

ADVANCED SUPERSEDEAS

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CHAPTER 14

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ADVANCED SUPERSEDEAS PROBLEMS

1. A money judgment has been handed down against your client. There is insurance covering the occurrence made the basis of the lawsuit, but the limits are much less than the judgment. Your client wishes to supersede the judgment but lacks sufficient funds to do so. How should the judgment debtor proceed? The insurer?
2. You represent a defendant tenant in a forcible entry and detainer claim on a pro bono basis. The county court, on a de novo appeal of the justice court judgment, has ruled against your client. Your client wishes to appeal to the Court of Appeals but lacks the funds to supersede the judgment. The landlord seeks enforcement of the writ of possession and your client is evicted. The Court of Appeals dismisses your appeal as moot. Can they do that?
3. Your client has suffered an adverse interlocutory ruling that may be appealed under Section 51.014 of the Civil Practices and Remedies Code. That statute provides that the taking of your type of interlocutory appeal "stays the commencement of a trial." Is it necessary to supersede the judgment to preclude enforcement of the order on appeal?
4. Assume a final money judgment is entered against your client who does not supersede the judgment on appeal. May the trial court enter a judgment of contempt against the Defendant while an appeal is pending? Does it matter if the trial court's plenary power has expired?
5. New Caps On Supersedeas. HB 4 modified appellate security requirements for a money judgment so that supersedeas required to suspend enforcement of a money judgment on appeal need only cover compensatory damages, interest for the duration of the appeal, and costs awarded in the judgment subject to a cap. What are compensatory damages? Are attorney fees or prejudgment interest awarded in the judgment compensatory damages that must be superseded?

HB 4 amendments to the Finance Code and Article 2415 lowered interest rates, and applies to "cases subject to appeal" as of the effective date of the Act. If an appeal was pending on the effective date of the Act, is it "subject to appeal" so the post-judgment interest rate is 5% instead of 10%?

6. It is no longer necessary to secure punitive damages. Do you have to secure interest on a punitive damage award under the requirement that the judgment debtor secure "interest for the duration of the appeal"?
7. No judgment debtor can be required to post security that exceeds \$25 million dollars, or 50% of the judgment debtor's net worth, whichever is less. What is net worth? Does it include insurance on the underlying occurrence made the basis of the suit? Is the judgment considered in calculating a debtor's net worth? Should exempt assets be considered in determining net worth? What if the judgment debtor has a negative net worth? If you are posting supersedeas at the cap (\$25 million dollars or 50% of the judgment debtor's net worth) is it unnecessary to further supersede interest for the duration of the appeal and costs? If judgment debtors are jointly and severally liable, and have varying degrees of wealth, may they post supersedeas at different amounts based upon their respective net worth or must they secure the entire judgment because of the joint liability?
8. Assume the judgment debtor claims a negative net worth and files \$1 as appellate security, together with an affidavit of net worth, accepted by the trial court clerk. You represent the judgment creditor and disbelieve the claimed net worth of the defendant. You conduct discovery for several months and then schedule a hearing on the contest. Who has the burden of proof? Who may testify as to net worth? Are net worth experts subject to Daubert challenges?
9. The trial judge, following a net worth contest, is to "issue an order that states the debtor's net worth and states with particularity the factual basis for that determination." Do rules pertaining to findings of fact apply in this scenario? For example, if a party believes the net worth findings of the trial court are erroneous or incomplete, must the party make a request for additional or amended findings to preserve error? At what point in time is the trial court to determine net worth: at the time the debtor filed its net worth affidavit, the time the creditor filed the contests, or the time of the hearing? Assume the judgment debtor, in response to the net worth contest, alternatively asserted that it would suffer substantial economic harm by posting appellate security due to its dismal financial situation. What effect does this have on the contest?
10. Assume the trial court sustains the net worth contests and enters an order merely finding that "the judgment debtor's net worth to be \$1,000,000" and sets the appellate security at \$500,000. The trial court judgment awarded the judgment creditor \$3.5 million dollars for compensatory damages, interest for the duration of the appeal, and costs. The judgment debtor, who has filed a notice of appeal in the underlying case, files a motion seeking review in the court of appeals of the trial court ruling on the net worth contest on the basis of

excessiveness and requests an immediate stay. What is the standard of review-abuse of discretion, factual sufficiency, a hybrid standard? If it is factual sufficiency, may the Texas Supreme Court conduct such a review pursuant to Tex. R. App. P. 24.4? May an appellate court make its own finding as to net worth and order supersedeas in that amount?

11. What authority does the trial court have to enjoin the judgment debtor from dissipating or transferring assets during the appeal?
12. You represent a judgment debtor of a substantial California money judgment that is sought to be enforced in Texas, but is the subject of appeal in California. May a Texas court stay enforcement of the California judgment? Do the Texas HB 4 "supersedeas caps" apply to the California judgment?
13. Assume the trial court entered a judgment awarding Plaintiff One \$750,000 against Defendant, but as to Plaintiff Two enters a take nothing judgment n.o.v., notwithstanding the favorable jury verdict of \$500,000. The defendant's supersedeas bond is posted at \$750,000, plus post-judgment interest and costs. The Court of Appeals affirms the adverse trial court money judgment as to Plaintiff One and reverses and renders In favor of Plaintiff Two based upon the \$500,000 verdict. Defendant timely files a petition for review. Plaintiff One immediately seeks a trial court order increasing supersedeas to secure the \$500,000 award in its favor. How should the trial court rule?
14. Assume the trial court denies the motion to increase appellate security, but the Supreme Court denies the petition for review. What is the obligation of the surety assuming the appellate court:

affirms the lower court judgment

modifies but Affirms the lower court judgment

reverses and renders

reverses and remands for a complete new trial

reverses and remands in part, and affirms in part

15. Assume the trial court judgment is reversed and rendered. Is it necessary to obtain an order of the appellate court formally discharging the surety?

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ADVANCED SUPERSEDEAS

I. INTRODUCTION

This article focuses upon the enforcement and superseding of civil judgments pending appeal under Texas state practice, with a comparative summary of federal law. Over the last twenty years, the landscape of supersedeas practice in Texas has dramatically changed and the rationale for requiring appellate security has been redefined. Historically, appellate security was viewed as necessary to protect the judgment winner and ensure that the judgment could be paid in the event the judgment loser did not prevail on appeal. After all, the parties had enjoyed their day in court, at least in the trial court, and the judgment winner had a property interest in the trial court judgment that warranted protection by the posting of supersedeas in the amount of the judgment, interest, and costs. If supersedeas could not be posted in the full amount, execution would issue. A Texas judgment could not be partially superseded. In 1988 the legislature, initially in response to the *Texaco, Inc. v. Pennzoil Co.* decision,¹ effectively took over the rule-making authority in this area, passing Chapter 52 of the Civil Practice and Remedies Code, providing for the posting of alternate (lesser) security on appeal with a focus on maintaining the status quo and upon the dissipation of the judgment loser's assets pending appeal, not necessarily ensuring that the full judgment could be satisfied at the end of the appellate process.

The Texas Legislature, through the enactment in June of 2003 of House Bill 4,² has once again significantly altered the amount of security required to suspend enforcement of money judgments on appeal.³ The legislature made sweeping changes to Chapter 52, making the posting of alternate security to suspend judgment enforcement on appeal substantially easier for the judgment loser, reflecting a new balance between the judgment creditor's right in the judgment and the dissipation of the judgment debtor's assets during the appeal against the judgment debtor's right to meaningful and easier access to appellate review. In summary, appellate security now required to suspend enforcement of a money judgment on appeal need only

cover compensatory damages, interest for the duration of the appeal, and costs awarded in the judgment. It is no longer necessary (as to a final judgment signed on or after September 1, 2003) to secure punitive damages. It is unclear whether attorneys' fees and prejudgment interest must be secured. Further, no judgment loser can be required to post security that exceeds twenty-five million dollars, or fifty percent of the judgment debtor's net worth, whichever is less. Net worth is not defined. In any event, a judgment debtor establishing that it is likely to suffer substantial economic harm, if required to post security in these amounts, is entitled to a court order lowering the amount of the security required to suspend judgment enforcement on appeal to an amount that will not cause the judgment debtor substantial economic harm. These new limits on supersedeas are apparently intended to provide relief to judgment debtors facing insolvency to avoid judgment execution or to those whose judgment is so large that the cost of supersedeas would effectively inhibit their ability to appeal. In the same 2003 session, the Texas Legislature lowered the prejudgment and postjudgment interest rates, to the current ceiling tied to the prime rate, further easing the financial barriers to a judgment debtor seeking appellate review.

Whether or not supersedeas or other appellate security is posted on appeal, a trial court now has express jurisdiction to enjoin a judgment debtor from dissipating or transferring assets to avoid satisfaction of a judgment, provided the trial judge may not enter an order that interferes with the judgment debtor's use, transfer, conveyance or dissipation of assets in the normal courses of business.

The pertinent Texas legislation, insofar as it affects appellate security requirements, appears in Appendix A to this work. As a result of House Bill 4, the Texas Supreme Court has recently adopted conforming amendments to Texas Appellate Rule 24, also appearing in Appendix A. These changes, and the many issues raised by this new legislation, are discussed throughout this paper.

Following entry of a final judgment, an unsuccessful litigant may face an immediate attempt to enforce an appealable judgment. Although a writ of execution generally will not issue until thirty days have passed since judgment entry or overruling of timely filed post judgment motions, other enforcement steps may be taken sooner which may significantly impair a judgment debtor's assets or other creditors.

Sage trial counsel, faced with the reality of a potentially adverse result, should assess the necessity and ability to supersede a money judgment prior to judgment signing. Notwithstanding sound prospects for a successful appeal, obtaining security to superseding

1. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1986); *see generally* Elaine A. Carlson, *Mandatory Supersedeas Bond Requirements—A Denial of Due Process Rights?*, 39 BAYLOR L. REV. 29 (1987) (noting Texas law allows for only one method to supersede enforcement of judgment and inability to pay bond is not it).

2. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

3. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon 2004).

judgment enforcement can be commercially difficult and expensive—if not impossible to obtain.

What avenues are available? Generally, a judgment debtor has six options:

- (1) do nothing and face possible execution to satisfy the judgment;
- (2) supersede by posting a supersedeas bond;
- (3) supersede by posting alternate security as approved by the court;
- (4) supersede by private agreement;
- (5) negotiate a private covenant not to execute or to delay execution, when allowed by law; or
- (6) seek bankruptcy protection.

This paper explores each option in depth. In addition, appellate review of security orders, including disposition of security at the conclusion of appellate review, is explored. A brief discussion of federal practice pertaining to alternate security is included for comparative analysis.

II. POST-JUDGMENT ENFORCEMENT—GENERAL PRINCIPLES

A. Voluntary Nature of Supersedeas

A judgment creditor may, as a general rule, seek to enforce a civil money judgment notwithstanding that appellate review is pending unless the judgment debtor timely takes appropriate action. In most instances, enforcement—which normally involves obtaining a judgment lien and execution on a debtor's property—may be forestalled by timely securing the judgment. Providing appellate security is voluntary. A party has the right to forgo protection from execution. Posting supersedeas cannot be compelled. However, an unsuccessful litigant wishing to suspend judgment enforcement must act expeditiously.

B. Enforcement Rights When Judgment Debtor Fails to Supersede

The means available to enforce a civil money judgment are varied and are, to some extent, dependent upon the time expired since judgment entry as well as the surrounding circumstances. Attendant costs and risks vary with each collection procedure. A creditor of an unsatisfied judgment, in formulating an enforcement plan, may consider utilizing a multiple of collection avenues either simultaneously or *in seriatim*. Methods of collection include the creation of a judgment lien, levy and execution, garnishment, turnover, and receivership.⁴

4. A detailed discussion of prerequisites to utilizing various avenues of collection are beyond this work. See 5 ROY W. McDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE ch. 31 (Enforcement of Domestic Judgment) &

The signing of a final judgment commences the timetable by which an unsuccessful litigant may take steps in an attempt to set aside, modify or seek appellate review of an adverse judgment.⁵ The entry of a final judgment is also significant to the successful litigant. It commences the time frame by which the judgment creditor may take steps to create a priority position as to the judgment debtor's subsequent creditors.

Although a writ of execution, as a general rule, will not issue prior to the expiration of thirty days following judgment entry, other enforcement steps may be taken immediately if a judgment is not properly superseded. For example, a judgment lien may be created against the judgment debtor's assets any time following entry of a final judgment unless it has been properly superseded. Post-judgment discovery to determine available assets for collection may commence immediately upon final judgment signing, unless enforcement has been suspended.⁶ Further, a writ of garnishment to create a lien upon the garnishable assets of the judgment debtor in the hands of a third party may issue at any time following the entry of a final judgment to obtain proceeds. However, a garnishment judgment would not be proper until the judgment is no longer subject to being set aside or modified on appeal, although it is not clear if this principle would apply when no supersedeas or other appellate security has been posted.⁷ Turnover relief may be sought immediately following the entry of a final judgment and requires no waiting period.⁸

A judgment creditor need not await the loss of a trial court's plenary power before taking steps to create a lien upon the judgment debtor's assets, unless the judgment debtor has properly superseded the judgment.

ch. 32 (Enforcement of Out-of-State and Federal Judgment) (2d ed. 1999); see also 6 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE ch. 14 (Superseding the Judgment) (2d ed. Supp. 2004).

5. TEX. R. CIV. P. 329b.

6. *Id.* 621a.

7. *Waples-Platter Grocer Co. v. Tex. & Pac. Ry. Co.*, 68 S.W. 265, 265 (Tex. 1902); *Horst v. City of London Fire Ins. Co.*, 11 S.W. 148, 149 (Tex. 1889); see also *Baca v. Hoover, Bax, & Shearer*, 823 S.W.2d 734, 738 (Tex. App.—Houston [14th Dist.] 1992, writ denied). If the underlying suit is reversed on appeal, the garnishment proceedings and the writs issued in connection with that proceeding become a nullity. *Taylor v. Trans-Cont'l Props., Ltd.*, 670 S.W.2d 417, 420 (Tex. App.—Tyler 1984), *rev'd on other grounds*, 717 S.W.2d 890 (Tex. 1986). It is not clear whether a supersedeas bond was filed in *Taylor*. *Id.*

8. See TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 2004); see also *Thomas v. Thomas*, 917 S.W.2d 425, 429–30 (Tex. App.—Waco 1996, no writ); *Childre v. Great S.W. Life Ins. Co.*, 700 S.W.2d 284, 287 (Tex. App.—Dallas 1985, no writ).

That is not to say, however, that the judgment may be satisfied through execution while the trial court enjoys plenary jurisdiction.

As noted above, the general rule is that execution may not issue until the expiration of thirty days since the entry of a final judgment. If a motion for new trial or a motion to set aside, reform, or vacate a judgment is filed, then execution is not to issue until thirty days following the overruling of these post-judgment motions.⁹ However, if a judgment creditor establishes by affidavit proof that the debtor is about to remove its property subject to execution out of the country or to transfer or secrete its assets for the purposes of defrauding its creditors, execution may issue before such time.¹⁰

Mandamus relief is appropriate to compel a court clerk to perform the ministerial act of issuing judgment execution absent supersedeas.¹¹ Similarly, mandamus may issue against a trial judge to hear a motion to enforce an un-superseded final judgment, notwithstanding the pending appeal of that judgment.¹²

A judgment creditor's *ex parte* application for an order directing issuance of a writ of execution is proper, as no notice is required to be given the debtor.¹³ Thus, counsel for a judgment debtor may be unaware of collection efforts and should consider precautionary steps in seeking supersedeas protection before such efforts may be undertaken.

Statutory and rule provisions allow a successful litigant to expeditiously proceed following judgment entry in an attempt to collect. The burden is upon the judgment debtor to establish its assets are exempt from seizure.¹⁴ Procedures allow a judgment creditor to create a priority position for itself, notwithstanding the judgment debtor subsequently posts supersedeas and seeks appellate review. While providing appellate security will suspend proceedings under any execution previously issued, it does not negate a priority lien position a judgment creditor might have achieved prior to that time.¹⁵ Thus, the decision to suspend enforcement by supersedeas, together with an assessment of the ability to supersede, should

commence prior to entry of a potentially unfavorable judgment.¹⁶

C. Finality of Judgment to Support Enforcement

As a general proposition, a judgment is properly the subject of execution only if it is final.¹⁷ Finality of judgment is dependent upon the context of the inquiry.¹⁸ As observed by the Texas Supreme Court:

The term 'final judgment' applies differently in different contexts. A judgment is 'final' for purposes of appellate jurisdiction if it disposes of all issues and parties in a case. The term 'final judgment' is also used with reference to the time when trial or appellate court power to alter the judgment ends, or when the judgment becomes operative for the purposes of *res judicata*.

'Final judgment' also applies when a judgment operates to finally vest rights as between the parties. In that context a decree appealed from by supersedeas . . . does not become final or effective until the case is disposed of on appeal.¹⁹

Thus, the point at which a judgment is considered "final" for execution purposes may vary from when it is final for *res judicata* or other purposes.²⁰

16. See *Teve Holdings, Ltd. v. Jackson*, 763 S.W.2d 905, 909 (Tex. App.—Houston [1st Dist.] 1988, no writ).

17. See generally *In re Alsenz*, 152 S.W.3d 617, 620 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding) (holding without a final judgment a turnover order is void); *Williams v. Washington*, 566 S.W.2d 54, 56 (Tex. Civ. App.—Dallas 1978), *rev'd on other grounds*, 584 S.W.2d 260 (Tex. 1979) (finding judgment cannot be enforced by execution unless it disposes of all parties and issues in case); *Trigg v. Royal Indem. Co.*, 468 S.W.2d 468, 469 (Tex. Civ. App.—Austin 1971, no writ) (holding writ of execution will issue only if judgment is final); *McMillan v. McMillan*, 67 S.W.2d 342, 343 (Tex. Civ. App.—Dallas 1933, orig. proceeding) (finding judgment must be final to be capable of execution).

18. See *Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988) (orig. proceeding); *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). See generally Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953 (2000) (highlighting the many implications of a final judgment).

19. *Street*, 756 S.W.2d at 301 (quoting *McWilliams v. McWilliams*, 531 S.W.2d 392, 393–94 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ)) (citations omitted).

20. See *Urban Indus., Inc. v. Thevis*, 670 F.2d 981, 985 (11th Cir. 1982) (noting enforceable finality does not equal

9. TEX. R. CIV. P. 627.

10. *Id.* 628; see also *Perfection Casting Corp. v. Aluminum Alloys, Inc.*, 733 S.W.2d 385, 386 (Tex. App.—San Antonio 1987, no writ).

11. *Gonzales v. Daniel*, 854 S.W.2d 253, 255 (Tex. App.—Corpus Christi 1993, orig. proceeding).

12. *In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 179 (Tex. 2003) (per curiam).

13. *Gonzales*, 854 S.W.2d at 257.

14. *Santibanez v. Wier McMahan & Co.*, 105 F.3d 234, 239 (5th Cir. 1997) (noting the absence of Texas procedures for claiming property is exempt from levy or execution).

15. See TEX. R. CIV. P. 634.

Conceptually, there can be but one final judgment. A judgment is generally regarded as final that disposes of all claims, issues, and parties before the tribunal, and no further action is required to determine the controversy.²¹ A judgment of this character is final for purposes of seeking appellate review.²² Interlocutory orders, on the other hand, may not be executed upon.²³ A writ of execution or an order incident thereto is not appealable.²⁴ The intermediate appellate courts are split on whether an order sustaining a motion to quash execution is a final, appealable judgment.²⁵ In limited circumstances, and with trial court approval, orders granting interlocutory relief that are subject to appeal may be superseded.²⁶ Further, the appeal of some interlocutory orders stays further action by the trial court without the necessity of any appellate security.²⁷

To be enforceable, an unsatisfied final judgment must not be superseded,²⁸ be active,²⁹ and not be preempted by federal law. A judgment stayed by virtue of a bankruptcy proceeding or a claim discharged in bankruptcy is not enforceable.³⁰

non-appealability).

21. See *Wagner v. Warnasch*, 295 S.W.2d 890, 892 (Tex. 1956); *Revier v. Spragins*, 810 S.W.2d 298, 300 (Tex. App.—Fort Worth 1991, no writ).

22. TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1997).

23. See *Nalle v. Harrell*, 12 S.W.2d 550, 551 (Tex. Comm'n App. 1929, holding approved); *Rose v. Dominguez*, 669 S.W.2d 866, 868 (Tex. App.—Corpus Christi 1984, orig. proceeding).

24. See *Pierson v. Hammond*, 22 Tex. 585, 586 (1858); *Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), *overruled on other grounds*, *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004).

25. Compare *Gonzales v. Daniel*, 854 S.W.2d 253, 255 (Tex. App.—Corpus Christi 1993, orig. proceeding) (holding motion to quash is not final), *with Inman v. Tex. Land & Mortgage Co.*, 74 S.W.2d 124, 125 (Tex. Civ. App.—Amarillo 1934, no writ) (holding motion to quash is final).

26. See *infra* Part III.F.

27. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon 2004). Interlocutory appeals of a class certification order, or of a denial of summary judgment based upon an assertion of immunity, or of the granting or denial of a plea to the jurisdiction by a governmental unit, in which a notice of appeal is filed on or after September 1, 2003, “also stays all other proceedings in the trial court pending resolution of that appeal.” *Id.*

28. See TEX. R. APP. P. 24.1.

29. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 34.001 (citing final judgment that has become dormant is not properly enforceable), 31.006 (Vernon 1997).

30. See 11 U.S.C. § 362(a)(2) (2000); *Hickey v. Couchman*, 797 S.W.2d 103, 108 (Tex. App.—Corpus Christi 1990, writ denied).

Discharge in bankruptcy terminates the personal obligation of the judgment debtor; but in the absence of a judgment lien invalidation, bankruptcy discharge will not prevent enforcement of a judgment lien.³¹ Invalidation may occur under statutory provisions such as the law of preferences or § 522(f) of the Bankruptcy Code.³² The filing of bankruptcy within ninety days of execution may result in the transfer being set aside as a preference.³³ As observed by the Corpus Christi Court of Appeals:

If the automatic stay is in effect the sheriff may not execute. If the debtor files bankruptcy within 90 days of the execution the transfer may be set aside as a preference. If the debtor files bankruptcy and the plaintiff's judgment is discharged, no recovery is allowed.³⁴

D. Alternate Methods of Staying Judgment Enforcement

1. Bankruptcy Stay

The filing of bankruptcy automatically stays all judicial proceedings against the debtor,³⁵ including judgment enforcement efforts against the debtor.³⁶ When a bankruptcy affects appellate proceedings, a notice of bankruptcy is required along with proof of the date the bankruptcy was filed.³⁷ “An action taken in violation of the automatic [bankruptcy] stay is void, not merely voidable.”³⁸ However, a document filed while an appeal is suspended by bankruptcy is not void, but is deemed filed on the same day, after the court reinstates or severs the appeal.³⁹ A bankruptcy stay deprives state court jurisdiction over the debtor and its property unless and until the stay is lifted or modified.⁴⁰ The bankruptcy court may authorize further state proceedings and prescribe limitations on a state court's power to enter judgments. The terms of an order lifting a stay are, however, strictly construed.⁴¹ A bankruptcy court stay-of-judgment execution against a

31. See 11 U.S.C. § 547(b); *Hickey*, 797 S.W.2d at 108.

32. 2 DANIEL R. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE § 6.13 (6th ed. 1994).

33. See 11 U.S.C. § 547(f); *Hickey*, 797 S.W.2d at 108.

34. *Hickey*, 797 S.W.2d at 108 (citations omitted).

35. See 11 U.S.C. § 362(a)(1)–(2); TEX. R. APP. P. 8.2.

36. See generally *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (affirming refusal of enforcement).

37. TEX. R. APP. P. 8.1.

38. *Cont'l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988).

