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Stays on Appeal

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BY STEVEN J. ANDRÉ

Almost every case has an unhappy ending for at least one party. Suppose the jury clobbers your client with a $5 million award. Bad news! But let's assume there are excellent grounds to win a reversal on appeal.

After the judgment is entered, what should you do? For starters, make sure you file a timely notice of appeal. In general, that should happen within 60 days after notice of entry of judgment (Cal. Rules of Court, Rule 8.104).

However, the mere filing of a notice of appeal does not stop execution proceedings; your client's assets may be at risk of seizure while you fight to overturn the judgment that put them in jeopardy. Many attorneys don't realize that in most cases the party who wins at trial is fully entitled to enforce a monetary judgment while the case moves to a higher court for review.

How, then, do you protect your client's assets during the appeal? The simplest way is to have your client post funds (usually in the form of an undertaking or bond) to guarantee a source of payment in case the judgment is affirmed. That will get your client a stay of execution until the case is decided by the appellate panel (Cal. Code Civ. Proc. § 917.1(a)(1); all further section references are to the Code of Civil Procedure).

HOW A STAY WORKS

A stay operates prospectively to preserve the status quo during appellate proceedings. It freezes the parties' respective positions as of the time the stay is issued (*State I. & I. Co. v. San Francisco*, 101 Cal. 135, 150 (1894)). A stay will also preclude the trial court from proceeding on matters affected by the judgment; with respect to other (collateral) matters, however, the trial court retains jurisdiction (§ 916). The determination of what matters are stayed depends upon whether additional trial court proceedings would affect the effectiveness of the appeal (*Betz v. Pankow*, 16 Cal. App. 4th 931, 938 (1993)).

Oddly enough, the general rule stated in section 916(a) actually states the opposite: that an appeal stays trial court proceedings, including enforcement of a judgment. But the exceptions swallow the rule. Execution is *not* automatically stayed in numerous situations, including cases involving money judgments (§ 917.1(a)(1)); specified Health and Safety Code violations, including the removal or release of hazardous substances (§§ 917.15, 917.8(d)); judgments directing sale or delivery of personal or real property (§§ 917.2, 917.4, 1176(a)); nuisance cases (§ 917.8(c)); and prohibitory, but not mandatory, injunctions (*Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827 (1964)).

Even if an exception to the stay rule is not specified in the code, the trial court has discretion to require an undertaking while the matter is on appeal; the amount to be posted usually will be a sum sufficient to compensate for loss of use of the money or property in question (§ 917.9).

To further complicate the analysis, in certain situations a stay is discretionary even when an undertaking is posted. Examples are unlawful detainer cases (§ 1176(a)) and disputes involving child custody rights and certain restraining orders (§ 917.7).

BONDS, UNDERTAKINGS, AND PERSONAL SURETIES

A bond or undertaking is simply an affirmation to stand as surety for the liability in question. Usually, they are issued by a surety company, but they also can be issued by a surety company together with an individual principal (§§ 995.190, 995.140).

Procedurally, an appeal bond is posted by filing it with the court and serving a copy on the other side (§§ 995.330, 995.370).

The insurer does not need to provide the required security. The code affords identical treatment to an insurer's bond, a pledge by personal sureties, and a personal deposit (§§ 995.210, 995.710).

Two or more persons may undertake to stand as sureties (§ 995.310). Not surprisingly, one cannot be a surety for oneself. And the Legislature let attorneys off the hook, so if a client asks you to stand as surety, politely respond that you cannot (and refer the client to section 995.510(a)(1)).

But an undertaking is not as simple as having the appellant's beer buddies file statements vouching to make good on a half million–dollar judgment. They must aver to facts substantiating their ability to cover the obligation. Among other qualifications, they must own real property or reside in the state, and the net value of each of their real and personal property holdings in the state—after debts and liabilities—must equal the undertaking amount (§ 995.520). If the undertaking exceeds $5,000, they must specify details identifying their property, their interest, and its value and encumbrances (§ 995.520(c)). Also, if the undertaking amount is more than $10,000, the collective net worth of the personal sureties must be *twice* the undertaking amount (§§ 995.510(b), 995.520(d)). In addition, the sufficiency of the undertaking filed with the court is subject to challenge via an expedited hearing (§§ 922, 995.940–995.960, 996.010).

SURETY INSURERS

Because most folks do not have enough wealthy friends or relatives willing to pay such a tab, insurance companies commonly provide appeal bonds for a fee (§ 995.120(a)). One such insurer is sufficient to give an undertaking to stay enforcement of a judgment (§ 995.610), although more than one insurance company may join in the undertaking (§ 995.620).

