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*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

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## **OFFER OF JUDGMENT CONDITIONED UPON THE EXECUTION OF A RELEASE AND STIPULATION FOR DISMISSAL WITH PREJUDICE HELD VALID**

In most cases, each party to a lawsuit – whether the winner or the loser – must pay her own attorney’s fees. An offer of judgment, sometimes also referred to as a proposal for settlement, however, is a statutorily authorized form of settlement offer that may result in the shifting of a party’s burden to pay her own attorney’s fees to the opponent.

Generally speaking, under the applicable Florida offer of judgment/proposal for settlement statutes and procedural rules, if a defendant serves a reasonable offer in the proper form that is not accepted by the plaintiff, and if the defendant wins the case or the plaintiff wins but the judgment she obtains is at least twenty-five percent less than the amount of the offer, then the defendant is awarded reasonable costs – including attorney’s fees and investigation expenses – incurred after the date the offer was served. Likewise, if a plaintiff serves a reasonable offer in the proper form that is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least twenty-five percent more than the amount of the offer, then the plaintiff is awarded reasonable costs – including attorney’s fees and investigation expenses – incurred from the date the offer was served. If an offer is not accepted in writing within the time allowed by the pertinent rules, the offer is deemed rejected. If an offer is accepted, though, then it may be filed with the court in order to enforce its terms, i.e., to have a final judgment entered in favor of the party receiving the offer and against the party making the offer for the amount of the offer. The usual practice, if an offer is accepted, is for the parties simply to enter into a settlement agreement with releases and file with the court only a stipulated notice of dismissal that does not refer to the settlement amount or other terms. This practice disposes of the case but avoids the entry of a judgment on the record against a party, which may be very desirable given the allegations in the case. Sometimes, however, parties cannot agree on this approach, and the party accepting the offer insists on filing it and having a judgment entered on the record.

Prior to 1997, Florida’s procedural rule governing offers of judgment/proposals for settlement prohibited the inclusion of any conditions in an offer. This meant that parties could not include in an offer/proposal language about entering into releases and dismissal stipulations without invalidating it. On the one hand, then, including such language would nullify the offer’s potential to shift the burden of paying fees and costs at the end of the case. On the other hand, there was always a risk that an offeree would insist on filing an acceptance of a valid offer and obtaining a final judgment.

In 1997, Florida Rule of Civil Procedure 1.442 was amended to provide that an offer/proposal shall “state with particularity any relevant conditions.” This change seemed to suggest that conditioning an offer of judgment on the parties entering into releases and stipulations of dismissal without the entry of a judgment would not invalidate the offer as before. Nonetheless, questions continued as to whether a reference in an offer/proposal to a release and dismissal stipulation rendered it invalid.

In the recently decided case of Gulf Coast Transportation, Inc. v. Padron, the Second District Court of Appeal said no. There, Ms. Padron, who was hurt in an automobile accident with a taxicab owned by Gulf Coast, sued the cab company seeking damages for her injuries.

Prior to trial, Gulf Coast served an offer of judgment/proposal for settlement pursuant to the Florida statutes and Rule 1.442. The offer as written was for \$50,000 and specifically required Ms. Padron to execute a full and complete release and a stipulation for dismissal of the action with prejudice. Ms. Padron rejected the offer. The case went to trial. The jury found Gulf Coast was eighty-five percent liable and Ms. Padron fifteen percent liable. The total jury award was \$56,190. After the court deducted certain set-offs, it entered a final judgment in favor of Ms. Padron in the net amount of \$22,761.50. Gulf Coast then filed a motion to tax costs and fees based on its offer/proposal that had been rejected. In denying the motion, the trial court found that Gulf Coast's proposal contained the impermissible conditions requiring a release and stipulation of dismissal. On appeal, the court reversed. It held that these conditions were not conditions that invalidated the offer/proposal. The appellate court noted the 1997 change to the language of Rule 1.442 and further stated that these conditions were "inconsequential to the offer and were merely formalities that normally would occur once an offer is accepted."

### **U.S. SUPREME COURT DECIDES IMPORTANT QUESTION CONCERNING TRADE DRESS INFRINGEMENT CLAIM**

In TrafFix Devices, Inc. v. Marketing Displays, Inc., the U.S. Supreme Court was faced with a question concerning trade dress infringement. There, an inventor named Sarkisian obtained two utility patents – patents on the way something functions – for a mechanism built on two springs to keep temporary road signs and other outdoor signs upright despite adverse wind conditions. A company called Marketing Displays, Inc. ("MDI") held the now-expired Sarkisian utility patents. MDI was in the business of manufacturing and selling sign stands incorporating the patented two-spring mechanism.

