



MICHAEL R. DILIBERTO, ESQ.



The First Offer May Cost You

Code of Civil Procedure section 998 encourages the settlement of lawsuits prior to trial. A party who fails to achieve a better result than that party could have achieved by accepting his or her opponent's section 998 offer to compromise may have to pay the other side's postoffer costs, including expert witness fees.

But what happens when a plaintiff serves two unaccepted offers to compromise pursuant to section 998, and the defendant fails to obtain a judgment more favorable than either offer? Does the plaintiff's last offer extinguish the first offer for purposes of expert fee recovery? The California Supreme Court said "No" and allowed plaintiff to recover expert fees incurred from the date of the first offer. (*Martinez v. Brownco Construction Co.* (2013) 56 Cal. 4th 1014.)

In 2007, plaintiffs served Brownco two settlement offers pursuant to section 998. Martinez offered to compromise his negligence claim for \$4.75 million, and his wife offered to compromise her loss of consortium claim for \$250,000. Brownco neither accepted nor rejected these offers within the statutory 30-day period.

In 2010, just before trial, Mr. Martinez and Mrs. Martinez served reduced compromise offers of \$1.5 million and \$100,000, respectively. As before, Brownco took no action. At trial, Mr. Martinez obtained a judgment of \$1.6 million, and Mrs. Martinez obtained a \$250,000 judgment. Plaintiffs filed to recover \$561,000 in itemized costs from Brownco.

Brownco sought an order to disallow Mrs. Martinez's recovery of \$188,000 in expert fees incurred after her first settlement offer but before her second offer. The trial court sided with Brownco and denied plaintiff her expert fees, stating: "The most recently rejected offer is the only pertinent offer. All prior offers are extinguished by the subsequent offer." The Court of Appeal reversed, and allowed plaintiff to recover her expert fees incurred from the date of the first rejected offer. The California Supreme Court affirmed.

Asserting general contract principles, Brownco argued that the last offer extinguished and replaced the first one ("last offer rule"). Instead, the court applied a "first offer rule" in which favorability of the judgment and recoverability of costs would be measured against the earliest reasonable offer regardless of later offers. The court reasoned that the chances of settlement increase with multiple offers; parties should not be penalized for making more than one reasonable settlement offer; and parties should not be rewarded for rejecting multiple offers where each proves more favorable than the result obtained at trial.

An award of expert witness fees is discretionary, and the court may address any gamesmanship concerns, mischief, or confusion arising from later offers. The court's discretion to award a defendant expert fees (if a section 998 offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment) also serves as a meaningful check against mischief and gamesmanship.