



Section 998 offers in the new normal of the pandemic

Insurers are trying to push fast, cheap settlements by making Section 998 demands before plaintiffs have had sufficient opportunity to conduct necessary investigation and discovery

BY RAMONA H. ATANACIO
AND ZACHARY J. BUCHTA

As plaintiffs' attorneys, we understand the importance of California Code of Civil Procedure section 998 offers in their ability to force defendants to seriously evaluate our cases at various stages of litigation. Most commonly, defendants will object and argue that the offer was not made in good faith because it was not realistically reasonable under the circumstances. Defendants may argue that because they do not have sufficient information to assess whether the offer is reasonable, they do not have a fair opportunity to intelligently evaluate the offer.

We all have seen the practice of civil litigation change dramatically during the COVID-19 pandemic. Changes include the unavoidable slowdown of case investigation and discovery. An outcropping of this altered civil landscape is a seemingly new trend in which section 998 offers are now being served by defendants before plaintiffs can assess whether an offer is reasonable. Plaintiffs' attorneys must be prepared and understand the law in assessing and responding to a defendant's section 998 offer from this reversed perspective.

This article provides legal background on section 998 offers to compromise, cases in which courts have found section 998 offers to be unreasonable, and suggestions for responding to an offer you believe is not realistically reasonable under the circumstances.

It is very important to recognize that an objection is reviewed for its validity in hindsight. Thus, a judge will be assessing the factors described in this article and one cannot predict with absolute certainty what the outcome of an objection will be. It is therefore necessary that you properly advise your client that there is no bright line test to give someone total confidence that an objection will be held to be proper when you choose to reject a section 998 offer.

C.C.P. section 998 offer to compromise: The basics

C.C.P. section 998 is a cost-shifting statute that was enacted to encourage the early settlement of lawsuits prior to trial and to penalize litigants who fail to accept reasonable settlement offers. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698.) A party that does not accept the opponent's reasonable settlement offer and then fails to achieve a better result at trial or arbitration faces the penalties prescribed by this section. (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

Under C.C.P. section 998, a plaintiff that rejects the defendant's section 998 offer, then fails to achieve a more favorable result at trial or arbitration, cannot recover court costs incurred after the section 998 offer was made and must pay defendant's post-offer court costs, even if the plaintiff is the prevailing party. (Code Civ. Proc., § 998, subd. (c).) Additionally, the court may order the plaintiff to pay a

reasonable sum to cover defendant's post-offer expert witness fees. (*Ibid.*)

Similarly, a defendant that rejects the plaintiff's section 998 offer, then fails to achieve a more favorable result at trial or arbitration, may also be required to pay a reasonable sum to cover plaintiff's post-offer expert witness fees. (Code Civ. Proc., § 998, subd. (d).) In a personal injury case, a defendant that fails to achieve a more favorable result will also be required to pay ten percent interest on the judgment calculated from the date the first section 998 offer was made. (*Cadlo v. Metalclad Insulation Corp.* (2009) 172 Cal.App.4th 1040, 1046.)

In order for a section 998 offer to be valid, it must meet several requirements. The section 998 offer must (1) be in writing; (2) state the terms and conditions of the proposed judgment or award; and (3) contain a provision that allows the offeree to accept the offer by signing a statement so stating. (Code Civ. Proc., § 998, subd. (b).) A section 998 offer expires after thirty days or upon the commencement of trial or arbitration, whichever comes first. (*Ibid.*)

A section 998 offer may be served on the opposing party at any time ten or more days before a trial or arbitration begins. (Code Civ. Proc., § 998, subd. (b).) For example, a plaintiff may serve a section 998 offer along with the summons and the complaint. Additionally, a defendant may serve a section 998 offer along with their answer to the complaint. However, a section 998 offer that is served



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together with the plaintiff's summons and complaint or with the defendant's answer may later be deemed to be unreasonable by the court if it determines that the offeree did not have sufficient information about the merits of the case to be able to determine whether the offer was reasonable. (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 925.)

Good faith offer – “Realistically reasonable under the circumstances”

For the section 998 offer to be valid, the offer must be made in good faith. (*Whalley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103, 1112.) This means that the offer must be realistically reasonable under the circumstances of the particular case, and that the offer have some reasonable prospect of being accepted. (*Ibid.*) Therefore, a token or nominal offer made with the sole purpose of attempting to shift expert fees will not be valid because it is not made in good faith and has no reasonable expectation of being accepted. (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821.)

To determine whether a section 998 offer is reasonable you must look at the circumstances of the case at the time that the offer was made. (*Elrod*, at p. 699.) In *Elrod v. Oregon Cummins Diesel, Inc.*, the court set forth a two-part test to determine whether a section 998 offer is reasonable. (*Ibid.*)

First, the offer is measured “by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant.” (*Elrod*, at p. 699.)

Second, reasonableness of the offer is measured by the information that the offeree had at the time of the offer. You must determine whether the offeree knew or reasonably should have known

the information used by the offeror when making the section 998 offer. (*Elrod*, at p. 699.)

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. (*Licudine*, at p. 925.)

