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Don't Rush The 998 Offer

Timing is everything. This is also true for “998 offers,” the cost-shifting procedure under Code of Civil Procedure section 998 that encourages settlement before trial. A prevailing party who does not beat a 998 offer may have to pay for an opponent’s post-offer costs, experts, and prejudgment interest. However, a 998 offer served before your counterpart has a grasp of the case is bad timing and invalid. (*Licudine v. Cedars-Sinai Medical Center* (2019) __ Cal.Rptr.3d __) (2019 WL 92087).

Plaintiff sued Cedars for malpractice and served a 998 offer for \$249,999.99, plus costs, 19 days after serving the complaint. Cedars sent a written objection to the offer, noting that plaintiff made her 998 offer only five days after Cedars filed its answer. Cedars explained that this 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 and trial ensued.

Plaintiff obtained a \$5.5 million verdict and sought \$2.3 million in prejudgment interest from the date of her 998 offer to the date of judgment. Cedars moved to strike, 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 court granted the motion to strike, finding that plaintiff’s 998 offer was “premature” because Cedars had not “ha[d] an adequate opportunity to evaluate the damages in this case at the time of the 998 offer.” The Court of Appeal affirmed. A 998 offer is valid only if it is made in “good faith,” considering two factors: First, was the 998 offer within the “range of reasonably possible results” at trial, considering all the information the offeror knew or reasonably should have known? Second, did the offeror know that the offeree had sufficient information to evaluate the offer? The verdict confirmed that plaintiff’s offer was within the range of possible trial results. The good faith analysis turned on the second factor (information available to the offeree), considering:

1. Timing of the offer: Serving a 998 offer soon after the lawsuit is filed is generally too early in the process for an intelligent response.
2. Available Information: Plaintiff’s “bare bones” complaint and the limited discovery exchanged provided no specifics about claimed injuries or damages. Thus, Cedars had insufficient information to evaluate the reasonableness of plaintiff’s 998 offer.
3. Notice to the Offeror: A party receiving the 998 offer may alert the offeror that it lacks sufficient information to evaluate the offer by (a) requesting discovery (formally or informally); (b) asking to extend the 998 offer’s deadline; or (c) otherwise objecting to the offer. If the offeror’s response to these concerns is less than forthcoming, “such obstinacy” is “potent evidence that [the] offer was neither reasonable nor made in good faith.”

Here, Cedars’ general objection to the timing of the 998 offer put plaintiff on notice that it lacked sufficient information to evaluate the offer, including issues of liability and the amount of damages. The 998 offer was deemed invalid.