The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Commerce Committee

BILL:	CS/SB 1726
INTRODUCER:	Committee on Commerce and Senator Baker
SUBJECT:	Offers of Settlement/Civil Actions
DATE:	March 22, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	**Fav/CS**
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

The Committee Substitute (CS) reenacts and amends s. 57.105, F.S., relating to the award of attorney's fees for raising unsupported claims or defenses, to do the following:

- Require a party who seeks fees to serve a motion on the other party in order to be entitled to those fees;
- Provide that a motion not complying with the provisions of the statute is null and void;
- Provide that the amended subsection is substantive and may only be waived in writing; and
- Provide that the subsection does not apply to sanctions order on the court's initiative.

The CS makes the substantive rights created by s. 57.105, F.S., retroactive.

The CS also amends s. 768.79, F.S., to insert, verbatim, the language of Rule 1.442(c)(3) regarding joint offers and multiple parties, and retain the apportionment language of that rule, which permits any party to make a single sum joint offer of settlement. The CS also permits a vicariously, constructively, derivatively or technically liable party to make a joint offer that is not apportioned as to itself or the offeree(s) in a civil suit for damages. The CS provides that accepting such an offer does not affect a party's rights of contribution or indemnity from the other tortfeasor.

The CS provides that if a court determines that this act improperly encroaches on the authority of the Florida Supreme Court to determine rule of practice and procedure, the Legislature declares its intent that such provision be considered a request for a rule change.

The CS makes this legislation effective July 1, 2007, and states that amendments made to s. 768.79, F.S., will only be applicable to offers of settlement made on or after that date.

This bill amends the following sections of the Florida Statutes: 57.105 and 768.79.

II. Present Situation:

Attorney's Fees Generally

Florida courts apply the common law "American Rule" in determining an entitlement to attorney's fees resulting from litigation.[1] That rule dictates that courts award fees where a statute exists compelling them to do so, or where an agreement exists between the parties outlining fees.[2] Florida's attorney's fee provision for raising unsupported claims or defenses, s. 57.105, F.S., and its offer of judgment statute, s. 768.79, F.S., are two such statutes.

Attorney's Fees For Unsupported Claims or Defenses

Section 57.105, F.S., provides that reasonable attorney's fees will be awarded at any time during a civil proceeding, upon motion of a party or the court, if the court finds that the losing party or the losing party's attorney knew or should have known (a) that a claim or defense was not supported by the facts, or (b) would not be supported by the application of the then-existing law to those facts. Either a motion by any party or the court's own initiative may trigger consideration of such an award. If granted, the award must be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney. However, the attorney is not personally responsible for paying attorney's fees if s/he acted in good faith based on the representations of the client regarding the material facts.[3]

Safe Harbor Provision

In 2002, s. 57.105, F.S., was amended to include a subsection (4), a safe harbor provision that mirrors Fed. R. Civ. Proc. 11.[4] That rule allows a party to voluntarily withdraw any pleading or claim that may be subject to an award of fees. The safe harbor provision requires a party seeking sanctions to file a motion that must be served, but not filed with the court unless, within 21 days after service, the challenged act is not withdrawn or corrected.[5] In summary, the provision gives parties charged with filing frivolous claims an opportunity to correct those claims before a motion is filed against them under this provision. The safe harbor provision is intended to promote judicial economy by minimizing litigation and allowing parties to police themselves.[6]

Attorney's Fees Stemming From Offers of Judgment

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[1] Katherine H. Miller, *A History of Apportioning Joint Offers of Judgment in Florida: Is Willis Shaw Really the Bottom Line, or Is There An Exception?*, 28 Nova L. Rev. 841, 841-842 (Spring 2004).
[2] *Dade County v. Pena*, 664 So.2d 959, 960 (Fla. 1995).
[3] Section 57.105(1), F.S. Civil damages, which may include attorney's fees, are also available under s. 57.105, F.S., if the moving party proves, by a preponderance of the evidence, that any action taken by the opposing party was taken primarily to unreasonably delay the proceedings.
[4] Section 1, ch. 2002-77, L.O.F.
[5] Section 57.105(4), F.S.
[6] *Maxwell Bldg Corp. v. Euro Concepts, LLC*, 874 So. 2d. 709, 710 (4th DCA 2004).

