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STATUTORY OFFERS OF SETTLEMENT IN FLORIDA PRACTICE: USES, PROBLEMS, AND SOLUTIONS

It has been fifteen years since the Florida Legislature passed F.S. §768.79,[1] the offer of settlement (and judgment)[2] statute, and nearly ten years since the Florida Supreme Court amended Rule 1.442 to harmonize the Rules of Civil Procedure to match the legislature's handiwork.[3] The Florida statutory settlement offer procedure is a powerful weapon for either a plaintiff or a defendant to bring litigation to a speedy settlement in the right circumstances. The "stick" or "hammer" leading to this result is the threat that if the party receiving the offer rejects it, and does not do at least 75 per cent as well as offered, that party will have to pay the offeror's attorneys' fees and costs from the date of the offer. Florida's statutory offer procedure thus creates coercive pressure toward settlements based on the fear of the statute's consequences for the "unreasonable" (in hindsight) rejection of statutory settlement offers.[4]

Classic Situations for Use of the Offer of Settlement Procedure

- *Creating Fee-shifting For Prevailing Defendants: Nominal and Similar Offers.* In virtually every case where a defendant is sued, defendant should consider making a statutory settlement offer to the plaintiff for the purpose of generating a potential claim for fees should the defendant prevail. Essentially the same considerations apply to an offer of settlement which is nominal or simply less than the plaintiff will accept: for instance, less than readily provable out of pocket losses.

Such strategic offers offend many judges (and plaintiffs), and have resulted in some language and holdings to the effect that such offers were not in "good faith" under the statute.[5] The policy and language of §768.79, however, apply with full force when a defendant has prevailed entirely after a plaintiff has walked away from a settlement offer in his favor. Florida

law provides that even nominal offers made solely to trigger a potential recovery of attorneys' fees are valid for that purpose so long as the defendant would have complied with the offer if accepted and there was a "reasonable foundation" for it.[6] The "reasonable foundation" for any offer made by a defendant *who in fact prevailed* is not difficult to demonstrate; as the Eleventh Circuit held in one case, "to accept in the same case in which a party did prevail the notion that there was no reasonable basis for that party prevailing would require self-contradiction on a scale that we are unwilling to consider."[7] The take home message is that a defendant has much to gain, and nothing to lose, by making a statutory offer for the purpose of creating a right to recovery of fees should defendant be so fortunate as to ultimately prevail in the litigation.

The operation of §769.79 in this type of case may lead to harsh results. A defendant, for example, may recover crushing attorneys' fees under the statute even if defendant's success resulted from the death of an essential witness, an intervening change in the law, or the jury's resolution of close and difficult factual disputes. An entitlement to a fee award can occur even if the offer rejected by the plaintiff was insultingly low or would not have provided significant compensation. The legislature has made the relevant public policy determination, concluding that the efficacy of the offer of judgment statute in shortening litigation and encouraging settlements outweighs the harm from unfair or unpalatable results in particular situations. The non-prevailing plaintiff in such a "hard luck" case has no defense to entitlement for attorneys' fees, although the plaintiff can argue that the fees awarded should be reduced in amount based on the statutory factors.[8]

- *Off-setting Damages with Attorneys' fees: The Over-reaching Plaintiff.* If a plaintiff is insisting on more damages than he is likely to recover, a statutory offer of settlement from the defendant will often be advisable. Take a hypothetical case where a plaintiff has a

strong case for receiving $10,000, but is stretching to claim an additional $90,000. The defendant in such a case should make a settlement offer for just more than 4/3 times the likely judgment, let's say $13,500.[9] If the plaintiff accepts the offer, the case is over. If the plaintiff does not, and the predicted result occurs, the plaintiff will have gotten only 74% of the offer, and thus, although he won $10,000, from this figure will be set off the defendant's attorneys' fees and costs not only at trial, but dating from the date of the offer. It is possible (and in this example, likely) that the result will be a net payment to the defendant, when the offer of judgment statute is considered – a possibility expressly contemplated by statute.[10]

Note that the defendant, to obtain this benefit, must make an offer in an amount of 33% more than the defendant believes she is likely to have to pay after trial. This is much harder to do as the amount at stake increases. If the defendant believes that a likely judgment were going to be $100,000, for instance, she would have to offer more than $133,333 to trigger an entitlement to fees – and would only recover fees if the plaintiff were so foolish to reject the generous offer. If millions are at stake, the defendant would have to offer, at a minimum, hundreds of thousands more than the likely exposure to trigger offer of judgment remedies.

