

**SUPREME COURT OF FLORIDA**

**CASE NO. SC09-1479**

**IN RE: AMENDMENTS TO THE FLORIDA  
RULES OF CIVIL PROCEDURE –  
FORM 1.996 (FINAL JUDGMENT  
OF FORECLOSURE)**

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**FLORIDA DEFAULT LAW GROUP, P.L.'S COMMENTS  
TO FORM 1.996 (FINAL JUDGMENT OF FORECLOSURE)**

Florida Default Law Group, P.L. (“FDLG”) submits the following comments to the newly added provision requiring findings as to the reasonable number of hours and the reasonable hourly rate for an award of attorney’s fees in the proposed Form 1.996 (Final Judgment of Foreclosure). The comments contained herein are solely those of FDLG and should not otherwise be interpreted or construed as reflecting the opinions of any FDLG clients.

**INTRODUCTION**

FDLG is a Florida law firm that focuses its practice primarily on the representation of lenders in residential mortgage foreclosure cases. Accordingly, the proposed Form 1.996 published for comment in this Court’s per curiam Order in Case No. SC09-1579, dated February 11, 2010, uniquely impacts the day to day operations of FDLG. As explained herein, FDLG prosecutes uncontested residential foreclosure actions pursuant to a modest flat rate fee agreement with its clients. Due to the flat fee agreement, FDLG’s attorneys and paralegals do not maintain time records documenting the time spent prosecuting an uncontested case. As such, in an uncontested case, FDLG

does not maintain time records for a court to review in determine the number of hours expended for a lodestar analysis.

## **BACKGROUND**

FDLG and/or its predecessor entities have been representing lenders in residential foreclosure actions in Florida since 1987. FDLG prosecutes residential foreclosures on a high volume basis. Over the years, FDLG has and continues to streamline its practice by employing policies and procedures designed to facilitate the efficient handling and flow of foreclosures. In doing so, FDLG has become highly successful in handling high volume foreclosures for lenders at low rates, which in turn benefits borrowers by reducing the overall fees and costs associated with foreclosure actions.<sup>1</sup> Because of the efficiencies achieved, FDLG and its lender clients have negotiated a modest flat rate attorney's fee for uncontested foreclosure actions. Currently, the flat rate attorney's fee for an uncontested foreclosure action does not exceed \$1,500.<sup>2</sup> If a foreclosure becomes contested, the firm's attorneys bill on an hourly basis, and keep appropriate records. However, even in a contested foreclosure, FDLG and its lender clients can and do agree to a flat fee for certain isolated services (i.e., such as mediation when the parties are referred to mediation).

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<sup>1</sup> This can be a significant benefit to a borrower who seeks to reinstate or payoff a loan balance prior to a final judgment and/or sale, and can also be a benefit to borrowers or subordinate lienholders who seek to exercise their statutory right of redemption. *See* Fla. Stat. §45.0315 (the "mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of monies specified in the judgment, order, or decree of foreclosure, or if no judgment, order or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.")

<sup>2</sup> This flat fee is prorated over the stages of the foreclosure action, and becomes fully earned upon summary judgment.

One of the policies implemented by the firm to facilitate the efficient handling of uncontested residential foreclosures was to eliminate timekeeping requirements for attorneys and paralegals working on uncontested matters. Since the firm is handling these matters for a low flat fee, eliminating timekeeping requirements and the administrative burden associated with recording time, allows the attorneys and paralegals to efficiently process a high volume of cases. This in turn makes it economically feasible for the firm to handle a residential foreclosure for the modest fee the firm's clients agree to pay. However, since the firm's attorneys do not maintain time records on uncontested foreclosures, there are no time records that would enable a court to conduct a lodestar analysis for awarding attorneys' fees as part of a final judgment.

