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Calling the defense's bluff

IT CAN BE WORTH IT TO TAKE THAT "TOO SMALL" CASE TO TRIAL

As plaintiffs' attorneys, how often do we hear some iteration of: "You can't take this case to trial, it's too small and you'd spend more in experts than any potential recovery you'd get." The defense bar, and their insurance adjusters, seem to assume that if a personal injury matter falls under a certain threshold or if the available policy limits are very low, they don't need to worry about aggressive litigation or trial. If true, this guts plaintiff's negotiating power and provides defense the ability to issue unreasonably low offers with a "take what you can get" attitude.

So, how do plaintiffs' attorneys get around this? In some ways, the defense is not wrong. There are just some cases where the value of the case will not exceed the cost of going to trial. Generally, when my firm goes to trial, we are required to spend at least \$75,000 to \$100,000 in working the matter up properly. The bulk of this cost is due to the necessary expert opinion work, including, at minimum, retaining an accident reconstructionist, biomechanical engineer, various medical experts, life care planner and economist, and taking the depositions of defense's own experts as well as the plaintiff's treating doctors. With a case that does not have a value above this figure, any additional funds remaining after these expenses for the plaintiff and attorneys' fees is generally unlikely. When viewed through this lens, the juice appears to not be worth the squeeze.

However, is it possible to maximize the chances that a small case can be properly worked up and presented at trial, while both the plaintiff and their attorney can be justly com-

pensated? Yes, absolutely. One such way is through strategic use of C.C.P. section 998 offers – these offers can make a small case that would normally be foreclosed from trial more than worth it.

Basic principles of a C.C.P. section 998 offer

Should a C.C.P. section 998 offer be rejected by a defendant and later exceeded following trial, the defendant can be ordered to pay the plaintiff's post-offer costs and expert fees. (Code Civ. Proc., § 998, subd. (d).) Critically, in evaluating whether a verdict will likely exceed the C.C.P. section 998 offer, the prevailing plaintiff's costs (both pre-offer and post-offer) are included in determining whether the judgment is more favorable than the pretrial 998 offer. As the rejecting defendant is the one who forced the case to trial, "(t)here is no reason to limit the plaintiff to damages plus pre-offer costs for purposes of determining whether the judgment exceeds the offer." (*Stallman v. Bell*, *supra*, 235 Cal.App.3d 740, 748.) As such, a defendant must take into consideration both the likely verdict for the plaintiff *and* the anticipated costs incurred to present the case at trial when considering whether to accept a plaintiff's 998 offer. As every trial attorney knows, these costs can be very substantial, making a reasonable C.C.P. section 998 offer even more likely to be exceeded.

Offers can be served very early

C.C.P. section 998 offers can be served quite early. Section 998 offers can be presented at almost any time during the litigation, and up to 10 days prior to plaintiff's opening

statement at trial or arbitration. (Civ. Proc., §§ 998, 1281, 1295.) The analysis depends on whether at the time of service, there is a reasonable prospect of acceptance. (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924.) Specifically, this requires the receiving party to have adequate information at the time of the offer to evaluate its reasonableness. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699.) Courts have held that a party may have sufficient information to evaluate the reasonableness of such an offer even at initial phases of litigation depending on what information is known to the receiving party concerning liability and damages. (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 925; *Barba v. Perez* (2008) 166 Cal.App.4th 444)

Practice pointer: Provide a comprehensive pre-litigation demand that analyzes liability of the defendant and plaintiff's damages, including full medical records, anticipated future medical care, past and future wage loss, and an analysis of past and future pain and suffering. Then, if you need to litigate, serve an early section 998 with an accompanying letter containing the same information as in the pre-litigation demand letter. Then, the defense should not be able to claim insufficient information at this point.

Early service starts interest accruing at the outset

A huge reason to serve a C.C.P. section 998 offer as early as possible, particularly when you know a low policy limit as at issue, is to start accruing

Bluff continues

interest as fast as possible. Per C.C.P. section 3291, if the plaintiff makes an offer which the defendant does not accept and the plaintiff exceeds the amount, “the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff’s first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.” (Code Civ. Proc., § 3291.)

Practice pointer: If sufficient information is exchanged pre-litigation for defense to sufficiently evaluate the reasonableness of such an offer, particularly in a matter with low policy limits, a C.C.P. section 998 offer at the outset of litigation can allow for significant interest to be applied in the years that a case awaits trial.

Recovering over the C.C.P. section 998 offer

Let’s say you have a case with a \$50,000 third party-policy limit where your client was rear-ended at a high rate of speed. Your client was taken to the emergency room, tried conservative treatment and eventually had to receive epidural steroid injections in the injured spinal area. You know your client’s medical treaters believe he needs epidural steroid injection again in their low back and had to miss work for a few months as they tried to recuperate, causing their past medicals, future medical needs, wage loss, and general damages above this policy limit. Further, it is clear that if you went to trial, your expert costs and fees combined with the likely jury verdict would easily exceed the offer.

Using this strategy, you served a comprehensive pre-litigation demand for the policy limit that was denied. When you filed your action, you served a C.C.P. section 998 offer for

the same policy limits. This was also rejected. Now, you can work up your case for trial with the awareness that (1) you are very likely to receive a verdict above the C.C.P. section 998 settlement offer at trial, (2) 10% interest is accruing throughout this time for the difference between the settlement offer and verdict amount, which could be substantial, and (3) all expert fees and costs will be recouped from the losing defendant.

Following trial, you will need to prepare a motion for pre-judgment interest and costs. This motion must present itemized expert witness expenses and supportive documentation to the court, and calculate the pre-judgment interest that should be awarded. Following this, it is up to the court’s discretion to award reasonable expert fees and costs and the applicable amount of accrued interest.

First-party bad faith – likely, the policy limit

In addition to the benefits to plaintiff’s own case when a defendant rejects a C.C.P. section 998 offer for the policy limit, defendant suffers further personal exposure by this activity. When an insurance company has the ability to resolve a claim against its insured for less than the policy limit and fails to do so, it exposes its insured to further personal liability. Thus, an insurer may be held liable for a judgment against its insured in excess of its policy limits where it has breached the implied covenant of good faith and fair dealing by unreasonably refusing to accept a settlement offer within the policy limits. (*Commercial Union Assur. Cos. v. Safeway Stores, Inc.* (1980) 26 Cal. 3d 912, 916-917.)

Generally, when there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement

within those limits, a consideration of the insured’s interest requires the insurer to settle the claim. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659.) An insurer that fails to accept a reasonable settlement offer within the applicable policy limits creates a conflict of interest with its insured and exposes itself to a first party bad faith claim. Further, the insurer will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal. App.4th 831, 836)

Conclusion

An early C.C.P. section 998 offer for the policy limit can make a so-called “small case” a lucrative and triable matter. Taking these cases through trial also shows the defense bar that even these small cases can and will be tried by plaintiff’s attorneys, further strengthening our negotiation power in subsequent matters. A C.C.P. section 998 offer for the policy limit can create a first-party conflict of interest between an insurer and its insured, generating further risk and maximizing the likelihood of fair resolution. Most importantly – injured persons can receive a full and fair recovery, rather than allow defendants to get a bargain price on their damages and avoid responsibility for their own negligent actions. ♦

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