DOES CCP 917.1 REQUIRE AN UNDERTAKING TO STAY A “COSTS ONLY” JUDGMENT?

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The law used to be well settled that an award of costs did not require an appellant to obtain a bond to prevent enforcement of a cost award pending appeal. That is what the statute said. That was how the courts interpreted the statute. But things change.

The endemic tendency of common law courts to emphasize precedent at the expense of expressions by the Legislature can be blamed for the current state of confusion regarding what are considered “costs.” It is the intrusion of a judicially introduced doctrine and the obstinate refusal of courts to abandon this doctrine in the face of a legislative countermand that is the source of the problem.

Code of Civil Procedure Section 917.1, states an exception to the general rule (Section 916(a) ) that an appeal stays trial court proceedings, including enforcement of a judgment. Money judgments require an undertaking to stay enforcement. Costs, prior to 1986, were not considered subject to exception from the general rule. Cases considering the question recognized that requiring a bond for almost every appealed judgment would be contrary to the legislative intent to require an undertaking only in specified situations. (See, McCallion et al. v. Hibernia Savings and Loan Society, et al. (1893) 98 Cal. 442; Whitaker v. Title Ins. And Trust Co. (1918) 179 Cal. 111; Imperial Beverage Co. v. Superior Court (1944) 24 Cal.2d 627, 631.) In 1986, the Legislature added subsection 917.1(d) to provide that costs are to be included in the judgment for purposes of obtaining a bond. Judgments consisting only of a cost award remained exempt from any undertaking requirement. Vadas v. Sosnowski (1989) 210 Cal.App.3d 471.

Enter the judiciary to cast doubt on whether some cost items recited in Section 1033.5 are actually costs. In 1986, the Fourth District in Chamberlin v. Dale’s R.V. Rentals, Inc. (1986) 188 Cal.App.3d 356, addressed the question of whether attorney’s fees should be added to a money judgment for purposes of obtaining a bond. In view of the lack of any clear statutory directive on whether an award of fees should be treated as costs, the court articulated a judicially created distinction between incidental routine costs and other costs that are non-ordinary, non-incidental, directly litigated awards, such as attorney’s fees. The Chamberlin court held that fee awards were more in the nature of money judgments than routine costs. Thus, an undertaking was required to stay enforcement as to those extraordinary cost items.

Other courts reacted, objecting to judicial creation of a dichotomy between routine and non-routine cost awards and citing the Legislature’s objective in providing a “reasonable and simple to apply” distinction between the judgment and an award of costs. Pecsok v. Black (1992) 7 Cal.App.4th 456. The court in Nielsen v. Stubos (1990) 226 Cal.App.3d 301, rejected the Chamberlin analysis, observing the Legislature’s 1986 indication that it did not wish to have “nonroutine” awards of fees treated as something other than costs:

Moreover, more recent legislation fortifies our conclusion that Chamberlin does not control the result here. We have previously noted the 1986 amendment to
Code of Civil Procedure section 917.1 which requires that costs be included in calculating the amount of bond required to stay a judgment for money damages. (Code Civ. Proc., § 917.1, subd. (d).) Assuming attorney fees are properly categorized as an element of costs, Chamberlin merely presaged the 1986 amendment, which took effect less than one month after the decision was filed. The 1990 amendment to Code of Civil Procedure section 1033.5, further supports the conclusion that contractual attorney fees are to be treated as costs. The amendment, which will take effect January 1, 1991, lists items allowable under Code of Civil Procedure section 1032 and includes in subdivision (a)(10)(A) attorney fees authorized by contract. (Stats. 1990, ch. 804, § 1.) Furthermore, section 2 of the chaptered bill reads in part: "It is the intent of the Legislature in enacting this act to confirm that these attorney's fees are costs ...." (Italics added.) By thus "confirm[ing]," the Legislature intended the amendment to Code of Civil Procedure section 1033.5 to reaffirm existing law.

