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Deal or no deal? A practical guide to Section 998 statutory offers to compromise

By now, your client has received or served a statutory offer to compromise under Section 998 of the Code of Civil Procedure. The stated public policy behind Section 998 penalties is to "encourage settlement by providing a strong financial disincentive to a party… who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." (*Bank of San Pedro v. Sup. Ct. (Goodstein)* (1992) 3 Cal.4th 797, 804 [12 Cal.Rptr.2d 696]; *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.*, (1999) 73 Cal.App.4th 324, 330 [86 Cal.Rptr.2d 398].) Section 998 penalizes a party "who fails to accept what, in retrospect, is seen to have been a reasonable offer." (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 726-727 [15 Cal.Rptr.3d 829].) While it appears even-handed in its intent, in practice Section 998 appears to benefit defendants more than plaintiffs. But it is relatively easy to shift this imbalance. Read the statute, this article, and the relevant cases and you will always know when to say "deal" or "no deal."

Section 998 deadlines

A plaintiff or defendant may personally serve a Section 998 offer as late as 10 days before trial. (Code Civ. Proc., § 998, subd. (a).) If the offer is made by mail, add five days to account for service. (Code Civ. Proc., §1013, subd. (a).) If trial commences, or if the offer is not accepted within 30 days (whichever occurs first) the offer is automatically "withdrawn." (Code Civ. Proc., § 998(b).) Just like any contract offer, a Section 998 offer may be revoked prior to acceptance. (*Berg v. Darden, supra,* 120 Cal.App.4th 721, 731.) An unaccepted offer may not be filed with the court. (Cal. Rules of Court, Rule 3.250(a)(23).) If accepted, the offer along with proof of acceptance must be filed with the clerk of court and judgment entered accordingly. (Code Civ. Proc., § 998, subd. (b)(1).)

Form of Section 998 offer

A Section 998 offer must be in writing, must state the terms and conditions of the proposed judgment, and must contain a provision that allows the offeree to accept the offer by signing a statement so stating. (Code Civ. Proc., § 998, subd. (b).) An offer should make specific reference to Section 998 to put the offeree on notice that rejection of the offer may create liability for cost or fee penalties under Section 998. (*Stell v. Jay Hales Development Co.* (1992) 11 Cal.App.4th 1214, 1232 [15 Cal.Rptr.2d 220].)

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Joint offer by plaintiff

The most common mistake plaintiffs make in drafting Section 998 offers occurs where there are several defendants. In general, an unapportioned settlement offer to several defendants jointly does not trigger Section 998 penalties. This is because "[t]he offer to any defendant against whom the plaintiff seeks to extract penalties for non-acceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 586 [11 Cal.Rptr.2d 820]; *Burch v. Children's Hosp. of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 544-547 [135 Cal.Rptr.2d 404]; *Textron Financial Corporation v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (2004) 118 Cal.App.4th 1061, 1076 [13 Cal.Rptr.3d 586].) One exception to this rule is where multiple defendants are jointly liable for plaintiff's injury, so there is no question regarding comparative fault. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 656 [25 Cal.Rptr.2d 109]; *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1549 [58 Cal.Rptr.2d 371].)

For example, in *Bihun v. A T & T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000-1001 [16 Cal.Rptr.2d 787], an employment case, Section 998 penalties were triggered even though the offer was unapportioned because the defendant employer was jointly liable with defendant employee on a respondent superior theory for the full amount of damages awarded.

Practically speaking, most plaintiffs are better off making separate settlement offers to each defendant individually. If liability is joint, the plaintiff is entitled to Section 998 penalties if the verdict is in excess of either offer. (*Hilliger v. Golden* (1980) 107 Cal.App.3d 394, 401 [166 Cal.Rptr. 33] ("*Hilliger*"). In *Hilliger*, the plaintiff made a Section 998 offer to one defendant for $14,999 and to the other defendant for $9,999. The jury verdict of $15,000 entitled the plaintiff to Section 998 penalties against *both* defendants.

