



By Steven L. Weinberg

An analysis of when an order is sufficiently final to permit a surety to return collateral without notice of a future loss under the bond.

When Should the Surety Release Collateral?

There are many different types of court bonds a surety company may issue on behalf of its principal to secure an obligation to the principal's adversary in litigation.

Instruments that may be filed include undertakings

for temporary restraining orders, preliminary injunctions and permanent injunctions. These bonds can include obligations for payment of a sum certain in consideration of foregoing certain acts if the temporary restraining order or order for injunctive relief is reversed and vacated.

Other common court bonds include appeal bonds and supersedeas or cost bonds. Traditionally, such bonds secure a stay of enforcement of a judgment. In the event the judgment is affirmed and the principal fails to pay, a surety will become obligated to pay the amount of the judgment with interest, which is calculated and included in the bond's penal sum.

Fiduciary bonds include undertakings for court appointed fiduciaries, such as guardians, receivers, executors or administrators.

A discharge of a mechanic's lien bond will permit the release of contract funds to the contractor, pending the foreclosure of a subcontractor's or supplier's mechanic's

lien, to establish the principal contractor's liability. If a lienor establishes the validity of its lien, upon the principal's failure to pay, the surety will become obligated to make payment.

A principal that is no longer liable for an obligation can petition the court for an order canceling the bond and discharging the mechanic's lien. Similarly, a successful principal can petition a court to discharge the fiduciary bond.

In consideration of issuing such court bonds, a surety typically obtains an indemnity agreement and/or takes collateral from the principal. The collateral may be cash, a letter of credit, assignment of a certificate of deposit, or another security. There may also be a separate written collateral agreement. A practice tip is to always read the collateral agreement carefully to determine the relationship between the collateral and the bond obligation. The collateral may either be specific to one bond obligation or retained as security for a program of surety bonds that may have been issued on behalf of a principal.

One common but technical question grounded in procedural law that sureties often face is when to release or return collateral to a principal. This article will briefly review the exposure analysis to determine when a



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judgment or order becomes final so that a surety can safely return collateral without worry that the bonded obligation remains. Simply put, is an order sufficiently final to permit a surety to return collateral without notice of a future loss under the bond? If the

