

Seven Deadly Sins of Plaintiff Offers of Settlement

by Daniel D. Hannula

The statute on offers of settlement, §807.01 Wis. Stats., has four separate and distinct sections. Two sections are for defendant offers, one is for plaintiff offers, and one section, regarding the payment of interest on rejected offers, is intended to apply to either party.

A defendant may make an offer of judgment with costs, §807.01(1). If accepted, this type of offer ends the case for this defendant. A defendant may also make an offer of damages, §807.01(2). This offer, if accepted, permits the defendant to continue its defense. If the defendant loses at trial, then damages will be assessed against that defendant in the amount of the accepted offer. This generally tends to be a have-your-cake-and-eat-it type of offer. The defendant still fights over liability, but tries to set a ceiling on damages should it lose that battle.

The plaintiffs' offer of settlement section, §807.01(3) Stats., works like the first section on defense offers. If accepted, it ends the case for that defendant.

The final section, §807.01(4), gives any party who makes an offer that is not accepted 12% interest on the amount recovered by that party from the date of the offer until paid.

This article is intended to lay out some basic rules on plaintiff offers of settlement that every plaintiff's attorney should know. I call these basics the seven deadly sins that are sometimes made by plaintiff attorneys.

All plaintiffs' attorneys must be aware of two statutory sections that govern plaintiffs' offers. One, §807.01(3), for double costs, and the other, §807.01(4), for 12% interest. It's important to know that double costs and interest come from two sections because they function differently. To get double costs, you must get a *more favorable* judgment than your offer. That is, you have to beat your offer. To get 12% interest, you must get an *equal or greater* amount than your offer. That is, just getting as much as your offer is sufficient for 12% interest.

An offer to settle will apply in any case tried in Wisconsin, even one tried in federal court.¹ However, your case must be a *litigated* case. An offer will not get you interest and double costs if it ultimately ends through arbitration.²

The sections on offers for both defendants and plaintiffs give the other party a ten day window to accept the offer. However, you may revoke your offer at any time within that ten days.³ Your offer, under the terms of the statute, expires after that ten day window.⁴ An offer works even if you are suing over liquidated damages.⁵ And, offers of settlement can get your

client double costs and interest over and above any liability caps⁶ as well as over and above the limits of any liability policy.

From my observations it appears that plaintiff offers of settlement are not used nearly as often as they could be. I think this stems, in part, from the fact that offers can sometimes get complicated. I have collected what I think are some of the basic mistakes made in making offers by plaintiffs' attorneys. This article will concern itself primarily with plaintiff offers although we will discuss defense offers a little bit along the way. I call my plaintiff mistakes the seven deadly sins of plaintiff offers.

Sin One: Failure to Make an Offer of Settlement

An offer of settlement under §807.01(3) and (4) can be a powerful tool for settlement and a simple way to double your costs and get extra interest. It costs nothing to do. The only down side risk is that your offer doesn't settle the case and doesn't work to get double costs and interest. In short, you have to have an unusual case to justify not making any offer at all. So, it makes sense to incorporate an offer of settlement into the checklist of "to dos" for every plaintiff's case.

Sin Two: Making an Ambiguous Offer

To get double costs and 12% interest, your offer of settlement must be clear and unambiguous. That means your offer needs to be in writing and should state, on its face, that it is an offer of settlement under §807.01. A mere offer in a settlement letter, even if it is an enforceable offer, is not good enough.⁷ You can just squeak by with an offer of settlement on a legal form containing the caption of the case and a statement containing the amount of the settlement offer with costs.⁸ But why be so sloppy? Make your offer in writing, make it in the form of a pleading entitled "Offer of Settlement, §807.01." In the body of your offer cite the two specific sections that apply to plaintiffs' offers, §807.01(3) [for double costs] and §807.01(4) [for 12% interest]. State clearly, using the words of the statute where you can, that the plaintiff [name him or her] hereby makes an "offer of settlement" for the "sum" of [state with clarity the exact amount it will take to settle the case]⁹ "with costs."¹⁰

The statute refers to the offer as being "served." There are no cases that specifically explain what that means. From the cases it appears that informal service may suffice. Don't chance it. If you file the original offer with the clerk, Wisconsin law deems that a copy was duly served upon the opposing party.¹¹ If you choose not to file your offer with the clerk, consider serving your offer with a process server so that you have proper proof of service.

