

Los Angeles Lawyer

JANUARY 2024

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Caps on Judgment Enforcement Fees

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California's Code of Civil Procedure¹ permits judgment creditors to recover their attorney's fees incurred in enforcing a judgment when the underlying judgment includes an award of attorney's fees authorized by statute or contract. The source of these enforcement of judgment attorney's fees (judgment enforcement fees) is the judgment itself, rather than the underlying contract, based on California courts' recognition of what is commonly referred to as a "merger doctrine." The merger doctrine, sometimes referred to as the "extinction by merger analysis," provides that "post-judgment rights are governed by the rights in the judgment and not by any rights arising from the contract."² In other words, the judgment extinguishes all further contractual rights of the parties, and the judgment itself governs post-judgment rights and entitlements. Thus, judgment enforcement fees are not subject to any limitation or "cap" on the recovery of attorney's fees contained in the underlying contract. California's Second District Court of Appeal recently reached this conclusion in *Nash v. Aprea* by affirming

the trial court's ruling.³

The plaintiffs, Nash and O'Connor, brought suit against their former landlord Ninon Aprea, alleging she had wrongfully retained their security deposit and certain other agreed-upon rent credits after the plaintiffs vacated the residence leased from Aprea. The plaintiffs' complaint attached the lease, a standardized form titled Residential Lease or Month-to-Month Rental Agreement (C.A.R. Form LR, Revised 12/19) (Lease), published by the California Association of Realtors® (CAR). The Lease contained an "Attorney Fees" provision in Paragraph 36 that read: "In any action or proceeding arising out of this Agreement, the prevailing party between Landlord

and Tenant shall be entitled to reasonable attorney fees and costs, collectively not to exceed \$1,000 (or \$_____), except as provided in paragraph 35A." (This is the "Lease Fee Cap.") The complaint sought compensatory damages, statutory damages under Civil Code Section 1950.5 for willful failure to return a residential security deposit, prejudgment interest, attorney's fees, and costs.

Aprea failed to appear, and the plaintiffs obtained a default judgment. The plaintiffs then filed a request for entry of default judgment, which included compensatory damages, statutory damages under Civil Code Section 1950.5, prejudgment interest, and the contractually provided for \$1,000 in



attorney's fees.⁴ This request was supported by a declaration from the plaintiffs' counsel, citing the attorney's fees clause contained in the standardized CAR Lease. The trial court entered the default judgment as requested, including a \$1,000 award of attorney's fees, for a total judgment amount of \$59,190.95.

Two rounds of motion practice before the trial court followed, stemming from Aprea's unsuccessful attempt to first vacate entry of default and default judgment, followed by Aprea's unsuccessful motion for reconsideration of that order. The plaintiffs—now judgment creditors—filed a motion for an order seeking their costs of enforcing the judgment (including their attorney's fees in conjunction therewith) pursuant to Code of Civil Procedure sections 685.040 and 685.080 (the Costs Motion). The Costs Motion sought \$58,067.50 in judgment enforcement fees, including both a number of enforcement activities and fees incurred for successfully opposing Aprea's attempts to vacate entry of default and the default judgment—an amount roughly the size of the original judgment itself. The judgment creditors argued this amount of judgment enforcement fees was appropriate, notwithstanding the Lease Fee Cap in the original contract because the provision contained in the contract (i.e., the Lease) was merged into the judgment. In response, Aprea argued that the Lease “trumped” the merger doctrine, and that the judgment creditors could not obtain any further attorney's fees beyond the \$1,000 Lease Fee Cap.

The trial court rejected the judgment debtor's argument and granted the Costs Motion, relying on *Globalist Internet Technologies, Inc. v. Reda* for the proposition that the right to judgment enforcement fees is based on the award of attorney's fees in the judgment rather than in the Lease; thus, the Lease Fee Cap did not apply.⁵ The trial court awarded judgment creditors \$27,721.41 in judgment enforcement fees incurred, denying the rest sought on the grounds that they were incurred in opposing Aprea's request to vacate the judgment rather than to enforce the judgment.