- *Obtaining Attorneys' fees from Defendants Where Not Otherwise Provided For: The Stubborn Defendant.* While most believe that the offer of judgment statute in its general operation favors defendants, the same procedure can be used by plaintiffs to their advantage in appropriate cases. Let us assume that a defendant is stubbornly unwilling to offer the full $100,000 which the plaintiff is sure she will win. If the plaintiff wants to collect her own reasonable attorneys' fees, and she expects to win $100,000, she should demand just less than 4/5 of the expected judgment, that is, just less than 4/5 times $100,000, let's say, $79,000.[11] If the demand is rejected, however, and the expected judgment arrives, the plaintiff will recover not

only her $100,000 judgment but also her reasonable attorneys' fees from the date of the offer of judgment. Note that to get this benefit, the plaintiff had to give the defendant the opportunity to settle the case for less than 80% of predicted damages. Interestingly, the math is such that while a defendant must offer 33% (one-third) more than the expected judgment to obtain sanctions, a plaintiff need "only" give a 20% (one-fifth) discount from the expected judgment to obtain the corresponding benefit.

- *The Half-a-Loaf Offer.* It is always difficult for a risk averse party to walk away from a reasonable settlement offer. The possibility of offer-of-judgment sanctions for a less-than-hoped for result makes the risk of rejecting a "half a loaf" offer in the hope of a complete win even greater. This is exactly as the legislature intended. Where the ultimate result is hard to predict (as it often is), a statutory offer within the realm of reason will strongly encourage settlement. The fact that an offer has been made pursuant to statute adds the additional risk that if things do not go well, the party would have to pay not only his own fees and costs, but also the other side's.

We turn to four topics of Florida offer of judgment jurisprudence.

(1) Are Offers of Judgment "Exclusive" of Costs and Fees Allowed?

In some cases, a party might want the flexibility to make an enforceable statutory offer which does not include a precise figure for court-ordered costs and attorneys' fees, but leaves these items for court computation. If, for example, the prevailing plaintiff would be entitled to attorneys' fees under a statute or contract, the defendant might be willing to make an acceptable offer on the merits, but might have no knowledge of the amount of the plaintiff's attorneys' fees, or might disagree as to their amount. As the First District once said, "[a] defendant would require prophetic powers to estimate the amount of fees to be awarded for his adversary's services."[12] If an offer which was "exclusive" of costs and fees (allowing these items to be

computed by the court were the offer accepted) were not accepted, and the defendant were later to move for sanctions under §768.79, the court could simply disregard the issue of pre-offer fees and costs, which would otherwise need to be computed under the case law in determining whether the actual result was 25% better for the offeree.[13]

Florida law is not clear, however, as to whether such an "exclusive" offer is allowable[14] under §768.79. The Second and Third DCA's have held that at least some "exclusive" offers (expressly leaving awards of interest, costs and/or attorneys' fees for the court) were invalid as either "conditional"[15] or lacking in "definiteness."[16] Cases in the Fourth and Fifth DCA's, by contrast, have upheld the award of fees under §768.79 based upon offers of judgment which were expressly "exclusive" of costs or attorneys' fees.[17] Uncertainty remains on the basic issue of whether an offeror may exclude costs and, especially, fees from an offer while preserving the right to seek sanctions under §768.79. The Supreme Court majority approached this issue, but did not resolve it, in the *White v. Steak and Ale* case,[18] which involved an "inclusive" (lump sum) offer. The proponents of "exclusive" offers have the better of the argument for a number of reasons. The patent legislative intent is to encourage expeditious settlements on any reasonable terms. Rule 1.442(c)(2)(F), in requiring that an offer "shall state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim," on its face allows valid offers to either include or exclude attorneys' fees, as the offeror elects. A party who wishes to "surrender" on the merits via a statutory offer of judgment should be allowed to do so even if the party disagrees as to the amount of fees or costs claimed by the other side.

(2) What conditions can be included in statutory offers?

§768.79 does not expressly address the conditions that may or may not be included in statutory offers. The statute's wording suggests that the only item worth mentioning is the "total

amount" of the offer. F.R.Civ.P. 1.442(c)(2)(C), however, states that a statutory offer "shall state with particularity any relevant conditions." The language of the Rule leaves open the argument that *any* condition at all may be included in an offer so long as it is "stated with particularity."

Certainly many conditions might be unproblematic: dismissal of the action; court approval; possession of property in dispute; or satisfaction of liens at issue.[19] If a condition, however, has an independent value to the offeror beyond the litigation being resolved, the condition renders infirm the test for the award of fees and costs for rejected offers, which compares the amount of the "offer" to the amount of the "judgment."[20] To use a simple example, assume a demand for judgment for $10,000. If a "condition" to this offer was that the defendant should also deliver the plaintiff certain specified property not at issue in the litigation, the demand would not be worth its face value of $10,000, but $10,000 plus the value of the property to be delivered. Such conditions cannot simply be ignored by a court applying §768.79.

There are two major alternatives: either the courts (1) will add the value of the condition to the monetary portion of the offer in determining entitlement to fees and costs under §768.79 or (2) will allow only certain permissible types of conditions (deemed reasonable) and disallow all others. In general, requiring valuation of conditions would bring the offer of settlement procedure to a grinding halt in a morass of tangential factual disputes on valuation of the extraneous "conditions," clashing with the principle that "[a] proposal for settlement is intended to end judicial labor, not create more."[21] Moreover, many of the types of conditions the courts wrestled with–the execution of various types of releases, indemnity agreements, and confidentiality agreements – are difficult or impossible to value. In order to promote judicial economy while preserving maximum flexibility for settlement offers, the courts – whether by rule or case law – should develop a body of law as to which non-monetary conditions are

deemed reasonable and allowable, and which are not.

