

The Morrison Law Journal  
February 2007  
Volume II, Edition 2

A Controlling Authority: Court of Appeal Rules  
That Offer To Compromise Statute Applies To Bar Recovery  
Of “Post-Offer” Attorney’s Fees To Plaintiffs Which Were Otherwise  
Entitled To Recover All Attorney’s Fees Incurred Under The Song-Beverly Act

By: Edward F. Morrison, Jr.  
Christina S. Karayan

In a case which may have significant impacts in regard to the recoverability of “post-offer” attorney’s fees, the California Court of Appeal, Third Appellate District, ruled that a plaintiff which failed to obtain a more “favorable” judgment or award in comparison to a pre-trial Offer to Compromise under Code of Civil Procedure section 998 could not recover “post-offer” attorney’s fees even though the plaintiff had won an award under a statute which provided for recovery of attorney’s fees to a prevailing plaintiff.

In the case of William R. Duale, et al. v. Mercedes-Benz USA, LLC (2007) DJDAR 2133 (herein, the “Duale” case), the Court of Appeal reversed a trial court’s ruling that permitted “post-offer” attorney’s fees to be awarded to plaintiffs which had won an award under California’s Lemon Law because the amount of the award was less than an Offer to Compromise which had been served before trial. The facts in the Duale case are common enough. In that case, the plaintiffs sued Mercedes-Benz USA, LLC and Mercedes-Benz of Sacramento (collectively, “Mercedes-Benz”) for rescission, contract revocation and damages and penalties under the Song-Beverly Act (found in California Civil Code section 1790, et. seq.) based upon alleged defects involving a dome light which would not turn off when the passenger doors were closed, excessive noise from the suspension system and the rear muffler when the car was in operation, excessive noise (or “thump”) emanating from the rear of the car when stationary and loss of power when the car was driven on the open road.

Prior to trial, defendant Mercedes-Benz offered to take back the car in exchange for \$51,466.00 plus “plaintiffs’ reasonably incurred attorney’s fees and all court costs incurred to date to be determined by the court if the parties could not agree”. The plaintiffs did not accept the settlement offer apparently because they wished to bring a motion to recoup pre-judgment interest (there did not appear to be a dispute with the amount offered, save for pre-judgment interest).

Following a five day jury trial, the jury awarded plaintiffs \$49,885.00 in damages under the Song-Beverly Act based upon a finding that the “rear thump” noise was a non-conformity covered by the warranty that substantially impaired the use, value or safety of the vehicle. The jury also found that the mileage on the vehicle was 4,348 at the time the car was brought in for repair. The award of \$49,885.00 reflected the purchase price of the vehicle less the mileage at the time the car was brought in for repair, as calculated under the Song-Beverly Act.

Despite the fact that the plaintiffs failed to obtain an award which was “greater” than the pre-trial Offer to Compromise, the trial court awarded both “pre-offer” and “post-offer” attorney’s fees and “pre-offer” costs to the plaintiffs on the basis that the Song-Beverly Act is a “specific” statute allowing costs, including attorney’s fees, for prosecuting cases such as the one above and the Offer To Compromise statute, found in Code of Civil Procedure section 998, is general in nature (the trial court also awarded “post-offer” costs to Mercedes-Benz).

On appeal, the Court of Appeal reversed the trial court’s award of “post-offer” attorney’s fees to the plaintiffs and ruled that, even though the costs feature of the Song-Beverly Act is more specific in comparison to the Offer to Compromise statute under Code of Civil Procedure Section 998, the Song-Beverly Act “does not trump or supersede the provisions of Code of Civil Procedure Section 998 when, as here, the two may be reconciled”. The Court of Appeal, citing the California Supreme Court’s decision in Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal.4th 985, 992, held that where no conflict or inconsistency could be determined to have occurred, the Song-Beverly Act did not preclude operation of Code of Civil Procedure Section 998 as it relates to recovery of “post-offer” costs. The Court of Appeal went on to comment that while a plaintiff may be encouraged to sue by the prospect of recovering his attorney’s fees and costs, if successful, “no articulated public policy is served by allowing him to maintain a lawsuit that loses its economic viability by virtue of the seller’s willingness to settle on terms better than those a jury will award”.

The Duale case is important in that it will provide a basis for a defendant, which has previously served an Offer to Compromise which is greater in amount than the award at trial, to successfully oppose a claim for post-offer attorney’s fees even though they are awardable under a specific statute.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Christina S. Karayan is a senior associate of The Morrison Law Group, a professional corporation. Their biographies can be viewed at [www.morrisonlawgroup.com](http://www.morrisonlawgroup.com).

Publication Note: The Morrison Law Group wishes to disseminate this publication to all clients and colleagues of the Firm who wish to receive it. Should any recipient desire to be removed from the distribution list, or wishes to have a colleague added, please contact Sabrina Jo Lewis at The Morrison Law Group at 213 356-5500 or [lewis@morrisonlawgroup.com](mailto:lewis@morrisonlawgroup.com).

Disclaimer Note: The legal article presented above is intended to provide general information which may be of interest or use to clients and colleagues of The Morrison Law Group and should not be construed as legal advice on any matter. ND: 4835-3241-7281, Ver 1