A Unified, Single Claim for Damages Requires Apportionment in a Joint Proposal: What the Decision in 'Trace Elements' Means for Property Insurance Claims

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The question of whether an offer of settlement submitted by married homeowners for a "unified, single claim for damages" requires apportionment has been answered. The answer is simple—Yes! Litigants and practitioners in Florida need to ensure compliance with this new decision if they intend to recover attorney fees under Section 768.79, Florida Statutes, and through Florida Rule of Civil Procedure 1.442. And, even though the Florida Supreme Court did not specifically address Section 768.79(6) (the exception included to apply to first party property cases), the decision further muddies the water as to whether that section will even be enforceable going forward without proper apportionment in a proposal for settlement.

The Supreme Court's Decision in 'Trace Elements v. MacKensen'

On July 2, 2026, the Florida Supreme Court in Trace Elements v. MacKensen, Case No. SC2024-1274, held that rule 1.442(c)(3) requires apportionment of a joint proposal regarding settlement of a unified, single claim. In accepting jurisdiction, the court resolved a conflict between the Second and Fourth Districts.

The Second District had held that where married homeowners had served an unapportioned proposal for settlement to a roofing contractor to settle their unified, single breach of contract claim, the joint proposal was invalid under rule 1.442(c)(3) for its failure to apportion between the plaintiff homeowners. See *Cobb v. Durando*, 111 So. 3d 277 (Fla. 2d DCA 2013). But, 11 years later, the Fourth District held this apportionment rule did not apply to a "joint proposal for settlement regarding a unified, single claim." See *Mackensen v. Trace Elements*, 388 So. 3d 815, 817 (Fla 4th DCA 2024). In keeping in line with its precedents, which mandate strict enforcement of the rule's apportionment requirement, in *Trace Elements*, the Supreme Court quashed the Fourth District's decision and approved the Second District's decision in Cobb.

In *Trace Elements*, Wolfgang and Nadja Mackensen, a married couple, contracted with Trace Elements to oversee renovations of their vacation rental property. Trace Elements prematurely terminated performance, and the Mackensens sued for breach of contract and unjust enrichment. Trace Elements countersued for breach of contract and tortuous interference with a business relationship.

Prior to trial, the Mackensens served a proposal for settlement to Trace Elements stating they were willing to accept a lump sum of $10,000 in full settlement of the action. The PFS did not describe how the $10,000 would be apportioned between the Mackensens. Trace Elements rejected the proposal, the case went to trial, and the jury found for the Mackensens, awarding $41,273.70 on their breach claim. They moved for attorney fees and costs under Section 768.79, Florida Statutes. The trial court denied the motion, finding the PFS was invalid for failure to comply with Rule 1.442(c)(3)'s apportionment requirement.

On appeal to the Fourth District, the court reversed and remanded for an award of attorney fees. While the Fourth District acknowledged rule 1.442(c)(3) requires joint proposals to state the amount attributable to each party, it found the proposal "was a joint proposal regarding a unified, single claim, which did not require apportionment to comply with rule 1.442." See *Mackensen*, 388 So. 3d at 816. This decision directly conflicted with Cobb, where married homeowners served a proposal for settlement to a roofing contractor which did not apportion the settlement amount attributable to each of the Cobbs. Despite the Cobbs seeking to settle their unified, single breach of contract claim, the Second District held the joint proposal for settlement was invalid under rule 1.442 because it did not apportion the proposal between the plaintiff homeowners.

In resolving the conflict, the Supreme Court noted that at play were Section 768.79 and Rule 1.442(c)(3). While Section 768.79 creates the substantive right to attorney fees, Rule 1.442 provides the method and means of implementing the right by dictating the required form. Rule 1.442(c)(3)'s apportionment requirement ("a joint proposal must state the amount and terms attributable to each party") implements 768.79(2)(b)'s requirement that a proposal 'name the party making it and the party to whom it is being made.'

The Supreme Court then discussed a myriad of situations and cases where it held that strict compliance with Rule 1.442(c)(3) was required. The court noted that, "the parties' relationships, theories of liability, or the number or nature of claims have been irrelevant to our application of the rule. Nor have we conditioned enforcement … on whether doing so aligned with the purposes of Section 768.79. Predictable and consistent application of the rule has created a framework on which parties governed by the rule can rely, without having to make case-by-case guesses about whether an underlying statutory purpose will excuse compliance with the rule." The court also noted it wants parties to be able to rely on its consistent application because 768.79 is a 'penalty statute.'