39. TEX. R. APP. P. 8.3.

40. *S. County Mut. Ins. Co. v. Powell*, 736 S.W.2d 745, 748 (Tex. App.—Houston [14th Dist.] 1987, no writ).

41. *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 114 (5th Cir. 1987).

non-bankrupt surety on a supersedeas bond prevents a federal district court order permitting execution against the security as the latter constitutes an impermissible collateral attack.⁴²

2. Private Supersedeas Agreements

Parties are free to privately covenant not to execute pending appeal, to refrain from creating judgment liens, or to agree to the sufficiency of property that will serve as appellate security in the event of affirmance.⁴³ Private agreements are common and may operate to suspend judgment enforcement.

Often the best solution for all parties is to enter into a non-execution agreement during the pendency of the appeal.⁴⁴ The consideration and terms are subject to negotiation. Typically a judgment debtor will agree to pay a non-refundable cash payment to the appellee and to preserve its assets, giving notice of any proposed material changes. Due to the expense and difficulty of supersedeas relief, a judgment debtor may find this to be the most effective and inexpensive method of staying enforcement. Typically, covenants to delay or forego execution are negotiated.

From the judgment creditor's perspective, two major benefits result from non-execution agreements. First, a significant cash payment may facilitate its appellate defense by deferring costs. Secondly, the risks of execution may be avoided. Recall that if a judgment is reversed on appeal, a party that has executed upon a judgment may be sued in restitution for the fair market value (not the sale proceeds) of property seized and sold through execution.⁴⁵

3. Covenants to Refrain From or Delay Execution

Covenants not to execute, historically, were negotiated by an unsuccessful defendant whose liability insurance carrier had wrongfully denied coverage, or failed to provide a defense or reasonably settle a covered claim.⁴⁶ "An insurer's duty to defend [and coverage responsibilities are] ordinarily a contractual undertaking defined by the insurance policy."⁴⁷ The insurer on a *liability* policy agrees to

defend the insured and to protect it from liability.⁴⁸ Notwithstanding the rendition of a judgment against an insured pertaining to a covered occurrence, an insured is not required to pay before its liability carrier. Upon judgment rendition, the insurer's liability to pay attaches. An *indemnity* policy is distinctive in that it requires the insured to actually pay a judgment before its indemnity carrier has responsibility.⁴⁹

A covenant not to execute is a contract that parties are generally free to fashion the terms. Historically, a judgment creditor would ordinarily require the assignment of actions (including "bad faith" claims) the debtor had against its insurer as consideration. The creditor would ordinarily agree not to execute upon the debtor's assets and to seek satisfaction only from the policy proceeds and/or from any assigned cause of action against the insurer.

A covenant not to execute is neither a satisfaction nor a release of the judgment.⁵⁰ "Its legal effect is similar to a covenant not to sue, in that it does not extinguish the plaintiff's cause of action and does not operate to release other joint tortfeasors."⁵¹ Thus, a covenant not to execute does not eliminate the underlying judgment or release an insurance carrier of policy obligation liability.⁵² Although the Texas Supreme Court initially held in *American Physicians Insurance Exchange v. Garcia* that underlying tort liability survives the execution of a covenant not to execute and a breach of contract action lies for collection upon the judgment in violation of the terms of the covenant, the court withdrew that opinion and decided the case on different grounds.⁵³ This remains an open question.

Covenants not to execute have been upheld notwithstanding the insured's noncompliance with such policy conditions as "no action clauses"⁵⁴ or non-

42. *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995).

43. See TEX. R. APP. P. 24.1(a)(1).

44. *Id.*; see also David J. Sacks, *Supersedeas, Stays or Substitutes, Practical Considerations*, in UNIVERSITY OF HOUSTON LAW CENTER APPELLATE PRACTICE SEMINAR D-12 (1994).

45. TEX. CIV. PRAC. & REM. CODE ANN. § 34.022 (Vernon 1997).

46. 7C JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4690 (Walter F. Berdal rev. ed. 1979).

47. *Whatley v. City of Dallas*, 758 S.W.2d 301, 304 (Tex. App.—Dallas 1988, writ denied) (citing *Goswick v.*

Employers' Cas. Co., 440 S.W.2d 287, 290–91 (Tex. 1969)).

48. *YMCA v. Commercial Standard Ins. Co.*, 552 S.W.2d 497, 502 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

49. *Id.* at 505.

50. *Id.*

51. *Id.*

52. See *First Nat'l Indem. Co. v. Mercado*, 511 S.W.2d 354, 357–58 (Tex. Civ. App.—Austin 1974, no writ); *Langdeau v. Pittman*, 337 S.W.2d 343, 348 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.); E.S. Stephens, Annotation, *Insured's settlement of third person's claim without suit, following liability insurer's denial of liability on ground that claim is not within policy coverage, as affecting insurer's liability*, 67 A.L.R. 2d 1086, 1086–87 (1959).

53. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 843 n.1 (Tex. 1994).

54. *Gulf Ins. Co. v. Parker Prods., Inc.*, 498 S.W.2d 676, 679 (Tex. 1973).

assignability provisions.⁵⁵ While an insurer “may ordinarily insist upon compliance with [policy conditions,] . . . it may not do so after it is given the opportunity to defend the suit or . . . [agree to settle] and refuses to do either on the erroneous [belief] that it has no responsibility under the policy.”⁵⁶ Where the insurer refuses to tender an obligatory defense, the insured often can protect itself only through a covenant not to execute.⁵⁷ The insured being left to defend itself may be expected to covenant against its own liability to hold the cost of defense to a minimum.⁵⁸ Without such a covenant, the insured either would have to pay to settle the claim or incur the defense expense itself, even though its insurer is contractually responsible for defense costs.⁵⁹

In 1996, the Texas Supreme Court, in *State Farm Fire & Casualty Co. v. Gandy*,⁶⁰ invalidated covenants not to execute when the insured tenders a defense or accepts coverage, in the following circumstances:

[A] defendant’s assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff’s claim against defendant in a fully adversarial trial, (2) defendant’s insurer has tendered a defense, and (3) either (a) defendant’s insurer has accepted coverage, or (b) defendant’s insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff’s claim. . . . In no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant’s insurer or admissible as evidence of damages in an action against defendant’s insurer by plaintiff as defendant’s assignee.⁶¹

55. See, e.g., *Griggs v. Bertram*, 443 A.2d 163, 174 (N.J. 1982).

56. See *Gulf Ins. Co.*, 498 S.W.2d at 679; *Womack v. Allstate Ins. Co.*, 296 S.W.2d 233, 236–37 (Tex. 1956); see also *Tex. United Ins. Co. v. Burt Ford Enters., Inc.*, 703 S.W.2d 828, 835 (Tex. App.—Tyler 1986, no writ).

57. *Foremost County Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754, 759 (5th Cir. 1990).

58. *First Nat’l Indem. Co. v. Mercado*, 511 S.W.2d 354, 358 (Tex. Civ. App.—Austin 1974, no writ).

59. *Foremost County*, 897 F.2d at 759.

60. 925 S.W.2d 696 (Tex. 1996); see Timothy D. Howell, *So Long “Sweetheart”—State Farm Fire & Casualty Co. v. Gandy Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY’S L.J. 47, 60–61 (1997).

61. See *Gandy*, 925 S.W.2d at 714 (disapproving “the contrary suggestion in dicta in *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), and *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 954 (5th Cir. 1990)”).

A judgment following an actual trial has been construed as “an entirely different judicial proceeding—presupposing . . . a contest of issues leading up to [a] final determination by court or jury, in contrast to a resolving of the same issues by agreement of the parties.”⁶² “[A]n insurer which seeks to defend under a reservation of rights should file a declaratory judgment action and prosecute it with dispatch, if the insurer wishes to fall within the *Gandy* elements.”⁶³

Insurance policy provisions generally empower liability insurers with the contractual right to complete and exclusive control of litigation in the event suit is brought by a third party against the insured for a covered occurrence. The insured is typically prohibited from settling a covered claim, except at its own expense.⁶⁴ Thus, a liability insurer ordinarily has the duty to investigate, prepare the defense of the lawsuit, try the case, and make reasonable attempts to settle.⁶⁵ If an insurer refuses an offer of settlement within policy’s limits, and an ordinary prudent person in the insured’s situation would have settled, the insurer may be liable for damages.⁶⁶ The liability binds not only the insured that denied coverage but also potentially-liable excess carriers.⁶⁷

A settlement offer within policy limits, unreasonably rejected, exposes a primary carrier to claims for any excess liability adjudged.⁶⁸ The mere

62. *Am. Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 176 (Tex. App.—El Paso 1996, writ denied).

63. Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1238 (1996).

64. 46 TEX. JUR. 3D *Insurance Contracts and Coverage* § 548 (1995).

65. *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 659 (Tex. 1987).

66. *Id.*; see also Ellen S. Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 TEX. TECH. L. REV. 869, 917 (2000).

An open question is the obligations of insurers with a duty to defend and directing the defense to pay litigation expenses that are shifted due to the insurer’s rejection of a Rule 167 offer to settle when the insured suffers a substantially less favorable judgment. See TEX. R. CIV. P. 167; TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–.005 (Vernon 2004); 1 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, *TEXAS CIVIL PRACTICE* § 17.32 (Offers of Settlement) (2d ed. Supp. 2004); Randall L. Smith & Fred A. Simpson, *Settlement Strategies and Remedies Code Chapter 42: Who Pays Attorney’s Fees and Costs?*, 67 TEX. B.J. 106, 106 (2004).

67. *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 810 S.W.2d 246, 252 (Tex. App.—Houston [1st Dist.] 1991), *aff’d in pertinent part*, 843 S.W.2d 480 (Tex. 1992).

68. *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 548 (Tex. Comm’n App. 1929, holding approved).

existence of the excess judgment is sufficient to support a *Stowers* action notwithstanding the judgment is not paid.⁶⁹

The judgment injures [the insured] while it remains unpaid. His credit is affected. A lien attaches to his land. His non-exempt property is constantly subject to sudden execution and forced sale.⁷⁰

A judgment is final for purposes of bringing a *Stowers* action if it disposes of all issues and parties, the trial court's power to alter the judgment has expired, and execution on the judgment, if appealed, has not been superseded.⁷¹

A *Stowers* claim belongs to the insured. A judgment creditor of an insured with a *Stowers* claim has no direct action against the insurer for damages exceeding policy limits.⁷² However, a *Stowers* claim, related negligence, deceptive trade practice, and other statutory claims, such as provided by article 21.21 of the Texas Insurance Code,⁷³ may be assigned.⁷⁴

It is well established that a covenant not to execute does not discharge an insurer of a legal obligation to pay within policy limits. The Texas Supreme Court has not addressed whether a non-execution agreement, which relieves the insured/judgment debtor of an obligation to pay an excess judgment, likewise relieves its insurer of an obligation to pay a judgment over policy limits.⁷⁵ A sound argument can be made that an insurer breaching its "good faith" duty may not benefit from its wrongful

denial of coverage notwithstanding the covenant not to execute that removes harm to the insured.⁷⁶ Otherwise there would be little incentive for the successful judgment creditor to enter into covenants not to execute with a debtor when to do so would limit a recovery to policy limits. Similarly, the incentive to the insurer to assume its obligation to begin with would be minimal.⁷⁷ On the other hand, the opportunity to enter into "sweetheart deals" not negotiated at arms length may result in disproportionate liability owing by an insurer.⁷⁸ As one legal commentator has observed "*Gandy* [holding insured-defendant's assignment of claim invalid under limited circumstances] begins to sour the use of sweetheart deals."⁷⁹ The dilemma, one commentator opines, is "how to preserve an important tactical option for insureds wrongfully abandoned by their carrier while preventing abuse by opportunistic plaintiffs seeking to recover beyond the bounds of the insurance contract."⁸⁰

The realignment of litigants effectuated through a "Mary Carter" agreement has been curtailed by the decision of *Elbaor v. Smith*.⁸¹ Prior to *Elbaor*, a defending party typically would agree to a settlement in exchange for a release of liability and the assignment of a partial interest in any recovery plaintiff might be awarded against non-settling defendants.⁸² Public policy precludes Texas enforcement of Mary Carter agreements⁸³ because they "skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment."⁸⁴

69. *Hernandez v. Great Am. Ins. Co.*, 464 S.W.2d 91, 94 (Tex. 1971).

70. *See Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988) (orig. proceeding); *Montfort v. Jeter*, 567 S.W.2d 498, 500 (Tex. 1978); *Hernandez*, 464 S.W.2d at 94.

71. *Street*, 756 S.W.2d at 301.

72. *See Hernandez*, 464 S.W.2d at 92.

73. *See TEX. INS. CODE ANN.* art. 21.21 (Vernon Supp. 1997).

74. *See Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 610 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *see also Ecotech Int'l, Inc. v. Griggs & Harrison*, 928 S.W.2d 644, 649 (Tex. App.—San Antonio 1996, writ denied) (recognizing continuing reliability of DTPA, and action for rule 21.21 violations in addition to a *Stowers* claim). *But see PPG Indus., Inc. v. JMB/Houston Ctrs. Partners L.P.*, 146 S.W.3d 79, 91–92 (Tex. 2004) (holding DTPA claim is not assignable and is personal to consumer; an assignment of a DTPA claims violates public policy and thwarts legislative purpose); Chris Wood, *Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 TEX. L. REV. 1373, 1376–77 (1997).

75. *See Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 869–70 (Tex. 1994).

4. Injunctive Relief from Trial or Appellate Courts in Lieu of Supersedeas

Whether or not supersedeas or other appellate security is posted on appeal, a trial court has

76. *See Critz v. Farmers Ins. Group*, 41 Cal. Rptr. 401, 410 (Cal. Dist. Ct. App. 1964).

77. *Rawlings v. Apodaca*, 726 P.2d 565, 575 (Ariz. 1986).

78. *See United Servs. Auto. Ass'n v. Morris*, 741 P.2d 246, 252–53 (Ariz. 1987); *Steil v. Fla. Physicians' Ins. Reciprocal*, 448 So. 2d 589, 592 (Fla. Dist. Ct. App. 1984); Reagan M. Brown, *Defending Against the Sweetheart Deal*, in STATE BAR OF TEX. PROF. DEV. PROGRAM, SUIING, DEFENDING AND NEGOTIATING WITH INSURANCE COMPANIES I, I-18 (1991).

79. Quinn, *supra* note 63, at 1237.

80. Wood, *supra* note 74, at 1377.

81. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

82. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 3 (Tex. 1986); *Gen. Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 n.1 (Tex. 1977).

83. *Elbaor*, 845 S.W.2d at 250.

84. *Id.*

jurisdiction to enjoin a judgment debtor from dissipating or transferring assets to avoid satisfaction of a judgment, provided the trial judge may not enter an order that interferes with the judgment debtor's use, transfer, conveyance or dissipation of assets in the normal courses of business.⁸⁵

May an appellant who cannot post a supersedeas bond, but who could fashion a security plan to adequately protect the appellee's interest in the judgment pending appeal, successfully seek from the appellate court in which an appeal is pending injunctive relief staying enforcement of the trial court judgment? This would seem to be a logical avenue of relief. However, the original jurisdiction of Texas appellate courts is limited to the issuance of writs of injunction only as is necessary to protect appellate jurisdiction.⁸⁶

There is a divergence of opinion among the Texas courts of appeal as to whether this authority extends to their issuance of a temporary injunction to stay a trial court judgment when no supersedeas bond has been posted, as "necessary to protect appellate jurisdiction."⁸⁷ Arguably, the sounder view is that injunctive relief is not necessary to preserve appellate jurisdiction under these circumstances. Three reasons come to mind. First, the posting of a supersedeas bond is not jurisdictional to an appeal. Second, if execution should issue on the judgment pending appellate consideration, the appeal is not ordinarily mooted.⁸⁸ Third, if the trial court judgment is reversed on appeal, the appellee is liable in restitution to the appellant for the fair market value of any property seized through execution.⁸⁹ Thus, Texas civil appellate jurisdiction is not ordinarily threatened by involuntary judgment

execution.⁹⁰ A judgment debtor voluntarily and unconditionally satisfying a judgment pending appeal, on the other hand, faces dismissal. Under these circumstances, there being no case or controversy, the appeal may properly be dismissed as moot.⁹¹

Perhaps the most persuasive support for the lack of appellate court power to enjoin trial court judgment enforcement is that the Texas rules prohibit this action, at least as to interlocutory appeals. Texas appellate rules governing interlocutory appeals confer power on the appellate courts to issue temporary orders necessary to preserve the rights of the parties until disposition of the appeal, but provide that such orders are inappropriate and "must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas."⁹² Logically, that same prohibition applies to an appeal from a final judgment. Accordingly, Texas appellate courts should not issue injunctive relief as a substitute for supersedeas or other appellate security required to forestall execution. Such action is not necessary to protect its jurisdiction.⁹³

District and county courts enjoy broader injunctive relief powers as part of their original jurisdiction.⁹⁴ Texas trial courts have the authority to enjoin execution of their judgments pending review by bill of review. This is so, even though no appeal was taken or supersedeas filed.⁹⁵ While the mere filing of a bill of review does not affect the finality or enforceability of the judgment it challenges,⁹⁶

85. See TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(e) (Vernon 2004); TEX. R. APP. P. 24.2(d).

86. See TEX. GOV'T CODE ANN. § 22.221(a) (Vernon 1997); see also EMW Mfg. Co. v. Le mons, 724 S.W.2d 425, 426 (Tex. App.—Fort Worth 1987, no writ); Madison v. Martinez, 42 S.W.2d 84, 86 (Tex. Civ. App.—Dallas 1931, writ ref'd).

87. Compare Pace v. McEwen, 604 S.W.2d 231, 233 (Tex. Civ. App.—San Antonio 1980, orig. proceeding) (holding court is not deprived of power to issue injunction because relator has adequate remedy at law through supersedeas), with Burch v. Johnson, 445 S.W.2d 631, 632 (Tex. Civ. App.—El Paso 1969, orig. proceeding) (holding relator having adequate remedy at law through supersedeas not entitled to injunctive relief), and Dallas Bank & Trust Co. v. Thompson, 78 S.W.2d 740, 740 (Tex. Civ. App.—Dallas 1935, orig. proceeding) (holding availability of supersedeas remedy prevents injunctive relief).

88. See Employees Fin. Co. v. Lathram, 369 S.W.2d 927, 930 (Tex. 1963); Cravens v. Wilson, 48 Tex. 321, 323 (1877).

89. TEX. CIV. PRAC. & REM. CODE ANN. § 34.022 (Vernon 1997).

90. See *id.*; Tex. Trunk R.R. v. Jackson, 22 S.W. 1030, 1031 (Tex. 1893), *overruled on other grounds*, Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 5 (Tex. 1986); Medina v. El Paso Mach. & Steel Works, Inc., 740 S.W.2d 99, 101 (Tex. App.—El Paso 1987, no writ).

91. Miga v. Jensen, 96 S.W.3d 207, 211 (Tex. 2002) (acknowledging that a litigant must be able to halt the accrual of post-judgment interest and yet preserve the right to appeal); *Employees Fin. Co.*, 369 S.W.2d at 930; *Connell v. B. L. McFarland Drilling Contractor*, 347 S.W.2d 565, 567 (Tex. 1961).

92. TEX. R. APP. P. 29.3.

93. *Butron v. Cantu*, 960 S.W.2d 91, 95 (Tex. App.—Corpus Christi 1997, no writ) (holding that enjoining recovery on the supersedeas bond is the same as enjoining executioner collection of the judgment); *EMW Mfg. Co. v. Lemons*, 724 S.W.2d 425, 426 (Tex. App.—Fort Worth 1987, no writ).

94. See TEX. CIV. PRAC. & REM. CODE ANN. § 65.013 (Vernon 1997); see also *McVeigh v. Lerner*, 849 S.W.2d 911, 914 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

95. *City of Houston v. Hill*, 792 S.W.2d 176, 179 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd by agr.).

96. *Schwartz v. Jefferson*, 520 S.W.2d 881, 889 (Tex. 1975).

injunctive relief from enforcement may be proper.⁹⁷ On the other hand, filing supersedeas will not suspend enforcement of a judgment attacked only by bill of review, if no appeal is pending.⁹⁸

III. THE RIGHT TO SUPERSEDE

A. General Right to Supersede

Execution on appealable judgments and orders may be superseded unless otherwise provided by statute. Superseding a money judgment exists as a matter of right pending appeal.⁹⁹ This right is not limited to judgments that require a writ of execution or other process for enforcement, but also extends to self-executing judgments.¹⁰⁰ There is, of course, no need to file supersedeas as to a take-nothing judgment. Likewise, a judgment merely declaring rights of parties is suspended upon perfection of appeal without the necessity of a bond.¹⁰¹ As to judgments for the recovery of property, the trial court sets the proper amount of the security.¹⁰² As to judgments for something other than money or an interest in property, supersedeas is within the discretion of the court.¹⁰³ However, judgments in certain cases are not to be stayed pending appeal.

B. Exceptions

By mandate of statute or rule, execution on judgments in a narrow class of cases may not be stayed. Included within this prohibition are:

1. Texas Alcoholic Beverage Commissioner orders “refusing, canceling, or suspending a permit or license”;¹⁰⁴
2. Appointment of receivers in a shareholder derivative action;¹⁰⁵
3. Suspension of a license to practice law;¹⁰⁶
4. Child support or custody orders unless specifically ordered by the trial court; and¹⁰⁷
5. Orders denying interlocutory relief.¹⁰⁸

Still some judgments may be stayed only within the discretion of the court. For example, the trial court may permit an order granting interlocutory relief to be suspended pending an appeal from the order, in which case the appellant may supersede the order as in other cases. However, if the trial court refuses to permit an order granting interlocutory relief to be superseded pending appeal, the appellant may move the appellate court to review that decision for abuse of discretion. The taking of an interlocutory appeal of an order allowed under section 51.014 of the Texas Civil Practice and Remedies Code, “stays the commencement of a trial in the trial court pending resolution of the appeal,”¹⁰⁹ except as to appeals pertaining to temporary injunctions.¹¹⁰ As to interlocutory appeals of a class certification order, a denial of summary judgment based upon an assertion of immunity, or the granting or denial of a plea to the jurisdiction by a governmental unit, in which a notice of appeal is filed on or after September 1, 2003, the

97. *Am. Fid. Fire Ins. Co. v. Pixley*, 687 S.W.2d 50, 51 (Tex. App.—Houston [14th Dist.] 1985, no writ).

98. *Kantor v. Herald Publ’g Co.*, 632 S.W.2d 656, 657–58 (Tex. App.—Tyler 1982, no writ).

99. *See Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941) (orig. proceeding); *State ex rel. State Highway & Pub. Transp. Comm’n. v. Schless*, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding); *Cont’l Oil Co. v. Leshner*, 500 S.W.2d 183, 185 (Tex. Civ. App.—Houston [1st Dist.] 1973, orig. proceeding [leave denied]); *W. Wendell Hall, Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY’S L.J. 1045, 1130 (1993) (finding “the right to supersedeas is absolute and enforceable by mandamus”); *see also* TEX. R. APP. P. 24.1.

100. *Houtchens v. Mercer*, 29 S.W.2d 1031, 1037 (Tex. Comm’n App. 1930, judgment adopted) (orig. proceeding).

101. *In re Marriage of Richards*, 991 S.W.2d 30, 31–32 (Tex. App.—Amarillo 1998, no pet.). A judgment merely declaring rights of parties is suspended upon perfection of appeal without the necessity of a bond. Thus, the trial court erred in requiring a bond in the amount of \$2,000, when the trial court’s judgment merely declared the status of the parties as divorced and approved a property division agreement entered into by the parties, but did not provide for a money judgment. *Id.* The appellate court observed, “[B]ecause the decree is declaratory, . . . the common law rule that the judgment is suspended when the appeal is perfected is applicable.” *Id.* at 32.

