

The Statutory Framework for Appeal Bonds

ORDINARILY, THE PERFECTING OF AN APPEAL stays proceedings in the trial court.¹ The purpose of this automatic stay is to “protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided.”² Many statutory exceptions to the automatic stay rule, however, require posting a bond or undertaking³ to obtain a stay of enforcement. The most significant exception is for money judgments.⁴ A bond is also required to stay enforcement of: 1) certain hazardous waste orders, 2) a judgment that “directs the assignment or delivery of personal property,” 3) a judgment that orders sale or delivery of real property,⁵ 4) a judgment appointing a receiver, and 5) a right to attach order.⁶

The trial court also has discretion to require a bond in any case not specified in the statutes that govern appeals bonds (Code of Civil Procedure Section 917.1 to 917.8). The court may impose this requirement when 1) the appellant possesses “money or other property belonging to the respondent,” 2) the appellant “is required to perform an act for [the] respondent’s benefit pursuant to [the] judgment or order under appeal,” or 3) the judgment is solely for costs awarded under Code of Civil Procedure Section 1021 that would otherwise not require a bond.⁷ Conversely, the court of appeal has recently confirmed that trial and appellate courts have discretion to exempt the indigent from the bond requirement.⁸

The most common method of satisfying the bond requirement is to post a bond issued by an admitted surety insurer.⁹ The other two principal methods are 1) personal sureties—i.e., individuals who guarantee payment of the judgment on the basis of their personal assets¹⁰ and 2) a deposit of cash or other financial instruments in lieu of a bond.¹¹ Recent case law developments in the area of appeal bonds have focused on three different areas: the extent of the bond obligation, bonding a judgment for costs, and the effect of a deposit in lieu of a bond.

The Enduring Nature of the Bond Obligation

Two recent cases—*Conservatorship of O’Connor* and *Lewin v. Anselmo*¹²—make clear that once an appeal bond has been given by a surety, the resulting obligations cannot easily be set aside. In *O’Connor*, the administrator of an estate appealed a judgment that rescinded a performance bond.¹³ On appeal, the surety argued that rescission of the bond was appropriate in part because the bond had never been filed or approved by the court and therefore had never become effective.¹⁴

The court of appeal refused to release the surety from liability because neither filing nor approval of the bond was consideration for issuance of the bond.¹⁵ Instead, the court held that once the bond premium was paid, a technical defect such as failure to file or obtain approval did not affect the validity of the bond.¹⁶ In reaching this conclusion, the court cited the “savings” clause in Code of Civil Procedure Section 995.380(a) that forgives technical errors or mistakes:

If a bond does not contain the substantial matter or conditions required by this chapter or by the statute providing for the bond,



or if there are any defects in the giving or filing of the bond, the bond is not void so as to release the principal and sureties from liability.¹⁷

In *Lewin*, two individuals agreed to give a personal surety bond to stay enforcement of a judgment pending the defendants’ appeal, but the agreement gave the sureties 15 days to rescind. The sureties rescinded within the 15-day period, and the judgment was then affirmed on appeal. The plaintiff, who had not been informed about the 15-day rescission period, made a motion to enforce the personal sureties’ liability. The trial court ruled in favor of the sureties, and the plaintiff appealed.¹⁸

The court of appeal reversed, holding that the 15-day rescission period had to be disregarded because, if enforced, it could prevent the bond from taking effect for 15 days, in violation of the statutory directive that “a bond is effective at the time it is given.”¹⁹ The court also invalidated the 15-day rescission period because it conflicted with Code of Civil Procedure Section 996.110, which requires a court determination to release any surety from liability on a bond, noting: “These statutory procedures are more than mere formalities....As [the sureties] did not comply with these procedures,...[they] were not released from liability on their bond....”²⁰

Bonding a Judgment for Costs

Costs awarded under Code of Civil Procedure Sections 998 and 1141.21 that would not have been awarded under Section 1033.5

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(which lists the items allowable as costs to a prevailing party) must be bonded to stay their enforcement on appeal.²¹ However, no bond is required to stay enforcement of a judgment solely for costs awarded pursuant to Section 1021.²² This exception covers a broad category of cost awards (such as filing fees, motion fees, jury fees, attorney's fee awards, and court reporter fees)²³ and has been interpreted in several recent cases.

