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Overcoming common defenses to plaintiffs' recovery of 998 costs

HOW TO EVALUATE THE LIKELIHOOD THAT YOUR 998 OFFER WILL WITHSTAND DEFENDANT'S CHALLENGES

California's Legislature enacted California Code of Civil Procedure, section 998 ("CCP § 998"), to financially incentivize pre-trial settlements by penalizing a party who fails to achieve a better result at trial than it could have achieved had it accepted the settlement offer. Since 998 Offers to Compromise may be issued by plaintiffs and defendants, it is critical that plaintiffs' attorneys understand how to properly craft their offers, how to protect their offers against inevitable challenge by a losing defendant, and how to challenge a defendant's 998 offer that otherwise would expose a losing plaintiff to substantial defense costs.

A plaintiff who issues a valid 998 offer to the defendant and recovers a more favorable amount at trial than defendant offered may be able to recover 10% prejudgment interest from the date of the first 998 offer exceeded by the judgment and the potential for cost-shifting of expert witness expenses at the court's discretion. (CCP § 998(d); CCP § 3291.) For a plaintiff who rejects a valid 998 offer from the defendant and fails to obtain a more favorable judgment or award, plaintiff's damages (if any) will be reduced by the amount of defendant's costs from the time of its offer. (CCP § 998(e).) If the costs exceed the amount awarded to the plaintiff, the net amount shall be awarded to the defendant and judgment entered accordingly. (CCP § 998(e).)

CCP § 998 must be read in conjunction with other statutes. In the employment-law context, for instance, under the Fair Employment and Housing Act (FEHA), notwithstanding section 998, a prevailing defendant may not be awarded fees and costs unless the court finds plaintiff's action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after the action clearly became so. (Gov. Code, § 12965, subd. (c)(6).)

Form matters – in writing, please

Although challenges typically focus on the substance of the 998 offer, understanding procedural requirements assists an attorney in both ensuring their 998 offer is valid, and in evaluating whether opposing counsel has erred. Under section 998, a party to a civil action "may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (CCP § 998(b).) The offer must include "the terms and conditions of the judgment or award." (*Ibid*.) Once the offer is accepted, "the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly." (§ 998(b)(1).)

Put differently, the 998 offer is invalid unless it is made in writing. The code is literal; an oral recitation that a court reporter transcribed has been held insufficient to fulfill the writing requirement. (See *Saba v. Crater* (1998) 62 Cal.App.4th 150, 153.) A statutory offer of compromise need not contain any "magic language," so long as it is clear the written offer is made under section 998 and, if accepted, will result in the entry of judgment or an alternative final disposition of the action legally equivalent to a judgment. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 731-732.)

The offer must be served on the opposing party (via counsel, if represented), and must be served not less than 10 days before the start of trial (i.e., deemed to occur either when plaintiff's counsel offers an opening statement, or absent an opening statement, when the first witness has been sworn). (CCP § 998(b)(2)-(3).) Typically, however, the amount of time to respond to a 998 offer is 30 days from the date of service, and a party's failure to respond within that time frame will result in the automatic rejection of the offer. (CCP § 998(b)(2).) Keep in mind that the 998 offer may be revoked at any time before acceptance. (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 283-284.)

Acceptance must be made in writing as well, signed by the party's attorney (or the party, if proceeding pro per). (CCP § 998(b).) A recent case, *Mostafavi Law Group, APC v. Larry Rabineau, APC, et al*. (2021) 61 Cal.App.5th 614, involved a 998 offer that did not contain an "acceptance provision" pursuant to subdivision (b) of section 998. Instead, the plaintiff hand-wrote an acceptance of the offer and filed it with the trial court and judgment was entered. Defendant moved to set aside the judgment, claiming his offer contained drafting errors including the failure to include an acceptance provision. The Court of Appeal agreed, holding a 998 offer must conform to the statute.

Common challenges to plaintiffs' 998 recovery

Regret often accompanies hindsight for the party that rejected a valid 998 offer and failed to achieve a more favorable result at trial. That regret may manifest itself into challenges to the validity of the statutory offer to compromise to avoid its harsh consequences. It is helpful to understand these common challenges to both fortify your future 998 offers and to protect your client by objecting to a defendant's attempted enforcement of its 998 offer.

