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Fee Simple Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds

Jineen T. Cuddy

University of the Pacific; McGeorge School of Law

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Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees And Posting Appeal Bonds

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Attorney fees have existed for almost as long as attorneys have existed.¹ Attorney fees represent an important gear that keeps the wheels of our judicial system turning. Yet, despite a long history, some of the procedures which govern attorney fees are ill-defined. In the United States, under the so-called "American Rule," there is generally no recovery of attorney fees by one party from the other party.² However, exceptions to the general rule allow the prevailing party to recover attorney fees from the losing party in certain instances.³ Whenever the losing party is ordered to pay attorney fees to the prevailing party, the attorney will want security that the other side will pay those fees.⁴ This is especially true

1. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, 34 (1953) The beginning of lawyers traces back to Ancient Greece, although the term "lawyer" was not used then. *Id.* In Ancient Rome and in the Early Middle Ages, "advocates" received only a gift-fee and had no legal right to fees. *Id.* at 68. In the late Middle Ages, the law was set forth that attorneys could sue for their fees, but barristers still only received a gift-fee and had no legal right to fees. *Id.* at 104.

2. See *infra* notes 16-20 and accompanying text (discussing the American Rule).

3. See *infra* notes 21-62 and accompanying text (discussing the exceptions to the American Rule).

4. See *infra* notes 297-298 and accompanying text (explaining why an attorney would want security that fees will be paid).

where the party ordered to pay the attorney fees appeals the judgment, because the attorney will have to await the resolution of the appeal before collecting the fees.⁵ If the court orders the appealing party to post a bond for the fees pending appeal, the respondent's attorney will have security for the attorney fees. Whether the court will require a bond may depend on whether the court classifies attorney fees as costs of the suit or as damages.⁶ In certain instances, it may depend on whether equity requires a bond to be posted.

Generally, a judgment for costs is automatically stayed pending appeal.⁷ Three relatively new California cases address attorney fees categorization for the purpose of posting appeal bonds.⁸ These cases are seemingly inconsistent as to whether a judgment for attorney fees requires a bond to be posted in order to stay execution pending appeal.⁹ One case held that attorney fees awarded pursuant to contract are costs, and are automatically stayed pending appeal.¹⁰ Another case held that attorney fees awarded as sanctions are monetary damages, and require the appellant to post a bond to stay them pending appeal.¹¹ Finally, a third case held that expert witness fees, which the court analogized to attorney

5. See *infra* notes 97-105 and accompanying text (discussing procedures for posting appeal bonds).

6. See *infra* notes 106-113 and accompanying text (discussing differences between costs and damages in procedures for posting appeal bonds).

7. See *infra* note 99 and accompanying text (discussing appeal bonds).

8. See *Banks v. Manos*, 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318, 321 (1992) (addressing attorney fees and posting appeal bonds); *Bank of San Pedro v. Municipal Court of Los Angeles*, 3 Cal. App. 4th 950, 956-57, 377, 283 Cal. Rptr. 372, 376 (1991) (*Bank of San Pedro* was originally cited as 232 Cal. App. 3d 370, but was reprinted for tracking purposes after the United States Supreme Court granted certiorari) (addressing expert witness fees and posting appeal bonds); *Neilsen v. Stumbos*, 226 Cal. App. 3d 301, 305, 276 Cal. Rptr. 272, 275 (1990) (addressing attorney fees and posting appeal bonds); see also *infra* notes 177-207 and accompanying text (discussing *Neilsen*); notes 208-241 and accompanying text (discussing *Banks*); notes 243-263 and accompanying text (discussing *Bank of San Pedro*).

9. See *infra* notes 177-207 and accompanying text (discussing *Neilsen*); notes 208-241 and accompanying text (discussing *Banks*); notes 243-263 and accompanying text (discussing *Bank of San Pedro*).

10. *Neilsen*, 226 Cal. App. 3d at 305, 276 Cal. Rptr. at 275. See *infra* notes 177-184 and accompanying text (discussing the facts and holding of *Neilsen*).

11. *Banks*, 232 Cal. App. 3d at 129, 283 Cal. Rptr. at 321. See *infra* notes 208-241 and accompanying text (discussing the facts and holding of *Banks*).

fees, are monetary damages, and require the appellant to post a bond to stay them pending appeal.¹²

The purpose of this Comment is to identify the confusion created by the aforementioned cases, and to demonstrate that the California courts or legislature must resolve the problem by definitively declaring whether attorney fees are automatically stayed pending appeal. Part I of this Comment explores the legal background of attorney fees in California.¹³ Part II discusses three recent California appellate court cases which considered whether a judgment for attorney fees is automatically stayed pending appeal.¹⁴ Finally, Part III discusses the ramifications of those appellate cases and suggests alternatives to settle the apparent legal inconsistencies.¹⁵

I. BACKGROUND AND CURRENT STATE OF THE LAW REGARDING ATTORNEY FEES

After briefly reviewing the American Rule and its exceptions, this section discusses the differences between statutory, contractual and equitable attorney fees for the purposes of filing an application for attorney fees. This section also explains California's procedural process for posting appeal bonds for both costs and money judgments.

12. *Bank of San Pedro*, 3 Cal. App. 4th at 957, 283 Cal. Rptr. at 376. See *infra* notes 243-263 and accompanying text (discussing the facts and holding of *Bank of San Pedro*).

13. See *infra* notes 16-169 and accompanying text.

14. See *infra* notes 170-266 and accompanying text.

15. See *infra* notes 267-301 and accompanying text.

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A. Availability of Attorney Fees

1. The American Rule

In the United States, attorney fees are generally not recoverable as an item of costs of a suit.¹⁶ In all other major common law systems, courts routinely award attorney fees to the party that prevails in the action.¹⁷ Under the American Rule, parties pay

16. For cases holding that attorney fees are not recoverable as costs, see e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 481 (1981), *aff'g*, 590 F.2d 433, 437 (2d Cir. 1978); *Alaska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Schwartz v. Folloder*, 767 F.2d 125, 132 (5th Cir. 1985); *Woods v. Barnett Bank*, 765 F.2d 1004, 1014 (11th Cir. 1985); *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982), *cert. denied sub nom.*, *Lewy v. Weinberger*, 464 U.S. 818 (1983); *Silberman v. Bogle*, 683 F.2d 62, 64 (3d Cir. 1982); *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 180 (D.C. Cir. 1980); *Petrites v. J.C. Bradford & Co.*, 646 F.2d 1033, (5th Cir. 1981); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 559 (5th Cir. 1981), *modified*, 459 U.S. 375 (1983); *Reiser v. Del Monte Prop. Co.*, 605 F.2d 1135, 1137 (9th Cir. 1979); *Melton v. Unterreiner*, 575 F.2d 204, 209 (8th Cir. 1978); *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1087 (2d Cir. 1977); *Shaw v. Merritt-Chapman & Scott Corp.*, 534 F.2d 786, 788 (6th Cir. 1977), *cert. denied*, 434 U.S. 852 (1977); *Straub v. Vaisman & Co.*, 540 F.2d 591, 599 (3d Cir. 1976); *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 994 (7th Cir. 1976); *Jackson v. Oppenheim*, 533 F.2d 826, 831 (2d Cir. 1977); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 559 (7th Cir. 1975); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1195 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975); *Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir. 1973), *cert. denied*, 416 U.S. 905 (1975); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90, 106 (10th Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971), and *cert. denied sub nom.* *Reynolds v. Texas Gulf Sulphur Co.*, 405 U.S. 918 (1972); *Kahan v. Rosenstiel*, 424 F.2d 161, 165 (3d Cir. 1969) *cert. denied sub nom.*, *Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1970); *Wright v. Heizer Corp.*, 503 F. Supp. 802, 811 (N.D. Ill. 1980); *Gilbert v. Bagley*, 492 F. Supp. 714, 744 (M.D.N.C. 1980); *Stull v. Baker*, 410 F. Supp. 1326, 1337 (S.D.N.Y. 1976); *Academic Computer Sys., Inc. v. Yarmouth*, 71 F.R.D. 198, 201 (S.D.N.Y. 1976); *Kerby v. Commodity Resources Inc.*, 395 F. Supp. 786, 790 (D. Colo. 1975); *Epic Enters., Inc. v. Brothers*, 395 F. Supp. 777, 778 (N.D. Okla. 1975); *Crasto v. Kaskel*, 63 F.R.D. 25, 27 (S.D.N.Y. 1974); *Chaney v. Western States Title Ins. Co.*, 292 F. Supp. 376, 379-80 (D. Utah 1968); *Stevens v. Abbott Proctor & Paine*, 288 F. Supp. 836 848 (E.D. Va. 1968); see also *Miller-Lindsey Lehrman, The Time to File for Fees*, 11 LITIG. 33, 33 (Winter, 1985) (stating that the American Rule has been the law in the federal courts ever since *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1790)).

17. See *Neil Williams, Fee Shifting and Public Interest Litigation*, 64 A.B.A. J. 859, 859 (June, 1978) (noting that the American treatment of attorney fees and costs of litigation is unique in the common law world and may be considered, by other countries, to be the most distinctive feature of American Civil Procedure); *Joyce Dougherty, After Alyeska: Will Public Interest Litigation Survive*, 16 SANTA CLARA L. REV. 267, 268 (1976) (stating that the American practice differs from that of almost every other country in the world).

their own attorney fees, no matter which party prevails.¹⁸ In California, as well as in other states and in the federal courts, legislatures and courts have carved out exceptions to the American Rule.¹⁹ Parties to a transaction may also avoid the American Rule by contracting for the prevailing party to pay the other party's attorney fees in the event of litigation.²⁰

18. See *Reynolds Metals Co. v. Alperon*, 25 Cal. 3d 124, 127, 599 P.2d 83, 84, 158 Cal. Rptr. 1, 2 (1979) (indicating that the American Rule is that a prevailing party's attorney fees are not recoverable unless a contract between the parties or a statute so provides); CAL. CIV. PROC. CODE § 1021 (West Supp. 1992) (codifying the American Rule that the measure and mode of compensation of attorneys is left to agreements between the parties, unless attorney fees are specifically provided for by statute); see also *Williams*, *supra* note 17, at 859 (noting that the purpose of the English Rule is to indemnify prevailing parties for the expense the parties had to bear for vindicating their legal rights). The English Rule also serves to discourage litigation, because it provides a strong incentive to settle. *Young v. Redman*, 55 Cal. App. 3d 827, 835-36, 128 Cal. Rptr. 86, 91 (1976) (quoting *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714, 718 (1967)) (stating that the American Rule was based upon the philosophy that a person should not be penalized for defending or prosecuting a suit, and, if the penalty for losing includes attorney fees of the other party, the poor may be unjustly discouraged from instituting actions to vindicate their rights). See Arthur Goodhart, *Costs*, 38 YALE L.J. 849, 873-77 (1929) (suggesting that the reason for the American Rule was that the American public basically distrusted lawyers and that lawyers were unnecessary, since the law could be understood by anyone). Additionally, the English Rule might tend to discourage poor litigants from bringing suit, because they would not want to risk having to pay two sets of attorney fees. *Id.* This would defeat the principle that the courts are open to everyone. *Id.* But see *Sciarotta v. Teaford Constr. Co.*, 110 Cal. App. 3d 444, 451, 167 Cal. Rptr. 889, 893 (1980) (indicating that a broad policy of granting attorney fees raises a possibility that litigation might ensue for its own sake, and the restrictive policy avoids encouragement or needless litigation and encourages settlement); *Dougherty*, *supra* note 17, at 269 (pointing out that the English Rule may actually encourage suits, because plaintiffs may be inspired by the prospect of recovering both damages and fees).

