CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Martinez v Browncо Construction Company, Inc. 6/10/13

CCP section 998; Successive Offers; Expert Witness Fees

Plaintiff Raymond Martinez was injured by an electrical explosion. He and his wife both sued Browncо, which performed demolition work at the jobsite, for negligence and loss of consortium. On August 30, 2007, plaintiff served defendant with a statutory offer to compromise pursuant to section 998 in the amount of $4,750,000. His wife, Gloria Martinez, served a similar offer for $250,000. Both were allowed to lapse, and were withdrawn by operation of law after the 30 days statutory period had passed. On February 8, 2010, plaintiff served a second 998 offer to compromise for $1,500,000 and his spouse for $100,000, and again Browncо took no action.

The case went to trial and after assessing plaintiff 10% and his employer 40% fault, the jury found Browncо 50% at fault and awarded plaintiff $1,646,674 and his spouse $250,000. Plaintiffs filed a memorandum of costs seeking a total of $561,257.14 in itemized costs. Browncо moved to tax costs, and sought an order disallowing Mrs. Martinez's recovery of $188,536.86 in expert fees incurred after her first settlement offer but before her second offer. The trial court agreed with Browncо, but the Court of Appeal reversed, reasoning that the allowance of expert fees incurred from the date of the first rejected offer is consistent with section 998's language and purpose, and that contract principles do not compel otherwise. The Supreme Court then accepted the case for review. The main question presented is whether a second 998 offer to compromise extinguishes the first such offer.

Expert fees are recoverable when a judgment following the nonacceptance of a pretrial settlement offer triggers operation of section 998. To qualify for the

augmented costs, the plaintiff's offer must be in writing and conform to statutory content requirements. (Section 998(b)) The Supreme Court noted the policy behind section 998 is to encourage the settlement of lawsuits. (*T.M. Cobb Co. v Superior Court* (1984) 36 Cal.3d 273) Section 998 provides a strong financial disincentive to a party – whether it be a plaintiff or a defendant – who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer. (*Bank of San Pedro v Superior Court* (1992) 3 Cal.4th 797) The potential for statutory recovery of expert witness fees and other costs provides parties a financial incentive to make reasonable settlement offers. Section 998 aims to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits. (*Culbertson v R.D.Werner Co., Inc.* (1987) 190 Cal.App.3d 704)

Nothing in the language of section 998 prevents a plaintiff from making more than one compromise offer, but the statute makes no mention as to the effect of a later offer on an earlier offer. When the language of section 998 does not provide a definitive answer for a particular application of its terms, courts may consult and apply general contract law principles. Because the process of settlement and compromise is a contractual one, such principles may, in appropriate circumstances, govern the offer and acceptance process under section 998. A general contract law principle may be found controlling if the policy of encouraging settlements is best promoted thereby. (*T.M. Cobb*, at p. 281) for example, under general contract law, an offer may be revoked any time before acceptance. (Civil Code section 1586) As explained in *T.M. Cobb*, because more offers will be made if revocation is permitted and because the more offers that are made, the more likely the chance for settlement, the Supreme Court has concluded that applying the basic principle of revocability better serves the policy of encouraging settlements than a rule of irrevocability.

Of course a contract law principle will not be found to govern if its application would conflict with section 998 or defeat its purpose. A counter offer that deviates from the terms of an offer ordinarily operates as a rejection of the offer so as to terminate the offer immediately. The Supreme Court earlier found this principle inapplicable in the 998 context because such a rule would tend to stifle negotiations and discourage settlement. (*Poster v Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266) Another relevant consideration is whether applying

section 998 in a particular manner serves the public policy of compensating the injured party. Courts look favorably upon applications that provide flexibility when parties discover new evidence bearing on the plaintiff's injuries or the defendant's culpability. Finally, a court should assess whether the particular contract law application injects uncertainty into the section 998 process. If a proposed rule would encourage gamesmanship or spawn disputes over the operation of section 998, rejection of the rule is appropriate. (*Westamerica Bank v MBG Industries, Inc.* (2007) 158 Cal.App.4th 109)