After the patents expired, a competitor, TrafFix Devices, Inc. ("TrafFix") sold sign stands with a visible spring mechanism that looked like and was like that of MDI. When TrafFix started in business, it sent an MDI sign stand to a company to have it reverse engineered, or copied. TrafFix's product also bore a very similar name to MDI's product. MDI brought suit under the Lanham Act against TrafFix for trade dress infringement – a claim that its product looked so much like MDI's product that it caused confusion as to the origin, sponsorship, or approval of the product – among other claims. The trial court ruled against MDI on the trade dress issue because it believed no reasonable trier of fact could find that consumers associated the look of the dual-spring design with MDI. It also determined that the dual-spring design was functional and therefore not subject to trade dress protection.

The appellate court reversed in part on the ground that TrafFix could have developed a similarly working but different looking mechanism which, in its opinion, would not have infringed MDI's trade dress. In criticizing the trial court's ruling, the appellate court noted that various federal appellate courts throughout the country were split on the question of whether the existence of an expired utility patent foreclosed the possibility of the patentee claiming trade dress protection in the product's design.

The U.S. Supreme Court reversed the decision of the appeals court. It noted first that it is well-established that trade dress can be protected under federal law, and that protection for trade dress exists to promote competition. With respect to a trade dress infringement claim, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional, because, as the trial court had held, trade dress protection may not be claimed for product features that are functional. Functionality is protected by the patent laws. In this case, the Supreme Court concluded that an expired utility patent is strong evidence that the product features that are claimed to be protected trade dress are functional and thus not subject to trade dress protection. It specifically held that where the expired product claimed the features in question, then one who seeks to establish trade dress protection must carry a heavy burden of showing that the feature is not functional but instead, merely an ornamental, incidental, or arbitrary aspect of the product.

### **FRAUDULENT INDUCEMENT CLAIMS MAY BE BARRED WHEN THE ALLEGED MISREPRESENTATIONS ARE EMBODIED IN A SUBSEQUENT CONTRACT**

Florida law embraces the economic loss doctrine, which essentially provides that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a breach of contract, which would justify a tort claim solely for economic losses. Simply put, this means that where a contract exists between two parties, a tort action will lie only for either intentional or negligent acts that are independent from the acts that breached the contract. Florida cases have recognized that a tort claim for fraudulent inducement to enter a contract is an independent tort because it requires proof of facts separate and distinct from the breach of contract. On the other hand, courts have held that claims of fraud in the performance of a contract are not independent and thus are barred by the economic loss rule.

In Bates v. Rosique, the court looked beyond the form of the manner in which a cause of action was pled and determined that an alleged fraudulent inducement claim was barred by the economic loss rule. There, Bates and others, as buyers, entered into a contract for the purchase of a hotel resort from Rosique and others, as sellers. The buyers claimed that prior to entering into the agreement, the sellers represented that certain development documents existed, were in the sellers' possession, and would be turned over to the buyers at closing. These representations were included in the purchase and sale contract. The agreement also contained a merger clause, which provided that no prior agreements or representations were to be binding on the buyers or sellers unless included in the contract.

The deal never closed. The sellers sued the buyers, and the buyers filed a counterclaim. One of the buyers' claims was for fraud in the inducement, i.e., the sellers represented they were in the possession of certain development documentation that they would deliver to buyers, the representations were false, and the representations were made to induce the buyers to enter into the contract to purchase and develop the property. The trial court found that the fraud claims were barred by the economic loss doctrine. The appellate court agreed. Although it recognized that as a general matter, a fraud in the inducement claim is not barred by the economic loss rule, here, the alleged fraudulent misrepresentations were inseparably embodied in the parties'

subsequent agreement. Moreover, because the contract contained a merger clause, the buyers could not rely upon any alleged misrepresentations made prior to the agreement to support their fraudulent inducement claim. Accordingly, any representations here – i.e., that the documents would be delivered – were made in connection with the sellers’ performance under the contract, and these claims were thus claims of fraud in the performance of a contract within the purview of the bar of the economic loss rule.

#### **FOURTH DISTRICT COURT OF APPEALS REQUIRES PLAINTIFF’S COUNSEL TO PAY DEFENDANT’S ATTORNEY’S FEES**

In Weatherby Associates, Inc. v. Ballack, Weatherby sued Mary Kay Ballack, Capital Health Resources, Inc., and Capital Finance Resources, Inc. for breach of an employment agreement. The pertinent facts are as follows: Ballack was formerly employed by Weatherby, which is in the business of recruiting physicians and health care executives. Capital Health is in the same line of business and is a direct competitor of Weatherby. Capital Finance, however, recruits and places accountants. Both Capital Health and Capital Finance are owned by former employees of Weatherby.

