HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 813 Award of Attorney's Fees
SPONSOR(S): Williams
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law		Birtman	Birtman
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Pursuant to Florida law, attorney's fees may not be awarded to the prevailing party unless specifically provided by statute or contract. This bill amends two such statutes as follows:

- Reenacts and amends s. 57.105, F.S., relating to the award of attorney's fees for raising unsupported claims or defenses. The section is reenacted to evidence legislative intent that the statutory standard for the award of attorney's fees is as laid out in the statute, and not based on a 'frivolous' standard. The section is also amended to provide that any motion for attorney's fees that do not comply with the substantive provisions of the statute shall be considered null and void.
- Amends s. 768.79, F.S., to require that offers made by or to multiple defendants solely alleged to be vicariously, constructively, derivatively, or technically liable must be made as one joint offer with a single sum applicable to all such defendants. The bill also requires that the offeree has the burden of clarifying any uncertainties in an offer's terms or conditions and that the offeror shall be bound by its offer if accepted.

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

The bill becomes effective July 1, 2007, and amendments made to s. 768.79, F.S., shall only be applicable to offers of settlement made on or after that date.

This bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promotes personal responsibility - The bill requires correction or withdrawal of any claim or defense that wasn't supported by the material facts necessary to establish the claim or defense prior to an award of attorney's fees.

Safeguards individual liberty - The act provides the substantive right to attorney's fees based on offers of judgment made to and by defendants who are vicariously, constructively, derivatively, or technically liable.

Promotes limited government - The act expresses the Legislature's intent to preserve and protect the separations of powers doctrine.

B. EFFECT OF PROPOSED CHANGES:

Attorney's fees in general: Florida adheres to the American Rule (the common law rule), which provides that each party is responsible for their own attorney's fees. Pursuant to Florida law, attorney's fees may not be awarded to the prevailing party unless specifically authorized by statute or agreed to by the parties.[1] Such statutes, which are in derogation of the common law, must be strictly construed by the courts.[2] The Florida Supreme Court has held that an award of attorney's fees to the prevailing party is a matter of substantive law properly within the aegis of the Legislature and does not unconstitutionally impinge upon the Court's rulemaking authority granted by Article V, section 2 of the Florida Constitution.[3]

Sanctions for raising unsupported claims or defenses: Section 57.105, F.S., provides that reasonable attorney's fees shall be awarded on any claim or defense at any time during a civil proceeding in which the court found that the losing party or losing party's attorney knew or should have known that a claim or defense when initially presented to the court, or at any time prior to trial was not supported by the material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts.[4] An award of attorney's fees may be based on the motion of any party, or upon the court's own initiative, and must be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney. The losing party's attorney is not personally responsible for paying attorney's fees if such attorney acted in good faith based on the representations of the client as to the existence of those material facts.[5]

The standard that a claim or defense not be supported by the material facts necessary to establish the claim or defense was a departure from previous statutory language, which required attorney's fees to be awarded to the prevailing party if the court found that, "there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party."[6]

Since 1999, when the Legislature enacted the new standard by which persons are entitled to attorney's fees, some Florida courts have continued to use the old standard,[7] and case law and scholarly articles

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[1] *Campbell v. Maze*, 339 So.2d 202 (Fla. 1976).
[2] *Hess v. Walton*, 898 So.2d 1046 (Fla. 2nd DCA 2005).
[3] *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1149 (Fla. 1985); *Moser v. Barron Chase Securities, Inc*., 783 So.2d 231 (Fla. 2001); *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992).
[4] Section 57.105(1), F.S.
[5] Id.
[6] Section 57.105(1), F.S. (1998). Amended by s. 4, ch. 99-225, L.O.F.
[7] *Pappalardo v. Richfield Hospitality Services, Inc*., 790 So.2d 1226 (Fla. 4th DCA 2001); *Vasquez v. Provincial South, Inc*., 795 So.2d 216 (Fla. 4th DCA 2001).

alike continue to use the term "frivolous" in referring to the applicable standard for fees even though the statute does not authorize the "frivolous" standard.[8]

With the intention of preserving and protecting the Legislature's constitutional right to enumerate the standard for the award of substantive rights (specifically the right to be awarded attorney's fees), this bill reenacts section 57.105, F.S., to again enumerate the substantive right to attorney's fees as set out in the statute.

