UNDERSTANDING PROPOSALS FOR SETTLEMENT

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I. Use of Offers of Judgment and Proposals for Settlement To Resolve Litigation or To Shift Litigation Costs

A. Using Offers of Judgment and Proposals for Settlement to Create a Legally Binding Resolution of Litigation

In 1986, the Florida Legislature enacted the current offer of judgment statute, *Fla. Stat.* § 768.79 ("the statute") as a way of creating opportunities for settlement of litigation. Since that time, the statute and rule governing the procedure of making an offer of judgment or proposal for settlement, Fla.R.Civ.P. 1.442 ("the rule") have dramatically changed. It has taken several years to refine the statute and the rule, but today, both the statute and the rule offer excellent opportunities to settle litigation and to shift fees if an offer of judgment is unreasonably rejected.

The offer of judgment statute and proposal for settlement rule work together to provide different options to litigants. Originally, the statute allowed only a judgment to be entered against a party if an offer of judgment was accepted. Litigants that did not want to have judgments entered against them on the books of Florida shied away from opportunities to resolve litigation though offering or demanding judgment. Today, however, litigants have the option of settling disputes using the offer of judgment statute and the proposal for settlement rule. Offers of judgment and proposals for settlement made pursuant to both the statute and the rule will be referred to herein as "Offers."

The key to a valid and enforceable Offer is the ability of the Offer to completely resolve one or more claims made in the litigation, if it is accepted.[1] The method of preparing a valid and enforceable Offer is detailed in the Technical Requirements section, *infra*. When an Offer is served in the manner prescribed under the statute and the rule, the plaintiff has 30 days from date on the certificate of service to accept the offer by filing the Offer and a written notice of acceptance in the court file.[2] Once the Offer and Notice of Acceptance of the Offer are filed, the court has jurisdiction to enforce the settlement agreement or enter a judgment.

[1] DiPaola v. Beach Terrace Assn. Inc., 718 So. 2d 1275 (Fla. 2d DCA 1998) citing McMullen Oil. Co., Inc. v. ISS Int. Service System, Inc., 698 So. 2d 372 (Fla. 2d DCA 1997).

[2] Additional days for service by mail are not added to this thirty-day time period.

B. Using Offers of Judgment as a Mechanism For Shifting the Burden of Paying Attorney's Fees from One Party to Another

If an offering party serves an Offer that is not accepted within 30 days, the Offer is deemed rejected, even if there is no response from the offeree.[3] If an Offer is rejected, the date upon which the Offer is served becomes the date upon which the fees to be shifted to the offeree begin to accrue. If for any reason, the offeror decides it wants to withdraw its Offer, the Offer may be withdrawn in writing. The withdrawal will be effective so long as the date that it is served is prior to the date that the notice of acceptance is filed with the court.

The Offer may become a mechanism for shifting the burden of paying the offeror's attorney's fees to the offeree. Offering plaintiffs may recover their fees if the judgment obtained is 25 percent more than the amount of the Offer. Specifically, Fla. Stat. § 768.79 provides,

> 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 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.

Offering defendants my recover their fees if the judgment obtained[4] is one of no liability, or if the offeree plaintiff fails to recover 75 percent or more than the amount set forth in the Offer. The statute specifically states that:

> 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 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.

The statute permits the court to deduct the offering defendant's attorney's fees incurred from the date of the Offer from any amount awarded to the plaintiff. Indeed, if the costs and

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[3] If the judgment obtained is 25 percent or more less than the amount of the Offer, the law further implies that plaintiff's rejection of the Offer was unreasonable.

[4] The judgment obtained will include additions and deductions for collateral source payments received or due from other sources at the time the judgment is entered. The judgment obtained may also include amounts for costs, prejudgment interest and attorney's fees if such items are part of plaintiff's legal claim. Thus, the judgment obtained will not necessarily equal the jury verdict.

attorney's fees total more than the judgment obtained, a defendant would be entitled to a final judgment in its favor.

The comparison of the amount offered in the Offer of judgment versus the judgment obtained will be critical in determining whether an offeror's right to shift fees has been triggered. The court will directly compare the numbers, conditions, and non-monetary terms in the Offer of judgment to the judgment obtained.[5]

A party can 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. If, for example, an offering defendant makes an Offer in the beginning of year one for $50,000, an offer in the beginning of year two for $75,000, and an offer in the beginning of year three for $100,000, and the plaintiff obtains a Final Judgment in the amount of $55,500, Defendant will have a right to shift responsibility for its fees in years two and three, but not year one. Furthermore, the Offer may not be used by any party as evidence of liability, or lack thereof, at trial.