DO IT YOURSELF

Alternatively, the appellant may post the security directly with the court (§§ 995.710, 995.730). In addition to cash, the statute lists negotiable securities that will suffice for this purpose, including bonds, notes, and bank accounts and certificates. (See § 995.710(a).) Such securities are deposited and filed with a certificate authorizing the clerk to negotiate them to enforce the liability (§ 995.710(c)). This lets the appellant avoid the expense of an annual fee (usually 2 percent of the undertaking amount)—similar to posting bail in full rather than purchasing a bail bond. In addition, interest earned on funds placed by the clerk in a trust account is paid to the posting party (§ 995.740(a)(1)).

HOW MUCH?

The amount of an undertaking is determined by the amount of the judgment and the nature of the security being provided. An undertaking by personal sureties must equal double the judgment. An insurer's bond need be only 150 percent of the judgment (§ 917.1(b)).

When the judgment involves the value of property, the court sets the amount of the security upon an appellant's motion, taking into account various factors, including potential damage to the property or diminishment in its value and the loss of its use (§§ 917.2, 917.4). Within ten days after service of the undertaking, the respondent can object to the sufficiency of the appellant's filing (§ 995.920) or move to increase the amount of the security (§ 995.930(b)). A later motion to challenge the sufficiency of the undertaking must be accompanied by a showing of changed circumstances or good cause to explain the failure to raise the objection earlier (§ 995.930(c)).

The appellant also can move to reduce the amount (§ 996.030).

TEMPORARY STAYS AND DEADLINES

The trial court can grant a temporary stay with respect to any judgment or order (§ 918). This allows an appellant time to post security or make appropriate post-judgment motions to obtain a stay. The stay may extend not more than ten days "beyond the last date on which a notice of appeal could be filed." (§ 918(b).)

To provide effective protection, the security should be posted before execution occurs (*California Commerce Bank v. Superior Court*, 8 Cal. App. 4th 582 (1992)). The stay is effective upon the filing of the undertaking, except in the case of judgments in favor of state agencies, in which case the court must first approve the undertaking (§§ 995.420, 995.840(a)).

> If the undertaking amount is more than $10,000, the collective net worth of the personal sureties must be *twice* the amount.

COST AWARDS

"Costs only" judgments have fomented considerable controversy.

In the case of a money judgment, costs (generally listed in section 1033.5) are combined with a damage award for purposes of calculating the bond amount (§917.1(d); *Gallardo v. Specialty Restaurants Corp.*, 84 Cal. App. 4th 463 (2000)).

An award consisting solely of costs, however, requires no bond to stay execution (§ 917.1(d)). These arise most often in cases where the defendant prevails, recovers no money, but is awarded the costs of a suit.

The practical reason for distinguishing between judgments for damages, on the one hand, and a "costs only"

judgment on the other, was explained in *Vadas v. Sosnowski* (210 Cal. App. 3d 471 (1989)). A damage award, said the court, represents the right to affirmative relief. To escape immediate enforcement, the appellant must provide security to the respondent guaranteeing collection of the award. But a judgment for costs alone does not represent an award of affirmative relief; rather, it involves *denial* of affirmative relief to one party, coupled with compensation to the opponent for the expenses of the lawsuit.

The courts and the Legislature have struggled to deal with awards not specifically defined by statute as "costs." Some courts have declined to differentiate among costs. (See *Pecsok v. Black*, 7 Cal. App. 4th 456 (1992); and *Nielsen v. Stubos*, 226 Cal. App. 3d 301 (1990).) Others have denominated certain expenses as damages due to their "nonroutine" status as costs. (See *Chamberlin v. Dale's R.V. Rentals, Inc.*, 188 Cal. App. 3d 356 (1986).) Eventually, the California Supreme Court accepted the latter view (*Bank of San Pedro v. Superior Court*, 3 Cal. 4th 797 (1992)). But controversy lingered, and detailed judicial inquiry was required to determine whether a given cost item was "routine" or not.

The Legislature responded in 1993, rejecting complications created by *Chamberlin* and *San Pedro*. It amended section 917.1(d) to provide that a "costs only" award made under sections 1021–1038 is automatically stayed on appeal. Now, only specified extraordinary costs (awarded pursuant to §§ 998 and 1141.2) require posting of security. Attorneys fees, whether awarded pursuant to contract, statute, or common law, were clarified as constituting costs in section 1033.5. However, the Legislature also gave courts the option to require security to be posted for any automatically stayed cost award (§ 917.9).

Practitioners should note that if costs (particularly attorneys fees) are awarded, a court unfamiliar with the legislative history of sections 917.1, 1033.5, and 917.9 might still require a bond. (See *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400 (2001).)

ALTERNATIVES TO THE BOND REQUIREMENT

Bonds set by statute are not the only way to obtain a stay while a case is on appeal. The first and most logical alternative is to have the parties stipulate to security at a lower dollar figure. The code allows the respondent to agree to accept a lesser amount, or to waive the requirement of an undertaking altogether (§ 995.230). Although the idea of a respondent waiving the bond requirement might seem unlikely, it does happen. Indeed, there are cases where *both* parties are appealing and a waiver may be a matter of mutual interest. Moreover, sometimes it is obvious that the appellant has the wherewithal to pay the judgment and the respondent wishes to avoid liability for the bond premium in the event of a reversal. (See Cal. Rules of Court, Rule 8.278(d)(1)(F).)

