



# On appeal: Admitted surety bonds, cash deposits and personal surety bonds

## An overview of appeal bonds and their enforcement

By DAVID J. COOK

Seeking to topple the adverse judgment and immunity from enforcement, the defendant perfects the appeal by filing the notice of appeal and posting a bond. C.C.P. section 917.1(b) requires a bond in twice the amount of the judgment, unless an admitted surety issues the bond. If a bond is issued from an admitted surety, the bond is 1.5 times the face amount of the judgment (§§ 995.610 to 995.675). Alternately, the defendant can execute a deposit in lieu of a bond (§§ 995.710 to 995.770) or offer a third-party personal surety (§§ 995.510 to 995.520).

Notwithstanding these bonds (§ 995.140 et seq.), the defendant is entitled to a discretionary stay of 70 days (§ 918(b).) Without a bond or discretionary stay, the plaintiff is free to enforce the judgment, without notice or demand, (§ 683.010), and all property, except federal or state exemptions (immune from enforcement, i.e., social security, pensions, etc.) is subject to enforcement and likewise community property (§§ 695.010 and 695.020). Upon entry, the plaintiff can encumber real and personal property (§§ 697.310 et seq. and 697.510 et seq.). All property subject to enforcement is subject to a writ of execution (§ 699.710). Upon service of an ORAP, the plaintiff encumbers all personal property (§ 708.110(d)).

Assuming that the defendant perceives that an appeal might reverse or remand the judgment and seeks to protect assets from enforcement, the

defendant walks down the path of posting a bond (i.e., admitted surety, cash deposit twice, or personal surety). Section 917.1(b), in providing for a bond, protects the judgment from becoming uncollectible while the judgment is subject to review and assuring the respondent with an assured source of funds (*Lewin v. Anselmo*, (1997) 56 Cal.App.4th 694, 700-01).

### Without a bond, where is there a stay?

On the other hand, the defendant foresees that the court of appeal will affirm the judgment and the defendant declines to post a bond for the lack of resources or refuses to collateralize the bond which forecloses either a bond or cash deposit. Without a bond, under section 917.1(b), the plaintiff is free to lien, levy and execute upon all assets. Absent also a cash settlement, a consensual work-out buttressed by collateral, or a Chapter 7, 11, or 13, and facing unfettered and well-funded enforcement, the defendant might fraudulently convey everything save exempt and immune assets. As the last hurrah, the defendant seeks a discretionary stay for 70 days (§ 918(b)) but if granted, the plaintiff can still record and file liens (§ 697.040(b)). The earlier the lien, the better the chances that the lien will survive a bankruptcy preference “clawback” (Bankruptcy Code, § 547(b)).

### The hidden twenty-two-day stay

How can the defendant stay enforcement

without collateralizing the bond to the tune of 150% of the face amount of the judgment or depositing 200% in cash with the clerk? The answer is posting a personal surety bond (“PSB”) where the defendant can escape the financial burden of collateralizing the bond with cash or posting cash with the court and retain control of all assets.

Sections 995.510 to 995.520 enable the defendant to post a personal surety bond which would pay the judgment should the plaintiff prevail. (§ 917.1(b).) “Unless the statute providing for a bond provides that the bond becomes effective at a different time, *a bond is effective at the time it is given* or, if the statute requires that the bond be approved, at the time it is approved.” (Italics added.) Section 995.410, subdivision (a) provides: *A bond becomes effective without approval* unless the statute providing for the bond requires that the bond be approved by the court or officer.” (Italics added). (*Lewin v. Anselmo*, *supra*, p. 698-700.) “The security typically takes the form of a bond or undertaking from a personal or corporate surety; however, it may also consist of a deposit of cash or negotiable securities.” (§ 36:13. *Overview, Cal. Civ. Prac. Procedure* § 36:13.) “Bond” and “undertaking” are interchangeable (§ 995.210).