Under the firm's current practice, the firm's attorneys submit an "Affidavit of Plaintiff's Counsel As to Attorney's Fees and Costs" which sets forth a description of the minimum legal services provided in an uncontested residential foreclosure action, the flat rate fee amount the firm's client agrees to pay, and an explanation that the firm does not create specific timekeeping records reflecting the amount of time incurred. The affidavit also makes clear that the firm only seeks to collect the amount the client agrees to pay. An example of such an affidavit is attached as Exhibit "A."<sup>3</sup>

The attorneys' fees portion of Form 1.996 requires a court to make a finding as to the reasonable number of hours and a reasonable hourly rate to conduct a lodestar analysis in arriving at an award of attorneys' fees. This form does not allow for the

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<sup>3</sup> The firm also submits an affidavit from an attorney familiar with the firm's practice, residential foreclosure work and the labor involved attesting to the reasonableness of the firm's flat fee amount.

possibility of a flat rate fee where no timekeeping records exist. As such, FDLG respectfully suggests that the form be amended to allow for a finding as to reasonableness of the flat rate fee without resorting to a lodestar analysis. FDLG proposes the following amendment to the attorney's fee portion of the form:

Attorneys' fees

Finding as to reasonable number of hours: \_\_\_\_\_

Finding as to reasonable hourly rate: \_\_\_\_\_

**Other\*:** \_\_\_\_\_

**(\*The requested attorney's fee is a flat rate fee that the firm's client has agreed to pay in this matter. Given the amount of the fee requested and the labor expended, the Court finds that a lodestar analysis is not necessary and that the flat fee is reasonable)**

Attorneys' fees total: \_\_\_\_\_

### **LEGAL ANALYSIS**

FDLG respectfully submits that the proposed change to Form 1.996 would further this Court's goal of achieving "clarity and readability and better conform to prevailing practices in the courts." *In re: Amendments to the Florida Rules of Civil Procedure – Form 1.996 (Final Judgment of Foreclosure)*, Case No. SC09-1579, p. 7. It would also further the Task Forces' objective of ensuring "candid, clear and truthful" representations in connection with "pleadings and affidavits filed with the Courts." *See Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, Final Report and Recommendations on Residential Mortgage Foreclosure Case, August 17, 2009, p. 21.*

As stated above, in uncontested matters, or flat fee portions of contested matters, the law firm's attorneys do not maintain timekeeping records detailing the time incurred. However, given the uniform and routine nature of uncontested foreclosure actions, a lack

of time records should not be an impediment to a state court's determination of a reasonable fee. This very issue was addressed by the Honorable Judge Hinkle in *Beck v. Codilis & Stawiariski, P.A.*, 2000 WL 34490402 (N.D. Fla. December 27, 2000). Here, the court ruled upon the reasonableness of a flat rate attorney's fee for an uncontested foreclosure in the absence of detailed time records. *Id.* at \*1. In doing so, the court recognized that the lodestar method adopted by this court in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985) was "a means to an end – the determination of a reasonable fee – not as an end in itself." *Id.* at \*3. *Beck* specifically held that "[w]hen a modest flat fee is obviously (and admittedly) reasonable, nothing in *Rowe* or *Quanstrum* requires the useless exercise of calculating a lodestar. Nor do those cases prohibit the shifting of the reasonable fee to the adversary party who agreed to pay it." *Id.*

In *Beck*, the court was concerned, in part, by the submission of affidavits in state court foreclosure proceedings for attorneys' fees which set forth the number of hours devoted to each task in an uncontested foreclosure together with an hourly rate. The court concluded that "under any fair reading, the affidavits constituted a false representation of the actual hours worked and actual hourly rate." However, the court noted that the firm, in each instance, "sought only the flat fee (\$1,000) that the lender was in fact obligated to pay the firm." *Id.* at \*1. The court held that the flat fee "was a reasonable fee." *Id.* In so holding, the court noted "when the issue is the amount of attorneys' fees to be awarded in a case litigated before the court, a court properly may consider its own knowledge of reasonable fees in the relevant legal market. *Id.*, fn.2,

citing *Norman v. Housing Authority*, 837 F.2d 1292, 1303 (11<sup>th</sup> Cir. 1988). The court further noted “[t]his court’s own knowledge, for many years as a practicing attorney in this state as well as from experience adjudicating contested fee applications, is that \$1,000 is a reasonable, indeed low, fee for handling an ordinary residential foreclosure.” *Id.*<sup>4</sup>