However, Section 998 penalties are not imposed for a defendant's failure to accept a settlement demand made by several plaintiffs jointly if it cannot be determined that the recovery at trial was "more favorable" than the Section 998 offer. (*Gilman v. Beverly Calif. Corp.* (1991) 231 Cal.App.3d 121, 126 [283 Cal.Rptr. 17].) Of course, these restrictions do not apply if you hit a home run, because Section 998 penalties are proper if it is absolutely clear plaintiff recovered more at trial than demanded in the offer. (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 263 [259 Cal.Rptr. 311].)

Defense-joint offers

In general, an offer to several plaintiffs jointly with no specific allocation of the judgment per plaintiff renders a Section 998 offer ineffective to trigger penalties under Section 998. Without the requisite specification, it is impossible to determine how much each plaintiff would receive and also whether each plaintiff's recovery was "more favorable" than the offer. (*Meissner v. Paulson* (1998) 212 Cal.App.3d 785, 791 [260 Cal.Rptr. 826].) Even if there is an apportionment of damages between the plaintiffs, a Section 998 offer cannot be conditioned on acceptance by each plaintiff. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 112 [30 Cal.Rptr.2d 486].)

But if the defendants are sued on a theory of joint and several liability, each is potentially liable for the full amount of any judgment. In this instance, an offer by codefendants jointly is an offer by each of them. The practical effect of this rule allows for the recovery of Section 998 penalties if the judgment at trial against either defendant is less than the full amount of their pretrial offer. (*Brown v. Nolan* (1979) 98 Cal.App.3d 445, 451 [159 Cal.Rptr. 469].) Further, a joint offer by two defendants that judgment may be taken against each of them jointly and severally, is valid even if both defendants are in fact not jointly and severally liable on all claims. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1171-1172 [23 Cal.Rptr.3d 335].)

Responding to a defendant's Section 998 offer, if at all

A defendant's Section 998 offer, and what it takes to beat it, is different from a plaintiff's Section 998 offer. A defendant's Section 998 offer, to be reasonable, must necessarily take into account not just the plaintiff's damages, but also in cases permitting the recovery attorneys' fees and costs, the plaintiff's attorney's fees and costs as of the making of the offer. This is because pre-offer fees and costs are added to the ultimate judgment when determining whether or not a plaintiff has beaten a defendant's Section 998 offer. (Code Civ. Proc., § 998, subd. (c); *Stallman v. Bell* (1991) 235 Cal.App.3d at 747-748 [286 Cal.Rptr. 755].) Despite this, defendants frequently send low-ball Section 998 offers that reflect only their own self-serving underestimation of the plaintiff's damages, with *nothing* included for attorney's fees and costs.

What costs are awardable under Section 998?

- Costs itemized in Code of Civil Procedure section 1033.5; Code of Civil Procedure section 998, subdivision (a). (*Scott Co. of Calif. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1112-1113 [86 Cal.Rptr.2d 614].)
- Attorney fees as costs for defendant: If a defendant's offer exceeds plaintiff's recovery, defendant is entitled to its post-offer attorney fees in any case in which attorney fees are otherwise awardable as costs. (Code Civ. Proc., §1033.5 – costs include attorney fees when authorized by contract, statute or law. (*Scott Co. of Calif. v. Blount, Inc., supra,* 20 Cal.4th at 1112).) However, a defendant is not entitled to attorney fees as part of post-offer costs where the statutory authority for the fees limits recovery to prevailing plaintiffs. (*Scott Co. of Calif. v. Blount, Inc., supra,* 20 Cal.4th at 1115.)

What is the net judgment?