102. *See infra* Part III.E.

103. *See infra* Part III.D.

104. TEX. ALCO. BEV. CODE ANN. § 11.67(a), (b)(4) (Vernon 1995).

105. *See Providential Inv. Corp. v. Dibrell*, 320 S.W.2d 415, 418 (Tex. Civ. App.—Houston 1959, orig. proceeding).

106. *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 832 (Tex. 1980) (orig. proceeding).

107. *See* TEX. FAM. CODE ANN. § 109.002 (Vernon Supp. 2002); *see also* *Smith v. Smith*, 63 S.W.3d 599, 600 (Tex. App.—Waco 2002, no pet.) (Gray, J., dissenting) (noting that “[t]he noble purpose of this legislative prohibition is to prevent a parent from escaping support duties by filing an appeal”); *Morris v. Morris*, 654 S.W.2d 789, 790–91 (Tex. App.—Tyler 1983, no writ).

108. TEX. R. APP. P. 29 cmt.

109. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2004); *Tarrant Reg’l Water Dist. v. Gragg*, 962 S.W.2d 717, 718–19 (Tex. App.—Waco 1998, no pet.) (“[W]e feel compelled by subsection (b) of section 51.014 to stay a trial of any part of the proceeding that may be affected by our decision in the interlocutory appeal now before us.”); *see also* TEX. R. APP. P. 29.5 cmt.

110. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b).

interlocutory appeal “also stays all other proceedings in the trial court pending resolution of that appeal,”¹¹¹ provided the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

- (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or
- (2) the 180th day after the date the defendant files:
 - (A) the original answer;
 - (B) the first other responsive pleading to the plaintiff’s petition; or
 - (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.¹¹²

Only particular types of parties may suspend the enforcement of some judgments. For example, civil rule 755 provides that a writ of possession in a forcible entry and detainer suit cannot be superseded by an appeal from a judgment in the county court unless the premises are used as the principal residence of a party.¹¹³ Even when the premises are used as the principal residence of a party so that an appeal will lie from the county court judgment, statutory restrictions mandate that the forcible judgment may not be stayed “pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.”¹¹⁴ Thus, absent

111. *Id.* Amended by section 1.03 of H.B. 4 effective as to cases in which a notice of appeal is filed on or after Sept. 1, 2003.

112. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(c)(1)–(2).

113. TEX. PROP. CODE ANN. § 24.007 (Vernon 2000); see TEX. R. CIV. P. 755; *McCartney v. Cal. Mortgage Serv.*, 951 S.W.2d 549, 550 (Tex. App.—El Paso 1997, no writ) (holding occupants’ appeal alone did not supersede writ of possession entered in a forcible entry and detainer suit); *Chang v. Resolution Trust Corp.*, 814 S.W.2d 543, 544–45 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding). However, it appears that issues not related to possession, such as the propriety of attorney’s fees may be the proper subjects of appellate review. See *Carlson’s Hill Country Beverage, L.C. v. Westinghouse Rd. Joint Venture*, 957 S.W.2d 951, 955–56 (Tex. App.—Austin 1997, no pet.); *Acad. Corp. v. Sunwest N.O.P., Inc.*, 853 S.W.2d 833, 833–34 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

114. TEX. PROP. CODE ANN. § 24.007. Arguably this statute is invalid as it has been held that a mandatory duty to

supersedeas the landlord may seek a writ of possession, and the appeal of the forcible detainer action, it has been held, is rendered moot.¹¹⁵

When a judgment is in favor of a governmental entity, in its governmental capacity, and when the entity has no pecuniary interest, the trial judge has discretion to suspend enforcement security.¹¹⁶ The court is to consider the harm likely to result to the judgment debtor if enforcement is not suspended, as well as the harm “likely to result to others if enforcement is suspended.”¹¹⁷

C. Historical Basis for Trial Court Discretion in Allowing Supersedeas

“Supersedeas” has been defined as “[a] suspension of the power of a trial court to issue an execution on judgment appealed from.”¹¹⁸ Originally, the legislature conferred an absolute right to supersede civil judgments throughout the appellate process by the adoption of articles 2270 and 2275.¹¹⁹ These statutes provided:

Art. 2270. Supersedeas bond.—An appellant or plaintiff in error, desiring to suspend the execution of the judgment may do so by giving a good and sufficient bond to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgment, interest and

post supersedeas as a prerequisite to appeal is unconstitutional and violates the open courts guarantee. See *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 484–85 (Tex. 1993); see also *Carlson*, *supra* note 1, at 33–34.

115. *Kemper v. Stonegate Manor Apartments, Ltd.*, 29 S.W.3d 362, 363 (Tex. App.—Beaumont 2000, pet. dismissed w.o.j.). But see *Marshall v. Housing Authority of San Antonio*, No. 04-02-00821-CV, 2003 WL 22794301, at *1 (Tex. App.—San Antonio Nov. 26, 2003, pet. granted).

116. TEX. R. APP. P. 24.2(a)(5). But see *In re S. Tex. Coll. of Law*, 4 S.W.3d 219, 220 (Tex. 1999) (Hecht, J., dissenting) (stating in dissent that when a judgment creditor is a governmental entity that has no pecuniary interest in a judgment in its favor, Appellate Rule 24.2(a)(5) applies in determining whether the judgment should be superseded). “This provision, unlike Rule 24.2(3), gives the trial court discretion to consider the public’s interest in enforcing the judgment pending appeal, as well as the judgment debtor’s interest in suspension of enforcement.” *Id.*

117. TEX. R. APP. P. 24.2(a)(5).

118. BLACK’S LAW DICTIONARY 1437 (6th ed. 1990).

119. See Act of 1892, 22d Leg., 1st C.S., art. 2270, 1892 Tex. Gen. Laws 42, reprinted in 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 810 (Austin, Gammel Book Co. 1898); Act of 1846, 1st Leg., R.S., art. 2275, 1846 Tex. Gen. Laws 363, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 811 (Austin, Gammel Book Co. 1898); see also *Waters-Pierce Oil Co. v. State*, 106 S.W. 326, 330 (Tex. 1907).

costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect; and in case judgment of the Supreme Court or the court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as the court may award against him.

Art. 2275. Judgment Stayed.—Upon the filing of a proper supersedeas bond, the appeal or writ of error shall be held to be perfected, and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a supersedeas.¹²⁰

These statutory provisions did not except from their operation any class of judgments and all civil judgments could be superseded upon posting a proper bond.¹²¹ With the adoption of the Texas Rules of Civil Procedure, articles 2270 and 2275 were re-enacted in Rules 364 and 368 “practically word for word from said articles and the reasoning relative to the construction given laws reenacted with the same language . . . applies.”¹²² Rule 364 was therefore construed to continue the absolute right of civil litigants to supersede judgments of all types upon posting a proper bond.¹²³

Effective April 1, 1984, Texas Rule of Civil Procedure 364 was amended to provide, for the first time, trial court discretion to disallow supersedeas in certain kinds of cases.¹²⁴ In particular, subsection (f) was amended to cloak the trial judge with discretion whether to allow supersedeas in cases when the judgment did not involve money, property or foreclosure. The trial court could decline to permit the judgment to be superseded upon filing by the judgment creditor of security to be ordered by the trial court in such an amount as will secure the judgment debtor in any loss or damage caused by an relief granted if it determined on final disposition that such relief was improper.¹²⁵

120. TEX. REV. CIV. STATS. ANN. arts. 2270, 2275 (Vernon 1925).

121. *Houtchens v. Mercer*, 29 S.W.2d 1031, 1037 (Tex. 1930) (orig. proceeding).

122. *Lumbermen’s Ins. Corp. v. State*, 364 S.W.2d 429, 432 (Tex. Civ. App.—Austin 1963, writ ref’d n.r.e.).

123. *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481 (Tex. 1964) (orig. proceeding).

124. TEX. R. CIV. P. 364, 47 TEX. B.J. 28 (Tex. 1984, repealed 1986); see also *Hill v. Fourteenth Court of Appeals*, 695 S.W.2d 554, 555 (Tex. 1985) (orig. proceeding).

125. TEX. R. CIV. P. 364(f), 47 TEX. B.J. 28 (Tex. 1984, repealed 1997); *Hill*, 695 S.W.2d at 555.

In *Hill v. Fourteenth Court of Appeals*, the Texas Supreme Court upheld a trial court order disallowing an election contest judgment to be superseded, disapproving of contrary holdings decided before the effective date of the rule amendment.¹²⁶ The purpose of this rule amendment is to “permit a trial court to deny supersedeas . . . conditioned upon the setting of a bond sufficient to protect the appealing party’s interests.”¹²⁷ Thus, for example the trial court might deny superseding a permanent injunction so that it remains effective throughout the appeal, provided the judgment winner secures the loser as to loss or damage should the appellate court ultimately determine supersedeas should have been allowed.

The adoption of the Texas Rules of Appellate Procedure resulted in the repeal of Rule 364 and the verbatim re-enactment as Rule 47(f).¹²⁸

D. Current Discretion of Trial Court to Allow Superseding of Judgments

1. Judgments Other than for Money or Property

Texas Rule of Appellate Procedure 24.2(a)(3) is the successor version of Rule 47(f). This rule continues trial court discretion to allow supersedeas and applies to judgments for “something other than money or an interest in property.”¹²⁹ The operation of the rule remains substantially unchanged except it no longer enumerates foreclosure judgments as within its application. Although former Rule 47(f) was poorly drafted, recently promulgated Rule 24.2(a)(3) is not a vast improvement. It provides:¹³⁰

When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage

126. *Hill*, 695 S.W.2d at 555.

127. *Klein Indep. Sch. Dist. v. Fourteenth Court of Appeals*, 720 S.W.2d 87, 88 (Tex. 1986) (orig. proceeding).

128. TEX. R. CIV. P. 364, 47 TEX. B.J. 28 (Tex. 1984, repealed 1986); TEX. R. APP. P. 47, 49 TEX. B.J. 571 (Tex. 1986, repealed 1997); see also *State ex rel State Highway & Pub. Transp. Comm’n v. Schless*, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding [leave denied]).

129. TEX. R. APP. P. 24.2(a)(3).

130. Smokers beware, because of the length of the third sentence, it should be read aloud only by a non-smoker in good health!

caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.¹³¹

It appears that the trial judge retains authority to decline suspension in cases other than money or property judgments, even when the judgment loser is willing to post supersedeas as ordered by the court. However, in that instance the judgment *winner* must put up security of an amount and type determined by the Court that will protect the judgment loser from damage should it ultimately be determined on appeal that the judgment debtor should have been allowed to supersede the judgment against it. In effect, the judgment creditor supersedes the judgment debtor's ability to supersede. Conceptually, this is not unlike the procedural mechanism of allowing a replevy bond to prevent execution on a prejudgment writ of sequestration, attachment, or garnishment.¹³²

The trial court discretion to deny suspension by supersedeas of the "other judgment" unless the judgment winner files a bond or makes a deposit in the amount determined by the trial court necessary is to protect the judgment loser from "any loss or damage" resulting from its inability to supersede.¹³³ The term "loss or damage" refers to "monetary or material losses ascertainable by proof, either by the judgment itself, or, where that is not conclusive, by evidence relating to proof of damages generally."¹³⁴

2. General Discretion and the Right to Suspend Appellate Rules

The trial court continues to have the general discretion to "make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause."¹³⁵

Texas Rule of Appellate Procedure 2 empowers an appellate court, in civil cases, to "suspend a rule's operation in a particular case and order a different procedure" as is necessary "to expedite a decision or for other good cause."¹³⁶ One court has suggested that "[t]he rule is reserved for cases where suspending a rule will actually facilitate processing the case through

the appellate court."¹³⁷ It remains to be seen the extent of this authority or how it implicates supersedeas practice.

E. Security Amount When Judgment is for Recovery of an Interest in Real or Personal Property

The trial court enjoys discretion in setting the amount of supersedeas required to suspend execution on a judgment awarding an interest in property.

The Fort Worth Court of Appeals observed in *Culbertson v. Brodsky* that the rules provisions affording this power were not a model of clarity:

Sections (c), (d), and (f) of Rule 47 are respectively the successors to sections (b), (c), and (e) of TEX.R.CIV.P. 364 [sic], as originally adopted in 1940. Despite the fact that these subparts of the rule have remained substantially unchanged for nearly fifty years, there is a dearth of authority interpreting or applying them. There is, for instance, no explanation of the difference between a Rule 47(c) judgment for the recovery of land and a Rule 47(d) judgment for the recovery of real estate. Similarly, no opinion or secondary authority that we can discover explains why Rule 47(c) states that a bond shall be conditioned, that the judgment debtor shall pay the judgment creditor *the value of the rent or hire of such property* during the appeal while Rule 47(d) requires that the bond shall be *not less than the rents and hire of said real estate*. Neither 47(c) nor (d), however, precludes the trial court from setting the amount of security necessary to suspend execution of judgment at an amount which is greater than the compensation for the use and occupancy of the land.¹³⁸

Texas Rule of Appellate Procedure 24.2(a)(2) is the successor version of Rule 47(c) and (d), collapsing those two subsections into one, so that all provisions regarding superseding a judgment for an interest in property are merged.¹³⁹ For real property, the security must be at least the value of the property interest's rent or revenue. The security for a judgment of personal property must be at least the value of the property interest on the date the court rendered judgment.¹⁴⁰

131. TEX. R. APP. P. 24.2(a)(3).

132. *See, e.g.*, TEX. R. CIV. P. 664, 701.

133. *See* Delhi Gas Pipeline Corp. v. Hassell, 730 S.W.2d 159, 161 (Tex. App.—Tyler 1987, orig. proceeding) (construing predecessor version of TEX. R. APP. P. 47(f)).

134. Los Campeones, Inc. v. Valley Int'l Props., Inc., 591 S.W.2d 312, 314 (Tex. Civ. App.—Corpus Christi 1979, no writ).

135. TEX. R. APP. P. 24.1(e).

136. *Id.* 2.

137. Mills v. Haggard, 17 S.W.3d 462, 463 (Tex. App.—Waco 2000, no pet.).

138. Culbertson v. Brodsky, 775 S.W.2d 451, 453 (Tex. App.—Fort Worth 1989, writ dismissed w.o.j.).

139. TEX. R. APP. P. 24.2 cmt.

140. *Id.* 24.2(a)(2).

F. Superseding Orders Granting Interlocutory Relief

“The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order”¹⁴¹ In that event, the appellant may supersede the order as in other cases.¹⁴²

A trial court’s denial of a stay of an order granting interlocutory relief is reviewable, on motion to the appropriate appellate court, under an abuse of discretion standard.¹⁴³ The appellate court “may make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal and may require appropriate security . . . [however,] if the appellant’s rights would be adequately protected by supersedeas” the appellate court “must not suspend the trial court’s order.”¹⁴⁴ An order denying interlocutory relief cannot be suspended.¹⁴⁵

The taking of an interlocutory appeal of an order allowed under section 51.014 of the Texas Civil Practice and Remedies Code, “stays the commencement of a trial in the trial court pending resolution of the appeal,”¹⁴⁶ except as to appeals pertaining to temporary injunctions.¹⁴⁷ Even in appeals reviewing temporary injunctions, the trial court may not otherwise act in the case pending the appeal if to do so would interfere or impair the jurisdiction of the appellate court.¹⁴⁸ As to interlocutory appeals of a class certification order, a denial of summary judgment based upon an assertion of immunity, or the granting or denial of a plea to the jurisdiction by a governmental unit, in which a notice of appeal is filed on or after September 1, 2003, the interlocutory appeal “also stays

all other proceedings in the trial court pending resolution of that appeal.”¹⁴⁹

IV. PREREQUISITES TO SUPERSEDING JUDGMENTS

A. Appealable Order or Judgment

An order or judgment whose enforcement is sought to be superseded must be appealable.¹⁵⁰ Only a final judgment may be appealed,¹⁵¹ unless there is statutory authority to the contrary.¹⁵² The judgment may result from a traditional evidentiary trial or from an original proceeding initiated in the trial court.¹⁵³

Absent a conventional trial on the merits, a judgment is not presumed final.¹⁵⁴ Hence, no presumption of finality is accorded to default or summary judgments.¹⁵⁵

A turnover order that does not contemplate additional court supervision may be sufficiently final for appellate review.¹⁵⁶ Often turnover orders are in the nature of injunctions and, thus, if the court’s action is complete, these orders should be subject to review. Supersedeas is available to suspend enforcement of a turnover order.¹⁵⁷

149. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (as amended by section 1.03 of H.B. 4 effective as to cases in which a notice of appeal is filed on or after Sept. 1, 2003).

150. *See* *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991) (orig. proceeding).

151. *See* *N.E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). A judgment may be final for appeal purposes, even though the trial court should have entered an interlocutory order. *See* *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192 (Tex. 2001); *Carlson & Dunn*, *supra* note 18, at 958.

152. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b); *N.Y. Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678 (Tex. 1990); *Schlipf v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex. 1982).

153. *Anderson*, 806 S.W.2d at 794.

154. *See* *Lehmann*, 39 S.W.3d at 195; *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding).

155. *See* *Houston Health Clubs, Inc.*, 722 S.W.2d at 693; *Etter’s Welding, Inc. v. Gainesville Nat’l Bank*, 687 S.W.2d 521, 522 (Tex. App.—Fort Worth 1985, no writ); *see also* *Carlson & Dunn*, *supra* note 18, at 965.

156. *Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1982) (orig. proceeding), *overruled on other grounds*, *In re Sheshtawy*, 154 S.W.3d 114, 124 (Tex. 2004).

157. *See Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941) (orig. proceeding) (recognizing that on permanent injunction appellant has absolute right to supersede); *Elizondo v. Williams*, 643 S.W.2d 765, 767 (Tex. App.—San Antonio 1982, no writ) (holding that temporary injunction appellant may seek supersedeas but the decision is in trial court’s discretion).

141. *Id.* 29.2.

142. *Id.*

143. *Id.* (governing the suspension of interlocutory orders pending review by the appellate courts, and providing that a trial court may allow an order granting interlocutory relief to be suspended pending an appeal if security is filed pursuant to Appellate Rule 24).

144. *Id.* 29.3.

145. *Id.* 29.3 cmt.

146. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2004); *Tarrant Reg’l Water Dist. v. Gragg*, 962 S.W.2d 717, 719 (Tex. App.—Waco 1998, no pet.) (“[W]e feel compelled by subsection (b) of section 51.014 to stay a trial of any part of the proceeding that may be affected by our decision in the interlocutory appeal now before us.”); *see also* TEX. R. APP. P. 29.5 cmt.

147. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b).

148. *Lee-Hickman’s Invs. v. Alpha Invesco Corp.*, 139 S.W.3d 698, 702 (Tex. App.—Corpus Christi 2004, no pet.) (granting summary judgment pending appeal of denial of temporary injunction by trial court was error as it impaired the jurisdiction of the appellate court, now required to dismiss the appeal due to the final judgment).

To be considered final, a judgment must be certain, so that it can be enforced by writ of execution.¹⁵⁸ Ministerial officers must be able to carry the judgment into execution without the necessity of ascertaining additional facts.¹⁵⁹ A judgment awarding an unascertainable amount of money cannot be final.¹⁶⁰

Appellate courts have no jurisdiction over an appeal from a trial court's interlocutory ruling absent statutory authority.¹⁶¹ However, when compliance with interlocutory orders would effectively threaten a party's continuation of litigation, and no appellate review is allowed, it is not performable until a final judgment is rendered. This allows for meaningful appellate review of interlocutory orders not appealable before final judgment. For example, the payment of monetary sanctions for discovery abuse in an amount so severe as to inhibit the continuation of suit must be deferred until rendition of a final judgment so as to allow for supersedeas and meaningful appellate review of the sanction order.¹⁶²

B. Pending Appeal

A judgment or order whose enforcement is sought to be suspended must be the subject of an actual pending appeal. A bill of review proceeding is not a pending appeal.¹⁶³ However, review of a final judgment by a restricted appeal (formerly known as a writ of error) or from original proceedings initiated in the trial court, qualifies.¹⁶⁴

After exhaustion of *all* appellate remedies, or of the time for seeking appellate review, execution on a valid and subsisting judgment cannot be stayed. Accordingly, if the unsuccessful litigant fails to properly perfect its appeal, the judgment or order may not be superseded.¹⁶⁵

158. *Jones v. Liberty Mut. Ins. Co.*, 733 S.W.2d 240, 242 (Tex. App.—El Paso 1987), *rev'd on other grounds*, 745 S.W.2d 901 (Tex. 1987).

159. *Mueller v. Banks*, 317 S.W.2d 256, 256 (Tex. Civ. App.—San Antonio 1958, no writ).

160. *Jones*, 733 S.W.2d at 242.

161. *See Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985) (orig. proceeding); *Henderson v. Shell Oil Co.*, 182 S.W.2d 994, 995 (Tex. 1944); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1987, no writ); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004); TEX. R. CIV. P. 76a.

162. *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding).

163. *See City of Houston v. Hill*, 792 S.W.2d 176, 179 (Tex. App.—Houston [14th Dist.] 1990, writ *dism'd* by *agr.*); *Kantor v. Herald Publ'g Co.*, 632 S.W.2d 656, 658 (Tex. App.—Tyler 1982, no writ).

164. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 (Tex. 1991) (orig. proceeding).

165. *See* TEX. R. APP. P. 25.1(g) (stating that appellate

The 1997 amendments to the Texas Rules of Appellate Procedure require that any party seeking a more favorable judgment than rendered by the trial court must perfect their own appeal as an appellant.¹⁶⁶ Successive appeals are allowed.¹⁶⁷ Both original and successive appellants should consider posting supersedeas or other security to suspend execution of the unfavorable portion of a judgment upon which they seek review.¹⁶⁸ This could include a judgment on the merits as well as one for sanctions imposed for discovery abuse or the like.¹⁶⁹ A successful party's appeal will not serve to supersede the losing litigant's judgment.¹⁷⁰

It should be noted that when a judgment of another state or any judgment entitled to full faith and credit is on appeal or the time to appeal has not expired or a stay of execution is sought in that jurisdiction or appellate security has been or will be provided in that jurisdiction, a Texas court should stay enforcement until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is

jurisdiction not invoked and no supersedeas allowed); *Summit Savs. Ass'n v. Garcia*, 727 S.W.2d 106, 107 (Tex. App.—San Antonio 1987, orig. proceeding) (refusing to supersede turnover order in absence of perfected appeal); *EMW Mfg. Co. v. Lemons*, 724 S.W.2d 425, 427 (Tex. App.—Fort Worth 1987, no writ) (holding that temporary injunction will not issue in lieu of supersedeas to stay execution); *Kantor*, 632 S.W.2d at 658 (recognizing that judgment in suit underlying bill of review could not be superseded by trial or appellate court); *Blackmon v. Blackmon*, 525 S.W.2d 711, 713 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (holding that order subsequent to judgment not superseded by superseding judgment).

166. TEX. R. APP. P. 25.1(c) (overruling *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 639 (Tex. 1989)).

167. *Id.* 26.1(d).

168. In *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 653 (Tex. 1987), decided under former Appellate Rule 40(c)(4), plaintiff had obtained a verdict of \$50,000. After the trial court granted a partial j.n.o.v. as to exemplary damages, the plaintiff was awarded \$15,000 in the judgment. *Id.* The plaintiff appealed the grant of the partial j.n.o.v.; therefore the defendant had to post a supersedeas bond to prevent execution on the \$15,000 judgment that it intended to challenge by cross points in its appellee's brief. *Id.* Under Appellate Rule 25.1(c), any party must independently bring an appeal when seeking a more favorable judgment and supersede to prevent judgment enforcement.

