CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 998: AN OFFER TO COMPROMISE BETWEEN THE AMERICAN AND ENGLISH RULES FOR FEE-SHIFTING?

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INTRODUCTION

Imagine you bring a personal injury claim seeking damages of $950,000. At the end of trial, the jury finds the defendant negligent and awards you $375,000. Although you prevailed at trial, the court orders you to pay a portion of the defendant's litigation costs. Accordingly, you lose your entire award and are required to provide an additional payment of $18,000 to the defendant. If you are confused by this hypothetical situation, you are not alone. This seemingly backwards scenario is made possible by California Code of Civil Procedure section 998 ("section 998"),[1] a cost-shifting statute that has perplexed California litigators for decades.

When it comes to the determination of which party is responsible for paying legal fees in a litigation, there are two prominent models: the "English rule" and the "American rule."[2] The majority of the Western world

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1. *See* CAL. CIV. PROC. CODE § 998(e) (West 2024). Under section 998, if a plaintiff rejects a defendant's 998 offer and subsequently fails to obtain a more favorable judgment or award, costs from the time of the offer are to be deducted from plaintiff's award. If the costs exceed damages awarded to the plaintiff, "the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly." *Id.* This hypothetical operates under two major assumptions. First, that the defendant, at some point, made a valid 998 offer to the plaintiff that was greater than $375,000, which the plaintiff subsequently rejected. And second, that the defendant's recoverable costs pursuant to section 998(c)(1) were $393,000.

2. Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 160–61 (2006).

implements the English rule,[3] which embodies a loser-pays system in which litigation costs, including attorney's fees, are shifted to the losing party.[4] Conversely, in America, absent bad faith or a statutory or contractual provision to the contrary, the general rule is no fee-shifting.[5] In other words, unless a lawsuit involves bad faith, a contractual dispute and the contract at issue contains a fee-shifting provision, or a statute that provides for recovery of costs, each party bears their own litigation costs, irrespective of the outcome.[6]

Each model has its pros and cons. On the one hand, a loser-pays system—the English rule—discourages nuisance litigation and promotes settlement, but may subsequently reduce access to litigation,[7] even for those with meritorious claims.[8] Conversely, a system that does not generally allow for fee-shifting—the American rule—enables individuals to have their fair day in court, avoiding the English rule's "potential chilling effect on meritorious litigation."[9] The American rule, however, may subsequently decrease the likelihood of settlement and open the door for increased nuisance litigation, which may overwhelm court systems.[10]

Because the American rule may lack distinct incentives for parties to settle or to refrain from bringing frivolous claims that create a backlog in courts, the American justice system has devices to encourage parties to settle their claims and resolve disputes as quickly and efficiently as possible. One such device includes offer-of-judgment rules: a type of fee-shifting statute that provides an exception to the general rule against fee-shifting. Offer-of-judgment rules are offer-based fee-shifting rules that allocate costs according to pretrial settlement offers.[11] Thus, under an offer-of-judgment rule, if a litigant rejects a pretrial settlement offer and subsequently receives a less favorable judgement at trial, they must compensate the offeror for certain post-offer costs.

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3. Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study* 19 (Univ. of Oxford Legal Rsch. Paper Series, Working Paper No. 55, 2009).

4. *Id.*

5. *Id.* at 23.

6. *Id.*

7. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653 (1982); Jaime Leigh Loos, *The Effect of a Loser-Pays Rule on the Decisions of an American Litigant*, 7 MAJOR THEMES ECONS., 31, 43–44 (2005).

8. Yoon & Baker, *supra* note 2, at 161.

9. *Id.*

10. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1634–35 (1993).

11. Kathryn E. Spier, *Pretrial Bargaining and the Design of Fee-Shifting Rules*, 25 RAND J. ECON. 197, 197 (1994).

Section 998 is California's offer-of-judgment rule. Section 998 is a cost-shifting statute designed to encourage settlement of litigation, without the need for a trial, by shifting certain costs to a party that rejected a 998 "offer to compromise" from their opponent and subsequently failed to obtain a better result at trial.[12] The California legislature and courts have made clear that the fundamental policy behind section 998 is to encourage the settlement of lawsuits prior to trial. However, statutory and case law analyses may indicate that 998's policy also encompasses promoting settlement without unduly limiting access to courts.

The effectiveness of section 998 remains an ongoing debate among civil litigators. Application of section 998 is exceedingly difficult to understand and there is concern that it may not offer a high enough incentive to settle since the statute allows only a limited amount of recoverable costs. On the other hand, even if section 998 does not result in settlement as frequently as anticipated, it is a beneficial tool that provides a financial incentive for parties to settle that might not otherwise exist. As the debate over section 998's efficacy continues, the California legislature and courts will likely be increasingly confronted with proposed amendments and judicial disputes over its applicability. Accordingly, in the future, these state actors may wish to consider how section 998 may be a powerful vehicle to relieve overburdened courts without overly deterring claimants from protecting their rights or interests.

This Note considers the extent to which section 998 can genuinely be considered a compromise between the English and American rules for fee-shifting, rather than just a tool to promote settlement. In particular, this Note asks whether section 998 seeks to promote settlement without unduly limiting access to courts, and if so, to what extent.. Although section 998 may be used in trial and arbitration,[13] this Note focuses on section 998 in the context of litigation and trial. To help inform this Note's discussion of the underlying policy tradeoffs behind different fee-shifting rules and the significance of promoting settlement prior to trial, Part I provides an overview of the mechanics, principal stages, and costs of civil litigation. Part II discusses section 998 relative to the competing models of the English rule and the American rule, including general policy tradeoffs and impact on litigation strategy. Part III provides an overview of the statutory framework of section 998 and its underlying policy considerations. Part IV examines section 998 legal developments and whether if, and to what extent, judicial determinations are not only promoting section 998's purpose of encouraging

12. *See* CAL. CIV. PROC. CODE § 998(c)(1), (d), (e) (West 2024).
13. *See id.* § 998(b).

settlements but also doing so without unduly limiting access to courts. A conclusion with final considerations follows.

I. THE COSTS AND MECHANICS OF CIVIL LITIGATION

For the most part, civil litigations follow the same general process. The principal stages of civil litigation include pleadings, discovery, trial, and appeals.[14] Litigation tasks include, among other things, "procedures such as case initiation, discovery (along with e-discovery in the modern landscape), settlement discussions and negotiations, pretrial motions, [and] the trial itself."[15]

Pleadings. A civil litigation begins with the filing of a complaint, which describes a plaintiff's claims and their legal basis for bringing suit.[16] In California, once a complaint is served, a defendant has thirty days to respond.[17] During the pleadings stage, parties may file various pleadings, such as an answer and a reply, and may amend pleadings as necessary.[18] Once a case makes it past the pleadings stage, the litigation moves through discovery.[19]

Discovery. During discovery, parties gather information about the facts and issues of the case using various litigation procedures, such as interrogatories, requests for production, depositions, witness interviews, and expert witnesses.[20] The discovery process alone can be exceptionally costly and time-consuming, and may often involve disclosure of potentially confidential information. Therefore, parties often prioritize dismissal of their case at an early pleadings stage to avoid this stage of litigation. Relatedly, these effects may impact incentives to make section 998 offers, as section 998 offers made before discovery can be advantageous in terms of cost consequences.

Trial. If parties do not resolve their case pretrial through alternative methods such as mediation or settlement, after discovery ends, the case will go to trial. In California, parties must complete discovery at least thirty days before trial begins.[21]

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14. *How Does a Lawsuit Work? Basic Steps in the Civil Litigation Process*, STOEL RIVES LLP (Jan. 24, 2012), https://www.stoel.com/legal-insights/article/how-does-a-lawsuit-work-basic-steps-in-the-civil-litigation-process [https://archive.is/eGZyK].

15. Kevin C. Johnson, Note, *Rule 68 and the High Cost of Litigation: The Best Defense Weapon of Which You've Never Heard and Its Missed Opportunity to Promote Settlement*, 10 CHARLESTON L. REV. 475, 479 (2016).

16. STOEL RIVES LLP, *supra* note 14.

17. CIV. PROC. § 412.20.

18. STOEL RIVES LLP, *supra* note 14.

19. *Id.*

20. *Id.*

21. CIV. PROC. § 2024.020.

The amount of time a civil litigation will take depends on the issues at hand, the complexity of claims, and the stage at which parties resolve the claims at issue.[22] According to a 2005 study by the U.S. Department of Justice Bureau of Justice Statistics, for tort, contract, and real property cases in state courts, the average length of time from filing to disposition ranges from twenty-six to thirty months.[23] In California, it generally takes up to twelve months to reach trial,[24] however, in some California courts it can take more than sixteen months.[25] Figure 1 provides an illustration of major milestones in the California civil litigation process, including the last point at which a section 998 offer to compromise can be made, which is ten days before trial commences.[26] This is different from traditional settlement, which can be reached between parties at any time throughout the litigation process, including before a lawsuit is filed, during jury deliberations, and even after the jury has rendered a verdict.[27]

22. *How Long Does A Civil Trial Take?*, BROWN & CHARBONNEAU, LLP: LEGAL BLOGS, https://www.bc-llp.com/long-civil-trial-take [https://archive.ph/p4Yg5].

23. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T JUST., CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 8 (2009), https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/X6M3-XBNG].

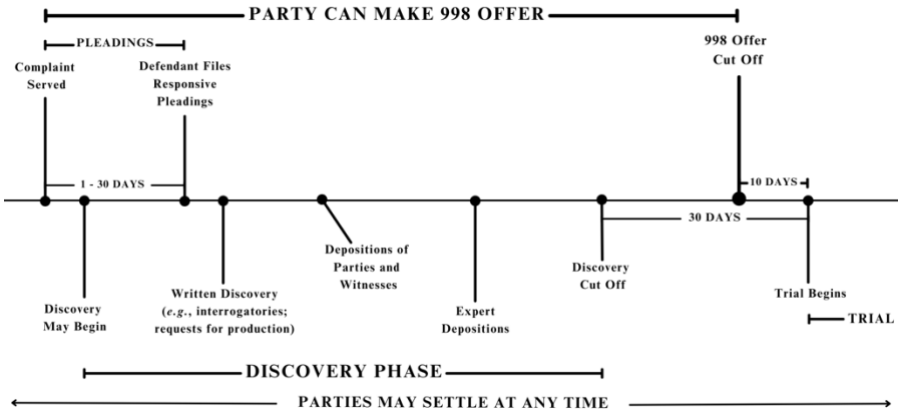
24. Eugene Lee, *How Much Time Do Lawsuits Take? (2024)*, CAL. LAB. & EMP. L., https://www.calaborlaw.com/how-much-time-do-lawsuits-take/ [https://perma.cc/Y73V-YUFG].

