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"Appeal Bonds 101: A Guide to the Steps Necessary to Stay Enforcement of a Money Judgment Pending Appeal"

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Without fail, the most complicated phase of any appeal from an adverse money judgment is procuring the bond that is necessary to halt enforcement of the judgment pending appeal. The filing of a claim of appeal, in and of itself, does not stay enforcement proceedings[i] which, if not stayed, can wreak havoc on a judgment debtor and jeopardize the success of even the strongest appellate arguments.

With no stay in place, a judgment creditor has a wide range of enforcement options under the Court Rules and statutory authorities. Enforcement efforts can range from the nuisance and embarrassment of a creditor's examination to the collection of funds through garnishment. For business entities, an unbonded money judgment can lead to the appointment of a receiver and unforeseen consequences such as a declaration of default under a loan agreement.

Although an appeal bond is not needed until 21 days after exhaustion of all post-trial remedies in the trial court,[ii] procurement of the bond cannot be an afterthought and waiting until the clock starts ticking on the 21 day window can have disastrous consequences. Efforts to obtain

the bond must be initiated well ahead of time, often before trial even starts given the intricacies of the bonding process.

This article is not designed to ring alarm bells but instead attempts to lift the curtain on the appeal bond process which largely unfolds behind the scenes and requires way more care than mere preparation of the form approved by the State Court Administrative Office ("SCAO").[iii]

The Basics

A money judgment is not immediately enforceable and is instead subject to an automatic stay that expires either 21 days after entry of the judgment or 21 days after a decision on a timely filed motion challenging the judgment.[iv] The 21 day window is not a coincidence as the expiration of the automatic stay coincides with the deadline for filing a claim of appeal.[v]

In order to stay enforcement of the judgment pending appeal, the appellant must post an appeal bond in an amount that is at least 110% of the judgment appealed from.[vi] The bond amount includes costs, interest and attorney's fees awarded through the date of the filing of the bond while the additional 10% is designed to serve as a cushion to account for the continued accumulation of interest during the pendency of the appeal which typically lasts 18 months through conclusion in the Court of Appeals.[vii] In the event a separate order awarding costs or attorney's fees is entered post-judgment, that separate award of costs or attorney's fees must also be separately appealed and bonded.[viii]

The filing of an appeal bond in a form that substantially complies with the requirements of the court rule serves to stay enforcement of the judgment unless and until objections to the bond are sustained by the court.[ix] Although objections to the bond are governed by MCR 7.209(G), if the appellant secures a bond in the required amount and the surety has sufficient assets to qualify as an appeal bond surety, the posting of the bond and a companion stay order typically occurs on stipulation without much fuss or fanfare.

The Complexities

From the SCAO appeal bond form, one would never anticipate just how complicated and time-consuming the process of procuring an appeal bond actually is. Although the only filing seen by the Court and opposing counsel is the two-page, pre-printed form, an enormous amount of work occurs behind the scenes to obtain the necessary information to secure approval of the appeal bond by the party ultimately responsible for paying the judgment: the surety.

The main driving force of complexity is that under the terms of the appeal bond, the surety promises to pay the judgment plus costs and interest if the reviewing courts affirm the judgment or order appealed from no matter what.[x] The obligation to pay the judgment applies equally to the judgment debtor and the surety and if one does not pay, the other is on the hook. The judgment debtor has a pre-existing obligation to pay the judgment anyway so its promise to do so if the judgment is affirmed remains, but the surety assumes a new liability that would not otherwise exist.

Although the surety will have an agreement with the debtor that the debtor must pay the judgment, if the debtor fails to pay for whatever reason, the surety is obligated to do so. In other words, even if the debtor disappears to the Cayman Islands only to be never heard from again, the surety is still liable. The surety is liable even if the debtor stops paying appeal bond premiums, which can range between 1% and 2% of the bond amount per annum.

Because of the surety's liability no matter what and promise to pay the judgment, the surety requires absolute protection from the judgment debtor. If the amount of the liability is minimal and the judgment debtor is a well-established and a fiscally sound entity, the surety may be satisfied with an indemnity agreement. But in the vast majority of appeals, the surety requires dollar for dollar collateral that matches its liability as a surety in the form or cash or a letter of credit. The posting of collateral and contractual arrangements between the surety and the judgment debtor is an intricate, time-consuming process that is fraught with peril.