Judgment debtor Aprea appealed this ruling, once again arguing that the judgment creditors' judgment enforcement fees must be capped at \$1,000 under Section 685.040 because any award of judgment enforcement fees was derived from reliance on Code of Civil Procedure Section 1033.5(a)(10)(A) regarding the

underlying contract, which capped such attorney's fees at \$1,000. However, relying on California's judicially adopted merger doctrine, the judgment creditors argued that because the terms of the underlying contract, i.e., the Lease, were merged into the judgment, and the \$1,000 limitation on the parties' contractual right to recover prevailing party attorney's fees “in any action or proceeding arising out of this Agreement”⁶ was therefore merged into the judgment; thus, such limitation was extinguished. In addition to *Globalist Internet*

The legislative history demonstrates that the purpose of the 1992 amendment was to overrule *Chelios* and to make clear that attorneys' fees can be awarded post-judgment.

Technologies, the judgment creditors relied in particular on *Jaffe v. Pacelli*, which explains the legislative history of Section 685.040 and held that under this statute “the award of post-judgment attorney fees is not based on the survival of the contract but is instead based on the award of attorney fees and costs in the trial judgment.”⁷ This is in accord with the extinction by merger analysis providing that post-judgment rights are governed by the rights in the judgment and not by any rights arising from the contract.”⁸

Jaffe was decided in 2008, following the California Legislature's 1992 amendment to Section 685.040. The 1992 amendment was in response to *Chelios v. Kaye*, a Fourth District Court of Appeal decision denying the judgment creditors' recovery of contractual attorney's fees incurred in enforcing a judgment.⁹ The *Chelios* plaintiffs recovered a breach-of-contract judgment that involved resisting a state court appeal and pursuing the defendants through bankruptcy court.¹⁰ After these plaintiffs recovered on the judgment through the bankruptcy court, they sought contractual attorneys' fees under Civil Code Section 1717. The trial court, however, denied their request for fees, and the Court of Appeal affirmed. The *Chelios* court held: “Civil Code section 1717 has no operation in this case, because the Chelioses' fees were not incurred to enforce the provisions of the contract (as required by Civil Code section 1717) but were instead expended to enforce the judgment.”¹¹ As the court explained, “[w]hen, as here, a lawsuit on

a contractual claim has been reduced to a final, nonappealable judgment, all of the prior contractual rights are merged into and extinguished by the monetary judgment, and thereafter the prevailing party has *only* those rights as are set forth in the judgment itself.”¹²

The legislature responded to *Chelios* by amending Section 685.040 to ensure that attorney's fees incurred to enforce a contract judgment would be recoverable if the contract contained a prevailing party attorney's fees provision. The 1992 amendment as now contained in Section

685.040(a) added the following language: “Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5.”¹³

The legislative history demonstrates that the purpose of the 1992 amendment was to overrule *Chelios* and to make clear that attorney's fees can be awarded post-judgment. An analysis prepared for the Assembly Subcommittee on Administration of Justice states: “*Chelios* reasoned that the contract merged into the judgment and as such contractual rights are extinguished. Both the State Bar and the [bill's] author believe that *Chelios* is contrary to AB 3331.”¹⁴ “This bill provides that if attorney's fees were awarded as part of the judgment in enforcing the contract, then they can be awarded post judgment.”¹⁵

The *Nash* Court of Appeal reiterated the relevant statutory scheme, in which Section 685.040 allows attorney's fees as costs incurred in enforcing a judgment when they are awarded in the underlying judgment pursuant to Section 1033.5(a)(10)(A). This statute itself permits the award of attorney's fees as costs in a judgment when they are authorized by a contract. The *Nash* court, quoting and citing *Jaffe*, *Globalist Internet Technologies*, and two other key cases,¹⁶ noted that in view of this legislative scheme, attorney's fees are awardable as costs of enforcement of judgment when

the underlying judgment includes an award of attorney's fees, including when authorized by a contract. Such post-judgment attorney's fees are based on the judgment, not the contract, "in accord with the extinction by merger analysis providing that post-judgment rights are governed by the rights in the judgment and not by any rights arising from the contract."¹⁷ The *Nash* court quoted *Jaffe's* explanation that "a judgment is rendered on a case involving a contract that includes an attorney fees and costs provision, the judgment extinguishes all further contractual rights, including the contractual attorney's fees clause."¹⁸ In other words, California courts look to the judgment and not the contract to determine whether to award judgment enforcement fees.

