

The Discretionary Stay against Enforcement of a Judgment

THE RACE TO ENFORCEMENT begins as soon as a judgment creditor wins a lawsuit. While typically the plaintiff, a judgment creditor can also be the defendant in an anti-SLAPP suit. In either situation, the judgment creditor can begin enforcement procedures immediately upon entry of judgment¹ and can go so far as to direct the sheriff to appear at the defendant's front door, break it down,² and seize the contents from floor to ceiling,³ including the family dog. Only settlement, posting of an expensive appeal bond, or entry of a discretionary stay of enforcement by the trial court can prevent enforcement.⁴

A debtor may apply for a stay under Code of Civil Procedure Section 918.⁵ The stay does not stop the race entirely, let alone reverse the judgment, and while discretionary stay motions are commonplace, judgment debtors sometimes leave themselves exposed to aggressive enforcement.

Once judgment is entered, the debtor immediately confronts postjudgment remedies. These include liens (which are passive) and levies (which are active) that can reach nearly all the debtor's assets.⁶ The creditor is also entitled to the issuance of an order of examination (commonly known as the OEX or ORAP)⁷ that compels the debtor to appear in court and testify about all its assets and liabilities, with the judge ready to compel the debtor to answer questions. The service of the order for the debtor's examination imposes a lien upon the personal property of the debtor.⁸

To add to the debtor's worries, some courts authorize the issuance of an OEX by letting the clerk affix the name of the judge. This permits the creditor to seek an OEX over the counter. The creditor thus may be able to start the race to seize assets on the day of judgment⁹ and execute on the judgment faster than the debtor can procure a stay. Moreover, the filing of a notice of appeal does not stay enforcement of a money judgment.¹⁰

However anxiously the debtor may contemplate these remedies, they are not likely to inspire the creditor to run more slowly. The existence of a judgment indicates that the parties have not settled their dispute, so the creditor has no reason to assume that the debtor will cooperate with enforcement. The debtor may quickly find ways to become judgment proof. The creditor faces a complete loss of the time and money it has expended on the suit if the debtor successfully shields assets, and the cost of unwinding a fraudulent conveyance may exceed the creditor's resources. Moreover, a debtor may prefer one creditor over another¹¹ and pay other creditors and financial institutions first.

The creditor may also be halted or slowed by the discretionary stay. Sections 918(a) and (b) grant a limited discretionary stay of enforcement for a money judgment—but only upon motion, whether by *ex parte*¹² proceedings or via the law and motion calendar. One treatise suggests that counsel for the loser of the judgment make an oral motion upon the rendering of the verdict or judgment.¹³ However the motion is made under Section 918 the debtor can seek a discretionary stay to cover the time during which an appeal is possible.¹⁴ Under filing

rules, the length of the discretionary stay can range from 70 days (if notice of entry of judgment has been served) to 190 days (if no notice has been served).¹⁵ The trial court has no inherent power to grant a stay pending appeal except as permitted by statute.¹⁶ Because the filing of a notice of appeal does not stay enforcement of a money judgment, the statutory limit means that a money judgment debtor must file an appeal bond or risk judgment enforcement. The temporary stay of Sections 918(a) and (b) provides the judgment debtor with some time to obtain a bond.

The debtor may seek a stay under Section 918(b) even if a notice

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of appeal has not been filed, but courts will ordinarily show greater consideration for movants that have filed the notice of appeal. As an additional showing of good faith, the debtor should consider paying for trial transcripts and retaining known appellate counsel. This will mitigate any skepticism the court may have that the discretionary stay is merely a stalling tactic and that the debtor never intends to pursue an appeal or secure a bond. Another means of showing good faith is to indicate the issues to be raised on appeal.

The creditor, however, will understandably be concerned that the debtor will use the stay to shield assets. The debtor can overcome these concerns by demonstrating good faith efforts to secure a bond. The debtor may offer full details regarding efforts to secure and post the bond—including the names, addresses, and telephone numbers of bonding agents or bond companies; whether security and indemnitors have been offered; description of the securities and indemnitors; and written responses of the bonding company or companies. All but the most solvent debtors must collateralize the bond with liquid assets or provide financial statements and indemnities from financially responsible individuals. Debtors should expect to pay bond premiums of 1 to 5 percent. Counsel should explain to the court that the debtor (or indemnitor) has the ability to secure a bond.

