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An Offer You Can't Accept

Code of Civil Procedure section 998 was enacted to encourage settlement of lawsuits before trial. The statute provides a cost shifting financial disincentive to a party who fails to achieve a better result at trial than that party could have achieved by accepting his or her opponent's settlement offer. The offer must be in writing and (1) shall include a statement of the offer; (2) containing the terms and conditions of the judgment or award; and (3) a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. (Code Civ. Proc., § 998, subd. (b).)

Acceptance of the offer (1) may be made on the document containing the offer or on a separate document of acceptance; (2) shall be in writing; and (3) shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party. (*Ibid*.) If accepted, the clerk or court must enter judgment accordingly, upon filing the offer with proof of its acceptance. (Code Civ. Proc., § 998, subd. (b)(1).)

Question: If a party accepts a Section 998 offer that lacks an "acceptance provision," is the resulting judgment valid? The answer is "no" according to *Mostafavi Law Group, APC v. Larry Rabineau, APC* (2021*)* 61 Cal.App.5th 614.

In *Mostafavi*, plaintiff MLG sued Rabineau for defamation. After several years of litigation, Rabineau served MLG with a Section 998 offer to compromise for $25,000.01. (The offer was silent as to costs). Rabineau's offer did not contain the required "acceptance provision." MLG's counsel hand-wrote the following onto the 998 offer: "Plaintiff [MLG] accepts the offer." MLG filed and served notice and proof of the acceptance with the trial court, which entered judgment for MLG pursuant to Section 998. Three days later, MLG demanded payment according to the judgment. Rabineau refused to pay unless MLG signed a settlement agreement under which each party would bear its own fees and costs.

MLG refused to sign the proposed agreement because it wanted to recover costs as the prevailing party. The costs dispute led Rabineau to file a motion to vacate the judgment under Code of Civil Procedure section 473, subdivision (d), on the grounds that his Section 998 offer was invalid because it lacked an acceptance provision. The trial court agreed and granted Rabineau's motion. MLG appealed, arguing that the order vacating the judgment (1) lacked support in caselaw; (2) contradicts the policies and purposes of Section 998; and (3) violates principles of contract law and equity.

The Court of Appeal affirmed the order vacating the judgment. The plain language of Section 998 requires all offers to contain an acceptance provision. The offer was deemed invalid because it contained no statement regarding acceptance. General contract principles do not apply where their application would conflict with Section 998.

The Costs Issue

The MLG/Rabineau settlement blew up over costs, which MLG claimed were $10,000. Avoid that issue by stating in the Section 998 offer that each party shall bear its own costs. Don't hope that costs will be covered later in a settlement agreement which may or may not materialize. Note that a Section 998 offer that is conditioned upon the other party entering into a "settlement agreement" is not valid.

In *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, the Rasnicks' 998 offer included a request for "The notarized execution and transmittal of a written settlement agreement and general release." The terms of the "written settlement agreement" were never communicated to Sanford. The Rasnicks argued on appeal that their Section 998 offer "is a standard, insurance defense offer that requires that [Sanford] execute a document titled 'settlement agreement and release' along with a Dismissal . . . ." The Court of Appeal found the Section 998 offer invalid, and reversed the order granting costs to the Rasnicks.

Sanford noted that Section 998 allows offers with nonmonetary terms and conditions. However, the offer itself must be unconditional. For example, an offer to two or more parties, contingent upon all parties' acceptance, is not a valid offer under the statute. In *Sanford*, the release was not a problem, because a release is not a settlement agreement. But the terms of a settlement agreement can be the subject of much negotiation, and may create problems under the statute.

Settlement agreements typically contain a waiver of all claims "known and unknown" under Civil Code section 1542, a provision that has been held to invalidate a Section 998 offer (because the offer is conditioned on waiving claims not encompassed within the current lawsuit). Also, settlement agreements frequently implicate the protection of lienholders, such as the medical lien in *Sanford*. *Sanford* refused to enforce a Section 998 offer that included a settlement agreement, let alone one undescribed and unexplained.

The Multiple Parties Issue

In *Mostafavi* there were two plaintiffs, both Mostafavi and his law firm, MLG. Rabineau served his Section 998 offer upon MLG only. That move could have left Rabineau without a global settlement, and with the obligation to pay a judgment to one plaintiff, while proceeding to trial with the second plaintiff.

Understand the issues with making Section 998 offers to multiple parties. As a general rule, " 'a section 998 offer made to multiple [defendants] is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them.' " (*Anthony v. Li* (2020) 47 Cal.App.5th 816, 821.) *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515, 534 explained that requiring separate offers to two defendants is appropriate, because one defendant may have plausible defenses to liability not available to the other defendant. By framing the offer to settle in the conjunctive, "[plaintiff] made it effectively impossible for either party to accept the offer, even if so inclined, because the offer required an entity that was not responsible for [the doctor's] actions to accept liability."

A Section 998 offer made to several plaintiffs jointly, with no indication of how it is to be allocated, is ineffective. A global number does not designate how much each plaintiff would receive under the offer, making it impossible to determine whether each plantiff's recovery at trial was "more favorable" than the offer. "[A]s a matter of law only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998." (*Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 791.)

Similarly, an offer to several plaintiffs that is conditioned on acceptance by all of them is invalid. (*Hutchins v. Waters* (1975) 51 Cal.App.3d 69, 73; (*Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1544.) Instead, serve separate offers on each plaintiff, allowing each plaintiff the opportunity to accept individually. (*Id*. at 1546.) However, a joint offer may be valid where several plaintiffs have a "unity of interest such that there is a single, indivisible injury." (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 505.)

The Takeaway

As noted by *Mostafavi*, the rule requiring a Section 998 acceptance provision to be valid, whether the offer is rejected or accepted, adds consistency and predictability to the statute's operation. This "bright-line rule will eliminate confusion and uncertainty" and "encourage settlements." Amir Mostafavi, counsel for MLG, commented that the result in this case may lead to mischief. He surmised that a party could intentionally serve an invalid 998 offer as a delay tactic, knowing that it may take months to get a judgment that can later be vacated. Whether a party would go to such lengths remains to be seen.

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