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Protect Your Offer

Code of Civil Procedure section 998 encourages settlement of disputes before trial by providing incentives for the party receiving a 998 offer to accept the offer, using a cost shifting procedure. If a party wins at trial with a judgment less favorable than a pretrial settlement offer made by the other party, then the prevailing party may not recover its own post-offer costs, and must pay its opponent's post-offer costs, which may include expert witness costs. (§ 998, subd. (c)(1).)

Question: Is a 998 offer that is conditioned upon the other party entering into a “settlement agreement” a valid offer, which triggers the cost shifting process? The answer is no, according to *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121.

Charles Sanford (Sanford) was injured in an automobile accident caused by William and Jacy Rasnick (the Rasnicks). Sanford sued both Rasnicks, who made a joint 998 offer for \$130,000. The offer lapsed, the case went to trial, and a jury awarded Sanford less than \$130,000. The trial court held the 998 offer valid, and awarded the Rasnicks their expert witness fees and costs. Sanford appealed, claiming the 998 offer was not valid, because it improperly requested a “settlement agreement.”

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 998 offer “is a standard, insurance defense offer that requires that [Sanford] execute a document entitled ‘settlement agreement and release’ along with a Dismissal” The court of appeal found the 998 offer invalid, and reversed the order granting costs to the Rasnicks.

The court noted that the 998 statute 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. Here, 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.

For example, settlement agreements typically contain a waiver of all claims “known and unknown” (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 this case. The court refused to enforce a 998 offer that included a settlement agreement, let alone one undescribed and unexplained.

Protect your 998 offer by making it unconditional. If your counterpart has to guess at what terms you may insist upon, or is asked to accept or reject without knowing what those terms are, the offer is not valid.