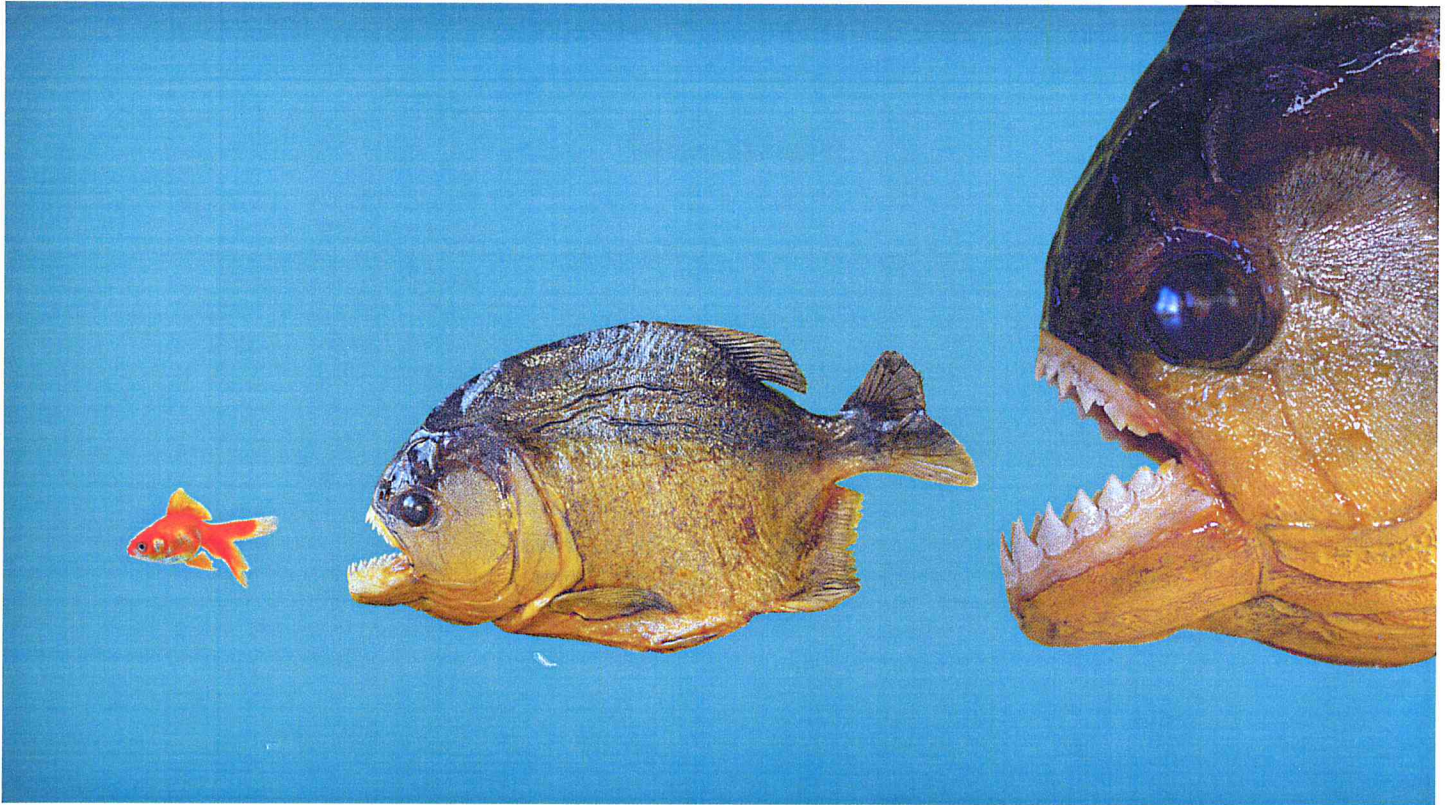




Herb Fox



## Your money judgment on appeal

Some days you eat the bond...

Congratulations! After years of fighting with brutish defense counsel and an intransigent claims adjuster, you've charmed the jury and were rewarded with a verdict for more than you asked!

Your client will now be compensated for her pain and suffering, lost income, and medical expenses and you will finally recoup your out-of-pocket litigation costs, and get paid some big bucks.

But, not so fast.

Remember your successful "junk science" motion to strike the testimony of the defense kinesiologist "expert"? The carrier claims that ruling was reversible error, and it just filed a Notice of Appeal. A carrier may have a duty to appeal the judgment where there are reasonable grounds for the appeal,

especially where there is an excess judgment that leaves the insured exposed. (*Jenkins v. Insurance Co. of North America* (1990) 220 Cal.App.3d 1481).

And not only that – it just served you with a Notice of Undertaking, accompanied by an appeal bond that has been filed with the Superior Court.

Now what? It's time to brush up on appeal bonds, which may determine if, when, and how your client (and you) will collect the judgment.

### Dispelling myths

Initially, let's dispel two common appeal-bond myths.

First, appeal bonds are not a condition of the right to prosecute an appeal from a money judgment. Instead, bonds

are a way to stay enforcement of a money judgment while the appeal is pending. Absent a bond, the defendant's appeal can go forward – but plaintiff can enforce the judgment while the appeal takes its leisurely route.

