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## TO ATTACH OR NOT TO ATTACH - THAT IS THE QUESTION Releases in Proposals for Settlement

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In 2006, the Supreme Court of Florida shed light on one of the many unsettled issues surrounding proposals for settlement—whether a party must attach the release to the proposal for settlement. In *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067 (Fla. 2006), the court held that the proposing party must either attach the proposed release or at the very least describe the proposed release with particularity:

We agree that a summary of the proposed release can be sufficient to satisfy rule 1.442, as long as it eliminates any reasonable ambiguity about its scope. 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. If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement.

We caution that rule 1.442 is not intended to revolutionize the language used in general releases. Traditionally, general releases have included expansive language designed to protect the offeror from unforeseen developments or creative maneuvering by the other party. Such language can be sufficiently particular to satisfy rule 1.442.

The Florida Supreme Court then found State Farm's summary of its proposed release ambiguous and refused to enforce its proposal for settlement:

The proposal stated, at the outset, that it would be "a full and final satisfaction and settlement of any and all of Nichols's claims and causes

of action in, or arising out of, the above-styled case." Then it provided that Nichols would be required to "execute a General Release in favor of State Farm which will be expressly limited to all claims, causes of action, etc., that have accrued through the date of Nichols's acceptance of this Proposal." At the time of the offer, Nichols not only had a pending PIP claim against State Farm but also a UM claim arising from the same accident and of greater value. Although that claim was not technically "in . . . the above-styled case," it could have been viewed as a claim "arising out of . . . the above-styled case," because it arose from the same set of facts. State Farm's use of the broad phrase "all claims, causes of action, etc." exacerbated this ambiguity.

Following the Florida Supreme Court's ruling, *Papouras v. Bellsouth Communications, Inc.* 940 So.2d 479 (Fla. 4th DCA 2006), rejected a plaintiff's proposal for settlement that simply recited without any further detail that the plaintiff would "execute a full release." The dissent pointed out that because the plaintiff had only one claim against the defendant, the language stating that the plaintiff would execute a full release should not have been considered ambiguous in that instance.

In contrast, the same court in *Palm Beach Polo Holdings v. Madsen*, 32 Fla.L. WeeklyD1077 (Fla. 4th DCA April 25, 2007) recently enforced a plaintiff's proposal for settlement that apparently did not attach the proposed release but summarized what the offeror was willing to extinguish. The operative language that the court approved stated:

"This offer, if accepted, will settle all pending claims in this action against Defendant, including claims for punitive damages, interest, costs and attorneys' fees (whether contractual or statutory)."

The Fourth District concluded: "It is clear from Madsen's proposal for settlement that if Holdings had accepted Madsen's proposal, it would have ended the litigation and disposed of all claims. We fail to see any ambiguity or lack of particularity in Madsen's proposal for settlement and therefore affirm."

A word of caution—if you do attach the release to your proposal for settlement, proof-read it! In *Stasio v. McManaway*, 936 So.2d 676 (Fla. 5th DCA 2006), the proposal for settlement stated that the settlement amount was \$60,000 but the attached release recited \$59,000. The appellate court refused to allow an award of fees on the rejected proposal because this discrepancy created "a patent ambiguity," notwithstanding the court's acknowledgement that the discrepancy may very well have been a typographical error.

Last but not least, just a reminder that an offer of settlement from a defendant to multiple plaintiffs requires apportionment of the amount and terms offered to each plaintiff: *Allstate Indemnity Co. v. Hingson*, 808 So.2d 197 (Fla. 2002). And, the same goes for proposals for settlements from plaintiffs, even if one of the defendants is only vicariously liable: *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005).

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