



MEMO

To: MSS

Re: Offer of Judgment Statute

OFFER OF JUDGMENT STATUTE

Generally, the Offer of Judgment Statute creates a right to recover reasonable costs and attorney's fees incurred after a settlement offer is made when (1) a party has served a demand or offer for judgment, and (2) that party has recovered at trial a judgment at least twenty-five (25) percent more or less than the demand or offer. *Dictiomatic, Inc. v. United States Fidelity & Guaranty Company*, 127 F.Supp.2d 1239, 1244 (Fla. 1999). The statute applies to both plaintiff and defendant settlement offers. See Fla. Stat. §768.69(1). In order for a party to recover attorney's fees and costs, the statute requires that "the offer:

1. Be in writing and state that it is being made pursuant to this section;
2. Name the party making it and the party to whom it is being made;
3. State with particularity the amount offered to settle a claim for punitive damages, if any; and
4. State its total amount." See Fla. Stat. §768.79(2).

The purpose of this statute is to terminate all claims, end disputes, and eliminate the need for further intervention by the court by encouraging all parties to reach a settlement. *Dictiomatic*, 127 F.Supp.2d at 1244. This statute will apply to any civil action for damages. *Beyel Bros. Cran and Rigging Co. of South Florida, Inc. v. Ace Transp., Inc.*, 664 So.2d 62 (Fla. 4th DCA 1995). However, the courts have held that because the statute is punitive in nature, the statute must be strictly construed. *Schussel v. Ladd Hairdressers, Inc.*, 736 So.2d 776 (Fla. 4th DCA 1999).

Therefore, the statutory requirements of an offer of judgment are that:

1. It must conform to statutory requirements.

2. The offer should be clear and capable of execution without a need for judicial interpretation. *Lucas v. Calhoun*, 813 So.2d 971 (Fla. 2d DCA 2002).
3. The proposal must also specifically refer to the statute or rule. *McMullen Oil Co., Inc. v. ISS Intern*, 698 So.2d 372 (Fla. 2d DCA 1997).

The offer need not contain a certificate of service or have been otherwise verified to support recovery under the statute when the offeror's attorney files notice of service of the offer. *Bailey v. Chambelee*, 697 So.2d 972 (Fla. 2d DCA 1997). Further, the actual written offer need not be filed unless it is accepted. See *Fla. Stat. § 768.79*.

Procedurally speaking, once a court enters a final judgment, a party seeking to recover costs and attorney's fees under the offer of judgment statute must make a demand by motion within 30 days to allow recovery. *Tampa Letter Carriers, Inc. v. Mack*, 649 So.2d 890 (Fla. 2d DCA 1995). Once a party establishes that he/she has complied with the statutory requirements, a trial court determines whether to award the costs and attorney's fees. *Camejo v. Smith*, 774 So.2d 28 (Fla. 2d DCA 2000). The only basis for a court's refusal to award costs and attorney's fees at this point is if the court finds that the settlement offer was made in bad faith. *Fla. Stat. § 768.79*. Whether or not the offer was made in bad faith is a matter of discretion for the trial judge and is to be determined from the facts and circumstances surrounding the offer. *Fox*, 745 So.2d 330. However, the determination of whether an offer of judgment was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make the offer. *Disney v. Vaughen*, 804 So.2d 581 (Fla. 5th DCA 2002). The courts have held that a nominal offer of settlement will only be suspect where it is not based on any assessment of liability and damages. *Fox v. McCaw Cellular Communications of Florida, Inc.*, 745 So.2d 330 (Fla. 4th DCA 1998). A mere belief that the figure will not be accepted does not necessarily suggest an absence of good faith. *Levine v. Harris*, 791 So.2d 1175 (Fla. 4th DCA 2001). Because establishing that an offer of judgment was made in bad faith requires such a high burden of proof, few courts refuse to award attorney's fees and costs because of bad faith.

If there is to be an award of attorney's fees and costs, the court will determine the reasonableness of the award pursuant to the Florida Statute § 768.79. *Fla. Stat. § 768.79(7)(b)*. The statute lists several factors the court must consider:

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 be prolonged. *Fla. Stat. § 768.79(7)(b)*.

In conclusion, the offer of judgment statute encourages settlement before trial due to the risk of having to pay the other party's costs and attorney's fees. Such an incentive makes the offer of judgment statute a powerful tool in any litigation proceeding.