

Appellate Practice Corner

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Appeal Bonds in Civil Cases – Recent Rule Modifications

The Illinois Supreme Court amended Rule 305 governing civil appeal bonds on June 15, 2004, to make it easier for a defendant to obtain a stay of enforcement or execution during an appeal. The court's actions have been described as an effort "to preserve the right of appeal" in those cases where a traditional bond might be unduly costly or unavailable. *See*, Press Release, Illinois Supreme Court, "Illinois Supreme Court Amends Rules on Appeal Bonds and Malpractice Insurance," (June 15, 2004). As noted in the Release and the commentary accompanying the Rule amendment, the traditional method of securing a judgment is to require the party against whom the judgment is entered to file an appeal bond in the amount of the judgment plus interest and costs.

Given the large verdicts seen over the past few years, and the increasing costs of obtaining appeal bonds, defendants many times have found themselves unable to afford an appeal bond. Citing to the recent case of *Price v. Philip Morris, Inc.*, 341 Ill. App. 3d 941, 993 N.E.2d 942 (5th Dist. 2003), *vacated by supervisory order No. 96644* (Sept. 16, 2003), where the defendant sought to appeal a \$10.1 billion judgment, the Commentary noted that "[i]n limited instances, the appeal bond requirement may be so onerous that it creates a barrier to appeal, forcing a party to settle a case or declare bankruptcy." Press Release, Illinois Supreme Court (June 15, 2004). Amended Rule 305(a) gives the circuit court the discretion to approve an appeal bond in money cases that covers less than the entire amount of the judgment plus anticipated interests and costs when that amount is "not reasonably available" to the defendant. The lower bond does not lessen the defendant's obligation to pay the judgment, but rather allows the defendant to obtain a stay of the execution on the judgment pending resolution of the appeal.

Amended Rule 305(a) further permits a defendant to file a form of security other than an appeal bond, such as a letter of credit, an escrow agreement, or a certificate of deposit, when the alternative form of security offers "comparable assurance of payment at lower cost." Rule 305(a), Commentary (June 15, 2004).

In other changes to Rule 305, the court clarified Rule 305(b) so that it is inapplicable to appeals from money judgments. Prior to amendment, Rule 305(b) purported to apply to both money and non-money judgments, stating, "other stays of enforcements of judgments and appealable orders."

A new provision, Rule 305(m) was also added, stating that "[a]ll original appeal bonds or other forms of security, whether approved by the circuit court or the reviewing court, shall be filed with the clerk of the circuit court in which the case was filed." According to the Commentary, this provision

was added because the appellate court clerks might not have appropriate facilities for keeping original bonds or other forms of security.

Appeal Bonds

Existing law provides that the filing of a timely post trial motion automatically stays the enforcement of a judgment until the circuit court disposes of the post trial motion. 735 ILCS 5/2-1202(c). Once the post trial motion is ruled upon, the automatic stay ceases and the party seeking to appeal must file for stay of execution. Rule 305, as amended, allows a party to obtain a stay of enforcement of an adverse judgment by posting a bond or “other form of security” with the circuit court. Rule 305(a), (b). Appeal bonds secure a judgment for the appellee while the appellant pursues his appeal. And, more important from the appellant’s perspective, the appeal bond prevents the appellee from executing on the judgment during the pendency of the appeal. *In re Marriage of Suriano and LaFeber*, 324 Ill. App. 3d 839, 756 N.E.2d 382 (1st Dist. 2001). The appeal bond does not affect the underlying judgment but simply serves to stay its enforcement.

Rule 305(a) applies to money judgments and Rule 305(b) applies to the enforcement of non-money judgments, disposition of property interests, and other appealable orders. To effect the stay, the notice of appeal must be timely filed and the appeal bond or other form of security must be “presented to, approved by, and filed with the court” within the time for filing the notice of appeal or any extension thereof granted under Rule 305(c). Section (c) permits the appellant to obtain a 30-day extension of time beyond the original 30-day deadline, but further prohibits any extension of more than 45 days without stipulation of the parties.

According to Rule 305(a), an “other form of security” includes, but is not limited to, “letters of credit, escrow agreements, and certificates of deposit.” According to the Rule, the bond or other form of security ordinarily “shall be in an amount sufficient to cover the amount of the judgment, interest and costs plus interest reasonably anticipated to accrue during the pendency of the appeal.” Since the rule offers no guidance on what constitutes a sufficient bond amount, counsel should use a rule of 1.5 times the judgment. *See, Kionka, Appeals to the Supreme and Appellate Courts* 25 (1994 ed). Thus, if the verdict is for \$100,000, the bond should be for \$150,000, the amount over the judgment to cover the interest and costs of the appeal. Rule 305(h) permits a party to modify the bond or other form of security if, due to the passage of time, the posted bond becomes insufficient. If a form of security other than an appeal bond is presented for approval, the appellant must demonstrate the adequacy of the alternative security.

