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Courts of Appeal are reining in ambiguous settlement offers

By Craig A. Roeb
and Heather Patrick

California Code of Civil Procedure Section 998 establishes a procedure to shift costs if a party fails to accept a reasonable pre-trial settlement offer. The statute has generally been considered an effective tool to force parties' hands to settle by encouraging resolution and avoiding needless litigation and trials. *Barba v. Perez*, 166 Cal. App. 4th 444 (2008). However, recent case law demonstrates that they must be carefully planned and composed, or else risk judicial nullification.

Since January, California Courts of Appeal have handed down cases arising from 998 offers that, when read together, reveal a trend toward circumscribing ambiguity of what an offer may and may not include. When considered together, defense litigators will need to carefully craft Section 998 offer to plaintiffs.

In *Ignacio v. Caracciolo*, 2016 DJDAR 7932 (Aug. 3, 2016), the Court of Appeal adopted a bright-line rule that could result in fewer settlement offers being made, especially in complex, multi-faceted cases. The *Ignacio* court affirmed the trial court's decision denying a defendant's motion for costs based on her pretrial 998 offer that totaled more than the jury's ultimate award to the plaintiff, "because the [general] release defendant submitted to plaintiff as part of her settlement offer sought to release defendant and others from claims outside the scope of the current personal injury action." In *Ignacio*, plaintiff Yolanda Ignacio was struck by defendant Marilynne Caracciolo's vehicle. Thereafter, Ignacio sued Caracciolo. Sometime before trial, Caracciolo conveyed to Ignacio a settlement offer pursuant to Section 998. The offer to settle for $75,000, plus costs incurred as the date the offer was served, "in exchange for a release (exemplar attached for purposes of identifying material terms of the release) and dismissal, without prejudice of the complaint filed by ... [plaintiff]." The appended exemplar release, titled "RELEASE OF ALL CLAIMS," included language whereby Ignacio would release Caracciolo from "any and all claims ... of whatever kind and nature in law, equity, or otherwise, whether now known or unknown, suspected or unsuspected that have existed or may have existed or which do exists, or which hereinafter can, shall or may exist." Another provision of the release would require Ignacio to waive the protections of Civil Code Section 1542, which provides that a general release does not extend to claims not known or suspected at the time of execution of the release.


ROEB


PATRICK

Ultimately, the jury verdict resulted in a judgment in favor of Ignacio for $70,000 — $5,000 less than the $75,000 Section 998 offer. Naturally, Caracciolo moved for an award of costs based on Section 998's cost-shifting language. Ignacio challenged the validity of the settlement offer on various grounds, including that it sought a general release of claims beyond the scope of the current litigation. After the lower court denied the Caracciolo's motion for costs, she appealed.

In affirming the lower court's decision, the Court of Appeal found that a release going beyond the scope of the current litigation renders the settlement offer invalid under Section 998. The *Ignacio* court focused on California case law relating to the requirement that a Section 998 offer's language must be specific, and not ambiguous: "Requiring resolution of potential unfiled claims not encompassed by the pending action renders the offer incapable of valuation" (citing *Valentino v. Elito Say-On Cas Inc.*, 201 Cal. App. 3d 692, 699-700 (1988)).

In her attempt to persuade the court, Caracciolo relied heavily on *Goodstein v. Bank of San Pedro*, 27 Cal. App. 4th 899 (1994), which held that a general release does not necessarily nullify a Section 998 offer. The Court of Appeal, however, detailed the historical usage of the term "general release" and specifically affirmed that it was a release "which was phrased broadly enough to include unknown claims," while a specific release did "not extend to unknown claims" (citing *Casey v. Proctor*, 59 Cal. 2d 97, 109 (1963)). The *Goodstein* court explicitly interpreted the Section 998 offer's "general release" to refer *only* to the litigation in which it was offered.

Interestingly, in *Goodstein*, the dissenting justice had the foresight that the majority opinion would be (incorrectly) relied upon exactly as defendant did so in *Ignacio*. The dissenting justice admonished the majority opinion because "[a]s commonly used among lawyers, in judicial decisions and in statutes, [a general release] would bar actual or potential causes of action beyond those embodied in the specific litigation that would go to trial if he rejected the offer." Thus, the *Ignacio* court clarified that "the rule to be taken from *Goodstein* is not that 'general release' does not invalidate a section 998 offer; the rule is that a release of unknown claims arising only from the claim underlying the litigation itself does not invalidate the offer."


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Utilizing the new, narrower *Goodstein* holding, the court returned to *Ignacio* and held that the defendant's offer was an invalid Section 998 offer when the plaintiff was required to release the defendant "from any and all claims ... whether now known or unknown, suspected or unsuspected, that have existed or may have existed or which do exist, or which hereinafter can, shall or may exist" because the language in the release goes well beyond the instant personal injury claims. By way of example, and quite significantly, the *Ignacio* court emphasized, as the plaintiff/respondent's attorney argued to both the trial and appellate courts, that the release within defendant's settlement offer arguably *could* include a claim for invasion of privacy against the defendant, her investor, and her attorney on the basis that they had "potentially invaded [plaintiff's] privacy and had potentially violated certain eavesdropping statutes."

The court also noted that defendant's counsel could not meaningfully argue otherwise. At a bare minimum, it appears that per Ignacio, including a general release in a Section 998 offer invalidates the offer. Surely, however, defense litigators can expect plaintiffs' counsel to attempt to invalidate any settlement offers presented under Section 998 by imagining *any* type of other claim that could arguably be envisioned within the language of the release.

The net result from Ignacio, especially in light of the decision in *Sanford v. Rasnick*, 246 Cal. App. 4th 1121 (2016), wherein the Court of Appeal held that a Section 998 offer was invalid because it required the plaintiff to execute a settlement agreement, is that defense litigators must narrowly tailor statutory settlement offers to the language of the statute in order to avoid the offers being declared void. This may be especially difficult to achieve in complex or multi-party matters, where a settling defendant may seek protection by including a Code of Civil Procedure Section 877/877.6 condition in the Section 998 offer. The bottom line for now: Plaintiffs may begin seeing fewer statutory settlement offers as a direct result of the *Ignacio* and *Sanford* decisions.

Craig A. Roeb *is a partner at Chapman, Glucksman, Dean, Roeb & Barger APC. You can reach him at croeb@cgdrblaw.com.*

Heather Patrick *is a senior associate at Chapman, Glucksman, Dean, Roeb & Barger APC. You can reach her at hpatrick@cgdrblaw.com.*