

Where A Party Makes Two CCP § 998 Offers And Both Are Rejected (Or Lapse), The Second Offer Does Not Extinguish The First For Purposes Of Cost Shifting.

In *Martinez v. Brownco Construction Co., Inc.* (2012 Cal.App. LEXIS 122), the Second Appellate District examined whether a plaintiff, who served the defendant with two Code of Civil Procedure ("CCP") section 998 offers to compromise, was entitled to costs incurred between the time the first and second offers were made.^[1] Here, the plaintiff served the defendant with an offer to compromise on August 30, 2007, in the amount of \$250,000. The offer was withdrawn by operation of law after 30 days. The plaintiff later served a second offer to compromise on February 8, 2010, in the amount of \$100,000, which was also withdrawn by operation of law when trial began on February 18. Between the time the first and second offers to compromise were made, the plaintiff incurred over \$188,000 in expert fees. At trial, the plaintiff was awarded \$250,000. After trial, the plaintiff sought recovery of the expert fees that were incurred between the time the first and second offers to compromise were made. The defendant argued, and the trial court agreed, that the plaintiff was not entitled to those fees because the second offer extinguished the first offer. The Court of Appeal reversed.

Under CCP section 998, subdivision (d), if a plaintiff makes a reasonable offer to compromise and the defendant rejects that offer but fails to obtain a more favorable judgment at trial, then the court may require the defendant to pay the plaintiff costs incurred after the offer to compromise was made. However, the statute is silent as to the effect of multiple offers to compromise. Here, it was undisputed that the plaintiff would have been entitled to the expert fees had she not made a second offer to compromise. In reversing the trial court's holding, the Court of Appeal reasoned that it would discourage settlement if a party was denied the benefit of making reasonable offers to compromise. The court noted that if a party knows that making a subsequent offer to compromise will extinguish the benefits potentially gained from the first offer, then that party will not be incentivized to attempt settlement at a later point in the case.

Thus, to encourage settlement and respect the Legislature's preference for early discovery and evaluation of the merits of an action, the Court of Appeal held that a second offer to compromise does not impact a party's entitlement to costs incurred after a first offer is made. This decision strengthens the judiciary's support of settlement efforts and is the second decision involving Section 998 offers in less than two weeks by



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the Court of Appeal.

[1] This case involves husband and wife plaintiffs who each made CCP § 998 offers to compromise. However, the issue of recovery for expert fees incurred between the first and second CCP § 998 offers is only relative to a discussion of the wife's offers to compromise. Accordingly, only the wife's offers and recovery are discussed above.

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