

# SURETY BOND

1. Parties

is made between:

## Demystifying Supersedeas Bonds in Civil Cases How to Stay a Judgment Pending Appeal

After trial, if the losing party wants to appeal the judgment, that party will want to avoid paying the judgment until after the appeal. A supersedeas bond—or appeal bond—triggers a stay of execution on the judgment pending appeal. This article covers the basics of the supersedeas bond process, including how to set a bond, how to get a bond, and what to do when the appeal is over. This article focuses on the state-court process for civil cases in Arizona. Other jurisdictions, including federal court, have similar processes, although the details may differ.

**ERIC M. FRASER** and **ANDREW G. PAPPAS** are attorneys at Osborn Maledon. Their practices focus on civil appeals. Some portions of this article were inspired by the October 29, 2020, episode of the Texas Appellate Law Podcast, *How to Get a Supersedeas Bond*, with Daniel Huckabay, Todd Smith and Jody Sanders (<https://tinyurl.com/3hukwzr>).

### Supersedeas Bond Basics

A supersedeas bond delays an appellant's obligation to pay a judgment while the party pursues an appeal.

Such a bond protects both parties. An appellant does not want to have to pay the judgment if it can be reversed or reduced on appeal. Perhaps the appellant thinks that ap-

pellee will spend the money during the appeal, making it difficult or impossible to recover the money if the judgment gets reversed on appeal. A supersedeas bond prohibits the appellee from executing on or enforcing the judgment during the appeal process.

The appellee may have similar fears. If the appellant does not have to pay while the appeal is pending, the appellee may fear the appellant will hide or squander the money, making it difficult to collect on the judgment if it gets affirmed on appeal. A supersedeas bond gives the appellee security. If the judgment gets affirmed on appeal and the appellant refuses to pay, then the appellee can execute on the bond.

Two rules govern civil bonds: Arizona Rule of Civil Procedure 62, and Arizona Rule of Civil Appellate Procedure 7.



### The Process in Court

After a judgment gets entered, the process moves fast. This means that as soon as a court or jury awards damages, the appellant should start thinking about a supersedeas bond, even before entry of judgment.

In civil cases, the rules automatically stay execution of every judgment for 15 days to allow the appellant to seek a bond. Ideally within that time period, the appellant should file a motion to set a supersedeas bond. This motion gets filed in the superior court, not the appellate court. In addition, the bond motion can be filed either before or after filing the notice of appeal.

Filing a motion to set a supersedeas bond immediately stays execution of the judgment. This temporary stay lasts until the court rules on the bond motion, plus however long the court allows for the appellant to post the bond.

If the parties can agree on the terms of the bond, they can also file a stipulation.

If the appellant files the motion within 15 days of the judgment and timely posts the bond after the superior court sets the bond, then there can be an unbroken series of stays

that prevent the appellee from executing on the judgment, from the moment judgment is entered until after the appellate mandate issues. The first stay is the automatic 15-day stay (ARIZ.R.CIV.P. 62(a)). The second stay begins upon filing the bond motion (ARCAP 7(a)(2)). The third stay begins upon posting the bond (ARCAP 7(b)(2)).

Contrary to popular belief, there is no deadline for starting the process for posting a supersedeas bond. A party can file a motion to set a bond even after an appeal has been pending for a year or more. The downside to waiting past the 15-day mark is that the appellee may start collection efforts. Unless there is a good reason to wait, the appellant should file the motion within 15 days of entry of the judgment.

### Setting the Bond Amount

ARCAP 7 and A.R.S. § 12-2108 control the amount of supersedeas bonds in civil cases. The bond is the lowest of the following:

- (1) Total damages (excluding punitive damages), plus costs, attorneys' fees, and prejudgment interest included in

the judgment;

- (2) 50 percent of the appellant's net worth; or
- (3) \$25 million

The second category (50 percent of the appellant's net worth) is often overlooked. If the appellant, whether an individual, company or not-for-profit, has low or even negative net worth, the amount of the bond can be low or even zero. If the bond amount is zero, the appellant may ask the trial court to stay execution on the judgment without requiring a bond.

The statute gives little discretion to the trial court. The court may increase the amount of the bond only if the appellant is intentionally dissipating assets. It may decrease the amount only if the appellant would suffer severe economic harm because of the bond (A.R.S. § 12-2108(B)-(C)).

The above factors apply to money damages. ARCAP 7 gives other criteria for other components of the judgment, such as real property, personal property and other types of relief. There are also special rules for other types of cases, and for cases involving government entities.

## A supersedeas bond delays an appellant's obligation to pay a judgment while the party pursues an appeal, and it protects both parties.

Note that many jurisdictions require a supersedeas bond to include anticipated post-judgment interest and anticipated attorneys' fees on appeal. Under the modern statute and rules, Arizona does not.

