



9-9-8: It's the combination

Learn the unlock code for CCP 998 and you will not only gain settlement clout but prevent loss of your judgment dollars from defendant's post-trial motions

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Did you realize that you could litigate or arbitrate a case, get a judgment in your favor, be denied your costs of suit and still owe the defendant money?

That's why you have to understand what lies locked behind the Code of Civil Procedure (herein CCP) 9-9-8 combination!

While the English Rule imposes the prevailing party's attorneys' fees on the losing party, the general rule in American jurisprudence is that in the absence of a special controlling statute, each party bears its own costs and attorneys' fees. (*Davis v. KGO-TV* (1998) 17 Cal.4th 436, 439). There are specific statutes dealing with when attorneys' fees are recoverable by contract or in asserting a specific statutory remedy (see CCP, §§ 1021, *et seq.*). There are also statutes dealing with recoverable litigation costs the "prevailing party" will recover, including filing fees, deposition costs and more (see CCP, § 1032, 1033.5).

CCP § 998

California Code of Civil Procedure § 998 is a cost-shifting statute encouraging early settlement of actions by penalizing a party who fails to accept a reasonable and good faith pre-trial settlement offer following the CCP 998 mandated format. Designed to avoid the time delays of protracted litigation and eliminate the economic waste of expensive trials or arbitrations, a CCP section 998 offer to compromise can greatly benefit the party that "beats" a rejected offer or cause counterintuitive consequences to the party who prevails in the lawsuit but falls short of the offered settlement.

If a plaintiff rejects a defendant's offer to compromise for \$250,000 and gets a verdict for \$249,000, it is conceivable the defendant will be awarded expert witness costs and, where authorized, attorneys' fees, while at the same time preventing plaintiff from recovering certain "prevailing party" costs of CCP section 1032. (*Heritage Engineering v. City of Industry* (1998) 65 Cal.App.4th 1435, 1439). Furthermore, the defendant's costs are deducted from the plaintiff's verdict. Where the awarded costs to defendant exceed the verdict, the plaintiff pays the defendant the difference. (CCP § 998(e)).

A plaintiff who beats its offer to compromise can not only seek "prevailing party costs" of CCP sections 1032 and 1033.5, but also the court's discretion to award post-offer expert costs and pre-judgment interest from the date of plaintiff's offer. (CCP, § 3291).

The process

The 998 process is a rigid, formalized, "bright line" methodology which generally operates under contract principles unless adherence to those principles would foster "gaming the system." (*Poster v. Southern California Rapid Transit* (1990) 52 Cal.3d 266). In order to prevail on a post-trial Offer to Compromise Motion, the offer must:

- Be timely (CCP, § 998(b));
- Be reasonable and in good faith (*Najera v. Hurta* (2011) 191 Cal.App.4th 872);
- Dispose of a claim subject to a pending lawsuit (*Chen v. InterInsurance Company* (2008) 164 Cal.App.4th 117); and
- Be clear, specific and calculable to the offeree (*Seever v. Copley Press* (2006) 141 Cal.App.4th 1550).

Timing

Any party to a lawsuit can make an offer to compromise (offeror) to any other party to the lawsuit (offeree). (CCP, § 998(b)). The offer can be made at any time ten days before trial or arbitration. The triggering trial events include opening statement, first witness sworn to testify or the introduction of evidence. (CCP, § 998(b)(3)). The offer is deemed withdrawn after 30 days or the beginning of the trial/arbitration. (CCP, § 998(b)(2)).

While the statute prescribes how late an offer can be made, the important question is: How soon can the offer be made and still be considered valid, reasonable and in good faith? The focus is upon the information available to the offeree at the time of the offer. Did the offeree have the necessary information to evaluate the facts and legal issues to intelligently evaluate the probability of success and extent of damages? Where a CCP 998 demand was served with the summons and complaint, and the parties had no ongoing, pre-existing exchange of information, courts have found the demand unreasonable and invalid. (*Najera v. Huerta* (2011) 191 Cal.App.4th 872). However, where there was a pre-filing relationship and exchange of evidence the reasonableness of service of the 998 offer to compromise with the summons and complaint is justified. (*Barba v. Perez* (2008) 166 Cal.App.4th 444).

The formal offer/acceptance

The form of the 998 offer is not only prescribed by statute, but a compliant form is available from the Judicial Council (form CIV-090). Use of the Judicial Council form is not mandatory but its use does eliminate a potential challenge to



the validity of the offer. (*Rouland v. Pacific Specialty* (2013) 220 Cal.App.4th 28).

The offer must be in writing, stating the terms and conditions which must be specific to the pending dispute and allow for an intelligent evaluation of the offeree's exposure to liability and damages. It must also contain a provision allowing the accepting offeree to indicate acceptance by signing a written statement that the offer is accepted. There also must be a provision concerning a "notice of acceptance" signed by the party or their attorney, if represented, which must be filed with the court. (CCP, § 998(b)(1)).

The Judicial Council form has all of these elements integrated into it. Courts have accepted offers where there were instructions for compliance with the "accepting" provisions but no enclosed separate document (*Rouland v. Pacific Specialty* (2013) 220 Cal.App.4th 280) and rejected offers where the single offer document did not contain instructions (*Perez v. Torres* (2012) 206 Cal.App.4th 418).