Second, appeal bonds are good, not bad, for your client as judgment creditor. An appeal bond virtually assures quick and easy collection of the judgment proceeds soon after the Court of Appeal affirms. And with 10 percent statutory interest accruing on that judgment (including costs), an appeal bond is an unbeatable investment – assuming that you and your client can hold out for the two-year delay caused by the appeal!

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## The big picture

The general rule is that an appeal automatically stays enforcement of a judgment. (Cal. Code Civ.Proc., § 916.) But exceptions swallow that rule, and the big exception is a money judgment, which is *not automatically* stayed on appeal. (Cal. Code Civ.Proc., § 917.1.) Instead, a judgment debtor who wants to stay enforcement pending appeal must post some form of undertaking in an amount prescribed by statute. (Cal. Code Civ. Proc., § 917.1, subs. (a) & (b).)

(A common exception to this exception is a pure cost award in favor of the defense, which is automatically stayed if the plaintiff appeals. But that exception has painful, and common, exceptions, including Code Civ. Proc., § 998 costs. See the sidebar accompanying this article).

The purpose of the undertaking is to provide to the judgment creditor an assured source of funds from which to collect the money judgment after postponing the enjoyment of a trial court victory caused by the appeal. (*Grant v. Superior Court* (1990) 225 Cal.App.3d 929.). An undertaking is, in essence, a statutory bargain – the plaintiff delays enforcement while the appeal is pending, in return for the security of easy post-appeal collection.

A bond, in turn, is simply one form of undertaking (although the terms “bond” and “undertaking” are used interchangeably. (Cal. Code Civ. Proc., §§ 995.140; 995.185; 995.190; 995.210.) An appeal bond is a guaranty issued by an admitted surety carrier that assures payment of the judgment when and if the Court of Appeal affirms. (Cal. Code Civ. Proc., § 917.1, subd. (b); 995.120.)

An appeal bond issued by an admitted surety must reflect a face amount representing 1.5 times the judgment, including costs and attorneys fees, if any. (Cal. Code Civ. Proc., § 917.1, subs. (b) & (d).)

Where the defendant is insured, appeal bonds may carry added value. The bond assures payment of the judgment notwithstanding any reservation of rights or policy limits, because by posting bond, the surety – whether it is the carrier or an independent surety – becomes

## \$998 & judicial arbitration costs on appeal ...And some days the bond eats you!

As explained in the accompanying article, an appeal bond can be a beautiful thing – unless it's *your* client who has to post the bond in order to stay enforcement of a cost judgment pending appeal! Those are the days that the appeal bond eats you.

How can that happen to a plaintiff? It's easier – and more common – than you might think. Here's how and why:

An appeal automatically stays enforcement of a judgment (Cal. Code Civ. Proc., § 916), except for money judgments, which require some form of security to perfect a stay. (Cal. Code Civ. Proc., § 917.1.) The exception to that exception, however, provides for an automatic stay of a “pure” cost award by merely filing an appeal, without posting an undertaking. (Cal. Code Civ. Proc., § 917.1, subd. (d).) Thus a plaintiff who has been defended and appeals, can stay enforcement of the cost award without further expense.

But that automatic stay has its own exceptions. It does not apply to the portion of the cost award that reflects expert witness fees awarded pursuant to Code of Civil Procedure, section 998, or to penalties (arbitrator and expert witness fees) assessed after a trial de novo following a judicial arbitration, where the trial de novo results in a less favorable award. (Cal. Code Civ. Proc. §1141.21; §917, subd. (a)(2,3).)

In short, if you are defended, are hit with section 998 costs, and appeal from the judgment, your client will need to post a bond, or other undertaking, in order to stay enforcement of that portion of the cost award while the appeal is pending.

Mercifully, the amount that needs to be secured is limited to the section 998 cost portion of the judgment, and not the entire cost award. (*Gallardo v. Specialty Restaurants Corp.* (2000) 84 Cal.App.4th 463.) So, for example, if your client is hit with \$5,000 in costs and \$10,000 in section 998 expert witness fees, your client needs to only secure the \$10,000.

If your client needs an appeal bond, call your insurance broker or do an on-line search. You can find a list of admitted sureties on the California Department of Insurance Web site.

You should also consider the alternatives to buying a bond, including posting a cash deposit, an irrevocable letter of credit, or a personal surety pledge of equity in real estate. (See generally, Cal. Code Civ. Proc., § 995.010 et. seq.)

When in doubt or needing help, call your friendly appellate specialist for guidance!

— Herb Fox

jointly and severally liable with the defendant for the underlying judgment. (Cal. Code Civ.Proc., § 996.410, subd. (a).) Because the bond protects the insured from enforcement of the judgment pending the outcome of the appeal, the carrier's failure to procure or pay the premium for an appeal bond may be a breach of the insurance agreement and, possibly, bad faith. (*Jenkins, supra*, 220 Cal.App.3d 1481.)

## When the bond is posted

So there you are: the carrier has filed a Notice of Appeal and served you with a Notice of Undertaking that has been filed with the trial court. (Cal. Code Civ. Proc., §§ 995.340; 995.360).

