WHEN COMPROMISING CAN LEAD TO WINNING: THE STRATEGIC USE OF 998 OFFERS

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Like many jurisdictions, California has a public policy that encourages the fair resolution of litigated claims. That public policy, as codified in Code of Civil Procedure section 998, gives some teeth to settlement negotiations when a statutory offer to compromise is not accepted.

Pursuant to section 998, any party may serve a written offer upon any other party up until 10 days before the commencement of trial or arbitration, and thereby allow a judgment to be taken or award to be entered. The terms and conditions must be specified clearly in the offer. If the offer is accepted, a judgment or award is entered accordingly. If the offer is not accepted before the commencement of trial or arbitration, or within 30 days after being made, it is deemed withdrawn and may not be used as evidence against the offering party.

The teeth part is when the offer is not accepted and the other party fails to obtain a more favorable judgment or award. In that case, the court or arbitrator has discretion to order payment of the costs which the offering party incurred for an expert to prepare for and attend the trial or arbitration. Depending on the case, expert costs can total many thousands of dollars.

But application of this rule is often blurry. Suppose a plaintiff makes an statutory offer, and it is ignored. Suppose the plaintiff makes a second, smaller offer closer to trial, and it too is ignored. The plaintiff prevails at trial. The issue is which offer should govern for purposes of imposing expert costs: the first or the one? In a recent case where the California Supreme Court granted review, so it is not legal precedent,[1] the court opted to enforce the earlier, larger offer. But in a different case,[2] the second offer would have been the operative one, except that it was revoked, which triggered application of the earlier one. In yet another case,[3] a second offer was made while the first offer was still pending. The second offer was deemed invalid, but the offering party was prevented on fairness grounds from trying to rely on the first offer.

A statutory offer to compromise can make a lot of sense if done properly – and even if the courts appear to apply the rules inconsistently at times. In a recent construction case tried in Northern California, the homeowner technically prevailed, but he was forced to pay the defense expert fees, which dwarfed the amount of the judgment, because he failed to recover more than the amount of the defendant's statutory offer. That was a situation where the so-called winner did not necessarily win for all purposes.

[1] *Martinez v. Brownco Construction Company, Inc.,* 203 Cal.App.4th 507 (2012), review granted, 280 P.3d 534 (2012).

[2] *One Star, Inc. v. Staar Surgical Company*, 179 Cal.App.4th 1082, 1092-1093 (2009).

[3] *Palmer v. Schindler Elevator Corp*., 108 Cal.App.4th 154, 158-159 (2003), disagreed with by *Ray v. Goodman*, 142 Cal.App.4th 83, 90 (2006).