BELL & ROPER LEGAL UPDATE

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

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PLAINTIFFS CAN'T GET NO (ACCORD AND) SATISFACTION!

By Mary J. Walter

Firm members **Michael Bell** and **David Blessing** successfully defended Vernon LaDow and Brandon Rogers in a lawsuit brought for alleged personal injuries and damages sustained by Jimmy Steakley and his wife, Lassie Steakley, arising out of a 2009 car versus motorcycle accident. The case was tried before a jury in front of Judge Nancy F. Alley in Seminole County, Florida.

Brandon Rogers, while operating a car owned by Vernon LaDow, collided with a motorcycle operated by Jimmy Steakley on Interstate 4. At the time of the accident, Mr. LaDow was insured under a policy of insurance that provided bodily injury liability coverage of $25,000.00 per person. The alleged damages far exceeded the policy limits. The medical specials, as one would expect from an accident involving a hospital stay, exceeded $100,000.00. Mr. LaDow's insurer immediately offered policy limits to the Steakleys.

The insurance carrier sent a letter to Mr. Steakley offering to tender the policy limits in full settlement of his claim. A settlement check in the amount of the policy limits was subsequently sent to the Steakleys. This check included language that it was for the bodily injury limits, was to resolve all claims, and that it was a final payment. The letter accompanying the check renewed the settlement offer and requested that the check be held if the offer was not ready to be accepted. A release was also provided.

Instead of holding the check, Mr. and Mrs. Steakley endorsed and negotiated the check with the funds being deposited into their checking account. They then proceeded within a week of deposit to spend or withdraw monies from the account. The account balance began to decline. It declined some more. It eventually declined well below the tendered amount.

The adjuster, after the check was deposited, attempted to contact the Steakleys to determine the status of the provided release. There was only silence. Then, the adjuster heard from their lawyer.

Counsel advised that a settlement had not been reached and set forth, as can be imagined, a number of conditions to actually achieve settlement for the policy limits. The insurance company contended that it even complied with this attorney-driven settlement demand. However, the plaintiffs contended that no settlement was reached, either by the tender and negotiation of the settlement check or after counsel was retained and demand made. In fact, the attempt to comply with the subsequent demand, it was later argued, was evidence that there was no settlement.

A settlement had not occurred, they further argued, because the insurance company's pre-suit communications were hopelessly disorganized and confusing and that the settlement check was delivered at a time when Mr. Steakley was not represented by counsel, was very ill, and was under the influence of pain medications. Further, they merely deposited the check for safe keeping and the insurance company did not inform them that the act of depositing the check would operate as a final settlement. The monies were also now being held in a constructive trust for return to the insurance company.

In their answer, the defendants argued that the case was settled before the lawsuit began. The court found that the issue of settlement turned on the facts, and the case proceeded toward a jury trial on the affirmative defense of accord and satisfaction. The defense had the burden of proof going forward to establish that there was a settlement in this case. The issues, described above, included the cashing of a check with full and final payment language, unilateral and mutual mistake, elements of contract (such as offer and acceptance), constructive trust, and lack of capacity due to intoxication by prescribed medications.

The trial on the affirmative defense was bifurcated from the trial on the negligence issues as the jury would necessarily be informed that there was insurance coverage. After all, it was the adjuster, not the insureds, attempting to achieve settlement within the policy limits. In fact, the insured defendants did not even testify at trial.

The jury returned a defense verdict finding that a settlement had been reached. The enduring mystery will be whether the jury found a settlement because of the tender and negotiation of the settlement check or due to compliance with the attorney-driven demand or both. The verdict form merely asked whether there was a settlement. Of course, we were very pleased with the verdict, especially given the significance of the alleged injuries and damages.

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FAILURE TO ATTACH COPY OF RELEASE OR SUMMARY OF CONTENTS OF RELEASE RENDERS PROPOSALS FOR SETTLEMENT AMBIGUOUS AND UNENFORCEABLE

By Cindy A. Townsend

In *Mix v. Adventist Health System/Sunbelt, Inc.*, 2011 WL 1195860, 1 (Fla. 5th DCA 2011), James and Arlene Mix filed a medical malpractice lawsuit against several healthcare providers, including Florida Hospital. During the course of the litigation, Florida Hospital submitted separate proposals for settlement to Mr. and Mrs. Mix who rejected them. After Florida Hospital prevailed at trial, it timely moved for an award of costs and attorney's fees, the latter being predicated on its rejected proposals for settlement. The proposals for settlement stated that Florida Hospital would prepare a release of all claims and a joint stipulation for dismissal with prejudice. However, Florida Hospital did not attach copies of either document with the proposals for settlement.

