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**Bankruptcy and Beyond:
Offers of Judgment in State
and Federal Courts
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Bankruptcy Bar Association
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What you will learn:

- Different Offer of Judgment (“OJ”) options for state and federal court
- Advantages and disadvantages of each OJ options
- Applicability in federal courts including BR court
- How to draft enforceable OJs under Fla. Stat. Section 768.79
- How to defend when an OJ is served on you

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Federal Court OJ Options: Rule 68 Advantages

- Short Timing: Don't have to wait any number of days to serve
 - Can serve up to 14 days before trial
 - Only have to keep Offer open for 14 days
- Offer of Judgment ("OJ") only has to beat Final Judgment ("FJ") by \$.01 not 25%
- Can serve subsequent offers
- Applies to all causes of action in federal court regardless of the basis for jurisdiction

Federal Court OJ Options: Rule 68 Disadvantages

- Doesn't automatically apply in contested proceedings in Bankruptcy Court; does apply in adversary proceedings
- Offers JUDGMENT not settlement
 - Does your client want a judgment entered against it?
- Only Defendant may make offer; Only works if a judgment is entered, not if Defendant completely prevails
- Prevailing Defendant may only recover its "costs" from the date of the offer.
 - Stops defendant from being responsible for plaintiff's fees from the date of the offer, but does not shift responsibility for defendant's attorney's or investigative fees to plaintiff. Defendant just recovers its costs under Section 1952.

Florida OJ Statute: 768.79

- Applies to “all” civil causes of action for damages filed in the state courts of Florida as long as Florida law applies, with the caveat:
 - choice of law provision may prevent use of OJ
 - can’t use in family law, employment discrimination, FDCPA/FCCPA, maritime or probate cases
 - can’t use in cases that seek pure declaratory relief (voting rights, easement)
 - can be used in insurance coverage cases even if the action seeks declaratory relief because money judgment will be entered.
- Applies in federal court when Florida law provides the rule of decision (includes diversity, bankruptcy or supplemental jurisdiction)
- Does not apply to federal claims on FQ jurisdiction

768.79 Offers, Advantages

- Offeror has a choice of offering judgment or settlement
- Has twin objectives of docket clearing and penalizing unreasonable litigants
- Can shift attorney’s fees and costs, not just costs
- Can add non-monetary conditions.
 - return of property, release of insurers

768.79 Offers, Details

- Date upon which Offer is served is date upon which fees start to accrue
- Additional days for service by mail/email are not added. Rule 1.442(f)(1).
- Offer may be withdrawn in writing, if notice of acceptance has not been delivered/filed with court
- Once the Offer and Notice of Acceptance of the Offer are filed, the court has full jurisdiction to enforce the settlement agreement or enter a judgment

Rule 1.442

- This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands or proposals and **supersedes all other provisions of the rules and statutes** that may be inconsistent with this rule.”
- Does this mean that conflicts between any Florida statute concerning OJs and Rule 1.442 are decided in favor of rule whether or not conflicts are procedural or substantive?
 - 1.442 is what allows non-monetary conditions, adds joint offer capability and requirements, adds the option to have the court determine fees, and adds the applicability to class actions. Is it really procedural?
- Time for service: 90/45; Time for acceptance: 30 (except in class actions)
- Withdraw any time before delivery of written acceptance (withdrawn = void)
- Mediation has no effect on OJs (this provision expressly conflicts with and supersedes Fla. Stat. § 44.102)
- Offers must resolve all claims for damages that would otherwise be resolved in a final judgment in the action.
 - No more cherry-picking claims

Does Rule 1.442 Apply in Federal Court?

- Yes. Both M.D. Fla. And 11th Cir. apply it.
- Rule 68 does not preempt the application of Fla. Stat. §768.79 to state law claims in federal court
- Adversary proceedings where Florida law provides rule of decision
- Actions where a judgment will result
- BUT don't cite Rule 68 when you serve a Section 768.79 offer in a case pending in federal court.
 - Rule 68 and Section 768.79 have conflicting times for service and acceptance of offers.

