Proposals for Settlement Update
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As in years past, Section 768.79, Florida Statutes (Offer of Judgment “Statute”) and Rule 1.442, Florida Rules of Civil Procedure (Proposals for Settlement “Rule”) continue to be the red-headed stepchildren of Florida statutes and procedural rules. Often blasted by appellate and federal court jurists because the dynamic duo has failed to magically vaporize crowded dockets by producing a sea of settlements, both the Statute and Rule remain a favorite target for criticism. However, when read in their entirety, 2012 published appellate and federal district court decisions addressing the Statute and Rule actually reinforced the well-known fundamentals of a valid proposal and brought increased clarity on how to prepare one.¹

By way of example, two Florida Supreme Court decisions held that when parties agree to be bound by the laws of a different forum, the Statute will not be available in their lawsuit, unless a sufficient public policy concern exists to override this choice of law. Additionally, the Statute and Rule only pertain to claims for monetary damages. The appellate and federal district court decisions included the reversal of both an award of $0.00 attorneys’ fees for an otherwise proper proposal as well as the denial of attorneys’ fees in response to a proposal for $1.00; analyzing whether the release must be physically attached to the proposal; how to count the 45 days; and when a joint proposal is permissible.

In February 2012, the Florida Supreme Court, in answering a certified question from the United States Court of Appeals for the Eleventh Circuit, held that the Statute is substantive for both constitutional and conflict of law purposes. Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So. 3d 73, 80 (Fla. 2012). However, the Statute was inapplicable and the proposal necessarily invalid because the parties contractually agreed to be bound by the substantive law of a different forum. Moreover, the absence of a sufficient public policy concern protected the parties’ freedom to agree to be governed by the substantive law of another forum. Stated another way, had a sufficient public policy concern existed in this case, the Statute would have applied notwithstanding the parties’ choice of law selection.

The Florida Supreme Court returned to the Statute a year later, again answering certified questions regarding application of the Statute from the Eleventh Circuit. In Diamond Aircraft Indus., Inc. v. Horowitz, No. SC11-1371 (Fla. Jan. 10, 2013), the Florida Supreme Court initially determined that the Statute did not apply in cases which seek equitable relief in the alternative, or in addition to, monetary damages, and, furthermore, that there was no exception for circumstances in which the equitable claim seriously lacks merit. Secondly, if the proposal purports to satisfy all claims, including a claim made for attorneys’ fees, but the proposal fails to expressly state whether attorneys’ fees are included within the proposal, the proposal necessarily fails. Notably, the Florida Supreme Court hinted that the proposal in this case may have survived had it solely been targeted at the monetary claim, which is permissible, and not both the monetary and non-monetary claims.

The District Court of Appeal of Florida, Second District, produced a thorough analysis of the application of the Statute and Rule when it reversed the trial court's determination that a reasonable attorneys’ fee award was $0.00 despite the validity of the proposal. Braaksma v. Pratt, No. 2D12-214, 2012 WL 5373433 (Fla. 2d DCA Nov. 2, 2012).² According to the trial court, rejection of the proposal made to a single defendant did not delay the litigation because a proposal was not made to all the defendants. The appellate court reversed the trial court because once it is determined that a party complied with the technical terms of the Statute and Rule, a court may disallow fees only upon a finding that the proposal was not made in good faith. Absent such a finding, then the court must further determine the reasonableness of the amount of the award. In order to do that, a court must consider, in addition to all other relevant criteria, the following factors: (1) the then apparent merit or lack of merit in the claim; (2) the number and nature of proposals made by the parties; (3) the closeness of questions of fact and law at issue; (4) whether the person making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer; (5) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting non-parties; and (6) the amount of the additional delay, cost and expense that the person making the proposal reasonably would be expected to incur if the litigation should be prolonged.

Notably, the Second DCA also took issue with two Third DCA decisions (Segundo v. Reid, 20 So. 3d 933 (Fla. 3d DCA 2009) and Cent. Motor Co. v. Shaw, 3 So. 3d 367 (Fla. 3d DCA 2009)), as being inconsistent with the seminal Florida Supreme Court decision in TGI Friday’s, Inc. v. Dvorak, 663 So. 2d 606, 612 (Fla. 1995), which stands for the proposition that once the technical terms of the Statute and Rule are satisfied, a court may disallow fees only upon a finding that the proposal was not made in good faith. The appellate court further noted that the trial court could award a reduced amount of attorneys’ fees based upon the aforementioned factors but could not award zero dollars.