169. *See Braden v. Downey*, 811 S.W.2d 922, 928–29 (Tex. 1991) (orig. proceeding); *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919–20 (Tex. 1991) (orig. proceeding).

170. *Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 (5th Cir. 1990).

vacated.¹⁷¹ Further, if the judgment debtor establishes a ground on which enforcement of a Texas judgment would be stayed, the Texas court must stay enforcement of the foreign judgment for an appropriate period and require the same security for suspending enforcement as would be required to suspend enforcement of a Texas judgment.¹⁷²

V. EFFECT OF FILING SUPERSEDEAS OR LEGAL EQUIVALENT

A. In General

Judgment enforcement is suspended upon the filing and approval of a proper supersedeas bond or its legal equivalent.¹⁷³ If execution has issued, the clerk must immediately issue a writ of supersedeas when appellate security is posted.¹⁷⁴

Providing appellate security does not preclude the recordation of an abstract of judgment to affix a lien on real property of the judgment debtor, except as restricted by court order or agreement.¹⁷⁵ However, the abstract filing does not constitute a lien on the real property of a defendant if the defendant has posted security as provided by law or is excused from posting security. An order fixing liens on personal property after a judgment is superseded is improper.¹⁷⁶

A judgment may be final for purposes of collateral estoppel and *res judicata* while on appeal notwithstanding a stay of enforcement is operative.¹⁷⁷

Discovery that aids the enforcement of a judgment is ordinarily not permissible once a judgment has been superseded pending appeal. However, post-judgment discovery is permissible to allow a party to assess the continuing sufficiency of the supersedeas, deposit, sureties, or other security posted to suspend execution

171. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.006(a) (Vernon Supp. 2004); *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 484–85 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

172. TEX. CIV. PRAC. & REM. CODE ANN. § 35.006(b).

173. Legal equivalents include cash deposits, proper notice of appeal by exempt entities, court-approved alternate security, or supersedes by private agreement. TEX. R. APP. P. 24.1.

174. *Id.* 24.1(f).

175. See *Group Purchases, Inc. v. Lance Invs., Inc.*, 685 S.W.2d 729, 731 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Roman v. Goldberg*, 7 S.W.2d 899, 899–900 (Tex. Civ. App.—Waco 1928, writ ref'd); *Ford v. State*, 209 S.W. 490, 492 (Tex. Civ. App.—Austin 1919, no writ); see also TEX. PROP. CODE ANN. § 52.001 (Vernon 2004).

176. *Powell v. Powell*, 822 S.W.2d 181, 185 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

177. See *Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 302 (Tex. 1988) (orig. proceeding); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 7 (Tex. 1986).

or in connection with a motion allowed under Appellate Rules 24 and 29.¹⁷⁸

A trial court's loss of plenary power, however, will prevent it from making any further rulings relative to the merits of the controversy. Perfection of an appeal "terminates the authority of the lower court pending the appeal" with respect to any matter relating to the subject matter of the appeal or that might interfere with appellate functions.¹⁷⁹ However, notwithstanding the invocation of appellate jurisdiction, a trial court may punish a party with contempt for disobeying a judgment, when a supersedeas bond or other security has not been posted.¹⁸⁰

B. Discovery Pertaining to Appellate Security

Either party may conduct discovery at any time after final judgment rendition for the purpose of obtaining information relevant to enforcement or pertaining to security on appeal.¹⁸¹ Discovery procedures for conducting pre-trial discovery may be utilized post-judgment to discover assets.¹⁸² The appellate courts are not in agreement as to the extent of a visiting judge's authority to entertain post-judgment discovery matters following the loss of plenary power.¹⁸³

During the appeal, intervening circumstances may mandate trial court modification of the amount of a

178. TEX. R. CIV. P. 621a.

179. See *Ex parte Travis*, 73 S.W.2d 487, 489 (Tex. 1934) (orig. proceeding) (determining that when temporary injunction is appealed by cost bond, trial court loses jurisdiction with respect to those matters that "trench" on appellate functions).

180. See *In re Sheshtawy*, 154 S.W.3d 114, 124–25 (Tex. 2004), *overruling* *Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 744 (Tex. 1991) (orig. proceeding); *Ex parte Boniface*, 650 S.W.2d 776, 778 (Tex. 1983) (orig. proceeding).

181. Discovery is not proper under Rule 621a absent a final judgment. *In re Elmer*, No. 04-04-00795-CV, 2005 WL 154213, at *1 (Tex. App.—San Antonio Jan. 26, 2005, orig. proceeding); see also TEX. R. APP. P. 24.2(c) (granting specific authority to conduct discovery when the judgment debtor is attempting to post appellate security based upon the net worth cap).

182. TEX. R. CIV. P. 621a.

183. *O'Connor v. Smith*, 815 S.W.2d 338, 341 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]) (visiting judge not prohibited from supervising post-judgment discovery in case where visiting judge rendered judgment). *But see Ex parte Holland*, 807 S.W.2d 827, 829 (Tex. App.—Dallas 1991, orig. proceeding) (visiting judge's authority limited to court's plenary power); *First City Bank v. Salinas*, 754 S.W.2d 497, 498 (Tex. App.—Corpus Christi 1988, orig. proceeding) (visiting judge without jurisdiction to take action in case after plenary power expired).

supersedeas bond, the form or type of security, or the sufficiency of the sureties. As discussed more fully below, appellate courts are empowered to review and modify a trial court order of security as warranted.¹⁸⁴ The central function of appellate security is to protect the judgment creditor from the delay or loss occasioned by the appeal.¹⁸⁵ The continual assessment of the security is necessary to effectuate that purpose. Its adequacy is a factual inquiry that may necessitate post-judgment discovery.¹⁸⁶

VI. SUPERSEDEAS PROCEDURE

A. Time to File Appellate Security

There is no prescribed time within which supersedeas or security on appeal must be posted. While the right to post supersedeas may be absolute as to a money judgment, the decision to do so is discretionary. The timing of filing supersedeas or other security is strategic, depending on the action sought to be prevented.

However, an appellant is to indicate on its appellate docketing statement, filed at the time of perfection, its intent to post supersedeas.¹⁸⁷ Supersedeas may be filed at any time the judgment debtor desires to stay future execution on the judgment.¹⁸⁸

To prevent the attachment of or to remove a judgment lien from a debtor's real property, statutory provisions must be followed. To prevent a lien, adequate security must be posted and a finding obtained by the trial court that the creation of a lien would not substantially increase the degree to which a judgment creditor's recovery would be secured when balanced against the costs to the debtor after the exhaustion of all appellate remedies.¹⁸⁹ If the judgment creditor has already created a judgment lien on the debtor's real property by filing an abstract of judgment in the real property records, a motion to release the judgment lien should be filed with the trial court.¹⁹⁰ An order withdrawing the lien is to be filed in the real property records of each county in which the abstract

of judgment or a certified copy of the judgment has been filed.¹⁹¹

A writ of execution may not ordinarily issue until thirty days after the date the judgment is signed, or if a timely motion for new trial is filed, thirty days after its overruling, whether expressly or by operation of law. A timely motion to modify, correct or reform a judgment or a request for findings of fact and conclusions of law properly extends appellate deadlines. However, none of these instruments are expressly delineated as one whose filing will extend a stay of execution, although arguably they do.¹⁹²

An exception allows earlier execution. Upon filing of proper affidavit proof supporting that the judgment debtor is about to secrete its personal assets, the judgment creditor may seek permission for immediate execution. In this instance, execution may be allowed within the thirty-day window following the signing of the trial court judgment.¹⁹³

If a trial court overrules a motion for new trial prior to the expiration of thirty days from the date that judgment is signed, execution may issue.¹⁹⁴ Therefore, even though thirty days have not transpired from the date the judgment is signed, the judgment debtor may wish to post supersedeas or other security to prevent issuance of a writ of execution or levy on such writ. A prior filing of a supersedeas bond, deposit, other adequate security, or proper notice of appeal as to parties not required to post appellate security, may prevent judgment enforcement.

If a writ of execution has issued, the clerk is to forthwith issue a writ of supersedeas to suspend execution upon the filing of supersedeas or its legal equivalent.¹⁹⁵ If proper supersedeas is not provided before an officer levies on intangible personal property, subsequent filing of the same will not prevent delivery of the seized property to the judgment creditor.

Turnover relief is obtainable at any time after a final judgment is signed. A judgment creditor may seek a turnover order without awaiting or obtaining a writ of execution. To prevent entry of a turnover order, a judgment debtor should file supersedeas, or its legal equivalent, upon the signing of the final judgment. The providing of security following the entry of a turnover

184. TEX. R. APP. P. 24.4.

185. *Id.* 24.1(c).

186. TEX. R. CIV. P. 621a (requiring post-judgment discovery should be initiated in same suit and court in which judgment is rendered).

187. TEX. R. APP. P. 32.1.

188. *See* S.W. States Gen. Corp. v. McKenzie, 658 S.W.2d 850, 852 (Tex. App.—Dallas 1983, writ dismissed); Cashion v. Cashion, 239 S.W.2d 742, 744 (Tex. Civ. App.—Waco 1951, no writ); Heath v. Elliston, 135 S.W.2d 512, 513 (Tex. Civ. App.—Amarillo 1939, orig. proceeding).

189. TEX. PROP. CODE ANN. § 52.0011(a) (Vernon 1995).

190. *Id.* § 52.0011(b).

191. *Id.*

192. TEX. R. CIV. P. 627.

193. *Id.* 628.

194. *Id.* 627.

195. TEX. R. APP. P. 24.1(f). Should a garnishment issue due to the absence of supersedeas, arises a trial court apparently may dissolve the writ on motion, once proper supersedeas is filed and before judgment is entered. Cantu v. Butron, 905 S.W.2d 718, 719 (Tex. App.—Corpus Christi 1995, writ denied).

order will not invalidate a previously issued order.¹⁹⁶ A trial court has no authority to order property or funds to be paid to third persons, not parties to the judgment.¹⁹⁷

A writ of garnishment may likewise issue upon or after the signing of a judgment, or simultaneous with the issuance of execution.¹⁹⁸ The filing of a supersedeas bond or other security will not entitle the judgment debtor to the return of property seized under that writ. Thus, to prevent issuance of a post-judgment garnishment writ, proper supersedeas should be filed on or before the signing of a judgment.¹⁹⁹ A party in control of a judgment creditor's assets may be responsible for their fraudulent transfer, but a trial court lacks ancillary jurisdiction to order such a party to satisfy the entire judgment as a sanction.²⁰⁰

B. Supersedeas Options—In General

Prior to 1988, a Texas judgment debtor not exempt from filing supersedeas could suspend judgment enforcement by posting a proper supersedeas bond or cash deposit in the amount of the judgment, interest, and costs. Debtors with “due on encumbrance” provisions on other obligations, faced ruinous results if supersedeas bond or deposit could not be secured and judgment liens were placed upon their property.

In response to this dilemma, highlighted by *Texaco v. Pennzoil*, 1988 rule amendments, provided for alternate security in appropriate circumstances.²⁰¹ Amendments promulgated in 2003 to Appellate Rule 24 further ease the burden of obtaining an order of lesser security to suspend judgment enforcement.²⁰² Legislative provisions were enacted to offer a judgment debtor additional flexibility to post security to suspend execution.²⁰³ The Property Code was

changed to restrict the right of a successful litigant to create a judgment lien on a debtor's real property pending appeal.²⁰⁴

Unless a stay of judgment is committed to trial court discretion, as in the case of a non-monetary judgment, the right to supersedeas is absolute. This right is enforceable by mandamus even though the trial court may retain discretion in fixing the amount of the bond. As to a judgment whose enforcements may be superseded, it is accomplished by timely:

- (1) Posting security as provided by private agreement;
- (2) Posting a full supersedeas bond in an amount required by the rule;
- (3) Posting a cash deposit in lieu of bond;
- (4) Posting alternate security as ordered by the trial court; or
- (5) As to certain appellants, timely filing and serving a notice of appeal.

C. Supersedeas by Private Agreement

Although it has long been the practice that judgment enforcement may be suspended by agreement of the parties, current Appellate Rule 24 expressly acknowledges the propriety and effectiveness of such private agreements. Parties, for example, may agree as to the property that will serve as appellate security in the event of affirmance or that judgment liens will not be created. Commonly, parties will privately agree for consideration in exchange for covenant to delay or forego execution. If the controversy is the subject of insurance coverage, historically an assignment of a bad faith claim would serve as consideration. However, as noted above, the assignment of an unadjudicated claim against an insurer in exchange for a covenant not to execute under circumstances may be against public policy.²⁰⁵ To be enforceable, the agreement suspending enforcement of the trial court's judgment must be in writing, setting forth the terms, and be signed by the parties or their counsel, and filed with the trial court.²⁰⁶

196. *Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1991) (orig. proceeding), *overruled on other grounds, In re Sheshtawy*, 154 S.W.3d 114, 124–25 (Tex. 2004); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon Supp. 2004).

197. *In re Alsenz*, 152 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

198. *See Waples-Platter Grocer Co. v. Tex. & Pac. Ry. Co.*, 68 S.W. 265, 266 (Tex. 1902); *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 612 (Tex. App.—Dallas 1998, pet denied).

199. TEX. R. CIV. P. 657.

200. *Peacock v. Thomas*, 516 U.S. 349, 358–59 (1996).

201. TEX. R. APP. P. 24.2(b).

202. *Id.* 24.2(a)–(b). A case in which a final judgment is signed on or after September 1, 2003, the amount of security required to supersede a money judgment is generally to be in an amount that covers compensatory (but not punitive) damages, interest for the estimated duration of the appeal and costs, subject to a cap, with the trial court obligated to reduce supersedeas upon a showing of substantial economic harm. *Id.*

203. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006

(Vernon Supp. 2004); *see also* Kevin W. Liles, *Supersedeas Bonds: The Ostensible Authority Struggle over Who Gets a Reduction*, 48 BAYLOR L. REV. 469, 470–79 (1996) (tracing historical progression of alternate security in Texas).

204. TEX. PROP. CODE ANN. § 52.0011 (Vernon 1995).

205. *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 711–13 (Tex. 1996).

206. *See* TEX. R. APP. P. 6.6, 24.1(a)(1).

D. Supersedeas Bond

1. In General

An appealing party entitled to stay execution via supersedeas must deposit with the trial court clerk a proper bond.²⁰⁷

A supersedeas bond is an instrument whereby the obligor binds itself to pay the judgment as well as damages caused by the delay in appeal, including interest and costs (up to the amount of the current cap) to the judgment creditor (up to the amount of the security) in the event the appeal is affirmed or the appeal is dismissed. A case in which a final judgment is signed on or after September 1, 2003, the amount of security required to supersede a money judgment is generally to be in an amount that covers compensatory (but not punitive) damages, interest for the estimated duration of the appeal and costs, subject to a cap, with the trial court obligated to reduce supersedeas upon a showing of substantial economic harm.²⁰⁸

The bond is to be approved by the clerk.²⁰⁹ Thus, the clerk must determine whether the amount of the bond complies with the rules or applicable court orders, as well as assess the sufficiency of sureties. The clerk possesses a ministerial duty to approve a supersedeas bond that complies with Appellate Rule 24.2.²¹⁰

2. Multiple Parties

All parties appealing from a money judgment must post their own supersedeas.²¹¹ Even if multiple judgment debtors have been held jointly and severally liable, each must secure the judgment. Every appellant must secure that part of the judgment for which it is individually liable and must also secure the full amount for which it is jointly and severally liable.²¹² The rationale is that if each were allowed to post a bond for its share of the judgment, and the judgment were reversed as to only one, the judgment creditor would not be secured for the entire judgment amount. Joint bonds may be posted by multiple appellants as long as the bond covers the full amount of the judgment, interest and costs. However, the surety must be liable for the full judgment amount even if the judgment is affirmed only as to one of the judgment debtors, unless

modified by agreement.²¹³ Because the cap on appellate security is tied to the judgment debtor's net worth, the amount of supersedeas required of each jointly and severally liable defendant may be different.²¹⁴

3. Form of Bond

While the clerk has discretion to assess the financial worthiness of sureties, it has no discretion to refuse a supersedeas bond due to defects of form, although the appellant may be required to amend to cure defects.²¹⁵ Errors as to form may be cured by amendment as a matter of right.²¹⁶ To cure a defect, the appealing party may be required, on proper motion, to file a new bond.²¹⁷ However, without the trial court clerk's approval of the bond, it will not stay execution.²¹⁸ A supersedeas bond, when approved by the clerk, suspends execution of a judgment.²¹⁹

A supersedeas bond must be payable to the judgment creditor in the appropriate amount, executed by a sufficient surety, and signed by the judgment debtor or the debtor's agent.²²⁰ It must be properly conditioned that the surety on the bond upon affirmance of the judgment or dismissal of the appeal will pay up to the amount of the security, all damages and costs as may be awarded against the judgment

213. *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ).

214. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004).

215. *English v. Treaccar*, 153 S.W.2d 539, 541 (Tex. Civ. App.—Galveston 1941, orig. proceeding).

216. *See Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989) (per curiam); *Reid v. Fernandez*, 52 Tex. 379, 382 (1880).

217. *See Carter Real Estate & Dev., Inc. v. Builder's Serv. Co.*, 718 S.W.2d 828, 831 (Tex. App.—Austin 1986, no writ) (ordering new supersedeas bond where original sureties did not own sufficient property within county with which to satisfy judgment); *Phelen v. Settle*, 431 S.W.2d 376, 377 (Tex. Civ. App.—Amarillo 1968, no writ) (holding only property within county owned by sureties were exempt homesteads); *see also Ruiz v. Watkins*, 701 S.W.2d 688, 691 (Tex. App.—Amarillo 1985, orig. proceeding); *Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ) (granting motion to alter amount and type of supersedeas granted); *Cont'l Oil Co. v. Leshner*, 500 S.W.2d 183, 185–86 (Tex. Civ. App.—Houston [1st Dist.] 1973, orig. proceeding); *Jennings v. Berry*, 153 S.W.2d 725, 726 (Tex. Civ. App.—Texarkana 1941, orig. proceeding) (issuing temporary restraining order issued).

218. *See Smyer v. Fort Worth & D.C. Ry. Co.*, 143 S.W. 683, 685 (Tex. Civ. App.—Amarillo 1911, writ ref'd).

219. *See Ex parte Wrather*, 161 S.W.2d 774, 775 (Tex. 1942) (orig. proceeding); *Kunz v. Spears*, 527 S.W.2d 520, 521 (Tex. Civ. App.—San Antonio 1975, orig. proceeding).

220. TEX. R. APP. P. 24.1(b).

207. *Id.* 24.1(b)(2).

208. *Id.* 24.2(a)–(b).

209. *Id.* 24.1(b)(2).

210. *Miller v. Kennedy & Minshew, P.C.*, 80 S.W.3d 161, 164 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

211. *Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1957, orig. proceeding).

212. *Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co.*, 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ).

debtor.²²¹ The bond description should identify the judgment or portion of judgment on appeal.²²²

Bonds securing a judgment for the recovery of land or property must be further conditioned that the surety will, in cases of judgment affirmance or dismissal, pay to the judgment creditor the value of the rent or revenue of such property during the appeal.²²³ An improperly conditioned bond is insufficient.²²⁴

A supersedeas bond may be amended as a matter of right.²²⁵ Any defect, whether of form or of substance, may be cured by amendment.²²⁶

4. Sufficiency of Sureties

A party tendering a supersedeas bond has the burden to establish that the obligation is backed by a “sufficient surety.”²²⁷ A surety promises to back up the obligation of another.²²⁸ Sureties are a favorite of the law and their obligations are strictly construed.²²⁹

A surety may be either an individual²³⁰ or a corporation.²³¹ For purposes of supersedeas, neither a clerk nor a trial court can require a corporate surety.²³²

221. *Id.* 24.1(d).

222. *See* Slaughter v. Tex. Life Ins. Co., 211 S.W. 350, 351–52 (Tex. Civ. App.—Austin 1919, orig. proceeding).

223. TEX. R. APP. P. 24.2(a)(2).

224. *See* Reid v. Fernandez, 52 Tex. 379, 382–83 (Tex. 1880); Kruger Jewelry Co. v. Fentress & Marsh, 19 S.W.2d 106, 106 (Tex. Civ. App.—Waco 1929, no writ).

225. Taylor v. Fed. Land Bank, 390 S.W.2d 477, 478 (Tex. Civ. App.—Beaumont 1965, writ dismissed).

226. Petroleum Cas. Co. v. Garrison, 174 S.W.2d 74, 76 (Tex. Civ. App.—Beaumont 1943, writ dismissed w.o.m.).

227. *See* Smith v. Valdez, 737 S.W.2d 141, 143 (Tex. App.—San Antonio 1987, no writ).

228. *See* Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985); Carter Real Estate & Dev., Inc. v. Builder’s Serv. Co., 718 S.W.2d 828, 830 (Tex. App.—Austin 1986, no writ). A sufficient surety includes a legal entity (1) that is separate from the judgment debtor; (2) that is not a party to the suit; and (3) whose solvency and ability to pay the judgment is established. Brown & Root, Inc. v. DeSautell, 554 S.W.2d 764, 771 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ refused n.r.e.).

229. Standard Accident Ins. Co. v. Knox, 184 S.W.2d 612, 615 (Tex. 1944). The liability of a surety may not be extended by implication, construction, or presumption beyond its contractual undertaking. First State Bank v. Metro. Cas. Ins. Co., 79 S.W.2d 835, 840 (Tex. 1935). The liability of a surety on its bond is controlled by the terms of the bond. Howze v. Sur. Corp. of Am., 584 S.W.2d 263, 266 (Tex. 1979).

230. *See Ex parte* Wrather, 161 S.W.2d 774, 775 (Tex. 1942) (orig. proceeding).

231. *See* S. Underwriters v. Dyche, 141 S.W.2d 674, 675 (Tex. Civ. App.—El Paso 1940, orig. proceeding).

232. *See* Hammonds v. Hammonds, 313 S.W.2d 603, 605 (Tex. 1958); Man-Gas Transmission Co. v. Osborne Oil Co., 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985,

A judgment debtor cannot serve as its own surety. The purpose of supersedeas is to afford the judgment creditor the protection of an independent surety’s promise to pay conditioned on the judgment debtor’s failure to do so.²³³ In order to act as a surety, an individual or business must arguably be licensed to engage in the business of insurance.²³⁴

The Texas Insurance Code requires:

Each insurance policy or contract [which presumptively could include a supersedeas bond or other instrument filed in lieu thereof] . . . that is not covered by an insurance guaranty fund or other solvency protection arrangement authorized by th[e] code must have affixed to the first page in 10–point type a statement to the effect that, in the event the insurer is unable to fulfill its contractual obligation[,] . . . the insurer is not covered by an insurance guaranty fund or other solvency protection arrangement.²³⁵

Assuming this provision applies to supersedeas bonds or deposits in lieu of bonds, this notation will assist the clerk in determining the sufficiency of the sureties and bond being tendered.

A key function of a surety is to back up judgment satisfaction. Thus, the clerk must determine whether a surety has sufficient non-exempt property to satisfy the judgment that may potentially be affirmed. If the only property owned by the surety is exempt from execution

no writ).

233. Elliott v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App.—Dallas 1939, no writ) (refusing bond signed by judgment debtor’s insurer on grounds that company was primarily liable on judgment rendered against insured even though insurer was a non-party; by contrast, a challenge to a surety that was both appealing party’s subsidiary and liability insurer failed). *But see* Brown & Root, Inc., 554 S.W.2d at 771 (allowing judgment debtor to utilize wholly owned subsidiary insurer as its surety).

