

RESOLUTION 08-07-2013 (As Amended and Adopted)

DIGEST

Code of Civil Procedure: Offers to Compromise – Content of Offers

Amends Code of Civil Procedure section 998 to clarify the contents of the offer and codify the presumption the offer does not include fees, costs or interest

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:

Similar to 11-03-12 which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure section 998 to clarify the method for determining whether attorney's fees and costs are included in statutory offers to compromise. This resolution should be approved as amended because it codifies California case law regarding the ability to recover attorneys' fees and costs in conjunction with an offer to compromise.

This resolution seeks to avoid the potential confusion posed by the statute's silence on whether costs, and attorney's fees, are presumptively included in a section 998 offer. California's courts have ruled that where a section 998 offer is silent about whether the offered amount includes costs and fees, then the party who is entitled to recover fees may recover them in addition to the amount offered in the section 998 offer. (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 184; *Engle v. Copenbarger & Copenbarger* (2007) 157 Cal.App.4th 165, 168-169; *Lanyi v. Goldblum* (1986) 177 Cal.App.3d 181, 187) The propriety of this rule was affirmed earlier this year in *Martinez v. Brown* (2013) 56 Cal.4th 2014. This resolution codifies that case law and clarifies that a section 998 offer's silence regarding attorney's fees and costs protects a party's right to recover fees and costs.

~~To avoid an internal contradiction in the proposed resolution, Resolutions Committee recommends that the second sentence be changed from "The offer *must* specify whether the sum includes taxable court costs . . ." (*emphasis added*) to "The offer *may* specify whether the sum includes taxable court costs . . ." (*emphasis added*) The second sentence, as currently written, contradicts the third sentence, which states "If the offer is silent as to taxable court costs . . .," if an offer must specify whether it includes taxable court costs (as required by the currently written second sentence), then it cannot be silent as to taxable court costs (as contemplated by the third sentence). (*Amendment made*).~~

This resolution is related to 08-01-2013.

TEXT OF RESOLUTION

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

§ 998

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

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

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

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

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

(c) Contents of offer. -- If any portion of an offer made under this section is for the entry of a monetary judgment, the monetary award to be made shall be set forth in the offer as a specifically stated sum, except as otherwise provided in this subdivision. The offer ~~must~~ may specify whether the sum includes taxable court costs, interest, and attorneys' fees, if any, sought in the case. If the offer is silent as to taxable court costs, interest or attorney's fees, then it is presumed the offer does not include those items. The offeror may elect to provide in the offer that taxable costs, interest, or attorney's fees are to be determined by the court or by another specified method in lieu of including said items in the specifically stated sum. The offer need not be apportioned by claim.

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

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

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

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

~~(e)~~ (f) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.

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

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

- (1) An offer that is made by a plaintiff in an eminent domain action.
- (2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

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

~~(i)~~ (j) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of 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

Existing Law: Current law allows parties to make a statutory offer to compromise – if the offer is not accepted within the statutory time and the party making the offer obtains a more favorable result at trial or arbitration, recoverable costs are shifted as specified in this section. Under current law, a party must specify whether the offer includes attorney's fees and costs.

This Resolution: This resolution amends Section 998 to provide certain required content for offers and to codify existing presumptions in case law. Specifically: (1) a presumption that an offer to compromise does not include costs, interest, or attorney's fees unless otherwise specified; (2) a presumption that offers silent as to costs, interest or attorney's fees exclude such amounts; and (3) an offer may specify that costs, interest, and/or attorney's fees are to be

determined by the court or other specified method in lieu of including those items within the specified monetary offer.

The Problem: The goal of Section 998 is to encourage settlements. However, the current language presents a trap for the unwary who fail to specify that attorney's fees, costs or interest are included in the statutory offer. (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 184 [Section 998 offer silent on attorney's fees; plaintiff accepting entitled to move for award of statutory fees]; accord *Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986, 990 [contractual attorney's fees].) This resolution would eliminate that trap by providing clear language that offers must expressly state the sum offered is inclusive of costs, interest and/or attorney's fees and by providing a presumption that an offer that is silent as to those items is presumed to exclude them from the offer.

Under current law, where attorney's fees are potentially recoverable in an action, the offering party must generally guess as to an amount that would be sufficient to cover potential attorney's fees. Further, the issue of attorney's fees often times becomes the driving force behind a case and presents an obstacle to settlement. This resolution adds language that recognizes a growing trend among counsel to set forth a sum specific as to damages and provide that items such as costs, interest and attorney's fees are to be determined by the court or another specified method (e.g., an arbitrator or mediator).

IMPACT STATEMENT

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

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