International Association of Defense Counsel

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Staying Enforcement of a Money Judgment Pending Appeal: An Overview

This article addresses one pressing issue that clients and defense counsel must confront after receiving an adverse verdict—can you avoid paying a money judgment while pursuing post-trial and appellate remedies?

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I. A JUDGMENT CAN USUALLY BE ENFORCED SOON AFTER IT IS ENTERED. IN RARE SITUATIONS, ENFORCEMENT IS AUTOMATICALLY STAYED BY OPERATION OF LAW.

The triggering event for the issues is the entry of a judgment. In some jurisdictions, a prevailing party may begin taking steps to enforce the judgment as soon as it is entered. *See, e.g.*, Cal. Civ. Proc. Code § 683.010 (West 2008) ("a judgment is enforceable under this title upon entry"); Or. Rev. Stat. Ann. § 18.252(1) (West 2008) ("a judgment may be enforced by execution upon entry of the judgment"). In many other jurisdictions, the enforcement of a judgment is stayed for a brief period after the judgment is entered. *See, e.g.*, Fed. R. Civ. P. 62(a) ("no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry"); Ala. R. Civ. P. 62(a) ("no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of thirty (30) days after its entry").

Although rare, there are some situations in which the law provides for an automatic stay of enforcement during an appeal. In Massachusetts, for example, "[n]o execution shall issue upon a judgment until the exhaustion of all possible appellate review thereof, and the receipt by the clerk of the trial court of the appropriate rescript or order." Mass. Gen. Laws Ann. ch. 235, § 16 (West 2008). In several states, government agencies and officers are entitled to a stay of enforcement pending their appeal from a judgment. *See, e.g.*, Cal. Civ. Proc. Code § 995.220 (West 2008); Ky. R. Civ. P. 81A. And in federal court, a judgment is automatically stayed if it would operate as "a lien on the judgment debtor's property under the law of the state where the court is located." Fed. R. Civ. P. 62(f); *see* Miss. Code Ann. §

11-7-191 (West 2008) ("A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled . . . ."). This is not an exhaustive list of situations in which an automatic stay is created; you will want to check the rules and statutes in operation in your jurisdiction.

In the vast majority of situations, the enforcement of the judgment will not be automatically stayed pending appeal. The losing party will need to obtain a stay of enforcement using one of the procedures we discuss below.

II. ENFORCEMENT OF A JUDGMENT CAN BE STAYED DURING THE TIME FOR POST-TRIAL MOTION PRACTICE IN THE TRIAL COURT.

In many cases where a jury returns an adverse verdict, it will be advisable to file one or more post-trial motions, such as a motion for new trial or a motion for judgment as a matter of law. In other cases, it may be mandatory to raise certain issues in post-trial motions to preserve them for appeal. Along with the desire to file post-trial motions comes the need to stay enforcement of the judgment while the trial court considers those motions.

In a very few jurisdictions, the timely filing of post-trial motions alone stays enforcement of the judgment. *See, e.g.*, 735 Ill. Comp. Stat. Ann. 5/2-1202(d) (West 2008) ("A post-trial motion filed in apt time stays enforcement of the judgment."). In other jurisdictions, a trial judge has discretion, without requiring security, to stay enforcement of a judgment during the time when post-trial motions may be filed. *E.g.*, Cal. Civ. Proc. Code § 918 (authorizing a stay until 10 days after a notice of appeal must be filed). But in most courts,

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including the federal courts, defendants must request a stay of enforcement during post-trial motion practice and trial judges have discretion to require some measure of security. *See, e.g.*, Fed. R. Civ. P. 62(b) ("On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following [post-trial] motions . . . ."). When a trial court demands security for the stay, a defendant generally may use the same types of security that we discuss below in the context of stays pending appeal.