Perhaps the most confusing issue is how to determine whether a judgment is "more favorable" than the Section 998 offer. The rule itself is simple: Trial courts must look to the *net* judgment. (*Scott Co. of Calif. v. Blount, Inc., supra,* 20

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Cal.4th at 1111-1112.) Calculation of the "net judgment" includes costs incurred prior to defendant's Section 998 offer in determining whether the judgment is "more favorable." (*Heritage Eng. Const., Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1441 [77 Cal.Rptr.2d 459].) This is because Section 998 expressly excludes post-offer costs from consideration. So, costs incurred before a defendant's offer must be considered in determining whether plaintiff obtained a "more favorable" judgment. (*Heritage Eng. Const., Inc. v. City of Industry, supra,* 65 Cal.App.4th at 1141.) This includes pre-offer attorneys' fees (if authorized). (*Heritage Eng. Const., Inc. v. City of Industry, supra,* 65 Cal.App.4th at 1441-1442; *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co., supra,* 73 Cal.App.4th 324, 330.)

Here's how this works in practice. Let's say you are faced with a Section 998 offer of $10,000. You go to trial and the jury awards your clients $10,000, and you win court costs of $1,000, one-half of which were incurred prior to receipt of the Section 998 offer. Your clients should not be penalized for rejecting the Section 998 offer because they obtained a "more favorable" judgment than the Section 998 offer, and your clients may recover their costs.

If your case permits the award of attorney's fees, such as in employment discrimination or wage and hour claims, you have a much greater chance of obtaining a "more favorable" judgment. Many of the cases our firm brings are rooted in California's Fair Employment and Housing Act (FEHA). The reality is, it can be exceedingly difficult for a defendant in a FEHA case to beat a plaintiff's reasonable Section 998 offer if *any* liability is found for the simple fact that FEHA provides for statutory attorney's fees recoverable as costs *and* expert fees. Thus, if a FEHA plaintiff is awarded even nominal damages, say $1,000, but ends up being entitled to attorney's fees and costs of $100,000, the number to beat is $101,000, not $1,000. Further, there is a significant difference between a plaintiff's Section 998 offer, and a defendant's Section 998 offer. With respect to a defendant's Section 998 offer, when determining whether or not the plaintiff obtained a more favorable judgment, only *pre*-offer attorney's fees and costs are included. (Code Civ. Proc., § 998, subd. (c); *Stallman v. Bell, supra,* 235 Cal.App.3d 740, 747-748 [to determine whether the plaintiff obtained a judgment more favorable than defendant's offer, pre-offer costs are added to the award of damages, and post-offer costs are excluded].)

In stark contrast to personal-injury actions, in determining whether a defendant has obtained a more favorable judgment than a plaintiff's offer, *both* pre- *and* post-offer attorney's fees and costs are included in FEHA cases. (*Stallman v. Bell, supra*, 235 Cal.App.3d at 748.) The court explained that both pre- and post-offer costs should be added to the verdict to determine the amount of the judgment because "[i]n this case it is the defendant who has impeded the statutory purpose by rejecting the offer, thus allowing the plaintiff to incur post-offer costs." (*Ibid.*) This is true even if the Section 998 offer itself contains an express waiver of costs or is silent thereto. (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 68-69 [29 Cal.Rptr.2d 615]; *Stallman v. Bell, supra*, 235 Cal.App.3d at 747-750.) This means a FEHA plaintiff's Section 998 offer can significantly exceed the amount of actual damages, and even the actual amount of attorney's fees incurred to date, even if made early on in the case.

Plaintiff's entitlement to costs and fees for defense rejection of Section 998 offer

Similarly, if a defendant rejects a plaintiff's Section 998 offer and then fails to obtain a "more favorable" judgment, plaintiff is entitled to statutory costs and fees as the prevailing party. (Code Civ. Proc., § 1032.) Personal-injury plaintiffs are also entitled to 10 percent interest on the judgment from the date of the offer, unless the action is against a public entity. (Code Civ. Proc., § 3291.) And the court may order the defendant to pay reasonable fees for plaintiff's expert witnesses in preparation for and/or during trial (or arbitration) of the case. (Code Civ. Proc., § 998, subd. (d).)

