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HITTING THE PAUSE BUTTON: STAYS PENDING APPEAL



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When clients receive an adverse judgment, among the first questions they're likely to ask are, "How do we stay the judgment while we appeal?" and, "Do we need to post a bond?" This article provides some answers.

Is a bond a prerequisite to appealing?

Posting a bond is *not* a prerequisite to appealing in California. The role of a bond is just to stay enforcement of a judgment while the appeal is pending, in situations where the stay is not automatic. The first step in answering whether a bond is necessary, therefore, is to determine whether the judgment is automatically stayed by filing a notice of appeal.

Is the judgment automatically stayed?

The default rule is that perfecting an appeal (i.e., filing a timely notice of appeal) automatically stays all trial court proceedings on the order appealed from, including enforcement proceedings. (Code Civ. Proc., § 916.) But there are many exceptions to the default rule, requiring close analysis.

Most notably, the Code of Civil Procedure broadly recites that perfecting an appeal does not stay enforcement of an order or judgment for "[m]oney or the payment of money." (*Id.*, § 917.1, subd. (a)(1).) Staying enforcement of such orders or judgments requires posting a bond or taking other affirmative steps, as discussed below.

This money-judgment carveout to the automatic stay is not as all-encompassing as it first appears, though: Some orders and judgments directing the payment of money *are* automatically stayed on appeal.

For example, an award solely for attorney fees and costs pursuant to Code of Civil Procedure section 1021 is automatically stayed pending appeal. (*Id.*, § 917.1, subd. (d); *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 654–655.) An award of prevailing party attorney fees under the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.) falls into this category. (*Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1546.)

On the other hand, an award of attorney fees to a defendant who prevails on an anti-SLAPP motion is *not* automatically stayed. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1431–1432.) Likewise, an appeal does not automatically stay a Code of Civil Procedure section 998 cost award—except that it does, as to amounts that would otherwise have been awarded as routine costs. (*Id.*, § 917.1, subd. (a)(2).)

And, public entities and officers benefit from the automatic stay even as to money judgments. No bond is required to stay enforcement of a judgment against the State of California, state agencies, departments, or officers in an official capacity, against counties, cities, districts, or their officers in an official capacity, or the United States or its agencies or officers. (Code Civ. Proc., § 995.220.) Trial courts also have discretion to dispense with bond requirements "when the appellant is an executor, administrator, trustee, guardian, conservator or other person acting in another's right." (*Id.*, § 919.)

Myriad other exceptions to the automatic stay rule appear at Code of Civil Procedure sections 917.15–917.5. Among other things, a judgment directing the assignment or delivery of personal property or real property is not stayed pending appeal unless the defendant posts an undertaking in a sum to be determined by the trial court. (*Id.*, §§ 917.2, 917.4.) The same is true as to a judgment appointing a receiver. (*Id.*, § 917.5.)

If the judgment or order at issue directs the performance of more than one type of act not subject to the automatic stay—for example, if it requires the defendant to pay money and

return property—obtaining a stay requires complying with the requirements of “each” applicable section. (Code Civ. Proc., § 917.6.) Section 917.6 has not been meaningfully discussed in a published decision, making it questionable whether a multipronged judgment could be *partially* stayed by compliance with only one of the applicable stay sections.

There are also nonstatutory stay rules. For example, as the Supreme Court recently described, under California common law, a prohibitory injunction is not stayed pending appeal, while a mandatory injunction is stayed. (*Daly v. San Bernardino County Board of Supervisors* (2021) 11 Cal.5th 1030.)

What are options for obtaining a stay?

The most common way to obtain a stay is to post a bond from an admitted surety insurer. Under such a bond, if the appealed judgment is affirmed or the appeal dismissed, and the appellant fails to pay it within 30 days of the remittitur, the judgment can be enforced against the person or company that issued the bond. (Code Civ. Proc., § 917.1.)