Sin Three: Failure to Account for Subrogated Claims

In every personal injury action, the plaintiff will have medical bills. These are often paid under a health policy or the med pay section of an auto policy. We all know that this gives those carriers a separately enforceable claim against the defendant. If you do not account for these subrogated claims in your offer of settlement, it could be an invalid offer. In short, the courts have interpreted §807.01 to require that the defendant has to be able to fully and fairly evaluate its exposure.¹² The defendant cannot do this if it doesn't know whether or not the offer includes or excludes the subrogated claims. It is your obligation to make your client's offer clear and unambiguous.

So, to clear up the ambiguity, simply state in your offer that your offer *excludes* the subrogated claims, *includes* those claims, or make a dual offer with an amount that excludes the subrogated claims and a different amount that includes those subrogated claims.¹³ In most cases you will want to make an offer that will get rid of any subrogated claims. Language such as the following should be sufficient:

“This offer includes all the reasonable and necessary medical expenses incurred as a result of the accident which is the subject of this action. Plaintiff will protect defendant from any subrogated claims related to these expenses.”

Sin Four: Making Your Offer for Exactly the Amount of the Policy Limits

Don't forget that your claim for 12% interest and double costs on a rejected offer comes from two different statutory sections. To get 12% interest on a judgment from the date of your offer, your judgment only needs to be *greater than or equal* to the offer.¹⁴ But, to get double the taxable costs, the plaintiff needs to recover *a more favorable judgment*.¹⁵

Since you can't get a judgment against a liability insurer for more than its limits,¹⁶ it would be wise to make your offer for less than those limits in order to guarantee that the double costs section will kick in. In some cases this is not a concern; those limits are way above your offer. But, in other cases you and your client may be willing to take the limits even though you conclude that a verdict may come in for more than that amount. In that case, make your offer for a few dollars less than the limits. For example, offer to settle for \$49,995 when there is a \$50,000 policy. That's a \$5 risk well worth taking. If you offer to settle for \$50,000, you only stand to get 12% interest and not the double costs from the liability carrier.

By the way, the 12% interest is calculated on those same policy limits as well.¹⁷ Unfortunately you cannot get 12% interest from the insurance carrier on the amount of the verdict over its limits unless its policy language specifically allows for it. In most cases it won't. So, in the example above, assuming your offer was \$49,995, the limits of liability were \$50,000 and the

jury returns a verdict for \$60,000, then you may claim from the liability carrier double costs and 12% interest only on \$50,000.

Sin Five: Making One Offer to Multiple Defendants

Now this sin is a bit tricky because there is an important exception. By trying to avoid this sin in all situations you could make your offer ambiguous and hence invalid. Let me explain. If you have more than one defendant, generally you cannot make one joint offer to all of them. If you did that, then each defendant would be unable to fully and fairly evaluate its separate exposure.¹⁸ Since each defendant cannot do that, your offer is invalid. Let me give you an example; your client is injured in a three-car pileup. There are two defendants, each sharing a percentage of fault for your client's injuries. If you make a joint offer to both defendants, they will be unable to determine how much of that amount they should each pay. In short, you have delegated the job of allocating the percentage of fault to the two defendants to work out between themselves. The two defendants either have to make a deal or one of them has to pay the entire amount of the offer. The rules governing offers of settlement don't allow you to throw a hot potato like this at these two defendants. You have to determine your settlement amount and make the percentage allocation yourself. That means you have to make two separate offers.¹⁹

But, there is an exception to this principle. If you have one party at fault, chances are that you also have an insurer as a separate defendant under the direct action statute. Must you make a separate offer to the insured and one to his insurance carrier? Generally, you should not. In most cases you will be willing to settle for an amount within the policy limits and the insurer has authority to control the defense, including the right to negotiate settlements. The insurance carrier in this case is the only party with a real interest in the offer. So, in those run-of-the-mill type cases, you should make one offer directed to both the insured and his insurance carrier.²⁰ Likewise, in the multiple defendant three-car-pileup situation described above, you should make two offers, one offer to each pair of insureds and insurers.

