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16-CV-I

November 10, 2016

Committee on Rules of Practice and Procedure
Administrative of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Suggested Changes to FRCP Rule 68

Dear Committee:

I request that the Committee consider a change to FRCP Rule 68 Offer of Judgment currently in effect. According to Rule 68, a defendant or defendants may extend an offer to resolve a dispute by way of entry of judgment. The issue of primary importance to my practice and to my individual clients is that since a Rule 68 Offer, if accepted, results in a judgment being entered against them, which may in fact impact their credit rating and ability to secure loans, including loans to purchase homes and refinance existing mortgages.

By way of background, our practice involves the representation of public entities and public employees in California. As such, many of the public entities and public employees are sued in federal court for violation of civil rights and other attorney fee generating federal laws. As such, Rule 68 provides the defendants with a means to potentially cap an award of attorney's fees by extending a Rule 68 Offer. However, in order for the offer to be beneficial towards capping potential attorney's fees and costs, the offer must be extended on behalf of all defendants. As such, if the Rule 68 Offer is accepted, a judgment is entered against the public entity and the employees in the amount of the offer. This has created havoc for many of the individual clients that we represent in securing credit, since the entry of the judgment or the judgment itself appears on credit reports. Moreover, many credit applications, especially as it relates to real estate loans, require the applicant to respond to a question as to whether or not a judgment has ever been entered against them. As such, many of our individually named clients are extremely reluctant to allow us to present a Rule 68 Offer, which may in fact result in a judgment being entered against them, even if the judgment is satisfied by their public entity employer.

Under California law, there is a means by which defendant can extend an "Offer to Compromise". This is embodied in California Code of Civil Procedure Section 998, and I have attached a copy. This procedure allows a defendant or defendants to extend an offer of settlement, and the offer will contain the necessary terms and conditions of the settlement, and if it is accepted, it becomes a binding contract which can be enforced. There is no formal judgment entered. Rather, the parties resolve the case pursuant to the terms and conditions contained in the CCP §998 Offer. This eliminates the potential entry of a formal judgment as all that occurs thereafter is the formal dismissal of the lawsuit per the offer which is the "judgment" referenced in CCP §998 according to California case law. See: *Goodstein v. Bank of San Pedro*, 27 Cal. App. 4th 899, attached.

In that regard, I would request that Rule 68 be amended so to allow it to be in the nature of an offer to settle, rather than an offer of judgment and thereafter the entry of a "formal" judgment against the offerees. This would eliminate the anxiety and stress to the individual defendants, and the necessary consequences to their credit life, by having the judgment entered. It would also promote the overall purpose of Rule 68, which is the resolution of litigation.

Please contact me with any further questions or concerns.

Respectfully submitted,

LOUIS A. LEONE, ESQ.

LAL/kns
Enclosure
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Document:Cal Code Civ Proc § 998

Cal Code Civ Proc § 998

Copy Citation

Deering's California Code Annotated CODE OF CIVIL PROCEDURE Part 2. Of Civil Actions Title 14. Miscellaneous Provisions Chapter 3. Offers by a Party to Compromise

§ **998**. Offer to compromise; Recovery of costs; Inapplicability of law

(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b) 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. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.

(1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award accordingly.

(2) If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.

(3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, or, if there is no opening statement, at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

(c)

(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

(2)

(A) In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs.

(B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in Encinitas Plaza Real v. Knight, 209 Cal.App.3d 996, that attorney's fees awarded to the prevailing party were not costs for purposes of this section but were part of the judgment.

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or

both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

(e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.

(f) Police officers shall be deemed to be expert witnesses for the purposes of this section. For purposes of this section, "plaintiff" includes a cross-complainant and "defendant" includes a cross-defendant. Any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement.

(g) This chapter does not apply to either of the following:

(1) An offer that is made by a plaintiff in an eminent domain action.

(2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

(h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.

(i) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

History

Added Stats 1971 ch 1679 § 3. Amended Stats 1977 ch 458 § 1; Stats 1986 ch 540 § 14; Stats 1987 ch 1080 § 8; Stats 1994 ch 332 § 1 (SB 1324); Stats 1997 ch 892 § 1 (SB 73); Stats 1999 ch 353 § 1 (SB 1161); Stats 2001 ch 153 § 1 (AB 732); Stats 2005 ch 706 § 13 (AB 1742), effective January 1, 2006; Stats 2015 ch 345 § 2 (AB 1141), effective January 1, 2016.

Goodstein v. Bank of San Pedro, 27 Cal. App. 4th 899

Court of Appeal of California, Second Appellate District, Division Seven.

August 18, 1994, Decided

No. B053778.

Reporter

27 Cal. App. 4th 899 * | 32 Cal. Rptr. 2d 740 ** | 1994 Cal. App. LEXIS 848 *** | 94 Cal. Daily Op. Service 6395 | 94 Daily Journal DAR 11594

WALLACE A. GOODSTEIN, Plaintiff and Appellant, v. BANK OF SAN PEDRO, Defendant and Respondent.

Prior History: [***1] Superior Court of Los Angeles County, No. C521095, Barnet M. Cooperman, Judge.

Disposition: The order is affirmed. Respondent is entitled to its costs on appeal.

Core Terms

costs, general release, settlement, statutory offer, parties, expert witness fees, lawsuit, cause of action, trial court, offeree, offers, instant case, terms, compromise agreement, conditions, compromise settlement, declarations, provisions, monetary, prevailing party, expert witness, offeror, causes, courts, settle, cases, statutory offer to compromise, precise cause,

deposition, surrender

Case Summary

Procedural Posture

Plaintiff, sole shareholder of a corporation, sought review of an order from the Superior Court of Los Angeles County (California), which granted defendant bank's motion for expert witness fees and costs after a judgement of nonsuit was granted in its favor on a complaint for negligence and slander because plaintiff had rejected a statutory offer to compromise under Cal. Civ. Proc. Code § **998**.

