Appellate Reports

Ruling makes new law for offers and responses per CCP 998

By Jeffrey I. Ehrlich

Licudine v. Cedars-Sinai Medical Center

(2019) _ Cal.App.5th _ (Second Dist, Div. 2.)

Who needs to know about this case: Any lawyer making or responding to a settlement demand made under Code Civ. Proc., § 998.

Why its important: Makes new law concerning the factors relevant in determining whether the party receiving a section 998 offer had sufficient facts to intelligently analyze the offer; holds that the trial court did not abuse its discretion in finding that an offer for $249,999.99 plus court costs made in a medical-malpractice action that ultimately resulted in a $7.6 million verdict was not made in good faith and was therefore invalid. As a result, the plaintiff lost out on over $2 million in prejudgment interest.

Synopsis: In 2012, Dione Licudine underwent gallbladder-removal surgery by Dr. Gupta at Cedars Sinai. The surgery was intended to be minimally invasive, but Dr. Gupta nicked a vein inside the abdominal cavity and caused substantial internal bleeding. This necessitated a more invasive surgery that left Licudine with a large scar, a month-long hospitalization, and a chronic abdominal condition.

She filed her medical-malpractice complaint against Cedars and the treating doctors in January 2013 and served Cedars with the summons and complaint on May 23, 2013. On June 11, 2013 (19 days after service of the complaint), Licudine served Cedars with a section 998 offer for $249,999.99, plus court costs. On June 27, 2013, Cedars sent her a written "objection" to the offer, noting that the offer had been served only five days after Cedars filed its answer. The objection stated, it was "too soon for it to make any determination as to whether plaintiff 's [998 offer] was reasonable" because Cedars had "not had an opportunity to fully investigate this action." The offer expired on July 16, 2013, without Cedars accepting it.

The case went to trial. A jury found Cedars liable for malpractice and awarded plaintiff $1,045,000 in damages. Both Cedars and plaintiff moved for a new trial on damages, and the trial court granted both motions and set the matter for a new damages trial. The Court of Appeal affirmed the new-trial order in *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881 (*Licudine I*).

On retrial of damages, the jury awarded total damages of $7,619,457, comprised of $5,344,557 in economic damages and $2,274,900 in noneconomic damages. The trial court reduced the latter award to $250,000 as required by MICRA, yielding a total verdict of $5,594,557.

Plaintiff filed a memorandum of costs seeking, among other things, $2,335,929.20 in prejudgment interest from the date of her 998 offer to the date of judgment. Cedars opposed, arguing that the 998 offer was invalid because it was "made so early in the proceedings that [Cedars] did not have a fair opportunity to intelligently evaluate it." The trial court ruled in favor of Cedars, striking the offer. Licudine appealed. Affirmed.

A plaintiff who makes a 998 offer that is not accepted is entitled to an award of, inter alia, prejudgment interest in personal-injury cases if the verdict exceeds the amount of the offer, provided that the offer is "valid." A 998 offer is valid only if it is made in "good faith." A 998 offer is made in good faith only if the offer is realistically reasonable under the circumstances of the particular case; that is, if the offer "carries with it some reasonable prospect of acceptance."

Whether a section 998 offer has a reasonable prospect of acceptance is a function of two considerations, both to be evaluated in light of the circumstances at the time of the offer and not by virtue of hindsight. First, was the 998 offer within the range of reasonably possible results at trial, considering all of the information the offeror knew or reasonably should have known? Second, did the offeror know that the offeree had sufficient information, based on what the offeree knew or reasonably should have known, to assess whether the offer was a reasonable one, such that the offeree had a fair opportunity to intelligently evaluate the offer? These two considerations assess whether the offeror knew that the 998 offer was reasonable, first, from the offeror's perspective and, second, from the offeree's perspective. In light of this focus on the reasonableness of the offeror's conduct in making the 998 offer (which makes sense because the issue is the validity of the offer in the first place), whether the offeree acted reasonably in rejecting that offer is irrelevant.

In assessing whether the 998 offeror knew that the offeree had sufficient information to evaluate the offer (the second consideration), the offeree needs information bearing on the issue of liability as well as on the amount of damages, because these are the issues upon which a verdict would rest and because the 998 offer, if accepted, would be in lieu of that verdict. In assessing the information available to the offeree, courts are to look

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to all of the relevant circumstances. The pertinent cases have nevertheless identified several specific circumstances to be examined. Of these, three are the most important:

First, how far into the litigation was the 998 offer made? A litigant receiving a 998 offer at the time a lawsuit is filed or soon thereafter is, as a general matter, less likely to have sufficient information upon which to evaluate that offer.

Second, what information bearing on the reasonableness of the 998 offer was available to the offeree before the offer expired? Information may be obtained (1) by virtue of prior litigation between the parties; (2) through pre-litigation exchanges between the parties; (3) through post-complaint discovery in the case; or (4) by virtue of a pre-existing relationship between the parties that yields a free flow of information.

Third, 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? An offeree may alert the offeror by (1) requesting discovery, either formally or informally; (2) asking for an extension of the 998 offer's deadline; or (3) otherwise objecting to the offer. If, after hearing the offeree's concerns, the offeror's response is less than forthcoming, "such obstinacy" is "potent evidence that the offer was neither reasonable nor made in good faith."

Although the party making a 998 offer generally has the burden of showing that her offer is valid, it is the 998 offeree who bears the burden of showing that an otherwise valid 998 offer was not made in good faith.

