$175M Bond Refiled By Trump Is Still Substantively Flawed

By **Adam Pollock** (April 4, 2024)

Adam Pollock

Last week, the New York appellate court cut former President Donald Trump some slack, reducing the bond required to stave off enforcement of the New York attorney general's fraud judgment from nearly $500 million to $175 million.

And this week, Trump posted the bond. On Thursday, Trump refiled the bond with corrections.

But the bond still fails to comport with the law and completely fails to ensure that the attorney general will be paid if the lower court's decision is affirmed. The attorney general has now sought to protect her case by excepting to the sufficiency of the bond.[1]

The Well-Known Backstory

On Feb. 23, New York's Supreme Court, the trial-level court, entered a judgment against Donald Trump, the Trump Organization and other related defendants, totaling to some $464 million.

Although a New York state court judgment is immediately enforceable, the attorney general offered a 30-day grace period. Trump could use that time to appeal the decision and post a bond — totaling nearly $500 million with interest and fees — to stay all enforcement of the judgment. That is, with the bond in place, the Attorney General's Office would be procedurally barred, while the appeal is pending, from seizing assets to satisfy the judgment.

An appellate bond is meant to secure the full amount of the judgment. Should Trump lose his appeal, then the full amount would have to be paid over to the creditor: New York state. But Trump went to the First Department appellate court, complaining that he could not possibly post a $500 million bond. The law, however, is clear that an appellant seeking to stay enforcement must post a bond "in that sum"[2] — that is, for the full amount of the judgment, plus interest.

Just hours before the 30-day grace period would have expired, the First Department agreed to reduce the bond to $175 million. The appellate court did not provide any explanation or cite to any precedent. But the terse order stayed enforcement of the attorney general's judgment, conditioned on Trump posting the $175 million bond within 10 days. Trump immediately issued a statement indicating that he would swiftly meet that requirement.

The appellate bond is not adequately secured.

On April 1, the Knight Specialty Insurance Co. posted the $175 million bond.[3] However, because the bond was facially flawed, the court clerk's office rejected the filing, returning it "for correction."

On Thursday, Knight filed the corrected bond. But it is still substantively flawed.

Importantly, the purpose of an appellate bond is to secure the judgment once it is affirmed

— i.e., if Trump loses on appeal.[4] But the Knight bond fails to do that because it fails to meet certain requirements specified under New York law.

First, the law requires that the entity underwriting the bond be an insurance company licensed to do business in New York. And second, the law requires that the insurance be adequately capitalized and that no single policy exceed 10% of its total capital.[5] Knight meets neither requirement.

Understandably, the law was written to require that the insurer be a reputable entity, or at least subject to and complying with New York's regulatory framework. And importantly, those regulations are intended to limit the risk — both to the creditor and to the insurer. The law wants to guarantee that an insurer will actually have the funds available when a policy comes due.

In the April 1 filing, Knight failed to report its capital position. In the updated April 4 filing, Knight claims to have $1 billion of surplus capital[6] — not very close to the $1.75 billion that would be required to write Mr. Trump's $175 million bond. But even that $1 billion is suspect because it includes affiliated companies that are also not registered in New York.

There is a provision in the law which allows the insurance company to exceed that 10% cap: if the debtor — Trump in this case — pledges collateral for the full $175 million amount of the bond.[7] But Trump did not pledge collateral. According to The Washington Post's interview with the owner of the insurer: "[T]he arrangement allowed Trump to hold onto his money."[8]

In other words, Knight isn't holding the collateral. Instead, Knight is relying on Trump's promise that he's good for the money. But given Knight's weak capital position, New York law does not allow Knight to waive the collateral requirement and merely accept Trump's word that he has the money to fully pay the judgment should he lose the appeal — ironically, in a case where Trump was literally proven to have lied, repeatedly, about his finances.

The appellate bond is procedurally flawed.

Though Knight has corrected its initially filed bond, more is still needed, because the bond is substantively flawed.

Knight has apparently taken the position that it isn't subject to the New York insurance law or the 10% cap because it is not licensed in New York. But the New York law requires an appellate bond to be written by an insurance company authorized to write such policies within New York.[9] And for good reason: the state wants the insurer to be here to make good on the bond.[10]

Further, the bond must be accompanied by "a certificate of qualification," as detailed in New York's insurance law.[11] The certificate is issued by New York's financial regulator if "the insurer is solvent, responsible and otherwise qualified."[12] Again, the law is requiring that an insurer be actually licensed to do business here in New York.