25. For example, the median time to trial in San Diego County Superior Court was 503 days, while the median time to trial in Los Angeles County Superior Court was 467 days. *It Takes 500 Days to Go to Trial for Some California State Courts, According to Lex Machina Data*, THE RECORDER (Apr. 20, 2021), https://plus.lexis.com/api/permalink/b1586c8e-0f6a-4ff6-9a66-27250e630a58/?context=1530671.

26. CIV. PROC. § 998(b). For a more in-depth timeline of the California civil litigation process, see *California Civil Litigation Timeline*, ELIA L. FIRM, APC, https://elialaw.com/san-diego/civil-litigation-process [https://perma.cc/5YLP-M4E5].

27. *How Courts Work*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling [https://archive.ph/3FZGu].

FIGURE 1. California Civil Litigation Timeline



When it comes to litigation, the adage that there is "no such thing as a free lunch" rings true. Although in America an individual receives access to a fair day in court to vindicate their rights, such vindication comes at a cost. In addition to being mentally stressful, personally invasive, and very time-consuming,[28] litigation can be expensive for both parties throughout all stages of litigation. For example, in 2012, the median costs for a typical automobile tort case, contract dispute, and professional malpractice claim were approximately $43,000, $91,000, and $122,000, respectively.[29] Adjusting for inflation today, these costs would rise to approximately $55,813, $118,117, and $158,355, respectively.[30] Attorney's fees, expert fees, court fees, and other administrative fees (for example, paralegal fees) accumulate throughout the entire course of the litigation.

Various factors affect the amount of time an attorney may spend on a litigation, including case complexity, client expectations, a firm's internal staffing procedures, and the attorney's working relationship with opposing counsel.[31] Nonetheless, the more a case progresses through the litigation

28. *Pitfalls of Litigation That You May Not Have Considered*, HOOVER PENROD PLC, https://www.hooverpenrod.com/pitfalls-of-litigation-that-you-may-not-have-considered [https://perma.cc/EY79-KXA5].

29. Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 NAT'L CTR. STATE CTS., no. 1, Jan. 2013, at 1, 2. This data comes from a study done by the National Center for State Courts ("NCSC"). NCSC looked at time expended by attorneys to resolve an automobile tort, premises liability, professional malpractice, breach of contract, employment dispute, and real property dispute. Using hourly billing rates reported by attorneys across forty-three states, NCSC estimated litigation costs associated with each type of case.

30. Data calculated on November 12, 2022, using the U.S. Inflation Calculator available at https://www.usinflationcalculator.com. According to the U.S. Inflation Calculator website, the calculator "uses the latest US government CPI data . . . to adjust for inflation and calculate the cumulative inflation rate."

31. Hannaford-Agor & Waters, *supra* note 29, at 2.

process, the more associated costs increase. [32] For example, a 2013 case study by the National Center for State Courts found that if a typical automobile tort case settles after discovery, attorney's fees may be anywhere from "$5,000 to $36,000."[33] If, however, the case proceeds to trial, the total costs for attorney and expert witness fees "can range from $18,000 to $109,000 per side,"[34] thus highlighting the importance of promoting settlement early on in litigation.

Table 1 provides estimates of the median attorney's fees associated with a typical automobile tort case and a contractual dispute. [35] Table 2 provides estimates of expert witness costs associated with typical automobile tort cases and contractual disputes.[36] As indicated by Tables 1 and 2, litigation costs for attorneys and expert witnesses can be substantial, with attorney's fees playing a sizeable role.

TABLE 1. Median Litigation Costs for Attorneys and Expert Witnesses

	Automobile Tort Case		*Contract Dispute*	
Position	Senior Attorney	Junior Attorney	Senior Attorney	Junior Attorney
Subtotal of Time	75.5	78.0	140.0	145.0
Hourly Rate	$275	$175	$290	$185
Billable Costs	$20,763	$13,650	$40,600	$26,825

32. *See id.* at 4–5.
33. *Id.* at 5.
34. *Id.* at 5–6.
35. *Hours Expended by Attorneys, Paralegals and Expert Witnesses to Complete Litigation Tasks by Case Type*, CT. STATS. PROJECT https://www.ncsc.org/__data/assets/pdf_file/0023/25529/csph_2013_tablesv1.pdf [https://perma.cc/T36L-5VXX].
36. *Id.*; Hannaford-Agor & Waters, *supra* note 29, at 5.

TABLE 2. Expert Witness Costs

	Automobile Tort Case			*Contract Dispute*		
Percentile	25th	50th	75th	25th	50th	75th
Number	1	1	2	1	2	2
Fees	$2,500	$5,000	$7,500	$4,625	$7,500	$20,000
Billable Costs	$2,500	$5,000	$15,000	$4,625	$15,000	$40,000

When looking at these estimates, it is important to consider not only that an atypical litigation can result in fees that are considerably higher but also that litigation costs include costs other than attorney's fees and expert witnesses. The substantial amount of these cost estimates may impact an individual's access to the court system. Thus, absent an expected return or meaningful cost-shifting mechanism in place, an individual may have little incentive to proceed with their claim to vindicate their rights.

II. FEE-SHIFTING

A. THE ENGLISH AND AMERICAN RULES

In the realm of law and economics, *fee-shifting* refers to the allocation of civil litigation costs between a plaintiff and a defendant.[37] These costs generally encompass witness and expert fees, court costs, and attorney's fees and expenses.[38] As mentioned, there are two primary models that govern fee-shifting in litigation: the English rule and the American rule.[39]

The English rule embodies a loser-pays system in which a prevailing party's litigation costs are shifted to the losing party.[40] There are several rationales underlying a loser-pays fee-shifting system. It creates fairness by making a loser pay and making a litigant financially whole for the wrong

37. Filippo Roda, *The Favoring Plaintiff Fee-Shifting Rule in Europe: An Alternative to Legal Aid in Financing Civil Litigation* 2 (RILE-BACT Working Paper Series No. 2015/4, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611608.

38. Hodges, Vogenauer & Tulibacka, *supra* note 3.

39. Roda, *supra* note 37.

40. Alexander G. Osevala, Comment, *Let's Settle This: A Proposed Offer-of-Judgment Rule for Pennsylvania*, 85 TEMP. L. REV. 185, 187 (2012).

they suffered.[41] Moreover, a loser-pays system seeks to discourage nuisance litigation and incentivize parties to settle, thus speeding up the disposition of cases and alleviating the burden on courts.[42] A party that faces a threat of having to pay fees will be encouraged to pursue meritorious claims and discouraged from bringing weaker or frivolous claims.[43] On the other hand, a loser-pays system raises concerns as to whether it results in too harsh a punishment for the loser of a close case or whether it "diminishes basic access to justice," particularly when it comes to middle- and lower-income individuals or risk-averse individuals with meritorious claims.[44]

Conversely, under the American rule, absent bad faith, or a contractual agreement or statute to the contrary, each party generally pays their own costs, irrespective of which party prevails.[45] In instances of bad faith, a court has discretion to award attorney's fees and other costs if a lawsuit was filed in bad faith or parties act in bad faith.[46] Moreover, under the American rule, parties may agree ahead of time via contract to allow for a shifting of fees if a dispute arises over the contract.[47] Contracts including a loser-pays rule or some variation ahead of time are common, and are therefore an important exception to the American rule in many contractual disputes. Fee-shifting statutes are also a notable exception to the American rule, and the most relevant for purposes of this Note. Fee-shifting statutes are discussed below in Section Part II.C. Other exceptions to the American rule include instances in which the common fund doctrine or the substantial benefit rule applies, as well as in-contempt proceedings.[48]

Notions of freedom and equal access to justice paved the way for the American rule. Access to justice through the court system is a pillar of American democracy. And proponents of the American rule have recognized that imposing both sides' fees onto a losing party might unjustly discourage individuals from bringing an action to vindicate their rights.[49] Moreover, a fee-shifting system may particularly impact access to courts for financially limited individuals who "may never file a lawsuit because [they] cannot afford to lose."[50] Thus, by removing the threat of potential substantial costs

41. Rowe, Jr., *supra* note 7, at 653.
42. *Id.*
43. *Id.* at 665–66.
44. Loos, *supra* note 7, at 43.
45. Hodges, Vogenauer & Tulibacka, *supra* note 3, at 23.
46. Osevala, *supra* note 40, at 193.
47. *Id.* at 192.
48. David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMPAR. L. REV. 583, 585 (2005). For a more detailed discussion on fee-shifting exemptions under the common fund doctrine, the substantial benefit rule, and in-contempt proceedings, see *id.* at 585–87.
49. Vargo, *supra* note 10, at 1634–35.
50. Osevala, *supra* note 40, at 198.

for losing parties, the American rule works to provide claimants with open access to courts to litigate their "basic rights."[51] However, like the English rule, the American rule faces criticism.[52] Because the rule lacks an incentive to settle or refrain from bringing non-meritorious claims, courts are overwhelmed by frivolous claims and unnecessary litigation.[53]

Put simply, the general policy tradeoffs among both models are as follows: the English rule produces a higher frequency of settlements while discouraging nuisance litigation but may subsequently reduce access to courts; the American rule provides individuals a fair day in court but may subsequently produce a lower frequency of settlements and increase nuisance litigation. Although each rule has its own distinct characteristics, they share one major commonality: each rule in some way impacts a party's decision to litigate.

B. COST ALLOCATION AND THE DECISION TO LITIGATE

Various factors impact a party's decision to litigate, including their chance of prevailing, the probable magnitude of a judgment, expected legal costs, the way in which such costs will be allocated, and the resources available to them to fund a litigation.[54] A party's risk preference, meaning a party's attitude toward possible gains and losses under uncertain conditions, also affects their willingness to litigate.[55] An individual who is risk neutral cares only about their expected value, rather than uncertainty, and is thus "indifferent among choices with equal expected values."[56] For example, a risk-neutral individual "would be indifferent between receiving (or paying) $2,500 for sure and receiving (or paying) $10,000 with [a] probability [of] 25 percent."[57] Conversely, an individual who is risk averse cares about their expected value as well as uncertainty.[58] This individual views uncertainty as undesirable and would prefer receiving "a smaller sure thing to a larger possible gain with equal net expected value."[59] For example, a risk-averse

51. Vargo, *supra* note 10, at 1635.
52. *Id.* at 1591.
53. *Id.*
54. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56 (1982); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 139 (Erwin Chemerinsky et al. eds., 3d ed. 2003). Note that the amount of resources available to a party to fund a litigation may be less relevant when plaintiffs are represented on a contingent-fee basis or when individuals are effectively represented by insurance companies.
55. Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 L. & CONTEMP. PROBS. 139, 142 n.19 (1984); POLINSKY, *supra* note 54, at 139.
56. Rowe, Jr., *supra* note 55, at 142 n.19.
57. Shavell, *supra* note 54, at 57–58.
58. *Id.* at 58.
59. Rowe, Jr., *supra* note 55, at 142 n.19.

individual "would prefer receiving (or paying) $2,500 for sure to receiving (or paying) $10,000 with [a] probability [of] 25 percent."[60] Large organizations and individuals that are generally well financed and regularly use the court system will usually be risk neutral.[61] On the other hand, individuals or small entities that do not litigate frequently are likely to be risk averse because they do not have the resources to easily pay the other party's costs and, as novice litigants, do not have reliable information about how significant those costs may be.[62] This is particularly true for lower-income individuals who are especially sensitive to the chance of substantial loss.[63]

As mentioned above, fee-shifting rules impact a party's litigation and settlement decisions.[64] Because the English rule shifts both parties' litigation costs to the losing party, economists believe that fee-shifting under the English rule tends to have a "deterrent effect on meritless claims" and produces "significantly more pretrial settlements than the American rule."[65] Example 1 below indicates how the English rule may discourage litigation, especially if a plaintiff is very unlikely to succeed.