234. Act of May 27, 1991, 72d Leg., R.S., ch. 242, § 11.89, 1991 Tex. Gen. Laws 1109, *repealed by* Act of May 22, 2001, 77th Leg., R.S., ch. 1419, § 30, 2001 Tex. Gen. Laws 4208; *see also* Brown & Root, Inc., 554 S.W.2d at 771; *cf.* Man-Gas Transmission Co., 693 S.W.2d at 577 (trial court’s requirement that bond be made by corporate surety deleted by San Antonio Court of Appeals because “[t]he cost of obtaining a corporate surety seriously interferes with appellants’ rights to suspend judgment”). *But cf.* Freedom, Inc. v. State, 569 S.W.2d 48, 48 (Tex. Civ. App.—Austin 1978, no writ) (quo warranto action in which state enjoined appellant from engaging in bail bond business without certificate of authority from State Board of Insurance).

235. TEX. INS. CODE ANN. art. 21.28-E(a) (Vernon 1981 & Supp. 1997).

or is insufficient to satisfy the judgment, the supersedeas bond is not backed by a *good and sufficient surety* as required by law.

Absent a showing of a surety's solvency or financial worth,²³⁶ there is no abuse of discretion by the clerk's refusal to approve a tendered bond. If the clerk has actual knowledge that a surety's non-exempt assets are insufficient to satisfy the judgment, the bond is properly rejected.²³⁷ Many clerks look to the *Notice of Companies Holding Certificates of Authority as Acceptable Sureties in Federal Bond, and as Acceptable Reinsuring Companies*, published by the U.S. Department of the Treasury in the Federal Register every July 1st, to determine if a surety is acceptable.²³⁸

When a surety's financial ability to pay the underlying judgment, interest, and costs is not disputed,²³⁹ or when a supersedeas bond is supported by uncontradicted documentary proof evidencing the surety's solvency, it is an abuse of discretion for the clerk to refuse to approve the tendered supersedeas bond in the proper amount.²⁴⁰

236. *English v. Treaccar*, 153 S.W.2d 539, 541 (Tex. Civ. App.—Galveston 1941, orig. proceeding).

237. *See S. Underwriters v. Dyche*, 141 S.W.2d 674, 675 (Tex. Civ. App.—El Paso 1940, orig. proceeding).

238. Department of the Treasury's Listing of Approved Sureties, available at <http://www.fms.treas.gov/c570/c570.html> (Department Circular 570) (listing sureties approved for bonds posted in favor of the United States).

239. *Ex parte Wrather*, 161 S.W.2d 774, 775 (Tex. 1942) (orig. proceeding).

240. *Ruiz v. Watkins*, 701 S.W.2d 688, 690–91 (Tex. App.—Amarillo 1985, orig. proceeding) (recognizing supersedeas bond supported by documentary proof showing solvency of at least one surety and no evidence to the contrary, clerk abuses discretion in not approving bond); *see also Groves v. W. Realty Co.*, 84 S.W.2d 835, 836 (Tex. Civ. App.—Dallas 1935, no writ) (finding evidence of sureties' insolvency insufficient to overcome sureties' affidavits) In *Ruiz*, the individual sureties presented: (A) a certificate from the sheriff of defendant's county of residence that certified that the sureties had "good and ample security for [the amount specified in the bond], that they have property in [the county] subject to execution of a larger amount, and that if the [bond] was offered to her for approval, [it] would be accepted and approved"; (B) a certificate to the same effect from the district clerk of defendant's county of residence; and (C) an unadjudicated balance sheet of one of the sureties and the surety's affidavit, both indicating that the surety's nonexempt assets in the county of his residence far exceeded the amount of the judgment, interest, and costs. *Ruiz*, 701 S.W.2d at 690. The clerk of the district in which the action was pending refused the bond because she could not determine the veracity of the indicated value of the surety's assets. The court of appeals reversed and defined the burden as outlined above. *Id.*

Once a bond has been approved and filed, the clerk cannot withdraw approval.²⁴¹ The clerk's decision pertaining to approval of supersedeas is subject to de novo trial court review.²⁴² The trial court, should it determine that the bond is insufficient, must order the specific action it deems necessary to adequately protect the judgment creditor.²⁴³ The trial court ruling in turn is subject to review by the appellate courts.²⁴⁴ The standard of review of a trial court ruling on the sufficiency of a supersedeas bond or other appellate security is an abuse of discretion.²⁴⁵

A surety must remain financially sound. A judgment creditor may move the court to determine the sufficiency of the surety anytime during the appeal.²⁴⁶

241. *See* TEX. R. APP. P. 24.1(c)(1)(3); *Kunz v. Spears*, 527 S.W.2d 520, 521 (Tex. Civ. App.—San Antonio 1975, orig. proceeding) (stating judge cannot withdraw supersedeas once filed and approved); *see also Polk v. Holland Tex. Hypotheek Bank*, 66 S.W.2d 1112, 1115 (Tex. Civ. App.—Beaumont 1933, no writ). *But see* TEX. R. APP. P. 24.3 (discussing the continuing jurisdiction of the trial court to review the adequacy of security to suspend enforcement notwithstanding appellate court jurisdiction).

242. *See* *Miller v. Kennedy & Minshew, P.C.*, 80 S.W.3d 161, 164 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]); *Lamar County Elec. Coop. Ass'n v. Risinger*, 51 S.W.3d 801, 805 (Tex. App.—Texarkana 2001, pet. denied) (holding evidentiary hearing in trial court is necessary to determine whether challenged sureties on bond are good and sufficient).

243. *Miller*, 80 S.W.3d at 164 (citing TEX. R. APP. P. 24.1(e)).

244. *See* TEX. R. APP. P. 24.1, 24.4. Prior to these provisions, it was held that the clerk might be compelled to approve a supersedeas bond under mandamus where the clerk had arbitrarily and without discretion refused to approve the bond. *Ruiz*, 701 S.W.2d at 690 (holding that to refuse bond or deposit without articulating any deficiencies was abuse of discretion for which mandamus would lie); *English v. Treaccar*, 153 S.W.2d 539, 541 (Tex. Civ. App.—Galveston 1941, orig. proceeding).

245. *See* *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996); *Miller*, 80 S.W.3d at 164; *Transamerican Natural Gas Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex. App.—San Antonio 1995, writ dismissed).

An abuse of discretion is shown "[w]ith respect to resolution of factual issues or matters committed to the trial court's discretion" when the movant "establish[es] that the trial court could reasonably have reached only one decision." However, "a trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure of the trial court to analyze or apply the law correctly will constitute an abuse of discretion . . ."

Finkelstein, 905 S.W.2d at 414 (quoting *Walker v. Packer*, 827 S.W.2d 833, 839–840 (Tex. 1992)).

246. *Houston Gas & Fuel Co. v. Perry*, 79 S.W.2d 623, 623–24 (Tex. 1935) (recognizing that surety became

A party not satisfied with a trial court's sufficiency ruling may seek review on motion to the appellate court with jurisdiction over the underlying appeal.²⁴⁷ An appellee may also challenge rulings by cross-point in its reply brief.²⁴⁸

E. Cash Deposit in Lieu of Bond

In lieu of filing a supersedeas bond, a judgment debtor may make a cash deposit "in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties."²⁴⁹ The procedure for doing this is to (1) prepare a "notice of cash deposit in lieu of supersedeas bond" in the proper amount with the same allegations and conditions required for the supersedeas bond; (2) attach a cashier's check payable to the clerk; (3) secure a certificate from the clerk stating that appellant has deposited cash in lieu of supersedeas bond; and (4) specify on the notice and the clerk's certificate that the cash has been deposited in an interest bearing account.²⁵⁰ The clerk's certificate that the judgment debtor has made a deposit in lieu of bond is sufficient evidence of that fact.²⁵¹ The judgment debtor must physically transfer possession of the deposit to the clerk.²⁵² Absent agreement to the contrary, a cash deposit remaining in physical possession of a bank will not suffice. When a judgment debtor deposits funds into the registry of the court to suspend judgment enforcement, the funds cease to be the assets of the judgment debtor.²⁵³ One intermediate court has held that a cash deposit may be retained pending retrial if liability is affirmed on appeal and remand is for retrial of damages only.²⁵⁴

An alternative to posting a supersedeas bond or cash may include a deposit of certain negotiable

insolvent during pendency of appeal and supersedeas bond became insufficient).

247. See TEX. R. APP. P. 24.4; *Schrader v. Garcia*, 512 S.W.2d 830, 831 (Tex. Civ. App.—Corpus Christi 1974, no writ).

248. *Pena v. Salinas*, 734 S.W.2d 400, 404 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

249. TEX. R. APP. P. 48; see *Id.* 24.1(c).

250. Marie Yeates, *Perfecting the Appeal and Supersedeas*, in UNIV. OF TEX. 4TH ANNUAL CONFERENCE ON TECHNIQUES FOR HANDLING CIVIL APPEALS IN STATE AND FEDERAL COURTS 88 (1994).

251. TEX. R. APP. P. 47(i).

252. *Mercantile Bank & Trust v. Cunov*, 733 S.W.2d 717, 718 (Tex. App.—San Antonio 1987, no writ).

253. *Olney Savs. & Loan Ass'n v. Trinity Banc Savs. Ass'n*, 885 F.2d 266, 274 (5th Cir. 1989); see also *Grubb v. Fed. Deposit Ins. Corp.*, 833 F.2d 222, 224–26 (10th Cir. 1987).

254. *Resolution Trust Corp. v. Chair King, Inc.*, 827 S.W.2d 546, 550 (Tex. App.—Houston [14th Dist.] 1992, no writ).

instruments. A qualifying negotiable instrument is one backed by the United States government or its agency. The most common deposit is a United States Treasury Note. No court approval is required before deposit. Procedurally, a notice of filing, attaching the negotiable instrument, is presented to the trial clerk for approval.

With leave of court, a negotiable obligation of any bank or savings and loan association chartered by the United States government or of any state, if it is federally insured, may be approved.²⁵⁵ The instrument must be in the amount set for the supersedeas bond and the same allegations and conditions required for the bond apply.²⁵⁶

To be negotiable, an instrument must be in writing, signed by the obligor, payable to the order of a named payee or to bearer, and include an unconditional promise or order to pay a sum certain in money either on demand or at a specified date with no other conditions.²⁵⁷ However, the following will not destroy negotiability: (1) "an undertaking or power to give, maintain or protect collateral;" (2) "authorization . . . to the holder to confess judgment or realize upon or dispose of collateral to secure payment;" or (3) "waiver of the benefit of any law intended for the advantage or protection of an obligor."²⁵⁸ An instrument otherwise negotiable, but which provides for interest to float with a published prime rate or some other referenced fluctuating index, is negotiable.²⁵⁹ A negotiable certificate of deposit may qualify providing the issuing bank or savings and loan is a member of the Federal Deposit Insurance Corporation. However, objections to negotiable instruments in excess of \$100,000 from any single financial institution, due to governmental insurance limitations, should be sustained.

Interest accruing on a cash deposit during appeal constitutes a part of the deposit.²⁶⁰ A party may contractually agree to timely renew a certificate of deposit and remit the interest to the district clerk. A letter directed to the trial court and signed by an authorized bank official with these conditions is

255. TEX. R. APP. P. 24.1(c).

256. *Id.* 24.1(a)–(b).

257. See TEX. BUS. & COM. CODE ANN. § 3.104 (Vernon 2002); *Bank of E. Tex. v. Jones*, 758 S.W.2d 293, 296–97 (Tex. App.—Tyler 1988, no writ) (refusing to declare letter of credit is a negotiable obligation); *Heritage Hous. Corp. v. Ferguson*, 651 S.W.2d 272, 273 (Tex. App.—Dallas 1983, no writ) (finding letter of credit is not a negotiable obligation within meaning of Rule 48 and thus will not substitute for a supersedeas bond, although draft presented under letter of credit may be a negotiable obligation).

258. TEX. BUS. & COM. CODE ANN. § 3.104(a)(3).

259. See *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 793 (Tex. 1992) (answering certified question from United States Fifth Circuit Court of Appeals).

260. TEX. R. APP. P. 24.1(d).

sufficient.²⁶¹ A cashier's check may qualify as a negotiable instrument. It may be deposited as security to suspend judgment enforcement with leave of court.²⁶²

The deposit of nonnegotiable instruments, that is, instruments that fail to comply with the test of negotiability,²⁶³ will not qualify as a deposit in lieu of supersedeas bond, but may be accepted on a motion for alternate security if the requisite standard²⁶⁴ is met or upon agreement of the parties.²⁶⁵

There is no provision for a "pauper's affidavit" to act as a supersedeas.²⁶⁶ A judgment debtor's right to appellate review guaranteed by the open courts provision of the Texas Constitution is not violated by an appellate security requirement.²⁶⁷ While execution may issue pending appeal, the appeal is not mooted.²⁶⁸ On the other hand, a mandatory supersedeas requirement, without the opportunity to post alternate security, violates a party's constitutional right to open access to the Texas courts unimpeded by needless financial barriers.²⁶⁹

F. Amount of Supersedeas Bond or Cash Deposit

1. In General

The official task of determining the sufficiency of the bond or deposit as to other litigants is initially that of the court clerk. Rejection of the bond, deposit, or other court-ordered security is warranted if it is not in

the amount or type set by the trial court. As to a money judgment, if the bond is not in the appropriate amount or is not in conformity with any court order pertaining to security, it will be rejected.²⁷⁰ A case in which a final judgment is signed on or after September 1, 2003, the amount of security required to supersede a money judgment is generally to be in an amount that covers compensatory (but not punitive) damages, interest for the estimated duration of the appeal and costs, subject to a cap, with the trial court obligated to reduce supersedeas upon a showing of substantial economic harm.²⁷¹ As to cases in which a final judgment is signed before September 1, 2003, the amount of security required generally must equal the amount of the judgment, interest for the estimated duration of the appeal and costs. To determine the amount of costs, the appellant should obtain a bill of costs from the clerk. A judgment imposing monetary sanctions for pretrial discovery abuse is treated as a money judgment for purposes of supersedeas.²⁷²

The amount of the supersedeas bond necessary to suspend judgment execution depends on the nature of the relief awarded in the judgment. In many cases, the amount is fixed by law. In others, the trial court has discretion to fix the amount of supersedeas.²⁷³ However, unless otherwise provided, the judge's discretion extends only to the amount of the security and not to whether execution may be stayed.²⁷⁴

The determination of the appropriate amount of a supersedeas bond is a ministerial duty the trial court may be required to perform by way of mandamus.²⁷⁵ In the case of a money judgment, unless otherwise ordered, the amount of the bond or deposit prior to the enactment of section 52.006 was at least the amount of the judgment, interest, and costs.²⁷⁶ This provision was held to be mandatory.²⁷⁷ Section 52.006 now requires,

261. See *Southwestern States Gen. Corp. v. McKenzie*, 658 S.W.2d 850, 852 (Tex. App.—Dallas 1983, writ dismissed).

262. *Jenkins v. Bryan*, 733 S.W.2d 268, 269 (Tex. App.—Amarillo 1987, no writ) (holding a cashier's check could not be used in lieu of surety bond without leave of court; however, because the clerk had accepted the deposit and issued a certificate, it was held to be a defect of form that could be cured by amendment).

263. See TEX. BUS. & COM. CODE ANN. § 3.104(a).

264. See TEX. R. APP. P. 24.2(b).

265. *Mercantile Bank & Trust v. Cunov*, 733 S.W.2d 717 (Tex. App.—San Antonio 1987, no writ).

266. See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154–55 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1986) (stating there is only one method to supersede enforcement of Texas judgment and inability to pay bond is not it); *Anderson v. Pioneer Bldg. & Loan Ass'n*, 150 S.W.2d 445, 446–47 (Tex. Civ. App.—Waco 1941, orig. proceeding).

267. TEX. CONST. art. I, § 13 ("All courts shall be open . . .").

268. *But see* *Marshall v. Housing Authority of San Antonio*, No. 04-02-00821-CV, 2003 WL 22794301, at *1 (Tex. App.—San Antonio Nov. 26, 2003, pet. granted) (stating requirement of mandatory supersedeas in forcible entry and detainer actions).

269. *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 (Tex. 1993); *see also* *Carlson*, *supra* note 1, at 32–33.

270. *But see* *Delhi Gas Pipeline Corp. v. Hassell*, 730 S.W.2d 159, 161 (Tex. App.—Tyler 1987, orig. proceeding) (reciting the clerk accepted bond in the amount of money judgment, interest, and costs despite no provision for amounts to become due in the future under declaratory judgment).

271. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004).

272. *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding).

273. See *supra* Part III.C–D.

274. See *Magnolia Petroleum Co. v. McClendon*, 65 S.W.2d 484, 484 (Tex. 1933) (orig. proceeding); *Cont'l Oil Co. v. Leshner*, 500 S.W.2d 183, 185 (Tex. Civ. App.—Houston [1st Dist.] 1973, orig. proceeding).

275. *McClendon*, 65 S.W.2d at 484.

276. TEX. R. APP. P. 24.2.

277. See *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ); *Cooper v. Bowser*, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no

as to a case in which a final judgment is signed on or after September 1, 2003, that a money judgment be secured in an amount that covers compensatory damages, interest, and costs—but not to exceed the lesser of twenty-five million dollars or fifty percent of the judgment debtor’s net worth.²⁷⁸ As a result of these amendments judgment debtors will have a much easier time suspending judgment enforcement pending appeal and appellate avenues will not be foreclosed by onerous supersedeas requirements.

a. New Supersedeas “Caps”

The Texas Supreme Court has recently adopted conforming amendments to Texas Rule of Appellate Procedure 24 to incorporate legislative changes mandated by House Bill 4.²⁷⁹ Two central changes were made as to cases in which a final judgment is signed on or after September 1, 2003. First, the rule reflects the legislative cap on supersedeas for money judgments and adopts procedural requirements a judgment debtor must follow to post appellate security based upon the “net worth cap.” Second, the rule was modified to incorporate a new standard for posting alternate security applicable to all judgments.

b. The “Net Worth Cap”

The most significant issue raised by the statutory modification mandated by HB 4 and Appellate Rule 24, is what constitutes net worth for purposes of placing a ceiling on the amount of a supersedeas bond (the lesser of twenty-five million dollars or fifty percent of the judgment debtor’s net worth) and to what extent is net worth discoverable? Neither HB 4 nor newly amended Appellate Rule 24 defines net worth.²⁸⁰

The classic textbook definition of net worth is assets less liabilities. It appears that under generally accepted accounting principles, net worth is reported based upon historical costs (book value) as opposed to current fair market value (with the exception of marketable securities).²⁸¹ The net worth of a judgment debtor may be considerably different depending upon the test utilized. For example, assume that the

judgment debtor’s assets consist of three acres of land purchased twenty years ago at \$1,000 an acre. The land is paid for. The debtor’s current net worth, using book value historical costs of assets, is \$3,000. Assume further that the current fair market value of that land is \$100,000 an acre. Utilizing the fair market value approach the net worth of the judgment debtor is \$300,000.

Another gray area that may affect the calculation of net worth is reserves. Assume that the judgment debtor manufactures widgets and provides a one-year repair or replacement warranty. It will carry reserves to cover the repair or replacement but will necessarily have to estimate that number based on historical data (1 of out every 100 items has historically been replaced).

An additional significant concern is whether net worth includes insurance coverage for the claimed wrong. Insurance is generally not considered an asset for accounting purposes unless it has a cash surrender value. Yet, it may be the single most important factor in terms of collectability of the judgment.

In a distinctive context, the Texas Supreme Court has held that evidence of punitive damage insurance coverage is not admissible to establish net worth for purposes of imposing exemplary damages.²⁸² A number of legal scholars and a few other jurisdictions have addressed the admissibility of insurance coverage when net worth is relevant to the recovery of punitive damages with mixed results.²⁸³

282. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 41 (Tex. 1998) (citing *Baker v. Armstrong*, 744 P.2d 170, 173 (N.M. 1987) (“[P]unitive damages liability coverage is not an asset which can be used to measure true punishment and . . . therefore, it should not be considered by the jury in assessing a defendant’s financial standing.”); *Rojas v. Vuocolo*, 177 S.W.2d 962, 964 (Tex. 1944) (holding that proof of insurance for the defense in connection with issues of liability or damages should not be introduced to the jury).

283. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 330 (Tex. 1994) (Gonzalez, J., concurring) (“[c]onflicting appellate court decisions on the meaning of the term ‘net worth’ are evidence of the confusion surrounding this fundamental issue.”); *Lunsford v. Morris*, 746 S.W.2d 471, 475–76 (Tex. 1988) (Gonzalez, J., dissenting) (dissenting opinion criticizing the court for not defining net worth and suggesting that evidence of insurance coverage is not admissible to establish net worth); *City of W. Allis v. Wis. Elec. Power Co.*, 635 N.W.2d 873, 888–89 (Wis. Ct. App. 2001) (recognizing that evidence of insurance coverage is not admissible to establish net worth or wealth); Gerald Reading Powell & Cynthia A. Leiferman, *Results Most Embarrassing: Discovery and Admissibility of Net Worth of the Defendant*, 40 BAYLOR L. REV. 527, 533 (1988) (“On pure relevance grounds, however, the logical conclusion is that if the court admits net worth evidence in a

writ); *Schrader v. Garcia*, 512 S.W.2d 830, 832 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Anderson v. Pioneer Bldg. & Loan Ass’n*, 150 S.W.2d 445, 446 (Tex. Civ. App.—Waco 1941, orig. proceeding); *Williams v. Walker*, 287 S.W. 517, 517 (Tex. Civ. App.—Austin 1927, no writ).

278. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004).

279. *See* TEX. R. APP. P. 24.

280. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006; TEX. R. APP. P. 24.

281. The book value net worth formula does reflect depreciation, but generally does not reflect appreciation, save for marketable investment securities.

Other issues that are likely to arise include whether exempt assets (such as a homestead, or a qualified retirement account) should be excluded in calculating net worth? Is the amount of the judgment itself included in determining net worth?

c. Procedures To Establish Net Worth

A judgment debtor attempting to post appellate security based upon the net worth cap bears the burden of proving its net worth.²⁸⁴ The judgment debtor upon posting the security “must simultaneously file an affidavit that states the debtor’s net worth and states complete, detailed information concerning the debtor’s assets and liabilities from which net worth can be ascertained.”²⁸⁵ The affidavit is prima facie evidence of the debtor’s net worth but may be contested by the judgment creditor filing an unsworn contest.²⁸⁶ The creditor is entitled to conduct reasonable discovery as to the debtor’s net worth, and may be entitled to discovery of the defendant’s tax returns.²⁸⁷ The trial court *must* hear such a contest promptly after discovery is completed with the burden of proof on the debtor to establish its net worth.²⁸⁸ “The trial court must issue an order that states the debtor’s net worth and states with particularity the factual basis for that determination.”²⁸⁹

d. When Supersedeas Becomes Inadequate on Appeal

Should supersedeas become inadequate pending appeal, likely due to a fluctuation in value of alternate security, relief may be sought in either the court entertaining the appeal or the trial court, which entered the judgment.²⁹⁰ The amount required to supersede judgments for an interest in property is set by the court in conformity with Appellate Rule 24.2(a)(2).²⁹¹ The ability to supersede judgments other than money and

case in which liability coverage exists, then the court should also admit evidence of liability insurance coverage.”).

284. TEX. R. APP. P. 24.2(c)(3).

285. *Id.* 24.2(c)(1).

286. *Id.* 24.2(c)(2).

287. *Id.*; see also *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988) (authorizing discovery of net worth when exemplary damages are sought); *In re C.F.W.C. Religious Ministries, Inc.*, 143 S.W.3d 891, 894–97 (Tex. App.—Beaumont 2004, orig. proceeding) (acknowledging defendant’s privacy interest in their income tax returns, but suggesting that a plaintiff may discover the returns when a showing is made that the returns are relevant to a determination of the defendant’s net worth and financial position); *Chamberlain v. Cherry*, 818 S.W.2d 201, 205–07 (Tex. App.—Amarillo 1991, no writ).

