Staying Enforcement of a Money Judgment on Appeal

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Unless enforcement is stayed, a judgment creditor can enforce a money judgment as soon as it is entered—unless the judgment debtor is a public entity. (Code Civ. Proc., §§ 917.1, subd. (a), 995.220.) Money judgments are usually enforced by levying against the judgment debtor's property under a writ of execution. (See Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2019) ¶ 6:300, p. 6D-1.) The court clerk has a *ministerial* duty to issue a writ of execution, which means that the clerk issues the writ in the ordinary course of business without any notice to the judgment debtor or any ruling or approval by the judge. (See Code Civ. Proc., §§ 699.510, 712.010; see also Judicial Council Forms, form EJ-130.)

Under a writ of execution, the judgment debtor's unprotected assets can be seized and its bank accounts frozen. (See Code Civ. Proc., §§ 695.010 et seq., 699.010 et seq., 699.520 et seq.) However, there are several ways to secure a stay of enforcement. Judgment debtors and their counsel should understand all of these available options.

I. THE VOLUNTARY STAY

The governing authority. Code of Civil Procedure section 995.230 states that "[t]he beneficiary of a bond given in an action or proceeding may in writing consent to the bond in an amount less than the amount required by statute or may waive the bond." Under section 995.230, judgment creditors can stipulate in writing not to execute on all or part of a judgment, for a specific period of time or until all appellate proceedings have concluded.

There are several reasons why a judgment creditor may decide to waive the appeal bond requirement or agree to a reduced bond or other security.

1. Waiving the bond avoids potential liability for appeal bond costs. The costs of obtaining an appeal bond, "including the premium, the cost to obtain a letter of

credit as collateral, and the fees and net interest expenses incurred to borrow funds to provide security for the bond or to obtain a letter of credit" are recoverable by a successful appellant. (Cal. Rules of Court, rule 8.278(d)(1)(F).) These annual costs can total 5-10 percent of the judgment amount over the course of an appeal. If the judgment debtor is financially secure, a prudent judgment creditor may offer to waive the appeal bond in order to eliminate possible liability for such costs. Similarly, a prudent judgment debtor should always ask the judgment creditor to waive the appeal bond, since their refusal to do so proves that the bond was necessary and thereby perfects the right to recover the appeal bond costs. (See *ibid.* [costs of an appeal bond are not recoverable if "the trial court determines the bond was unnecessary"].)

2. Parties can negotiate an appeal bond waiver agreement on any terms. Second, the parties can *negotiate* any deal they want. For example, if a judgment debtor would otherwise incur tens of thousands of dollars in annual appeal bond costs, the judgment creditor might offer to waive the appeal bond in exchange for a nonrecourse lump sum payment (or annual payments) of an amount less than the cost of the bond. If priced right, both parties may benefit from such an arrangement.

3. Agreeing to a temporary stay may avoid needless litigation costs. Finally, even if the judgment creditor is unwilling to waive the appeal bond entirely, the judgment creditor might nonetheless agree to a temporary stay under Code of Civil Procedure section 918 (discussed below).

II. THE TEMPORARY STAY ORDER

If the judgment creditor declines to temporarily or permanently waive the appeal bond (or indeed has begun to execute on the judgment), the judgment debtor may apply to the court for a temporary stay of enforcement lasting up to 10 days after the last day on which a timely notice of appeal could be filed. (See Code Civ. Proc., § 918.) Such a temporary stay can be sought ex parte at any time, even before entry of judgment. Most judges understand that granting a temporary stay of enforcement is appropriate because it gives the judgment debtor time to secure an appeal bond—especially when the amount of the required bond may change as a result of posttrial motions, an award of costs and/or

attorney fees, or setoffs due to prior settlements. However, this type of stay is entirely within the discretion of the trial court, and the granting of a temporary stay is therefore subject to any concerns the trial court may have regarding the security of the judgment (e.g., whether the defendant is likely to hide assets from collection).