Did the plaintiff prevail?

Typically, it will be clear which party failed to obtain a more favorable judgment or award than the 998 offer

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

the party rejected. But this preliminary question should not be bypassed because sometimes the answer is unclear and sometimes the defendant's assumption that it is the prevailing party must be challenged. To gain clarity, it is important to understand how to calculate whether the "judgment" or award is more favorable than the 998 offer. This analysis requires correctly determining the value of the 998 offer *at the time it was made*. (*Guerrero v. Rodan Termite Control, Inc.* (2008) 163 Cal.App.4th 1435, 1441.)

Section 998 is completely silent on the question of whether a particular item is to be included or excluded by the court in determining whether the judgment obtained by the plaintiff is "more favorable" than the defendant's offer to compromise. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1111-1112; *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1523.) Obviously, the amount of the damages awarded at trial must be considered. Beyond that, there are some guiding principles from cases applying legislative intent for plaintiffs who prevail at trial but who fail to recover more than the 998 offer.

For instance, when comparing the plaintiff's recovery to the 998 offer, the recovery must include costs incurred by the plaintiff before the offer, including pre-offer attorney fees in any case in which attorney fees are otherwise awardable as costs. (*Oakes v. Progressive Transportation Services, Inc.* (2021) 71 Cal.App.5th 486, 500.) It must also include *pre-offer* prejudgment interest. (*Bodell, supra,* 62 Cal.App.4th at 1526.) The court must then deduct from the judgment or award the defendant's post-offer costs allowable under section 1033.5 (§ 998(a); *Scott Co., supra*, 20 Cal.4th at 1112-1113), and any post-offer expert witness fees assessed against the plaintiff in the court's discretion. (§ 998, subd. (c)(1), (e); *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 1000.) Any liens against the plaintiff's award, including any workers' compensation lien, must *not* be deducted when determining whether the plaintiff obtained a more favorable judgment or award. (*Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1842.) If the defendant's post-offer costs exceed the damages awarded to the plaintiff, a judgment in the net amount of the difference must be entered in the defendant's favor. (§ 998, subd. (e); see *Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 267.)

Did the defendant prevail?

A slightly different analysis is used when determining whether the defendant failed to obtain a more favorable verdict under CCP § 998(d) because, in that scenario, it was the defendant that forced the case to trial. Accordingly, the court looks to the net judgment against the defendant to whom the 998 offer was made (i.e., after the jury verdict has been reduced by settlement offsets with other defendants). The judgment includes all of plaintiff's costs (i.e., pre- and post-offer). (*Stallman v. Bell* (1991) 235 Cal.App.3d 740, 748.) It does not, however, include prejudgment interest under Civil Code section 3291. (*Steinfeld v. Foote-Goldman Proctologic Med. Group Inc.* (1997) 60 Cal.App.4th 13, 18.)

Uncertain 998 offers

One common method to attack a 998 offer is asserting that its terms are uncertain and incapable of valuation, and therefore the 998 offer is not valid. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050.) Uncertain terms appear most frequently in situations in which the offer includes a non-monetary component. (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 697.) Non-monetary terms are permissible, and the offer must be evaluated in light of all the terms and conditions attached to that offer and not simply the monetary amount of the offer. If the offer is not amenable to valuation, then the offer to compromise is not valid and cannot be used to shift costs onto the otherwise prevailing party.

The variations on this theme are unending, but case examples may help in identifying how to spot an ambiguous term (and how to avoid accidentally including one while drafting a 998 offer). Some clauses that have led courts to reject enforcing 998 offers because of ambiguity include: confidentiality clauses (see *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 801-802 ["the worth to an individual of the chance to clear his or her good name in a defamation action is simply too subjective"]); and conditional clauses, such as those in cases with multiple parties that require all parties' acceptance (see *Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 576; *Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 791); requiring the plaintiff to forgo other causes of action not embodied in the complaint (see *Valentino, supra,* 201 Cal.App.3d at 699); requiring the offeree to agree to enter into a settlement agreement and general release without disclosing specific terms (see *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 1131-1132); including an indemnification requirement (see *Khosravan v. Chevron Corp.* (2021) 66 Cal.App.5th 288, 296, 299).

