

Bill No. SB 1726

Barcode 545448

CHAMBER ACTION

Senate

House

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The Committee on Commerce (Oelrich) recommended the following amendment:

Senate Amendment (with title amendment)

Delete everything after the enacting clause

and insert:

Section 1. Section 57.105, Florida Statutes, is reenacted and amended to read:

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.--

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

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1 (a) Was not supported by the material facts necessary
2 to establish the claim or defense; or

3 (b) Would not be supported by the application of
4 then-existing law to those material facts.

5
6 However, the losing party's attorney is not personally
7 responsible if he or she has acted in good faith, based on the
8 representations of his or her client as to the existence of
9 those material facts. If the court awards attorney's fees to a
10 claimant pursuant to this subsection, the court shall also
11 award prejudgment interest.

12 (2) Paragraph (1)(b) does not apply if the court
13 determines that the claim or defense was initially presented
14 to the court as a good faith argument for the extension,
15 modification, or reversal of existing law or the establishment
16 of new law, as it applied to the material facts, with a
17 reasonable expectation of success.

18 (3) At any time in any civil proceeding or action in
19 which the moving party proves by a preponderance of the
20 evidence that any action taken by the opposing party,
21 including, but not limited to, the filing of any pleading or
22 part thereof, the assertion of or response to any discovery
23 demand, the assertion of any claim or defense, or the response
24 to any request by any other party, was taken primarily for the
25 purpose of unreasonable delay, the court shall award damages
26 to the moving party for its reasonable expenses incurred in
27 obtaining the order, which may include attorney's fees, and
28 other loss resulting from the improper delay.

29 (4) A party is entitled to an award of sanctions under
30 this section only if a motion is ~~by a party seeking sanctions~~
31 ~~under this section must be served~~ by a party seeking sanctions

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1 under this section. Such motion shall ~~but may~~ not be filed
2 with or presented to the court unless, within 21 days after
3 service of the motion, the challenged paper, claim, defense,
4 contention, allegation, or denial is not withdrawn or
5 appropriately corrected. Any motion filed with the court which
6 does not comply with this subsection is null and void. This
7 subsection is substantive and shall not be waived except in
8 writing. This subsection does not apply to sanctions ordered
9 upon the court's initiative.

10 (5) In administrative proceedings under chapter 120,
11 an administrative law judge shall award a reasonable
12 attorney's fee and damages to be paid to the prevailing party
13 in equal amounts by the losing party and a losing party's
14 attorney or qualified representative in the same manner and
15 upon the same basis as provided in subsections (1)-(4). Such
16 award shall be a final order subject to judicial review
17 pursuant to s. 120.68. If the losing party is an agency as
18 defined in s. 120.52(1), the award to the prevailing party
19 shall be against and paid by the agency. A voluntary dismissal
20 by a nonprevailing party does not divest the administrative
21 law judge of jurisdiction to make the award described in this
22 subsection.

23 (6) The provisions of this section are supplemental to
24 other sanctions or remedies available under law or under court
25 rules.

26 (7) If a contract contains a provision allowing
27 attorney's fees to a party when he or she is required to take
28 any action to enforce the contract, the court may also allow
29 reasonable attorney's fees to the other party when that party
30 prevails in any action, whether as plaintiff or defendant,
31 with respect to the contract. This subsection applies to any

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1 contract entered into on or after October 1, 1988.

2 (8) The provisions of this section create substantive
3 rights to the award of attorney's fees, and any procedural
4 provisions are directly related to the definition of those
5 rights. Any procedural aspects of this provision are intended
6 to implement the substantive provisions of the law.

7 Section 2. Section 768.79, Florida Statutes, is
8 reenacted and amended to read:

9 768.79 Offer of judgment and demand for judgment.--

10 (1) In any civil action for damages filed in the
11 courts of this state, if a defendant files an offer of
12 judgment which is not accepted by the plaintiff within 30
13 days, the defendant shall be entitled to recover reasonable
14 costs and attorney's fees incurred by her or him or on the
15 defendant's behalf pursuant to a policy of liability insurance
16 or other contract from the date of filing of the offer if the
17 judgment is one of no liability or the judgment obtained by
18 the plaintiff is at least 25 percent less than such offer, and
19 the court shall set off such costs and attorney's fees against
20 the award. Where such costs and attorney's fees total more
21 than the judgment, the court shall enter judgment for the
22 defendant against the plaintiff for the amount of the costs
23 and fees, less the amount of the plaintiff's award. If a
24 plaintiff files a demand for judgment which is not accepted by
25 the defendant within 30 days and the plaintiff recovers a
26 judgment in an amount at least 25 percent greater than the
27 offer, she or he shall be entitled to recover reasonable costs
28 and attorney's fees incurred from the date of the filing of
29 the demand. If rejected, neither an offer nor demand is
30 admissible in subsequent litigation, except for pursuing the
31 penalties of this section.

