

1 A bill to be entitled
 2 An act relating to award of attorney's fees; reenacting
 3 and amending s. 57.105, F.S.; relating to attorney's fees
 4 and sanctions for raising unsupported claims or defenses;
 5 providing an entitlement to fees and requiring compliance
 6 with filing provisions; amending s. 768.79, F.S.;
 7 requiring joint offers in specified circumstances;
 8 requiring party to clarify uncertainties in offer's terms
 9 or conditions; allowing offers to be made at any time by
 10 any party; providing exceptions; providing that a party
 11 will be bound by its offer if accepted; prohibiting the
 12 evaluation of zero or nominal offers; providing
 13 legislative intent; providing applicability; providing an
 14 effective date.

15
 16 WHEREAS, the legislative power of the state is vested
 17 solely in the Legislature of the State of Florida, and the
 18 Legislature is the only branch of government constitutionally
 19 authorized to confer substantive rights, and

20 WHEREAS, shifting fees to the losing party is in derogation
 21 of the common law American rule that each party in a lawsuit pay
 22 its own attorney's fees, and

23 WHEREAS, the award of attorney's fees is a substantive
 24 right that may only be conferred by the Legislature, and

25 WHEREAS, a substantive right created by the Legislature may
 26 not be abolished by the courts, and

27 WHEREAS, the Legislature enacted chapter 99-225, Laws of
 28 Florida, which amended both section 57.105, Florida Statutes,

HB 813

2007

29 and section 768.79, Florida Statutes, and

30 WHEREAS, the Legislature provided the standard for the
 31 award of attorney's fees under section 57.105, Florida Statutes,
 32 which provides that attorney's fees shall be awarded to the
 33 prevailing party in a civil proceeding or action in which the
 34 court finds that the losing party or the losing party's attorney
 35 knew or should have known that a claim or defense when initially
 36 presented to the court or at any time before trial was not
 37 supported by the material facts necessary to establish the claim
 38 or defense, or would not be supported by the application of
 39 then-existing law to those material facts, and

40 WHEREAS, the standard for the award of attorney's fees
 41 under section 57.105, Florida Statutes, is not whether the claim
 42 or defense was "frivolous," and

43 WHEREAS, the application of a standard other than the
 44 standard adopted by the Legislature for the award of a
 45 substantive right violates the separation of powers clause in
 46 section 3, Article II of the State Constitution, NOW, THEREFORE,

47
 48 Be It Enacted by the Legislature of the State of Florida:

49
 50 Section 1. Section 57.105, Florida Statutes, is reenacted,
 51 and subsection (4) of that section is amended, to read:

52 57.105 Attorney's fee; sanctions for raising unsupported
 53 claims or defenses; service of motions; damages for delay of
 54 litigation.--

55 (1) Upon the court's initiative or motion of any party,
 56 the court shall award a reasonable attorney's fee to be paid to

HB 813

2007

57 | the prevailing party in equal amounts by the losing party and
58 | the losing party's attorney on any claim or defense at any time
59 | during a civil proceeding or action in which the court finds
60 | that the losing party or the losing party's attorney knew or
61 | should have known that a claim or defense when initially
62 | presented to the court or at any time before trial:

63 | (a) Was not supported by the material facts necessary to
64 | establish the claim or defense; or

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

67 |

68 | However, the losing party's attorney is not personally
69 | responsible if he or she has acted in good faith, based on the
70 | representations of his or her client as to the existence of
71 | those material facts. If the court awards attorney's fees to a
72 | claimant pursuant to this subsection, the court shall also award
73 | prejudgment interest.

74 | (2) Paragraph (1)(b) does not apply if the court
75 | determines that the claim or defense was initially presented to
76 | the court as a good faith argument for the extension,
77 | modification, or reversal of existing law or the establishment
78 | of new law, as it applied to the material facts, with a
79 | reasonable expectation of success.

80 | (3) At any time in any civil proceeding or action in which
81 | the moving party proves by a preponderance of the evidence that
82 | any action taken by the opposing party, including, but not
83 | limited to, the filing of any pleading or part thereof, the
84 | assertion of or response to any discovery demand, the assertion

HB 813

2007

85 of any claim or defense, or the response to any request by any
86 other party, was taken primarily for the purpose of unreasonable
87 delay, the court shall award damages to the moving party for its
88 reasonable expenses incurred in obtaining the order, which may
89 include attorney's fees, and other loss resulting from the
90 improper delay.

