

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; providing legislative intent;
7 providing applicability; providing for retroactive
8 applicability of a specified amendment; reenacting and
9 amending s. 768.79, F.S., relating to offer of judgment
10 and demand for judgment; allowing offers to be made by or
11 to any party or parties; requiring joint proposals to
12 state the amount and terms attributable to each party;
13 providing an exception when a party is alleged to be
14 solely vicariously, constructively, derivatively, or
15 technically liable; providing an exception for specified
16 parties in actions governed by the Florida Small Claims
17 Rules; providing legislative intent; providing
18 applicability; providing an effective date.

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20 WHEREAS, the legislative power of the state is vested
21 solely in the Legislature of the State of Florida, and the
22 Legislature is the only branch of government constitutionally
23 authorized to confer substantive rights, and

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

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

29 WHEREAS, a substantive right created by the Legislature may
 30 not be abolished by the courts, and

31 WHEREAS, the Legislature enacted chapter 99-225, Laws of
 32 Florida, which amended both section 57.105, Florida Statutes,
 33 and section 768.79, Florida Statutes, and

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

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

47 WHEREAS, the application of a standard other than the
 48 standard adopted by the Legislature for the award of a
 49 substantive right encroaches upon the Legislature's right to
 50 confer substantive rights, and

51 WHEREAS, it is the intent of the Legislature to preserve
 52 and protect the separation of powers clause in section 3,
 53 Article II of the State Constitution, NOW, THEREFORE,

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55 Be It Enacted by the Legislature of the State of Florida:

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57 Section 1. For the purpose of manifesting the
58 Legislature's intent to confer the substantive right to the
59 award of attorney's fees, section 57.105, Florida Statutes, is
60 reenacted, and also that section is amended, to read:

61 57.105 Attorney's fee; sanctions for raising unsupported
62 claims or defenses; service of motions; damages for delay of
63 litigation.--

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

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

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

76

77 However, the losing party's attorney is not personally
78 responsible if he or she has acted in good faith, based on the
79 representations of his or her client as to the existence of
80 those material facts. If the court awards attorney's fees to a
81 claimant pursuant to this subsection, the court shall also award
82 prejudgment interest.

83 (2) Paragraph (1)(b) does not apply if the court
84 determines that the claim or defense was initially presented to

85 the court as a good faith argument for the extension,
86 modification, or reversal of existing law or the establishment
87 of new law, as it applied to the material facts, with a
88 reasonable expectation of success.

89 (3) At any time in any civil proceeding or action in which
90 the moving party proves by a preponderance of the evidence that
91 any action taken by the opposing party, including, but not
92 limited to, the filing of any pleading or part thereof, the
93 assertion of or response to any discovery demand, the assertion
94 of any claim or defense, or the response to any request by any
95 other party, was taken primarily for the purpose of unreasonable
96 delay, the court shall award damages to the moving party for its
97 reasonable expenses incurred in obtaining the order, which may
98 include attorney's fees, and other loss resulting from the
99 improper delay.

100 (4) A party is entitled to an award of sanctions under
101 this section only if a motion is by a party seeking sanctions
102 under this section must be served by a party seeking sanctions
103 under this section. Such motion shall but may not be filed with
104 or presented to the court unless, within 21 days after service
105 of the motion, the challenged paper, claim, defense, contention,
106 allegation, or denial is not withdrawn or appropriately
107 corrected. Any motion filed with the court that does not comply
108 with this subsection is null and void. This subsection is
109 substantive and shall not be waived except in writing. This
110 subsection shall not apply to sanctions ordered upon the court's
111 initiative.

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112 (5) In administrative proceedings under chapter 120, an
113 administrative law judge shall award a reasonable attorney's fee
114 and damages to be paid to the prevailing party in equal amounts
115 by the losing party and a losing party's attorney or qualified
116 representative in the same manner and upon the same basis as
117 provided in subsections (1)-(4). Such award shall be a final
118 order subject to judicial review pursuant to s. 120.68. If the
119 losing party is an agency as defined in s. 120.52(1), the award
120 to the prevailing party shall be against and paid by the agency.
121 A voluntary dismissal by a nonprevailing party does not divest
122 the administrative law judge of jurisdiction to make the award
123 described in this subsection.

