CHAPTER 141

SETTLEMENT AND RELEASE

Scope

This chapter discusses the general authority to settle an action or claim and enumerates factors used in determining whether settlement is advantageous. The Legal Background explores settlement procedures and techniques, statutory offers of judgment and demands for judgment, and enforcement and avoidance of settlement agreements. The Legal Background also contains a subpart on releases, with emphasis on the effect of releases and enforcement and avoidance. The Practice Guides contain information on determining the settlement value of a case and negotiating a settlement. There is a guide for making and responding to statutory proposals for settlement, and a guide for drafting a settlement agreement. The chapter also discusses court-ordered mediation.

For discussion of procedures before and during trial, see Chapter 130. For discussion of mediation in medical malpractice claims, see Chapter 61. For discussion of structured settlements, see Chapter 142.

Synopsis

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PART I. LEGAL BACKGROUND

A. Settlement

1. Settlement Procedures and Techniques

§ 141.01 Nature and Purpose of Settlement

A settlement is an agreement between two or more persons who have resolved their differences through mutual concessions with respect to a dispute that is or may become the subject of a lawsuit. The principal advantages of settling a case instead of bringing it to trial are to provide for a certain, adequate, and fair compromise to which both parties have consented so as to avoid the uncertain results of the litigation process, and to protect the client from future adverse claims based on the same future occurrence. Settlement also allows a party to avoid the costs of litigation and the emotional trauma involved. The major disadvantage of settlement is that the trier of fact might have returned a more favorable award for the plaintiff or found less or no liability on the part of the defendant.

§ 141.02 Settlement Evaluation Factors

[1]—In General

The evaluation of a tort action for settlement depends on a consideration of such issues as liability [*see* [2], *below*], the financial responsibility of the defendants [*see* [5], *below*], damages [*see* [6], *below*], cost of litigation [*see* [7], *below*], and the timing of the settlement [*see* [7], *below*]. Only after an informed consideration of all these factors should an attorney advise a client as to the advantages or disadvantages of settling the case at various stages of the litigation process, as well as informing the client of the factors that will influence the eventual outcome of the case.

[2]—Potential Liability

[a]—Comparison of Opposing Claims. The issue of liability is important in evaluating a case for settlement purposes. The strengths and weaknesses of a case should be analyzed by each party to learn which points should and should not be emphasized in negotiating, and whether a settlement should be offered, accepted, or rejected. The potential for success in settlement negotiations depends on the potential for success at trial. That is, attorneys for both sides must advise their clients as to the strength of the plaintiff's liability theory and the chances of recovery on that theory, plus the probable effect of any claims and affirmative defenses asserted by the defendant.

[b]—Analysis of Facts as Supported by Evidence. To determine the potential for liability or recovery in a tort action, attorneys must analyze the facts of the event that gave rise to the tort in light of the available evidence that supports those facts. Consideration of affirmative defenses that the defendant may raise and the evidence that is available to support them is also important because a successful defense could reduce, if not eliminate, liability.

To be useful to the plaintiff or the defendant, evidence must be competent for introduction at trial [*see* Ch. 3, *Proof of Negligence*]. For instance, assume that P was driving her car in a safe and legal manner. She arrives at an intersection with a four-way stoplight, which is green, and proceeds through the intersection. However, D is driving over the speed limit because he is late for work, and he is not paying attention to the traffic signal. D enters the same intersection against a red light and hits P's car broadside. There are no other witnesses to the accident. In this factual situation, liability is clear. Nevertheless, D claims that he had a green light and that P ran a red light, causing the accident. Because the evidence consists only of conflicting testimony of the two parties, without corroborating witnesses, P's ability to prove D's liability at trial depends on the credibility of the testimony of the parties before the trier of fact, a burden that is difficult at best. Even if plaintiff's damages are extensive, the settlement value is diminished due to the lack of corroborative evidence to support the defendant's liability. On the other hand, if there had been a few witnesses who could testify in support of P, then P's settlement position would be strengthened.

[c]—Novelty of Plaintiff's Theory of Liability. If the theory of liability is untried in the Florida courts and is not directly authorized by statute, the chances of recovery at trial, and therefore the chances of recovery through settlement, are less certain than if the theory of liability is directly supported by Florida statutes or case law. For example, if D violated a traffic law by running a red light and hit an injured P who had legally entered the intersection, the theory of liability would be negligence based on violation of a statute [*see* § 316.1574, Fla. Stat. (obedience to traffic control devices)]. This is a well-accepted basis of liability [*see* Ch. 101, *Motor Vehicles*]. If P could produce sufficient evidence to verify his version of the facts, he would have a strong case against D, and both the likelihood of settlement and the value of P's case would increase.

In contrast, assume that P joins as a second defendant, C, the owner of a coffee shop where D had consumed several cups of coffee before driving through the intersection where the accident with P occurred. P alleges that the accident was caused in part because C negligently failed to warn D that the coffee was so strong that it could induce nervousness and decreased muscular coordination. Based on this theory, recovery for C's alleged negligence would be difficult because there is no supporting Florida case law or

statute. Even if P could obtain overwhelming medical evidence to prove his allegations of the effect of strong coffee, Florida law has not yet imposed such liability, and the outcome of a trial would therefore be unpredictable. Thus, the likelihood of obtaining a large settlement from the coffee shop would be remote. Nevertheless, the coffee shop may be willing to settle for a nominal sum just to avoid litigation, but the chances of this are also remote.

[3]—Participants at Trial

In general, a party who is well-dressed and well-spoken will make a better impression on the trier of fact than one who is not. In addition, a party's personality may or may not make a favorable impression on the trier of fact. These impressions on the trier of fact will generally affect the outcome of the litigation and thus, have a major impact on the settlement value of a party's case. A belligerent, abusive party may antagonize the trier of fact, while a party who is polite and sincere will likely receive their sympathy and respect. The party's potential impact on the trier of fact must be considered when weighing the advantages and disadvantages of settling the case or going to trial.

The level of skill and experience of an adversary's counsel must be considered when predicting the value and likelihood of settlement. For example, if the plaintiff's counsel has 20 years of trial experience and polished persuasive skills, and the defendant's counsel is newly admitted to practice, the plaintiff's chances of recovery at trial are greater than the defendant's. Therefore, the potential for a large settlement is greater than if the attorneys' levels of skill are equal.

The trial judge may affect the outcome of a trial, and his or her identity should be considered when deciding whether, when, and for how much to settle a case. For example, a judge who favors one of the parties is capable of influencing the outcome of the trial in many ways.

The availability and testimony of the witnesses may also strengthen or weaken a party's case. If an expert will be used who is the foremost authority in the field that is the subject of his or her testimony, the chances of a favorable settlement are enhanced. Similarly, a lay witness who is credible and well-received by the jury will strengthen a party's case. Witness characteristics that influence the jury include similarity or differences in background between the witness and the jurors, similarity in age, and similarity in general attitudes about trials, insurance, lawsuits and the like.

[4]—Locality of Trial

Where the trial takes place often determines which party will win and whether an award will be small or large. For example, local prejudice for or against the parties or subject matter of the lawsuit may predetermine the outcome to a certain extent. A jury from an area with conservative attitudes,

for example, would have more sympathy for a child hit by a car than for a cult member driver a car while under the influence of drugs. Such biases can negatively or positively influence the value of a case. The local attitudes toward lawsuits and large jury verdicts must be evaluated. If the locale of the trial is not a favorable one for a client, the settlement value of the case will be reduced.

[5]—Financial Resources of Defendant

The issue of the extent of financial resources available to a defendant is an important consideration for a plaintiff with respect to the decision to settle the action. If a potential defendant has no apparent financial means, such as insurance coverage or personal assets to satisfy the damages sought by the plaintiff, the plaintiff may decide to settle for the highest amount the defendant can afford, even if this is far below the actual amount of damages. Otherwise, if the action is litigated, the plaintiff may obtain a judgment that is of no practical value because the defendant has no financial means to satisfy it.

[6]—Plaintiff's Damages

The extent of a plaintiff's damages must be assessed when a case is being evaluated. The plaintiff may have medical bills, property damage, wage loss, and other, noneconomic damages such as emotional trauma and pain and suffering. To determine whether to settle, and a settlement amount that would adequately compensate the plaintiff, it is essential to assess these damages, in conjunction with the other factors involved in the case and to predict what a jury might award if the case went to trial.

The issue of damages is separate from that of the defendant's potential liability, but liability affects the kind of damages the plaintiff may receive. For instance, punitive damages are available only when the defendant has committed a tort and is personally guilty of intentional misconduct or gross negligence [*see* § 768.72(2), Fla. Stat.; *see also* Ch. 113, *Punitive Damages*]. Unless the plaintiff can produce sufficient evidence to support a finding of intentional misconduct or gross negligence, no punitive damages may be awarded. Special damages are those that can be ascertained by determining what the plaintiff's actual economic damages are. Medical bills, wage loss, cost of medication, and future wage loss are all special damages that can be awarded to a plaintiff. General damages include emotional trauma and pain and suffering that the plaintiff has suffered in connection with the tort.

The award of damages will be affected by the quality of the evidence and the witnesses. Weak evidence will not support a large award of damages, giving the plaintiff more incentive to settle the case short of trial. Strong evidence to support the plaintiff's claim gives the plaintiff a strong incentive to litigate

the claim, because the likelihood of success at trial is great. Conversely, the defendant has little incentive to settle when the plaintiff's evidence is weak, and strong incentive to settle when the plaintiff's evidence is strong. These countervailing forces must be taken into account when settlement is attempted by either side.

[7]—Timing and Costs of Litigation

In evaluating a case for settlement, attorneys for both parties must assess not only the potential jury award, and whether the jury will find for the plaintiff or the defendant, but also when settlement would be more advantageous than proceeding to trial. The costs of litigation, investigation, discovery, and preparation of a case for trial may be great. Thus, settling the case as soon as possible to avoid incurring unnecessary fees for legal services may be in the client's best interests. For that reason, the parties must continually weigh the costs of litigation against the potential liability of the defendant, the financial resources of the defendant, and the available damages. If the costs of bringing a case to trial are higher than the net amount a client expects to recover at trial, or if the net amount of the anticipated damages award is negligible, it is in the client's best interests to settle before substantial discovery, trial preparation, or litigation has occurred.

The timing of the settlement must also accommodate the client's financial needs. For example, some clients may prefer to receive a small settlement at the present time rather than to wait several months or even years for a potentially large jury award of damages. A plaintiff's urgent need for an early settlement may lower the settlement value if known to the defendant. On the other hand, a defendant's need to settle the case quickly, if known to the plaintiff, may enhance the potential settlement value of the case.

Often, the best time to settle a case is before a complaint has been filed. For example, if damages are substantial and liability is clear, but the defendant has limited insurance coverage, the plaintiff's attorney may make a settlement demand for the policy limits before suing. This procedure may not only provide a recovery for the client as quickly as possible, but will also invoke the duty of good faith [*see* Ch. 152, *Bad Faith Insurance Actions*], which requires that a defendant's insurer settle the case as quickly and fairly as possible. If the company breaches that duty, the insurance company may be liable for the entire amount of the ultimate verdict obtained by the plaintiff, regardless of the insurance policy limits.