At the conclusion of the trial, the trial court awarded Florida Hospital attorney's fees and costs based on the plaintiffs' rejection of the proposals for settlement. Mix then appealed that award and argued that the proposals for settlement were ambiguous because Florida Hospital did not include a summary of the proposed release or attach the actual release to the proposal offers, thus failing to satisfy the particularity requirement outlined in *State Farm Mutual Automobile Insurance Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006).

Section 768.79, Florida Statutes, authorizes the parties to any civil action for damages to make an offer of judgment or demand for judgment, and governs the procedures whereby attorney's fees may be awarded to the successful offering or demanding party. The statute is implemented by Florida Rule of Civil Procedure 1.442. *See Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007); *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

Rule 1.442 requires that a settlement proposal name the party making the proposal and the party to whom the proposal is being made; that it identify the claims that the proposal is attempting to resolve; and that it state with particularity any relevant conditions and all nonmonetary terms. Fla. R. Civ. P. 1.442(c)(2)(A)-(D). The rule "requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." *Nichols*, 932 So. 2d at 1079. "A proposal for settlement is intended to end judicial labor, not create more." *Id.* at 1078 (quoting *Nichols v. State Farm Mut.*, 851 So. 2d 742, 746 (Fla. 5th DCA 2003)).

A proposal does not satisfy the "particularity" requirement if an ambiguity within the proposal could reasonably affect the offeree's decision. *Id.* at 1079. Because the offer of judgment statute and related rule must be strictly construed, an ambiguous proposal is not enforceable. *Stasio v. McManaway*, 936 So. 2d 676, 678 (Fla. 5th DCA 2006); *Hibbard ex rel. Carr v. McGraw*, 918 So. 2d 967, 971 (Fla. 5th DCA 2005). For the purpose of construing the particularity requirement of rule 1.442, an ambiguity is defined as "the condition of admitting

more than one meaning." *Saenz v. Campos,* 967 So. 2d 1114, 1117 (Fla. 4th DCA 2007) (citation omitted).

In the *Mix* case, Florida Hospital's proposals for settlement provided, among other things, that Mr. and Mrs. Mix would be required to execute releases to be prepared by its attorneys. However, the proposed releases were not attached to the proposals for settlement nor was a summary of the contents of the releases included. The Fifth District opined that a proposal for settlement can contain either the proposed release or a summary of the terms of the proposed release, provided that the summary eliminates any reasonable ambiguity about its scope. *Nichols,* 932 So.2d at 1079. However, the proposals in this case did neither. The Court further stated that it could only speculate about what the release would contain and what it would have achieved that dismissing Florida Hospital with prejudice would not have accomplished. As such, the Fifth DCA held that the proposals for settlement were ambiguous and unenforceable due to Florida Hospital's failure to attach the proposed releases or a summary of the contents of the releases. As a result, the final judgment awarding attorney's fees was reversed.

The *Mix* case further complicates defense strategy on the filing of Proposals for Settlement. Where one does not expect the plaintiff to accept the Proposal, the best strategy may simply be to not even require the plaintiff to execute a release as a condition of accepting the proposal.

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REMOVING CASES TO FEDERAL COURT WHEN MULTIPLE DEFENDANTS ARE INVOLVED

By Kathryn A. Johnson

Under 28 U.S.C. § 1446(b), defendants may remove a civil case from state to federal court if the case originally could have been filed in federal court, and if the notice of removal is filed within thirty days after the receipt by the defendant of a copy of the initial pleading or the service of summons.

The statute clearly explains that a single defendant must seek removal within thirty days of service, but it provides no guidance as to when the time for removal begins to run for subsequently served defendants. When multiple defendants must join in petitions for removal is a question that Congress has left to the courts. As a result, the courts have resolved the problem of multiple defendants in an inconsistent fashion-with some adopting the "first-served rule" and others following the "last-served rule." When applied, these rules produce very different results.

The genesis of the "first-served rule" was *Getty Oil Corp. v. Insurance Co. of North America,* 841 F.2d 1254 (5th Cir.1988). In *Getty,* the Fifth Circuit reasoned that the thirty-day

removal period begins to run when the first defendant is served, even though the statute itself is silent regarding multiple defendants. *Getty* concluded:

> In cases involving multiple defendants, the thirty (30) day period begins to run as soon as the first defendant is served. It follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty (30) days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served. *Id.* at 1262-63 (internal citations omitted). As a general premise, under the "first-served rule," defendants who are properly served within thirty days of the first defendant's service must join in the removal petition. The "failure to do so renders the petition defective." *Id.* at 1262.

Under the facts of *Getty*, however, the application of the first-served rule did not produce an inequitable result. Nonetheless, recognizing the potential for harsh results, other decisions provide that exceptional circumstances may sometimes require relief from strict application of the rule in order to achieve equitable results. *See Milstead Supply Co. v. Cas. Ins. Co.*, 797 F.Supp. 569, 573 (W.D.Tex.1992) (holding that "joinder in or consent to the removal petition must be accomplished by only those defendants: (1) who have been served; and (2) whom the removing defendant[s] actually knew or should have known had been served"); *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir.1986) (recognizing that "exceptional circumstances" might permit removal when a later-joined defendant petitions for removal more than thirty days after the first-served defendant is served).