> **Example 1.** Let us say that a plaintiff and a defendant are both risk neutral and both agree that damages are $11,000 and that the plaintiff has a 10% chance of prevailing. The litigation costs are $1,000 for each party, and both parties are risk neutral. Under the American rule, the plaintiff will bring suit because their expected judgment would be $1,100, which is at least as much as their expected legal costs of $1,000, showing a net gain of $100. This scenario is indicated by the following equation: ($11,000 x 10%) - $1,000 = $100. However, under the English rule, the plaintiff will not sue because their expected judgment would be $1,100, which is less than their expected legal costs of $1,800, showing a net loss of -$700. This scenario is indicated by the following equation: ($11,000 x 10%) – (90% x $2,000) = $-700.[66]

Ultimately, the monetary amount parties will settle for, if they choose to settle at all, may be impacted by the aforementioned factors, as well as each party's respective optimism, bargaining power, negotiation skills, and strategic behavior.[67] Since going to trial involves uncertainty, risk aversion tends to reduce the likelihood of litigation.[68] A plaintiff who is risk neutral

60. Shavell, *supra* note 54, at 58.
61. Rowe, Jr., *supra* note 55, at 142.
62. *See* Rowe, Jr., *supra* note 55, at 142, 142 n.19.
63. *See id.*
64. Rowe, Jr., *supra* note 7, at 665.
65. Yannick Gabuthy, Emmanuel Peterle & Jean-Christian Tisserand, *Legal Fees, Cost-Shifting Rules and Litigation: Experimental Evidence*, 93 J. BEHAV. & EXPERIMENTAL ECON. 1, 2 (2021).
66. I take this hypothetical example from a fall 2021 Civil Procedure course taught by Professor Daniel Klerman at the University of Southern California, Gould School of Law.
67. Shavell, *supra* note 54, at 64.
68. *Id.* at 61.

might bring a case that a plaintiff who is risk averse might not.[69] And the more risk averse a party is, the more open they are to settling.[70] Because of the possibility of having to pay a larger amount of fees under the English rule than under the American rule, the impact of risk aversion is stronger under the English rule than under the American rule.[71] Accordingly, fee-shifting under the English rule may result in a higher tendency for settlement than under the American rule.[72] Nonetheless, a plaintiff and defendant will settle if and only if there is a settlement amount that both parties would prefer over going to trial.

C. FEE-SHIFTING STATUTES: AN EXCEPTION TO THE AMERICAN RULE

As mentioned above, one of the exceptions to the American rule is fee-shifting statutes. Statutes on both the state and federal level allow for fee-shifting in certain circumstances.[73] Today, there are more than two hundred federal statutes and roughly two thousand state provisions that allow for fee-shifting.[74] In general, fee-shifting statutes allow for either a one-way shift or a two-way shift of costs. One-way fee shifting allows one chosen beneficiary, either the plaintiff or the defendant, but typically the plaintiff, to recover costs.[75] On the other hand, two-way fee shifting—such as the English rule—shifts the prevailing party's costs to the losing party, regardless of whether the prevailing party is the plaintiff or the defendant.[76] Most state and federal fee-shifting statutes provide for one-way shifting.[77]

A central purpose of enacting fee-shifting statutes is to help implement public policy.[78] Among other things, these provisions may help "equalize contests between private individual plaintiffs and corporate or governmental defendants" when it comes to areas of law such as environmental protection, consumer protection, and civil rights.[79] California has enacted numerous fee-shifting statutes and provisions, such as the Song-Beverly Consumer

69. POLINSKY, *supra* note 54, at 139.

70. *Id.* One thing to note is that because risk aversion is more significant when a party is lower income, such individuals may be discouraged from bringing valid claims forward out of fear that the suit might make them worse off than they are now. Shavell, *supra* note 54, at 58.

71. Shavell, *supra* note 54, at 62.

72. Root, *supra* note 48, at 607.

73. Vargo, *supra* note 10, at 1588.

74. *Id.*

75. SUSANNE DI PIETRO, TERESA W. CARNS, PAMELA KELLEY, ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES 14 (1995), https://ajc.alaska.gov/publications/docs/research/atyfeeexec.pdf.

76. *Id.* at 14–15.

77. *Id.*

78. HENRY COHEN, CRS REPORT FOR CONGRESS: AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 1 (2008), https://sgp.fas.org/crs/misc/94-970.pdf [https://perma.cc/YTK6-GC2B].

79. *Id.* (quoting the report summary, which precedes the table of contents).

Warranty Act, a pro-consumer automobile lemon law, which allows for a buyer to recover costs as part of their judgment.[80] While California fee-shifting statutes and provisions serve various public policies, the encouragement of settlements is a principal focus for this Note.

Some fee-shifting statutes follow the English rule for cost allocation, which shifts fees to the losing party.[81] On the other hand, other statutes operate as offer-of-judgment rules in which the allocation of fees is based on pretrial settlement offers.[82] Under an offer-of-judgment rule, if a litigant rejects a pretrial settlement offer and subsequently receives a less favorable judgement at trial, then they must compensate the offeror for certain post-offer costs.[83] The most well-known offer-of-judgment rule is Federal Rule of Civil Procedure 68, which allows for a one-way shift of costs.[84] Under Rule 68, a defendant may make a pretrial settlement offer to a plaintiff.[85] If the plaintiff rejects the offer and then fails to obtain a judgment more favorable than the offer, the plaintiff must pay certain costs accrued by the defendant running back to the date the defendant made such offer.[86] Rule 68 is often considered to be a "hybrid of the English and American rules."[87] Rule 68 is similar to the English rule in that, when a rejecting plaintiff fails to receive a more favorable judgment, cost-shifting penalties are imposed.[88] Conversely, Rule 68 is similar to the American rule in that when a rejecting plaintiff does receive a more favorable judgment, each side remains responsible for their own costs.[89]

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80. The Song-Beverly Act is a pro-consumer automobile lemon law enacted under sections 1790–1795 of the California Civil Procedure Code. The Act allows for a buyer to "recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended." CAL. CIV. PROC. CODE § 1794(d) (West 2024). Another California fee-shifting provision can be found in the California Public Records Act ("CPRA"). The CPRA, located in sections 7920–7931 of the California Government Code, requires disclosure of government records to the public upon request, unless exempt by law. CPRA provides that a court shall award court costs and reasonable attorney fees to a plaintiff should the plaintiff prevail in litigation filed pursuant to the Act. CAL. GOV'T CODE § 7923.115(a) (West 2024).

81. Spier, *supra* note 11, at 197.

82. Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1874 (1998).

83. Spier, *supra* note 11, at 197.

84. *Id.*

85. FED. R. CIV. P. 68 ("At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. . . . If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.").

86. *Id.*

87. Yoon & Baker, *supra* note 2, at 162.

88. *Id.*

89. *Id.*

1. Section 998: An Exception to the American Rule

Section 998 is a California cost-shifting statute that is substantially similar to Federal Rule 68. Section 998 is different from a typical settlement offer in that section 998 is a settlement tool with teeth. The statute allows for a two-way shift of certain costs,[90] imposing "mandatory and discretionary penalties"[91] on a party that declines to accept their opponent's section 998 settlement offer and subsequently "fails to obtain a more favorable judgment" at trial.[92]

Section 998 was enacted to encourage settlement of litigation, without the need for a trial, and is widely regarded as a settlement tool that "clearly reflects" California's "policy of encouraging settlements."[93] However, rather than being a tool that seeks only to promote settlement, section 998 may be viewed as the California legislature's attempt to bridge the gap between the English rule and American rule—combining an incentive for parties to settle without unduly restricting access to courts.

As mentioned, the English rule is often seen as a system that is "too absolute" and reduces access to litigation.[94] Although the rule works to discourage meritless cases from flooding court systems, as a result, the threat of substantial consequences for losing may also deter legitimate cases from being brought forth, thus failing to provide individuals with adequate access to courts. On the other hand, the American rule may avoid a loser-pays system's effect on limiting access to courts but may fail to incentivize settlement and deter meritless litigation due to a lack of substantial consequences for losing.[95] Like the English rule, section 998 shifts costs to promote settlement and deter meritless claims. However, under the English rule, costs automatically shift to the loser, whereas section 998 requires additional steps before an offeror may recover costs. An offeror must first make a section 998 offer to compromise to invoke the statute's cost-shifting provisions, and the declining offeree must subsequently fail to obtain a more favorable result at trial.[96] Thus, under section 998, litigants are not punished solely for losing at trial. Because litigation costs, including attorney's fees, are a significant factor that prevents access to courts, the complex features

90. Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. STATE U. L. REV. 89, 92 (2005).

91. Daniel Rozansky & Crystal Jonelis, *Calif. Justices Create Arbitration Compromise Conundrum*, LAW360 (Aug. 6, 2019, 3:31 PM), https://stubbsalderton.com/wp-content/uploads/2019/08/Calif.-Justices-Create-Arbitration-Compromise-Conundrum.pdf [https://perma.cc/N87H-HR4P].

92. CAL. CIV. PROC. CODE §§ 998(c)–(e) (West 2024).

93. Poster v. S. Cal. Rapid Transit Dist., 801 P.2d 1072, 1074 (Cal. 1990).

94. Sherman, *supra* note 82, at 1873.

95. *See id.* at 1877.

96. CIV. PROC. §§ 998(c)(1), (d), (e).

of section 998, discussed below in Part III, may allow the rule to capture the English rule's ability to incentive settlement while ensuring access to courts by being overall less punitive than the English rule. Statutory and case law analyses in Parts III and IV help shed light on this point.