With a stay imposed by the PSB, at least for a short period of time, the defendant can fraudulently convey everything, pay more pressing creditors (i.e., child and spousal support, taxes, attorneys, or anyone else), or invest in exemptions including the \$600k homestead



exemption. (§ 704.730(a)(1).) The PSB stay frees the defendant of any constraints in disposing of assets, but only until the court determines that the PSB is held insufficient and a sufficient undertaking is not given without being provided by the court, and “enforcement of the judgment or order appealed from is no longer stayed and property which has been levied upon under execution issued upon such judgment shall not be released from levy.” (§ 922.)

### Objecting to the PSB

Objecting to the PSB starts with a timely objection 10 days from the date of service and not the date of filing (§ 995.930(b)). The objection shall be in writing in the format of a noticed motion and specify the precise grounds for the objection. If a ground for the objection is that the amount of the bond is insufficient, the notice of motion shall state the reason for the insufficiency and include an estimate of the amount that would be sufficient (§ 995.930(b)). If the objection is untimely, the beneficiary is deemed to have waived all objections except upon a showing of good cause or changed circumstances. (§ 995.930(c); *California Commerce Bank v. Superior Court*, (1992) 8 Cal.App.4th 582, 587-88 [Missed the 10-day deadline].)

### Welcome to rocket litigation

“Unless the parties otherwise agree, the hearing on an objection shall be held not less than *two* or more than *five* days after *service* of the notice of motion” (§ 995.950(a)). Sureties usually offer equity in real estate (i.e., a home) which compels the creditor to obtain a dated down litigation guaranty (i.e., the date of issuance), a current appraisal (drive-by or inspected) and offer expert testimony whether the surety can readily discharge the obligations under the PSB should the judgment be affirmed. The surety (or plaintiff) must brief valuation, community

property interests, separate property claims, trust ownership, senior liens, or abstracts [support judgments], and exemption claims (surety or surety’s spouse).

Expect that the parties will litigate the value of real estate with dueling appraisals: “If a ground for the objection is that the value of property or an interest in property on which the amount of the bond is based exceeds the value estimated in the bond: (a) The objection shall state the beneficiary’s estimate of the market value of the property or interest in property.” (§ 995.940(a).)

The bond hearing is a full-blown bona fide trial and the court may require experts: “The hearing shall be conducted in such manner as the court determines is proper. The court may permit witnesses to attend and testify and evidence to be procured and introduced in the same manner as in the trial of a civil case.” (§§ 995.950(b) and 995.950(c).)

Upon the hearing, “the court shall make an order determining the sufficiency or insufficiency of the bond.” (§ 995.960(a).) Counsel must have at hand the proposed order (one or more versions) and request findings on the record in great clarity. If the court determines that the bond is insufficient, the PSB stay (i.e., “rights” under the PSB) evaporates subject to a final order (§ 995.960(b)(1)):

“(1) The court shall specify in what respect the bond is insufficient and shall order that a bond with sufficient sureties and in a sufficient amount be given within *five* days. If a sufficient bond is not given within the time required by the court order, all rights obtained by giving the bond immediately cease and the court shall upon ex parte motion so order.”

Ask to “waive notice” of the order “to specify in what respect [bond] is insufficient” and in any event, serve the signed order before parties exit the courtroom or at least email the executed order to start

the appellate clock. However, the next requirement is an additional order (ex parte) that “all rights obtained by giving the bond immediately cease,” based on the failure to provide a sufficient bond. Likewise, remember to request “waive notice” and likewise serve the ex parte order by email.

This entire process consumes about 22 days (10 days for the filing of the noticed motion, 5 days for the hearing, and 5 days to extinguish the bond), about 2 days for the ex parte post order, and likely additional time as counsel will seek to prepare for the section 995.950, subdivisions (b) and (c) trial if real estate supports the surety’s proposed assets.

### Conclusion

In the face of objecting to a PSB, counsel must comply with all deadlines and bring to trial in 20 days the full-blown case with experts, witnesses, and evidence. But the real risk is making sure that valuable assets do not beat a hasty retreat out the back door.

Think writs of attachment, temporary protective orders (notice waived) or restraining orders (notice waived) or sworn denials of any fraudulent transfer.

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