Perhaps the most significant part of the amended rule is that portion permitting the circuit to approve a bond or other form of security in an amount less than the amount of the judgment.

If the court, after weighing all the relevant circumstances, including the amount of the judgment, anticipated interest and costs, the availability and cost of a bond or other form of security, the assets of the judgment debtor and of the judgment debtor’s insurers and indemnitors, if any, and any other factors the court may deem relevant, determines that a bond or other form of security in the amount of the judgment plus anticipated interest and costs is not reasonably available to the judgment debtor, the court may approve a bond or other form of security in the maximum amount reasonably available to the judgment debtor. In the event that the court approves a bond or other form of security in an amount less than the amount of the judgment plus anticipated interest and costs, the court shall impose additional conditions on the judgment debtor to prevent dissipation or diversion of the judgment debtor’s assets during the appeal. Rule 305(a).

This amendatory language resulted from the problems witnessed in the *Price v. Philip Morris* case, where the appellant would have had to tender a bond in excess of \$15 billion. Moreover, it addresses

other circumstances, such as that presented by *Forrester v. Patrick*, 167 Ill. App. 3d 105, 520 N.E.2d 1188 (1st Dist. 1988), where the appellant, while able to post a \$100,000 insurance policy, could not muster the funds to bond the remaining \$55,000 of judgment. *See also, Burkart v. Toraason*, 107 Ill. App. 3d 92, 437 N.E.2d 388 (3rd Dist. 1982) (policy less than amount of judgment deemed insufficient to serve in lieu of appeal bond). Now the circuit court has the discretion to approve a bond in a lower amount if it concurrently imposes restrictions to prevent the debtor from disposing of the assets during the appeal.

Posting The Insurance Policy

For cases covered by insurance, Rule 305(j) permits the appellant to post the insurance policy as a bond. In that event, the appellant must comply with section 392.1 of the Illinois Insurance Code, which reads:

Whenever an appeal is taken from any judgment in any case wherein it appears to the court that all of the particular liability of the appellant thereunder is insured against in and by a liability insurance policy or surety bond issued by any insurance company authorized to do business in the State of Illinois, and the court is satisfied of the applicable coverage of such policy or bond, it shall not be required of the appellant to provide any appeal bond or bond to stay enforcement pending such appeal, but such insurance company may be required by the court, and is hereby given authority, to execute its written recognizance of the adverse party or parties for the payment of the taxable costs of such appeal. Such company shall deposit with the court a copy of the insurance policy or bond and shall admit its liability thereunder, and agree to pay such judgment against its insured, if any, as shall be affirmed by the appellate court; and in such case the court having jurisdiction thereof, on its own motion, may enter judgment against the insurance company to such extent without further proceedings.

Notice that in order to post the policy as a bond, coverage must not be disputed. When an insurance policy is presented in lieu of an appeal bond, counsel should review the policy closely to determine if the carrier is, according to the policy language, obligated to pay interest. This is especially important where there are multiple policies or excess coverage.

Governmental Agencies

Appeals by public, municipal, or governmental entities or by a public official acting in his or her official capacity may proceed without the requirement of a bond or other form of security. Application for a waiver of bond must be made under Rule 305(j) and, absent stipulation of counsel, some form of proof of governmental status should accompany the motion.

Bond Approval Procedure

The motion for stay and approval of bond should be presented in the first instance to the circuit court. If for some reason that means is impractical, or if the circuit court has denied the request, a party may move for relief before the appellate court. *Steinbrecker v. Steinbrecker*, 197 Ill. 2d 514, 527, 759 N.E.2d 509 (2001). In that event, a supporting record containing documents that show why the stay could not obtain from the circuit court should accompany the motion.

As this short review shows, counsel should give careful consideration to how to affect a stay of the underlying judgment. All possible security options should be considered well in advance of the denial of the post trial motion so that your opponent does not commence enforcement proceedings while you are busy procuring a bond or similar security. Also, where possible, try to obtain opposing counsel's consent in advance to either the amount of the proposed bond or other security. Moreover, where

possible, consider tendering the insurance policy in lieu of an appeal bond. In any event, plan ahead and always review section 305 before acting.

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