III. THE STATUTORY FRAMEWORK OF SECTION 998

A. OVERVIEW OF SECTION 998

In 1969, the California state legislature enacted Code of Civil Procedure section 998, a then "new" cost-shifting mechanism to encourage settlement by allowing for costs as a matter of right.[97] Section 998 allows for a two-way shift of costs.[98] Under section 998, if a valid offer to compromise is made but is either rejected or not accepted by the offeree, and the offeree fails to obtain a more favorable judgment or award, section 998 shifts certain costs to the offeree.[99] Unlike the English rule, section 998 considers more than just which party received a verdict against them. When it comes to 998, even if a party prevails at trial, if their judgment is less than what the opposing party offered under 998, certain costs are shifted. Cost-shifting penalties vary based on whether the offeree is the plaintiff or the defendant.[100]

As a fundamental premise, the policy behind section 998 is to encourage settlement of lawsuits prior to trial.[101] By allowing for a "reduction or augmentation of costs" contingent on the circumstances and the outcome of the case, parties are encouraged to "assess realistically their positions prior to trial" and genuinely consider whether a settlement should be reached.[102] Section 998 implements a carrot-and-stick approach to achieve its statutory purpose. To encourage settlements, the statute provides a "strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting [their] opponent's settlement offer."[103] Thus, section 998 embraces the idea that a party that rejects a reasonable settlement offer and subsequently obtains less than said offer, should be penalized for carrying on the litigation. On the flip side—the carrot—the statute creates a financial incentive to make reasonable settlement offers by awarding costs to the party that attempted to settle.

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97. Pomeroy v. Zion, 96 Cal. Rptr. 822, 822 (Ct. App. 1971).
98. Spier, *supra* note 11, at 199.
99. *See* CIV. PROC. §§ 998(c)–(e).
100. *See id.*
101. Bank of San Pedro v. Superior Ct., 838 P.2d 218, 222 (Cal. 1992).
102. Stell v. Jay Hales Dev. Co., 15 Cal. Rptr. 2d 220, 231 (Ct. App. 1992).
103. *Bank of San Pedro*, 838 P.2d at 222.

Since enactment, the statute has been regularly amended.[104] Some amendments appear to further promote the statute's policy of encouraging parties to make and accept reasonable settlement offers prior to trial. For example, in 2015, the legislature amended section 998 so that both plaintiffs and defendants may recover expert witness costs, but only those incurred post-offer.[105] Prior to the 2015 amendment, presuming all requirements were met, a plaintiff could recover only post-offer expert witness costs while a defendant could recover pre- and post-offer expert witness costs.[106] Thus, section 998 treated defendants more favorably than plaintiffs. Though this amendment now limits a defendant's recoverable costs, removing an imbalance between plaintiffs and defendants and equalizing costs in section 998 settlements helps to encourage all parties to make and accept reasonable settlement offers, thus furthering 998's purpose.

B. APPLICABILITY OF SECTION 998

Though section 998 was created with personal injury and complex litigation cases in mind,[107] any party may serve a 998 offer to compromise on any other party to a civil action in California state court.[108] The statute makes clear, however, that section 998 does not apply in (1) 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; or (3) labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act.[109] While the statute explicitly lists these instances, this list is non-exhaustive, and there are other instances in which section 998 may be inapplicable. For example, California courts of appeal have held that section 998 does not apply to proceedings under the Family Law Act[110] or to nonfrivolous Fair Employment and Housing Act ("FEHA") actions.[111] Given that the Family Law Act and FEHA are acts that each include their own cost-allocation

104. *See* CAL. CIV. PROC. CODE § 998 (West 2024) (noting amendments to statutory provision in 1971, 1977, 1987, 1994, 1997, 1999, 2001, 2005, and 2015).

105. Act of Sept. 28, 2015, ch. 345, sec. 2, § 998(c), (d), 2015 Cal. Stats. 3254, 3263 (A.B. 1141).

106. *See* WILLIAM E. WEGNER ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL TRIALS AND EVIDENCE § 17:121, at 17–58 (2015).

107. Rachel Pusey, *998s: They're Out to Get You. Better Leave While You Can . . .* , PLAINTIFF MAG. (Apr. 2012), https://www.plaintiffmagazine.com/recent-issues/item/998s-they-re-out-to-get-you-better-leave-while-you-can [https://perma.cc/VR3R-38C7].

108. CIV. PROC. § 998(b).

109. *Id.* § 998(g), (i).

110. *In re* Marriage of Green, 261 Cal. Rptr. 294, 299 (Ct. App. 1989) (holding that section 998 does not apply to proceedings under the Family Law Act since the Act provides for how costs, including attorney fees, are to be awarded in such proceedings).

111. Huerta v. Kava Holdings, 240 Cal. Rptr. 3d 72, 79 (Ct. App. 2018) (holding that section 998 does not apply in nonfrivolous FEHA actions because section 998 is directly tied to section 1032, which is inapplicable in FEHA cases because costs of provisions of FEHA apply instead).

provisions, such decisions indicate that section 998 may be inapplicable in instances in which cost-allocation provisions are already in place, deeming 998 unnecessary.

C. "COSTS" RECOVERABLE UNDER SECTION 998

The "costs" referenced to in section 998 are costs awarded pursuant to California Code of Civil Procedure section 1032 and are itemized in California Code of Civil Procedure section 1033.5.[112] Because the legislature expressly ties section 998 to section 1032,[113] it is vital to understand section 1032 to understand the costs a party may recover under section 998.

Section 1032 is the central authority for awarding costs in civil actions in California.[114] Under section 1032, sometimes referred to as the "general cost award statute,"[115] a "prevailing party" is entitled as a matter of right to recover "costs" in an action, unless otherwise expressly provided by statute.[116] A "prevailing party" may include a party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant if neither the plaintiff nor the defendant obtains any relief, or a defendant as against those plaintiffs who do not recover any relief against that defendant.[117] The costs allowable under section 1032 are itemized in section 1033.5.[118] Among other things, costs may include the following: "filing, motion, and jury fees"; "juror food and lodging"; certain fees associated with depositions such as "taking, video recording, and transcribing" and "travel expenses"; service of process if certain requirements are met; "fees of expert witnesses ordered by the court"; and "transcripts . . . ordered by the court."[119] Notably, attorney's fees are an allowable cost under section 1032 when authorized by contract, statute, or law.[120] Items assessed on application as well as items not expressly listed in section 1033.5 may be allowed or denied at the court's discretion.[121]

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112. CIV. PROC. § 998(a) ("The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section."); *id.*§ 1033.5 (noting that "[t]he following items are allowable as costs under Section 1032," followed by an extensive list of items).

113. CIV. PROC. § 998(a).

114. Scott Co. v. Blount, Inc., 979 P.2d 974, 977 (Cal. 1999).

115. *Id.*

116. CIV. PROC. § 1032(b).

117. *Id.* § 1032(a)(4). A " 'party with a net monetary recovery' is the party who gains money that is 'free from . . . *all* deductions.' A plaintiff who obtains a verdict against a defendant that is offset to zero by settlements with other defendants does not gain any money free from deductions." Goodman v. Lozano, 223 P.3d 77, 81 (Cal. 2010) (quoting Wakefield v. Bohlin, 52 Cal. Rptr. 3d 400 (Ct. App. 2006) (Mihara, J., dissenting).

118. CIV. PROC. § 1033.5.

119. *Id.*

120. *Id.* § 1033.5(10).

121. *Id.* § 1033.5(a)(16), (c)(4).

Accordingly, when it comes to section 998, the post-offer costs that section 998 shifts are the costs allowed under section 1032 to a prevailing party.[122] Although section 998 confers cost-shifting penalties, a rejecting party that prevails at trial but recovers less than the section 998 offer may still recover their own costs as the "prevailing party" under Section 1032. However, section 998 may limit the rejecting prevailing party's recovery to pre-offer costs.[123] Section 998 does not confer an independent right to attorney's fees.[124] But because section 998 "interlaces, without displacing" costs recoverable under 1032 and 1033.5, the statute allows for recovery not only typical litigation costs, such as filing fees and deposition fees, but also attorney's fees if allowed by contract, statute, or other law.[125] Thus, the statute can have real teeth in cases that involve a contract containing an attorney's fees provision, such as commercial transactions.

The structure of recoverable costs under 998 sheds light on how section 998 may be considered a hybrid between the American and English rules. In threatening to shift certain costs, which can include attorney's fees, section 998 creates a strong financial incentive for parties to genuinely consider whether they should settle. Thus, this feature of 998 captures the ability of the English rule—which shifts costs, including attorney's fees, to the loser—to incentivize settlement and discourage nuisance litigation. On the other hand, section 998 does not *automatically* shift the most expensive item in litigation—attorney's fees. Rather, attorney's fees are shifted under 998 only if such fees are authorized by contract, statute, or other law. Unless cost categories such as expert witness fees and deposition costs are high, or attorney's fees are at stake in a litigation, the amount that 998 can shift to a rejecting offeree may therefore not be high enough to incentivize settlement.[126] Nonetheless, because attorney's fees are a significant factor that prevents access to courts,[127] limiting the amount recoverable under section 998 diminishes the undesirable effect of denying access to courts. 998's cost structure enables it to exist as a tool to promote settlement without unduly limiting access to courts, especially for individuals and entities that

122. Scott Co. v. Blount, Inc., 979 P.2d 974, 981 (Cal. 1999).

123. CIV. PROC. § 998(a), (c)(1), (d).

124. Linton v. County of Contra Costa, 243 Cal. Rptr. 3d 183, 186 (Ct. App. 2019) (denying a prevailing party's request for attorney's fees because a "prevailing party is not automatically entitled to attorney fees merely by virtue of prevailing, but must demonstrate such an entitlement via contract, statute, or law").

125. Vasko R. Mitzev, *"Shut This Puppy Down," and Take a Judgment Against Me: Section 998 Offers*, LINKEDIN (Apr. 10, 2015), https://www.linkedin.com/pulse/shut-puppy-down-take-judgment-against-me-section-998-offers-mitzev [https://perma.cc/J4MP-H7LG].

126. *998 Offers in California Litigation – The Basics*, STIMMEL L., https://www.stimmel-law.com/en/articles/998-offers-california-litigation-basics [https://perma.cc/ZX2G-TQ8K].

127. Osevala, *supra* note 40, at 185.

may be financially limited and may otherwise be dissuaded from litigating due to the threat of having to pay their opponent's attorney's fees.

D. THE OFFER PROCESS

A number of formalities must be met to have a valid 998 offer that carries with it the potential for beneficial cost-shifting mechanisms to kick in. First, a party must make a 998 offer. The offer must be in writing[128] and served at least ten days prior to the commencement of trial.[129] For purposes of section 998, a trial is considered to have commenced at the beginning of a plaintiff's or counsel's opening statement.[130] If no opening statement is made, a trial is considered to have commenced at the time the first witness is given their oath or affirmation, or on the introduction of any evidence.[131] Although standard settlement offers may be made typically at any point within the litigation process,[132] requiring a 998 offer to be made at least ten days prior to the beginning of trial furthers the legislature's purpose of encouraging settlement of litigation, without the need for a trial at all.

