

LIEN CLAIMS, ATTORNEYS' FEES AND SETTLEMENT OFFERS: CLEAR AS MUD

Construction Law Section

Chairs: Timothy C. Ford, Hill Ward Henderson, and Jason J. Quintero, Carlton Fields, P.A.



Prognosticating entitlement to attorneys' fees in lien claims is akin to predicting the weather. While the "prevailing party" in an action brought to enforce a lien may recover reasonable attorneys' fees, *Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194 (Fla. 2009) clouds "prevailing party" status with uncertainty.

Supplanting the "net judgment" rule, *Trytek* ordained the "significant issues" test as the standard to determine "prevailing party" status. Under this rule, the owner/defendant may be the "prevailing party" even if the contractor/lienor obtains a judgment. *Id.* at 1201. *Trytek* also allows the court to determine that neither party is the "prevailing party," relieving the previously mandatory decision. *Id.* at 1203.

Predicting prevailing party status only becomes more difficult when there has been a settlement offer from the owner—either through a simple settlement offer—or one pursuant to section 768.79, Florida Statutes. If the former, then the "litigant must have recovered an amount exceeding that which was earlier offered in settlement of the claim" to recover fees. *C.U. Assocs., Inc. v. R.B. Grove, Inc.*, 472 So. 2d

1177, 1179 (Fla. 1985). In *C.U.*, the Court held that the rejection of a pre-trial settlement offer of the entire unpaid balance precluded the lienor from recovering attorneys' fees as the "prevailing party." *Id.*

However, to trigger this preclusion, some courts have held that the settlement offer must come before suit. *See Grant v. Wester*, 679 So. 2d 1301, 1308 (Fla. 1st DCA 1996); *All-Brite Aluminum, Inc. v. Desrosiers*, 626 So. 2d 1020, 1022 (Fla. 2d DCA 1993). Otherwise, the defendant could offer the disputed amount on the eve of trial when the lienor had already incurred significant attorneys' fees.

If the offer is made pursuant to section 768.79 and Rule 1.442, then an interesting scenario can occur if the plaintiff obtains a judgment less than 75% of the offer. For example, if a lienor files an action on a \$100,000 claim of lien and the defendant serves a proposal for settlement of \$50,000, a potential quagmire occurs if the lienor obtains a judgment for \$37,499 or less. Under *Trytek*, the court could determine that either or neither party is the "prevailing party."

If the contractor is the "prevailing party," then he or she



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would undoubtedly obtain fees. Notwithstanding section 713.29, Florida Statutes, under *White v. Steak and Ale of Fla., Inc.*, 816 So. 2d 546 (Fla. 2002), all pre-offer costs and fees a lienor would be entitled to as the "prevailing party" would catapult the judgment above the 75% recovery threshold, meaning, if the court held that the lienor was the "prevailing party," then the pre-offer attorneys' fees

would be added to the judgment to determine whether the judgment obtained exceeded the 75% threshold. If, however, the court were to hold that either the owner was the "prevailing party" or neither party was the "prevailing party," then the owner would be entitled to fees under section 768.79 and Rule 1.442.

In sum, predicting fee recovery in lien claims is extremely difficult and is only more complex when accompanied by settlement offers. The only certainty is uncertainty.

Advise clients to bring an umbrella even on the sunniest of days.



Author: T. Bennett Acuff, Hill, Ward, Henderson