Once a right to shift fees is triggered by entry of a final judgment that is either 25 percent more or less than the Offer, the offeror must move quickly to assert its right to fee shifting. The offeror must file its motion for attorney's fees within 30 days of the entry of the final judgment (as provided by Fla.R.Civ.P. 1.525). Prior to the fee hearing, the offering defendant will be required to submit an itemization of the fees it is seeking to recover and will be required to present the sworn testimony of an attorney's fee expert to support the amount sought.

At the fee hearing, the court will review the Offer to ensure that it meets the technical requirements of the rule and statute, and to ensure that the Offer was served in good faith. Good faith is determined by the subjective motivations and beliefs of the pertinent actor. See Dep't of Highway Safety and Motor Vehicles v. Weinstein, 747 So. 2d 1019, 1021 (Fla. 3d DCA 1999). The Court may decide in its discretion that an Offer was not made in good faith because the Offer was not capable of immediately resolving the litigation, its terms were vague, or it was served with improper motives. If the court finds that the Offer was not made in good faith, the court may deny the motion for fees and costs.

A court, however, cannot find that an Offer was not served in good faith simply because the offeree does not believe that the amount of the Offer was sufficient to settle the case. An offering party can make a nominal or minimal offer if the offeror believes based on its evaluation of the case, that it has no liability or insignificant liability.[6] While the nominal or minimal nature

[5] Ideally, the court will engage in a simple numerical calculation to decide whether the amount set forth in the judgment obtained is more than 25 percent less than the amount offered in the Offer of Judgment, rather than engaging in a valuation of the non-monetary terms or the conditions.

[6] State Farm v. Marko, 695 So. 2d 874, 875 (Fla. 2d DCA 1997).

of the amount offered should not affect whether a judge finds that the Offer was served in good faith, it is wise to send a letter along with the Offer that explains offeror's basis for the amount of the offer. Then, should the court question the offeror's good faith basis for the amount offered, a contemporaneous writing will support the offeror's good faith basis for the amount of the Offer. Moreover, if the offeror presents affidavits or testimony showing a reasonable relationship between the offer and a realistic assessment of liability, then the court will likely find that the offer was served in good faith. Pacer Technology v. Lee Pharmaceuticals, Inc., 737 So. 2d 1238, 1238 (Fla. 3d DCA 1999).

C. Good Faith and Reasonable Rejection Are Not The Same Thing

The reasonableness of the offeree's rejection of the Offer is irrelevant in the decision of whether to shift fees. In Knealing v. Puleo, 675 So. 2d 593 (Fla. 1996) the Florida Supreme Court held that "the right to an award [of attorney's fees and costs] depends only on the amount of the rejected offer and [versus] the amount of the later judgment." 675 So. 2d at 595. "[T]he reasonableness of the plaintiff's rejection of the offer is irrelevant to the question of fee entitlement." Id. Thus, while reasonableness of an offeree's rejection of an Offer may impact the amount of fees shifted, it will not affect the Court's decision to shift fees.

D. Factors To Be Considered In The Fee Award Process

Once a court finds that an offeree unreasonably rejected an Offer made in good faith for at least 25 percent more or less than the judgment obtained, the court must award fees to the offeror. At the fee hearing, the court must consider several factors in deciding the amount of the fees to be awarded: (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; and (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. The court will evaluate of all of these factors together with the fee statements of the offeror (and sometimes will examine the fees of the offeree's counsel), the testimony of experts and the rules relating to the calculation and recovery of contingency fees to arrive at a fee award. Once a fee award is entered, the final judgment will be amended or, if a defendant prevails in the fee hearing, a new final judgment may be entered in favor of the defendant.