Id. at 305. See also, More Direct Response v. Callahan (1992) 12 Cal.Rptr.2d 573 (depublished), where the Fourth District reasoned its earlier decision in Chamberlin was supplanted by the 1986 amendments which bridged the gap left by the codes and now defined attorney’s fees as costs and held such fees should be treated no differently than other costs.

The Supreme Court entered the fray in Bank of San Pedro v. Superior Court (1992) 3 Cal.4th 797. That case concerned a section 998 (offer to compromise) cost award of expert witness fees. The Court agreed with the Chamberlin holding, although it is not clear that the Supreme Court accepted its “directly litigated” basis for its ruling. The Court did accept Chamberlin’s distinction between costs that are “nonroutine” and those that are routine. The basis relied upon for the distinction is difficult to discern. The Court found it significant that a “nonroutine” cost award was “by any practical or semantic measure – a judgment directing the payment of money.” But why the money awarded in a routine cost award is in some manner different is not explained. For purposes of ascertaining whether a cost item is incidental or collateral, the Court approved of the Chamberlin treatment of expert witness fees as “like attorneys’ fees.” It held that expert witness fees awarded under Section 998 are not routine and require an undertaking to stay execution on a judgment.

As a practical matter, what the Court did was create a potential quagmire of litigation over whether a particular cost item was routine or not. This was to be resolved by looking at various factors such as whether it was within the trial court’s discretion, whether it was awarded to the prevailing or non-prevailing party, and, possibly, whether it was resolved through collateral litigation. Sorting out the factors and how they are to be weighed in this evaluation is hardly black and white. The “incidental” question may not be so easily answered. Contracts commonly contain attorneys’ fee clauses and such awards may fairly be said to be “routine” in such cases. The “discretionary” aspect of an award is not particularly enlightening either – all sorts of expenses not specified by statute are considered within the trial court’s latitude to award. Science Applications Internat. Corp. v. Superior Court (1995) 39 Cal.App.4th 1095,1103. The amount of the
expense involved in a particular cost item is not a fair indicium. Certainly attorney’s fee awards and expert witness expenses can be hefty and may even exceed damages. But other items traditionally regarded as costs have become quite sizable as well. The “directly litigated” criterion also seems to be a dead end. To say that an opposition to a fee motion is any more “litigated” than many motions to tax or, for that matter, that it is comparable to the discovery, pre-trial motions and trial of a fully litigated case (jury or otherwise) is a dubious proposition. And this criterion would not seem to be relevant to cases where the party subject to a cost bill did not oppose a claimed cost item.

Whether the Court in San Pedro had engaged in judicial activism or not was a question that was soon beside the point. Along came the Legislature in 1993 to amend pertinent portions of Sections 917.1, 917.9 and 1033.5 (AB 58). Acting in response to the San Pedro decision, the Legislature sought to "revise the circumstances in which an undertaking is required.” (Legislative Counsel’s Digest, Ch. 456, Sept. 27, 1993) What the Legislature was revising is apparent not only from the changes to the statutes. It is also plain from the August 16, 1993, comment to the Senate Committee, which stated:

The CCP sets forth the general rule that a judgment for routine costs is stayed by the filing of an appeal. However, existing law provides that extraordinary costs are not automatically subject to a stay of enforcement; a stay is only allowed for these costs if a party has posted a bond.

The Supreme Court in Bank of San Pedro v. Superior Court, (1992) 3 Cal.4th 797, held that costs which have been awarded pursuant to C.C.P. 998 (failure of a party to accept fair compromise offer) or C.C.P. 1141.21 (a judgment in a trial de novo that is less favorable then the arbitration award) are extraordinary costs. Thus, a bond or undertaking must be filed in order to stay enforcement of those orders.

AB 58 would codify the San Pedro case. It would also give to trial courts the discretion to condition a stay of an award of cost in all other cases upon the filing of a sufficient bond or undertaking.

