CHAPTER 807

CIVIL PROCEDURE — MISCELLANEOUS PROVISIONS

NOTE: Chapter 807 was created by Sup. Ct. Order, 67 W (2d) 585, 740 (1975), which contains Judicial Council Committee notes explaining each section. Statutes prior to the 1983−84 edition also have these notes.

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 ss. 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.

History: Sup. Ct. Order, 67 W (2d) 585, 741 (1975); Sup. Ct. Order, 67 W (2d) vii (1975); 1975 c. 218; 1979 c. 271; 1981 c. 314; 1983 a. 253; 1985 a. 340.

Cross−reference: For tender of payment, see s. 895.14.

Sub. (3) applies to cases of both liquidated and unliquidated damages. Graves v. Travelers Ins. Co. 66 W (2d) 124, 224 NW (2d) 398.

Subs. (3) and (4) do not apply to rejected joint settlement offer made on behalf of individual plaintiffs. White v. General Cas. Co. of Wisconsin, 118 W (2d) 433, 348 NW (2d) 614 (Ct. App. 1984).

Defendants who are jointly and severally liable may submit joint offers of judgments to individual plaintiff under (1). Denil v. Integrity Mut. Ins. Co., 135 W (2d) 373, 401 NW (2d) 13 (Ct. App. 1986).

Offers under (3) are revocable. Sonnenburg v. Grohskopf, 144 W (2d) 62, 422 NW (2d) 925 (Ct. App. 1988).

Settlement offer document must indicate offer is made pursuant to 807.01 to qualify for (3) sanctions. Sachsenmaier v. Mittlestadt, 145 W (2d) 781, 429 NW (2d) 532 (Ct. App. 1988).

Under (3) plaintiff suing multiple defendants under multiple theories, one of which involves several liability, must make separate settlement offers. Smith v. Keller, 151 W (2d) 264, 444 NW (2d) 396 (Ct. App. 1989).

Sub. (4) provides for simple, rather than compound, interest to accrue on amount recovered; relationship between (4) and 628.46 (1) discussed. Upthegrove v. Lumbermans Ins. Co., 152 W (2d) 7, 447 NW (2d) 367 (Ct. App. 1989).

While inclusion of reference to this section is preferable, settlement offer that should reasonably be understood as offer pursuant to 807.01 is sufficient to invoke provisions. Bauer v. Piper Industries, Inc. 154 W (2d) 758, 454 NW (2d) 28 (Ct. App. 1990).

Plaintiff's offer of settlement addressed to multiple defendants reciting one aggregate settlement figure for all claims did not allow defendants to individually assess their own exposure and is not valid for sanctions purposes. Wilber v. Fuchs, 158 W (2d) 158, 461 NW (2d) 803 (Ct. App. 1990).

Plaintiff's single offer of settlement to two individual defendant's and insurer of both within the policy limits invoked sanctions under this section as the insurer was only party interested in the settlement and could fully evaluate its exposure. Testa v. Farmers Ins. Exchange, 164 W (2d) 296, 474 NW (2d) 776 (Ct. App. 1991).

Where damages are subject to a statutory limit, costs and interest awarded under this section are in addition to the damage award. Gorman v. Wausau Ins. Cos. 175 W (2d) 320, 499 NW (2d) 245 (Ct. App. 1993).

Insurer was not subject to sanctions under this section where, after initially rejecting plaintiff's offer to settle, new facts resulted in the insurer's submitting its own offer to settle in the same amount. Oliver v. Heritage Mutual Ins. Co. 179 W (2d) 1, 505 NW (2d) 452 (Ct. App. 1993).

Separate offers to the defendant and the defendant's insurer in the same amount which left unclear whether acceptance by the insurer also released the insured did not invoke sanctions under this section when the verdict exceeded the amount of the individual offers. Cue v. Carthage College, 179 W (2d) 175, 507 NW (2d) 109 (Ct. App. 1993).

Common law prejudgment interest and 12% interest under sub. (4) are not to be combined. Erickson v. Gunderson, 183 W (2d) 106, 515 NW (2d) 293 (Ct. App. 1994).