E. The Expanding Use of Offers of Judgment

Because the offer of judgment rule and statute are such useful tools for resolving litigation, the Florida Supreme Court has expressly expanded their use to include class actions. In 1998, the Third District Court of Appeal held that Offers could be served on class representatives and that class representatives could be individually subjected to judgments for attorney's fees.[7] In 2002, the Florida Supreme Court amended Rule 1.442 to expressly permit the service of Offers in class actions.[8] The rule permits the class representative an additional 30 days to respond to an offer after any order granting or denying class certification. The rule does not make clear whether class members, as opposed to class representatives, are subject to the fee shifting provisions of *Fla. Stat.*§ 768.79 and Rule 1.442. Recently, however, the Second District Court of Appeal held that a class action defendant may settle claims with individual class members even after class certification.[9] With no express prohibition on service of an Offer on an individual class member, this remains an open issue. Furthermore, Offers may be used to resolve state law claims that are being litigated in federal court on the basis of diversity jurisdiction. There is some question as to whether such Offers would be enforceable by federal courts when the court's jurisdiction is based upon a federal question. Because of multiple potential conflicts between Fla. Stat. § 768.79 and Fed. R. Civ. P. 68, it is advisable to carefully consider whether such an offer could be successfully enforced. McMahan v. Toto, 311 F. 3d 1077, 1082 (11th Cir. 2002).

II. Technical Requirements of Offers of Judgment

Between the 91st day after the plaintiff has filed its original complaint and the 45th day prior to trial, any party may serve an Offer on any other party or combination of parties. The Offer may either attempt to settle the case by offering a settlement agreement or offering or demanding entry of a judgment.[10] Pursuant to the rule and statute, any Offer must meet the criterion that follows.[11]

A. Citation to Rules

The offer must state that it is being made pursuant to rule 1.442 and *Fla. Stat.* § 768.79. In parenthesis next to the citation of the statute, the offer should designate the year of the applicable version of *Fla. Stat.* § 768.79 by noting the year in which the plaintiff's cause of

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[7] Oruga Corp. v. AT&T Wireless of Florida, Inc., 712 So. 2d 1141 (Fla. 3d DCA 1998).
[8] The Rule states, "In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed."
[9] Allstate v. Chaple, 774 So. 2d 742, 744 (Fla. 2d DCA 2001).
[10] There are some instances where entry of a judgment is preferable to payment.
[11] Fees and costs will not be awarded where the Offer fails to include the elements prescribed by law. Jaffrey v. Baggy Bunny, Inc., 733 so. 2d 1141 (Fla. 4th DCA 1999).

action accrued.[12] The statute has not been amended since 1997, so for more recent cases, citation to the correct version of the statute is not a struggle. For earlier cases, however, finding the version of the statute then in effect can be mind boggling. If the year the cause of action is accrued is an issue (*e.g.* there is a statue of limitation defense), then the offeror may make offers under multiple versions of the statute by listing each possible year in which the cause of action accrued in the parenthesis.

B. Identity of Parties

The Offer must name the party or parties making the proposal and the names of the party or parties to whom the Offer is being made. This rule helps each offeree in a multi-party lawsuit evaluate whether the Offer applies to him or her.

C. Apportionment

In multi-party litigation, Offers can be made separately, by on plaintiff to one defendant, or jointly. Joint offers are those which attempt to resolve jointly, the claims of more than one plaintiff or defendant. Like more simple offers from one plaintiff to one defendant, joint Offers must allow each party of the Offer to evaluate how the offer applies to only him or her. Allstate Indem. Co. v. Hingson, 808 So. 2d 197, 198 (Fla. 2002). This means that if there are multiple defendants or multiple plaintiffs, the Offer must apportion the amount offered as between each party.

Rule 1.442(c)(3) specifically requires that a joint proposal "state the amount and terms attributable to each party." This is true even when one party is only technically or vicariously liable for the liability of another, or when one party's claim is wholly dependent on another party's claim or injury. Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276 (Fla. 2003), and Lamb v. Matetzschk, 906 So. 2d 1037 (Fla. 2005).[13]

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[12] If a plaintiff's cause of action accrued prior to October 1, 1990, Defendant should consider citation of the offer of judgment statute that applies to causes of action accruing before October 1, 1990, Fla. Stat. § 45.061. The fee shifting provisions are different from the current statute, and less favorable to defendants, but there is a larger window of opportunity to serve and accept Offers under Fla. Stat. § 45.061.

[13] But see, Hall v. Lexington Ins. Co., 895 So. 2d 1161, 1166 (Fla. 4th DCA 2005) (husband and wife, who filed a single insurance claim were not required to apportion offer of judgment). The validity of this holding is now questionable, however.