The logical starting point is the ruling of the Fifth District in the *Nichols* case that "a proposal for settlement should not include conditions that, if accepted, would cause an offeree to give up a claim or right that it could not have otherwise lost in the litigation."[22] This rationale has been applied to prevent conditions requiring the extinction of other claims between the parties as part of a settlement.[23] The reasoning is unimpeachable: a requirement of abandoning claims extrinsic to the litigation may cause an offeree to reject a settlement which would otherwise have been accepted. In such a case, the imposition of sanctions for rejection of the offer would be unfair and inappropriate. There is no practical way to value Claim B, which has not yet been filed, but the abandonment of which was a condition of the rejected offer, in the context of a motion in Case A to determine if a party is liable for statutory sanctions. On the other hand, the court in Case A cannot arbitrarily value at zero the elimination of Claim B. Thus, as the courts have realized, a condition which disposes of extrinsic claims is simply inconsistent with the scheme of §768.79. Conditions by which offerors can obtain at no cost to themselves extrinsic benefits which they could never obtain from the litigation itself represent a slippery slope on which the courts should not start to descend.

Despite the apparent agreement that abandonment of separate claims of the offeree may not be required as a condition of statutory settlement offers, Florida courts have not consistently applied this rationale in the context of general releases. To the contrary, Florida law on this issue has been fairly described as being in a state of "confusion."[24] The Second and Third DCA's, for example, have held that general release conditions – which by definition extinguish all claims of the offeree against the offeror[25] – are allowable, stating that general releases, dismissal requirements, and even indemnity agreements are "legally inconsequential" conditions which do

not "add or subtract anything from what would be the consequences of simply accepting the offer of settlement."[26]

Florida law on permissible conditions for statutory offers of judgment is epitomized by the three opinions in *Dryden v. Pedemonti*, 910 So.2d 854 (Fla. 5th DCA 2005). The facts involved rejection of a settlement offer conditioned upon execution of a general release and "hold harmless" agreement. Judge Sharp's opinion for the Court held that the conditions invalidated the offer because of ambiguity as to whether the terms would preclude other claims than those at issue in the litigation. Judge Griffin's special concurrence stated that the "the problem is not so much the clarity" of the release but "its scope": in Judge Griffin's view, permissible conditions should never "go beyond what the offeror would be entitled to by operation of law, upon settlement" – i.e., a limited release similar in effect to what res judicata law would provide. Because Judges Sharp and Griffin agreed that the offer in question was invalid, sanctions were held improper even though the rejected offer was significantly better than the plaintiff's judgment. In dissent, Judge Pleus argued, citing Third District precedents, that general release and hold harmless provisions, like confidentiality agreements, should all be freely allowed, and further, that debate on these points only allowed parties which had rejected statutory settlement offers as financially insufficient to escape sanctions after they had lost their gamble. The disagreements on that particular panel, like parallel disagreements on First[27] and Third[28] District panels in other cases, demonstrate the need for clarification by Supreme Court decision or rule.

General releases, like indemnity agreements or confidentiality agreements, may be inconsequential if never raised or enforced by the parties, but they plainly have significantly broader legal effect than a limited release as could be demonstrated, for example, in a second,

later, litigation between the parties.[29] A limited release should suffice for the protection of the offeror, while simplifying the task of courts and counsel in §768.79 practice. If we are to follow the logic of the *Nichols* case, the creative drafting of onerous conditions should not be allowed to provide offerors with benefits of a type they could not obtain in the litigation itself.

If, on the other hand, general releases or other forms of settlement covenants are to be allowed as valid conditions, counsel are in need of guidance from the courts or by rule to clarify the circumstances in which such conditions would be proper, and perhaps to address permissible language. For instance, should there be a requirement that conditions addressing the execution of releases be mutual? When, if ever, would conditions calling for the release of third parties, such as insurers, affiliates, or third parties with potential indemnity claims against the settling party, be allowed? When, if ever, might the execution of a confidentiality agreement – for breach of which the offeree might be liable in damages – be a permissible condition? Is there a condition by which a plaintiff could assure the offeror of timely payment of her demand?[30] Certainly, the Bar should know – clearly and without conflict – which of these types of conditions are allowable, and which are prohibited, so that the offer of judgment statute can be efficiently applied without unproductive collateral litigation. In the absence of such guidance, the inclusion of consequential conditions beyond the execution of limited releases should be avoided by counsel and resisted by the courts. A practical reason for doing so is ensuring that an offer of judgment will be deemed allowable in the post hoc inquiry of a circuit court without hard fought litigation on the point.

