

The name is Bond, Appellate Bond

A surety bond will be required in most appeals; an overview of the options available to stay execution of judgment

By David Zarmi

You are a defendant in a California superior court who has just received a judgment against you and want to appeal. Or you are plaintiff who has lost at trial and now owes attorney fees or costs but wants to appeal. California has established a system to balance the rights of both the appellant and respondent during the appeal process if the appellant is not inclined to satisfy the judgment prior to appealing. This system utilizes a surety or bond to ensure that you will still be able to satisfy the judgment even if you lose on appeal.

Going through this process can sometimes be confusing and overwhelming even for the most seasoned trial attorneys and this article will provide a starter pack of options on the table, when each applies, and a bit of a deeper look into the options themselves.

Execution on judgment

Ordinarily, a California state court judgment is enforceable upon entry. (Code Civ. Proc., § 683.010.) Beyond that, an appellant may receive a stay of up to "10 days beyond the last date on which a notice of appeal could be filed." (*Id.*, § 918, subd. (b).) That time can be used for appellant to get her affairs in order before execution, to negotiate with respondent in lieu of a bond, or to get her documents and financials together to satisfy the requirement for a surety. As a notice of appeal is ordinarily due 60 days from notice of entry of judgment, that comes out to a 70-day stay. However, because a motion for new trial will push off the date a notice of appeal is due, in such a case, a potential appellant who files a timely motion for new trial will be able to obtain a stay past the 70 days.

To avoid the possibility of execution on the judgment before receiving the stay, an appellant should file the section 918 motion before notice of entry of judgment (and therefore before any notice of appeal).

When is a surety or bond required?

Although the statutory framework seems to indicate that a notice of appeal automatically stays execution unless an exception applies, the exceptions swallow the rule, and a bond will be required in the majority of appeals. (Code Civ. Proc., §§ 916, subd. (a), 917.1-917.9.) That is first and foremost because the most common ordinary money judgment is not stayed without a surety. (§ 917.1, subd. (a)(1); but see § 995.220 [exception of awards against public entities].) But the money judgment is not the only exception that swallows the rule. Let's also look at injunctions (orders requiring action) and costs on appeal.

Injunctions

You would think that the automatic stay that applies when appealing injunctions would also extend to judgments that require the sale or transfer of property and orders creating receiverships. But, indeed, that is not the case.

"Mandatory injunctions" – that is injunctions that require the appellant to actively do something to change the status quo – are automatically stayed on appeal under section 916, subdivision (a). This operates under the premise that the appeal would be futile if reversed after the status quo has irreversibly changed. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1035, 1041-1042, 1048-1049.)

While this logic should extend to judgments requiring the sale or transfer of real property, or appointing a receiver to do the same, the Code of Civil Procedure says otherwise. Under sections 917.4 and 917.5 there is no automatic stay and, as will be seen below, the amount of the surety is at the discretion of the superior court. Likewise, section 917.2 provides there is no automatic stay for an order directing the assignment or delivery of personal property, but that the superior court may determine a surety amount or provide other remedies such as appointing a custody officer to hold the property.

Costs and § 998 settlements offers

A third situation that trips up many attorneys is the impact of section 998 settlement offers on cost appeals. Although it otherwise seems similar to a money judgment a la section 917, subdivision (a)(1), execution on an order for attorney fees or costs is actually stayed on appeal (and often requires a separate appeal). (§ 917.1, subd. (d); *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 654-655 & fn. 2 [interpreting the same to include attorney's fees whether authorized by contract or statute]; cf. *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1431-1432 [§ 917.1, subd.(d) does not anti-SLAPP awards].) In *Ziello*, the money award was much smaller than the costs and attorney fees, so the appellant just paid the award and appealed solely from the cost and attorney fees, staying execution on that larger amount. (*Id.*, at pp. 653-655.)

However, this changes where a section 998 settlement offer was made and rejected. In that case, any stay requires a bond for execution on "[c]osts awarded pursuant to [§] 998 which otherwise would not have been awarded as costs pursuant to [§] 1033.5." Section 1033.5, subdivision (b)(1) in turn excludes, inter alia, expert fees and investigation expenses. So, practically speaking, an appeal from a costs judgment in a case where a section 998 offer was rejected will stay some costs but not the potentially hefty expert and investigative costs.

Although by no means exhaustive, these are the three most common types of

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situations where a bond or a surety is required to stay execution. Additionally, on respondent's motion, a superior court may always set a surety even where none is required by statute if appellant was found to possess respondent's money or property, where appellant has been ordered to perform an act for respondent's benefit, or where the judgment is solely for costs. (§ 917.9, subd. (a).) And, where the appellant acts in representative capacity as executor, administrator, trustee, guardian, or conservator, the superior court may do the opposite and relieve the requirement of a surety to stay execution. (§ 919.) Where an appellant cannot afford a bond, the court may also stay execution, discussed further below.

