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## Settlement Offers and Offers of Judgment — Tools or Traps?

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### I. THE TOOL BAG - OFFERS OF SETTLEMENT AND OFFERS OF JUDGMENT

Black's Law Dictionary defines an "Offer of Settlement" as "*An offer by one party to settle a dispute amicably (usu. by paying money) to avoid or end a lawsuit or other legal action.*" Offers of Settlement are utilized everyday as a tool by claims professionals and legal counsel to negotiate the resolution of potential or pending claims and cases. Obviously, the benefits of an Offer of Settlement are numerous but occasionally an Offer of Settlement can be detrimental and used against the party making the offer.

An "Offer of Judgment" is defined in Black's Law Dictionary as "*A settlement offer by one party to allow a specified judgment to be taken against the party.*" Federal Rule of Civil Procedure 68 and the rules of civil procedure of many states provide a mechanism for a party to make a more "formal" settlement offer that can result in a judgment against the offering party if accepted. An Offer of Judgment is a tool that can be used to great benefit over a more "informal" Offer of Settlement, including potentially cutting off claims to attorney fees and costs, but an Offer of Judgment can also be potentially detrimental and a trap for the party making the offer to fall.

Depending on the facts, Offers of Settlement and Offers of Judgment can be an effective tool. At times, a more "informal" Offer of Settlement is appropriate while at other times a more "formal" offer such as an Offer of Judgment can be the right tool. However, there is always the risk that that an Offer of Settlement or an Offer of Judgment is not the right tool for needed task at hand.

When is an Offer of Settlement more appropriate than an Offer of Judgment? When does an Offer of Judgment work best? Are there other forms of more "formal" Offers of Settlement that exist in your state and how do you use them?

## **II. INFORMAL OFFER OF SETTLEMENT TOOLS**

Offers of Settlement that range from informal conversations to lengthy correspondence can effectively resolve claims or cases. An informal Offer of Settlement can result in early resolution of a claim or case while avoiding potential expenses, resources and attorney fees.

While negotiating and making Offers of Settlement, the resulting communication can build rapport between the parties while also communicating the expectations and boundaries of the parties. Generally, an Offer of Settlement enjoys the benefit of not being admissible in a subsequent arbitration or trial to establish liability or the amount of damages in a claim or case. An Offer of Settlement provides the parties an opportunity to resolve a matter amicably, including obtaining settlement agreements in which no liability is admitted and may require confidentiality.

When do “informal” Offers of Settlement work best? What factors do you consider when making an Offer of Settlement?

## **III. INFORMAL OFFER OF SETTLEMENT TRAPS**

While an Offer of Settlement is the primary method for resolving a dispute between parties amicably, an Offer of Settlement can sometimes be detrimental to the party making the offer. The form of the Offer of Settlement can sometimes push the opposing party to retain counsel or move forward with litigation.

The contents of an Offer of Settlement can also be used against the party making the offer to support claims of Bad Faith or a violation of Unfair Claim Practices Act type provisions. An Offer of Settlement can also not turn out to completely resolve a matter such as when there are liens, additional claims and the right to seek attorney fees and costs.

How can you word an Offer of Settlement to avoid causing a party to retain counsel and move forward with litigation? What wording can be used to avoid supporting claims of Bad Faith or a violation of Unfair Claim Practices Act type provisions if an arbitrator or jury awards more than the Offer of Settlement? What can prevent an Offer or Settlement from being a global settlement that resolves any and all claims?

## **IV. FORMAL OFFER OF SETTLEMENT TOOLS**

At times, it is best to utilize a more “formal” Offer of Settlement such as an Offer of Judgment which is available under the rules of civil procedure in Federal Court and the Courts of many states. When the requirements of an Offer of Judgment are satisfied, an Offer of Judgment can be utilized to cut off potential claims for costs and attorney fees. An Offer of Judgment can also communicate the bottom line of the party making the offer while acting as a motivator and leverage against the receiving party.

Even after litigation is commenced, an Offer of Judgment can act to resolve a case early in the process. The more “formal” Offers of Settlement and an Offer of Judgment can be utilized in specific cases, such as elder abuse, landlord/tenant matters and timber trespass cases depending on the jurisdiction, to cut off punitive type damages such as treble damages and/or attorney fees.

When does an Offer of Judgment work best? When is the best time to use an Offer of Judgment? What other type of “formal” Offers of Settlement do you have available in your jurisdiction and how do they work? What are some benefits, direct and indirect, of an Offer of Judgment or more “formal” type of Offer of Settlement?

## **V. FORMAL OFFER OF SETTLEMENT TRAPS**

A “formal” Offer of Settlement – depending on the form – can act to effectively chisel your offer in stone. A “formal” Offer of Settlement may be filed with the Court depending on your jurisdiction. Once filed, the ability to “amend” a “formal” Offer of Settlement, such as an Offer of Judgment, may be ineffectual or too late.

When the need to send out a “formal” Offer of Settlement is time sensitive, the party making the offer can sometimes have limited information due to a variety of factors which can have a later detrimental effect. Sometimes a given deadline is missed or an insufficient Offer of Judgment is conveyed which can also create problems including claims of Bad Faith and efforts to seek enhanced sanctions or fees.

Depending on the wording and form of a “formal” Offer of Settlement, including an Offer of Judgment, the offer may not resolve all claims or still entitle the receiving party to make subsequent claims for attorney fees or allow a lien holder to further pursue the client. In addition, an Offer of Judgment can also create issues for a client such as a judgment being entered against it.

How can you word a “formal” Offer of Settlement, including Offers of Judgment, to ensure total and global resolution of a matter? After filing a “formal” Offer of Settlement, including Offers of Judgment, can you amend and what is the effect? How do you handle having limited information at the time you need to make a “formal” Offer of Settlement or Offer of Judgment? Do you need to get the client and/or insured’s permission before you make an Offer of Judgment?