Safe harbor provision: In 2002, section 57.105, F.S., was amended to adopt a safe harbor provision that mirrors Federal Rule of Civil Procedure 11 and allows for the voluntary withdrawal of any pleading or claim that may be subject to an award of fees.[9] The safe harbor provision requires a person seeking sanctions to file a motion that must be served but not filed with the court unless, within 21 days after service of the motion, the challenged act is not withdrawn or appropriately corrected.[10] It appears that the safe harbor provision reduces the amount of litigation over attorney's fees; however, there appears to be confusion amongst the courts whether this is a substantive provision or a procedural provision that can be waived.[11]

The bill provides that the safe harbor requirement is a condition precedent and the motion must be served. Any motion filed with the court that has not been served 21 days prior is null and void.

Offers of judgment: Section 768.79, F.S., authorizes attorney's fees to be awarded to the defendant in a civil action if the judgment is at least 25% less than the offer made by the defendant to the plaintiff; and authorizes attorney's fees to be awarded to the plaintiff if the judgment is at least 25% more than the offer made by the plaintiff to the defendant.[12] The statute requires that the offer be in writing, name the party making it and the party to whom it is being made, and state the total amount.[13]

Florida Rule of Civil Procedure 1.442 sets out the procedure for making proposals of settlement. 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.[14] The committee notes attached to the rule state that the amendment was made in order to conform with the Fabre v. Marin case,[15] which requires that each defendant should pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident. In order to do this, it is necessary to determine the percentage of fault of all entities who contributed to the accident regardless of whether they are joined as defendants.[16] As then-Chief Justice Pariente noted, the application of Rule 1.442(c)(3) allowing joint proposals has caused a "proliferation of litigation."[17]

Several recent cases highlight that the application of Rule 1.442(c)(3) to defendants who are solely alleged to be vicariously,[18] constructively, derivatively,[19] or technically liable, appears to have diluted the substantive right to attorney's fees authorized by the Legislature:

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[8] *Read v. Taylor*, 832 So.2d 219, 222 (Fla. 4th DCA 2002) ("The revised statute, while broader than its predecessors, still is intended to address the issue of frivolous pleadings."); *Connelly v. Old Bridge Vill. Co-o. Inc*., 915 So.2d 652 (Fla. 2d DCA 2005) (quotes the Read case.); *Peyton v. Horner*, 920 So.2d 180 (Fla. 2nd DCA 2006) (cites Connelly, which cites Read.); *Murphy v. WISU Props., Ltd*., 895 So.2d 1088, 1093 (Fla. 4th DCA 2004); "A Survey of Section 57.105, Florida Statutes: Effective Use of this Powerful Statute and How to Avoid its Consequences," 25 No.3 Trial Advoc. Q. 10, Summer 2006.

[9] Section 1, ch. 2002-77, L.O.F.

[10] Section 57.105(4), F.S.

[11] *Maxwell Building Corp. v. Euro Concepts, LLC*, 874 So.2d 709 (Fla. 4th DCA 2004), holding that subsection (4) of the statute is procedural; but see *Walker v. Cash Register Auto Insurance*, 2006 WL 3751489 (Fla. 1st DCA 2006), holding that subsection (4) of the statute is substantive.

[12] Section 768.79(1), F.S.

[13] Section 768.79(2), F.S.

[14] *In re Amendments to Florida Rules of Civil Procedure*, 682 So.2d 105 (Fla. 1996).

[15] *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993).