On the other hand, if a plaintiff's damages are small, and the evidence of liability is excellent, and the defendant's financial resources are adequate, plaintiff's attorney may advise a delay in pretrial settlement negotiations as long as possible without violating the statute of limitations for filing suit. Such a

delay could be advantageous, for example, if a plaintiff who sustained seemingly slight injuries were to develop serious and significant complications months or years later. The likelihood of this possibility should be weighed against all other relevant factors in determining when to settle a case.

§ 141.03 Cooperation in Settlement

[1]—By Client

Knowing how and when to settle a case is useless unless the client agrees. An attorney has two principal duties to the client. The first is to obtain for the client the maximum recovery that can be obtained in an honest and ethical manner. The second duty is to communicate with and educate the client at stages of the settlement and litigation process so that the client understands each step of the process [*see* Rules Reg. Fla. Bar, Rule 4-1.3 (diligence); Rules Reg. Fla. Bar, Rule 4-1.4 (communication with client)]. An attorney must abide by the client's decision whether to make or accept an offer of settlement [Rules Reg. Fla. Bar, Rule 4-1.2(a)].

The first interview with the client often has a significant influence on the ultimate resolution of the case. At that time, an attorney should explain the factors to be considered in evaluating the case for settlement or trial. The attorney should inform the client of the possible results of litigation generally, the time and costs involved, and the advantages and disadvantages of settlement. Additionally, the attorney should emphasize that the decision to settle is ultimately made by the client, and should ascertain the extent to which a client is amenable to a settlement.

During the progress of a case, the attorney should continue to ascertain whether the client prefers to settle or to litigate [*see* Rules Reg. Fla. Bar, Rule 4-1.4 (communication with client)]. If the attorney keeps the client informed of the progress and problems with the case at all stages of the settlement or litigation process, the client is more likely to follow the attorney's advice as to the best means for resolving the case. A client who is informed is also more likely to be satisfied with the settlement or judgment obtained.

[2]—Opposing Parties

Some opponents will not settle. They take the position that the opposing party was at fault in an accident, and either will refuse to negotiate, or will offer a figure that is ridiculously low, or make a demand that is ridiculously high. When dealing with this type of opponent, one should consider the fact that such negotiating positions are often a bluff, and continued efforts to negotiate may be successful. However, there are some opposing parties who prefer trial, and no amount of negotiation will effect a settlement. One of the few effective tools for dealing with opposing parties who refuse to settle is to

make a statutory proposal for settlement, which, if rejected or ignored, may entitle the offeror to costs and attorneys' fees upon a favorable conclusion of the litigation [*see* § 786.79, Fla. Stat.; *see also* § 141.20].

§ 141.04 Mediation in Aid of Settlement

[1]—Applicability of Court-Ordered Mediation Statute

Statutory court-ordered mediation can be a useful and relatively inexpensive settlement tool. "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives [§ 44.1011(2), Fla. Stat.].

On the request of a party, a court must refer to mediation any civil action for monetary damages, unless the action is excepted by statute, and provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties [§ 44.102(2), Fla. Stat.]. The following types of action may not be sent to statutory court-ordered mediation [§ 44.102(2)(a), Fla. Stat.]:

(1) A landlord tenant dispute that does not include a claim for personal injury.
(2) A debt collection action.
(3) A medical malpractice claim.
(4) Actions governed by the Florida Small Claims Rules.
(5) An action the court determines is more properly referred to nonbinding arbitration.
(6) An action in which the parties have agreed to binding arbitration.
(7) An action in which the parties have agreed to an expedited trial [*see* § 45.075, Fla. Stat.].
(8) An action in which the parties have agreed to voluntary trial resolution [*see* § 44.104, Fla. Stat.].

[2]—Mediation Procedures

Court-ordered mediation must be conducted according to the rules of practice and procedure adopted by the Supreme Court [§ 44.102(1), Fla. Stat.]. Within ten days of the order of referral to mediation, the parties may stipulate to a mediator [Fla. R. Civ. P. 1.720(f)(1)]. If the parties cannot agree upon a mediator, the plaintiff or petitioner must notify the court within ten days

of the expiration of the period to agree on a mediator, and the court must appoint a certified mediator selected by rotation or by such other procedures as may be adopted by the administrative order of the chief judge in the circuit where the action is pending [Fla. R. Civ. P. 1.720(f)(2)].

If a party fails to appear at a duly noticed mediation conference without good cause, the court must impose sanctions, including an award of mediator and attorneys' fees and other costs, against the party failing to appear. If a party to mediation is a public entity required to conduct its business pursuant to Chapter 286, Florida Statutes, that party is deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity. Otherwise, unless stipulated by the parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present [Fla. R. Civ. P. 1.720 (b)]:

(1) The party or its representative having full authority to settle without further consultation.

(2) The party's counsel of record.

(3) A representative of the insurance carrier for any insured party who is not the carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or the policy limits, whichever is less, without further consultation.

An individual defendant is required to personally attend court-ordered mediation even when the defendant's insurer sends a representative with full authority to settle up to the policy limits. Thus, both the party and the representative of the insurance carrier must attend. Furthermore, a representative does not have "full authority to settle" if the representative is only authorized to settle up to insurance policy limits and the plaintiff has not agreed to limit his or her demands to those limits [Carbino v. Ward, 801 So. 2d 1028, 1031 (Fla. 5th DCA 2001)].

The mediator is in control of the mediation and the procedures to be followed in the mediation. Counsel is permitted to communicate privately with their clients. In the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court [Fla. R. Civ. P. 1.720(d)].

[3]—Mediation Results and Effect

On completion of the mediation, if the parties do not reach an agreement as to any matter, the mediator must report the lack of an agreement to the court without comment or recommendation. With the consent of the parties, the mediator's report may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or

completed, would facilitate the possibility of a settlement [Fla. R. Civ. P. 1.730(a)].

If a partial or final agreement is reached through mediation, the agreement must be reduced to writing and signed by the parties and their counsel. The agreement must be filed if required by law or with the parties' consent. A report of the agreement must be submitted to the court, or a stipulation of dismissal must be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. If so recorded, the transcript may be filed with the court. The mediator must report the existence of the signed or transcribed agreement to the court without comment within 10 days [Fla. R. Civ. P. 1.730(b)].

If any party breaches or fails to perform under the agreement, the court may impose sanctions, including costs, attorneys' fees, or other appropriate remedies including entry of judgment on the agreement [Fla. R. Civ. P. 1.730(c)].

Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent others present at the proceeding from disclosing, communications made during the mediation proceeding. All oral or written communications in a mediation proceeding, other than an executed settlement agreement, are confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise [§ 44.102(3), Fla. Stat.].

At least one court has opined that cases settled in mediation are especially unsuited to liberal application of rules allowing for rescission of a settlement agreement. Mediation is an alternative dispute resolution device, and is not to be engaged in casually or carelessly. The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are foregone. The finality of it once the parties have set down their agreement in writing is critical. A party who makes the decision to settle is entitled to rely on the finality of the mediation agreement. The mediation rules treat cases in which an agreement is reached differently from a case in which no agreement is reached. Also, mediation proceedings are confidential and what transpires during mediation may not be revealed. An opposing party in the position of trying to uphold the validity of a mediated settlement agreement may be at a disadvantage in impeaching or rebutting claims of mistake as to the meaning of a mediated settlement agreement because they cannot introduce evidence of what occurred during the mediation process [Sponga v. Warro, 698 So. 2d 621, 625 (Fla. 5th DCA 1997)].

§ 141.05 Settlement Techniques

[1]—Structured Settlements

Cases involving substantial damages often employ the device of a structured settlement. Internal Revenue Code Section 104 specifically excludes personal injury damages from gross income whether received in a legal action or by agreement [*see* 26 U.S.C.S. § 104(a)(2)]. Further, the Internal Revenue Code does not distinguish between damages received in lump sums or as periodic payments. Therefore, there are no direct tax advantages to a plaintiff in receiving a settlement in one lump sum, or in payments over time [*see* 26 U.S.C.S. § 104(a)(2); *see also* Ch. 117, *Taxation of Tort Damages*]. However, the plaintiff may prefer one type of settlement over the other, and the individual advantages and disadvantages of each method of payment must be discussed with the client.

There are significant indirect tax advantages if a plaintiff receives payment of a settlement over time rather than as a lump sum and invests that sum at a certain percentage annual yield. In contrast to the nontaxable nature of each periodic settlement payment, the interest earned on an invested lump-sum award will be treated as taxable income [*see* 26 U.S.C.S. § 104(a)(2)]. The principal advantage to the defendant of choosing periodic payments rather than a lump-sum payment is that the defendant retains use of the funds for a longer period of time.

For additional discussion of structured settlements, see Chapter 142, *Structured Settlements*.

[2]—"Mary Carter" Agreements

A "Mary Carter" agreement, named after the case of *Booth v. Mary Carter Paint Company*, which established its validity, is a contract between a plaintiff and one of several defendants. A codefendant agrees, without the knowledge of the other defendants, to defend himself or herself in court and attempt to convince the trier of fact to hold the other defendants liable. In return, the defendant who is a party to the Mary Carter agreement will have his or her own maximum liability diminished proportionately by increasing the liability of the other codefendants [Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d DCA 1967); *see* Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973) (giving an operational definition of a Mary Carter agreement); *see also* § 768.041, Fla. Stat. (effect of release as to one of multiple defendants)]. As discussed below, the Florida Supreme Court has held Mary Carter agreements to be void. However, the Supreme Court's holding applies prospectively; that is, it does not affect the legality of a Mary Carter (or similar type) agreement entered into prior to the date of the Court's opinion (August 26, 1993). However, even

if not void, Mary Carter agreements are admissible in evidence and their disclosure to a jury is required to avoid misleading the jury [Dosdourian v. Carsten, 624 So. 2d 241, 247–248 (Fla. 1993)].

Typically, the purpose of a Mary Carter agreement is to allow the plaintiff to secure a large judgment against one or more defendants who have substantial resources with the help and cooperation of another defendant who agrees to testify that the codefendants were primarily at fault for the plaintiff's injuries [*see* Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d DCA 1967)]. An example of a Mary Carter agreement is illustrated as follows: A plaintiff was injured by a gunshot that came from a rifle range, and several possible defendants could be liable for the injury. There were three people on the range at the time of the accident, and the owner of the rifle range was also there. The plaintiff could bring suit against all four as codefendants. The plaintiff entered into a Mary Carter agreement with the three men on the rifle range so that they would testify that the accident was the result of defective equipment at the range, or poor design of the range, because the owner of the rifle range had the greatest financial resources. The agreement stipulated that if the rifle range was held liable, the three codefendants would have no liability. If the three codefendants were held liable, the agreement limited their liability to the plaintiff to a maximum of $5,000 each.

There are several incentives for a settling defendant to enter into a Mary Carter agreement with the plaintiff. One is to limit the potential liability to the plaintiff by a guarantee that his or her maximum exposure to liability will be no more than the amount fixed by the agreement. Another incentive is to obtain a guarantee that the settling defendant will have no liability should the trier of fact find the nonsettling defendants liable for a certain minimum judgment provided for in the agreement [*see* Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d DCA 1967)].

On the other hand, by entering into such an agreement, a settling defendant assumes the risk that the trier of fact will find either none of the defendants or none of the codefendants liable. In that event, the Mary Carter agreement provides that the settling defendant is liable to the plaintiff for the maximum amount agreed as the exposure limit, even if not liable. This provision therefore creates a strong incentive for the settling defendant to try to shift liability to the codefendants [*see* Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d DCA 1967)].