Overview

Plaintiff, sole shareholder of a corporation, filed a lawsuit against defendant bank for negligence and slander of title. Prior to trial, defendant made a statutory offer to compromise which offered plaintiff a sum of money in exchange for dismissal of the action with prejudice in favor of defendant and that each party pay their own respective costs and attorney's fees. Plaintiff rejected the compromise and the trial court eventually entered a non-suit judgment in favor of defendant. The trial court subsequently granted defendant's motion to recover its expert witness fees and costs by virtue of its status as the prevailing party under Cal. Civ. Proc. Code §§ 1032 and **998**(c). Plaintiff contended on appeal that defendant's offer did not meet the criteria of § 1032 because it did not allow a judgement to be taken against defendant. The court affirmed the trial court's decision. The court ruled that the wording in the offer to compromise dismissing the action with prejudice would have resulted in a final disposition of the underlying suit and that the trial court did not abuse its discretion in awarding pre-offer and post-offer attorney's fees and costs.

Outcome

The court affirmed the order of the trial court, which granted defendant bank's motion for expert witness fees, costs, and attorney's fees, in a negligence and slander action by plaintiff, sole shareholder of a corporation. The court found that defendant's statutory offer to compromise requiring dismissal of the action would have met the statutory criteria for entry of a final judgment.

LexisNexis® Headnotes

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1 Cal. Civ. Proc. Code § **998**(a) provides that all costs allowed under §§ 1031 and 1032 shall be withheld or augmented as provided in this section. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Experts

Real Property Law > Eminent Domain Proceedings > Procedures

Real Property Law > ... > Elements > Just Compensation >

Property Valuation

HN2 Cal. Civ. Proc. Code § **998**(c) provides that if an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his or her costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court, in its discretion, may require the plaintiff to pay the defendant's costs from the date of filing of the complaint and a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, the preparation or trial of the case by the defendant. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN3 Cal. Civ. Proc. Code § **998**(b) provides that not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN4 Cal. Civ. Proc. Code § **998**(f) provides that any judgment entered pursuant to this section shall be deemed to be a compromise agreement. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN5 Judgment is defined in Cal. Civ. Proc. Code § 577 as the final determination of the rights of the parties in an action or proceeding. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

Contracts Law > Defenses > Coercion & Duress > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN6 A valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties thereto and operates as a bar to the reopening of the original controversy. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts

> Settlement Agreements

HN7 Until a party seeks to enforce a compromise agreement and to have judgment entered thereon, the underlying lawsuit has not finally been disposed of although the parties may in fact be bound by a valid and enforceable settlement contract. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement

> General Overview

Contracts Law > Contract Interpretation > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts

> Settlement Agreements

HN8 Because compromise agreements are contracts and are governed by the general principles of contract law, the parties retain their right to seek to specifically enforce their settlement contract even if the underlying lawsuit is dismissed. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN9 The word "judgment" in Cal. Civ. Proc. Code § **998** indicates an offer to compromise which, if accepted, will result in the final disposition of the underlying lawsuit. The statute does not indicate any intent to limit the terms of the compromise settlement or the type of final disposition. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement

> General Overview

HN10 A compromise agreement contemplating payment by defendant and dismissal of the action by plaintiff is the legal equivalent of a judgment in plaintiff's favor. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN11 Compromise agreements are governed by the legal principles applicable to contracts generally. They regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time. *Shepardize* - Narrow by this Headnote

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN12 Nothing in Cal. Civ. Proc. Code § 1032 prohibits parties from stipulating to alternative procedures for awarding costs in the litigation. *Shepardize* - Narrow by this Headnote

Banking Law > ... > Banking & Finance > Bank Activities

> Bank Expenses & Income

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

HN13 If the items on a verified cost bill appear to be proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Costs & Attorney Fees ▾ > Costs ▾ > General Overview ▾

HN14 Cal. Civ. Proc. Code § 1032(b) provides that a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. It is irrelevant under section 1032 whether costs were incurred before or after an offer made pursuant to Cal. Civ. Proc. § **998**. *Shepardize* - Narrow by this Headnote

▼ Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

After a judgment of nonsuit was granted in favor of defendant bank on an individual's complaint for slander of title and negligence, the trial court granted defendant's motion to recover expert witness fees and other costs, based on plaintiff's rejection of defendant's written statutory offer to compromise and plaintiff's failure to obtain a judgment more favorable than the offer (Code Civ. Proc., § **998**, subd. (b)). In its offer to compromise, defendant offered to pay a certain amount in exchange for plaintiff's entering a request for dismissal with prejudice and plaintiff's execution of a general release in favor of defendant. (Superior Court of Los Angeles County, No. C521095, Barnet M. Cooperman ▾, Judge.)

The Court of Appeal affirmed. It held that defendant was entitled to its costs pursuant Code Civ. Proc., § **998**, subd. (b), even though the offer of compromise called for an entry of dismissal with prejudice rather than a judgment against defendant. The word "judgment" in Code Civ. Proc., § **998**, indicates that the statute contemplates that an offer to compromise that is accepted will result in the final disposition of the underlying lawsuit; the statute does not indicate any intent to limit the terms of the compromise settlement or the type of final disposition. The acceptance of the instant compromise agreement calling for a voluntary dismissal with prejudice would have finally disposed of the complaint as effectively as one calling for entry of judgment in favor of plaintiff. The court also held that the requirement of a general release pertained only to the instant action and did not require plaintiff to surrender any other action against defendant. The court further held that substantial evidence supported the finding that the experts were intended witnesses at trial, rather than mere consultants to defendant. The court finally held that defendant was entitled to costs incurred both before and after making its offer. (Opinion by Lillie, P. J., with Woods (Fred), J., concurring. Separate dissenting opinion by Johnson, J.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a) (1a) ***CA(1b)*** (1b) Costs § 12 > Items Other Than Attorney Fees > Costs After Rejection of Offer to Compromise > Valid Offer Under Statute Allowing Costs > Offer Calling for Dismissal of Action With Prejudice Rather Than Judgment Against Defendant.

