

## **OFFER OF JUDGMENT REQUIREMENT FOR PARTICULARITY**

RCP 1.442 has probably generated more appellate opinions than any other rule. A recent Second District opinion which highlights a prior Supreme Court opinion concerning the particularity necessary with respect to the kind of release that must be signed if a proposal for settlement is accepted is a case in point. Darrow v. Gilmer McCrary Heitman, 35 Fla. L. Weekly D2417 (Fla. 2<sup>nd</sup> DCA, Oct. 29, 2010) was a suit over real property. Proposals for settlement were made by the defendant to each of the plaintiffs offering a nominal sum and conditioning the acceptance upon plaintiffs' signing of "a release" and dismissal of the action. Defendants won and sought attorney's fees under RCP 1.442 and the appellate court refused to award those fees on the grounds that the proposal for settlement did not meet the requirements of RCP 1.442 with respect to particularity because the defendant failed to indicate whether each plaintiff was to sign a general or specific release and did not summarize the language to be used in the release. The Second District relied upon State Farm Mutual Ins. Co. v. Nichols, 932 So. 2d 1067, 1078 (Fla. 2006).

Nichols was a suit over PIP benefits won by the insurer. The proposal for settlement was for a nominal amount which included a requirement that the plaintiffs "execute a general release in the favor of State Farm which will be expressly limited to all claims, causes of action, etc., that have accrued through the date of Nichols acceptance of this proposal."

In addition to the PIP claim that was the subject of the litigation, plaintiffs also had an uninsured motorist claim pending. After losing the PIP suit plaintiffs argued that the terms of the proposal for settlement conceivably included a

release of the UM claim as well as the PIP claim and, therefore, failed to meet the particularity requirements of RCP 1.422.

That rule requires that all proposals for settlement “state with particularity any relevant conditions” and “state with particularity all non-momentary terms.” (Fla. R. Civ. P. 1.442(c)(2)(C)-(D)).

The Supreme Court agreed with the District Court that the language used by State Farm in its proposal for settlement failed to meet the requirements of Fla. R. Civ. P. 1.442. At 1078-79, the Court held:

We think it clear that when an offeror insists that an offeree sign a general release, the release becomes a stipulation or prerequisite of the contract. Even if the release does not constitute the essence of the settlement proposal-and thus a condition under subdivision (c)(2)(C) of the rule-at the very least it qualifies as a nonmonetary term under subdivision (c)(2)(D).

Next we consider what degree of particularity the rule requires. Some courts have demanded “that an offeror state *all the terms* of ... any ‘general release’ or, instead, attach a copy of the actual documents themselves to the offer.” *Swartsel*, 882 So. 2d at 453 (emphasis added). In this case, however, the Fifth District interpreted the rule as giving offerors the option of including “either the proposed language of the release or a summary of the substance of the release.” *Nichols*, 851 So. 2d at 746; *see also Palm Beach Polo*, 904 So. 2d at 653 (following *Nichols*); *Boyd*, 890 at 1242 (requiring only a summary ‘sufficient to apprise [the offeree] of its terms’).

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. As the Second District recently explained:

The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

It is important to understand that the basis for the Supreme Court's conclusion cited above was the existence of the uninsured motorist claim along with the PIP claim. By siding with those District Courts who have held that only a summary of the release is necessary, the Supreme Court opened the door to an argument as to whether the summary adequately addresses all concerns possible relative to the preciseness of the language necessary under the rule.

The Supreme Court explains at 1079

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.

Each case must be looked at on its particular facts. It is easy to understand why the Supreme Court held as it did in State Farm v. Nichols. A proposal for settlement conditioned upon a release which might wipe out not only the pending PIP claim but additionally an uninsured motorist claim clearly does not satisfy the requirements of the rule. The decision in Darrow v. Gilmer is less clear. There the Second District based its denial of attorney's fees on the theory

that a general release in a case involving alleged defects to property and misrepresentation of the condition of the property theoretically might waive the married plaintiffs' claim of joint ownership. That, in the writer's opinion, is a bit of a stretch.

The safest course is not to rely upon a summary of the release and to merely attach the proposed release to a proposal of settlement. That may or may not have cured the problem either in the State Farm case or Darrow. The problem is that in an actual settlement scenario, the parties negotiate the language of the release and any concerns on the part of the releasor are handled at that time. When a proposal or offer for settlement is made, no such negotiations occur. Nevertheless, these cases raise an issue that every attorney making a proposal under RCP 1.442 must consider.

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