One case, *Ziello v. Superior Court*,²⁴ involved a dispute between a mortgagor and mortgagee over the proceeds of an insurance policy. The judgment awarded approximately \$62,000 plus routine costs and attorney's fees of approximately \$160,000. The principal amount of the judgment having been paid, the judgment debtor bank appealed only from the cost award. When the judgment creditors sought to execute on the cost and attorney's fee award, the bank obtained an order quashing the writ of execution. The judgment creditors then filed a writ petition seeking to execute on the cost and attorney's fee award notwithstanding the bank's appeal.²⁵

The court of appeal denied the writ petition, holding that if the defendant appeals only from an award of costs (which includes an award of attorney's fees when authorized by contract, statute, or law)²⁶ the order on appeal is "solely" for costs within the meaning of Code of Civil Procedure Section 917.1(d). Accordingly, no bond is required to stay enforcement of that order pending appeal.²⁷

In *Dowling v. Zimmerman*,²⁸ the plaintiff appealed from a judgment dismissing his complaint under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, and awarding the defendant attorney's fees and costs under the attorney's fee provision of that statute.²⁹ The plaintiff did not file an appeal bond to stay enforcement of the attorney's fee award, and the defendant sought to enforce the award by issuing a subpoena and noticing a judgment debtor exam. When the trial court denied a motion to quash the subpoena and vacate the debtor exam, the plaintiff sought a writ of supersedeas to stay enforcement of the award on the grounds that an anti-SLAPP attorney's fee award is a judgment "solely for costs" and is therefore automatically stayed without bond under Code of Civil Procedure Section 917.1(d).³⁰

The court of appeal held there was no automatic stay because "[a]n award of reasonable attorney fees and costs under the anti-SLAPP statute cannot be construed as an award of routine or incidental costs subject to the automatic stay rule under Section 917.1(d)."³¹ Although the court recognized that a judgment for attorney's fees awarded pursuant to statute is ordinarily a judgment



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for costs under Section 1033.5 (which allows as costs attorney's fees authorized by statute), the court found the legislative intent of the anti-SLAPP statute required the appeal bond statutes to be interpreted in a manner favoring the bond requirement:

We are persuaded the Legislature intended to deter SLAPP litigation not only at the trial court level, but also in the appellate courts....Requiring a SLAPP plaintiff who appeals from an adverse judgment under the anti-SLAPP statute to give an undertaking to stay enforcement of the portion of the judgment awarding reasonable attorneys fees and costs to the prevailing defendant...will promote meritorious appeals, and will deter continued SLAPP litigation at the appellate level.³²

A third case, *Gallardo v. Specialty Restaurants Corporation*,³³ dealt with a judgment consisting of expert witness fees awarded under Code of Civil Procedure Section 998, for which a bond is required to stay enforcement under Section 917.1(a)(2), and routine costs awarded under Section 1032, for which a bond is not required under Section 917.1(d) if the judgment is solely for such costs. The question was whether a bond was required for both amounts or whether the appellant's bond for only the Section 998 costs was sufficient. The court of appeal held that no bond was required for the routine costs awarded under Section 1032. The court relied on Section 917.1(d), which specifies that costs are to be included in the amount of the bond only for purposes of a money judgment as specified in Section 917.1(a)(1). The court reasoned that Section 998 costs are not a money judgment for purposes of Section 917.1(a)(1) because such costs are separately treated under Section 917.1(a)(2), and therefore costs awarded in such a judgment do not require a bond.³⁴

By statute, a deposit in lieu of an appeal bond has the same force and effect as any other form of appeal bond.³⁵ Under Rule 27 of the California Rules of Court, the "cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral" is recoverable in the event of a successful appeal.³⁶ In *Cooper v. Westbrook Torrey Hills*³⁷ the court of appeal held that because a deposit is equivalent to a bond, the cost of making a deposit is a recoverable cost on appeal, just as the cost of procuring a surety bond is recoverable under Rule 27.³⁸

Recent case law interpreting the appeal bond requirement emphasizes that appeal bonds are creatures of statute.³⁹ Therefore, the starting place to determine whether an appeal bond is required and, if so, how to obtain one, should always be the provisions of the gov-

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erning statutory scheme, which is found in Section 917.1 through 917.9, as well as Sections 995.010 through 996.510, of the Code of Civil Procedure. ■

¹ See CODE CIV. PROC. §916(a).

² Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1428 (2001). Recent case law notes that if the trial court refuses to acknowledge the existence of an automatic stay of enforcement, a writ of supersedeas is available. Gallardo v. Specialty Rests. Corp., 84 Cal. App. 4th 463, 467 (2000).

³ CODE CIV. PROC. §995.210. The terms "bond" and "undertaking" may be used interchangeably.

⁴ CODE CIV. PROC. §917.1(a)(1).

⁵ CODE CIV. PROC. §917.4. Current case law notes that this exception to the automatic stay rule does not apply to an appellant who has neither possession of nor the right to possess the real property. Royal Thrift & Loan Co. v. County Escrow, Inc., 123 Cal. App. 4th 24, 36-37 (2004).

⁶ See CODE CIV. PROC. §§917.2, 917.5, 917.15, 917.65. The trial court also has discretion to require a bond in any case not specified in the statutes governing appeal bonds. CODE CIV. PROC. §§917.1-8.

⁷ See CODE CIV. PROC. §§917.1(d), 917.9.

⁸ Williams v. Freedomcard, Inc., 123 Cal. App. 4th 609, 614 (2004).

⁹ See CODE CIV. PROC. §§917.1(b), 995.610-675.

¹⁰ See CODE CIV. PROC. §§995.510-520.

¹¹ See CODE CIV. PROC. §§995.710-770.

¹² Conservatorship of O'Connor, 48 Cal. App. 4th 1076 (1996); Lewin v. Anselmo, 56 Cal. App. 4th 694 (1997).

¹³ O'Connor, 48 Cal. App. 4th at 1086. Although O'Connor involves a performance bond rather than an appeal bond, the provisions of the bond and undertaking law construed by the O'Connor decision apply equally to all bonds. See CODE CIV. PROC. §995.020.

¹⁴ O'Connor, 48 Cal. App. 4th at 1102.

¹⁵ Id. at 1102-03.

¹⁶ Id.

¹⁷ Id. at 1103 n.21.

¹⁸ Lewin v. Anselmo, 56 Cal. App. 4th 694, 697-8 (1997).

¹⁹ Id. at 700 (citing CODE CIV. PROC. §995.420).

²⁰ Id. at 700-01.

²¹ CODE CIV. PROC. §917.1(a)(2), (3).

²² CODE CIV. PROC. §917.1(d).

²³ See CODE CIV. PROC. §1033.5.

²⁴ Ziello v. Superior Court, 75 Cal. App. 4th 651 (1999).

²⁵ Id. at 653-54.

²⁶ See CODE CIV. PROC. §1033.5(a)(10).

²⁷ Ziello, 75 Cal. App. 4th at 655.

²⁸ Dowling v. Zimmerman, 85 Cal. App. 4th 1400 (2001).

²⁹ Id. at 1405.

³⁰ Id.

³¹ Id. at 1432.

³² Id. at 1433-34; see also Banks v. Manos, 232 Cal. App. 3d 123 (1991) (An award of attorney's fees as sanction under §128.5 is not routine and therefore must be bonded to be stayed pending appeal.).

³³ Gallardo v. Specialty Rests. Corp., 84 Cal. App. 4th 463 (2000).

³⁴ Id. at 465-70.

³⁵ CODE CIV. PROC. §995.730.

³⁶ CAL. R. OF CT. 27(c)(1)(E).

³⁷ Cooper v. Westbrook Torrey Hills, 81 Cal. App. 4th 1294 (2000).

³⁸ Id. at 1298-1300.

³⁹ See, e.g., Lewin v. Anselmo, 56 Cal. App. 4th 694, 698 (1997) ("The terms of a statutory bond are controlled by statute.").

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