

Avoiding Mistakes in Statutory Offers to Compromise

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Statutory offers of compromise under Section 998 of the California Code of Civil Procedure are a wonderful way to put teeth into the settlement offers and add a cold slice of reality into the case. Section 998 may present a trap for the unwary, however. This is exemplified in the recent decision *Pazderka v. Caballeros Dimas Alang, Inc.* 98 Daily Journal D.A.R. 2992 (March 25, 1998).

The 1st District California Court of Appeal essentially held that once a Section 998 offer is accepted, the resulting judgment cannot be set aside under normal rules of contract or because of a mistake of counsel. The Court concluded that a showing of fraud or undue influence is required. The Section 998 offer therefore must be drafted with even more care than one would devote to a settlement agreement. Mistakes can lead to unexpected recoveries and incomplete settlements.

Before one drafts an offer of compromise, a quick review of the Section 998 is advisable. Its purpose is to encourage the settlement of lawsuits before trial. *Taing v. Johnson Scaffolding Co.*, 9 Cal.App.4th 579 (1992). It punishes any party who rejects the offer and who then fails to gain a better result at trial. It does this by awarding or supplementing the offeror's court costs and denying court costs to the offeree. *Elrod v Oregon Cummins Diesel, Inc.*, 195 Cal App 3d 692, 699 (1987).

A plaintiff failing at trial to beat the defendant's Section 998 offer is denied its statutory court costs and must pay the defendant's costs incurred after the offer was made. Section 998 also gives the court the authority to award defendant its fees from the onset of the action and all or a portion of the defendant's expert witness fees. This latter option would be particularly appropriate when the trial ends in a defense verdict.

A defendant is punished by awarding the offering plaintiff its expert witness fees in addition to its statutory costs. A plaintiff suing for personal injury damages may also recover interest on the amount of the judgment calculated from the date of the first offer until judgment is satisfied. See California Civil Code Section 3291.

Not every offer is effective under Section 998. First, the offer must be made in good faith. It cannot be a token offer which is not likely to be accepted. The courts have read the good faith requirement into the statute to eliminate gamesmanship and to promote settlement. Offers that are rejected are held to be *prima facie* proper. The party seeking to avoid the punitive effects of Section 998 bears the burden of establishing lack of good faith. Courts must evaluate both the nature of the claims and the damages suffered, and the state of the mind of both parties, to determine the extent of their appreciation of the merits of the case at the time the offer was made.

In the past, a good yard stick for measuring the good faith of an offer might be the independent evaluation of the case made by a settlement judge or mediator. See *Goodstein v. Bank of San Pedro*, 27 Cal.App.4th 899, 908 (1994). Such evidence may now be inadmissible of the blanket of confidentiality enacted in 1997-2000 covering communication made during mediation conferences. See California Evidence Code Section 1115, et seq.

The offer must be sufficiently certain to allow the judge to determine whether the recovery at trial is "more favorable." *Valentino v. Elliott Sav-On Gas, Inc.*, 201 Cal.App.3d 692 (1988). The offer should not require a general release of claims other than those being litigated in the action, because that could render the offer uncertain.

Any disputes regarding the meaning of the offer should be resolved by application of general contract law principles unless they conflict with Section 998 or defeat the statutory purpose of encouraging pretrial settlement. In *re Watts*, 162 Cal. App. 3d 1160 (1984).

Section 998 should not be made conditional on the settlement of others, requiring each party either to accept jointly or risk punishment later. See *Santantonio v. Westinghouse Broadcasting Corp.* 25 Cal. App. 4th 102 (1994) ("[A] section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them"). This makes good sense, for it would be unfair to punish a defendant receiving the offer who cannot avoid punishment by accepting the offer. The conditional offer therefore is ineffective. See *Meissner v. Paulson*, 212 Cal.App.3d 785 (1989).

The reported cases analyzing Section 998 deal almost exclusively with rejected offers; the disputes are over whether the punitive force of the statute should be imposed. *Padzerka* is one of the few reported cases discussing a circumstance in which the offer was accepted and the offeror seeks to disavow the settlement.

The case involved a business dispute between parties to a commercial lease. An off-the-record settlement offer was incorporated into a Section 998 offer by the lessor. The lessor meant to offer have judgment entered in the lessees' favor in the amount of \$15,000, exclusive of attorney fees and costs. The lessor's counsel failed to include any reference to fees and costs in the offer, however. The offer was accepted by the lessees within a few days and filed with the court.

The lessor thereafter attempted to confirm the compromise with a settlement agreement and release, which required the waiver of fees and costs. The lessees' counsel claimed it did not receive the proposed agreement. When the clerk entered the judgment, the lessees filed a cost bill and a motion for fees of \$29,662.50 under the attorney fees clause in the lease.

After the Court granted the lessees their fees and costs, the lessor sought reconsideration of the award. The lessor claimed that it intended its offer to exclude recovery of fees and costs, pointing to the proposed settlement agreement tendered to the lessees' counsel after the offer was accepted. The lessor's attorney further testified that he mistakenly believed that the language of the offer communicated to the lessees that fees and

costs would not be recoverable. The trial court granted relief to the lessor under California Code of Civil Procedure Section 473 (b), based on the mistake and surprise of counsel.

On appeal, the Court of Appeal reversed. The court held held that Section 473(b) only grants relief where the mistake was one that "a reasonably prudent person under the same or similar circumstances" might have made. According to the court, "[t]he 'reasonably prudent person standard' . . . gives an attorney the benefit of such relief only where the mistake is one which might ordinarily be made by a person with no special training or skill. Here, counsel for [the lessor] mistakenly failed to include attorneys' fees and costs in the offer to compromise, which is not the type of mistake "ordinarily made by a person with no special training or skill."

The court went on to hold that the trial court erroneously considered the ordinary contract law principles of mistake and lack of intent in vacating the judgment entered under Section 998. "Permitting the court to unravel such agreements based on mistake or evidence of no intent, as the trial court did here, would contravene the policy objectives of section 998."

The court also addressed the seemingly Draconian effect of its ruling by reference to the underlying purposes of the statute: "Although our conclusion may seem harsh, it will advance the clear purpose of section 998, which is to encourage the settlement of lawsuits prior to trial. If courts could set aside compromise agreements on the grounds of mistake, section 998 judgments would spawn separate, time-consuming litigation. It bears repeating: Section 473, subdivision (b), was not intended to permit attorneys 'to escape the consequences of their professional shortcomings' or insulate them from malpractice claims."

An attorney error in drafting the offer thus effectively transmuted a \$15,000 settlement offer into a binding judgment worth in excess of \$40,000.

If there is a lesson to be learned from this example of a statutory offer gone awry, it is that Section 998 can be fraught with danger. Pazderkas confirms that this is one of the few areas of our practice where counsel may not be excused for inadvertence and sloppiness. And while practitioners should not hesitate to use Section 998, they should do so with a full appreciation of the merits of the case, the impact of the law and the potential for disaster. Unless considerable care is taken, the real risk in making a Section 998 offer is getting what one asked for.

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