

NY Bond, Enforcement Options As Trump Judgment Looms

By Neil Pedersen and Adam Pollock (March 19, 2024, 5:24 PM EDT)

The two recent judgments against former President Donald Trump — one in federal court and one in state court — have thrust into the spotlight appellate bonds and, in the absence thereof, the plaintiffs' ability to enforce their judgments.

While Trump has now bonded the appeal of Jean Carroll's federal defamation case, he is apparently unable to secure an appellate bond for the massive judgment stemming from the New York attorney general's case against him.

But the attorney general need not wait at all: In state court, the plaintiff can commence enforcement from the moment that the judgment is entered.

Federal Pause, State Haste

Under the Federal Rules of Civil Procedure, Rule 62(a), a federal court judgment is automatically stayed for 30 days, "unless the court orders otherwise."^[1] In contrast, in New York state court, there is no automatic stay. The plaintiff, now known as the "judgment creditor," can immediately begin enforcement of the judgment.

Although there is no automatic stay, the New York attorney general apparently has given Trump a 30-day grace period before commencing execution. But there was no legal requirement for such grace.

When a case proceeds to judgment in New York Supreme Court, i.e., cases above the \$50,000 jurisdictional floor to get into Supreme Court, the county clerk enters that judgment, and the judgment creditor can immediately enforce it against the judgment debtor's assets in that county.

Enforcement begins by the attorney delivering an "execution," plus a \$50 fee, to a New York City sheriff or marshal. Execution in hand, the sheriff or marshal can then walk into a financial institution, or other location holding the debtor's property, and efficiently seize the debtor's assets.

For example, if the debtor banks at Deutsche Bank, the sheriff can walk into a branch, serve the execution, and the bank will drain the debtor's account, handing over a cashier's check. With present exemption levels, under New York Civil Practice Law and Rules, the former president would get to keep \$3,000 in his bank account, which is the floor protected from execution.^[2]



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By statute, the sheriff or marshal is entitled to a 5% commission, known as "poundage," on the amount collected and the judgment is, in turn, increased by 5%.[3] As New York City sheriffs are employees of the city's Department of Finance, the poundage goes into the city's budget. But New York City marshals are actually private agents who have won a commission from the city. So, if a judgment creditor utilizes the services of a marshal, the marshal keeps that 5% — an amount that can be quite lucrative on, say, a nearly \$465 million judgment.

In many cases, before serving executions, the judgment creditor first starts by seeking to obtain post-judgment discovery, all without notice to the judgment debtor, in an effort to locate the debtor's assets. That is, a sheriff can't seize an account without knowing where the debtor banks. But here, the attorney general already has a detailed road map to Trump's assets. Indeed, the attorney general's entire trial was centered on the financial institutions Trump relies upon.

Appellate Bonds

The debtor can stay execution by filing an appellate bond.[4] An appellate bond secures the full amount of the judgment and is paid over to the creditor if the debtor-appellant loses the appeal.

In New York state court, CPLR Section 5519 requires that the judgment along with costs on appeal be included in the bond. One prominent ongoing cost is the statutory interest that will continue to accrue on the judgment at 9% per year. And the appeal could easily take a year, or more, until decision, so the bond has to grow commensurately.

In our experience, certain New York judgment debtors have bonded either 110% or 120% of the final entered judgment, depending on how long the appeal is expected to last.

In federal court, post judgment interest rates fluctuate based on the one-year Treasury bill rate, but are typically much less than 9%. There is no set amount for the bond, but in the U.S. District Courts for the Eastern District and Southern District of New York, a bond for 111% is regularly accepted by the clerk. This amount is an old clerk's rule.

In exchange for an annual bond premium and indemnification, the surety issues the bond. The bond premium is the annual cost of the bond charged by the surety. This generally ranges between 1%-3% per year. The indemnification agreement is the contract that governs the bond.

If a judgment is on the horizon, it is always suggested to have the bond lined up well in advance of the entry of the judgment so that the bond can be filed immediately.

Bond Collateral

Defendants often see the bail bondsmen near the courthouses, but may not realize that bail bond brokers — and appellate bond brokers — are actually licensed insurance agents. A bail bond insures that the defendant will return to court and, unlike on television, most every criminal defendant does turn up. As a result, there's a relatively low risk for such insurers, like auto insurance. (Most cars don't crash.)

But an appellate bond pays out to the judgment creditor if the debtor loses the appeal — and pays in full, with interest, within 10 days of the appellate decision. And the debtor already lost in the court below. So, what are the debtor's chances on appeal? Maybe 50/50? Even that seems high. In short, the appellate bond insurer has to secure against a very real likelihood of payment.

The bond itself is an extension of credit or a financial guarantee of payment pending appeal. So, while a bail bond broker might take relatively low collateral to bond the criminal appearance, perhaps 10% of a \$100,000 bond, the appellate bond broker will likely require the full amount of the judgment, including expected interest.

