

Early 2012 Case Law Analysis – Settlement Offers Pursuant to Code of Civil Procedure section 998 – By Benjamin Ikuta

In early 2012, two cases have been published which will have a profound impact on settlement offers in California, particularly in Medical Malpractice matters.

In California, Code of Civil Procedure section 998 governs settlement offers. Accordingly, sending a monetary settlement offer in California is commonly known as a “998 offer.” The purpose of the 998 statute is to promote settlement by enacting significant consequences to rejecting a reasonable offer and failing to improve on that offer at trial. After a 998 offer is made, the opposing party has only 30 days to decide whether to accept the offer. If not accepted within the 30-day period, the offer is deemed withdrawn.

The consequences of not accepting a 998 offer within the 30-day period can have a profound impact on the party’s costs after trial. If a party fails to better the 998 offer at trial, that party must pay the reasonable litigation costs of the opposing party after the offer was tendered. These costs include filing costs, deposition costs, attorney travel costs and, in some cases, interest and attorney fees.

In addition, if a defendant fails to beat the plaintiff’s 998 offer at trial, the defendant is also liable for the postoffer fees of the plaintiff’s expert witnesses both in preparation for and during trial. Likewise, a plaintiff who fails to better a defendant’s offer may also be required to pay the defendant’s expert witness costs.

The expert fee provisions in a 998 offer are especially significant in Medical Negligence cases. The applicable standard of care in Medical Malpractice cases can be established only by experts in the field. Likewise, causation in Medical Malpractice matters must be based upon qualified expert testimony. Lastly, life care plans, economist reports, independent medical examinations, life care reports, and various other damage-related analysis usually require expert testimony. Thus, experts are a critical and substantial part of a Medical Malpractice action. Typically, the bulk of expert fees are accumulated at or on the eve of trial, after a 998 offer has been tendered. Therefore, the expert fee-shifting provisions of section 998 are often substantial, particularly in professional negligence matters.

With this backdrop, we analyze the recent decisions interpreting the 998 statute.

Martinez v. Brownco

Until very recently, California law dictated that any 998 offer would extinguish the legal impacts of any previous 998 offers. In 1999, the California Third District Appellate Court in *Wilson v. Walmart* (1999) 72 Cal.App.4th 382, 390 established a bright line rule where any judgment could only be measured against a single valid statutory offer regardless of offers made earlier in the litigation. Therefore, even if a party fails to beat an earlier 998 offer in litigation, they are not liable for any costs or fees following that offer.

In *Wilson*, a customer slipped and fell at a department store and sued for damages. Early in the litigation, the customer sent an offer to compromise for \$150,000. The department store did not respond within the 30-day period and the offer was therefore rejected. Over a year later, the customer asserted a second offer for \$249,000. Once again, the store allowed the offer to lapse.

Following a jury verdict of \$175,000 in her favor, the customer sought 998 costs in excess of \$100,000. This included expert fees incurred after the first offer. Although the store bettered the customer's second offer, the customer argued that her first 998 offer should be controlling.

The Appellate Court disagreed, finding that her second offer extinguished the first. Specifically, the Court found that possible settlement was promoted by allowing only a single offer. The Court explained that if more than one offer was permitted, there was nothing precluding a plaintiff from continuously raising her offer before trial. The Court ruled that such gamesmanship did not promote settlement and therefore refused to allow the plaintiff to recover her expert fees following the first offer.

However, on February 10, 2012, a recent case in the California Second District Appellate Court explicitly rejected the *Wilson* holding. Specifically, *Martinez v. Brownco Const. Co., Inc.* held that subsequent 998 offers do not overturn or extinguish the impact of prior 998 offers. In other words, if a party fails to beat the first 998 offer, they must pay expert fees/costs following the offer even if a subsequent offer is tendered.

In *Martinez*, the plaintiff sent a 998 offer for \$250,000. Two and a half years later, the plaintiff sent a second 998 offer for \$100,000. A jury ultimately found for plaintiff in the amount of \$250,000. Since defendant failed to beat plaintiff's first offer, plaintiff sought to recover her expert fees following her first 998 offer rather than her second 998 offer. Following *Wilson*, the trial court allowed plaintiff to recover her expert fees following the second offer, but refused to allow her to recover her expert fees accrued between the first and second offer.

The Appellate Court reversed, finding that plaintiff was entitled to her expert fees following the first offer. The Court read the face of the 998 statute and used general contract principles to hold that a second offer does not extinguish the impact of the first offer. Furthermore, the Court explicitly disagreed with *Wilson* and held that the "trial court abused its discretion when, albeit following *Wilson*, it found that plaintiff's second offer to settle extinguished her first." The Court also disagreed with the *Wilson* decision that multiple offers would discourage settlement.

It would not be surprising if the California Supreme Court reviews the issue of whether a subsequent 998 offer extinguishes the impact of a prior offer. However, as it stands, the *Martinez* matter raises interesting strategic considerations in civil litigation cases, especially in Medical Malpractice cases. Under *Martinez*, either party can submit a subsequent 998 offer that is more beneficial to its side without losing the impact of the prior, less desirable offer. The *Martinez* case will have a profound impact on civil litigation since 998 offers are a common and recurrent aspect in professional negligence matters.

Chaaban v. Wet Seal

In *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, the California Fourth Appellate District addressed the issue of whether a party can recover the fees expended on an opposing expert when the opposing party fails to beat a 998 offer. The Court held that expert fees may be awarded under section 998 regardless of who retained the expert.

The plaintiff sued her employer for wrongful termination. The plaintiff rejected the employer's 998 offer for \$20,000. The plaintiff then hired an expert to testify at trial. The employer paid the expert his hourly rates after noticing and taking his deposition at a total cost of \$2,500. However, the expert did not testify at trial due to a successful motion in limine by the employer.

After a jury verdict in the employer's favor that awarded the plaintiff no monies, the employer sought to recover the costs of deposing the expert witness. The plaintiff argued that she was not liable to pay these costs since the employer had not retained the expert. In addition, the plaintiff claimed that since the expert did not actually testify or produce any evidence at trial, the costs should be stricken. The trial court disagreed, awarding the employer the costs of deposing the expert witness.

The Appellate Court affirmed the trial court's decision. The Court found that section 998 "contains no limitation on the source of an expert; it allows recovery of costs incurred for the services of expert witnesses without qualification as to the sponsoring side." In addition, the Court determined that the legislative intent of section 998 to encourage settlements supported the principle that a non-settling party is potentially liable for *all* of the expert fees, regardless of the source.

Lastly, the expert fee was recoverable despite the fact he never testified at trial because the deposition was reasonably necessary to prepare for trial. Without the deposition testimony, the employer would have lacked the very subject matter on which it based its motion in limine.

In Medical Malpractice litigation, this is an extremely important decision. Experts in the medical field typically charge high rates for litigation. In addition, medical experts often require a minimum number of hours or an inflated rate for deposition testimony. In fact, parties are often required to pay high expert rates to subsequent treating physicians who are not retained by any party. In the past, parties often decided to omit the depositions of treating physicians and an opposing party's experts due to the exorbitant costs relative to the benefits. However, since the opposing party is now liable for these costs if she fails to recover a more favorable award under section 998, parties will be more apt to take these depositions. The recovery of expert fees regardless of whose witness the expert is will also greatly encourage and promote settlement in medical malpractice matters.