

# LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

SUMMER 2003

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### *In This Edition . . .*

- An Indefinite Leave of Absence Is Not A Reasonable Accommodation Under the ADA
- Multiple Plaintiffs Must Craft Offers Of Settlement Carefully
- Florida's Supreme Court Addresses Courts' Jurisdiction To Enforce Settlement Agreements
- A Recent Analysis Of Spoliation Of Evidence Claims
- Welcome Litchford & Christopher's Summer Associate Class Of 2003
- Congratulations Keith Latek

Hal K. Litchford \* Donald E. Christopher \* David G. Lerner \* Alan B. Taylor  
Scott K. Lippman \* G. Steven Fender \* Richard C. Swank \* Paul E. DeHart

*Antitrust and Unfair Competition*  
*Financial Fraud*  
*Business Torts*  
*Real Property Transactions*  
*Corporate Control Disputes*  
*Civil Litigation*

*Agreements Not To Compete*  
*Patent, Trademark, Copyright Infringement*  
*Employment Discrimination*  
*Real Property Disputes*  
*Motor Vehicle Dealership Relations*  
*Commercial Litigation*

*Trade Secrets*  
*Contract Disputes*  
*Public Accommodations*  
*Corporate Transactions*  
*Partnership Disputes*  
*Class Actions*

**THE AMERICANS WITH DISABILITIES ACT DOES NOT REQUIRE  
AN EMPLOYER TO PROVIDE AN EMPLOYEE WITH  
AN INDEFINITE LEAVE OF ABSENCE**

Mark Wood began working for a Circuit Court Clerk's Office in 1974. Four years later, he began suffering from cluster headaches. Over the ensuing years, Wood missed work for extended periods of time and was unable to accomplish a substantial portion of his job duties. The Clerk's Office created a new position for Wood in order to accommodate his absences resulting from his cluster headaches. This new position – Court Coordinator – required Wood, as his primary duty, to review new legislation and rules that affected the courts and establish appropriate procedures to address the new legislation and rules. These duties took around fifty percent of Wood's time; the remainder of his time he worked with court supervisors, monitored court-related financial accounts, spoke at conferences, interfaced with difficult customers, and disseminated information to the public. Wood received favorable annual reviews from his employer.

The Court Clerk regularly granted Wood discretionary leave when he had used all medical, sick, and vacation leave. Wood was absent a tremendous amount. For example, in 1998 he missed fifteen weeks of work because of his headaches, and in 1999, he missed large portions of January through March, July, and August.

In Fall 1999, Wood met with his direct supervisor for his annual evaluation. The supervisor informed Wood he would not receive his annual pay increase given his absences from work. Not long afterward, Wood began experiencing another cluster headache and asked for a discretionary leave of absence, without pay, until he was able to return. Leave was approved in early December 1999 with no termination date. Late that month, Wood's doctor sent a letter to his employer, but in January 2000, Wood's employer terminated him.

Wood brought suit, in federal court, under the Americans With Disabilities Act. The case was tried to a jury for eight days. The jury returned a verdict in favor of Wood in which he was awarded back pay and reinstatement, but reinstatement was stayed pending appeal. The employer filed a motion for judgment as a matter of law with the trial court. The trial court denied the motion. The employer appealed.

In Wood v. Green, the Eleventh Circuit addressed the principle question of whether Wood's requested leaves of absence were a reasonable accommodation. The employer argued on appeal that Wood was not a qualified individual within the meaning of the ADA because his requested accommodation of indefinite leaves of absence was unreasonable. The court agreed. To be a "qualified individual" under the ADA, a person must be able to perform the essential functions of his or her job either with or without a reasonable accommodation. Here, Wood argued, and the trial court determined, that Wood's request for leave was not indefinite because his past experience provided a reasonable indicator of the probable length of time his leave would last. But, the appellate court observed Wood might return within a month or two, or he could be stricken with another cluster headache soon after his return and require yet another indefinite leave of absence. In short, Wood was not seeking an accommodation that would have allowed him to continue to work in the present but instead, in the future at some indefinite time.

Although the employer had created Wood's new position to accommodate his employment absences and had previously granted him indefinite leaves of absence, these prior accommodations did not make his currently requested accommodation reasonable.

"The ADA covers people who can perform the essential functions of their jobs presently or in the immediate future" the court wrote. Wood was not a qualified individual within this scope. Therefore, the Eleventh Circuit Court of Appeals reversed the trial court's order denying the employer's motion for judgment as a matter of law and rendered judgment in the employer's favor.

### **MULTIPLE PLAINTIFFS MUST APPORTION THEIR OFFERS OF SETTLEMENT AMONG THEMSELVES**

One of the more convoluted areas of Florida law involves the making of offers of settlement, which are sometimes also referred to as proposals or demands for settlement, or offers of or demands for judgment. There are procedural rules and statutes that govern the timing and method of making these offers, demands, and proposals, and the manner and consequences of rejecting them. If made properly, and depending on the ultimate outcome of a case, an offer, demand, or proposal can shift costs and attorney's fees from one party to another. In Willis Shaw Express, Inc. v. Hilyer Sod, Inc., the Florida Supreme Court had the chance to interpret whether the pertinent rules and statutes require multiple plaintiffs to apportion in proposals for settlement the amount each plaintiff is offering.

