Alternatives to Supersedeas Bonds

Protecting Your Assets During an Appeal

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Until bond requirements are reformed, the legal system should not force parties hit with immense judgments to forgo their rights to appeals.

The jury has just returned a substantial verdict against your client. The amount is excessive. The plaintiff's legal theory was weak. And you think that you can win a reversal. But if you want to keep a victor from claiming the spoils before you can remedy the jury's error, time and knowledge are of the essence—especially in the present economic climate.

Any party subject to a monetary judgment—a judgment debtor—may pursue appellate review. To keep a judgment creditor—any party entitled to a money judgment—away from your client's assets while your appeal unfolds, however, requires you to take that action immediately. If a judgment debtor fails to satisfy the judgment in a timely manner, the judgment creditor may seek to collect the judgment from the debtor's assets even if the debtor has appealed the judgment. To stay an adverse judgment and protect its assets during appeal, a losing defendant ordinarily must post security to cover the entire judgment amount, plus interest and costs. Unless a defendant is willing and able to escrow cash or other assets, providing the required security usually involves obtaining a third-party guarantee in the form of a supersedeas bond, sometimes called an "appeal bond." In cases with eight-, nine-, or even 10-digit awards, this requirement can become crippling. In 1987, Texaco was actually forced to file for bankruptcy to avoid the bonding requirement for a \$10.5 *billion* verdict. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. dismissed*, 485 U.S. 994 (1987). More recently, Philip Morris narrowly avoided having to post a \$12 *billion* bond to stay the execution of a \$10 billion judgment. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005), *reh'g denied*, 846 N.E.2d 597 (Ill. 2006), *cert. denied*, 549 U.S. 1054 (2006).

Some states have reformed onerous appeal bond requirements. But the lack of federal reform in the face of continued growth in the size of damages awards—both punitive and compensatory—can create great difficulties for judgment debtors and their sureties. More than one out of every seven



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jury awards now exceeds $1 million, and in the five years before the 2008 economic crisis, one in 18 U.S. companies suffered a liability loss of $5 million. Nineteen of the top 20 awards in 2009 exceeded $100 million. Blockbuster damages awards can lead large companies to bankruptcy while even smaller verdicts may prove catastrophic for a midsized or small company. The ability to stay enforcement of such awards pending appeals is critical.

Challenging economic conditions during the global recession have made it more and more difficult and costly to obtain a supersedeas bond. One report has noted an "increasing scarcity" of companies willing to consider, let alone issue, supersedeas bonds, calling it the "legal equivalent of a snipe hunt." *The Myth of the Supersedeas Bond*, The Daily Record, Jul. 16, 2007. And the Surety & Fidelity Association of America warned of the impact of the credit crunch on the surety market. *Aon Surety Marketplace Update* 1, 2, Spring 2009. Credit-rating downgrades and bankruptcies have led to increased bonding costs and more demanding collateral requirements, drastically reducing or eliminating surety credit for some industries. *Id.* Insurer Willis reported an average premium increase of 15 percent in 2009. *Willis Finds Credit Crunch Fallout Raises Financial Premiums by 15 percent*, Insurance Journal, Apr. 17, 2009. Now more than ever, courts need to have sensitivity to the burdens of supersedeas bonds on would-be appellants, and companies and their counsel need to understand their bonding options and how to manage them effectively in a tight credit market.

What Are Supersedeas Bonds?

Supersedeas, meaning "you must desist," is a writ, secured by posting a bond, staying execution of a trial court judgment pending an appeal. A judgment debtor doesn't need to post a supersedeas bond to begin an appeal. But if a judgment debtor appeals without posting a supersedeas bond or otherwise obtaining a stay of execution, a judgment creditor can enforce the judgment immediately. Should the debtor later win its appeal, it may file a lawsuit to collect its lost resources—though a right to recover does not necessarily translate into the ability to recover. By allowing a judgment debtor to postpone paying a damages award until after an appeal, the supersedeas bond prevents a judgment creditor from enforcing the judgment then dissipating the award, transferring it to another person or entity, or placing it in a foreign jurisdiction where recovery may prove impossible.

At the same time, a supersedeas bond assures that assets are available to pay a judgment if an appeals court upholds it, so a judgment creditor does not have to worry about the judgment debtor declaring bankruptcy or dissipating or hiding assets during the year or more that it will take to resolve an appeal. Appeals of large punitive damages awards will often take significantly longer. *See, e.g., Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077 (9th Cir. 2009) (ending litigation of a $5 billion punitive damages jury verdict for an accident that occurred 20 years earlier).