Not all conditions are invalid, however. A valid section 998 offer may include terms requiring the release of all claims (by parties or nonparties) arising from the injury at issue in the lawsuit. (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 88 ["Boilerplate language identifying individuals and entities beyond the named parties in the case as releasors and releasees does not invalidate the offer, if the claims released relate only to the subject matter of the current litigation"].)

Attorney fees

Keep in mind, also, that courts do not consider provisions in the 998 offer for "reasonable attorney fees and costs" to be ambiguous because there are statutes and court rules that specify the procedure for determining the awardable amount. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 629.) In fact, when a section 998 offer is silent as to costs and fees, contractual or statutory attorney fees

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

are recoverable in addition to the amount of the accepted offer. (*Ibid*.)

Sometimes the ambiguity is not obvious at first glance because the condition uses common terms that would not alert a party to any particular legal definition. Consider, for example, *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050. There, the court determined the term requiring a buyback of a car "in undamaged condition, save normal wear and tear" inserted ambiguity into the offer. Although "undamaged" might not seem like an ambiguous term, the court considered that it was undefined, that it was unclear what would happen if the plaintiff accepted the 998 offer but the defendant subsequently concluded the car was "damaged" beyond normal wear and tear, and that the issue of whether the car was "undamaged" – an issue that was not relevant to the trial proceedings – would require further inquiry in order to evaluate the value post-trial of the repurchase provision.

To avoid ambiguity

Strategically, when challenging a 998 offer's validity based on uncertainty, consider the following:

- Does the 998 offer include key terms that are not defined within the 998 offer itself, or by incorporating definitions in a referenced statute?
- Do any of the terms require subjective determinations or implicate a moving target for valuation?
- Are any of the terms conditioned on non-monetary obligations, on the assent of multiple parties, or on matters that potentially extend beyond the specific lawsuit?
- Does the 998 offer contain a general release or full release?

Unfortunately, inadvertent ambiguities in an otherwise valid 998 offer occur, and in such situations a trial court is powerless to alter, rewrite, or add a term on which the offer is silent. (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9.) Such was the circumstance in *Arriagarazo v. BMW of North America, LLC* (2021) 64 Cal.App.5th 742, a wrongful-death case. BMW had intended to deviate from section 998's default rule, that the acceptance of the 998 offer leads to the entry of a judgment (see CCP § 998(b)(1)). BMW conditioned the 998 offer and its payment to plaintiffs on their execution of a "general release" (that it did not attach to the offer). Although BMW understood that general releases are typically followed by a dismissal rather than a judgment, BMW's 998 offer was silent regarding whether a judgment or dismissal would be entered. The appellate court, applying contract-interpretation rules, strictly construed the 998 offer against BMW, the drafter, and applied the statutory default (i.e., entry of judgment) absent clear contractual language in the 998 offer to the contrary. (*Id.* at pp. 748-749.) By vacating the judgment based on BMW's "mistake" to the contrary, the trial court abused its discretion in that case.

Unreasonable 998 offers or "bad faith"

Another common attack on the validity of a 998 offer is that it was made in bad faith. A 998 offer is made in good faith only if the offer is "'realistically reasonable under the circumstances of the particular case'" [Citations] – that is, if the offer "carr[ies] with it some reasonable prospect of acceptance." (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924, citations omitted.) Although section 998's text does not itself condition validity upon an offeror's good faith, such a requirement is necessarily implied by the statute's purpose: Section 998 is meant "to encourage the settlement of lawsuits prior to trial" and it uses the proverbial "stick" to do so: "Accept this offer or you will face additional financial consequences for rejecting it." (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924, internal citations omitted.) If a section 998 offer has no "reasonable prospect of acceptance," an offeree will reject the offer no matter what and applying section 998's punitive "stick" will do nothing to encourage settlement. (*Ibid*, citations omitted.)

