

### Court Reverses Course, Allows Defendants in Insurance Bad Faith Lawsuits to Recover Costs After Making Joint §998 Offer to Husband and Wife Plaintiffs

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#### §998 Offer to Compromise

California Code of Civil Procedure §998 provides a mechanism for a litigant to recover certain costs when the opposing party has rejected a good faith offer to compromise. Under §998, if a plaintiff does not accept a defendant's good faith offer to compromise and then fails to obtain a more favorable judgment, the plaintiff must compensate the defendant for his or her post-offer costs. The court may also hold the plaintiff responsible for the defendant's expert witness fees. Therefore, §998 provides defendants with a powerful case-resolution tool.

#### Claims Brought Jointly by Husband and Wife

Historically, in cases involving joint plaintiffs claiming separate injuries, defendants were not allowed to make joint settlement offers, but rather were required to present a separate, unconditional offer to each plaintiff. Courts found that this limitation was necessary to prevent one plaintiff from depending on another for acceptance of a settlement offer and to avoid uncertainty regarding apportionment of a joint settlement offer among individual plaintiffs.

In *Weinberg v. Safeco Ins. Co. of America*, 114 Cal.App.4th 1075 (2004), the court applied this rule in a bad faith case arising from an uninsured motorist claim. The court reasoned that the husband and wife plaintiffs did not suffer a "single, indivisible injury" because each plaintiff may have "suffer[ed] varying degrees of emotional distress." Therefore, the defendant was required to make independent offers to compromise to each plaintiff in order to comply with §998.

Cases such as *Weinberg* constructively eliminated the use of §998 offers by defendants in insurance bad faith cases brought by husband and wife plaintiffs. The requirement that separate, unconditional settlement offers be made to each plaintiff created a significant risk that one plaintiff would accept the settlement offer while the other plaintiff would continue to pursue the full amount of any claim for policy benefits.

#### New Case Authorizes Joint §998 Offers to Husband and Wife Plaintiffs

On May 26, 2010, the same Court of Appeal that decided *Weinberg* reversed itself in *Barnett v. First National Insurance Company of America*, 184 Cal.App.4th 1454 (2010), a bad faith case brought by a husband and wife arising out of a homeowners insurance claim. The *Barnett* court noted that regardless of whether the injuries claimed by a husband and wife are "indivisible" or "separate," a cause of action to recover damages, as well as

the actual recovery, are community property. Therefore, because California Family Code §1100(a) places control of community property in either spouse, either plaintiff could have accepted the insurer's offer to settle without obtaining the other plaintiff's consent. Further, because both spouses have equal interests in a potential recovery, allocation of damages is not an issue.

## **Ramifications of the *Barnett* Decision**

In the past, defendants in bad faith cases brought jointly by husband and wife plaintiffs had little choice but to forego one of their strongest settlement negotiation tools. The Barnett decision, however, allows defendants to use this tool in such cases. Defendants now have significantly more leverage to compel joint husband and wife plaintiffs to accept a good faith offer to settle because failure to accept the offer will subject the plaintiffs to §998 penalties.

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