### Objections and a Hearing

The appellee has an opportunity to object to the bond motion. Objections typically involve challenging things like the appellant's net worth, disputing which components of the judgment should be considered for the bond, disputing claims of financial hardship, alleging that the appellant is dissipating assets, or arguing that alternative forms of secu-

urity are insufficient.

Somewhat unusually, ARCAP 7(a)(2) requires a court to hold an evidentiary hearing on the request of any party.

### How to Get a Bond

A surety issues a bond. The appellant should contact surety bond companies to discuss obtaining a bond.

Here's the bad news. The surety often requires 100 percent collateral, even for fairly creditworthy appellants. That protects the surety in case the appellant loses the appeal and refuses to pay the judgment. The collateral typically involves some combination of cash, real estate, stock or an irrevocable letter of credit from a bank. The surety also may require the appellant to provide financial information, including audited financial statements from companies. The surety charges a fee, typically a percentage of the bond amount paid every year the bond is in place.

This process can take time. It can take weeks for a surety to evaluate real estate or

stock for collateral purposes (e.g., time to get an appraisal of real estate and prepare a deed of trust). Even if the appellant posts cash, it can take time to liquidate assets, get the cash to the surety, and have the surety process the bond.

This is why it helps to start discussions early, even before entry of judgment. This is also why the appellant should ask the trial court to allow a long enough period to post the bond after the court sets the final amount.

Once the bond is issued, the appellant must serve a copy on the appellee and file it with the clerk of the superior court. Although not specified in the rules, the appellant also may file a "notice of filing bond" so the record is clear about what happened.

### Bond Alternatives: Cash and Other Security

By statute, Arizona allows the appellant to post cash with the clerk of the court in lieu of posting a supersedeas bond (A.R.S. § 7-106). Many litigants prefer to post cash directly with the court rather than a supersedeas bond. Surety companies typically require both 100 percent collateral and charge

# Quick Tips to Become a Bond Pro

- **Start early.** Discuss the bond before entry of judgment—the process takes longer than you may expect.
- **Study the three sources of law on bonds.** The law is spread out across A.R.S. § 12-2108, ARCAP 7, and ARIZ.R.CIV.P. 62.
- **Don't forget about net worth.** Sometimes 50 percent of the appellant's net worth is the lowest of the possible bond amounts.
- **Remember the collateral types.** Types include cash, real estate, stocks or a line of credit.
- **Craft the proposed order carefully.** Specify enough time between the date of the order and the deadline for posting the bond (e.g., 30 days). Specify that the clerk may accept cash under A.R.S. § 7-106.
- **Be careful when the appeal is over (or settled).** Check with the surety company before signing or submitting any settlement agreement, proposed order or satisfaction of judgment.



## Supersedeas Bonds in Civil Cases

a fee, but they often pay interest on the collateral.

The process for posting cash varies by county. In Maricopa County, the clerk requires a court order that specifies that cash may be accepted. For this reason, in the proposed order attached to the bond motion, we almost always include, “Under A.R.S. § 7-106, the clerk is directed to accept cash in lieu of a supersedeas bond.” We do so even if the client plans on posting a bond, because doing so creates a Plan-B option if the client cannot obtain a bond quickly enough.

The clerk accepts only limited forms of cash, including cold-hard currency, wire transfers, cashier's checks, and checks from an attorney trust account. The clerk's office has many special requirements and forms, so calling the clerk's office ahead of time is wise.

In some situations, the court also may consider other security in lieu of a bond. This often arises by stipulation. For example, the parties may agree to post cash or property with a trusted escrow company or other third party, or the parties may agree to

It helps to start discussions early, even before entry of judgment. And the appellant should ask the trial court to allow a long enough period to post the bond after the court sets the final amount.

a lien on specified property. The point is to give the appellee security that the judgment will be paid. This is a good opportunity to think creatively about ways to provide such security that are less burdensome and expensive than a supersedeas bond or cash.

### After the Appeal

The stay runs until the appellate mandate issues. This typically means that it lasts through the entire appellate process, including petitions for review to the Arizona Supreme Court and any motions for reconsideration. Note that a petition to the Supreme Court of the United States does not automatically stay the mandate.

If the appellant wins, then ordinarily the bond will be exonerated and the surety will return or release the collateral back to the appellant. The appellant should obtain an order from the superior court to exonerate the bond, either by motion or stipulation. Note that the bond fee is a taxable cost under A.R.S. § 12-332 (to be recovered on remand in the trial court, not on appeal).

If the appellant loses, it may pay the judgment and present a satisfaction of the judgment to the surety to exonerate the bond.

If the case settles on appeal, be sure to specify in the settlement agreement exactly what happens to the supersedeas bond, any cash deposited with the court, and any other security.

Surety companies can be very particular about the text required to exonerate a bond. It is wise to give the surety company a draft of the instrument exonerating a bond (e.g., a proposed order, satisfaction of judgment, or settlement agreement) before finalizing it, to ensure that the text is precise enough to satisfy the surety. 