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Are Anti-SLAPP Fee Awards Stayed on Appeal?

The Better Side of a Split of Authority Says Yes

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Let's start with what might be described as an inverted judgment — a scenario common in anti-SLAPP actions: The underlying judgment amount is much less than the costs because the costs include a large award of attorney fees. The size of the cost award draws an appeal.

On appeal, what happens to that oversized cost award — is it stayed automatically, or does the appellant have to post a bond? For the past 20 years, the assumed answer has been: anti-SLAPP fee awards are not automatically stayed. But that is not necessarily correct. The better answer is: it depends.

The general rule in civil cases is that an award of costs is automatically stayed on appeal. But there is an exception to that rule, and that exception has been interpreted differently in two decisions of the Courts of Appeal. The first decision, *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, makes the exception very large, so that unless a bond is posted, many types of costs are enforceable on appeal. These include fee awards in anti-SLAPP actions. Lawyers and judges have mostly followed this decision, mostly uncritically, so the assumed rule has been that anti-SLAPP fees are not stayed on appeal.

The second decision, *Quiles v. Parent* (2017) 10 Cal.App.5th 130, makes the exception very small: specifically, just three types of costs defined by statute. These do not include fee awards in anti-SLAPP actions.

This article argues that *Quiles* offers sounder reasoning than *Dowling*. Following *Quiles*, anti-SLAPP fee awards — and any other cost award not specified by statute (Code Civ. Proc., § 917.1, subd. (a)(2) [expert costs], subd. (a)(3) [small claims de novo costs], and § 917.75 [family law fees]; further unspecified statutory references are to the Code of Civil Procedure) — should be stayed automatically on appeal without a bond.

That is good news to the party saddled with a cost judgment. But there is consolation to the party seeking to enforce a costs award: Even under *Quiles*, costs are *not* stayed if the underlying judgment is being appealed as well.

In other words, when both a money judgment and costs have been awarded, and the appeal is from *both* the judgment *and* the cost award, then there is no automatic stay of the cost award.

Summary of the Automatic Appellate Stay Rule Applied to Cost Awards

Before exploring the split between *Dowling* and *Quiles*, here is a summary of the rules concerning stays of enforcement of awards on appeal. The overarching rule is in section 916: "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order." (*Id.*, subd. (a).) Subsequent sections lay out various exceptions.

Taking those exceptions into account, the rules related to money judgments and cost awards are as follows:

1. Money judgment only: The judgment is enforceable unless the appellant posts a bond. (§ 917.1, subd. (a)(1).)

2. Costs only: An appeal automatically stays enforcement of the cost award, without a bond. (§ 917.1, subd. (d).) This rule does not apply to (1) costs under section 998, (2) costs of de novo trials in small claims actions, (3) costs in family law cases, or (4) at the trial court's discretion, in other situations. (See §§ 917.1, subd. (a)(2)-(3), 917.75, 917.9, subd. (a)(3).)

3. Money judgment *and* costs: The underlying judgment *plus costs* is enforceable unless the appellant posts a bond — enforcement of the cost portion is not automatically stayed, unlike the situation above. But if the underlying judgment is paid, then enforcement of the cost award *is* automatically stayed, without a bond. (§ 917.1, subd. (d), § 917.9; *Quiles v. Parent, supra*, 10 Cal. App.5th at p. 139.)

4. Anti-SLAPP fees as costs, and no other relief: according to *Dowling*, the anti-SLAPP fees are automatically stayed; according to *Quiles*, they are not.

The "Routine/Nonroutine" Distinction

Although the Legislature has excepted only three specific types of costs from the automatic appellate stay (see no. 2 above), courts have been following *Dowling* to recognize a further exception for any other costs the courts deem "nonroutine." This exception includes cost awards in anti-SLAPP actions.

Dowling's "routine/nonroutine" distinction can be traced back to two 1992 opinions.

