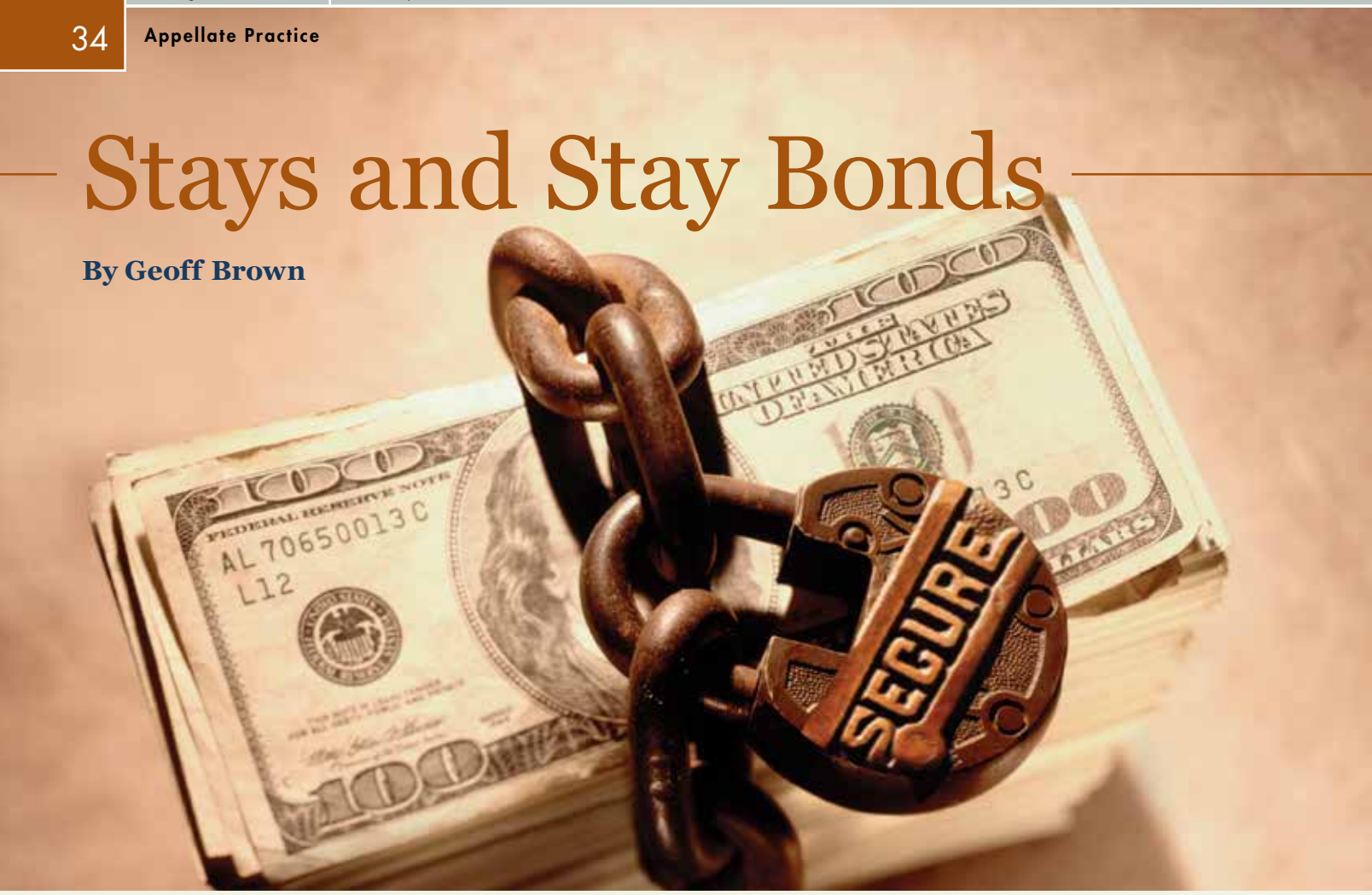
Stays and Stay Bonds

By Geoff Brown



The unthinkable happens: your client loses at trial and is now facing a hefty money judgment. Your client doesn't want to pay—doesn't think he should have to pay—and wants to appeal. You agree and head off to the Court of Appeals in search of justice denied. That will keep the plaintiff's collection efforts at bay, right?

Not so much.

It's true that the court rules provide for a brief automatic stay of 21 days from the date the trial court signs the judgment.[1] And that stay gets extended if you timely file a motion for reconsideration, new trial, or judgment notwithstanding the verdict—the stay of execution stays in place until 21 days after the signing of an order disposing of your motion.[2] After that, however, you will need to get a stay pending appeal or else the plaintiff will be able to proceed with collection efforts despite your pending appeal.[3] But where to begin?