The Legislature was rejecting the routine/nonroutine dichotomy. “Extraordinary” costs – those not automatically stayed - were now specifically limited to awards pursuant to sections 998 and 1141.21 only. These exceptions to the automatic stay were stated at subsection (a)(2) and (a)(3). All other costs were just that – costs. If the amendments were not clear enough in and of themselves, this explanatory language should have done the trick. But no published decision addressing the question has considered the evidence bearing upon legislative intent.

With AB 58, the Legislature was agreeing with the earlier cases that said it was simpler to just have a costs/judgment distinction. The Legislature simplified the analysis by doing five things. 1) It codified the holding (not the reasoning) in San Pedro pertaining to section 998 and section 1141.2 costs not being stayed. (Section 917.1(a)(2) ) 2) It left awards of money judgments plus costs in the category of not being stayed. (Section 917.1(d) ) 3) It specifically made judgments "solely for costs” subject to the automatic
4) It allowed courts discretion to require posting of an undertaking for any automatically stayed cost award (CCP 917.9).

Fifth, the Legislature was also responding to the invitation of the court in Banks v. Manos (1991) 232 Cal.App.3d 123. The Sixth District determined that an award for costs, fees and sanctions invoked the provision of subsection (d), requiring posting an undertaking for the entire amount. The court started from the “traditional rule that an award of costs alone is stayed by an appeal without bond.” The court then considered the 1986 amendment’s directive that costs should be included with a money judgment for purposes of bonding. The court observed that some ambiguity existed as to whether a section 128.5 sanction fee award was an award under contract or statute thereby bringing it under section 1033.5’s penumbra of fees considered “costs” which then only included fees awarded pursuant to contract or statute. The court found that the basis for the fees lay elsewhere, holding that the fees awarded as sanctions were essentially in the nature of damages. As such, this brought the related cost awards under the provision of subsection (d) requiring inclusion of cost awards with a money judgment for purposes of determining the bond amount. The ambiguity pointed up by the Banks court comprehended more than sanctions, including other fee awards not based upon contract or statute, such as an award under the common law rule stated in Serrano v. Priest (1977) 20 Cal.3d 25.

The new language added to subsection (d) in 1993 reads: “However, no undertaking shall be required pursuant to this section solely for costs awarded under Chapter 6 (commencing with Section 1021) of Title 14.” Chapter 6 is the section of the code entitled “Of Costs” and, not surprisingly, deals with costs. In other words, any award of a “costs only” judgment under Section 1033.5 was automatically stayed, unless a judge ordered otherwise pursuant to Section 917.9. The 1993 amendment also modified Section 1033.5 to encompass any conceivable fee award as “costs” by including fee awards under contract, statute and law.

The practical reasons for distinguishing between a judgment for damages and a “costs only” judgment were stated by the Sixth District in declining to interpret the 1986 amendment as excepting costs only judgments from the stay:

The former represents a victory in the trial court securing affirmative relief against the appellant in redress of some wrong done the respondent. The price of the appeal then is the provision by appellant of some security to the respondent for the ultimate collection of that affirmative award which makes the respondent whole. But a judgment for costs alone does not represent an award of affirmative relief against the appellant for some past wrong done the respondent; rather, it is a denial of affirmative relief to the former coupled with an affirmative award to the respondent compensating him for the expenses of the lawsuit.

Vadas, supra, at 474. Although Vadas, involving an $11,120.76 cost bill in a medical malpractice action, undoubtedly entailed “nonroutine” expert witness fees, any significance to be accorded this distinction was not mentioned by the court. The
differences the court did consider significant have not been touched by legislative enactment or history. If anything, this view distinguishing an award of affirmative relief from a denial of such relief was accepted by the Legislature and codified in its 1993 amendment to Section 917.1.