While there is no explicit requirement that a 998 offer follow a specific format (other than being in writing), at its most basic level, the written offer must include (1) a statement of the offer that includes the terms and conditions of the judgment or award; and (2) an acceptance provision that "allows the accepting party to indicate acceptance."[133] Although not explicitly required by 998, courts have read in the requirement that a 998 offer must be made in good faith to be enforceable.[134] The reading in of a good faith requirement has considerable policy considerations, which are discussed below in Section IV.B.

Once a valid 998 offer is made, an offeree must accept the offer within thirty days or before the beginning of trial, whichever occurs first.[135] To accept a 998 offer, the offeree's acceptance must be in writing and signed by the offeree's counsel or the offeree.[136] Once accepted, proof of acceptance must be filed with the court, which will enter judgment accordingly. One

128. CIV. PROC. § 998(b); Saba v. Crater, 72 Cal. Rptr. 2d 401, 402–03 (Ct. App. 1998) (holding that an oral offer to compromise made pursuant to section 998 by a defendant on record during deposition was unenforceable because the offer did not meet 998's writing requirement).

129. CIV. PROC. § 998(b).

130. *Id.* § 998(b)(3).

131. *Id.*

132. *How Courts Work*, *supra* note 27.

133. CIV. PROC. § 998(b).

134. Wear v. Calderon, 175 Cal. Rptr. 566, 567–68 (Ct. App. 1981) ("We believe that in order to accomplish the legislative purpose of encouraging settlement of litigation without trial, a good faith requirement must be read into section 998.") (citation omitted).

135. CIV. PROC. § 998(b)(2).

136. *Id.* § 998(b).

thing to note is that an offeror is not required to keep their offer open for the statutory acceptance period—rather, an offeror may revoke their 998 offer at any time prior to acceptance.[137] Allowing the revocation of a 998 offer is consistent with 998's policy of not only encouraging settlement but also ensuring access to courts. If a party knows that they have the ability to change their mind, they may be more inclined to make an offer in the first place, thus increasing the chance for settlement. Moreover, revocability makes it so that an offeror is not immediately cut off from the trial system once making an offer. This flexibility ensures that an offeror maintains the ability to vindicate their rights through the trial system if they wish. Nonetheless, even if an offeror revokes their 998 offer, they may make another 998 offer.[138] Judicial treatment of multiple-offer scenarios are discussed in detail in Section IV.A.

E. WHEN AN OFFEREE REJECTS OR DOES NOT ACCEPT A VALID 998 OFFER

If an offeree either rejects or does not accept a valid 998 offer within the statutory acceptance period and subsequently "fails to obtain a more favorable judgment or award," complex cost-shifting statutory penalties kick in.[139] Statutory penalties vary based on whether the declining offeree is the plaintiff or the defendant.[140] Table 3 provides a summary of costs that may shift to a rejecting offeree, either as a plaintiff or a defendant, who fails to obtain a more favorable judgment.

If an offer is made by a plaintiff and the defendant rejects or does not accept the offer and subsequently fails to obtain a more favorable judgment, the defendant must pay the plaintiff's costs as a prevailing party, which may include attorney's fees when authorized by contract, statute, or law.[141] In addition to the plaintiff's costs, at the court's discretion, the defendant may be required to pay a reasonable sum to cover the plaintiff's post-offer costs of the services of expert witnesses.[142] Further, in a personal injury action, a plaintiff may also recover a 10% prejudgment interest from "the date of the plaintiff's first [998] offer . . . which is exceeded by the judgment."[143]

137. Martinez v. Brownco Constr. Co., 301 P.3d 1167, 1170 (Cal. 2013) ("[A] section 998 offer is revocable prior to its acceptance or statutory expiration.").

138. *Id.* at 1168 ("The terms of section 998 do not prohibit a party from making more than one settlement offer . . . .").

139. *See* CIV. PROC. § 998(c)–(e).

140. *See id.*

141. *Id.* §§ 998(d), 1032(a)(4), 1032(b), 1033.5(10)(A)–(C).

142. *Id.* § 998(d).

143. *Id.* § 3291 ("In any action brought to recover damages for personal injury . . . [i]f the plaintiff makes an offer pursuant to Section 998 . . . which the defendant does not accept . . . and the plaintiff obtains a more favorable judgment, 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 . . . which is exceeded

However, there are limitations; such prejudgment interest is available only on the damages attributable to personal injury and is not recoverable against public entities or employees for acts within the scope of their employment.[144]

Conversely, if an offer is made by a defendant and the plaintiff rejects or does not accept the offer and subsequently fails to obtain a more favorable judgment, the plaintiff cannot recover their post-offer costs and must pay the defendant's post-offer costs.[145] Further, at the court's discretion, the plaintiff may be required to pay a reasonable sum to cover post-offer costs of the services of expert witnesses.[146] Recall that when it comes to section 998, even if a party prevails at trial, if they recover less than what the opposing party offered under 998, certain costs shift. Therefore, even if a plaintiff prevails in a lawsuit, if they recover less than the defendant's offer, they must pay cost-shifting penalties. For example, let us say that a plaintiff brought a personal injury claim seeking damages of $500,000. Prior to trial, the defendant made a valid Section 998 offer to compromise for $300,000. At the end of trial, the jury found the defendant negligent and awarded the plaintiff $200,000. Although the plaintiff prevailed, the plaintiff may not recover their post-offer costs and must pay the defendant's post-offer costs, including post-offer expert fees at the court's discretion. This hypothetical exemplifies how an effective section 998 offer holds the power to turn a win into a loss, and vice versa. Although the plaintiff prevailed at trial, for purposes of 998, the defendant is treated as the "prevailing party," for purposes of post-offer costs, even if the defendant was not the prevailing party with respect to the lawsuit as a whole.[147] Section 998 will limit the plaintiff's recovery, but only to pre-offer costs.[148] Accordingly, the plaintiff may still recover pre-offer costs they may be entitled to, including costs as the prevailing party under section 1032, which, by operation of section 1033.5, may include attorney's fees if authorized by contract, statute, or law.[149] Costs owed to the defendant are deducted from damages awarded in favor of the plaintiff, if any.[150] If, however, the defendant's costs exceed the plaintiff's award, then the plaintiff must pay the defendant the difference.[151]

Note that regardless of whether a rejecting offeree is a plaintiff or a defendant, in either instance, a court in its discretion may require them to pay a "reasonable sum" to cover the offeror's post-offer costs of the services

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by the judgment, and interest shall accrue until the satisfaction of judgment.").

144. *Id.* § 3291.
145. *Id.* § 998(c)(1).
146. *Id.*
147. Scott Co. v. Blount, Inc., 979 P.2d 974, 979 (Cal. 1999).
148. *Id.*
149. CIV. PROC. §§ 1032, 1033.5(10); *Scott Co.*, 979 P.2d at 979.
150. CIV. PROC. § 998(e).
151. *Id.*

of expert witnesses.[152] The expert witness, however, may not be a regular employee of any party, and the costs of such witness must be "reasonably necessary" and "actually incurred" in trial preparation or during trial, or both, of the offeror's case.[153] This provision is particularly noteworthy for two reasons. First, although California's general cost award statute allows a prevailing party to recover certain costs, fees paid to a non-court-ordered expert witness are not ordinarily recoverable.[154] Second, further limiting 998 by judicial discretion over the shifting of expert witness costs recognizes that a rule that has already been tailored to mitigate some of the harsh effects of cost-shifting may sometimes still result in unfairness. Given that expert witness costs are "more discretionary and unpredictable" and thus may be "more subject to manipulation and unfairness in cost shifting," a court having discretion over such costs helps to safeguard parties against undue hardship, in the interest of justice.[155]

TABLE 3. An Overview of Costs that May Shift Under Section 998

Rejecting Plaintiff Offeree[a]	*Rejecting Defendant Offeree*[b]
• The plaintiff cannot recover their post-offer costs. • The plaintiff must pay the defendant's post-offer costs. • The plaintiff may be required to pay, at the court's discretion, a reasonable sum to cover post-offer costs of the services of expert witnesses.	• The defendant must pay the plaintiff's costs as a prevailing party, which may include attorney's fees when authorized by contract, statute, or law. • The defendant may be required to pay, at the court's discretion, a reasonable sum to cover the plaintiff's post-offer expert witness costs. • If personal injury action, the defendant must also pay a 10% prejudgment interest rate.

Sources: [a] CAL. CIV. PROC. CODE § 998(c)(1) (West 2024). [b] *Id.* §§ 998(d), 1032(a)(4), 1032(b), 1033.5, 3291.

152. *Id.* § 998(c)(1), (d).
153. *Id.*
154. *Id.* § 1033.5(b)(1). Recall that section 998 must be read in conjunction with section 1032 and 1033.5. *See id.* § 998(a).
155. Sherman, *supra* note 82, at 1888.

IV. LEGAL DEVELOPMENTS

Section 998 is a complex statutory provision that presents numerous procedural and substantive issues before California courts. Section 998 was first interpreted in *Pomeroy v. Zion* in 1971.[156] Since then, the statute has appeared in over a thousand opinions.[157] Though courts have struggled to interpret and apply section 998, in time, California courts, in exercise of their judicial power, have created principles that help define and clarify section 998 and its applicability, including the reading in of requirements as implied by the statute's purpose of encouraging settlement prior to trial. When looking at California courts' treatment of 998, genuine considerations include whether judicial interpretations are not only promoting the fundamental policy behind section 998 to encourage the settlement of lawsuits prior to trial,[158] but also the extent to which such decisions might promote settlement without unduly limiting access to the courts. The following selection of cases explore these considerations and provide a better understanding into the principal issues California courts face when dealing with section 998 and the extent to which these decisions are reliable predictors of future judicial treatment in the section 998 landscape.

A. THE EFFECT OF MULTIPLE 998 OFFERS

There is no explicit text in section 998 that limits a party to making only one 998 offer to compromise. The statute is also silent on the effect of a secondary statutory offer on a first statutory offer. Because California courts of appeal were split on whether a plaintiff's last 998 offer extinguishes their first 998 offer for purposes of section 998's cost-shifting provisions, the issue was brought before the California Supreme Court in *Martinez v. Brownco Construction Co*.[159] In *Martinez*, a wife brought a loss of consortium claim against a construction company for damages arising out of an electrical explosion that severely injured her husband.[160] The wife made two section 998 offers to compromise related to her loss of consortium claim. In August 2007, the wife made a section 998 offer to compromise for $250,000, which the construction company neither accepted nor rejected within the statutory

156. Pomeroy v. Zion, 96 Cal. Rptr. 822, 822 (Ct. App. 1971) ("This appeal calls for construction of section 998 of the Code of Civil Procedure, a section enacted in 1969 which has not been interpreted previously.").