You would make your offer ambiguous, and hence invalid, by sending two identical offers separately to both the insured and his insurance carrier.²¹ In that case, they would not know whether it's one offer or two. You could also create ambiguity by directing your offer to just the liability insurance carrier. Although I recommend doing otherwise, that mistake will probably not invalidate your offer. Although the offer is ambiguous, it has been held that the insurance company has a fiduciary obligation to its insured to seek clarification.²² But, you should avoid the possibility of a mix-up altogether by addressing your offer to both the defendant and his liability carrier.

Sin Six: Making One Offer for More Than One Plaintiff

For the same reason that you can't make one offer to more than one defendant, you cannot make a joint offer for more than one plaintiff.

If you represent more than one plaintiff, even if they are husband and wife, you are required to make an individual offer of settlement for each plaintiff.²³ Otherwise, like the joint offer to multiple defendants, the defendant is unable to evaluate the offer. The defendant does not know how much will be going to each plaintiff. Furthermore, the value of one plaintiff's claim may be so high that it unfairly leverages the offer or pressures the defendant into accepting the offer. Whereas, if the offer was broken down, the defendant might accept one offer and reject the others. Furthermore, the courts note, the statute talks about offers from a "plaintiff" or "party" not plaintiffs or parties. The undue pressure such an offer makes is probably what motivates a plaintiff's lawyer to send a joint offer in the first place. Well, it won't work. Even if it would work, the plaintiffs would have to figure out a way to divide the settlement amongst themselves. The rules require that the plaintiffs do that *before* any offers are made. In short, you have to make your offer a simple *accept* or *reject* proposition. That means you have to make a separate offer for each plaintiff.

SinSeven: Don't Let Your Offer Get Trumped

Plaintiffs' attorneys need to be aware of the possibility of getting trumped. In short, in some special situations, a defendant can make a counteroffer under the defense offer sections²⁴ that ends a plaintiff's right to recover double costs and 12% interest. It works like this. Plaintiff makes an offer of settlement. The offer is rejected within ten days. Then, at a later date, after the defendant "receives facts which significantly alter the risk assessment of going to trial,"²⁵ the defendant files its own offer to settle for at least the same amount as the plaintiff's original offer. If the plaintiff declines the counteroffer, this could prevent our plaintiff from getting double costs and 12% interest. How does that work? Most insurance contracts do not provide for the payment of interest before entry of judgment. The Court of Appeals has held that this contract language does *not* apply when an offer of settlement has been refused by an insurer.²⁶ But, where the insurer makes a counteroffer under these circumstances, the Court of Appeals will allow such contract language control.²⁷ The courts argue that the defendant did what it was supposed to do when it learned new facts. So, the defendant should not be penalized.

You need to know that this works only in a specific set of circumstances. First, the insurer must have a "good reason" when it rejects plaintiff's offer. Second, the insurer must not have been "negligent" in investigating the facts of the case in the first place. And, third, the reason for the insurer's change of heart must be "material" to the case.²⁸

If this happens to you, review the circumstances to determine if the defendant has trumped your offer should you reject its counteroffer. If so, consider making a new offer in order to get another shot at double costs and 12% interest.

These are some basic sins that plaintiffs can make in offers of settlement. Sometimes the facts of your case will send you back to the cases so that you are sure that you are making a valid and enforceable offer of settlement. I admit, sometimes it can get tricky. However, there is really no excuse for committing sin one. There really is no valid reason for not making an offer of settlement in just about every case.

