Mark Adams 714.429.3064 MarkAdams@JMBM.com

Monica C. Yu 714.429.3603 myu@jmbm.com

Tanaka, Moreo, Fukuoka & Goto, P.C.

Using Unenforceable Non-Competes Can Be Very Costly

For example, a defendant in a contract case might be anxious to settle but it is not until the very end of the case or at trial, when it would make a section 998 offer to settle for far less than its offer of judgment. The case goes to trial, the defendant loses, but the amount awarded is less than both section 998 offers. Even though the defendant lost the case, the plaintiff could be permitted to reject the defendant’s attorney’s offer and costs incurred after the section 998 offer was made.

Offer Procedures: A Trap for the Unawary

Making section 998 offers can be expensive if not properly executed or understood. The court added a non-stay to the case and required the defendant to make an additional section 998 offer, which was never made. The court also clarified that an earlier section 998 offer is not effective until accepted, and that as a policy of encouraging settlements, an offer revoked before acceptance is invalid if not accepted within that time. Although the 30-day statutory period resurrects a section 998 offer revoked before acceptance during the 30-day period, the offer cannot be effective until accepted.

The trial court found that ST AAR’s second offer to compensate extinguished the first offer. The Court of Appeals disagreed, finding the present case falls outside the parameters of the published decision above that section 998 offers are fully effective when made, and that the general rule, subsequent section 998 offers represent an offer to make a section 998 offer with a shorter period of time to expire (as of trial’s end), rather than to extend the duration of section 998 offer 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 face a fait accompli situation where it is too late to accept the earlier offer before acceptance. Parties should also be careful not to rely on conflicting offers during this time frame; they cannot refuse to counter an offer that was made as of trial’s end and the 30 days past.

What’s Inside

Using their own marketing strategies, both parties pushed the court to continue the case in order to maximize their prospective economic advantage. In one case, the plaintiff sent three letters to its competitors, ST AAR, before the trial started. Each letter instructed ST AAR to stop selling competing products for a year. Additionally, the plaintiff was successful in preventing Bausch & Lomb from marketing a competing product for two months. In the course of two months, the Honorable Glenda Sanders presided over separate, two-month long jury trials, our trial team prevailed in Orange County Superior Court in two cases, that together might have saved itself $11.4 million. In one case, the court found that ST AAR’s second offer to compensate extinguished the first offer. The Court of Appeals disagreed, finding the present case lies at the outer edge of the plaintiff’s offering decisions. The court clarified that an earlier section 998 offer is not effective until accepted, and that as a policy of encouraging settlements, an offer revoked before acceptance is invalid if not accepted within that time. Although the 30-day statutory period resurrects a section 998 offer revoked before acceptance during the 30-day period, the offer cannot be effective until accepted.

The SMI case was also presented to a jury, including $2.7 million in punitive damages. The court found that ST AAR’s second offer to compensate extinguished the first offer. The trial court found that ST AAR’s second offer to compensate extinguished the first offer. The Court of Appeals disagreed, finding the present case lies at the outer edge of the plaintiff’s offering decisions. The court clarified that an earlier section 998 offer is not effective until accepted, and that as a policy of encouraging settlements, an offer revoked before acceptance is invalid if not accepted within that time. Although the 30-day statutory period resurrects a section 998 offer revoked before acceptance during the 30-day period, the offer cannot be effective until accepted.

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