Section 768.79, F.S., provides for attorney's fees where a party's offer to settle a case has been rejected. The statute states, in pertinent part:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him…if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer….If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees….

The statute also requires that an offer:

- Be in writing and state that it is being made pursuant to this section;
- Name the party making it and the party to whom it is being made;
- State with particularity the amount offered to settle a claim for punitive damages, if any; and
- State its total amount.

On its face, the language of the statute seems to adequately address the allocation of attorney's fees in civil actions for damages. However, the statute does not explicitly address situations involving multiple parties. The implementing rule, Fla. R. Civ. Proc. 1.442, provides procedural guidance lacking in the statute. Paragraph (c)(3) of the rule states: "A proposal 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 shall state the amount and terms attributable to each party." Moreover, neither the statute nor the rule makes a distinction regarding the awarding of attorney's fees under varying theories of liability (e.g., comparative fault or vicarious liability). The rule's silence on the issue of liability, particularly vicarious liability, has become a source of some confusion in Florida's courts.

Vicarious Liability

Vicarious liability is "[t]he imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two."[7] The Restatement of Torts states that a person who is vicariously liable is "one whose liability is imputed based on the tortious acts of another [and] is liable for the entire share of comparative responsibility assigned to the other….." [8] The liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent, are common examples of relationships where vicarious liability may lie.

[7] Black's Law Dictionary, 6th Edition, p. 1084.
[8] Restatement (Third) of Torts: Apportionment of Liability § 13 (2000); *See also, American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459, 467 (Fla. 2005).

Florida's Offer of Judment Rule and Related Cases

While the Florida Supreme Court has interpreted Rule 1.442(c)(3) to require that any party making an offer to one or more parties apportion the offer, district courts have applied differing interpretations. Concurring opinions in a relatively recent Florida Supreme Court case along with lower court opinions suggest that the rule may need to be revisited to address, in particular, cases involving vicarious liability where determining the portion of liability of the non-negligent defendant is difficult.

In 1996, the Florida Supreme Court amended Rule 1.442 to allow joint proposals for settlement as long as the joint proposal states the amount and terms attributable to each party. The committee notes attached to the rule state that the amendment was drafted in recognition of the *Fabre v. Marin*[9] case, which requires that each defendant pay noneconomic damages in proportion to the percentage of fault attributable to each defendant.[10] The rule was examined again in 2002, but the Civil Procedure Rules Committee of the Florida Bar declined to adopt a proposal "to specifically excuse apportionment requirements in proposals for settlement directed to parties alleged to be vicariously, constructively, derivatively or technically liable."[11] Their consideration of that proposal stemmed from their decision in *Willis Shaw Express Inc., v. Hilyer Sod, Inc.*,[12] which required that multiple plaintiffs apportion their offer among the plaintiffs.

The Florida Supreme Court revisited this issue in a 2005 case, *Lamb v. Matetzschk*,[13] where it reviewed two District Court of Appeal cases which conflicted with one another regarding the apportionment of offers. In this case, Matetzschk rear-ended a car driven by Lamb. Lamb sued Matetzschk, and also sued his wife who was vicariously liable as a co-owner of the car. Lamb made three offers to Matetzschk to settle the case; the first two offers were undifferentiated between Mr. and Mrs. Matetzschk. The last offer was made solely to Mr. Matetzschk who rejected it. At trial, Lamb was awarded $73,108. The Fifth District decided that Lamb was only entitled to attorney's fees based on the last offer, as the first two offers were undifferentiated and thus violative of Rule 1.442.