III. THE ADMITTED SURETY APPEAL BOND

Admitted surety bonds are often used because they must be accepted. Most judgment debtors secure an appeal bond from an admitted surety to stay enforcement of a money judgment during the pendency of an appeal. Admitted sureties are insurance companies that have been admitted by the California Department of Insurance to underwrite surety bonds. (Civ. Code, § 8002; Code Civ. Proc., § 995.120; Ins. Code, § 105.) One advantage of using an admitted surety bond is that minimum attorney time is generally required. This is because the court *must* accept bonds from admitted sureties if they are in proper form. (Code Civ. Proc., § 995.630.)

Considerations regarding the *form* of the surety bond. Counsel should confirm that an appeal bond is in proper form before filing it. Under the Bond and Undertaking Law, Code of Civil Procedure section 995.330 prescribes language that may be used in the bond. Although the statutory language is not mandatory, its suggested terms provide good benchmarks for determining the technical sufficiency of a proposed bond.

Statutory requirements governing the bond form. An appeal bond must be in writing and signed by the surety under oath. (Code Civ. Proc., § 995.320, subd. (a).) It must list addresses for service on the surety and on the principal. (*Id.*, § 995.320, subd. (a)(2).) It also must be "executed in the name of the surety insurer under penalty of perjury" or the fact of execution must be "duly acknowledged before an officer authorized to take and certify acknowledgments." (*Id.*, § 995.630.) In addition, either one of the following two conditions must be satisfied: (1) a certified power of attorney for the attorney-in-fact executing the bond must be "filed in the office of the clerk of the county in which the court is located"; or (2) a "copy of a power of attorney [must be] attached to the bond." (*Id.*, § 995.630, subds. (a) & (b).) In practice, it is best to have the bond executed by the

attorney-in-fact under penalty of perjury with the signature notarized and to *always* attach the power of attorney to the appeal bond—don't assume that the power of attorney is on file in the clerk's office.

Bond language can be simple, and multiple sureties can be used. The surety must state it obligates itself under the statute providing for the bond to pay the amount of the judgment. (Code Civ. Proc., §§ 995.320, subd. (a)(1), 995.330.) Typically, this is done simply by referencing Code of Civil Procedure section 917.1 (or another applicable appeal bond statute) in the bond text. More than one surety can execute appeal bonds, and the amount of their individual bonds can be aggregated together to meet the required amount. (*Id*., § 995.620.) If there are sureties, they must state they are jointly and severally liable to the extent of the liability they are assuming. (*Id*., §§ 995.320, subd. (a)(1), 995.620.)

Archaic and redundant language should be avoided. Some sureties use unnecessary language in their appeal bonds that can be revised for clarity or omitted entirely. Other sureties attempt to track all of the applicable statutory language (such as the bond conditions listed in Code of Civil Procedure section 917.1, subdivision (b)), but they sometimes do so imperfectly and thereby make the bond vulnerable to objections. It is better for the bond to simply cross-reference the applicable statute. (E.g., *id*., § 917.1.)

Bonds must accurately and completely identify the correct parties. It is critically important for an appeal bond to accurately and completely list all judgment creditors (i.e., every person or entity to whom the judgment directs the judgment debtor to pay money)—if it fails to do so, then any judgment creditor who is omitted from the bond can execute on the judgment. (See Code Civ. Proc., §917.1.) It is equally important that the bond accurately specify which judgment debtor(s) it protects. A bond that inadvertently lists a codefendant may be used to satisfy the judgment against that codefendant. (See *id*., § 996.410 et seq.)

The power of attorney should be in correct form. Counsel also should carefully review the power of attorney form to ensure it is in proper form. The power of attorney generally has three sections: (1) the appointment section—which must name the

exact attorney-in-fact who signs the bond, specifies what limits (duration and amount) attaches to that appointment, and states who made the appointment—counsel must make sure the bond meets any such limitations; (2) the authority section—which generally quotes the corporate bylaws that specify who can appoint attorneys-in-fact for the surety—counsel must make sure that an authorized person made the appointment at issue; and (3) the certification section—which confirms that everything stated in the first two sections is accurate as of the date the bond was executed (so the dates of execution of this section and the bond must be the same). Counsel also should make sure that the bond and power of attorney forms comply with Code of Civil Procedure section 2015.5, which governs certifications and declarations under penalty of perjury.