The Second DCA reversed another trial court’s denial of attorneys’ fees on the grounds that the proposal was not made in good faith. McGregor v. Molnar, 79 So. 3d 908 (Fla. 2d DCA 2012). The injured

¹ Please note that multiple decisions identified herein are subject to withdrawal or revision given their recent release.

² As this opinion has not been released for publication in the permanent law reports, it is subject to revision or withdrawal.

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motorist served a proposal solely upon the employee driver and not the employer defendant as well. The trial court determined the proposal was not made in good faith because: (1) the proposal was not intended to conclude the litigation entirely as to both the driver and the driver’s employer; (2) the proposal was only made in order to provide funds to continue with the litigation; and (3) the employee’s failure to accept the proposal caused no additional delay or cost, i.e. the case continued. The appellate court disagreed on all three grounds. The appellate court found that the “question of whether a proposal was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make his offer and made it with the intent to settle the claim against the offeree should the offer be accepted.” McGregor 79 So.3d at 911, (quoting Wagner v. Brandeberry, 761 So. 2d 443, 446 (Fla. 2d DCA 2000)). Having found that the proposal was made in good faith, the next step was for the trial court to consider the aforementioned six (6) factors listed in the Brawksma decision supra, in order to determine the reasonableness of the attorneys’ fee award.

In multiple appellate opinions courts have addressed the common issue of whether the release must be physically attached to the proposal itself. The short answer is “no,” provided the terms of the release are contained within the proposal itself. Clearly, however, the better practice is to physically attach the written release to the proposal to remove ambiguity.

In Ziadie v. Feldbaum, 84 So. 3d 435 (Fla. 4th DCA 2012), the Fourth DCA reversed the trial court’s award of attorneys’ fees because the indemnity or confidentiality agreements were neither attached to the proposals nor were the terms included within the proposals. Thus the proposals did not satisfy the particularity requirement of the Rule which requires the settlement proposals to “state with particularity any relevant conditions” and “non-monetary terms.” Ziadie, 84 So. 3d at 436, (quoting State Farm Mut. Auto Ins. Co. v. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006)).

Later in the year, the Fourth DCA again relied on Nichols to invalidate a proposal. Lyons v. Chamoun, 96 So. 3d 456 (Fla. 4th DCA 2012). Notably, the appellate court reversed the trial court’s award of attorneys’ fees to the plaintiff because the terms of the release were not adequately defined, including whether the driver was included in the proposed release. The appellate court held that if the release is not attached to the proposal, than the proposal itself must satisfy the requirements of the Rule and eliminate any reasonable ambiguity about its scope. “If ambiguity within the proposal could reasonably affect the offeree’s decision, the proposal will not satisfy the particularity requirement.” Lyons, 96 So. 3d at 458, (quoting Nichols, 932 So. 2d at 1079.)

A federal district court opinion went the other way on a somewhat similar issue. U.S. Specialty Ins. Co. v. Burd, No. 6:09-cv-231-Orl-31KRS, 2012 WL 3242997, (M.D. Fla. Aug. 8, 2012). The court granted the defendant’s motion for attorneys’ fees despite the plaintiff’s objection that it was fatally ambiguous with respect to the phrase “general release.” The district court found that the only claims extinguished were the ones related to the lawsuit and that the insurer’s objection that other claims were being released was not reasonable. The opinion quoted the Florida Supreme Court’s holding in Nichols that “it may be impossible to eliminate all ambiguity. The rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification.” Burd, at 1, (quoting Nichols, 932 So. 2d at 1079).

In 2012, courts addressed another common issue - the impact of joint proposals. Notwithstanding the amendment to the Rule permitting joint proposals for parties alleged to be solely vicariously liable (effective January 1, 2011, and thus is inapplicable to lawsuits filed prior to that date), the better practice remains to isolate a single offeror to a single offeree whenever possible. That is not to say that joint proposals are never permissible as analyzed below even before the amendment.

