

The Section 998 Minefield

Parties Beware: A second settlement offer that is revoked will resurrect a prior settlement offer *by Monica Q. Vu*

During the course of litigation, either party may serve the other with a written offer to allow a judgment to be entered on specified terms as late as 10 days before trial, according to Code of Civil Procedure section 998.

Section 998's primary goal is to provide a strong financial incentive to a party who will not achieve a better result at trial than they could by accepting a settlement. If the amount awarded to the winning party is less than what a settlement offered, they could be responsible for the other sides' legal costs, including expert witnesses and attorneys' fees. This cost-shifting—potentially including attorney fees—statute can have a dramatic effect on litigation strategy.

For example, a defendant in a contract case where attorneys' fees will be awarded to the winner recognizes they are unable to fully defend the case at trial. So, they make a section 998 offer to settle for a sum of money. The case goes to trial, the defendant loses, but the amount awarded is less than their section 998 offer. Even though the defendant lost the case, the plaintiff could be required to pay the defendant's attorneys' fees and costs incurred after the section 998 offer was made.

Offer Procedures - A Trap for the Unwary

Making section 998 offers can be a minefield. If not properly worded or addressed, section 998 offers may not be beneficial. The court added a new wrinkle in the recent case *One Star, Inc. v. STAAR Surgical Company*, in which our litigation team represented the respondent. The Court of Appeals held that a section 998 offer revoked before acceptance during the 30-day statutory period resurrects a prior offer.

Ordinarily, a section 998 offer has a potential life of 30 days and is withdrawn if not accepted within that time. Although the provision does not address the revocability or irrevocability of the offer,

the California Supreme Court in *T. M. Cobb Co., Inc. v. Superior Court* held that section 998 offers can be revoked before acceptance. In *Berg v. Darden*, the court held that a section 998 offer remains on the table until it is officially rejected, formally revoked or expired. Another case, *Brown v. Labow* specified that the written offer may be orally revoked.

The rationale behind allowing a party to revoke a section 998 offer is simple: if parties know they can change their minds by revoking an offer, they are more likely to make the offer in the first place. In *T. M. Cobb*, the court's interpretation of section 998—permitting the revocation before the other party accepts it—is consistent with a policy of encouraging settlements.

In addition, the courts have previously clarified that an earlier section 998 offer is cancelled out by a later offer. If the offeror discovers new facts or changes its mind, it may terminate its earlier offer by making a new one. It makes no difference that the new offer is invalid under section 998; it extinguishes the first offer.

In *Palmer v. Schindler Elevator Corp.*, the court found that the second settlement offer was invalid because it was directed to several parties jointly; however, the defective offer still extinguished the initial settlement offer. In this case a later, although invalid, offer determines whether a plaintiff's judgment is "more favorable" than a defendant's offer in recovering section 998 penalties. The court in *Wilson v. Wal-Mart Stores, Inc.*, found that the plaintiff could not recover interest and costs because she was awarded less than the defendant's second (invalid) offer, even though she won more than the first settlement offered.

When An Offer is Revoked Before Acceptance

But what happens when a section 998 offer is made but revoked before it is accepted? That was the issue raised by the *One Star* case. On September 12, 2007, STAAR made a section 998 offer

to compromise, allowing a judgment in favor of One Star for \$65,000. One Star did not accept the offer, and it lapsed 30 days later.

STAAR then made a second offer on December 7, 2007, adding the legal applicable rate of interest beginning more than a year before to the initial \$65,000. Less than two weeks later, STAAR withdrew its second offer before One Star could accept.

The trial court found that STAAR's second offer to compromise extinguished the first offer. The Court of Appeals disagreed, finding the present case lies at the intersection of the policies discussed above—that section 998 offers are fully revocable until accepted, and that as a general rule, subsequent section 998 offers supersede prior ones. If a section 998 offer is withdrawn by a party prior to its expiration (by start of trial or 30 days after the offer is made), their right to cost-shifting under section 998 is determined by the last rejected offer.

The practical result of this new rule is that parties receiving a second or later section 998 offer should revisit the most recent prior offer and weigh the pros and cons of both. While a later section 998 offer has the potential to cancel out the earlier offer, the offering party may revoke it at any point within 30 days before acceptance. Parties should also be careful not to rely on pending offers when making strategic decisions or litigation maneuvers; they cannot count on the effect of such an offer until the 30 days pass. ■

Monica Q. Vu is a lawyer in the Litigation Department of JMBM's Orange County office. She has a wide range of experience in general and commercial litigation including the prosecution and defense of contract disputes, real estate disputes, employment disputes and trade secret/unfair competition claims. Contact her at MVu@JMBM.com or 714.429.3063.