

## *Recent Court Decisions Create Ambiguity Over California CCP 998 Cost-Shifting Statute, by Katherine S. Catlos, Esq. and Heather L. Caughron, Esq., 3-19-2024*

Many attorneys use California Code of Civil Procedure section 998's "offers to compromise" as a tool to encourage pre-trial settlement.

CCP 998 is a cost-shifting statute that incentivizes a party to accept an offer to compromise (i.e., settle) because if a party rejects a 998 statutory settlement offer and fails to obtain a more favorable judgment, the statute shifts post-offer litigation and expert costs, including potential attorney's fees recoverable by statute or contract, to the party who failed to accept a reasonable 998 settlement offer.

Two recent court decisions broaden section 998's applicability to allow a party to apply the statute's cost-shifting provisions when the case ends in settlement as opposed to judgment.

The most recent ruling, *Jacob Ayers v. FCA US, LLC* (2024) (B315884), involved the settlement of a "lemon law" cause of action asserted under the Song-Beverly Consumer Warranty Act (Song-Beverly), California Civil Code section 1790, et seq. Plaintiff Ayers sued automaker FCA over alleged problems with a new Jeep Grand Cherokee. Over several years, FCA made three section 998 offers that were rejected by plaintiff. After trading in the Jeep, plaintiff then issued three 998 offers to FCA. The third offer, similar to FCA's last 998 offer, was accepted by FCA. However, the parties failed to agree on costs, expenses and attorney fees and plaintiff filed a motion to determine these amounts. FCA argued its third 998 offer precluded plaintiff from recovering attorney fees incurred after its 998 offer date and moved to tax plaintiff's costs accordingly. Plaintiff pursued and was granted a judgment for fees and costs incurred after rejecting FCA's 998 offers.

FCA appealed the trial court's order granting post-offer attorney fees and costs after plaintiff rejected FCA's valid and good faith pretrial 998 offer. A significant issue was whether section 998's cost-shifting penalty provisions apply when an offer to compromise is rejected and the case ends in settlement, and not a judgment.

While the trial court held that "section 998's limitations on expense and cost recovery do not apply when the case is resolved by a pretrial settlement," the California Second District Court of Appeal disagreed. The court of appeal applied section 998, and refused to allow plaintiff his post-offer costs because plaintiff did not prevail on FCA's 998 offer. In other words, plaintiff's settlement was less than FCA's final CCP 998 offer, and thus applying 998, plaintiff was not entitled to his post-offer costs.

In doing so, the court of appeal pointed to an earlier lemon law case, *Madrigal v. Hyundai Motor America* (2023) 90 Cal.App.5th 385, 399 (review granted Aug. 30, 2023, S280598), where a divided three-judge panel of the California Third District Court of Appeal agreed that section 998 does not exclude cases that end in settlement or limit its cost-shifting provisions to cases that end in a judgment after trial.

Consider now, using a 998 in a California Fair Employment and Housing Act (FEHA) employment context. A defendant employer would not be entitled to costs unless a court or arbitrator determined that plaintiff's claims were frivolous. "[A] prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." Cal. Gov. Code section 12965 (c)(6), et seq.

If a FEHA-plaintiff rejects an employer's reasonable CCP 998 made after an unsuccessful mediation, for example, and the case ultimately settled for less, the employer, with the requisite finding, could bar plaintiffs from receiving their post-offer costs.

The broad applicability of *Ayers* and *Madrigal* has yet to be established by the courts. However, these cases suggest that courts will uphold 998 offer cost shifting in certain settlement and limited employment contexts.

While 998 offers are a useful tool that can help expedite a settlement and reduce litigation costs, how the offer and any corresponding settlement agreement is drafted will be even more critical as it may impact the final resolution of the dispute.

Given the recent court decisions and the heightened spotlight on 998's, companies should seek legal counsel to assess whether extending a 998 offer is prudent and to ensure their 998 offer is carefully drafted to best optimize their litigation strategy.

#### Kaufman Dolowich Can Help

Kaufman Dolowich's team of skilled labor and employment attorneys are well versed in drafting and negotiating 998 offers and can assist in navigating complexities surrounding these powerful tools.