



MICHAEL R. DILIBERTO, ESQ.



A Tale of Two Offers

Is a section 998 offer to settle with more than one defendant valid if the offer is conditioned on acceptance by all defendants? The answer is no, according to *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515. Burchell sued his doctor and a hospital, FPS, for professional negligence and medical battery, due to surgery that left Burchell impotent. Before trial, Burchell served both defendants with an offer to compromise pursuant to Code of Civil Procedure section 998 for \$1.5 million. The offer was not accepted, and by statute it was deemed withdrawn.

Burchell was awarded \$9.2 million at trial. Because Burchell achieved a better result than his section 998 offer, the trial court ordered the defendants to pay Burchell's costs, including \$27,000.00 for expert witness fees and \$1.0 million for prejudgment interest. FPS appealed and argued that Burchell's section 998 offer was invalid as to the doctor and FPS because it was improperly conditioned on acceptance by both parties. The Court of Appeal agreed. *Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1544, and *Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 576, instruct that a section 998 offer must be "made in a manner allowing individual offerees to accept or reject it," and "[e]ven if a section 998 offer is allocated among individual defendants, it may not be conditioned on acceptance by all defendants."

The court held that Burchell did not comply with the statutory content requirements. Burchell's section 998 offer to the doctor and FPS was a single document addressed to both parties, which referred to them in the conjunctive as "Defendants." It offered to take judgment against both the doctor and FPS together, not against one or the other. The accompanying notice of acceptance also referred to both the doctor and FPS in the conjunctive as "Defendants," and there was only one signature line, for the attorney who represented both of them.

The court explained why it is generally appropriate to require separate offers, even though Burchell's offer was to hold the doctor and FPS jointly liable for the entire settlement amount:

FPS had plausible defenses to liability not available to the doctor, namely, that it was not the doctor's employer and should not be held liable for his actions. By framing the offer to settle in the conjunctive, Burchell made it effectively impossible for either party to accept the offer, even if so inclined, because the offer required an entity that was not responsible for [the doctor's] actions to accept liability.

The trial court's award of over \$1.0 million for expert witness fees and prejudgment interest on the basis of that section 998 offer was reversed.