

## OFFER OF JUDGMENT OPTIONS IN FEDERAL COURT

Trial Lawyers Section

Chair: Rebecca H. Steele, ACLU Foundation of Florida

If you are defending a case in the Northern, Southern or Middle Districts or the Bankruptcy courts of Florida, you may have considered serving an Offer of Judgment, whether under Federal Rule 68 or Florida's Offer of Judgment Statute, Fla. Stat. §768.79. An offer of Judgment may be a tool to encourage settlement or potentially shift your client's litigation costs to the opposing party. Although they are both titled, "Offer of Judgment," Rule 68 and Fla. Stat. §768.79 are quite different, substantively and procedurally. Depending on your client's goals and the amount of time left in your case prior to trial, an offer under either the Federal Rule or the Florida Statute may provide you with some leverage to settle your case or penalize an unreasonable litigant. This article will tell you about the differences between the Federal Rule and the Florida Statute, which are completely different methods for case resolution. This article will also discuss when your client should consider making an offer of judgment pursuant to Florida's offer of judgment statute in federal court.

Rule 68 offers can be made only by parties defending an action, so the usefulness of such offers is already limited to approximately half of the litigants in federal court.

Moreover, many practitioners shy away from Rule 68 offers, because if a Rule 68 offer is accepted, the accepted offer results in a final judgment being entered by the court. If a defending party is not afraid of the publicity of a final judgment, then Rule 68 offers have some potential benefits. Rule 68 offers may be served immediately upon commencement of the litigation and up to ten days before trial (the time for service of such offers under the Florida statute is far more limited—between 90 days after commencement/service, and up to 45 days before the first day of the trial docket). Rule 68

offers must remain open for ten days in order to shift fees (not 30 days as required of offers made pursuant to the Florida statute). Plus, a Rule 68 offer need only be \$.01 better than the final judgment obtained by the plaintiff (offers made by defending parties pursuant to the Florida statute must exceed the final judgment by 25%). Even with these benefits, however, the defending party's victory could be hollow; Rule 68 doesn't permit a prevailing defendant to shift costs because a judgment must be entered for the plaintiff for Rule 68 to apply.



**This article will tell you about the differences between the Federal Rule and the Florida Statute, which are completely different methods for case resolution.**

For these and other reasons, practitioners have looked to Florida's offer of judgment statute as a tool to shift fees and costs in federal courts.

Florida's offer of judgment statute also has limited application in federal court in that it generally does not apply to claims made pursuant to federal law (although an argument could be made that Florida's offer of judgment statute could apply in cases in which federal statutes look to substantive state law to provide the rule of decision), plus

it does not apply to some causes of action that contain remedial attorney's fees provisions. However, since 1990, when the Eleventh Circuit found that the predecessor statute to Fla. Stat. §768.69 (it was Fla. Stat. §45.061) was not preempted by Rule 68 and that it applied to a cause of action asserted under State law, the use of such offers has expanded. *See Tanker Mgmt., Inc. v. Brunson*, 918 F.2d 1524 (11th Cir.1990). Despite the Eleventh Circuit's clear finding in 1990,

*Continued on page 47*

# OFFER OF JUDGMENT OPTIONS IN FEDERAL COURT

Trial Lawyers Section

*Continued from page 46*

that Rule 68 did not preempt Florida's offer of judgment statute, successive litigants have argued preemption and lack of applicability of the successor versions of Florida's offer of judgment statute in federal and bankruptcy courts.

In this last year, the Eleventh Circuit has responded to arguments regarding the applicability of Florida's offer of judgment statute in federal court by finding in two cases, *Jones v. United Space Alliance*, 494 F.3d 1306 (11th Cir. 2007), and *Menchise v. Akerman Senterfitt*, 532 F.3d 1146 (11th Cir. 2008), that Florida's offer of judgment statute is a substantive attorney's fees and cost shifting

statute that applies to claims pending in federal court where Florida substantive law provides the rule of decision. Moreover, in the more recent decision, the Eleventh Circuit made clear that Florida's offer of judgment statute is not preempted by Rule 68. This holding affirms the expanding use of offers of judgment under the Florida statute in federal cases based upon diversity, supplemental or bankruptcy jurisdiction. Thus, if your client is faced with prosecuting or defending a civil action based upon Florida substantive law and pending in federal district or bankruptcy court, an offer of judgment made pursuant to Florida law might provide the fee shifting you need. A few words to the wise,

though. Be sure to read both the Florida Statute and Fla. R. Civ. P. 1.442 before preparing your offer (whether this rule should apply in federal court is a subject for a much longer article, but because some federal courts have applied the rule, it can't hurt to have your offer conform to this rule). And, finally, don't cite Rule 68 when you make an offer of judgment under Florida law in federal court. The differing deadlines under Rule 68 and Florida law could

wreak havoc on your fee shifting plans.



*Author:  
Ellen Koehler  
Lyons, Carlton  
Fields, P.A.*

## WE OFFER COMPLETE INSURANCE PACKAGES

PROPERTY  
COMMERCIAL  
WORKERS COMPENSATION  
PRODUCT LIABILITY  
LIABILITY/PROFESSIONAL LIABILITY  
GROUP LIFE, HEALTH, DENTAL



MONDAY-FRIDAY 8:30AM - 5:00PM

813-962-6677

FAX 813-962-6671

E-MAIL [INFO@CARRONINSURANCE.COM](mailto:INFO@CARRONINSURANCE.COM)

THE LAW FIRM OF

**JOHNSON POPE BOKOR RUPPEL & BURNS, LLP**

IS PROUD TO ANNOUNCE

**MURRAY B. SILVERSTEIN**

**HAS JOINED THE FIRM AS A SHAREHOLDER  
IN ITS NEW ST. PETERSBURG OFFICE AT**

**Wachovia Plaza, Suite 900  
150 Second Avenue North  
St. Petersburg, Florida 33701-3341  
Phone: (727) 822-7750**

[www.jpfirm.com](http://www.jpfirm.com)

**Providing a full range of legal services to  
Central Florida for more than 30 years**

**TAMPA**

**CLEARWATER**

**ST. PETERSBURG**