19. See Taylor, *Resistance Stiffens to Abandonment of the American Rule*, 5 ORANGE COUNTY B.J. 343, 350 (1979) (listing 52 statutory exceptions in California in which attorney fees are awarded to the prevailing party); Michael Green, *From Here to Attorney Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 217-18 (1984) (estimating that there are over one hundred federal statutes that provide for attorney fees, typically to the prevailing party); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 260-261 n.33 (1975) (giving a list of federal statutes which provide for attorney fees). Some statutes make the award mandatory, such as the Clayton Act, 15 U.S.C. § 15 (1970), the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1938), and the Truth in Lending Act, 15 U.S.C. § 1640(a) (1968). *Id.* Other statutes make the award discretionary with the court, such as the Patent Act, 35 U.S.C. § 285 (1952), and the Civil Rights Act of 1946, tit. II, 42 U.S.C. § 2000a-3(b) (1964). *Alyeska*, 421 U.S. at 260-61 n.33.

20. See *infra* notes 24-34 and accompany text (discussing contractual provisions for attorney fees).

2. Three Exceptions to the American Rule

In California, the basic provision for recovery of attorney fees is California Code of Civil Procedure [hereinafter CCP] section 1021.²¹ Section 1021 provides that, unless attorney fees are specifically allowed by statute, they are left to the agreement of the parties.²² Perhaps the largest exception to the American Rule in California is the last part of section 1021, that the American Rule can be changed by “agreement, express or implied, of the parties.”²³

a. Contractual Attorney Fees

The California courts consistently acknowledge that CCP section 1021 permits attorney fees awards against opposing parties pursuant to contractual agreement.²⁴ Parties to a contract regularly include attorney fee provisions in the contract.²⁵ Attorney fee provisions usually authorize fees to specified parties or to the “prevailing party”²⁶ in the event of litigation.²⁷ Due to unequal bargaining power of the parties, fee provisions were frequently

21. See CAL. CODE CIV. PROC. § 1021 (West Supp. 1992) (providing: “[e]xcept as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.”).

22. *Id.*

23. *Id.*

24. See, e.g., *Iverson v. Spang Indus., Inc.*, 45 Cal. App. 3d 303, 312, 119 Cal. Rptr. 399, 405 (1975) (stating that where a contract provides for attorney fees without specifying a fixed sum, the amount of the award is within the discretion of the court); *Nevin v. Salk*, 45 Cal. App. 3d 331, 334, 119 Cal. Rptr. 370, 374 (1971) (stating that a provision in an agreement that one party agrees to pay reasonable attorney fees is valid); *Malibou Lake Mountain Club v. Smith*, 18 Cal. App. 3d 31, 35, 95 Cal. Rptr. 553, 556 (1971) (affirming the validity of a contractual provision directing the payment of attorney fees).

25. *Attorney Fees*, 1984 CAL. CONTINUING EDUC. BAR § 1.311, 1.

26. See CAL. CIV. CODE § 1717(b)(1) (West Supp. 1992) (indicating that the prevailing party is the one who recovered greater relief in the action, but if the case is dismissed there is no prevailing party). *But see* CAL. CODE CIV. PROC. § 1032 (West Supp. 1992) (indicating that the term “prevailing party” also includes a defendant who obtains a dismissal, a defendant where neither party obtains relief, or the party who the court determines is the prevailing party).

27. Kent Scheidegger, *Attorney’s Fees and Civil Code Section 1717*, 13 PAC. L.J. 233, 233 (1981).

structured to entitle attorney fees to only one party to the contract.²⁸ The California Legislature enacted California Civil Code section 1717 to remedy this unfairness by creating a reciprocal right to attorney fees whenever a contract entitles one party to attorney fees but not the other party.²⁹ Under section 1717, when a contract contains a fee provision that benefits only one party to the transaction, the prevailing party may recover attorney fees, even if the fee provision was not intended to benefit that party.³⁰ Section 1717 thus converts a unilateral contractual right to recover attorney fees into a bilateral right for either party to recover attorney fees.³¹ Section 1717 assists persons who are disadvantaged by unequal bargaining positions and protects their rights by allowing the recovery of attorney fees.³² Although courts usually use section 1717 to award attorney fees to the party who is not benefitted by the unilateral contract fee provision, in the past

28. See *id.* The drafters of form contracts customarily include clauses providing for attorney fees, generally benefitting only the drafter of the form. *Id.* A typical one-sided provision for attorney fees would read: "[I]n the event that Buyer defaults on the payments due under this contract, Buyer agrees to pay all costs of collection, including reasonable attorney fees." *Id.* at 233 n.1.

29. See *International Indus., Inc. v. Olen*, 21 Cal. 3d 218, 222-23, 577 P.2d 1031, 1036, 145 Cal. Rptr. 691, 693 (1978) (indicating the legislative intent behind the enactment of California Civil Code section 1717 was to provide a reciprocal right to attorney fees).

30. CAL. CIV. CODE § 1717 (West Supp. 1992). This section provides in pertinent part:

(a) [i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party, prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Id.; cf. ARIZ. REV. STAT. ANN. § 12-341.01 (West 1991) (providing that in any contested action arising out of a contract, the court may award reasonable attorney fees to the prevailing party, even if the contract does not provide for attorney fees).

31. *T.E.D. Bearing Co. v. Walter E. Heller & Co.*, 38 Cal. App. 3d 59, 62, 112 Cal. Rptr. 910, 914 (1974); see also *Scheidegger*, *supra* note 27, at 235 (referring to *Ecco-Phoenix Elec. Corp. v. Howard J. White, Inc.*, 1 Cal. 3d 226, 272, 461 P.2d 33, 36, 81 Cal. Rptr. 849, 852 (1969) (illustrating that even in cases tried prior to the enactment of section 1717, the courts softened the impact of one-sided attorney fee clauses because such clauses were believed to be contrary to public policy as encouraging frivolous litigation and allowing the party benefitted by the provision to impose any settlement on the other party just by threatening to raise the costs of the suit higher than the amount actually being disputed); *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 597 n.3, 97 Cal. Rptr. 30, 39 n.3 (1971) (indicating that another purpose of section 1717 is to provide protection for parties to a contract who have less bargaining power).

32. *T.E.D. Bearing Co.*, 38 Cal. App. 3d at 63, 112 Cal. Rptr. at 913; *Coast Bank* 19 Cal. App. 3d at 597 n.3, 97 Cal. Rptr. at 39 n.3.

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courts have also used section 1717 to award attorney fees to the party who is benefitted by the unilateral fee provision.³³ In addition to rights to attorney fees arising out of contracts, statutes may provide an independent basis for recovery of attorney fees.³⁴

b. Statutory Attorney Fees

In California, there are many statutory exceptions to the American Rule.³⁵ California Code of Civil Procedure section 1021 acknowledges that, in addition to contractual rights to attorney fees,

33. *Beneficial Standard Props., Inc. v. Sharps*, 67 Cal. App. 3d 227, 230, 136 Cal. Rptr. 549, 551 (1977); *see, e.g., Reynolds Metals Co. v. Alperson*, 25 Cal. App. 3d 124, 128, 599 P.2d 83, 87, 158 Cal. Rptr. 1, 3 (1979); *Sain v. Silvestre*, 78 Cal. App. 3d 461, 475, 144 Cal. Rptr. 478, 487 (1978) (indicating that section 1717 applies whether the contractual provision for attorney fees is bilateral or unilateral). *But see Scheidegger, supra* note 27, at 241 (arguing that section 1717 should apply to unilateral clauses only).

34. *See infra* notes 35-43 and accompanying text (describing statutes that provide for awards of attorney fees).

35. *See Attorney Fees, supra* note 25, at 255-67 (listing 234 provisions for attorney fee awards in California); *see, e.g., CAL. BUS. & PROF. CODE* §§ 7044, 7168 (West Supp. 1992); *CAL. CIV. CODE* §§ 798.85, 1717, 1798.46, 1798.53, 1942.5, 2983.4, 2988.9, 3250, 1714.1(b), 1788.30(e), 1798.48(b), 1799.2, 1811.1, 789.3(d) (West 1982, 1985 and Supp. 1992); *CAL. CIV. PROC. CODE* §§ 730, 731.5 (West 1980 and 1987); *CAL. EDUC. CODE* § 43048(b) (West Supp. 1992); *CAL. GOV'T CODE* § 19765 (West 1980); *CAL. PUB. RES. CODE* § 25455 (West 1986); *CAL. PUB. UTIL. CODE* § 453 (West Supp. 1992) (providing that the court *shall* award attorney fees to the prevailing party); *CAL. CIV. CODE* §§ 815.7, 1584.6; 1584.5, 2528 (West Supp. 1992); *CAL. CIV. PROC. CODE* §§ 396b, 527.6(h), 1021.5, 1021.6 (West Supp. 1992); *CAL. FIN. CODE* §§ 865.6(e), 15153(d), 18333(e) (West 1989); *CAL. GOV'T CODE* §§ 11130.5, 12965(b), 54960.5, 91012 (West 1980 and Supp. 1992) (providing that the court *may* award attorney fees to the prevailing party); *CAL. BUS. & PROF. CODE* §§ 17082, 10238.7, 16750(a), 21140.4 (West 1987 and Supp. 1992); *CAL. CIV. CODE* §§ 1747.50(c), 1747.60(e), 1747.70(d), 1785.31(d), 1786.50(a)(2), 1787.3, 1812.34, 1812.123(a) (West 1985); *CAL. CIV. PROC. CODE* §§ 491.160, 1030, 1031(c), 1036, 1235.140(b), 1245.060(b) (West Supp. 1992); *CAL. CORP. CODE* § 27200 (West 1977); *CAL. ED. CODE* § 67139.5 (West 1989); *CAL. HEALTH & SAFETY CODE* §§ 7109 (West 1970); *CAL. INS. CODE* § 11629, 11708 (West 1988); *CAL. LAB. CODE* §§ 432.7(b), 1197.5(g), 3709, 3709.5, 3860, 3856, 5801 (West 1985 and Supp. 1992); *CAL. PENAL CODE* §§ 496, 593d (West Supp. 1992); *CAL. STS. & HIGH. CODE* §§ 5412, 6615, 9354, 8831 (West 1969 and Supp. 1992); *CAL. UNEMP. INS. CODE* § 1957 (West 1986); *CAL. WELF. & INST. CODE* §§ 10962, 19709 (West 1984 and 1991) (providing that the court *shall* award attorney fees to the successful plaintiff or injured party); *CAL. BUS. & PROF. CODE* §§ 21202, 22386 (West 1987); *CAL. CIV. CODE* §§ 52(a), 54.3, 1794, 56.35, 1794.1(a)-(b), 1794.1(b), 1812.62(a), 1812.94(a) (West 1985, 1982 and Supp. 1992); *CAL. CIV. PROC. CODE* §§ 482.110(b), 491.130, 585(a) (West Supp. 1992); *CAL. EVID. CODE* § 1158 (West Supp. 1992); *CAL. GOV'T CODE* §§ 800, 31536, 13965(c), 13973(e) (West 1980 and Supp. 1992); *CAL. HEALTH & SAFETY CODE* § 26850.5(b) (West Supp. 1992); *CAL. INS. CODE* § 1619 (West Supp. 1992); *CAL. LAB. CODE* §§ 4555, 4607, 4903.2, 5410.1, 5710 (West 1989); *CAL. PENAL CODE* § 653.60 (West 1988) (providing that the court *may* award attorney fees to the plaintiff or injured party).

