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A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

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Proposals for Settlement In Insurance Litigation

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Although proposals for settlement were expected to reduce litigation costs and conserve judicial resources, the actual effect has been the opposite.[1] Proposals for settlement made under Florida Statute § 768.79 and Florida Rule of Civil Procedure 1.442 have, instead, generated significant ancillary litigation and case law.[2] This is particularly true of joint proposals served on multiple offerees.[3]

In litigation involving a property policy, it may be both intuitive and tempting for the insurer to serve a joint proposal for settlement on two named insureds who possess an undivided interest in the insured property. As current caselaw illustrates, however, a great deal of caution must be exercised in drafting a joint proposal for settlement to multiple offerees if it is to survive judicial scrutiny.

Florida Statute Section 768.79 governs offers of judgment, and Florida Rule of Civil Procedure 1.442 delineates the procedures that implement the statutory provision. Rule 1.442(c)(3) authorizes the use of joint proposals and provides as follows:

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Condominium Water Damage Claims

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Water damage claims should be straightforward. However, in recent years, there has been a significant uptick in water damage claims that reach the litigation stage. In condominiums, water damage claims can have disastrous effects. A water loss in an upstairs floor of a home or condominium unit can cause damages well over $100,000.

In the case of condominium units used for vacation or rentals in Florida, it may be weeks before the damage is found. By the time that the leak is detected, the water damage may have spread well beyond the source of the leak, causing extensive property damage and mold to any adjacent units.

Pertinent Statistics

Assignments of benefits ("AOB") also alter the dynamic of water damage claims. According to a CBS news report from August of 2017, the average water damage claim without an AOB is $6,700 compared to $13,750 when the owner signs an AOB to the water remedia-

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> [a] proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

The Florida Supreme Court determined that Rule 1.442(c)(3) "inherently requires that an offer of judgment must be structured such that either offeree can independently evaluate and settle his or her respective claim by accepting the proposal irrespective of other parties' decisions. Otherwise, a party's exposure to potential consequences from the litigation would be dependently interlocked with the decision of other offerees."[4] Accordingly, the *Gorka* Court determined that joint offers conditioned on acceptance by all offerees are invalid.[5]

The *Gorka* Court determined that a joint offer *expressly* conditioned on the mutual acceptance by both offerees is invalid. The application of *Gorka* is less predictable where that condition is not express. A significant reason for that lack of predictability are the two competing standards governing a court's review of a proposal for settlement.

Competing Standards in Adjudging Joint Proposals

On one hand, the Florida Supreme Court has made it clear that the statute and rule must be strictly construed because they are in derogation of the common law in which each party pays its own attorney fees.[6] On the other hand, the Florida Supreme Court cautioned courts against "nitpicking" in determining whether a joint offer is valid.[7] Not surprisingly, courts resolve the tension between "strictly construing" and "not nitpicking" differently, thereby creating uncertainty and unpredictability for the attorney drafting a joint offer.

Strict Application Standards

"Courts resolve the tension between 'strictly construing" and 'not nitpicking' differently"

The First District Court of Appeal addressed a joint proposal to multiple offerees in *Chastain v. Chastain*.[8] In *Chastain*, two defendants served a joint offer on two plaintiffs. The total amount of the offer was $5,002. Each offeror was apportioned $2,500 payable to one offeree, and $1 payable to the other. The proposal provided, in part, that "upon the acceptance of this proposal for settlement, the defendants . . . agree to pay the plaintiffs the amount of $5,002.00 and in accordance with this [proposal for settlement] in return for the plaintiffs dismissing their claims . . . with prejudice . . .".[9]

While conceding that the proposal did not expressly require joint acceptance by both offerees, the *Chastain* court found the proposal invalid. In so doing, the court observed that "[i]t is clear from the proposal in this case that there was one offer in the amount of $5,002 and that the offer . . . was conditioned on joint acceptance by [both offerees]."[10]