The appellate court, reviewing *de novo* because the issue on appeal was whether the trial court had the authority to award the judgment enforcement fees (rather than their amount), found the trial court properly awarded judgment enforcement fees per the Costs Motion because the requirements for such an award were satisfied: 1) It was undisputed that the \$27,721.41 awarded by the trial court

was incurred in enforcing the Judgment, and 2) the underlying judgment contained an award of attorney fee's pursuant to Section 1033.5(a)(10)(A).

The *Nash* court also noted *Aprea's* argument below had "superficial appeal": "If [plaintiffs] were authorized as prevailing parties in the underlying action to recover only \$1,000 in attorney's fees pursuant to [Section] 1033.5[(a)(10)(A), why can they now recover almost 30 times as much as judgment creditors in enforcing the judgment based on [Section] 685.040, which expressly references [Section] 1033.5?"¹⁹ The appellate court responded, "The answer lies in the statutory language[,] and "decline[d] *Aprea's* invitation to read into [Section] 685.040 an additional requirement [...] that any enforcement fees also be expressly authorized by the underlying contract."²⁰

Alongside this exercise in interpreting the plain language of the relevant statutes, the *Nash* court noted this outcome was consistent with the merger doctrine, in which rights in a contract are extinguished and thereafter governed by the judgment. The appellate court further noted the California Legislature did

not intend to abrogate the merger doctrine when drafting the current version of Section 685.040 but intended instead "to ensure that a judgment creditor could obtain attorney's fees incurred in enforcing a judgment notwithstanding termination of their contractual rights by merger into the judgment."²¹

Acknowledging that most of the appellate courts considering Section 685.040 did not explicitly address whether a contractual limit on attorney's fees survives merger, the appeals court was persuaded by *Cardinale v. Miller*, in which plaintiffs obtained an award of attorney's fees at trial on the basis of a contract and subsequently pursued a fraudulent transfer and conspiracy action to enforce the judgment against not only the other party to the contract but also against their non-party broker.²² Because the *Cardinale* court found the statutory requirement for obtaining attorney's fees in connection with enforcing a judgment was present, the broker's "status as strangers to *Cardinale's* contract with *Miller* does not immunize them from liability under [Section] 685.040."²³ While the *Nash* court expressed "reservations [about] whether [Section] 685.040 supports an attorneys' fees award against a nonparty to a contract, that question is not before us."²⁴ The *Nash* court concluded that it was persuaded by *Cardinale* and, thus, held that the limitations of a contract, including caps on attorney's fees, "no longer apply once the judgment is entered." Therefore, "the operative question in considering whether fees are available as enforcement costs under [Section] 685.040 is simply whether the judgment included attorney's fees awarded to a contract because the judgment extinguishes all further contractual rights, including the contractual attorney fees clause."²⁵ Accordingly, the appellate court affirmed the trial court's award of judgment enforcement fees.

Nash v. Aprea provides vital clarification that contractual limitations on attorney's fees will not apply to claims for attorney's fees incurred to enforce judgments when they are properly sought pursuant to a judgment. While the *Nash* court's ruling was based solely on its interpretation of the relevant statutes, case law regarding the merger doctrine, and the legislative intent of Section 685.040, this ruling is roundly consistent with public policy. In the absence of such a holding, parties to contracts that contain limits on attor-

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ney's fees would face no incentive to satisfy judgments obtained pursuant to such contracts because such judgment debtors would conceivably be incentivized to resist enforcement of judgment to such an extent that the judgment creditor, fearing ever spiraling attorney's fees incurred to enforce a judgment, will simply walk away. *Nash v. Aprea* makes clear that this approach will not succeed.