If the amount of the bond is in the millions of dollars, the collateral requirement can hamper the judgment debtor's viability and continued operations of a business entity. Some sureties will consider other forms of collateral, such as a pledge of property. And when these alternate forms of collateral are posted, the surety retains substantial discretion to, for example, sell the property or demand additional collateral if during the passage of time the value of the collateral diminishes.

Some sureties also demand the right to settle the underlying claim in its sole discretion without input from the judgment debtor, itself, or its attorneys. The rationale for the surety's contractual right to potentially assume total control of the litigation is to prevent a situation where the value of the collateral has diminished to such an extent that it may be unprotected at the conclusion of the appeal and left without adequate collateral to make the surety whole upon payment of the liability.

A surety may be willing to soften the language to maintain control of the litigation where it absolutely belongs with the litigant and its attorneys, but these terms and conditions are standard and there is not always another surety in the marketplace the appellant can turn to. Absent negotiation of less oppressive terms and conditions, the other option for the appellant is to fashion the stay order in such a way that does not allow the surety to settle a claim out from under the appellant and its attorneys.

Simpler Forms of Appellate Security Are the Exception Not the Rule

There are three statutes that can simplify or eliminate the appeal bond requirement altogether, but these statutes only apply in limited circumstance.[xi] MCL 500.3036 allows a judgment debtor to post a liability insurance policy in lieu of an appeal bond. The benefits of this procedure are threefold because the judgment debtor need not: (1) pay appeal bond premiums to a surety; (2) post collateral; or (3) incur costs and attorney's fees which can accumulate quickly when a bond is procured.

That said, this beneficial statute only applies when the judgment debtor has a liability insurance policy that covers the judgment and when the insurer waives any coverage defenses it may have. In this scenario, if the policy limit is not sufficient to cover the entire amount of the judgment, the insurance policy can be posted, and an appeal bond is needed to make up the difference.[xii]

One other statutory protection only comes into play when the monetary liability is outlandish. MCL 600.2607 caps the amount of the bond regardless of the amount of the judgment. The statutory cap was initially set at $25 million in 2003, but it is adjusted for inflation every five years with the current cap at $37,467,999.00. In the case of an enormous money judgment, the cap allows the posting of a reduced bond rather than the 110% requirement. But a bond approaching $38 million is a substantial commitment for even a large corporation.

Lastly, if the judgment debtor is a governmental entity, the appeal bond requirement is waived altogether, a statutory protection only available to a limited number of defendants.[xiii]

Conclusion

It is not uncommon to get a call close to the expiration of the deadline for filing an appeal. Even under a tight timeline, a claim of appeal can be cobbled together on a moment's notice to vest the Court of Appeals with jurisdiction. The same cannot be said of procuring an appeal bond which cannot be accomplished on a moment's notice. Rather, the best course of action if a litigant knows a case is going to trial with the potential of appellate proceedings is to begin the appeal bond process before trial even begins.

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[i] MCR 7.209(A)(1) ("an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders.")
[ii] MCR 2.614(A)(1).
[iii] https://www.courts.michigan.gov/4a2aa2/siteassets/forms/scao-approved/mc56.pdf

[iv] MCR 2.614(a)(1).
[v] MCR 7.204(A)(1).
[vi] MCR 7.209(E)(2)(a).
[vii] *Id*.
[viii] The most frequent circumstance in which two separate money judgments had to be separately appealed and bonded was when a prevailing party obtained an award of case evaluation sanctions under the former version of MCR 2.403(O). The current version of the case evaluation rule no longer includes the sanctions provision so the circumstances in which post-judgment attorney's fees are awarded are limited to statutory grants of prevailing party attorney's fees, contractual attorney's fees awarded separately than the primary judgment or as offer of judgment sanctions under MCR 2.405. No matter the basis of the award, the appellate court rules define as a postjudgment order awarding costs and attorney's fees as a "final order" that can be appealed as of right. See MCR 7.202(6)(a)(iv).
[ix] MCR 7.204(4) and (5).
[x] Paragraph 1b. obligates the judgment debtor and the surety that, "If the reviewing court affirms the lower court judgment or the appeal is dismissed or discontinued, perform or satisfy the judgment or order appealed including costs and interest."
[xi] The trial court also has discretion to reduce the amount of the bond or waive the appeal bond requirement "as justice requires," but this protection typically applies where the judgment debtor is impoverished and unable to post a bond.
[xii] MCR 7.209(H)(3).
[xiii] MCL 600.2611.