Mary Carter agreements are most effective when their existence is not divulged to the other defendants, as the nonsettling defendants are then unprepared to counter the testimony. The defendants thus have little or no opportunity to explain to the trier of fact that the settling defendant, because of a Mary Carter agreement, is setting a procedural trap designed to shift the

entire liability for a tort onto the nonsettling defendants. Nevertheless, the Florida Supreme Court has held that Mary Carter agreements must be disclosed to avoid misleading the jury [Dosdourian v. Carsten, 624 So. 2d 241, 247–248 (Fla. 1993)].

In fact, even before the Supreme Court held Mary Carter agreements to be void, it held that Mary Carter agreements are discoverable [Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973)]. Moreover, a trial judge was given authority to force the settling parties to reduce an oral Mary Carter agreement to writing so that it could be obtained in discovery or admitted as evidence of its existence. The trial judge also has the authority to edit a written Mary Carter agreement so as to inform the jury of the terms of the agreement, while excluding statements in the agreement that, if introduced into evidence, would unfairly prejudice the nonsettling defendant [*see* Bechtel Jewelers, Inc. v. Ins. Co. of N. Am., 455 So. 2d 383, 384–385 (Fla. 1984) (portions of agreement containing language that was biased against the other defendant and would unduly sway the jury could be excised from discoverable portions)].

The Florida Supreme Court has held that Mary Carter agreements are void because they undermine the fairness of the judicial system [Dosdourian v. Carsten, 624 So. 2d 241, 246–248 (Fla. 1993)]. The Court reasoned that such agreements allow settling defendants to retain their influence on the outcome of the lawsuit. Mary Carter defendants also often exert undue influence on the adversarial process before a trial because they may share with a plaintiff work product disclosed to them by a non-settling defendant. In addition, by virtue of a Mary Carter agreement, settling defendants acquire a financial interest in the outcome of the trial. Finally, Mary Carter agreements promote unethical practices by attorneys, who must make misrepresentations to the court concerning the adversarial nature of the relationships between the parties [Dosdourian v. Carsten, 624 So. 2d 241, 243–244 (Fla. 1993)]. This prohibition applies not only to agreements that fit the previously accepted definition of a Mary Carter agreement, but also to any agreement that requires the settling defendant to remain in the litigation, regardless of whether there is a financial incentive to do so [Dosdourian v. Carsten, 624 So. 2d 241, 246 (Fla. 1993)].

[3]—Stipulated Judgments in Insurance Cases

If an insurance company refuses to defend an insured, the plaintiff and the insured may enter into a stipulated judgment with respect to liability and damages, as long as the judgment is not a product of collusion or fraud. Either the plaintiff or the defendant may then litigate the separate issue of whether there is insurance coverage. These types of agreements are sometimes referred to as Coblentz settlement agreements after a federal Fifth Circuit case that recognized the technique [*see* Coblentz v. American Sur. Co., 416 F.2d 1059 (5th Cir. 1969); *see also* Ahern v. Odyssey Re (London) Ltd., 788 So. 2d 369,

371 (Fla. 4th DCA 2001)]. Florida courts have recognized the validity of such agreements, concluding that an insured who is left to defend himself or herself has the right to protection by means of a stipulated judgment, which provides that such judgment may only be satisfied from applicable insurance [*see* Ahern v. Odyssey Re (London) Ltd., 788 So. 2d 369, 371–372 (Fla. 4th DCA 2001); Florida Farm Bureau Mut. Ins. Co. v. Rice, 393 So. 2d 552, 556 (Fla. 1st DCA 1980); Kovarnik v. Royal Globe Ins. Co., 363 So. 2d 166, 169 (Fla. 4th DCA 1978)]. Although, ordinarily, one who is not a party to a settlement agreement cannot be bound by its terms, the courts have recognized an exception for Coblentz agreements. When an insurer wrongfully refuses to defend its insured, the insurer's liability is established by the settlement agreement and the insurer may not later relitigate this issue. An indemnitor will be bound by a settlement agreement in a suit against the indemnitee if the indemnitor had notice of the suit and an opportunity to defend, and the settlement was not the product of fraud or collusion [Ahern v. Odyssey Re (London) Ltd., 788 So. 2d 369, 371–372 (Fla. 4th DCA 2001)].

Florida courts have also recognized that when an insurance company contributes toward a settlement of a lawsuit after the parties had agreed that the company could retain its right to proceed with a declaratory judgment on the issue of coverage, the voluntary payment to the injured party does not extinguish the insurer's right to pursue declaratory relief regarding the issue of coverage. An agreement that provides payment to the injured party while retaining the insurer's right to contest coverage is commendable because it facilitates prompt settlement of the underlying controversy thereby eliminating the interim expenditures of litigation. It also yields a savings to defending insurance carrier by enabling them to resolve purely legal issues of coverage through the more expedient declaratory judgment procedure [*see* State Farm Fire & Cas. Co. v. Fleet Fin. Corp., 724 So. 2d 1218, 1219–1220 (Fla. 5th DCA 1998) (dicta); citing with approval, Allstate Ins. Co. v. Employers Liab. Assurance Corp., 445 F.2d 1278 (5th Cir. 1971)].

[4]—High-Low Agreements

Cases that involve substantial damages and in which liability is tenuous provide problems for both the plaintiff and the defendant. The plaintiff faces the prospect of a long and expensive trial with an unpredictable chance of recovery. The defendant faces the possibility of a large award of damages to the plaintiff. A tool used by attorneys to minimize the risk in this type of case is the high-low agreement.

In such an agreement, the defendant guarantees that the plaintiff will receive at least a specified minimum amount of money, regardless of the amount of the damages awarded. In return, the plaintiff guarantees that the defendant will be held liable for no more than a designated maximum amount, regardless

of the damages awarded. The high-low agreement essentially allows the parties to reach a partial settlement when they are unable to agree to a precise amount. They can set a minimum and maximum limit on liability, and then submit their arguments to the trier of fact for an objective determination. The agreement of the parties will override an award that is beyond the fixed minimum or maximum amount.

A high-low agreement is not an unenforceable Mary Carter agreement. A "Mary Carter" agreement is a contract under which one codefendant secretly agrees with the plaintiff that, if the defendant will proceed to defend himself or herself in court, that defendant's own maximum liability will be diminished proportionately by increasing the liability of the other codefendants. The hallmark of a Mary Carter agreement is the pitting of one defendant against the remaining defendants at trial [*see* [2], *above*]. A high-low agreement is different from a Mary Carter agreement because the high-low agreement does not attempt to shift liability between defendants. Rather, all of the defendants agree to the settlement, they share the benefits of the liability cap, and liability is not shifted. High-low agreements are a common form of settlement, which have been approved by the courts in the past [*see* Cardona v. Metro Dade Transit Agency, 680 So. 2d 1098, 1099 (Fla. 3d DCA 1996)].

§ 141.06 Statutes Affecting Settlements

[1]—Wrongful Death Actions

An action for wrongful death must be brought by the decedent's personal representative. It is the duty of the personal representative to recover for the benefit of the decedent's estate all damages that result from the injury and death of the decedent [§ 768.20, Fla. Stat.]. When a wrongful death action is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or incompetent is effective unless approved by the court [§ 768.25, Fla. Stat.].

[2]—Settlements on Behalf of Minors

Parents are the natural guardians of their own children during minority [§ 744.301(1), Fla. Stat.]. The parents, as natural guardians, are authorized to settle any claim or cause of action accruing to their minor children when the amount involved does not exceed $5,000, without appointment, authority, or bond [§ 744.301(2), Fla. Stat.].

If a minor has a claim for personal injury, property damage, or wrongful death in which the gross settlement equals or exceeds $25,000, the court must appoint a guardian ad litem to represent the minor's interest. For settlements equaling or exceeding $10,000 but less than $25,000, the court may, but is not

required to appoint a guardian ad litem to protect the minor's interest. In either case, however, if a legal guardian of the minor has already been appointed and has no potential adverse interest to the minor, the court is not permitted to appoint a guardian ad litem unless it determines that the appointment is otherwise necessary [§ 744.301(4)(a), Fla. Stat.].

Once a lawsuit has been commenced by or on behalf of a minor or incompetent, any settlement must be approved by the court that has jurisdiction over the action [§ 744.387(3)(a), Fla. Stat.]. If the net settlement of a minor or incompetent exceeds $5,000 and no guardian has been appointed, the court must appoint a guardian of the property [§ 744.387(3)(b), Fla. Stat.]. In making a settlement under court order, the guardian is authorized to execute any instrument that may be necessary to effect the settlement. When executed, the instrument is a complete release of the person making the settlement [§ 744.387(4), Fla. Stat.].

Failure to follow the approval procedures may subject the defendant to further liability. For example, the Second District ruled that a presuit settlement in favor of the minor children of the decedent did not bar a wrongful death action on behalf of the surviving minor children if the settlement was not approved by a court having competent jurisdiction [Sullivan v. Dep't of Transp., 595 So. 2d 219, 220 (Fla. 2d DCA 1992) (holding that, although not specified in statutes, settlement exceeding $5,000 in favor of minor requires court approval)].

[3]—Uniform Contribution Among Joint Tortfeasors Act

The Uniform Contribution Among Joint Tortfeasors Act provides that when joint and several liability applies, a good-faith settlement with one tortfeasor does not discharge any other tortfeasor from liability unless the terms of the settlement agreement so provide [§ 768.31(5), Fla. Stat.]. Therefore, a plaintiff who settles with one defendant is not barred from pursuing an action against another defendant who is jointly and severally liable for the same tort [*see* § 768.041(1), Fla. Stat. (release of one tortfeasor does not release other tortfeasors)]. Under this rule, a suit may be maintained against a person who is vicariously liable for the torts of another even though the active tortfeasor has settled with the injured party [*see* Robert L. Turchin, Inc. v. Gelfand Roofing Inc., 450 So. 2d 554, 556 (Fla. 3d DCA 1984); *see also* Ch. 50, *Vicarious Liability*]. However, in any action against a nonsettling tortfeasor, the amount of the settlement is deducted from the amount of any judgment against the nonsettling tortfeasor [§ 768.041(2), Fla. Stat.].

The Uniform Contribution Among Joint Tortfeasors Act does not affect the right of indemnity under existing law [*see* § 768.31(2)(f), Fla. Stat.; *see also* Robert L. Turchin, Inc. v. Gelfand Roofing Inc., 450 So. 2d 554, 555 (Fla.

3d DCA 1984)]. Only the contribution by nonsettling tortfeasors to a settling tortfeasor is required by the statute. Whether contractual or implied by a special relationship, the right of indemnity affects the plaintiff's rights only indirectly. Similarly, the Uniform Contribution Among Joint Tortfeasors Act does not limit the plaintiff to recovery against only one tortfeasor, but the plaintiff will be limited to only one recovery [*see* § 768.31(2)(f), Fla. Stat.; *see also* § 768.041(3), Fla. Stat.].

If a party settles with less than all of the defendants, the remaining defendants are not permitted to tell the jury that the plaintiff has settled with the other defendants [§ 768.041(3), Fla. Stat.].

For further discussion of the Uniform Contribution Among Joint Tortfeasors Act, see Chapter 140, *Contribution and Indemnity*.

[4]—Optional Settlement Conferences

The court may require a settlement conference to be held at least three weeks before the date set for trial [§ 768.75(1), Fla. Stat.]. Attorneys who will conduct the trial, parties, and persons with authority to settle must attend the settlement conference unless excused by the court for good cause [§ 768.75(2), Fla. Stat.].