"More favorable" judgment standard for plaintiff Section 998 offers

Courts are required to look to the "net" judgment, after the jury verdict is reduced by any settlement offsets with other defendants. (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 114 [214 Cal.Rptr. 581].) Also, all costs incurred by the plaintiff, whether pre or post offer, are included in the "more favorable" judgment determination. (*Stallman v. Bell, supra,* 235 Cal.App.3d 740, 748.) Once plaintiff recovers a "more favorable" judgment, he or she is entitled to all allowable court costs, regardless of whether the costs were incurred before or after service of plaintiff's Section 998 offer. (*Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 910 [32 Cal.Rptr.2d 740] ("*Goodstein*").) The *Goodstein* court noted that it was "absurd" to argue that the plaintiffs were limited to costs incurred after the Section 998 offer.

Prejudgment interest for defense rejected offer

Prejudgment interest (as a "penalty" where defendant rejects plaintiff's Section 998 offer and plaintiff obtains a more favorable judgment) is authorized in "any action to recover damages for personal injury" under Code of Civil Procedure section 3291. "Personal injury action" has been defined as an action in which the primary claim is an injury to person rather than an injury to property. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 656 [25 Cal.Rptr.2d 109].) Where a judgment is for personal injury and other claims, prejudgment interest is only authorized on the personal-injury portion of the judgment and the plaintiff has the burden of establishing what portion of the judgment is for personal injury. (*Lakin v. Watkins Associated Industries, supra,* 6 Cal.4th at 657-658.)

An action for sexual harassment in the workplace is an action for "personal injury" within the meaning of Code of

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Civil Procedure section 3291. (*Bihun v. A T & T Information Systems, Inc., supra,* 13 Cal.App.4th at 1005.) So are actions for intentional infliction of emotional distress. (*Lakin v. Watkins Associated Industries, supra,* 6 Cal.4th at 656 [emotional distress resulted from dealings with the defendant following a car accident].) On the other hand, insurance bad-faith cases and certain claims for tortious wrongful termination of employment seek redress for a violation to "property." Thus, courts have held that emotional distress damages in these cases are merely "incidental thereto" and the plaintiffs are not entitled to prejudgment interest under Sections 998 and 3291. (*Gourley v. State Farm Mutual Auto Ins. Co.* (1991) 53 Cal.3d 121, 126-127 [3 Cal.Rptr.2d 666] [insurance bad faith]; *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1435-1436 [22 Cal.Rptr.2d 172] [wrongful termination].)

Similarly, punitive damages cannot be regarded as damages for "personal injury" within the meaning of Code of Civil Procedure section 3291. The rationale for this finding is that punitive damages are awarded to punish a defendant rather than make a plaintiff whole. (*Lakin v. Watkins Associated Industries, supra,* 6 Cal.4th at 662.) However, for purposes of determining "net judgment" punitive damages and other non-personal injury damages are considered because the statute requires a "simple comparison… between the judgment and the offer to compromise." (*Ibid.*)

Expert-witness fees

In personal-injury actions, the award of expert-witness expenses as a "penalty" for failing to accept a Section 998 offer is discretionary. (*Santantonio v. Westinghouse Broadcasting Co., supra,* 25 Cal.App.4th 102, 121-124.) Expert-witness fees may be claimed on a party's memorandum of costs; a noticed motion is not required. (*Id*., at 109-110.) A party may seek expert expenses for trial preparation and mediation work, along with time spent on the witness stand at trial. (*Amelco Electric v. City of Thousand Oaks* (2000) 82 Cal.App.4th 373, 397 [98 Cal.Rptr.2d 159]; *Santantonio v. Westinghouse Broadcasting Co., supra,* 25 Cal.App.4th at 123-124; *Michelson v. Camp* (1999) 72 Cal.App.4th 955, 974 [85 Cal.Rptr.2d 539].) Expert fees may be awarded even if the expert is only retained to prepare for trial. (*Santantonio v. Westinghouse Broadcasting Co., supra,* 25 Cal.App.4th at 124; *Amelco Electric v. City of Thousand Oaks, supra,* 82 Cal.App.4th at 397.)

Bad-faith Section 998 offers.