288. TEX. R. APP. P. 24.2(c)(3).

289. *Id.*

290. See *id.* 24.

291. See *id.* 24.2(a)(2).

property judgments is discretionary with the trial court provided the judgment creditor posts bond.²⁹²

2. Interest Computation

a. Purpose for Requiring Interest to be Secured

The historical function of supersedeas is to protect the judgment creditor from damages caused by delay in enforcing the judgment pending appeal by the judgment debtor. Thus, in order to fully protect the judgment creditor, post-judgment interest accruing on the unpaid judgment must be secured. A supersedeas bond that does not include interest is “patently insufficient.”²⁹³ However, under newly enacted section 52.006, the cap on the amount of appellate security required to suspend enforcement of a money judgment (as to a case in which a final judgment is signed on or after September 1, 2003) may not exceed the lesser of twenty-five million dollars or fifty percent of the judgment debtor’s net worth.²⁹⁴ It appears that if appellate security is posted at the cap, it is not necessary to further supersede interest and costs by additional security.

b. Duration of Appeal Determination

When post-judgment interest is to be secured, for what duration should interest be calculated? It is impossible to predict when an appeal will be complete, so the precise amount of post-judgment interest that will accrue is incapable of being definitively ascertained. Rules and statutory provisions do not, and could not, provide the exact amount of post-judgment interest required. Instead, this is a matter within the discretion of the trial court clerk and should be determined before the bond is filed. It is proper that the amount of the supersedeas bond include estimated post judgment interest at the statutory rate.

c. Prejudgment Calculation Is Based Upon the Judgment

Prejudgment interest is calculated on the judgment amount, not the amount of damages awarded by the jury.²⁹⁵ Any credits or offsets due the defendant are to be deducted from the total damages awarded and

292. See *supra* Part III.D.1.

293. See *Kennesaw Life & Accident Ins. Co. v. Streetman*, 644 S.W.2d 915, 917 (Tex. App.—Austin 1983, writ ref’d n.r.e.); *Cooper v. Bowser*, 583 S.W.2d 805, 807 (Tex. Civ. App.—San Antonio 1979, no writ).

294. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (Vernon Supp. 2004).

295. See *Pringle v. Moon*, No. 2-04-012-CV, 2005 WL 327188, at *3 (Tex. App.—Fort Worth Feb. 10, 2005, no pet. h.); *C & H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259, 275 (Tex. App.—Houston [1st Dist.] 1991, writ granted).

it is the net number that is controlling for purposes of calculating the award of prejudgment interest.²⁹⁶

e. Changes to Prejudgment and Postjudgment Interest Rates

Due to recent statutory amendments, the post-judgment rate in almost all types of cases has effectively dropped from a minimum of ten to a minimum of five percent tied to the prime rate. As to cases covered by the statute in which a final judgment is signed or is “subject to appeal” after June 20, 2003, the post-judgment interest rate is:

- (1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation;
- (2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is less than five percent; or
- (3) 15 percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is more than 15 percent.²⁹⁷

Thus, the post-judgment interest rate is now tied to the prime rate as declared by the Federal Reserve Bank and is a minimum of five percent and a maximum of ten percent. The Texas Consumer Credit Commissioner is to calculate the rate and send it to the Secretary of State for publication in the Texas Register.²⁹⁸

This change in interest rates from a minimum of ten percent to five percent applies to cases in which a final judgment is signed or is subject to appeal after the effective date of the statute. Two issues arise from this legislation: first, what is the effective date of the statute; and second, what is a judgment subject to appeal? As to the effective date of the statute, the issue is obfuscated by the fact that two identical statutes were passed in the same legislative session with identical provisions for calculating post-judgment interest rate: House Bill 2415, effective June 20, 2003, and House Bill 4, generally effective September 1, 2003. Applying statutory rules of construction, one legal commentator and one intermediate appellate

court have concluded that the effective date of the amendment is June 20, 2003.²⁹⁹

What judgments are subject to appeal as of the effective date, June 20, 2003, of the statute so as to be subject to the lower interest rate? The intermediate courts that have addressed this issue to date, have concluded that subject to appeal means capable of being appealed. Under those decisions, judgments on appeal before the effective date of the act may not benefit from the reduced judgment interest rates passed in the 2003 legislative session.³⁰⁰ Some appellate

299. Jennifer Tillison, *Subject to Appeal*, 16 APP. ADVOC. 6, 12 (Winter 2004) (concluding that HB 2415, as later-enacted provision, provides effective date); see also TEX. GOV'T CODE ANN. § 311.025(b), (d)–(e) (Vernon 2005) (providing methods for determining which irreconcilable statutes and amendments control when enacted by same session of Legislature); *Pringle*, 2005 WL 327188, *3 n.2 (stating judgment interest rate is based upon date judgment is signed and not on date of prior judgment subsequently vacated).

300. See *Columbia Med. Ctr. of Las Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835, 865 (Tex. App.—Fort Worth 2003, pet. denied); *accord Tesfa v. Stewart*, 135 S.W.3d 272, 279 (Tex. App.—Fort Worth 2004, pet. filed.) (“Here, the final April 25, 2003 judgment was ‘signed’ and was ‘subject to appeal’ on the date it was signed, before the June 20, 2003 and September 1, 2003 effective dates of the amendments to the finance code.”); *Warrantech Corp. v. Computer Adapters Servs., Inc.*, 134 S.W.3d 516, 532 (Tex. App.—Fort Worth 2004, no pet.) (“The judgment at issue here was signed and became capable of being appealed months before the effective date of the amendment; therefore, the 5% postjudgment interest rate in amended section 304.003 does not apply.”); *Sibley v. RMA Partners, L.P.*, 138 S.W.3d 455, 459 (Tex. App.—Beaumont 2004, no pet.) (per curiam) (“The final judgment here was signed August 15, 2000. Appellant filed his notice of appeal on November 9, 2000, at which time this cause became ‘pending’ on appeal, rather than ‘subject to’ appeal, long before the amendments’ effective dates.”). The Houston Fourteenth and the Austin Courts of Appeals agree. *Bennett v. Cochran*, No. 14-00-01160-CV, 2004 WL 852298, at *7 (Tex. App.—Houston [14th Dist.] Apr. 22, 2004, no pet.) (“We agree with our two sister courts of appeals that have concluded the ‘subject to appeal’ language does not mean ‘pending on appeal.’”); *Utts v. Short*, No. 03-03-00512-CV, 2004 WL 635342, at *5–*6 (Tex. App.—Austin Apr. 1, 2004, pet. denied) (memorandum opinion). The Dallas Court of Appeals has reached the same conclusion. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.2d 671, 687 (Tex. App.—Dallas 2004, pet. granted) (“Because the judgment in this case was both signed and subject to appeal before September 1, 2003, the amended statute setting post-judgment interest rates does not apply.”); *City of Dallas v. Redbird Dev. Corp.*, 143 S.W.3d 375, 388–89 (Tex. App.—Dallas 2004, no pet.). The Corpus Christi Court of Appeals has taken that position as well. *In re Kajima Int’l, Inc.*, 139 S.W.3d 107, 114 (Tex. App.—Corpus Christi 2004, no pet.) (“[T]he final April 25, 2003 judgment was

296. *Pringle*, 2005 WL 327188, at *3; *Sisters of Charity of the Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 118 (Tex. App.—Austin 1992, writ denied).

297. TEX. FIN. CODE ANN. § 304.003(c) (Vernon Supp. 2004).

298. *Id.* § 304.004. The current rate may be accessed on line at http://www.occ.state.tx.us/pages/int_rates/Index.html, or via the phone at 1-800-538-1579.

practitioners advance that “‘subject to appeal’ presumably means any judgment that was signed before September 1, 2003 where either (1) the trial court still has plenary jurisdiction [over the judgment] or (2) an appeal is pending.”³⁰¹ The issue must await Texas Supreme Court clarification.³⁰²

The change to post-judgment interest rates necessarily affects the prejudgment interest rates. “Because both statutory and common-law prejudgment interest rates adopt the postjudgment interest rate by reference, HB4’s amendment of the postjudgment interest rate automatically changes the prejudgment interest rate too.”³⁰³

It should be noted that HB 4 expressly excludes the recovery in personal injury, wrongful death, and property damage cases, of prejudgment interest on future damages overruling, *C & H Nationwide, Inc. v. Thompson*³⁰⁴, bringing the rule, according to some legal commentators, “into line with all other cases, in which prejudgment interest has historically not been allowed on future damages.”³⁰⁵ This appears to be a sound approach, as prejudgment interest should not be allowed on future damages as they have not yet accrued at the time of trial, and such interest is not necessary to make the claimant whole. Further, overcompensation may arise if prejudgment interest is allowed on future damages as those damages are discounted to present value as of the date of trial.³⁰⁶

‘signed’ and was ‘subject to appeal’ on the date it was signed, before the June 20, 2003 and September 1, 2003 effective dates of the amendments.”)

301. Claudia Frost et al., *The New Rules on Appeal: Interlocutory Appeals and Stays, Conflict Jurisdiction, Appeal Bonds, and Interest Rates, in Law Practice After HB 4*, Univ. of Texas CLE Course, at 13 (2003) (copy on file with author).

302. Columbia Med. Ctr. of Las Colinas, Inc. 132 S.W.2d at 687.

303. Frost et al., *supra* note 301, at 14.

304. 903 S.W.2d 315, 325 (Tex. 1994).

305. Frost et al., *supra* note 301, at 15 (citing *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 555–56 (Tex. 1985), *overruled on other grounds*, *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998) (extending statutory post-judgment interest rate to prejudgment interest rate for all cases not already covered by statute)).

306. *See Cavnar*, 696 S.W.2d at 555–56 n.5 (linking common law prejudgment interest to statutory provisions); *Mo. Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 530 (Tex. App.—Houston [14th Dist.] 1993, writ *dism’d* by *agr.*); *see also* Robert H. Pemberton, *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 TEX. TECH. L. REV. 71, 101 (1999).

e. The Need to Secure Prejudgment and Postjudgment Interest

As to a case in which a final judgment is signed on or after September 1, 2003, the amount of security required to supersede a money judgment is generally to be in an amount that covers compensatory (but not punitive) damages, interest for the estimated duration of the appeal and costs, subject to a cap, with the trial court obligated to reduce supersedeas upon a showing of substantial economic harm.³⁰⁷ Thus, the law has changed from requiring supersedeas to cover “the *judgment*, interest for the estimated duration of the appeal and costs” to requiring supersedeas in an amount covering “*compensatory damages awarded in the judgment*, interest for the estimated duration of the appeal, and costs awarded in the judgment.”³⁰⁸ Arguably, based upon the literal language of this new provision, it is unnecessary to supersede prejudgment interest, if interest is not considered to be compensatory damages.³⁰⁹ The statutory definition of compensatory damages applicable to Texas civil actions does not expressly include either interest or attorney fees.³¹⁰ Ultimately the issue of what is

307. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004); TEX. R. APP. P. 24.2(a)–(b).

308. TEX. R. APP. P. 24.2(a).

309. Frank Gilstrap & Chris Griesel, *2003 Legislative Update: Selected Issues for Civil Appeals, in STATE BAR OF TEXAS 17TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 4* (2003). “Obviously, any portion of the judgment that represents exemplary damages will not have to be superseded. Arguably, the same will be true for attorneys fees and prejudgment interest.” *Id.*

310. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001. Compensatory damages are defined in Chapter 41 to mean “economic and noneconomic damages. The term does not include exemplary damages.” *Id.* § 41.001(8). Economic damages “means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.” *Id.* § 41.001(4). Noneconomic damages “means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.” *Id.* § 41.001(12). Under these statutory definitions, neither interest nor attorneys fees are expressly included as compensatory damages. Neither interest or attorneys fees are traditionally considered costs of court. Arguably, the only interest that must be secured by supersedeas is interest on compensatory damages and perhaps interest on costs for the duration of the appeal. *But see* *Columbia Hosp. Corp. of Houston v. Moore*, 92 S.W.3d 470, 473 (Tex. 2002) (describing prejudgment interest as “additional compensatory damages” and holding that prejudgment interest under subchapter P of the Medical

considered compensatory damages will be judicially determined and will be a matter of legislative intent.

It is generally necessary that the supersedeas cover estimated interest for the duration of the appeal on the appellate security posted. However, if a judgment debtor posts appellate security at the cap of the lesser of twenty-five million dollars or fifty percent of the judgment debtor's net worth, it is apparently not necessary to further secure interest or costs.³¹¹

f. Local Practices Regarding Interest

When interest is to be secured by appellate security for the estimated duration of the appeal, the clerk may require that the bond cover the appropriate amount of damages and costs, plus a general provision to cover any interest that may accrue during the pendency of the appeal. In that instance, the rate of interest should be specified in the bond, as well as the date from which interest begins to accrue.³¹² Local rules and practice may provide regional preferences concerning the manner in which interest is covered. Most clerks require the bond cover one year of post-judgment interest. Once the bond is approved, it is presumed to comply with applicable requirements.³¹³

g. Payment of Judgment May Halt Accrual of Post-Judgment Interest

The Texas Supreme Court has held that payment on a judgment will not moot an appeal if the judgment debtor clearly expresses an intent to exercise his right to pursue an appeal, noting that a litigant must be able to halt the accrual of post-judgment interest and yet preserve the right to appeal.³¹⁴

3. Securing Attorney Fees

Attorney's fees allowed by law may be provided for in a trial court judgment for both successful trial and appellate efforts. While a purpose of appellate security is to protect the judgment creditor and secure the trial court judgment, there is no Texas authority requiring inclusion of appellate attorney's fees in the

Liability and Insurance Improvement Act is subject to the statutory cap); *see also* Hoffman-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 446 (Tex. 2004) (holding statutory cap in discrimination cases does not apply to back pay, interest on back pay, and equitable relief).

311. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006; TEX. R. APP. P. 24.2(a)–(b).

312. *See* Nat'l Convenience Stores, Inc. v. Martinez, 763 S.W.2d 960 (Tex. App.—Houston [1st Dist.] 1989, no writ); Kennesaw Life & Accident Ins. Co. v. Streetman, 644 S.W.2d 915, 917 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

313. *See* Kantor v. Herald Publ'g Co., 632 S.W.2d 656, 658 (Tex. App.—Tyler 1982, no writ).

314. Miga v. Jensen, 96 S.W.3d 207, 211–12 (Tex. 2002).

amount of the supersedeas bond.³¹⁵ Such an award is conditional on the conclusion of the appeal, and these fees need not be included in the amount of supersedeas posted.³¹⁶

As to a case in which a final judgment is signed on or after September 1, 2003, the amount of security required to supersede a money judgment is generally to be in an amount that covers compensatory (but not punitive) damages, interest for the estimated duration of the appeal and costs, subject to a cap, with the trial court obligated to reduce supersedeas upon a showing of substantial economic harm.³¹⁷ Thus, the law has changed from requiring supersedeas to cover “the judgment, interest for the estimated duration of the appeal and costs” to requiring supersedeas in an amount covering “*compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment.*”³¹⁸ The statutory definition of compensatory damages applicable to Texas civil actions does not expressly include either interest or attorney fees.³¹⁹ Ultimately whether attorney's fees constitute compensatory damages will be judicially determined and will be a matter of legislative intent.

If a judgment debtor posts appellate security at the cap of the lesser of twenty-five million dollars or fifty percent of the judgment debtor's net worth, it is

315. *Pena v. Salinas*, 734 S.W.2d 400, 404 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

316. *Hughes v. Habitat Apartments*, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992), *rev'd on other grounds*, 860 S.W.2d 872 (Tex. 1993).

317. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004); TEX. R. APP. P. 24.2(a)–(b).

318. TEX. R. APP. P. 24.2(a).

319. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001. Compensatory damages are defined in Chapter 41.001 to mean “economic and noneconomic damages. The term does not include exemplary damages.” *Id.* § 41.001(8). Economic damages “means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss, but does not include exemplary damages or noneconomic damages.” *Id.* § 41.001(4). Noneconomic damages “means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.” *Id.* § 41.001(12). Under these statutory definitions, neither interest nor attorney's fees are compensatory damages. Neither interest or attorneys fees are traditionally considered costs of court. Arguably, the only interest that must be secured by supersedeas is interest on compensatory damages and perhaps interest on costs for the duration of the appeal.

apparently not necessary to further secure interest, costs, or attorney's fees.³²⁰

4. Partial Supersedeas—Quandary of Insurer Facing Excess Judgment

Historically, a money judgment could not be partially superseded.³²¹ That is, to file an effective supersedeas bond as to a money judgment, the full amount of the judgment plus costs and interest was required to be secured. The requirement that a money judgment be fully superseded, is potentially modified by newly enacted section 52.006 of the Civil Practices and Remedies Code as the supersedeas amount now required is a sum that equals the amount of compensatory damages, interest and costs but the amount of security is not to exceed the lesser of twenty-five million dollars or fifty percent of the judgment debtor's net worth. That is, by application of the supersedeas ceiling, a judgment may only be partially superseded.

When appellate security is required in an amount covering the amount of compensatory damages, interest and costs, it may exceed insurance policy limits placing an insurer with a duty to defend in a difficult position. Posting a bond for the entire amount required has been held to make the insurance company liable for the entire judgment even though beyond the limits of coverage.³²² Absent full supersedeas, on the other hand, a judgment creditor may commence execution, including collecting on an insurance policy, as well as on an insured's non-exempt assets. The potential for "bad faith" liability against the insurer complicates the insurer's supersedeas decision.³²³ The obligation to proceed in good faith applies not only to the insurer but also to any excess carriers.³²⁴ Since a money judgment may require appellate security in excess of policy limits,³²⁵ a defending primary carrier

is faced with the choice to post the bond for the full amount and risk voluntarily increasing its liability, or fail to post a full supersedeas, risking execution, as well as a potential bad faith claim brought by its insured³²⁶ or by an excess carrier who becomes liable.³²⁷ Voluntary and unconditional payment of the judgment by the insured or its insurer may moot the appeal and require dismissal.³²⁸ The insurer's risk of increasing its liability limits by posting security beyond its coverage limits, or the consequences of its failure to post a full supersedeas with potential execution on the insured's assets, are not attractive options. To further complicate matters, it is not uncommon for an insured defendant to discharge counsel retained by its insurer and negotiate a covenant not to execute, in exchange for assigning to plaintiffs any action against the insurer on a bad faith claim.³²⁹

A carrier may bond the statutorily required amount and contract with its insured to be reimbursed for the excess part of the judgment. However, the insured may be unable to reimburse the insurer, or it may allege bad faith by the insurer in allowing the excess judgment. If the insurer declines to post any supersedeas, the insured may still allege bad faith on the basis that the insurer is putting its interests ahead of the insured. A viable solution to this dilemma awaits judicial clarification. In the interim, it may be feasible for the judgment debtor to seek an order of alternate security in a lower amount upon a showing of substantial economic harm due to these circumstances.

G. Alternate Security

1. Overview

The general rule is that execution on a money judgment may be suspended, pending appeal, by posting a supersedeas bond in the full amount of compensatory damages provided in the judgment, "interest for the estimated duration of the appeal and costs awarded in the judgment."³³⁰ In theory, when this security is provided, the judgment winner is assured of satisfaction, except as to any punitive damages, should

320. See *id.* § 52.006; TEX. R. APP. P. 24.2(a)-(b).

321. See TEX. R. APP. P. 47(j), 49 TEX. B.J. 571-72 (Tex. 1986, amended 1997) (stating "execution of the judgment or so much thereof as has been superseded, shall be suspended," indicating partial supersedeas might have been allowed before amendment of this rule); *Haney Elec. Co. v. Hurst*, 608 S.W.2d 355, 356 (Tex. Civ. App.—Dallas 1980, no writ).

322. See *Hurst*, 608 S.W.2d at 355; see also *Mea v. Mea*, 464 S.W.2d 201, 207-08 (Tex. Civ. App.—Tyler 1971, no writ).

323. See, e.g., *Rogers v. Clinton*, 794 S.W.2d 9, 10 (Tex. 1990).

324. *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 810 S.W.2d 246, 253 n.5 (Tex. App.—Houston [1st Dist.] 1991), *aff'd*, 843 S.W.2d 480 (Tex. 1992).

325. *Hurst*, 608 S.W.2d at 356; see also *Harvey v. Stanley*, 783 S.W.2d 217, 219 (Tex. App.—Fort Worth 1989, no writ).

326. See *Rogers*, 794 S.W.2d at 10; *Hurst*, 608 S.W.2d at 355.

327. *Am. Centennial*, 810 S.W.2d at 254.

328. *Cont'l Cas. Co. v. Huizar*, 740 S.W.2d 429, 430 (Tex. 1987). However, payment on a judgment will not moot an appeal if the judgment debtor clearly expresses an intent to exercise his right to pursue an appeal. *Miga v. Jensen*, 96 S.W.3d 207, 210 (Tex. 2002) (acknowledging that a litigant must be able to halt the accrual of post-judgment interest and yet preserve the right to appeal).

329. See *Rogers*, 794 S.W.2d at 10.

330. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a)(2)-(3) (Vernon Supp. 2004); TEX. R. APP. P. 24.2(a)(1).

the judgment be affirmed on appeal,³³¹ and the delay in collecting the judgment caused by the appeal will not harm the appellee. Appellate security for judgments other than for money,³³² also serve this purpose.

Statutory and rule provisions empower the trial court to make an order pertaining to security deviating from the “usual” security requirements on a proper showing at a noticed hearing.³³³ Former Texas Rule of Appellate Procedure 24.2(b) set forth a single standard for adjudging the propriety of an order of lesser security than full supersedeas and it applies to all judgments—not just money judgments—as previously limited.³³⁴ Recently, through the passage of House Bill 4, Chapter 52 of the Civil Practices and Remedies Code was amended to include a distinctive standard for alternate security pertaining to a money judgment as to cases in which a final judgment is signed on or after September 1, 2003.³³⁵ Because the Texas Supreme Court is prohibited from adopting rules that conflict with Chapter 52 of the Civil Practices and Remedies Code, Appellate Rule 24.2(b) was amended to conform to the statute, but is expanded to apply to all judgments and not just money judgments.³³⁶ Newly enacted Civil Practices and Remedies Code Section 52.006, effective September 1, 2003, *requires* the trial court to order security in a lesser amount that generally is required to secure a judgment “[o]n a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm.”³³⁷ The court is to lower the amount of the security required to suspend judgment enforcement on appeal to an amount that will not cause the judgment debtor substantial harm.³³⁸ The statute does not define substantial economic harm and the appropriate interpretation of that term is left to development in the caselaw.

The modifications over the last two decades of the standard for the allowance of alternate security to suspend judgment enforcement reflect divergent rationales for requiring security on appeal. Former Appellate Rule 47(b)(1) that placed the onus on the judgment debtor to either protect the judgment creditor’s interest in collecting the entire judgment upon affirmance or risk judgment execution has been abandoned. This former security requirement protected

the judgment creditor from *any* loss occasioned by the appeal. The pertinent inquiry was the degree to which collection was secured. Appellate Rule 24.2(b), applicable to cases where a final judgment is signed prior to September 1, 2003, focuses on the degree to which a judgment creditor’s recovery could be affected pending appeal, treating the security requirement as one merely to protect the status quo. The recent legislative modifications to supersedeas requirements effective as to cases in which a final judgment is signed on or after September 1, 2003, reflect a shift in concern from that of protecting the judgment creditor’s ability to collect the judgment if affirmed on appeal, to protecting the judgment debtor from substantial economic harm by appellate security requirements that may effectively preclude the ability to seek appellate review.³³⁹

2. Order of Alternate Security—Burden of Proof

The Texas supersedeas scheme has historically protected the judgment creditor against loss or damage occasioned by an appeal by requiring full supersedeas. As to cases in which a final judgment is signed on or before September 1, 2003, the standard for obtaining an order of alternate (lesser) security is irreparable harm to the judgment debtor in posting security for the full amount of the judgment, interest, and costs and a showing that lesser security will not substantially impair the judgment creditor’s ability to recover after all appellate remedies are exhausted. This suggests that the judgment creditor’s ability to collect the judgment pending appeal and post-appeal must remain substantially the same notwithstanding the security order. The order of alternate security effectively preserves the status quo.