III. ENFORCEMENT OF A JUDGMENT CAN BE STAYED DURING AN APPEAL.

A. Defendants should first ask prevailing plaintiffs to agree voluntarily not to enforce the judgment during the appeal.

In most states, the parties may agree to stay enforcement of a judgment pending appeal. *See, e.g.,* N.Y. C.P.L.R. § 2504(a) (McKinney 2008) ("Unless the court orders otherwise, an undertaking may be waived by the written consent of all parties."). It is prudent to contact the opposing party to see if he will agree to a voluntary stay, which can be quickly memorialized in a stipulation or letter signed by counsel on both sides. Few plaintiffs ultimately agree to waive the requirement of security altogether, but by making such a request, defendants can establish that the plaintiff has forced them to post a bond or provide other security. In many jurisdictions, that allows the defendant to recover the cost of obtaining security (usually bond premiums) if the defendant eventually prevails on appeal. *See, e.g.*, Fed. R. App. P. 39(e)(3) (bond premiums are recoverable costs); Cal. R. Ct. 8.278(d)(1)(F) (West 2008) (similar).

B. A defendant commonly obtains a stay of enforcement of the judgment pending appeal by providing security. Courts accept many different types of security.

1. An appeal bond (sometimes called a supersedeas bond) is the most common form of security.

a. What is a bond and who writes it?

A bond is a document that memorializes a surety's agreement to answer for the judgment if the defendant loses the appeal and does not pay the judgment. Sureties are often insurance companies or divisions thereof, *see* 31 U.S.C. §§ 9301-9309 (federal standards governing sureties), but individuals may serve as sureties in some jurisdictions, *e.g.*, Cal. Civ. Proc. Code §§ 995.510-995.520 (West 2008). Most bonds are just a few pages in length: they briefly list the judgment for which the surety assumes responsibility; they provide the

surety's contact information for service of process; and they bear the notarized signature of the surety or its attorney-in-fact. Counsel generally drafts the bond and presents it to the surety for approval; however, some sureties prefer to use their own forms.

b. How do you obtain a bond from a surety?

There are many surety companies that write appeal bonds. The terms on which sureties offer bonds vary, so it is often a good idea to consult with a bond broker to identify the best options and prices. If your client is a well-known, publicly-traded company, it may be possible to obtain a bond simply by executing an indemnity contract in which your client agrees to pay back the surety for any sum the surety must pay the plaintiff. In most instances, however, your client will need to provide collateral. Surety companies tend to be very risk averse; it is not unheard of for sureties to demand full collateral before writing a bond. Your client will also need to pay premiums (usually annually) on the bond. Premiums are typically measured by the amount of the bond, usually a low single-digit percentage of the total. The process of identifying a surety, negotiating the terms of the bond, and supplying collateral can take from several days to several weeks. Because your client will want to obtain a stay as quickly as possible—to avoid the harassment of enforcement efforts—it may be a good idea to begin planning even before the judgment is entered.

c. How is the amount of the bond determined?

The amount of the bond will vary, depending on the case and the jurisdiction where the judgment is entered. In some courts and states, there are rules or statutes that set the amount of the bond as a multiple or percentage in excess of the judgment. *See, e.g.*, Cal. Civ. Proc. Code § 917.1(b) (West 2008) (for individual sureties, a bond "shall be for double the amount of the judgment or order"; for "an admitted surety insurer . . . it shall be for one and one-half times the amount of the judgment or order"); E.D. Cal. R. 65.1-151(d)

("a supersedeas bond shall be 125 percent of the amount of the judgment unless the Court otherwise orders"). In other jurisdictions, a bond equal to the amount of the judgment will usually suffice. *E.g., Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1559-60 (10th Cir. 1996) ("Typically, the amount of the bond matches the full amount of the judgment."). When a trial judge has discretion to set the amount of the bond, a defendant should propose an amount large enough to secure the plaintiff's entire recovery if it prevails on appeal: the judgment, any award of fees and costs, and any post-judgment interest that will accrue while the appeal is pending. *See, e.g.*, Ga. Code Ann. § 5-6-46(a) (West 2007) ("[T]he amount of the bond or other form of security shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a lesser amount.").

d. What happens to the bond signed by the surety?