(3) Offers to or from Joint Plaintiffs or Defendants: the Apportionment Problem

Rule 1.442 provides, as a sub-set of the Rule's particularity requirement, that "[a] joint proposal shall state the amount and terms attributable to each party." The Supreme Court, in a

trio of cases, has required that where an offer is either made to or from two or more co-parties, the offer must specify the amount attributable to each of the co-parties.[31] One reason for this is mathematical: in the absence of attribution, the trial court might have no way to determine on a motion for sanctions whether the offeree is 25% worse off than if the rejected offer had been accepted.[32] Assume, for instance, a plaintiff made a joint demand on two defendants for $50,000, which was rejected. After trial, each defendant is found liable for $35,000, for a total of $70,000. Although the plaintiff has done 25% better than the joint offer, because the offer was not apportioned, the Court does not know whether the offer should be treated as a $25k/25k offer, for example, in which case both defendants would be liable for fees and costs, or whether it was intended as a $10k/$40k offer, in which only one of the defendants would be liable.

The Supreme Court has held, in effect, that an ounce of prevention in eliminating such ambiguities will make the offer of settlement procedure work better in all cases. An accepted joint offer would be enforced as a contract. Because, however, such offers do not comply with the apportionment requirement of Rule 1.442(c)(3), they are invalid as statutory offers and cannot serve as a basis for an order requiring the payment of attorneys' fees, even if (for example) both offerees lost completely at trial. In essence, the Supreme Court's apportionment rulings are a drafting lesson to counsel, who must either make separate offers to separate offerees (allowing acceptance of one or the other), or if one offer is made, specify the amount attributable to each recipient. The Court has essentially created a right for each offeree to "evaluate the offer as it pertains to him or her."[33]

The Supreme Court's decisions appear to have a corollary: if each offeree has the right to separately evaluate an offer as to him or her, then statutory offers cannot be "all or none." This turns out to be sensible and to avoid absurd results. Take a case where a joint offer – which by

its terms requires acceptance by both parties – is acceptable to one party, but not to the other. For example, a plaintiff might make a joint "all or none" demand for $50,000, apportioned 50/50 between defendants Willing and Reject. Willing wants to accept, but Reject does not. In these facts, there can be no settlement (because under the terms of the "all or none" offer Willing does not have the option of accepting without Reject's acquiescence). In this example any defendant ultimately found liable for more than $31,250 (125% of the demand made by plaintiff) would ordinarily be responsible for [some portion of] the plaintiff's attorneys' fees. Would this same result apply to create liability for the party which wanted to accept the offer (but was not able to because of its "all-or-nothing" nature)? Even worse, if the plaintiff recovers $40,000 against Willing, and loses against Reject, can he recover all of his fees from Willing (the party which wanted to settle)? These unpalatable results are prevented by the Supreme Court's creation of a right of individual "evaluation" for each offeree.

One application of the apportionment requirement which has created some resistance arises when statutory offers are made to or from parties whose legal position is identical. For instance, in *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005), the defendants were the driver of an automobile and the driver's spouse, whose liability (if any) was purely vicarious. The plaintiff made an unapportioned offer, arguing that there was no way to rationally apportion the identical liability between two defendants. In a variety of opinions acknowledging the practical problem, the Court held that the Rule meant what it said and apportionment was required in offers of judgment. Judge Quince's majority opinion stated that "it may take some creative drafting to fashion an offer of settlement when one party is only vicariously liable. However, we are confident that the lawyers of this State can and will draft an offer that will satisfy the requirements of the rule."[34] Hoping that the Supreme Court's confidence is well-placed, one

way to resolve the practical conundrum is as follows: the offeror should make identical offers to each party in the desired amount, with a condition (clearly stated) that only one of the offers may be accepted.[35]

(4) Are Partial Statutory Settlement Offers Allowed?

May a partial settlement offer – in other words, a statutory offer which disposes of less than the entire case between a plaintiff and a defendant – operate to trigger sanctions under §768.79? Rule 1.442(2)(B), in allowing the specification of "the claim or claims the proposal is attempting to resolve," may be construed to allow partial offers of settlement between particular parties. Does this language allow a plaintiff or defendant to trigger an entitlement to attorneys' fees by an offer of judgment which "cherry picks" the strongest or weakest count in the plaintiff's complaint for a settlement proposal? May a plaintiff, for example, make an offer of settlement within §768.79 as to a counterclaim, while leaving the rest of his case intact? Will the courts have to resolve motions for attorneys' fees under §768.79 prior to trial because of a legal defect in one of five pending counts in a still-to-be-resolved complaint?

The Legislature intended to financially penalize the rejection of offers of judgment, so that settlements and the early termination of litigation would be encouraged. The legislative intent was to encourage the settlement of entire cases, at least as between the offeror and offeree. The very use of the word "judgment" in the statute reflects this understanding: Florida law in general allows only one judgment per case as between one set of parties.[36] The statute's key requirement to compare the "offer" to the "judgment" in computing whether to make fee and cost award contemplates a process that occurs one time, at the conclusion of a case, and includes all claims between the parties.[37] If an offer of settlement may be used only in situations where offers of judgment could be employed, again the inference is clear that an offer under §768.79 must encompass all claims and counterclaims between the offeror and offeree.

