

***Rouland v. Pacific Specialty Ins. Co.* – 2013 Cal. App. LEXIS 799**
Fourth Appellate District
Insurance company may be entitled to expert fees incurred in defending lawsuit.

FACTS AND PROCEDURAL POSTURE

Plaintiffs, husband and wife, owned a hillside home which was damaged by a landslide. Defendant insurance company insured the home but denied the claim because the policy excluded landslide damage. Plaintiffs sued Defendant for breach of contract and bad faith. Two months before trial, Defendant made separate offers to settle with each plaintiff pursuant to CCP § 998, offering \$95,000 to the husband and \$30,000 to the wife. The offers conditioned acceptance upon filing an Offer and Notice of Acceptance. Plaintiffs did not accept either offer.

At trial, the jury returned a defense verdict. Defendant filed a memorandum of costs seeking nearly \$385,000 from plaintiffs, including \$331,000 in expert witness fees based on Plaintiffs' failure to obtain a more favorable judgment than the § 998 offer. Plaintiffs responded by moving to tax Defendant's expert witness fees on the ground that the § 998 offers did not comply with the § 998 acceptance provision because they lacked a signature space for the Plaintiffs to formally accept. The offers were also challenged as being merely token gestures and Plaintiffs argued that the expert fees were unreasonable and unnecessary. The Plaintiffs' motion was granted because the court found that the offers were defective (although the specific defect was not identified). The court rejected the Plaintiffs' arguments that the offers were token offers and that expert fees were unreasonable or unnecessary. This appeal followed.

DISCUSSION

Where a plaintiff rejects a defendant's § 998 offer and later fails to obtain a more favorable judgment, the court may exercise its discretion to require the plaintiff to pay the reasonable expert witness fees incurred by defendant. In 2006, § 998 was amended to specify the requirements of a valid offer and acceptance. These amendments require a provision that allows the accepting party to accept the offer by signing a statement of acceptance. Specifically, § 998 requires that acceptance "whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." On appeal, the court specifically examined whether Defendant's offer satisfied the requirements of § 998 by including a provision which allowed Plaintiffs to accept the offers.

Plaintiffs conceded that the offers included a provision that asked them to file an "Offer and Notice of Acceptance" with the court. The court had to decide whether that request complied with § 998's acceptance requirements. Case precedent has relied upon the plain meaning of § 998's language that an offer "shall include" some provision allowing acceptance to be made "by signing a statement that the offer is accepted." A bright-line rule invalidating an offer that fails to address acceptance in such a way has been favored as serving the purpose of § 998 by eliminating confusion about what must be included in a valid offer.

The court recognized that there is no specific authority on how to satisfy the acceptance provision requirements. Case precedent all indicated, without specificity, that there must be some indication on how acceptance is to take place. The court cited to *Whatley-Miller v. Cooper*, (2013) 201 Cal.App.4th 1103, recognizing that an acceptance provision contained on a document separate from the offer itself may still qualify as a valid acceptance provision. The *Whatley-Miller* court recognized that § 998 does not specify that acceptance must contain any specific words or that it must be made in one particular manner other than it be in writing and signed by the appropriate person. The court stated that Defendant included its offer and acceptance provisions on a single document. The acceptance provision stated that an “Offer and Notice of Acceptance” be filed.

Plaintiffs argued that this provision was invalid as it did not provide a line for them to sign to indicate acceptance as found in form CIV-090 and it contained no specific language that acceptance is given by signing a statement that the offer is accepted. The court rejected both arguments. The court first stated that form CIV-090 is not a mandatory form and has not been specified as the exclusive means for satisfying § 998’s acceptance requirements. The court explained that the language of § 998 makes no mention that an offer must include a line for the party to sign or any specific language that the party accepts the offer by signing a statement of acceptance. There is no “magic language” or specific format required for acceptance or an offer. § 998 only requires that acceptance be in writing and signed by the accepting party or its counsel. The court stated that it could not impose additional requirements or limitations which are not included in the language of the statute.

The court held that Defendant’s offers satisfied § 998’s acceptance provisions because they informed Plaintiffs how to accept the offer (by filing an “Offer and Notice of Acceptance”). While this provision did not expressly require a written and signed acceptance, the court recognized that these requirements were implicit in the acceptance provision. Any acceptance by Plaintiffs that was to be filed with the court would necessarily have to be in writing and signed by their counsel. As long as the offer specifies the manner of acceptance, the steps for accepting may be implicit in the identified means. The court rejected the Plaintiffs’ formalistic approach because it could potentially invalidate written acceptances of § 998 offers and undermine the statutory purpose of encouraging pretrial settlements.

The trial court, relying on *Puerta v. Torres*, (2011) 195 Cal.App.4th 1267, granted the motion to tax the expert witness fees on the basis that Defendant failed to comply with § 998’s acceptance requirements. However, the court recognized that nothing in *Puerta* required strict compliance with § 998 such that the court is required to grant the motion to tax in the event of failure to follow the § 998 requirements.

DISPOSITION: The court reversed and remanded for the trial court to determine whether Defendant may recover its expert witness fees because the trial court did not exercise its discretion in making its decision.