

WHAT IS THE ATTORNEY'S ROLE IN OBTAINING APPEAL BONDS?

March 2021



By Dan Huckabay, President
Court Surety Bond Agency

When I was recently preparing for a presentation, an appellate attorney asked me what the attorney's role is in obtaining appeal bonds. Attorney involvement was something I had always valued but never really considered directly before. After giving it some thought, I concluded that there are 3 main areas where we commonly see attorneys have important involvement.

Stay of Enforcement

We find most appellants are unfamiliar with the timing of when a judgment becomes enforceable. In fact, many believe the filing of the notice of appeal will stay enforcement. Our agency tends to rely on attorneys to guide the client on when a bond needs to be filed, because there are often specific nuances with each case such as posttrial motions or stipulation with the other party that can affect the timing. Strategy may also play a part in the process.

The timing of when the bond needs to be filed plays a critical role in determining what options the client has for securing a bond. Collateral is often, but not always, required by surety companies, and when it is, having more time always allows for more options. For example,

an appeal bond using cash collateral can be put in place in just a few days. When a client uses a bank letter of credit to secure an appeal bond, it takes 2-3 weeks depending on their banking relationship. Using real estate can take anywhere from 45 to 60 days.

Many jurisdictions have no automatic stay, making the judgment enforceable immediately. In those situations, attorneys who advise the client to start the process as soon as possible, sometimes even before the judgment is final, can provide much-needed extra time to complete the process depending on the type of collateral being used.



Bond Form

We work closely with the client's attorneys when drafting the bond form. While things like the case caption and number are very straightforward, there are times only certain parties are listed as principals on a bond. For example, in one case, the appellant consisted of two individuals and two entities they owned.

The two individuals were appealing the lower court's ruling that they were alter egos of the entities. They specifically wanted to provide the bond on behalf of the individuals, not the entities because that was the part of the judgment they were appealing.

Another example where the bond form can be important is in class action cases. For example, in one instance, the class representative, class members, and a government entity were all judgment creditors. We had the surety's legal counsel work with the client's appellate attorneys to determine who to list as the beneficiaries of the bond.

The appellate attorneys should also work with the surety to ensure that the amount of the bond is properly calculated. While some jurisdictions have formulas or requirements that are more straightforward than others, it is always best for the client's attorney to confirm the amount will be sufficient to meet the court's requirements before the bond is issued.

Exonerating the Appeal Bond

Appeal bonds are continuous in form, which means they cannot be simply canceled by the surety company. Therefore, the only way to close the bond is to prove there is no further liability. This is an area in which we find the client's attorney is indispensable as it becomes a pure legal issue. The manner in which this is accomplished takes a variety of forms depending on how the case is concluded.

For example, when an appellate decision reverses the underlying judgment in its entirety, the decision itself may be all that is needed to exonerate the bond. In cases where the

decision is only partially reversed, or remanded for additional review, there can remain liability under the bond. In those situations, sureties generally require an order from the court to specifically exonerate the bond. It is best for the client's attorney to provide a draft to the surety for review and approval before filing the proposed order with the court to ensure it meets the surety's needs.

When a case is settled, it is important that the client's attorney include language in the settlement agreement exonerating the bond and referencing both the bond number and surety company. Similar to orders to exonerate, we always recommend that the specific language be shown to the surety company first to avoid delays due to any objections when the surety receives a finalized settlement agreement after the fact.

Conclusion

While some attorneys take a more hands-off approach to helping their clients obtain appeal bonds, we have found that attorneys play an important role at all stages of the process. The value and benefit to the client of having an engaged, knowledgeable attorney in the process can't be understated.

Dan Huckabay is President of Court Surety Bond Agency (CSBA) located in Orange, California. CSBA is a leading surety broker specializing in appeal bonds nationwide. He is frequent presenter and author on the topic of appeal bonds. He has also served as an expert for various cases involving appeal bonds. Dan can be reached at (877) 810-5525 or Dan@courtsurety.com.