Where to begin

You must start your quest for a stay order at the trial court;[4] you can only ask the Court of Appeals for a stay if you've first sought one from the trial court.[5]

There are several ways to secure a stay of execution pending appeal. The one that is arguably easiest and the least costly is to simply ask the opposing party to stipulate to an order staying enforcement of the judgment. Those of you who have been practitioners for some length of time, however, likely instinctively saw "easiest" and "least costly" and concluded that it's also unlikely to happen. Plaintiffs (and their lawyers) are often understandably uneasy about being asked to simply trust that your client will still have enough money or assets to satisfy the judgment if the Court of Appeals affirms it 18 months or two years later. While we have all heard the maxim, "you never know if you don't ask," in most cases, you can know without asking that your opposing party won't simply stipulate to a stay without some kind of security. But there are exceptions. For example, if your client is a large, well-established corporation with plenty of money and easy-to-locate assets, the plaintiff may be willing to stipulate to a stay, secure in the knowledge that your client will, in fact, be "good for it" if the appeal doesn't go your client's way. And because (as discussed below) premiums for stay bonds are expensive, particularly for large judgment amounts, and become a taxable cost against the plaintiff if you prevail on appeal, the

plaintiff may find it more advantageous not to demand a bond from a well-established, well-funded defendant who is unlikely to try to dispose of assets during an appeal. But in most cases, you're going to either need a bond or a suitable substitute.

Bonds

A bond stays execution if it is filed before collection has begun, or suspends it if filed after a plaintiff has begun collection efforts.[6] Until recently, the trial court had the discretion to set the bond in an amount sufficient to protect the interests of the plaintiff if the appeal ends in his or her favor.[7] Effective January 1, 2016, however, the court rules provide for a minimum bond amount of "not less than 110%" of the amount of the judgment, including costs, interest, attorney fees, and sanctions.[8] That notwithstanding, by statute, the maximum amount for a bond is $25 million.[9] But regardless, if a bond is filed in the proper form, the court rules provide that it extends the stay of execution unless the plaintiff objects to the amount or the surety within seven days.[10]

Getting a bond in the sufficient amount can be a financial challenge. Most commercial sureties will charge a bond premium of one to two percent of the bond amount annually. This means that if you're seeking a bond to secure a $1 million judgment and you're ordered to provide a bond for 110 percent of that amount, your $1.1 million bond will cost your client $11,000 to $22,000 per year. And if that weren't bad enough, most sureties will require the bond to be fully collateralized—meaning your client will need an irrevocable letter of credit in the amount of $1.1 million, which a bank will be happy to provide so long as your client deposits the entire amount first. That's right: securing the bond to prevent the plaintiff from taking the amount of the judgment from your client during an appeal means that a bank and a surety will likely take it instead. The ironic result is that the clients who most need bonds will find them too expensive to obtain, while the clients who can easily afford them are probably best positioned not to need them.

Technically speaking, however, the law doesn't require a commercial surety for a bond. A personal surety bond can be given if the designated person executes an affidavit that "he or she has pecuniary responsibility…."[11] To show pecuniary responsibility, a would-be surety "must affirm that he or she owns assets not exempt from execution having a fair market value exceeding his or her liabilities by at least twice the amount of the bond."[12] As a lawyer, however, you cannot be a surety for "any client in criminal or civil matters."[13] And a personal surety isn't a golden ticket, because the plaintiff can object to "the sufficiency of the surety" within seven days.[14] But the "[f]ailure to do so waives all objections to the surety."[15]

If your client is a municipality or governmental agency, it will not need a bond to stay execution of a judgment while an appeal is pending.

What to do if you need a bond but can't or don't want to get one

As discussed above, bonds are potentially expensive and hard to get. But often, a court or plaintiff won't let you get a stay without some form of security. Luckily, you have some options if a bond is either too expensive or you'd rather not buy one.

If your client has a liability-insurance policy that covers the acts for which the judgment was entered, you can post the policy instead of a bond, provided the insurer is authorized to do business in Michigan and provides an "affidavit of recognizance" admitting liability under the policy for the judgment.[16] If the policy limits are sufficient to satisfy the judgment, the court must stay execution without a bond.[17] If, however, the judgment amount exceeds the policy limits by more than $1,000, the posting of the policy only operates as a stay of execution up to the amount of the policy limits.[18] To avoid collection on the excess amount, your client will either need a bond for the additional amount or a stipulation or order staying execution on the excess amount.

If your client doesn't have an insurance policy to post and has enough assets to get a bond but wants to avoid the premium expense, the legislature has provided for some alternatives to a bond. Your client can deposit with the treasurer of the municipality where the bond would be filed (e.g., the county treasurer) cash, a certified check,

FAST FACTS

In most cases, a bond or bond substitute is required to stay execution of a judgment pending appeal.