How Courts Evaluate OJs

- An OJ is measured against a FJ
 - Offer of Judgment compared to Judgment Obtained ("FJ")
 - Offer of Judgment must include all relief that might be awarded in a final judgment
 - Prejudgment interest
 - Taxable Costs
 - Attorney's fees (can include in lump sum or leave for court resolution)
 - Punitive damages (must apportion \$0.00 even if not part of legal claim)
- "Judgment Obtained" is net judgment plus post-offer collateral source payments received or due as of the date of the judgment or settlement amounts that have reduced the net judgment.

What Courts Will Not See With OJs:

- OJs are not evidence of liability or used in other proceedings. Section 768.79(8): "Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section."
- OJs are not to be filed until fee shifting even occurs. Section 768.79(3): "The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section."
- A party may make as many Offers as it desires during the course of the litigation and it can increase or decrease the amount of each subsequent Offer at any time without prejudice to its right to recover under earlier Offers. Section 768.79(2) "The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer"

Shifting Fees

- For Defendants: If the Judgment Obtained is one of:
 - No Liability (through FJ, involuntary/voluntary dismissal with prejudice)
 - Plaintiff recovers 75% or less of the amount set forth in Offer
- For Plaintiffs: plaintiff recovers a judgment in an amount *at least* 25 percent more than the amount of the offer.
- Party seeking fees shall be entitled to reasonable costs (really means taxable costs), investigative expenses, and attorney's and paralegal's fees from the date of the offer

Rule 1.442 Requires OJs To Identify:

- Statute, Fla. Stat. §768.79
- Parties making the offer and to whom the offer is made
- That OJ seeks to resolve all damages that would otherwise be resolved in a final judgment in the action, subject to a statement about whether attorney's fees will be resolved in the Total Amount or left for the court to decide.
- Relevant conditions stated with particularity
- State Total Amount of proposal

Rule 1.442 Requires OJs To:

- In a Joint OJ, apportion it between all offerors
- Non-monetary terms stated with particularity – best practice is to attach proposed release
- State amount set aside to settle punitive damages claim
- State whether OJ includes attorney's fees and whether attorney's fees are part of the legal claim
- Include certificate of service in form required by Fla. R. Civ. P. 1.080. (does not require service to every party in the action)
 - BUT what happened to Rule 1.080? Rule 1.080 generally refers to Rule of Jud. Admin. 2.516
 - Does Rule 2.516 apply to OJs?
 - Split and conflicting authorities (4th and 2nd DCAs disagree)
 - FOR NOW: Serve via email (not e-portal or CM/ECF) AND via U.S. Mail until conflict resolved

Once Fees Are Triggered

- Must file motion for attorney's fees and costs within 30 days of FJ that triggers right to fee shifting in state court (Rule 1.525), check local rules to see if deadline is shorter in other courts
- Bifurcate motion for fees to ask for entitlement then amount? That's a strategic decision. Must have determination of entitlement and amount in order to appeal
- May recover Legal Assistant fees, investigative fees
- No multiplier on OJ fees, just use lodestar method

Why Offers Are Invalidated

- Failure to apportion joint offers
- Not made in good faith
- Vague or ambiguous non-monetary conditions
- Mistakes in compliance with technical elements of Rule 1.442
- Attempts to obtain more relief than available in FJ

Apportionment of Joint Offers

- Can't make joint offers to multiple offerees (but see Saterbo case - because rule 1.442(c)(4) now permits joint proposals without apportionment where one party is solely vicariously liable...)
 - Normally, courts will not intertwine >1 litigants' fates; separate offers to separate parties is best
- An offer from multiple offerors to a single offeree must be apportioned to show amounts paid by or on behalf of each offeror to the offeree UNLESS:
 - a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract
 - I determine if sole vicarious liability is alleged by looking at the complaint.
 - When enforcing joint OJ, both Total Amount and each element of apportioned amounts must be capable of shifting fees (Hoang Dinh Duong v. Ziadie, 153 So. 3d 354 (Fla. 4th DCA 2017))

Good Faith – What is it?