Similarly, in May 2018, the Third District Court of Appeal invalidated a joint offer even though it did not expressly require mutual acceptance by both offerees in *Pacheco v. Gonzalez*.[11] In *Pacheco*, a plaintiff served a joint proposal on two defendants. The total amount of the proposal was $300,000 and each defendant was apportioned $150,000 of that amount. Except for the paragraph apportioning their individual monetary responsibility, however, the plaintiff referred to the defendants throughout as the "Pacheco Defendants." The proposal provided:

> 6. Acceptance of this Proposal: Upon acceptance of this offer by the PACHECO DEFENDANTS, Plaintiff and the PACHECO DEFENDANTS shall authorize their counsel to sign and file a stipulation of voluntary dismissal with prejudice in the form attached hereto as Exhibit "A."[12]

In invalidating the proposal for settlement, the *Pacheco* Court acknowledged the "strict construction"

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standard by stating:

> The Florida Supreme Court has made clear that Florida courts must strictly construe the statute and the rule as they "are in derogation of the common law rule that each party pay its own fees." (citations omitted). Moreover, proposals for settlements made under the rule and statute must "be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." (citation omitted). "[A]ny drafting deficiencies [will be] construed against the drafter." (citation omitted).

Both the *Chastain* and *Pacheco* courts found these joint offers were invalid because, although not express, they found the offers "clearly required" mutual acceptance by all offerees.

Application Discouraging Invalidation

However, the Third District Court of Appeal reached the opposite conclusion in another recent case, *Atlantic Civil, Inc. v. Swift.*[13] In that case, the court reviewed a plaintiff's joint offer of $50,000 to two defendants apportioning $25,000 of the total to each. The offer stated:

> ACI proposes that Defendants pay ACI the total amount of FIFTY THOUSAND DOLLARS ($50,000.00) apportioned as follows: from Swift to ACI, the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), and from Key Haven to ACI, the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), in full and complete settlement of the claims identified in paragraph (1) above. [...]
>
> ACI will dismiss this action with prejudice and execute a general release, in favor of Defendants, of the claims identified in paragraph (1) above. Likewise, Defendants will execute a general release, in favor of ACI, of all counterclaims arising from or connected to this action which, if not asserted herein, would be barred by final judgment in this matter.

In analyzing the validity of this offer, the *Swift* Court acknowledged that joint proposals must be strictly construed but also noted that:

> . . . "given the nature of language, it may be impossible to eliminate all ambiguity," and "[t]he rule does not demand the impossible." (citation omitted). Only [i]f ambiguity within the proposal could ***reasonably*** affect the offeree's decision, the proposal will not satisfy the particularity requirement." (citation omitted). (emphasis in the original). As the Florida Supreme Court recently warned in *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 852 (Fla. 2016), "courts are discouraged from 'nitpicking' proposals for settlement to search for ambiguity."
>
> In interpreting the settlement proposal, "the intention of the parties must be determined from ex amination of the whole contract and not from separate phrases or paragraphs."[14]

The *Swift* Court found the offer to be valid, concluding that "[l]ooking at the complete language of the Proposal for Settlement and the attached general release to be signed by [the defendants] we find no requirement that both defendants must agree in order to effectuate the settlement."[15]

Notwithstanding the absence of express language requiring acceptance by both offerees, the *Swift* dissent noted that there was sufficient language in the document to suggest that the proposal was joint in nature, *i.e.*, that neither defendant could accept separately from the other.[16] The dissent further observed that "Throughout the one, single, document the "defendants" are jointly referenced in the plural; the proposal was conditioned on the mutual exchange of releases; and Atlantic Civil wanted to recover a total of $50,000 — nothing less.[17] Although there is an exception to the requirement that joint offers to multiple offerees be apportioned, it should be used with caution. Rule 1.442(c)(4) provides the sole exception to

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"Although there is an exception to the requirement that joint offers to multiple offerees be apportioned, it should be used with caution."

