

Hidden Costs of 998 Offers

By Audrey Priolo, Litigation Review Attorney

A Section 998 offer can be a powerful tool for a Defendant in litigation. Many Defendants make 998 offers to recoup costs and fees from a Plaintiff when the case appears unable to settle. The art of selecting the right amount for a 998 offer is a delicate balance between too much and too little. However, numerous defendants have failed to measure two important factors into their offers – Plaintiff's costs and fees. It is standard practice for a defendant to include the caveat that a 998 offer assumes both parties will bear their own fees and costs. That limitation may be the amount that tips the scale on the determination of a prevailing party under Section 998.

The court in *Hersey v. Vopava* held that a Plaintiff's costs at the time of a 998 offer must be factored when determining which party prevailed at trial. Defendant Vopava made two 998 offers to Plaintiff before trial. The first for \$10,000 and the second for \$20,001. After a bench trial, the court awarded Plaintiff \$7,438. The trial court held Defendant was the prevailing party under Section 998 and awarded Defendant costs and fees of \$30,483.55.

Plaintiff argued Defendant was not the prevailing party once the Plaintiff's costs were taken into account. The Court of Appeals agreed reasoning that Section 998(c)(2)(A) specifically excluded post-offer costs. The court explained that the exclusion of post-offer costs "necessarily implies pre-offer costs are included." The court further indicated that attorney's fees are considered costs under Section 998.

Additionally, the argument costs should be frozen once the first 998 offer expires was rejected. The court indicated that the policy behind Section 998 does not support freezing costs after a first offer is made. Rather, such a policy would encourage defendants to make a nominal bad faith offer early in litigation.

Defendants cannot possibly know a Plaintiff's costs at the time of a Section 998 offer. Accordingly, factoring in a Plaintiff's costs makes an already difficult assessment more complicated. However, it is important for litigants to understand that becoming a prevailing party under Section 998 is not as simple as it seems at first glance.

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