--In a civil action in which defendant obtained a judgment of nonsuit, the trial court did not err in granting defendant's motion to recover its costs, based on plaintiff's rejection of defendant's written statutory offer to compromise and plaintiff's failure to obtain a judgment more favorable than the offer (Code Civ. Proc., § **998**, subd. (b)), even though the offer of compromise called for an entry of dismissal with prejudice rather than a judgment against defendant. The word "judgment" in Code Civ. Proc., § **998**, indicates that the statute contemplates that an offer to compromise that is accepted will result in the final disposition of the underlying lawsuit; the statute does not indicate any intent to limit the terms of the compromise settlement or the type of final disposition. The acceptance of the instant compromise agreement calling for a voluntary dismissal with prejudice would have finally disposed of the complaint as effectively as one calling for entry of judgment in favor of plaintiff. Further, although the parties were involved in three actions consolidated for trial, the trial court impliedly determined that the offer was intended to settle only plaintiff's complaint against defendant.

[See 6 **Witkin,** Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 57.]

CA(2) (2) Compromise, Settlement, and Release § 9 > Compromise > Construction, Operation, and Effect > Relationship to Judgment.

--A valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties thereto and operates as a bar to the reopening of the original controversy.

CA(3) (3) Compromise, Settlement, and Release § 9 > Compromise > Enforcement.

--Until a party seeks to enforce a compromise agreement and to have judgment entered thereon, the underlying lawsuit has not finally been disposed of, although the parties may in fact be bound by a valid and enforceable settlement contract. Also, because compromise agreements are contracts and are governed by the general principles of contract law, the parties retain their right to seek to specifically enforce their settlement contract even if the underlying lawsuit is dismissed. A dismissal will not adversely affect the agreement between the parties.

CA(4) (4) Compromise, Settlement, and Release § 9 > Compromise > Construction, Operation, and Effect > Governing Principles.

--Compromise agreements are governed by the legal principles applicable to contracts generally. They regulate and settle only those matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof. They do not extend to matters that the parties never intended to include therein, although existing at the time.

CA(5) (5) Costs § 12 > Items Other Than Attorney Fees > Costs After Rejection of Offer to Compromise > Valid Offer Under Statute Allowing Costs > Offer Calling for Plaintiff to Execute General Release in Favor of Defendant.

--In a civil action, defendant's offer to compromise was valid under Code Civ. Proc., § **998** (payment of offering party's costs if rejecting party does not obtain more favorable judgment), even though the offer called for plaintiff to execute a general release in favor of defendant. This language did not require plaintiff to surrender all possible causes of action against defendant; it unambiguously applied only to full settlement of the instant action. Thus, the trial court did not err in awarding defendant costs after entry of judgment of nonsuit.

CA(6) (6) Costs § 12 > Items Other Than Attorney Fees > Costs After Rejection of Offer to Compromise > Valid Offer Under Statute Allowing Costs > Good Faith of Offer.

--In a civil action, defendant's offer to compromise under Code Civ. Proc., § **998** (payment of offering party's costs if rejecting party does not obtain more favorable judgment), was made in good faith, and thus the trial court did not err in awarding defendant costs after entry of judgment of nonsuit. In its offer to compromise, defendant offered to pay a certain amount in exchange for plaintiff's entering a request for dismissal with prejudice and plaintiff's execution of a general release in favor of defendant. The requirement of a dismissal without prejudice would not have been tantamount to a judgment in favor of defendant making it the prevailing party entitled to costs under Code Civ. Proc., § 1032. Instead, had plaintiff accepted the offer, it would have been deemed a settlement by operation of law, with each party bearing its own costs. Also, the offer was not in bad faith even though a judge in a settlement conference opined that the case was worth more than the ultimate offer. Defendant obtained the nonsuit, and where the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable.

CA(7) (7) Costs § 9 > Items Other Than Attorney Fees > Expert and Other Witness Fees.

--After obtaining judgment of nonsuit in a slander of title action in which plaintiff had rejected defendant's offer to compromise under Code Civ. Proc., § **998**, defendant bank was entitled to its expert witness fees. The record showed that the witnesses were not merely, as plaintiff asserted, consultants and not potential expert witnesses at trial. The record contained declarations establishing that defendant designated its experts before trial and intended to call each of them to testify either in defendant's defense-in-chief or in rebuttal to plaintiff's claims or his expert witnesses. Thus, substantial evidence supported the trial court's implied findings that defendant's experts were potential expert witnesses at trial and not merely consultants. No factual basis supported plaintiff's claims that the experts were percipient witnesses. In addition, plaintiff's claim that the services of certain experts were duplicative was not supported by the record, which contained substantial evidence that they were hired to investigate and testify as to different issues in the case.

CA(8) (8) Costs § 12 > Items Other Than Attorney Fees > Costs After Rejection of Offer to Compromise > Entitlement to Costs Before Offer Made.

--After obtaining judgment of nonsuit in a slander of title action in which plaintiff had rejected defendant's offer to compromise under Code Civ. Proc., § **998**, defendant bank was entitled to its costs incurred both before and after it made its offer. Code Civ. Proc., § 1032, referenced in Code Civ. Proc., § **998**, provides that a prevailing party is entitled to recover costs in any action. It was without dispute that defendant was the prevailing party, and it is irrelevant under Code Civ. Proc., § 1032, whether costs were incurred before or after a Code Civ. Proc., § **998**, offer. Moreover, even though the parties were involved in three separate actions, the award of costs only included costs pertaining to the instant action. If the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred. Defendant's memorandum of costs contained detailed schedules of deposition dates, costs, deponents, investigative costs, lists of dates and fees for service of process on named persons, and an itemized list of expert witness fees, none of which was contradicted by plaintiff.

Counsel: John Clifton Elstead for Plaintiff and Appellant.

Epport & Richman and Steven N. Richman for Defendant and Respondent.

Judges: Opinion by Lillie, P. J., with Woods Fred, J., concurring. Separate dissenting opinion by Johnson, J.

Opinion by: LILLIE, P. J.

Opinion

[*903] [**741] **LILLIE, P. J.**

Plaintiff Goodstein appeals from a September 11, 1990, order granting defendant's motion to recover expert witness fees, awarding fees and costs of $ 138,421, and denying plaintiff's motion to tax costs. On appeal, plaintiff challenges the trial court's award of expert witness fees under Code of Civil Procedure section **998** and the cost award on several grounds.

