



CARLTON FIELDS

Proposals for Settlement:
How to draft ones that will stick
and how to deal with them when
they land on your desk

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Offer of Judgment Statutes

- **Section 768.79**
 - applies to all civil causes of action filed in the State courts of Florida
 - Has not changed substantively since 1997
 - Conflicts between statute and Rule 1.442 are decided in favor of rule
 - Applies in federal court when Florida law provides the rule of decision

768.79 Offers

- Offeror has a choice of offering judgment or settlement (unlike Fed. R. Civ. P. 68)
- Has twin objectives of docket clearing and penalizing unreasonable litigants
- Can be used to settle all litigation or just certain counts of a complaint
 - Must terminate the litigation or claim if accepted (can't create additional litigated issues)
- Can't be used to settle more claims than are being litigated (release of future claims)

768.79 Offers

- Date upon which Offer is served is date upon which fees start to accrue
- Additional days for service by mail are not added. Rule 1.442(f)(1)
- Offer may be withdrawn in writing, if notice of acceptance has not been filed with court
- Once the Offer and Notice of Acceptance of the Offer are filed, the court has full jurisdiction to enforce the settlement agreement or enter a judgment
- Acceptance by delivery of written notice per rule, but filing per statute
- Can you specify a different manner of acceptance?

Rule 1.442

- Expressly supersedes statutes in subparagraph (a)
- Latest significant amendment in 2010, effective January 2011 to allow unapportioned joint proposals in pure vicarious/technical liability situations
- Time for service: 90/45
- Time for acceptance: 30
- Withdraw any time before delivery of written acceptance (withdrawn = void)
- Mediation has no effect on OJs (this provision expressly conflicts with and supersedes Fla. Stat. § 44.102)

What does an OJ include?

- **An OJ is measured against a FJ**
 - Offer of Judgment compared to Judgment Obtained (“FJ”)
 - Offer of Judgment must include all relief that might be awarded in a final judgment
 - Prejudgment interest
 - Taxable Costs
 - Attorney’s fees (can include in lump sum or apportion)
 - Punitive damages (must apportion if part of legal claim)
- **“Judgment Obtained” is net judgment plus post-offer collateral source payments received or due as of the date of the judgment or settlement amounts that have reduced the net judgment.**

Shifting Defendant's Fees

- **For Defendants: If the Judgment Obtained is one of**
 - No Liability
 - Plaintiff recovers 75% or less of the amount set forth in Offer
 - Defendant shall be entitled to all reasonable costs (really means taxable costs), investigative fees and attorney's fees from the date of the offer

768.79 Language

- In any civil action for damages filed in the courts of this state (includes federal courts applying Florida law), if a defendant files (don't file, serve) an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs (taxable 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 (should be "service") of the offer if the judgment (this is not the verdict. It is defined by the statute) 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 (Court will even enter a judgment for Defendant if fees and costs exceed judgment obtained by plaintiff)

Shifting Plaintiff's Fees

- If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent more than the amount of 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
- 25.0% is enough to shift fees

Subsequent Offers

- A party may make as many Offers as it desires during the course of the litigation and it can increase or decrease the amount of each subsequent Offer at any time without prejudice to its right to recover under earlier Offers

OJ cannot be used as evidence at trial or in other proceedings

- OJs may not be used as evidence of liability at trial
- OJs may not be used as evidence in other proceedings (same concept as *Fla. Stat.* §90.408)
- If an OJ is rejected, it is immaterial until a right to fee shifting is triggered

Rule 1.442 Requires OJs To Identify: (Part I of III)

- Name the applicable statute
- Parties making the offer and to whom the offer is made
- Claims to be resolved (just 1 count or whole litigation)
- Relevant conditions stated with particularity
- State Total amount of proposal

Rule 1.442 Requires OJs To: (Part II of III)

- Apportion Total Amount between joint offerors (except under 1.442(4), if liability is purely technical)
- Non-monetary terms stated with particularity
- State amount set aside to settle punitive damages claim, if any (failure to do this will not result in invalidation of offer if punitive damages are never an issue)
- State whether OJ includes attorney's fees and whether attorney's fees are part of the legal claim (don't have to list the amount of fees separately, may just include them in total amount)

Rule 1.442 Requires OJs To: (Part III of III)

- Include certificate of service in form required by Fla. R. Civ. P. 1.080(f) (does not require service to every party in the action)

Once Fees Are Triggered

- Per Rule 1.525, must file motion for entitlement to attorney's fees and costs within 30 days of FJ that triggers right to fee shifting (consider bifurcating entitlement and amount phases)
- Prior to hearing to determine amount of fees, file itemized fees (hours expended, hourly rate, description of activity)
- Get an expert to support hourly rate and reasonableness of fees
- May recover Legal Assistant fees
- No multiplier on OJ fees

Why Offers Are Invalidated

- **Non-compliance with Rule 1.442, including failure to apportion**
- **Not made in good faith or served with improper motives**
- **Not capable of resolving litigated issue**
- **Contains terms/conditions that are vague, non-specific or incapable of being valued**
- **Attempts to obtain more relief than available in FJ**

Apportionment

- Joint offers must be apportioned – i.e. each offeror must identify the amount to be paid by or on its behalf, UNLESS:
 - The parties making the joint offer are alleged to be solely vicariously, constructively, derivatively, or technically liable. The rule does not say where to look to determine whether the liability alleged “solely” technical, but I look to the operative complaint.