The first was *Pecsok v. Black* (1992) 7 Cal. App.4th 456. The *Pecsok* defendants obtained a judgment in their favor and an award of about $75,000 in fees and costs, including expert costs. *Pecsok* noted that "[i]t is settled that a judgment which awards no damages, but is for costs alone, need not be bonded because costs are routine and are usually granted to the successful party in every case; to require a bond in order to stay enforcement of a judgment for costs would essentially negate the automatic stay provisions of section 916." (*Id.* at p. 459.) The Second District elaborated, based on its reading of section 917.1, subdivisions (a), (b), and (d), that the Legislature "intended to ensure the sufficiency of the bond to cover damages *and* costs where damages were awarded but did not intend to change the rule [of automatic stay of enforcement on appeal] where the judgment was for costs only." (*Pecsok,* at p. 459 & fn. 4.)

But are attorney fee awards counted as "costs" under this rule? *Pecsok* noted a split

between Civil Code section 1717 fee awards, which were considered cost awards and therefore fell within the rule, and fee awards as sanctions under section 128.5, which were considered "damages" and therefore fell outside the rule. (*Pecsok, supra,* 7 Cal.App.4th at p. 460 & fn. 5.)

The defendants in *Pecsok*, anxious to enforce their award of fees and expert costs, acknowledged that costs are ordinarily not treated as enforceable money judgments because they are "routine" and thus to do so would make the money judgment exception so wide that nothing would be left of the automatic stay rule. Still, the *Pecsok* defendants urged the court to find certain costs to be "nonroutine" and thus excepted from the automatic stay rule.

In the portion of the opinion that would later be disapproved by the Supreme Court, *Pecsok* refused to make a "routine/nonroutine" cost distinction. *Pecsok* reasoned that the Legislature enacted section 917.1 "without making any exception for 'non-routine' costs" (*Pecsok, supra,* 7 Cal.App.4th at p. 461) and observed that no other authority "really supports that proposition" either (*id.* at p. 460). *Pecsok* concluded that "[t]here is neither authority nor reason for a recognition of a distinction between costs that are 'routine' as opposed to 'non-routine.'" (*Id.* at p. 461.) Conceivably, *Pecsok* allowed, there are some costs that may deserve to be treated as money judgments. For such policy preferences, "the Legislature may want to consider some statutory change." (*Id.* at p. 462, fn. 8.) Until then, *Pecsok* held, the more sensible approach is a "bright line rule that all costs, which are expressly authorized to be awarded under the provisions of section 1033.5, shall be treated alike" for purposes of the appellate stay. (*Id.* at p. 462.)

But just four months after *Pecsok*, the Supreme Court adopted the "routine/nonroutine" distinction in *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797. That case saw another prevailing defendant getting a judgment of over $100,000 in expert fees under section 998. (This case predated the statutory exception to the automatic stay rule for section 998 costs, codified in section 917, subdivision (a)(2).) The plaintiff appealed.

Meanwhile, the prevailing defendant set about enforcing its massive cost award. Under the plain language of the money judgment exception, an appeal does not stay a judgment that "directs the payment of money." (§ 917.1, subd. (a).) "On its face," the defendant's judgment directed the payment of money, the dollar sign followed by Arabic numerals being a dead giveaway. (*Bank of San Pedro*, *supra,* 3 Cal.4th at p. 800.)

But like the Court of Appeal in *Pecsok*, the Supreme Court rejected this reasoning. Instead, the Court noted that the money judgment exception in section 917.1, subdivision (a) was subject to a "judicial construction" under which routine costs are not "money." (*Bank of San Pedro*, *supra,* 3 Cal.4th at pp. 800–801.) Again, this is the same analysis as in *Pecsok*: some costs are so routine that, if they were treated as "money" under section 917.1, subdivision (a), then every cost judgment would become a money judgment, and the appellate stay under section 916 would become a dead letter. This, the Supreme Court concluded, "could not have been consistent with the Legislature's intent." (*Bank of San Pedro,* at p. 801.)