If, indeed, the legislative language and intent would only attach the statutory consequences to offers which would resolve the entire case as between offeror and offeree (as would a judgment), the legislative intent must be enforced, and no partial offers of settlement or judgment may be allowed. As the Florida Supreme Court has held, "the circumstances under which a party is entitled to costs and attorneys' fees is substantive and that our rule can only control procedural matters."[38] Thus, any attempt to read Rule 1.442 as broadening the remedy of attorneys' fees and costs award beyond the circumstances allowed or contemplated by the legislature (even if that were the Supreme Court's intention) would be invalid under Florida's separation of powers principles.

The Second District, in dictum in the *Wagner v. Brandeberry*, 761 So.2d 443 (Fla. 2d DCA 2000), suggested that settlements of less than all claims between the same parties might be allowed in statutory offers of judgment.[39] The Court's dictum did not address the underlying constitutional separation of powers issues. Two other cases have cited the *Wagner* dictum for the proposition that partial offers ordinarily would be valid to trigger sanctions, again without referring to the separation of powers issue, although in each case the court found the partial offer before it invalid on other grounds.[40] In fact, no reported Florida case has yet made a financial award based on a partial offer of judgment.

Leaving aside the separation of powers issue, as a matter of public policy, the use of partial offers of judgment or settlement as the basis for sanctions motions is ill-advised. While some streamlining of issues might result,[41] a partial settlement regime would create manifest practical problems and would generate limitless collateral litigation. Very often a plaintiff will bring essentially the same claim under alternative theories – for instance, breach of contract, breach of implied contract, and quantum meruit. A plaintiff prevailing on a breach of contract

theory should not face a motion for sanctions as to a claim for quantum meruit because of an offer of settlement limited to that count. Nor should the court have to address, long before final judgment, a motion for offer of settlement sanctions because a motion to dismiss or for summary judgment was granted as to one count as to which the defendant had lodged an offer of settlement. Another consequence of allowing partial offers of settlement to receive sanctions under §768.79 would be endless, often irresoluble, disputes about the apportionment of attorneys' fees between one interrelated claim and another.

Conclusion

The Florida offer of settlement procedure has made a dramatic impact in many cases. Its impact will only increase as the Bar's familiarity with statutory offers of judgment grows. Addressing unsettled issues of offer of judgment practice with due appreciation for both the legislative intent and practical considerations affecting the courts in application of §768.79 should maximize the benefits of the statute, while providing needed and appropriate fairness and clarity for the Bar and parties.

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[1] Laws 1990, ch. 90-119, §48. See generally *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 218-22 (Fla. 2003).

[2] Under Rule 1.442(a), offers of judgment and settlement may be used interchangeably, with the same consequences in the case of rejection, depending on whether the offeror wishes (or does not wish) a judgment to be entered. See *Abbott & Purdy Group Inc. v. Bell,* 738 So.2d 1024 (Fla. 4th DCA 1999) (plaintiffs who accepted offer of settlement were not entitled to entry of judgment; "a common reason for settling a lawsuit is to avoid a judgment of record").

[3] *In re Amendments to Florida Rules of Civil Procedure,* 682 So.2d 105 (Fla. 1996) (effective January 1, 1997).

[4] *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 222 (Fla. 2003) (award of attorney fees "is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer," thus "unnecessarily continuing the litigation.") While the rejection, with hindsight, is "presumed" unreasonable, the rejection need not have been unreasonable under the circumstances at the time to trigger sanctions. *TGI Fridays v. Dvorak*, 663 So.2d 606, 613 (Fla. 1995) ("reasonableness of the rejection is irrelevant to the question of entitlement" although it may be pertinent to the amount to be awarded).

[5] A recent judicial criticism of the "one-sided" nature of the offer of judgment procedure is found in *Hauss v.*

Waxman, 914 So.2d 474, 478 (Fla. 4th DCA 2005) (Farmer, J., concurring). The statutory provision which authorizes trial courts to deny remedies to offers not made in good faith is §768.79(7)(a). See, e.g., *Stewart Select Cars v. Moore*, 619 So.2d 1037, 1039 (Fla. 4th DCA 1993), where it was held an offer was not made in "good faith" because it was "insufficient" in the trial court's judgment. The highwater mark of judicial hostility to nominal offers from defendants was *Eagleman v. Eagleman*, 673 So.2d 946 (Fla. 4th DCA 1996) (Pariente, J.) ($100 offer held void; "courts should view with considerable skepticism nominal offers which bear no relationship to damages and which are not founded upon a reasonable and realistic assessment of liability.") The Fourth District has since rejected the *Eagleman* analysis without expressly overruling the case. *Fox v. McCaw Cellular Comm.*, 745 So.2d 330 (Fla. 4th DCA 1998); *Ryan v. Lobo de Gonzalez*, 841 So.2d 510, 521-22 (Fla. 4th DCA 2003) (upholding $100 offers). The Third District, in a recent case, affirmed a finding that a $500 nominal offer by a prevailing defendant was not in good faith because "the defendant had at least some exposure". *Event Services America Inc. v. Ragusa*, -- So.2d --, 2005 WL 1875705 (Fla. 3d DCA 2005). Why the defendant's own evidence of no liability (which convinced the jury) did not create a "reasonable foundation" for the nominal offer was not explained. The *Ragusa* decision is in apparent conflict with other cases, see notes 6 and 7 infra.