As with many appellate endeavors, the most efficient path with the best results for both parties is comity and cooperation between the parties and their respective counsel. The parties are able to come to their own agreement regarding the amount and terms of surety. This happens because under California Rules of Court, rule 8.278(d)(F)-(G), if the appellant is successful on appeal, she recovers all the expenses incurred in obtaining a surety including the interest expenses. An agreement of partial payment to the respondent in lieu of a bond with protection for respondent from bond costs should the appeal succeed could be a win-win for appellant and respondent.

But where all else fails, appellant will need to take steps to obtain a surety to avoid premature execution on the judgment.

Amount and types of surety

In most cases, there are three ways to satisfy the requirement for a surety: (1) admitted surety bond; (2) deposit in lieu of appeal bond; and (3) personal surety appeal bond.

An admitted surety bond is a bond obtained from an insurance company on the California Department of Insurance list. The courts must accept bonds from admitted sureties if they are in proper form. (§ 995.630.) This will be obtained through an appellate-bond specialist and is less complicated than it appears because the bond specialist will do all the work for the appellant. The bond amount requires a multiplier 1.5 times the amount of the judgment and collateral (see §§ 995.610-995.675), either in the form of real property (after any mortgages) or a letter of credit from a bank. From my own experience, the letter of credit method is lower interest than using real property and faster because it does not require appraisal and title search. A home-equity line of credit can be used for the letter of credit.

A deposit in lieu of bond also follows the 1.5 multiplier. (§ 995.710, subd. (b).) And it similarly must be accepted by the courts. (§§ 995.710, 995.730.) The deposit may be made in cash, U.S. treasuries, federally insured certificates of deposit or savings accounts, and securities as valued by the parties or by court order if the parties cannot agree. (§§ 995.710, 995.720.)

A third-party personal surety bond requires a bond with a multiplier of two times the amount of the judgment. (§ 917, subd. (b).) The personal surety cannot be a lawyer or judge "and must be a resident, and either an owner of real property or householder, within the state." (§ 995.510(a).) There is no prohibition on a relative, friend, or business entity to act as a personal surety. The Code of Civil Procedure requires two personal sureties or a personal surety and an admitted surety. (§ 995.310.) Additionally, if only one of the sureties is able to cover the entire bond amount, an appellant will require a personal surety with a multiplier of four times the judgment amount. (§ 995.510.) On the other hand, there are no additional financing or interest costs in obtaining the bond as with an admitted surety.

Special bond for orders appointing receiver or requiring transfer of property

As mentioned above, the amount of bond required to stay execution on an order appointing a receiver or requiring the transfer or sale of real or personal property is at the discretion of the superior court rather than a fixed multiplier. (§§ 917.2, 917.4, 917.5.) The remedy for the failure of the trial court to set a bond is a writ of supersedeas with the Court of Appeal. (*Arrow Sand & Gravel v. Superior Court* (1985) 38 Cal.3d 884, 891.)

Inability to afford a bond and supersedeas

If all else fails and an appellant simply cannot obtain a bond (or deposit the requisite amount), the Code of Civil Procedure authorizes the superior court to exempt the appellant from obtaining a surety to stay execution. (§ 995.240.) Although there are no cases directly on point, this statute may not apply to corporate entities. (See *Williams v. Freedomcard, Inc.* (2004) 123 Cal.App.4th 609, 614 [dicta stating the same].)

In a case where the superior court denies the motion (or where the appellant is a corporate entity), the appellant may file a supersedeas petition with the Court of Appeal making the same request. "Supersedeas" means "you shall desist" in Latin and refers to an order requiring the respondent to stay collection efforts. Although a supersedeas petition does not require indigency, it will be hard to show issues of equity if appellant could have posted a bond and did not. For that reason, appellants should go through the steps of trying to obtain a bond even where they clearly will not qualify so they can generate the exhibits that will be useful in support of the superior court motion and the supersedeas petition.

Reviewing courts have statutory and inherent authority to maintain the status quo pending appeal through writ of supersedeas. (§ 923; *People ex rel. San Francisco Bay Conserv. & Develop. Commn. v. Town of Emeryville* (1968) 69 Cal.2d 533, 536-539.) A petition for writ of supersedeas should be granted where the appeal (1) presents substantial issues and (2) failure to stay execution is more likely to injure appellant than a stay of execution is likely to injure respondent. (*Estate of Murphy* (1971) 16

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Cal.App.3d 564, 569; *Davis v. Custom Component Switches, Inc.* (1970) 13 Cal.App.3d 21, 27-28.) Supersedeas petitions are notoriously hard to win, but it can be done.

Overall, after receiving a judgment, the prospect of collection on the award can be daunting. This article has hopefully served to not only provide an overview of the options available to stay execution but to allow you to enter negotiations with opposing counsel with a better understanding of your client's leverage.

David Zarmi is certified by the State Bar of California as an appellate specialist. He served as a Deputy Attorney General in the California Department of Justice, as a judicial attorney for the California Court of Appeal, and now has an appellate practice in Los Angeles. He handles both federal and state civil and criminal appeals. He has served as lead counsel and produced wins in the U.S. Supreme Court and the California Supreme Court. His website is www.zarmilaw.com.



Zarmi

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