



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

Title	Agenda Item Type
Appellate Procedure: Recoverable Costs on Appeal	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rules 8.278 and 8.891	January 1, 2013
Recommended by	Date of Report
Appellate Advisory Committee	August 27, 2012
Hon. Kathryn Doi Todd, Chair	Contact
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Executive Summary

The Appellate Advisory Committee recommends amending the rules regarding costs on appeal to make recoverable the fees and net interest expenses incurred to borrow funds to deposit as security for an appeal bond, as security for a letter of credit procured to secure an appeal bond, or with the superior court in lieu of an appeal bond.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council amend rules 8.278 and 8.891 of the California Rules of Court, effective January 1, 2013, to provide that fees and net interest expenses incurred to borrow funds to deposit as security for an appeal bond, as security for a letter of credit procured to secure an appeal bond, or with the superior court in lieu of an appeal bond are recoverable costs.

The text of the proposed rule is attached at pages 6–8.

Previous Council Action

The Judicial Council adopted the predecessor to rule 8.278, regarding costs on appeal in civil cases, as part of the original Rules for the Supreme Court and District Courts of Appeal, effective September 1, 1928. As originally adopted, this rule did not list items that were recoverable as costs on appeal. Effective July 1, 1943, the council adopted a new set of Rules on Appeal, including a new rule on costs in civil appeals. This new rule listed items recoverable as costs, but this list did not include costs related to procuring an appeal bond. After a statutory amendment allowed recovery of costs for the premium on surety bonds, and case law concluded that this statute also applied in appeals, the council amended the rules effective January 1, 1959, to add to the list of recoverable costs “the premium on any surety bond procured by the party recovering costs, unless the court to which the remittitur is transmitted determines that the bond was unnecessary.” Effective January 1, 1994, in response to a Court of Appeal decision holding that this rule did not authorize recovery of the expense of acquiring a letter of credit required as collateral for an appeal bond, the council amended the rule to add to the list of recoverable costs “other expense reasonably necessary to procure the surety bond, such as the expense of acquiring a letter of credit required as collateral for the bond.” Effective January 1, 2003, the council combined the provisions relating to the premium and other costs of obtaining a surety bond into a single subdivision, but did not substantively modify these provisions. Effective January 1, 2008, the council moved all provisions relating to costs on appeal into new rule 8.278, added filing fees to the list of recoverable costs, and made other clarifying changes to the rule, but did not modify the provisions relating to the costs of obtaining a surety bond.

The Judicial Council adopted the predecessor to rule 8.891, regarding costs on appeal in appellate division proceedings, effective September 15, 1945. As adopted, this rule did not authorize recovery of expenses of acquiring a letter of credit required as collateral for an appeal bond. Effective January 1, 2009, the Judicial Council repealed all of the rules relating to the superior court appellate division and replaced them with new rules. The language of new rule 8.891 was modeled on rule 8.278.

Rationale for Recommendation

Rule 8.278 of the California Rules of Court addresses costs on appeal in civil cases in the Court of Appeal and rule 8.891 addresses such costs in civil appeals in the superior court appellate division. Subdivision (d) of each of these rules lists the costs that may be recovered on appeal. Among the items that these rules specify as recoverable is “[t]he cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral.”

Surety bonds are the typical mechanism used to provide the required undertaking to stay enforcement of a money judgment on appeal. The bond amount must generally be one and a half times the amount of the money judgment (Code Civ. Proc., § 917.1). This is to ensure that if the judgment is affirmed, the bond will be sufficient to pay the judgment plus any interest accrued on the award during the pendency of the appeal and any new costs awarded against the appellant. To obtain such a bond, appellants are typically required to obtain a letter of credit equal to the

bond amount. To secure the letter of credit, most banks require the appellant to deposit an amount equal to the line of credit. Many appellants must borrow the funds for the required bank deposit and incur interest expenses and fees associated with borrowing these funds. These costs, particularly the interest expenses, may grow quite large over the period that the appeal is pending.