A supersedeas bond thus provides security to both parties to litigation. It represents a procedural middle ground between a judgment debtor's right to appeal and a judgment creditor's right to recover.

The mechanics of obtaining a stay of enforcement by posting a supersedeas bond are not complex. As a matter of right, a judgment debtor may obtain a stay pending an appeal in a federal court by posting a supersedeas bond. Under Federal Rule of Civil Procedure 62(d), a judgment debtor simply must file the notice of appeal before or at the same time as it posts the bond, and the court must approve the form and amount of the bond. Local rules often set the requisite bond amount. Some courts set the amount as a fixed multiple of a judgment, while others require a bond to cover the judgment, some amount of interest, and an added amount for costs. *See, e.g., E.G.* Cal. R. 151(d) (setting the bond amount at 125 percent of the judgment amount); N.D. Ill. L.R. 62.1 (setting the judgment, plus one year's interest at the statutory interest rate provided in 28 U.S.C. §1961, plus $500 for costs as the bond amount). A judgment debtor may itself finance a supersedeas bond, but if the debtor lacks the liquidity to do so, or if a court refuses to approve a self-financed bond, the debtor will need a third-party surety. And the choice of a third-party surety is subject to court review and local requirements. The U.S. Treasury Department maintains a list of approved corporate sureties: http://www.fms.treas.gov/c570/c570-certified-reinsur-comp.html (last visited Nov. 15, 2011). Depending on the local rules, however, a surety does not necessarily have to come from this list. *See, e.g.*, S.D.N.Y. & E.D.N.Y. Civ. Rule 65.1.1. In practice, navigating this procedure in a case with a very large judgment can become difficult and time-consuming and requires the immediate attention of a counsel and the client as soon as a judgment becomes a possibility.

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Staying the Judgment and Securing the Bond

Although small surety bonds were once available on short notice, modern bonds, particularly for large judgments, may take several weeks or even months to secure. Yet in the federal courts a bond seeker only has a two-week window between a judgment's entry and the time that the bond must be in place to stay the judgment. Upon expiration of the automatic, 14-day stay that begins when a monetary judgment is entered under Federal Rules of Civil Procedure 62(a), a judgment creditor may execute the judgment immediately—obtaining orders freezing a judgment debtor's assets or taking any other action to collect the judgment. While a debtor may still seek a stay after the automatic stay has ended, any actions taken by a judgment creditor to enforce the judgment before a court has approved the additional stay may remain effective even after a court enters that stay. Because an appellant must file a notice of appeal before a court would enter a stay pending an appeal, the 30-day window for filing a notice of appeal is effectively narrowed to the 14-day period during which the automatic stay of a judgment is in place.

In some cases, a defendant may obtain the plaintiff's agreement not to enforce the judgment for some period after expiration of the 14-day automatic stay while the defendant makes bond arrangements. But unless a judgment creditor is assured of such forbearance, it ideally should identify, investigate, and begin negotiations with potential sureties even before a court enters a judgment. A judgment debtor may want first to approach its own insurers, which will have already acquired much of the requisite information and performed a certain amount of due diligence concerning the debtor's finances. In the case of an immense judgment, only a handful of companies have the resources to provide surety—including Travelers Insurance, Liberty Mutual, Zurich, Hartford, Chubb, Ace, and AIG—so a debtor may need to resort to using several sureties. Those sureties will generally require 100 percent collateral for their bonds in the form of cash or a letter of credit. And sureties have restrictions on how much credit they can accept from individual banks, which means that a judgment debtor may need multiple letters of credit from different institutions in some cases. If a judgment debtor uses a letter of credit, the bank issuing it will need to perform substantial due diligence that may take more than a month. A debtor should use a bank with which it has a preexisting relationship to secure better rates on issuing fees and to gain a head start on the bank's due diligence inquiries.

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If the awarded damages are large relative to a judgment debtor's finances, alternatives to a cash- or letter-of-credit-backed supersedeas bond may be the best and sometimes only way to preserve the judgment creditor's right to its damages award, the debtor's right to an appeal, and the public's interest in the debtor's continued viability. *Cf. Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1138 (2d Cir. 1986) (arguing that Texaco could not possibly post a mandatory $12 billion bond given that the worldwide surety-bond capacity was no larger than $1.5 billion). The added pressures of the current economic crisis on the surety market make exploring alternate means of securing each party's interests all the more important. *See ASARCO v. Americas Mining Corp.*, 419 B.R. 737, 743 (S.D. Tex. Jun. 2, 2009) (acknowledging that the credit crisis contributes to "extraordinary" circumstances warranting an altered bond).

