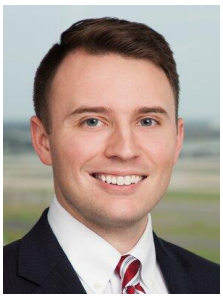
Applying New Fla. Settlement Proposal Rule To Pending Cases

By **Joseph Lang and David Wright** (July 28, 2022)

Joseph Lang



David Wright

The Florida Supreme Court's recent amendment to Florida Rule of Civil Procedure 1.442 represents another major change to an area of Florida law that seems to be in constant flux.

According to the court, the amendment was made to align Rule 1.442 with "the substantive elements" of Florida's settlement proposal statutes by amending the rule to "exclude nonmonetary terms from a proposal for settlement, with the exceptions of a voluntary dismissal of all claims with prejudice and any other nonmonetary terms permitted by statute."[1] The opinion expressly provided that the amendments would become effective July 1, at 12:01 a.m.[2]

Unlike the Florida Supreme Court's amendments to Rule 1.510, the opinion amending Rule 1.442 did not specifically address the amendment's application to pending cases.[3]

However, the amendments to both rules were accompanied by an explicit statement as to when the respective changes would become effective. The question, then, is whether proposals for settlement served before July 1 are affected by the amendment to Rule 1.442.

The answer likely depends on when the proposal was served, how broadly or narrowly one reads prior cases and, possibly, when the acceptance period expired compared to the effective date of the amendment.

The Florida Supreme Court has held, as noted in the 1997 Neil Alan Natkow v. Adrienne Beth Natkow decision, that rules of procedure are "prospective unless specifically provided otherwise."[4]

In 1999, the court addressed a situation in MGR Equipment Corp. Inc. v. Wilson Ice Enterprises Inc. where a party served two proposals for settlement, both of which went unaccepted.[5] Four months after the second proposal was served, an amendment to Rule 1.442 that would have invalidated the proposal became effective.[6]

The court, however, noted that the then-current version of Rule 1.442 did not apply because the amendment "became effective ... after the instant offer of judgment was tendered."[7]

If one reads the court's footnote in the MGR Equipment case literally, then the determining factor for whether an amendment applies to a proposal for settlement is when the proposal is tendered. Proposals served prior to an amendment would be unaffected, whereas proposal served on or after the amendment's effective date would be affected.

On the other hand, if one reads the court's footnote in the MGR Equipment case narrowly and in the context of the facts in that case, then it's possible that the date of service of the proposal is not the determining criterion.

The amendment in MGR Equipment became effective four months after the proposal was

served, which necessarily means the 30-day acceptance period had expired before the amendment became effective. A narrow reading of the second footnote that is dependent upon the facts of the case would suggest the determining criterion was really when the proposal expired.

There is precedent from the Fifth District Court of Appeal of the State of Florida supporting a narrow reading of the second footnote from MGR Equipment.[8]

In 2004, the Fifth District Court of Appeal addressed in Betts v. Ace Cash Express Inc. whether an amendment to Rule 1.442(f)(2) applied "in an ongoing case where the acceptance period of a proposal for settlement has expired on the effective date of the amendment."[9]

There, the defendant served proposals for settlement on Aug. 7, 2000, which the plaintiffs did not accept within 30 days.[10] After the proposals for settlement expired, the Florida Supreme Court adopted an amendment to Rule 1.442 bearing an effective date of Jan. 1, 2001.[11]

Subsequent to the amendment's effective date, the defendant prevailed on summary judgment and sought fees.[12] The plaintiffs argued in opposition that the defendant was not entitled to fees because the proposals for settlement were not valid under the amended Rule 1.442.[13]

The trial court rejected the argument and, on appeal, the Fifth District affirmed by relying on the following court decisions: Pearlstein v. King in 1992, Mendez-Perez v. Perez-Perez in 1995 and Natkow v. Natkow in 1997.[14]

In short, because the Florida Supreme Court's opinion adopting the new amendment to Rule 1.442 expressly stated a specific application date and the acceptance period expired before the amendment's effective date, the amendment did not apply to invalidate the proposal.[15]

As in the Betts case, the recent amendment to Rule 1.442 expressly stated a specific application date — July 1. Accordingly, a proposal for settlement that was served — and went unaccepted by the 30-day mark — prior to July 1, is likely not affected by the amendment.