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the rule requiring apportionment. That subsection provides:

> (4) Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. …

This exception to the rule requiring apportionment is only applicable where the liability of an offeree is alleged to be *exclusively* vicarious, constructive, derivative, or technical.[18] The fact that an offeree may be responsible for 100% of the damages, does not trigger the exception.[19] Conversely, it is applicable where an offeree's liability is exclusively vicarious even though that offeree may not be responsible for 100% of the offeror's damages.[20] Courts have cautioned that "[t]he focus of the exception contained in rule 1.442 (c)(4) is not whether a party is liable for the full amount of damages, but rather, it is whether the claims against the party are direct claims or solely claims of vicarious or other forms of indirect liability."[21]

Given the tension between the "strict construction" standard and the Florida Supreme Court's instruction to avoid "nitpicking," joint proposals to multiple offerees continue to be an unpredictable undertaking. The *Pacheco* Court warned that "joint proposals have become a trap for the wary and unwary alike" and observed that, ". . . until the law is further clarified or corrected, we caution counsel in our district to avoid joint proposals lest a similar fate befall them." [22]

Although joint proposals to multiple offerees may not be avoidable, *Gorka* and the cases applying it provide instruction. Joint proposals to multiple offerees cannot expressly condition the offer on the mutual acceptance of all offerees. Additionally, a joint proposal must be carefully reviewed to eliminate any implication that mutual acceptance is required or that any act beyond the control of each offeree is required for acceptance. While the Florida Supreme Court instructed courts not to "nitpick" proposals for settlement, a prudent practitioner will do just that when drafting a joint proposal to multiple offerees.

1. *Wolfe v. Culpepper Constructers, Inc.*, 104 So. 3d 1132, 1134 (Fla. 2d DCA 2012).
2. *Paduru v. Klinkenberg*, 157 So. 3d 314, 318 (Fla. 1st DCA 2014).
3. Joint proposals include those made by: (1) multiple offerors to a single offeree, (2) a single offeror to multiple offerees; or (3) multiple offerors to multiple offerees.
4. *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010)
5. *Gorka*, 36 So. 3d at 649.
6. *Pratt v. Weiss*, 161 So.3d 1268, 1271 (Fla. 2015), *Gorka*, 36 So. 3d at 649.
7. *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 853 (Fla. 2016).
8. *Chastain v. Chastain*, 119 So. 3d 547 (Fla. 1st DCA 2013).
9. *Chastain*, 119 So. 3d at 548 -49.
10. *Id.* at 550.
11. 2018 Fla. App. LEXIS 6774; 43 Fla. L. Weekly D 1084; 2018 WL 2224163. As of the date of this writing, the *Pacheco* opinion is not final.
12. Attached as Exhibit A to the Proposal was a Stipulation of Voluntary Dismissal With Prejudice (the "Stipulation"), stating that the "PACHECO DEFENDANTS dismiss with prejudice all claims, counterclaims and third-party claims that were brought or could have been brought by them in this action" and that "Plaintiff voluntarily dismisses with prejudice all claims that were brought or could have been brought in this action against the PACHECO DEFENDANTS."
13. 2017 Fla. App. LEXIS 2755 *; 42 Fla. L. Weekly D 516; 2017 WL 815362. As of the date of this writing, this opinion is not final.
14. *Id.* at 4-5.
15. *Id.* at 5-6.
16. *Id.* at 7.
17. *Id.*
18. *Peltz v. Trust Hosp., Int'l, LLC*, 242 So. 3d 518, 520 (Fla. 3rd DCA 2018).
19. *Id.*
20. *Saterbo v. Markuson*, 210 So. 3d 135, 138-39 (Fla. 2d DCA 2016).
21. *Id.*
22. *Pacheco*, at 14 – 15. IM

Water Damage, continued from page 1

tion company.[1] That number increases to $26,000 if the contractor regularly uses an attorney.

