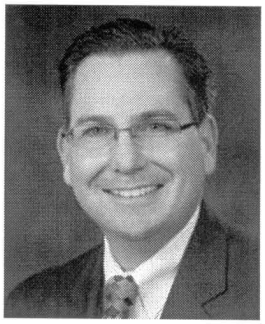
# Considering Your Alternatives: Obtaining a Stay Pending Appeal with Alternative Security



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*Editor's Note: When the Appellate Advocate found out that our new fellow, Tom Hudson, had written about alterative security, it invited him to submit this article. What to do when the stakes are high is a subject of interest to all of our membership.*

Suppose a company is hit with a large verdict – one so large that it cannot possibly compile the cash and other assets required for a supersedeas bond. Unfortunately, given the realities of the current bond market, even a company with substantial assets may be unable to post a bond if its assets are neither liquid nor readily capable of liquidation. Yet, facing collection efforts during an appeal may make continuing normal business operations difficult or impossible.

The good news is that there are other strategies for staying collection efforts during an appeal. In particular, when the judgment debtor is unable to post a supersedeas bond in the usual amount (typically the full amount of the judgment plus interest and costs), the federal courts and many state courts recognize that the trial court has discretion to condition a stay on the basis of alternative and even reduced security.

This article discusses federal and state law authorities concerning alternative security, as well as some of the critical strategy issues related to pursuing alternative security. Although never an attractive option, if your client faces the unfortunate situation of having a significant judgment entered against it, a judgment creditor who intends to pursue collection, and the inability to post a supersedeas bond in the "usual amount," it may be the least-worst alternative.[1]

## Federal courts generally recognize they have discretion to enter a stay pending appeal conditioned on alternative security

Former Federal Rule of Civil Procedure 73(d) explicitly recognized the power of a district court to fix a bond amount less than the full amount of damages.[2] Although that rule was repealed, Federal Rule of Civil Procedure 62(d) and Federal Rule of Appellate Procedure 8 have generally been interpreted as maintaining courts' inherent discretion to require alternative or reduced security.[3]

In an early case, the judgment debtor had argued it could not obtain the necessary $161 million supersedeas bond without "requiring it to engage in disruptive and time-consuming liquidation of assets or a costly and time-consuming financing program."[4] The judgment debtor produced letters from surety companies showing that such a bond "could be arranged only if secured with a deposit of collateral in the form of cash or government bonds or documents of similar liquidity in the full amount of the bond," which the judgment debtor did not have.[5]

After noting "the repeal of Rule 73(d)," the district court explained that it "has the inherent power in extraordinary circumstances to provide for the form and amount of security for a stay pending appeal, based on the conditions it finds to exist in a particular case."[6] The district court went on to explain that a bond of $161 million was not "practicable under the circumstances," and permitted alternative security in the form of a cash bond of $75 million and assurances from the judgment debtor that it would maintain a net worth three times the amount of the $86 million balance.[7] The Fifth Circuit subsequently noted the district court's "wise exercise of its discretion" in fashioning an alternative to requiring the judgment debtor to

post a supersedeas bond in the usual amount of the judgment plus interest and costs.[8]

Five years later, the Fifth Circuit decided *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, the seminal decision discussing alternative security.[9] In that case, the district court had set a $10,000 supersedeas bond on a $270,985 judgment because the judgment creditor failed to present any evidence that the judgment debtor lacked sufficient financial resources to respond to the judgment if it was affirmed on appeal.[10] The Fifth Circuit held that the judgment debtor, not the judgment creditor, bore the burden of "objectively" demonstrating why a full security supersedeas bond should not be required, and went on to describe two circumstances in which such a bond would be unnecessary: (1) when the judgment debtor can demonstrate it can "facilely respond" to the judgment and presents "a financially secure plan for maintaining that same degree of solvency during the period" of the appeal, and (2) when the judgment debtor can demonstrate that its current financial condition "is such that the posting of a full bond would impose an undue financial burden."[11] In the second situation, the Fifth Circuit explained, a trial court would have "discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish equal protection of the judgment creditor."[12] Other federal courts have subsequently followed the Fifth Circuit's approach.[13]

