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PERSPECTIVE

Got a final award? It ain't necessarily so.

By Michael R. Diliberto

Is it timely to submit a request for costs under Code of Civil Procedure Section 998 to the arbitrator after a final award on the merits is issued? The answer is “Yes,” according to *Heimlich v. Shivji*, 2019 DJDAR 4663 (Cal. May 30, 2019).

In *Heimlich*, an attorney sued his client to collect fees for services rendered. The client cross-complained for a refund of fees paid. The client made two 998 offers to settle the case, which were rejected. The arbitrator issued a final award granting \$0 to both parties. Six days after the final award, the client notified the arbitrator of the two 998 offers, and sought costs because the attorney did not beat the 998 offers.

The arbitrator refused to consider the request, apparently believing that after rendering a final award, he lacked jurisdiction to consider the cost request. The trial court confirmed the award, without costs, and the client appealed. The Court of Appeal vacated the award, finding that the client's rights were prejudiced “by the refusal of the arbitrator to hear evidence material to the controversy,” namely, evidence relevant to the 998 offer. The Supreme Court of California reversed and affirmed the trial court's confirmation of the arbitration award and denial of costs.

Among other factors considered, the California Arbitration Act provides implicit authority

for ongoing jurisdiction. Section 1283.4 requires that an award must determine “all questions submitted to the arbitrators” necessary “to determine the controversy.” In light of this duty, “courts have inferred that when a putatively final arbitration award omits resolution of an issue necessary to decide the parties' controversy, the arbitrator retains power to amend the award to address the undecided issue.” Section 1284 expressly vests arbitrators with continuing jurisdiction for “not later than 30 days after service of a signed copy of the award on the applicant.”

Section 998 seeks to create parity between arbitrations and court cases. Cost applications in court are filed after a judgment, generally within 15 days. California Rules of Court, Rule 3.1700(a) (1). The court reasoned that consistent with civil litigation, a party to an arbitration may submit a cost request asserting rejection of an earlier 998 offer within 15 days after issuance of a final award. The arbitrator has implicit power under Section 998 to consider the request and amend any award accordingly. Cost applications in a case governed by Section 998 must come after a judgment or award. Only then can the outcome be compared with the terms of the settlement offer and deemed more or less favorable.

The takeaway:

1. At Hearing: While inadmissible to prove liability, 998 offers may be admissible for a different purpose. For example, a carrier's



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settlement offers may be admissible to show an insurance claim was handled in bad faith. *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 888-89 (1985).

2. Pre-Award: A request for costs under Section 998 may be submitted before the final arbitration award is issued. But such timing is not required because it could influence a merits determination by signaling the offeror's willingness to pay some amount.

3. Post-Award: A request for costs under Section 998 is timely if filed with the arbitrator within 15 days of a final award. In response to such a request, an arbitrator has continuing jurisdiction to award costs to the offering party within 30 days after service of a final award.

4. Limited Review: In *Heimlich*, the arbitrator's error was not reviewable. Consider raising this issue up front and have the arbitrator's scheduling order provide that the arbitrator will (a) issue an interim award and retain jurisdiction to award attorney's fees and costs in a final award; or (b) retain jurisdiction to award attorney's fees and costs after a final award.

5. Scope of Review: Arbitration is a matter of consent. While the statutory grounds to correct

and vacate arbitration awards do not ordinarily include errors of law, contractual limitations on the arbitrators' powers can alter the usual scope of review. Incorporate the following in your arbitration clause: “The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.” *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1340 (2008).

Michael R. Diliberto is a full-time mediator and arbitrator with *ADR Services, Inc.* He is also an adjunct professor at *Loyola Law School* where he teaches negotiation skills. Michael's monthly articles about litigation and strategies for settlement negotiations are at www.DilibertoADR.com.



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