

Offers of judgment in Wisconsin courts

You represent the plaintiff in a toxic tort case and want to persuade the defendant to settle before you incur significant litigation costs. Be sure your client understands the gamble in refusing to accept an offer of judgment.

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The Wisconsin offer of judgment statute, section 807.01 of the Wisconsin Statutes,¹ establishes the offer of judgment, the offer of damages and the offer of settlement. Under the statute, a party to a civil action may offer to have judgment entered against it in a stated amount, offer to stipulate to damages pending resolution of the issue of liability, or offer to settle a lawsuit in a specified amount, all under the threat of the opposing party not receiving any costs or having to pay actual or double costs or extra interest on the judgment if it improvidently refuses the offer. The offer of judgment statute was enacted to encourage pretrial settlements and avoid court delays.² Wisconsin courts have evinced a general willingness to effect these purposes.

Through the offer of judgment statute, Wisconsin attorneys have an effective means by which to persuade recalcitrant adversaries to resolve lawsuits and protect their clients from incurring further costs or to allow them to recover actual or double costs and extra interest if their offer is not accepted. This article encourages greater use of the offer of judgment statute to settle more lawsuits thereby reducing legal fees and court delays, and provides information on serving and responding to offers under the statute.



Applicable in state and federal courts

Section 807.01 of the Wisconsin Statutes is applicable in all civil actions in the state circuit courts.³ The offer of judgment statute has been held equally applicable in Wisconsin federal courts sitting in diversity jurisdiction. In *Data-point Corp. v. M&I Bank of Hilldale*,⁴ a case brought in the district court for the Western District of Wisconsin, the plaintiff made an offer of settlement under section 807.01(3). After granting summary judgment for the plaintiff in an amount in excess of the offer, the court further granted the plaintiff 12 percent interest on the judgment amount from the date of the offer under section 807.01(4). In so ruling, the court held that the offer of settlement statute was broader in scope than the federal offer of judgment rule⁵ and that the plaintiff would have been entitled to the increased interest under the statute if the action had been brought in state court.⁶

The offer of judgment

Section 807.01(1) provides that a defendant⁷ may make an offer to the plaintiff allowing judgment to be entered against the defendant for the amount or to the effect specified. If the offer is accepted, judgment is entered accordingly. However, if the offer is rejected and the plaintiff does not recover a more favorable judgment, the defendant recovers all costs and the plaintiff recovers only actual damages.⁸ Finally, if the offer is rejected and the plaintiff recovers a more favorable judgment, the plaintiff recovers actual damages and costs.⁹

In *Brown v. Bosworth*,¹⁰ for example, the plaintiff sued to recover damages when the defendants unlawfully removed timber from her property. The defendants submitted an offer of judgment, which the plaintiff refused. At trial the plaintiff recovered less than the amount of the offer. While the plaintiff was entitled to her damages, the defendants were awarded their costs. The supreme court affirmed. In consid-

ering this decision, it is important to note that had the plaintiff recovered even the amount of the offer, the defendants still would have recovered their costs.¹¹

The requirements for a valid offer of judgment are fairly straightforward. The offer must be in writing and in a separate document.¹² In one early case,¹³ a defendant attempted to include an offer of judgment in his answer. The court held that the purported offer was invalid and, therefore, constituted an admission upon which liability could be imposed. The offer should state that it is an offer of

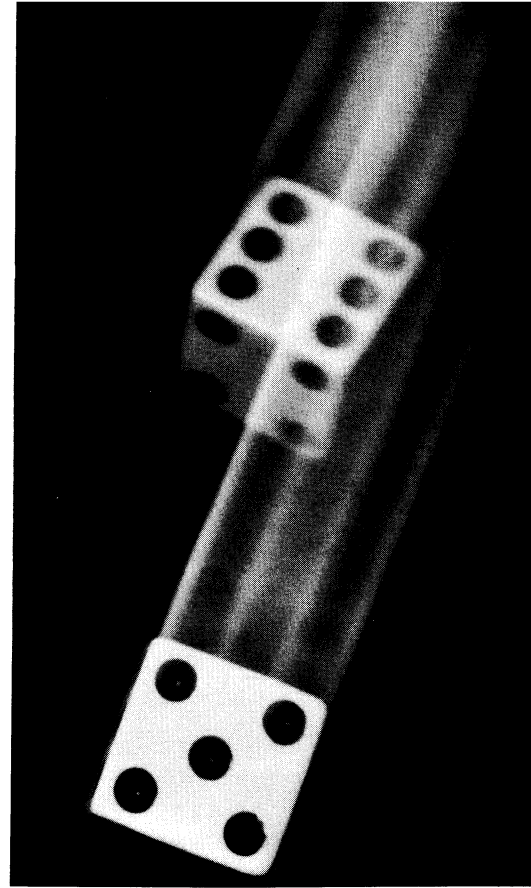
The offer of judgment statute was enacted to encourage pretrial settlements and avoid court delays.