- It's okay to have twin objectives, settlement / punishing unreasonable litigant
 - Determined by the subjective motivations and beliefs of the offeror
 - Nominal offer is made in good faith where the offeror has a reasonable basis to believe that its exposure to liability is minimal (Taylor Engineering, Inc. v. Dickerson Florida, Inc.)
 - The Standard of Review on Appeal is LOWER for good faith!
 - It is within the discretion of the trial judge to invalidate an OJ if he or she finds it was not served in good faith
 - For all other aspects of OJs, the standard of review is *de novo*, because a proposal for settlement is in the nature of a contract
- Reasonable rejection and good faith are not the same thing

Non-Monetary Conditions

- Release? Res judicata? For release, use language from Bd. of Trustees of Florida Atlantic University v. Bowman, 853 So. 2d 507 (4th DCA 2003); it's court approved and includes release of insurers
- Agreement to satisfy liens – probably okay, but don't ask someone to lie by including a no lien or no dependent affidavit
- Hold Harmless / Indemnify – has been an acceptable condition since 2006, but this may change
- Carve out of declaratory relief – this is okay so far, based on 2 cases (MYD Marine Distributor, Inc. v. International Paint Ltd. – true relief) and (Yacht Club v. Lexington, 599 Fed. Appx. 875, 883 (11th Cir. 2015) – look behind pleadings)
- Bad Faith Settlement Practices Release - (Auffant BR case allows this BUT expect big case on release of un-accrued claims.

Non-Monetary Conditions, Part II

- Future causes of action?
- Confidentiality – currently okay in 3rd DCA and 11th Cir., but look for big decision on this - Definitely can't ask counsel to become a party for purpose of confidentiality agreement (Brunner)
 - Caccimani, 11th Cir. - Confidentiality is a perfectly fine condition
 - Russell Post – 3d DCA - OJ not invalidated for confidentiality, minor discussion
 - Schantz – 1st DCA - OJ not invalidated for confidentiality, no discussion of why
 - Dryden – 2005 5th DCA concurrence that says confidentiality is a condition that can't be valued
 - Embroidme.com – SD Fla – Confidentiality is an okay condition, nice discussion, but later negatively treated on other issues
 - If you use this, make sure that offeree still has ability to accept offer

Ellen's Drafting Checklist

- Are all the claims in the lawsuit made pursuant to Florida statutes or Florida common law?
- For contract claims, was contract signed in Florida? Does it have choice of law provision? Choice of law provision means OJ statute may not apply. (OJ may not stop other side's prevailing party K atty fees but may act as set-off)
- Any maritime, employment, family law, probate or consumer collection claims? Any claims accrue before 1990? If so, consider whether OJ statute applies.
- Are all of the claims for money damages ONLY? If any claims are for pure equitable or declaratory relief, or specific performance, OJ statute may not be able to be used.
- Consider and mention counterclaims.
- Do you want any property returned?
- Are attorney's fees a part of the legal claim? If yes, specify which party has a claim for fees in the OJ. Add fees into Total Amount or leave for the court to decide, but say explicitly what you decide.
- Were punitive damages ever asserted? If yes, consider apportionment. If no, say that no part of OJ is for punitive damages.

- How many parties are making the offer? If more than one offeror, are the multiple offerors alleged to be solely vicariously liable? Apportion if you make a joint offer by non-vicariously liable parties.
- Is there any allegation of joint and several liability? (Anderson v. Hilton Hotels Corp., 202 So. 3d 846 (Fla. 2016))
- Any medical liens? If yes, ask offeree to agree to be responsible for medical liens.
- What is the offeror's subjective valuation of the case at the time the offer was made? This is essential to good faith.
- Should there be a letter that accompanies the OJ?
- Does the client want a release? If yes, use court-approved form from the *Bowman* case. If no, just let the dismissal serve as *res judicata*. Call me if you want confidentiality, indemnity, hold harmless or a bad faith release. If you decide to include a bad faith release, use the release language approved in *Auffant* case, but understand that Florida law conflicts on the release of un-accrued bad faith claims.
- SERVE via email but don't use the E-portal or CM/ECF. Follow rules of Fla. R. Jud. Admin. 2.516 with regard to use of "SERVICE OF COURT DOCUMENT" and case the number. Back up this service with mail service. Do not file the offer.

Questions and CLE Credit

- Thank you for listening and participating.