A liability-insurance policy can be posted in lieu of a bond if the insurer is authorized to do business in Michigan and admits liability for the judgment.

Cash, a certified check, and negotiable municipal or federal bonds are other recognized alternatives to a surety bond.

or negotiable municipal bonds or federal bonds.[19] This saves your client from paying bond premiums (and the funds may even earn some interest). In addition to these alternatives, you may be able to persuade the plaintiff to agree to the deposit of certificates of deposit, letters of credit, or securities in lieu of a bond. As a practical matter, though, the treasurer is going to require an order directing it to accept the deposit and another order directing the release of the funds after the appeal. And, as of January 1, 2016, the court rules also explicitly allow the trial court—on stipulation or otherwise—to order a stay secured by "other forms of security."[20]

Failing all that, if your client lacks sufficient (or any) funds to buy a bond, you can file a motion asking the court to enter a stay either with no bond or with a bond that would otherwise be insufficient. The court rules previously provided broadly that trial courts can order a stay of any order without bond "as justice requires."[21] The Supreme Court has, however, stricken that provision from the rule and appears to allow stays "[w]ith respect to money judgments" only when a party obtains a bond or suitable substitute security.[22] The language permitting stays without a bond "as justice requires" has been moved to a subsection that applies "to all other judgments."[23] But by statute, if a party is unable to provide a bond "by reason of poverty," the trial court can "upon due proof" of poverty, grant a stay without a bond.[24] The trial court can impose conditions and reasonable time limits on the stay. Such statutes are meant to "avoid the harsh effect the bond requirement can have on the poor…."[25]

If you unsuccessfully seek a stay from the trial court, you can file a motion in the Court of Appeals asking it to order a stay instead. You must first move for a stay and have your motion decided in the trial court.[26] Your Court of Appeals motion must be accompanied by the trial court opinion (if there is one), denial order, and transcript of the motion hearing.[27] But, if necessary, you can file an additional motion—with, of course, an additional motion fee—seeking relief from the requirements of (1) first moving in the trial court for a stay, if you are certain it would be futile to do so; or (2) providing the trial court's order or the hearing transcript, if for some reason you cannot get them in time.

Conclusion

Contrary to what many believe, simply filing the appeal does not stay execution of the judgment being appealed. If you want relief from execution while you pursue your client's appeal, you will need to exercise one of the many available options to keep collection efforts at bay.[28] ■

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ENDNOTES

1. MCR 2.614(A)(1).
2. *Id.*
3. See MCR 7.209(A)(1).
4. This article is devoted to stays and appeal bonds for appeals from circuit-court money judgments to the Court of Appeals. Appeals to circuit court, appeals in domestic-relations matters, and appeals in criminal matters, for example, have different requirements that would likely require a few more articles to discuss.
5. MCR 7.209(A)(2).
6. MCR 7.209(H)(1).
7. MCR 7.209(B).
8. MCR 7.209(E)(2)(a), as amended effective January 1, 2016, per the Supreme Court's order entered October 21, 2015, in ADM File No. 2013-26. However, Section (G)(1)(f) of the amended rule provides "For good cause shown, the trial court may set the amount of the bond in a greater or lesser amount adequate to protect the interests of the parties."
9. MCL 600.2607(1).
10. MCR 7.209 and MCR 3.604(E).
11. MCR 3.604(D)(1).
12. MCR 3.604(D)(2).
13. MCL 600.2665.
14. MCR 3.604(E).
15. *Id.*
16. MCL 500.3036 and MCR 7.209(H)(3).
17. *Id.*
18. MCR 7.209(H)(3).
19. MCL 600.2631.
20. MCR 7.209(E)(2)(c), as amended effective January 1, 2016, per ADM File No. 2013-23. The rule only explicitly mentions irrevocable letters of credit as an alternate form of security, although it specifically states that alternative forms of security are "not limited to" letters of credit.
21. MCR 7.209(E)(1).
22. See MCR 7.209(E)(1) and (2), as amended effective January 1, 2016.
23. MCR 7.209(E)(2)(b), as amended effective January 1, 2016.
24. MCL 600.2605.
25. *Federal Nat'l Mortgage Ass'n v Wingate*, 404 Mich 661, 678–679; 273 NW2d 456 (1979).
26. See MCR 7.209(A)(2).
27. MCR 7.209(A)(3).
28. For more discussion of this topic, the author acknowledges and recommends you read Shannon & Gerville-Réache, eds, Michigan Appellate Handbook (3rd ed), ch 2, which he coauthored with his mentor and former law partner Noreen L. Slank of Collins Einhorn Farrell PC in Southfield. The author thanks Ms. Slank for her wisdom and guidance (and patience) in mentoring me in this and all other areas of appellate practice.