[16] *Wells v. Tallahassee Memorial Regional Medical Center, Inc*., 659 So.2d 249 (Fla. 1995).

[17] *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005), Pariente, C.J., concurring.

[18] 'Vicarious' liability is defined as indirect liability; for example, the liability of an employer for the acts of an employee. Black's Law Dictionary 1404 , Fifth Edition (1979).

- In Hess v. Walton, the plaintiff sued Dr. Hess for performing surgery on the wrong wrist; she also sued the Florida Orthopaedic Institute (FOI) as Dr. Hess' vicariously liable employer. The plaintiff made an offer of $100,000 to Dr. Hess, and $15,000 to FOI, both of which were rejected. Dr. Hess and FOI jointly made an offer to the plaintiff of $25,000, which was also rejected. The jury returned a verdict in favor of the plaintiff for $23,500. Because Florida Rule of Civil Procedure 1.442, permits plaintiffs to make differentiated offers to joint defendants, even when one is only vicariously liable for the negligence of the other, the court upheld attorney's fees against FOI of $99,425.[20] In its opinion, the court noted, "It seems unfair that the defendants are penalized or sanctioned with an award of attorneys' fees when they offered the plaintiff more than the jury awarded,"[21] and further noted that it is for the Legislature to review its policies as they relate to defendants who are merely vicariously liable for the acts of another.[22]
- In Lamb v. Matetzschk, the Florida Supreme Court held that a joint proposal for settlement must differentiate between the parties, even when one party's alleged liability is purely vicarious, also basing their holding on Rule 1.442.[23] 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, the first two were undifferentiated between Mr. and Mrs. Matetzschk. The last offer was made solely to Mr. Matetzschk. All three offers were rejected; at trial Lamb was awarded $73,108. The Supreme Court upheld the Fifth District's opinion 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. In its opinion, the majority stated that "It may take some creative drafting to fashion an offer of settlement when one party is only vicariously liable. However, we are confident that the lawyers of this state can and will draft an offer that will satisfy the requirements of the rule, that is, state the amount and terms attributable to each party when the proposal is made to more than one party."[24]

The Florida Supreme Court has held that the offer of judgment statute is applicable to claims where another fee-shifting provision applies. In State Farm Mutual Automobile Insurance Company v. Nichols,[25] the Florida Supreme Court held that: 1) the offer of judgment statute (s. 768.79, F.S.) applies to a suit for PIP benefits; 2) the offer of judgment statute does not conflict with the attorney fee provision in the PIP benefits statute;[26] and 3) allowing automobile insurers to recover attorney fees under the offer of judgment statute does not violate access to courts provisions of the state constitution.[27]

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[19] 'Derivative' liability involves wrongful conduct by both the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another; the derivatively liable person is legally responsible for all of the harm caused by the active tortfeasor. *Grobman v. Posey*, 863 So.2d 1230 (Fla. 4th DCA 2003).

[20] *Hess v. Walton*, 898 So.2d 1046 (Fla. 2nd DCA 2005).

[21] Id at 1048.

[22] Id.

[23] *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005).

[24] Id at 1041.

[25] *State Farm Mutual Automobile Insurance Company v. Nichols*, 932 So.2d 1067 (Fla. 2006).

[26] In fact, the Supreme Court noted that s. 768.71(3), F.S., provides that if a provision of this part [part II of chapter 768, which contains s. 768.79, F.S., the offer of judgment statute] is in conflict with any other provision of the Florida Statutes, such other provision shall apply. *State Farm v. Nichols* at 1073. The Court then went on to find that there was no conflict between s. 627.428, F.S., which authorizes the award of pre-offer attorney's fees to insureds who prevail against their insurer for PIP benefits, and post-offer attorney's fees under s. 768.79, F.S. Id. at 1075.