A Section 998 offer not made in good faith is invalid. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263 [74 Cal.Rptr.2d 607].) Despite this rule, many token offers land at our doorstep. While there is no penalty for rejecting a "token" or "bad faith" offer served by an unenlightened defendant, remember the burden of *proving* the rejected offer was token or bad faith is on the party seeking to avoid Section 998 penalties. The decision on whether an offer was reasonable and made in good faith lies within the trial court's sound discretion and is reversible on appeal only for abuse of discretion. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698-699 [241 Cal.Rptr. 108]. *Santantonio v. Westinghouse Broadcasting Co., supra,* 25 Cal.App.4th 102, 116-117.)

Of course a token offer is realistic where there is no reasonable probability that a defendant can be held liable. But, where liability is reasonably probable, no plaintiff in their right mind would accept a token offer. The plaintiff must explain in detail that the defendant should not be allowed to benefit from a "no-risk" offer extended for the sole purpose of making itself eligible for recovery of costs. (*Wear v. Calderon, supra,* 121 Cal.App.3d at 821; *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co., supra,* 73 Cal.App.4th 324, 332-335.) The reasonableness of its offer is tested by circumstances existing at the time the offer was made, and not by hindsight. The judgment recovered has a bearing on "reasonableness" of the offer: Unreasonableness may be inferred from a large jury verdict. (*Jones v. Dumrichob, supra,* 63 Cal.App.4th 1258, 1264. *Fortman v. Hemco, Inc., supra,* 211 Cal.App.3d 241, 264.)

"For a Section 998 offer to be made in good faith, there must be some reasonable prospect of acceptance." (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 471 [33 Cal.Rptr.3d 713].) But how can a defendant making a Section 998 offer fully consider the existing circumstances to determine whether their offer is or is not in good faith? Tell defendant yourself!

When you receive a bad faith or token Section 998 offer, never keep this news to yourself. Rather, send the defendant a letter explaining why you consider the offer to have been made in bad faith. "Bad-faith" correspondence should be tailored to fit the facts and circumstances of your client's case. So, be sure to address the following factors:

- *Defendant's apparent liability:* Low offers in comparison to the claimed damages may be in good faith if the defendant *reasonably* believes there is no liability.
- Plaintiff's *damages:* What damages might a jury award?
- *Insurance coverage:* Is the defendant insured or have sufficient insurance coverage?
- *Plaintiff's knowledge:* Did plaintiff know or should have known enough information to evaluate defendant's offer when it was made? (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136 [84 Cal.Rptr.2d 753] [trial court's finding that defendant's $5,000 settlement offer was "token" offer upheld where insufficient information about whether plaintiff was aware of weaknesses in case].)

While the issue of whether a Section 998 offer is deemed to have been made in "good faith" is at the discretion of the trial court, attaching your letter containing the above disclosure of the current state of affairs to your motion challenging whether the offer was made in "good faith" can only help your cause.

While there are cases that say where the offeror obtains a judgment more favorable than its offer, the judgment con-

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stitutes prima facie evidence showing the offer was reasonable, this is not always the case. (*See*, *e.g.*, *Hartline v. Kaiser Foundation Hospitals, supra*, 132 Cal.App.4th at 471; *Santantonio v. Westinghouse Broadcasting Co., supra,* 25 Cal.App.4th 102, 117.) Indeed, the requisite "good faith" element may be found lacking when the defendant's offer is so disproportionate to the plaintiff's demand, that there is no "realistic" chance it would be accepted. (*Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 62-63 [169 Cal.Rptr. 66] ["good faith" element was found to be lacking even after the defendant obtained a defense verdict, when its Section 998 offer of $2,500 was so disproportionate to plaintiff's demand of $10,000,000 that it was unreasonable to expect that it would be accepted].)

If the Section 998 offer, whether made in good faith or not, is simply unacceptable, it need not be rejected, but can simply be ignored since it expires after 30 days, or at the latest, on the first day of trial. (Code Civ. Proc., § 998, subd. (b)(2).)