157. This statement is based on a Westlaw search that indicates 1,711 cases citing section 998 as of February 26, 2024.

158. Bank of San Pedro v. Superior Ct., 838 P.2d 218, 222 (Cal. 1992).

159. Martinez v. Brownco Const. Co., 301 P.3d 1167, 1174 (Cal. 2013).

160. *Id.* at 1168. In *Martinez*, the husband and wife each brought a claim against the construction company—the husband for negligence and the wife for loss of consortium. Successive 998 offers were made individually by both the husband and the wife, relevant to each of their claims. However, because the California Supreme Court considered only the section 998 offers by the wife, for purposes of clarity, the facts related to the husband have been omitted.

acceptance period, so the offer was deemed withdrawn.[161] In February 2010, ten days before trial, the wife made a second 998 offer to compromise for $100,000.[162] Like the first offer, the construction company took no action and the offer was withdrawn. At trial, the wife obtained a $250,000 judgment.[163] Because the wife made section 998 offers, she sought recovery of costs, including $188,536 in expert fees incurred between the first and second settlement offers.[164]

The trial court barred recovery of the expert fees incurred between the first and second settlement offers.[165] Although section 998 provides that a plaintiff may recover post-offer costs of expert witness services if the defendant does not accept a valid 998 offer and subsequently fails to obtain a more favorable judgment, the court stated that prior 998 offers are extinguished by subsequent offers.[166] Thus, the only pertinent offer is the most recently rejected offer, otherwise known as the "last offer rule," a general contract principle.[167] At the appellate level, the court reversed and allowed for recovery of expert fees incurred from the date of the first rejected offer on the basis that such recovery is consistent with section 998's language and purpose.[168] This is otherwise known as the "first offer rule," a general contract principle in which costs are "measured against the earliest reasonable offer regardless of later offers."[169]

The California Supreme Court affirmed, holding that in instances in which a plaintiff makes two successive 998 offers and the defendant fails to obtain a judgment more favorable than either offer, the plaintiff may recover expert fees incurred from the date of their first offer.[170] However, the court noted that a trial court still maintains discretion as to whether to award fees since section 998 "expressly states an award of expert witness fees is discretionary."[171] Accordingly, the wife was not precluded from recovering the $188,536 in expert witness fees incurred between her first and second settlement offers, and the case was remanded to the trial level for its "discretionary determination" as to whether she was entitled to such fees.[172] The *Martinez* rule is presumed to apply to instances in which a defendant

161. *Id.* If an offeree does not accept an offer within the statutory period for acceptance—thirty days after it is made—the offer is deemed "withdrawn." CAL. CIV. PROC. CODE § 998(b)(2) (West 2024).
162. *Martinez*, 301 P.3d at 1168.
163. *Id.* at 1168, 1174.
164. *Id.* at 1169.
165. *Id.*
166. *Id.*
167. *Id.* at 1169, 1172.
168. *Id.* at 1169.
169. *Id.* at 1174.
170. *Id.*
171. *Id.* at 1175.
172. *Id.*

makes two statutory offers and a plaintiff fails to obtain a verdict more favorable than either.[173]

In reaching its decision to allow statutory benefits to flow from the date of a first 998 offer, the California Supreme Court sought to further section 998's goal of encouraging settlement. Because section 998 achieves its purpose by benefiting parties who make reasonable settlement offers and burdening offerees who reject such offers and then fail to obtain a more favorable result, the court reasoned that 998's purpose "would be more fully promoted if the statutory benefits and burdens were to operate whenever the judgment or award is not more favorable than any of the statutory offers made."[174] If 998's benefits and burdens could be obtained only from the date of the last offer, parties may be deterred from making offers earlier because this would reduce settlement opportunities. Although the court agreed that courts may rely on general contract principles when section 998's language does not provide an answer for a particular application, the court made clear that when it comes to 998, a general contract principle will not control if it conflicts with section 998 or defeats its statutory purpose of encouraging settlements.[175] Accordingly, because the chances of settlement increase with multiple offers, the court declined to apply the last offer rule.

Prior to *Martinez*, a later 998 offer would extinguish any previous 998 offers. Now, section 998 may entitle an offeror to cost shifting from the date of their earliest reasonable 998 offer. However, the *Martinez* court did not find the last offer rule or the first offer rule to be controlling in all circumstances. The court recognized that the last offer rule is suitable in instances in which "an offeree obtains a judgment or award that is less favorable than a first section 998 offer but more favorable than the later offer."[176] On the other hand, a first offer rule should be applied when an offeror makes several 998 offers and the declining offeree fails to obtain a judgement more favorable than any of the offers.

Ultimately, *Martinez* increased the amount of risk that comes with proceeding to trial while lowering the risk of making a subsequent offer, together increasing the possibility of settling.[177] However, in declining to

173. *See, e.g.*, Rempell v. Hofmann, No. A146257, 2018 WL 2931835, at *15 (Cal. Ct. App. June 12, 2018) ("Where a defendant makes two statutory offers and the plaintiff fails to obtain a verdict more favorable than either, 'section 998's policy of encouraging settlements is better served by not applying the general contract principle that a subsequent offer entirely extinguishes a prior offer.' " (quoting *Martinez*, 301 P.3d 1167)). Note that in California, an unpublished opinion does not constitute binding precedent. However, this does not mean unpublished cases are irrelevant since they can be persuasive, even if not binding.

174. *Martinez*, 301 P.3d at 1173.

175. *Id.* at 1170.

176. *Id.* at 1174.

177. Emily Green, *High Court Ruling Aids Settlements*, BAKER BURTON & LUNDY (June 11, 2013),

create a bright-line rule that the first offer rule applies to all scenarios in which there are multiple offers, the court not only promoted 998's purpose of encouraging settlement but also did so in a way that did not unduly limit access to the court system. If a first offer rule controlled in all multiple-offer circumstances, this might unduly influence an offeree presented with a second 998 offer to accept the second offer, rather than proceed to trial, out of fear that failure to accept the second offer might result in significant costs since cost-shifting penalties would run back from the date of the first offer. Instead, having the option of the last offer rule and the first offer rule makes it so that an offeree may assess their position and determine whether they are willing to either accept the second offer or risk it and go to trial with hopes that they will, at a minimum, receive a judgment higher than the second 998 offer and thus be subject to the last offer rule in which penalties will run only from the date of the second offer.

For example, let us say that a defendant made two offers to compromise. The first offer was for $250,000 and was made thirty months before trial. The second offer was for $100,000 and was made ten days before trial. If the first offer rule controlled in all circumstances, the plaintiff would be unduly influenced into accepting the second offer in fear that a judgment less favorable than $250,000 would result in thirty months of costs being shifted. On the other hand, a system that allows for either the last offer rule or first offer rule to apply, depending on the trial outcome, gives the plaintiff greater flexibility to determine whether they want to go to trial. If the plaintiff feels that their worst-case scenario would be a judgment less favorable than $250,000 but more favorable than $100,000, they may choose to take on the risk and go to trial because this scenario would result in ten days of costs being shifted, rather than thirty months.

The *Martinez* decision sheds light on how 998 may exist as a combination of the English and American rules. Aside from providing more opportunities for settlement, the flexibility between the application of the last offer and first offer rules has the effect of preserving some access to the court system that may not otherwise exist under a traditional loser-pays system while ensuring that a losing party will be penalized for unreasonably refusing to accept a settlement offer.

B. GOOD FAITH AND REASONABLENESS

Section 998 does not have an express requirement that offers must be made in good faith and be reasonable. Notwithstanding this, the California courts of appeal have consistently acknowledged that only good faith settlement offers will be valid for purposes of section 998. Thus, whether an

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https://www.bakerburtonlundy.com/press/998-settlement-ruling [https://perma.cc/NQD7-DAAD].

offer is made in good faith and is reasonable is an important analysis when it comes to the enforcement of section 998 offers.[178] While issues of good faith and reasonableness appear before many California courts, three court of appeal cases have laid the foundation for its legal framework: *Wear v. Calderon* (1981),[179] *Elrod v. Oregon Cummins Diesel, Inc.* (1987),[180] and *Licudine v. Cedars-Sinai Medical Center* (2019).[181]

A good faith requirement was first read into section 998 in *Wear v. Calderon*.[182] In *Wear*, a passenger in a car crash sued both drivers for damages for personal injuries he sustained.[183] One defendant made a section 998 offer to compromise for the amount of $1.00.[184] The defendant won at trial, and the trial court subsequently granted recovery of their expert witness fees pursuant to section 998.[185] The jury awarded the plaintiff $18,500 against the other defendant.[186] On appeal, the court reversed the award of expert witness fees, reasoning that a plaintiff cannot reasonably be expected to accept a nominal offer unless there is "no reasonable possibility" the defendant will be held liable.[187] If there is, however, some reasonable possibility, no matter how slight, that the defendant may be held liable, "there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial."[188] Therefore, to achieve 998's legislative purpose of encouraging settlement of litigation without trial, the court read in a good faith requirement to section 998: "[T]he pretrial offer of settlement required under section 998 must be realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, particularly where, as here, there is no cross-complaint."[189]

Section 998 was amended five years after the *Wear* decision but no change was made to the statutory language that *Wear* interpreted, leading courts to conclude that the legislature intended for only good faith settlement

178. Olivia K. Leary & Eustace de Saint Phalle, *Preparing for and Defeating Bogus 998 Objections*, RAINS LUCIA STERN ST. PHALLE & SILVER, PC, https://www.rlslawyers.com/preparing-for-and-defeating-bogus-998-objections [https://perma.cc/DZP2-CFLV].

179. Wear v. Calderon, 175 Cal. Rptr. 566, (Ct. App. 1981).

180. Elrod v. Oregon Cummins Diesel, Inc., 241 Cal. Rptr. 108 (Ct. App. 1987).

181. Licudine v. Cedars-Sinai Med. Ctr., 242 Cal. Rptr. 3d 76 (Ct. App. 2019).

182. *Wear*, 175 Cal. Rptr. at 567–68.

183. *Id.* at 567.

184. *Id.*

185. *Id.*

186. *Id.* at 568.