The amount of the appeal bond—entire judgment appealed. Unless the judgment creditors (i.e., the bond beneficiaries) agree otherwise (see Code Civ. Proc., § 995.230), an appeal bond must be 1.5 times the amount awarded in a money judgment (Code Civ. Proc., § 917.1, subd. (b)). If the judgment awards costs under Code of Civil Procedure section 1021 et seq., the bond amount should be 1.5 times the sum of the judgment and the cost award. (*Id.*, § 917.1, subd. (d).) If the cost award amount is unknown when the bond is filed, a separate bond covering those costs should be filed when the amount becomes known. No undertaking is required if the judgment awards only costs under Code of Civil Procedure, chapter 6, title 14. (*Ibid.*)

The amount of appeal bond—severable portion of judgment appealed. If a severable portion of the judgment will not be challenged on appeal, the judgment debtor may satisfy that portion of the judgment while preserving the right to appeal other portions of the judgment, rather than allow the unchallenged award to accrue postjudgment interest during the appeal. (See Code Civ. Proc., § 695.215.) The judgment debtor can then bond only 1.5 times the unsatisfied portion of the judgment. (See *ibid.*)

Postjudgment interest considerations. Postjudgment interest generally accrues at the rate of 10 percent per annum from the date judgment is entered. (Code Civ. Proc., §§ 685.010, 685.020.) Thus, the requirement that appeal bonds equal 1.5 times the amount of the judgment essentially reflects a legislative determination that the bond be adequate to cover the amount of the judgment plus five years of accrued interest. However, if interest

on a particular judgment started to accrue earlier than when the judgment was entered, such as when a declined statutory settlement offer was made (see Civ. Code, § 3291; Code Civ. Proc., § 998), then the judgment creditor may assert that the bond amount is insufficient and the trial court may require a larger bond (see Code Civ. Proc., §§ 995.920, 996.010 et seq.).

The cost of an appeal bond. The cost of an appeal bond varies, depending in part on how financially sound the surety perceives the judgment debtor to be. The COVID-19 pandemic is prompting many surety insurers to demand that appeal bonds be fully collateralized, usually by a bank letter of credit—even for judgment debtors who have a long history of financial security. Bond brokers are often used to shop for the best appeal bond terms among admitted sureties.

Filing and serving the appeal bond. The bond must be filed with the superior court clerk, together with a proof of service showing service on counsel for the beneficiary plaintiff(s). (Code Civ. Proc., § 995.340, 995.370; see *id.*, § 995.030.) Generally, the *original* appeal bond and certified power of attorney are filed with the superior court where the judgment was entered. Some courts, however, accept or even require electronic filing (and many clerk's offices are closed during the COVID-19 quarantine). In such circumstances, electronic filing and service of the appeal bond and power of attorney should be made, with counsel keeping the original on file.

IV. THE DEPOSIT IN LIEU OF APPEAL BOND

The governing authority. Judgment debtors have the statutory right to make a deposit into the court of certain approved financial instruments in lieu of filing an appeal bond. (Code Civ. Proc., § 995.710 et seq.) "A deposit given instead of a bond has the same force and effect, is treated the same, and is subject to the same conditions, liability, and statutory provisions, including provisions for increase and decrease of amount, as the bond." (*Id.*, § 995.730.)

The advantage of a deposit in lieu of appeal bond. The major advantage of making a deposit in lieu of an appeal bond is that the judgment debtor avoids all of the

costs associated with procuring an appeal bond and instead receives payment of interest earned by the deposit. (Code Civ. Proc., § 995.740; see *id*., § 995.170.)

The disadvantage of a deposit in lieu of appeal bond. The major disadvantage of making a deposit in lieu of appeal bond is that it ties up the funds or securities that are deposited and may impact the judgment debtor's reserve requirements or other obligations. (However, that same disadvantage exists when an admitted surety requires full collateral for an appeal bond. If the same funds will be tied up either as bond collateral or as a deposit in lieu of bond, the latter may be the preferred option since it avoids bond costs.) Another possible disadvantage is the attorney time needed to secure a court order valuing the deposit of certain securities, as described below.