The California Supreme Court recently concluded in *Rossa v. D.L. Falk Const., Inc.* (2012) 53 Cal.4th 387 that rule 8.278 does not authorize an award of costs for interest expenses and fees incurred to borrow funds to deposit as security for a letter of credit procured to secure an appeal bond. This conclusion was based primarily on the fact that rule 8.278 does not specifically list such interest expenses and fees among the recoverable costs and that such interest expenses are of a different character and typically much larger than the other costs listed in this provision. The court noted, however, that “[o]f course, the Judicial Council may consider whether to extend the right to recover costs to interest expenses and fees incurred to borrow funds to secure a letter of credit” (*Id.*, at fn. 8).

In this same opinion, the Supreme Court also disapproved the holding in *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.App.4th 1294 that had allowed an appellant to recover as costs the interest expenses incurred on funds the appellant borrowed to deposit with the superior court in lieu of an appeal bond. The court in *Cooper* concluded that the appellant must be able to recover the reasonable necessary expenses associated with making a deposit with the court in lieu of the bond, including the interest expenses and fees incurred to borrow funds to deposit with the court. The court based its decision on a combination of the language of Code of Civil Procedure section 995.730, which provides that “[a] deposit given instead of a bond has the same force and effect, is treated the same, and is subject to the same conditions, liability, and statutory provisions” as the bond, and the predecessor to rule 8.278, which allowed the recovery of expenses “reasonably necessary to procure the surety bond.” The Supreme Court in *Rossa* reasoned that, in light of its conclusion “that rule 8.278 does not authorize an award of interest expenses incurred to acquire assets to obtain a bond and letter of credit to stay enforcement of a judgment pending appeal, it follows that section 995.730 does not authorize an award of interest expenses incurred to acquire assets to deposit in lieu of a bond.”

This proposal amends rule 8.278 and rule 8.891, the companion rule on costs in the superior court appellate division, to provide that the net interest expenses and fees incurred to borrow funds for deposit as security for an appeal bond, a letter of credit procured to secure an appeal bond, or a deposit with the superior court in lieu of an appeal bond are all recoverable costs. This change will remedy a problem that causes significant cost to parties who wish to appeal money judgments. Depending on the amount of the judgment appealed and length of time until the appeal is decided, these interest expenses may grow quite large and thus, if not recoverable, may be a significant cost for an appellant who prevails on appeal. In the committee’s view, recovery of these interest expenses and fees will provide protection for such a prevailing appellant similar to the protection provided to a prevailing respondent in the form of the statutory interest that must be paid on the money judgment if the judgment is affirmed. The committee also notes that

parties can reduce or eliminate these costs by agreeing on a lower bond or deposit amount or that the respondent will not seek to enforce the money judgment while the appeal is pending.

Comments, Alternatives Considered, and Policy Implications

Comments

A proposal to amend rule 8.278 to provide for recovery of the fees and interest incurred on funds borrowed to obtain a letter of credit to secure an appeal bond was circulated for public comment between April 17 and June 20, 2012, as part of the regular spring 2012 comment cycle. Five individuals or organizations submitted comments on this proposal. Three commentators agreed with the proposal and two agreed with the proposal if modified. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 9–14. The main substantive comments and the committee’s responses are also discussed below.

Guidance on “reasonable” interest rate. The invitation to comment sought input on whether rule 8.278 should establish a cap on the recoverable interest expenses, by, for example, providing that the interest rate used to calculate these expenses not exceed a specified percentage. Three of the five commentators provided input on this issue. All three recommended against establishing such a cap. Based on this input, the committee is not recommending including such a cap on recoverable interest.

Coverage of interest and fees for loans to secure bond or for deposit in lieu of bond

The proposal circulated for public comment would have amended rule 8.278 to specifically provide for recovery only of the fees and interest incurred on funds borrowed to obtain a letter of credit to secure an appeal bond. One commentator raised the question of whether the proposed amendments to rule 8.278 should also specifically address the recovery of fees and interest expenses incurred to borrow funds either for a deposit to directly secure an appeal bond or for a deposit with the superior court in lieu of an appeal bond.

