



# Attacking the token 998 offer

*The authors argue that token offers violate the policy behind Section 998, are therefore void and do not entitle defendants to expert costs.*

**CHARLES C. KELLY, II  
AND BETHANY CARACUZZO**

While Code of Civil Procedure section 998 was conceived and implemented to promote settlement and judicial economy, defendants frequently abuse this procedure by making no more than a token or bad faith offer, for little or even no money or perhaps a mutual waiver of costs. Defendant's transparent motive is simply to set plaintiffs up so that they can collect defense expert costs if the matter is lost by plaintiff at trial.

A token offer results in a zero sum game for plaintiffs: They must either accept a settlement offer for zero dollars or risk losing at trial and paying defense expert costs, which can be considerable.

Recently, we have been successful in arguing that these token offers violate the policy behind Section 998, are therefore void and do not entitle defendants to expert costs.

## **Purpose of Section 998**

The stated purpose of Section 998 is to encourage settlement between parties to litigation and to punish a party who fails to accept a reasonable offer. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699.) Section 998 provides that the offeror may recover his ex-

pert costs incurred in preparing for and participating in trial if his Section 998 offer is rejected, and he obtains a more favorable judgment at trial.

Where an offeror obtains a more favorable judgment than its offer, the judgment is prima facie evidence that the offer was reasonable and the burden is on the offeree to prove otherwise. (*Elrod, supra*, at 700.) Plaintiff can meet this burden by arguing that the Section 998 offer was a "token" or "bad faith" offer.

## **When the court will deny Section 998 penalties**

Section 998 penalties may be denied if the trial court determines that the defendant's 998 offer was merely a "token" or "bad faith" offer, i.e. one where there was no reasonable prospect for acceptance. While what is "reasonable" falls within the Court's discretion, we have successfully argued that defendants' offers were anything but reasonable, thus voiding the Section 998 offer.

## **What is a reasonable 998 offer?**

In evaluating whether an offer is reasonable, courts have looked to: (1) the purpose of Section 998, (2) whether, at the time of the offer, there was any reasonable possibility that the defendant would not prevail, and (3) the amount of the offer given the circumstances of the

case. (*The People ex rel Bill Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1271; *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821; *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 62-3.)

*Elrod* held that a 998 offer must carry with it some reasonable prospect of acceptance at the time it was made to support a recovery of expert costs. If an offer is unreasonable at the time it is made, any subsequent punishment of the offeree for non-acceptance does not further the purpose of Section 998 because the offeree would not have acted differently at the time of the offer despite the threat of later punishment. In that situation, later punishment of the offeree provides a windfall to the offeror and does not promote settlement. (*Elrod, supra*, at 699.)

Further, if there is some reasonable possibility, however slight, that defendant will be held liable, there is no chance that a reasonable plaintiff will accept a token offer of settlement in view of the cost of preparing a case for trial. (*Wear, supra*, at 821.)

Defendants often cite to *Culbertson v. R.D. Werner* (1987) 190 Cal.App.3d 704, *Colbaugh v. Hartline* (1994) 19 Cal.App.4th 1516, and *Jones v. Dimrichob* (1998) 63 Cal.App.4th 1258. However, these arguments have generally been unsuccessful.



While these cases follow the analysis established by *Wear* and *Elrod* to support the recovery of expert costs pursuant to Section 998, there are important factual differences to consider. In *Colbaugh*, the Court found that the plaintiffs knew throughout the litigation that the written contract they relied upon in support of their claims did not exist. In fact, plaintiffs' claims were so entirely devoid of merit that defendant prevailed on non-suit.

In *Culbertson*, a products liability case arising out of an alleged defective ladder, pre-trial discovery revealed that plaintiff's injuries were caused by modifications to the ladder, which occurred after leaving the defendant manufacturer. Because one of the elements a plaintiff must prove in a products liability case is the defect causing injury existed at the time the product left the defendant manufacturer's possession, the Court found the evidence completely foreclosed the possibility of plaintiff's success at trial, making the defendant's offer of \$5,000 reasonable under the circumstances.

In these cases, the courts each held that the Section 998 offers were not unreasonable at the time of the offer, and therefore were not "token." However, defendants' reliance on these two cases will only be persuasive if a plaintiff's claims are entirely devoid of merit and defendant would have succeeded in bringing a motion for non-suit, summary judgment or directed verdict. Indeed, in cases where damages are substantial a plaintiff may not reasonably be expected to accept a token offer unless "it is *absolutely clear* that no reasonable possibility exists that defendant will be held liable." (*Wear, supra* at 821 (Emphasis added).)

In *Dimrichob*, the offer contained both a waiver of costs and a stipulation that judgment would be entered against the defendant. The stipulated judgment against defendant was found to have tangible value by the Court. It is extremely rare indeed where a defendant will propose having judgment entered against it as part of the terms of the Section 998 offer. Consequently, a defendant's reliance on this case will most usually be misplaced.

### What to argue in the motion to tax costs

In the motion to tax costs, plaintiff should argue that the 998 offer was not reasonable at the time it was made by directing the Court's attention to the status of discovery at the time of the Section 998 offer.

Plaintiff's counsel should argue that the facts developed at the time of the offer showed there was a reasonable possibility that the defendant would not prevail. Plaintiff should cite and discuss witness and expert deposition testimony and written discovery supporting his or her claims, as well as any evidence supporting the amount of his or her damages.

### Point out that defendant did not file necessary motions

Further, plaintiff may argue that defendant's contention that the 998 offer was reasonable is belied by defendant's failure to bring a demurrer, motion for summary judgment, or directed verdict.

### The impact of litigation costs

The cost of the litigation up until the time of the offer is also relevant as to whether it is reasonable to expect a

plaintiff to accept an offer for zero dollars, as the court may consider a waiver of costs as having actual value. However, the litigation costs, even if low at the time of the offer, would still not be enough to thwart a request for expert costs pursuant to 998 if the plaintiff clearly knew his or her claims were unsupported at the time of the offer.

California law prohibits a defendant from making a bad faith offer, which it anticipates a plaintiff will not accept in order to obtain its expert costs. As stated by the *Wear* Court, a defendant should not be allowed to benefit from a 'no-risk' offer extended for the sole purpose of making itself eligible for the recovery of expert costs. If plaintiffs continue to successfully challenge these

bad faith offers, defendants will be forced to begin making realistic 998 offers that carry with them a true possibility for settlement.



Kelly

*Charles C. Kelly, II is a partner at the Law offices of Hersh & Hersh in San Francisco. He specializes in products liability and catastrophic tort cases.*



Caracuzzo

*Bethany Caracuzzo is an associate at Minami Tamaki where she specializes in employment, civil rights and consumer law. She is a graduate of Boston College and Cal Western School of Law. She worked in the DA's offices of San Diego and Alameda counties.*

