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California Supreme Court Allows Costs Under C.C.P. § 998 From Date of First Offer When the Opposing Party Fails to Beat Any of the Multiple Offers

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The California Supreme Court recently allowed costs under California Code of Civil Procedure Section 998 ("Section 998") to begin to run from the date of the first Section 998 offer when the opposing party failed to obtain a judgment more favorable than the first offer or any subsequent Section 998 offer.

Subject to specific requirements and caveats, Section 998 generally allows a party to make an offer to compromise the outstanding claims to another party. If the offeree refuses the statutory offer of compromise and does not obtain a more favorable judgment or award, the offeror may be entitled to a separate judgment for the court costs, expert fees and other costs that he incurred from the rejection date of the Section 998 offer. Section 998's strong underlying purpose is to encourage settlement prior to trial by applying pressure to the parties through financial incentives and disincentives arising from the offers to compromise.

In *Martinez v. Brownco Construction Company, Inc.*, 56 Cal.4th 1014 (June 10, 2013), plaintiff Mr. Martinez first offered to compromise his negligence claim for personal injury against defendant Brownco for $4.75 million in August 2007. His wife, a co-plaintiff, made a separate Section 998 offer to compromise her loss of consortium claim against Brownco for $250,000. Brownco refused both offers.

In February 2010, Mr. Martinez made a second Section 998 offer for only $1.5 million. His wife made a separate reduced offer for $100,000. Brownco did not respond to any of the Section 998 offers.

At trial, Mr. Martinez obtained a judgment against Brownco for $1.6 million and Mrs. Martinez obtained a judgment for $250,000. Notably, the amount of the judgment Mr. Martinez obtained against Brownco was lower than his first offer, but higher than the amount of his second Section 998 offer. Brownco failed to obtain a more favorable judgment than either of Mrs. Martinez's Section 998 offers. Mrs. Martinez was entitled to costs under both of her Section 998 offers. In this case, the California Supreme Court only considered the Section 998 offers by Mrs. Martinez. The question was whether the amount of allowable costs should be measured from the rejection date of her first Section 998 offer or from the date of the second offer.

Plaintiffs filed a memorandum of costs seeking a total of $561,257 in itemized costs. Brownco sought to avoid Mrs. Martinez's recovery of $188,537 in expert fees incurred after her first Section 998 offer but before her second offer. The trial court ruled for Brownco and disallowed the expert fees Mrs. Martinez incurred between the first offer and the second offer. The trial court determined that, "[T]he most recently rejected offer is the only pertinent offer. All prior offers are extinguished by the subsequent offer." It reasoned that the "last offer rule" derived from contract law regarding offers should apply to

Section 998 offers, citing *Distefano v. Hall*, 263 Cal. App. 2d 380 (1968) and *Wilson v. Wal-Mart Stores, Inc.*, 72 Cal. App. 4th 382 (1999).

The appellate court reversed that decision and allowed Mrs. Martinez to recover costs from the date of the first offer, reasoning that this is consistent with Section 998's purpose. The appellate court, in effect, applied a "first offer rule," where recoverability of costs is measured against the earliest reasonable offer.

The California Supreme Court agreed with the Court of Appeal, and refused to rigidly consider each Section 998 offer as an offer under contract law. The Court determined that allowing costs to run from the date of the first offer promotes settlement, which is the clear policy underlying Section 998, by allowing the recovery of increased costs.

The Court relied heavily on the policy and purpose of Section 998, which is premised on using financial incentives and disincentives to encourage settlement.

Comment

Mr. Martinez obtained a judgment more favorable than the second offer but lower than his first Section 998 offer. Mr. Martinez would still be entitled to an award of costs from the rejection date of the second offer.

The Court did not consider the more interesting, though admittedly less usual, circumstance where a judgment is more favorable than a first offer but lower than a second offer. This could have occurred, for example, if Mr. Martinez's Section 998 offers were switched — $1.5 million as a first offer and a $4.75 million second offer, compared with his $1.6 million judgment. Under *Distefano* and *Wilson*, the second offer would extinguish the first under the "last offer rule" and the offeror would obtain no cost recovery. *Martinez* may apply narrowly only to situations where an offeree fails to beat any of the multiple Section 998 offers. However, the Court's heavy reliance on the general policy underlying Section 998 may encourage successful Section 998 offerors to urge this same general policy to encourage courts to award higher costs in this situation as well.

After *Martinez*, more litigants will seek recovery of costs incurred after a rejected first offer under Section 998's underlying purpose of encouraging settlements.

Martinez v. Brownco Constr. Co., Inc., 56 Cal. 4th 1014 (June 10, 2013)

For more information, please contact Brendon L.S. Hansen or your regular Hinshaw attorney.
