

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 686

INTRODUCER: Banking and Insurance Committee, Judiciary Committee, and Senator Brandes

SUBJECT: Offers of Judgment

DATE: March 11, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Schrader</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 686 revises and expands the statute that governs settlement offers in civil litigation. These offers of judgment and demands for judgment encourage settlements by providing a mechanism to shift significant attorney fees and costs to a party who does not accept an offer that will ultimately be assessed as a reasonable settlement offer.

The bill creates an additional settlement mechanism in statute. The bill permits a party to make an offer of judgment that compensates someone solely for their harm or loss. It does not include an offer to compensate for the potentially more complicated and contentious issues of awarding attorney fees and costs.

The bill permits an offer of judgment that is served on joint owners of real property who are insureds to require that both insureds either accept or reject the offer.

Finally, the bill requires a party served with a settlement offer to notify the party making the offer, within 30 days, of any grounds for challenging the validity of the offer. The notice must be in writing and state with specificity the grounds for challenging the validity of the offer. The right to challenge the validity of the offer is waived if not objected to in the proper timeframe.

The bill takes effect July 1, 2021.

II. Present Situation:

Offers of Judgment

Background

In 1986, the Legislature adopted an “offer of judgment and demand for judgment” statute to serve as a tool to encourage civil litigation settlements.¹ In United States common law, each party to a lawsuit is generally required to pay its own attorney fees, but this statute is a partial repeal of that principle.² The statute creates the potential to shift the expense of costs and attorney fees to the opposing party in a lawsuit. In general terms, if a specially designated settlement offer is made and rejected and the damages awarded are less favorable by 25 percent of the offer, the offer to settle becomes the tool that shifts the burden of paying costs and attorney fees to the rejecting party.³ This effectively applies pressure and creates risks for an opposing party.⁴

Purpose

Several appellate courts have offered explanations for the purposes of the offer-of-judgment statute. One court noted that the purpose of the statute was to encourage the settlement of lawsuits.⁵ Another court stated that the purpose was to reduce litigation costs, not create more.⁶ Yet another reason that the purpose of the statute was to deter parties from rejecting reasonable settlement offers by permitting the imposition of sanctions in the form of costs and attorney fees.⁷

An Offer of Judgment and a Demand for Judgment

A Defendant’s Offer of Judgment

In a civil action for damages, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant is entitled to recover reasonable costs and attorney fees incurred by her or him, or on the defendant’s behalf,⁸ from the date of filing the offer, if the judgment is:

- One of no liability; or
- The judgment obtained by the plaintiff is at least 25 percent less than the offer.

¹ Chapter 86-160, s. 58, Laws of Fla.

² *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 852 (Fla. 2016).

³ See also Fla.R.Civ.P. Rule 1.442, the Proposal for Settlement rule which applies to all proposals for settlement authorized by Florida law.

⁴Ellen Koehler Lyons, Carlton Fields Law Firm, *Understanding Proposals for Settlement* at 8 (2006)

<https://www.carltonfields.com/files/Publication/C93C8D17-3532-4F25-A1FB-65366405D522/Presentation/PublicationAttachment/E2F69B42-8754-42A7-B087-2E37794E4818/Understanding%20Offers%20of%20Judgment.pdf>.

⁵ *Wilcox v. Neville*, 283 So. 3d 878, 881 (Fla. 1st DCA 2019).

⁶ *Diecidue v. Lewis*, 223 So. 3d 1015, 1019 (Fla. 2d DCA 2017).

⁷ *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So. 3d 362, 372 (Fla. 2013).

⁸ This is premised on the assumption that there is a policy of liability insurance or some other contract.

The court must set off the costs and attorney fees against the award. If the costs and attorney fees total more than the judgment, the court must enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award.⁹

A Plaintiff's Demand for Judgment

If a plaintiff files a demand for judgment that is rejected by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, the plaintiff is entitled to recover reasonable costs and attorney fees incurred from the date of the filing of the demand.¹⁰

Rejected Offers

If either an offer of judgment or a demand for judgment is rejected, neither is admissible in future litigation, except for the purpose of pursuing penalties set forth in the statute.¹¹ If an offer is not accepted, that does not preclude a party from making a subsequent offer.¹² If an offer is not accepted, the date that the offer is served on the offeree is the date upon which the fees that may be shifted start accruing.

Contents of an Offer

An offer must:

- Be in writing and state that it is being made pursuant to s. 768.79, F.S.
- Name the party making the offer and name the party to whom the offer is made.
- State the particular amount that is being offered to settle a claim for punitive damages, if any.
- State the total amount of the offer.¹³

The offer must be construed as including all damages which may be awarded in a final judgment.¹⁴ The offer must be served upon the party to whom it is made, but the offer may not be filed unless it is accepted or if it is necessary to file the offer to enforce an accepted offer or to determine the imposition of sanctions.¹⁵

Acceptance of an Offer

An offer is accepted by filing a written acceptance with the court within 30 days after the offer is served.¹⁶

Enforcement by the Court

After a judgment or after a voluntary or involuntary dismissal is entered, the offeror has 30 days to file a motion with the court to enforce the terms of the offer. As mentioned above, if a defendant's offer is not accepted and the plaintiff's judgment is at least 25 percent less than the amount of the offer, the defendant will be awarded reasonable costs, which include investigative

⁹ Section 768.79(1), F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² Section 768.79(2), F.S.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 768.79(3), F.S.; Section 768.79(8), F.S.

¹⁶ Section 768.79(4), F.S.

expenses, and attorney fees calculated in accordance with Supreme Court guidelines. These costs, fees, and expenses are calculated from the date the offer was served.¹⁷

Similarly, if a plaintiff's offer is not accepted and the plaintiff's judgment is at least 25 percent more than the amount of the offer, the plaintiff will be awarded reasonable costs, including investigative expenses, and attorney fees calculated from the date the offer was served.¹⁸

If a court determines that a party, entitled to costs and fees, did not make the offer to settle in good faith, the court may disallow the award of costs and attorney fees.¹⁹

Interpretations of the Phrase "Judgment Obtained"

The phrase "judgment obtained" occurs several times in s. 768.69, F.S., and has been the subject of much conjecture and controversy. The judgment obtained is the financial amount a court uses as the benchmark to determine whether a party has met the settlement amount stated in an offer of judgment which entitles a party to receive costs and attorney fees. What constitutes the components of a judgment obtained is not clear. The statute and case law do not appear to be in agreement.

Statute Definition

As discussed above, the term "judgment obtained" is defined slightly differently for a defendant's offer of judgment and a plaintiff's demand for judgment. When a defendant serves an offer on a plaintiff, and the offer is rejected, a judgment obtained includes:

- The amount of the net judgment entered;
- Plus any postoffer collateral source payments received or due as of the date of the judgment; and
- Plus any postoffer settlement amounts²⁰ by which the verdict was reduced.²¹

When a plaintiff serves a proposal for settlement on a defendant and the offer is rejected, a judgment obtained includes:

- The amount of the net judgment entered; and
- Plus any postoffer settlement amounts by which the verdict was reduced.²²

Florida Supreme Court Definition

In contrast to the statutory language, the Florida Supreme Court has interpreted the phrase "judgment obtained" much more broadly. In *White v. Steak and Ale of Florida, Inc.*, the Court held that a judgment obtained is not limited solely to the amount of the judgment for damages.²³ Two district courts of appeal had earlier determined that the phrase was limited to the amount of the judgment for damages awarded by the jury. Two other district courts of appeal disagreed and

¹⁷ Section 768.29(6)(a), F.S.

¹⁸ Section 768.79(6)(b), F.S.

¹⁹ Section 768.79(7)(a), F.S.

²⁰ Postoffer settlement is not defined in statute. However, the First District Court of Appeal recently determined that a postoffer settlement is a "settlement reached any time after the service of the offer." *Wilcox v. Neville*, 283 So. 3d 878, 882 (Fla. 1st DCA 2019).

²¹ Section 768.79(6), F.S.

²² *Id.*

²³ *White v. Steak & Ale of Florida, Inc.*, 816 So. 2d 546, 550 (Fla. 2002).

determined that a judgment obtained included taxable costs incurred up until the time of the offer for purposes of determining the entitlement to attorney fees and costs.²⁴ The Court held that the judgment obtained means the net judgment for damages plus any attorney fees and taxable costs that could have been included in a final judgment if the final judgment had been entered on the date of the offer.²⁵ The terms supplied by the Court, however, do not appear in the statute's definition.

Regarding the issue of how prejudgment interest is to be calculated in an offer of judgment, the Florida Supreme Court has accepted review of the case *CCM Condominium Association, Inc., v. Petri Positive Pest Control, Inc.* Oral argument was held in October, 2020, but a decision has yet to be rendered.²⁶ In the lower court decision, the Fourth District Court of Appeal noted, "we are troubled by how far the formula created in *White* strays from what we believe is the plain meaning of the statute."²⁷

Current Practice of Making Settlement Offers for Damages Only

Rule 1.442(c)(2)(F) of the Florida Rules of Civil Procedure states that a proposal for settlement must "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim." Because litigators recognize the complexity that calculating attorney fees and costs present when making proposals for settlement, some litigants have chosen to offer proposals for damages only. With such offers, there is an understanding that attorney fees and costs will be resolved at a later time. While some practitioners might read the current statute and believe that offers for damages only are not prohibited, others might conclude that the statute is silent as to whether someone can offer a proposal for damages only, and choose not to participate in that type of offer.

A practical example would be a defendant who serves a proposal for a settlement for \$50,000. The proposal is rejected and the plaintiff recovers \$10,000 at trial. The defendant's position is that the plaintiff did not meet the 75 percent threshold of recovering \$37,500; therefore, the defendant is entitled to recover its costs and attorney fees incurred from the date of the offer, pursuant to the language of the statute. The plaintiff then counter-argues that, in order to arrive at the correct figure to determine whether the plaintiff met the 75 percent threshold, you must add the plaintiff's fees and costs in to make a correct comparison. Because attorney fees and costs often far eclipse the damages judgment, the plaintiff's fees and costs generally exceed the amount needed to reach the \$37,500 threshold. Therefore, the proposal for settlement is not enforced. Using this rationale, it may be difficult to recover attorney fees and costs because they are added in to the damages, thereby substantially raising the threshold that must be met.

Enforcing Offers with "Ambiguities"

It appears from a review of appellate cases that enforcing proposals for settlement can, at times, be problematic. The party who does not prevail and is looking at the possibility of paying costs and attorney fees often argues that the proposal contained ambiguities and is not enforceable. In

²⁴ *Id.* at 549-550.

²⁵ *Id.* at 550.

²⁶ *CCM Condominium Association, Inc., v. Petri Positive Pest Control, Inc.*, 271 So. 3d 1001 (Fla. 4th DCA 2019) *review granted*, SC 19-861, 2019 WL 5704171 (Fla., Nov. 5, 2019).

²⁷ *Petri Positive Pest Control, Inc. v. CCM Condominium Association, Inc.*, 271 So. 3d 1001, 1006 (Fla. 4th DCA 2019).

an effort to bring clarity to this argument, the Florida Supreme Court has noted that a proposal must be sufficiently clear and free from ambiguities so that the recipient has an opportunity to fully consider the proposal. The Court expounded on this concept and said that it has not required that every ambiguity be eliminated, only the reasonable ambiguities. The Court stated:

We recognize that, given the nature of language, it may be impossible to eliminate all ambiguity. The rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. If ambiguity within the proposal could reasonably affect the offeree’s decision, the proposal will not satisfy the particularity requirement [of Rule 1.442(c)(2)(C)-(D)]²⁸

The Court concluded by noting that courts are discouraged from “nitpicking” settlement proposals in search of an ambiguity.²⁹

Offers in Insurance Litigation

Insurance litigation is subject to both s. 627.428, F.S., and s. 768.79, F.S.³⁰ Section 627.428, F.S., allows an insured to recover his or her own attorney fees if the insured prosecutes a lawsuit to enforce an insurance policy. Florida courts will apply both statutes to the same litigation with s. 627.428, F.S. governing the award of attorney fees prior to the insurer making an offer of judgment, while both s. 627.428, F.S., or s. 768.79, F.S., apply to the award of attorney fees after an offer of judgment is made, depending on how much the insured recovers. The Florida Supreme Court in *State Farm Mut. Auto Ins. Co. v. Nichols* explained how the two statutes interact in different circumstances by including the following chart in its opinion:³¹

If the judgment is:	The insured receives:	The insurer receives:
No liability	No fees	Post-offer fees under the offer of judgment statute.
75 percent or less of the insurer’s offer	Pre-offer fees under s. 627.428, F.S.	Post-offer fees under the offer of judgment statute.
More than 75 percent of the insurer’s offer, but not more than 100 percent	Pre-offer fees under s. 627.428, F.S.	No fees.
More than the insurer’s offer	All fees under s. 627.428, F.S.	No fees.

Offers to Joint Property Owners

The Florida Supreme Court rendered a decision in 2010 that addressed the imposition of attorney fees pursuant to a joint offer of settlement involving joint property owners. The issue before the Court was whether a joint offer or proposal for settlement that is conditioned on the mutual

²⁸ *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846, 853 (Fla. 2016).

²⁹ *Id.*

³⁰ See *Pennsylvania Lumbermans Mut. Ins. Co. v. Sunrise Club Inc.*, 711 So.2d 593 (Fla. 3rd DCA 1998).

³¹ *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1074 (Fla. 2006).

acceptance of all joint offerees is valid and enforceable. The Court determined that the joint offer was “invalid and unenforceable because it is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal.”³²

III. Effect of Proposed Changes:

Offer of Judgment Exclusive of Attorney Fees and Costs

The bill revises s. 768.79, F.S., to further encourage settlements. The revision allows a litigant to limit the financial scope of what may be included in an offer of judgment or a demand for judgment. The offer must still include the “total amount of indemnity or damages” that may be awarded in a final judgment. However, the provision specifically allows attorney fees and costs to not be included. By removing the often contentious issues of what constitutes valid attorney fees and reasonable costs, the underlying claim for damages may be easier to reconcile. The bill also removes any doubt as to whether proposals for damages only are authorized by statute.

The bill, in proposed new subsection (3,) specifies that a party who serves an offer of judgment for damages only is not required to specify an amount being offered for attorney fees and costs. In essence, when a party serves this offer of judgment, the party is saying that the offer is only being made for a specific damage amount and *does not* include the additional costs and attorney fees that are currently included in an offer. In theory, the process will be bifurcated. The attorneys would likely resolve the amount of fees and costs due among themselves or hold a hearing before the court at some later time to resolve what constitutes reasonable costs and attorney fees.

An Offer for People Who Jointly Own Property

The bill also includes a new provision that if an action involves damages to real property that is jointly owned by two individuals who are insured, an offer of judgment which is served on both insureds may require that both insured people either accept or reject the offer. In other words, one person cannot accept the offer and the other person reject the offer. This would effectively negate the Court’s finding on the issue in *Attorneys’ Title Insurance Fund*.

Details for Challenging the Validity of an Offer

Under current law, an offer is accepted by filing a written acceptance with the court within 30 days after service of the offer. For an offer to be withdrawn, it must be in writing and served before the date a written acceptance is filed. Once an offer is withdrawn, the offer is void.³³ However, when an offer and acceptance are filed, a court has full jurisdiction to enforce the settlement agreement.³⁴

The bill provides a mechanism and a time frame for challenging the validity of an offer. Within 30 days after an offer of judgment is served, the offeree must notify the offeror of any grounds for challenging the validity of the offer. The basis for challenging the validity of the offer must

³² *Attorneys’ Title Insurance Fund, Inc. v. Gorka*, 36 So. 3d 646, 647 (Fla. 2010).

³³ Section 768.79(5), F.S.

³⁴ Section 768.79(4), F.S.

be in writing and stated with specificity. If the recipient of the offer fails to timely notify the offeror in writing of the grounds for challenging the validity of the offer, the offeree waives the right to later object to the validity of the offer. By placing this mechanism in statute, the validity or invalidity of the offer must be raised and addressed promptly where it can be resolved, instead of, for example, waiting for an opposing party raise the issue as a defense once the court has determined that a the other party is entitled to costs and fees, pursuant to s. 768.79.³⁵

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce litigation costs and fees that would otherwise be incurred if the action were not resolved more promptly by an offer of judgment.

C. Government Sector Impact:

None.

³⁵ See present 768.79(7)(a), F.S., which states that “if a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney’s fees.”

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 768.79, Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on February 15, 2021:

The committee substitute does not differ substantially from the underlying bill. The phrase “exclusive offer of judgment” is removed but the concept remains that a party may make an offer of judgment that identifies only the total amount of indemnity or damages and stipulates that attorney fees and costs will be established at a later time by the parties or the court.

The committee substitute deletes the phrase “or paragraph (b)” referring to what the term “judgment obtained” means when a plaintiff serves an offer which is not accepted by the defendant. Additionally, the word “interest” is deleted from the underlying bill when referring to what is excluded from an offer of judgment made to a plaintiff.

CS/CS by Banking and Insurance on March 10, 2021:

The committee substitute deletes the bill’s requirement that, when an offeree challenges an offer of settlement, the specificity required must be sufficient to enable the offeror to reevaluate the offer and make corrections.

- B. **Amendments:**

None.