What now? A few prudent steps can protect you and your client.

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First, you should confirm that the bond contains the required language (see Civ.Proc., §§ 995.320; 995.330) and reflects the correct amount (1.5 times the judgment, including costs).

Next, you should confirm that the surety is admitted in California. Many but not all liability carriers are also admitted sureties. The California Department of Insurance maintains a list of admitted sureties on its Web site, [www.insurance.ca.gov](http://www.insurance.ca.gov).

Next, you might confirm with the surety that the bond is valid, in force and effect. Often a phone call will do the trick.

If there is an issue with the amount of the bond or the status of the surety, you must *quickly* file a notice of motion objecting to the bond. (Cal. Code Civ. Proc., § 995.910 *et seq.*) Although defects in the language or manner of giving or giving the bond do not release the surety from liability (Cal. Code Civ. Proc., § 995.380), the better practice is to object to defective bonds at the outset. Failure to file that motion within 10 days of service of notice of the bond waives any defect. (Cal. Code Civ. Proc., § 995.930, subs. (b) & (c).) The bond remains in effect, by the way, while the motion is pending. (Cal. Code Civ. Proc., § 995.960, subd. (b).)

Further, bonds are generally issued for terms of one year, and the face of the bond will display the effective date. If the bond is cancelled for non-renewal, the surety is required to give notice of cancellation. (Cal. Code Civ. Proc. § 996.320.) But it is still good practice to calendar the one-year anniversary and when that date arrives, confirm with the surety that the bond has been renewed. If the bond expires before the appellate decision is final and no new bond is issued within 30 days of notice of cancellation, the judgment debtor's protection evaporates, and you can enforce the judgment. (Cal. Code Civ. Proc., § 996.340, subd. (a).)

### Collecting the money

Fast forward 18 months or so, and the Court of Appeal finally issues an opinion holding that striking the testimony of the kinesiologist was not an

abuse of discretion and, even if it was, it was harmless in light of the duplicative testimony provided by another defense expert.

Congratulations again! Judgment affirmed!

The fun begins soon – but you still need to be patient. Your right to enforce the judgment does not begin until the clerk of the Court of Appeal issues the remittitur, about 100 days after the opinion is filed, assuming the Supreme Court does not grant review. (Cal. Rule of Court, rule 8.272, subd. (b).)

(Cheer up – that's another three months of interest at 10 percent.)

Once the remittitur issues (and assuming that you have not already received the check), here is what to do:

First, immediately send a demand letter to the defendant, the carrier and the surety (if they are not the same), demanding immediate payment of all proceeds due, including interest.

Such demands are usually effective because most judgment debtors do not want you to enforce against the surety. If the surety must make good on its guaranty, it is substituted to your client's rights to enforce the judgment as if the surety had recovered the judgment. (Cal. Code Civ. Proc., § 917.1, subd. (c); Cal. Civ. Code, § 2848.) The surety will then be able to enforce that obligation against whatever collateral the judgment debtor may have pledged in consideration for the bond.

If payment is not tendered within 30 days after the remittitur issues, you are then free to seek a judgment against the surety. (Cal. Code Civ. Proc., § 917.1, subd. (b).) This can be done by a separate civil action or – even better – by noticed motion within the existing case. (Cal. Code Civ. Proc., §§ 996.430, 996.440.) The court's jurisdiction over the surety is established by the act of giving the bond. (Cal. Code Civ. Proc., § 996.420.)

Once you get a judgment against the surety, it is directly enforceable against the surety. (Cal. Code Civ. Proc., §§ 996.460, subd. (d), 996.495.) And the surety will be liable for the cost and attorneys fees incurred in that enforcement effort. (Cal. Code Civ. Proc., § 996.480, subd. (a)(2).)

### Alternatives to bonds

Notwithstanding the benefits of appeal bonds, there is at least one downside: the bond premium bond is a recoverable appeal cost if the judgment is reversed. (Cal. Rule of Court, rule 8.278, subd. (d)(1)(F).) That could sting – premiums generally run from two to 10 percent of the judgment, depending on factors including the quality of the collateral and the credit worthiness of the judgment debtor.

If you are satisfied that the carrier will ultimately make good on the judgment and is not itself an admitted surety, you might consider negotiating over the need for a bond. I handled one appeal where the carrier unconditionally paid my client an amount equal to what would have been a bond premium, in consideration for a stipulation not to execute during the appeal.

Alternative forms of undertakings that stay money judgment pending appeal include a cash deposit, pledge of an account, an irrevocable letter of credit, or pledges by personal sureties. (See generally, Cal. Code Civ. Proc., §§ 995.010 *et seq.*) The amount of security for these forms of undertakings must be twice the face of the judgment (Cal. Code Civ. Proc., § 97.1, subd. (b)) and, except for cash deposits, they all offer greater risk than do bonds.

### The bottom line

Facing an appeal from a money judgment is never enjoyable. But securing payment at a 10 percent annual return has its rewards, especially in these recessionary times. So while you may want to curse the appeal, you may also want to kiss the surety!

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