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TOP VERDICTS

By Mark Pierce

The COVID-19 pandemic has created delays in the handling of civil cases throughout the state of California. While some jurisdictions are dealing with the crisis better than others, the problems are universal. In many counties, civil trials are not being scheduled, leading to a tremendous backlog.

One tool that may be useful is making an offer of settlement under California Code of Civil Procedure Section 998. The goal of Section 998 is to encourage settlements prior to trial.

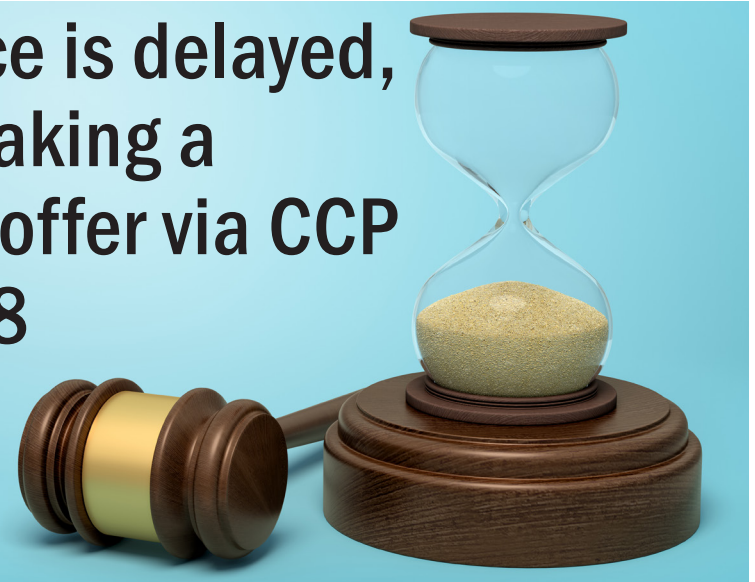
Section 998 provides that once a lawsuit is filed, either party may make an offer of settlement. Most commonly used in personal injury cases, it also provides that a party obtaining a better result than a previous offer of compromise may obtain additional relief than they would otherwise be entitled to. Such relief includes interest on the judgment and expert witness fees. The section was enacted when interest rates were relatively high.

Given the potential of long delays in obtaining a trial date, an early 998 offer has several significant benefits. By making an offer of com-

When justice is delayed, consider making a settlement offer via CCP Section 998

promise one is signaling interest in resolving the case, and also providing some parameters for a discussion. Some form of alternative dispute resolution — either mediation or arbitration — may be appropriate to consider. Often times with long delays in obtaining a trial, cases may be overlooked.

The interest and expert witness fees in these situations can be substantial. This applies to any party seeking a monetary judgement. In recent cases in Santa Clara County Superior Court, some parties have been awarded interest, which magnified the verdict tremendously. This is because those parties had made an early Section 998 offer and there were numerous delays in bringing the case to trial.



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Frequently, the parties are hesitant to make an early Section 998 offer because they have not had time to evaluate the case, or they are afraid that an early offer will signal some sort of weakness. There is no limitation on the number of offers that can be made. It is important to remember that a Section 998 offer is valid for 30 days and is then automatically withdrawn. Thus, a number of offers can be made during the pendency of a case. As a case develops, an attorney may have a better idea of its value and is therefore may want to adjust the offer amount.

While it might seem that only plaintiffs seeking damages would benefit from a Section 998 offer, defendants can also benefit. Under Sec-

tion 998, a defendant whose offer is not accepted is entitled to expert witness fees, which can be significant. An early offer that is not accepted may lead to considerable fees as a credit on a judgment, or simply a judgment against the opposing party.

A Section 998 offer that has been rejected as a matter of law due to non-acceptance is also valuable in settling a case. Many things can happen during the pendency of a case, particularly one that is delayed due to the limitations in trial court availability. Quite often expert witness discovery, which invariably comes at the very end of a case, can have a profound effect on its value. There is no worse situation at a pre-trial settlement conference than one where a party reminds

the other of a long forgotten Section 998 offer made shortly after the filing.

In calculating damages before trial, a party should consider any rejected Section 998 offers as having the potential to affect the amount of damages. Where there has been a long period of time in getting a case to trial, interest and expert witness fees can be large.

While an early demand pursuant to Section 998 can be very effective, extreme care is called for in drafting the demand. There are several pitfalls that can dramatically effect attempts to collect interest and expert witness fees by post-trial motions to tax costs.

Great care must be taken in drafting the Section 998 offer. Keep in mind that the party to which the offer is being made must be clearly specified. Quite often there are multiple parties to a lawsuit, and it is incumbent on the offering party to be specific. This issue is often raised in post-trial motions when it is too late for the offering party to change or clarify the offer.

Another potential problem is when the offer is conditional. This issue can occur when a defendant makes an offer, but conditions it on liens being satisfied by the party receiving the offer. Again, this issue can be

raised in post-trial motions. Thus, it is crucial to be very specific on the existence of any conditions attached to the offer. Even then it can be difficult to make a conditional offer without running the risk of later rejection.

Given the current backlog of cases in many state courts, it is key to be aware of ways to facilitate resolutions. Making an early Section 998 offer is one way to stimulate settlement discussions either directly or within the parameters of alternative dispute resolution. While a Section 998 offer may not be accepted, it gives the parties something to fall back on should the case go to trial and an

award of interest and expert witness fees is granted. ■

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