Other circuits have rejected the "first-served rule." *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755-57 (8th Cir.2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532-33 (6th Cir.1999).

The Court in *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir.2005) when addressing a different removal-related issue, endorsed this reasoning, and observed an admonishment from the United Stated Supreme Court that "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court." *Id.* (citing *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186, 27 S.Ct. 184, 51 L.Ed. 430 (1907)); *C.L.B. v. Frye*, 469 F. Supp. 2d 1115, 1117-18 (M.D. Fla. 2006).

The removal process was created by Congress to protect defendants. Congress "did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trustees of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir.1992) (quoting *McKinney v. Bd. of Trustees of Mayland Cmty. Coll.*, 713 F.Supp. 185, 189 (W.D.N.C.1989)). As the Supreme Court long ago admonished, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186, 27 S.Ct. 184, 188, 51 L.Ed. 430 (1907); *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005).

The Eleventh Circuit is split when addressing the issue of multiple defendants and removal. *See e.g., Mitsui Lines Ltd. v. CSX Intermodal Inc.*, 564 F. Supp. 2d 1357, 1360 (S.D. Fla. 2008) (This thirty-day period begins to run as to *all* defendants when the first defendant is served.) *citing Jones v. Florida Department of Children & Family Services,* 202 F.Supp.2d 1352, 1355 (S.D.Fla.2002) (citing *In re Ocean Marine Mut. Prot. and Indem. Ass'n,* 3 F.3d 353, 355-56 (11th Cir.1993)) *compared with Bailey v. Janssen Pharmaceutica, Inc.,* 536 F.3d 1202 (11th Cir. 2008) ("We are convinced that both common sense and considerations of equity favor the last-served defendant rule.")

The trend in recent case law favors the last-served defendant rule. *See, e.g., General Pump & Well, Inc. v. Laibe Supply Corp.*, No. CV607-30, 2007 WL 3238721, *2 (S.D.Ga. Oct. 31, 2007) ("More recently, however, the trend in the case law has been toward the later-served rule. The Sixth and the Eighth Circuits, several district courts in this circuit and a court in this district have followed the later served rule.").

Among the four courts of appeals that have considered this issue, only the Fifth Circuit and (seemingly) the Fourth Circuit have adopted the first-served rule, and have held that a notice of removal is only timely if it is filed within thirty (30) days of service of process on the first defendant. *See Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir.1986) ("The general rule ... is that if the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove ... due to the rule of unanimity among defendants which is required for removal.") (internal quotations and punctuation omitted); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir.1988) ("In cases involving multiple defendants, the thirty-day period begins to run as soon as the first defendant is served (provided the case is then removable)."); *Barbour v. International Union*, __ F.3d __, 2011 WL 242131 (Jan. 27, 2011).

Conversely, the two courts among the circuit courts to have adopted the last-served defendant rule have done so more recently: The Eighth Circuit in 2001, and the Sixth Circuit in 1999. *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755 (8th Cir.2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir.1999).

Additionally, the en banc Fourth Circuit recently adopted a variant of the first-served defendant rule in *Barbour v. International Union*, __ F.3d __, 2011 WL 242131 (Jan. 27, 2011). Under the Fourth Circuit's so-called "intermediate" approach, a later-served defendant cannot itself file a notice of removal more than thirty (30) days after service on the first defendant. Instead, it has thirty days to join any earlier-filed notice of removal.

The controversy over Section 1446(b)'s thirty-day deadline in multiple-defendant cases affects removals based on federal question or ordinary diversity-jurisdiction principles. Given the deepening of the circuit split on this important question of civil procedure, it seems likely that litigants will seek U.S. Supreme Court review on the issue.

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BELL & ROPER NEWS

The Firm congratulates **Michael Bell**, a founding Partner of Bell & Roper, P.A., for his membership into the American Board of Trial Advocates. The Firm also congratulates Firm member **Esteban Scornik**, who recently received the "AV" rating from Martindale-Hubbell, the highest peer review rating which it offers.

We welcome **Charles Smith** to the Bell & Roper team. Mr. Smith has joined the Firm as an Associate Attorney, and he will practice in all areas of insurance defense. Mr. Smith graduated from Indiana University School of Law-Indianapolis in May of 1996 and brings a wealth of legal knowledge to Bell & Roper.

Please be on the lookout in subsequent newsletters for information on Bell & Roper's 2011 Firm Seminar. We anticipate that the Seminar will be held in the Fall of 2011.

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