

## The Practitioner Civil Procedure

# Recover Losses

## Are Costs Obtainable Under Attorney Fee Provisions?

By Jeffrey Huron

A procedural question that remains undecided is whether costs not allowed under California Code of Civil Procedure Section 1033.5(b) are nonetheless recoverable as attorney fees pursuant to a contract entitling the prevailing party to fees and costs. California appellate courts are divided on this issue.

The 1st District Court of Appeal, in *Bussey v. Affleck*, 225 Cal.App.3d 1162 (1990), held that when a contract provides for payment of costs and fees, courts may award legal expenses if they are ordinarily billed to a client and are not included in the over-head component of the attorney's hourly rate. In *Ripley v. Pappadopoulos*, 23 Cal.App.4th 1616 (1994), the 3rd District rejected *Bussey* and concluded that unallowable costs are not recoverable as attorney fees pursuant to a contract.

A prevailing party's recovery of its legal costs pursuant to a contract providing for their recovery therefore depends on which case's reasoning the trial court chooses to follow. The issue is not even settled in the 1st and 3rd Districts, because "the opinions of the various district appellate courts are equally binding on all the courts of inferior jurisdiction in the state." *People v. Bullock*, 26 Cal.App.4th 985 (5th Dist. 1994).

An award of costs is subject to the limitations of Section 1033.5. Subdivision (a) lists allowable items of costs (including attorney fees, subdivision (a)(10), when authorized by contract or statute). Subdivision (b) lists costs that are unallowable unless expressly authorized by law (expert witness fees and postage, telephone and photocopying charges, except for exhibits). Subdivision (c) places further restrictions on an award of costs and provides that an award of costs, including items not mentioned in Section 1033.5, is subject to the court's discretion.

In *Bussey*, the plaintiffs appealed the trial court's disallowance of certain costs (including expert fees and photocopying charges) incurred in obtaining judgment for the balance due on a promissory note. The note required defendants to "pay all costs and expenses of collection including reasonable attorney fees." The plaintiffs sought the costs as attorney fees pursuant to Section 1033.5(a)(10), based on the fee and cost provision in the note.

The *Bussey* court agreed with the plaintiffs and reversed the trial court. "An agreement for attorney's fees and costs would be less than effectual if it

could not cover the actual costs of litigation, including disbursements of counsel, and a contrary conclusion would mean that the party prevailing on the contract could never be made whole."

In support of its conclusion, the *Bussey* court reasoned that expenses unallowable under Section 1033.5(b), unless expressly authorized, were allowable by statutes authorizing parties to shift the burden of attorney fees and costs. See Code of Civil Procedure 1021 (parties free to agree on compensation of attorneys); and Civil Code Section 1717 (prevailing party pursuant to a contract for attorney fees and costs is entitled to reasonable fees "in addition to other costs"). The *Bussey*

otherwise unallowable costs, such as expert fees, are authorized by the statutes permitting parties to shift the burden of legal fees and expenses by contract. *Ripley* cited cases for the proposition that special contract damages must be specially pleaded and proven at trial. *Ripley* reasoned that while contractual attorney fees are recoverable in a cost award under Section 1033.5(a)(10), the recovery of expert fees — and the other costs listed in subdivision(b) — are not, unless expressly authorized by law.

The *Ripley* court thus held that if such costs are recoverable under a contractual provision between the litigants, then "they must be specifically pleaded and proven at trial rather than included in a memorandum of costs." The court accordingly reduced plaintiffs' award of costs because they did not plead and prove their right to recover them under an applicable contract.

However, *Ripley* did not address *Bussey's* argument that, pursuant to Section 1033.5(c), courts may award an item of cost not specifically disallowed.

This may have been

because Code of Civil Procedure Section 1021 (authorizing parties to agree on fee shifting) restricts an award of costs pursuant to such an agreement to those provided for in Section 1033.5 — a fact not noted in either *Bussey* or *Ripley*. This express restriction of Section 1021 on parties' ability to shift costs may arguably preclude a court from awarding the unallowable costs listed in Section 1033.5(b).

But assuming otherwise unallowable costs are recoverable pursuant to contracts providing for fees and costs under Civil Code Section 1717, it would appear that the Legislature has given courts the authority to include such costs in an award under the catchall language of Section 1033.5(c). Therefore, requiring litigants to specially plead and prove litigation expenses pursuant to a contractual provision during trial may not only be inefficient but also unnecessary.

In many cases, the unallowable costs listed in Section 1033.5(b), such as expert witness fees, and postage, telephone and photocopying expenses, are substantial. In *Ripley*, for example, the court reduced the award of costs by more than \$25,000 — the jurisdictional limit of the superior court.

Until the Supreme Court or the Legislature resolves the split of authority represented by *Bussey* and *Ripley*, litigants who may be entitled to an award of fees and costs pursuant to a contractual provision should inquire of the trial court whether or not items of costs listed in subdivision (b) are recoverable, and, if so, whether they must be specially pleaded and proven during trial. See *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* 47 Cal.App.4th 464 (1996) (where costs recoverable under contract pleaded and proved pursuant to a procedure stipulated by parties).

Recovery of legal costs pursuant to a contract providing for their recovery depends on if the court chooses to follow 'Bussey' or 'Ripley.'

court further reasoned that subdivision (c) gives courts discretion to award items of cost not listed as allowable costs under subdivision (a).

Finally, the *Bussey* court cited several federal opinions including legal expenses in awards for legal fees. These federal cases equated litigation expenses with attorney fees. "Attorney's fees and expenses are inseparably intertwined as equally vital components of the costs of litigation." See *Dowdell v. City of Apoka, Fla.*, 698 F.2d 1181 (11th Cir. 1983).

The *Bussey* court thus held that when a contract provides for payment of costs and fees, courts may allow costs as attorney fees under Section 1033.5(a)(10), so long as they are ordinarily billed to a client.

The trial court in *Ripley*, relying on *Bussey*, awarded costs, including charges for expert witnesses, photocopying and postage, to the plaintiffs pursuant to fee and cost provisions in limited partnership agreements. On appeal, the defendants contended that *Bussey* was wrongly decided.

The *Ripley* court agreed and reduced the award. It reasoned that Section 1033.5(b) specifically disallowed expert fees, copying expenses and postage unless expressly authorized by law. "In the absence of some specific provision of law otherwise, attorney fees and the expense of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include such costs and costs do not include attorney fees." In support of its conclusion, *Ripley* cited several decisions distinguishing costs from fees. But see Civil Code Section 1717 (fees "shall be an element of the costs of suit").

With respect to *Bussey's* reasoning that

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