



# “FLORIDA MAN” STRIKES AGAIN: \$1000 AN HOUR ATTORNEYS’ FEES

Christopher Barkas and Kyle Weaver Carr Allison

If you spend any time on social media, you’ve no doubt heard of “Florida Man.” The @FloridaMan Twitter account details the colorful exploits of the Sunshine State’s most famous citizen. Among his, shall we say, “highlights” are: “Florida Man breaks INTO jail to hang out with friends,” and our personal favorite, “Florida Man charged with assault with a deadly weapon after throwing alligator

through drive-thru window.” No need to belabor the point, as we are sure you now understand that aside from the natural beauty and (mostly) desirable climate of our fair state, it can be a strange place to live.

The strangeness and uniqueness of our state does not stop with Florida Man’s antics, and frequently spills over into Florida’s courts. Unlike @FloridaMan, the headlines

emanating from Florida’s courtrooms are no laughing matter. Many Florida litigants are surprised to learn just how strange Florida is when confronted for the first time with Florida’s Proposal for Settlement (“PFS”) statute. The statute can result in defendants paying \$800 to \$1,000 an hour for the plaintiff’s attorneys’ fees after trial, and fee judgments (in addition to the jury verdict) exceeding \$500,000.

**IN 1986, FLORIDA MAN (WITH A MULLET) ENACTED TORT REFORM MEASURES THAT EVENTUALLY PRODUCED FLA. STAT. § 768.79.**

Traditionally, parties to a lawsuit pay their own attorneys' fees whether they win or lose a lawsuit. This is the "American Rule." Florida Man, ever mindful of his need to be different, altered the "American Rule," with Section 768.79. The Statute requires the party which rejected an offer to settle to pay the offering party's post-offer attorneys' fees and costs if the net verdict after trial fails to meet the threshold defined in the statute. A plaintiff's PFS is successful (causing the defendant to pay post-offer attorneys' fees and costs) if the net judgment recovered is 125% above the amount of the PFS. On the other hand, a defendant's PFS is successful (causing the plaintiff to pay post-offer attorneys' fees and costs) if the plaintiff fails to obtain a net judgment of at least 75% of the defendant's offer.

Assume the plaintiff filed a lawsuit on January 1, 2010. Defendant filed a PFS to plaintiff for \$10,000 on July 1, 2010. There was no response, so the proposal was deemed rejected. The case went to trial on December 1, 2010, where the plaintiff obtained a \$15,000 verdict. The judge reduced the jury verdict for collateral source payments of \$10,000. The court then considered evidence (by way of attorney affidavit) of the plaintiff's costs during the period January 1, 2010 – July 1, 2010. The costs were \$2,000 (filing fees, copies, transcripts, etc.). The net judgment calculation is:

Jury Verdict:	\$15,000
Set Offs (Collateral Sources):	-\$10,000
Plaintiff's Pre-Offer Costs:	+ \$2,000
<b>Net Judgment:</b>	<b>\$7,000</b>

The net judgment did not exceed the 75% threshold (\$7,500), so the plaintiff is liable for the defendant's attorneys' fees and costs from July 1, 2010, through trial. In all likelihood, the defense fees/costs exceed the \$7,000 net judgment, so a money judgment is actually entered in favor of the defendant, and the defendant may pursue its fee award from the plaintiff (though most are judgment proof).

Another hypothetical, except here, the plaintiff filed the PFS for \$10,000 and obtained a jury verdict for \$25,000. The judge reduced the jury verdict for collateral sources, considered evidence of the plaintiff's pre-offer costs, and determined the net judgment as follows:

Jury Verdict:	\$25,000
Set Offs (Collateral Sources):	-\$10,000
Plaintiff's Pre-Offer Costs:	+ \$2,000
<b>Net Judgment:</b>	<b>\$17,000</b>

The net judgment exceeds 125% (\$12,500) of the plaintiff's proposal for settlement, so the defendant is liable for the plaintiff's attorneys' fees and costs from the filing of the PFS through trial.