**Many state courts have adopted the federal approach and have given trial courts discretion to enter a stay pending appeal conditioned on alternative security**

States, of course, each have their own rules governing the bonding requirements necessary to obtain a stay during the appeal. Nevertheless, several states have endorsed the approach taken by the federal courts as "the appropriate one."[14] The Arizona Court of Appeals, for example, recently looked to federal authority to clarify "the standards a superior court should apply in determining the bond amount when a judgment debtor is unable to post a bond in the" usual amount (i.e., the "full amount of the judgment together with costs, interest and damages attributed to the stay pending appeal").[15] In that case, the trial court had entered an $18.4 million judgment against a company following a jury verdict, which required a supersedeas bond of approximately $22 million to obtain a stay as a matter of right. The judgment debtor presented evidence that it lacked the "financial resources to post a full supersedeas bond, and if the judgment was not stayed pending appeal" collection efforts would likely drive it out of business.[16] The trial court believed that although it had "broad discretion in crafting the form of the bond," it lacked "discretion to set a bond below the amount of the judgment (at least when the reduction is to account for the debtor's inability to pay)..."[17]

The Arizona Court of Appeals disagreed, holding that trial courts have "discretion to condition a stay of the judgment... on [the basis of] a reduced bond and alternate security." In reaching that conclusion, the Court surveyed federal law on the issue, and articulated a list of non-exclusive factors that trial courts should consider, including (1) "the collectable value of the judgment debtor's assets as of the date of the judgment," (2) "complexities the judgment creditor would face in pursuing its rights to the security if the judgment is affirmed on appeal," (3) the protection that can be put in place to ensure that the "debtor will conduct its business in the ordinary course and will not jeopardize the alternate security."[18] Other state courts have similarly embraced the federal approach.[19]

**Strategy considerations for alternative security**

If pursuing a stay conditioned on alternative security seems to be the least-worst alternative, there are several critical issues that should be considered. These include (1) the evidence necessary to demonstrate that the client cannot obtain a bond in the usual amount, (2) the harm that will ensue in the absence of a stay, and (3) the nature and extent of the alternative security the client can provide.

**Evidence concerning the inability to obtain a bond in the usual amount and irreparable harm absent a stay**

Courts agree that the judgment debtor must demonstrate that departing from the usual bond requirement is warranted.[20] On this threshold issue, a judgment debtor typically compiles evidence concerning its financial condition, the nature and liquidity of its assets, and the attempts it has made to secure a bond or financing for a bond.[21] Accordingly, it is important to determine whether, in fact, the client cannot obtain a bond (perhaps even at a higher premium), and how best to compile evidence on this point to submit to the trial court. In at least one case, the appellate court questioned "whether a supersedeas bond was in fact unobtainable." [22]

Courts also often look to the nature of the harm the judgment debtor will likely suffer in the absence of a stay.[23] Accordingly, consideration should also be given to developing evidence concerning the effect on the client and its business if the court does not grant a stay. In addition to harm to the company, employees, and the economy generally, harm to other creditors is a pertinent consideration.[24]

## Developing the plan for alternative security

Assuming the client cannot obtain a bond and will face harm without a stay during the appeal, the judgment debtor must also develop and present a plan for the alternative security. Such a plan should address at least two key components: (1) the amount the alternative security is intended to secure, i.e., the amount that should ultimately be available in the event the judgment is affirmed on appeal, and (2) the nature and components of the alternative security.

With respect to the amount to be protected, the critical inquiry is the "status quo" at the time of the judgment. As numerous courts have noted, "[t]he purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal."[25] Because a supersedeas bond serves to protect the appellee from the damages reasonably anticipated to flow from a stay pending appeal, the status quo is generally measured by judgment debtor's "***current ability*** to satisfy the judgment"—not the face value of the judgment itself. [26]

In many cases, protecting the status quo will nevertheless require security equivalent to that provided by the usual supersedeas bond. Indeed, typically, the judgment debtor possesses sufficient assets to fully satisfy the judgment (even if it lacks the ability to obtain a bond due to a lack of liquidity). But when the judgment debtor can demonstrate that execution on the judgment would yield less than the judgment (or less than the judgment plus interest and costs), the status quo is different. In such cases, there is a strong argument that the amount the alternate security must protect during a stay can be less than the usual bond amount.[27]