187. *Id.*

188. *Id.*

189. *Id*. at 567–68.

offers to qualify under section 998.[190] Today, for a 998 offer to be valid, it must be made in good faith. A section 998 offer is made in good faith if it is "realistically reasonable under the circumstances of the particular case."[191] The offer must carry with it a "reasonable prospect of acceptance."[192]

A few years following *Wear*, the California Court of Appeal, Third Appellate District, in *Elrod v. Oregon Cummins Diesel, Inc.*, developed a two-part test to determine whether a 998 offer is reasonable.[193] To determine whether a 998 offer is realistically reasonable, a court must consider whether (1) the offer is within the "range of reasonably possible results" following trial considering all of the information the offeror knew or should have reasonably known, and (2) the information the offeror relied on in support of their offer is known or should have been known to the offeree.[194] If an offeror knew or reasonably should have known that the offeree lacked information necessary to evaluate the offer, the 998 offer was not made in good faith.[195] In essence, the second element ensures that the offeree has sufficient information to "intelligently evaluate the offer" and determine whether the offer is a reasonable one.[196] As stated in *Elrod*, "the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer,"[197] thus frustrating 998's purpose of encouraging pretrial settlements.

An offer must satisfy both prongs of the *Elrod* test, and both prongs must be evaluated in light of the circumstances at the time the offer was made.[198] An offeror receiving a judgment more favorable than their offer is prima facie evidence that their offer was reasonable.[199] The offeree, therefore, carries the burden of showing that an offer was neither reasonable nor made in good faith.[200] Whether a section 998 offer was made in good faith and was reasonable is at the discretion of the trial court.[201]

In *Licudine v. Cedars-Sinai Medical Center*, the California Court of Appeal, Second Appellate District, provided insight into the second part of

190. Elrod v. Oregon Cummins Diesel, Inc., 241 Cal. Rptr. 108, 111 (Ct. App. 1987).
191. *Elrod*, 241 Cal. Rptr. at 111 (quoting *Wear*, 175 Cal. Rptr. at 567–68).
192. *Elrod*, 241 Cal. Rptr. at 111.
193. *Id.* at 112.
194. *Id.*
195. *Id.*
196. Licudine v. Cedars-Sinai Med. Ctr., 242 Cal. Rptr. 3d 76, 82 (Ct. App. 2019) (internal quotation marks omitted).
197. *Elrod*, 241 Cal. Rptr. at 112.
198. *Id.*
199. *Id.* at 113.
200. *Id.*
201. *Id.*

the *Elrod* test, which holds that an offer can be reasonable only if the offeree had information necessary to evaluate the offer at the time it was made.[202] In determining whether an offeree had sufficient information to evaluate a 998 offer, the offeree needs information that bears on the issues of liability and the amount of damages.[203] The *Licudine* court laid out pertinent factors that a court may look at to assess the information available to an offeree and determine whether such information was sufficient for the offeree to evaluate the offer before them.[204] First, a court should ask at what point in the litigation was the offer made.[205] A litigant that receives an offer shortly after a lawsuit is filed is less likely to have sufficient information to evaluate the offer.[206] Second, a court should examine what information was available to the offeree prior to the offer's expiration.[207] Among other ways, information may be obtained by virtue of prior litigation between parties, prelitigation exchanges, or a preexisting relationship between parties.[208] Third, a court should consider whether the offeree notified the offeror that they lacked sufficient information, and, if so, how the offeror responded.[209] If an offeree expresses concern and the offeror responds in a stubborn manner, it is more likely that the offer was neither reasonable nor made in good faith.[210]

In *Licudine*, a plaintiff brought a medical malpractice lawsuit for injuries sustained during a gallbladder removal surgery. Nineteen days after serving her complaint, the plaintiff made a 998 offer in the amount of $249,999.99 plus legal costs.[211] The defendant sent a written objection to the offer noting that the offer was made only five days after the defendant filed its answer, which was not enough time to fully investigate the action and determine whether the offer was reasonable.[212] The plaintiff's offer expired, and the jury found in the plaintiff's favor, awarding $5.59 million in damages.[213] Pursuant to 998, the plaintiff sought costs including, among other things, $2.34 million in prejudgment interest from the date of her 998

202. Licudine v. Cedars-Sinai Med. Ctr., 242 Cal. Rptr. 3d 76, 83 (Ct. App. 2019).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 84.
211. *Id.* at 80.
212. *Id.*
213. *Id.* at 80–81. At trial, the jury awarded the plaintiff $1,045,000 in damages. The trial court granted a motion for a new damages trial. At retrial, the jury awarded $7,619,457 ($5,344,557 in economic damages and $2,274,900 in noneconomic damages). Pursuant to the statutory cap on noneconomic damages in medical malpractice cases, the trial court reduced the noneconomic damages to $250,000, resulting in a final verdict of $5,594,557. *Id.* at 81.

offer to the date of judgment.[214] The defendant moved to strike the plaintiff's prejudgment interest request on the basis that it was made too early in the proceedings and thus not in good faith. The trial court agreed that the offer was "premature" and denied plaintiff's request.[215]

On appeal, the court applied the two-prong *Elrod* test to determine whether the plaintiff's 998 offer was made in good faith. First, the court found that the plaintiff's offer to settle for $249,999 was within the "range of reasonably possible results" at trial. At trial, the plaintiff received a more favorable judgment than her 998 offer, which constituted prima facie evidence of reasonableness to which the defendant provided no evidence to the contrary.[216] As to the second factor—whether the offeree had information necessary to evaluate the reasonableness of the offer—the court considered the timing of the offer, the information available to the defendant, and whether the defendant notified the plaintiff that it lacked sufficient information to evaluate the offer.[217] In looking at these factors, the court found that the defendant did not have sufficient information to assess whether the offer was reasonable, and thus the offer was not made in good faith.[218]

Although the defendant had some information, including a letter from the plaintiff that her injuries were well-documented and exceeded the cap of $250,000 for noneconomic damages, photos of the plaintiff pre- and post-surgery, answers to general interrogatories,[219] and the plaintiff's medical chart, considered in its totality, this did not constitute sufficient information to evaluate the reasonableness of her 998 offer. The plaintiff made her offer nineteen days after serving her complaint and only five days after the defendant filed its answer. Moreover, the defendant had "very little information available to it on the issues of liability and the amount of damages." The complaint was "bare bones," and though her medical chart provided some information regarding liability, it did not address issues such as loss of earning capacity or pain and suffering.[220] And although the plaintiff responded to the defendant's request for documents, she did so the day before the offer was to expire. Lastly, the defendant notified the plaintiff after receiving her 998 offer that it was "too soon . . . to make any determination," and the plaintiff never responded.[221] Accordingly, the trial court did not

214. *Id.*
215. *Id.*
216. *Id.* at 84.
217. *Id.* at 84–86.
218. *Id.* at 85–86.
219. The court could not evaluate whether the plaintiff's answers to interrogatories provided sufficient information because they were not made part of the record. *Id.* at 86.
220. *Id.* at 84–85.
221. *Id.* at 85.

abuse its discretion in concluding that the defendant did not have sufficient information to evaluate the reasonableness of the offer, thus deeming the offer invalid.[222]

Though *Wear* and *Elrod* were issued over thirty-five years ago, their good faith and reasonableness language is still cited in section 998 cases today.[223] Lower courts also appear to adhere to the framework set forth in *Wear*, *Elrod*, and *Licudine*. For example, in *O'Rourke v. Ali*, the Second District Court of Appeal, when affirming the trial court's decision to grant defendants' post-offer costs and expert fees pursuant to section 998, centered its analysis on whether the offer was made within the range of reasonably possible results, considering the information available to the plaintiffs when the offer was made.[224] In making its determination, the court leaned on the *Licudine* factors to assess reasonableness.[225] In *O'Rourke*, plaintiffs brought suit against two doctors—an emergency room physician and a hospitalist—seeking $26 million in economic damages for injuries sustained after receiving allegedly below-standard medical care from the doctors.[226] The defendants each made a separate 998 offer to compromise, both of which the plaintiffs declined.[227] At trial, the jury found defendants not negligent, and the trial court awarded each defendant their costs, including expert witness fees, pursuant to section 998.[228] On appeal, the plaintiffs asserted that the defendants were not entitled to costs because their 998 offers were unreasonable and not made in good faith.[229] The court of appeal disagreed, finding that the defendants' offers were reasonable and made in good faith, and thus valid.[230]

The court agreed that only good faith offers are valid, reiterating that the offer must be reasonable under the circumstances of the case, with a focus on whether the offer was made within the range of reasonably possible results when considering the information available at the time of the offer.[231] In its analysis of the defendants' separate offers, the court stuck closely to

222. *Id.*
223. *See e.g.*, Riera v. Mecta Corp., No. 2:17–cv–06686–RGK–JC, 2021 WL 6102465, at *2 (C.D. Cal. Aug. 9, 2021) (discussing the good faith requirement from *Wear* and reasonableness test from *Elrod*); 18131 Ventura Blvd, LLC v. 5223 Lindley, LLC, No. B307958, 2021 WL 5903303, at *2 (Cal. Ct. App. Dec. 14, 2021) (same).
224. O'Rourke v. Ali, No. B305139, 2022 Cal. App. Unpub. LEXIS 6626, at *51, *55 (Oct. 31, 2022).
225. *Id.* at *46.
226. *Id.* at *1, *50.
227. *Id.* at *6.
228. *Id.* at *1–2.
229. *Id.* at *40–41.
230. *Id.* at *55.
231. *Id.* at *51.

the legal framework set out by *Wear*, *Elrod*, and *Licudine* for good faith and reasonableness of offers made pursuant to 998.[232]

As to the emergency room physician's offer, unlike an offer made close to the filing of a complaint, the physician made his offer close to trial, meaning both parties had sufficient information to assess the reasonableness of the offer.[233] When the physician made his offer, discovery was finished, his expert had opined, and the plaintiffs made no argument to the contrary.[234] The court rejected the plaintiffs' argument that because the offer was made just over a week before trial, which was six years after the complaint was filed, the physician knew there was no way the plaintiffs would accept the offer given the time and resources expended.[235] Although this might be true, the court noted whether it was reasonable for an offeree to reject an offer has no bearing on whether the offer was made in good faith.[236]

As to the hospitalist's offer, the hospitalist made his offer two months before trial was to begin.[237] Depositions of nurses had been taken, the plaintiffs had provided discovery responses, and experts had submitted competing declarations.[238] Although trial was subsequently pushed back for three years after the hospitalist made his offer, he "made [his] 998 offer at a time when [he] thought trial was imminent and when there was sufficient evidence to evaluate the case."[239]

The reading in of a good faith and reasonableness requirement seems to align with 998's goal of encouraging settlement—and courts seem to agree. To achieve its statutory purpose, 998 punishes a party who fails to accept a *reasonable* offer from the other party. If a section 998 offer does not have a "reasonable prospect of acceptance," then an offeree will reject the offer, thus defeating the power behind section 998's mechanisms to encourage settlement.[240] While the good faith requirement imposed by courts works to effectuate the statute's purpose of encouraging settlement, it serves additional policy considerations such as preventing litigants from using section 998 as a vehicle to "game the system" and recover litigation costs that may otherwise be unrecoverable under the American rule that prohibits fee-shifting.[241] For example, as established in *Wear*, the good faith

232. *See id.* at *50–55.
233. *Id.* at *51.
234. *Id.*
235. *Id.* at *51–52.
236. *Id.* at *52.
237. *Id.* at *52–53.
238. *Id.* at *53.
239. *Id.* at *53.
240. Licudine v. Cedars-Sinai Med. Ctr., 242 Cal. Rptr. 3d 76, 82 (Ct. App. 2019) (internal quotation marks omitted).
241. Menees v. Andrews, 19 Cal. Rptr. 3d 664, 668 (Ct. App. 2004) ("The courts have uniformly

requirement prevents an offeror from making a token or nominal offer. This is because a token or nominal offer carries little to no risk and is essentially made for the sole purpose of later recovering costs, such as expert witness fees.