The parties focused primarily on two Court of Appeal decisions that addressed the effect of a second statutory offer on a first statutory offer. In *Distefano v Hall* (1968) 263 Cal.App.2d 380, two defense offers were submitted under the predecessor statute CCP section 997. The appellate court affirmed the trial court award of costs to plaintiff who obtained a verdict ($12,559) in excess of defendant's second statutory offer ($10,000) but not in excess of the earlier such offer ($20,000). The court emphasized the contractual nature of the statutory settlement and compromise process and the general contract rule that any new offer communicated prior to a valid acceptance of a previous offer extinguishes and replaces the prior one. Noting a legislative intent to give full effect to the parties' reappraisals of the merits of their cases, *Distefano* concluded that parties should be encouraged to make and consider multiple settlement offers and that the policy in favor of settlements would be promoted by a rule that a later statutory offer extinguishes a previous statutory offer for purposes of cost shifting.

In the second case, *Wilson v Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, a plaintiff made two section 998 offers to compromise, first for $150,000 and the second for $249,000. Defendant failed to respond to either offer and they were both deemed withdrawn by operation of the statute. The jury awarded plaintiff $175,000, but the trial court granted defendant's motion to tax, finding plaintiff's last offer of $249,000 superseded and extinguished the first offer. The appellate court affirmed, specifically agreeing with *Distefano*. It stated that parties must be allowed to review their respective positions as more information is discovered and to consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial. It expressed concern that if a subsequent offer did not extinguish a previous one,

then a plaintiff might be encouraged to maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the plaintiff finds comfort in the knowledge that, even if the plaintiff receives an award less than his or her last demand, the plaintiff might still enjoy the cost reimbursement benefits of section 998 so long as the award exceeded a lower demand made by the plaintiff sometime during the course of the litigation. Thus, under the so-called "last offer rule" applied in *Wilson* and *Distefano*, when a party makes successive unrevoked and unaccepted section 998 offers, the last such offer is the only operative offer with respect to the statutory benefits and burdens.

Justice Baxter then turned to Mrs. Martinez' effort to recover expert fees incurred from the date of her first offer and the question of whether that would be consistent with the language and purpose of section 998. First, the language of the statute itself (section 998(d)) is not contravened by allowing such a recovery for expert fees incurred after her earlier August 2007 offer in addition to those incurred after the second offer of February 2010. It is undisputed that each offer met the statutory requirements of section 998, and defendant did not obtain a more favorable judgment. In addition, allowing such a recovery would further the goals of section 998, encouraging settlement by affording a benefit of enhanced costs to parties who make reasonable settlement offers and imposing a burden on offerees who fail to obtain a better result than they could have achieved by accepting the offer.

The Court added: This purpose would be more fully promoted if the statutory benefits and burdens were to operate whenever the judgment or award is not more favorable than any of the statutory offers made. If the statutory benefits were to run only from the date of the last offer, plaintiffs might be deterred from making early offers or from later adjusting their demands. This would inhibit settlement opportunities.

The Court of Appeal declined to apply the last offer rule because it found the underlying contractual principle did not apply. In effect, 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, with the trial court retaining discretion when awarding costs to address any

gamesmanship concerns or any mischief or confusion arising from later offers.

Here plaintiff made two statutory offers, and defendant failed to obtain a judgment more favorable than either. In cases such as this, section 998's policy of encouraging settlements is better served by not applying the general contract principle that a subsequent offer entirely extinguishes a prior offer. Not only do the chances of settlement increase with multiple offers, but to be consistent with section 998's financial incentives and disincentives, parties should not be penalized for making more than one reasonable settlement offer.

Accordingly, the California Supreme Court holds that where a plaintiff serves two unaccepted and unrevoked statutory offers, and the defendant fails to obtain a judgment more favorable than either offer, the trial court retains discretion to order payment of expert witness costs incurred from the date of the first offer. This will encourage parties to make more settlement offers and promote the policy of compensating injury victims. It will also encourage parties to adjust their settlement posture without forfeiting statutory benefits. Finally, since section 998 expressly states an award of expert witness fees is discretionary, if a later offer results in mischief or confusion, or any gamesmanship appears, the court may address such concerns when considering what postoffer fees to award.

The judgment of the Court of Appeal is affirmed.