Reasonableness from the offeree's perspective under *Licudine*

Under the second part of the *Elrod* test, a section 998 offer is not reasonable if the offeree did not have crucial information that the offeror had when making the offer. (*Elrod*, at p. 699.) Moreover, the reasonableness of an offer does not depend solely on information actually known by the offeree, but rather on information that was known or reasonably should have been known by the offeree. (*Elrod*, at p. 700.) This is an objective test which looks at whether a reasonable person would have discovered the information prior to the expiration of the section 998 offer. (*Ibid.*)

If one party has crucial information that is privileged and not discoverable by the other party, and that party makes a high or low section 998 offer based on its exclusive knowledge of that information, that offer would likely be found to be unreasonable. (*Elrod*, at p. 699-700.) Unless the offeror communicates its exclusive knowledge of critical information to the offeree along with its offer, the offer is not reasonable and does not qualify as a valid section 998 offer. (*Elrod*, at p. 700.)

In assessing whether the offeree of a section 998 offer had sufficient information to evaluate the offer, the offeree needs information on the issues of liability and the amount of damages. (*Licudine*, at p. 925.) This is because a verdict would be based on these issues, and if accepted, the section 998 offer would be in lieu of that verdict. (*Ibid.*)

When assessing the information available to the offeree at the time of the section 998 offer, the court looks at all of

the relevant circumstances of the case at the time the offer was made. (*Licudine*, at p. 925.) The Court in *Licudine* outlined three general considerations in determining whether the offeree had sufficient information to evaluate the offer. (*Ibid.*)

First, how far into the litigation was the section 998 offer made? Although section 998 fixes no minimum period that must elapse following commencement of suit for service of a valid section 998 offer, a litigant receiving a section 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. (*Licudine*, at p. 925.)

Second, what information bearing on the reasonableness of the section 998 offer was available to the offeree prior to the offer's expiration? 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 preexisting relationship between the parties that yields a free flow of information. (*Licudine*, at p. 926.)

Third, did the party receiving the section 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 section 998 offer; 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 evidence that the offer was neither reasonable nor made in good faith. (*Licudine*, at p. 926.)

998 offer held unreasonable

Below are two cases in which the courts have reviewed the information available to the offeree and found that the section 998 offer was unreasonable. Although the defendant was the offeree in these cases, plaintiffs can use these cases to make similar arguments.



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

In 2019, the Second Court of Appeals determined that the trial court did not abuse its discretion in concluding that the offeree, defendant Cedars-Sinai Medical Center, lacked sufficient information to evaluate the section 998 offer.

First, the plaintiff in this medical malpractice case made her section 998 offer just 19 days after serving the defendant with her complaint, and just five days after the defendant filed its answer. The defendant had very little information on the issues of liability and the amount of damages prior to the expiration of the plaintiff's section 998 offer. Plaintiff's complaint was "bare bones," and it listed no specifics as to the injuries she suffered or the amount of damages she sought. The plaintiff never filed the required section 364 pre-litigation notice which would have set forth the legal basis of her claim and the type of loss sustained, including the specific nature of the injuries suffered. Finally, no depositions had been taken in the case.

However, plaintiff had sent the defendant a letter the day before making a section 998 offer which stated that her doctors' negligence was "self-evident," that her "injuries are well documented and far exceed" the \$250,000 cap on noneconomic damages, and attached photographs of plaintiff before and after the surgery.

Plaintiff also provided some written discovery to defendant prior to the expiration of the section 998 offer. Plaintiff provided the defendant her answers to the general interrogatories propounded by the defendant, and the plaintiff responded to defendant's request for documents on the day before the section 998 offer expired. However, those responses contained no details on the issues of liability and the amount of damages except to indicate that plaintiff was not making a claim for lost earnings, to tell defendant to contact

plaintiff's insurance carrier to obtain plaintiff's medical bills, and to tell defendant to look at its own records. The defendant also had in its possession plaintiff's nearly 10,000-page medical records, which included the operation report noting the nicked vein and internal bleeding, and the records indicating her extended stay and care at the hospital.

On the question of liability, one of the doctors may have admitted to holding the instrument that nicked plaintiff's vein but this information did not indicate which doctor 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 discuss the plaintiff's pain and suffering, the amount of plaintiff's medical expenses, or any possible loss in her earning capacity. Additionally, the defendant alerted the plaintiff about its concern that it was "too soon for it to make any determination as to whether" her section 998 offer was reasonable, and plaintiff never responded.

The court ultimately decided that the trial court did not abuse its discretion in concluding that this information, considered in its totality, did not provide defendant with sufficient information to evaluate the reasonableness of plaintiff's section 998 offer.

A plaintiff's attorney will generally have sufficient information about the damages suffered by the plaintiff prior to filing a complaint. However, the attorney may not have enough information regarding the liability of the defendant. If a defendant serves an unreasonably low section 998 offer based on the damages of the plaintiff, the plaintiff's attorney may want to object to that offer citing a lack of information about liability to be able to properly evaluate the offer. This objection would need to request more time for discovery and identify the

additional information they need to evaluate the offer.