Rule-Based Alternatives to a Supersedeas Bond

Under Federal Rule of Civil Procedure 62, a judgment debtor may delay or bypass full supersedeas bond requirements in certain circumstances. First, Federal Rule of Civil Procedure 62(b) gives a court discretion to stay a judgment without requiring a full bond while certain postjudgment motions are pending. Thus, a judgment debtor in effect can extend the time allowed to secure a full supersedeas bond by filing a Federal Rule of Civil Procedure 50 motion for a judgment as a matter of law, a rule 59 motion for a new trial, or a rule 60 motion for other relief—motions that many losing defendants would file routinely to seek to hone the issues for appeal—and by moving for a stay under rule 62(b). A defendant can file such postjudgment motions as late as 28 days after a court enters a money judgment, but to prevent enforcement of the judgment, a party must file these motions before the 14-day automatic stay has lapsed. And while courts have discretion to enter a Federal Rule of Civil Procedure 62(b) stay without requiring a full bond, courts ordinarily will demand some measure of security.

Federal Rule of Civil Procedure 62(c) permits a court to stay an injunctive order pending an appeal of the order, whether the order granted or denied injunctive relief. Accordingly, a judgment debtor should consider carefully whether a portion of a judgment can be characterized as injunctive, no matter how loosely. *See Donovan v. Fall River Foundry Co.*, 696 F.2d 524 (7th Cir. 1982) (characterizing *any* "order to do," as opposed to an "order to pay," as injunctive). Courts considering applications for a Federal Rule of Civil Procedure 62(c) stay apply the four factor test from *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), which balances (1) the likelihood that the applicant will succeed in the appeal, (2) the likelihood that denying the stay will irreparably injure the applicant, (3) whether the stay will substantially harm the other party or parties, and (4) whether the stay serves the public interest. A court cannot mechanically apply the test, no single condition is exclusive, and demonstrating the necessary likelihood of success may require as little as showing a "difficult legal question." *Palazzetti Import v. Morson*, No. 98 Civ. 722, 2002 WL 562654, at *2 (S.D.N.Y. Apr. 16, 2002). A court still must secure the opposing parties' interests through a bond or other terms, but the terms of the security are within the court's discretion.

Finally, under Federal Rule of Civil Procedure 62(f) any judgment that operates as a lien on the judgment debtor's property under state law entitles the debtor to the same stay of execution that a state court would give. Automatic stays in some states extend beyond the 14 days allowed by Federal Rule of Civil Procedure 62(a). *See, e.g., Whitehead v. K-Mart Corp.*, 202 F. Supp. 2d 525, 529–32 (S.D. Miss. 1999) (applying Mississippi's automatic stay while post-judgment motions remain pending). Furthermore, most states have judgment caps that limit the amount that a supersedeas bond must cover. *See, e.g.*, Idaho Code Ann. §13-202(2) (West 2006) (limiting the amount of punitive damages that an appeal bond must cover to $1 million); Minn. Stat. Ann. §550.36(a) (West 2006) (limiting the maximum required appeal bond amount to $150 million). To access these state protections, however, a judgment debtor must prove that a judgment operates as a lien in the state in which the district court sits, a standard that has produced "fragmentary" legal authority. *Rodriguez-Vazquez v. Lopez-Martinez*, 345 F.3d 13, 13–14 (1st Cir. 2003). Some courts will apply Federal Rule of Civil Procedure 62(f) only if state law automatically transforms a judgment into a lien without requiring the judgment creditor to take action to perfect the lien. Other courts apply Federal Rule of Civil Procedure 62(f) if simple "ministerial acts" can convert a judgment into a lien, such as preparing an abstract from the judgment. A third approach queries whether a judgment debtor has property within the state to establish whether a state lien is even possible. A judgment debtor should investigate state protection available to it that would trigger Federal Rule of Civil Procedure 62(f) and be ready to offer an affirmative motion invoking state law.

Discretionary Alternatives to a Full Supersedeas Bond

Rule-based relief aside, a judgment debtor also may ask a federal court to exercise its discretion to accept some security other than a full supersedeas bond. The security may be something other than a bond, or it may be for less than the full amount of the judgment. A supersedeas bond is meant to preserve the status quo regarding a debtor's ability to fulfill a judgment, not to ruin the debtor financially. In the current economic climate, we think that courts will more frequently exercise their discretion to alter bond requirements and accept alternative means of security. The Southern District of Texas in an analysis of a motion to stay a nearly $1.5 billion monetary judgment recently recognized that the global credit crisis makes securing large bonds substantially more difficult than in previous years. *ASARCO*, 419 B.R. at 743.

