

Larry R. Fleurantin & Manu L. Davidson Co-authored article published in Florida Bar Journal

Attorneys' Fees on Appeal: Misapplication of the Law of the Case Doctrine Raises Procedural and Substantive Due Process Concerns

MIAMI - Feb. 26, 2016 - [PRLog](#) -- The authors contend that an appellate court should not grant or deny entitlement to appellate fees without the benefit of the trial court's ruling on the validity of a proposal for settlement or contractual agreement because entitlement may depend on the trial court's resolving factual issues. Thus, ruling on entitlement to appellate fees without the benefit of a developed trial court record raises procedural and substantive due process concerns. The authors conclude that if the appellate court decides to grant a motion for appellate fees in reviewing the final judgment, then the court should grant fees conditioned upon the trial's court finding that the proposal for settlement or contractual agreement is valid.

Appellate court orders deciding entitlement to fees without the benefit of a developed record raise substantive due process issues with profound consequences, in particular because such fee orders deprive litigants of substantive due process, as they require litigants to lose a significant property interest by paying their adversary's attorneys' fees for the underlying trial and subsequent appeals. The problem is that sometimes there is no underlying legal basis for attorneys' fees when the trial court finds a proposal for settlement was not made in good faith.²⁵ But a party should not be deprived of its due process right to a meaningful, full, and fair hearing before it is held liable for its opponent's attorneys' fees.

An appellate court should not grant or deny entitlement to appellate fees without the benefit of the trial court's ruling on the validity of a proposal for settlement or contractual agreement because it is premature for the appellate court to rule on a motion for attorneys' fees without the benefit of a developed record. If the appellate court decides to grant a motion for appellate fees in the first appeal, then the court should grant fees conditioned upon the trial court's finding that the proposal for settlement or contractual agreement is valid. Otherwise, appellate orders granting fees unconditionally, when the issue of entitlement has not been decided at the trial court, will infringe on litigants' rights to procedural and substantive due process.

Media Contact

Larry R. Fleurantin
Managing Partner
***@fleurantinlaw.com
305-944-7220

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| Source | Fleurantin, Francois & Antonin, P.A. |
| City/Town | Miami |
| State/Province | Florida |
| Country | United States |
| Industry | Business |
| Tags | Law , Appellate Law , Attorneys Fees |
| Link | https://prlog.org/12537054 |



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