

Chabaan v. Wet Seal, Inc., et al

If CCP 998 Offers To Compromise Are Rejected, The Prevailing Party At Trial Can Recover Fees Paid Not Only To Its Experts, But Also Fees Paid To The Opposing Party's Experts

In *Chabaan v. Wet Seal, Inc., et al.* (2012 Cal.App. LEXIS 84), the Fourth Appellate District provided guidance regarding what costs are recoverable following a rejected California Code of Civil Procedure section ("CCP") 998 offer to compromise. For the first time, the Court interpreted CCP 998(c)^[1] as giving "the trial court the discretion to award defendant's expert fees, regardless of whose witness the expert is, in the event that the plaintiff fails to obtain a more favorable judgment or award." In *Chabaan*, plaintiff sued her employer for wrongful termination. Prior to trial, defendant made a CCP 998 offer to compromise, which plaintiff rejected. Defendant subsequently deposed plaintiff's designated expert, and paid plaintiff's expert a fee of \$2,500.00. Defendant then ordered an expedited copy of the deposition transcript (which doubled the cost), in order to prepare a Motion in Limine to exclude that expert from testifying at trial by the deadline set in the Local Rules. The Court subsequently granted the motion and excluded plaintiff's expert from testifying at trial. Defendant ultimately prevailed at trial and then filed a memorandum of costs and sought to recover, among other costs, the deposition fee paid to plaintiff's expert as well as the cost to obtain the expedited transcript. Plaintiff filed a motion to tax costs and argued defendant was only entitled to recover expert fees incurred for defendant's own experts, and not fees paid to plaintiff's experts. Moreover, plaintiff argued defendant was not entitled to recover any expedited fees under CCP 998. The trial court denied the motion, finding that the fees defendant paid to plaintiff's expert were expended in preparation for trial and the expedited costs were necessary given the timing between plaintiff's expert deposition and deadlines for filing motions in limine. The Court of Appeal affirmed, holding that CCP 998(c) does not differentiate between fees paid for plaintiff's experts or defense experts; rather it allows recovery of costs incurred for "the services of expert witnesses."

This decision reiterates the primary policy of CCP 998: to encourage settlement by providing strong financial incentive to a party – whether it be a plaintiff or defendant - who fails to achieve a better result than that party could have achieved by accepting the CCP 998 offer. In other words, it punishes a party who does not accept a reasonable offer from the opposing party. This case adds to that financial incentive, as the prevailing party can now not only recover its own expert fees, but can also recover fees

spent on the opposing side's experts (e.g., deposition fees and transcripts) in the Court's discretion. This principle is true even if the expert does not testify at trial, as the fees are "incurred and reasonably necessary in...preparation for trial." This decision is also noteworthy for explaining the various costs allowed to be recovered under CCP 998, including expedited fees, so long as the party incurring the costs has satisfactorily accounted for the need to incur such costs to the trial court. This decision reinforces the need for counsel to carefully discuss with their clients the potential high costs of rejecting a reasonable CCP 998 offer, as well as the advantages of making a reasonable CCP 998 offer prior to trial.

¹ CCP 998(c) governs defendants' settlement offers to plaintiffs; whereas CCP 998(d) governs plaintiffs' settlement offers to defendants. Both subsections use virtually identical language regarding the recovery of expert costs.

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