If the bond is not filed with such a certificate — Trump's bond was not — the attorney general can take exception, i.e., object, to it within 10 days.[13]

Then, the insurance company (Knight) has 10 days to prove why the bond is nonetheless sufficient, and must do so by testifying under oath at a hearing.[14] The purpose of the

hearing is "to determine the sufficiency of the surety and the undertaking," i.e., if "there will be a sufficient guaranty of payment of any judgment which may be rendered."[15]

Campaign Finance Questions

Notably, Knight has apparently issued the bond on Trump's behalf with favorable terms that may be violations of the campaign finance laws. First, as noted above, Knight didn't require Trump to put up any collateral. Yet, most surety companies require collateral that covers at least the full bond amount. Here, Knight did not.

Indeed, The Washington Post quoted the owner of the insurer as stating: "At least [Trump is] getting interest on his collateral." In other words, Trump is keeping the money himself.

And second, the insurer typically charges a bond premium of 1%-3% per year. Here, however, the insurer is reportedly charging Trump only a "modest fee."

The question arises: Are these unusual provisions in-kind campaign contributions? The question does not appear to be a close call. The Federal Election Commission's regulations are clear that "the provision of any goods or services … at a charge that is less than the usual and normal charge for such goods or services" is a campaign contribution.[16] Here, Knight appears to be clearly making a contribution to a preferred political candidate.

Conclusion

An appellate bond reflects policy of the state of New York: A debtor can temporarily stop a judgment creditor from coming after them while they appeal the decision. But the bond must comply with state law in order to protect the creditor.

Here, Trump seems to be rigging the system. He has won a stay of enforcement, but the bond appears to be far from sufficiently guaranteeing payment.

Adam Pollock is the managing partner of Pollock Cohen LLP. He was previously an assistant attorney general for the New York State Attorney General's Office.

[1] Dkt. no. 1708 in People Of The State Of New York, by Letitia James, Attorney General of the State of New York v. Donald J. Trump et al, Sup. Ct., N.Y. Cty., no. 452564/2022.

[2] NY CPLR 5519(a)(2).

[3] Dkt. no. 1707 in People Of The State Of New York, by Letitia James, Attorney General of the State of New York v. Donald J. Trump et al, Sup. Ct., N.Y. Cty., no. 452564/2022.

[4] Robert Stigwood Organisation, Inc. v. Devon Co., 91 Misc. 2d 723, 723–24 (Sup. Ct., N.Y. Cty. 1977) ("statutory intent that should a party … is entitled to have his victory secured so that when the stay of enforcement resulting from the appeal is vacated by affirmance, a ready fund with which to satisfy the judgment shall be available.").

[5] N.Y. Insurance Law § 1115(a).

[6] Dkt. no. 1707, re-filed on April 4, 2024, in People Of The State Of New York, by Letitia James, Attorney General of the State of New York v. Donald J. Trump et al, Sup. Ct., N.Y. Cty., no. 452564/2022.

[7] NY Ins. Law § 4118(a)(1)(C).

[8] Michael Kranish & Jonathan O'Connell, How a California billionaire known for auto loans provided Trump's bond, Wash. Post, Apr. 2, 2024.

[9] NY CPLR 2502(a)(1); Schiavone Const. Co. v. Elgood Mayo Corp., 105 Misc. 2d 431, 432 (Sup. Ct., N.Y. Cty. 1980) ("such an undertaking must be executed by an insurance company authorized to do so within this State").

[10] Ellenville Nat. Bank v. Nat Kagan Meat & Poultry, Inc., 84 Misc. 2d 815, 816 (Sup. Ct., Ulster Cty. 1976) ("The requirement that individual sureties be domiciled here was intended to insure that they could be served if an action against them became necessary.").

[11] NY CPLR 2506(a).

[12] NY Ins. Law § 1111(a).

[13] In Albany's arcane language, "a party may except to the sufficiency of a surety…." NY CPLR 2506(a).

[14] NY CPLR 2507(a).

[15] Schiavone Const., 105 Misc. 2d at 432.

[16] 11 CFR § 100.52(d)(1); see, e.g., Fed. Election Comm'n v. Kalogianis, 2007 WL 4247795, at *6 (M.D. Fla. Nov. 30, 2007).