statutes may authorize attorney fees.³⁶ Statutes typically, although not exclusively, provide that the prevailing party may recover attorney fees.³⁷ Statutory attorney fees provisions have two fixed characteristics. Each statute indicates both the threshold of success that a party must attain to recover attorney fees, and the amount of discretion the court has in awarding fees to a party meeting the threshold requirement.³⁸ The degree of success required to recover attorney fees extends over a spectrum. At one end of the spectrum are statutes permitting recovery of attorney fees to a party who has achieved minimal success on the merits, such as obtaining a favorable judgment on an issue.³⁹ At the other extreme are statutes allowing fee shifting only when a party has litigated in bad faith.⁴⁰ The degree of a trial court's discretion in awarding attorney fees also extends over a spectrum, ranging from mandatory obligation to award attorney fees, to unbounded discretion in awarding attorney fees.⁴¹

A literal reading of CCP section 1021 indicates that a court can award attorney fees based only on a statute or contract.⁴² Through California decisional law, however, exceptions to CCP section 1021 have been developed.⁴³ These exceptions are based upon the inherent equity powers of the courts.

c. Equitable Attorney Fees

The California Supreme Court has recognized three equitable exceptions to the literal reading of CCP section 1021: (1) The

36. CAL. CODE CIV. PROC. § 1021 (West Supp. 1992).

37. Green, *supra* note 19, at 218.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. CAL. CIV. PROC. CODE § 1021 (West Supp. 1992). *See supra* note 21 providing pertinent text of section 1021).

43. *See infra* notes 47-62 and accompanying text (discussing the three judicial exceptions to section 1021).

“common fund” doctrine;⁴⁴ (2) the “substantial benefit” doctrine;⁴⁵ and (3) the “private attorney general” doctrine.⁴⁶

The common fund doctrine is based on the principle of preventing unjust enrichment.⁴⁷ Under this doctrine, when a litigant’s efforts create or preserve a fund from which others derive benefit, the litigant may require the beneficiaries to contribute to the litigation costs and attorney fees.⁴⁸ The common fund exception is based on the historic power of equity to permit the trustee of a fund or property to recover costs and attorney fees from the fund or the property itself, or from the parties receiving the benefit.⁴⁹ The plaintiff is eligible for an award under this doctrine if the litigation affected the creation or recovery of an identifiable fund from which attorney fees may be paid.⁵⁰ A modern derivative of the common fund doctrine is the substantial benefit doctrine.⁵¹

Like the common fund theory, the substantial benefit doctrine is based on the notion that those who have been unjustly enriched at another’s expense should, under some circumstances, contribute to the costs of the litigation that produced the benefits.⁵² Under the substantial benefit doctrine, courts award attorney fees when the litigant procures a judgment that confers a substantial benefit on members of an ascertainable class.⁵³ The benefit may be

44. See *infra* notes 47-51 and accompanying text (discussing the common fund doctrine).

45. See *infra* notes 52-54 and accompanying text (discussing the common benefit doctrine).

46. See *infra* notes 55-62 and accompanying text (discussing the private attorney general doctrine).

47. *Attorney Fees*, *supra* note 25, § 3.12, at 36. The common fund doctrine is the oldest equitable exception to the American Rule. *Id.*

48. *Serrano v. Priest*, 20 Cal. 3d 25, 35, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 318 (1977) (quoting *Quinn v. State*, 15 Cal. 3d 162, 167, 539 P.2d 761, 764, 124 Cal. Rptr. 1, 4 (1975).)

49. *Serrano*, 20 Cal. 3d at 35, 141 Cal. Rptr. at 318.

50. *Id.* at 37, 141 Cal. Rptr. at 320. The fund must be preserved or created by the judgment itself, rather than from legislative implementation of the judgment. *Id.* In *Serrano*, the court denied an award of attorney fees because the judgment did not require any particular expenditure. *Id.* An identifiable fund was not created in *Serrano*; any monetary benefits would come only from the legislative implementation of the judgment. *Id.*

51. *Attorney Fees*, *supra* note 25, § 3.13, at 38-39.

52. *Woodland Hills Residents Ass’n v. City Council*, 23 Cal. 3d 917, 943, 593 P.2d 200, 214, 154 Cal. Rptr. 503, 517 (1979).

53. *Serrano*, 20 Cal. 3d at 35, 141 Cal. Rptr. at 318.

pecuniary or nonpecuniary, and may be conferred on plaintiffs or defendants.⁵⁴ In addition to the foregoing judicial exceptions, courts may award attorney fees under the private attorney general doctrine.

The private attorney general doctrine encourages suits that enforce a strong public policy and benefit a broad class of people because it awards attorney fees to those who successfully sue someone who has infringed on an important constitutional right.⁵⁵ The doctrine has been rejected by the federal courts in the absence of statutory authorization.⁵⁶ However, California state courts have exercised their inherent equitable authority to award attorney fees where litigants successfully pursue public interest litigation vindicating important constitutional rights.⁵⁷

In 1977, the California Legislature enacted CCP 1021.5.⁵⁸ Section 1021.5 codifies and broadens the equitable private attorney general doctrine.⁵⁹ California Code of Civil Procedure section 1021.5 provides explicit statutory authority for court-awarded attorney fees under a private attorney general theory.⁶⁰ California Code of Civil Procedure section 1021.5 broadens the common law private attorney general doctrine by permitting awards of attorney fees in cases that vindicate statutory as well as constitutional rights.⁶¹ Thus, the exceptions to the American Rule authorize the

54. *Id.*

55. *Woodland Hills*, 23 Cal. 3d at 933, 593 P.2d at 208, 154 Cal. Rptr. at 511.

56. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 42 U.S. 240, 247 (1975).

57. *Serrano*, 20 Cal. 3d at 43, 141 Cal. Rptr. at 324.

58. CAL. CODE CIV. PROC. § 1021.5 (West Supp. 1992). *See infra* note 60 (setting forth the requirements under section 1021.5).

59. *Id.*

60. *See* CAL. CODE CIV. PROC. § 1021.5 (West Supp. 1992) (providing that in order to be deemed an action enforcing an important right affecting the public interest the action must meet the following criteria: (1) A significant benefit must be conferred on the general public or large class of persons; (2) the necessity and financial burden of private enforcement make the award appropriate; and (3) such fees should not be paid out of the recovery, if any); *see also* *Residents Ad Hoc Stadium Comm. v. Board of Trustees*, 89 Cal. App. 3d 274, 292, 152 Cal. Rptr. 585, 596 (1979) (holding that CCP section 1021.5 does not violate the equal protection clause of the United States Constitution).

61. *Woodland Hills Residents Ass'n v. City Council*, 23 Cal. 3d 917, 925, 154 Cal. Rptr. 503, 506 (1979). "When other statutory criteria are satisfied, the section explicitly authorizes such award in any action which has resulted in the enforcement of an important right affecting the public interest, regardless of its source-constitutional, statutory or other." *Id.*

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court to order one party to pay the other party's attorney fees. The court must then determine the appropriate amount to pay the attorney. There are various methods for arriving at the proper figure.⁶²

3. Determining the Amount of the Award in California Courts

When a contract or statute provides for attorney fees, the fee calculation may vary. The statute or contract may specifically limit the amount of the fee,⁶³ or provide a general right to attorney fees, or specify a right to "reasonable" attorney fees.⁶⁴ Where the contract or statute specifies the amount to be awarded, the court can award this amount even if it is unreasonable.⁶⁵ Where the statute or contract is silent, the trial court has discretion to determine the amount of the fee.⁶⁶ Thus, in order to determine the amount of the attorney fee, the court will first look to see if the contract or statute provides for a set amount, and if it does not, or

62. See *infra* notes 63-66 and accompanying text (discussing the methods for calculating attorney fee awards).

63. See CAL. CODE CIV. PROC. § 1031 (West Supp. 1992) (providing that the award of attorney's fee cannot exceed 20% of the amount of the recovery); CAL. GOV'T CODE § 800 (West Supp. 1992) (providing that award of attorney fee should be computed at \$100 per hour, and should not exceed \$7500).

64. See CAL. CIV. PROC. CODE § 874.010 (West 1980) (providing for award of a reasonable attorney fee); CAL. CIV. CODE § 1695.7 (West 1985) (providing for award of a reasonable attorney fee).

65. *Johnson v. Kaeser*, 196 Cal. 686, 695, 239 P. 324, 327-28 (1925) (holding that the court has discretion to award the amount provided for in statute or contract, even if the amount is unreasonable under the circumstances).

66. See *Stokus v. Marsh*, 217 Cal. App. 3d 647, 654, 266 Cal. Rptr. 90, 94 (1990) (stating that a successful plaintiff who is awarded attorney fees is entitled to recover fees that are reasonable and that bear a rational relationship to the substantive recovery). The issue of reasonableness is within the sound discretion of the trial judge, and the factors to be considered in determining what constitutes reasonable compensation include the nature of the litigation, its difficulty, the amount involved, the skill required and skill employed in handling the litigation, the attention given, the success of the attorney's efforts, the learning, age, and experience in the particular type of work demanded, the intricacies and importance of the litigation, the labor and necessity for legal training and ability in trying the case, and the time consumed. *Id.* at 657, 266 Cal. Rptr. at 96; see also *California Interstate Tel. Co. v. Prescott*, 228 Cal. App. 2d 408, 411, 39 Cal. Rptr. 472, 474 (1964) (indicating that the trial judge is an expert in the matter of attorney fees, and the value of the attorney's services is a matter with which a judge must necessarily be familiar). When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix the value of the fees. *Id.*

if it provides for a reasonable attorney fee, the court will determine what is reasonable under the circumstances.

B. Procedures for Filing for Attorney Fees

Different procedures govern the award of statutory, contractual and equitable attorney fees.⁶⁷ A party applies for attorney fees either by including them in a memorandum of costs⁶⁸ or by filing a motion requesting reasonable attorney fees.⁶⁹ In general, statutory attorney fees are included in a memorandum of costs, while contractual and equitable attorney fees are obtained by a motion procedure.⁷⁰ However, there are exceptions to these general rules.⁷¹

1. Filing a Memorandum of Costs

a. Statutory Fees

In California, attorney fees awarded pursuant to a statute are recoverable as costs.⁷² Thus, statutory attorney fees are usually included in a memorandum of costs, rather than requested by motion.⁷³ The procedure for obtaining costs in the trial court is set

67. See *infra* notes 69-105 and accompanying text (discussing the different procedures governing statutory, contractual and equitable attorney fee awards).

68. See CAL. CODE CIV. PROC. § 1033 (West Supp. 1992) (providing that the memorandum of costs must be served on the adverse party and filed no later than 10 days after the entry of judgment); see also *Coast Elec. Serv., Inc. v. Jensen*, 111 Cal. App. 124, 126, 295 P. 346, 346-47 (1931) (holding that failure to file a cost bill extinguishes the remedy to recover costs). But see *Marini v. Municipal Court*, 99 Cal. App. 3d 829, 834, 160 Cal. Rptr. 465, 468 (1979) (noting that the trial court has broad power to deviate from CCP section 1033).