A closer question is whether the amendment affects proposals served before July 1, but for which the 30-day acceptance window has not closed, and the parties are within the 45-day restricted period.[16]

For example, 46 days before trial, a defendant serves a proposal for settlement that contains a general release — we'll assume for present purposes that the release complied with case law addressing releases.[17]

Does the 2022 amendment operate to invalidate the proposal? Under Betts, where the holding turned, in part, on the fact the acceptance period closed prior to the effective date of the amendment, then proposals falling within the twilight zone between Rules 1.442(b) and 1.442(f) would arguably be invalid.

At the same time, an argument could be made that the amendment should not be applied so as to invalidate what would have been an otherwise valid proposal because the offeree would have no ability to serve a new proposal. If the amendment were to apply to twilight-

zone proposals, then parties would effectively have lost the rights afforded under Section 768.79.

Moreover, not applying the amended Rule 1.442 to twilight-zone proposals arguably furthers the purpose of Rule 1.442 and Section 768.79 by ensuring sanctions are imposed against parties who "unnecessarily continu[ed] litigation."[18]

Indeed, because Section 768.79 "benefits the state more than the parties,"[19] not applying the amended rule to twilight-zone proposals preserves for the courts a tool to encourage settlements and thereby reduce the demand on scarce judicial resources.

For parties who are not within the 45-day restricted period and whose proposal include nonmonetary terms not permitted by the new rule[20] and which has not expired before July 1, Betts suggests that the 2022 amendment would apply.

While an offeror with a twilight-zone proposal has policy grounds to argue that are unavailable to an offeror whose offer was served, but had not expired, before the amendment's effective date, both types of offerors can argue for a broad reading of the Natkow and MGR Equipment decisions.

If the Florida Supreme Court said what it meant and meant what it said in those cases, then the answer to whether an amendment applies turns on when the proposal was served.

What, then, is the takeaway? Litigators should conduct a risk assessment by first determining the category into which their proposal falls. Depending on the category, a risk-aversion determination should be made.

For example, if the proposal was served and expired before July 1, then the amendment likely does not apply retroactively and the risk of the proposal being invalidated under the current version of Rule 1.442 is lessened.[21]

If, however, a proposal was served but had not expired before July 1, and the offeror is highly risk-adverse, then strong consideration should be given to serving a new proposal that complies with the current version of Rule 1.442.

Joseph H. Lang Jr. is a shareholder and David R. Wright is an associate at Carlton Fields.

[1] In re Amendments to Florida Rule of Civil Procedure 1.442, --- So. 3d ---, No. SC21-277, 2022 WL 1679398, at *1 (Fla. 2022).

[2] Id.

[3] Compare In re Amendments to Florida Rule of Civil Procedure 1.442, 2022 WL 1679398, at *1, with In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d 72, 77–78 (Fla. 2021).

[4] Natkow v. Natkow, 696 So. 2d 315, 317 (Fla. 1997) (citing Mendez-Perez v. Perez-Perez, 656 So. 2d 458, 460 (Fla. 1995); Pearlstein v. King, 610 So. 2d 445, 446 (Fla.1992)).

[5] MGR Equip. Corp., Inc. v. Wilson Ice Enters., Inc., 731 So. 2d 1262, 1263 n.2 (Fla. 1999).

[6] Id. at 1263.

[7] Id. at 1263, n.2.

[8] Betts did not cite or discuss MGR Equipment Corp. But the facts in both cases are sufficiently analogous that one may read the two together.

[9] 863 So. 2d 1252, 1253 (Fla. 5th DCA 2004).

[10] Id.

[11] Id.

[12] Id. at 1253–54.

[13] Id. at 1254.

[14] Id.

[15] Id. at 1254–55.

[16] An offeree has 30 days to accept a proposal. Fla. R. Civ. P. 1.442(f). A party cannot serve a proposal for settlement "later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier." Fla. R. Civ. P. 1.442(b).

[17] See Bd. of Trs. of Fla. Atl. Univ. v. Bowman, 853 So. 2d 507 (Fla. 4th DCA 2003).

[18] Harris v. Tiner, 336 So. 3d 1238, 1240 (Fla. 2d DCA 2022).

[19] Williams v. Fernandez, 335 So. 3d 194, 200 (Fla. 2d DCA 2022).

[20] It is beyond the scope of this article to address what statutory provisions permit a party to include a non-monetary condition other than dismissal with prejudice.

[21] Assuming the proposal otherwise complies with the prior version of Rule 1.442 and case law interpreting that version of the Rule.