2. Statutory Offers of Judgment and Demands for Judgment

§ 141.20 Availability of Statutory Offer of Judgment

[1]—Actions in Which Offer of Judgment Statute May Be Used

In an attempt to settle a case, a defendant may make an offer of judgment or a plaintiff may make a demand for judgment in conformity with the Florida Rules of Civil Procedure [*see* Fla. R. Civ. P. 1.442 (Proposals for Settlement) and the Florida Statutes [*see* § 768.79(1), Fla. Stat.]. An offer of judgment or demand for judgment can be advantageous to the offering party because, under certain circumstances, the court is authorized to award costs and attorneys' fees to the offeror as sanctions against an offeree who unreasonably rejects the offer [*see* § 768.79(1), Fla. Stat.; *see also* § 141.16]. The intent of the statute and rule is to encourage the settlement of cases.

The offer of judgment statute has been held to be constitutional [*see* TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995)].

The Third District has held that the offer of judgment statute applies to all civil actions, including class actions. It had been argued that the statute creates a conflict of interest for a class representative because, in some situations, it may be advantageous for the personal representative to accept an offer of judgment to avoid potential personal exposure for substantial class

action attorneys' fees and costs, but the offer of judgment may not be in the best interests of the other class members. While acknowledging the validity of these concerns, and noting that the federal courts have held the federal offer of judgment rule to be inapplicable to class action, the court felt that it was bound by the statutory language, which states that it applies to "any civil action" [Oruga Corp. v. AT&T Wireless, Inc., 712 So. 2d 1141, 1144 (Fla. 3d DCA 1998); *see* § 768.79(1), Fla. Stat. ("[i]n any civil action for damages")].

Also in accordance with statutory language that the rule applies to "any civil action," the Fourth District held that Florida's offer of judgment statute applies to a case arising in Tennessee but litigated in Florida under Tennessee substantive law. The court refused to apply a conflict of laws analysis, noting that choice of law considerations are not applied when the laws of the other state would prejudice its own citizens or are repugnant to its own public policy. When the Florida Legislature enacted the offer of judgment statute, it was making a policy determination that attorneys' fees should be recoverable in "any" civil action for damages brought in Florida, for the primary purpose of reducing litigation. An action for damages based on the substantive law of another jurisdiction has the same impact on the Florida court system as one based on the substantive law of Florida [BDO Seidman, LLP v. British Car Auctions, Inc., 802 So. 2d 366, 369 (Fla. 4th DCA 2001)]. However, the federal Eleventh Circuit reached the opposite conclusion, holding that the offer of judgment statute is substantive and therefore, should not be applied to a case in which Virginia substantive law governed the underlying claim [*see* McMahon v. Toto, 256 F.3d 1120, 1133-1134 (11th Cir. 2001)].

[2]—Offer of Judgment Statute May Be Preempted

The offer of judgment statute may be preempted in an action brought pursuant to federal law when the federal law contains a conflicting provision for an award of attorneys' fees. For example, it has been held that the federal civil rights act, which authorizes an award of attorneys' fees to a prevailing defendant only if the suit was vexatious, frivolous, or brought to harass or embarrass the defendant, is much narrower and thus, preempts use of the Florida offer of judgment statute and rule in federal civil rights actions [*see* Moran v. City of Lakeland, 694 So. 2d 886, 886–887 (Fla. 2d DCA 1997)]. Similarly, it has been held that the Florida offer of judgment statute is preempted by the attorneys' fees provision of the Federal Fair Debt Collection Protection Act (FDCPA) [*see* Clayton v. Bryan, 753 So. 2d 632, 634 (Fla. 5th DCA 2000)]. The FDCPA provides that attorneys' fees may be awarded to a prevailing defendant only when the court expressly finds that the plaintiff's case was "brought in bad faith and for the purpose of harassment" [15 U.S.C.S. § 1692k(a)(3)].

§ 141.21 Numerous Versions of Statutes and Rules Warrant Caution in Reliance on Earlier Case Law

Several rules and statutes have been adopted over the years to authorize offers of judgment and demands for judgment [*see, e.g.*, former § 45.061, Fla. Stat. (effective July 2, 1987 through Sept. 30, 1990)]. Some of these statutes had overlapping and conflicting provisions. In addition, the rule of civil procedure governing offers of judgment has been adopted, amended, withdraw, and re-adopted on several occasions [*see* Fla. R. Civ. P. 1.442]. Thus, any case law should be carefully reviewed before use in support of any arguments concerning offers of judgment to determine which version of the statute or rule the court was interpreting.

Section 768.79 is now the only statute under which a statutory offer of judgment or demand for judgment may be made. In addition, Florida Rule of Civil Procedure 1.442 applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals. The rule supersedes all other provisions of the rules and statutes that are inconsistent [Fla. R. Civ. P. 1.442(a)].

All procedures and requirements discussed in this subpart of the chapter are based on the current version of Section 768.79 and Rule 1.442, unless specifically indicated otherwise.

§ 141.22 Overview of Offer or Demand Procedure

In any civil action, the defendant may make an offer of judgment to the plaintiff. If the plaintiff does not accept the offer within 30 days, the defendant is entitled to recover reasonable costs and attorneys' fees from the date of the filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer [§ 768.79(1), Fla. Stat.]. When such costs and attorneys' fees total more than the judgment for the plaintiff, the court must enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award [§ 768.79(1), Fla. Stat.].

Similarly, the plaintiff may make a demand for judgment on the defendant. If the defendant does not accept the demand within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, the plaintiff is entitled to recover reasonable costs and attorneys' fees incurred from the date of the filing of the demand [§ 768.79(1), Fla. Stat.].

§ 141.23 Form and Content of Proposal for Settlement

An offer must be in writing and must identify the applicable Florida law under which it is being made [§ 769.79(2)(a), Fla. Stat.; Fla. R. Civ. P.

1.442(c)(1)]. An offer must comply with all of the following [Fla. R. Civ. P. 1.442(c)(2); *see* § 768.79(2), Fla. Stat.]:

(1) Name the party or parties making the proposal and the party or parties to whom the proposal is being made.

(2) Identify the claim or claims the proposal is attempting to resolve.

(3) State with particularity any relevant conditions.

(4) State the total amount of the proposal and state with particularity all non-monetary terms of the proposal.

(5) State with particularity the amount proposed to settle a claim for punitive damages, if any.

(6) State whether the proposal includes attorneys fees and whether attorneys' fees are part of the legal claim.

(7) Include a certificate of service in the form required by Florida Rule of Civil Procedure 1.080(f).

Although not specifically prohibited by the statute or rule, some courts have applied the requirement that a proposal for settlement not contain "impermissible conditions." In this regard, the courts have ruled that an offer is not invalid simply because it requires the parties to exchange releases and dismiss the action on acceptance. The requirements of dismissal and release are not really "conditions," but rather are mechanical and legally inconsequential means of effecting the settlement [Gulf Coast Transp., Inc. v. Padron, 782 So. 2d 464, 466 (Fla. 2d DCA 2001); Earnest & Stewart, Inc. v. Codina, 732 So. 2d 364, 366 (Fla. 3d DCA 1999)].

§ 141.24 Other Procedural Requirements for Offer

[1]—Persons to Whom Offer May Be Made

An offer 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 must state the amount and terms attributable to each party [Fla. R. Civ. P. 1.442(c)(3)].

The Second District has ruled that a single offer made to husband and wife plaintiffs did not meet the requirements for a joint proposal when it did not itemize the amount to be allocated to one spouse's loss of consortium claim. Even a plaintiff with a derivative claim has an independent right to evaluate and decide the settlement of his or her claim [United Servs. Auto. Ass'n v. Behar, 752 So. 2d 663, 665 (Fla. 2d DCA 2000)]. Conversely, the Second District held that when two offerors make a proposal for settlement to one offeree, the offeree is entitled to know the amount and terms of the offer that are attributable to each offeror [Allstate Ins. Co. v. Materiale, 787 So. 2d 173, 175 (Fla. 2d DCA 2001) (certifying a conflict with the Third and Fifth

Districts)]. On the other hand, the Fifth District ruled that when two plaintiffs made a joint offer of settlement to a single defendant, lack of apportionment between the plaintiffs made no difference. The several offerors could apportion the amount received among themselves without affecting the defendants' right to a release by all claimants [Spruce Creek Dev. Co. v. Drew, 746 So. 2d 1109, 1116 (Fla. 5th DCA 1999)]. Similarly, other courts have found that a single offer to multiple defendants is permissible when the only basis on which the defendants could be held liable was vicarious liability, because each individual defendant could be held liable for the entire amount of the damages under joint and several liability. Thus, no individual defendant was adversely affected by the joint offer because the defendants were not joint tortfeasors with potentially different degrees of fault and competing interests [*see* Safelite Glass Corp. v. Samuel, 771 So. 2d 44, 46 (Fla. 4th DCA 2000), *rev. dismissed*, 786 So. 2d 1188 (Fla. 2001); Strahan v. Gauldin, 756 So. 2d 158, 161 (Fla. 5th DCA 2000), *rev. dismissed*, 2001 Fla. LEXIS 2206 (Fla. Nov. 1, 2001); Flight Express, Inc. v. Robinson, 736 So. 2d 796 (Fla. 3d DCA 1999) (single offer by two defendants to one plaintiff was not void for failing to separate the offer of each defendant)].

[2]—Time Requirements

A proposal to a defendant may not be served earlier than 90 days after service of process on that defendant. A proposal to a plaintiff may not be served earlier than 90 days after the action has been commenced [Fla. R. Civ. P. 1.422(b)].

Acknowledging a possible conflict, the Third District Court of Appeal ruled that an offer of judgment served by a defendant less than 90 days after that defendant was served with a third-party complaint, while technically premature, was a valid offer of judgment when the main action had been pending for several years. The technical violation of the time requirement was harmless [Kuvin v. Keller Ladders, Inc., 797 So. 2d 611, 613 (Fla. 3d DCA 2001)]. On the other hand, the Fourth District has ruled that the time requirements of the rule must be strictly construed, and a premature offer is unenforceable [Grip Dev., Inc. v. Coldwell Banker Residential Real Estate, Inc., 788 So. 2d 262, 265 (Fla. 4th DCA 2000), *rev. denied*, 790 So. 2d 1102 (Fla. 2001)].

A proposal to either party may not be served 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)]. The 45-day rule is strictly construed. Thus, a timely offer must be served at least 45 days before the first day of the docket on which the case is set for trial, even if the start of the trial is later delayed to a date more than 45 days after the offer [*see* Schussel v. Ladd Hairdressers, Inc., 736 So. 2d 776, 777–778 (Fla. 4th DCA 1999)]. On the other hand, another court found that a proposal for settlement was timely when it was made at a time when the case, which had been on the trial

docket, was no longer set for trial and the offer was directed at the next, as yet unscheduled, docket [*see* Liguori v. Daly, 756 So. 2d 268, 269 (Fla. 4th DCA 2000)]. The Third District has also found a narrow exception to the bright-line rule that an offer must be filed more than 45 days before the first day of the docket. That is, if an offer is made at a point in time when it appears that the offer is not directed to the current trial period, but rather is intended for the next, as yet unscheduled, trial period, then the offer is not a nullity and is considered timely. In order to rely on this exception, there must be some evidence in the record that both parties know the case will not be tried during the current trial period and that the offer is made in anticipation of the next unscheduled trial period [Progressive Cas. Ins. Co. v. Radiology & Imaging Ctr., Inc., 761 So. 2d 399, 400 (Fla. 3d DCA 2000)]. Conversely, if it is not clear that both parties knew at the time of the offer that the case would not be heard as set, this "narrow" exception cannot be applied [Largen v. Gonzalez, 797 So. 2d 635, 638 (Fla. 5th DCA 2001) (it cannot turn on one or even both parties' "speculation" concerning probability that action will be heard as set)].

