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PERSPECTIVE

Turning down reasonable 998 offers can be costly

By Arash Homampour

In the complex world of legal disputes, the path through trial is fraught with uncertainty and potential financial peril. Offers in compromise under California Code of Civil Procedure Section 998 provide a navigational tool for litigants to steer through these tumultuous waters toward a more predictable outcome.

Sometimes, a plaintiff - a human being - has suffered a serious injury as a result of the defendant's negligence, needs immediate compensation, and cannot wait potentially years for litigation to end. Other times, a defendant wants to buy peace and stop the financial bleeding. But Section 998 can also be used by parties as a device to send a message that has nothing to do with reasonableness or fairness, and there can be serious financial consequences for this type of gamesmanship.

Section 998 allows either party in a lawsuit to make a formal offer to settle the dispute before trial. If the offer is not accepted and the trial outcome is less favorable to the rejecting party than the offer, significant financial consequences ensue, including the payment of pre-judgment interest and potentially the opposing party's litigation expenses from the time of the offer.

The legislative purpose of the law was to encourage litigants to accept reasonable settlement offers prior to trial. Making a non-settling party pay pre-judgment interest was intended to compensate the other party for loss of use of funds, but it also served as a cautionary warning. A plaintiff who got a less favorable award at trial would be on the hook for the defendant's



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costs from the time of the offer and could actually end up having to pay to the defense the difference between accrued costs and the amount awarded at trial.

998 Strategy

The 998 offer is a double-edged sword, serving as a litmus test for the reasonableness of a party's case valuation. For defendants, accepting a plaintiff's settlement offer may prevent the risk of a trial verdict that far exceeds the settlement amount, along with accruing costs and fees. Conversely, plaintiffs who decline a defendant's offer gamble against receiving a lower jury award. The decision to reject a 998 offer locks both parties into the uncertainty of litigation, with the potential for protracted court battles and escalating legal costs.

The strategic implications of 998 offers extend beyond the financial. They influence litigation dynamics, encouraging parties to evaluate the strengths and weaknesses of their cases realistically. An offer under Section 998, when crafted thoughtfully, can be a powerful tool for signaling a party's confidence in their position, potentially prompting a reassessment and settlement before trial. This aligns with the broader objectives of the legal system, to foster dispute resolution in a manner that is both efficient and equitable.

But the effectiveness of a 998 offer hinges on its timing and the sufficiency of information available to both parties. An offer made too early or without adequate disclosure may not achieve its intended purpose. It is crucial, therefore,

for litigants to carefully consider the timing of their offers, ensuring they are backed by sufficient evidence and a clear understanding of the potential outcomes at trial.

The strategy behind 998 offers underscores the significance of litigation management. Parties must navigate the delicate balance between the pursuit of justice and the pragmatic considerations of legal costs and potential outcomes. The law serves as a reminder of the value of negotiation and the importance of seeking resolution outside the courtroom whenever possible.

Settlement gamesmanship

Sometimes a 998 offer is used solely to game the system. Defendants with money and power often have less incentive to settle. They can afford to play the long game,

counting on desperate, financially insecure plaintiffs to agree to low-ball settlement offers.

Imagine, for example, a situation in which the plaintiff has made a reasonable 998 offer to the defense in an attempt to settle a potentially lengthy and complex matter but the defense has rejected the offer, deciding to take its chances before a jury. This happened in one of my cases.

My client P had suffered a catastrophic injury as a result of the defendants' alleged negligence. She and her husband M - both plaintiffs in the action - wanted nothing more than to move on with their now much-attenuated lives, and they desperately needed access to funds to care for P. Their good-faith 998 settlement offers - \$9,475,000 for P and \$475,000 for M - were rejected by the defendants, who instead responded with their own offer to settle the entire matter for \$250,000.

Reasonableness of 998 offers

The defense offer looked positively paltry after a jury awarded my clients \$60 million for their injuries. But the defendants went back into court after the verdict was issued and argued that the plaintiffs' original 998 offer was, somehow, unreasonable. Case law, alas, was not on their side.

Courts have held that 998 offers are presumed to be reasonable "when a party obtains a judgment more favorable than its pretrial offer." The burden will be on the opposing party to prove otherwise. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700; *Essex Insurance Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1528.) Such offers cannot be arbitrary; they should, in fact, "represent a reasonable prediction of the amount of money defendant would have to pay plaintiff following a trial it lost, discounted by an appropriate factor for receipt of money by plaintiff before trial." (*Elrod*, supra, 195 Cal.App.3d at pp. 699-700.)