The Fifth District's decision in Lamb conflicted with the Second District Court of Appeal's decision in *Barnes v. Kellogg, Co.*[14] Barnes also involved one plaintiff suing two defendants, but in that case, the defendants offered to settle and Barnes rejected their joint offer. When the defendants moved for attorney's fees, the trial court granted their request. On appeal, the Second District upheld the ruling, holding that defendants were not required to apportion their offer as to themselves.

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[9] 623 So. 2d 1182 (Fla. 1993).
[10] *Amendments to the Florida Rules of Civil Procedure*, 682 So. 2d 15, 126 (Fla. 1996).
[11] *Amendments to the Florida Rules of Civil Procedure (Two Year Cycle)*, 858 So.2d 1013, 1014 (Fla. 2003). Prior to this consideration of a rule change, the rule was amended to limit the timeframe in which an offer had to be accepted or rejected to 30 days (1.442(f), Fla. R. Civ. Proc.), and to require a party seeking sanctions based on the failure of the proposal's recipient to accept a proposal to file a motion pursuant to Rule 1.525, Fla. R. Civ. Proc. (1.442(g), Fla. R. Civ. Proc.). *See, Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098, 1118-1119 (Fla. 2000).
[12] 849 So.2d 276 (Fla. 2003).
[13] 906 So.2d 1037 (Fla. 2005).
[14] 846 So.2d 568 (Fla. 2d DCA 2003).

In reviewing the lower court decisions, the Supreme Court applied a strict reading of the rule as required by precedent[15] and held that parties who make settlement offers must apportion those offers among the defendants or plaintiffs to whom or from whom the offers are made. Importantly, the Court held that this rule applies even where one of the defendants is only vicariously liable. However, three Justices, in two separate opinions, registered their concerns with the majority's interpretation of the rule regarding apportioning offers where vicarious liability is involved.

Justice Pariente agreed with the majority, but wrote a separate opinion in which Justices Anstead and Lewis concurred. In it, the Justice expressed her concern that the majority opinion's interpretation of Rule 1.442(c)(3) would not foster the primary goal of the rule of encouraging settlements.[16] She also noted that the current version of the rule itself may not always advance the underlying purpose of the rule.[17] Importantly, Justice Pariente pointed out that where the liability of one defendant is based on vicarious liability and that issue is undisputed, "apportionment of the offer between the active tortfeasor and the vicarious tortfeasor is problematic because the liability of both defendants is not apportioned but is coextensive."[18]

Justice Lewis, wrote a separate opinion, and concurred with the majority in result only. Importantly, he noted that since a nonnegligent party who is found to be only vicariously liable is entitled to total and complete indemnification from an active tortfeasor,[19] an attempt to apportion an offer of settlement is "meaningless and essentially unworkable." Justice Lewis goes on to encourage mindfulness to the functionality and practicality in actual application of procedural rules. He encouraged the civil rules committee to immediately revisit the rule and consider modifications that would take into account vicariously liable defendants. The Justice concluded that "[t]he result [in this case]…is purely the product of the technical language of the rule, not logic or proper reasoning."[20]

Good Faith Offers

Section 768.79(7)(a), F.S., also provides that when a party is entitled to costs and fees pursuant to this statute, the court may use its discretion to disallow the award if it determines that an offer was not made in good faith. In determining good faith, the court should ask itself "whether the offer or burden bears a reasonable relationship to the amount of damages suffered and was a realistic assessment of liability."[21]

III. Effect of Proposed Changes:

Section 1 amends s. 57.105, F.S., to do the following:

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[15] *Willis Shaw*, supra, note 12, at 278-79 (noting that rule 1.442(c)(3) and s. 768.79, F.S., must be strictly construed because they are exceptions to the common law and, as such, essentially penalize claimants).
[16] *Lamb*, supra, note 13 (Pariente, J. concurring opinion) at 1043, quoting, *Unicare Health Facilities, Inc. v. Mort.*, 553 So.2d 159, 161 (Fla. 1989).
[17] *Lamb*, supra¸ note 13, at 1043.
[18] *Id.* at 1044.
[19] *Id*., at 1045, (Lewis, J., concurring opinion), relying on, *Houdaille Indus., Inc. v. Edwards*, 374 So.2d 490 (Fla. 1979).
[20] *Id.*
[21] *Gurney v. State Farm Mut. Auto. Ins. Co*., 889 So. 2d 97, 99 (Fla. 5th DCA 2004), relying on, *Evans v. Piotraczk*, 724 So. 2d 1210, 1211 (Fla. 5th DCA 1998).

