Section 998 update

Six notable recent cases clarify the law surrounding offers to compromise

By Jeremy Cloyd

California Code of Civil Procedure section 998 offers continue to be fertile ground for appellate attention. The following six cases, issued just since 2018, are notable and worth reviewing. Together they can be read as furthering the policy purpose of encouraging reasonable settlements.

Validity of joint 998 offers

***Gonzalez v. Lew* (2018) 20 Cal.App.5th 155**

Why is this case important? *Gonzalez* contains a comprehensive summary of law on the validity of joint 998 offers and ultimately encourages the practice by multiple plaintiffs. The court rejects contrary dicta from *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388.

Gonzalez arose from a building fire that resulted in two deaths. Decedents' heirs sued defendant property owners for wrongful death. Plaintiffs made a joint 998 offer to settle their claims for $1.5 million. Defendants rejected the offer and plaintiffs prevailed at trial, with the jury awarding $2.2 million to one set of heirs and $357,000 to the other.

Defendants argued plaintiffs' joint 998 offer was invalid as it did not allocate the amount of money that would go to each heir. The court rejected dicta from *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388 that a joint offer *by* multiple parties is as equally invalid as an unallocated offer *to* multiple parties. (*Id.* at 166.) The court noted that while joint offerors may not be able to establish they obtained a more favorable verdict, "that will not always be the case and would not, in any event, justify a rule that joint offers from multiple parties are always invalid." (*Ibid.)*

The policy of "encouraging reasonable settlements, compensating injured parties, and avoiding the injection of uncertainty into the 998 process" weighed in favor of the offer's validity. (*Id*. at 172.) "If plaintiffs with disparate claims want to make a global settlement offer which would put an end to the litigation at hand (and work out the details among themselves), they should be encouraged to do so." (*Ibid*.) The court found it "'incomprehensible' that [defendants] could not evaluate the risk of refusing the settlement offer because it was not allocated between the two sets of heirs. [Defendants] could have evaluated their exposure on the wrongful death claims individually and then added the figures together. If they fared better under plaintiffs' offer, it would have been prudent to accept it." (*Id*. at 171.)

Gonzalez is helpful but at least partially dependent on the underlying verdict that clearly exceeded any potential allocation. Plaintiffs' counsel should continue to evaluate whether it makes sense to allocate a monetary amount to each plaintiff on a case-by-case basis.

A party's inability to pay

LAOSD asbestos cases (2018) 25 Cal.App.5th 1116

Why is this case important? The court held that a trial court must consider a party's inability to pay, among other factors, when deciding whether and to what extent to award section 998 costs.

The court of appeal noted that "courts have interpreted the discretionary authority in section 998 to allow the consideration of a party's ability to pay when determining the appropriate recovery under that statute." (*Id*. at 1127.) But for the trial court to "properly exercise its discretion regarding what amount, if any, it was reasonable for [plaintiff] to pay, the court was required to consider all of the relevant factors." (*Ibid*.) These factors include the plaintiff's financial circumstances, whether the offer was reasonable and made in good faith, and whether the requested fees were incurred and reasonably necessary. (*Ibid*.) The court reversed and remanded the denial of fees to allow the trial court to consider all of these factors.

The court of appeal notably expressed doubt that the trial court record contained enough evidence to consider the plaintiff's inability to pay. Parties seeking to assert an inability to pay section 998 costs must be sure to present substantial evidence of financial condition such as a declaration with detailed financial information.

Decedent's insurer may be considered a "party"

***Meleski v. Estate of Albert Hotlen* (2018) 29 Cal.App.5th 616**

Why is this case important? *Meleski* holds that the decedent's insurance carrier may be considered a "party" and thus liable for section 998 penalties.

Meleski brought a suit for injuries against decedent's estate pursuant to Probate Code sections 550 through 555 by which her recovery was limited to decedent's insurance coverage with Allstate. Plaintiff attempted to settle her claim before trial by way of a section 998 offer in the amount of $99,999. Allstate rejected the offer and a jury awarded plaintiff $180,613.86. The trial court denied Meleski's request for section 998 costs though because decedent's estate, not Allstate, was the named party.

As the court of appeal noted, section 998 applies to "parties" ("*any party* may serve an offer in writing upon *any other party* to the action to allow judgment to be taken…" *Id.* at 623, italics by court). Allstate argued section 998 did not apply since it was not a true party.

The court of appeal reasoned that section 998 refers to parties "because in

nearly every circumstance, the party is the entity controlling the litigation and incurring the risk of loss." (*Id.* at 624.) A decedent's estate, however, is "neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent." (*Ibid.)* In contrast, Allstate accepted service of the Complaint, provided the defense, and controlled the litigation. (*Id.* at 625.)

The court thus found that Allstate was a "party" for purposes of section 998 because a narrower interpretation would "frustrate the manifest purpose of section 998 and lead to absurd results." (*Id.* at 626.) "By enforcing the terms of section 998 against Allstate, we are holding Allstate accountable for its own actions in failing to accept a reasonable settlement offer." (*Id.* at 625.)