69. See *infra* notes 72-93 and accompanying text (discussing the two methods of filing a memorandum or a motion).

70. *Attorney Fees*, *supra* note 25, § 6.1, at 65.

71. See *infra* notes 77-80 and accompanying text (discussing exceptions to filing a memorandum of costs to recover statutory attorney fees); notes 88-91 and accompanying text (discussing exceptions to filing a motion to recover contractual attorney fees).

72. *T.E.D. Bearing Co. v. Walter E. Heller & Co.*, 38 Cal. App. 3d 59, 62, 112 Cal. Rptr. 910, 914 (1974).

73. *Id.*

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out in CCP section 1033.⁷⁴ Section 1033 provides that the prevailing party must file with the court, and serve on the other party, a memorandum of costs and disbursements at any time after the court's verdict or decision is made, and not later than ten days after the entry of judgment.⁷⁵ However, some statutes provide exceptions to CCP section 1033.⁷⁶

California Code of Civil Procedure section 1021.5 codifies the private attorney general doctrine.⁷⁷ This section states that attorney fees should be applied for "upon motion."⁷⁸ Therefore in order to recover attorney fees pursuant to section 1021.5, the prevailing party must file a motion. The motion procedure is also more appropriate in statutory fee cases which are settled informally or dismissed, because there is no entry of judgment in such cases. An entry of a judgment⁷⁹ is required in order to file a memorandum of costs.⁸⁰ Since there is no entry of judgment when a case is dismissed or settled informally, the motion procedure must be used in order to receive attorney fees.

2. Filing a Motion

a. Contractual Fees

The procedure for seeking contractual attorney fees varies according to the facts of each case and the contract language.⁸¹ The court looks to the language contained in the contract provision to determine the correct procedure to follow.⁸² In *City Investment*

74. See CAL. CIV. PROC. CODE § 1033 (West Supp. 1992) (providing the procedure for filing memorandum of costs).

75. *Id.*

76. See *infra* notes 77-80 and accompanying text (discussing exceptions to CCP section 1033).

77. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1992). See *supra* notes 55-62 and accompanying text (discussing the private attorney general theory).

78. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1992).

79. See *Oppenheimer v. Ashburn*, 173 Cal. App. 2d 624, 343 P.2d 931 (1959) (defining "entry of judgment" as the date from which the time for filing an appeal begins).

80. *Id.* But see *Rappenecker v. Sea-Land Serv., Inc.*, 93 Cal. App. 3d 256, 265, 155 Cal. Rptr. 516, 521 (1979) (allowing a cost bill to be filed after settlement).

81. *Attorney Fees*, *supra* note 25, § 7.2, at 78.

82. *Genis v. Krasne*, 47 Cal. 2d 241, 248, 302 P.2d 289, 293 (1956).

*Co. v. Pringle*⁸³ the court held that, when attorney fees are sought solely under contract, they must be particularly alleged and demanded in the complaint as special damages.⁸⁴

When a contract provides that reasonable attorney fees shall be awarded to either party, and does not specify that they are to be included as costs, courts generally allow a claim for fees by notice of motion and motion.⁸⁵

b. Equitable Attorney Fees

The California courts have not yet defined the proper procedures for filing an application for attorney fees pursuant to an equitable theory.⁸⁶ In some of the recent equitable fee cases, however, the prevailing party filed a motion for attorney fees.⁸⁷ In an equitable fee case, attorney fees should be alleged at the earliest possible stage.⁸⁸ However, one court of appeal has held that CCP section 1021.5 does not require a special demand for attorney fees in the complaint.⁸⁹

83. 49 Cal. App. 353, 193 P. 504 (1920).

84. *Id.* at 355, 193 P. at 504. The contract clause must be pleaded in the main action and proven. *Genis*, 47 Cal. 2d at 246, 302 P.2d at 292.

85. *Mabee v. Nurseryland Centers, Inc.*, 88 Cal. App. 3d 420, 428, 152 Cal. Rptr. 31, 36 (1979). The stage at which the court hears the motion varies with the facts of each case. *Id.*

86. *Attorney Fees*, *supra* note 25, § 6.4, at 68.

87. *See, e.g., Serrano v. Priest*, 20 Cal. 3d 25, 31, 569 P. 2d 1303, 1304, 141 Cal. Rptr. 315, 316 (1977); *Northington v. Davis*, 23 Cal. 3d 955, 957, 593 P.2d 221, 222, 154 Cal. Rptr. 524, 525-526 (1979).

88. *Attorney Fees*, *supra* note 25, § 6.4, at 68. The early allegations warn the opposing counsel and the trial court that the fees will be requested, and put pressure on the opposing counsel to settle the case. *Id.*

89. *Committee for Sewer Referendum v. Humboldt Bay Wastewater Auth.*, 77 Cal. 3d 117, 125 n.7, 143 Cal. Rptr. 463, 468 n.7 (1978). Federal precedent does not require attorney fees to be pleaded in complaint. *La Raza Unida v. Volpe*, 440 F. Supp. 904, 912 n.20 (N.D. Cal. 1977). California courts have followed federal precedent in deciding many attorney fee issues. *See, e.g., Woodland Hills Residents Assoc. v. City Council*, 23 Cal. 3d at 917, 154 Cal. Rptr. 503 (1979); *Serrano*, 20 Cal. 3d at 48 n.23, 569 P.2d at 1317 n.23, 141 Cal. Rptr. at 328 n.23.

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c. Exceptions

In contract cases where the contract specifically provides that fees may be included as costs, the party may file a cost bill rather than filing a motion.⁹⁰ Moreover, for attorney fees sought under contract provisions implicating Civil Code section 1717, which provides for a reciprocal right to attorney fees, attorney fees are treated as an element of costs, and a cost bill procedure must be followed.⁹¹ For purposes of filing an application for attorney fees, courts treat contractual attorney fees and equitable attorney fees differently from statutory attorney fees.⁹² Courts may draw similar distinctions in other areas of legal procedure, such as the posting of appeal bonds.⁹³

C. Posting Appeal Bonds

In addition to pleadings, the distinction courts draw between statutory, equitable and contractual attorney fees may impact appeals. For example, assume that the losing side appeals from a judgment that includes attorney fees. Generally, a judgment for costs alone will be automatically stayed pending appeal.⁹⁴ In contrast, to stay a judgment for damages, the appellant must post a bond with the court.⁹⁵ Thus, the categorization of attorney fees as damages or costs will affect whether the appellant can stay the award pending appeal. Given the courts' treatment of attorney fees for pleading purposes, and the distinction courts draw between contractual, equitable and statutory attorney fees, it might be

90. *Genis v. Krasne*, 47 Cal. 2d 241, 246, 302 P. 2d 289, 292 (1956).

91. *See City Inv. Co. v. Pringle*, 49 Cal. App. 353, 353, 193 P. 504, 504 (1920) (indicating that cost bill must be filed when attorney fees are sought under Civil Code Section 1717).

92. *See supra* notes 72-93 and accompanying text (discussing the differences between contractual, equitable and statutory attorney fees for purposes of applying for the fees).

93. *See infra* notes 94-105 and accompanying text (discussing the distinctions drawn between different types of attorney fees for purposes of posting appeal bonds).

94. *McCallion v. Hibernia Sav.*, 98 Cal. 442, 445, 33 P.2d 329, 330 (1893). *See infra* notes 100-107 and accompanying text (discussing *McCallion*).

95. *See infra* notes 106-113 and accompanying text (discussing *McCallion*, which held that the appellant must post a bond to stay a judgment for money damages).

presumed that the courts would make the same distinction for the purposes of posting appeal bonds. If the same distinction were made, then contractual and equitable attorney fees would require a bond to stay them pending appeal, while statutory attorney fees would be automatically stayed pending appeal. However, a review of recent case law reveals that this presumption is probably not correct.⁹⁶ Before delving into the cases, it is helpful to understand the requirements and procedures for posting appeal bonds.

1. Procedure for Posting Appeal Bonds

California Code of Civil Procedure section 916 sets forth the rule that filing an appeal automatically stays the judgment of the trial court.⁹⁷ However, section 916 indicates that there are a number of exceptions to this general rule, in which the execution of the judgment will only be stayed upon the filing of an appeal bond with the court.⁹⁸ One such exception is contained in CCP section 917.1.⁹⁹ This section provides that a judgment for money damages is not automatically stayed unless the appellant posts a bond.¹⁰⁰ The amount of the bond must be double the amount of the judgment.¹⁰¹

In 1986, the legislature amended section 917.1 to include subsection (d).¹⁰² Subsection (d) provides that, if costs are awarded as part of the monetary damages, they are to be included in the amount of the bond.¹⁰³ This amendment is significant because it implies that costs are important enough to require that

96. See *infra* notes 177-266 and accompanying text (discussing three recent cases involving attorney fees and appeal bonds).

97. See CAL. CIV. PROC. CODE § 916 (West Supp. 1992) (providing that the taking of an appeal stays the judgment of the trial court in most circumstances).

98. See *id.* §§ 116.810, 917.1-917.9 (West Supp. 1992) (listing the exceptions to the automatic stay provision of CCP section 916).

99. See *id.* § 917.1(a)-(d) (providing that judgments ordering the payment of money are not automatically stayed pending appeal).

100. *Id.* § 917.1(a) (West Supp. 1992).

101. *Id.* § 917.1(b) (West Supp. 1992).

102. 1986 Cal. Stat. ch. 1174, sec. 1, at 117840. See *id.* § 917.1(d) (West Supp. 1992).

103. CAL. CIV. PROC. CODE § 917.1(d) (West Supp. 1992).

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the appeal bond reflect their amount, at least where there is also a money judgment. Section 917.1 does not address situations where the court awards no monetary damages, and the judgment is for costs alone.¹⁰⁴ However, cases decided before the 1986 amendment concluded that a judgment for costs alone was automatically stayed pending appeal.¹⁰⁵

2. The Pre-Amendment Cases

The California Supreme Court *McCallion v. Hibernia Savings*¹⁰⁶ held that an award of costs alone was automatically stayed pending appeal.¹⁰⁷ The *McCallion* court reasoned that, because courts award costs in nearly every case, costs are “incidental to the judgment.”¹⁰⁸ Therefore, costs alone are not the type of money judgment referred to in CCP section 917.1.¹⁰⁹ The *McCallion* court reasoned that if costs were the type of money judgment contemplated by section 917.1, then the exception would swallow the rule.¹¹⁰ In other words, courts would require a bond in nearly every case, which would render the automatic stay provision of section 916 superfluous.¹¹¹ Such an outcome would be contrary to the legislative intent to require a bond only in the instances enumerated as exceptions to the automatic stay provision.¹¹²

Thus, at least until subsection (d) was added in 1986, a judgment for costs alone was automatically stayed pending appeal. However, *McCallion* involved judgments which did not include

104. *Vadas v. Sosnowski*, 210 Cal. App. 3d 471, 473, 258 Cal. Rptr. 374, 375 (1989).

105. *See McCallion v. Hibernia Sav.*, 98 Cal. 442, 33 P. 329 (1893). *See also infra* notes 106-113 and accompanying text (discussing of *McCallion*).

106. 98 Cal. 442, 33 P. 329 (1893).

107. *Id.* at 445, 33 P.2d at 330; *see also Whitaker v. Title Ins. & Trust*, 179 Cal. 111, 113, 175 P. 460, 462 (1918) (holding that an award of costs alone is automatically stayed pending appeal).