The Fourth DCA affirmed the trial court’s award of attorneys’ fees to the defendants even though the defendants’ proposal did not apportion their proposal. Pratt v. Weiss, 92 So. 3d 851 (Fla. 4th DCA 2012). The difference in this case was that the proposal was made on behalf of the single hospital entity allegedly responsible, albeit the single hospital was owned by two of the named parties.

In Health First, Inc. v. Cataldo, 92 So. 3d 859 (Fla. 5th DCA 2012), the plaintiff served virtually identical proposals for settlement on both defendants, but each proposal was nevertheless conditioned on the dismissal of both defendants. The defendants argued that the proposals were ambiguous because more than one proposal was made, making it uncertain as to whether both proposals had to be accepted. The appellate court affirmed the trial court and held the plaintiff’s proposals were valid, enforceable and not ambiguous. Importantly, the proposals were not invalidated because of the plaintiff’s promise to release the remaining defendants as a nonmonetary term of the settlement and it did not transform the proposal into an undifferentiated joint proposal.

In another case, the Second DCA reversed the trial court’s denial of plaintiffs’ motion for attorneys’ fees because it was a joint proposal for $25,000.00 that could only be accepted by the defendant if it dismissed claims against both the husband and wife plaintiffs. Wolfe v. Culpepper Constr., No. 2D10-3228, 2012 WL 5935633 (Fla. 2d DCA Nov. 28, 2012). However, the joint proposal expressly stated that $12,500.00 would be paid by the wife and $12,500.00 would be paid by the husband. The court determined the joint proposal satisfied all the statutory and rule requirements thus rendering it valid.

Similarly, while the joint proposal may be valid, in order ultimately to be compensated, the attorney must be able to establish the work done for each claim and client. The appellate court reversed the trial court’s award of attorneys’ fees for the

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sion or withdrawal.
Patent trolls are much more than a nuisance, and many companies are now finding themselves in the position of having to respond to demands from patent trolls. Also commonly called a patent holding company or a non-practicing entity (“NPE”), a patent troll is a company that owns patents but does not make, use or sell any products covered by its patents. Rather, a patent troll generates revenue by enforcing its patent rights through licenses, litigation settlements or damage awards.

The cost to defend against patent trolls is real and significant. A recent article from two faculty members at the Boston University School of Law looked at the cost to defend suits brought by NPEs. 1 The authors found that, in 2013, NPEs filed 5,842 lawsuits against 2,150 different companies. The total cost to defend against these lawsuits and other demands that did not reach litigation was over $29 billion. That should convince any in-house counsel that a demand from a patent troll must be taken seriously.

Those numbers are not skewed toward large companies. Small and mid-sized companies face risks too. According to the authors, approximately 59% of the cases were brought against small to mid-sized companies who bore 37% of the aggregate $29 billion. The average cost to defend a lawsuit was $420k for a small to mid-sized company and $1.52 million for a large company. The average costs for the companies to settle these cases were $1.33 million and $7.27 million, respectively.

A company that receives a demand from a patent troll may be faced with defending a product or product line from the troll’s patents, and the cost to just defend the case can be substantial. An ultimate finding of infringement could expose the company to monetary damages and a permanent injunction barring it from making and selling a product or even an entire product line. 2 Even worse, a finding of willful infringement may result in treble damages and, in exceptional cases, having to pay the patent troll’s attorney fees. 3

Responding to Patent Trolls

By Brian R. Harris, Akerman Senterfitt LLP

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A. Lay the Foundation for an Effective Response

With so much potentially on the line for a company, it would be a very risky strategy to blindly ignore a first contact from a patent troll and hope that nothing comes of it. A more prudent course of action is to

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2 35 U.S.C. §§ 283, 284; eBay, Inc. v MercExchange, 547 U.S. 388 (2006) (explaining that injunctions in patent cases are determined by traditional equitable factors, and a district court cannot deny a patent holder’s motion for injunctive relief solely because the patent holder willingly licenses its patents or because it lacks commercial activity in practicing the patents).