judgment made pursuant to section 807.01(1) of the Wisconsin Statutes.¹⁴ The offer must specify the sum or property or the effect for which it is being made,¹⁵ together with costs,¹⁶ and can be for dollar damages or equitable relief, including possession of property.¹⁷ The offer can be made any time after issue is joined but not later than 20 days before trial,¹⁸ it must be accepted, if at all, within 10 days of its receipt,¹⁹ and it is revocable at any time within those 10 days.²⁰

If the offer of judgment is accepted, written notice of the acceptance must be provided to the defendant, and the offer and proof of service of the notice of acceptance may be filed with the clerk of court. The clerk then is required to enter judgment in accordance with the offer. Acceptance of the offer is a final resolution of the case; a plaintiff may not accept part of the offer and still reserve the right to pursue any part of the case.²¹ Likewise, a plaintiff may not add to or vary any of the terms of the offer.²² If the offer is not accepted, it cannot be used as evidence at trial. The offer becomes significant only after final resolution of the case and solely for purposes of determining recovery of costs.²³

In multiple-defendant cases, a twist is added. Where there are multiple defendants against whom judgment is sought jointly and severally, those defendants may make either joint or individual offers of judgment. One such case was *Denil v. Integrity Mutual Insurance Co.*²⁴ In that case, Denil brought a personal injury suit against four persons alleging

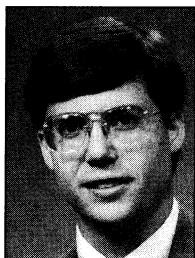


joint and several liability. The defendants made a joint offer of judgment that was refused. Denil failed to recover a greater amount at trial, however, and the court awarded the defendants their costs. The court of appeals affirmed stating that "defendants who are jointly and severally liable may submit joint offers of judgments (sic) to an individual plaintiff under section 807.01(1)."²⁵

In a situation where judgment is sought only severally against the defendants, however, they may only make individual offers. In *Denil*, the court of appeals further stated that "joint offers by defendants who are only severally liable do not invoke the provisions of this statute."²⁶

Finally, in multiple-plaintiff/single-defendant cases, a defendant may make an offer to the plaintiffs collectively if their claims are joint but, otherwise, may only make offers to the plaintiffs individually. *Basom v. Wayne Nasi Construction Inc.*²⁷ is one such case. The Basom family sued Nasi for damages for the defective construction of their house. Nasi served an offer of judgment on the plaintiffs collectively but the offer was refused. When the Basoms recovered less at trial than the amount of the offer, the court awarded Nasi its costs. The court of appeals reversed holding that the settlement offer was defective be-

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Judgment

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cause it failed to specify the sums offered to each of the Basoms. As the basis for its decision, the court of appeals stated that "[m]ultiple plaintiffs cannot evaluate a settlement offer made by a defendant that does not specify a sum offered to each plaintiff. Also, because no single plaintiff can settle without the agreement of the others, joint offers make partial settlements impossible."

The offer of damages

The offer of damages²⁸ provides that a defendant may make an offer to the plaintiff to allow damages to be assessed in a specified sum in the event the defendant fails in its defense. If the offer is accepted and the plaintiff prevails at trial, the damages are assessed accordingly. However, if the offer is not accepted and the damages assessed are not greater than the damages offered, neither party can recover its costs. Finally, if the offer is not accepted and the plaintiff recovers damages in excess of the amount offered, the plaintiff can recover costs in addition to the actual damages. The specific procedures for making a valid offer of damages are the same as for an offer of judgment.