Since 2015, the frequency of water claims has risen by 44% with all regions of the State of Florida experiencing double-digit increases.[2] Similarly, the average severity of water claims has increased by 18%, which is nearly triple the 14.2% average annual increase shown in 2015.

The Claims Process

Water leaks can be caused by a variety of issues: water heaters, bidet add-ons to toilets, water valves, water hoses, pipes, over flowing of sinks, showers, and HVAC systems, to name a few. It is imperative to know the source of the leak and the causation, not only to guarantee that it is remedied, but to ensure the greatest potential chance of success on any water damage claim.

For example, a typical condominium insurance policy should protect a unit owner against water damage that is caused by that unit owner's plumbing, water heater or appliances. If, on the other hand, the water is due to the common elements, then the condominium association's master insurance policy should insure the risk. Knowing the source of the leak may determine which insurance pays on a claim.

Once a claim is filed, it is typical and best practices for the assigned field adjuster to interview as many people as possible, document the cause of loss, preserve the broken/failed parts of any component that is believed to be the source of the leak, and retain a leak detection expert and/or engineer. If the insurer does not undertake these measures, then the claimant should hire a claim investigator to conduct interviews and gather evidence prior to filing a claim or complaint.

Steps to Recovery in the Litigation Phase

Once the source of the leak or water intrusion is determined, the declaration of condominium, by-laws of the condominium, and Florida Statutes governing condominiums will assist in determining the parties that are legally responsible. These documents should outline what types of appliances and renovations are permitted (or not permitted), and which parties are responsible for maintaining and repairing which elements of the building. Many times, the condominium association will be responsible for some of the repairs.

For example, the declaration of condominium will address whether one can claim strict liability against a unit owner that is responsible for any of the water damage. Naturally, the process is more challenging if there is no strict liability standard imposed under the declarations. Florida law requires that the aggrieved unit owner bring a negligence claim to recover for water damage arising from a neighboring condominium unit. *Sherry v Regency Ins. Co.*, 884 So.2d 175 (Fla. 2d DCA 2004). In *Sherry*, the unit owner had lived in the condominium unit for 6 years and the washing machine was 13 years old before the original hose burst. The washing machine owner's manual called for the hose to be replaced; however, it would be for a jury to determine if the failure to obtain the manual and follow the procedures constituted negligence. Additionally, the court ruled that a determination of *res ipsa loquitor* creates only a rebuttable inference of negligence which is not sufficient in and of itself to support a summary judgment motion.

Water damage claims in condominiums are not difficult; however, these types of claims invoke a broad spectrum of disciplines including insurance, negligence, real estate law, and condominium law. As such, any claimant or counsel should pay close attention to detail and conduct a broad review of all the factors.

"Water leaks can be caused by a variety of issues [and it] is imperative to know the source of the leak"

1. CBS "Why Florida insurers could double homeowners' rates". (August 16, 2017).
2. Press Release of the Florida Office of Insurance Regulation. (January 12, 2018). IM

Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. IM

Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

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Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)

Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
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The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

Schedule of Upcoming RPPTL Section Meetings

September 26-28, 2018
Executive Council Meeting,
Out of State
The Westin Excelsior, Rome
Rome, Italy (with pre-event in Florence, Italy)

December 5-9, 2018
Executive Council Meeting &
Committee Meetings
The Four Seasons
Orlando, FL

March 13-17, 2019
Executive Council Meeting
Omni Resorts
Amelia Island Plantation
Amelia Island, FL

Mariela Malfeld
Co-Vice Chair & Co-Editor

Cynthia Beissel
Co-Editor

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of ***Insurance Matters!***, please contact Mariela Malfeld at mmalfeld@watttieder.com or Cindi Beissel at cindi@coquinalawgroup.com

We Need You!

We are in need of persons to assist in leading various subcommittees. Please contact us if you would like to become more involved.

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You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at http://www.rpptl.org.

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