Although acceptance of a CCP § 998 offer results in the entry of a judgment in favor of the offeror, it is a "stipulated or consent judgment," a ministerial act which does not amount to collateral estoppel. (*Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997).

The terms of the offer

Whereas the form of the offer/acceptance is prescribed by statute, the content or terms of the offer are not. They simply must be dispositive of the pending claim and allow the offeree (and later the court) an intelligent opportunity to evaluate the exposure. (*Najera v. Huerta* (2011) 191 Cal.App.4th 872).

Most 998 offers are for specific dollar amounts alone. However, specific dollar amounts and "reasonable attorney fees" have been upheld. (*Elite Show Services v. StaffPro* (2004) 119 Cal.App.4th 263). A 998 offer which disposes of the complaint but not the cross-complaint may also be valid. (*West America Bank v. MBG* (2007) 158 Cal.App.4th 109).

Joint offerors/offerees

The offeree and court's ability to evaluate the terms of the offer also comes into play when joint parties make a single offer and when a single offer is made to joint parties. Again, the focus is upon the ability to determine the "reasonableness" of the offer. Where a single offeror serves a 998 on a single offeree, there is an opportunity for the party to intelligently evaluate its monetary exposure to a judgment. Similarly, when the offer is rejected, the mathematical calculation by the court in determining if the prevailing party "beat" the offer is simple. But, the "reasonableness" evaluation by the court is complicated where joint parties make an offer or a single party makes an offer to joint offerees.

Generally speaking, where multiple defendants' liability is joint and several based on vicarious liability or arising from a non-delegable duty, a single 998 offer to them is valid. (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537).

A defendant can make a single joint offer to joint plaintiffs where the damages is a unitary amount as in a wrongful death case (*McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201) or a single property damage insurance claim (*Vick v. Da Corsi* (2003) 110 Cal.App.4th 206; *Barnett v. First National Insurance Company of America* (2010) 184 Cal.App.4th 1454). Both *Vick, supra* and *Barnett, supra* relied on community property principles to reach their conclusion that the claim was a single "action for damages" and therefore valid. In a medical malpractice case, the sole defendant made a joint offer to husband and wife. The Court held it invalid. (*Menes v. Andrews* (2004) 122 Cal.App.4th 1540).

Multiple offers

There is no limit on the number of CCP, § 998 offers a party can serve in the course of a case. In fact, as the issues of damages and liability become clearer through discovery, it is encouraged.

Where a party makes an initial offer which expires; later serves another offer to settle for less than the first, and beats both offers at trial, interest and costs have been assessed off the date of the first offer. (*Martinez v. Brownco Construction* (2013) 56 Cal.App.4th 1014). This is a situation in which ordinary contract principles of "last offer rule" do not apply.

In a case *One Star, Inc. v. STAAR Surgical* (2009) 179 Cal.App.4th 1082, defendant made an initial offer which expired, then made a second 998 offer which it withdrew. At trial, defendant beat its first expired/unaccepted offer. Defendant recovered 998 costs and interest from the expired first offer. The revocation of an offer before it expires according to the statutory terms is a void act and neither triggers the cost-shifting provisions of the revoked offer nor upsets the effect of any expired/unaccepted prior offers. (*Marcey v. Romero* (2007) 148 Cal.App.4th 1211). An offer is not extinguished by a subsequent vacated judgment (*Palmer v. Schindler Elevator* (2003) 108 Cal.App.4th 154) nor by a counter-offer (*Poster v. Southern California Rapid Transit* (1990) 52 Cal.3d 266), nor by a JNOV (*Saakyan v. Modern Auto* (2002) 103 Cal.App.4th 383).

Post-trial costs and interest

The award of CCP § 998 costs and prejudgment interest is vested in the sound discretion of the court. (*Adams v. Ford* (2011) 199 Cal.App.4th 1475). As previously discussed, the court must determine that a reasonable and good faith 998 offer was made, focusing on the form of the offer and its terms. The court also evaluates the rejecting party's financial ability to pay costs and prejudgment interest. (*Holman v. Altana* (2010) 186 Cal.App.4th 262). This is referred to as "scaling costs." (C).

Pre-judgment interest begins to run from the date of the CCP 998 offer (CCP, § 3291). In a multi-defendant case where joint and several liability applies, each defendant pays its share of the prejudgment interest – not cumulative interest on the total joint and several



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damages. (*Cadlo v. Metalclad* (2009) 172 Cal.App.4th 1040).

In the multi-defendant case based on joint and several liability where some of the defendants settle before trial, pre-judgment interest is assessed against the non-settling defendant(s) from the date of the 998 offer based on the joint and several damages until each settling defendant actually offsets that amount. (*Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 780-781).

Conclusion

Cases must be litigated aggressively in discovery to determine the liability issues and damages so an early and informed CCP section 998 offer can be

made, supported by evidence. Not only does this increase the pressure and probability of timely resolution of the claim, but where a plaintiff expects a case not to go to trial for a year, interest is accumulating at the rate of 10 percent. Add in “prevailing party” costs and expert fees, you’ll add thousands of dollars of exposure to the rejecting party’s liability. Yet, failure to understand the mathematics and process of using a CCP § 998 offer may expose you and your client to economic disappointment. That’s why you must figure out what’s locked behind the combination 9-9-8.



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