Only one appellate opinion involving an offer of damages has been located. In that case,²⁹ the defendants attempted to make an offer of damages before answering the complaint. When the plaintiffs did not accept the offer, the defendants filed an answer admitting liability but contesting damages. The plaintiffs recovered their damages at trial but the court allowed the defendants their costs. The supreme court reversed, in part, and held that the offer was invalid because it was made before the defendants answered the complaint. Because the offer was invalid, the plaintiffs were entitled to recover their costs and the defendants were entitled to none.³⁰

The offer of settlement

Under the offer of settlement statute,³¹ a plaintiff may make an offer to the defendant to settle the case for the amount or to the effect specified. If the offer is accepted, the defendant may file the offer and proof of acceptance with the clerk. However, if the offer is not accepted and the plaintiff does not recover a more favorable judgment, the plaintiff recovers actual damages and costs.³² If the offer is not accepted but the plaintiff recovers a more favorable judgment, the

plaintiff recovers actual damages, plus double the amount of actual costs, plus interest at the rate of 12 percent per annum from the date of the offer until the judgment is satisfied.³³ Again, the specific procedures for making a valid offer of settlement are the same as for an offer of judgment.

As with the offer of judgment, however, there are a few twists. A plaintiff or plaintiffs with separate causes of action against multiple defendants must submit separate offers of judgment to each defendant.³⁴ For example, in *DeMars v. LaPour*,³⁵ the plaintiffs had filed suit, each with different causes of action, against a number of defendants. The plaintiffs thereafter made a joint offer of settlement to the defendants collectively. The offer was not accepted. At trial, the plaintiffs recovered more than the amount of the offer and moved for double costs and extra interest under section 807.01(4). The trial court denied the request. The supreme court affirmed stating that the "plain language of the statute indicates that separate offers of settlement must be made by each individual plaintiff."³⁶

But where a plaintiff has a claim against multiple defendants jointly or where multiple plaintiffs have only joint claims against all of the defendants, the plaintiff(s) may serve a joint offer on the defendants collectively.³⁷ In *Eichmiller v. Rural Mutual Insurance Co.*,³⁸ Eichmiller and his wife brought suit against the defendants based upon a concerted action theory for damages caused when the defendants destroyed their barn. They thereafter served a joint offer of settlement on the defendants collectively that was not accepted. The court of appeals held that the settlement offer was valid even though made by multiple plaintiffs because the plaintiffs had sued in their capacity as joint owners of the barn and therefore were pursuing one jointly held claim. The Eichmillers were entitled to recover double costs because the amounts recovered at trial exceeded the amount of the offer.

Invalid offers

An offer that fails to comply with the statutory requirements is invalid and does not invoke the penalty provisions of the statute. For example, the offer of settlement made in *Nicholson v. The Home Insurance Cos.*³⁹ did not state that it was a statutory offer of settlement. Likewise, the offer of judgment in *Swenson v. Doschadis*⁴⁰ did not provide that it was with costs. Each of these offers failed to comply with the statutory requirements

and each was held invalid. In each instance, then, the offer failed to invoke the penalty provisions desired.

An offer that fails to comply with the statutory provisions also can constitute an admission of liability. In *Tullgren v. Karger*,⁴¹ the defendants attempted to make their offer of judgment in their answer. The court held that the purported offer was invalid and that it constituted an admission of liability in the amount of the purported offer.

Costs recoverable

The costs recoverable as a result of an improvidently rejected offer are set forth in chapter 814 of the Wisconsin Statutes. The recoverable costs include statutory attorney fees, filing and service fees, disbursements for certified copy, postage and telephone costs, court reporter fees and certain expert witness expenses.⁴² However, costs do not include interest under section 807.01(4).⁴³ Thus, for purposes of doubling of costs under the offer of settlement statute, all costs under section 814.04 of the Wisconsin Statutes are doubled except for interest under sections 807.01(4) and 814.04(4).⁴⁴

Conclusion

The Wisconsin offer of judgment statute is an effective means by which to protect a party from needlessly incurring litigation costs or to allow a party to recover actual or double costs and extra interest if an adversary will not accept a reasonable settlement offer. There are significant advantages to making offers under the statute, but offers that do not comply with it are invalid and may constitute an admission of liability. For these reasons, Wisconsin attorneys need to understand the offer of judgment statute and use the offers of judgment, damages and settlement to their clients' benefit.