A bond issued by an admitted surety insurer must be for 1.5 times the amount of the judgment. (Code Civ. Proc., § 917.1.) The judgment amount for these purposes includes any cost award (which, in turn, includes contractual or statutory attorney fees). (*Ibid.*) If the cost and fee amounts have not been determined yet, they can be handled later through a separate bond.

A sophisticated bond broker will be able to walk your client through the mechanics of obtaining and posting a bond from an admitted insurer, including what collateral is necessary.

But a bond from an admitted surety insurer is far from the only way to obtain a stay. There are multiple other possible paths, depending on the specifics of the case. They include:

Temporary stay by trial court. The trial court has discretion to stay enforcement of a judgment until 10 days beyond the last date on which a notice of appeal could be filed. (Code Civ. Proc., § 918.) This temporary stay can avoid the need for a bond while postjudgment motions are pending, since timely postjudgment motions extend the deadline to file a notice of appeal. Even if postjudgment motions aren’t being filed, this short stay provides time to arrange for a bond or other option for a more permanent stay.

Courts routinely grant Code of Civil Procedure section 918 stays, unless the judgment creditor can show prejudice.

Stipulation. Consider asking the plaintiff to stipulate to a stay without a bond, or with a bond in an amount less than

that required by statute. The Code of Civil Procedure expressly allows such stipulations. (*Id.*, § 995.230.)

Many plaintiffs would refuse, but if the defendant is a large company with more than sufficient assets to pay the judgment, there may be room to negotiate. For example, plaintiffs may be willing to forego a bond in exchange for defendant paying them a portion of what a bond premium would cost (money that the defendant would have to spend either way).

Assuming the defendant is sufficiently creditworthy, plaintiffs have an incentive to cooperate because bond premiums, the cost of obtaining a letter of credit as collateral, fees and interest incurred to borrow funds to provide security for a bond, and fees and interest expenses to borrow funds to deposit in lieu of an undertaking are all recoverable costs on appeal unless the court determines that the bond was unnecessary. (Cal. Rules of Court, rule 8.278(d)(1)(F).) Indeed, under the California rule’s federal analog, Federal Rule of Appellate Procedure 39, the United States Supreme Court recently affirmed a \$2.2 million cost award reflecting the prevailing appellants’ costs to obtain an appeal bond. (*City of San Antonio, Texas v. Hotels.com, L.P.* (2021) 539 U.S. __ [141 S.Ct. 1628, 209 L.Ed.2d 712].)

Moreover, if the plaintiff declines to stipulate, that fact can be helpful in its own right. When a defendant prevails on appeal and seeks its bond premiums as a recoverable cost, a plaintiff that refused to stipulate to a stay will be hard-pressed to object on the ground that the bond was unnecessary.

Bond by personal sureties. As an alternative to an admitted surety insurer, personal sureties can bond a judgment. (See Code Civ. Proc., § 995.510.) There are several differences when personal sureties are involved. A personal surety bond must be twice the amount of the judgment (as compared to 1.5 times for an admitted surety insurer bond). (*Id.*, § 917.1.) And, the bond must be executed by two sureties, not just one. (*Id.*, § 995.310.) Personal sureties must be California residents and own real property in California or be “householders” in the state. (*Id.*, § 995.510.) Court officers and members of the bar are not eligible, nor can the debtor be his or her own surety. (*Ibid.*)

If two sureties sign the bond, each must have a net worth of at least the amount of the bond in real or personal property situated in California, excluding judgment-proof property. (Code Civ. Proc., § 995.510.) If the bond is executed by more than two sureties and exceeds \$10,000, any one surety’s worth may be less than the amount of the bond, so long as the sureties’ aggregate worth is at least twice the amount of the bond. (*Ibid.*)

Personal sureties must provide affidavits of qualification, and the respondent may object to a bond if the affidavits are deficient (Code Civ. Proc., § 995.520), potentially subjecting the sureties to discovery. And as with an admitted insurer bond, personal sureties become liable if the judgment is affirmed on appeal and the appellant fails to pay upon receipt of the remittitur.