Appellate bonds are typically collateralized with cash or liquid securities. While some debtors — like Trump — may have extensive assets in real estate or in businesses, these illiquid assets are not actually common collateral for appeal bonds. Once appeals are decided, the surety has a short window to pay the judgment, typically 10 days. And, of course, real estate is not easily liquidated that quickly, at least not without a very substantial haircut.

There are some more opportunistic surety companies that will charge higher rates to issue appeal bonds with real estate pledged as collateral. These companies take on select risks, but the bond amounts are commonly less than \$25 million.

A corporate appellant might be able to secure a bond with detailed financial statements, including both a profit and loss statement and a balance sheet. But more typically, acceptable collateral can be cash (equal to the bond amount), an irrevocable letter of credit (equal to the bond amount, normally secured by cash collateral on deposit at a bank), or a pledge of publicly traded blue chip securities (around 150% of the bond amount to take into account market fluctuations).

There was an old surety industry standard where an applicant with liquid assets of 7 times the bond amount and fixed assets between 15 to 20 times the bond amount could have a bond issued without collateral, or at least will have some credit extended.

This is not a metric that is followed by every company, but underwriters often fall back on these reference points. Here, given public reports of Trump's wealth, he would be unlikely to qualify for a bond without collateral based on his financials.

Stepping back, surety companies tend to stay away from individuals or entities that could have headline or reputational risk. Insurers are very cautious. Even if the appellate bondman — effectively, the insurance agent — were a political friend of the former president, the insurance companies backing the agents have no interest in anything but protecting their bottom line.

Put simply, they are not interested in publicity for polarizing companies or individuals, nor doing any favors — let alone for someone, like the former president, who is notoriously bad at making good on his financial obligations.

Enforcement Mechanisms

Until and unless an appeal is bonded, the judgment creditor has myriad enforcement mechanisms. These tools are little known to the typical practitioner — and even less apparent to the debtor.

As noted above, the New York Supreme Court judgment is immediately enforceable in the county where it was won. To execute on a debtor's property in another county, the creditor buys a transcript of judgment and then docket that judgment in another county.

Likewise, for federal court judgments, after the expiration of the 30-day stay, the creditor purchases an

abstract of judgment from the federal clerk and then docketed that abstract in the county where enforcement is targeted.

The judgment creditor can then rely on the CPLR's enforcement mechanisms. And for federal court judgments, the state court enforcement tools are also incorporated into the federal rules by reference.[5]

For example, the creditor can deliver an execution for a defendant's assets — whether a gold toilet or an iPad or a work of art — and the sheriff will show up and demand that it be given over for auction. When the debtor inevitably fails to politely comply, the judgment creditor can obtain a turnover order.[6] In the New York attorney general's case, Justice Arthur Engoron would likely swiftly sign such a turnover order.

Here, the Trump judgment debtors are owners of real estate, such as the 40 Wall Street office tower, and "the Mar-a-Lago Club as well as other hotels, golf courses and other real estate." If these LLCs are in turn held by judgment debtor defendants, or if these LLCs themselves have another level of LLC ownership between them and the real estate, the attorney general could become the owner of these assets within days.

The attorney for the creditor can also sign a restraining notice, which prohibits the debtor, on pain of contempt, "to make or suffer any sale, assignment, transfer or interference" with his property. In short, once served with a restraining notice — which doesn't even have to be hand-served and can be sent by certified mail — the debtor effectively can't spend money beyond certain base-line exemptions.

Were Trump to go to LaGuardia and fill his jet with fuel, that would violate the restraining order and he could quickly be held in contempt of court. And for good reason: A debtor shouldn't be able to spend \$25,000 on private jet fuel when he owes \$464.6 million to the people of the state of New York.

The judgment creditor can also seize and auction the debtor's real estate. This is a longer process, requiring public notices of sale and advertising. Here, this is likely unnecessary, as the LLC membership interests, i.e., the ownership, can be most readily executed upon.

Finally, under the Uniform Enforcement of Foreign Judgments Act, adopted by 48 states, a creditor can very easily register a judgment in another state. Here, "foreign" means another state and not an international judgment, where recognition proceeds under a separate law.

The New York attorney general could docket the state's judgment in Palm Beach County and begin to use Florida sheriffs to enforce against Trump's assets there.

In short, Article 52 of the CPLR is little read, but it includes many mechanisms, among these mentioned here, that a judgment creditor can use to quickly pounce on the debtor's assets.

Conclusion

As reported in the press, Trump has had difficulty securing an appellate bond — likely because surety companies are seeking well in excess of the \$464.6 million judgment amount, in cash or liquid securities. And until the appeal is bonded, the New York attorney general can quickly seize the former president's assets.

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[1] FRCP 62(a). See, e.g., Cengage Learning, Inc. v. Nguyen, 2022 WL 18231654, at *7 (S.D.N.Y. Nov. 21, 2022) ("Here, there is a risk of dissipation of assets, such that dissolving of the automatic stay is appropriate.").

[2] NY CPLR 5205(l).

[3] NY CPLR 8012(b).

[4] NY CPLR 5519; FRCP 62(b).

[5] FRCP 69(a).

[6] NY CPLR 5225.