Many debtors can argue that they will suffer irreparable injury if the creditor proceeds with enforcement. In the stay motion, the debtor may try to prove that the enforcement will destroy the debtor as a going concern, cause the sale of a key asset of significant value, or precipitate bankruptcy or insolvency. (In addition, the debtor that loses the posttrial race can file for bankruptcy under chapter 11, which

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creates an immediate stay, dissolves the levies and liens, and excuses the defendant from posting a bond.)¹⁷ To substantiate the hardship claim, the debtor may produce financial statements, a description of net worth, and complete disclosure of prior major financial transactions. Careless debtors, however, do not always review financial statements sufficiently. If the documentation discloses or suggests that the debtor has committed a fraudulent conveyance or engaged in suspicious or dubious financial transactions, any claim of irreparable injury will be undermined and doom the motion for a stay. In addition, the creditor may be able to file a new claim under the Uniform Fraudulent Transfer Act.¹⁸

In the race to enforce or prevent enforcement of a judgment, however, the creditor and other interested parties may also plead financial hardship. The creditor may argue that it will suffer a continuing injury and potential financial ruin in being deprived of the payment owed. The creditor will likely have obligations such as taxes, wages, trade debt, bank loans, damages, and other losses. The creditor may face ruin if the debtor takes steps to render the judgment uncollectible. In opposing the stay motion, counsel for the creditor may present the creditor's financial and personal investment in the case, the attempts at settlement, the sharp practices of the debtor, the debtor's proclivity to engage in judgment proofing, and the loss that will burden the creditor as a result of delay.

The debtor may also argue that its financial collapse will devastate others, leading to widespread financial calamity for many interested parties. Before posting the bond, the debtor will likely highlight its financial obligations to vendors, employees, family members, and customers. These arguments may be supported by a detailed account of the financial hardships or bankruptcies that will befall parties other than the judgment creditor. The debtor that serves a broad community of customers or patients may raise a public interest argument, especially if its services or goods are irreplaceable or if the debtor's ruin may adversely affect members of the community. The debtor may provide important governmental, quasi-governmental, or community services, for example.

Under federal rules, the judgment debtor bears the affirmative burden to provide assurances of payment when seeking a stay without posting a bond. While a discretionary stay under Section 918(b) is not a surrogate for an appeal bond and does not require a debtor to assure the payment that is due, nonetheless the creditor is entitled to assurances that the debtor will refrain from judgment proofing, fraudulent conveyances, or otherwise experiencing a financial calamity that would render the judgment uncollectible.

Rule 62(d) of the Federal Rules of Civil Procedure provides a guide to a state court judge concerning which assurances are recognized and tested.¹⁹ For example, federal courts have issued unbonded stays in cases in which a debtor:

- Has ample assets, revenue, and net worth to assure payment.²⁰
- Has a funded program that assures payment.²¹
- Is a long-time resident of the district and has no intention to leave.²²
- Would be eliminated as the creditor's competition if enforcement were allowed and acts reasonably by placing stocks and cash in escrow and posting a security bond.²³

In a case involving a judgment for \$36 million against Western Union Telegraph Company (which had a net worth of \$3 billion but was financially distressed and illiquid) the company obtained a bond by persuading a bank to issue a letter of credit. The court allowed alternative security to be posted, consisting of a cash deposit of \$10 million, \$10 million more in accounts receivable, and a security interest.²⁴ In another case, in which the judgment was for \$145 million, the court ordered a partial bond of \$75 million to secure the judgment. The debtor agreed to maintain a net worth of triple the balance and promised to provide detailed financial disclosures and an independent certificate of net worth.²⁵

In a case concerning an intellectual property judgment, the impairment of the debtor's financial condition and good faith issues were raised on appeal, and the court ordered the debtor to deposit allegedly illicit profits into an escrow account and to report income and expenses during the pendency of action.²⁶ In a different matter involving a relatively small judgment against an oil company and foreign state, the court denied the stay to a party that had "no intention of recognizing this court's judgments against it...and has given this court the impression that it will not recognize this court's jurisdiction."²⁷

In a case in which judgment was entered for \$2.1 million, the debtor had insurance for \$500,000, lacked other assets, and would be insolvent after enforcement. The court granted a stay but on the conditions that the insurance proceeds be deposited in an escrow account, the debtor not transfer any assets, the creditor could proceed with asset discovery, and the debtor did not dispose of any asset other than what was necessary for living expenses and engaging in business.²⁸