Participation in mediation has no effect on the dates during which parties are permitted to make or accept a proposal for settlement [Fla. R. Civ. P. 1.442(j)].

[3]—Service and Filing

An offer must be served on the party to whom it is made. An offer is not filed with the court unless it is accepted or unless filing is necessary to enforce the provisions of the offer of judgment statute and rule [§ 768.79(3), Fla. Stat.; Fla. R. Civ. P. 1.442(d)].

§ 141.25 Acceptance, Withdrawal, and Rejection

The offer of judgment statute provides that an offer is accepted by filing a written acceptance with the court within 30 days after service of the offer [§ 768.79(4), Fla. Stat.]. The court rule is slightly different in that it provides that a proposal is accepted by delivery of a written notice of acceptance within 30 days after service of the proposal [Fla. R. Civ. P. 1.442(f)]. The difference will probably not be significant in most cases because the parties will probably do both; that is, deliver and file the acceptance within the 30-day period. However, because the rule rather than the statute controls in procedural matters, if, for example, a party were to deliver an acceptance but not file it within the 30-day period, acceptance would be complete because all the rule requires is delivery. On the other hand, if a party were to file the acceptance but not deliver it to the offeree within the 30-day period, it could be argued that acceptance was not complete because not delivered in accordance with the court rule.

In any case, an oral communication cannot constitute an acceptance, rejection, or counteroffer [Fla. R. Civ. P. 1.442(f)].

Upon filing of both the offer and the acceptance, the court has full jurisdiction to enforce the settlement agreement [§ 768.79(4), Fla. Stat.]. Unless the terms of a settlement proposal specifically provide for the entry of a judgment against the offeror, a trial court lacks authority to enter a final judgment against the offeror [Abbott & Purdy Group, Inc. v. Bell, 738 So. 2d 1024, 1025 (Fla. 4th DCA 1999)]. Although it repeatedly refers to "judgment," Section 768.79 does not require entry of judgment on acceptance of an offer. The statute simply provides the procedural mechanism for an "offer" and "acceptance" to result in a settlement agreement. Once the offer and acceptance are filed, the court has full jurisdiction to enforce the settlement agreement [§ 768.79(4), Fla. Stat.], although the rule does not specify what action the trial judge may take to enforce it. Arguably, one mechanism the court could use would be to enter a judgment on which the offeree could execute. However, unless the offeror fails to pay the agreed amount, entry of judgment would not be necessary. Furthermore, requiring entry of judgment, absent an agreement for entry of judgment or failure of a party to comply with the settlement agreement, is contrary to the public policy of promoting settlements. A common reason for settling a lawsuit is to avoid a judgment of record, and there is no reason to thwart this purpose in the absence of noncompliance with the settlement agreement [*see* Abbott & Purdy Group, Inc. v. Bell, 738 So. 2d 1024, 1026–1027 (Fla. 4th DCA 1999)].

The making of an offer of settlement that is not accepted does not preclude the making of a subsequent offer [§ 768.79(2), Fla. Stat.]. Because the statute places no limits on the number of offers or demands that can be made, a second offer of judgment does not revoke a first offer of judgment. Once a party fails to accept the first offer within the statutory period, it is no longer merely an offer, but becomes a statutory right to recover attorneys' fees and costs in the event the judgment is below a certain amount. Thus, when a party rejects two offers, the first remains in effect and may provide the basis for a cost award [Kaufman v. Smith, 693 So. 2d 133, 134 (Fla. 4th DCA 1997)].

An offer may be withdrawn by serving a written withdrawal before the date a written acceptance is delivered. Once withdrawn, an offer is void [Fla. R. Civ. P. 1.442(e); *see* § 768.79(5), Fla. Stat. (statute uses the word "filed" rather than "delivered," which the rule uses)].

A proposal not accepted within the 30-day time period is deemed rejected [Fla. R. Civ. P. 1.442 (f)].

If rejected, neither an offer nor a demand is admissible in subsequent litigation, except for the purpose of pursuing costs and fees under the statute [§ 768.79(1), Fla. Stat.]. Evidence of an accepted proposal is admissible only in proceedings to enforce the accepted proposal [Fla. R. Civ. P. 1.442(i)].

§ 141.26 Enforcement of Right to Attorneys' Fees and Costs

[1]—Timely Motion Is Required

A party seeking sanctions based on the failure of a party to accept a proposal must serve and file a motion within 30 days after entry of judgment in a nonjury action, the return of a verdict in a jury action, or the entry of a voluntary or involuntary dismissal [§ 768.79(6), Fla. Stat.; Fla. R. Civ. P. 1.442(g)]. It should be noted that the rule is more specific than the statute in this case, which simply states that the motion must be filed "within 30 days after the entry of the judgment or after voluntary or involuntary dismissal" [compare § 768.79(6), Fla. Stat. with Fla. R. Civ. P. 1.442(g)]. Because the rules of civil procedure control in procedural matters when they are in conflict with, or more specific than, a statutory provision, a party must follow the more specific time periods set forth in the rule. For example, in an action tried by a jury, a motion for attorneys' fees on a rejected offer of judgment must be filed within 30 days after return of the verdict, rather than within 30 days after entry of judgment [*see* Spencer v. Barrow, 752 So. 2d 135, 137 (Fla. 2d DCA 2000)].

[2]—Court's Determination on Motion

Upon a motion for sanctions brought by a defendant whose offer was not accepted by the plaintiff, the court must first determine if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer [§ 768.79(6)(a), Fla. Stat.]. For purposes of this determination, the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer collateral source payments received or due as of the date of the judgment, plus any post-offer settlement amounts by which the verdict was reduced [§ 768.79(6), Fla. Stat.]. If the court makes this determination, the defendant is entitled to be awarded reasonable costs, including investigative expenses, and attorneys' fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served. The court must set off such costs and attorneys' fees against the plaintiff's award. If the costs and attorneys' fees awarded to the defendant total more than the amount of the plaintiff's judgment, the court must enter a judgment for the defendant against the plaintiff for the amount of costs and fees, less the amount of the award to the plaintiff [§ 768.79(6)(a), Fla. Stat.].

Similarly, on a motion brought by a plaintiff whose offer was not accepted by the defendant, the court must first determine whether the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer [§ 768.79(6)(b), Fla. Stat.]. For purposes of this determination, the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer settlement amounts by which the verdict was reduced [§ 768.79(6), Fla. Stat.]. If the court makes this determination, the plaintiff is entitled to

be awarded reasonable costs, including investigative expenses, and attorneys' fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served [§ 768.79(6)(b), Fla. Stat.].

There is a split of authority in the district courts as to whether pre-demand costs that a prevailing party is entitled to collect pursuant to Section 57.104, Florida Statutes are part of the "judgment obtained" for purposes of determining whether the judgment obtained by the plaintiff is at least 25 percent greater than the demand for judgment. The Second and Fifth Districts have held that pre-demand costs are not part of the "judgment obtained." These courts have defined the term as being limited to the amount of the judgment for damages awarded by the jury [*see* Mincin v. Short, 662 So. 2d 1323, 1325 (Fla. 2d DCA 1995); Williams v. Brochu, 578 So. 2d 491, 493 (Fla. 5th DCA 1991)]. However, the Third District has disagreed with this definition of "judgment obtained." Citing Black's Law Dictionary, the Third District found that the amount of damages awarded by a jury is a "verdict," not a "judgment." Furthermore, Section 768.79(6)(b), Florida Statutes, defines "judgment obtained" as "the amount of the net judgment entered, plus any post-offer settlement amounts by which the verdict was reduced." In excluding costs from the term "judgment obtained," the Second and Fifth Districts relied on cases holding that costs are incidental to an action for jurisdictional purposes. The Third District explained that, while costs may be incidental for jurisdictional purposes, they are not incidental for settlement purposes. There is a correlation between the amount demanded and the amount that needs to be recovered in order to trigger entitlement to attorneys' fees under the demand for judgment statute. The higher the demand, the higher the judgment threshold. Because the inclusion of costs in a plaintiff's demand necessarily raises the amount demanded, it also raises the judgment threshold. The court felt that it would be unfair to force a plaintiff to include costs in his or her demand, consequently setting the judgment threshold, and not to include them in determining whether that threshold has been met. Therefore, the court interpreted the statutory term "net judgment entered" to include a prevailing party's pre-demand costs [Perez v. Circuit City Stores, Inc., 721 So. 2d 409, 412 (Fla. 3d DCA 1998)].

[3]—Court's Discretion to Disallow Fees on Finding That Offer Was Not Made in Good Faith

If a party is otherwise entitled to costs and fees [*see* [2], *above*], the court may, in its discretion, determine that an offer was not made in good faith. In such a case, the court may disallow an award of costs and attorneys' fees [§ 768.79(7)(a), Fla. Stat.; Fla. R. Civ. P. 1.442(h)(1)]. Although this provision gives the trial judge some discretion to decline to award of fees when the offer was not made in good faith, the Florida Supreme Court has ruled that Section

768.79 provides for an award of attorneys' fees regardless of the reasonableness of an offeree's rejection of an offer. The Court concluded that Section 768.79 creates a mandatory right to attorneys' fees if two statutory prerequisites have been met: (1) a party has served a demand or offer for judgment; and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor, including the reasonableness of the rejection, is relevant in determining the question of entitlement. Thus, a trial court may disallow an award of attorneys' fees, but only if it determines that a qualifying offer "was not made in good faith." This is the sole basis on which a court may disallow an entitlement to an award of fees [TGI Friday's Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995)].

It has also been held that a trial court errs in not awarding attorneys' fees and costs pursuant to the offer of judgment statute when it made no finding that the offer was made in bad faith. In other words, if the court intends not to make an award of attorneys' fees and costs after a party has recovered a judgment that would entitle it to such an award, the court must make the appropriate finding that the offer was not made in good faith [Camejo v. Smith, 774 So. 2d 28, 29 (Fla. 2d DCA 2000)].

[4]—Amount of Attorneys' Fees

When determining the reasonableness of the amount of an award of attorneys' fees, the court must consider, along with all other relevant criteria, the following factors [§ 768.79(7)(b), Fla. Stat; Fla. R. Civ. P. 1.442(h)(2)]:

(1) The then-apparent merit or lack of merit in the claim.
(2) The number and nature of proposals made by the parties.
(3) The closeness of questions of fact and law at issue.
(4) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.
(5) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
(6) The amount of additional delay, cost, and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

In an *en banc* decision reversing prior case law in the district, the Fifth District court of Appeal held that contingency fee multipliers may not be used to compute attorneys' fees in offer of judgment cases. The predicate showing for application of a contingency risk multiplier is that the attorney representing the party who made the offer of judgment (or any other competent attorney in that legal community) would not have taken the case without the availability

of the multiplier. The district court noted that it has yet to see a case in which this showing has been made to the satisfaction of the appellate panel and questioned whether such a showing can ever be made. Therefore, the court retracted its earlier holdings which had concluded that the multiplier is available, reasoning that it is not fair to the parties or the Bar to continue to hold out the hope of obtaining a continency risk multiplier in offer of judgment cases [Allstate In. Co. v. Sarkis, 809 So. 2d 6 (Fla. 5th DCA 2001)].