The committee discussed this issue at some length and concluded that rule 8.278 should indeed also specifically provide for recovery of the fees and interest incurred to borrow funds either to directly secure an appeal bond or to make a deposit with the superior court in lieu of such a bond. In members’ view, the fees and interest expenses incurred by the appellant borrower in these situations are practically and functionally equivalent in every way to those incurred to borrow money to obtain a letter of credit to secure an appeal bond and recovery of such fees and interest expenses raises exactly the same policy issues. It was noted that both the *Rossa* and *Cooper* decisions regarding the recoverability of the fees and interest incurred on funds borrowed to deposit with the superior court in lieu of an appeal bond were dependent on whether rule 8.278 was held to provide for recovery of the fees and interest incurred on funds borrowed to secure an appeal bond. Amending rule 8.278 to specifically provide that the fees and interest incurred on funds borrowed to obtain a letter of credit are recoverable could therefore be interpreted by extension as also authorizing recovery of fees and interest incurred on funds borrowed to deposit

with the superior court in lieu of an appeal bond. Rather than leave the issue open to interpretation, however, the committee concluded that it was preferable for the rule to explicitly state that such fees and interest expenses are recoverable, particularly given the Supreme Court's view that rule 8.278 should be narrowly construed.

The committee discussed whether this revision of the proposed amendment to rule 8.278 should be recirculated for public comment or whether it could be recommended for adoption by the Judicial Council without being circulated. The committee concluded that because recovery of the fees and interest in these situations was indistinguishable on both a policy and functional basis from the recovery of fees and interest on funds borrowed to obtain a letter of credit, this change to the proposal would be a minor change unlikely to create controversy, and thus that, under rule 10.22(d), it falls within the bounds of rule amendments that can be recommended for adoption by the Judicial Council without circulation for public comment.

Alternatives Considered

The proposal circulated for public comment would have amended only rule 8.278 relating to costs on appeal in the Court of Appeal. Following the public comment process, the committee concluded that, to ensure equitable treatment of appellants in cases appealed to the superior court appellate division, similar amendments should also be recommended to rule 8.891, the companion rule on costs in the appellate division. The committee concluded that because recovery of these fees and interest expenses in Court of Appeal was indistinguishable on a policy basis from the recovery of such fees and interest in appellate division proceedings, this change to the proposal would be a minor change unlikely to create controversy, and thus, under rule 10.22(d), could be recommended for adoption by the Judicial Council without circulation for public comment.

The committee considered not proposing any change to rule 8.278 or rule 8.891, which would mean that interest expenses and fees incurred to borrow funds to deposit as security for a letter of credit procured to secure an appeal bond would not be recoverable. However, because the inability to recover the costs of interest and fees on such borrowed funds poses a significant cost to litigants who wish to appeal a money judgment, the committee concluded that it was preferable to propose these amendments.

Implementation Requirements, Costs, and Operational Impacts

These proposed rule amendments should not create significant implementation requirements, costs, or operational impacts for the courts. They may impose a significant new cost on respondents if the appellant prevails on appeal.

Attachments

1. Cal. Rules of Court, rule 8.278 and 8.891, at pages 6–8
2. Comment chart, at pages 9–14

Rule 8.278 and 8.891 of the California Rules of Court are amended, effective January 1, 2013, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 4. Hearing and Decision in the Court of Appeal

Rule 8.278. Costs on appeal

(a)–(c) * * *

(d) Recoverable costs

(1) A party may recover only the following costs, if reasonable:

(A) Filing fees;

(B) The amount the party paid for any portion of the record, whether an original or a copy or both. The cost to copy parts of a prior record under rule 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the copying;

(C) The cost to produce additional evidence on appeal;

(D) The costs to notarize, serve, mail, and file the record, briefs, and other papers;

(E) The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply; ~~and~~

(F) The cost to procure a surety bond, including the premium, ~~and~~ the cost to obtain a letter of credit as collateral, and the fees and net interest expenses incurred to borrow funds to provide security for the bond or to obtain a letter of credit, unless the trial court determines the bond was unnecessary; and

(G) The fees and net interest expenses incurred to borrow funds to deposit with the superior court in lieu of a bond or undertaking, unless the trial court determines the deposit was unnecessary.