108. *McCallion*, 98 Cal. at 445, 33 P.2d at 330.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The Court inferred the legislative intent from the fact that certain exceptions were enumerated, and as such, the legislature must have intended to provide exceptions only in those particular circumstances. *Id.*

attorney fees as an item of the costs.¹¹³ Therefore, *McCallion* did not necessarily govern an award of attorney fees.

3. *Is an Award of Attorney Fees Alone Automatically Stayed Pending Appeal?*

Two later cases looked to the reasoning behind *McCallion* to determine if that logic applied to attorney fees.¹¹⁴ In these cases, the answer depended on whether the court considered attorney fees “ordinary costs” that were “incidental to the judgment” or whether the court considered attorney fees “extraordinary costs,” separate from ordinary costs.¹¹⁵

In *Chamberlin v. Dale’s Rentals*, the court indicated that some costs are incidental to the judgment and awarded in nearly every case, while other costs are not incidental to the judgment and not routinely awarded.¹¹⁶ The *Chamberlin* court indicated the former are “ordinary costs,” while the latter are “extraordinary” costs.¹¹⁷ In *Chamberlin*, the parties executed a contract with a fee provision benefitting the prevailing party in the event of litigation.¹¹⁸ Chamberlin sued Dale’s Rentals and received a judgment of compensatory and punitive damages.¹¹⁹ Chamberlin then filed a memorandum of costs including attorney fees.¹²⁰

The *Chamberlin* court discussed *McCallion*, finding that the costs that were automatically stayed in *McCallion* did not include attorney fees.¹²¹ The holding in *McCallion* did not purport to

113. *Id.*

114. See *Chamberlin v. Dale’s Rentals*, 188 Cal. App. 3d 356, 232 Cal. Rptr. 785 (1986); *Vadas v. Sosnowski*, 210 Cal. App. 3d 471, 258 Cal. Rptr. 374 (1989); see also *infra* notes 116-126 and accompanying text (providing a full discussion of *Chamberlin*); notes 127-137 and accompanying text (providing a full discussion of *Vadas*).

115. See *Chamberlin*, 188 Cal. App. 3d at 361-62, 232 Cal. Rptr. at 788; *Vadas*, 210 Cal. App. 3d at 473, 258 Cal. Rptr. at 375.

116. *Chamberlin*, 188 Cal. App. 3d at 361-62.

117. *Id.* at 364.

118. *Id.* at 358.

119. *Id.*

120. *Id.*

121. *Id.*

apply to attorney fees.¹²² Attorney fees, the court reasoned, are more closely related to a litigated issue than an incident to the judgment.¹²³ Furthermore, the *Chamberlin* court found that attorney fees are not the type of costs that are awarded in virtually every case, rather attorney fees are only awarded in certain limited situations.¹²⁴ The court in *Chamberlin* found that the arguments used in *McCallion* against posting a bond for a money judgment did not apply to attorney fees.¹²⁵ As a result, the *Chamberlin* court concluded that attorney fees should not be governed by *McCallion*, and the defendant was compelled to post an appeal bond.¹²⁶

In 1989, the court in *Vadas v. Sosnowski*,¹²⁷ addressed the distinction between incidental and non-incidental costs which the *Chamberlin* court noted.¹²⁸ The *Vadas* court intimated that after the 1986 amendment to section 917.1, *McCallion* may no longer be good law.¹²⁹ In *Vadas*, the plaintiff appealed from a judgment which required him to pay costs to the defendant.¹³⁰ The trial court would not stay the judgment unless the plaintiff posted a bond.¹³¹ The plaintiff sought a writ of supersedeas¹³² to stay the execution of the judgment.¹³³ The appellate court reversed, and

122. *Id.* at 361.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. 210 Cal. App. 3d 471, 258 Cal. Rptr. 374 (1989).

128. *Id.* at 473, 258 Cal. Rptr. at 375; *see supra* notes 114-118 and accompanying text (discussing distinction between incidental and non-incidental costs in *Chamberlin*).

129. *Vadas* 210 Cal. App. 3d at 473, 258 Cal. Rptr. at 375.

130. *Id.* at 472, 258 Cal. Rptr. at 375.

131. *Id.*

132. *See* *John Paul Lumber v. Agnew*, 116 Cal. App. 2d 638, 639-40, 254 P.2d 131, 132 (1953) (stating that the purpose of the writ of supersedeas is to stay proceedings of the lower court and preserve the status quo until the appeal is finished); *Messenkop v. Duffield*, 211 Cal. 222, 225, 294 P. 715, 716 (1930) (noting that the effect of supersedeas is to hold matters in the condition that they were in when the stay became effective); *see also* *Erickson v. Bohne*, 120 Cal. App. 2d 606, 606, 261 P.2d 782, 782 (1953) (indicating that issuance of the writ of supersedeas is discretionary, and the party needs to show that there is a substantial question to be presented on appeal); *Smith v. Smith*, 91 Cal. App. 743, 745, 267 P. 709, 710 (1928) (holding that the writ of supersedeas only acts to stay the hand of the lower court and not to undo anything that has been done).

133. *Vadas*, 210 Cal. App. 3d at 471, 258 Cal. Rptr. at 374 (1989).

held that a judgment for costs alone is automatically stayed pending appeal.¹³⁴

The *Vadas* court pointed out that *McCallion* was decided prior to the 1986 amendment to CCP section 917.1.¹³⁵ Moreover, the court noted that since 1986, no reported decision had considered whether a judgment for costs alone is still subject to the automatic statutory stay on appeal.¹³⁶ The court in *Vadas* agreed with the holding in *Chamberlin* that a judgment for attorney fees is distinguishable from a judgment for costs, since attorney fees are not routinely part of most judgments.¹³⁷

McCallion, *Chamberlin*, *Vadas* and *City Investment Co. v. Pringle* offer three possibilities for the characterization of attorney fees in relation to the posting of appeal bonds. The *McCallion* court held that ordinary costs are incidental to the judgment, from which one could infer that attorney fees would be automatically stayed pending appeal.¹³⁸ The *Chamberlin* and *Vadas* courts held that attorney fees are extraordinary costs, which are not incidental to the judgment, in which case appellant must post a bond to stay them pending appeal.¹³⁹ Finally, the court in *City Investment Co. v. Pringle* held that contractual attorney fees that do not trigger Civil Code section 1717, which provides for a reciprocal right to attorney fees and monetary damages, in which case appellant would post a bond to stay them pending appeal.¹⁴⁰

134. *Id.*

135. *Id.*

136. *Id.* at 473-74, 258 Cal. Rptr. at 375-76. The *Vadas* court noted that the legislative history of the 1986 amendment and the committee reports only discuss a judgment for costs as part of a judgment for money damages and say nothing about a judgment for costs alone. *Id.* But see *Civil Appellate Procedure*, 1988 CAL. CONTINUING EDUC. BAR § 6.23 (indicating that prior law is unchanged).

137. *Vadas*, 210 Cal. App. 3d at 474, 258 Cal. Rptr. at 3.

138. *McCallion v. Hibernia Sav.*, 98 Cal. 442, 33 P. 329 (1893); see *supra* notes 105-113 and accompanying text (discussing *McCallion*).

139. *Chamberlin v. Dale's Rentals*, 188 Cal. App. 3d 356, 361, 232 Cal. Rptr. 785, 788 (1986); *Vadas v. Sosnowski*, 210 Cal. App. 3d 471, 474, 258 Cal. Rptr. 374, 376 (1989); see *supra* notes 109-119 and accompanying text (providing a full discussion of *Chamberlin*); notes 127-137 and accompanying text (providing a full discussion of *Vadas*).

140. *City Inv. v. Pringle*, 49 Cal. App. 353, 193 P. 504 (1920); see *supra* note 91 and accompanying text (discussing *Pringle*).

D. Statutory Language Regarding Attorney Fees

It is unclear whether these three possibilities are mutually exclusive, or whether two or more of them may be able to exist together harmoniously. The statutes that refer to attorney fees and costs exacerbate the confusion. No statute defines costs.¹⁴¹ Some statutes treat attorney fees as part of costs,¹⁴² while other statutes treat the two items separately.¹⁴³ Finally, there are ambiguous statutes which are not clear in their intent to treat attorney fees as costs or as separate from costs.¹⁴⁴

1. Attorney Fees as Costs

Although a large number of statutes categorize attorney fees as part of costs to be awarded, other statutes do not.¹⁴⁵ California Code of Civil Procedure section 1032 provides that a prevailing party in an action can recover costs as a matter of right.¹⁴⁶ California Code of Civil Procedure section 1033.5 lists the items that are allowable as costs under section 1032.¹⁴⁷ Contractual and statutory attorney fees are among the items the legislature allows as costs under section 1033.5.¹⁴⁸ Furthermore, subsection (c)(5)

141. See *Rabinowitch v. California Western Gas Co.*, 257 Cal. App. 2d 150, 161, 65 Cal. Rptr. 1, 8 (1967) (pointing out that there is no statutory definition of costs).

142. See *infra* notes 145-154 and accompanying text (discussing statutes which treat attorney fees as part of costs).

143. See *infra* notes 155-160 and accompanying text (discussing statutes which treat attorney fees as separate from costs).

144. See *infra* notes 162-169 and accompanying text (discussing ambiguous statutes).

145. See *Green, supra* note 19, at 220 (providing that a number of statutes do not categorize attorney fees as part of costs to be awarded).

146. CAL. CIV. PROC. CODE § 1032 (West Supp. 1992).

147. See *id.* § 1033.5(a)-(c) (West Supp. 1992) (providing that the following items are included as costs: (1) Filing, motion and jury fees; (2) juror food and lodging while they are kept together during trial and after the jury retires for deliberation; (3) taking, videotaping and transcribing necessary depositions; (4) service of process; (5) expenses of attachment including keeper's fees; (6) premiums on necessary bonds; (7) ordinary witness fees ordered by the court; (8) fees of expert witnesses as ordered by the court; (9) transcripts of court proceedings ordered by the court; (10) attorney fees, when authorized by contract or statute; (11) court reporters fees; (12) models and blowups of exhibits; (13) any other item that is required to be awarded to the prevailing party pursuant to statute).

148. *Id.* § 1033.5(a)(10)(A)-(B) (West Supp. 1992).

of section 1033.5 notes that where a statute refers to an award of "costs and attorney fees," the attorney fees are an item of the costs.¹⁴⁹ This seems to indicate that the legislature intended for attorney fees to be costs under section 1032.

In actions for recovery of wages, CCP section 1031 provides that the court "shall add, as part of costs, an attorney's fee."¹⁵⁰ Similarly, other California statutes providing for attorney fees include those fees as costs.¹⁵¹ For instance, CCP section 874.010 provides that in partition of property proceedings, there is recovery of costs of partition, "including reasonable counsel fees."¹⁵² In an action for trespass, under CCP section 1021.6, the prevailing party is entitled to attorney fees, "in addition to other costs."¹⁵³ Finally, in an action for damages arising out of a peace officer's conduct, under CCP section 1021.7, the prevailing party is entitled to attorney fees "as part of costs."¹⁵⁴

2. Attorney Fees as Separate from Costs

Some statutes, however, expressly distinguish costs and attorney fees.¹⁵⁵ For instance, under CCP section 1268.710, which covers condemnation proceedings, attorney fees are expressly excluded from costs.¹⁵⁶ There are also statutes which implicitly separate attorney fees and costs by using the conjunction "and" between the terms.¹⁵⁷ For instance, California Code of Civil Procedure section 482.110 provides that a writ of attachment may include an estimate of costs *and* attorney fees.¹⁵⁸ California Code of Civil

149. *Id.* § 1033.5(c)(5) (West Supp. 1992).