Interest under sub. (4) does not accrue on an award of double costs under sub. (3). American Motorists Insurance Co. v. R & S Meats, Inc. 190 W (2d) 197, 526 NW (2d) 791 (Ct. App. 1994).

A party making a settlement offer must do so in clear and unambiguous terms. A party's mere offer to settle for a specified sum where part of the party's claim had been admitted and already reduced to judgment was ambiguous. Stan's Lumber, Inc. v. Fleming, 196 W (2d) 554, 538 NW (2d) 849 (Ct. App. 1995).

In a case involving a subrogated defendant, failure of an offer to specify whether payment to the subrogated defendant would be made from the settlement proceeds left the defendants unable to fully evaluate their exposure so that the offer was not valid for purposes of sub. (3). Ritt v. Dental Care Associates, S.C. 199 W (2d) 48, 543 NW (2d) 852 (Ct. App. 1995).

A judgment in favor of a plaintiff against a party to whom an offer to settle is made that is equal or larger than the offer entitles the plaintiff to interest under sub. (4) on the amount recovered against the party to whom the offer was made. Blank v. USAA Property & Casualty Ins. Co. 200 W (2d) 270, 546 NW (2d) 512 (Ct. App. 1996).

Subs. (3) and (4) may be utilized in diversity actions in federal courts. Dillingham−Healy v. Milwaukee Metro. Sewerage Dist. 796 F Supp. 1191 (1992).

The new Wisconsin rules of civil procedure: Chapters 805—807. Graczyk, 59 MLR 671.

Offers of Judgment in Wisconsin Courts. Crinion. Wis. Law. Feb. 1991.

Meeting Head On: Offers of Settlement and an Insurer's Potential Bad Faith. Warch. Wis. Law. Oct. 1996.

807.02 Motions, where heard; stay of proceedings. Except as provided in s. 807.13 or when the parties stipulate otherwise and the court approves, motions in actions or proceedings in the circuit court must be heard within the circuit where the action is triable. Orders out of court, not requiring notice, may be made by the presiding judge of the court in any part of the state. No order to stay proceedings after a verdict, report or finding in any circuit court may be made by a court commissioner. No stay of proceedings for more than 20 days may be granted except upon previous notice to the adverse party.

History: Sup. Ct. Order, 67 W (2d) 585, 742 (1975); 1977 c. 449; Sup. Ct. Order, 141 W (2d) xiii (1987).

Judicial Council Note, 1988: The section is amended to except telephone hearings on motions from the requirement that motions be heard in the circuit where the action is triable. The amendment also permits the court to hear motions elsewhere upon stipulation of the parties. [Re Order effective Jan. 1, 1988]

807.03 Orders, how vacated and modified. An order made out of court without notice may be vacated or modified without notice by the judge who made it. An order made upon notice shall not be modified or vacated except by the court upon notice, but the presiding judge may suspend the order, in whole or in part, during the pendency of a motion to the court to modify or vacate the order.

History: Sup. Ct. Order, 67 W (2d) 585, 743 (1975).

807.04 Proceedings, where held; restriction as to making orders. All trials, and all hearings at which oral testimony is to be presented, shall be held in open court. The court may make any order which a judge or court commissioner has power to make. Court commissioners shall have the powers provided in ch. 753 or by other statute.

History: Sup. Ct. Order, 67 W (2d) 585, 743 (1975); 1977 c. 187 s. 135.

807.05 Stipulations. No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

History: Sup. Ct. Order, 67 W (2d) 585, 744 (1975); 1975 c. 218; Sup. Ct. Order, 141 W (2d) xiii (1987).

Judicial Council Note, 1988: The statute is amended to reflect that stipulations entered into at telephone conferences are no less binding than those made in writing or in court. [Re Order effective Jan. 1, 1988]

Where stipulation did not satisfy this section, summary judgment was improper. Wilharms v. Wilharms, 93 W (2d) 671, 287 NW (2d) 779 (1980).

