE ON THE ISSUE OF THE FIVE DAY MAILING RULE AND ITS IMPACT ON THE RULES CONFERRING JURISDICTION TO THE DISTRICT COURTS OF APPEAL.

In its March 12, 1997 Opinion, the Fourth District noted:

> The two separate final orders awarding attorneys' fees were both entered and mailed on October 3, 1996. Allowing time for mailing, Mr. Dalack's motion for review was timely filed on November 6. (A.3)

Under 9.400 Fla. R. App. P., any motion for review of the order dated October 3, 1996 had to be filed by November 2, 1996. However, it was not until November 6, 1996, BELL and LAGANO filed a Motion for Review of Trial Court Order Awarding Appellate Attorney's Fees. (A.20-25) Attached to the Motion was the final order awarding appellate attorney's fees signed and dated by the Court October 3, 1996.[5] (A.23-25)

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[5] Following the Court's March 12, 1997 Opinion, Dalack as counsel for BELL and LAGANO filed an Extraordinary Motion for Clarification of Opinion (A.64-71) claiming that the October 3, 1996 Order that it had attached to its 9.400 Motion for Review was not the operative order, but rather a later order signed October 7, 1996. The Court summarily denied the extraordinary motion. (A.72)

The District Court of Appeal below, found that the five day mailing rule of Fla. R. App. P. 9.420 applied to invoking the Court's jurisdiction under Fla. R. App. P. 9.400.

Rule 9.400(c) states:

> Review of orders rendered pursuant to this rule shall be by motion filed in the court within thirty days of rendition.

Rule 9.400 provides no additional time for mailing. The Fifth District Court of Appeal in Bouchard v. State, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 448 So.2d 1126 (Fla. 5th DCA 1984), examined the five day mailing rule and its impact on the filing of a notice of appeal. The Court noted:

> We write this opinion because we perceive some misconception about the effect of Rule 9.420(d) among some appellate practitioners. The rule provides as follows:
>
> > Whenever a party or clerk is required or permitted to do an act within some prescribed time after service of a document, and the document is served by mail, five days shall be added to the prescribed period.
>
> The rule provides for additional five days only when some act is required to be done after service of a document by mail, **not when the act is required to be done after rendition** or filing of an order or judgment even though a mailing of the document rendered or filed may be involved. Thus, the extra five days does not apply to notices of appeal or motions for rehearing of an appellate decision. (Emphasis added.)

The appellate courts have been consistent in not allowing the five additional days permitted by Rule 9.420(d) when an act is required to be performed within a prescribed period after rendition of an order.

The First District Court of Appeal in Speed v. Florida Department of Legal Affairs, 387 So.2d 459 (Fla. 1st DCA 1980), in deciding whether the mailing rule applied to Fla. R. App. P. 9.110 noted that Fla. R. App. P. 9.110 provides:

> Jurisdiction of the court under this rule shall be invoked by filing two copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within thirty days of rendition of the order to be reviewed. (Emphasis added).

The appellant in Speed claimed that she had an additional five days under Rule 9.420(d), and relied on case law applicable to the prior rule regarding the filing of Notices of Appeal. The First District noted that under the current rules which specifically establish the date of rendition, the mailing rule was inapplicable.

The Fifth District Court of Appeal in Turner v. State, 557 So.2d 939 (Fla. 5th DCA 1990) also found that rule 9.420(d) does not allow an additional five days for the filing of a notice of appeal by mail. Similarly, the Fourth District Court of Appeal in Franchi v. Florida Department of Commerce, 375 So.2d 1154 (Fla. 4th DCA 1979) stated that as the appellate rules require that a notice of appeal be filed within thirty days of rendition of an order, failure to file within the thirty day period constitutes "an irremediable jurisdictional defect." Franchi at 1155. The court in Franchi, like the First District in Speed noted that the prior rules were not as clear as the current rules, and found that Rule 9.420(d) "has no application to the jurisdictional requirements for filing a notice of appeal". Id. at 1156.

In the subject action, the Fourth District while noting that the appeal sought to be reviewed was dated October 3, 1996,

provided counsel with an additional five (5) days period for mailing, thus finding that the motion filed November 6, 1996 was timely. (A.3) Therefore, the Court incorrectly applied a five (5) day mailing rule to the invoking of its jurisdiction in considering BELL and LAGANO'S Motion. Thus, the basis upon which the District Court deemed Respondents' Motion for Review timely filed is in express conflict with the other district courts of the state.

CONCLUSION

For the forgoing reasons, Respondents/Cross-Petitioners respectfully request this Court to enter an Order approving Command Credit Corporation v. Mineo and its rationale as adopted by the Court below. Additionally, Respondents/Cross-Petitioners request the Court enter an Order disapproving the May 12, 1997 decision of the Fourth District Court of Appeal with respect to the conflicts created within the Opinion regarding the Court finding that the only proper review of the post-mandate attorney's fees was to be by Rule 9.400 motion as opposed to being able to be considered along with other points of appeal arising out of the same action; and disapproving the Fourth District Court of Appeal opinion which created conflict by applying a five (5) day mailing rule in invoking its jurisdiction to consider Petitioners' Motion for Review of Appellate Attorney's Fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to Basil E. Dalack, Esq., 1615 Forum Place, Suite 300, West Palm Beach, FL 33401 this 10th day of September, 1997.

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By: _____
Marshall J. Osofsky, Esq.
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