[**742] FACTUAL AND PROCEDURAL BACKGROUND

After a judgment of nonsuit was granted in favor of defendant (Bank) on Goodstein's complaint for slander of title and negligence, 1 Bank filed a memorandum of costs in conjunction with a motion to recover expert witness fees totaling about $ 116,000, based on Goodstein's rejection of Bank's written statutory [***2] offer to compromise and his failure to obtain a judgment more favorable than the offer (Code Civ. Proc., § **998**, subd. (c)). 2

[***3] According to declarations submitted in support of Bank's motion, Goodstein claimed numerous items of damages exceeding $ 2 million in his suit against Bank, including damages

for loss of business investment in Jook Box Corporation, of which Goodstein was the sole shareholder. Prior to trial, Bank designated numerous expert witnesses, including Robert Wagman and James Call who were deposed in early 1989, before trial in September and October 1989; Wagman was a partner of Price Waterhouse with over 12 years of experience in financial services and tax issues; his trial testimony would relate to the financial status of Goodstein and his ability to obtain capital for the operation of Jook Box Corporation; Call was a senior manager at Price Waterhouse; his trial testimony would relate to the management and operation of Jook Box Corporation and the reasons for its failure.

Wagman rendered 103 hours of service for Bank in connection with the lawsuit, including initial investigation and research, preparation for deposition, and trial preparation, but excluding the time spent in deposition; his **[*904]** fees were $ 15,077, equating to an average hourly rate of about $ 146; about $ 12,500 [***4] of his fees were incurred after the December 1988 statutory offer to compromise.

Call rendered 481 hours of service in connection with the lawsuit, excluding time spent in deposition; Price Waterhouse charged Bank $ 69,725 for his services, plus costs of $ 5,696, equating to an average hourly rate of $ 135; about $ 69,300 of the fees were incurred after the statutory offer to compromise. 3

Goodstein filed opposition to Bank's motion for expert witness fees and a motion to tax costs, challenging items of costs sought by Bank by virtue of its status as a prevailing party under Code of Civil [***5] Procedure section 1032, as well as items of costs sought by virtue of Code of Civil Procedure section **998**, subdivision (c).

After oral argument on the motions, the court took the matters under submission. On September 11, 1990, the court issued its ruling on submitted matter, which stated in pertinent part: "The Motion of defendant [Bank] to recover expert witness fees in the sum of $ 116,184.05, as claimed in the Memorandum of Costs filed November 15, 1989, is granted ([Code Civ. Proc.] § **998**(c)). Defendant Bank has carried its burden to establish that the foregoing sum is reasonable, actually incurred, and reasonably necessary in the preparation for trial of the case at bench. [P] ... Costs, over and above the foregoing expert witness fees, and which costs are in the sum of $ 22,237.62 ... are granted ... under the provisions of [Code Civ. Proc.] § **998**(c), 1032, and 1033.5 .... [P] ... Plaintiff's Motion to Tax [**743] the foregoing costs is denied." Plaintiff filed timely notice of appeal from the order.

I. Statutory Offer Under Section **998**

(1a) (1a) Appellant claims that certain aspects of the statutory offer to compromise prevent it from constituting an offer to compromise [***6] within the provisions of Code of Civil Procedure section **998**, subdivision (b). 4 He argues that "The Bank's requirement of a dismissal with prejudice invalidated its offer as a section **998** offer and, consequently, the trial court's order **[*905]** granting the Bank's motion for expert witness fees and denying Dr. Goodstein's motion to tax costs was erroneous as a matter of law."

[***7] In this case, the offer was captioned "Statutory Offer to Compromise," AND PROVIDED IN PERTINENT PART THAT: "In full settlement of this action, [Bank] hereby offers to pay [Goodstein] the total sum of $ 150,000 in exchange for each of the following: [P] 1. The entry of a Request for Dismissal with prejudice on behalf of the Plaintiff in favor of [Bank]; [P] 2. The execution and transmittal of a General Release by [Goodstein] in favor of [Bank]; [P] 3. Each party is to bear their own respective costs and attorney's fees."

Appellant contends that the foregoing offer does not fall within Code of Civil Procedure section **998** because it fails "to allow judgment to be taken" against Bank. Appellant maintains that a dismissal with prejudice operates as a final judgment on the merits while a judgment obtained pursuant to section **998** is deemed to be a "compromise settlement" under section **998**, subdivision (f), so that "the Bank created a situation where it would have been impossible for the terms of its offer to become operative" under section **998**, subdivision (b), which requires that "the clerk or the judge shall enter judgment accordingly."

The distinctions set up by appellant [***8] are not tenable, and he offers no authority to support his argument, which is premised on the claim that a compromise settlement under Code of Civil Procedure section **998** can never include an agreement for a voluntary dismissal or release. Had Goodstein accepted the offer in this case, and had Bank performed pursuant to the terms of the offer, there would have been no impediment to Goodstein's execution of a request for dismissal and the clerk's entry of it. Such a procedure would have resulted in a "judgment ... taken in accordance with the terms and conditions stated at that time" in the offer. We perceive no impediment to that dismissal being part of the compromise settlement and "judgment" within the meaning of section **998**.

HN5 "Judgment" is defined in Code of Civil Procedure section 577 as "the final determination of the rights of the parties in an action or proceeding." ***(2)*** (2) ***HN6*** " '[A] valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties thereto and operates as a bar to the reopening of the **[*906]** original controversy.' " (*Folsom* v. *Butte County Assn. of Governments* (1982) [***9] 32 Cal.3d 668, 677 [186 Cal.Rptr. 589, 652 P.2d 437].)

(3) (3) "However, ***HN7*** until a party seeks to enforce a compromise agreement and to have judgment entered thereon, the underlying lawsuit has not finally been disposed of although the parties may in fact be bound by a valid and enforceable settlement contract." (*Varwig* v. *Leider* (1985) 171 Cal.App.3d 312, 315 [217 Cal.Rptr. 208].) ***HN8*** Because compromise agreements "are contracts and are governed by the general principles of contract law" (*id.* at p. 316), the court in *Varwig* stated that even though the underlying [**744] lawsuit giving rise to a settlement agreement is dismissed for failure to bring the action to trial in five years, "The parties will retain their right to seek to specifically enforce their settlement contract even if the underlying lawsuit is dismissed" (*ibid.*), and "A dismissal ... will not ... adversely affect the agreement between the parties." (*Ibid.*)

(1b) (1b) ***HN9*** The word "judgment" in Code of Civil Procedure section **998** indicates that the statute contemplates that an offer to compromise which is accepted will result in the final disposition of the underlying lawsuit; the statute does not indicate any [***10] intent to limit the terms of the compromise settlement or the type of final disposition. The acceptance of the instant compromise agreement calling for a voluntary dismissal with prejudice would have finally disposed of the complaint as effectively (see Code Civ. Proc., § 581d) as one calling for entry of judgment in favor of plaintiff.