Endnotes

¹Wis. Stat. section 807.01 provides as follows:

807.01 Settlement offers. (1) After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.

(2) After issue is joined but at least 20 days

before trial, the defendant may serve upon the plaintiff a written offer that if the defendant fails in the defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days after receipt of the offer, and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.

(3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

(4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under sections 814.04(4) and 815.05(8).

(5) Subsections (1) to (4) apply to offers which may be made by any party to any other party who demands a judgment or setoff against the offering party.

²*Graves v. Travelers Ins. Co.*, 66 Wis. 2d 124, 140, 224 N.W.2d 398, 407 (1974) and *Howard v. State Farm Mut. Auto. Liab. Ins. Co.*, 70 Wis. 2d 985, 995, 236 N.W.2d 643, 648 (1975). See also *Johnson v. Pearson Agri-Systems Inc.*, 119 Wis. 2d 766, 773, 350 N.W.2d 127, 131 (1984) ("statute designed to encourage an end to litigation and to relieve overcrowded court calendars").

³Wis. Stat. § 801.01(2). The only exception to the applicability of section 807.01 is in land condemnation cases. See *Gottscher Real Estate Co. v. State*, 121 Wis. 2d 264, 269-70, 359 N.W.2d 164, 167-68 (Ct. App. 1984) where the court of appeals held that Wis. Stat. section 32.28 (and not section 807.01) applied in condemnation actions.

⁴665 F. Supp. 722 (W.D. Wis. 1987).

⁵The federal offer of judgment rule is Fed. R. Civ. P. 68.

⁶665 F. Supp. at 728-29. In reaching its opinion, the court summarily rejected the decisions in *Hutchison v. Burning Hills Steel Co.*, 559 F. Supp. 553 (E.D. Wis. 1983) and *Klawes v. Firestone Tire & Rubber Co.*, 572 F. Supp. 116 (E.D. Wis. 1983) by stating that neither court applied the proper analysis. At least three other district courts have taken the same position on similar statutes. See *Renner v. Lichtenwalner*, 513 F. Supp. 271 (E.D. Pa. 1981); *Frenette v. Vickery*, 522 F. Supp. 1098 (D. Conn. 1981); and *Murphy v. Marmon Group Inc.*, 562 F. Supp. 856 (D. Conn. 1983).

⁷While the statute is phrased in terms of "plaintiff" and "defendant," an offer of judgment also may be made by a plaintiff in response to a counterclaim. Wis. Stat. § 807.01(5). For purposes of simplicity, the terms "plaintiff" and "defendant" will be used.

⁸Wis. Stat. § 807.01(1) and *Nolop v. Spettel*, 267 Wis. 245, 258, 64 N.W.2d 859, 866 (1954). The costs are not apportioned according to the offer date. Rather, the defendant is awarded all costs, and the plaintiff is allowed to recover no costs. Even if the plaintiff recovers nothing (as in a judgment for the defendant), the defendant still recovers its costs. *Auley v. Ostermann*, 65 Wis. 118, 127, 25 N.W. 657, 661 (1886).

⁹Wis. Stat. § 807.01(1).

¹⁰58 Wis. 379, 17 N.W. 241 (1883).

¹¹The statute requires that the plaintiff win a more favorable judgment not merely an equivalent judgment. *Lammers v. Heritage Mut. Ins. Co.*, No. 83-2193, unpub. slip op. (Wis. App. Aug. 15, 1984) (unpublished opinions may not be cited as authority pursuant to section 809.25(3)); *Martell v. Nat'l Guardian Life Ins. Co.*, 27 Wis. 2d 164, 133 N.W.2d 721 (1965); and *Pahl v. Komorowski*, 168 Wis. 553, 556, 170 N.W. 950, 951 (1919). In determining whether a judgment is more favorable than an offer, punitive damages and prejudgment interest are added to the actual damages before comparison. *Kasdorf v. Durable Coatings Inc.*, No. 81-1450, unpub. slip op. (Wis. App. July 27, 1982); *Kellogg v. Pierce*, 60 Wis. 342, 344, 18 N.W. 848 (1844); and *Freedom Plastics Inc. v. Schneider Tank Lines Inc.*, No. 82-1128, unpub. slip op. (Wis. App. Sept. 14, 1983).

