Trial Law TIPS

Roy D. Wasson's
TIP #69

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Offers of Judgment/Proposals for Settlement

A Proposal For Settlement, also known as an Offer of Judgment, can be a useful tool to encourage settlement in that it exposes the offeree to liability for the offeror's attorneys fees if the offer is rejected and the offeror then attains a more favorable result at trial. The law has evolved rapidly over the last several years in many areas of concern to those serving or receiving an OJ/PFS. Some of those areas of evolving law—such as the cases involving whether an OJ/PFS is reasonable—are beyond the scope of this Trial Law Tip. However, there are a few procedural requirements that are likely to be involved in most cases where the validity of an OJ/PFS is being litigated. Therefore, this Tip focuses on some of those common procedural questions.

The form and timing requirements of an OJ/PFS are established by Fla. R. Civ. P. 1.442 and section 768.79, Fla.

Stat. In determining the validity of an OJ/PFS, whether you are the recipient or the offeror, you must keep in mind that the Florida Supreme Court has "specifically found the language of the statute and rule must be strictly construed because the Offer of Judgment statute and rule are in derogation of the common law rule that each party pay its own fees." *Campbell v. Goldman*, 959 So. 2d 223, 226 (Fla. 2007). Make sure that your OJ/PFS meets the timing requirements of the rule, that it states the offer with specific specificity, and complies with the other requirements of the recent case law. Some of the key areas of concern are addressed in more detail below.

Timing of an OJ/PFS

Subsection (b) of Rule 1.442 establishes the timing requirements for a valid OJ/PFS. The earliest that such an offer or a proposal may be served depends upon whether it is being served by the plaintiff or by the defendant. A defendant may serve an OJ/PFS upon the plaintiff "no earlier than ninety days after the action has been commenced." That means that an OJ/PFS may be served by the defendant even before the defendant has been served with the summons and complaint, because the action has been "commenced" upon the filing of the complaint. *See* Fla. R. Civ. P. 1.050. On the other hand, "[a] proposal to a defendant shall be served no earlier than ninety days ***after service of process*** on that defendant." Fla. R. Civ. P. 1.442(b) (emphasis added). Therefore, calendar your earliest date for serving a proposal after you see a return of service, not from the filing of your complaint.

A more complicated problem arises with the question of the latest date that an OJ/PFS may be served. The rule states that the latest date is no "later than 45 days before the date set for trial or the first day of the docket in which case is set for trial, whichever is earlier." However, as we all know, most cases are not reached when first set for trial, so the question arises whether a continuance will re-start that time period.

In *Schussel v. Ladd Hairdressers, Inc.*, 736 So. 2d 776 (Fla. 4th DCA 1999), the defendant sought a large attorneys fee award because it had made a $10,000 Offer of Judgment and prevailed at a jury trial on the plaintiff's slip-and-fall claim. The trial started on February 12, 1998 and the Offer of Judgment had been served on July 24, 1997), more than six months before trial. However, the Fourth District held that the defendant was not entitled to recover attorneys' fees on its Offer of Judgment because the case had initially been set to commence on the three-week docket beginning August 18, 1997, just twenty-five days after the OJ/PFS was served.

The Court held that the forty-five-day period under rule 1.442(b) refers to when the case is initially set for trial, not when the case actually goes to trial. The Court rejected the defendant's argument "that the granting of the continuance breathed life back into an otherwise untimely Offer of Judgment." *Id*. at 778.

There does not appear to be any appellate decision in Florida to the contrary, and the *Schussel* case has been cited with approval as recently as February 2008. *See Columbia/JFK Med. Ctr. v. Sangounchitte*, 2008 Fla. App. LEXIS 1837 (Fla. 4th DCA Feb. 13, 2008). Therefore, make sure that the OJ/PFS is timely using the initial trial date as the benchmark, not when the case actually goes to trial.

Citation of Applicable Law

One of the requirements of Rule 1.442 is that an OJ/PFS "shall identify the applicable Florida law under which it is being made." Fla. R. Civ. P. 1.442(c)(1). That does not mean simply citing the rule in your proposal. Section 768.79(2)(a) requires that an OJ/PFS must "state that it is being made pursuant to this section." The Florida Supreme Court has expressly held that the failure to cite the statute in the OJ/PFS prevents it from being enforced. *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007) ("this is mandatory for this penal, fee-shifting provision"). To be safe, you should cite both Rule

1.442 and the statute in any OJ/PFS you prepare and contest the enforcement of any you receive which omit reference to either of those provisions of law.

Specificity Requirement When Release Proposed

Although neither Rule 1.442 nor section 268.79 refer to a release being provided as part of an OJ/PFS, the courts that have decided the issue have agreed that the "fact that plaintiffs are required to release defendant for all claims which had accrued as of the date of the Proposal For Settlement does not invalidate the Proposal For Settlement." *See Board of Trustees v. Bowman*, 853 So. 2d 507, 509 (Fla. 4th DCA 2003). However, the case law is clear that the language of any such release must be specifically stated in the proposal, and that the release's language cannot be ambiguous.