See note to 801.15, citing Oostburg Bank v. United Savings, 130 W (2d) 4, 386 NW (2d) 53 (1986).

Oral agreement to settle action which doesn't comply with this section is unenforceable. Adelmeyer v. Wis. Elec. Power Co., 135 W (2d) 367, 400 NW (2d) 473 (Ct. App. 1986).

Section does not affect procedural stipulations or judicial admissions which dispense with evidentiary requirements. State v. Aldazabal, 146 W (2d) 267, 430 NW (2d) 614 (Ct. App. 1988).

Subscription requirement is met by stamped facsimile signature; provision does not require hand−written signature. Kocinski v. Home Ins. Co. 154 W (2d) 56, 452 NW (2d) 360 (1990).

Contract law is not binding in construing, enforcing or modifying stipulations, but principles of contract law, including the uniform commercial code, may illuminate a stipulation dispute even to the point of being dispositive. Phone Partners Ltd. v. C. F. Communications, 196 W (2d) 702, 512 NW (2d) 155 (Ct. App. 1995).

Oral settlements are not invariably unenforceable. Gliniciki v. Borden, Inc. 444 F Supp. 619.

807.06 Copy of paper may be used, when. If any original paper or pleading be lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original.

History: Sup. Ct. Order, 67 W (2d) 585, 744 (1975).

807.07 Irregularities and lack of jurisdiction over the parties waived on appeal; jurisdiction exercised; transfer to proper court. (1) When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction over the parties of the appellate court, unless the respondent moves to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it appears upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

(2) If the tribunal from which an appeal is taken had no jurisdiction of the subject matter and the court to which the appeal is taken has such jurisdiction, the court shall, if it appears that the action or proceeding was commenced in the good faith and belief that the first named tribunal possessed jurisdiction, allow it to proceed as if originally commenced in the proper court and shall allow the pleadings and proceedings to be amended accordingly; and in all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appears that the error arose from mistake.

History: Sup. Ct. Order, 67 W (2d) 744; 1975 c. 218; Sup. Ct. Order, 92 W (2d) xiii (1979).

Judicial Council Committee's Note, 1979: Sub. (1) is amended to clarify that it addresses jurisdiction over the parties, and not the subject matter jurisdiction of the appellate court. Lack of subject matter jurisdiction of an appellate court cannot be waived. Sub. (1) cannot be used to cure defects concerning subject matter jurisdiction of an appellate court. [Re Order effective Jan. 1, 1980]

Neither this section nor 274.11 (4), Stats. 1971, confers jurisdiction on the court to hear an appeal in a criminal case when the appeal is not timely. Scheid v. State, 60 W (2d) 575, 211 NW (2d) 458.

Sub. (2) applies only at the trial court level; it does not confer appellate jurisdiction on the supreme court when an appeal is first mistakenly taken to the circuit court. State v. Jakubowski, 61 W (2d) 220, 212 NW (2d) 155.

Mere retention of appellant's brief prior to making a motion to dismiss is not participation in the appeal and does not constitute a waiver of objection to jurisdiction. The holdings in White and Maas that mere retention of briefs constitutes participation in the appeal process are overruled. State v. Van Duyse, 66 W (2d) 286, 224 NW (2d) 603.

Where claimant timely appealed adverse worker's compensation decision in good faith but erroneously captioned appeal papers, trial court abused discretion by dismissing action. Cruz v. DILHR, 81 W (2d) 442, 260 NW (2d) 692.

Section 807.07 (1) does not apply to petitions to appeal under 808.10. First Wis. Nat. Bank of Madison v. Nicholaou, 87 W (2d) 360, 274 NW (2d) 704 (1979).

Court of appeals erred in failing to exercise discretion under (1) to permit amendment of notice of appeal. Northridge Bank v. Community Eye Care Center, 94 W (2d) 201, 287 NW (2d) 810 (1980).

Sub. (2) applies to actions for review under ch. 227. Shopper Advertiser v. Department of Rev. 117 W (2d) 223, 344 NW (2d) 115 (1984).