[5]—Right to Attorneys' Fees and Costs After Dismissal

When the action is terminated through a dismissal, a defendant is not entitled to an award of attorneys' fees under Section 768.79 unless the dismissal is with prejudice [MX Invs., Inc. v. Crawford, 700 So. 2d 640, 642 (Fla. 1997)]. Section 768.79(6), Florida Statutes provides that on "motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal," the court must make a determination as to entitlement to attorneys' fees and costs. The Florida Supreme Court has construed the terms "voluntary dismissal" and "involuntary dismissal" in this context to mean a dismissal with prejudice so that the dismissal is the basis for a judgment of no liability. Thus, only when a plaintiff's voluntary dismissal is with prejudice or is a second voluntary dismissal (resulting in a dismissal with prejudice under Florida Rule of Civil Procedure 1.420(a)(1)) is the defendant entitled to attorneys' fees under the offer of judgment statute [MX Invs., Inc. v. Crawford, 700 So. 2d 640, 642 (Fla. 1997)].

A voluntary dismissal without prejudice, even after the statute of limitations has run, is not the equivalent of an adjudication of no liability. Therefore, a defendant is not entitled to recover attorneys' fees under the offer of judgment statute when a plaintiff obtains a voluntary dismissal without prejudice, even though the statute of limitations has run and the plaintiff would be precluded from refiling the action [Gammie v. State Farm Mut. Auto. Ins. Co., 720 So. 2d 1163, 1163–1164 (Fla. 3d DCA 1998)].

3. Enforcement and Avoidance of Agreement

§ 141.40 Settlements Are Highly Favored

Settlements are highly favored and will be enforced whenever possible [Robbie v. Miami, 469 So. 2d 1384, 1385 (Fla. 1985); State Farm Mut. Auto. Ins. Co. v. Interamerican Car Rental, Inc., 781 So. 2d 500, 501–502 (Fla. 3d DCA 2001)]. When the parties have agreed to the essential terms of the settlement agreement [*see* § 141.41], the settlement will be enforced [State Farm Mut. Auto. Ins. Co. v. Interamerican Car Rental, Inc., 781 So. 2d 500, 502 (Fla. 3d DCA 2001)]. On the other hand, although the law favors settlement agreements and their enforcement, the evidence must clearly

demonstrate that there was a mutual agreement to the material settlement terms [Cheverie v. Geisser, 783 So. 2d 1115, 1119 (Fla. 4th DCA 2001)].

The party seeking a judgment on the basis of a settlement agreement has the burden of establishing a meeting of the minds or mutual reciprocal assent to a certain and definite proposition [Long Term Mgmt., Inc. v. University Nursing Care Ctr., 704 So. 2d 669, 673 (Fla. 1st DCA 1997)].

§ 141.41 Required Elements of Settlement Agreements

A settlement agreement does not have to be in writing to be enforceable [State Farm Mut. Auto. Ins. Co. v. Interamerican Car Rental, Inc., 781 So. 2d 500, 502 (Fla. 3d DCA 2001); *see* Long Term Mgmt., Inc. v. University Nursing Care Ctr., 704 So. 2d 669, 673 (Fla. 1st DCA 1997) (oral settlement agreement reached by the parties and announced to the court was a fully enforceable settlement agreement)]. Nor does the agreement have to fix all details of the parties' understanding in order to be enforceable [State Farm Mut. Auto. Ins. Co. v. Interamerican Car Rental, Inc., 781 So. 2d 500, 502 (Fla. 3d DCA 2001)]. However, preliminary negotiations or tentative and incomplete agreements do not establish a sufficient meeting of the minds to create an enforceable settlement agreement. To be judicially enforceable, a settlement agreement must be sufficiently specific and mutually agreeable as to every essential element [Cheverie v. Geisser, 783 So. 2d 1115, 1118 (Fla. 4th DCA 2001); Long Term Mgmt., Inc. v. University Nursing Care Ctr., 704 So. 2d 669, 673 (Fla. 1st DCA 1997)].

Parties are free to contract for any terms not prohibited by law or contrary to public policy. Therefore, whether a particular aspect of a settlement agreement qualifies as an "essential term" does not hinge on whether a court could grant the same benefit in a lawsuit. Although what is an essential term differs according to the circumstances, it must include the terms specified in the offer to make the contract. This is because an acceptance is effective to create a contract only if it is absolute and unconditional, and identical with the terms of the offer [Giovo v. McDonald, 791 So. 2d 38, 40 (Fla. 2d DCA 2001) (loss-of-use damages was an essential term for the settlement agreement, even though such damages could not be awarded by the court, because they were part of plaintiff's offer to settle)].

There is no requirement that settlement monies actually be immediately transferred in order to find that the settlement agreement is binding and enforceable [State Farm Mutual Auto. Ins. Co. v. Interamerican Car Rental, Inc., 781 So. 2d 500, 502 (Fla. 3d DCA 2001) (settlement agreement was enforceable even though payment was not made until several years after the agreement was reached because the parties had agreed payment would be made by insurer after case against tortfeasor was resolved)].

§ 141.42 Settlement Agreements Are Governed by Contract Rules

Settlements are governed by the rules for interpretation of contracts [Robbie v. Miami, 469 So. 2d 1384, 1385 (Fla. 1985); Long Term Mgmt., Inc. v. University Nursing Care Ctr., 704 So. 2d 669, 673 (Fla. 1st DCA 1997); Belcher Pshp., Inc. v. Ferguson, 704 So. 2d 653, 654 (Fla. 2d DCA 1997)]. To be enforceable, a settlement agreement must meet the requirements of a valid contract. That is, there must be an offer, acceptance, and consideration [*see* Lickert v. Pike, 736 So. 2d 724, 725 (Fla. 2d DCA 1999) (offer and acceptance); Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 924 (Fla. 2d DCA 2000) (consideration)]. An acceptance is an assent to the same matters contained in the offer. In addition, an acceptance must be communicated to the offeror [Lickert v. Pike, 736 So. 2d 724, 725 (Fla. 2d DCA 1999)]. For example, the Second District found that there was no offer and acceptance, and therefore no enforceable settlement agreement when the offeree did not accept the terms of a proposed settlement, but instead made changes and sent the proposal back to the original offeror who never communicated an acceptance of the changes [*see* Lickert v. Pike, 736 So. 2d 724, 725 (Fla. 2d DCA 1999)].

As with other types of contracts, settlement agreements must be supported by consideration to be enforceable [Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 924 (Fla. 2d DCA 2000)]. There is valid consideration when mutual promises contained in the settlement agreement reflect mutual concessions of the parties and are made to resolve disputed issues [Foliage Corp. v. Watson, 382 So. 2d 356, 359 (Fla. 5th DCA 1980) (settlement of disputed claim is valid consideration)]. An agreement to perform a preexisting obligation does not constitute consideration for a settlement agreement. Additionally, an agreement to forbear from litigation does not constitute legal consideration [*see* Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 924 (Fla. 2d DCA 2000) (because neither party gave consideration for "contract confirmation," it did not constitute enforceable settlement agreement)].

§ 141.43 Separate Action for Enforcement May Be Required

There is a conflict in the district courts over whether a court that approves a settlement agreement retains jurisdiction to enforce the agreement. The Third District has held that a settlement agreement incorporated into a final judgment may be enforced by the court that entered the judgment [*see* Buckley Towers Condominium, Inc. v. Buchwald, 321 So. 2d 628, 629 (Fla. 3d DCA 1975)]. On the other hand, the Fifth District takes an approach based on a strict view of the pleadings. The Fifth District has held that a court has only that subject matter jurisdiction invoked by the initial pleading. In other words, the court would have jurisdiction only over the underlying action that was

resolved by the settlement agreement. A claim based on the settlement agreement itself would have to be brought in a separate action, by complaint and not motion, giving the defendant the opportunity to plead defenses and request a jury trial if appropriate [Wallace v. Townsell, 471 So. 2d 662, 665 (Fla. 5th DCA 1985); *see* General Dynamics Corp. v. Paulucci, 797 So. 2d 18, 21 (Fla. 5th DCA 2001) (affirming the continuing validity of *Wallace*, but also certifying the issue to the Supreme Court)].

On the other hand, when there is no court order or judgment, a separate enforcement action is required. For example, after a reaching a settlement, the parties may achieve dismissal without an order of the court through a voluntary dismissal under Florida Rule of Civil Procedure 1.420. When this route is taken and the parties have neither presented the settlement agreement to the court nor obtained an order of dismissal predicated on the settlement, a party will not be able to obtain enforcement of the settlement agreement by simply filing a motion in the now-dismissed case if one of the parties to the agreement objects. By voluntarily dismissing their suit, the litigants have removed their dispute from the judge's consideration. Under this scenario, the trial court may not rely on its inherent power to enforce its own orders because there is no judgment or order for the court to enforce. The parties would ordinarily have to pursue a new breach of contract action to enforce the settlement agreement [MCR Funding v. CMG Funding Corp., 771 So. 2d 32, 34–35 (Fla. 4th DCA 2000)].

§ 141.44 Grounds for Avoidance

[1]—Fraud

A settlement agreement may be set aside when there is sufficient evidence to establish that it was obtained by fraud [*see* 17070 Collins Ave. v. Granite State Ins. Co., 720 So. 2d 1132, 1133–1134 (Fla. 3d DCA 1998) (complaint should not have been dismissed because it sufficiently alleged fraud so as to vitiate settlement agreement)].

A choice of law provision in a settlement agreement controls the disposition of a claim that the agreement was fraudulently procured if the defrauded party has elected to affirm the contract and sue for damages. Under Florida law, fraudulent inducement renders a contract voidable, not void. Thus, Florida law provides for an election of remedies in fraudulent inducement cases: rescission, whereby the party ratifies the transaction; or damages, whereby the party ratifies the contract. If the plaintiff chooses damages, thereby ratifying the contract, the plaintiff also remains subject to the burdens and terms of the contract, including the choice of law provision. A rescission, on the other hand, requires a tender of benefits received under the contract, including a return

of the settlement proceeds [*see* Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co., 761 So. 2d 306, 313 (Fla. 2000)].

[2]—Mistake

A unilateral mistake may provide the basis for an action for rescission of a settlement agreement [Maryland Cas. Co. v. Krasnek, 174 So. 2d 541, 542 (Fla. 1965); United States Alliance Corp. v. Tobon, 715 So. 2d 1122, 1123 (Fla. 3d DCA 1998)]. A unilateral mistake is grounds for rescission if the mistake is material [Williams, Salomon, Kanner, Damian, Weissler & Brooks v. Harbour Club Villas Condominium Ass'n, Inc., 436 So. 2d 233, 235 (Fla. 3d DCA 1983); *see* Maryland Cas. Co. v. Krasnek, 174 So. 2d 541, 542 (Fla. 1965) (unilateral mistake by liability insurer who did not realize that insured's coverage had lapsed could be basis for rescission of settlement made with insured)]. However, a unilateral mistake is not grounds for rescission if the mistake is a result of an inexcusable lack of due care or if the other party to the agreement has so far relied on the agreement that it would be inequitable to rescind [United States Alliance Corp. v. Tobon, 715 So. 2d 1122, 1123 (Fla. 3d DCA 1998)].

