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INVITATION TO COMMENT SPR12-06

Title	Action Requested
Appellate Procedure: Costs on Appeal	Review and Submit Comments by Friday, June 15, 2012
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 8.278	January 1, 2013
Proposed by	Contact
Appellate Advisory Committee	Heather Anderson, 415-865-7691
Hon. Kathryn Doi Todd, Chair	heather.anderson@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing that the rule regarding recoverable costs on appeal be amended to provide that the interest expenses and fees incurred to borrow funds to deposit as security for a letter of credit procured to secure an appeal bond are recoverable costs.

Background

Rule 8.278 of the California Rules of Court addresses costs on appeal. Subdivision (d) of this rule lists the costs that may be recovered on appeal. Among the items that this rule provides are 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 method used to provide the required undertaking to stay enforcement of a money judgment on appeal. The bond must generally be for one and a half the amount of the money judgment (Code of Civil Procedure section 917.1). This is to ensure that it is sufficient to pay the judgment if it is affirmed, plus any interest accruing on the judgment during the pendency of the appeal and any costs that may be awarded against the appellant. To obtain such a bond, appellants are typically required to obtain a letter of credit equal to the amount that would be paid by the bond. To secure the letter of credit, most banks require the appellant to deposit an amount equal to the line of credit. Many appellants are required to borrow the funds necessary to make the required deposit and incur interest expenses and fees associated with borrowing these funds. These costs, particularly the interest expenses, may be quite large over the period that the appeal is pending.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

Recently, in *Rossa v. D.L. Falk Const., Inc.* (2012) 53 Cal.4th 387, the Supreme Court concluded that this provision in 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 the rule 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” (53 Cal.4th at footnote 8).

The Proposal

This proposal would amend rule 8.278 to provide that the interest expenses and fees incurred to borrow funds to deposit as security for a letter of credit procured to secure an appeal bond are recoverable costs. This change will remedy a problem that causes significant inconvenience to parties who wish to appeal money judgments. Depending on the amount of the money judgment being appealed and the length of time until the appeal is decided, these interest expenses and fees may be quite large and thus, if not recoverable, may be a significant loss for an appellant who prevails on appeal. In the committee’s view, recovery of these interest expenses and fees would provide protection against loss 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 the parties can reduce or eliminate these costs by agreeing on a lower bond amount or that the respondent will not seek to enforce the money judgment while the appeal is pending.

Alternatives considered

The committee considered not proposing any change to rule 8.278, 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 this interest and fees is significant inconvenience to parties who wish to appeal money judgments, the committee concluded that it was preferable to propose this amendment.

Implementation Requirements, Costs, and Operational Impacts

This proposal should not create significant implementation requirements, costs, or operational impacts for the courts. It may impose a significant new cost on respondents if the appellant prevails on appeal.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should rule 8.278 establish a cap on the 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 advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Will the proposal provide cost savings? If so please quantify.
- What are the implementation requirements for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management system, or modifying case management system.
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Rule 8.278 of the California Rules of Court would be 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 interest expenses and fees incurred to borrow funds to obtain a letter of credit, unless the trial court determines the bond was unnecessary.

(2) * * *