150. *Id.* § 1031 (West Supp. 1992).

151. *See supra* notes 145-150 and accompanying text (discussing statutes that provide for attorney fees as costs).

152. CAL. CIV. PROC. CODE § 874.010 (West 1980).

153. *Id.* § 1021.6 (West Supp. 1992).

154. *Id.* § 1021.7 (West Supp. 1992).

155. *See infra* note 156 and accompanying text (discussing statutes that expressly distinguish costs and attorney fees).

156. CAL. CODE CIV. PROC. § 1268.710 (West 1982).

157. *See infra* notes 158-160 and accompanying text (discussing statutes which separate costs and fees by using the word "and" in between them).

158. CAL. CODE CIV. PROC. § 482.110 (West 1979).

Procedure section 1029.8 provides that where an unlicensed person causes injury to another, the court may award to the injured party all costs *and* attorney fees.¹⁵⁹ Code of Civil Procedure section 1030 provides that, when a plaintiff is an out-of-state resident, the court can require a bond to be posted to secure costs *and* attorney fees.¹⁶⁰ Thus, some statutes classify attorney fees as costs and some statutes indicate that attorney fees are separate from costs. Unfortunately, other statutes are ambiguous.

3. Ambiguous Statutes

Some statutes are not clear in their intent to treat attorney fees as costs.¹⁶¹ For instance, CCP section 1021 codifies the American Rule that each party must pay its own legal fees.¹⁶² That section states that “[e]xcept as attorney’s fees are specifically provided for by statute,” agreements between the parties govern attorney fee awards.¹⁶³ Section 1021 then provides that the parties are entitled to have their costs paid as provided in the sections following section 1021.¹⁶⁴ Section 1021.5, which follows section 1021, provides for the recovery of attorney fees in some situations.¹⁶⁵ This indicates that the phrase “costs as hereinafter provided” was intended to include attorney fees at least in situations addressed by section 1021.5.¹⁶⁶ The first part of section 1021 is a general provision banning the recovery of attorney fees in an action except as provided by statute or agreement.¹⁶⁷ The last clause authorizes recovery of costs.¹⁶⁸ This explicit bifurcation between the clauses indicates a legislative intent that the attorney fees mentioned in the

159. *Id.* § 1029.8 (West Supp. 1992).

160. *Id.* § 1030 (West Supp. 1992).

161. *See infra* notes 162-169 and accompanying text (discussing ambiguous statutes).

162. *See* CAL. CODE CIV. PROC. § 1021 (West Supp. 1992) (providing that each party is responsible for their own attorney fees, except where a statute or contract provides otherwise); *see also supra* note 21 (giving full text of section 1021).

163. CAL. CODE CIV. PROC. § 1021 (West Supp. 1992).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

first clause are not part of the costs recoverable under the second clause.¹⁶⁹ It appears then, that the legislative intent regarding contractual attorney fees is unclear. Thus, the statutes themselves provide no consistent and concise rule whether attorney fees are part of, or separate from, costs. It is not surprising, then, that the case law trying to categorize attorney fees is similarly inconsistent.

II. RECENT CASE LAW REGARDING ATTORNEY FEES AND POSTING APPEAL BONDS

Three California cases, decided in different appellate districts, demonstrate the varying interpretations among the courts as to whether attorney fees are automatically stayed pending an appeal or whether the appellant must post a bond to stay them.¹⁷⁰ In the case of *Nielsen v. Stumbos*,¹⁷¹ the third district court of appeal held that contractual attorney fees are automatically stayed pending appeal.¹⁷² In *Banks v. Manos*,¹⁷³ the sixth district court of appeal held that attorney fees awarded as sanctions under CCP section 128.5 require the appellant to post a bond to stay the judgment pending appeal.¹⁷⁴ Finally, the second district court of appeal in *San Pedro v. Superior Court of Los Angeles*,¹⁷⁵ analogizing expert witness fees to attorney fees, held that expert

169. *Mandel v. Myers*, 106 Cal. App. 3d 384, 392-93, 165 Cal. Rptr. 148, 153 (1980). The *Mandel* court also noted that the inclusion of section 1021.5 in the costs section does not imply a legislative intent to define an award of attorney fees as an item of costs to be recovered pursuant to the chapter, because if the legislature intended that attorneys fees awarded pursuant to section 1021.5 would be recoverable as costs it would have plainly said so. *Id.*

170. *See Banks v. Manos*, 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318, 329 (1991) (holding that attorney fees awarded as sanctions require an appeal bond in order to stay them pending appeal); *Bank of San Pedro v. Superior Court*, 3 Cal. App. 4th 950, 957, 283 Cal. Rptr. 372, 376 (1991) (holding that expert witness fees require an appeal bond in order to stay them pending appeal); *Neilsen v. Stumbos*, 226 Cal. App. 3d 301, 305, 276 Cal. Rptr. 272, 275 (1990) (holding that attorney fees awarded pursuant to contract are automatically stayed pending appeal); *see also infra* notes 177-207 and accompanying text (discussing *Neilsen*); notes 208-241 and accompanying text (discussing *Banks*); notes 243-263 and accompanying text (discussing *San Pedro*).

171. 226 Cal. App. 3d 301, 276 Cal. Rptr. 272 (1990).

172. *Id.* at 305, 283 Cal. Rptr. at 275.

173. 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318, 329 (1991).

174. *Banks v. Manos*, 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318, 329 (1991).

175. 3 Cal. App. 4th 950, 957, 283 Cal. Rptr. 372, 376 (1991).

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witness fees required the appellant to post a bond to stay them pending appeal.¹⁷⁶

A. Nielsen v. Stumbos

In *Nielsen v. Stumbos*, the California Court of Appeal for the Third District addressed whether the enforcement of an award of attorney fees plus other costs is automatically stayed pending appeal.¹⁷⁷ The plaintiff in *Nielsen* sued his former law partners for an accounting.¹⁷⁸ The partnership agreement provided that the prevailing party would be entitled to reasonable attorney fees in the event of litigation.¹⁷⁹ The trial court found for the defendants.¹⁸⁰ The defendants submitted a memorandum of costs, including attorney fees.¹⁸¹ The trial court awarded the defendants \$33,270.21 for costs and attorney fees.¹⁸² The defendants threatened to enforce the judgment unless the plaintiff posted a bond to stay the judgment pending appeal.¹⁸³ The plaintiff argued that the filing of an appeal stays the enforcement of the judgment, and sought a writ of supersedeas on this point.¹⁸⁴

The appellate court in *Nielsen* looked to the applicable statutes, and discussed the automatic stay provision of CCP section 916 and the exception for money judgments of CCP section 917.1.¹⁸⁵ The court relied on *McCallion*,¹⁸⁶ stating that a judgment for costs only is not a money judgment for purposes of section 917.1.¹⁸⁷ According to the *Nielsen* court, any other construction would negate the automatic stay provision of section 916.¹⁸⁸ The court

176. *Id.* at 957, 283 Cal. Rptr. at 376.

177. *Nielsen*, 226 Cal. App. 3d at 303, 276 Cal. Rptr. at 273.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.* (citing CCP sections 916, 917.1).

186. *See supra* notes 106-113 and accompanying text (discussing *McCallion*).

187. *Nielsen*, 226 Cal. App. 3d at 303, 276 Cal. Rptr. at 273.

188. *Id.* at 304, 276 Cal. Rptr. at 273.

then addressed whether it should treat attorney fees as costs or as a money judgment.¹⁸⁹ The *Nielsen* court looked no further than the plain language of Civil Code section 1717, providing for the recovery of attorney fees where a contract provides for such recovery.¹⁹⁰ Section 1717 allows an award of attorney fees to be made to the prevailing party "in addition to other costs."¹⁹¹ The *Nielsen* court determined that the word "other" implies that contractual attorney fees are merely one of several types of costs.¹⁹² Additionally, the court reviewed the third paragraph of section 1717.¹⁹³ That paragraph indicates that reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of the suit.¹⁹⁴

The court in *Neilsen* distinguished *Chamberlin*¹⁹⁵ by limiting it to its facts.¹⁹⁶ *Chamberlin* involved a judgment for money damages.¹⁹⁷ The issue in *Chamberlin* was whether a bond for that money judgment should be increased to reflect the amount of the award of attorney fees.¹⁹⁸ *Nielsen* did not involve a money judgment, only an award of attorney fees.¹⁹⁹ The question in *Nielsen* was whether a bond must be posted at all if there is no money judgment.²⁰⁰ The *Neilsen* court instead analogized to *Vadas v. Sosnowski*.²⁰¹ Like *Nielsen*, *Vadas* involved a judgment for costs alone.²⁰² The *Neilsen* court supported this view by pointing out that CCP section 1033.5, which lists the items recoverable as costs, includes contractual attorney fees as items

189. *Id.*

190. *Id.*

191. CAL. CIV. CODE § 1717 (West Supp. 1992).

192. *Nielsen*, 226 Cal. App. 3d at 303, 276 Cal. Rptr. at 273.

193. *Id.*

194. *Id.*

195. See *supra* notes 116-126 and accompanying text (discussing *Chamberlin*).

196. *Nielsen*, 226 Cal. App. 3d at 303, 276 Cal. Rptr. at 273.

197. See *supra* notes 120-130 and accompanying text (discussing *Chamberlin*).

198. *Chamberlin v. Dale's Rentals*, 188 Cal. App. 3d 356, 362, 232 Cal. Rptr. 785, 789 (1986).

199. *Nielsen*, 226 Cal. App. 3d at 305, 276 Cal. Rptr. at 274.

200. *Id.*

201. *Id.*; see *supra* notes 127-137 and accompanying text (discussing *Vadas*).

202. *Vadas v. Sosnowski*, 210 Cal. App. 3d 471, 471, 258 Cal. Rptr. 374, 374 (1989).

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allowable as costs under section 1032, which provides that the prevailing party is entitled to costs as a matter of right.²⁰³

Therefore, the court in *Neilsen* concluded that the plaintiff was not required to post a bond to stay the judgment for attorney fees pending appeal.²⁰⁴

The *Neilsen* holding, however, refers to contractual attorney fees only.²⁰⁵ The court does not address whether statutory attorney fees would also be automatically stayed.²⁰⁶ A few months later, the case of *Banks v. Manos*²⁰⁷ partially answered that question.

B. *Banks v. Manos*

The *Banks v. Manos* case involved attorney fees awarded pursuant to CCP section 128.5.²⁰⁸ Section 128.5 provides that the court can order one party to pay the other party's attorney fees as sanctions.²⁰⁹ *Banks* held that such attorney fee awards do require appellants to post a bond to stay them pending appeal.²¹⁰

In *Banks*, the plaintiffs sued the defendants under the Home Equity Sales Contracts Statute.²¹¹ The plaintiffs sought equitable relief, damages, attorneys fees and costs.²¹² The trial court granted summary judgment to the defendants.²¹³ The court determined that the plaintiff had brought a frivolous lawsuit and, as a sanction, ordered the plaintiff to pay the defendant's attorney fees.²¹⁴ The plaintiff filed an appeal, but the trial court refused to stay the execution of the judgment pending appeal unless the

203. *Neilsen*, 226 Cal. App. 3d at 305, 276 Cal. Rptr. at 274-75.