Table I. A Statutory Snapshot of Service for Appeals and Types of Bonds

Jurisdiction	Rule
Federal	<p>Fed. R. App. P. 4(a)(1)(A): File notice of appeal with the district clerk within 30 days after the judgment or order appealed from is <i>entered</i></p> <p>Fed. R. App. P. 4(a)(5): Motion for extension of time</p> <p>Fed. R. Civ. P. 59: Motion for new trial; altering or amending a judgment</p> <p>Fed. R. App. P. 7: Bond for costs on appeal in a civil case</p> <p>Fed. R. App. P. 8: Stay or injunction pending appeal</p> <p>Fed. R. Civ. P. 65: Injunctions and restraining orders</p>
California	<p>Cal. Ct. R. 8.104(a): File notice of appeal on or before the <i>earliest</i> of: (1) 60 days after the superior court clerk <i>mails</i> the party filing the notice of appeal a document entitled “Notice of Entry” of judgment or a file-stamped copy of the judgment, showing the date either was mailed; (2) 60 days after the party filing the notice of appeal <i>serves</i> or is served by a party with a document entitled “Notice of Entry” of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or (3) 180 days after <i>entry</i> of judgment</p> <p>Cal. Ct. R. 8.108(b): Motion for new trial</p> <p>Cal. Ct. R. 8.108(e): Motion to reconsider appealable order</p> <p>Cal. Ct. R. 8.112: Petition for writ of supersedeas (<i>Note that this court rule has been amended by California Court Order 08-142.</i>)</p> <p>Cal. Ct. R. 3.1150(f): Preliminary injunctions and bonds</p> <p>Cal. Ct. R. 3.1178: Amount of undertaking for receivers</p> <p>Cal. Ct. R. 7.207: Bonds of conservators and guardians</p> <p>Cal. Prob. Code §8480 (West 2009): Personal representatives; approved bond required before issuance of letters; two or more appointees; beneficiaries and condition; failure to give bond or supplemental bond, etc.</p> <p>Cal. Civ. Code §§3143, 3144.5 (West 2009): Release of Mechanics’ lien</p>
Florida	<p>Fla. R. App. P. §9.110(b): File notice of appeal with the clerk of lower tribunal within 30 days of <i>rendition</i> of the order to be reviewed</p> <p>Fla. R. App. P. §9.330: Motion for rehearing, clarification, or certification</p> <p>Fla. R. Civ. P. §1.530: Motions for new trial and rehearing; amendment of judgments</p> <p>Fla. Stat. Ann. §59.13 (West 2008): Supersedeas on petition for certiorari</p> <ul style="list-style-type: none"> • Fla. R. App. P. §9.310: Stay pending appeal may be conditioned on the posting of a good and sufficient bond <p>Fla. R. Civ. P. §1.610: Injunctions</p> <ul style="list-style-type: none"> • Fla. Stat. §60.04 (West 2008): Injunction; sureties on bond of fiduciaries may restrain disposition of principal’s property <p>Fla. R. Civ. P. §1.620: Receivers</p> <p>Fla. Stat. Ann. §733.402 (West 2008): Bond of fiduciary; when required; form (probate)</p> <p>Fla. Stat. Ann. §744.351 (West 2008): Bond of guardian</p> <p>Fla. Stat. Ann. §713.21 (West 2008): Discharge of lien</p>
Illinois	<p>Ill. Sup. Ct. R. 303(a): File notice of appeal with clerk of circuit court within 30 days after the <i>entry</i> of the final judgment appealed from.</p> <p>Ill. Sup. Ct. R. 303(d): Lists the extensions of time in certain circumstances.</p> <p>Ill. Sup. Ct. R. 367: Rehearing in review court</p> <p>Ill. Sup. Ct. R. 305: Stay of judgments pending appeal</p> <ul style="list-style-type: none"> • Ill. Sup. Ct. R. 305 (g): Condition of bond <p>735 Ill. Comp. Stat. Ann. §5/11-103 (West 2008): Bonds may be required for restraining orders and injunctions</p> <p>735 Ill. Comp. Stat. Ann. §5/2-415 (West 2008): Appointment of and actions against receivers</p> <p>755 Ill. Comp. Stat. Ann. §5/13-2 (West 2008): Bond and oath of public administrators, guardians and conservators</p> <p>755 Ill. Comp. Stat. Ann. §5/12-2 (West 2008): Individual representative; oath and bond</p> <p>770 Ill. Comp. Stat. Ann. §60/35 (West 2008): Satisfaction or release; recording; neglect; penalty (Mechanics’ Lien)</p>

¹ Proposed legislation in 2007 may affect statute. See, 2007 MA H.B. 1482 (NS), 1482 (NS), 2007 Massachusetts House Bill No. 1482, Massachusetts (Jan 10, 2007), VERSION: Introduced, PROPOSED ACTION: Amended. See, 2007 MA S.B. 1859 (NS), 1859 (NS), 2007 Massachusetts Senate Bill No. 1859, Massachusetts (Jan 10, 2007), VERSION: Introduced, PROPOSED ACTION: Amended.

bond remains in effect and a principal's collateral is no longer available to secure the obligation, a surety is exposed and, if faced with a claim, it will have no choice but to incur additional legal fees to enforce its rights of indemnification and/or subrogation.