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1 (2) The making of an offer of settlement which is not
2 accepted does not preclude the making of a subsequent offer.

3 An offer must:

4 (a) Be in writing and state that it is being made
5 pursuant to this section.

6 (b) Name the party making it and the party to whom it
7 is being made.

8 (c) State with particularity the amount offered to
9 settle a claim for punitive damages, if any.

10 (d) State its total amount.

11

12 The offer shall be construed as including all damages which
13 may be awarded in a final judgment.

14 (3) A proposal may be made by or to any party or
15 parties and by or to any combination of parties properly
16 identified in the proposal. A joint proposal shall state the
17 amount and terms attributable to each party.

18 (4) Notwithstanding subsection (3), when a party is
19 alleged to be solely vicariously, constructively,
20 derivatively, or technically liable, whether by operation of
21 law or by contract, a joint proposal made by or served on such
22 a party need not state the apportionment or contribution as to
23 that party. Acceptance by any party shall be without prejudice
24 to rights of contribution or indemnity.

25 ~~(5)(3)~~ The offer shall be served upon the party to
26 whom it is made, but it shall not be filed unless it is
27 accepted or unless filing is necessary to enforce the
28 provisions of this section.

29 ~~(6)(4)~~ An offer shall be accepted by filing a written
30 acceptance with the court within 30 days after service. Upon
31 filing of both the offer and acceptance, the court has full

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1 jurisdiction to enforce the settlement agreement.

2 ~~(7)(5)~~ An offer may be withdrawn in writing which is
3 served before the date a written acceptance is filed. Once
4 withdrawn, an offer is void.

5 ~~(8)(6)~~ Upon motion made by the offeror within 30 days
6 after the entry of judgment or after voluntary or involuntary
7 dismissal, the court shall determine the following:

8 (a) If a defendant serves an offer which is not
9 accepted by the plaintiff, and if the judgment obtained by the
10 plaintiff is at least 25 percent less than the amount of the
11 offer, the defendant shall be awarded reasonable costs,
12 including investigative expenses, and attorney's fees,
13 calculated in accordance with the guidelines promulgated by
14 the Supreme Court, incurred from the date the offer was
15 served, and the court shall set off such costs in attorney's
16 fees against the award. When such costs and attorney's fees
17 total more than the amount of the judgment, the court shall
18 enter judgment for the defendant against the plaintiff for the
19 amount of the costs and fees, less the amount of the award to
20 the plaintiff.

21 (b) If a plaintiff serves an offer which is not
22 accepted by the defendant, and if the judgment obtained by the
23 plaintiff is at least 25 percent more than the amount of the
24 offer, the plaintiff shall be awarded reasonable costs,
25 including investigative expenses, and attorney's fees,
26 calculated in accordance with the guidelines promulgated by
27 the Supreme Court, incurred from the date the offer was
28 served.

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30 For purposes of the determination required by paragraph (a),
31 the term "judgment obtained" means the amount of the net

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1 judgment entered, plus any postoffer collateral source
 2 payments received or due as of the date of the judgment, plus
 3 any postoffer settlement amounts by which the verdict was
 4 reduced. For purposes of the determination required by
 5 paragraph (b), the term "judgment obtained" means the amount
 6 of the net judgment entered, plus any postoffer settlement
 7 amounts by which the verdict was reduced.

8 ~~(9)(7)~~(a) If a party is entitled to costs and fees
 9 pursuant to the provisions of this section, the court may, in
 10 its discretion, determine that an offer was not made in good
 11 faith. In such case, the court may disallow an award of costs
 12 and attorney's fees.

13 (b) When determining the reasonableness of an award of
 14 attorney's fees pursuant to this section, the court shall
 15 consider, along with all other relevant criteria, the
 16 following additional factors:

17 1. The then apparent merit or lack of merit in the
 18 claim.

19 2. The number and nature of offers made by the
 20 parties.

21 3. The closeness of questions of fact and law at
 22 issue.