Precedent has long established that the court may waive bond requirements when the appellant is indigent. (See *Conover v. Hall*, 11 Cal. 3d 842, 850–853 (1974).) This rule was later codified, directing the court to consider all relevant factors including "the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived." (§ 995.240.) Though an appellant's mere inconvenience or hardship does not warrant a waiver, the practical inability to post a bond, coupled with potentially irreparable harm if a stay is not granted, will carry the day (*Markley v. Superior Court*, 5 Cal. App. 4th 738, 748–750 (1992)). Determining "indigency" appears to involve an assessment of the party's means in relation to the amount of the undertaking, rather than a determination of actual poverty (*Alshafie v. Lallande*, 171 Cal. App. 4th 421, 428–365 (2009)).

COURT DISCRETION AND APPELLATE POWER

The trial court may stay execution when the appellant has a separate action pending against the respondent (§ 918.) The court will usually base its stay decision on a number of factors, including the likelihood that the appellant will prevail in the separate action; the comparable amounts at issue in the pending cases; and the respondent's ability to satisfy a judgment in the separate action.

The court also has discretion to impose a stay when the appellant is acting on behalf of another, such as when the appellant is a guardian, conservator, trustee, or executor. (See § 919.)

In contrast to the trial court, whose power to issue a stay is circumscribed by statute, the court of appeal is free to issue any order it believes appropriate to preserve the status quo, including a stay of execution (§ 923). Generally, a party requests such relief by petitioning for a writ of supersedeas. The writ emanates from the court's inherent power to control proceedings in keeping with the exercise of appellate jurisdiction. A writ of supersedeas can stay any or all execution proceedings in the lower court. Moreover, when a trial court judgment dissolves a preliminary injunction, the court of appeal may issue an order *continuing* the injunction in order to preserve the status quo while the case is on appeal (*People ex. Rel. S.F. Bay etc. Com. v. Town of Emeryville*, 69 Cal. 2d 533, 538–539 (1968)).

Reversal on appeal restores the status quo (§ 908). Thus, bonding a stay is not a one-way street. A respondent who executes on the judgment or requires that an appellant put up security while the case is on appeal may wind up paying money back (or reimbursing bond premiums) if the judgment is reversed.

So pick your poison: If you want a stay, be prepared to bond the case. Conversely, if you represent the respondent, recognize the risk involved should the trial court's decision get reversed.

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Stays on Appeal

1 Filing an appeal automatically stays a money judgment.
❑ True ❑ False

2 A stay on appeal operates to preserve the status quo as of the date of judgment.
❑ True ❑ False

3 A stay prevents the trial court from proceeding with all matters related to the case.
❑ True ❑ False

4 Posting security does not always stay execution.
❑ True ❑ False

5 The form of a bond is a statement filed with the court and served on the respondent.
❑ True ❑ False

6 A respondent has the right to challenge the adequacy of an undertaking within ten days.
❑ True ❑ False

7 A trial court may grant a temporary stay, but this extends only for a brief time after the deadline for appeal elapses.
❑ True ❑ False

8 In granting a permanent stay, the trial court may dispense with the bond requirement if the court believes such action is appropriate to preserve the status quo.
❑ True ❑ False

9 The amount required for an undertaking posted by a private individual is different from the amount that must be provided by a surety company.
❑ True ❑ False

10 A party to an appeal can be a surety on the party's own behalf.
❑ True ❑ False

11 Personal sureties and surety insurers may join together in providing security.
❑ True ❑ False

12 Either a trial or appellate attorney can post security for a client.
❑ True ❑ False

13 A single personal surety is not sufficient to stay enforcement of a judgment.
❑ True ❑ False

14 Even if an automatic stay is allowed by statute, the trial court still may have discretion to require an appellant to post security.
❑ True ❑ False

15 Parties on appeal are free to agree to alternatives to the statutory appellate bond requirements.
❑ True ❑ False

16 Costs awarded by the court do not count in calculating the amount to be posted for a required undertaking.
❑ True ❑ False

17 A "costs only" judgment is automatically stayed without the need for posting security.
❑ True ❑ False

18 A court may consider the amount of the judgment in relation to an appellant's assets in determining whether the bond requirement can be waived for indigence.
❑ True ❑ False

19 An appellant's hardship is a sufficient basis for waiving the bond requirement.
❑ True ❑ False

20 If a judgment is reversed on appeal, the respondent is responsible for the appellant's expenses in connection with obtaining a stay of execution.
❑ True ❑ False

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