On the other hand, if the Section 998 offer appears to be in good faith, and plaintiff wishes to accept, be sure to properly accept on behalf of your client, *e.g.*, accept in writing and be certain that the acceptance is an "absolute and unqualified" acceptance. By no means include any additional terms, or the "acceptance" becomes a counter-offer. Code of Civil Procedure section 998 subdivision (b) requires that an acceptance must be in writing and signed by counsel for the accepting party. (*See*, *e.g., Bias v. Wright* (2002) 103 Cal.App.4th 811, 820 [127 Cal.Rptr.2d 137] [the purported acceptance of a Section 998 offer silent on costs simply adding the language "each party to bear their own respective costs" was determined to be a counter-offer, not a valid acceptance].) One who accepts a Section 998 offer with conditions (*e.g.* costs of suit) does not constitute the requisite proof of acceptance.

Finally, if you receive successive Section 998 offers, the *most recently rejected offer* is used to determine whether the judgment obtained by plaintiff is "more favorable" than defendant's offer. In other words, all prior offers are extinguished and superseded by a subsequent offer. (*Wilson v. Wal Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390-392 [85 Cal.Rptr.2d 4].)

When a Section 998 offer is silent as to fees or costs

When determining whether to accept a defendant's Section 998 offer, an award of fees and costs is often the most important consideration. So what happens when the defendant's Section 998 offer is silent as to fees or costs? They are *excluded* from the offer, and a plaintiff who accepts the Section 998 offer silent to fees or costs may pursue them post-acceptance.

The undisputed rule is that a party who accepts an offer of compromise under Section 998 may recover costs after judgment where the compromise offer is silent on costs. (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 676 [186 Cal.Rptr. 589].) There, the court specifically denied the defendant's motion to strike costs, holding that the unqualified acceptance by plaintiffs of the defendant's Section 998 offer stating the sums offered were in "full compromise settlement" of plaintiffs' claims but making no specific mention of costs did not preclude plaintiffs from recovering for their costs.) This principle also applies where the offer is silent on fees. (*Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986, 991 [113 Cal.Rptr.2d 579].) The rule applies even if the offeror *intended* such costs and fees to be included. (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670 [73 Cal.Rptr.2d 242.)

And, under current law, it is *still* true even though the Section 998 offer calls for a dismissal without prejudice, rather than entry of judgment against defendant (thus, conferring prevailing party status on the plaintiff). For example, in *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1084-1085 [57 Cal.Rptr.3d 698], the court held that an acceptance of an offer "to settle and compromise" cross-complaint for a total payment of $25,000 "as full and complete resolution of all of the claims raised by the cross-complaint to be dismissed with prejudice" could not reasonably be interpreted to exclude recovery of attorney's fees and costs, and the prevailing party was entitled to seek them.

Note well: in *On-Line Power*, *Inc*., the issue of "prevailing party" status for purposes of awarding attorney's fees was ordered to be determined upon remand because "both parties achieved a status that Code of Civil Procedure section 1032 defines as a prevailing party" (one got a net monetary recovery and the other got a dismissal with prejudice). (*Id.* at 1087.) Expect to see this issue rear its ugly head within the next few years.

Thus, if your client receives a Section 998 offer that is silent as to fees or costs, the plaintiff can accept the Section 998 offer, and then file a memorandum of costs and a motion for attorney's fees for their recovery. Expect a fight (no doubt because at least one court has called such an obvious omission of such simple language as "each side to bear its own attorney fees and costs" from a Section 998 offer as "malpractice"), but there is quite literally *zero* case law supporting the position that a Section 998 offer silent as to fees or costs prohibits their recovery. (*Pazderka v. Caballeros Dimas Alang, Inc., supra*, 62 Cal.App.4th at 672 [denying relief under Code Civ. Proc., § 473 where offer failed to include statement that each side should bear its own fees and costs].) The court held that relief under Section 473 "was not intended to permit attorneys to escape the consequences of their professional shortcomings or to insulate them from malpractice claims." (*Ibid*.)