[27] The Supreme Court rejected the argument that applying the offer of judgment statute to PIP suits will deny insureds access to courts and thus render the entire PIP system unconstitutional, finding that the benefit of 'swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption' makes the PIP statute a reasonable alternative to the traditional tort system and thus not violative of the Kluger test [the Legislature cannot abolish a traditional common-law right of recovery without providing a reasonable alternative to redress for injuries unless the Legislature can show an over-powering public necessity to abolish such right, and no alternative method of meeting such public necessity can be shown. *Kluger v. White*, 281 So.2d 1 (Fla. 1973).]. Id. at 1076.

This bill requires joint offers of settlement by and to allegedly actively negligent defendants who are sued in the same case as defendants solely alleged to be vicariously, constructively, derivatively, or technically liable. The bill also requires that the joint offer include a single sum applicable to all of such defendants, which sum shall be considered the total amount.

Burden of clarifying uncertainties: While s. 768.79, F.S., provides a powerful tool to encourage settlements, it appears that the statute itself is causing litigation over the propriety of the offer. Florida courts have held that the burden for clarifying an offer's terms cannot lie on the offeree;[28] thus the current scheme encourages attorneys who believe that an offer is procedurally defective to "lie in the weeds" hoping that the offer will be later held invalid. Attorneys have little incentive to put the offeror on notice of an offer's defective terms and thus bring the case to a quick settlement. Such a scheme appears to be contrary to the intent of the Legislature in enacting s. 768.79, F.S., and is leading to more litigation rather than less.

The bill requires that the party to whom an offer is made has the burden of clarifying any uncertainties in an offer's terms or conditions, and shall be bound by its offer if such offer is accepted.

Good faith offers: Section 768.79, F.S., also provides that the court may disallow an award of attorney's fees if the court determines that the offer was not made in good faith. Whether an offer was made in bad faith involves the court's discretion based upon the particular facts and circumstances surrounding the offer.[29] The good faith requirement "insists that the offeror have some reasonable foundation on which to base an offer."[30] A reasonable basis for a nominal offer exists only where "the undisputed record strongly indicate[s] that [the defendant] had no exposure" in the case.[31] Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal.[32]

This bill provides that an offer is not made in good faith if it is zero or merely nominal. Categorically deeming nominal offers as being made in bad faith may discourage low offers of settlement by a defendant when the defendant believes it has no liability.[33]

C. SECTION DIRECTORY:

Section 1 reenacts and amends s. 57.105, F.S., regarding attorney's fees for raising unsupported claims or defenses.

Section 2 amends s. 768.79, F.S., regarding offers of judgment and demand for judgment.

Section 3 provides legislative intent and requests that should a court find that any section of this bill improperly encroach upon the authority of the Florida Supreme Court to enact rules of practice and procedure, that such provision will be construed as a request for a rule change.

Section 4 provides an effective date and applicability.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

[28] *Stasio v. McManaway*, 936 So.2d 676 (Fla. 5th DCA 2006).
[29] *Fox v. McCaw Cellular Communcations of Florida, Inc*., 745 So.2d 330 (Fla. 4th DCA 1998).
[30] *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2005), citing *Schmidt v. Fortner*, 629 So.2d 1036, 1039 (Fla. 4th DCA 1993).
[31] *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2005), citing *Peoples Gas Sys., Inc. v. Acme Gas Corp*., 689 So.2d 292, 300 (Fla. 3d DCA 1997).
[32] *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2005), citing *Dep't of Highway Safety and Motor Vehicles, Florida Highway Patrol v. Weinstein*, 747 So.2d 1019 (Fla. 3d DCA 2000). See also *Fox v. McCaw Cellular Communications of Florida, Inc*., 745 So.2d 330, 333 (Fla. 4th DCA 1998) in which the court stated that "proof of bad faith requires a showing beyond the mere amount of the offer."
[33] *Fox v. McCaw Cellular Communications, Inc*. at 337; Farmer, J. concurring.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   To the extent that this bill encourages settlements over litigation, the court system may experience a decline in civil trials and litigation regarding attorney's fees.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

   Separation of powers: Unlike the federal constitution, Florida's constitution includes a specific provision pertaining to the separation of powers among the three branches of government.[34] The separations of powers doctrine forbids one branch of government from usurping the functions of another. While the Legislature has exclusive authority to create substantive law[35], the Florida Supreme Court has exclusive authority to promulgate court rules of practice and procedure.[36] The Legislature is authorized to repeal a court rule by a two-thirds vote[37], however, any rule repealed by the Legislature may be reenacted by the Court.