In light of the foregoing, we conclude that the instant offer to compromise meets the requirements of subdivision (b) of Code of Civil Procedure section **998**. Our conclusion is consistent with *Gregory* v. *Hamilton* (1978) 77 Cal.App.3d 213 [142 Cal.Rptr. 563], although that case did not involve a section **998** offer.

In *Gregory*, plaintiff accepted a settlement offer for $ 7,500 during a settlement conference in the judge's chambers and then refused to sign a release and repudiated the settlement; on motion, the trial court granted defendant's motion for an order compelling enforcement of compromise settlement agreement and judgment thereon for $ 7,500; plaintiff appealed and complained on appeal that "the court was without power to enter a judgment in her favor, since the compromise agreement contemplated no such thing, but rather payment [***11] by respondent and dismissal of the action by appellant. However, it is recognized that a compromise agreement operates as a merger and bar of all preexisting claims and causes of action [citation] and is as binding and effective as a final judgment itself [citation]. Thus, entry of judgment in favor of appellant in conformance with the compromise **[*907]** is not improper, and indeed has been sanctioned in the past. [Citation.]" (77 Cal.App.3d at p. 221.)

We interpret *Gregory* to stand for the proposition that, as between the parties thereto and for purposes of enforcement of settlement agreements, ***HN10*** a compromise agreement contemplating payment by defendant and dismissal of the action by plaintiff is the legal equivalent of a judgment in plaintiff's favor.

Appellant points out that the distinction between a judgment and a voluntary dismissal may have an impact on a party's status as a prevailing party under the provisions of Civil Code section 1717, but this issue is not implicated here. Cases dealing with attorney fees under

Civil Code section 1717 do not provide authority for appellant's restrictive interpretation of Code of Civil Procedure section **998**.

We also reject [***12] appellant's argument that the offer is fatally uncertain because it fails to specify whether it was an offer intended to compromise all three of the actions consolidated for trial, or just Goodstein's action against the Bank. The trial court impliedly determined that the offer was clear and unambiguous and was intended to settle only Goodstein's complaint against Bank. Substantial evidence in the record supports the trial court's determination.

(4) (4) "***HN11*** Compromise agreements are, of course, 'governed by the legal principles applicable to contracts generally.' [Citation.] They 'regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time.' " (*Folsom* v. *Butte County Assn. of Governments, supra*, 32 Cal.3d at p. 677.)

(5) (5) Citing the provision of the instant offer pertaining to Goodstein's execution of a general release, appellant contends that the foregoing provision required him to surrender "other present and future possible causes of action against the defendant," [***13] thus rendering the offer "hopelessly uncertain and directly under the purview of *Valentino* [v. *Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692 (247 Cal.Rptr. 483)]." Appellant [**745] argues that his other potential causes of action against the Bank "include abuse of process and malicious prosecution, neither one of which [he] was willing to surrender at the time of the Bank's offer." The clear and unambiguous language of the offer provides that the terms and conditions applied only "in full settlement of this action." Accordingly, the offer reasonably cannot be construed to apply to other litigation contemplated by Goodstein. **[*908]**

The instant case is distinguishable from *Valentino* v. *Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692 [247 Cal.Rptr. 483], a personal injury case in which defense counsel included with a $ 15,000 offer a requirement that plaintiff sign and file a notice of acceptance which "not only terminated the instant personal injury action against Sav-On but also released Sav-On, its attorneys and insurance carrier from any and all claims and causes of action arising out of appellant's claims including insurance bad faith and violation [***14] of Insurance Code section 790.03." (201 Cal.App.3d at p. 695.) As stated by the court in *Valentino*, "It would be hard enough for a trial court to place a value on a condition requiring the plaintiff to dismiss a single specific lawsuit she had already filed against the defendant in another court. But when the condition mandates surrender of an array of potential lawsuits against not only the defendant but two other parties the task becomes impossible. Even if it were possible, it would not be worth the cost. Recalling the underlying purpose of section **998** is to promote judicial economy, this court is not about to encourage defendants to add conditions to their statutory offers which introduce so much uncertainty to those offers the courts must spend hours or days sorting them out to determine whether plaintiffs have achieved a more favorable result at trial." (*Id.* at pp. 700-701.)

Inasmuch as the general release in the instant case pertained only to the same action before the trial court which Bank sought to have dismissed upon its payment of $ 150,000 to Goodstein, *Valentino* has no application to the facts of this case.

(6) (6) We also reject appellant's claim that had he [***15] accepted the instant offer, calling for dismissal, such dismissal would have been tantamount to "a judgment on the merits in favor of defendant," and he would have incurred the risk "of having the defendant declared the prevailing party under [Code of Civil Procedure section] 1032 and [defendant] pursuing him for costs anyway." GOODSTEIN IS WRONG: Had he accepted the offer, it would have been deemed a compromise settlement by operation of law; moreover, by its own terms, each side would have agreed to bear their own costs and attorney fees. ***HN12*** Nothing in section 1032 prohibits parties from stipulating to alternative procedures for awarding costs in the litigation. (See Code Civ. Proc., § 1032, subd. (c).)

Without merit also is appellant's contention that "The Bank's offer was an invalid bad faith offer that had no reasonable prospect of acceptance." Bank's declarations establish without contradiction that at a voluntary settlement conference in December 1988, the judge

reviewed the file, spoke with each party, independent of the other, and expressed his opinion that the case had a settlement value of $ 200,000. After the settlement conference, defense counsel decided to offer the [***16] figure of $ 150,000 to Goodstein, and such a statutory offer was served on Goodstein shortly thereafter.