- Require a party who seeks fees to serve a motion on the other party in order to be entitled to those fees;[22]
- Provide that a motion not complying with the provisions of the statute is null and void;
- Provide that the amended subsection is substantive and may only be waived in writing; and
- Provide that the subsection does not apply to sanctions order on the court's initiative.

This section also provides that s. 57.105, F.S., creates substantive rights and any procedural provisions are directly related to the definition of those rights. The CS specifies that any procedural aspects of this provision are intended to implement the substantive provisions of the law.

Section 2 amends s.768.79, F.S., to add three new subsections. Subsection (3) inserts, verbatim, the language of Rule 1.442(c)(3) regarding joint offers and multiple parties, and retains the apportionment language of that rule. Specifically, the amendment provides: "A proposal 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 shall state the amount and terms attributable to each party."

Subsection (4) is added to the statute to permit a vicariously, constructively, derivatively or technically liable party (essentially, the defendant) to offer a joint proposal without apportioning the offer. This provision also states that accepting such an offer does not affect a party's rights of contribution or indemnity from the other tortfeasor.

A new subsection (11) is added to provide that s. 768.79, F.S., creates substantive rights, and any procedural provisions are directly related to the definition of those rights. The CS specifies that any procedural aspects of this provision are intended to implement the substantive provisions of the law.

Section 3 provides legislative intent indicating that "nothing in this act should be construed as an effort to impinge on [the] prerogatives [of the judiciary]." This section also states that if the Supreme Court were to find that any portion of the act encroaches on the authority of the court to determine rules of practice and procedure, the Legislature "declares its intent that such provision be construed as a request for a rule change pursuant to section 2, Article V[23] of the State Constitution and not as a mandatory legislative directive." (Reference added).

Section 4 provides that the language in the new subsection (4) of s. 57.105, F.S., is remedial in nature and is intended to apply retroactively.

Section 5 provides an effective date of July 1, 2007.

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[22] This portion of the CS contains the following phrase: A party is entitled to an award of sanctions under this section ***only if*** a motion is served by a party seeking sanctions under this section." If adopted, this phrase would create an internal inconsistency in s.57.105, F.S., which currently also allows a court, on its own initiative, to award attorney's fees.

[23] Art. V, Sec. 2, Fla. Const. provides, in pertinent part: "The supreme court shall adopt rules for the practice and procedure in all courts…."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Separation of Powers

Florida's constitution includes a specific provision pertaining to the separation of powers among the three branches of government.[24] The "separations of powers" doctrine forbids one branch of government from usurping the functions of another. While the Legislature has the authority to make substantive law, the judicial branch creates procedures to implement the law. As the Supreme Court has stated previously:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions.[25]

The question of whether a law is procedural or substantive has been decided on a case-by-case basis. Where a "statute creates substantive rights and any procedural provisions [contained in the statute] are directly related to the definition of those rights"[26] or the procedural aspects are intended to implement the substantive provisions of the law, Florida courts have found that such legislative provisions do not violate the separation of powers clause of the State Constitution.[27]

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[24] Art. II, sec. 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").
[25] *Benyard v. Wainwright*, 322 So.2d 473, 475 (Fla. 1975).
[26] *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 55 (Fla. 2000).
[27] *See, e.g., id*., (holding that a statute permitting mortgagee suing to foreclose its nonresidential mortgage, without the necessity of posting a bond, to obtain prejudgment order directing mortgagor to pay interest does not violate due process or infringe on Supreme Court's rulemaking authority; reasoning that the procedural provisions in the statute were meant to implement the substantive provisions, and, therefore, did not violate separation of powers).

