

RESOLUTION 08-05-2013

DIGEST

Civil Procedure: Offer to Compromise

Amends Code of Civil Procedure section 998 to equalize the treatment of expert costs by allowing the parties to recover only postoffer expert costs in the context of a statutory offer to compromise.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 998 to equalize the treatment of expert costs by allowing the parties to recover only postoffer expert costs in the context of a statutory offer to compromise. This resolution should be approved in principle because it eliminates a disparity between the treatment of plaintiffs and defendants in the statute.

Under current law, if a defendant makes a section 998 offer to compromise and receives a more favorable result after trial, the court, in its discretion, may order the plaintiff to pay for all of the defendant's expert costs (pre and post offer) because subdivision (c)(1) is silent as to whether costs of the services of expert witnesses is pre or post offer. (See, e.g., *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262). However, if a plaintiff makes a section 998 offer and receives a more favorable result after trial, the defendant only has to pay for the plaintiff's *post*-offer expert costs. (Code Civ. Proc., § 998, subd. (d)(1)).

This resolution amends the statute at subdivision (c)(1) so that any offeree, regardless of whether they are the plaintiff or defendant, who rejects a section 998 offer will only become liable for post-offer expert costs. This amendment brings uniformity to the statute and allows for both parties to more easily evaluate the risks of rejecting a section 998 offer. Based on discovery, law and motion practice, the amount of time before trial, and the evaluation of the complexity of the case performed in the litigation at the time a section 998 offer is made, the offeree's attorney can reasonably anticipate the number and type of experts, and expert discovery that will occur from the time of the offer. However, it is nearly impossible for a party to anticipate the amount the other party has incurred in expert costs before the section 998 offer and expert discovery has occurred.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Code of Civil Procedure section 998, to read as follows:

1 § 998

2 (a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as
3 provided in this section.

4 (b) Not less than 10 days prior to commencement of trial or arbitration (as provided in
5 Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in
6 writing upon any other party to the action to allow judgment to be taken or an award to be
7 entered in accordance with the terms and conditions stated at that time. The written offer shall
8 include a statement of the offer, containing the terms and conditions of the judgment or award,
9 and a provision that allows the accepting party to indicate acceptance of the offer by signing a
10 statement that the offer is accepted. Any acceptance of the offer, whether made on the document
11 containing the offer or on a separate document of acceptance, shall be in writing and shall be
12 signed by counsel for the accepting party or, if not represented by counsel, by the accepting
13 party.

14 (1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk
15 or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof
16 of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award
17 accordingly.

18 (2) If the offer is not accepted prior to trial or arbitration or within 30 days after it is
19 made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence
20 upon the trial or arbitration.

21 (3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually
22 commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is
23 no opening statement, then at the time of the administering of the oath or affirmation to the first
24 witness, or the introduction of any evidence.

25 (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a
26 more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and
27 shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding
28 other than an eminent domain action, the court or arbitrator, in its discretion, may require the
29 plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who
30 are not regular employees of any party, actually incurred and reasonably necessary in either, or
31 both, preparation for trial or arbitration, or during trial or arbitration, of the case by the
32 defendant.

33 (2)(A) In determining whether the plaintiff obtains a more favorable judgment, the court
34 or arbitrator shall exclude the postoffer costs.

35 (B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the
36 holding in Encinitas Plaza Real v. Knight, 209 Cal.App.3d 996, that attorney's fees awarded to
37 the prevailing party were not costs for purposes of this section but were part of the judgment.

38 (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more
39 favorable judgment or award in any action or proceeding other than an eminent domain action,
40 the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to
41 cover postoffer costs of the services of expert witnesses, who are not regular employees of any
42 party, actually incurred and reasonably necessary in either, or both, preparation for trial or
43 arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's
44 costs.

45 (e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more
46 favorable judgment or award, the costs under this section, from the time of the offer, shall be

47 educted from any damages awarded in favor of the plaintiff. If the costs awarded under this
48 section exceed the amount of the damages awarded to the plaintiff the net amount shall be
49 awarded to the defendant and judgment or award shall be entered accordingly.

50 (f) Police officers shall be deemed to be expert witnesses for the purposes of this section.
51 For purposes of this section, “plaintiff” includes a cross-complainant and “defendant” includes a
52 cross-defendant. Any judgment or award entered pursuant to this section shall be deemed to be a
53 compromise settlement.

54 (g) This chapter does not apply to either of the following:

55 (1) An offer that is made by a plaintiff in an eminent domain action.

56 (2) Any enforcement action brought in the name of the people of the State of California
57 by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

58 (h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall
59 not exceed those specified in Section 68092.5 of the Government Code.

60 (i) This section shall not apply to labor arbitrations filed pursuant to memoranda of
61 understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of
62 Division 4 of Title 1 of the Government Code).

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: As currently written, Code of Civil Procedure section 998 limits a plaintiff’s recovery of expert witness fees to those incurred after the offer to compromise, but has been interpreted to allow a defendant to recover all expert costs, even those incurred prior to the offer to compromise. This does not comport with the purpose of the statute, which is to encourage parties to accept reasonable offers to compromise thereby avoiding costs associated with trial, by cutting off the non-accepting party’s right to recover postoffer costs and by allowing the offering party to recover expert fees incurred by the offering party in having to proceed forward with trial. Further, as currently interpreted, the section creates an incentive for a defendant to delay service of a statutory offer until substantial expert costs have been incurred because the penal nature of the statute is not tied to the timing of the offer.

This Solution: This resolution amends Code of Civil Procedure section 998 to equalize treatment of expert costs in the context of a statutory offer to compromise by providing for recovery of only postoffer expert costs.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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