[*909] Moreover, in light of the judgment of nonsuit, and the affirmance of that judgment on appeal, appellant's characterization of this case as one of "clear liability" is without merit. As stated in our opinion dealing with the appeal from the judgment of nonsuit, "Bank did not slander [Goodstein's] title by filing a forged deed of trust, ... Dr. Goodstein's *partner* did these wrongful acts." We also affirmed the judgment on the ground that certain alleged wrongful conduct by Bank was determined to be privileged, other allegedly negligent conduct was not the proximate cause of damage to Goodstein, and Goodstein had no standing to sue for the lost profits involving the Jook Box Corporation and a derivative action was not pleaded. (*Goodstein* v. *Bank of San Pedro*, *supra*, B048044.) "Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable ...." (*Elrod* v. *Oregon Cummins* [**746] *Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700 [241 Cal.Rptr. 108].)

Appellant [***17] implies that despite pleading defects and the lack of evidence of causation, Bank nevertheless took Goodstein's claims against it for millions of dollars seriously because its offer "barely exceeded its own costs" of about $ 138,000, and "it is unlikely that the Bank would have spent so much on the defense of the case and withheld a **998** offer until the eve of trial if it had not reasonably anticipated a significant verdict against it, greatly in excess of the $ 150,000 offered."

We find nothing in this record to indicate that Bank actually valued the case in excess of its statutory offer. According to the declaration of counsel monitoring the case on behalf of Bank's insurer, "It was decided that a Statutory Offer in the sum of $ 150,000 would be offered for the sole purpose of confirming the offer that had been made at the December 29, 1988 settlement conference and to give us the opportunity to collect any expert fees that were generated in this case." Thus, the offer is consistent with the fact that, despite its lack of merit, Goodstein's action would entail substantial costs and expenses if it went to trial.

Given all of the above circumstances, appellant fails to establish [***18] that the trial court abused its discretion in impliedly determining that the statutory offer in this case was made in good faith. Accordingly, we reject appellant's contentions that the offer in this case does not fall within the provisions of Code of Civil Procedure section **998**.

II. Expert Witness Fees

(7) (7) Appellant contends that the Bank was not entitled to expert witness fees within the provisions of Code of Civil Procedure section **998**, subdivi- **[*910]** sion (h), and Government Code section 68092.5, subdivision (a), "because its experts were merely consultants and not potential expert witnesses at trial." This is a factual argument which is not borne out by our record, which contains declarations establishing that Bank designated its experts before trial and intended to call each of them "to testify either in Bank's defense-in-chief or in rebuttal to Plaintiff's claims or his expert witnesses." Substantial evidence thus supports the trial court's implied findings that Bank's experts were potential expert witnesses at trial and not merely consultants. No factual basis supports appellant's claims that the experts were percipient witnesses. In addition, appellant's claim that [***19] the services of experts Call and Wagman were duplicative is not supported by the record, which contains substantial evidence that they were hired to investigate and testify as to different issues in the case.

III. Costs

(8) (8) In addition to expert witness fees, the trial court awarded costs totaling $ 22,237.62 for filing and motion fees, deposition costs, service of process, witness fees, and court-ordered transcripts. Appellant contends that "The Bank was not entitled to more than $ 7,853.08 of its costs because all of the other costs were incurred before its offer was made."

Appellant argues that the trial court abused its discretion in awarding costs incurred *before* the statutory offer was made because the trial court "made no determination as to when the complaint in any of the three consolidated actions was filed, let alone which of the costs claimed pertained to which of these actions. It simply ordered that all costs claimed by the Bank were to be paid by the plaintiff, which could mean costs for two of the cases that have not even been dismissed, as well as costs incurred before any of the complaints were filed."

This argument is simply absurd. We should not have to [***20] point out to appellant's counsel that Bank's memorandum of costs contained detailed schedules containing itemized lists of deposition dates, costs, and deponents, investigative costs, lists of dates and fees for service of process on named persons, and an itemized list of expert witness fees. Bank's motion contained detailed declarations further explaining and justifying the expert witness fee expenses. Bank's declarations [**747] were not contradicted by any declarations submitted by Goodstein. "***HN13*** If the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred." (*Rappenecker* v. *Sea-Land Service,* **[*911]** *Inc.* (1979) 93 Cal.App.3d 256, 266 [155 Cal.Rptr. 516].) Appellant's mere statements in his points and authorities and in his briefs on appeal are insufficient to rebut Bank's prima facie showing (*ibid.*), and we must presume the trial court's order to be correct inasmuch as appellant fails to affirmatively show any error. (*Ibid.*)

Appellant also fails to establish any abuse of discretion by the trial court in awarding Bank both preoffer and postoffer costs [***21] under the provisions of Code of Civil Procedure section 1032 or Code of Civil Procedure section **998**, subdivision (c). (*Ante*, fn. 2.) ***HN14*** Subdivision (b) of section 1032 provides that "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." It was without dispute that Bank was the prevailing party within the meaning of section 1032. It is irrelevant under section 1032 whether costs were incurred before or after a section **998** offer.

DISPOSITION

The order is affirmed. Respondent is entitled to its costs on appeal.

Woods Fred, J., concurred.

Dissent by: JOHNSON, J.

Dissent

JOHNSON, J.

I respectfully dissent.

My concerns about the majority opinion center on a single issue. Was the defendant's offer a *valid*Code of Civil Procedure Section **998** offer despite the fact it included a demand the plaintiff sign a "general release," not just a termination of this particular cause? I believe the answer is no, it was not. That is, I construe section **998** as limiting the terms of a statutory offer to the precise cause which will go to trial before the court if the offer is not accepted.

In my view, this very court actually decided this issue [***22] in a unanimous opinion six years ago. (*Valentino* v. *Elliot Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692 [247 Cal.Rptr. 483] review den. Aug. 18, 1988.) In that opinion, we characterized the issue as follows: "[W]

e confront a fundamental issue in the interpretation of California's settlement incentive scheme. May costs be shifted against a prevailing party who rejected a statutory settlement offer (under Code Civ. Proc., § **998**) that would have required this party to forego other lawsuits as well as dismissing the one involved in the case at trial?" (201 Cal.App.3d at p. 694.) That sounds nearly identical to the issue before us in this case, where a party rejected a settlement offer including a general release "that would have required it to forego other lawsuits as well as dismissing the one involved in the case at trial."

