

Atty. Alexander Ullenberg's

# GETTING PAID BULLETIN

Your source for information on collecting the money you're owed, promptly and legally.†

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## EVALUATING SETTLEMENT OFFERS OR PAYMENT PLAN PROPOSALS

Properly evaluating settlement offers or payment plans proposed by your debtors during and after litigation is an integral part of success collections. However, this is often the most challenging aspect of collection. Successful evaluation often depends upon your and your attorney's experience in trying collections cases and reducing judgments to payment.

To evaluate a settlement offer or payment plan you must consider the following:

**1. Likelihood You Will Receive a Judgment Against Your Debtor.** While most creditors believe it is a given they will succeed in Court on their case, this is simply not true. The law is complex and changes rapidly. Even relatively simple collections matters (like small claims account-receivable collections) are regulated by various laws – especially when those accounts receivable concern goods or services sold to consumers. Many times, if you have failed to comply with

those applicable regulations (which often times are extremely technical in nature), you could face significant counterclaims which equal or exceed the amounts you are seeking to recover.

In addition, if your paperwork (i.e. documentation of your transaction, collection efforts, etc.) is missing or so incomplete that you cannot prove your case to a preponderance of the evidence, you may not recover any amounts at all.

Usually if your debtor-defendant is represented by counsel, their counsel will highlight any counterclaims they have against you. However, more often than not, in small claims collections debtors are unrepresented initially – and remain unrepresented only until they fail to reach what they believe is a “fair” resolution with you. When your debtor is unrepresented, the burden falls on you when evaluating offers to scrutinize your involvement with that debtor and determine whether you face any potential

counterclaims. If you anticipate a counterclaim, you need to be able to evaluate the likelihood that your debtor will recognize the claim or seek counsel to bring that claim to their attention.

Obviously, if you anticipate a strong counterclaim, or you have missing documentation which could threaten your recovery, you need to adjust your settlement behavior accordingly.

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† Do not regard these articles as legal advice. The complexity of laws and people's problems make it difficult to give legal advice without knowing all the facts of each situation. In addition, the law changes rapidly so general concepts explained herein may change before you act upon them. Call us for your legal needs or seek other professional advice before acting upon anything you read in this or other publications.

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**2. The Realistic Amount of Your Judgment.** In most cases the amount of the judgment is predefined by contract. For example, if a consumer or business purchases goods from you there is usually a defined price associated with those goods. That price is either posted in your store, or part of a bid or contract with your customer.

However, in unique cases where there is some problem with the quality or quantity of the goods or services, you may need to realistically assess the amount a neutral third-party (i.e. judge or jury) would award in light of all the facts. When so evaluating your case, remember to put yourself in the shoes of a party who does not know you or your debtor. What would that third-party think is reasonable?

If your debtor has a potentially strong counterclaim against you, you also need to realistically evaluate the value of that counterclaim and how much this could diminish your ultimate recovery.

**3. Time It Will Take You to Obtain a Judgment.** Don't underestimate the time it will take you to obtain a judgment through litigation. In small claims cases (i.e. cases where the amount in dispute is under \$5,000), after you file a complaint it takes 2-3 weeks to get the first court date. If your debtor disputes the complaint, in some counties it may take 4-6 months to get a trial date.

In large claims cases (i.e. those cases where the amount in dispute is over \$5,000) it takes a minimum of a month and a half to get a judgment if the debtor does not dispute the complaint. If your debtor disputes a large claims action, it may be a year or more before you get a trial date.

Obviously, at some point receiving cash in hand immediately is better than an IOU down the road. And until payment is received voluntarily or forced through garnishment, execution or other post-judgment collection means, a judgment is basically an IOU.

**4. Likelihood Your Debtor Will Pay the Judgment.** By the time your overdue accounts go to legal collections, your debtors have or should have been given several opportunities to remit full payment. They have not paid you because (1) they do not want to, (2) they do not feel they have to because of something you did or did not do, or (3) they do not have enough money to pay you.

Here, we are most concerned with the third reason – ability to pay. While all of my clients want full payment on their accounts, we need to be realistic. Many times debtors have simply overextended themselves financially or even recklessly taken on too much debt. They may be close to having to file for bankruptcy protection, or have such limited assets that you will never be able to collect from them through garnishment, execution, etc. (For more information, see section on Wisconsin

Exemptions in this issue.)