D. Identify Claims

The Offer must state the claims it is seeking to resolve either by stating that it is intended to settle all claims, or by specifying the claims by Count. For example, the Offer may specify that it is only intended to settle plaintiff's failure to warn claim, thus leaving all other issues for trial.

E. Identify Conditions

The Offer must state with particularity any relevant conditions.[14] A valid Offer cannot require an offeree to enter into an agreement with unclear terms. Rather, the Offer must be written in terms that are extremely clear and immediately enforceable by the court if the Offer is accepted. If the conditions of settlement require anything more to be executed than a stipulated dismissal with prejudice, then the document to be executed should be attached to the Offer. It is particularly important to attach confidentiality agreements, because the court will question whether the parties could have agreed on the length of the agreement, and the penalties for improper disclosure.

F. Identify Non-Monetary Conditions

Stating non-monetary conditions and is mandatory because "[t]he rule intends for an offer to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions." Lucas v. Calhoun, 813 So. 2d 971 (Fla. 2d DCA 2002) and United Serv. Auto. Ass'n v. Behar, 752 So. 2d 663, 665 (Fla. 2d DCA 2000). Non-monetary terms might include an obligation of the plaintiff to turn certain evidence over to a defendant. The valuing of non-monetary terms is difficult for a court, so unless there is a compelling reason to include a non-monetary term, we generally do not recommend adding these terms to Offers.

G. Identify Whether Offer Includes Punitive Damages

The Offer must state with particularity the amount proposed to settle a claim for punitive damages, if punitive damages are part of the legal claim. Lucas v. Calhoun, 813 So. 2d 971 (Fla. 2d DCA 2002). Even if the plaintiff has not yet asserted a claim for punitive damages, it is wise to state whether any of the amount is intended to compensate the plaintiff for punitive damages. A good Offer will anticipate whether punitive damages will become an issue at trial and try to estimate the amount of punitive damages that may be awarded. If the offeror is not interested in devoting any portion of the Offer to punitive damages, the Offer should state that

[14] When the relevant conditions are not stated with particularity, the offer of judgment is ineffective. MGR Equipment Corporation v. Wilson Ice Enterprises, Inc., 731 So. 2d 1262 (Fla. 1999).

"No amount of this Offer is specifically set aside for the settlement of any claim for punitive damages."

H. Identify Whether Attorney's Fees Are Part of the Legal Claim

The Rule requires that an Offer state whether it includes the amount of attorney's fees that might be awarded to the offeree and whether attorney's fees are part of the offeree's legal claim.[15] If it is unclear whether attorney's fees are part of the legal claim, you may state that "This amount includes within the total amount stated any costs and attorney's fees which may be awarded under any claim in this action."

I. Certificate of Service

The Offer must be served in the same manner as any other pleading in the case and must include a certificate of service indicating the date of service. It is useful to serve the Offer by regular mail and by certified mail, and while the Offer may not be filed in the court file at the time it is served, (it may not be filed until a right to fees is triggered), the offeror may file a Notice of Serving Offer of Judgment to create a court record of the date the Offer was served.

III. Conclusion

Offers of Judgment are highly technical and failure to meet the technical requirements can result in a determination that the Offer is unenforceable as a fee shifting mechanism. Even a perfectly drafted Offer can sometimes be invalidated if a judge subjectively determines that the Offer was not served in good faith. Moreover, the law of Offers is rapidly changing, and the result of these changes creates additional requirements that retroactively invalidate otherwise valid offers. However, despite these obstacles, offers of judgment can be effective in creating settlement and fee shifting opportunities, and in applying pressure and creating risk for an opposing party. Thus, an offer of judgment should be considered as part of an overall litigation strategy.

[15] While technically, the offeror's failure to state whether attorneys' fees are part of a legal claim causes the Offer to violate Rule 1.442(c)(2)(F), it is unlikely that the court will invalidate the offer. Indeed, in no published decision has any court ever invalidated an offer of judgment due to a party's failure to state whether fees are part of the legal claims at issue. In fact, the Second District has enforced an offer of judgment that contained the following language, "This proposal is to include any attorney's fees and costs of the Plaintiff and attorney's fees are/are not part of the legal claim." Barnes v. Kellogg Co., 2003 WL 1936397 *2 (Fla. 2d DCA 2003), overruled on other grounds by Lamb, 906 So. 2d 1037 (Fla. 2005).