204. *Id.*

205. *Id.*

206. *Id.* at 305, 276 Cal. Rptr. at 275.

207. 232 Cal. App. 3d 123, 283 Cal. Rptr. 318 (1991).

208. *Id.* at 126, 283 Cal. Rptr. at 321.

209. CAL. CIV. PROC. CODE § 128.5 (West Supp. 1992).

210. *Banks*, 232 Cal. App. 3d at 126, 283 Cal. Rptr. at 321.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

plaintiff posted a bond.²¹⁵ The plaintiff sought a writ of supersedeas.²¹⁶ The California Court of Appeal for the Sixth District in *Banks* held that the plaintiff was not entitled to an automatic stay, and must post a bond to stay the execution of what the *Banks* court called a “money judgment.”²¹⁷

The court discussed *Vadas v. Sosnowski*,²¹⁸ indicating that a judgment for costs alone does not require a bond, since courts routinely award costs.²¹⁹ According to the *Banks* court, to require a bond would negate the automatic stay provisions of section 916.²²⁰ The *Banks* court pointed out, referring to *Chamberlin*,²²¹ that a judgment for damages plus attorney fees must be bonded for the full amount, since attorney fees, unlike costs, are not routinely part of most judgments.²²² The court in *Banks* found that attorney fees awarded as sanctions differ from contractual attorney fees, statutory attorney fees and costs.²²³

The court in *Banks* distinguished *Nielsen*²²⁴ by noting the differences between statutory attorney fees and attorney fees awarded pursuant to CCP section 128.5.²²⁵ Section 128.5 does not authorize awards of attorney fees as a matter of course.²²⁶ However, section 128.5 does authorize the court to award attorney fees as sanctions.²²⁷ The court in *Banks* noted that section 128.5 is applied only in extraordinary cases.²²⁸ The *Banks* court then pointed out that Civil Code section 1717 authorizes the court to award attorney fees to the prevailing party whenever the contract

215. *Id.*

216. *Id.*

217. *Id.* at 126-27, 283 Cal. Rptr. at 320.

218. See *supra* notes 127-137 and accompanying text (discussing *Vadas*).

219. *Banks*, 232 Cal. App. 3d at 127, 283 Cal. Rptr. at 320.

220. *Id.*

221. See *supra* notes 116-126 and accompanying text (discussing *Chamberlin*).

222. *Banks*, 232 Cal. App. 3d at 127, 283 Cal. Rptr. at 320.

223. *Id.*

224. See *supra* notes 177-207 and accompanying text (discussing *Neilsen*).

225. *Banks*, 232 Cal. App. 3d at 128, 283 Cal. Rptr. at 320.

226. See CAL. CIV. PROC. CODE § 128.5 (West Supp. 1992) (providing that the court can award attorney fees as sanctions).

227. *Id.*

228. *Banks*, 232 Cal. App. 3d at 128, 283 Cal. Rptr. at 320.

provides for attorney fees, and courts routinely apply section 1717.²²⁹ Further, the *Banks* court noted that contractual attorney fees are identified as costs under CCP section 1033.5,²³⁰ which provides that contractual attorney fees are included as costs for purposes of CCP section 1032.²³¹ Section 1032 provides that the prevailing party is entitled to costs.²³² Next, the *Banks* court found that attorney fees awarded pursuant to section 128.5 also differ from attorney fees awarded pursuant to statute, because judgments for sanctions are not necessarily related to the size of the recovery or the amount of time billed by the attorney.²³³

The court in *Banks* determined that attorney fees awarded as sanctions differ from costs in five respects.²³⁴ First, attorney fees as sanctions are similar to a monetary judgment, because the fees represent damages for abusive legal tactics.²³⁵ Second, courts routinely award costs, while attorney fees as sanctions have extraordinary application.²³⁶ Third, the court can award attorney fees sanctions against a third party.²³⁷ On the other hand, the court can only award costs to the prevailing party, which includes only the plaintiffs and defendants.²³⁸ Fourth, the language in section 1033.5 indicates that if a statute authorizes an award of "attorney fees and costs," the attorney fees are awarded as part of the costs.²³⁹ Finally, since section 128.5 only imposes "reasonable expenses" as an element of sanctions and makes no mention of costs, the legislature did not intend to classify sanctions as costs.²⁴⁰

229. *Id.*

230. CAL. CIV. PROC. CODE § 1033.5 (West Supp. 1992).

231. *Banks*, 232 Cal. App. 3d at 128, 283 Cal. Rptr. at 320.

232. CAL. CIV. PROC. CODE § 1032 (West Supp. 1992).

233. *Banks*, 232 Cal. App. 3d at 128, 283 Cal. Rptr. at 320-21.

234. *Id.*

235. *Id.*

236. *Id.* at 129, 283 Cal. Rptr. at 321.

237. *Id.*

238. *Id.*

239. *Id.*; see CAL. CIV. PROC. CODE § 1033.5 (West Supp. 1992) (providing that the court can allow certain items as costs); *supra* note 147 (providing a complete list of the items allowable as costs).

240. *Banks*, 232 Cal. App. 3d at 129, 283 Cal. Rptr. at 321. See CAL. CIV. PROC. CODE § 128.5 (West Supp. 1992) (providing that the Court can award attorney fees as sanctions).

Therefore, the *Banks* court concluded that an award for attorney fees as sanctions under section 128.5 required the appellant to post an appeal bond to stay the judgment pending appeal.²⁴¹ After *Banks*, it would seem that contractual and statutory attorney fees are automatically stayed pending appeal, with the exception of CCP section 128.5, which requires a bond to be posted in order to stay the judgment. However, the case of *Bank of San Pedro v. Superior Court of Los Angeles*,²⁴² decided six days after *Banks*, interprets the law on this point very differently than the court in *Banks*.

C. *Bank of San Pedro v. Superior Court of Los Angeles*

In *Bank of San Pedro v. Superior Court of Los Angeles*, the California Court of Appeal for the Second District addressed whether expert witness fees are automatically stayed pending appeal.²⁴³ The court analogized expert witness fees to attorney fees and held that expert witness fees, like attorney fees, are not ordinarily part of the costs awarded at trial.²⁴⁴ The court reasoned that since attorney fees require a bond to stay them pending appeal, expert witness fees also require a bond.²⁴⁵

In *San Pedro*, Goodstein, the real party in interest, sued numerous defendants, including the Bank of San Pedro.²⁴⁶ Ultimately, the Bank of San Pedro obtained a judgment for non-suit.²⁴⁷ The Bank then moved to collect \$116,184 in expert witness fees under CCP section 998.²⁴⁸ That section authorizes the court to order a plaintiff to pay the defendant's expert witness fees where the plaintiff refuses a settlement offer and subsequently

241. *Banks*, 232 Cal. App. 3d at 129, 283 Cal. Rptr. at 321. The court noted that if part of the judgment is required to be bonded, then the rest of the judgment must be bonded. *Id.*

242. 2 Cal. App. 4th 950, 283 Cal. Rptr. 372 (1991).

243. *Id.* at 955-56, 283 Cal. Rptr. at 375.

244. *Id.*

245. *Id.*

246. *Id.* at 952, 283 Cal. Rptr. at 373.

247. *Id.*

248. *Id.*; see CAL. CIV. PROC. CODE § 998(d) (West Supp. 1992) (providing that the court may require a defendant to pay a plaintiff's expert witness fees if the defendant does not accept an offer to compromise made by plaintiff, and then fails to receive a more favorable judgment at trial).

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fails to recover more than the offer at trial.²⁴⁹ The plaintiff appealed, and refused to post a bond.²⁵⁰ The defendant moved to require the plaintiff to post a bond, but the trial court denied the motion.²⁵¹ The defendant sought a writ of supersedeas.²⁵²

The *San Pedro* court discussed CCP section 917.1, the exception for money judgments from the automatic stay provision of section 916.²⁵³ The *San Pedro* court noted that a conflict in the law had developed as a result of *Vadas*.²⁵⁴ As described above, *Vadas* held that a judgment for ordinary costs is automatically stayed pending appeal.²⁵⁵ The *San Pedro* court limited *Vadas* by noting that *Vadas* only involved routine costs, not extraordinary costs.²⁵⁶

After distinguishing *Vadas*, the *San Pedro* court referred to the holding in *Chamberlin* that the collection of costs, which are not routinely part of most judgments, would not be stayed pending appeal unless the appellant posted a bond.²⁵⁷ As the court did in *Chamberlin*, the court in *San Pedro* reasoned that extraordinary costs such as attorney fees were not the type of costs implicated in *McCallion*.²⁵⁸ The *McCallion* court held that, since courts award costs in virtually every case, requiring a bond in every case would negate the automatic stay provision of section 916.²⁵⁹

The *San Pedro* court then analogized the attorney fees in *Chamberlin* to the expert witness fees in the case at hand, and determined that expert witness fees are not ordinarily a part of the

249. CAL. CIV. PROC. CODE § 998 (West Supp. 1992).

250. *San Pedro*, 3 Cal. App. 4th at 953, 283 Cal. Rptr. at 374.

251. *Id.*

252. *Id.* at 953, 283 Cal. Rptr at 375.

253. *Id.* at 376, 283 Cal. Rptr. at 375; see CAL. CIV. PROC. CODE § 917.1(a) (West Supp. 1992) (providing that a judgment that includes money damages is not automatically stayed pending appeal).

254. *San Pedro*, 3 Cal. App. 4th at 955, 283 Cal. Rptr. at 375; see *supra* notes 127-137 and accompanying text (discussing *Vadas*).

255. See *supra* notes 127-37 and accompanying text (discussing *Vadas*).

256. *San Pedro*, 3 Cal. App. 4th at 956, 283 Cal. Rptr. at 375-76.

257. *Id.*, 283 Cal. Rptr. at 376 (referring to *Chamberlin v. Dale's Rentals*, 188 Cal. App. 3d 356, 362, 232 Cal. Rptr. 785, 788 (1986)).

258. *Id.*

259. See *supra* notes 100-107 and accompanying text (discussing *McCallion*).

costs courts generally awarded at trial.²⁶⁰ In addition, courts do not award expert witness fees in virtually every case.²⁶¹ Finally, expert witness fees are a directly litigated issue, rather than an incidental matter.²⁶² The court in *San Pedro* concluded therefore, that expert witness fees, like attorney fees, are not automatically stayed pending appeal.²⁶³

In sum, *Nielsen*, *Banks*, and *San Pedro* do not appear to offer consistent resolutions to the problem of whether attorney fees are automatically stayed pending appeal. The *Nielsen* court held that an award of contractual attorney fees is automatically stayed pending appeal.²⁶⁴ The *Banks* court held that attorney fees awarded as sanctions do require the appellant to post a bond to stay the award pending appeal.²⁶⁵ Finally, the *San Pedro* court, analogizing expert witness fees to attorney fees, held that expert witness fees require appellant to post a bond to stay the fees pending appeal.²⁶⁶

III. RAMIFICATIONS AND ALTERNATIVE SOLUTIONS

A. Reconciliation of the Cases

Despite the apparent inconsistency of the *Neilsen*, *Banks* and *San Pedro* cases, it is possible to reconcile the cases by reading the holdings narrowly. First, *Neilsen* and *Banks* can be factually limited. *Neilsen* involved attorney fees awarded pursuant to contract, so it stands for the narrow proposition that contractual attorney fees are automatically stayed pending appeal.²⁶⁷ *Banks*

260. *San Pedro*, 3 Cal. App. 4th at 956, 283 Cal. Rptr. at 376.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Neilsen v. Stumbos*, 226 Cal. App. 3d 301, 305, 276 Cal. Rptr. 272, 275 (1990); see *supra* notes 177-207 and accompanying text (discussing *Neilsen*).