The test for whether a court should accept a security other than a full supersedeas bond varies from court to court. Some courts apply the Federal Rule of Civil Procedure 62(c) test from *Hilton*. Other courts have developed their own balancing tests that review the complexity of the collection process, the amount of time required to obtain a judgment after an appeal, the defendant's ability to pay the judgment, whether the defendant's clear ability to pay makes the cost of a bond wasteful, and whether the defendant is in such a precarious financial condition that a bond would harm its other creditors. *See, e.g.*, *Dillon v. City of Chicago*, 866 F.2d 902, 904–05 (7th Cir. 1988). But if the test in the relevant jurisdiction includes probable success in the appeal, as *Hilton* does, a judgment debtor should plan to seek a stay from the court of appeals, as success with such a motion may effectively require a district court to admit that this element of the standard is satisfied.

Alternative Forms of Security

Courts have accepted several alternative forms of security. The most common involves putting cash and stocks into an interest-bearing escrow account or supplying one or more letters of credit. *See, e.g.*, *Ligurotis v. Whyte*, 951 F.2d 818, 821 (7th Cir. 1992) (accepting a letter of credit); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520–21 (E.D. Pa. 1973) (accepting an interest-bearing escrow account of securities and cash). Such arrangements often will cost less than obtaining a surety bond. For example, obtaining a bond usually involves paying one fee to the surety and another fee to the bank that supplies the letter of credit that the surety company requires. Providing security directly in the form of one or more letters of credit eliminates the fee to the surety company.

Alternative arrangements may take quite some time to negotiate. Courts will sometimes extend the mandatory 14-day stay to make reasonable negotiating time available. A judgment creditor may also agree simply to forgo executing a judgment for a time.

As with any motion, a court is more likely to approve an alternative when the parties have agreed to it. Because an alternative may cost less than a bond, a judgment creditor may agree to an alternative security to avoid costs that a judgment debtor may later recover under Federal Rule of Appellate Procedure 39(e)(3) if the judgment debtor wins the appeal. A creditor may also agree to an alternative arrangement to ensure that it has the opportunity to insist on certain terms, such as conditions for drawing on a letter of credit, as opposed to taking the risk that a court will simply approve an alternative unilaterally negotiated by the debtor and its bank or surety. Every letter of credit between the parties should also have an accompanying agreement that governs return of all letters of credit.

Reduced Amounts of Security

Courts also have the discretion to reduce or even waive entirely the full bond requirement, although most courts hesitate to do so. A judgment debtor must show that posting a full bond is financially impracticable, unnecessary, or impossible because of extraordinary, compelling, or exceptional circumstances. Such circumstances can arise, for example, when a judgment so dwarfs a judgment debtor's ability to pay that the bond requirement would unduly endanger other creditors, or when a judgment is so small in relation to the debtor's assets and ability to satisfy the judgment that the bond requirement and its attendant fees are unnecessary and wasteful.

If a judgment debtor can show that it has a present inability to pay the judgment and has made a good faith but failed effort to secure a bond, a court may view a reduced bond amount as preferable to having no bond at all. It secures at least some of a judgment creditor's interest while also staving off the judgment debtor's bankruptcy, which is in no one's interest. A judgment debtor generally must first show that it attempted but failed to secure a bond, but as little as an affidavit of inability to pay may shift the burden to the creditor to show the debtor's financial solvency.

Conclusion

No one wants to lose a trial, but competent counsel should prepare for the eventuality and plan accordingly, including by devising how to meet the security requirements to stay an adverse judgment execution during an appeal. At the same time, courts need to understand that adverse judgments during bad economic times increase the pressures on those suffering the adverse judgments, making it particularly important to allow judgment debtors to use reasonable security arrangements. Federal reform of supersedeas bond requirements that reflects the realities of modern mega-awards and the frequency with which courts reduce or overturn them on appeals may be necessary as judgments continue to grow in size. Until that reform occurs, the legal system should not force parties hit with immense judgments to forgo their rights to appeals. Proper planning, aggressive use of the available procedural protections, both rule-based and discretionary, and forthright bargaining with the other side can help ensure that when an appellate court finally reverses that faulty damages award, your client's assets are still intact. FD