

[Appellate Court Concludes that Cost Shifting is Calculated from the Date of the Last Urevoked Offer of Judgment](#)

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In [One Star Inc. v. Staar Surgical Co.](#) the [Second District Court of Appeal](#) reversed the decision of the trial court concerning the interpretation of the “offer of the judgment” statute, [California Code of Civil Procedure § 998](#).

One Star Inc. (“Star”) was a business representative for Staar Surgical Co. (“Surgical”). Star sued Surgical for breach of contract. In September of 2007, Surgical made an offer of compromise pursuant to CCP § 998. Pursuant to the terms of the statute the offer lapsed 30 days after it was made and not accepted. Two months later Surgical made a second offer. However, Surgical withdrew the offer before the date that it lapsed. Star was successful at trial but recovered less than what Surgical had offered in the first offer of judgment. Surgical then moved to recover the costs pursuant to CCP § 998.

Pursuant to CCP § 998 a party may make an offer in writing to allow judgment to be taken against that party. If the offer is not accepted prior to trial, or within 30 days after it is made, it is deemed withdrawn. If the plaintiff fails to accept the offer and fails to obtain a higher judgment, the plaintiff is required to pay the defendant’s costs, including proper expert costs. For this reason the statute can be a powerful settlement tool in litigation.

The trial court denied Surgical’s motion to recover costs on the ground that the second withdrawn offer extinguished the first offer. Surgical appealed, arguing that its first offer still controlled because it expired before the second offer was made and withdrawn. The court of appeal agreed and reversed.

The appellate court held that under Section 998, when a plaintiff refuses a settlement offer and then obtains a less favorable judgment at trial, the defendant is entitled to those costs incurred after the settlement offer. The later offer operates to extinguish the earlier offer, regardless of its validity. However, there is an exception where the offer of judgment is revoked before expiration of the statutory period. It is no longer treated as a valid 998 offer.

Thus, where a defendant withdraws a second settlement offer, the plaintiff’s recovery is measured against the first settlement offer. In this case, the second offer was revoked and no longer considered a valid offer of judgment. Thus, the court of appeal concluded that the lower court made an error when it ruled that the prior offer was extinguished by the second offer.