

Commercial and Complex Litigation

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AALRR Alert



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Although Cal. Civ. Proc. Code Sec. 998 Offers to Compromise Are Powerful Tools for Litigants, They Cannot Be Conditioned on a Vague “Settlement Agreement”

Early settlement offers made pursuant to California Civil Procedure Code section 998 can be a powerful tool used by either party in a case to shift litigation costs to the other side and force the other side into making a difficult decision. If the other side fails to accept the offer and does not do better at trial, it risks losing costs and potentially attorney's fees. These costs and attorney's fees can total tens of thousands of dollars including expert witness fees. Accordingly, parties in every case should make an early analysis as to whether a 998 offer to compromise should be made and in what amount.

More specifically, section 998 is intended to encourage parties to settle. It provides in relevant part: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer.” In other words, if the party who prevails at trial obtains a judgment less favorable than the pre-trial offer, then it may not recover costs it incurred after

the offer was made and must pay its opponent's post-offer costs.

Savvy attorneys, with the permission of their savvy clients, may use section 998 offers to save litigation costs, pressure their opponents to settle cases quickly, and/or shift costs to their opponents. Once a party makes a valid section 998 offer, the clock starts ticking on litigation fees subject to reimbursement. Therefore, the opposing party will need to come to a quick decision regarding settlement.

Because so much money may be at stake and because courts have interpreted Section 998 strictly, this settlement tool must be used carefully. In *Sanford v. Rasnick*, 246 Cal.App.4th 1121 (2016), the California Court of Appeal determined that the plaintiff who rejected a pre-trial offer that included a request for a “settlement agreement” was not liable for post-offer costs under California Civil Procedure Code section 998 because the request made the offer unclear. The lack of clarity in the pre-trial compromise offer

prohibited the recovery of litigation costs from the plaintiff.

Case Background

The plaintiff was riding his motorcycle when he was struck by a car and injured. He filed a complaint against the driver and her father, who owned the car. Both defendants were covered by one insurance policy, so they were represented by the same attorney from the insurance company.

The defendants made a joint offer under Cal. Civ. Proc. Code sec. 998 to give the Plaintiff \$130,000 in exchange for: (1) a dismissal of the action with prejudice and/or a finding that the compromise was a good faith settlement; and (2) a written settlement agreement and general release. The offer did not

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apportion the \$130,000 between the two defendants or disclose the terms of the written settlement agreement.

The offer lapsed and the case went to trial, resulting in a \$122,000 judgment for the plaintiff. The trial court ruled that because this amount was less than the defendants' earlier offer, the plaintiff was liable for post-offer costs pursuant to section 998. The plaintiff appealed.

Legal Discussion

The plaintiff asserted that the defendants' offer did not meet the requirements of section 998 because it was not apportioned between the two defendants and because it improperly requested a vague "Settlement Agreement." The appellate court agreed with the plaintiff's second argument and did not address the first one. The court reversed the trial court's decision, ruling that the defendants had not made a valid section 998 offer and, therefore, were not entitled to any costs.

The party making the offer has the burden to prove its validity under section 998. The defendants in this case did not do so. The appellate court held that a valid 998 offer cannot include a settlement agreement, especially one that is "undescribed and unexplained." The terms of the settlement agreement were not described or revealed, so the plaintiff did not know what he would have to agree to.

The defendants argued that requiring plaintiffs to execute a "settlement and release" document is a common insurance defense offer. The court rejected this argument, stating that the fact that something is common does not make it valid.

The court further noted that the terms of a settlement agreement can be the subject of much negotiation and can cause problems such as waivers of all claims known and unknown, a provision that invalidates a section 998 offer. Moreover, the terms of a settlement agreement can and often do implicate the protection of lienholders, who should not be omitted from settlement negotiations.

Significance

A party that makes a pre-trial compromise offer must make sure it is free of uncertainties or contingencies in order to preserve the prospect of recovering post-offer costs.