While the conditions of a stay may be severe, they are likely to be less so than what the debtor faces if it fails (perhaps by oversight) to secure a stay. If no stay is granted, the creditor may commence enforcement without notice and before the posting of a

bond and filing of the notice of appeal. The clerk of the court will issue writs of execution, abstracts of judgment (which list the creditor, debtor, and judgment) and—under the judge's signature—an order of examination. The creditor can levy upon the debtor's bank accounts, accounts receivable, escrow accounts, third-party funds held in trust, general intangibles due from a third party, deposits held by others, and any other debt. The creditor can engage a private process server to serve the writ of execution but must provide and complete the levy package. This includes the notice of levy (garnishee and defendant), memorandum of garnishee, sheriff's instructions, writ of execution, list of exemptions, and fees due the sheriff.²⁹

This process can be a literal race. The counsel for the creditor (or a process server) must appear at the clerk's window, get the writ issued, open the file with the sheriff, and physically serve the levy package upon financial institutions. As this happens, the creditor can expect that the debtor's counsel is preparing the motion for a stay and likewise running to the courthouse.

The race may also reach the debtor's home. Through an abstract of judgment, the creditor can encumber real property. Accounts receivable, equipment, farm products, inventory, chattel paper, and negotiable documents of title may be encumbered by filing a JL-1 (a Judicial Council form)³⁰ with the California secretary of state. The debtor can also encumber the defendant's personal property upon service of an OEX. If the debtor's property is in a third party's possession, service of an OEX upon that party creates a lien.

Del Riccio

As *Del Riccio v. Superior Court* holds, a discretionary stay will not undo or discharge a perfected levy. In *Del Riccio*, the creditor levied on the bank account of the defendant. At the debtor's request, the trial court issued an order staying enforcement pending the determination of a new motion. The stay prevented the sheriff from turning over to the judgment creditor the funds that had been seized from the debtor's bank account. The court noted that the purpose of its order staying enforcement was not to halt execution but only to restrain the sheriff from paying money in his possession to the creditor. Satisfied with this outcome, the debtor did not move to recall the execution or quash the levy and made no claim that the execution was irregular. The plaintiff sought review. The question before the court of appeal was whether, in the absence of statutory authority, the court had the power to stay enforcement when the sheriff's duty was to pay the creditor.

The *Del Riccio* court held that the money

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in the hands of the sheriff was the property of the judgment creditor and not the debtor, and that the law compelled the sheriff to turn it over to the creditor. "[T]he money should be deemed to have been delivered to the creditor immediately upon its receipt by the officer, and [the creditor's] right to receive it is not affected by any delay that may occur."³¹ The appellate court held that the trial court lacked the power to unwind the levy, holding that the trial court "was without power to take control of the money of petitioners by ordering the sheriff not to pay it over as he was legally bound to do."³² Under *Del Riccio*, trial courts cannot undo a perfected levy that results in the garnishment of the debtor's funds. The case underscores the rule that a stay under Section 918(b) is prospective only. Until the debtor posts a bond and files the notice of appeal, the successfully levied funds belong to the creditor.

And unless the court expressly orders otherwise, prospective passive liens also survive the Section 918(b) discretionary stay. Code of Civil Procedure Section 697.040(b) provides that a discretionary stay does not extinguish or prevent the creation of a lien under Section 697.340 (recording of abstract of judgment) and under Section 697.540 (filing of a JL-1 with secretary of state) except by express order. In drafting a discretionary stay motion, counsel for the debtor should therefore specifically seek to extinguish liens. Counsel for the creditor, in turn, can be expected to argue to retain them. All but the most solvent debtors should expect the court to retain the passive liens. On the other hand, the stay that arises from the filing of the notice of appeal and posting of the undertaking, as required under Section 917.1(a), extinguishes existing liens, including abstracts and JL-1s under Section 697.040(a)(1) and (2). One way a debtor can avoid losing the lien race is to convince a court of the sincerity of its intention to appeal, and the way to do that is to take verifiable steps to pursue the appeal.

A fleet-footed creditor, however, may still win the race. Without a properly perfected stay (which includes the bond), any of the debtor's funds in the hands of the sheriff belong to the creditor and constitute payment on the judgment. The levy changes title to the funds from the debtor to the creditor. A judgment creditor that wins the race to the bank may be able to compel a settlement. If the debtor wins the discretionary stay and posts a bond, however, the creditor faces an appeal and may decide to accept a settlement on less favorable terms. ■

¹ CODE CIV. PROC. §683.010; *Phillips v. T. F. Patterson*, 34 Cal. App. 2d 481, 484 (1939).