91 (4) A party is entitled to an award of sanctions under
92 this section only if a motion is by a party seeking sanctions
93 under this section must be served. Such motion shall ~~but~~ may not
94 be filed with or presented to the court unless, within 21 days
95 after service of the motion, the challenged paper, claim,
96 defense, contention, allegation, or denial is not withdrawn or
97 appropriately corrected. Any motion filed with the court that
98 does not comply with this subsection is null and void.

99 (5) In administrative proceedings under chapter 120, an
100 administrative law judge shall award a reasonable attorney's fee
101 and damages to be paid to the prevailing party in equal amounts
102 by the losing party and a losing party's attorney or qualified
103 representative in the same manner and upon the same basis as
104 provided in subsections (1)-(4). Such award shall be a final
105 order subject to judicial review pursuant to s. 120.68. If the
106 losing party is an agency as defined in s. 120.52(1), the award
107 to the prevailing party shall be against and paid by the agency.
108 A voluntary dismissal by a nonprevailing party does not divest
109 the administrative law judge of jurisdiction to make the award
110 described in this subsection.

HB 813

2007

111 (6) The provisions of this section are supplemental to
 112 other sanctions or remedies available under law or under court
 113 rules.

114 (7) If a contract contains a provision allowing attorney's
 115 fees to a party when he or she is required to take any action to
 116 enforce the contract, the court may also allow reasonable
 117 attorney's fees to the other party when that party prevails in
 118 any action, whether as plaintiff or defendant, with respect to
 119 the contract. This subsection applies to any contract entered
 120 into on or after October 1, 1988.

121 Section 2. Subsection (2) and paragraph (a) of subsection
 122 (7) of section 768.79, Florida Statutes, are amended to read:

123 768.79 Offer of judgment and demand for judgment.--

124 (2) The making of an offer of settlement which is not
 125 accepted does not preclude the making of a subsequent offer. An
 126 offer must:

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

129 (b)1. Name the party making it and the party to whom it is
 130 being made.

131 2. When the sole allegation against a defendant is based
 132 upon vicarious, constructive, derivative, or technical liability
 133 and that defendant is sued in the same case as defendants
 134 alleged to be actively negligent, whether by operation of law or
 135 by contract, an offer of settlement made:

136 a. To such allegedly actively negligent defendants shall
 137 be made jointly in one offer with a single sum applicable to all

HB 813

2007

138 of them. The single sum shall be considered the total amount for
139 purposes of paragraph (d).

140 b. By such allegedly actively negligent defendants shall
141 be for a single sum offered jointly by them. The single sum
142 shall be considered the total amount for purposes of paragraph
143 (d).

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

146 (d) State its total amount.

147 (e) The party to whom an offer is made has the burden of
148 clarifying any uncertainties in an offer's terms or conditions.

149 (f) Except as otherwise provided in paragraph (b), an
150 offer may be made at any time for any amount by any party.

151 (g) A party shall be bound by its offer if such offer is
152 accepted.

153
154 The offer shall be construed as including all damages which may
155 be awarded in a final judgment.

156 (7)(a) If a party is entitled to costs and fees pursuant
157 to the provisions of this section, the court may, in its
158 discretion, determine that an offer was not made in good faith.
159 In such case, the court may disallow an award of costs and
160 attorney's fees. For purposes of this section, an offer is not
161 made in good faith if it is zero or merely nominal.

162 Section 3. It is the intent of this act and the
163 Legislature to accord the utmost comity and respect to the
164 constitutional prerogatives of Florida's judiciary, and nothing
165 in this act should be construed as an effort to impinge upon

HB 813

2007

166 those prerogatives. To that end, should any court of competent
167 jurisdiction enter a final judgment concluding or declaring that
168 a provision of this act improperly encroaches upon the authority
169 of the Florida Supreme Court to determine the rules of practice
170 and procedure in Florida courts, the Legislature hereby declares
171 its intent that such provision be construed as a request for
172 rule change pursuant to section 2, Article V of the State
173 Constitution and not as a mandatory legislative directive.

174 Section 4. This act shall take effect July 1, 2007, and
175 the amendments to section 768.79, Florida Statutes, made by this
176 act shall apply only to offers made on or after that date.