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Settlement Offer Under Section 998 Automatically Expires If Judge Grants Summary Judgment

Tim Kowal November 15, 2022

There are several odd things about *Trujillo v. City of Los Angeles* (D2d1 Oct. 27, 2022 No. B314042) -- Cal.Rptr.3d -- (2022 WL 15119812), a case about accepting a Code of Civil Procedure section 998 offer of compromise. The court held the acceptance was not valid because, even though it was within the statutory 30 days, the acceptance came after the trial court had already granted summary judgment.

The set-up is pretty simple: The City was defending against a claim that it negligently maintained a cracked sidewalk that caused Trujillo to trip during a late-night jog. The City filed a motion for summary judgment. Then just a few days before the hearing, the City served a section 998 offer.

Here is **Odd Thing #1**: When you get a 998 offer, you have 30 days to accept it. But here, the offer was served only "a few days" before the hearing. (The opinion suggests the offer was made after briefing was complete on February 25, and "a few days" before the hearing on March 2, but gets no more specific than that.) So Trujillo did not have 30 days before the hearing in which to consider the offer.

Back to the case. At the hearing, the trial court orally granted the City's motion for summary judgment. Four minutes later, Trujillo accepted the 998 offer, and then immediately filed the executed 998 offer.

Note that this is still within 30 days of the offer, which by its terms was to be held open for 30 days (or the commencement of trial).

The trial court rejected the 998 acceptance.

And so did the Court of Appeal. The court held that "a still-pending 998 offer expires when a trial court *orally grants summary judgment*." (Italics added.)

The court was very specific about that last language. The court rejected the view that the 998 offer expires earlier than the oral ruling, *i.e.*, at the commencement of the summary-judgment hearing. Or later than the oral ruling, *i.e.*, entry of the written ruling or judgment.

The appellate court reasoned that, under the text of section 998, the offer "may only be made when there exists a dispute to be resolved." And granting summary judgment resolves all the disputes in the case.

This raises **Odd Thing #2**: True, the text of section 998 refers to "a dispute to be resolved." But that is not quite all. The whole sentence from section 998 reads: "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." (Italics added.)

So the "dispute" language does not modify the "trial" language. It only modifies the "arbitration" language, which is not relevant to Trujillo.

And then there is **Odd Thing #3**: What about tentative rulings? Given the court was so explicit that the 998 offer does not expire before the oral ruling, presumably a tentative ruling would not terminate the ability to accept a still-pending 998 offer. This would undermine the purpose of section 998, which the court aims to achieve. That seems an Odd Thing.

Back to the court's reasoning. The court worries that if a defendant files a 998 offer a few days before a summary-judgment hearing, the plaintiff probably would wait to see what happened at the hearing. And the purpose of the statute is to encourage parties to settle cases.

Odd Thing #4: That may be the **purpose** of the statute, but the ***text*** of the statute gives the plaintiff 30 days to consider an offer. If a momentous event in the case is going to happen before the 30 days is up, it seems an Odd Thing for the court to cut short the statutory 30-days in order to advance the statutory purpose.

One more interesting point about the court's analysis. One easy way the court could have reached this result—an eminently understandable and common-sense result, by the way—would have been to treat the summary-judgment hearing as a trial. That way, under the text of section 998, the court simply could have found that the 998 offer was not made at least "10 days prior to commencement of trial." The offer was invalid, and thus the acceptance was invalid, too.

Which leads us to **Odd Thing #5**: The court explicitly rejected this approach. The court reasoned that summary judgment "is not a substitute for trial" because it does not "entail such a commitment of resources."

Comment: The outcome of *Trujillo* seems right, but in addition to the Odd Things mentioned above, there are still a few other things about the opinion that seem amiss.

First, it seems unfair to fault Trujillo and her counsel for not accepting the 998 offer in the short space of time after the City served it and the hearing a mere "few days" later. If there was "gamesmanship" afoot, as the court accuses, then one could draw the inference it was committed by the City: A 998 offer served just a few days before the hearing on the MSJ was pretty much guaranteed not to be accepted. And if the City lost its MSJ, the plaintiff—chuffed by her win—was pretty much guaranteed not to accept it then, either.

Recall also that summary judgments are reviewed de novo. The City could consult retired appellate justices to evaluate its ultimate chances of prevailing on the issue of law. So the trial court's ruling would not really provide significant new information that necessarily would have affected the City's bargaining position. Yet it would have offered the well-heeled defendant a tactical insight into the *plaintiff's* will and ability to stick out her case.

Second, the court's black-letter holding, pegging the termination of the 998 to the moment of the oral ruling granting MSJ, is inconsistent with the court's focus on the purpose of the statute. A rigid black-letter rule is not going to achieve the more expansive goal the court has in mind.

Here is why. Consider a related scenario: Plaintiffs often bring claims on contracts that have an attorney-fee provision. Sometimes, such a plaintiff may grow concerned that the defendant may prevail. And if the defendant prevails, the defendant will be entitled to attorney fees. Let's say that in one of these cases, the defendant files an MSJ. At the hearing, things are not looking so good for the plaintiff. So the plaintiff gets an idea: I'll ask for a continuance of the hearing. There are some deposition transcripts that only just became available, or whatever, and the court needs to consider that evidence in opposition. Then during the brief reprieve, I'll dismiss my case without prejudice! Voila: the defendant will not have prevailed on the contract claim, and not be entitled to a fee award!

That is exactly what the plaintiff tried in *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765. But the trial court refused to enter the plaintiff's dismissal. And the Court of Appeal agreed with the trial court.

There are cases with similar scenarios. And "the common thread running through all of these decisions is the notion of fairness, which in turn depends on the plaintiff's motivation and intent in dismissing his complaint." (*Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 546.) "The thread of fairness is twisted out of true" in such cases as where a party dismisses after fact-finding has commenced: "To allow real party to dismiss in the wake of an unfavorable referee's [fact-finding] recommendation would work an injustice. Trial had 'actually commenced' within the meaning of section 581 and within the policies of fairness in the cases set forth above." (*Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 173.)

In my humble opinion, the *Trujillo* court would have done well to analogize these sorts of cases, rather than fashion a rigid rule that will likely need repair in future cases by amendments and exceptions. Section 998 is plagued by enough strange doctrinal peculiarities as it is.

This article was originally published on the website of Thomas Vogele & Associates, APC.

Tim Kowal is an appellate attorney at Thomas Vogele & Associates, APC, with offices in Orange and Monterey counties. He co-hosts the California Appellate Law Podcast at www.CALPodcast.com and publishes a newsletter of appellate tips for trial attorneys at www.tvalaw.com/articles. Contact Tim at tkowal@tvalaw.com.

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