

While We Know Florida's Offer of Judgment Statute May Apply in Federal Court, Does Florida's Offer of Judgment Procedural Rule Apply?

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Scenario: A defendant files an offer of judgment in federal court, pursuant to Florida's offer of judgment statute, Fla. Stat. § 768.79, and Florida's offer of judgment civil procedure rule, Fla. R. Civ. P. 1.442. The plaintiff rejects the defendant's offer of judgment. Thereafter, a judgment of no liability is entered in favor of the defendant. The defendant files a motion seeking to recover attorneys' fees and costs under section 768.79. The plaintiff then objects to the defendant's motion, arguing that the defendant's offer of judgment did not comply with Rule 1.442. Does Florida's offer of judgment civil procedure rule, Fla. R. Civ. P. 1.442, apply in federal court, and therefore, does a federal court even need to consider any argument based on Rule 1.442?

Fla. Stat. § 768.79 provides, in pertinent part, that "[i]n any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff...the defendant shall be entitled to recover reasonable costs and attorney's fees...if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer." Fla. Stat. § 768.79(1). Florida has also adopted a rule of civil procedure, Rule 1.442, which establishes additional requirements as to the form and content of an offer of judgment that are not set forth in section 768.79 of the Florida Statutes.

According to the pertinent case law, federal courts in diversity cases must apply the law of the forum state to any substantive issues and must apply federal law to any procedural issues. *See, Tiara Condominium Ass'n, Inc. v. Marsh USA, Inc.*, 697 F.Supp.2d 1349, 1357 (S.D. Fla. 2010). Pursuant to the Eleventh Circuit, section 768.79 of the Florida Statutes is substantive in nature and therefore applicable in federal court. *See, McMahan v. Toto*, 311 F.3d 1077, 1081 (11th Cir. 2002). Thus, while the case law is clear that section 768.79 of the Florida Statutes applies in federal court, the case law is not as definitive with respect to whether Rule 1.442 applies in federal court.

Several cases have discussed whether Rule 1.442 is procedural or substantive in nature because if Rule 1.442 is deemed procedural then it likely does not apply in federal court and if it is deemed substantive then it arguably applies in federal court. The Fourth District Court of Appeal has stated that section 768.79 of the Florida Statutes provides "the substantive law concerning proposals for settlement while Rule 1.442...provides its procedural mechanism." *Saenz v. Campos*, 967 So.2d 1114, 1116 (Fla. 4th DCA 2007).

However, it appears from the relevant case law that Rule 1.442 is not purely procedural and does have at least some substantive aspects which are applicable in federal court. The Supreme Court of Florida has noted that both section 768.79 and Rule 1.442 contain substantive and procedural portions. *See, Campbell v. Goldman*, 959 So.2d 223, 227 (Fla. 2007).

Furthermore, the Middle District of Florida has held that a portion of Rule 1.442 is substantive in nature, specifically discussing Rule 1.442(f), which permits an extension of time

for a plaintiff to accept an offer of judgment made in a class action case. *See, Owner-Operator Indep. Drivers Assoc., Inc. v. 4 Points Logistics, LLC*, 2007 WL 2789265, 3 (M.D. Fla. 2007).

Moreover, in McMahan, the Eleventh Circuit construed Rule 1.442 as substantive in nature by applying it to a claim in federal court where Florida law was applicable. In McMahan, the defendant proposed an offer of judgment that the plaintiff rejected, the defendant was awarded attorney's fees and costs, and the plaintiff objected arguing that the defendant's offer of judgment was defective because the offer failed to comply with Rule 1.442(c)(2)(E) as it did not state with particularity the amount of the claim for punitive damages. The Court in McMahan substantively applied Rule 1.442 in concluding that the defendant's offer of judgment was valid. *See, McMahan*, 311 F.3d at 1081-3.

Rule 1.442 has also been applied by the Bankruptcy Court in the Middle District of Florida. In In re Auffant, 274 B.R. 554 (Bankr. M.D. Fla. 2002), a debtor sued her insurer, pre-petition, in state court following the insurer's denial of the debtor's theft loss claim. The insurer served an offer of judgment, pursuant to section 768.79 and Rule 1.442, which the debtor rejected. A judgment of no liability was entered in favor of the insurer and the jury found that the debtor intentionally misrepresented material facts as to the theft loss she incurred. Thereafter, the insurer filed a motion seeking recovery of its attorney's fees. The debtor filed bankruptcy on the eve of the hearing on attorney's fees. Post-petition, the insurer filed an adversary proceeding against the debtor, seeking a determination that the attorney's fees and costs owed by the debtor to the insurer were non-dischargeable. The Bankruptcy Court held that the debtor's conduct was willful and malicious; therefore, pursuant to section 523(a)(6) of the Bankruptcy Code, the attorney's fees were deemed non-dischargeable. *See, In re Auffant*, 268 B.R. 689 (Bankr. M.D. Fla. 2001). The debtor then argued to the Bankruptcy Court that the offer of judgment proposed by the insurer in state court was invalid under Rule 1.442 because it required the debtor to execute a general release containing the following language "any and all claims and demands of whatever nature which [debtor] holds or may hold, known or unknown," and therefore, failed to state with particularity the relevant conditions and nonmonetary terms. In re Auffant, 274 B.R. at 558. Rule 1.442 specifically provides that an offer of judgment must state with particularity any relevant conditions and nonmonetary terms. *See, Fla. R. Civ. P. 1.442(c)(2)(C) and (D)*. The Bankruptcy Court in Auffant disagreed with the debtor, and determined that the offer of judgment proposed by the insurer, containing the general release, was valid and consistent with the plain meaning of Rule 1.442. *See, In re Auffant*, 274 B.R. at 559-60.

This article is intended only as a starting point with respect to discussing the applicability of Florida's offer of judgment civil procedure rule in federal court and an exhaustive discussion of all case law is beyond the scope of this article. In addition, the question remains whether Florida's offer of judgment civil procedure rule is applicable to litigation initiated in bankruptcy court with no prior state court litigation involving an offer of judgment proposal.

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