As a condition of her employment with Weatherby, Ballack signed an employment agreement that included a covenant whereby she agreed not to disclose confidential information, and a non-competition provision by which she agreed not to become engaged in either physician recruitment or health care executive placement in any capacity for a period of one year after termination of her employment with Weatherby.

After working with Weatherby for over six years, Ballack resigned. Sometime later, Weatherby discovered that a computer diskette was missing, and Ballack was seen entering the offices of Capital Health one morning. Weatherby’s attorney contacted Capital Health’s attorney, who advised that Ballack was working for Capital Finance, not Capital Health. As of that date, Capital Finance was a new company, and its articles of incorporation had not yet been filed.

Weatherby’s ensuing lawsuit alleged, among other things, that Ballack breached her employment agreement by working for Capital Health and giving it confidential information in violation of the non-disclosure and non-competition agreements. Weatherby filed an emergency motion for a temporary injunction to enforce the non-disclosure and non-competition agreements.

Deposition evidence obtained prior to the injunction hearing confirmed, however, that Ballack went to work for Capital Finance recruiting accountants, which was not prohibited by the non-competition agreement. The depositions also confirmed that Weatherby had no evidence that Ballack removed or used confidential information, or that she was working in health care executive and physician recruiting. Suit had been filed by Weatherby because Ballack was seen entering Capital Health’s offices, and she conducted various data base searches the weekend

before she left Weatherby (which Weatherby did not find out until after suit had been filed). Weatherby's motion for a temporary injunction was denied.

Weatherby filed an amended complaint adding Capital Finance as a defendant. In response, all three defendants filed motions for summary judgment and for the award of attorney's fees under Florida's frivolous litigation statute. At the conclusion of a hearing on the motion for attorney's fees, the trial court determined that at the time the case was filed, the plaintiff had no evidence to support its claims, and after substantial discovery, the plaintiff still had no evidence. Yet, it pursued the motion for temporary injunction. The trial court held that the plaintiff's counsel knew or should have known the claims were not supportable, and at the time the case was brought, there was a complete absence of a justiciable issue. The court awarded all three defendants their fees. With respect to Ballack's fees, however, Weatherby was ordered to pay half, and its counsel was ordered to pay the other half. On appeal, Weatherby argued that there was sufficient evidence to raise an inference that Ballack was competing with Weatherby, and the trial court erred, therefore, in finding the case frivolous and awarding fees.

Fees may be awarded under Florida's frivolous litigation statute when there is an absolute lack of justiciable issues of either law or fact. The frivolousness of a claim may be measured when it is initially brought or at any time before trial. Thus, a claim may not be frivolous when it is initially filed, but it may become so thereafter. In that instance, the failure to dismiss a party when it becomes evident there is no longer a justiciable claim or defense may subject a losing party to a fee award under the statute. Here, the appellate court held that when Weatherby initially filed suit, it could have reasonably inferred from the evidence available to it that Ballack and Capital Health were making misrepresentations concerning where Ballack was employed and inferred that she was really working for Capital Health in violation of her employment agreement. The suit, therefore, was not frivolous when it was filed initially. But, after suit was filed and it became clear from the deposition evidence that Ballack was working for Capital Finance recruiting accountants, and Weatherby had no evidence whatsoever to substantiate its claims, the justiciable issues were resolved and the case was frivolous from that point forward. Under the statute, fees may be assessed against the losing party's attorney when the court finds not only that there were no justiciable issues of law or fact, but also that the attorney did not act in good faith. The trial court found that plaintiff's counsel did not act in good faith in filing and pursuing this case, and the appellate court agreed there was substantial evidence in the record to support that finding.

The trial court's order assessing the defendants' fees against Weatherby and as regards the claims against Ballack, Weatherby's attorneys, was affirmed. The case was remanded, though, for a determination of the amount of those fees from the date after the filing of suit that the court determined Weatherby and its counsel knew it was frivolous.

## **JURY TRIAL MAY BE AVAILABLE ON A FRAUDULENT CONVEYANCE CLAIM**

Florida has adopted the Uniform Fraudulent Transfer Act. The possible remedies for a violation of the Act, which are enumerated in the pertinent Florida statute, are equitable. Where

a right or remedy is equitable in nature, there is no right to a jury trial. A provision of the statute also provides, however, that in addition to the equitable remedies specifically enumerated, a movant may be entitled to any other relief the circumstances may require. In Hansard Construction Corporation v. Rite Aid of Florida, Inc., the court held that this catchall provision was sufficiently broad to encompass a monetary judgment sought by a plaintiff. Thus, one who seeks monetary damages for a fraudulent conveyance pursuant to the statute's catchall provision seeks a traditional legal remedy and therefore, according to this court, is entitled to a jury trial on the claim.