Once the bond is finalized, the defendant usually files it with the trial court. In some jurisdictions, the act of filing a bond in the proper amount creates a stay of enforcement. *E.g.*, Cal. Civ. Proc. Code § 995.410(a) (West 2008) ("A bond becomes effective without approval unless the statute providing for the bond requires that the bond be approved by the court or officer."). In other jurisdictions, particularly the federal courts, a trial judge must approve the bond before any stay of enforcement takes effect. *See* Fed. R. Civ. P. 62(d) ("The stay takes effect when the court approves the bond."). When a trial court has discretion to approve or disapprove the bond, it is generally a good idea to prepare a motion explaining why the amount of the bond is appropriate to secure the plaintiff's interest.

2***. Defendants can provide several alternative forms of security in lieu of an appeal bond.***

An appeal bond is not the only form of security that will operate to stay enforcement of a judgment. *E.g., Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 993* P.2d 516, 538 (Haw. 2000) ("We hold that the trial court, in its discretion, may allow a party to provide alternative security in lieu of a supersedeas bond. Here, Windward was provided with both a judgment lien on Alteka's real property, with a tax assessment value of at least $15 million, and $100,000 in a court-supervised interest-bearing account."); *Ryder Truck Rental, Inc. v. Sutton*, 807 S.W.2d 909, 913 (Ark. 1991) ("After considering evidence from both Sutton and Ryder's appraisers, the trial court found that the present fair market value of the property pledged by Sutton was adequate security to protect Ryder pending Sutton's appeal.").

In many courts, defendants can deposit cash with the court, or provide less liquid forms of security such as treasury notes, shares of stock, letters of credit, and the like. *See, e.g.*, Okla. Stat. Ann. tit. 12, § 990.4(B)(1)(b) (West 2008) ("[I]nstead of filing a supersedeas bond, the appellant may obtain a stay by depositing cash with the court clerk in the amount of the judgment or order plus an amount that the court determines will cover costs and interest on appeal. The court shall have discretion to accept United States Treasury notes or general obligation bonds of the State of Oklahoma in lieu of cash."). As a general rule, however, use of conventional liquid assets will increase the likelihood that a trial court will accept those assets as security for the judgment. There may be financial advantages to your client to providing security in an atypical form, but be aware that trial courts are accustomed to dealing with bonds and straightforward deposits of cash; you may have a difficult time convincing a trial court to approve a more unusual request.

C. As a last resort, a defendant may request a stay of enforcement without providing security, but such relief is difficult to obtain.

It is theoretically possible (though practically quite difficult) to obtain an unsecured stay of enforcement of a judgment. Despite the difficulties, however, some defendants have no choice but to seek such a stay without security. For example, a defendant usually cannot obtain a bond or deposit funds sufficient to secure the judgment if the judgment exceeds its assets.

A few courts have shown flexibility in allowing unsecured stays. The Seventh Circuit, for example, has stated that "an inflexible requirement of a bond would be inappropriate in two sorts of case[s]: where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money; and—the opposite case, one of increasing importance in an age of titanic damage judgments—where the requirement would put the defendant's other creditors in undue jeopardy." *Olympia Equip. Leasing Co. v. W. Union Tele. Co.,* 786 F.2d 794, 796 (7th Cir. 1986). But most courts take a much harder line, generally rejecting unsecured stays that a defendant requests simply because he cannot post a bond or provide other security.

Most jurisdictions provide a mechanism for seeking a stay of enforcement with no security. A defendant may often move for a stay of enforcement in the trial court and, if unsuccessful, may renew the request in the court of appeals. *See* Fed. R. App. P. 8(a); Cal. Civ. Proc. Code, § 995.240 (permitting the trial court to waive the bond requirement for an indigent); Cal. R. Ct. 8.112 (West 2008) (permitting a petition for writ of supersedeas to be

filed in the appellate court). In preparing a motion or petition, counsel should explain the need for a stay and the reason why security cannot be provided. Counsel should also make a showing that the defendant will be able to raise substantial issues on appeal. *E.g., Hansen v. Eighth Jud. Dist. Ct.*, 6 P.3d 982, 987 (Nev. 2000) ("Although, when moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.' ").

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