Jurisdiction	Rule
Massachusetts—almost identical to federal rules	<p>Mass. R. App. P. 4(a): File notice of appeal with the clerk of the lower court within 30 days of the date of the entry of the judgment appealed from</p> <p>Mass. R. App. P. 4(c): Extension of time for filing notice of appeal</p> <p>Mass. R. Civ. P. 59: Motion for new trial; amendments of judgment</p> <p>Mass. R. App. P. 6(a) and 6(b): Stay or injunction pending appeal</p> <p>Mass. R. Civ. P. 65(c): Security for temporary restraining order and preliminary injunction</p> <p>Mass. Gen. Laws Ann. ch. 214 §17; ch. 203 §7 (West 2008): Receiver's bond</p> <p>Mass. Gen. Laws Ann. ch. 205 §1 (West 2008): Probate bonds</p> <p>Mass. Gen. Laws Ann. ch. 254 §14 (West 2008)¹: Dissolution by bond recording; labor and materials; form of bond</p> <p>Mass. Gen. Laws Ann. ch. 254 §15 (West 2008): Discharge by payment; dissolution of judgment for mechanics' lien</p> <p>Mass. Gen. Laws Ann. ch. 254 §15a (West 2008): Application to court for order ruling on or discharging mechanic's lien</p>
New Jersey	<p>N.J. Ct. R. 2:4-1:</p> <ul style="list-style-type: none"> • Appeals from final judgments of courts, judges sitting as statutory agents and final judgments of the Division of Workers' Compensation must be taken within 45 days of their <i>entry</i>. • Appeals from final decision or actions of state administrative agencies or officers, other than appeals from the Division of Workers' Compensation, tax matters and wage collection section appeals, must be taken within 45 days from the date of <i>service</i> of the decision OR <i>notice of the action taken</i>. • Appeals from interlocutory orders must be made within 20 days after date of <i>service</i> of such order. <p>N.J. Ct. R. 2:4-4: Extension of time for appeal and review</p> <p>N.J. Ct. R. 2:5-6: Appeals from interlocutory orders, decisions and actions.</p> <p>N.J. Ct. R. 2:9-6: Supersedeas bond</p> <p>N.J. Ct. R. 4:52-3: Security for interlocutory injunction or temporary restraining order</p> <p>N.J. Stat. Ann. §3B:15-1 (West 2008): Bonds of fiduciaries</p> <p>N.J. Stat. Ann. §3B:12-24.1 (West 2008): Determination by the court of need for guardianship services; specific services (Limited guardian, pendent elite temporary guardian and general guardian shall furnish bond as required by N.J. Stat. Ann. §3B:15-1 <i>et seq.</i> (West 2008).)</p> <p>N.J. Stat. Ann. §2A:44A-30 (West 2008): Satisfaction payment, settlement or forfeiture of claim; discharge by certificate or order; contents of certificate (Construction Lien Law)</p>
New York	<p>N.Y. C.P.L.R. 5513 (McKinney 2008): Time to appeal is computed from date of <i>service</i> whether appeal is taken by right or by permission. Appellant has 30 days after service of copy of the judgment or order and written notice of its <i>entry</i> to appeal. Additional time is given when served by mail or overnight delivery.</p> <p>N.Y. C.P.L.R. 2221 (McKinney 2008): Motion affecting prior order (Time to move to reargue or renew is 30 days after service of a copy of order determining prior motion and written notice of its entry)</p> <p>N.Y. C.P.L.R. 5519(d) (McKinney 2008): Undertaking on appeal</p> <p>N.Y. C.P.L.R. 6312(b) (McKinney 2008): Undertaking for preliminary injunction</p> <p>N.Y. C.P.L.R. 6313(c) (McKinney 2008): Undertaking for temporary restraining order</p> <p>N.Y. C.P.L.R. 6403 (McKinney 2008): Undertaking for receiver</p> <p>N.Y. Mental Hyg. Law §81.25 (McKinney 2008): Filing of bond by guardian</p> <p>N.Y. Lien Law §37 (McKinney 2008): Bond to discharge all liens (Mechanics' Lien)</p> <p>N.Y. Surr. Ct. Proc. Act §§708, 801 <i>et seq.</i> (McKinney 2008): Fiduciary bonds</p>
Texas	<p>Tex. R. App. P. 26.1: File notice of appeal within 30 days after the judgment is <i>signed</i>. Sections a through d of 26.1 list exceptions and extend the time to file to 90 days</p> <p>Tex. R. Civ. P. 320 and 324: Prerequisites for motion for new trial</p> <p>Tex. R. App. P. 24.1, 24.2 and 24.4: Suspension of enforcement of judgment pending appeal in civil cases</p> <p>Tex. R. Civ. P. 684: Applicant's bond (temporary restraining order; injunction)</p> <p>Tex. Ins. Code Ann. §443.008 (Vernon 2008): Injunctions and orders under the Insurance Receivership Act</p> <p>Tex. Prob. Code Ann. §703 (Vernon 2008): Bond of guardian of the estate</p> <p>Tex. Prob. Code Ann. §194 (Vernon 2008): Bonds of personal representatives of estates</p> <p>Tex. Prop. Code Ann. §53.157 (Vernon 2008): Discharge of mechanic's lien</p>