The specific financial instruments that may be deposited. The approved deposits in lieu of an appeal bond include: (1) U.S. currency or a cashier's check from a bank, savings association, or credit union authorized to do business in California; (2) bonds or notes issued by the United States or the State of California; (3) certificates of deposit not exceeding the federally insured amount, issued by banks or savings associations authorized to do business in California and insured by the FDIC; (4) savings accounts not exceeding the federally insured amount with banks authorized to do business in California and insured by the FDIC; (5) investment certificates or share accounts not exceeding the federally insured amount, issued by savings associations authorized to do business in California and insured by the FDIC; and (6) share certificates not exceeding the guaranteed or insured amount, issued by a credit union, as defined in section 14002 of the Financial Code, whose share accounts are insured by the National Credit Union Administration or guaranteed or insured by any other agency that the Commissioner of Business Oversight has not deemed to be unsatisfactory. (Code Civ. Proc., § 995.710, subd. (a).)

The amount of the deposit. The amount of the required deposit is the same as the amount of an admitted surety appeal bond. (Code Civ. Proc., § 995.710, subd. (b).)

Assignment agreements and instructions that must accompany deposits. A deposit in lieu of an appeal bond must be held in trust in interest-bearing deposit or share

accounts. (Code Civ. Proc., § 995.710, subd. (a)(1).) When cash is deposited, the court clerk will deposit the money in an interest bearing account. When bonds or notes are deposited, the title holder must file and serve all parties, the court clerk, and the appropriate bank officer possessing the bond or note, instructions "that the treasurer of the county where the judgment was entered is the custodian of that account" to whom the title holder assigns "the right to collect, sell, or otherwise apply the bond or note to enforce the judgment debtor's liability pursuant to Section 995.760." (*Id.*, § 995.710, subd. (a)(2).) The deposit also must be "accompanied by an agreement executed by the principal authorizing the officer to collect, sell, or otherwise apply the deposit to enforce the liability of the principal on the deposit." (*Id.*, § 995.710, subd. (c); see *id.*, §995.160 [the term " 'officer' " includes the court clerk].)

Valuing securities used for a deposit in lieu of bond. The market value of bonds or notes used for a deposit "shall be agreed upon by stipulation of the principal and beneficiary" or, if they are unable to agree, then by court order upon application by the judgment debtor making the deposit. (Code Civ. Proc., § 995.720, subds. (a) & (b).) An application for the court's valuation of market value must be heard "not less than five days or more than 10 days after service of the application." (*Id.*, § 995.720, subd. (c).)

V. THE PERSONAL SURETY APPEAL BOND.

The advantages and disadvantages of personal surety bonds. The final option for staying enforcement of a money judgment on appeal is personal sureties. (Code Civ. Proc., § 995.510 et seq.) The advantages of using personal surety bonds include avoiding the cost of an admitted surety bond and avoiding tying up funds used either for bond collateral or a deposit in lieu of a bond. The disadvantages include finding qualified personal sureties, and the prospect of the personal surety losing whatever assets they pledge to demonstrate their ability to act as a personal surety (e.g., their home) in the event the judgment is affirmed and the judgment debtor does not (or cannot) satisfy it.

The bond form. The form of the personal surety bond is governed by many of the same statutes cited above regarding admitted surety bonds. (See Code Civ. Proc., §§ 995.320, 995.330.) In addition, if the bond is based on the value of property, the personal surety bond must describe the property in sufficient detail and estimate its value. (*Id.*, § 995.320, subd. (a)(3).)

Personal surety requirements. A single personal surety cannot bond a judgment on appeal. (Code Civ. Proc., § 995.310.) Instead, at least two personal sureties, or one personal surety and one admitted surety, are required. (*Ibid.*) A 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." (*Id.*, § 995.510, subd. (a)(1), (2).) And while the judgment debtor cannot act as his or her own personal surety (*Id.*, §§ 995.185, 995.510, subd. (a)(1); *Buzgheia v. Leasco Sierra Grove* (1994) 30 Cal.App.4th 766, 770; see Civ. Code, § 2787), a closely related person or entity who is not a named judgment debtor can act as a personal surety.