[6] E.g., *State Farm Mutual Auto. Ins. Co. v. Marks*, 695 So.2d 874, 875 (Fla. 2d DCA 1997) (one dollar offer valid as defendant's statement "that it believes it has no liability and should not be a part of the litigation"); *Dean v. Vazquez*, 786 So.2d 637, 640 (Fla. 4th DCA 2001) (nominal offer in good faith under "reasonable foundation" test); *Levine v. Harris*, 791 So.2d 1175, 1177-79 (Fla. 4th DCA 2001) ($500 offer held to be in "good faith" although trial court found offer was a "drop in the bucket" compared to amount at stake); *Lieff v. Sandoval*, 726 So.2d 335,336 (Fla. 3d DCA 1999) (motive to trigger right to fees is not "bad faith"); *Camejo v. Smith*, 774 So.2d 28 (Fla. 2d DCA 2000) ($100 offer in good faith when there was a reasonable basis for defendant to believe he had no liability); *Hartley v. Guetzloe*, 712 So.2d 817 (Fla. 5th DCA 1998) (extreme closeness of issues irrelevant); *Dept. of Highway Safety v. Weinstein*, 747 So.2d 1019 (Fla. 3d DCA 2000) (nominal offer in good faith where defendant's evidence was that there was no negligence; rejecting requirement to be "realistic" or objectively reasonable). These holdings follow the Supreme Court's holding in *TGI Fridays v. Dvorak*, 663 So.2d 606, 613 (Fla. 1995), in the context of a prevailing plaintiff's motion for fees, that the "reasonableness" of rejection, and by necessary implication of the offer itself, are "irrelevant" to entitlement to fees and costs under the plain and "mandatory" language of the statute.

[7] *McMahan v. Toto*, 311 F.3d 1077, 1083-84 (11th Cir. 2002) (applying §768.79).

[8] §768.79(7)(b) provides for consideration of such factors as the "closeness" or "apparent merit" of the case in determining the *amount* of an attorneys' fee award under the statute. As stated by the Supreme Court in *Sarkis v. Allstate*, these statutory factors may be the basis for a discount of otherwise "reasonable" fees (25% in one case mentioned by the Court). 863 So.2d at 214 n.2.

[9] Algebraically, the breakpoint for the defendant's Offer "O" to exceed the expected Judgment "J" by 25% is determined by solving the equation $O - J = .25O$. The solution is that $J = .75O$, so that O equals J divided by ¾, or times 4/3. In other words, for a defendant to give an offer that will exceed the amount of an expected judgment by 25%, the offer must be one-third more than the expected judgment.

[10] §768.79(6)(a) ("When such costs and fees [awarded per the statute to a defendant] total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff . . ."). The procedural aspects of the statute are pre-empted by Rule 1.442(g), which requires a post-judgment motion for fees under Rule 1.525 within 30 days. In cases where the amount of fees would reduce or eliminate the judgment, a prudent party should file a motion to alter or amend under Rule 1.540(g) within 10 days to prevent possible enforcement of the judgment during the pendency of the motion for fees under Rule 1.442.

[11] Again, a detour into algebra: for Plaintiff's Demand "D" to be 25% less than the Judgment "J," $J - D = .25D$, or J equals 1.25 times D. The breakpoint demand is thus 4/5 (the inverse of 5/4) of the judgment expected by the plaintiff. In other words, the demand from the plaintiff should be at least 20% less than the amount of the expected

judgment.

[12] *Wisconsin Life Ins. Co. v. Sills*, 368 So.2d 920, 922 (Fla. 1st DCA 1979).

[13] *White v. Steak and Ale of Florida, Inc.*, 816 So.2d 546, 551 (Fla. 2002) requires the determination of costs and, where applicable, fees, "up to the date of the offer" in computing whether the "judgment obtained" is or is not 25% less favorable than the rejected offer of settlement.

[14] Terms such as "invalid" or "allowable" are shorthand for "may be used to trigger liability for sanctions under §768.79 if rejected." Any of these offers, if accepted, will create valid and enforceable contracts. *Travelers Ins. Co. v. Horton*, 366 So.2d 1204, 1205 (Fla. 3d DCA 1979) (validity of settlement offers governed by contract law).

[15] *McMullen v. ISS Intl. Service System, Inc.*, 698 So.2d 372, 374 (Fla. 2d DCA 1997) (offer by prevailing defendant of judgment which was exclusive of "such interest, costs, and attorneys' fees as the court may award" was "impermissibly conditional" and invalid as the basis for sanctions since both entitlement and amount of attorney fee issues would have remained).