¹²Wis. Stat. § 807.01(1) and *Nicholson v. Home Ins. Cos.*, 137 Wis. 2d 581, 405 N.W.2d 327, 337 (1987).

¹³*Tullgren v. Karger*, 173 Wis. 288, 295-96, 181 N.W. 232, 234 (1921).

¹⁴*Sachsenmaier v. Mittelstadt*, 145 Wis. 2d 781, 790, 429 N.W.2d 532, 535 (Ct. App. 1988); *Umbs v. Walsh*, No. 87-2446, unpub. slip op. (Wis. App. Nov. 16, 1988); and *Bauer v. Piper Indus. Inc.*, No. 89-1247, unpub. slip op. (Wis. App. Feb. 20, 1990).

¹⁵A defendant should be precise in its offer because the court will enter a judgment based upon the language of the offer. In *Emerson v. Pier*, 105 Wis. 161, 163-64, 80 N.W. 1100, 1101 (1899), a defendant offered to allow judgment to be taken against it "according to the demand of the complaint in said action." The supreme court upheld entry of judgment for title to the property (as demanded in the complaint) notwithstanding the defendant's protestations that the offer was only for possession of the property. See also *Hardrath v. Geiger*, No. 89-822-FT, unpub. slip op. (Wis. App. Nov. 27, 1989) (offer must be specific and allow prompt response without further investigation).

¹⁶Wis. Stat. § 807.01(1) and see *Swenson v. Dorschadis*, No. 88-2313, unpub. slip op. (Wis. App. Oct. 26, 1989) (offer made exclusive of costs is improper and, therefore, not a valid offer). Failure to state that an offer is with costs, however, does not make it invalid since an offer "is in effect a consent to judgment for costs in addition to the damages." *Brown v. Bosworth*, 58 Wis. 379, 383, 17 N.W. 241, 243 (1883).

¹⁷See *Chicago & Nw. Ry. Co. v. Groh*, 85 Wis. 641, 55 N.W. 714 (1893) (offer for possession of real property); *Emerson v. Pier*, 105 Wis. 161, 163-64, 80 N.W. 1100 (1899) (offer for title to real property); and *Trecker v. Wisconsin Marine Inc.*, No. 78-16, unpub. slip op. (Wis. App. Nov. 17, 1979) (offer to repurchase certain common stock owned by the plaintiff).

¹⁸Wis. Stat. § 807.01(1); *Nicholson v. Home Ins. Cos.*, 137 Wis. 2d 581, 606, 405 N.W.2d 327, 337 (1987); and *Cordes v. Hoffman*, 19 Wis. 2d 236, 240, 120 N.W.2d 137, 139 (1963).

¹⁹Wis. Stat. § 807.01(1); *Smith v. Thewalt*, 126 Wis. 176, 177-78, 105 N.W. 662 (1905); and *Tullgren v. Karger*, 173 Wis. 288, 295, 181 N.W. 232, 234 (1921).

²⁰*Sonnenburg v. Grohskopf*, 144 Wis. 2d 62, 67, 422 N.W.2d 925, 927 (Ct. App. 1988).

²¹*Sellers v. Union Lumbering Co.*, 36 Wis. 398, 401 (1874) and Interpretative Commentary to Wis. Stat. § 269.02 (1955).

²²See *Jankiewicz v. Insurance Co. of N. Am.*, No. 79-953, unpub. slip op. (Wis. App. May 13, 1980) (one plaintiff could not accept offer of judgment made only to the plaintiffs collectively).

²³Wis. Stat. § 807.01(1); *Trecker v. Wisconsin Marine Inc.*, No. 78-16, unpub. slip op. (Wis. App. Nov. 17, 1979); and see *Mann v. Erie Mfg. Co.*, 19 Wis. 2d 455, 463, 120 N.W.2d 711, 716 (1963) (valid offer of judgment is not an admission). An offer of judgment that is not accepted drops entirely out of the case until a final resolution is reached on the facts. At that time, the offer of judgment is considered in determining the question of allocation of costs. *Bourda v. Jones*, 110 Wis. 52, 59, 85 N.W. 671, 674 (1901).

