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Your Skills: How to Obtain a Stay Pending Appeal

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If your big-dollar defense verdict goes the wrong way—the judge delivers a devastating result in your quiet title bench trial, or the other side just got declaratory judgment establishing your client's widely advertised trademark is suddenly in the public domain—you're probably going to want to seriously consider an appeal.

But you better think fast, because even though you usually get 30 or 60 days to file your notice of appeal in federal and California courts, respectively, your opponent can execute on her final judgment immediately in state court, and after only 14 days in federal court. Postjudgment motions can delay enforcement slightly, but unless your client is ready to throw in the towel and pay up, sign over the deed to her house or let any old Mickey Mouse operation use its Mickey Mouse logo, you're going to need a formal appellate stay.

Appellate stays exist to ensure that by the time the appellate court gets a chance to issue a decision, the issue on appeal is still practically ripe and in need of adjudication. Often, that means the overarching question in whether a judgment will be stayed pending appeal is whether granting or denying the stay request would best preserve the status quo in the real world, so the appellate court can rule on the appellant's claims of error with greatest effectiveness.

Whether you can get an appellate stay and how you do so, however, can be surprisingly complex. Sometimes, a stay is automatic on the filing of a notice of appeal. In California, final judgments for orders that adjudicate rights that don't require payment of money or property, like declaratory judgments, are often automatically stayed. So are "mandatory" injunctions, which are injunctions that compel affirmative behavior or changes to the status quo—as opposed to "prohibitory" injunctions, which proscribe changes to the status quo and are not automatically stayed.

In federal court, automatic stays are infrequent. For example, a federal litigant can obtain an automatic appellate stay of a judgment against property when the state in which the property is located offers a similar stay. Usually in federal court, as well as in California, whenever a judgment involves money or property, which includes many business judgments, you'll need to obtain a bond or other undertaking to get a stay.

The bond will have to be in an amount sufficient for the judgment plus interest and fees—usually

between 125 percent and 150 percent of the judgment amount, depending on local rules and sometimes on the court's discretion. Appellate bonds generally require collateral equal to the amount of the judgment bonded, unless your client is a large corporation or high net-worth individual. The upside is that sureties often accept letters of credit or real estate as collateral if cash is unavailable. And in any event, you usually don't want to pay the judgment to the other side while you have a live appeal, lest you're deemed to have satisfied the judgment and thereby mooted the case.

If you can't come up with enough collateral, you can sometimes get a federal court to lower the bond amount, but rarely in California courts.

If the trial court rejects your stay request or imposes a crippling bond requirement—a fate Philip Morris faced in Illinois in 2005, when hit briefly with a \$12 billion appeal bond demand—don't give up! Both California and federal courts permit litigants to file extraordinary writ petitions in their respective appellate bodies seeking "supersedeas"—literally, "you must desist." The California Court of Appeal and Ninth Circuit Court of Appeals have broad discretion to grant petitions for writs of supersedeas and will sometimes do so after taking into consideration factors like the chances of success on appeal, funds available to the appellant and equities from staying enforcement.

Indeed, appellate courts may ultimately be more receptive to stay arguments than trial courts because they may be more concerned with ensuring the effects of their own rulings and jurisdiction by preserving the status quo ante. Even so, litigants should not interrupt the normal processes of the appellate courts with extraordinary writ petitions before first exhausting all reasonable opportunities to obtain a stay from the trial court.

Once the stay is in place, the judgment creditor may not seek, and the trial court may not entertain, direct or indirect efforts to enforce the judgment, like through contempt proceedings. However, a liquidated judgment continues to accrue interest at the statutory rate during the stay, and should the appellant fail to reverse the judgment, she could be liable for waste she caused during the stay.

Obtaining a stay of enforcement is often essential, but the law of appellate stays can be particularly tricky. Be sure to consult an appellate treatise or retain an appellate specialist as soon as the possibility of a significant adverse judgment appears on the horizon. Otherwise, your client could win her appeal in its entirety, but end up with nothing to show for it.

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