An OJ/PFS that merely mentions the requirement of a release, without specifying the particular language of the release is invalid. *Sink v. Emerald Hill Owners Ass'n., Inc.*, 903 So. 2d 1047 (Fla. 1st DCA 2007) (reversing award of attorneys' fees "because the Proposal For Settlement was invalid in that it failed to state with sufficient particularity the terms of the release upon which the settlement offer was conditioned"). Thus, unless the OJ/PFS states the terms of the release within its four corners, or attaches the proposed release, the proposal will be invalid. Because plaintiffs typically do not have any reason to propose that a release be signed, you may think that it is better to state in your OJ/PFS that "no release is being proposed."

Even attaching the proposed the form of a release will not guarantee that the OJ/PFS will be valid. For example, in *Nichols v. State Farm Mut.*, 851 So. 2d 742 (Fla. 5th DCA 2003), the Court held that a Proposal For Settlement was ambiguous and unenforceable because the general release associated with it could have required the plaintiff to release a first party insurance claim against the defendant UM carrier, in addition to the UM claim. The Court held that the "[t]he

terms and conditions of a proposal should be devoid of ambiguity, patent or latent." *Id*. at 746.

Even using standard language of a general release will not guarantee that it will be valid under the case law. In *Sparklin v. Southern Industrial Associates, Inc.*, 960 So. 2d 895 (Fla. 5th DCA 2007), the Court reversed an award of attorneys' fees to the defendant which had been based on an OJ/PFS requiring the plaintiff to enter into a release, the form of which was attached to the proposal. The Court held that the release language was ambiguous because "accepting the Offer of Judgment might well have had the effect, unintended or otherwise, of releasing another party not named in release" due to boilerplate language contained in the release. *Id*. at 898.

Requirement of Apportionment

The law is crystal clear that an OJ/PFS may not be to or from multiple parties without apportioning the amounts to be paid or received by each individual party. In *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003), the Florida Supreme Court held that "under the plain language of rule 1.442(c)(3), an offer from multiple plaintiffs must apportion the offer among the plaintiffs."

Further, an OJ/PFS from the plaintiff to multiple defendants must set forth the amount that each defendant is required to pay, thanks to my loss in *Lamb v. Matetzschk*, 906 So. 2d 1037 (Fla. 2005). The *Lamb* decision demonstrates just how strictly the Florida Supreme Court interprets the rule and the statute, because the OJ/PFS served in that case was for a undifferentiated amount within the policy limits to two defendants, one of whom was actively negligent and the other of whom was only vicariously liable as the owner of the vehicle being driven by the other defendant. There did not appear to be any way that the amount of a verdict could be different as against one defendant or the other, but the failure

to apportion the settlement amount rendered the OJ/PFS invalid and unenforceable.

Occasionally there are valid reasons for wanting to accept less than the full settlement value from one of multiple defendants, so the apportionment requirement does not impose a great burden upon plaintiffs in that situation. However, in the typical case we want to propose a global settlement to conclude the entire case. In that situation, I have been preparing a separate OJ/PFS for each defendant, making each of them in the full settlement amount my client will accept to conclude the entire case. Although directing each OF/PFS only to an individual defendant, I recite in each one that—if it is accepted and the settlement amount is paid—I will dismiss the case as to all defendants involved in the lawsuit.

Although not yet tested in an appellate decision, I hope that my suggested solution satisfies the requirement of apportionment while allowing us to enter into global settlements under the OJ/PFS procedure. Please let me know if you have other suggested approaches for complying with the apportionment requirement while still settling the entire case.

Liability for Fees following Voluntary Dismissal

A question that arises from time-to-time is whether a plaintiff may voluntarily dismiss a lawsuit following receipt of an otherwise-valid OJ/PFS without exposing the plaintiff to liability for fees. There was split of authority between the district courts of appeal concerning that question, but the split has been resolved by the Florida Supreme Court. In *MX Investments, Inc. v. Crawford*, 700 So. 2d 649, 642 (Fla. 1997), the Court held that "only when a plaintiff's voluntary dismissal is with prejudice or is a second voluntary dismissal is the defendant entitled to attorney[s] in accord with section 768.79, Florida statutes."

Conclusion

Understanding the nuances of the law applicable to Offers of Judgment/Proposals for Settlement is not easy in light of the multitude of things to consider and the seemingly-unusual holdings of many of the cases in this area. Use of the OJ/PFS as a tool to assist your client will require a great deal of research, so don't just stop by reading this Tip but, . . .

Keep Tryin!

Roy

WASSON & ASSOCIATES, CHARTERED
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com