807.08 Borrowing court files regulated. The clerk shall not permit any paper filed in the clerk's office to be taken therefrom unless upon written order of a judge of the court. The clerk shall take a written receipt for all papers so taken and preserve the same until such papers are returned. Papers so taken shall be returned at once upon request of the clerk or presiding judge, and no paper shall be kept longer than 10 days.

History: Sup. Ct. Order, 67 W (2d) 585, 745 (1975); 1993 a. 486.

Clerks of court may not send original records of criminal cases to public defender prior to appeal unless judge authorizes release. 69 Atty. Gen. 63.

807.09 Conciliators. (1) A circuit judge of the circuit court of any county may appoint and remove at any time, any retired or former circuit or county court judge to act, in matters referred by the judge and in conciliation matters. When a matter for conciliation is referred for such purpose, the conciliator shall have full authority to hear, determine and report findings to the court. Such conciliators may be appointed court commissioners as provided in s. 757.68.

(2) The circuit judges of such county shall make rules, not inconsistent with law, governing procedure before and pertaining to such conciliators and the county board shall fix and provide for their compensation.

History: Sup. Ct. Order, 67 W (2d) 585, 746 (1975); 1975 c. 218; 1977 c. 187 s. 135; 1977 c. 323 s. 16.

807.10 Settlements in behalf of minors; judgments. (1) A compromise or settlement of an action or proceeding to which a minor or mentally incompetent person is a party may be made by the general guardian, if the guardian is represented by an

attorney, or the guardian ad litem with the approval of the court in which such action or proceeding is pending.

(2) A cause of action in favor of or against a minor or mentally incompetent person may, without the commencement of an action thereon, be settled by the general guardian, if the guardian is represented by an attorney, with the approval of the court appointing the general guardian, or by the guardian ad litem with the approval of any court of record. An order approving a settlement or compromise under this subsection and directing the consummation thereof shall have the same force and effect as a judgment of the court.

(3) If the amount awarded to a minor by judgment or by an order of the court approving a compromise settlement of a claim or cause of action of the minor does not exceed $5,000 (exclusive of interest and costs and disbursements), and if there is no general guardian of the ward, the court may upon application by the guardian ad litem after judgment, or in the order approving settlement, fix and allow the expenses of the action, including attorney fees and fees of guardian ad litem, authorize the payment of the total recovery to the clerk of the court, authorize and direct the guardian ad litem upon the payment to satisfy and discharge the judgment, or to execute releases to the parties entitled thereto and enter into a stipulation dismissing the action upon its merits. The order shall also direct the clerk upon the payment to pay the costs and disbursements and expenses of the action and to dispose of the balance in one of the manners provided in s. 880.04 (2) as selected by the court. The fee for the clerk's services for handling, depositing and disbursing funds under this subsection is prescribed in s. 814.61 (12) (a).

History: Sup. Ct. Order, 67 W (2d) 585, 746 (1975); 1975 c. 218; 1981 c. 317.

Cross−reference: See s. 880.125 for provision requiring a court approving settlements to be satisfied as to the sufficiency of the guardian's bond.

807.11 Orders: rendition and entry. (1) An order is rendered when it is signed by the judge.

(2) An order is entered when it is filed in the office of the clerk of court.

History: Sup. Ct. Order, 67 W (2d) 585, 747 (1975).

Oral order of state court that injunction be issued was valid even though case was removed to federal court before order was signed. Heidel v. Voight, 456 F Supp. 959 (1978).

807.12 Suing by fictitious name or as unknown; partners' names unknown. (1) When the name or a part of the name of any defendant, or when any proper party defendant to an action to establish or enforce, redeem from or discharge a lien or claim to property is unknown to the plaintiff, such defendant may be designated a defendant by so much of the name as is known, or by a fictitious name, or as an unknown heir, representative, owner or person as the case may require, adding such description as may reasonably indicate the person intended. But no person whose title to or interest in land appears of record or who is in actual occupancy of land shall be proceeded against as an unknown owner.

(2) When the name of such defendant is ascertained the process, pleadings and all proceedings may be amended by an order directing the insertion of the true name instead of the designation employed.