Settling for a significantly reduced amount may be the best option at this point. (Keep in mind, though, that payments made by a debtor to a creditor within 90 days before filing for bankruptcy, may be subject to avoidance by the trustee under the “preference” laws.)

However, even in cases where the likelihood of collection is diminished, it may still be to your advantage to pursue a judgment such as when your debtor's financial woes are the result of a temporary job loss or health problem, your debtor filed bankruptcy only a few years ago (and therefore cannot refile immediately), or the amount you are owed is large enough to gamble that the



debtor may recover financially and be able to pay your debt.

**5. Time It Will Take Your Debtor to Pay the Judgment.** Successful collection is as much an art as a financial science. Money in hand now is always more important than a promise to pay in the future.

No matter how small or large the amounts we are collecting, when we first make contact

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## EXEMPTIONS FROM COLLECTION IN WISCONSIN.

Even though you have a judgment against someone, you cannot seize all their income and assets to pay the debt. Your debtor's "exemptions" from execution limit which income and assets you can seize.

Depending upon your debtor's marital status, number of dependents, and nature of debt (i.e. whether it was a consumer credit transaction or whether you have a mortgage or security interest in property), some or all of their income or assets may be exempt from compulsory legal collection.

Below is a list of some of those exemptions in Wisconsin. It is by no means an exhaustive list of all the applicability, exceptions, and amounts of all exemptions. If you have particular concerns on these exemptions, you must consult the underlying law.

### **Exemptions from Income:**

- Wages and earnings (generally 80%, unless below poverty line)
- Salary used to purchase savings bonds (up to 10%)
- Child support, family support, and alimony
- Pension benefits from large cities, fire / police pensions, federal war pen-

sions, retirement trust funds, or public employee trust funds

- Worker's compensation, unemployment compensation, federal disability insurance, and veteran's benefits.
- School aid moneys and assistance grants

### **Exemption from Assets:**

- Homestead real estate
- Clothing, jewelry, household furniture and furnishings
- Consumer goods (up to \$5,000 total)
- Depository accounts (i.e. bank accounts) up to \$1,000 total
- Motor vehicles (up to \$1,200 plus unused consumer goods exemption)
- Life insurance, personal injury or wrongful death claims
- Life insurance cash / loan value (up to \$4,000 total)
- Proceeds from fire / casualty insurance claims
- Cemetery lots, burial facilities / monuments, and coffins
- Business and farm equipment, inventory, products and professional books not exceeding \$7,500
- Interests in partnership property, tenant's housing corporation, or crime victim awards.

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with a debtor they offer us \$25 or \$50 a month. This is usually acceptable if your debtor owes you \$100 or so, but what if they owe you \$1,000. At \$25 a month, it will take over 3 years to pay off that \$1,000 balance! A lot can happen to your debtor in three years – while they may get a new job or raise, they may also lose a job or fall further in debt.

You also cannot underestimate the time and expense that goes along with tracking extended monthly payments. Assuming it takes you five minutes to open a letter and record a payment, or follow up on an overdue payment, that's one hour a year per payment plan. If you have enough payment plans, that's a part-time or full-time job.

### **Putting it all together.**

When evaluating settlement offers or payment plan proposals, always evaluate your payment options through legal collection procedures. Once you know what you are likely to recover through legal proceedings, you will best be able to evaluate a reasonable settlement offer.

If you accept a significantly reduced amount, try to obtain a lump sum payment. And if you are settling for less than you are owed because you believe your debtor does not have the funds to pay you, try to obtain as much independent verification of that fact before settling.

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Lastly, if you are settling for a lesser amount because you fear a strong counterclaim against you, insist that your debtor sign a full and complete release as part of the set-

tlement process. This will protect you from future lawsuits from your debtor after you settle the amount owed.

**Excuse of the Month:** “Oh – they wanted me to pay that bill right away? I thought I had a six month grace period.”

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**Atty. Alexander Ullenberg**



has represented clients in hundreds of lawsuits across Wisconsin from high-volume small-claims collections to complex bankruptcy litigation.

He is a guest lecturer at the University of Wisconsin Law School and a former business law instructor for Marian College of Fond du Lac.

Alex lives in Fond du Lac, Wisconsin, where he is an active member of the State Bar of Wisconsin, Fond du Lac County Bar Association, and the Noon Rotary Club.

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Questions? Comments? Ideas? Opinions? I'm always happy to hear from you. *Alex*

You can reach me at:

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