In this case, plaintiff Willis Shaw Express sought to recover damages incurred to its tractor-trailer and cargo. Co-plaintiff Edward McAlpine sought to recover damages for loss of property he had stored in the tractor. Both plaintiffs brought their claims against the defendant in one complaint. The plaintiffs served a joint proposal of settlement to the defendant in the amount of \$95,001.00. The proposal did not specify the amount and terms each plaintiff was requesting. The ultimate total of the recoveries in the case was more than twenty-five percent greater than the proposed settlement amount; therefore, per applicable statute, the trial court granted a motion by the plaintiffs to recover their fees and costs under the proposal for settlement law. Hilyer Sod, Inc. appealed. It argued the joint proposal was invalid because it did not apportion the amount demanded between the two plaintiffs.

The First District Court of Appeal reversed. In doing so, it quoted and relied on Florida Rule of Civil Procedure 1.442(c)(3), which provides in part that an offer of settlement made jointly by multiple plaintiffs must apportion the amounts "attributable to each party." The district court also noted there was a split of authority among the state's appellate courts. Its ruling was consistent with law from the second district's decisions. Nevertheless, the third and fifth districts' opinions held that lack of apportionment did not render a proposal invalid.

The supreme court began its analysis by recounting the offer of settlement law. Under the pertinent Florida statute, an offer of (or, in the case of a plaintiff, a "demand for") settlement or judgment provides a sanction against a party who unreasonably rejects the offer. That sanction generally works as follows: If a plaintiff serves a demand for judgment that is not accepted by a defendant within thirty days, and the plaintiff recovers a judgment in an amount at

least twenty-five percent greater than the demand, the plaintiff is entitled to recover his or her reasonable attorney's fees and costs incurred from the date of the demand. The effect is the same for a defendant who makes an offer when the plaintiff does not recover twenty-five percent more than the offered amount. A demand or offer, by statute, must be in writing and state it is being made per the statute, name the party making it and the party to whom it is being made, state the amount offered, and state its total amount.

The offer of settlement statute is implemented by Florida Rule of Civil Procedure 1.442. This rule, which requires certain additional detail to be included in settlement proposals, provides in part that "[a] joint proposal shall state the amount and terms attributable to each party."

The court then noted that this rule and the offer of settlement statute must be strictly construed because they are in derogation of the common law that each party must pay its own attorney's fees. Applying this principle, the supreme court held that the plain language of the rules requires offers made by multiple offerors to apportion the amounts attributable to each offeror. This is consistent with the law previously established in the first and second districts.

### **THE COURTS' JURISDICTION TO ENFORCE SETTLEMENT AGREEMENTS**

The Pauluccis sued General Dynamics Corporation and associated entities alleging they contaminated their warehouse property when GDC leased it from them. Two years after the suit was filed, the parties entered into a settlement agreement that required GDC to pay the Pauluccis \$3 million. The settlement also required GDC to initiate contact with the Department of Environmental Protection concerning the condition of the property and to maintain a "No Further Action" letter, or obtain reissuance of it, and if required to investigate and clean up the property. The parties also agreed that if after fifteen months a valid "No Further Action" letter was not in place, then defendants had to pay the plaintiffs certain monthly payments until a valid NFA letter was issued.

The trial court approved the settlement and incorporated it into the final judgment in the case. In that final judgment, the court retained jurisdiction to "enforce, construe, interpret, and otherwise insure compliance" by the parties with their settlement agreement.

After the entry of the final judgment, the Pauluccis filed various motions in which they alleged the defendants did not comply with the terms of the settlement agreement. Upon consideration of jurisdictional issues, the trial court entered an order that provided, in part, that the plaintiffs could file a motion in that court to enforce the settlement agreement, but they had to file an action to recover damages for its breach in a separate lawsuit.

On appeal, the Fifth District Court of Appeal noted that the trial court's solution to the jurisdictional questions was reasonable; however, based on a prior fifth district decision, it held that any action seeking to enforce a settlement agreement had to be brought separately by the filing of a complaint and not a motion, and the defendant had to have the opportunity to plead defenses and request a jury trial if appropriate. Accordingly, it held the trial court had no subject matter jurisdiction to enforce the terms of the settlement agreement because the remedy that was

sought was outside the scope of the original action. Nevertheless, that court certified a question of great public importance to the supreme court and also certified conflict with a decision of the Third District Court of Appeal.