Rescission is justified when the unilateral mistake is based on fraud, misrepresentation, or similar circumstances. Generally, a plaintiff's unilateral mistake will support rescission when (1) the mistake is induced by the defendant; (2) the plaintiff is not negligent in relying on the defendant's representations; (3) a denial of rescission would be inequitable; and (4) the defendant's position does not change in such a manner as to otherwise render the rescission unjust [Lechuga v. Flanigan's Enters., Inc., 533 So. 2d 856, 857 (Fla. 3d DCA 1988)].

Some courts have recognized that a settlement of a claim for personal injuries may be set aside based on a mistake of fact when the parties were unaware at the time of the settlement that the plaintiff had sustained any injury or when the plaintiff was unaware of a particular injury. By contrast, a release of a claim for personal injuries may not be set aside based on a mistake of fact when the claimant's known injury proves to be more serious than was anticipated by the parties at the time of the execution of the settlement agreement and release. A mistake as to the future consequences of a known injury does not involve a present mistake of fact, but instead involves an erroneous opinion or improvident guess as to the future consequences of presently known injuries [*see* Sponga v. Warro, 698 So. 2d 621, 624–625 (Fla. 5th DCA 1997)].

[3]—Duress

Duress has been defined as a condition of the mind produced by an improper external pressure or influence that destroys the free agency of a person and

causes that person to perform an act or make a contract not of his or her own volition [*see* Miami v. Kory, 394 So. 2d 494, 497–498 (Fla. 3d DCA 1981)]. Duress is recognized in Florida as a defense to enforcement of a contract generally [*see* Miami v. Kory, 394 So. 2d 494, 497–498 (Fla. 3d DCA 1981)], and thus, would apply in cases of settlement agreements.

Although threats to enforce legal rights may constitute duress under certain circumstances, they do not constitute duress when the threat is to enforce existent legal rights. Duress only occurs when the threatened enforcement is to enforce rights that are in fact legally nonexistent, as when a contract sought to be enforced is illegal [*see* Spillers v. Five Points Guar. Bank, 335 So. 2d 851, 853 (Fla. 1st DCA 1976)].

B. Releases

§ 141.50 Nature and Purpose of Releases

A release is an outright cancellation or discharge of an obligation as to one or all of the alleged wrongdoers [Rosen v. Fla. Ins. Guar. Ass'n., 802 So. 2d 291, 295 (Fla. 2001), *quoting* Atlantic Coast Line R.R. v. Boone, 85 So. 2d 834, 843 (Fla. 1956)]. A release is different than a satisfaction, which is the acceptance of full compensation for an injury. A release, on the other hand, is a surrender of a cause of action [Prosser & Keeton, The Law of Torts, § 49 (5th ed., West 1984)].

A release should also be distinguished from a covenant not to sue. A covenant not to sue recognizes that the obligation or liability continues, but the injured party agrees not to assert any rights grounded on the obligation against a particular covenantee [Rosen v. Fla. Ins. Guar. Ass'n., 802 So. 2d 291, 295 (Fla. 2001), *quoting* Atlantic Coast Line R.R. v. Boone, 85 So. 2d 834, 843 (Fla. 1956)].

In more practical terms, a release is a type of contract that formalizes a settlement agreement entered into by two or more parties to resolve a dispute. The requirements for the formation of a contract therefore also apply to the execution of a release. A release is used to absolve a defendant from liability for all or part of the plaintiff's damages related to a claim or cause of action. It may also be used to discharge fewer than all defendants from liability.

§ 141.51 Considerations for Drafting a Release

[1]—Typical Provisions

A release should state who the parties are, what type of action is involved, and whether the parties are being released from liability for all future action, only known actions, or from some specific liability. The release must be signed

by all parties to it. It should state that the parties signing the release agree to its terms, and intend to be bound by it.

[2]—Use of General Language

As a general rule, Florida courts enforce general releases to further the policy of encouraging settlements. Numerous Florida cases have upheld general releases, even when the releasing party was unaware of the defect at the time the agreement was executed [*see* Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co., 761 So. 2d 306, 314 (Fla. 2000)]. Therefore, releases should be drafted carefully to preclude release of claims that were not intended to be released. The courts typically construe general release language broadly. For example, the Florida Supreme Court held that a general "Release of All Claims" in a marital settlement agreement was a release of all claims arising from the marriage, which barred the wife's subsequent tort action against her former husband for assault and battery, intentional infliction of emotional distress, and fraud for incidents that took place during the marriage. The court rejected the argument that the release was limited solely to those claims dealing with the distribution of assets. Instead, the Court found that the general release language evidenced an intent to release all claims between the parties [Cerniglia v. Cerniglia, 679 So. 2d 1160, 1164 (Fla. 1996)].

Under Florida law, a general release will ordinarily be regarded as embracing all claims or demands that had matured at the time of its execution [Hold v. Manzini, 736 So. 2d 138, 141 (Fla. 3d DCA 1999)]. Conversely, a general release does not bar a claim that had not yet accrued at the time the release was executed [Hold v. Manzini, 736 So. 2d 138, 141 (Fla. 3d DCA 1999); *see* Mulholland v. USAA Ins. Co., 771 So. 2d 567, 569 (Fla. 2d DCA 2000) (when general language is used, release is only binding on claims that have matured at time release was executed)].

Specific language usually controls over general language in a release. However, in order to trigger this maxim of construction, the specific language must actually conflict with the general provision. If the specific language does not conflict, but merely clarifies the general language, the specific language will not limit the general release [Mulholland v. USAA Ins. Co., 771 So. 2d 567, 569 (Fla. 2d DCA 2000)].

§ 141.52 Effect of Releases

[1]—Release of One Tortfeasor Does Not Affect Liability of Others

Under the common law, when a plaintiff released one defendant, all other defendants who were jointly or severally liable were also automatically released [*see* Stephen Bodzo Realty v. Willits Int'l Corp., 428 So. 2d 225, 226 (Fla. 1983)]. However, in 1980, the Florida Legislature passed a law that abrogated

that common law rule, providing instead that the release of one tortfeasor does not release all jointly and severally liable tortfeasors [*see* § 46.015, Fla. Stat.; *see also* Stephen Bodzo Realty v. Willits Int'l Corp., 428 So. 2d 225, 226 (Fla. 1983)]. Now, a release of fewer than all of the defendants has no effect on the liability of the remaining defendants [*see* Stephen Bodzo Realty v. Willits Int'l Corp., 428 So. 2d 225, 226 (Fla. 1983)], other than to entitle the remaining tortfeasors who are jointly and severally liable to a set-off against their own liability [*see* [2], *below*]. That is, the award of damages may be reduced by the amount the plaintiff received in settlement with the other defendants [*see* §§ 46.015, 768.041, Fla. Stat.].

[2]—Apportionment of Damages and Set-Off

The set-off rules do not apply equally to economic and noneconomic damages. Specifically, the set-off statutes do apply to economic damages and thus, a nonsettling defendant is entitled to a set-off or reduction of his or her apportioned share of the economic damages for sums paid by the settling defendants in excess of their apportioned liability. On the other hand, the set-off statutes do not apply to noneconomic damages. Therefore, a nonsettling defendant is not entitled to a set-off as to noneconomic damages [Wells v. Tallahassee Mem'l Reg'l Med. Ctr., 659 So. 2d 249, 253 (Fla. 1995)].

The settling parties may not control the allocation between economic and noneconomic damages through their settlement agreement. Instead, settlement proceeds must be divided between economic and noneconomic damages in the same proportion as the jury's award [Wells v. Tallahassee Mem'l Reg'l Med. Ctr., 659 So. 2d 249, 253 (Fla. 1995)].

The set-off statutes are inapplicable to a settling defendant who is found to have no liability. Thus, if a plaintiff has delivered a written release or covenant not to sue to a settling defendant and that defendant is later found to have no liability, settlement proceeds may not be set-off against any award for economic damages recovered from the nonsettling defendant [Gouty v. Schnepel, 795 So. 2d 959, 964 (Fla. 2001)].

[3]—Subrogation Rights

When the tortfeasor obtains a release from an insured with knowledge that the insured has already been indemnified by the insurer, the release of the tortfeasor does not bar the right of subrogation of the insurer [*see* Ortega v. Motors Ins. Corp., 552 So. 2d 1127, 1128 (Fla. 3d DCA 1989)]. This knowledge need not be actual to estop the tortfeasor from relying on the release. A release will not bar a subsequent subrogation action if the tortfeasor has constructive knowledge of the insurer's subrogation rights. A party is deemed to have constructive knowledge of a fact when that party has actual knowledge of facts

and circumstances that would lead a reasonable person to inquire and discover the fact in question, or infer its existence [Dadeland Dodge, Inc. v. American Vehicle Ins. Co., 698 So. 2d 929, 931 (Fla. 3d DCA 1997)].

§ 141.53 Enforcement and Avoidance

[1]—Contract Law Controls

A release is governed by the general rules for interpretation of contracts [Hold v. Manzini, 736 So. 2d 138, 141 (Fla. 3d DCA 1999)]. Thus, when the language of the release is clear and unambiguous, the court may not indulge in construction or interpretation, but must apply the plain meaning of the language. On the other hand, when the terms of the release are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intention. This issue of fact may not, of course, be resolved by summary judgment [Hold v. Manzini, 736 So. 2d 138, 141 (Fla. 3d DCA 1999)].

As in contract law generally, the intent of the parties controls interpretations of their releases [Rosen v. Fla. Ins. Guar. Ass'n., 802 So. 2d 291, 296 (Fla. 2001)]. Language in a release is the best evidence of the parties' intent. Thus, when that language is clear and unambiguous, the courts may not indulge in construction or interpretation of its plain meaning [Vermut v. General Motors Corp., Inc., 773 So. 2d 126, 128 (Fla. 4th DCA 2001)].

Although evidence of an oral agreement may not be used to alter the terms of a written release, it can be introduced to show that the release was obtained by fraudulent means. Thus, for example, parol evidence regarding the circumstances of the signing of the release is admissible [Edwards v. Norman, 780 So. 2d 162, 163 (Fla. 2d DCA 2001)].

[2]—Usual Contract Defenses Apply

Because a release is governed by the general rules for the interpretation of contracts, all of the defenses for avoidance of a contract are also available to avoid a release. For instance, a release may be avoided on the basis of unilateral mistake [*see* § 141.44[2] (avoidance of settlement agreement on ground of unilateral mistake)]. However, this defense is available only when one party conceals the mistake, or at least has knowledge that the other party is mistaken, and when the mistaken party does not have access to the true facts [Smiles v. Young, 271 So. 2d 798, 803 (Fla. 3d DCA 1973)]. For example, in a personal injury case, the plaintiff, under the mistaken impression that her injuries were minor, released the defendant from liability. At the time of executing the release, the defendant had information that indicated that the injuries were more serious, but did not reveal this information. The release was based on a settlement for a small sum. Nevertheless, the court upheld the validity of

the release on the ground that the plaintiff's access to the doctor's report that revealed the true seriousness of her injuries but chose to ignore it [*see* Smiles v. Young, 271 So. 2d 798, 803 (Fla. 3d DCA 1973)].