The amount of the bonds and net worth of the sureties. Personal surety bond(s) must total twice the amount of the judgment (plus costs). (Code Civ. Proc., § 917.1, subd. (b).) All personal sureties must be worth the amount of the bond they are executing if the bond amount is $10,000 or less. (*Id.*, § 995.510, subd. (a)(3); see *id.*, § 995.510, subd. (b).) If the total bond amount exceeds $10,000, a personal surety may be worth less than the amount of the bond, so long as the aggregate worth of all sureties executing the bond is at least twice the total bonded amount (i.e., four times the amount of the judgment plus costs). (*Id.*, § 995.510, subd. (b).)

The personal surety affidavit. Each personal surety must execute an affidavit providing: (i) the surety's name, occupation, residence address, and business address (if any); (ii) a statement of residence in California and either ownership of real property or status as a householder within the state; and (iii) a

statement that the surety has sufficient worth in real or personal property to support the bond being executed. (Code Civ. Proc., § 995.520, subds. (a) & (b).) If the bond exceeds $5,000, the affidavit must also include: (i) a description of the surety's property and the nature of the surety's interest in that property, (ii) the surety's best estimate of the property's fair market value, (iii) a statement of any charges or liens against the property, and (iv) a disclosure of any clouds or impediments on the personal surety's use of the property. (*Id.*, § 995.520, subd. (c).)

Requirements based on bond amount. If the bond exceeds $10,000 and there are more than two personal sureties, each surety may list assets in an amount less than the total bond amount and each surety's liability may be limited "to the worth of the surety stated in the affidavit, so long as the aggregate worth of all sureties executing the bond is twice the amount of the bond." (Code Civ, Proc., §§ 995.510, subd. (b), 995.520, subd. (d); see *id.*, § 996.470, subd. (c)(1) [liability of surety is limited to the amount stipulated pursuant to section 995.520].)

Service and filing of the bond. As with admitted surety bonds, personal surety bonds must be filed with the superior court clerk, together with a proof of service showing service on counsel for the beneficiary plaintiff(s). (Code Civ. Proc., §§ 995.030, 995.340, 995.370.)

VI. OBJECTION AND EXAMINATION PROCEEDINGS.

Grounds for objecting to bonds and deposits. The judgment creditor/bond beneficiary may object to any bond or deposit by noticed motion specifying one or more of the following grounds: (1) the sureties are insufficient; (2) the amount of the bond is insufficient; and (3) the bond, from any other cause, is insufficient. (Code Civ. Proc., §§ 995.920, 995.930.) Objections to the bond must be made within 10 days after service of the bond, or those objections are waived—except upon a showing of good cause for the delay or change of circumstances. (*Id.*,

§ 995.930, subds. (b) & (c).) Objections regarding the *value* of the property supporting the bond are sometimes directed towards personal surety bonds. Admitted sureties, on the other hand, are deemed to provide sufficient security for the bonds they write, but that presumption can be challenged. (*Id*., § 995.630.)

Hearing and Resolving Objections. Although personal sureties need not encumber any of their assets (they need only list them), their finances are subject to examination in a trial-like objection proceeding when the bond is filed and upon a claim of changed circumstance. (Code Civ. Proc., §§ 995.940, 995.950.) The beneficiary also might claim that a bond amount has become insufficient, possibly due to the accrual of posttjudgment interest during the pendency of the appeal or other new circumstances. Unless the parties agree otherwise, the court must hear bond objections within two to five days after service of the beneficiary's notice of motion. (*Id*., §§ 995.950, subd. (a); 996.010, subd. (b).) If the court determines that the bond is insufficient, it must specify the insufficiency and give the judgment debtor at least five days to cure the defect. (*Id*., §§ 995.960, subd. (b)(1), 996.010, subd. (c).) If the judgment debtor fails to cure the defect within the specified time, the stay of enforcement created by the bond is lifted. (*Id*., §§ 995.960, subd. (b)(1), 996.010, subd. (d).)