(3) In an action against a partnership, if the names of the partners are unknown to the plaintiff, all proceedings may be in the partnership name until the names of the partners are ascertained, whereupon the process, pleadings and all proceedings shall be amended by order directing the insertion of such names.

History: Sup. Ct. Order, 67 W (2d) 585, 748 (1975).

This section does not authorize judgment against unnamed individual. Miller v. Smith, 100 W (2d) 609, 302 NW (2d) 468 (1981).

See note to 893.02, citing Lak v. Richardson−Merrell, Inc. 100 W (2d) 641, 302 NW (2d) 483 (1981).

See note to 893.02, citing Lavine v. Hartford Acc. & Indemnity, 140 W (2d) 434, 410 NW (2d) 623 (Ct. App. 1987).

See note to 893.57, citing Spitler v. Dean, 148 W (2d) 630, 436 NW (2d) 308 (1989).

807.13 Telephone and audio−visual proceedings. (1) ORAL ARGUMENTS. The court may permit any oral argument by telephone.

(2) EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the court on the record by telephone or live audio−visual means, subject to cross−examination, when:

(a) The applicable statutes or rules permit;

(b) The parties so stipulate; or

(c) The proponent shows good cause to the court. Appropriate considerations are:

1. Whether any undue surprise or prejudice would result;

2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;

3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;

4. Whether the procedure would allow full effective cross−examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross−examination;

5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;

6. Whether the quality of the communication is sufficient to understand the offered testimony;

7. Whether a physical liberty interest is at stake in the proceeding; and

8. Such other factors as the court may, in each individual case, determine to be relevant.

(3) CONFERENCES. Whenever the applicable statutes or rules so permit, or the court otherwise determines that it is practical to do so, conferences in civil actions and proceedings may be conducted by telephone.

(4) NOTICE; REPORTING; STIPULATION; WAIVERS; ETC.; ACCESS. In any proceeding conducted by telephone under this section:

(a) If the proceeding is required to be reported, a court reporter shall be in simultaneous voice communication with all parties to the call, whether or not in the physical presence of any of them.

(b) Parties entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant other than the reporter electing to be present with any other participant shall give reasonable notice thereof to the other participants.

(c) Regardless of the physical location of any party to the call, any waiver, stipulation, motion, objection, decision, order or any other action taken by the court or a party to a reported telephone hearing has the same effect as if made in open court.

(d) With the exception of scheduling conferences and pretrial conferences, proceedings shall be conducted in a courtroom or other place reasonably accessible to the public. Participants in the proceeding may participate by telephone from any location or may elect to be physically present with one or more of the other participants. Simultaneous access to the proceeding shall be provided to persons entitled to attend by means of a loudspeaker or, upon request to the court, by making a person party to the telephone call without charge.

History: Sup. Ct. Order, 141 W (2d) xiii (1987); Sup. Ct. Order, 158 W (2d) xvii (1990); 1991 a. 32.

Judicial Council Note, 1988: This section [created] allows oral arguments to be heard, evidence to be taken, or conferences to be conducted, by telephone. Sub. (4) prescribes the basic procedure for such proceedings. [Re Order eff. 1−1−88]

Judicial Council Note, 1990: The change in sub. (2) (c) (intro.) from "interest of justice" to "good cause" is not intended as substantive, but merely to conform it to the language used in other statutes relating to use of telephonic procedures in judicial proceedings. SS. 967.08, 970.03 (13), 971.14 (1) (c) and (4) (b), and 971.17 (2), Stats. [Re Order eff. 1−1−91]

Speaker−telephone testimony in civil jury trials: The next best thing to being there? 1988 WLR 293.

807.14 Interpreters. On request of any party, the court may permit an interpreter to act in any civil proceeding other than trial by telephone or live audio−visual means.

History: Sup. Ct. Order, 141 W (2d) xiii (1987).

Judicial Council Note, 1988: This section [created] allows interpreters to serve by telephone or live audio−visual means in civil proceedings other than trials, on request of any party and approval by the court. [Re Order effective Jan. 1, 1988]