In terms of the nature and components of the alternate security, courts have approved a wide range of proposals. Typical components of alternative security include cash, a reduced bond, security interests in the judgment debtor's assets, real estate, orders limiting what the judgment debtor may do with its assets while the stay is in place, or a combination of some or all of these items.[28] The Seventh Circuit, for example, approved a stay pending appeal with alternative security in lieu of a $36 million bond when the judgment debtor had assets nominally worth $2 billion, but was financially distressed and illiquid.[29] The alternative security consisted of a pledge of $10 million in cash, $10 million in accounts receivable, a security interest worth about $70 million, and orders limiting the company's ability to transfer cash to the parent corporation.[30]

Other courts have required that various forms of security, such as stock, be placed in escrow subject to a security agreement to be approved by the Court, and then issued orders to protect the judgment creditor during the stay. In one case, for example, in addition to the escrow security, the court required the judgment debtors to (1) "do everything in their power to maintain the value of all their assets and prevent a decrease in the value thereof," (2) not pay "any debts in whole or part except to trade creditors in the ordinary course of business and debt obligations as set forth on the financial statements heretofore furnished plaintiff," (3) give the plaintiff inspection and audit rights, and (4) give the plaintiff the right to request additional security "[i]n the event of changed circumstances which substantially reduce the value of the security placed in escrow by defendants." [31]

Judge Easterbrook, on the other hand, has expressed the view that "[t]here should be a strong preference for a partial bond in the amount of the value of the claim."[32] In his view, what a judgment debtor can get by way of a bond on the open market is ultimately a good reflection of the appropriate amount of alternative security.[33] But in the end, as one court aptly observed, "[e]ach judgment debtor is different," and exactly what will be required "to best preserve the status quo" with alternative security varies from case to case.[34]

## Conclusion

When a client faces a significant judgment that it wants to appeal, yet it cannot obtain a supersedeas bond in the usual amount, there may be alternative strategies for securing a stay under the right circumstances. Pursuing a stay predicated on alternative security may provide the client the least-worst alternative in the face of difficult circumstances. ❖

** Thanks to Kathleen O'Meara for her comments on an earlier draft. All the mistakes in this one are the author's.*

1. Historically, some courts have also required reduced or no security when the judgment debtor is so financially strong that a bond seems to provide no additional protection. *See, e.g., Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (discussing this principle). However, in light of recent economic events (including the collapse of major financial institutions that were viewed as healthy), pursuing this course has become more difficult and is not discussed in this article.
2. *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 757, 759 (D.C. Cir. 1980).
3. *Id.* (explaining that although Federal Rule of Civil Procedure 62(d) now provides that "the appellant by giving supersedeas bond ***may*** obtain a stay," this language "speaks only to stays granted as a matter of right; it does not speak to stays granted by the court in accordance with its discretion"); *see also Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986) (agreeing with *Federal Prescription*'s reading of Rule 62(d)).
4. *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 95 (S.D.N.Y. 1970), *judgment aff'd in part and rev'd in part by Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 177 (2d Cir. 1975).
5. *Id.* at 96.
6. *Id.* (citing 9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 208.06(1), at 1416 (2d ed. 1969)).
7. *Id.* at 98.
8. *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 176-78 (2d Cir. 1975).
9. 600 F.2d at 1189.
10. *Id.* at 1190.
11. *Id.* at 1191.
12. *Id.*
13. *See, e.g., Athridge v. Iglesias*, 464 F. Supp. 2d 19, 23-25 (D.D.C. 2006); *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 873-74 (10th Cir. 1986); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154-55 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987); *Int'l Telemeter Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492, 1495 (9th Cir. 1985) ("the court has discretion to allow other forms of judgment guarantee" where debtors present financially secure plan); *Fed. Prescription Serv.*, 636 F.2d at 757-58; *Alexander v. Chesapeake, Potomac, & Tidewater Books, Inc.*, 190 F.R.D. 190, 191-94 (E.D. Va. 1999); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520-21 (E.D. Pa. 1973); *Trans World Airlines*, 314 F. Supp. at 98 (setting the bond amount on a $145 million-plus judgment at $75 million and imposing other conditions on the judgment debtor).
14. *See Shanghai Inv. Co. v. Alteka Co.*, 993 P.2d 516, 538 (Haw. 2000), *overruled in part on other grounds by Blair v. Ing*, 31 P.3d 184, 188 (Haw. 2001).
15. *Salt River Sand & Rock Co. v. Dunevant*, 213 P.3d 251, 253 (Ariz. Ct. App. 2009).
16. *Id.* at 257.
17. *Id.* at 253.
18. *Id.* at 258.
19. *See, e.g., Shanghai Inv. Co.*, 993 P.2d at 525 (adopting approach set forth in *Poplar Grove* and noting that "the fashioning of substitute security and its supervision pending appeal are the duty of the trial court"); *O'Donnell v. McGann*, 529 A.2d 372, 373 (Md.