So far, this is consistent with *Pecsok*. But where *Pecsok* would have left well enough alone, the Supreme Court went further. It held that the judicial construction that costs are not "money" is limited to "routine" costs. Where costs are "nonroutine," they are still subject to the operation of section 917.1, subdivision (a): They direct the payment of money, and they

are not subject to the automatic stay. (*Bank of San Pedro, supra,* 3 Cal.4th at pp. 802–803.)

What is problematic about *Bank of San Pedro* is that the Court did not draw a clear distinction between "routine" and "nonroutine" costs. The closest the Court came to articulating a standard was to state that a cost award is nonroutine when it "(1) is not the type of cost included in virtually every case and (2) was a directly litigated issue, as opposed to being an incidental matter." (*Bank of San Pedro*, *supra,* 3 Cal.4th at p. 803.) Additional factors in deeming costs nonroutine include whether they may be awarded even to a losing party, whether the costs are discretionary, and whether they are designed to encourage settlement. (*Id.* at pp. 803–804.) All these factors apply to awards of expert costs under section 998, which is why the *Bank of San Pedro* defendant got to enforce its cost award pending appeal.

But how should these factors be applied to other types of costs? Recall that *Pecsok* had held just four months earlier that there was "no reason for the courts to become mired in a microscopic examination of a successful party's cost bill in order to evaluate whether any particular cost item is usual or unusual, typical or nontypical or 'routine' or 'nonroutine.'" (*Pecsok*, *supra,* 7 Cal.App.4th at p. 462.) But other than expressing its disapproval, the Supreme Court did not address *Pecsok*'s reasoning.

The 1993 Amendment to Section 917.1

The following year, in 1993, the Legislature amended section 917.1. (Stats. 1993, ch. 456, § 13.) This amendment codified *Bank of San Pedro*'s exception for section 998 costs. (See § 917.1, subd. (a)(2).) But it abrogated *Bank of San Pedro*'s broadening of the money judgment to all "nonroutine" costs, by adding this sentence: "However, no undertaking shall be required pursuant to this section solely for costs awarded under Chapter 6 (commencing with section 1021) of Title 14." (§ 917.1, subd. (d).) This vindicated *Pecsok*.

Unfortunately, no one seemed to notice.

Perhaps it is not quite fair to say that *Dowling* did not notice the 1993 legislative amendment. The Fourth District, Division One, dutifully summarized all the applicable statutory authority that preempted the "routine/nonroutine" distinction, including the 1993 amendment. Yet somehow, after reading the new music, *Dowling* still sang the same old "routine" tune.

In *Dowling*, the plaintiff appealed an anti-SLAPP fee award against him. The plaintiff also argued, via a petition for a writ of supersedeas, that the award was subject to the automatic appellate stay. *Dowling* held that anti-SLAPP fee awards are "nonroutine," equivalent to money judgments, and must therefore be bonded for their enforcement to be stayed on appeal.

How did *Dowling* come to this conclusion when the 1993 amendment to section 917.1 had already specified precisely which costs were not subject to the automatic stay, *and did not include anti-SLAPP fees among them*? After all, *Dowling* accurately quoted section 917.1, including that "no undertaking shall be required pursuant to this section solely for costs awarded under" sections 1021 et seq. (*Dowling, supra,* 85 Cal.App.4th at p. 1430.) *Dowling* also noted that the costs subject to the automatic stay include those under section 1033.5, subdivision (a)(10), which include attorney fees awarded pursuant to contract, statute, or law — for instance, anti-SLAPP fees. (*Dowling,* at p. 1431.)

But a few things appear to have escaped the *Dowling* court's attention. First, *Dowling* never once cited *Pecsok*, whose criticism of

the "routine/nonroutine" distinction was vindicated by the 1993 legislative amendment to section 917.1. Second, *Dowling* cited *Bank of San Pedro* — favorably and uncritically — without mentioning that its holding in favor of the "routine/nonroutine" distinction was inconsistent with the subsequent statutory amendment. (*Dowling*, *supra,* 85 Cal.App.4th at p. 1430.) And third, possibly as a result, *Dowling* deployed *Bank of San Pedro*'s "routine/nonroutine" cost distinction, suggesting it had never occurred to the court that it was cooking supper with expired ingredients. (*Dowling,* at p. 1432.)

