Bonne Bridges
Mueller O'Keefe & Nichols
PROFESSIONAL CORPORATION

Offers To Compromise: What You Need To Know To Trigger Cost-Shifting Provisions Under CCP Section 998

by Patricia Daehnke & Linda Rurangirwa

California Code of Civil Procedure Section 998 is a statutory device that has many purposes, but is primarily used to strategically jump start a dialogue with the opposing party to lead to a satisfactory resolution.

It is also used as a tactic to encourage the opposing party to evaluate the merits of their case or defense at an early stage due to the penalties associated with rejecting a reasonable offer. This is because California Code of Civil Procedure Section 998 encourages early resolution of lawsuits by serving as a cost-shifting measure that penalizes litigants who fail to accept reasonable settlement offers.

From a defense perspective, if a plaintiff refuses to accept a valid 998 Offer, and fails to obtain a more favorable judgment at trial, the plaintiff cannot recover costs incurred after the date of the Offer, and must pay the defendant's costs from the time the offer was made. Allowable costs are delineated in Code of Civil Procedure Section 1033.5 (a), and include attorney fees if authorized by law, statute or contract. In addition, the court has discretion to allow the defendant to recover expert witness fees from the time the Complaint was filed. These fees could be extensive especially in the medical malpractice arena where expert witnesses are generally key to the defense of a case. Therefore, if your purpose in serving a section 998 Offer to Compromise is not only to seriously start negotiations, but also to carry through with the implicit threat to punish the party should he unreasonably reject your Offer and go to trial, then you must make sure you have made an enforceable Offer to Compromise.

The key to enforcement of the 998 cost-shifting provisions is to ensure a ***valid*** Offer to Compromise has been made. Specifically, the Offer must be in writing, must contain the term "CCP Section 998" and must allow for entry of judgment or some alternative final disposition of the case. The Offer, must also be certain and "capable of valuation." A court recently stated that an Offer is not capable of valuation if the court must "engage in wild speculation bordering on psychic prediction." What this means for practical purposes is that if you cannot reduce the terms of the agreement to financial terms, then there is a possibility that your Offer is not valid. A California court of appeals recently determined that an Offer that contained a confidentiality provision was incapable of valuation and therefore unenforceable.[1] Yet another court of appeals deemed an Offer uncertain and incapable of valuation because it was conditioned on the release of claims other than those being litigated.[2]

No published opinion in California has addressed the validity of an Offer for a waiver of the costs of defense and malicious prosecution rights. Based on the foregoing test, it is uncertain whether such an Offer is capable of valuation, even if accompanied by a letter setting forth the dollar value of the costs of defense. It has been our experience that although some trial judges will enforce the cost-shifting measures with such Offers, other trial judges have deemed such an Offer invalid as the right to sue for malicious prosecution is "unaccrued" and thus incapable of valuation.

Other ways in which your 998 may be deemed unenforceable include making a single Offer to multiple parties, and conditioning the acceptance of an Offer on acceptance by another party.[3]

If you cannot reduce the terms of the agreement to financial terms, then there is a possibility that your Offer is not valid.

In addition, the courts have recently implied a "good faith" requirement into an Offer. An Offer is unenforceable unless it is "realistically reasonable under the circumstances of the case." This is usually a hindsight determination made by the trial judge after a jury verdict or court judgment has been entered. Often this determination is made months if not years after the Offer has been made. Nonetheless, the reasonableness of the Offer is gauged as of the time the Offer was made.

The courts have focused on a two step process determine "reasonableness under the circumstances": (1) Is your offer reasonable, i.e. would an experienced attorney or judge, standing in your shoes, place the amount of the Offer within the range of your Offer; and (2) Does the

continued

Offers To Compromise *continued*

plaintiff know, or should the plaintiff reasonably have known the information on which you based the amount of the Offer.[4] In theory, the value of a case and thus what constitutes a reasonable Offer should be known or readily ascertainable by the plaintiff or his counsel early in the litigation. Oftentimes, however, it is incumbent upon the defense to force that assessment by making an Offer to plaintiff. Therefore, the question you must consider when making the Offer is: How much do you want to educate the plaintiff about your case at the point in time when the Offer is made?

The moral of the story is that if you are not only interested in starting a settlement dialogue, but you also want the enhanced penalties of Section 998 to be effective, keep the Offer simple and certain, make sure that the terms of the Offer can be reduced to financial terms, and make sure that the opposing party knows, or at least has the relevant material so that they should know, why you have valued the case as you have.

Remember, these principles and consequences work to the benefit and detriment of both the plaintiff and the defendant, and thus should be kept in mind when you are the recipient of a Section 998 Offer to Compromise and you are considering whether to accept or reject the Offer. ■

[1] See Barella v. Exchange Bank (2000) 84 Cal. App. 4th 793

[2] Valentino v. Elliott Sav-On Gas, Inc., (1988) 201 Cal. App. 3d 692

[3] Menees v. Andrews (2004) 122 Cal. App. 4th 1540

[4] See Elrod v. Oregon Cummins Diesel (1987) 195 Cal. App. 3d 692

For further information regarding this article, contact Patricia Daehnke at 213.738.5896, pdaehnke@bonnebridges.com or Linda Rurangirwa at 213.738.5882, lrurangirwa@bonnebridges.com.

If you would like to receive our newsbrief electronically or would like complimentary copies, please send your request to pholguin@bonnebridges.com.

© 2006. The newsbrief is a publication of Bonne Bridges and is intended as a report on legal developments and should not be construed as legal advice on any specific facts or circumstances. Readers should not act upon the information contained within this publication without professional advice.

www.bonnebridges.com

Bonne Bridges
Mueller O'Keefe & Nichols
PROFESSIONAL CORPORATION
3699 Wilshire Boulevard, 10th Floor
Los Angeles, CA 90010-2719

n e w s b r i e f