In reaching his conclusion that neither *Rowe* nor *Quanstrum* requires the exercise of calculating a lodestar even when the payment of the fee is shifted to an adversary party who agreed to pay it, the court relied on the following key facts:

1. The agreement between the law firm and its clients called for the payment of a flat fee for each case;
2. That was the fee the lenders were obligated to pay the firm and that was the fee the firm demanded from plaintiffs in a foreclosure action whose mortgages obligated them to pay a reasonable attorneys’ fee incurred by the lenders;
3. The agreements between the law firm and its lender clients for payment of a flat fee were lawful;
4. Nothing in Florida law requires attorneys to charge by the hour. To the contrary flat fees have been around longer than hourly fees and can be every bit as lawful; and,
5. The amounts at issue here - \$1,000 per foreclosure – were reasonable, indeed cheap.

*Id.* at \*2.

Likewise, under FDLG’s current practice, the agreement between the law firm and its clients call for the payment of a flat fee for each uncontested case; this fee is the

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<sup>4</sup> The court’s finding that the flat rate fee was reasonable was also supported by affidavits submitted in the action, including an affidavit from GMAC Mortgage Corporation, Aurora Loan Services, Inc. and Federal National Mortgage Association. *Id.* at \*1, fn.2.

fee lenders are obligated to pay the firm and it is the same fee that the firm requests in foreclosure actions against borrowers whose mortgages obligate them to pay the reasonable attorneys' fees.

Flat fee agreements continue to be lawful in Florida, and the undersigned is not aware of any cases finding that a flat fee agreement is unlawful. Further, the undersigned is not aware of any requirement under Florida law that attorneys *must* charge by the hour. See *Solar Research Corp. v. Parker*, 221 So. 2d 138 (Fla. 1969); *Williams, Solomon, Kanner, Damian, Weissler & Brooks v. Harbour Club*, 436 So. 2d 233 (Fla. 3<sup>rd</sup> DCA 1983); *Universal Beverage Holdings, Inc. v. Merkin*, 902 So. 2d 288 (Fla. 3<sup>rd</sup> DCA 2005). These cases deal with the enforcement of a fee agreement between an attorney and the attorney's client. However, recognizing this distinction in *Solar Research Corp.*, this Court did not rule that a fixed fee when shifted to a party's adversary is unlawful, but rather, "must be proved as any other fact, and determined and allowed by the court in its judicial discretion." *Solar Research Corp. v. Parker*, 221 So. 2d at 142.

In adopting the federal lodestar approach for computing reasonable attorneys' fees when the fee is awarded and assessed against parties in litigation, this Court's objective was to put in place a suitable foundation for an objective and uniform structure for court-determined fees. *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d at 1149-1150 (concerned with the perceived "lack of objectivity and uniformity in court-determined reasonable attorney fees," this Court found that the "federal lodestar approach . . . provides a suitable foundation for an objective structure.") However, in *In re Estate of Platt*, this Court also noted "[r]easonable" also means that the fee should be

consistent with other fees set in similar cases. Similar facts require the application of similar factors.” *In re Estate of Platt*, 586 So. 2d at 336.

Allowing for a flat rate fee in uncontested foreclosure actions without resort to a lodestar analysis achieves this Court’s objectives of objectivity and uniformity. This flat fee arrangement is a standard in the foreclosure industry among high volume practice law firms, and like FDLG, these firms do not maintain contemporaneous time records. Under this approach, state court judges can be relieved of reviewing detailed time records in hundreds, if not thousands, of uncontested matters where a flat fee is requested, and given the uniformity of uncontested cases, apply similar factors allowing for consistent fee awards.