The offeree bears the burden of showing that an otherwise valid 998 offer was not made in good faith. (*Times Out LLC v. 13359 Corp.* (2018) 21 Cal.App.5th 933, 942.) When evaluating whether a 998 offer has a "reasonable prospect of acceptance," courts evaluate circumstances of the case at the time of the offer. (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 548.) Two primary considerations courts use include: (1) whether the offer was within the "range of reasonably possible results" at trial, considering all of the information the offeror knew or reasonably should have known; and (2) whether the offeror knew the offeree had sufficient information, based on what the offeree knew or reasonably should have known, to assess whether the "offer [was] a reasonable one," such that the offeree had a "fair opportunity to intelligently evaluate the offer." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699-700.)

To assess information available to the offeree, courts often consider various factors including: (1) how far into the litigation the 998 offer was made and whether the timing of the offer limited the information the offeree possessed to evaluate the offer; (2) what information bearing on the reasonableness of the 998 offer was available to the offeree prior to the offer's expiration (i.e., through prior litigation, pre-litigation exchanges, post-complaint discovery, pre-existing relationship between the parties); and (3) whether the party receiving the 998 offer alerted the offeror that it lacked sufficient information to evaluate the offer and, if so, how the offeror responded. (*Licudine, supra,* 30 Cal.App.5th at 925-926.)

These factors are not determinative and can be used both offensively and defensively. For instance, if a defendant claims the plaintiff served a 998 offer too early in the litigation, the plaintiff may defend the offer's validity by demonstrating that the defendant possessed a wealth of knowledge of the case due to pre-trial litigation communications and the close

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

relationship between the parties for years before the dispute. Similarly, plaintiff may demonstrate that defendant merely chose not to respond to the offer, letting it lapse, rather than requesting additional information or additional time in which to obtain such information. Conversely, that defendant may claim plaintiff did not act in good faith by refusing a request to extend the deadline for acceptance to allow the defendant a chance to obtain necessary information for evaluating the offer.

The dollar amount of the offer may also demonstrate bad faith. "A plaintiff may not reasonably be expected to accept a token or nominal offer from any defendant exposed to this magnitude of liability unless it is absolutely clear that no reasonable possibility exists that the defendant will be held liable. If that truly is the situation, then a plaintiff is likely to dismiss his action without any inducement whatsoever. But if there is some reasonable possibility, however slight, that a particular defendant will be held liable, there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial." (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821.)

A medical-malpractice case, *Licudine, supra,* 30 Cal.App.5th 918, illustrates how courts evaluate the reasonableness of the statutory offers to compromise. There, the court found the plaintiff's 998 offer was not made in good faith when it was made just 19 days after the complaint was served, where the complaint was "bare bones" and pre-litigation notice required by statute (that would have fleshed out key details) was not filed, the defendant lacked details as to the amount of plaintiff's damages, and when defendant alerted the plaintiff to its concern that it needed additional time to evaluate the offer, plaintiff did not respond. (*Id.* at pp. 927-928.) The court noted that "plaintiff's conduct in making an offer as to noneconomic damages that… was 'one penny below' the statutory cap for such damages mere weeks after serving [defendant] raises more than a specter of gamesmanship, which, … is antithetical to the legitimate operation of section 998." (*Id*. at p. 928.)

Conclusion

Code of Civil Procedure section 998 offers require thoughtful analysis, both while drafting and while advising clients on whether to accept the compromise or proceed to trial. The consequences of rejecting a valid 998 offer may be a costly gamble, and the consequences of improperly assuming the validity of one's own 998 offer may be equally costly. Therefore, understanding the most common challenges to such offers helps plaintiffs navigate what information to disclose to defendants prior to issuing a 998 offer, what language should be included or avoided in drafting a 998 offer, how to evaluate the likely validity of an opponent's 998 offer, whether to issue a subsequent 998 offer, and how to evaluate the likelihood of their 998 offers withstanding defendants' challenges. Simply, anticipating challenges to 998 offers provides plaintiffs the benefit of hindsight before it is too late to course-correct.

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