

Partial Proposals May Run Afoul of Supreme Court

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The Florida Supreme Court in November 2013 made a notable change to Florida's Proposal for Settlement rule, generally gutting the ability of a party to serve a partial Proposal for Settlement. The new rule invalidates partial Proposals for Settlement served after January 1, 2014—unless the Proposal is only partial in that it expressly excludes attorney's fees. While partial Proposals may have been a creative tool in the past for multi-count complaints, a Florida litigant's use of this strategy now may run afoul of the Supreme Court's modified Rule 1.442.

In terms of background, a Proposal for Settlement is not merely an offer to settle. It is a formal litigation tool with strict guidelines. Designed to make litigation shorter and less costly, it punishes those who fail to settle when a reasonable dollar offer has been made. Specifically, Florida litigants may, as a result of a Proposal for Settlement, obtain a post-trial sanction of attorney's fees against the other party. The sanction is available if the other party unreasonably failed to settle before trial, which is determined by calculations after trial concludes. A party unreasonably failed to settle if such party did not accept a pre-trial Proposal for Settlement that the proposing party later "beat" by 25 percent or more at trial.

The controlling statute and rule for such Proposals for Settlement are Section 768.79, Florida Statutes, and Rule 1.442, Florida Rules of Civil Procedure. This statute and rule, prior to the change at hand, permitted a party to serve a Proposal for Settlement that would only resolve part of the lawsuit if accepted. For

example, a party in a product liability suit could serve a Proposal for Settlement that sought to resolve all negligence counts against another party, but which did not resolve any strict liability counts against the other party. Effective January 1, 2014, such a partial Proposal for Settlement is invalid, meaning the party now needs to serve a Proposal for Settlement that would resolve all negligence and strict liability causes of action.

The history behind the Proposal for Settlement change is straightforward. The Florida Bar's Standing Committee on the Florida Rules of Civil Procedure determined that Rule 1.442 should be consistent with the statute, §768.79, which states that Proposals "shall be construed as including all damages which may be awarded in a final judgment." The final judgment reference of course suggests that all counts of a complaint should be taken into account. The new Rule 1.442 requires that a party serving a Proposal for Settlement take into account all counts of a complaint.

Various Florida appellate court decisions previously supported partial Proposals for Settlement. In the Second District Court of Appeals' 2002 *Lucas v. Calhoun* case, the plaintiff sued the defendant for both bodily injury and property damages arising from a motor vehicle accident. The appeals court in such case noted that the Plaintiff could have settled only the bodily injury claim (and not the property damages claim) via partial Proposal for Settlement if the Proposal had been written more clearly. In the First District Court of

Appeals' 2004 *Connell v. Floyd* case, the plaintiff sued the defendant regarding failure to comply with obligations regarding a real estate sale. The defendant real estate agent counterclaimed (i.e., sued plaintiff in the same lawsuit) for failure to pay commission. The appeals court noted that the defendant could have served a partial Proposal for Settlement for only the plaintiff's claims (and not the counterclaim) if the Proposal had been written with more specificity. In the Second District Court of Appeals' 2000 *Wagner v. Brandeberry* case, the plaintiff sued the defendant regarding a motor vehicle accident. The plaintiff's Proposal was deemed valid, and the appeals court noted that a Proposal need not settle all claims between the parties to the Proposal. The change effective at the beginning of 2014 to the Proposal for Settlement rule is in clear contrast to these prior examples of cases that were supportive of partial Proposals.

The one exception to the new prohibition of partial Proposals for Settlement is that a party may still exclude attorney's fees claims from Proposals. For instance, a malicious prosecution claim is a claim that by definition usually involves attorney's fees. A defendant serving a Proposal in a malicious prosecution lawsuit could exclude attorney's fees from the Proposal. By doing so, the defendant would obtain the immediate benefit and leverage provided by the Proposal for Settlement rule without having to estimate, or specifically determine, the amount of attorney's fees the plaintiff has incurred.



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