Email correspondence can be evidence of 998 offer's terms

***Prince v. Invensure Insurance Brokers, Inc*. (2018) 23 Cal.App.5th 614**

Why is this case important? Contemporaneous email correspondence between the parties resolved any ambiguity as to the terms of the section 998 offer, which was therefore valid.

Prince, the former principal of an insurance agency, sued the agency for damages related to lost value. The agency countersued for unauthorized computer access and theft of trade secrets. Prince served two 998 offers: the first was for a judgment in his favor for $400,000; the second was for judgment in his favor for $500,000 on his complaint only. The jury awarded $647,706.48 to Prince, who then sought an award of section 998 expert fees. The trial court awarded only a portion of the requested fees though because it ruled the first 998 offer ambiguous and the second offer only applied to Prince's complaint – not the countersuit.

The court of appeal reversed the trial court's decision because the parties had shown an ability to clarify any ambiguity in the initial offer that entitled Prince to all expert fees. "In the context of this case, where two sophisticated parties are represented by counsel, allowing an offer to compromise to be clarified in writing after the offer was made serves the purposes of section 998. Such clarification encourages reasonable settlement" (*Id*. at 623.)

Courts may thus look beyond the express language of a section 998 offer to determine whether the parties made reasonable attempts to clarify any ambiguity. Counsel should be aware that providing meaningful clarification in response to a request can help improve the validity of the offer.

The common-sense reading of an offer's language

***Timed Out LLC v. 13359 Corp*. (2018) 21 Cal.App.5th 933**

Why is this case important? *Timed Out LLC* favors a common-sense reading of an offer's language when a party subsequently claims the offer was ambiguous.

Plaintiff brought a cause of action that allowed for recovery of costs and fees. Defendant served a section 998 offer in the amount of $12,500 "exclusive of reasonable costs and attorney [] fees, if any." A bench trial resulted in a plaintiff's judgment for $4,483, "exclusive of any costs [or] attorneys' fees that may be set by noticed [m]otion." (*Id.* at 936.) Plaintiff's verdict exceeded the 998 offer, but only if recoverable costs and fees were added to the verdict. The trial court interpreted defendant's offer as preserving plaintiff's right to seek costs and fees in a subsequent motion and therefore found that plaintiff did not obtain a more favorable verdict. The court of appeal similarly rejected plaintiff's post-trial arguments that the 998 language was ambiguous. "Common sense informs us that 'exclusive' is the opposite of 'inclusive.'" (*Id.* at 943.)

While certainly not ground-breaking, *Timed Out* is helpful authority for anyone seeking to enforce a 998 offer against belated claims of ambiguity. Read in conjunction with *Prince, supra,* 23 Cal.App.5th 614, both cases support addressing and resolving ambiguities while the offer can still be accepted.

As to whether an early offer was made in good faith

***Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918**

Why is this case important? *Licudine* summarizes the factors that trial courts consider in deciding whether an early 998 offer was made in good faith.

Plaintiff in a medical malpractice lawsuit served a 998 offer for $249,999.99 less than 30 days after service of her complaint. The offer was rejected and a jury eventually returned a damages award of $7,619,457. However, the trial court denied plaintiff's request for prejudgment interest because the offer was premature and did not provide "an adequate opportunity to evaluate the damages in this case at the time of the 998 offer." (*Id.* at 923.)

The court of appeal identified two considerations in determining whether a section 998 offer has "a reasonable prospect of acceptance": (1) was the offer within the range of reasonably possible results at trial, considering all the information the offeror knew or reasonably should have known?; and (2) did the offeror know the offeree had sufficient information to assess whether the offer was reasonable? Because the offer was "undoubtedly" within the range of reasonably possible results, *Licudine* focused on the circumstances related to the second consideration that include: "how far into the litigation was the 998 offer made;" "what information bearing on the reasonableness of the 998 offer was available to the offeree prior to the offer's expiration;" "did the party receiving the 998 offer alert the offeror that it lacked sufficient information to evaluate the offer and, if so, how did the offeror respond?" (*Id.* at 925-26.)

In affirming the offer's invalidity, *Licudine* emphasized the lack of information known to defendant due to a "bare bones" complaint, the failure to serve a 90-day notice letter, and an absence of the meaningful exchange of information.

The court seemed to also be influenced by the amount of the 998 offer (one penny below the non-economic damages cap) and its timing, both which raised "more than a specter of gamesmanship." (*Id.* at 928.)

Licudine highlights the importance of making a contemporaneous record of the information knowable to the 998 offeree and avoiding the appearance of any gamesmanship. Although *Licudine* is unlike other cases discussed here because it invalidates a 998 offer, it encourages the common underlying policy by encouraging parties to use the statutory tool as part of a meaningful settlement process.

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