265. *Banks v. Manos*, 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318, 321; see *supra* notes 208-241 and accompanying text (discussing *Banks*).

266. *San Pedro*, 3 Cal. App. 4th at 957, 283 Cal. Rptr. at 376; see *supra* notes 243-263 and accompanying text (discussing *San Pedro*).

267. *Neilsen*, 226 Cal. App. 3d at 305, 276 Cal. Rptr. at 275.

involved attorney fees awarded as sanctions, so it stands for the narrow proposition that attorney fees as sanctions are not automatically stayed pending appeal.²⁶⁸ Finally, the discussion in *San Pedro* that attorney fees are not automatically stayed is mere dicta, and was not part of the holding of that case.²⁶⁹ The *San Pedro* case only referenced attorney fees by analogy, and therefore, stands for the narrow proposition that expert witness fees are not automatically stayed.²⁷⁰

B. Criticism of the Cases

If *Neilsen*, *Banks* and *San Pedro*, are not reconciled by interpreting the holdings narrowly, they have the potential to present even more problems. *Neilsen*, *Banks* and *San Pedro* have created uncertainty in the law as to whether an appeal bond must be posted for a judgment of attorney fees alone. Such uncertainty breeds increased litigation, and undermines society's confidence in the judicial system.²⁷¹ When the law is uncertain, it encourages potential litigants to sue, since the case could easily go either way.²⁷² When the law is settled, it deters many potential litigants. The increased litigation, caused by the uncertainty in the law, costs the judicial system money, and congests the court system. Additionally, when the law is uncertain, it causes people to lose faith in a judicial system.²⁷³

This uncertainty in the law surrounding attorney fees and posting appeal bonds can be resolved in three different ways. The following subsection discusses each solution in turn, first offering

268. *Banks*, 232 Cal. App. 3d at 129, 283 Cal. Rptr. at 321.

269. *Neilsen*, 226 Cal. App. 3d at 305, 276 Cal. Rptr. at 275.

270. *Id.*

271. See Green, *supra* note 19, at 235 (noting that uncertainty in the law results in increased litigation).

272. G. Robert Blakey, *Symposium Law and the Continuing Enterprise*, 65 NOTRE DAME L. REV. 1073, 1078 (1990).

273. *Miller v. Arizona Bank*, 43 P.2d 518, 527 (1935) (noting that experience proves that uncertainty in the law is generally more harmful to the public in the long run than occasional inconveniences).

a broad rule and then offering a more narrow rule based on the subtle differences between the various types of attorney fees.

C. Solutions to the Problem

1. Treat Attorney Fees as Part of Damages

The broadest possible solution is to treat all attorney fees as damages for purposes of posting appeal bonds. If an award for attorney fees alone is deemed a judgment for money damages, then the losing party would have to post a bond in order to stay the award pending appeal. When the court awards attorney fees in addition to money damages, the appeal bond must be increased to reflect the amount of the attorney fees.²⁷⁴ There does not seem to be any reason, then, why a judgment for attorney fees alone should not require a bond. However, such a bright line rule is a very blunt instrument, and may not be sensitive enough to the differences between the three types of attorney fees. Perhaps a better solution is one which contemplates those differences.

The two procedures for applying for attorney fees and the policies behind those procedures provide an practical line of demarcation.²⁷⁵ To apply for statutory attorney fees, a party must include them in the memorandum of costs.²⁷⁶ This indicates that such fees are similar to costs or perhaps actually are costs. The provisions for these fee awards are found in statutes, just as the provisions for cost awards are found in statutes.²⁷⁷ To apply for contractual and equitable attorney fees, a party must file a motion with the court requesting such fees.²⁷⁸ This procedure separates

274. *Chamberlin v. Dale's Rentals*, 188 Cal. App. 3d 356, 362, 232 Cal. Rptr. 785, 788 (1986).

275. See *supra* notes 67-73 and accompanying text (discussing procedure for applying for attorney fees); *supra* notes 97-105 and accompanying text (discussing procedure for posting appeal bonds).

276. See *supra* notes 72-76 and accompanying text (discussing filing for statutory attorney fees).

277. See *supra* notes 81-89 and accompanying text (discussing procedure for filing contractual and equitable attorney fees).

278. *City Inv. v. Pringle*, 49 Cal. App. 353, 355, 193 P. 504, 505 (1920); see *supra* note 91 and accompanying text (discussing *Pringle*).

these types of attorney fees from costs, and treats them differently. Most likely, this is because contractual and equitable attorney fees are more closely tied to the merits of the case and are more similar to a litigated issue. Contractual attorney fees even have to be pleaded in the complaint and proved at trial as special damages.²⁷⁹ There is every reason to treat them as damages for the purposes of posting appeal bonds as well. In order to recover equitable attorney fees, the prevailing party must meet certain requirements.²⁸⁰ Whether or not the party meets those requirements must be adjudicated during the course of the trial. Thus, equitable attorney fees are a litigated issue in the trial, just as damages are. Since statutory and equitable attorney fees are distinct enough from costs to require a motion to be filed in order to receive them, they are also distinct enough to require a bond to be posted in order to stay them.

This solution is problematical, because contractual attorney fees that implicate Civil Code section 1717, as costs, will be automatically stayed, while contractual attorney fees that do not implicate Civil Code section 1717, as damages, will require a bond.²⁸¹ Section 1717 is only implicated when a contract unfairly provides for attorney fees to one party.²⁸² If section 1717 attorney fees are automatically stayed pending appeal, it will encourage drafters of contracts to include a one-sided provision for attorney fees, so that the contract falls under section 1717. This would undermine the section's attempt to alleviate the unfairness of one-sided attorney fee provisions.

2. *Treat Attorney Fees as Extraordinary Costs*

Another possible solution is to follow the distinction drawn in *Vadas* and *Chamberlain*, treating attorney fees as extraordinary

279. See *supra* note 60 (discussing requirements for receiving attorney fees under private attorney general theory).

280. See *supra* notes 30-34 and accompanying text (discussing Civil Code section 1717).

281. See *supra* notes 114-134 and accompanying text (discussing distinction between ordinary and extraordinary costs).

282. See *supra* notes 208-241 and accompanying text (discussing *Banks*).

costs which require a bond to be posted to stay them pending appeal.²⁸³ A broad rule would treat all attorney fees as extraordinary costs and require a bond for all attorney fees, whether awarded pursuant to contract, statute or equitable considerations. Once again, this broad rule might be too blunt an instrument, because there may be reasons to treat certain awards of attorney fees as ordinary costs. A rule which contemplates the subtle differences between the three types of attorney fees may be more workable.

3. Require Bond Only When Equity Requires

The best solution would be to require a bond when equity requires it. This would not be a bright line rule that attorneys and parties can count on to work in their favor every time. Attorneys will have to present and brief the issue at trial. However, a rule that requires the court to determine if equity requires a bond to be posted to stay a judgment for attorney fees alone best serves the purpose behind awarding attorney fees in certain situations. Equity requires a bond to be posted for attorney fees whenever attorney fees are awarded under the private attorney general doctrine.²⁸⁴ Additionally, equity may require attorney fees awarded as sanctions to require a bond.²⁸⁵

The private attorney general doctrine was created by the courts and codified in CCP section 1021.5 to provide potential litigants with an incentive to vindicate an important right or policy.²⁸⁶ It is intended to encourage those litigants who are motivated by the policy of benefiting others.²⁸⁷ Moreover, not only are potential litigants motivated by the private attorney general theory, attorneys are also motivated to take cases where the plaintiff will not be able

283. Carl Cheng, *Important Rights and the Private Attorney General Doctrine*, 73 CALIF. L. REV. 1929, 1929 (1985).

284. *Id.*

285. *Id.*

286. *Id.*; CAL. CIV. PROC. CODE. § 1021.5 (West Supp. 1992).

287. Cheng, *supra* note 283, at 1929.

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to afford the costs of the suit.²⁸⁸ The private attorney general theory awards attorney fees to the plaintiff's attorney whenever the suit meets certain criteria.²⁸⁹ This encourages attorneys to devote their time and energy to public interest lawsuits. If attorneys cannot be secure that this award will be forthcoming, they will be discouraged from litigating public interest lawsuits.

In public interest suits, the judgment is usually an injunction, not damages. Thus, there are many cases where the judgment will be for attorney fees alone. The losing party must post a bond for these attorney fees in order to give attorneys a sense of security that they will indeed be paid. If the attorney must await the resolution of the appeal, the other party has the chance, in the interim, to sell, encumber, transfer or conceal his assets.²⁹⁰ The other party might also, in good faith, go bankrupt.²⁹¹ While this is also a possibility where attorney fees are awarded pursuant to statute or contract, the public interest arena is the only place where this result has a grave impact. Attorneys will lose their incentive to litigate important public interests and society will lose its voice in the courts. For equitable and policy reasons, therefore, attorney fees awarded under the private attorney general theory must require a bond to be posted in order to stay them pending appeal.

As the court in *Banks* indicated, attorney fees awarded as sanctions are different from other types of attorney fees.²⁹² Attorney fees awarded as sanctions are punishment against a party or attorney for misconduct and they are restitution for the aggrieved party for having endured that wrongdoing.²⁹³ In this regard, sanctionable attorney fees are more similar to damages than any other type of attorney fees.²⁹⁴ If equity requires a judgment for money damages to be stayed only by posting a bond, then the

288. *Id.*

289. *See supra* note 60 (providing the four criteria that the plaintiff must meet in order to get attorney fees).

290. *Bank of San Pedro v. Superior Court*, 3 Cal. App. 4th 950, 950, 283 Cal. Rptr. 372, 374-75 (1991).

291. *Id.*

292. *Banks v. Manos*, 232 Cal. App. 3d 123, 128, 283 Cal. Rptr. 318, 321 (1991).

293. *Id.*

294. *Id.*

same logic requires a judgment for attorney fees as sanctions to be stayed only by posting a bond.

IV. CONCLUSION

Equity demands that attorney fees awarded pursuant to the private attorney general theory must not be automatically stayed pending appeal. Additionally, logic demands that attorney fees awarded as sanctions must not be automatically stayed pending appeal. Contractual and statutory attorney fees, while they are not routine costs, must be automatically stayed pending appeal. Contractual attorney fees can conceivably arise in every contract action. Over 200 statutes provide for attorney fees in California, and other states are not far behind.²⁹⁵ Between these two sources of attorney fee awards, courts have occasion to award attorney fees quite frequently. While such attorney fees have been deemed "extraordinary" in the past, they are not so extraordinary as to require a bond to be posted to stay them pending appeal.

The holdings of *Neilsen* and *Banks* and the dicta of *San Pedro* must be reconciled. The conflicting holdings in various appellate courts are unacceptable, because they create uncertainty in the law. Furthermore, the inconclusive status of attorney fees as part of costs, or as separate from costs, adds to the confusion and uncertainty. The legislature or the courts must draw some lines and set some boundaries in the area of attorney fees, particularly with regard to whether a judgment for attorney fees alone requires a bond to be posted pending appeal.

Jineen T. Cuddy

295. See *supra* note 35 (listing California statutes that provide for attorney fees).