Post-House Bill 4, an order of alternate security may be feasible under the lower standard of “substantial economic harm.” Neither section 52.006 of the Civil Practice and Remedies Code nor Appellate Rule 24 defines the term; ultimately this will be judicially determined.

The judgment debtor has the burden to demonstrate substantial economic harm by posting security at the cap (the lesser of twenty-five million dollars or fifty percent of the judgment debtor’s net worth) and to design a plan of alternate security that will not cause substantial economic harm. For example, a debtor who lacks the liquidity to post bond but who could pledge sufficient unencumbered assets should establish that value and argue the sufficiency of that protection. Similarly, a judgment debtor who demonstrates that it owns an abundance of assets beyond that necessary to satisfy the judgment should it

331. *Mercantile Bank & Trust v. Cunov*, 733 S.W.2d 717, 718–19 (Tex. App.—San Antonio 1987, no writ) (per curiam).

332. *See infra* Part III.D–F.

333. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(c); TEX. R. APP. P. 24.2(b).

334. TEX. R. APP. P. 24.2(b).

335. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006.

336. TEX. R. APP. P. 24.2(b).

337. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(c).

338. *Id.*

339. *Id.* § 52.006.

be affirmed may obtain an order of alternate security requiring the pledging of the assets, or a letter of credit, or the like.

An order of alternate security may be warranted when the judgment creditor is already protected by other assets belonging to the judgment debtor. The debtor may establish harm if required to post security beyond that necessary to satisfy the judgment. For example, a judgment creditor who files its judgment with the clerk in the county where the judgment debtor possesses real property, absent supersedeas, creates a lien on the property. The value of this lien may be sufficient protection so that an additional supersedeas requirement may be excused.³⁴⁰

A motion for alternate security should be filed in advance of the time a judgment creditor could begin execution to allow for any delay in obtaining a ruling on that motion.³⁴¹ A highly respected appellate practitioner suggested that the judgment debtor be prepared to introduce testimony and evidence on the following matters to make out the former irreparable harm standard, but many of these matters may also assist in establishing the new substantial economic harm standard for alternate security:

1. the process of obtaining a supersedeas bond including the financial requirements for obtaining a supersedeas bond;
2. the judgment debtor's diligent efforts to obtain a supersedeas bond in the full amount;
3. the judgment debtor's inability to obtain a supersedeas bond in the full amount;
4. if applicable, the amount of a supersedeas bond, less than full amount, that the judgment debtor is able to obtain;
5. explanations from officers of the surety companies refusing to issue the judgment debtor a supersedeas bond in the full amount of as to the reasons sureties are unwilling to issue the judgment debtor a supersedeas bond in the full amount;
6. the judgment debtor's inability to obtain a letter of credit to act as collateral for the supersedeas bond, even at a higher than ordinary interest rate and explanations from lending institutions (if possible) regarding why they refuse to issue a letter of credit;
7. the judgment debtor's past, current, and projected financial condition;
8. the existence of any acceleration clauses or similar provisions in the judgment debtor's financing agreements that might be triggered by a judgment lien against the judgment

debtor's real property or by the issuance of the letter of credit needed to acquire a supersedeas bond, thereby precipitating the judgment debtor's insolvency;

9. the likely net realizable liquidation value of the judgment debtor's assets;
10. the irreparable harm to the judgment debtor of having to post a supersedeas bond in the full amount, including if applicable, the requirement that the judgment debtor sell assets at a fraction of their market value in forced sales in order to raise the amount of cash necessary to post a full bond, the inability of the corporation to continue in business if required to post a bond in the full amount, and the probability that the judgment debtor will be forced to take bankruptcy if it is unable to post alternate security to suspend execution of the judgment;
11. the total value of assets that the judgment creditor could reach to satisfy the judgment if the judgment were not superseded;
12. alternative security arrangements that would guarantee the judgment creditor's recovery, upon exhaustion of all appellate remedies, or at least the total value of assets that they could reach to satisfy the judgment if the judgment were not superseded.³⁴²

3. Power of Trial Court to Enjoin Dissipation of Assets

The trial court has the power to enjoin the judgment debtor from dissipating or transferring assets to avoid judgment satisfaction, but "may not make any order that interferes with the judgment debtor's use, transfer, conveyance or dissipation of assets in the normal course of business."³⁴³

H. Supersedeas by Notice of Appeal

Some appellants are "entitled to supersede the judgment without security by filing a notice of appeal."³⁴⁴ Statutory provisions exempt a myriad of governmental entities from filing supersedeas or other security on appeal, as monies could not be expended without legislative approval and political subsidies performing governmental functions are exempt from garnishment or execution.³⁴⁵ Exempt entities include: the State of Texas; any county in Texas; any state department; any state department head; the Federal Housing Administration; the Veterans' Administration;

342. *Id.* at 27–28.

343. TEX. CIV. PRAC. & REM. CODE § 52.006(e); *see* TEX. R. APP. P. 24.2(d).

344. TEX. R. APP. P. 25.1(g)(2).

345. Nat'l Surety Corp. v. Friendswood Indep. Sch. Dist., 433 S.W.2d 690, 694 (Tex. 1968).

340. TEX. PROP. CODE ANN. § 52.001 (Vernon 1995).

341. Yeates, *supra* note 250, at 27.

the Government National Mortgage Associations; and any national mortgage savings and loan insurance corporation created as a national relief organization and operating on a statewide basis with the F.D.I.C. in its capacity as a receiver or in its corporate capacity.³⁴⁶ Security for costs and interest may not be required of a Texas municipality;³⁴⁷ executors, administrators, or guardians in their fiduciary capacity;³⁴⁸ incorporated cities and towns;³⁴⁹ and water improvement districts, water control and improvement districts, water control and preservation districts, levee improvement districts and drainage districts.³⁵⁰

Exempted entities may generally supersede an adverse judgment by timely filing a notice of appeal.³⁵¹ However, the judgment must be one directed against the governmental subdivision claiming the statutory relief from supersedeas,³⁵² or against officials sued in their official capacity.³⁵³

I. Judgment Liens

Providing appellate security does not preclude the recordation of an abstract of judgment to affix a lien on real property of the judgment debtor, except as restricted by court order or agreement.³⁵⁴ However, the

abstract filing does not constitute a lien on the real property of a defendant if the defendant has posted security as provided by law or is excused from posting security. As the newly amended supersedeas requirements may well result in a judgment being partially secured by supersedeas, counsel for the judgment creditor should consider obtaining judgment liens against the judgment debtor's real property in an attempt to further secure the judgment.

The trial court may preclude the filing and recordation of an abstract of judgment to prevent a lien on a defendant's real property upon proof supporting that:

- (1) the defendant has posted security as provided by law or is excused by law from posting security; and
- (2) the court finds that the creation of the lien would not substantially increase the degree to which a judgment creditor's recovery under the judgment would be secured when balanced against the costs to the defendant after the exhaustion of all appellate remedies.³⁵⁵

346. TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001–.003 (Vernon 2002).

347. See *id.* § 6.002(b); TEX. PROP. CODE ANN. §§ 21.011–.016 (Vernon 2004); see also *City of W. Univ. Place v. Martin*, 123 S.W.2d 638, 638 (Tex. 1939); *City of Fort Worth v. Johnson*, 71 S.W.3d 470, 472 (Tex. App.—Waco 2002, no pet.); *In re Tarrant County*, 16 S.W.3d 914, 918 (Tex. App.—Fort Worth 2000, orig. proceeding).

348. TEX. PROB. CODE ANN. § 29 (Vernon Supp. 1997). Pending appeal, a monetary judgment against an estate and executrix in her representative capacity is suspended without the necessity of filing a supersedeas bond or other appellate security. See *Vineyard v. Irvin*, 855 S.W.2d 208, 211 (Tex. App.—Corpus Christi 1993, no writ); *Latham v. Allison*, 560 S.W.2d 481, 483–84 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

349. TEX. CIV. PRAC. & REM. CODE ANN. § 6.002(a).

350. *Id.* § 6.003(b).

351. *Id.* § 6.001(a); see also *Richards v. Mena*, 820 S.W.2d 371, 371 (Tex. 1991); *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964) (orig. proceeding).

352. See *Valerio v. Laughlin*, 307 S.W.2d 352, 353–54 (Tex. Civ. App.—San Antonio 1957, orig. proceeding) (holding that judgment against county judge and commissioners, not against county itself, requires a bond to be superseded).

353. *Greanias v. City of Houston*, 841 S.W.2d 411, 413 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

354. See TEX. PROP. CODE ANN. § 52.0011 (Vernon 2004); *Group Purchases, Inc. v. Lance Invs., Inc.*, 685 S.W.2d 729, 731 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); see also *Roman v. Goldberg*, 7 S.W.2d 899, 900 (Tex. Civ. App.—Waco 1928, writ ref'd); *Ford v. State*, 209 S.W. 490, 492 (Tex. Civ. App.—Austin 1919, no writ).

To be effective, a certified copy of the trial court order denying the creation of a judgment lien must be recorded in the real property records in each county in which the abstract of judgment or a certified copy of the judgment is filed.³⁵⁶

The trial court may withdraw such a finding any time it determines, from evidence presented, that the finding should be withdrawn. A previously created judgment lien is resurrected upon withdrawal of the finding. Filing of a certified copy of the court order of withdrawal in the appropriate real property records is necessary.³⁵⁷ Appellate courts lack jurisdiction to initially determine lien status.³⁵⁸

A judgment creditor may voluntarily abandon a judgment lien it holds and seek different security to protect it from dissipation of the debtor's assets throughout the appeal. However, a judgment creditor may be in a legally superior posture to other unsecured creditors so that abandonment may not be prudent (e.g., where a judgment debtor files bankruptcy and the judgment lien is not a preference because it was not created within ninety days of the filing of bankruptcy). A junior lienholder takes subject to senior mortgages or lienholders.

355. TEX. PROP. CODE ANN. § 52.0011(a).

356. *Id.*

357. *Id.* § 52.0011(b).

358. *Chrysler First Fin. Servs. Corp. v. Kimbrough, Carson & Woods*, 801 S.W.2d 213, 214 (Tex. App.—Houston [1st Dist.] 1990, no writ) (per curiam).

The filing of a proper supersedeas bond, deposit, proper notice of appeal, or court-ordered security has the effect of staying judgment execution.³⁵⁹ Accordingly, even though an abstract has been properly filed and creates a judgment lien on the debtor's real property, execution on that lien is not permitted by virtue of the supersedeas.

J. Continuing Trial Court Jurisdiction Notwithstanding Appeal

The trial court has continuing jurisdiction throughout the appeal to determine the adequacy of security, notwithstanding its loss of plenary power.³⁶⁰ It has continual power, on motion, to reassess the amount or type of security and the sufficiency of sureties to protect the judgment creditor. The trial court has concurrent jurisdiction with the appellate court to modify a prior order upon a showing of changed circumstances (e.g., the value of alternate security has declined or the financial rating of the bonding company has been lowered), and it may require additional security to continue suspending judgment execution throughout the appeal period,³⁶¹ although supersedeas may not be required in an amount that exceeds the legislative cap.³⁶² Recently, several intermediate courts have held that a motion to determine the adequacy of appellate security must first be presented to the trial court, before an appellate court may review the same.³⁶³

Many variables can affect the adequacy of appellate security, including the duration of the appeal,³⁶⁴ the fluctuating value of property securing the judgment, and the financial worthiness of sureties. The security must ordinarily cover post-judgment interest.

359. TEX. R. APP. P. 24.1(a), (f).

360. *See id.* 24.3(a)(1); *Miller v. Kennedy & Minshew, P.C.*, 80 S.W.3d 161, 164 (Tex. App.—Fort Worth 2002, pet. denied).

361. *See* TEX. R. APP. P. 24.3(a)(2); *see also* *Iuani v. Manske-Sheffield Radiology Group, P.A.*, 805 S.W.2d 602, 608 (Tex. App.—Beaumont 1991, writ denied).

362. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004).

363. *See* *Law Eng'g. & Envtl. Servs., Inc. v. Slosburg Co.*, 100 S.W.3d 389, 390 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Hamilton v. Hi-Plains Truck Brokers, Inc.*, 23 S.W.3d 442, 443 (Tex. App.—Amarillo 2000, no pet.). *But see* *Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.) (stating Appellate Rule 29.2 does not require that a trial court refuse to supersede before appellate court may make orders necessary to preserve the parties' rights pursuant to Rule 29.3).

364. *Lowe v. Monsanto Co.*, 965 S.W.2d 741, 742 (Tex. App.—El Paso 1998, no pet.) (per curiam). The trial court may be requested to make findings as to the estimated duration of appeal to assist the appellate court in determining the proper amount of post-judgment interest. *Id.*

In assessing the amount of security to be posted in favor of the judgment creditor, an estimate must be made as to the amount of post-judgment interest that will accrue from the time of judgment entry through the termination of the appeal.³⁶⁵ One method is to fashion the bond or other security to expressly secure any and all interest that will accrue during the appeal. Another option is to approximate the duration of the appeal and provide an estimated fixed amount of interest in the bond, deposit or security. In any event, absent posting security at the cap for money judgments³⁶⁶ or a court order allowing lesser security, the bond, deposit or security is to cover interest for the estimated duration of the appeal.³⁶⁷ If the security becomes inadequate because it does not sufficiently cover post-judgment interest, the judgment creditor may seek trial court modification of the security amount.

Another variable that may require judicial reconsideration of a security order is the fluctuating value of property posted. If property is allowed to secure a judgment in lieu of a bond, its value, if not constant, may be the subject of reassessment. Should its value become inadequate to secure the underlying compensatory damages, interest and costs, additional security should be sought. Conversely, if the judgment debtor has posted security that increases in value pending appeal, it may seek court approval for release of any excess.³⁶⁸

Notwithstanding invocation of the appellate jurisdiction and the expiration of the trial court's plenary power, orders pertaining to appellate security are subject to modification pursuant to the trial court's continuing jurisdiction.³⁶⁹ Changed circumstances will warrant trial court modification of orders with regard to the sufficiency of the sureties, or as to the amount and/or type of security. A judgment debtor must notify the court of appeals of any trial court modified security order. The change in security is subject to appellate review. The adequacy of a supersedeas bond, deposit, or other security pending appeal is reviewable by the appellate court even prior to an appeal on the merits.³⁷⁰

365. *See* Acts of May 8, 1967, 60th Leg., R.S., ch. 274, § 2, 1967 Tex. Gen. Laws 610, *repealed by* Acts of May 24, 1997, 75th Leg., R.S., ch. 1008, § 6(a), 1997 Tex. Gen. Laws 3603. For many years there has been statutory support in Texas for recovery of interest on unpaid judgments.

366. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b).

367. TEX. R. APP. P. 24.2(a)(1).

368. *See id.* 24.3; *Bank of E. Tex. v. Jones*, 758 S.W.2d 293, 295 (Tex. App.—Tyler 1988, no writ) (per curiam).

369. TEX. R. APP. P. 24.3.

370. *Id.* 24.4(d).

VII. APPELLATE REVIEW OF SECURITY ORDERS

A. In General

Texas appellate courts are empowered to review the sufficiency or excessiveness of supersedeas orders. Under pre-1988 rules, no error could be demonstrated by a showing that the trial court ordered a supersedeas bond in the amount of a money judgment, interest, and costs. Today any trial court order pertaining to security is reviewable on motion by an appellate court with jurisdiction. These motions are to be heard “at the earliest practicable time.”³⁷¹

Review of security orders may be sought by either the judgment creditor or debtor. An appellate court may evaluate supersedeas orders for sufficiency or excessiveness.³⁷² Both the courts of appeals and the Texas Supreme Court enjoy this reviewing power.³⁷³ However, factual sufficiency complaints are not within the constitutionally prescribed jurisdiction of the Texas Supreme Court.³⁷⁴ An appellate court may not modify the amount of security required to exceed the statutory caps as defined by statute for money judgments—that is the lesser of fifty percent of the judgment debtor’s net worth or twenty-five million dollars.³⁷⁵

An appellate court may issue temporary orders necessary to preserve a party’s rights. In ruling, it may consider the record before it, or remand to the trial court with directions to make findings of fact or the taking of evidence as necessary for proper determination.³⁷⁶ “Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.”³⁷⁷

B. Appellate Modification of Security Orders

The sufficiency or excessiveness of supersedeas, the sufficiency of sureties, the type of security, the determination of whether to permit supersedeas of enforcement, as well as trial court orders modifying security orders, are reviewable by the courts of appeals and the Texas Supreme Court. If an appellate court determines that an order pertaining to supersedeas is improper (i.e., security is inadequate to protect the judgment creditor or is excessive so as to be unduly

detrimental to the judgment debtor), it is not required to remand the matter to the trial court for correction. It may, as it deems appropriate, modify these orders pursuant to the authority conferred by Appellate Rule 24.4.³⁷⁸

Sufficiency or excessiveness of supersedeas may be reviewed as to the initial amount as well as in regard to an amount proper in light of changed circumstances. The appellate court may remand to the trial court for an evidentiary hearing and any necessary fact findings.³⁷⁹ Should a determination be made that the bond, deposit or other security is insufficient, the court is to order additional security, subject to caps for security as to money judgments.³⁸⁰ Conversely, if the security is found to be excessive, the appellate court may enter an order reducing it.³⁸¹

C. Compliance with Modified Security Orders

If an appellate court orders additional or other security to supersede the judgment, an appellant has twenty days “after the appellate court’s order” to provide it.³⁸² Presumptively, that same time period is allowed to procure a different surety, if the original surety is found to be inadequate. During this time, the enforcement of the judgment is suspended. Should the judgment debtor fail to put up the ordered security, the clerk is to notify the trial court that execution may issue. If the additional security is timely filed in the trial court, the suspension of judgment continues. Providing additional security does not release the liability of the surety on the original supersedeas bond or otherwise release previously posted security or affect alternate security arrangements unless ordered by the appellate court.³⁸³

While Appellate Rule 19 provides a time limit for courts of appeals to exercise plenary power after

378. *Id.* 24.4; *see, e.g.*, Nat’l Convenience Stores, Inc. v. Martinez, 763 S.W.2d 960, 960 (Tex. App.—Houston [1st Dist.] 1989, no writ). The appellate court was requested to increase the supersedeas bond (which had been posted). *Id.* The original bond covered the judgment and prejudgment interest. *Id.* Exercising its power to review and enter orders as to supersedeas bonds, the appellate court granted the motion. *Id.* The court noted that a supersedeas bond may be posted for a sum certain (which would include an estimate of post-judgment interest, actual judgment and prejudgment interest, and costs) or posted generally (covering the judgment, costs, and any interest, specifying only the rate of interest and the date from which it begins to accrue). *Id.*

379. TEX. R. APP. P. 24.4(d).

380. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006.

381. TEX. R. APP. P. 24.4(d).

382. *Id.* 24.4(e). Former Appellate Rule 49(c) allowed appellant twenty days after the appellate court order was served.

383. *See id.* 19.3(c).

371. *Id.*

372. *Id.* 24.4(a)(1); *see, e.g.*, Harvey v. Stanley, 783 S.W.2d 217, 218–19 (Tex. App.—Fort Worth 1989, no writ).

373. TEX. R. APP. P. 24.4.

374. TEX. CONST. art. V, § 3.

375. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon Supp. 2004).

376. *See* TEX. R. APP. P. 24.4(d); Lowe v. Monsanto Co., 965 S.W.2d 741, 742 (Tex. App.—El Paso 1998, pet. denied) (per curiam).

377. TEX. R. APP. P. 24.4(b).

signing its judgment, this does not limit its power to enforce or suspend enforcement of its judgment.³⁸⁴

D. Mandamus Review of Security Orders

Mandamus relief is intended to be an extraordinary remedy, available only in limited circumstances. These writs issue “only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.”³⁸⁵

The Texas Supreme Court may issue mandamus relief against a court of appeals that abuses its discretion in ruling on a motion pertaining to supersedeas.³⁸⁶ The court of appeals likewise possess mandamus jurisdiction to correct abuses by lower courts pertaining to security orders. A relator attacking a trial court ruling must establish, under the circumstances of the case, that the facts and law permit the trial court to make but one decision. Mandamus will not lie to correct an action of the lower court involving discretion.³⁸⁷

As a general rule, a party’s right to supersede a judgment is not a matter within the trial court’s discretion.³⁸⁸ A party has the right to supersede a final

money judgment by posting appellate security, thereby suspending execution.³⁸⁹ As to parties exempt from posting supersedeas, a timely notice of appeal stays a judgment or so much of it as may be superseded.³⁹⁰ A final judgment may be superseded on appeal notwithstanding the judgment does not require a writ of execution or other process for its enforcement.³⁹¹ However, if review by appeal is an adequate remedy, mandamus should not issue.³⁹² If no supersedeas bond or other appellate security is posted, mandamus may issue should the trial court decline to enforce the judgment pending appeal.³⁹³

E. Effect of Execution and Judgment Satisfaction During Appeal

Appellate jurisdiction properly invoked is not defeated by subsequent execution on the appellant’s property.³⁹⁴ Thus, if a judgment is not, or cannot be superseded, and execution issues, the appeal will continue.³⁹⁵ Should a judgment debtor be successful on appeal, the action against the executing judgment creditor is one in restitution to recover the fair market value of property subjected to execution.³⁹⁶ Thus, an executing party risks restitution liability beyond that received from an execution sale. The inability of the judgment creditor to make restitution, in the event of appellate reversal will not justify a stay of execution absent the posting of a supersedeas bond or other proper security.³⁹⁷

384. *Id.*

385. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (quoting *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding)); see APPELLATE PROCEDURE IN TEXAS § 1.4[1][b] (Orville C. Walker ed., 2d ed. 1979).

386. See, e.g., *Swinney v. Tenth Dist. Court of Appeals*, 749 S.W.2d 50, 50 (Tex. 1988) (orig. proceeding). In this case, the trial court entered a money judgment in favor of the plaintiff awarding both pre-judgment and post-judgment interest. *Id.* The supersedeas bond posted by the judgment debtor was in a fixed amount. *Id.* Due to the running of post-judgment interest, the amount of the supersedeas bond became insufficient. *Id.* Accordingly, the judgment creditor moved the court of appeals to increase it so as to be an open-ended bond. *Id.* That is, the appellant sought an amended supersedeas bond in an amount fixed by the trial court judgment, including an open-ended commitment for interest accruing at the post-judgment amount of ten percent per annum until final appellate disposition. *Id.* The court of appeals refused to issue the order. *Id.* The supreme court conditionally issued a writ of mandamus directing the court of appeals to grant the motion to amend the supersedeas bond so that the bond not only covered the amount of the judgment, but extended in the future to any and all post-judgment interest that might accrue. *Id.* It appears that actions taken by the court of appeals concerning issues of supersedeas bonds or other security orders will be subject to the usual mandamus review.

387. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding).

388. See *Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ) (per curiam); *Weber v. Walker*, 591 S.W.2d 559, 562

(Tex. Civ. App.—Dallas 1979, orig. proceeding).

389. TEX. R. APP. P. 24.1(a).

390. *Id.* 25.1(g).

391. *Los Campeones, Inc. v. Valley Int’l Props., Inc.*, 591 S.W.2d 312, 314 (Tex. Civ. App.—Corpus Christi 1979, no writ).

392. See *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding); see also *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004) (“An appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.”).

393. *In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 179 (Tex. 2003) (issuing mandamus to compel the trial court to hear a motion to enforce an unsuperseded final declaratory judgment, notwithstanding pending appeal of that judgment).