(2) * * *

1 **Advisory Committee Comment**

2
3 This rule is not intended to expand the categories of appeals subject to the award of costs. See rule 8.493
4 for provisions addressing costs in writ proceedings.

5
6 **Subdivision (c).** * * *

7
8 **Subdivision (d).** Subdivision (d)(1)(B) is intended to refer not only to a normal record prepared by the
9 clerk and the reporter under rules 8.122 and 8.130 but also, for example, to an appendix prepared by a
10 party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.

11
12 “Net interest expenses” in subdivisions (d)(1)(F) and (G) means the interest expenses incurred to borrow
13 the funds that are deposited minus any interest earned by the borrower on those funds while they are on
14 deposit.

15
16
17 **Division 2. Rules Relating to the Superior Court Appellate Division**

18
19 **Chapter 4. Briefs, Hearing, and Decision in Limited Civil and Misdemeanor Appeals**

20
21
22 **Rule 8.891. Costs and sanctions in civil appeals**

23
24 **(a) – (c)** * * *

25
26 **(d) Recoverable costs**

27
28 (1) A party may recover only the costs of the following, if reasonable:

29
30 (A) Filing fees;

31
32 (B) The amount the party paid for any portion of the record, whether an original or
33 a copy or both, subject to reduction by the appellate division under subdivision
34 (e);

35
36 (C) The cost to produce additional evidence on appeal;

37
38 (D) The costs to notarize, serve, mail, and file the record, briefs, and other papers;

39
40 (E) The cost to print and reproduce any brief, including any petition for rehearing
41 or review, answer, or reply; ~~and~~

42
43 (F) The cost to procure a surety bond, including the premium, ~~and~~ the cost to
44 obtain a letter of credit as collateral, and the fees and net interest expenses
45 incurred to borrow funds to provide security for the bond or to obtain a letter of
46 credit, unless the trial court determines the bond was unnecessary; and
47

1 (G) The fees and net interest expenses incurred to borrow funds to deposit with the
2 superior court in lieu of a bond or undertaking, unless the trial court determines
3 the deposit was unnecessary.
4

5 (2) Unless the court orders otherwise, an award of costs neither includes attorney’s fees
6 on appeal nor precludes a party from seeking them under rule 3.1702.
7

8 (e) * * *

9
10 **Advisory Committee Comment**

11
12 **Subdivision (d).** “Net interest expenses” in subdivisions (d)(1)(F) and (G) means the interest expenses
13 incurred to borrow the funds that are deposited minus any interest earned by the borrower on those funds
14 while they are on deposit.
15

SPR12-06**Appellate Procedure: Costs on Appeal** (amend Cal. Rules of Court, rule 8.278)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association By: Kate Mayer Mangan, Chair	AM	<p>Our committee supports the revisions to rule 8.278.</p> <p>In response to the Judicial Council's request for specific comments, our committee believes that rule 8.278 should not establish a cap on the recoverable interest expenses by providing a specific percentage rate. Rule 8.278(d)(1) already states that the costs must be "reasonable." Rather than providing a specific interest rate, the current rule permits the superior court judge to determine the reasonableness of any interest expenses. Additionally, given that success on appeal is far from guaranteed, the appealing party will have no incentive to incur an unreasonable or usurious interest rate unless absolutely necessary. Thus, each party's own self interest should limit the incurred interest expenses to a reasonable amount.</p> <p>Our committee was concerned, however, that the current rule contains no standard for the reasonableness of interest expenses. Interest rates are inherently volatile, constantly changing such that what may be reasonable at the time an appellant obtains a bond could be considered unreasonable several years later after an appeal is finally determined. Therefore, we suggest adding an Advisory Committee comment to rule 8.278 that would read as follows: As used in (d)(1)(F), "reasonable" interest expenses and fees will depend on the circumstances of each case but should include</p>	<p>The committee appreciates this input.</p> <p>The committee appreciates this input.</p> <p>The committee appreciates this suggestion. The committee concluded, however, that the trial courts that consider requests for costs on appeal have sufficient experience with determining what are reasonable costs, including assessing the impact of changes in what might be a reasonable expense since a particular cost was incurred, that such guidance is not necessary.</p>