[*912] The majority opinion is correct in stating there are factual differences between *Valentino* and the instant case. But the *Valentino* rationale is broad enough to decide this case as well. Furthermore, principles of statutory construction and policy considerations underlying that rationale strongly support a rule against allowing Code of [***23] Civil Procedure section **998** offers to include a requirement the offeree sign a "general release."

In *Valentino*, the defendant made a Code of Civil Procedure section **998** offer of $ 15,000. In order to obtain this sum, however, plaintiff not only had to dismiss her current personal injury action but also release defendant, its attorneys and insurance carrier "from any and all claims and causes of action arising out of appellant's claims including insurance bad faith and violation of Insurance Code section 790.03." (201 Cal.App.3d at p. 695.) In its inclusion of a broad general release as part of the section **998** offer, *Valentino* is virtually identical to the instant case.

There was a somewhat different outcome at trial, however. In *Valentino*, the plaintiff received a judgment of $ 9,750 while the instant case ended in a defense verdict. Still, what the plaintiff won in *Valentino* fell short of the defendant's Code of Civil Procedure section **998** offer. Consequently, if that offer were considered valid, despite the inclusion of a general release, the defendant would have been entitled to the cost shifting allowed under section **998**. Indeed the trial court awarded the defendant [***24] $ 13,244.40 in costs, leaving the plaintiff a net loser.

[**748] This court reversed in *Valentino* specifically because the defendant's Code of Civil Procedure section **998** offer incorporated a general release not just a settlement of the case before the court. "Other terms or conditions of a statutory offer may effectively negate the monetary term of the offer.... (T)he other terms and conditions may reduce the actual value of the monetary term so that a damage award in a lesser sum actually would be 'more favorable' not less favorable than the statutory offer the defendant made...."

"... Evaluated in the light of this (general release), the monetary term of the offer is not really $ 15,000 *to settle the causes of action at issue in the instant case.* Instead that $ 15,000 is diluted by the worth of other present and future possible causes of action (the plaintiff) must surrender in order to receive the defendant's cash. (Italics in original.) *Most or indeed all of the $ 15,000 actually may represent a payment to be released* from potential bad faith or other claims against the insurance company, the lawyer, or the (defendant) rather than a payment to settle the instant [***25] case....

"... In retrospect, of course, (plaintiff's) bad faith claim appears valueless and it is hard to conjure any other claims she could file .... But **[*913]** the value of these claims must be measured as of the time (defendant) made its statutory offer and without benefit of hindsight.

"To pinpoint the value of the various potential unfiled claims [plaintiff] might have had at the time of the statutory offer or in the future ..., would require the court to engage in wild speculation bordering on psychic prediction. Merely identifying all the potential claims would take some clairvoyance as well as the collection of a host of facts unrelated to the merits of the instant case.... After all the potential causes of action had been identified, the court would then have to gather further facts about the apparent probabilities of success and possible recoveries for each as they would have appeared at the time of the statutory offer. Then it would have had to arrive at estimates as to all these variables and calculate an estimated value for each individual potential claim, cumulate those estimated values, and determine whether the total exceeded [the difference between defendant's [***26] section **998** offer and plaintiff's recovery in the case on trial]....

".....

"It would be hard enough for a trial court to place a value on a condition requiring the plaintiff to dismiss a single specific lawsuit she had already filed against the defendant in another court. But when the condition mandates surrender of an array of potential lawsuits ... *the task becomes impossible*. Even if it were possible, it would *not be worth the cost*. Recalling the underlying purpose of section **998** is to promote judicial economy, this court is *not about to encourage defendants to add conditions to their statutory offers which introduce so much uncertainty* to those offers the courts must spend hours or days sorting them out to determine whether plaintiffs have achieved a more favorable result at trial." (201 Cal.App.3d at pp. 697-701, italics added.)

As the language quoted above demonstrates, this court in *Valentino* disapproved the inclusion of general releases in Code of Civil Procedure section **998** offers and gave several reasons for its position. While *some* of those reasons are more relevant when the plaintiff wins something in the specific case on trial, most of them [***27] apply even if that specific case results in a defense verdict. As our *Valentino* opinion highlighted, when the section **998** offer includes a general release we cannot be certain whether *any* of the monetary offer was addressed to the single case before the court. As we held in *Valentino*, "... indeed all of the [monetary offer] may represent a payment to be released from ... other claims ... rather than a payment to settle the instant case." (201 Cal.App.3d at p. 698.) Moreover, as further discussed in *Valentino*, the difficulties and costs of determining whether that **[*914]** is true are present whether the trial of the single case before the court ends in a defense or plaintiff's verdict. If we allow section **998** offers to include general releases, judicial economy--a major goal of section **998**--suffers in either instance.

In my view, then, the lesson of *Valentino* is that Code of Civil Procedure section **998** offers which include general releases--or require dismissal of causes other than the one before the court on this occasion-- [**749] are invalid *from the inception*. Nor is their validity restored just because the trial happens to result in a defense [***28] verdict. The fatal vices identified in *Valentino* remain.

Still, *Valentino* only surfaced some of the problems inherent in Code of Civil Procedure section **998** offers which include general releases. There are others.

First, a general release clause in a Code of Civil Procedure section **998** offer places the offeree in an untenable position. It requires the offeree to risk section **998** cost-shifting *in this case* in order to preserve his rights to pursue other litigation against his opponent.

The opposing party could make a monetary offer that was quite reasonable for settlement *of this case*, but unreasonable as an offer to settle both this case and any other actual or potential litigation between the parties. If such an offer nevertheless is to be considered a valid Code of Civil Procedure section **998** offer, it places the offeree in a terribly unfair dilemma. If the offeree accepts the offer, he signs away his rights to pursue other causes of action against the offeror. In doing so, he will be giving up probable recoveries which, when added to the probable recovery in this case, might substantially exceed the section **998** offer in this case. On the other hand, if he rejects [***29] what he knows to be a reasonable offer *for this case*--and, moreover, an offer he will have a hard time surpassing *in this case*--he is forced to run the considerable risk he will have to pay his opponent's costs *in this case*.