Good Faith – What is it?

- It means that the offer is intended to resolve the litigation
- It is determined by the subjective motivations and beliefs of the offeror
- Courts use words like “reasonable evaluation of likely judgment”

Why is Good Faith Important?

- It is within the discretion of the trial judge to invalidate an OJ if he or she finds it was not served in good faith
 - Difficult to obtain reversal of such a finding because the appellate standard of review is abuse of discretion

Nominal Offers

- Offers of nominal amounts (\$1, \$100) are not *per se* invalid
 - Offeror may reasonably believe he or she has no liability
- Offeror may serve an offer even if he or she is certain that the offeree will not accept it
- It is optional, but can be helpful to state the reasonable foundation for the amount of the OJ in a letter sent contemporaneously with the OJ

Reasonable Rejection

- Good faith and reasonable rejection are not the same thing
- Reasonableness of rejection is irrelevant to entitlement
- Offeree's rejection of OJ is presumed unreasonable when right to fee shifting is triggered
- Reasonableness of rejection considered when determining amount of fees

Non-Monetary Conditions

- **Be mindful of non-monetary conditions**
 - Confidentiality Agreement
 - Return of Property (BMW case)
- **Are these conditions capable of being valued?**
- **The court might use non-monetary conditions not reflected in Judgment Obtained to invalidate an offer**
- **Occasionally worth trying if your objective is to settle the case**

To Release or Not To Release

- **Options:**

- Let *Res Judicata* do your work for you
- Use release language quoted in Board of Trustees v. Bowman, 853 So. 2d 507 (Fla. 4th DCA 2003)

- **What claims are to be released?**

- Palm Beach Polo Holdings, Inc. v. Village of Wellington, 904 So. 2d 652 (Fla. 4th DCA 2005)
- Zalis v. M.E.J Rich Corp., 797 So. 2d 1289 (Fla. 4th DCA 2001)
- Don't try to use OJ to obtain more relief than your client could obtain in an FJ

Release Options

- Release all claims that were raised or could have been raised relating to or arising out of certain action
- Release all claims arising out of accident on certain date
- Understand risk involved in asking for no lien affidavit or making condition that acceptance constitutes offerree's acknowledgement that he/she is responsible for liens.
- Asking for "holding harmless," indemnity or confidentiality agreement is dangerous – how to value?
- Keep in mind that Court will compare judgment to judgment

Standard of Review on Appeal

- The standard of review in determining whether an offer of settlement comports with rule 1.442 and section 768.79 is *de novo*, because a proposal for settlement is in the nature of a contract
- The standard of review on whether an offer of judgment was made in good faith is abuse of discretion

Stupid Mistakes

- Not citing Fla. Stat. §768.79 (Goldman case)
- Not tracking language of 1.442
- Inconsistencies between written and Arabic numeral dollar amounts of offer Jamieson v. Kurland, 819 So.2d 267 (Fla. 2d DCA 2002)
- Failure to include important conditions
- Not specifying whether settlement or judgment is contemplated by the offer
- Asking for too much relief in the release
- Failure to specify claims you are trying to resolve

Cutting Edge Issues

- Joint Offers of Judgment made by multiple offerors
- Conditioning an OJ on dismissal of parties that are not offerors or even parties to the litigation (See Toll Bros, Newby, Frey)
- “Pure” Declaratory Relief, what does it mean?
- Class actions with offers to class members
- Leaving amount of attorney’s fees in OJ unresolved (asking court to decide)
- How are costs calculated to determine if OJ will be enforced – Is there a difference between the district courts

Application in Federal Court

- Florida Statute Section 768.79 applies to potentially shift fees in federal court actions where court sits in diversity and applies Florida law or in any cases where Florida law provides the rule of decision.
- Choice of law provisions in contracts can make Florida's OJ statute inapplicable.
- Still have the option to use a Federal Rule of Civil Procedure 68 Offer of Judgment, but don't combine them. Too many conflicting provisions. Use either a Florida OJ or a federal OJ.
- Rule 1.442 does apply to Florida OJs served in federal court.

Class Actions – Class Reps

- Can be used in class actions against class representatives, but reps have 30 days from the order granting or denying class certification is filed (great uncertainty as to how long offer will be pending)
- If the class rep is individually responsible for the adverse party's fees, are the fees taken out of the total recovery to be shared by the class? Is there a conflict of interest?
- On whom does the sanction fall: class reps or individual class members? This is a debate involving competing policy issues (See Oruga 712 So. 2d 1141 (Fla. 3d DCA 1998) and article on tenders before class cert. at 76-Nov Fla. B.J. 10, 2002)

Strict Construction of Rule 1.442

- Rule 1.442 is a Florida Rule of Civil Procedure, yet it is construed. (See Wills Shaw and progeny)
- Other Florida Rules of Civil Procedure should be construed in a “just, speedy and inexpensive fashion”
- Judge Farmer in Haus and Goldman questions this
- But, 1.442 expressly supersedes the statute
 - Is the Court making substantive law through 1.442? Separation of powers?
 - If so, is 1.442 constitutional?
 - Is that why it must be strictly construed?