SPR12-06**Appellate Procedure: Costs on Appeal** (amend Cal. Rules of Court, rule 8.278)

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	Commentator	Position	Comment	Committee Response
			<p>consideration of interest rates at the time the bond was obtained.</p> <p>Other than this proposed comment, our committee supports the changes to rule 8.278.</p>	
2.	<p>Committee on Appellate Courts State Bar of California By: Paul R. Johnson, Chair</p>	AM	<p>The Committee on Appellate Courts supports this proposal, subject to the following comments.</p> <p>Specific comments are requested on whether the proposed amendment appropriately addresses the stated purpose and whether there should be a cap on recoverable interest expenses incurred to borrow funds to obtain a letter of credit by, for example, providing that the interest rate used to calculate these expenses may not exceed a specified percentage. The Committee agrees that the proposed amendment addresses the stated purpose by eliminating the risk of loss that prevailing appellants face in the event substantial interest expenses are unrecoverable, and it appears to level the playing field vis-à-vis prevailing respondents. However, the Committee notes that the proposal creates gaps in protection, which may warrant further consideration. Specifically, the proposed amendment responds to the Supreme Court's narrow holding in <i>Rossa v. D.L. Falk Const., Inc.</i> (2012) 53 Cal.4th 387, which only addressed recoverability of interest expenses and fees in connection with obtaining a letter of credit. However, appellants may incur the same substantial interest expenses to borrow cash to</p>	<p>The committee appreciates this input.</p> <p>Based on this comment, the committee revised its proposal to explicitly provide that the fees and interest on funds borrowed either to directly secure an appeal bond or to deposit with a superior court in lieu of an appeal bond are also recoverable.</p>

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Appellate Procedure: Costs on Appeal (amend Cal. Rules of Court, rule 8.278)

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	Commentator	Position	Comment	Committee Response
			<p>securitize a bond directly (rather than providing a letter of credit), or to make a cash deposit directly with the court. Appellants may also incur interest expenses in borrowing funds necessary to securitize a bond provided by personal surety. The proposed amendment to the rule leaves the risk of loss with appellant in these scenarios.</p> <p>The Committee believes that consideration of whether interest expenses incurred in connection with borrowing funds to deposit with the court is particularly important. In <i>Rossa</i>, the Supreme Court expressly disapproved <i>Cooper v. Westbrook Torrey Hills</i> (2000) 81 Cal.App.4th 1294, in which the court applied former rule 26(c) (which allowed “expense[s] reasonably necessary to procure the surety bond”) and allowed appellant to recover as costs the interest expense incurred on funds the appellant borrowed to deposit as an undertaking in order to stay foreclosure on appeal. The court based its conclusion on the fact former rule 26(c) allowed recovery of expenses reasonably necessary to secure a bond and that Code of Civil Procedure section 995.730 provides that “[a] deposit given instead of a bond . . . is treated the same and is subject to the same conditions, liability, and statutory provisions . . . as the bond.” (<i>Cooper, supra</i>, at p. 1298.) The court concluded, “In order to read rule 26(c) consistent with section 995.730, the reasonable or necessary costs associated with procuring a deposit in lieu of a</p>	