So what about the plaintiff drafting a Section 998 offer – should the offer include or exclude attorney's fees and costs? As with a defendant's Section 998 offer, a plaintiff's Section 998 offer that is silent as to fees or costs does not prohibit the plaintiff from, after defendant accepts, moving to recover its attorney's fees and costs. (*See*, *Hoch v. Allied-Signal, Inc., supra*, 24 Cal.App.4th at 69 [impliedly agreeing with the defendant's

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argument that its acceptance of the plaintiff's Section 998 offer without an express cost waiver would not have precluded the plaintiff from seeking statutory costs under Code Civ. Proc., § 1032, citing to *Rappenecker v. Sea-Land Service, Inc., supra*].) A careless defendant might not notice the omission, accept the offer, and then be liable for attorney's fees and costs well beyond the amount the defendant believed it was agreeing to pay by accepting the Section 998 offer.

On the other hand, an offer that includes attorney's fees and costs, or agrees to waive them as part of the offer (which does not alter the proper inclusion of these elements for purposes of determining whether a defendant obtained a more favorable judgment), is more likely to be accepted, because the typical defense attorney would notice the omission and understand its consequences. (*Hoch v. Allied-Signal, Inc., supra*, 24 Cal.App.4th at 68-69; *Stallman v. Bell, supra*, 235 Cal.App.3d at 747-750.)

Rather than try to pull a "fast one" and hope you are dealing with a negligent attorney, a plaintiff's Section 998 offer could expressly point out that attorney's fees and costs are *not* included, with the offer expressly including language that these amounts are to be determined by the judge pursuant to the ordinary memorandum of costs and motion for attorney's fees procedures. For the defendant who would like to limit their exposure and who is willing to roll the dice on attorney's fees and costs, this is an appealing option.

Memorandum of costs

To obtain costs, a prevailing party must file a memorandum of costs. The deadline for filing a memorandum of costs is the earliest of:

- 15 days after the clerk's mailing of notice of entry of judgment or dismissal;
- 15 days after any party's service of such notice; or
- 180 days after judgment. (Code Civ. Proc., §664.5; Cal. Rules of Court, Rule 870(a)(1).)

Motion to tax costs

The losing party at trial may dispute any item in the cost memorandum by filing a "motion to tax costs." (Cal. Rules of Court, Rule 870(b).) The motion must be directed to specific items on the costs and state the reason or reasons each item is objectionable in same order the costs appear in the costs memorandum. (Cal. Rules of Court, Rule 870(b)(2).) A motion to tax or strike costs must be served and filed with the court within 15 days after services of the costs memorandum and this time limit is extended by five days if the costs memorandum was served by mail. (Cal. Rules of Court, Rule 870(a)(1); Code Civ. Proc., §1013, subd (a).) After the time has passed for a motion to strike or tax costs, the clerk enters the allowed costs on the judgment. Code Civ. Proc., § 685.090, subd. (a); Cal. Rules of Court, Rule 870(b)(4).)

Hearing on motion to strike or tax costs

A verified costs memorandum is prima facie evidence of the propriety of the costs. The burden is on the party seeking to tax costs to show the costs or were not reasonable or necessary. (*Ladas v. California State Auto Association* (1993) 19 Cal.App.4th 761, 774-776 [23 Cal.Rptr.2d 810].) Proper objection to items on the costs memorandum shifts the burden of proof to the party claiming the costs. (*Ibid.*)

Motion for attorneys' fees

The memorandum of costs form includes an entry for an award of attorneys' fees. Where either the "prevailing party" status or "reasonableness" of attorney fees requested must be determined by the court, a party must file a noticed motion claiming fees. (Cal. Rules of Court, Rules 8.100 & 8.104.) The time limit to file a motion for attorneys' fees is the same as the time limit for filing a notice of appeal, or 60 days after either the clerk's mailing of notice of entry of judgment, or any party's service of notice of entry of judgment, or 180 days after the date of entry of judgment, whichever is the earliest. (Cal. Rules of Court, Rule 8.104.)

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