124 (6) The provisions of this section are supplemental to
125 other sanctions or remedies available under law or under court
126 rules.

127 (7) If a contract contains a provision allowing attorney's
128 fees to a party when he or she is required to take any action to
129 enforce the contract, the court may also allow reasonable
130 attorney's fees to the other party when that party prevails in
131 any action, whether as plaintiff or defendant, with respect to
132 the contract. This subsection applies to any contract entered
133 into on or after October 1, 1988.

134 (8) The provisions of this section create substantive
135 rights to the award of attorney's fees, and any procedural
136 provisions are directly related to the definition of those
137 rights. Any procedural aspects of this provision are intended to
138 implement the substantive provisions of the law.

139 Section 2. The amendment to subsection (4) of section
140 57.105, Florida Statutes, is remedial in nature and is intended
141 to apply retroactively.

142 Section 3. For the purpose of manifesting the
143 Legislature's intent to confer the substantive right to the
144 award of attorney's fees, section 768.79, Florida Statutes, is
145 reenacted, and also that section is amended, to read:

146 768.79 Offer of judgment and demand for judgment.--

147 (1) In any civil action for damages filed in the courts of
148 this state, if a defendant files an offer of judgment which is
149 not accepted by the plaintiff within 30 days, the defendant
150 shall be entitled to recover reasonable costs and attorney's
151 fees incurred by her or him or on the defendant's behalf
152 pursuant to a policy of liability insurance or other contract
153 from the date of filing of the offer if the judgment is one of
154 no liability or the judgment obtained by the plaintiff is at
155 least 25 percent less than such offer, and the court shall set
156 off such costs and attorney's fees against the award. Where such
157 costs and attorney's fees total more than the judgment, the
158 court shall enter judgment for the defendant against the
159 plaintiff for the amount of the costs and fees, less the amount
160 of the plaintiff's award. If a plaintiff files a demand for
161 judgment which is not accepted by the defendant within 30 days
162 and the plaintiff recovers a judgment in an amount at least 25
163 percent greater than the offer, she or he shall be entitled to
164 recover reasonable costs and attorney's fees incurred from the
165 date of the filing of the demand. If rejected, neither an offer

166 nor demand is admissible in subsequent litigation, except for
 167 pursuing the penalties of this section.

168 (2) The making of an offer of settlement which is not
 169 accepted does not preclude the making of a subsequent offer. An
 170 offer must:

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

173 (b) Name the party or parties making it and the party or
 174 parties to whom it is being made.

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

177 (d) State its total amount.

178

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

181 (3) A proposal may be made by or to any party or parties
 182 and by or to any combination of parties properly identified in
 183 the proposal. A joint proposal shall state the amount and terms
 184 attributable to each party.

185 (4) Notwithstanding subsection (3), when a party is
 186 alleged to be solely vicariously, constructively, derivatively,
 187 or technically liable, whether by operation of law or by
 188 contract, a joint proposal made by or served on such a party
 189 need not state the amount and terms attributable to each party.
 190 Acceptance by any party shall be without prejudice to rights of
 191 contribution or indemnity.

192 (5)~~(3)~~ The offer shall be served upon the party to whom it
 193 is made, but it shall not be filed unless it is accepted or

194 unless filing is necessary to enforce the provisions of this
195 section.

196 (6)~~(4)~~ An offer shall be accepted by filing a written
197 acceptance with the court within 30 days after service. Upon
198 filing of both the offer and acceptance, the court has full
199 jurisdiction to enforce the settlement agreement.

200 (7)~~(5)~~ An offer may be withdrawn in writing which is
201 served before the date a written acceptance is filed. Once
202 withdrawn, an offer is void.

203 (8)~~(6)~~ Upon motion made by the offeror within 30 days
204 after the entry of judgment or after voluntary or involuntary
205 dismissal, the court shall determine the following:

206 (a) If a defendant serves an offer which is not accepted
207 by the plaintiff, and if the judgment obtained by the plaintiff
208 is at least 25 percent less than the amount of the offer, the
209 defendant shall be awarded reasonable costs, including
210 investigative expenses, and attorney's fees, calculated in
211 accordance with the guidelines promulgated by the Supreme Court,
212 incurred from the date the offer was served, and the court shall
213 set off such costs in attorney's fees against the award. When
214 such costs and attorney's fees total more than the amount of the
215 judgment, the court shall enter judgment for the defendant
216 against the plaintiff for the amount of the costs and fees, less
217 the amount of the award to the plaintiff.

218 (b) If a plaintiff serves an offer which is not accepted
219 by the defendant, and if the judgment obtained by the plaintiff
220 is at least 25 percent more than the amount of the offer, the
221 plaintiff shall be awarded reasonable costs, including

222 | investigative expenses, and attorney's fees, calculated in
 223 | accordance with the guidelines promulgated by the Supreme Court,
 224 | incurred from the date the offer was served.

225 |
 226 | For purposes of the determination required by paragraph (a), the
 227 | term "judgment obtained" means the amount of the net judgment
 228 | entered, plus any postoffer collateral source payments received
 229 | or due as of the date of the judgment, plus any postoffer
 230 | settlement amounts by which the verdict was reduced. For
 231 | purposes of the determination required by paragraph (b), the
 232 | term "judgment obtained" means the amount of the net judgment
 233 | entered, plus any postoffer settlement amounts by which the
 234 | verdict was reduced.

235 | (9)~~(7)~~(a) If a party is entitled to costs and fees
 236 | pursuant to the provisions of this section, the court may, in
 237 | its discretion, determine that an offer was not made in good
 238 | faith. In such case, the court may disallow an award of costs
 239 | and attorney's fees.

240 | (b) When determining the reasonableness of an award of
 241 | attorney's fees pursuant to this section, the court shall
 242 | consider, along with all other relevant criteria, the following
 243 | additional factors:

- 244 | 1. The then apparent merit or lack of merit in the claim.
- 245 | 2. The number and nature of offers made by the parties.
- 246 | 3. The closeness of questions of fact and law at issue.
- 247 | 4. Whether the person making the offer had unreasonably
 248 | refused to furnish information necessary to evaluate the
 249 | reasonableness of such offer.

250 5. Whether the suit was in the nature of a test case
 251 presenting questions of far-reaching importance affecting
 252 nonparties.

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

256 ~~(10)(8)~~ Evidence of an offer is admissible only in
 257 proceedings to enforce an accepted offer or to determine the
 258 imposition of sanctions under this section.

259 (11) This section shall not apply to any party not
 260 represented by an attorney in an action governed by the Florida
 261 Small Claims Rules.

262 (12) The provisions of this section create substantive
 263 rights to the award of attorney's fees, and any procedural
 264 provisions are directly related to the definition of those
 265 rights. Any procedural aspects of this provision are intended to
 266 implement the substantive provisions of the law.

267 Section 4. It is the intent of this act and the
 268 Legislature to accord the utmost comity and respect to the
 269 constitutional prerogatives of Florida's judiciary, and nothing
 270 in this act should be construed as an effort to impinge upon
 271 those prerogatives. To that end, should any court of competent
 272 jurisdiction enter a final judgment concluding or declaring that
 273 a provision of this act improperly encroaches upon the authority
 274 of the Florida Supreme Court to determine the rules of practice
 275 and procedure in Florida courts, the Legislature hereby declares
 276 its intent that such provision be construed as a request for

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277 rule change pursuant to section 2, Article V of the State
278 Constitution and not as a mandatory legislative directive.

279 Section 5. This act shall take effect July 1, 2007, and
280 the amendments to section 768.79, Florida Statutes, made by this
281 act shall apply only to offers made on or after that date.