[16] *State Farm Life Ins. Co. v. Bass*, 605 So.2d 908, 909 (Fla. 3d DCA 1992) (offer of judgment "exclusive of costs and attorneys' fees" which would "be agreed to or determined by the court at a later date" held defective as not "stat[ing] the total amount of the offer"); *Perez v. Circuit City Stores Inc*., 721 So.2d 409 (Fla. 3d DCA 1998) (citing *Bass* for proposition that "in order for a plaintiff to preserve his entitlement to attorneys' fees, the plaintiff's demand must include costs"). The Eleventh Circuit in the *McMahan v. Toto* case, supra, 311 F.3d at 1082 (without recognizing the conflict in Florida law) treated *Bass* as an accurate statement of Florida law.

[17] *Siedlicki v. Arabia*, 699 So.2d 1040, 1042 (Fla. 4th DCA 1997) (demand for judgment which excluded costs and attorneys' fees was valid; "a plaintiff need not include taxable costs or attorneys' fees otherwise provided for by statute and rule", recognizing conflict with *Bass*); *Hellman v. City of Orlando*, 610 So.2d 103 (Fla. 5th DCA 1992) ("failure to state claimed costs in a dollar amount does not invalidate an otherwise valid offer of judgment"). The Third District addressed these cases in *Clinica Lourdes v. Miro*, 713 So.2d 1062, 1063 n.1 (Fla. 3d DCA 1998) (settlement offer which provided that issues relating to attorneys' fees would be "submitted to and determined by the court" invalid as indefinite; footnote 2 stated, with no explanation, that this result was actually not contrary to *Siedlicki* or *Hellman*). *Miro* may suggest (contrary to *Perez*) that a simple exclusive offer allowing the assessment of costs (and fees) might be upheld, while one referring to the court's power to make the assessment would not be.

[18] *White v. Steak and Ale of Florida, Inc.*, 816 So.2d 546 (Fla. 2002). The Court ruled that, in determining whether an inclusive offer was 25% better than the actual judgment, the Court must consider the offeree's right to costs and fees as of the time of the offer and add any such amounts to the "judgment obtained" for purposes of the 25% computation. In a partial dissent, Justice Harding noted the conflict between the districts as to whether exclusive offers were allowed and suggested that the Court might consider a requirement that "all future offers [] be inclusive of costs." *Id.* at 552-53. The majority did not address whether offers "exclusive" of costs or fees are or should be allowed.

[19] See, e.g., *BMW of North America v. Krathen*, 471 So.2d 585 (Fla. 4th DCA 1985).

[20] *Earnest & Stewart, Inc. v. Codina*, 732 So.2d 364, 368 (Fla. 3d DCA 1999) (Cope, J., concurring) (comparison of offer to judgment under § 768.79 "breaks down" if settlement conditions go beyond what is obtainable in case of judgment).

[21] *Nichols v. State Farm Mutual*, 851 So.2d 742, 746 (Fla. 5th DCA 2003).

[22] *Nichols v. State Farm Mutual*, 851 So.2d 742, 746n.3 (Fla. 5th DCA 2003) (general release addressing other

claims).

[23] *Nichols*, supra note 23; *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) (broad covenant not to sue the defendant in the future); *Connell v. Floyd*, 866 So.2d 90 (Fla. 1st DCA 2004) (settlement offer which included a condition of a finding that the offeror "prevailed" was invalid because of its possible effect on other claims between the parties).

[24] E.g., G. Pappas and J. Walford, Proposals for Settlement: More Traps for the Unwary, 76 Fla. Bar J. 69 (Dec. 2002).

[25] The description of releases as "general" or "limited" is not always clear, as there are unlimited variations on the release theme. Herein, a "limited release" is one which relinquishes only the litigated claims, and perhaps, certain closely related and similar claims, while a "general release" extinguishes any claims whatsoever against the released party, such as the release enforced in *Cerniglia v. Cerniglia*, 679 So.2d 1160, 1165 n.4 (Fla. 1996).

[26] *1 Nation Technology Corp. v. A1 Teletronics, Inc.*, -- So.2d --, 2005 WL 1457729 (Fla. 2d DCA 2005); *Gulf Coast Transportation Inc. v. Padron*, 782 So.2d 464, 466 (Fla. 2d DCA 2001); *Earnest & Stewart Inc. v. Codina*, 732 So.2d 364, 366 (Fla. 3d DCA 1999); *Kaplan v. Goldfarb*, 777 So.2d 1208 (Fla. 2001); *Delpa Inc. v. Martinez*, 878 So.2d 455 (Fla. 3d DCA 2004).

[27] *Ambeca Inc. v. Marina Cove Village Townhome Ass'n.*, 880 So.2d 811 (Fla. 1st DCA) (dispute as to whether that release of "any other claims which [offeree] may have" was valid).

[28] *Earnes & Stewart Inc. v. Codina*, 732 So.2d 364, 367 (Fla. 3d DCA 1999) (dispute as to whether the requirement of an indemnity agreement was valid).