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Appellate Procedure: Costs on Appeal (amend Cal. Rules of Court, rule 8.278)

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	Commentator	Position	Comment	Committee Response
			<p>bond must be awarded to a prevailing party.” (<i>Id.</i> at p. 1299 fn. omitted.) In disapproving <i>Cooper</i>, the Supreme Court held that in light of its conclusion that rule 8.278 does not authorize an award of interest incurred to acquire assets to obtain a bond and letter of credit, it follows that section 995.730 does not authorize an award of interest expenses incurred to acquire assets to deposit in lieu of a bond.</p> <p>The proposed amendment clarifies that interest expenses incurred to obtain a bond secured by a letter of credit are recoverable but leaves open the possibility that the same expenses incurred to procure a cash deposit, or to directly collateralize a bond are not recoverable. If the purpose of the amendment is to compensate prevailing appellants for interest expenses incurred in connection with obtaining a bond then the Committee observed that perhaps the rule should expressly apply to these other scenarios. But if the rule is intended to respond only to the narrow facts in <i>Rossa</i>, then the Committee believes that it is adequate as written.</p> <p>The Committee concluded that there seems to be little justification for a cap on the recoverable expenses. No such cap exists for any other item of recoverable costs and, given the variability of interest expenses, calculating a maximum rate would seem arbitrary and potentially unfair. Interest rates on loans depend on many factors, including the nature and creditworthiness of the</p>	<p>The committee appreciates this input.</p>

SPR12-06

Appellate Procedure: Costs on Appeal (amend Cal. Rules of Court, rule 8.278)

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	Commentator	Position	Comment	Committee Response
			<p>borrower, the amount and term of the loan and prevailing interest rates. These charges can be unpredictable and imposing a cap would undermine the stated goal of compensating prevailing appellants for their actual expenses. Further, prevailing respondents earn statutory interest at 10%, regardless of prevailing rates and actual opportunity costs. In that respect, they earn somewhat of a windfall. Capping rates or expenses for prevailing appellants would undermine the stated goal of affording prevailing appellants similar protections. A better alternative may be to require that interest rates and expenses be commercially reasonable, which the Committee believes is already covered by subdivision (d)(1) (“A party may recover only the following costs, if reasonable”). Such a limitation should be sufficient to protect respondents from unreasonably excessive expenses. The Committee recognized that the lack of a cap may hinder respondents’ ability to budget an appeal, or assess risk. However, the Committee concluded that such risk was outweighed by the need to further the stated goal of compensating appellants for their actual costs on appeal. Further, if respondents wish to avoid the risk of a potentially large cost award then they are free to negotiate a stipulated stay, or to assist appellants in obtaining commercially reasonable financing.</p> <p>Another consideration the Committee noted is whether recovery should be limited to net</p>	

SPR12-06**Appellate Procedure: Costs on Appeal** (amend Cal. Rules of Court, rule 8.278)

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	Commentator	Position	Comment	Committee Response
			interest expenses incurred. To the extent appellant earns interest on the cash deposited to secure a letter of credit, such interest arguably should be used to offset the recovery of the interest paid.	The committee appreciates this input.
3.	Orange County Bar Association By: Dimetria Jackson, President	A	No additional comments.	The committee appreciates this input.
4.	Superior Court of San Diego County By: Mike Roddy, Executive Officer	A	No additional comments.	The committee appreciates this input.
5.	Don Willenburg, Partner Gordon & Rees LLP San Francisco	A	I support 12-06, as may be amended. The point to recoverable costs on appeal is to reimburse ordinary, necessary and reasonable costs. A fee for a bond to stay enforcement is such a cost and expressly covered by statute. So too are finance fees to get the bond. The rule should not fix a maximum amount, other than “reasonable and necessary,” a determination courts make all the time. I might also include some provision to make sure that the appellant is not ginning up costs by transactions with affiliates, thereby gaming the system.	The committee appreciates this input.