Exposure

One distinguishing feature of court bonds is that generally a surety's exposure or obligation to pay is not triggered until a judgment or injunctive relief has become final. With a fiduciary bond, a surety's exposure is not triggered until the principal has actually been surcharged and has failed to pay.

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There are statutes governing the undertakings for temporary restraining orders and/or injunctions. Appeal, supersedeas and/or cost bonds are required by statute to stay enforcement of a judgment. Fiduciary bonds are provided for in applicable articles governing receivers, guardians, administrators, and executors. The lien law or real property law typically sets forth the requirements for discharge of mechanic's lien bonds.

The time to move to reargue, or renew, or to serve a notice of appeal, is governed by statute, that can be extended depending upon the method of service and it is dependent upon whether the time to move or appeal in that jurisdiction is based upon docketing or service of the order with notice of entry. Table I on pages 24–25 provides the statutory annotations for each type of bond and service for appeals in several representative jurisdictions.

An exposure analysis constitutes reviewing a jurisdiction's procedural rules regarding when a judgment becomes final. Has the adversary or intended beneficiary of the bonded obligation properly served the last decision and order of the court, with notice of entry, or has the last deci-

sion and order of the court been docketed for the requisite time period to preclude a further motion or appeal? Has the principal exhausted its appellate and motion practice remedies?

The analysis of the procedural rules involves determining whether (1) there may be a motion to reargue or to renew; (2) there is an appeal that may be taken as of right; (3) there is a further appeal that may be taken by petition; and (4) there may be a motion or leave for permission to appeal to the appellate court and/or then to the next appellate court level. Judgments become final only when all of these procedural remedies have been exhausted, or the time to invoke them has expired.

Once a principal wins the motion regarding the injunctive relief or the appeal and the judgment is vacated, a surety and its attorneys must ensure that its bond obligation has been discharged. They must take a step back, review the procedural rules and ensure that the reversal is the law of the case and the adversary has exhausted all motion and appellate remedies. Just as it is important to ensure that a surety only pays once the bond obligation has become final, it is equally as important for the surety to determine that its obligations are discharged before it returns the collateral.

Collateral

Many sureties will take collateral to secure the bonded obligation. This security may include a deposit of funds, an assignment of a certificate of deposit, or an irrevocable letter of credit. Inevitably, as soon as a principal wins or obtains an order discharging the surety, the surety receives a demand for the return of the collateral. Does the decision and order completely discharge the surety? Is the decision and order in favor of the principal as the prevailing litigant and the law of the case, and is it final?

The danger for a surety is prematurely releasing the collateral prior to performing the procedural analysis to ensure that the successful principal's victory is truly final. Otherwise, a surety risks being without the collateral to indemnify itself, and it will have to commence new litigation to pursue its rights of indemnification and/or subrogation.