Likewise, Florida law does not appear to require attorneys to maintain time records. As explained in *Rowe*, “the first step in the lodestar process requires the court to determine the number of hours *reasonably expended* on the litigation.” *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d at 1146 (emphasis added). However, as clarified in *In re Estate of Platt*, 586 So. 2d 328, 333 (Fla. 1991), “‘reasonably expended’ means the time that ordinarily would be spent by lawyers in the community to resolve this particular type of dispute. It is *not* necessarily the number of hours actually expended by counsel in the case” (emphasis in original). “Rather, the court must consider the number of hours that should reasonably have been expended in that particular case. The court is not required to accept the hours stated by counsel.” *Id.* at 333-334.



Further, even in instances in which hourly fees apply, the rule is that while “the attorney fee applicant *should* present records detailing the amount of work performed . . . [i]nadequate documentation may result in a *reduction* in the number of hours claimed . . . .” *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d at 1150 (emphasis added). Thus, this Court did not suggest that a lack of documentation will result in a denial of fees, even where hourly fee calculations are involved. Nowhere is it suggested that a standard procedure of charging flat fees, obviating the necessity of time records, is inadequate or improper. Indeed, current literature is replete with articles on the growing popularity of alternative billing arrangements in general, and that this type of system has particular application to situations where, as here, an attorney has a volume practice of small, uncomplicated cases, and can use this practice as a method of delivering high quality services at a lower cost to the client.<sup>5</sup> The reality is if the attorneys are required to bill hourly and maintain time records, the costs of prosecuting foreclosures would increase. A flat fee method is a positive development in the law, beneficial to clients and the public in general, and this Court should not enact something that would hinder lawyers’ ability to serve their clients.

In *Rowe*, this Court noted that “[t]o accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed.”

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<sup>5</sup> See, The Skinny on Flat Fees: "Value Pricing" Requires Managing a New Way. 94-JUL A.B.A. J. 26. Implementing Flat Fees in Your Practice. 20-OCT Utah B.J. 24 ("from the client’s perspective, the billable hour is the work of the devil"); Moving from Billable Hours to Fixed Fees: Task-Based Fees and Legal Ethics. 47 U. Kan. L. Rev. 819 ("[m]any clients, particularly businesses that use lawyers repeatedly, are proposing fixed fees when negotiating with their lawyers"); and Trapped in Time: Can Alternative Methods Put a Stop to Billing Time? 22 No. 6 Legal Mgmt. 32. (“[c]lients love fixed fees because there are no surprises when the final bill is opened up. They want predictability”).

*Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d at 1150. Here, FDLG's fee affidavits describe the minimum legal services generally performed in all routine foreclosure actions. Thus, a state court judge reviewing the affidavit can assess the labor involved and determine, using the judge's own knowledge and experience, whether the requested flat fee is reasonable without resorting to a review of detailed time records. Such an approach is also consistent with Rule Regulating the Florida Bar 4-1.5(c) which expressly provides that time devoted to the representation is not a controlling factor in determining the reasonableness of a fee and that all factors should be considered. Thus, FDLG's lack of detailed hourly statements should not be an impediment to determining a reasonable fee when a modest flat fee is being requested.

Uncontested foreclosures are fairly routine in nature and therefore are much more susceptible to a standard or flat rate attorney fee. For instance, a strong analogy can be drawn to attorneys' fees awarded in Chapter 13 bankruptcy proceedings. *See*, for instance, *In re Howell*, 226 B.R. 279 (Bankr. M.D. Fla. 1998) involving debtor's counsel's fee application in a Chapter 13 case. At the outset, the bankruptcy court noted "[i]n considering fee applications, the bankruptcy court typically uses the lodestar method." *Id.* at 281. However, "the court need not use the lodestar method when the court finds the method inappropriate in the circumstances." *Id.*, citing *Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736 (8<sup>th</sup> Cir. Bap. 1997). The court wrote:

Routine Chapter 13 cases are not appropriate cases for the use of the lodestar method. Instead, they are much more susceptible to a standard rate or flat, fixed rate approach, based upon all the relevant legal factors. Chapter 13 cases are standardized and systemized, and much of the work is capable of performance by the paralegals. These cases are

typically handled in high volume practices. Although counsel may lose a few dollars on one case when a standard, fixed fee is approved in a routine case, counsel will make up those dollars in another case. In the marketplace of this community, this is precisely the foundation upon which most attorneys accept representation and charge their clients in Chapter 13 debtor cases.

***This approach also has the advantage of simplicity, efficiency, and economy.*** The court deals with a high volume of Chapter 13 cases every week, each one of which involves a relatively modest attorneys' fee. As a practical matter, the court has no ability to provide individualized, microscopic treatment to small applications in literally thousands of cases. Not only is this standard, fixed fee approach to awarding fees in routine Chapter 13 cases a practical solution to this high volume problem, it also carries the benefit of certainty for lawyers, debtors, creditors, and the Chapter 13 trustee. Many, if not most, bankruptcy courts around the nation use such standardized fees in Chapter 13 cases as established by individual judges or as promulgated by the court as a whole.

*Id.* at 281-282 (internal citations omitted) (emphasis added). Thus, the court adopted a standard, fixed fee to be used in truly routine cases, leaving the more detailed lodestar method for those few cases that deviate from the norm. *Id.* at 282; *see also Newman v. Barnett*, 2003 WL 751327 \*3 (Bankr. M.D. February 18, 2003) (“[t]o address the practical realities of consumer Chapter 13 practice, and given the number of routine consumer cases that are dealt with by a bankruptcy court, a number of courts have concluded that it is within a court’s discretion to set a presumptively reasonable fee as an alternative to requiring documentation to substantiate the number of hours expended under the lodestar method.”)

As with Chapter 13 bankruptcy proceedings, uncontested residential foreclosures are typically “standardized and systemized” and handled in high volume practices. Moreover, allowing state court judges to evaluate the reasonableness of a modest flat fee without resorting to individualized reviews of thousands of fee applications would promote “simplicity, efficiency, and economy” in foreclosure cases, goals which both this Court and the Task Force are seeking to achieve with the amendments to the rules and adoption of forms. Upon information and belief, most judges across the state know and understand that routine residential foreclosures are being handled on a modest flat fee basis and that the attorneys handling the foreclosures do not keep time records. Upon information and belief, state court judges also understand the nature and extent of the routine legal services provided in each foreclosure, and based upon the fee affidavit (as attached as “Exhibit A”) award the flat fee amount.<sup>6</sup> This Court asked the Task Force to recommend “policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of the parties.” AOSC09-8, *In re Task Force on Residential Mortgage Foreclosure Cases*, March 27, 2009. Allowing state courts the option to forego a review and analysis of detailed time records in conducting a lodestar analysis on routine uncontested residential foreclosures would, FDLG respectfully submits, further this Court’s stated goal of easing the burden foreclosure actions impose on the state court system, while at the same time, promoting certainty and uniformity for attorney fee requests.

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<sup>6</sup> In some instances, judges have awarded less than the flat fee requested, thus demonstrating, in practice, a judge’s use of the judge’s own knowledge and experience to evaluate the reasonableness of an award.

As such, FDLG respectfully requests that this Court consider the comments and legal authorities set forth herein, and amend Form 1.996 to allow for an award of fees based on a flat fee agreement without resorting to a lodestar analysis.

Dated this 12<sup>th</sup> day of April, 2009.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Committee Chair, Mark A. Romance, 201 S. Biscayne Boulevard, suite 1000, Miami, FL 33131-4327, this 12<sup>th</sup> day of April, 2010.

/s/

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