Ct. App. 1987) (holding that a "stay of execution of judgments has not been circumscribed by rule or statute so as to limit the discretion of the court to modify the penalty of a supersedeas bond required for the stay of execution of a money judgment"); *Isern v. Ninth Ct. of App.*, 925 S.W.2d 604, 606 (Tex. 1996) (trial court did not abuse its discretion in staying $3.1 million judgment based on $500,000 in alternative security).

20. *Poplar Grove*, 600 F.2d at 1191 ("If a court chooses to depart from the usual requirement of a full security supersedeas bond to suspend the operation of an unconditional money judgment, it should place the burden on the moving party to objectively demonstrate the reasons for such a departure."); *Salt River*, 213 P.3d at 255 (the judgment debtor carries "the burden of proving the existence of a secure alternative to the usual cash bond").
21. *See, e.g., Olympia*, 786 F.2d at 796 (discussing whether the judgment debtor's proof regarding the inability to obtain a bond was adequate).
22. *Id.*
23. *See id.* at 799 ("But we are reluctant to conclude that a district judge commits an abuse of discretion by refusing to allow a plaintiff to execute a judgment in circumstances where the execution may cause a billion-dollar bankruptcy..."); *Salt River*, 213 P.3d at 254 (noting that judgment debtor presented evidence that without a stay the judgment creditor would begin "collection efforts" and the judgment debtor "would likely be forced to shut down"); *Miami Int'l*, 807 F.2d at 874 (approving a bond for less than the judgment amount in part because the judgment debtor established that "execution of the judgment would cause him irreparable harm and place him in insolvency").
24. *See Olympia*, 786 F.2d at 798 ("A judgment creditor is a bona fide creditor, but the court that issues the judgment is not required to ignore the interests of other creditors when deciding how much security to make the defendant post as a condition of being allowed to stave off execution of the judgment pending appeal."); *id.* at 800 (Easterbrook, J., concurring) ("The supersedeas bond is not supposed to elevate the judgment creditor over other creditors..."); *Texaco*, 784 F.2d at 1154 ("[W] hen setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors..."), *judgment rev'd on other grounds by Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).
25. *Poplar Grove*, 600 F.2d at 1190-91.
26. *Alexander*, 190 F.R.D. at 193 (emphasis added); *Salt River*, 123 P.3d at 258 ("To preserve the status quo, the superior court must consider the collectable value of the judgment debtor's assets as of the date of the judgment."); *cf. Paynter*, 807 F.2d at 873 ("Miami is correct in arguing that the purpose of a supersedeas bond is to secure an appellee from loss ***resulting from the stay of execution***...") (emphasis added).
27. *See, e.g., Salt River*, 123 P.3d at 258; *Alexander*, 190 F.R.D. at 193 ("[W]here...the judgment debtor has not the means to secure a full supersedeas bond, a stay may issue," and the "bond or security may well be significantly less valuable than the amount of the damages award.").
28. *See, e.g., Salt River*, 213 P.3d at 258.
29. *Olympia*, 786 F.2d at 796.
30. *Id.*
31. *C. Albert Sauter Co.*, 368 F. Supp. at 523-24.
32. *Olympia*, 786 F.2d at 800 (Easterbrook, J., concurring).
33. *See id.*
34. *Salt River*, 213 P.3d at 258.