   The question of whether a law is procedural or substantive has been decided on a case-by-case basis. Generally, substantive laws create, define, and regulate rights. Court rules of practice and

[34] "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." Art. II, sec. 3, Fla. Const.
[35] "The legislative power of the state shall be vested in a legislature of the State of Florida…" Art. III, sec. 1, Fla. Const.
[36] "The Supreme Court shall adopt rules for the practice and procedure in all courts…" Art. V, sec. 2(a), Fla. Const.
[37] Art. V, sec. 2(a), Fla. Const.

procedure prescribe the method or process by which a party seeks to enforce or obtain redress.[38] Where a "statute creates substantive rights and any procedural provisions are directly related to the definition of those rights"[39] or the procedural aspects are intended to implement the substantive provisions of the law,[40] Florida courts have found that such provisions do not violate the separation of powers clause of the Florida Constitution. This bill expressly provides that it is authorizing the award of attorney's fees as a substantive right, and sets forth the standard by which such right may be actualized.

This bill also provides legislative intent that the Legislature accords the utmost comity and respect to the constitutional prerogatives of the judiciary, and that nothing in the act should be construed as an effort to impinge upon the judicial prerogative. To that end, the bill provides that should any court of competent jurisdiction enter a final judgment concluding or declaring that a provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature requests that such provision be construed as a request for a rule change pursuant to section 2, Article V of the State Constitution and not as a mandatory legislative directive.

Retroactive application of legislation: As to non-criminal statutes, the general rule of statutory construction is that a substantive statute or other change of law adopted by the Legislature will not operate retrospectively absent clear legislative intent to the contrary. However, even when the Legislature has expressly stated its intent to apply a statute retroactively, the courts have refused such retroactive application if the legislation "impairs vested rights, creates new obligations, or imposes new penalties."[41]

Further, retroactive civil legislation may be considered unconstitutional if it is held to impermissibly impair contractual obligations under the Contract Clause of the U.S. and Florida Constitutions. The Contract Clause prohibits states from passing laws that substantially impair contract rights.[42] This bill specifically provides that the amendments to section 768.79, F.S., shall only be applicable to offers made after the effective date of this act.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The 'whereas clause' on lines 43 – 46 of the bill provides that application of a standard other than the standard adopted by the Legislature for the award of a substantive right violates the separation of powers clause in section 3, Article II of the State Constitution. Because the judicial branch is the only branch of government authorized to find that an action violates the separation of powers clause, consider changing that 'whereas clause' to provide that it is the intent of the Legislature to preserve and protect the separation of powers doctrine in section 3, Article II of the State Constitution by reenacting the stated statutory provisions.

Newly created subsection 768.79(2)(g), F.S., (on lines 151-152 of the bill) provides that a party shall be bound by its offer if such offer is accepted. As drafted this language would allow parties whose offers violate the substantive provisions of this act to benefit from such offers if accepted. Consider amending this subsection to provide that a party shall be bound by its offer if such offer is accepted and does not violate the provisions of this section.

[38] *Haven Federal Savings & Loan Assoc*., 579 So.2d 730 (Fla. 1991).
[39] *Caple v. Tuttle's Design-Build, Inc*., 753 So.2d 49, 55 (Fla. 2000).
[40] *Kalway v. State*, 730 So.2d 861 (Fla. 1st DCA 1999).
[41] *Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994).
[42] *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1923).

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES