

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 686

INTRODUCER: Senator Brandes

SUBJECT: Offers of Judgment

DATE: February 12, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	BI	_____
3.	_____	_____	RC	_____

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**I. Summary:**

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 called an “exclusive offer of judgment.” The bill permits a party to make an exclusive offer of judgment that compensates someone solely for their harm or loss. It does not include an offer to compensate for the more complicated and often contentious issues of awarding attorney fees, costs, or interest.

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 bill specifies what must be contained in the notice. 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.<sup>1</sup> At common law, each party to a lawsuit was generally required to pay its own attorney fees, but this statute is a partial repeal of that principle.<sup>2</sup> 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.<sup>3</sup> This applies pressure and creates significant risks for an opposing party.<sup>4</sup>

#### *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<sup>5</sup> 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.

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.<sup>6</sup>

##### 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.<sup>7</sup>

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<sup>1</sup> Chapter 86-160, s. 58, Laws of Fla.

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

<sup>3</sup> 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.

<sup>4</sup> Ellen Koehler Lyons, Carlton Fields Law Firm, *Understanding Proposals for Settlement* (2006).

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

<sup>5</sup> This is premised on the assumption that there is a policy of liability insurance or some other contract.

<sup>6</sup> Section 768.79(1), F.S.

<sup>7</sup> *Id.*

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.<sup>8</sup> If an offer is not accepted, that does not preclude a party from making a subsequent offer.<sup>9</sup> 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.<sup>10</sup>

The offer must be construed as including all damages which may be awarded in a final judgment.<sup>11</sup> 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.<sup>12,13</sup>

*Acceptance of an Offer*

An offer is accepted by filing a written acceptance with the court within 30 days after the offer is served.<sup>14</sup>

*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 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.<sup>15</sup>

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.<sup>16</sup>

The term "judgment obtained" is defined slightly differently depending on whether the defendant or the plaintiff made the offer. For purposes of calculating a defendant's offer, it means the

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<sup>8</sup> *Id.*

<sup>9</sup> Section 768.79(2), F.S.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Section 768.79(3), F.S.

<sup>13</sup> Section 768.79(8), F.S.

<sup>14</sup> Section 768.79(4), F.S.

<sup>15</sup> Section 768.29(6)(a), F.S.

<sup>16</sup> Section 768.79(6)(b), F.S.

amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts that reduced the verdict. If the plaintiff made the offer that was not accepted, the judgment obtained means the amount of the net judgment entered, plus any postoffer settlement amounts that were used to reduce the verdict.<sup>17</sup>

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.<sup>18</sup>

### ***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 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.”<sup>19</sup>

## **III. Effect of Proposed Changes:**

### **“Exclusive” Offer of Judgment**

The bill creates a new tool to encourage settlements called an “exclusive offer of judgment.” The exclusive offer of judgment limits the financial scope of what may be included in an offer of judgment or a demand for judgment. The offer includes all “damages” that may be awarded in a final judgment. However, the provision specifically excludes any amount that may be awarded for attorney fees, costs, or interest, which are currently permitted. By removing the often contentious issues of what constitutes valid attorney fees and reasonable costs, the underlying claim for damages should be easier to reconcile.

The bill specifies that a party who serves an exclusive offer of judgment is not required to specify an amount being offered for attorney fees and costs. In essence, when a party serves an exclusive offer of judgment, he or she 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 will apparently resolve the amount of fees and costs due among themselves or have 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**

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.

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<sup>17</sup> Section 768.79(6), F.S.

<sup>18</sup> Section 768.79(7)(a), F.S.

<sup>19</sup> *Attorneys’ Title Insurance Fund, Inc. v. Gorka*, 36 So. 3d 646, 647 (Fla. 2010).

### **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.<sup>20</sup> However, when an offer and acceptance are filed, a court has full jurisdiction to enforce the settlement agreement.<sup>21</sup>

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 be in writing and stated with enough specificity to enable the offeror to reevaluate the offer and make corrections if corrections are warranted. 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, rather than waiting much later, perhaps after the damages are resolved to raise the issue.

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.

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<sup>20</sup> Section 768.79(5), F.S.

<sup>21</sup> Section 768.79(4), F.S.

**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.

**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 Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

## B. Amendments:

None.