***Najera v. Huerta* (2011) 191 Cal.App.4th 872**

In this case there was no free flow of information or preexisting relationship between the parties. Instead, when plaintiff's attorney served a pre-litigation demand letter on defendant's insurance company, and when that insurance company requested additional information, none was provided.

When the section 998 offer was served concurrently with the summons and complaint, there were no special circumstances present to show that defendant's counsel had access to information or a reasonable opportunity to evaluate plaintiff's offer within the thirty-day period before the offer expired.

The court then explained that it is ordinarily not reasonable to expect defendants to conduct sufficient discovery in the thirty-day period to respond to a section 998 offer served with the summons and complaint considering everything the defense counsel must do following the service of a summons and complaint.

The defense counsel objected to the section 998 offer based on the inability to properly evaluate the offer. The court found that there were no special circumstances in this case that would have allowed the defense to properly evaluate the section 998 offer served concurrently with the summons and complaint. Therefore, the court concluded that the trial court did not abuse its discretion in granting the motion to tax costs and thereby denying recovery of special costs pursuant to section 998.

A defendant also has the ability to serve a section 998 offer on the plaintiff along with their answer to the complaint. If the defendant does so, the plaintiff may not have had an opportunity to investigate issues regarding liability. If this is the



case, the plaintiff's attorney may want to object to that offer stating that a section 998 offer served along with the defendant's answer does not provide the plaintiff with sufficient information to evaluate the offer unless there were special circumstances or a sharing of information during the pre-litigation process.

998 offer held reasonable

In your evaluation, you may want to consider the following cases in which the courts found that the section 998 offer was reasonable:

***Barba v. Perez* (2008) 166**

Cal.App.4th 444

The parties in this case had a close, semi-familial relationship, and there was a free flow of information between parties throughout the litigation process. Plaintiff waited eight months after the accident before filing the lawsuit. Plaintiff wrote a letter before the suit was filed, informing the defendant that his medical bills were approximately \$70,000, and requested that defendant pay the medical bills. However, defendant never responded to the letter. Finally, Plaintiff served a section 998 offer for \$99,999.99 along with a complaint which listed medical expenses in excess of \$70,000 and sought damages for lost wages. The trial court determined that the section 998 offer was reasonable.

***Whatley-Miller v. Cooper* (2013) 212**

Cal.App.4th 1103

The defendant argued that the plaintiffs' section 998 offer was not made in good faith because it was served two months after the defendant responded to the complaint and before the defendant had the opportunity to discover and evaluate the facts underlying the complaint. The court then laid out the information available to defendant, including the decedent's annual income and the financial

impacts of his death, which plaintiffs produced during discovery prior to the section 998 offer.

Prior to the expiration of the section 998 offer, the defendant did not inform the plaintiffs that he required more information, did not describe or identify what additional information he needed, and did not inform the plaintiffs how much additional time he needed to evaluate the offer. Based on the defendant's failure to make these requests, the court found that the plaintiffs' section 998 offer was made in good faith, and therefore valid.

***Aguilar v. Gostischef* (2013)**

220 Cal.App.4th 47

Plaintiff requested policy limit information several times in letters indicating willingness to settle for the policy limits but got no response. Months later after plaintiff filed suit, defendant made a section 998 offer for \$100,000 policy limits. Plaintiff then made a section 998 offer for \$700,000. Court found plaintiff's offer above the policy limits to be reasonable because the insurance company ignored genuine offers to settle within policy limits.

***Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968**

Plaintiff sued the county for violations when arrested after being found not guilty in criminal trial. Plaintiff made a section 998 offer three months after filing and three days after acquittal in criminal trial. Court said defendant had sufficient information to evaluate the offer because all parties had testified in a criminal trial and Sheriff's department had done an internal investigation.

COVID-19 impacts section 998 decisions

Due to the changes resulting from the COVID-19 pandemic, most plaintiffs have been denied discovery, extensions have occurred, and there has been an inability to take proper depositions on issues of liability and causation which

could affect the ability to assess damages. Therefore it appears that, based on case law, there is a proper COVID-19 objection to a section 998 offer from a defendant, especially in the situation where the defendant has used the COVID-19 pandemic as a reason to delay or prevent discovery on the issues of liability and causation. These issues are what the practitioner should use in analogizing to the case law presented above.

In this COVID-19 pandemic, defendants are serving more section 998 offers before plaintiffs have had sufficient opportunity to conduct necessary investigation and discovery to evaluate and respond. It is important for plaintiffs' attorneys to think about the law from this different point of view and be prepared to respond appropriately. Moreover, an objection to a defendant's section 998 offer would be reviewed by a judge after a judgment, so it is recommended that clients be advised that an attorney can never know with complete certainty how a judge will rule. There is always some risk when rejecting a section 998 offer that the offer could later be held valid. If you would like a sample objection to a defendant's section 998 offer that is consistent with this article, please contact us.

Ramona H. Atanacio and Zachary J. Buchta are attorneys in the Rains Lucia Stern St. Phalle & Silver, PC Personal Injury Group. They represent persons who have suffered serious injury as a result of automobile accidents, defective products, dangerous premises, negligence, and intentional torts. ☒



Atanacio



Buchta