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Stays and Appeal Bonds

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I. [8.1] INTRODUCTION

This chapter discusses the state and federal procedures for obtaining stays following the entry of judgment and those procedures associated with securing an appeal bond or other security in lieu of a bond to support the stay. In any case involving a money judgment, a stay is conditioned on the filing of an appeal bond or some other form of security to provide backing for the potential future execution of judgment and must be sufficient to cover anticipated costs and interests on the judgment during the pendency of the appeal. As many practitioners who have experience with stays and appeal bonds know, this can be one of the most stressful periods during an appeal, especially if opposing counsel is overly aggressive and tries to enforce the judgment immediately, before a stay can be put in place.

While the filing of a posttrial motion stays enforcement of the underlying judgment pending disposition of the motion, the state and federal laws differ with respect to whether the plaintiff can move for immediate enforcement and execution. *See In Re Estate of Kunsch*, 342 Ill.App.3d 552, 794 N.E.2d 1059, 276 Ill.Dec. 809 (2d Dist. 2003); Federal Rule of Civil Procedure 62(a). In Illinois, a window of vulnerability exists between the time the judgment is entered and the filing of the posttrial motion. Indeed, enforcement proceedings may begin as soon as judgment is entered. *Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill.App.3d 1033, 365 N.E.2d 1191, 8 Ill.Dec. 805 (3d Dist. 1977). Under federal law, there is a 14-day window when the judgment may not be enforced. Fed.R.Civ.P. 62(a).

In any case, when counsel fears an adverse verdict with sizeable damages, thought should be given long before the entry of the verdict as to how the judgment will be stayed and what bond or other form of security can be obtained to support the request for stay. The bonding process can be long and complex and frequently requires considerable time to complete.

II. [8.2] STAYS AND BONDS IN ILLINOIS — ILLINOIS SUPREME COURT RULE 305

Stays of enforcement and appeal bonds in Illinois state law cases are governed by Illinois Supreme Court Rule 305. The rule has specific provisions governing stays in cases involving money judgments and nonmoney judgments. The rule further sets forth the procedures to be followed and what substitutes for an appeal bond are permitted. While the rule does not state the precise amount of a bond or other form of guarantee (other than the generic statement “in an amount sufficient to cover the amount of the judgment and costs plus interest reasonably anticipated to accrue during the pendency of the appeal” (see Ill.S.Ct. Rule 305(a)), the current rule of thumb is between 120 and 130 percent of the judgment.

A. [8.3] History of Stays of Enforcement

Ill.S.Ct. Rule 305 traces its origins back to 1966, when

a number of provisions, previously scattered among the Supreme Court Rules (former Rules 31(3) and 37) and the statutes (former §§76 and 82 of the Civil Practice Act and §§21 and 22 of the Injunction Act) were consolidated in Rule 305. The rule preserved the Illinois supersedeas practice under which the enforcement of a judgment could be stayed by filing a bond in either the trial or reviewing court, and provided that upon the filing of a bond by the appellant the trial court could stay the force and effect of a permanent injunction or an order appealable under Rule 307 for ten days to permit application to the reviewing court for a stay pending appeal. The reviewing court or a judge thereof was empowered to grant such a stay on motion and after the filing of a bond.

In 1969, the rule was amended to provide that the trial court might stay the force and effect of any “final or interlocutory judgment or judicial or administrative order granting relief other than money” on “such terms as are just,” which “may include a bond.” As before, the power of the trial court was limited to the grant of a stay not to exceed ten days, and application for a stay of longer duration was available only by motion in the reviewing court. Special provision was made for orders appealable under section 276 of the Probate Act (Ill.Rev.Stat.1969, ch. 22, ¶276), requiring that any stay of such an order must be sought from the reviewing court or a judge thereof.

The 1971 amendments to the rule abandoned the use of the term “supersedeas,” while preserving the distinction, introduced in 1969, between judgments for money only, the enforcement of which is stayed upon the filing of an approved bond, and other judgments and orders, the force and effect of which may be stayed by order of the court. The procedure for obtaining a stay was simplified by requiring that all applications for a stay shall normally be filed in the first instance in the trial court. Commentary, Ill.S.Ct. Rule 305 (Jan. 5, 1981).

Rule 305 was amended in 2004 to create alternative means of providing security in lieu of an appeal bond because “[i]n recent years, changes in the insurance market have made appeal bonds costly in many cases and unavailable in some cases.” Commentary, Ill.S.Ct. Rule 305(a) (June 15, 2004). As a result, alternative means of security (see §§8.12 – 8.14 below), which offer comparable assurance of payment at a lower cost, were permitted as a substitute for an appeal bond.

B. [8.4] Failure To Obtain Stay

As a general rule, there is no automatic stay of enforcement or execution of a judgment. Once judgment is entered, the party seeking to appeal must also take affirmative steps to ensure that the judgment is not executed or enforced. While Illinois law provides for restitution in the event the