

## Cost Shifting is Proper Where Defendant's Section 998 Offer Was Reasonable as a Matter of Law

November 21, 2011 by [David J. McMahon](#)

In [Adams v. Ford Motor Co.](#), 2011 Cal. App. Unpub. LEXIS 7411 (Cal. App. 2d Dist. Sept. 29, 2011), the [California Court of Appeal for the Second Appellate District](#) decided an important case arising under the cost shifting provisions of [California Code of Civil Procedure § 998](#). This is the so called “offer of judgment” statute. The case arose out of a wrongful death claim against [Ford Motor Co.](#) (“Ford”).

The decedent allegedly performed regular maintenance on his vehicles. Five of the cars were manufactured by Ford. He contracted [mesothelioma](#) and passed away. His wife and their three children sued Ford. The plaintiffs argued that Ford’s products caused the decedent’s exposure to asbestos.

Ford served the plaintiffs with a settlement offer under CCP § 998 in the amount of \$2,500 per plaintiff, amounting to \$10,000. The offer also included a mutual waiver of costs. The plaintiffs did not respond to the offer, allowed it to expire and the case went to trial.

The jury found in favor of Ford, and Ford filed a memorandum of costs, claiming \$185,741 in costs, including expert witness fees of \$167, 570 pursuant to the cost shifting provisions of CCP § 998.

The plaintiffs moved to tax costs.

Plaintiffs alleged that Ford’s 998 offer was made in bad faith and that Ford had no reasonable expectation that the offer would be accepted. Thus, it was made only to recover expert witness fees in the event that Ford prevailed at trial. The trial court denied plaintiffs’ motion as the lower court concluded that the offer was reasonable.

The Court of Appeal affirmed the lower court’s ruling. The Court noted that if a plaintiff does not accept a defendant’s Section 998 offer and the plaintiff fails to obtain a more favorable judgment, the plaintiff may not recover post-offer costs. Moreover, the plaintiff must pay the defendant’s costs from the time of the offer as well as for the services of expert witnesses.

However, to be enforceable, the settlement offer must be **“realistically reasonable under the circumstances of the particular case.”** The Court concluded that the plaintiffs should have known that their chances of prevailing were slim because they had entered into several other settlements with other defendants for amounts much lower than they sought from Ford.