Moreover, the good faith requirement shows concern over the opportunistic use of section 998 to pressure individuals or small entities to accept a low-ball settlement offer that is much less than their claim is actually worth. As a premise, individuals or small entities with less resources are more likely to be pressured into accepting a low-ball 998 settlement offer because of the threat of having to pay potentially substantial costs if they decline the offer and later fail to receive a more favorable judgment. Thus, much like the English rule, section 998 may deter middle- and lower-class individuals or small entities from bringing forth meritorious claims, reducing their access to the court system. However, the good faith requirement allows courts to deem a low-ball settlement offer as unreasonable, if necessary. This therefore helps mitigate a loser-pays system's effect on limiting access to courts, highlighting another instance in which section 998 acts as a combination of the two rules.

CONCLUSION

In crafting section 998, the California legislature made clear that the fundamental policy behind the statute is to encourage the settlement of lawsuits prior to trial.[242] As a start, 998 provides litigants with a financial incentive to make reasonable settlement offers by providing the potential to statutorily recover costs. With the power to essentially convert a case into a loser-pays system, when it comes to 998, a party may rely on the carrot or the stick, or both, to reach a settlement. And 998 being a two-way rule, available to both plaintiffs and defendants, increases settlement opportunities. Judicial determinations are also working to effectuate section 998's purpose through statutory interpretation. As seen in Part IV, courts give heavy deference to the policy and purpose of section 998: to encourage settlement of lawsuits prior to trial. The reading in of a good faith and reasonableness requirement ensures that 998 offers have a reasonable prospect of acceptance. And the *Martinez* decision to allow statutory benefits to flow from the date of the first 998 offer encourages parties to not only make multiple offers but also make earlier offers. This point goes hand-in-hand with an offeror having flexibility to revoke a 998 offer.

While the legislature and courts have made clear that the fundamental policy behind section 998 is to encourage the settlement of lawsuits prior to

rejected an interpretation of section 998 which would allow offering parties to . . . 'game the system.' ").

242. Bank of San Pedro v. Superior Ct., 838 P.2d 218, 222 (Cal. 1992).

trial, statutory and case law analyses indicate that 998's policy may also encompass promoting settlement without unduly limiting access to the courts. Thus, like other offer-of-judgment rules, 998 may serve to strike a balance between the English rule, which shifts both sides' litigation costs to the losing party, and the American rule, under which each party generally bears their own costs. The English rule discourages frivolous litigation and encourages settlement, but its threat of substantial consequences for losing may deter meritorious litigation, particularly for those of moderate to low income. The American rule seeks to avoid a loser-pays system's effect on limiting access to courts but fails to incentivize settlement and deter meritless litigation due to a lack of substantial consequences for losing.

A look into section 998's complex features, legislative history, and judicial interpretations emphasizes the nexus between section 998, the English rule, and the American rule. Because the general belief in America is that one's access to the court system should not be restricted by the threat of substantial monetary penalties for losing,[243] section 998 includes safeguards to ensure that its cost-shifting penalties will not drastically limit access to the court system. Both the English rule and section 998 deter meritless claims from being brought by threatening to shift costs. Unlike the English rule, however, section 998 is less punitive in that it will burden a party with costs but only when they fail to receive a judgment less favorable than the 998 offer in question. With this, section 998 seems to capture the English rule's ability to incentivize settlement but still ensures access to courts by being overall less punitive than the English rule. Moreover, because attorney's fees are a major factor that prevents access to courts,[244] the fact that 998 does not confer an independent right to attorney's fees enables it to exist as a tool to promote settlement without drastically limiting access to courts.[245] This is especially true for individuals and entities that may be financially limited and may otherwise be dissuaded from litigating due to the threat of having to pay their opponent's attorney's fees. The *Martinez* decision to not apply the first offer rule in all multiple-offer scenarios prevents an offeree from being locked into a first offer and thus potentially be unduly influenced into accepting a less favorable subsequent offer down the line. And the good faith requirement helps diminish concern

243. Sherman, *supra* note 82, at 1864.

244. Osevala, *supra* note 40, at 185.

245. Recall that the costs recoverable under section 998 are costs awarded pursuant to California Code of Civil Procedure section 1032. Section 1032 provides attorney's fees as an allowable cost when authorized by contract, statute, or law. *See* CAL. CIV. PROC. CODE §§ 998(a), 1033.5(10) (West 2024); Linton v. County of Contra Costa, 243 Cal. Rptr. 3d 183, 186–87 (Ct. App. 2019) (denying a prevailing party's request for attorney's fees because a "prevailing party is not automatically entitled to attorney fees merely by virtue of prevailing, but must demonstrate such an entitlement via contract, statute, or law").

over the opportunistic use of section 998 to pressure middle- and low-income individuals or small entities into accepting low-ball settlement offers rather than pursue trial. Notably, the preservation of a court's broad discretion to determine whether a party may recover post-offer expert witness costs under section 998 helps to mitigate any harsh effects that may otherwise come with a cost-shifting mechanism.

While the legislature and courts aim to encourage settlement through section 998, settlement may not occur as frequently as the legislature anticipated.[246] There are two significant issues when it comes to 998 that may hinder the statute's ability to be effective. First, when it comes to section 998, the devil is in the details. Described as "deep and nuanced,"[247] a "minefield of technicalities,"[248] and a "[t]rap for the [u]nwary,"[249] section 998 is exceedingly difficult to understand. Consequently, although section 998 can be a "powerful tool for litigants," its advantages may be lost due to its numerous procedural requirements that may be difficult for even a seasoned lawyer to comprehend.[250] Second, section 998 may not offer a high enough incentive to settle because the statute allows only for a limited amount of recoverable costs. In most cases, attorney's fees are the lion's share of litigation costs.[251] Because attorney's fees are recoverable under section 998 only when authorized by contract, statute, or law,[252] it might be the case that section 998 is significant only when attorney's fees are at stake in the litigation,[253] or when expert witness fees and deposition costs are high.

246. Brian S. Kabateck & Stephanie Charlin, *Cost Factors Related to Code of Civil Procedure Section 998*, L.A. LAW., Feb. 2019, at 17.

247. Eric Ganci, *California Civil Code Section 998 – The Settlement Code*, CASEYGERRY (July 28, 2021), https://caseygerry.com/california-civil-code-section-998-the-settlement-code [https://perma.cc/J72L-HE9L].

248. Timothy Kowal, *Judgment on Section 998 Agreement Vacated Because Offer Did Not Contain Signature Line for Acceptance*, THOMAS VOGELE & ASSOCS., APC (Mar. 8, 2021), https://tvalaw.com/publication/judgment-on-section-998-agreement-vacated-because-offer-did-not-contain-signature-line-for-acceptance [https://perma.cc/AHE7-SVH7].

249. Monica Q. Vu, *The Section 998 Minefield*, ORANGE CNTY. LITIG. NEWS, Spring 2010, at 5.

250. Laurie Quigley Saldaña, *Avoiding the Pitfalls of CCP 998 Offers*, MEDIATION CENT., https://www.mediationcentral.net/articles/ccp-998.pdf [https://perma.cc/44FW-Q2VN]. The California Judicial Council created form CIV-090, which sets forth the elements of an offer to compromise and an acceptance under section 998. *See Form CIV-090*, https://www.courts.ca.gov/documents/civ090.pdf [https://perma.cc/TR9K-SFTQ]. Given the complexity of 998, a litigant may wish to use form CIV-090 to ensure that all requirements for a valid 998 offer are met and avoid pitfalls that have ensnared others. Valerie T. McGinty & Kirsten M. Fish, *998 Offers: Pitfalls and Opportunities in the Statutory Settlement Offer*, PLAINTIFF MAG. (Dec. 2015), https://www.plaintiffmagazine.com/recent-issues/item/998-offers-pitfalls-and-opportunities-in-the-statutory-settlement-offer [https://perma.cc/XH97-TE5Z].

251. Hannaford-Agor & Waters, *supra* note 29.

252. CAL. CIV. PROC. CODE § 1033.5(10) (West 2024).

253. Edwin F. McPherson, *Practice Tips: Guidance on Section 998 Offers to Fee Shift in Arbitration*, MCPHERSON LLP (Dec. 2019), https://mcpherson-llp.com/articles/practice-tips-guidance-on-section-998-offers-to-fee-shift-in-arbitration [https://perma.cc/NT2U-G3E8].

At the end of the day, rather than being a tool that seeks only to promote settlement, section 998 may be considered as California's attempt to bridge the gap between the English rule and American rule—combining an incentive for parties to settle without unduly restricting access to courts. Even if section 998 may not result in settlement as frequently as the legislature anticipated, this does not mean that the statute is not a beneficial tool. Section 998 provides litigants with a financial incentive to make reasonable settlement offers by providing parties an opportunity to statutorily recover costs that might not otherwise exist.

Because of the gaps and ambiguities in section 998, the statute will likely face future proposals for modification and judicial disputes over its applicability. Accordingly, in the future, California courts and the legislature may wish to consider how section 998 may be a powerful vehicle to deter meritless litigation and relieve overburdened courts without overly deterring claimants from bringing a lawsuit to protect their rights or interests. Overall, statutory and case law analyses in this Note indicate that when faced with confusion, the legislature and courts will interpret section 998 in a way that helps eliminate the economic waste of expensive trials and best carries out the statute's purpose. Court cases in particular appear to be reliable predictors of future judicial treatment of the section 998 landscape. Nonetheless, the extent to which the legislature plans to modify section 998 or to which courts will continue to interpret section 998 remains unclear. One thing that is clear, however, is that section 998 seeks to provide a solution to encourage settlement in the face of the American rule against no fee-shifting. And although not perfect, its ability to encourage settlement without unduly limiting access to courts may justify its defects.