Any attorneys representing parties, be they clients or residential agents, utilizing the CAR standardized form lease, would be well advised to pay particular attention to the language in the standard attorney's fees provision in that document. Importantly, the attorney's fees provision in the CAR form lease presents several alternatives regarding the presence, absence, or modification of the attorney's fee cap. For example, one could leave the language as is with the \$1,000 cap, select a specified dollar amount other than \$1,000, or have no cap on attorney's fees by simply crossing out the "collectively, not to exceed \$1,000 (or \$_____)," language in the text.

Whether in any particular situation, any of the foregoing alternatives is in the best interests of the client, be he or she a landlord or a tenant, is best addressed on a case-by-case basis, as this is not an example of a one-size-fits-all approach. While caveat emptor may not apply in the lease context, the better practice would be for the attorney to bring this very important lease term to their client's attention, under either a *caveat locator* (landlord beware) or *caveat arrendator* (tenant beware) theory. In any language, the principle to remember is that under *Nash v. Aprea* caps on attorney's fees found in contracts do not survive judgment on those contracts under California's extinguishment by merger doctrine. ■

¹ California's Enforcement of Judgments law, Code of Civil Procedure Section 680.010, was enacted in 1982, at which time attorney's fees were added to the definition of post-judgment costs in Section 685.040. See Stat. 1982, ch. 1364, §2 ("Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law").

² Jaffe v. Pacelli, 165 Cal. App. 4th 927, 935 (2008).

³ Nash v. Aprea, No. B322796, 2023 WL 6399479 (Cal. Ct. App. Oct. 3, 2023), *reh'g denied* (Oct. 19, 2023).

⁴ As the Court of Appeal pointed out, the actual language of the lease limits the attorney's fees and costs cumulatively to \$1,000 rather than attorney's fees alone to \$1,000; noting no objection was ever made regarding this mistake.

⁵ Globalist Internet Techs., Inc. v. Reda, 167 Cal. App. 4th 1267, 1273-74 (2008).

⁶ Lease, ¶36.

⁷ Jaffe, 165 Cal. App. 4th at 935.

⁸ *Id.* at 934-35.

⁹ *Chelios v. Kaye*, 219 Cal. App. 3d 75 (1990).

¹⁰ *Id.* at 77-78 n.3.

¹¹ *Id.* at 79 (emphasis in original).

¹² *Id.* at 80 (emphasis in original).

¹³ Stat. 1992, ch. 1348, §3.

¹⁴ Assembly Bill 3331 amended Section 1033.5 to explicitly include contractual attorneys' fees as a recoverable cost. Stat. 1990, ch. 804, §1.

¹⁵ Assembly Comm. on Judiciary, 3d reading analysis of Assem. 2616, 1991-1992 Reg. Sess., as amended May 13, 1992, at 2 ("[O]ne provision of the debtor/creditor portion of the bill overturns *Chelios v. Kaye*, 268 Cal. Rptr. 38 (4th Dist. 1990)"); Sen. Comm. on Judiciary, Analysis of Assem. 2616, 1991-1992 Reg. Sess., as amended

Aug. 12, 1992, at 2 ("This bill would overrule

Chelios v. Kaye. It would allow the creditor to recover his attorney's fees as part of an award of collectible costs whenever the judgment creditor is entitled to an attorney's fee award fees under a written contract or pursuant to statutory authority").

¹⁶ Guo v. Moorpark Recovery Service, LLC, 60 Cal. App. 5th 745, 750 (2021); *Cardinale v. Miller*, 222 Cal. App. 4th 1020, 1025 (2014).

¹⁷ *Nash v. Aprea*, No. B322796, 2023 WL 6399479, at *4 (Cal. Ct. App. Oct. 3, 2023) (quoting Jaffe v. Pacelli, 165 Cal. App. 4th 927, 935 (2008)).

¹⁸ *Nash*, 2023 WL 6399479, at *4.

¹⁹ *Id.* at *5.

²⁰ *Id.*

²¹ *Id.* (quotations and citations omitted).

²² See generally *Cardinale*, 222 Cal. App. 4th 1020.

²³ *Id.* at 1026.

²⁴ *Nash*, 2023 WL 6399479, at *6.

²⁵ *Id.* (quotations omitted).



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