A defendant asked to respond to a plaintiff's 998 offer should be given reasonable access to all facts necessary to "intelligently evaluate the offer." (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 921 (quoting *Elrod*, supra, 195 Cal.App.3d at pp. 699-700).) A court will look at how far into the proceedings the 998 offer was made, as well as how much discovery was conducted. Was all material information provided to the defen-

dant? The closer to the trial date a 998 offer is made, the more information the defendant should have, but it can always "let the offeror know it lacked sufficient information to evaluate the offer." (*Licudine*, supra, at 30.)

Bottom line: Was the offer reasonable at the time it was made? When a party makes an offer to which the other side objects, the offering party should be prepared to respond with as much detail as possible showing why the offer was reasonable. It should also consider extending the time to accept the offer beyond the statutory 30 days.

Statutory interest

When a defendant counters a 998 offer with a much lower offer - as happened in our case - it should not then be able to use its counter-offer as proof that the plaintiffs' original offer was unreasonable, especially after a jury has issued a much larger award. To find otherwise would be to allow parties to ignore reasonable offers knowing that they could dodge some or all of the award at trial with a low-ball counter-offer. Such a posture would undermine the very purpose of 998 offers to compromise, which is "to encourage litigants to accept reasonable settlement offers prior to trial." (*Bodell Const. Co. v. Trustees of California State University* (1998) 62 Cal.App.4th 1508, 1527.)

For this reason, Civil Code Section 3291 imposes a 10% statutory interest penalty if a declined offer results in a more favorable judgment: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." The defendants in our case were ordered to pay \$30 million in interest under Section 998.

Costs and fees

When a plaintiff makes a "valid" 998 offer in good faith, he or she becomes entitled to reimbursement of a wide range of costs incurred over the course of the litigation. A "valid" offer is one that is

"realistically reasonable under the circumstances of the particular case" (*Elrod*, supra, 195 Cal.App.3d at 698) and "carries with it some reasonable prospect of acceptance." (*Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 731.)

The offer must be within the range of reasonably possible results at trial, considering all information the defendant knew or reasonably should have known. The plaintiff must determine whether the defendant had enough information, based on what it knew or reasonably should have known, to enable it to assess whether the plaintiff's offer was reasonable. In other words, did the defense have a fair opportunity to intelligently evaluate the offer?

Assuming that a plaintiff's offer was made in good faith and defendants were given sufficient information to evaluate the odds of obtaining a favorable verdict at trial, a big win for the plaintiff suggests that the defense unreasonably gambled on winning at trial or having the process wear the plaintiff down. When it rejected the plaintiff's reasonable 998 offer, the defense should have understood and been prepared for the consequences.

Those consequences include not just payment of the amount awarded at trial but prejudgment and cost reimbursement under Section 998. On top of statutory interest, these costs, which may include post-offer costs of expert witnesses, were part of the risk that the defendant accepted when it rejected the plaintiff's reasonable 998 offer to settle.

Delays

What happens when a trial is unexpectedly prolonged or delayed? Shouldn't there be some relief for the defense? Our trial was significantly pushed out by the COVID-19 pandemic, as well as other circumstances. By the time judgment was finally entered in 2022, the process had gone more than five years beyond the plaintiffs' original 998 offers. But this was what the defendant signed up for when it rejected the 2017 settlement offers. A California Court of Appeal has stated that "the vagaries of litigation, including the possibility of juror misconduct or reversal on appeal, which increases the opposing party's costs, are part of the risk inherent in rejecting a section 998 offer." (*Saakyan v. Modern Auto, Inc.* (2002) 103 Cal.App.4th 383, 392.)

In denying the defendants' request to invoke equitable tolling in our matter, the judge noted the respective impact of the delay on the parties. "COVID-19 caused delay in trying this case to the prejudice of both Plaintiffs and Defendant. *Civ. Code*, § 3291 recognized that a personal injury plaintiff would 'manifest greater prejudice of delay in recovering personal injury damages as compared to contractual or business-tort losses given the probability personal injury plaintiffs are likely to be physically as well as monetarily impaired.'" (*McGlynn v. State of California* (2018) 21 Cal.App.5th 548, 561.) During the additional delay caused by COVID-19, Defendant had use of the money, while Plaintiff's [sic] did not. Due to COVID-19 delay, Plaintiffs sustained greater prejudice than Defendant."

Conclusion

Offers to compromise under Section 998 serve an important purpose. They allow parties to resolve and move past their disputes while ensuring that those who have suffered loss or injury are adequately compensated. The law's cost-shifting and penalty provisions were intended to encourage consideration of good-faith, reasonable settlement offers.

When parties are unwilling to consider compromise offers and try instead to game the process, they should expect to pay the price because many times this is not a game.

Arash Homampour of the Homampour Law Firm is a trial attorney who represents individuals in catastrophic injury/wrongful death, employment and insurance bad faith matters throughout California.