This CS's inclusion of procedural language appears directly related to the substantive rights created by the statute, and, therefore, may be able to survive a constitutional challenge reliant on the separation of powers doctrine. However, the legislature's directive that the Court construe the legislative intent language as a request for a rule change if the Court finds it violates separation of powers, may violate the doctrine.

Retroactive Application of Legislation

Section 4 of this CS provides that the amendment to s. 57.105, F.S., is intended to be remedial and, therefore, will apply retroactively. A retroactive or retrospective law is one that "affects rights, obligations, acts, transactions, and conditions which are performed or exist prior to the adoption of the statute."[28] The Florida Supreme Court has noted that:

> A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein ... a new obligation or duty is created or imposed ... in connection with transactions or considerations previously had or expiated.[29]

The court considered a retroactive provision in *Fla. Compensation Fund v. Scherer,*[30] medical malpractice action. In that case, the court examined whether the date by which a statute enlarging the right of attorney's fees became effective (1980) applied to an injury that was caused in 1979, but not discovered until later. The court held that damages and penalties, including an award for attorney's fees, cannot be constitutionally enlarged after the date of the alleged malpractice. Importantly, the court found that doing so would violate both state and federal prohibitions against ex post facto laws;[31] and it stated, "Due process considerations preclude retroactive application of a law that creates a substantive right."[32] The Court applied similar reasoning in *Young v. Althenus*,[33] another medical malpractice suit where doctors sought to recover attorney's fees. In that case, the Court considered whether a recent statutory change that required the non-prevailing party to pay attorney's fees was a new obligation or duty, and, therefore, substantive. The court concluded that the law be applied prospectively since statutes that interfere with vested rights will not be given retroactive effect.

While the Legislature did not explicitly state whether the statute in *Young* should have applied retroactively or prospectively, as this bill does, the court's reasoning and conclusions are instructive. The language in the proposed subsection (8) of 57.105, F.S., explicitly states that the provisions of that statute create substantive rights. Therefore, attempts to derogate those rights may be violative of ex post facto prohibitions and due process rights.

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[28] 16A C.J.S. Constitutional Law, Sec. 559.
[29] *Young v. Althenus*, 472 So. 2d 1152, 1154, quoting, *McCord v. Smith*, 43 So. 2d 704, 709 (1949).
[30] *Florida Patient's Compensation Fund v. Scherer*, 558 So.2d 411 (Fla. 1990).
[31] *Id.*,at 414 (Fla. 1990).
[32] *Id*. Art. I, sec. 9, U.S. Const., Art. I, sec. 10, U.S. Const. and Art. I, sec. 10, Fla. Const., essentially provide that, "A law violates the ex post facto clauses of the United States and Florida Constitutions when it increases the punishment for a criminal offense after the crime has been committed." *Goad v. Fla. Dept. of Corrections*, 845 So.2d 880 (Fla. 2003).
[33] *Young*, supra, note 29.

The amendment to s. 57.105, F.S., in subsection (4) provides that fees are available ***only if*** a party files a motion; this change may be interpreted as removing the court's discretion to grant fees and a party's ability to receive fees based on a court's discretion. This amended language, if applied retroactively, would infringe on a party's substantive right created by statute to receive attorney's fees. Therefore, retroactive application of the amended language may be constitutionally violative.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that this bill encourages settlement, the private sector may experience a decline in the overall cost of litigation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The CS amends s. 57.105, F.S., to require a party who seeks fees to serve a motion on the other party in order to be entitled to those fees. Currently, under s. 57.105(1), attorney's fees may be awarded on the court's own initiative or by motion of any party—this portion of the statute is retained in the CS. The amendment requiring that a motion be filed in order for a party to win attorneys fees may cause an internal inconsistency in the CS.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.