²⁴135 Wis. 2d 373, 401 N.W.2d 13 (Ct. App. 1986).

²⁵*Id.*, 135 Wis. 2d at 380, 401 N.W.2d at 16-17.

²⁶*Id.*

²⁷No. 84-1164, unpub. slip op. (Wis. App. May 21, 1985).

²⁸Wis. Stat. § 807.01(2).

²⁹*Cordes v. Hoffman*, 19 Wis. 2d 236, 120 N.W.2d 137 (1963).

³⁰*Id.*, 19 Wis. 2d at 239-40, 120 N.W.2d at 139.

³¹Wis. Stat. § 807.01(3) and (4).

³²Wis. Stat. § 814.01(1).

³³Wis. Stat. § 807.01(3) and (4); *Peissig v. Wisconsin Gas Co.*, 155 Wis. 2d 686, 700, 456 N.W.2d 348, 354 (1990); and *Knoche v. Wisconsin Mut. Ins. Co.*, 151 Wis. 2d 754, 756, 445 N.W.2d 740, 741 (Ct. App. 1989). Note that section 807.01(3) requires the judgment to be more favorable than the offer for purposes of double costs but section 807.01(4) requires only that the judgment be greater than or equal to the offer for purposes of the extra interest provision.

³⁴*Smith v. Keller*, 151 Wis. 2d 264, 276, 444 N.W.2d 396, 401 (Ct. App. 1989); *White v. General Cas. Ins. Co. of Wis.*, 118 Wis. 2d 433, 439-40, 348 N.W.2d 614, 617-18 (Ct. App. 1984); *Samuelson v. General Cas. Ins. Co. of Wis.*, No. 83-2283, unpub. slip op. (Wis. App. Mar. 26, 1985); *Martin v. Federated Rural Elec. Ins. Corp.*, No. 83-1775, unpub. slip op. (Wis. App. May 23, 1985); *DeMars v. LaPour*, 123 Wis. 2d 366, 373-74, 366 N.W.2d 891, 894-95 (1985); and *Umbs v. Walsh*, No. 87-2446, unpub. slip op. (Wis. App. Nov. 16, 1988).

³⁵123 Wis. 2d 366, 366 N.W.2d 891 (1985).

³⁶*Id.*, 123 Wis. 2d at 372, 366 N.W.2d at 894; and see *Peissig v. Wisconsin Gas Co.*, 155 Wis. 2d at 701-02, 456 N.W.2d at 354.

³⁷*Dan-Dee Equip. Inc. v. Zignego Ready Mix Inc.*, No. 87-2158, unpub. slip op. (Wis. App. Oct. 12, 1988) and *Eichmiller v. Rural Mut. Ins. Co.*, No. 88-410, unpub. slip op. (Wis. App. May 25, 1989).

³⁸No. 88-410, unpub. slip op. (Wis. App. May 25, 1989).

³⁹137 Wis. 2d 581, 405 N.W.2d 327 (1987).

⁴⁰No. 88-2313, unpub. slip op. (Wis. App. Oct. 26, 1989).

⁴¹173 Wis. 288, 181 N.W. 232 (1921).

⁴²Wis. Stat. § 814.04.

⁴³*Nichols v. U.S. Fidelity & Guar. Co.*, 13 Wis. 2d 491, 501, 109 N.W.2d 131, 136 (1961); *Knoche v. Wisconsin Mut. Ins. Co.*, 151 Wis. 2d 754, 761, 445 N.W.2d 740, 744 (Ct. App. 1989); and *Krenz v. Terra Firma Estates Inc.*, No. 83-250, unpub. slip op. (Wis. App. Nov. 8, 1983).

⁴⁴*Knoche v. Wisconsin Mut. Ins. Co.*, 151 Wis. 2d 754, 761-62, 445 N.W.2d 740, 744 (Ct. App. 1989) and *Krenz v. Terra Firma Estates Inc.*, No. 83-250, unpub. slip op. (Wis. App. Nov. 8, 1983).