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Endnotes:

¹ *Data Point Corp. v. M&I Bank of Hilldale*, 665 F.Supp. 722, 728 (W.D. Wis. 1987).

² *Lane v. Williams*, 240 Wis. 2d 255, 621 N.W.2d 922 (2000).

³ *Sonnenburg v. Grohskopf*, 144 Wis. 2d 62, 422 N.W.2d 925 (Ct.App. 1988).

⁴ *Upthegrove Hardware, Inc. v. Pennsylvania Lumbermen's Mutual Ins. Co.*, 146 Wis. 2d 470, 431 N.W.2d 689 (Ct.App. 1988).

⁵ *Graves v. The Travelers Ins. Co.*, 66 Wis. 2d 124, 224 N.W.2d 389 (1974)

⁶ *Gorman v. Wausau Ins. Cos.*, 175 Wis. 2d 320, 499 N.W.2d 245 (1993).

⁷ *Sachsenmaier v. Mittlestadt*, 145 Wis. 2d 781, 429 N.W.2d 532 (Ct.App. 1988).

⁸ *Bauer v. Piper Industries, Inc.*, 154 Wis. 2d 758, 454 N.W.2d 28 (Ct.App. 1990).

⁹ *Cue vs. Carthage College*, 179 Wis. 2d 175, 507 N.W.2d 109, (Ct.App. 1993).

¹⁰ *Stahl v. Sentry Ins. Co.*, 180 Wis.2d 299, 509 N.W.2d 320 (Ct.App. 1993).

¹¹ See §801.14(4), Wis. Stats.

¹² *Ritt v. Dental Care Associates, S.C.*, 199 Wis. 2d 48, 543 N.W.2d 852 (Ct.App. 1995).

¹³ *Testa v. Farmers Ins. Exchange*, 164 Wis. 2d 296, 474 N.W.2d 776 (Ct.App. 1991).

¹⁴ See §807.01(4), Wis. Stats.

¹⁵ See §807.01(3), Wis. Stats.

¹⁶ *Oliver v. Heritage Mutual Ins. Co.*, 179 Wis. 2d 1, 505 N.W.2d 452 (Ct.App. 1993).

¹⁷ *Blank v. USAA Property & Casualty Ins. Co.*, 200 Wis. 2d 270, 546 N.W.2d 512 (Ct.App. 1996),

Nelson v. McLaughlin, 211 Wis. 2d 487, 565 N.W.2d 123 (1997).

¹⁸ *Wilber v. Fuchs*, 158 Wis. 2d 158, 461 N.W.2d 803 (Ct.App. 1990).

¹⁹ *Id.*, *supra*. However, you should know that those same two defendants could, if they wanted, make a deal between themselves and send a single valid joint offer at you. See *Denil v. Integrity Mutual Ins. Co.*, 135 Wis. 2d 373, 401 N.W.2d 13 (Ct.App. 1986). Defendants who are jointly and severally liable may submit joint offers of judgment to an individual plaintiff. However, joint offers by defendants who are only severally liable won't work.

²⁰ You should even make only one offer, which is really directed to just the insurance carrier, when you have two joint and several defendants, where both are covered by the same liability policy. See *Testa*, *supra*.

²¹ *Cue v. Carthage College*, 179 Wis. 2d 175, 507 N.W.2d 109 (1993), although this may have been modified by *Prosser v. Leuck*, *infra*.

²² *Prosser v. Leuck*, 225 Wis. 2d 126, 592 N.W.2d 178 (1999).

²³ *DeMars v. LaPour*, 123 Wis. 2d 366, 366 N.W.2d 891 (1985).

²⁴ See §807.01(1) and §807.01(2), Wis. Stats.

²⁵ *Oliver*, 179 Wis. 2d at p. 20.

²⁶ *Knoche v. Wisconsin Mutual Ins. Co.*, 151 Wis. 2d 754, 445 N.W.2d 740 (Ct.App. 1989).

²⁷ See *Oliver*, *supra*.

²⁸ *Oliver*, 179 Wis. 2d at p. 21, footnote 4.