Deposit. Defendants can forego a bond entirely, and avoid bond premiums, by depositing money with the court instead. (Code Civ. Proc., § 995.710.) The deposit must be at least equal to the amount that would be required for an admitted surety bond; it may be made in cash or statutorily specified securities. (*Ibid.*) The court must hold cash in an interest-bearing account and pay interest on demand. (*Id.*, §§ 995.710, 995.740.)

Supersedeas. In an extreme case, to preserve the status quo where the defendant is unable to post the requisite bond or deposit, the Court of Appeal has power to stay enforcement of the judgment without a bond via a writ of supersedeas.

For example, in *Davis v. Custom Component Switches, Inc.* (1970) 13 Cal.App.3d 21, 26–27, the appellate court stayed enforcement of a judgment where the respondent was pursuing a writ of execution that would force a sale of a business’s assets and leave the appellants with no meaningful recovery if they prevailed on appeal, and where the appellants could not afford a bond. Similarly, in *Estate of Murphy* (1971) 16 Cal.App.3d 564, 568–569, the court stayed distribution of trust assets where “the task of recovering the property and redistributing it would be enormous” if the property were distributed and appellants later prevailed on appeal, and as to some of the appellants, the undertaking fixed by the trial court “may be prohibitive.”

The appellate court can also use its supersedeas power to stay enforcement of a prohibitory injunction or otherwise freeze events that could impact the efficacy of an appeal. (Code Civ. Proc., § 923 [noting a reviewing court’s power to “stay proceedings during the pendency of an appeal or to issue a writ of supersedeas,” to “preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction”]; see, e.g., *Advanced Real Estate Services, Inc. v. Superior Court* (2011) 196 Cal.App.4th 338, 341 [staying a planned sale of the Orange County Fairgrounds].)

A petition for a writ of supersedeas must be filed in the Court of Appeal, *after filing the notice of appeal*, and must show (a) that the appellant would suffer irreparable harm absent a stay, and (b) that the appeal raises substantial questions on which the appellant’s position has merit. Such petitions are rarely granted, but on the right facts are worth considering.

When does the stay need to be in place?

Absent a stay, a California state court judgment is enforceable upon entry. (Code Civ. Proc., § 683.010.)

That makes it prudent to ask the plaintiff to stipulate to stay enforcement (at least temporarily), or to ask the trial court for a temporary stay under Code of Civil Procedure section 918, *before judgment is entered*. Otherwise, there is a risk that the plaintiff will begin enforcement procedures before the defendant posts a bond or otherwise arranges for a more permanent stay.

If the plaintiff won’t stipulate to a stay, it is also prudent to have your client start talking to a bond broker when the jury renders its verdict or the court issues its ruling, rather than waiting for entry of judgment. It can take some time to get a bond in place.

Counsel should also be aware of a wrinkle in stay timing in cases where there will be postjudgment motions. For judgments that would be automatically stayed by filing an appeal, it may be tempting to file the notice of appeal immediately to trigger the stay.

But there is case law holding that a notice of appeal divests the trial court of jurisdiction to rule on motions for judgment notwithstanding the verdict, motions to vacate the judgment, and motions for reconsideration. (See *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 50–51; *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 641; *Weisenburg v. Molina* (1976) 58 Cal. App.3d 478, 486, abrogated on another ground by *Adams v. Murakami* (1991) 54 Cal.3d 105, 111; but see *Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 Cal.App.3d 1204, 1211 [disagreeing with *Weisenburg*, and holding that appeal does not divest court of jurisdiction to rule on JNOV motion].) A temporary stipulated or section 918 stay is a good alternative to filing a hasty appeal and potentially depriving the trial court of jurisdiction to rule on postjudgment motions.

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