Second, by placing a general release clause in a Code of Civil Procedure section **998** offer an offeror obtains an unfair advantage. The offeror is allowed to impose the pressure of cost-shifting in a case which is before the court to force settlement of other actual or potential cases which are not before the court. This is not the purpose of section **998** and its cost-shifting provisions. The purpose of section **998** is to encourage reasonable settlement of the cause which is before the court, not to provide one party with additional leverage to impose its terms in other disputes which may exist between the parties.

[*915] Indeed if settlement of other actual and potential lawsuits can be embraced in a Code of Civil Procedure section **998** offer, there is no reason the offeror could not include requirements the offeree do all kinds of other things unrelated to the cause being litigated before the court, such as a promise to buy a million widgets [***30] from the offeror, or whatever.

Third, the offeree is only allowed to count his recovery *in this case* in determining whether he achieved a more favorable judgment than the offer. Hence the Code of Civil Procedure section **998** offer itself should only be allowed to embrace settlement *of this case*. If we allow the section **998** offer to embrace the settlement of other actual and potential cases, then logic dictates we should count the recoveries or potential recoveries in those other cases in determining whether the offeree achieved an outcome more favorable than the section **998** offer. In most instances, that would require waiting for several years after the judgment in the present case was entered, which doesn't seem practical. But it does highlight the absurdity of allowing a section **998** offer to include a "general release" or any other language purporting to resolve other actual or potential litigation between the parties while only allowing the offeree to count his recovery in the case before the court when determining whether that recovery exceeded the section **998** offer.

Fourth, nothing in the language of section **998** itself suggests it contemplates an offer which covers [***31] anything other than the causes of action which are before the court in the precise cause which is otherwise going to trial. The courts certainly have understood that language to be so limited. "[T]he reasonableness of a defendant's offer ... represents a reasonable prediction of *the amount of money*, if any, defendant would have to pay plaintiff *following a trial*, ..." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699 [241 Cal.Rptr. 108].) The offer thus does not embrace the amount of money the defendant might have to pay the plaintiff in causes of action which will *not* be resolved at the trial of the litigation in which the offer is made. Consequently, the offer cannot require the plaintiff to terminate or abstain from pursuing those other causes of action as the price of receiving the monetary consideration the defendant tenders.

Fifth, the legislative purpose of the Code of Civil Procedure section **998** legislation is furthered by limiting the offer to the precise cause which otherwise is going to trial. That purpose is to encourage settlement [**750] of individual cases which are in litigation on fair and reasonable terms and thereby save [***32] the courts and litigants the costs of trial. "... [S] ection **998** achieves its purpose by punishing a party who fails to accept a *reasonable* offer from the other party." [Italics added.] (*Hurlbut* v. *Sonora Community* **[*916]** *Hospital* (1989) 207 Cal.App.3d 388, 408 [254 Cal.Rptr. 840].) For reasons described above, this legislative purpose is distorted and defeated if the courts allow section **998** offers to encompass "general releases" and similar terms going beyond the precise cause which is otherwise going to trial.

The majority seeks to characterize the "general release" in this case as somehow confined to the precise causes of action that were being litigated in this case. Thus, according to that opinion, the offer does not suffer from any of the vices which bother me.

While it might be reassuring and certainly would have saved me time and effort to accept that narrow view of this general release, I was unable to do so. Other terms of this offer required the offeree to dismiss with prejudice all the claims which were the subject of the cause before the court in this action. A "general release" confined to those causes of action would be mere surplusage--a completely [***33] redundant term. Res judicata takes care of any concern as to the possible revival of the dismissed claims and does so at least as effectively as would a "release" of those causes of action.

So when the offer contained a separate and distinct term requiring a "*general* release" in addition to dismissal of the claims actually before the court, what is the reasonable interpretation of that term? I submit the term meant what it normally means--a general relinquishment of all causes of action, whether embraced in complaints already filed in the courts or ones which might be filed in the future. This meaning of the phrase "general release" has become a recognized term of art in the law and among lawyers. It is a term with a settled meaning. Indeed that settled meaning even has been recognized in statutes. (See, e.g., Civ. Code, § 1542.)

Accordingly, when defendant made a Code of Civil Procedure section **998** offer embodying as one of its conditions this common term of art--a demand for a "general release"--the plaintiff could only place one reasonable construction on that part of the defendant's offer. If he were to receive the money the defendant was offering he would be required [***34] to execute a standard "general release," not just dismiss his present cause. As commonly used among lawyers, in judicial decisions and in statutes, such a 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.

If this is the proper reading of the "general release" condition included in this Code of Civil Procedure section **998** offer--and I submit it is the most and perhaps the only reasonable reading of that part of the offer--then that section **998** offer is infected with all the vices discussed earlier in this **[*917]** opinion. For those reasons, the section **998** offer is unreasonable and invalid. Accordingly, it cannot be the basis of a cost-shifting award under section **998** and that award should be reversed.

Footnotes

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1 We upheld this judgment in an unpublished opinion in *Goodstein* v. *Bank of San Pedro* (Dec. 10, 1993) B048044, review denied March 23, 1994.

2 ***HN1*** Code of Civil Procedure section **998** provides in pertinent part: "(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section. [P] ... [P] ***HN2*** (c) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his or her costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court, in its discretion, may require the plaintiff to pay the defendant's costs from the date of filing of the complaint and a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, the preparation or trial of the case by the defendant."

3 Bank also claimed lesser amounts of expert witness fees for 10 other experts, whose fees are not specifically mentioned in Goodstein's briefs on appeal. It is not necessary to set out the details of these other fees to resolve the issues on this appeal. We do note that Bank's motion contained detailed information about the background and anticipated testimony of the expert witnesses, and an itemization of their fees.

4 ***HN3*** Code of Civil Procedure section **998**, subdivision (b), provides in pertinent part: "Not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and

conditions stated at that time. [P] (1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. [P] (2) If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial."

HN47 Subdivision (f) of section **998** provides in part that "Any judgment entered pursuant to this section shall be deemed to be a compromise settlement."

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