

Post Judgment Execution on Attorneys' Fees: *Navigating An Area That Is Ripe For Review*

A present split of authority may affect the collection of costs and attorneys' fees. As a general rule, an appeal does not stay enforcement of a money judgment. This issue becomes more complex however, as it relates to defendants. When a party is sued, defending against the suit can often become only half the battle. Normally, the successful defending party may recover costs, and sometimes, even attorneys' fees. But what happens if the losing plaintiff files an appeal? For recovering costs, the law is settled: under California Code of Civil Procedure Section 917.1, the appeal operates as a stay of the case, forcing the successful defending party to wait until the conclusion of the case, including the appeal.

As to attorneys' fees however, the courts have come down on both sides, making recovery of these fees without a stay possible, but a tricky endeavor. The main issue is whether attorneys' fees should be considered costs under Section 917.1, which would postpone recovery until after the appeal. Early on, in cases such as *Pecok v. Black*, 7 Cal.App.4th 456, 459-462 (1992) and *Nielsen v. Stumbos*, 226 Cal.App.3d 301, 304-305 (1990), the courts lumped attorneys' fees with costs, finding that these awards were subject to the automatic stay pending appeal under Section 917.1. However, the court in *Chamberlin v. Dale's R.V. Rentals, Inc.*, 188 Cal.App.3d 356, 361-362 (1986) disagreed. The generally accepted reason for requiring a stay for costs is that they are awarded in nearly every case. The court in *Chamberlin*, reasoned that attorney's fees are not like incidental routine costs, in that they are not routinely awarded in every case. Additionally, the *Chamberlin* court reasoned that attorneys fees are a directly litigated issue, whereas costs are merely incidental to the judgment.

In 1992, the court in *Bank of San Pedro v. Superior Court*, 3 Cal.4th 797 (1992) essentially adopted the *Chamberlin* ruling. Though the issue in *Bank of San Pedro* related to the collection of expert witness fees, they included attorneys' fees in its

discussion. Specifically, the court in *Bank of San Pedro* found that expert witness fees "like attorneys' fees" are non-routine costs that are not subject to the automatic stay of enforcement pending appeal. The *Bank of San Pedro* court also criticized a number of the prior holdings, and for a time, the matter was settled.

In 1993, the Legislature amended Section 917.1, removing undertaking requirements for costs awarded under Chapter 6 of the Code of Civil Procedure, but permitting them regarding costs under Code of Civil Procedure Section 998. This led to some confusion as to whether awards of attorneys' fees were still considered to be exempt from the automatic stay pending appeal.

Most recently, in 2007, the court in *Behniwal v. Mix*, 147 Cal.App.4th 621 (2007) sided again with the exemption for attorneys' fee awards from the automatic stay, following the court in *Bank of San Pedro*. Although the direct issue in that case dealt with whether a contractual fee award is incidental to a specific performance judgment, the court engaged in a detailed discussion of the prior history regarding the attorneys' fees issue, and, following the court in *Bank of San Pedro*, reasoned that expert witness fees "and surely, we can add, attorney fees" are always a matter of trial court discretion, even if awarded as a matter of right. In so finding, the court reiterated the distinction between routine costs and non-routine attorneys' fees, as set forth in *Chamberlin* and *Bank of San Pedro*.

Based on this, it is possible to successfully seek to enforce an award of attorneys' fees, even where the losing plaintiff appeals the decision. Because the prior cases have not been overruled (though they have been criticized), it is likely that this issue will be taken up and settled by the Supreme Court in the not too distant future.