23 4. Whether the person making the offer had
 24 unreasonably refused to furnish information necessary to
 25 evaluate the reasonableness of such offer.

26 5. Whether the suit was in the nature of a test case
 27 presenting questions of far-reaching importance affecting
 28 nonparties.

29 6. The amount of the additional delay cost and expense
 30 that the person making the offer reasonably would be expected
 31 to incur if the litigation should be prolonged.

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1 ~~(10)(8)~~ Evidence of an offer is admissible only in
2 proceedings to enforce an accepted offer or to determine the
3 imposition of sanctions under this section.

4 (11) The provisions of this section create substantive
5 rights to the award of attorney's fees, and any procedural
6 provisions are directly related to the definition of those
7 rights. Any procedural aspects of this provision are intended
8 to implement the substantive provisions of the law.

9 Section 3. It is the intent of this act and the
10 Legislature to accord the utmost comity and respect to the
11 constitutional prerogatives of Florida's judiciary, and
12 nothing in this act should be construed as an effort to
13 impinge on those prerogatives. To that end, should any court
14 of competent jurisdiction enter a final judgment concluding or
15 declaring that a provision of this act improperly encroaches
16 upon the authority of the Florida Supreme Court to determine
17 the rules of practice and procedure in Florida courts, the
18 Legislature hereby declares its intent that such provision be
19 construed as a request for a rule change pursuant to section
20 2, Article V of the State Constitution and not as a mandatory
21 legislative directive.

22 Section 4. The amendment to subsection (4) of s.
23 57.105, Florida Statutes, is remedial in nature and is
24 intended to apply retroactively.

25 Section 5. This act shall take effect July 1, 2007,
26 and the amendments to s. 768.79, Florida Statutes, made by
27 this act shall apply only to offers made on or after that
28 date.

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1 ===== T I T L E A M E N D M E N T =====

2 And the title is amended as follows:

3 Delete everything before the enacting clause

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5 and insert:

6 A bill to be entitled

7 An act relating to award of attorney's fees;

8 reenacting and amending s. 57.105, F.S.,

9 relating to attorney's fees and sanctions for

10 raising unsupported claims or defenses;

11 providing an entitlement to fees and requiring

12 compliance with filing provisions; providing

13 legislative intent; reenacting and amending s.

14 768.79, F.S.; allowing offers to be made by or

15 to any party or parties; requiring joint

16 proposals to state the amount and terms

17 attributable to each party; providing

18 exceptions when a party is alleged to be solely

19 vicariously, constructively, derivatively, or

20 technically liable; providing legislative

21 intent; providing for specified retroactive

22 applicability; providing applicability;

23 providing an effective date.

24

25 WHEREAS, the legislative power of the state is vested

26 solely in the Legislature of the State of Florida, and the

27 Legislature is the only branch of government constitutionally

28 authorized to confer substantive rights, and

29 WHEREAS, shifting fees to the losing party is in

30 derogation of the common law American rule that each party in

31 a lawsuit pay its own attorney's fees, and

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1 WHEREAS, the award of attorney's fees is a substantive
2 right that may only be conferred by the Legislature, and
3 WHEREAS, a substantive right created by the Legislature
4 may not be abolished by the courts, and
5 WHEREAS, the Legislature enacted chapter 99-225, Laws
6 of Florida, which amended both section 57.105, Florida
7 Statutes, and section 768.79, Florida Statutes, and
8 WHEREAS, the Legislature provided the standard for the
9 award of attorney's fees under section 57.105, Florida
10 Statutes, which provides that attorney's fees shall be awarded
11 to the prevailing party in a civil proceeding or action in
12 which the court finds that the losing party or the losing
13 party's attorney knew or should have known that a claim or
14 defense when initially presented to the court or at any time
15 before trial was not supported by the material facts necessary
16 to establish the claim or defense, or would not be supported
17 by the application of then-existing law to those material
18 facts, and
19 WHEREAS, the standard for the award of attorney's fees
20 under section 57.105, Florida Statutes, is not whether the
21 claim or defense was "frivolous," and
22 WHEREAS, the application of a standard other than the
23 standard adopted by the Legislature for the award of a
24 substantive right encroaches upon the Legislature's right to
25 confer substantive rights, and
26 WHEREAS, it is the intent of the Legislature to
27 preserve and protect the separation of powers clause in
28 section 3, Article II of the State Constitution, NOW,
29 THEREFORE,

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