The plaintiff can serve a proposal on a defendant beginning 90 days after service, and as many times as they like until 45 days before trial. Similarly, a defendant may serve a proposal on a plaintiff beginning 90 days after suit is filed, and as many times as they like until 45 days before trial.

**ABUSE BY THE PLAINTIFF'S BAR**

The examples above are simple, as they only address situations involving one plaintiff and one defendant. Proposals may also be served in cases where there are multiple defendants. In Florida trucking cases, the most common claims are for the direct or "active" negligence of the truck driver, and vicarious liability (under the *Dangerous Instrumentality Doctrine*, or respondeat superior) against the trucking company. A growing trend among plaintiff lawyers is to serve two proposals simultaneously: one to the company and one to the driver. One (usually the driver's) will be substantially lower than the other. The jury's verdict (in vicarious cases) is not apportioned between the driver and the company, so the "low ball" proposal has a high likelihood to succeed at trial and result in payment of plaintiff's attorneys' fees if the low ball PFS is rejected.

For example, a plaintiff may serve a proposal to the trucking company for \$750,000 and a proposal to the driver for \$75,000. At trial, the plaintiff in the hypothetical must simply recover a net judgment of \$93,750 to be entitled to attorneys' fees. It does not matter that the driver has no money and is covered by the same insurance or self-insured funds as the company defendant. If the low-ball proposal is rejected by the defendant, the plaintiff lawyer (...is thrilled and...) uses the expired proposal to negotiate a much higher settlement because of the anticipated (and ludicrous) attorneys' fee award after trial. Unfortunately, the practice of splitting PFSs between company and driver is well established, and its "legality" (though logically and morally wrong) has been confirmed on numerous occasions.

After a defendant rejects a PFS, a growing trend among plaintiff firms is to have multiple attorneys unnecessarily attending events (depositions, trials, hearings) where they do not participate, and are merely there to drive up fees. Florida trial courts are routinely awarding plaintiff attorneys \$500/hour, and in one recent routine small automobile case, the court awarded \$1,000 an hour for the senior partner. In that case, the

insurer refused to tender its \$25,000 limits. The attorney fee award against the insured after trial was nearly \$1,000,000.

Unfortunately, the same fee risk does not apply to the plaintiffs under the law, or in practical reality. Defendants are limited to recovery of fees according to their contract rate with their defense lawyers, and let's face it, most plaintiffs are judgment proof, so there are probably no assets to collect an attorney fee judgment from if the defendants prevail at trial.

**COMBATING THE PROPOSAL FOR SETTLEMENT**

It is possible to use counter-PFSs to combat the plaintiff's PFS and shift the risk back to the plaintiff. Often, the best defense against the proposal is a strong offense. Because the first proposal from the plaintiff may arrive as little as 90 days after service of the lawsuit, aggressive discovery must be undertaken from the outset of the case so there is enough information available to evaluate the case when the Proposal arrives. The plaintiff's deposition should be taken as soon as possible in the first 90 days. There are also insurance products available to both plaintiffs and defendants which can provide up to \$250,000 of insurance if a proposal creates liability for the party. However, in our experience, the insurance for most commercial defendants is of dubious value.

Unfortunately, absent legislation, the wild alligator that is Florida's Proposal for Settlement statute is here to stay. If you do business in Florida or have Florida claims, you must be on guard against Florida Man and his Proposals for Settlement.



*Christopher Barkas, a native "Florida Man," is a shareholder in Carr Allison's Tallahassee, Florida office. His career began as a prosecutor in Miami, Florida. He now defends transportation, employment, products liability, and retail claims. He graduated from Florida State University and Cumberland School of Law.*



*Kyle Weaver, also a native "Florida Man," is an associate in Carr Allison's Tallahassee, Florida office. His practice is dedicated to the defense of transportation claims across Florida, South Georgia and South Alabama. He graduated from Florida State University and Cumberland School of Law.*

He graduated from Florida State University and Cumberland School of Law.