As applied in this case, these factors show that the trial court did not abuse its discretion in finding that the 998 was invalid because it was served before Cedars could evaluate it. The offer was served only 19 days after the complaint was served, at a time when Cedars had very little information available to it on the issues of liability and the amount of damages prior to the date plaintiff's 998 offer expired. Plaintiff's three-page complaint was "bare bones" and listed no specifics as to the injuries she suffered or the amount of damages she sought. Nor was the skeletal complaint fleshed out by the pre-litigation notice required by section 364, which would have set forth the "legal basis of [her] claim and the type of loss sustained, including the specific ... nature of injuries suffered," because plaintiff never filed such a notice.

Plaintiff had sent Cedars a letter the day before she made her 998 offer (1) stating that her doctors' negligence was "self-evident" and that her "injuries are well documented and far exceed the" $250,000 cap on noneconomic damages, and (2) attaching photographs of plaintiff before and after the surgery. Plaintiff also provided some written discovery to Cedars prior to her offer's expiration – namely, (1) she forwarded to Cedars her answers to the general interrogatories propounded by defendant Dr. Carroll, but submitted to the trial court only the cover sheet for those answers and not the answers themselves, and (2) she responded to Cedars's request for documents on the day before her 998 offer expired. Those responses contained no details on the issues of liability and the amount of damages except (1) to indicate that plaintiff was not making a claim for "lost earnings" and that plaintiff's "earning capacity may be affected as she had to delay starting law school for at least two years," (2) to tell Cedars to contact plaintiff's insurance carrier to obtain her medical bills, and (3) to tell Cedars to look at its own records. And Cedars also had in its possession plaintiff's 9,662-page medical chart, which included (1) the operation report noting the nicked vein and internal bleeding, and (2) the records indicating her extended stay and care at the hospital.

The trial court did not abuse its discretion in concluding that this information, considered in its totality, did not provide Cedars with sufficient information with which to evaluate the reasonableness of plaintiff's section 998 offer. On the question of liability, this information did not indicate which doctor (Dr. Gupta or Dr. Carroll) was responsible for any negligence or the extent to which plaintiff's injuries were related to or exacerbated by any preexisting medical conditions she might have. On the question of the amount of damages, this information did not speak at all to plaintiff's pain and suffering, to the amount of her medical expenses (including any offset due to insurance), or to any possible loss in her earning capacity. Indeed, plaintiff's response to Cedars' request for documents indicated she was unsure whether she would suffer any loss of earning capacity.

As to providing notice of the lack of sufficient information and any response to that notice, Cedars alerted plaintiff to its concern that it was "too soon for it to make any determination as to whether" her 998 offer was reasonable, and plaintiff never responded.

Short(er) takes

Default judgments; cross-complaints; statement of damages; no incorporation by reference; *Yu v. Liberty Surplus Ins. Corp.* (2019) __ Cal.App.5th __ (Fourth Dist., Div. 3).

Yu hired ATMI, a general contractor, to design and build a hotel. After the hotel opened, Yu sued ATMI for construction defects, praying for damages of not less than $10 million. ATMI filed a cross-complaint against its subcontrators, including Fitch. The cross-complaint sought damages "according to proof." Yu settled with ATMI, with ATMI assigning to Yu its rights against Fitch. Yu obtained a $1.2 million default judgment. When Yu then sued Fitch's insurers seeking to enforce the judgment, the trial court voided the default judgment, finding that ATMI's cross-complain never stated the amount of damages sought. Yu appealed. Affirmed.

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Section 425.10, subdivision (a) of the Code of Civil Procedure states that a cross-complaint must contain "a demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated." A default judgment that exceeds the amount of damages demanded is void.

Here, ATMI's cross-complaint did not specify the amount of damages demanded; hence, Fitch was not put on notice of the amount of a potential default judgment. Since the cross-complaint did not state an amount of damages, it was proper to treat it as making a demand of $0. And the cross-complaint did not clearly and unequivocally incorporate by reference the amount of the $10 million demanded by Yu in the complaint. Accordingly, the trial court properly voided the default judgment.

Torts; negligence; duty of care; cell-phone manufacturers; distracted driving: *Modisette v. Apple, Inc*. (2018) __ Cal.App.5th __ (Sixth Dist.)

Plaintiffs were seriously injured, and their daughter was killed, in an automobile collision caused by a driver who was using the FaceTime application on his iPhone 6. The Modisettes sued Apple for products liability, alleging that Apple had wrongfully failed to implement in the iPhone 6 a safer alternative design that would have automatically prevented drivers from utilizing FaceTime while driving at highway speed (lockout technology). The Modisettes also alleged that Apple had failed to warn users that the iPhone "was likely to be dangerous when used or misused in a reasonably foreseeable manner." The Modisettes alleged that Apple "had a legal duty to ... use due care in the design, manufacture, and sale of its iPhone 6 Plus" and that Apple had "breached that duty by failing to use reasonable care to design and manufacture [the phone] with the safer, alternative 'lock-out' technology it had already developed to prevent the use of its pre-installed 'FaceTime' application during a driver's operation of a motor vehicle." The trial court sustained Apple's demurrer without leave to amend, finding that it owed no duty of care to the Modisettes. Affirmed.

While several of the factors articulated in *Roland v. Christian,* which courts use to determine whether to create an exception from the general duty of care imposed by Civil Code section 1714 do favor the plaintiffs, ultimately the court concluded that no duty was owed. In particular, the court concluded, "first, that there was not a 'close' connection between Apple's conduct and the Modisettes' injuries and, second, that 'the extent of the burden to Apple and consequences to the community of imposing a duty to exercise care with resulting liability for breach' would be too great if a duty were recognized.

A duty of care will not be held to exist even as to foreseeable injuries ... where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability. "The Modisettes' complaint alleges a duty that, at its core, may preclude cellular-phone manufacturers from allowing the use of phones while driving, notwithstanding California law that expressly permits such uses under certain circumstances."

Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm*, in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*

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