² CODE CIV. PROC. §699.030(b).

³ CODE CIV. PROC. §700.070(b)(2).

⁴ CODE CIV. PROC. §918(a).

⁵ David M. Axelrad, *Staying Power*, LOS ANGELES LAWYER, Nov. 1995, at 33, 34.

⁶ See CODE CIV. PROC. §§697.010-697.750 (abstracts of judgment, personal property liens with secretary of state, and execution liens), CODE CIV. PROC. §708.110(d) (examination of debtor), §708.120(c) (examination of third party), CODE CIV. PROC. §708.205(a) (postexamination turnover order), CODE CIV. PROC. §708.250 (creditor's suit), CODE CIV. PROC. §708.320(a) (service of motion for charging order), and CODE CIV. PROC. §708.410 (lien in debtor's lawsuits); see also *Yusov v. M. Yusuf*, 892 F. 2d 784, 785 n.1 (1989).

⁷ CODE CIV. PROC. §708.110(a). See ALAN AHART, ENFORCING JUDGMENTS AND DEBTS ¶¶6:1271-1301.2 (2009).

⁸ CODE CIV. PROC. §708.410(a). See also CODE CIV. PROC. §§708.250, 708.320(a), 697.710.

⁹ CODE CIV. PROC. §918(b).

¹⁰ CODE CIV. PROC. §917.1(a)(1). FED R. CIV. PROC. 62(a) gives the debtor a 14-day automatic stay.

¹¹ CIV. CODE §3432. See *Wyzard v. Goller*, 23 Cal. App. 4th 1183, 1189-90 (1994).

¹² CAL. R. CT. 3.1204.

¹³ EISENBERG, HORWITZ & WIENER, CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶7:64 (2008).

¹⁴ *Id.*

¹⁵ CAL. R. CT. 8.104(a)(1), (2) (60 days if notice of entry of judgment is given); CAL. R. CT. 8.104(a)(3) (180 days in the absence of notice of entry of judgment); CODE CIV. PROC. §918.

¹⁶ *Mannix v. Superior Court*, 157 Cal. 730, 731 (1910); *People v. Brent*, 2 Cal. App. 4th 675, 686 (1992); *Del Riccio v. Superior Court*, 115 Cal. App. 2d 29, 31 (1952); *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 482 (2008).

¹⁷ See 11 U.S.C. §362(a) (stay) and §547(b) (preference).

¹⁸ Relief under the prior Uniform Fraudulent Conveyance Act may be accessible. *Cortez v. Vogt*, 52 Cal. App. 4th 917, 929-30 (1997). Additional relief may also be available under resulting trust remedies. *Fidelity Nat'l Title Ins. v. Schroeder*, 179 Cal. App. 4th 834, 847-49 (2009).

¹⁹ See *Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart Inc.*, 600 F. 2d 1189, 1191 (1979). See also *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (1981); *International Wood Processors v. Power Dry Inc.*, 102 F.R.D. 212 (1984).

²⁰ *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F. 2d 265, 281 (1986).

²¹ *Dillion v. City of Chicago*, 866 F. 2d 902, 905 (1988).

²² *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 636 F. 2d 755, 760-61 (1980).

²³ *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520-21 (1973).

²⁴ *Olympia Equip. v. Western Union Tel. Co.*, 786 F. 2d 794 (1986).

²⁵ *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 97-98 (1970), *aff'd in relevant part*, 515 F. 2d 173 (1975), *cert. denied*, 424 U.S. 934 (1976).

²⁶ *MDY Indus., LLC v. Blizzard Entm't, Inc., & Vivendi Games, Inc.*, 2008 U.S. Dist. LEXIS 53988, 2008 WL 2757357 (D. Ariz., 2008).

²⁷ *In re Oil Spill by "Amoco Cadiz"*, 744 F. Supp. 848, 850-51 (N.D. Ill. 1990).

²⁸ *Miami Int'l Realty v. Paynter & P.C.*, 807 F. 2d 871, 874 (1986).

²⁹ GOV'T CODE §§6103.2 *et seq.*; CODE CIV. PROC. §699.080. See, e.g., <http://civil.lasd.org/faq/faq-judgment.html?4>.

³⁰ See CODE CIV. PROC. §697.510 *et seq.*

³¹ *Del Riccio v. Superior Court*, 115 Cal. App. 2d 29, 31 (1952).

³² *Id.*