

768.79 Offer of judgment and demand for judgment.—

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within ~~30~~ 90 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within ~~30~~ 90 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

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

- (a) Be in writing and state that it is being made pursuant to this section.
- (b) Name the party making it and the party ~~or parties~~ to whom it is being made.
- (c) State with particularity the amount offered to settle a claim for punitive damages, if any.
- (d) State its total amount-, ~~not including costs. This amount must not include costs, and costs must not be included in the calculation of the judgment for the sole purpose of determining whether an offer of judgment is enforceable.~~
- (e) ~~Have no non-monetary terms, except for a provision requiring the execution of a release of all claims. A copy of any proposed release must be attached to the offer of judgment.~~
- (f) ~~Be apportioned in amount between all parties, if applicable, and each party must have the independent ability to accept or reject any offer of judgment.~~
- (g) ~~Notwithstanding subsection (f) above, an offer of judgment must resolve all claims against parties whose liability is strictly vicarious, in addition to the claims made against the parties from whom the liability derives.~~
- (h) ~~A demand for judgment may not be filed against a defendant earlier than 180 days after the service of the complaint upon that defendant. An offer of judgment may not be filed against a plaintiff earlier than 180 days after the first filing of the complaint.~~

The offer shall be construed as including all damages which may be awarded in a final judgment-, ~~except that taxable costs must not be included in determining the amount of the offer.~~

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within ~~30~~ 90 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

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

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

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

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, **and this statute**, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the 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 by which the verdict was reduced- **,and not including costs**. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced- **,and not including costs**.

(7)(a) 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. **An offer of judgment is per se not made in good faith if it is in an amount that a party is unable to pay, including any available insurance.**

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

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

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

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

7. An award of attorney's fees must not exceed the amount of attorney's fees that would have been earned by the attorney(s) of the claiming party, consistent with Florida law, as if this statute did not exist.

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

History.—s. 58, ch. 86-160; s. 48, ch. 90-119; s. 1175, ch. 97-102.

Explanations of Proposed Changes to Florida Statute 768.79

1. 768.79(2)

I have changed the word “settlement” to “judgment” to be consistent with the title of the statute.

2. 768.79(2)(b)

I have added “or parties,” because there can be Offers of Judgment to more than one party, under some conditions.

3. 768.79(2)(e)

I have added a paragraph that states that an Offer of Judgment may not have non-monetary terms, which makes it consistent with the case law. I have also added a sentence that states a release may be required, as long as it is attached. This does not change the prohibition against non-monetary terms, but the inclusion of a release helps fix a problem for many with the case law that prohibits non-monetary terms.

4. 768.79(2)(f)

I have added a paragraph that states that an Offer of Judgment must be apportioned between any included parties, and that each party must have an independent ability to accept. No one can be trapped. This makes it consistent with the case law.

5. 768.79(2)(g)

I have added a paragraph that requires the resolution of claims against a party whose liability is strictly vicarious at the same time as the claims against the party from whom the liability derives. An auto accident lawsuit involving a driver and owner of a vehicle is one example.

6. 768.79(2)(h)

I have added a paragraph that provides that an Offer of Judgment may not be filed against a Plaintiff earlier than 180 days after the filing of a Complaint, nor earlier than 180 days after the service of a Complaint upon a Defendant.

7. 768.79(1) and (4)

I have changed the acceptance period from 30 days to 90 days.

8. 768.79(2)(d), last sentence of 2 and 6(b).

I have removed costs, which are unknowable before the verdict, from the determination of whether an offer of judgment is effective.

9. 768.79(2), last sentence addition.

I have added a sentence that excludes taxable costs from the calculation of the judgment necessary to determine whether an Offer of Judgment has been triggered. This does not exclude taxable costs from any judgment awarded. This also does not put either side at any disadvantage. However, the taxable costs of opposing parties are unknown until after a verdict at best, and excluding taxable costs from this calculation eliminates an unknown factor from the decision-making process necessary to formulate a potentially effective Offer of Judgment. Guessing at amounts of costs serves no useful purpose.

10.768.79(6)(a) and (b)

I have added this statute as a stated basis for an award of attorney's fees. This is consistent with the purposes of the statute, and it eliminates any ambiguity.

11.768.79(6) final paragraph.

I added the words "taxable costs" to be consistent with #5 above.

12.768.79(7)(a)

I added a sentence that states: An offer of judgment is per se not made in good faith if it is in an amount that a party is unable to pay. The determination of ability to pay must include the amount of any applicable insurance coverage.

This removes a "gotcha" from the Offer of Judgment process. The way this unfolds is that an attorney files a Proposal for Settlement, pursuant to this statute and Rule of Civil Procedure 1.442, for an amount somewhat more than the amount of insurance coverage. The defendant is unable to pay the

Proposal for Settlement (PFS), and it expires. There was never any hope that the defendant could pay the PFS. So, now the opposing party has a PFS that could trigger as an almost certain foregone conclusion, the defendant could never have paid it, and the attorney has now built in a mechanism for a very large attorney fee claim at the end of the case, having never made an offer with any expectation that it could be paid. That is not a good faith offer, but the practice is widespread.

13.768.79(7)(b)(7)

This is a sentence that is added to be consistent with #7 above, and in the interest of avoiding any potential inconsistency.

14.768.79(7)(b)(7)

I have added a sentence that sets a limit on attorney's fees that can be awarded pursuant to this statute. That limit is the amount of fees an attorney would have earned in the absence of the statute.

The reason for this is to eliminate the counterproductive effect of the statute as it is, which is to incentivize prolonged and additional litigation that does not serve the interest of the clients. When a "Proposal for Settlement" pursuant to this statute and Florida Rule of Civil Procedure 1.442 is served in a case, and the attorney believes that they have a good chance of collecting attorney's fees at very high rates, that attorney then has the incentive to generate more attorney's fees which will benefit the attorney, and not the client. The client may not have to pay an attorney's fees out of the Judgment if this is successful, which would be the same after my proposed revision, but the client would not benefit from the additional attorney's fees generated by the Offer of Judgment statute. The Offer of Judgment becomes the "tail that wags the dog," and litigation for the purpose of generating attorney's fees, rather than for any purpose benefitting the client, is incentivized. This effect is rampant. This is a solution.

These proposed changes either make the statute more consistent with existing case law, or they reduce uncertainties and counterproductive effects of the statute that were not intended when the statute was enacted. This statute should encourage the speedy and reasonable resolution of lawsuits, not encourage them to be prolonged and more expensive.