The procedural analysis is critical to avoid traps. A surety should not release

collateral until all of the motion and appellate remedies have been exhausted. There is always the possibility that a motion to reargue and for relief requested therein may be granted, before a motion for leave to appeal is granted, and/or before the appeal as of right results in a reversal. A surety must determine whether a decision on the motion to reargue or renew is itself appealable in the jurisdiction where it is filed. In New York, for example, an order denying reargument is not appealable, while an order granting reargument is appealable, even if it adopts the earlier decision. On the other hand, an order on a motion to renew is appealable, whether granted or denied, while an order either granting or denying a motion to resettle a prior order is not appealable. This universe of possibilities requires that counsel closely scrutinize all means by which the original judgment or order of the court might be resurrected after a reversal to thereby restore the original obligation of the bond. *See, In re Jones Will*, 16 A.D.2d 685, 227 N.Y.S.2d 486 (App. Div. 1962), *aff'd*, 12 N.Y.2d 1049, 239 N.Y.S.2d 880 (1963); *Consolidated Indem. & Ins. Co. v. Deim*, 233 A.D. 380, 253 N.Y.S. 162 (1931); *Southwest Bitulithic Co. v. Martinez et al.*, 135 Tex. 347, 143 S.W.2d 116 (Tex. Comm'n App. 1940); *Pearl v. Wellman*, 11 Ill. 352, 1849 W.L. 4292 (1849); and *Crane v. Weymouth*, 5 P.C.L.J. 315, 54 Cal. 476 (1880).

A surety should request that its principal's attorney show proof that (1) there is an order canceling or discharging the bond; (2) the decision and order providing the determination in favor of the principal was docketed and/or served with notice of entry; (3) the time for a motion to reargue, renew, and resettle or for a notice of appeal to be filed and served has expired; and (4) the time for a motion for leave to appeal has expired in each applicable appellate level for that jurisdiction. In New York, the motion for leave to appeal can be made twice; once to the appellate court and subsequently to the next appellate court level. *See*, N.Y. C.P.L.R. §5602 (McKinney 2008). Care should be taken to check the statutory provision for permission for leave to appeal in other jurisdictions where the claim is pending.

It is only after proof of service of the decision and order in favor of the princi-

pal with notice of entry, proof of filing and docketing the decision, and the passage of the applicable time, including additional time available that is dependent on the method of service, that a surety should consider releasing the collateral. In New York, for example, the appellant or movant has 30 days from the date of service and the notice of entry to serve a notice of appeal or motion, plus an additional one to five days, depending on the method by which it was served. If a motion or a notice of appeal has been filed, a surety should wait for the outcome of the motion or the appeal, and apply the same analysis to the order determining the motion or the appeal. If a principal claims no notice of appeal or motion has been received, it is still recommended that its surety check the docket to make sure a neither has been filed with the court. When a decision is favorable to a principal, its surety may

want to encourage the principal to have the order served with notice of entry to “start the clock” on the time to appeal or move for other relief.

A potential trap exists in jurisdictions where there is a specific time to serve a motion or a notice to appeal but there is no requirement to actually file the motion or notice of appeal with the court until a reasonable time thereafter. It may be advisable for a surety to wait one to two weeks before checking the docket to ensure that a motion or notice of appeal has not actually been served and subsequently filed. In a few jurisdictions, it may be advisable to wait three to four weeks if there is a backlog of docket entries that have not been entered before determining that the reversal of the judgment, court order or the surcharge is truly final and all litigation remedies have been exhausted.

In certain jurisdictions, a principal’s

attorney may have followed the applicable rules to obtain a court order discharging the bond and the surety’s obligations thereunder. While this demonstrates an understanding of a principal’s obligation to defend the interest of both the principal and the surety, it is nevertheless critical to perform the same procedural analysis to determine if that order was served in accordance with that jurisdiction’s rules. The analysis includes three steps:

- When does the time to serve a motion or notice of appeal begin?
- When does the time to serve notice of appeal or motion expire?
- Is the order discharging the bond final?

The collateral should, therefore, only be released to the bonded principal when a judgment or order is final and the order canceling and discharging the bond is final.