[29] For example, in *Plumpton v. Continental Acreage Dev. Co.*, 830 So.2d 208 (Fla. 5th DCA 2002), a general release extinguished claims unrelated to the litigation which led to the signing of the release. Whether a general release in particular provides more benefit than a limited one in practice depends on whether more than one claim or right exists as between the parties – which may or may not be known to the court or apparent of record.

[30] The Fifth District in *Morgan v. Beekie*, 879 So.2d 110 (Fla. 5th DCA 2004) held that a condition that the offeree "demonstrat[e] his ability to pay" was invalid for §768.79 purposes as ambiguous.

[31] *Allstate Indemnity Corp. v. Hingso*n, 808 So.2d 197, 199 (Fla. 2002); *Willis Shaw Express Inc. v. Hilyer Sod Inc*., 849 So.2d 276 (Fla. 2003); *Lamb v. Matetzschk*,, 906 So.2d 1037 (Fla. 2005).

[32] *Allstate Indemnity Corp. v. Hingson*, 808 So.2d 197, 199 (Fla. 2002).

[33] *Hingson*, 808 So.2d at 199 (quoting lower court opinion).

[34] *Id.* Despite the Supreme Court's consistency on the subject, resistance continues to exist. See generally J. Luyster, Drafting and Analyzing Joint Proposals for Settlement, 80 Fla. Bar. J. 8 (January 2006). The First District in *Heymann v. Free*, -- So.2d --, 2005 WL 2179733 (Fla. 1st DCA 2005) requested an amendment of Rule 1.442 to change the result of the *Lamb* case. A special concurrence in *Hauss v. Waxman*, 914 So.2d 474 (Fla. 4th DCA 2005) challenged the Supreme Court's reasoning in *Lamb* and *Willis Sod*. Similarly, the Court in *Fiedler v. Weinstein Design Group*, 891 So.2d 1095, 1095 (Fla. 4th DCA 2005) opined that a result contrary to *Lamb* for vicariously liable defendants might be "better reasoned." *Hall v. Lexington Ins. Co*., 895 So.2d 1161 (Fla. 4th DCA 2005) was arguably inconsistent with *Lamb* in holding that an unapportioned offer to two plaintiffs who were jointly pursuing one "unified" claim was valid under §768.79.

[35] For another alternative, see the bookend offers made to jointly liable parties in *Hess v. Walton*, 898 So.2d 1046 (Fla. 2d DCA 2005).

[36] E.g., *McGurn v. Scott*, 596 So. 2d 1042, 1045 (Fla. 1992).

[37] The conclusion that the legislature only contemplated offers which would encompass resolution of the entire case in a manner similar to judgments is confirmed by the statutory provision that "the offer shall be construed as including all damages that may be awarded in a final judgment." §768.79(2).

[38] *Timmons v. Combs*, 608 So.2d 1, 2 (Fla. 1992); accord *In re Amendment to Florida Rules of Civil Procedure*, 682 So.2d 105, 105-06 (Fla. 1996) (disclaiming ability to address issues of entitlement to fees and costs under Rule 1.442 via rule; "we conclude that we must respect the legislative prerogative to enact substantive law").

[39] *Wagner v. Brandeberry*, 761 So.2d 443 (Fla. 2d DCA 2000) held that an offer by one defendant triggered the right to sanctions against a plaintiff, even if it did not completely resolve the litigation as to the plaintiff – an unimpeachable result. The Second District (in dictum) stated that "[n]othing in either the statute or the rule requires that a proposal settle all claims between all parties, *or even all claims between the parties to the proposal*." *Id.* at 447 (emphasis added). The cases cited in *Wagner* all involved, like *Wagner*, settlements offers resolving in full claims between one set of parties. The Florida courts have no difficulty in validating offers of judgment which would resolve the entire dispute between the offeror and offeree, even if one or both would remain in the case due to disputes with other parties. E.g., *State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So.2d 874 (Fla. 2d DCA 1997). This is to be expected given that Florida law (unlike federal law) routinely contemplates multiple final judgments in one case, one for each set of parties. E.g., *Holton v. H.J. Wilson & Co., Inc.*, 482 So.2d 341, 344 (Fla. 1986); *State Farm Mut. Ins. Co. v. American Hardware Mut. Ins. Co.*, 345 So.2d 726, 728 (Fla. 1977); Fla. R. App. P. 9.110(k) (partial final judgment disposing of entire case as to one party explicitly addressed). One should not, however, unreflectively apply principles applicable to the multiple party situation (where multiple judgments are allowed by Florida law) to the multiple claim situation between one set of parties (where they are not).

[40] *Lucas v. Calhoun*, 813 So.2d 971 (Fla. 2d DCA 2002); *Connell v. Floyd*, 866 So.2d 90 (Fla. 1st DCA 2004).

[41] Compare *Allstate Ins. Co. v. Materiale*, 787 So.2d 173, 176-77 (Fla. 2d DCA 2001) (Casanueva, J., concurring) (addressing separate parties' claims).