In Paulucci v. General Dynamics Corporation, the supreme court began its analysis by reaffirming two basic principles. First, when a judgment has been rendered, a court loses jurisdiction over the subject matter of the suit other than to see that the judgment is properly entered and the rights it establishes are properly enforced. Second, a trial judge has the inherent power to do those things that are necessary to enforce its orders. Consistent with these principles the court held that when a trial court incorporates a settlement agreement into a final judgment or approves a settlement agreement by order and retains jurisdiction to enforce its terms, the court has jurisdiction to enforce the settlement even if the terms are outside the scope of the remedy sought in the original pleadings. On the other hand, if a party is claiming a breach of the agreement and is seeking general damages not specified in the agreement itself, then the appropriate action would be to file a separate lawsuit and not merely a motion in the settled lawsuit.

As applied here, the trial court approving the settlement agreement had the authority to enforce the defendants' obligation to pay the stipulated rental if a valid NFA letter was not in place fifteen months after the date of the agreement. A motion for damages under the general breach provision of the agreement – as opposed to enforcement of a preexisting duty in the agreement – had to be brought as a separate lawsuit. The supreme court expressly limited the scope of this decision to cases where the trial court has entered a final judgment incorporating the terms of a settlement or approved the agreement by order and expressly retained jurisdiction to enforce it. Importantly then, the court concluded that a statement in an order that the trial court expressly retained jurisdiction to enforce the settlement makes clear that the parties and the court intended that jurisdiction be expressly retained, and an independent lawsuit to enforce the agreement is unnecessary in that situation.

## **THE SECOND DISTRICT COURT OF APPEAL ANALYZES THE CONCEPT OF SPOILIATION OF EVIDENCE**

Karyen Jost, as guardian of Arthur Myers, filed a medical malpractice action against the hospital and Mr. Myers' doctor, Amir Ahmad. The case was tried before a jury, and the defendants obtained a verdict. The appellate court determined the trial court committed reversible error by excluding evidence of certain communications and ordered a new trial. After remand, but before a new trial, Mr. Myers died. Ms. Jost, as personal representative, filed and amended complaint.

In Jost v. Lakeland Regional Medical Center, the plaintiff alleged in her amended complaint that the hospital was negligent in its treatment of Arthur Myers. She also claimed that the hospital and its insurer had concealed or destroyed evidence. The defendants moved to dismiss the amended complaint. The trial court granted the motions to dismiss the spoliation of evidence counts.

On appeal, the plaintiff argued that Florida recognizes a cause of action for destruction or spoliation of evidence. Although the second district agreed, it noted that she intertwined claims of concealment and destruction of evidence, but a claim of concealment is not actionable and does not form a basis for a claim of spoliation of evidence. The court went on to align itself with the position of the Fourth District Court of Appeal that an independent cause of action for spoliation of evidence will not lie where the alleged spoliator and the defendant in the underlying case are the same. In this instance, the plaintiff should avail itself of adverse inferences and other sanctions that may be available to address any harm it claims to have suffered by the destruction of evidence. Moreover, the court noted that a spoliation claim is a separate claim for negligence that does not arise until the underlying action is completed.

Here, the second district affirmed the dismissal of the spoliation counts against the hospital because it was the defendant in the underlying cause of action but directed the trial court to determine whatever negative inferences, sanctions, or jury instructions may be appropriate. The appellate court held that the claim against the insurer was premature and would not be ripe until the underlying medical malpractice case had been resolved. Therefore, those claims were directed to be dismissed without prejudice to Ms. Jost's ability to raise them again later.

### **WELCOME SUMMER ASSOCIATES**

Litchford & Christopher is pleased to introduce you to its Summer Associate Class of 2003.

Kathleen Kurlander, who began a couple of weeks ago, has just completed her first year at Northwestern University School of Law. Prior to attending Northwestern, she received a Bachelor of Arts degree from Dartmouth College and worked as a legal assistant in a Chicago, Illinois firm focusing on real estate and probate matters.

Jonathan Yi has been with the firm for one week. He is a rising third year student at the University of Chicago Law School. He received a Bachelor of Arts degree in Anthropology from the University of Florida. Last summer, Jonathan was an intern for the U.S. Department of Education – Office for Civil Rights in Washington, D.C.

Bruce Davis begins his clerkship with the firm in August. Bruce will receive his law degree from William and Mary School of Law in May 2004. At William and Mary, Bruce is an Associate Editor of the school's Journal of Women and the Law among other accomplishments. Bruce has a Masters of Public Administration degree from Seattle University, and he completed his undergraduate work at the University of Washington.

### **CONGRATULATIONS KEITH LATEK**

The firm is pleased to announce that Keith Latek has successfully completed the two-day Certified Legal Assistant examination. He is now entitled to use of the "CLA" professional credential. Keith is among some 3,000 legal assistants in the State of Florida and over 11,800 legal assistants nationwide who have attained this goal.

Established in 1976, the Certified Legal Assistant examination program is a voluntary professional credentialing program developed by the National Association of Legal Assistants and administered by a board of composed legal assistants, members of the American Bar Association, and members of the field of education active in legal assistant training. The CLA program involves successful completion of a two-day comprehensive examination covering the topics of communications, legal research, ethics, human relations and interviewing techniques, legal terminology, judgment and analytical ability, and substantive law.

Join us in congratulating Keith on this wonderful accomplishment.