One court, at least, followed the Legislature’s cue and, finding that an award of fees was an award of costs held, based upon subsection (d), that a costs only award was stayed without an undertaking. Ziello v. Superior Court (1999) 75 Cal.App.4th 651. Witkin, Cal.Jur and the CEB practice guide contain vague, vestigial references to “routine” costs, but rely upon subsection (d) to clearly state that the bond requirement does not apply to judgments limited to costs awarded under CCP §§1021-1038. Witkin, Cal.Proc. 5th ed. (Appeal) §235-236; 4 Cal.Jur.3d (Rev.) §268; Axelrod, Cal. Civil Appeal Practice (CEB) Section 6.28, p.340. The Rutter guide also had indicated that enforcement of a "costs only" judgment is automatically stayed pending disposition of an appeal. Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1999) 7:132.

But the story does not stop there. The routine/nonroutine dichotomy sprang forth again like an annoying weed to infest judicial reasoning in spite of the Legislature’s effort to pluck it from its statutory landscape. The court in Gallardo v. Specialty Restaurants Corp. (2000) 84 Cal.App.4th 463, addressed the question of whether costs awarded under Section 998 should be added to other costs for purposes of determining the amount of a bond. The court treated the difference between “routine” and other costs in keeping with the 1993 legislation – routine costs were everything other than costs awarded under sections 998 and 1141.21. But the persistent use of the “routine” reference was unnecessary and distracting. Whether the Legislature intended to include other costs in a section 998 cost award for purposes of the undertaking requirement had nothing to do with whether the costs were routine or not. The Legislature had clarified that costs are costs, whether they are ordinary or not. Only section 998 and section 1141.21 costs are treated differently – requiring bonds. The issue for the court was framed by subsection (d) (“Costs awarded . . . shall be included in the amount of the judgment or order”). The proper inquiry was to determine whether the Section 998 award of “costs” was a “judgment or order” to which the other costs should be included. The court held they were not to be included.

Then, in Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, the court considered an award of fees and costs on a successful motion to strike under Section 425.16. The court did not see the issue as one of determining whether this was a “solely costs” judgment. The court instead asked whether the cost award was “a judgment for ‘money or the payment of money’ within the meaning of the money judgment exception codified in section 917.1(a)(1).” By framing the issue in this manner, the court set up the analysis in terms of evaluating whether the costs in question were routine or “nonroutine.” In other words, it engaged in the Chamberlin and San Pedro analysis the Legislature had rejected in the 1993 amendments, using this to divine the meaning of those very amendments. Although the meaning of subsection (d) is plain if one does not bootstrap routine/nonroutine criteria into it, the court – having injected this into its deductive process – believed the amended language to be uncertain. Consequently, it recognized the need to resort to “extrinsic sources” and the “legislative history.” Sadly, in spite of
this lip service, the court did not bother to consider the legislative history of section 917.1 and instead misperceived a “labyrinth of statutory authority.” Had it reviewed the legislation in the context of the related court decisions, the Fourth District would not have concluded that a cost award for attorney fees “is unquestionably a judgment for payment of money,” as it did. Elsewhere, the court in Beniwal v. Mix (2007) 147 Cal.App.4th 621, applied the routine/nonroutine dichotomy to a fee award in the context of a specific performance judgment.

The 1993 enactments pertaining to sections 917.1, 917.9 and 1033.5, stated the Legislature’s rejection of the judicially evolved analysis in Chamberlin and San Pedro and its acceptance of the earlier and simpler rule differentiating costs from judgments as stated in Vadas, Pecsok and Nielsen and Ziello. “Costs only” judgments were not to be subject to the undertaking requirement unless a court, in its discretion, made such an order. Simplicity and clarity was to be the rule. Nevertheless, insisting upon applying superceded precedent, courts have imposed a muddled approach that considers cost awards to be akin to damages - money judgments in some circumstances but not others. Hopefully, more courts will take a look at the legislative history of the 1993 amendments in the context of the judicial treatment of the problem and place the development of the routine/nonroutine dichotomy in proper perspective. Likewise, such a process may help to provide some much needed perspective on judicial review and the proper place for judicial interpretation in the face of direct legislative enactments. A judicially developed analysis of a statue should not persist where the reason for it has been abrogated by the Legislature. Courts should retain their proper place as interpreters of the law rather than legislators.