Given that the court had consistently ruled that strict compliance is required, no matter what the situation, no matter how "nonsensical" it may seem (a term used by the Mackensons), and even if it does not accomplish the goal of Section 768.79, the court held Rule 1.442(c)(3) requires apportionment of a joint proposal regarding a unified, single claim.

Practical Effect on First Party Property Litigation Going Forward

Although *Trace Elements* did not involve a first party property case, how this decision may be applied in the arena of a breach of contract action involving a property insurer making a joint proposal is unclear. If anything, it muddies the waters and does not provide guidance as to whether a joint proposal made to multiple offerees is valid if it does not apportion the amount. Mackenson did not involve multiple offerees and a property insurer in a breach of contract action. The current version of Section 768.79 contains a provision uniquely geared to breach of contract actions involving property insurers.

Subsection 768.79(6) implemented in late 2022, added the following provision: “For a breach of contract action, a property insurer may make a joint offer of judgment or settlement that is conditioned on the mutual acceptance of all the joint offerees.” See Section 768.79(6), Fla. Stat. (2022).

So, would a property insurer who is making a joint proposal, and conditioning the acceptance of the proposal on mutual acceptance of all offerees, still have to apportion the amount? For what purpose? If a $10,000 proposal is made to Mary and John Smith, two insureds with a single breach claim arising out of their unified insurance claim, and acceptance of the $10,000 is conditioned upon them both accepting the $10,000.00, does a property insurer still need to apportion this amount (e.g., this offer is conditioned upon the mutual acceptance by the plaintiffs of the offer with $5,000 to Mary and $5,000 to John)?

As illogical and “nonsensical” as this would be, the court has already indicated that it is irrelevant if there is a single, unified claim, which is usually the case when there are multiple insureds in a property insurance breach of contract action (e.g., husband and wife insureds who own the home and sue their homeowner’s insurer in a breach of contract action). It is also irrelevant if the procedural rule defeats the purpose of the substantive rule. According to the court, Rule 1.442(c) (3) requires strict compliance because it is a penalty statute.

The Supreme Court’s holding, however, was not in the context of Section 768.79(6). Additionally, the myriad of precedential cases did not involve the 2022 version of 768.79 and its added provision allowing property insurers to make acceptance of the joint proposal conditioned upon mutual acceptance of the joint offerees. The Supreme Court discussed that 1.442(c)(3) is the procedural mechanism for implementing the substantive right to fees under 768.79, but it was a prior version of the statute.

Could Florida courts now distinguish property cases from all others in the 1.442(c)(3) and 768.79 context, given the 2022 change? It is unlikely given that the court indicated “our precedents under Rule 1.442(c)(3) reflect a judgment that, overall, the benefits of strict enforcement outweigh whatever would be gained by making ad hoc exceptions to address overbreadth in the rule.” Rather, rule changes may be forthcoming.

To date, Rule 1.442 does not have a carve out exception for implementing 768.79(6) which would obviate the need for apportionment. Rule 1.442(c)(4) contains exceptions for other scenarios (e.g., vicarious liability), but not one for a property insurer making a joint proposal conditioned upon mutual acceptance by the offerees. Until Rule 1.442 adds such an exception, it is likely that insurers still need to apportion the offer to multiple insureds.

In *Trace Elements*, dissenting Justice Meredith Sasso noted that all the precedential case law cited by the majority did not involve a single, unified claim, and this case was distinguishable and factually and legally different. Therefore, those cases were not binding on the current case. But, the majority made clear that Rule 1.442(3) is to be strictly construed.

Thus, it is most likely that Florida courts could take the same approach in property cases and disregard distinguishing facts and a separate statutory provision applying only to proposals served by property insurers. Strict compliance means strict compliance. However futile or "nonsensical" it may seem, we believe the prudent course of action is to still apportion the proposal amount to each insured if serving a joint proposal in a Section 768.79(6) scenario. The mutual acceptance language does not matter (for now).

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