Releases that include language that neither party intended to include may be avoided by reason of mutual mistake [Ayr v. Chance, 372 So. 2d 1000, 1001–1002 (Fla. 4th DCA 1979)]. One court has held that a party who seeks relief from a release has the burden of proof on the issue of whether such language was included in the release as a result of mutual mistake, as compared to a unilateral mistake, in which case the release cannot be avoided [*see* Ayr v. Chance, 372 So. 2d 1000, 1001–1002 (Fla. 4th DCA 1979)].

A release of liability executed by a minor prior to incurring personal injuries is unenforceable. Except for contracts for necessities, the contract of a minor is generally voidable. Public policy against enforcement of the contract of a minor is especially applicable when the minor has contracted away the right to recover damages for personal injuries. Therefore, a minor injured because of the defendant's negligence is not bound by the minor's contractual waiver of the right to file a lawsuit [*see* Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 356–357 (Fla. 4th DCA 1997)].

[3]—Exculpatory Clauses

An exculpatory clause in a release is a provision that attempts to preclude liability for one's own negligence. Although viewed with disfavor under Florida law, exculpatory clauses are valid and enforceable if clear and unequivocal [Borden v. Phillips, 752 So. 2d 69, 73 (Fla. 1st DCA 2000)]. The wording must be so clear and understandable that an ordinary and knowledgeable party will know what he or she is contracting away [Raveson v. Walt Disney World Co., 793 So. 2d 1171 (Fla. 5th DCA 2001)].

An exculpatory clause in a release should be declared against public policy when: (1) it concerns a business of a type generally suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great public importance, which is often a matter of practical necessity for some members of the public; (3) the party holds himself or herself out as willing to perform this service for any member of the public who seeks it; (4) as a result of the essential nature of the service and the economic setting of the transaction, the party seeking exculpation possesses a decisive advantage in bargaining strength; (5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation; and (6) as a result of the transaction, the person or property of the purchaser is placed under control of the party to be exculpated [*see* Goeden v. CM III, Inc., 756 So. 2d 1105, 1106 (Fla. 3d DCA 2000)]. Applying these principles, one court ruled that an exculpatory clause in a release signed by a student at

a motorcycle school was valid and enforceable because attendance at the school was not required by law. On the other hand, the court noted that if the plaintiff had been under the age of 21, so that attendance at a motorcycle school would have been statutorily mandated in order to obtain the motorcycle endorsement for a driver's license, the release would have been void as against public policy [*see* Goeden v. CM III, Inc., 756 So. 2d 1105, 1106–1107 (Fla. 3d DCA 2000)].

[4]—Public Policy Grounds for Avoidance

A release that is against public policy is void [Shinall v. Pergeorelis, 325 So. 2d 431, 433 (Fla. 1st DCA 1975)]. Thus, an agreement executed by a preganant woman to release the putative father from liability for paternity is invalid [*see* Shinall v. Pergeorelis, 325 So. 2d 431, 433 (Fla. 1st DCA 1975)].

[5]—Statutory Grounds for Avoidance

A release is not valid if it is in contravention of statute. For example, a release signed by a recipient of workers' compensation benefits is void because no recipient may release or assign such benefits to another [§ 440.22, Fla. Stat.].

[6]—Other Factors Affecting Enforcement and Avoidance

In personal injury cases, a release cannot be avoided solely because the injuries are later found to be more serious than anticipated at the time the release was executed. However, it is possible to avoid the release when the existence of an injury was unknown when the release was executed [Van De Water v. Echols, 382 So. 2d 147, 148–149 (Fla. 4th DCA 1980)].

PART II. PRACTICE GUIDE

A. Client Interview—Facts and Documents

§ 141.100 Facts

(1) Identity of each party or potential party.
(2) Identity of any insurers for each party.
(3) Plaintiff's medical expenses, wage loss, and other special damages.
(4) Details of accident or occurrence giving rise to claim.
(5) Any permanent injuries or disabilities suffered by plaintiff.
(6) Names and addresses of any witnesses.
(7) Facts about any partial settlements already reached:
  (a) Identity of settling parties.
  (b) Amount of settlement.

§ 141.101 Documents

(1) Copies of plaintiff's medical bills.
(2) Proof of plaintiff's wage loss, such as check stubs, income tax returns, wage statements.
(3) Copies of any insurance policies covering incident.
(4) Any accident reports prepared by authorities.
(5) Written or tape-recorded witness statements.
(6) Correspondence with insurance companies.
(7) Any statutory proposals for settlement.
(8) Copies of any settlement agreements reached with other parties.

B. Preliminary Determinations

§ 141.110 Determining Settlement Value of a Claim

(1) Determine dollar value of plaintiff's case:
  (a) Consult with other lawyers who have handled similar cases.
  (b) Research published records of awards and settlements for similar cases and injuries.
  (c) Ascertain all sources of damages, including past and future medical expenses, past and future wage loss, any permanent injury or scarring, pain and suffering, emotional trauma, and loss of consortium.

(d) Consider whether punitive damages might be available because defendant is personally guilty of intentional misconduct or gross negligence [*see* § 768.72(2), Fla. Stat.; *see also* Ch. 113, *Punitive Damages*].

(2) Evaluate strengths and weaknesses of each party's case, considering [*see* § 141.02]:

(a) Plaintiff's theory of liability.

(b) Affirmative defenses available to defendant.

(c) Novelty of plaintiff's theories [*see* § 141.02[2][c]].

(d) Admissibility of evidence available to support each party's claims and defenses [*see* § 141.02[2][b]].

(e) Conflicting oral testimony.

(f) Any corroborating witnesses.

(g) Credibility of witnesses and parties.

(h) Supporting and conflicting expert testimony.

(3) Consider external factors that might affect value of each party's case:

(a) Physical appearance of each party and witness [*see* § 141.02[3]].

(b) Personality and character of parties and witnesses [*see* § 141.02[3]].

(c) Location of court [*see* § 141.02[4]].

(d) Demeanor and traits of judge [*see* § 141.02[3]].

(e) Skill and experience of opposing counsel.

(4) Ascertain other party's willingness to settle [*see* § 141.03].

C. Procedural Guide

§ 141.120 Preparing for and Negotiating Settlement

(1) Advise client of advantages and disadvantages of settlement:

(a) Settlement is quicker and cheaper and avoids trauma and anxiety involved in testifying and presenting case to jury.

(b) Settlement avoids uncertain results of litigation process.

(c) Trial might result in higher award for plaintiff.

(d) Trial might result in finding of less or no liability for defendant.

(2) Advise client of strengths and weaknesses of each party's case, emphasizing:

(a) Viability or novelty of plaintiff's theories.

(b) Viability of defenses and counterclaims.

(c) Admissibility of evidence at trial.

(d) Conflicting oral testimony.

(e) Corroborating witnesses for each side.

(f) Credibility of witnesses and parties.

(g) Supporting and conflicting expert testimony available.

(3) Advise client that he or she has ultimate authority to settle or reject settlement offer, but consent should not be unreasonably withheld.

(4) If useful, request court-order mediation to help settle dispute [*see* § 141.04].

NOTE: On the request of a party, a court must refer to mediation any civil action for monetary damages, unless the action is excepted by statute [*see* § 141.04[1]], and provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties [§ 44.102(2), Fla. Stat.].

(5) Attend any settlement conference scheduled by court, along with client who has authority to settle.

NOTE: The court may require a settlement conference to be held at least three weeks before the date set for trial [§ 768.75(1), Fla. Stat.]. Attorneys who will conduct the trial, parties, and persons with authority to settle must attend the settlement conference unless excused by the court for good cause [§ 768.75(2), Fla. Stat.].

§ 141.121 Making and Responding to Statutory Proposals for Settlement

NOTE: In an attempt to settle a case, a defendant may make an offer of judgment or a plaintiff may make a demand for judgment in conformity with the Florida Rules of Civil Procedure [*see* Fla. R. Civ. P. 1.442 (Proposals for Settlement) and the Florida Statutes [*see* § 768.79(1), Fla. Stat.; *see also* § 141.20]. An offer of judgment or demand for judgment can be advantageous to the offering party because, under certain circumstances, the court is authorized to award costs and attorneys' fees to the offeror as sanctions against an offeree who rejects the offer [*see* § 768.79(1), Fla. Stat.; *see also* § 141.26].

(1) Prepare written proposal for settlement as follows [Fla. R. Civ. P. 1.442(c)(2); *see* § 768.79(2), Fla. Stat.]:

(a) Identify applicable Florida law under which proposal is being made [§ 769.79(2)(a), Fla. Stat.; Fla. R. Civ. P. 1.442(c)(1)].

(b) Name party or parties making proposal.

(c) Name party or parties to whom proposal is being made.

(d) Identify claim or claims proposal is attempting to resolve.

(e) State with particularity any relevant conditions.

(f) State total amount of proposal and state with particularity all non-monetary terms of proposal.

(g) For joint proposals, state amount and terms attributable to each party [Fla. R. Civ. P. 1.442(c)(3); *see* § 141.24[1]].

(h) State with particularity amount proposed to settle any claim for punitive damages.

(i) State whether proposal includes attorneys fees and whether attorneys' fees are part of legal claim.

(2) Attach certificate of service [*see* Fla. R. Civ. P. 1.080(f) (for form)].

(3) Serve proposal for settlement in timely manner [Fla. R. Civ. P. 1.422(b)]:

(a) Proposal to defendant may not be served earlier than 90 days after service of process on that defendant.

(b) Proposal to plaintiff may not be served earlier than 90 days after action has been commenced.

(c) In any case, proposal may not be served later than 45 days before date set for trial or first day of docket on which case is set for trial, whichever is earlier.

(4) File offer with court only if it is accepted or when necessary to enforce provisions of offer of judgment statute and rule [§ 768.79(3), Fla. Stat.; Fla. R. Civ. P. 1.442(d)].

(5) If desired, accept offer by delivering written acceptance within 30 days after service of offer [§ 768.79(4), Fla. Stat.; Fla. R. Civ. P. 1.442(f)].

NOTE: A proposal not accepted within the 30-day time period is deemed rejected [Fla. R. Civ. P. 1.442 (f)].

(6) If necessary, withdraw offer by serving a written withdrawal before written acceptance is delivered [Fla. R. Civ. P. 1.442(e); *see* § 768.79(5), Fla. Stat. (statute uses the word "filed" rather than "delivered," which the rule uses)].

D. Drafting Guide

§ 141.130 Drafting Settlement Agreement

(1) Prepare written settlement agreement.

NOTE: Although a settlement agreement need not be in writing to be enforceable [*see* § 141.42], because settlement negotiations often concern many interrelated subjects and involve a number of people, the chances of error or misunderstanding in coming to a resolution are great. Therefore, it is important that settlement agreements be in writing.

(2) Include the following information:

(a) Names of all parties to agreement.

(b) Status or capacity of parties.

(c) Description of occurrence or transaction giving rise to dispute.

(d) Description of cause of action is lawsuit ha already been filed.

(e) Statement that parties intend that agreement contain full and complete terms and conditions of settlement.

(f) Specific statement of provision of settlement.

(g) If applicable, statement that agreement is not intended to release any persons not parties to settlement agreement.

(h) If applicable, statement that agreement does not foreclose parties' rights to bring actions against other persons not parties to lawsuit.

(3) If settlement will be paid over time, specify

(a) Time period.

(b) When payments will be made.

(c) To whom payments will be made.

(d) Amount of each payment.

(e) Method of payment.

(4) State each party's consideration for the settlement [*see* § 141.42].

(5) Obtain signatures of parties to agreement.

(6) Have signatures witnessed or notarized.