For example, even after describing the 1993 amendment to section 917.1, *Dowling* cited a commentator's explanation of the underlying principle "in terms of incidental or 'routine' costs." (*Dowling, supra,* 85 Cal. App.4th at p. 1430.) *Dowling* went on to state that anti-SLAPP fees "cannot be construed as an award of routine or incidental costs." (*Id.* at p. 1432.)

Dowling seems never to have considered that the Legislature knew how to express itself "in terms of incidental or 'routine' costs" had it wished to, but it instead had chosen not to. And in fact, the Legislature in 1993 had before it one decision supporting the "routine/nonroutine" rule (*Bank of San Pedro*) and another supporting a bright-line rule (*Pecsok*), and it elected a bright-line rule. The "routine/nonroutine" rule is simply inconsistent with the 1993 amendment to section 917.1.

Finally, in 2017, someone noticed something was amiss. In *Quiles*, the Fourth District, Division Three spotted the problem in *Dowling* and suggested that *Pecsok* might have been on to something after all.

The plaintiff in *Quiles* had prevailed in her wrongful termination action under the federal Fair Labor Standards Act of 1938, walking away with a judgment for a little over $200,000. As the FLSA provides a right to attorney fees, the plaintiff obtained a combined award of fees and costs of almost $750,000. (*Quiles, supra,* 10 Cal.App.5th at p. 135.)

The defendant-employer tendered payment of the underlying $200,000 money judgment, and appealed the fee and cost award only. The defendant did this to make the appeal about the cost award only, automatically staying enforcement under section 917.1, subdivision (d). When the trial court refused to honor the stay, the defendant filed a petition for writ of supersedeas, arguing that enforcement of the fee award was automatically stayed by the appeal. (*Quiles, supra,* 10 Cal.App.5th at p. 135.)

The *Quiles* court agreed. Noting the 1993 legislative amendment to section 917.1, *Quiles* concluded that the question then turned on whether the fee award must be construed as "costs awarded under" sections 1021 through 1038. (*Quiles, supra,* 10 Cal.App.5th at p. 139.) Section 1033.5, subdivision (a)(10), expressly defines costs to include any attorney fees authorized by contract, statute, or law. So far, this is the same analysis the *Dowling* court had followed.

But unlike *Dowling*, *Quiles* did not throw expired ingredients into the mix. Following just the statute, without the old "routine/nonroutine" seasoning, *Quiles* concluded, "there is a reasonable argument that nearly all postjudgment awards of costs in California courts should be subject to the automatic stay of section 917.1, subdivision (d), including attorney fees and unusual costs particular to specific statutes or contracts." (*Quiles, supra,* 10 Cal.App.5th at p. 141.) The only statutorily recognized exceptions are for costs under section 998 and 1141.21 and in family law cases.

As to the "routine/nonroutine" cost distinction, *Quiles* noted that "the Legislature did not create any [other] additional categories of costs to which this rule applied . . . ." (*Quiles, supra,* 10 Cal.App.5th at pp. 143–144.) "The intent," *Quiles* went on, quoting the legislative record, was to require a bond to stay "an order for extraordinary costs awarded to *specified* [Code of Civil Procedure] sections." (*Id.* at p. 144.)

Conclusion

Dowling's analysis is faulty. The more recent and better reasoned decision in *Quiles* should stand in its place. *Quiles* is more consistent with the statutory framework and easier to apply. Under *Quiles*, except for the three categories specified by statute, all fee and cost awards — including anti-SLAPP awards — are stayed on appeal automatically, without the need to post a bond.

But until the Supreme Court resolves the conflict of authority, trial courts may exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of a conflict, and may rely on *Dowling* or *Quiles*. And, if after an appeal on the question, your client is not successful, consider doing a public service and taking the issue up to the Supreme Court in a petition for review.