394. *EMW Mfg. Co. v. Lemons*, 724 S.W.2d 425, 426–27 (Tex. App.—Fort Worth 1987, no writ); see also TEX. R. CIV. P. 627.

395. *Anderson v. Lykes*, 761 S.W.2d 831, 833–34 (Tex. App.—Dallas 1988, orig. proceeding); see also TEX. R. CIV. P. 627.

396. TEX. CIV. PRAC. & REM. CODE ANN. § 34.022 (Vernon 1997).

397. See *Harrison v. Barngrover*, 72 S.W.2d 971, 971

A voluntary and unconditional satisfaction of judgment pending appeal will moot the controversy.³⁹⁸ Absent some remaining controversy, the appellate court must dismiss for want of jurisdiction. Appellate courts may not issue advisory opinions.³⁹⁹ However, payment on a judgment will not moot an appeal if the judgment debtor clearly expresses intent to exercise his right to pursue an appeal.⁴⁰⁰

F. Supersedeas on Appeal to Texas Supreme Court or U.S. Supreme Court

A take-nothing judgment does not require a supersedeas bond, since there is no judgment requiring enforcement against assets. If a take-nothing judgment is reversed by a court of appeals, a supersedeas bond presumptively need not be posted in order to forestall execution pending Texas or United States Supreme Court review, because execution should not occur until the mandate issues.⁴⁰¹ A losing party may move the court of appeals for a stay of judgment.

Once appellate security is filed in accordance with Appellate Rule 24, enforcement of that judgment is suspended pending a final “adverse judgment . . . on appeal.”⁴⁰² However, the trial court retains jurisdiction to modify the required appellate security in the event that a surety becomes insufficient, or the amount of security is insufficient to bond the trial court’s judgment. However, there is no authority that empowers the trial court to order an increase or decrease in appellate security premised upon an

appellate court judgment when that judgment is subject to further appellate review, and no mandate has issued. Put another way, the obligation of a judgment debtor is to post appellate security in accordance with Appellate Rule 24 to suspend execution of the trial court judgment. The court of appeals is to issue its mandate only when further appellate review is not sought. Specifically, the court of appeals mandate may issue only when one of the following periods expires:

Ten days after the time has expired for filing a motion to extend time to file a petition for review or a petition for discretionary review if:

- (A) no timely petition for review or petition for discretionary review has been filed;
- (B) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending . . .⁴⁰³

When further review is sought but denied by the Texas Supreme Court, the mandate is to issue:

Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review, if no timely filed motion for rehearing or motion to extend time is pending.⁴⁰⁴

(Tex. Civ. App.—Beaumont 1934, writ ref’d).

398. See *Cont’l Cas. Co. v. Huizar*, 740 S.W.2d 429, 430 (Tex. 1987) (citing *Employees Fin. Co. v. Lathram*, 369 S.W.2d 927, 930 (Tex. 1963)); *Dalho Corp. v. Tribble & Stephens*, 762 S.W.2d 733, 734 (Tex. App.—San Antonio 1988, no writ) (citing *Huizar*, 740 S.W.2d at 430).

399. See generally *Huizar*, 740 S.W.2d at 430 (noting payment under duress would not render appeal moot).

400. *Miga v. Jensen*, 96 S.W.3d 207, 211–12 (Tex. 2002) (acknowledging that a litigant must be able to halt the accrual of post-judgment interest and yet preserve the right to appeal).

401. See TEX. R. APP. P. 51; see also *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (holding that when a county official, such as a district clerk, is sued in an official capacity, the timely filing of a notice of appeal operates as a supersedeas bond and suspends enforcement of the underlying judgment on appeal; accordingly, the underlying superseded judgment cannot form the basis for contempt for acts occurring during the appeal in violation of the lower court judgment which are the subject of the appeal until there is a mandate issued by the final appellate court). *But see* *Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 490–91 (Tex. App.—Texarkana 1998, pet. denied) (holding once appeal is final, a supersedeas bond no longer precludes enforcement of judgment).

402. TEX. R. APP. P. 24.1.

The district clerk bears the responsibility for determining when funds deposited to supersede a judgment may be released and is not to do so “until the conditions of liability in [Rule 24.1](d) are extinguished.”⁴⁰⁵ The clerk also is the officer responsible for issuing writs of execution.⁴⁰⁶ The clerk is directed under the rules, that execution is not to issue when a trial court judgment has been superseded on appeal.⁴⁰⁷ The district clerk is further directed that it is not to enforce an appellate court judgment until the clerk receives the mandate.⁴⁰⁸

Until a final adverse judgment on appeal is rendered, the security continues to serve to supersede the trial court’s judgment. An appealable judgment, which by its nature may not be enforced until completion of the appellate process, should not be considered a changed circumstance that would support

403. *Id.* 18.1(a)(1).

404. *Id.* 18.1(a)(2).

405. *Id.* 24.1(c)(3).

406. TEX. R. CIV. P. 627.

407. *Id.*

408. TEX. R. APP. P. 51.1(b).

trial court modification of appellate security. To hold to the contrary, would be inconsistent with not only one final judgment principles but also with the clear directive that an appellate judgment is not enforceable unless a mandate has issued and no further appellate review is sought. A trial court empowered to increase appellate security requirements when no court of appeals mandate has issued and Texas Supreme Court review is pending, would, in effect, have the ability to enforce the appealable judgment. If the judgment debtor could not provide the additional security, the judgment would be subject to enforcement, contrary to Appellate Rule 51.1(b) prohibiting enforcement of an appellate judgment until the trial court clerk receives the mandate from the appellate court, signaling that appellate review is complete.⁴⁰⁹ Thus, the trial court judgment should remain the operative judgment until the appellate process is complete and a judgment is entered by the appellate court and the appellate court issues its mandate requiring recognition and enforcement of its judgment.⁴¹⁰

Should a petition for review be denied, a stay of mandate may be sought from the Texas Supreme Court pending disposition by the United States Supreme Court on a petition for writ of certiorari. Under limited circumstances, a stay may be obtained from the United States Supreme Court.⁴¹¹ A motion to stay mandate “must state the grounds for the petition and the circumstances requiring the stay.”⁴¹² The appellate court authorized to issue the mandate may grant a stay upon a determination that the “grounds are substantial and that the petitioner or others would incur serious hardship from the mandate’s issuance if the United States Supreme Court were later to reverse the judgment.”⁴¹³ However, if a stay is denied, the rules are silent as to any right to supersede. It is unnecessary to supersede when a stay of enforcement is obtained.

G Disposition of Security on Conclusion of Appellate Review

1. Conditions of Liability

The liability of a surety on a supersedeas bond, or other appellate security, following final disposition on appeal is dependent upon the nature of the appellate judgment. Appellate Rule 24.1(d) provides the surety is

responsible up to the amount of the bond, deposit in lieu of bond, or alternate security if (1) the debtor does not perfect the appeal, or the appeal is dismissed, when the debtor does not perform the trial court judgment, or (2) the debtor does not perform an adverse judgment final on appeal.⁴¹⁴

Texas Rule of Appellate Procedure 43.5 instructs the court of appeals in affirming the trial court judgment or modifying it and rendering judgment against the appellant to also render judgment against the sureties on the appellant’s supersedeas bond “for the performance of the judgment and for any costs taxed against the appellant.”⁴¹⁵ Appellate Rule 60.5, applicable to the supreme court, also speaks in terms of the surety performing the entire judgment but does not contain language limiting the surety’s obligation to the amount of the bond, deposit, or alternate security posted.⁴¹⁶ The contractual terms of the supersedeas bond will ultimately define the surety’s obligations, and should limit the surety’s liability to the amount of the bond, deposit or security. The trial court, holding a cash deposit as appellate security in the registry of the court, must make disbursements that do not conflict with the appellate court’s opinion and mandate.⁴¹⁷

In the event the trial court judgment is affirmed, the appellant covenants to perform the judgment and

414. *Id.* 24.1(d). This rule speaks in terms of conditions of liability that must be undertaken by the surety on “a bond, any deposit in lieu of a bond, or any alternate security ordered by the court.” *Id.* However, there will be instances when no surety is involved as the party itself will post a deposit in lieu of bond, such as cash, cashier’s check, or certain negotiable instruments or even court approved alternate security. Thus, the rule addresses conditions of liability that must be undertaken by the surety in superseding judgments and is silent as to the parties’ responsibilities. Strictly speaking, a surety is one backing up the obligation of another and thus a party is not and cannot be a surety to itself. However, the court no doubt intended that the conditions of liability expressed in Appellate Rule 24.1(d) would apply to appellants when acting without a surety. Former Appellate Rule 47(a) spoke in terms of the conditions of liability a judgment debtor was required to undertake in superseding a judgment, backed by a good and sufficient surety if a bond were posted. A cash deposit or alternate security, filed by court order, should be similarly conditioned.

415. *Id.* 43.5.

416. *Id.* 60.5.

417. *See In re Alsenz*, 152 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding) (holding where appellate court mandate unconditionally released supersedeas on remand, trial court had no authority to condition the release of the bond on direct payment of the proceeds from the bond to attorney in payment of fees); *Kenseth v. Dallas County*, 126 S.W.3d 584, 601 (Tex. App.—Dallas 2004, pet. denied).

409. *Id.*

410. The author is aware of one instance in which an appellate court ordered the modification of the appellate security necessary to continue suspension of the enforcement of a judgment based upon the appellate modification of that judgment. *See Harris v. Archer*, No. 07-01-0071-CV, at 3 (Tex. App.—Amarillo 2004, order) (unpublished).

411. TEX. R. APP. P. 18.2.

412. *Id.*

413. *Id.*

pay levies and costs awarded against it.⁴¹⁸ Thus, a surety on a supersedeas bond or on other approved security agrees to pay the damages if the judgment is affirmed, even if modified on appeal,⁴¹⁹ up to the amount of the bond, deposit or security. There is no authority to release supersedeas bonds to the judgment creditor while an appeal is pending.⁴²⁰ If the judgment is affirmed, changed, or affirmed as modified, the appellate court is to render judgment against the appellant and the sureties on any supersedeas bond or deposit filed.⁴²¹ In addition, the appellate court must make a disposition of costs as it deems proper, including costs in the rendition of the judgment.⁴²² The appellate clerk issues a mandate in accordance with the judgment directed to the trial court clerk in a timely manner.⁴²³ Upon receipt, the judgment of the appellate court may be enforced, and the trial clerk is to proceed to issue execution as in other cases.⁴²⁴

On the other end of the spectrum, if a judgment protected by appellate security is either vacated or reversed and rendered on appeal, the surety has no liability, since the judgment debtor has no obligation on the judgment.⁴²⁵ Under these circumstances, and once the time to further appeal has elapsed,⁴²⁶ the supersedeas bond should be released and the surety discharged.⁴²⁷ If a judgment is reversed on appeal for a procedural reason rather than on the merits, the surety is apparently nonetheless released on the bond, deposit, or alternate security according to the conditions of liability.⁴²⁸ In the event that the appellate court reverses the trial court judgment and remands the case in its entirety, the surety is likewise discharged, as the judgment the surety obligated itself upon no longer exists.⁴²⁹

There is a divergence of opinion as to whether cash security should necessarily be released in the

event of judgment reversal.⁴³⁰ Upon a debtor's deposit of cash into the registry of the court to suspend judgment execution, funds cease to be the assets of the judgment debtor. One view is that if cash is unconditionally deposited by a party—and not a surety—to suspend execution, the deposit may remain in effect, if equitable, to secure a judgment reversed only as to damages and when damages are liquidated.⁴³¹ A disparate view holds that once a judgment is reversed on appeal, there is nothing to supersede, and the obligation to post bond is discharged. Since the cash is merely deposited in lieu of a supersedeas bond, it should be returned to the successful appellant.⁴³² A cash deposit conditionally made by a surety should be returned in any event upon judgment reversal following the appeal.⁴³³

Upon reversal, an appellant is entitled to execution issued by the trial court against the appellee, for costs occasioned by the appeal.⁴³⁴ The cost of obtaining supersedeas is not recoverable in Texas according to a 1958 Texas Supreme Court decision, contrary to federal practice.⁴³⁵ Perhaps the time has come for Texas to adopt this more enlightened view.

2. What is an Adverse Judgment Final on Appeal?

Texas jurisprudence is unclear as to the extent of the surety's liability when a judgment on appeal is affirmed in part and reversed and remanded in part. One conclusion, arguably supported by rules and judicial decisions, is that absent a final judgment on appeal disposing of all parties and issues, the surety is discharged from liability on the underlying judgment.⁴³⁶ A contrary position is also tenable; when a judgment is affirmed in part and reversed and remanded in part, the surety is liable as to the damages affirmed when either an express or implied severance is proper. That is, the matter that is affirmed must be

418. See TEX. R. APP. P. 24.1.

419. See S.W. Bitulithic Co. v. Martinez, 143 S.W.2d 116, 119 (Tex. Comm'n App. 1940, judgment adopted).

420. Muniz v. Vasquez, 797 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1990, no writ).

421. TEX. R. APP. P. 43.1–.2.

422. *Id.* 43.4.

423. *Id.* 18.1.

424. *Id.* 51.1, 65.2.

425. Blair v. Sanborn, 18 S.W. 159, 160 (Tex. 1892).

426. Flanary v. Wade, 113 S.W. 8, 9–10 (Tex. 1908); see also Mut. Life Ins. Co. of N.Y. v. Bohart (*In re Bohart*), 743 F.2d 313, 319 (5th Cir. 1984).

427. Neeley v. Bankers Trust Co. of Tex., 848 F.2d 658, 659 (5th Cir. 1988).

428. TEX. R. APP. P. 24.1(d); see also Amwest Sur. Ins. Co. v. Graham, 949 S.W.2d 724, 727 (Tex. App.—San Antonio 1997, writ denied).

429. Amwest Sur. Ins. Co., 949 S.W.2d at 727.

430. See Olney Savs. & Loan Ass'n v. Trinity Banc Savs. Ass'n, 885 F.2d 266, 274 (5th Cir. 1989); Resolution Trust Corp. v. Chair King, Inc., 827 S.W.2d 546, 548 (Tex. App.—Houston [14th Dist.] 1992, no writ).

431. *Resolution Trust Corp.*, 827 S.W.2d at 550.

432. See Neeley, 848 F.2d at 659; Amwest Savs. Ass'n v. Farmers Mkt. of Odessa, Inc., 753 F. Supp. 1339, 1344 (W.D. Tex. 1990).

433. *Resolution Trust Corp.*, 827 S.W.2d at 550.

434. See TEX. R. APP. P. 43.4; *In re Marriage of Burrell*, 747 S.W.2d 479, 484 (Tex. App.—Amarillo 1988, writ denied).

435. Hammonds v. Hammonds, 313 S.W.2d 603, 604–05 (Tex. 1958).

436. Amwest Sur. Ins. Co. v. Graham, 949 S.W.2d 724, 729 (Tex. App.—San Antonio 1997, writ denied) (“[T]he surety on a supersedeas bond does not promise to pay any judgment entered in a particular case; it bonds a ‘particular judgment.’”).

properly severable from those matters remanded for retrial. These distinctive positions will be fully developed below.

As noted above, a surety's liability is dependent upon the judgment of the appellate court, as follows:

LIABILITY OF SURETY ON SUPERSEDEAS (OR OTHER APPELLATE SECURITY) FOLLOWING APPEAL	
APPELLATE COURT JUDGMENT	EFFECT ON SURETY'S LIABILITY
Appeal Dismissed	Surety Liable *
Judgment Affirmed	Surety Liable
Judgment Modified and Affirmed	Surety Liable
Judgment Vacated	Surety Discharged
Judgment Reversed and Rendered	Surety Discharged
Judgment Reversed and Remanded	Surety Discharged
Judgment Reversed and Rendered in Part, Affirmed in Part	Surety Liable as to Affirmed Judgment
**Judgment Reversed and Remanded in Part, Affirmed in Part	Surety May Be Liable as To Judgment Affirmed
* Exception, if appeal is dismissed because the judgment is not final and appealable, the surety should be discharged.	
**Non-final judgment in traditional sense (leaves matters to be resolved on remand).	

Appellate Rule 24 imposes liability upon a surety of appellate security when "the debtor does not perform an adverse judgment final on appeal."⁴³⁷ This rule became effective September 1, 1997. To date there are no Texas judicial decisions concerning the determinative question of, nor do the rules define what is an adverse judgment final on appeal that will trigger the surety's liability when the debtor fails to perform the judgment. A judgment that is affirmed or is modified and affirmed is clearly adverse to the appellant and is definitely a final judgment as that term is used in the traditional sense, in that it disposes of all parties and all issues in the lawsuit.⁴³⁸ As Texas jurisprudence adheres to the one final judgment principle, these rules are consistent with that notion. These rules also support that a judgment against a surety on the appellant's supersedeas bond or other appellate security is not proper when the appellate court (1) vacates, (2) reverses and renders, or (3) reverses and remands in its entirety the lower court judgment, as these dispositions do not constitute an adverse judgment as to the appellant.

What is the surety's liability in the event of a partial remand? An appellate court may affirm in part and reverse and remand in part when there is reversible error that "affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties."⁴³⁹ However, the court may

439. TEX. R. APP. P. 44.1; *see also id.* 61.2 (applying substantially the same language to proceedings in the supreme court); *Otis Elevator, Co. v. Bedre*, 776 S.W.2d 152, 153 (Tex. 1989) (finding it improper for trial court to remand negligence claim without also remanding related contributory negligence claim); *Woods v. Littleton*, 554 S.W.2d 662, 672 (Tex. 1977) (ordering unlimited remand where issues were intertwined, using standard of severability under the former rule rather than separable without unfairness under the current rule); *Great State Petroleum, Inc. v. Arrow Rig Serv., Inc.*, 714 S.W.2d 429, 431 (Tex. App.—Fort Worth 1986, no writ) (holding issues of liability and damages so intertwined that they were not clearly separable without unfairness to the parties). Examples of cases that have held claims to be clearly separable without unfairness to the parties include: *Cochran v. Am. Savs. & Loan Ass'n of Houston*, 586 S.W.2d 849, 850 (Tex. 1979) (per curiam) (holding it error to reverse and remand both usury claims and fraud claims when error affected only usury claims and issues were separable); *Glud v. Glud*, 641 S.W.2d 688, 691 (Tex. App.—Waco 1982, no writ) (holding that reversal of custody award to the wife did not require reversal of property division); *Lipshy v. Lipshy*, 525 S.W.2d 222, 224 (Tex. Civ. App.—Dallas 1975, writ dismissed w.o.j.) (custody held severable from property issues for purposes of remand); *see also* MCDONALD & CARLSON, TEXAS CIVIL

437. TEX. R. APP. P. 24.1(d)(2).

438. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). Conversely, an interlocutory judgment does not dispose of the case but leaves it for further action by the court to settle and determine the entire controversy. *See Merch. Mart, Inc. v. Marcus*, 515 S.W.2d 663, 664 (Tex. 1974).

not order a separate trial solely on unliquidated damages if liability issues remain contested.⁴⁴⁰

In most instances, remand on the issue of damages alone is permitted in an appeal from a default judgment because liability is established by default.⁴⁴¹ Courts have construed the rule to permit a remand on the issue of attorney's fees alone, despite the fact that they are unliquidated.⁴⁴²

The question remains of what effect an appellate court judgment affirming in part and reversing and remanding in part has on the liability of the surety of appellate security. As noted above, the literal language of the rule imposes liability on the surety conditioned upon the debtor not performing "an adverse judgment final on appeal."⁴⁴³ It is possible that a different analysis than that traditionally utilized to determine what constitutes a final judgment following disposition on appeal should be applied in making this determination. A trial court's judgment is final for purposes of appeal when it purports to dispose of all parties and all issues.⁴⁴⁴ If the traditional definition of what constitutes a final judgment is utilized, a judgment that reverses and remands in part, absent a severance is not a final judgment on appeal against the appellant, as it fails to dispose of all issues and all parties. If the traditional test for determining judgment finality is applied, there is no "final judgment" and the surety's liability on the judgment is arguably discharged. That is, the bond is wed to the judgment, and when the judgment is reversed to any extent and remanded, the surety's obligation as to that judgment is

extinguished. This position is consistent with the notion that execution cannot issue on a judgment that is not final, and the rule that a case may have only one final judgment.⁴⁴⁵ However, a possible argument can be made that when a judgment is affirmed in part and reversed and remanded in part, an implied severance may result, provided that the matter that is affirmed is separable on appeal from those matters remanded for retrial. If so, arguably an adverse judgment, final on appeal, is present and the surety is liable to the extent of the damages affirmed.⁴⁴⁶

To suggest that a surety is discharged from liability whenever a judgment is affirmed in part and remanded in part may be overly simplistic. A careful analysis suggests that a surety's liability on appellate security when a judgment is reversed and remanded upon appeal is dependent upon three things: (1) the scope of the appellate complaints preserved and presented, (2) the contractual terms undertaken by the surety, and (3) the nature of the appellate judgment, that is, whether the matter affirmed is independent of—and not interdependent on—the matter remanded.

The scope of an appeal—the complaints addressing the lower court judgment—defines the potential for remand. Remand for retrial of matters not the subject of appellate complaint is improper. Thus, for example, an appeal from a divorce judgment attacking only the property settlement does not support remand of the judgment insofar as it affects dissolution of the marriage.

A supersedeas bond is a contract by which the surety obligates itself to pay the judgment rendered against the principal upon stated terms.⁴⁴⁷ Typically, the surety contracts to "prosecute [the] appeal with effect" and in the event the appellate judgment is adverse, to pay all damages as may be awarded against the appellant.⁴⁴⁸ Contractual language to this effect bonds the surety to a double obligation "to both prosecute the appeal with effect and to perform the judgment of the appellate court."⁴⁴⁹ As a general rule, an appeal is prosecuted with effect when "the judgment is reversed, and the cause is remanded, with no

PRACTICE § 34:4 (2d ed. 1998) (Enforcement and Proceedings on Remand).

440. See *TEX. R. APP. P.* 44.1, 61.2; *Lakewood Pipe of Tex., Inc. v. Conveying Techniques, Inc.*, 814 S.W.2d 553, 557 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding that where liability issues were contested in trial court, and damages are unliquidated, appellate court cannot remand just damages portion of case).

441. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 734 (Tex. 1984) (suggesting to court of appeals that if remand was necessary after consideration of the factual sufficiency of the evidence, such remand should be limited to damages because liability had been established by default).

442. See *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991); *Pelto Oil Co. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583, 588 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Baytown Constr. Co. v. City of Port Arthur*, 792 S.W.2d 554, 563 (Tex. App.—Beaumont 1990, no writ); *Caldwell & Hurst v. Myers*, 714 S.W.2d 63, 66 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n. r. e.).

443. *TEX. R. APP. P.* 24.1(d)(2).

444. See *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192 (Tex. 2001); *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1994); *Pan Am. Petroleum Corp. v. Tex. Pac. Coal & Oil Co.*, 324 S.W.2d 200, 200 (Tex. 1959) (per curiam).

445. *Hughes v. Habitat Apartments*, 828 SW.2d 794, 795 (Tex. App.—Dallas 1992), *rev'd on other grounds*, 860 S.W.2d 872 (Tex. 1993).

446. See *Crane v. Buckley*, 203 U.S. 441, 446–47 (1906); *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 930 F.2d 1572, 1576 (Fed. Cir. 1991); *Neeley v. Bankers Trust Co. of Tex.*, 848 F.2d 658, 659–60 (5th Cir. 1988); *Aetna Cas. & Sur. Co. v. Woods*, 565 S.W.2d 861, 864–65 (Tenn. 1978); *Holmes v. U.S. Fid. & Guar. Co.*, 844 S.W.2d 632, 636 (Tenn. Ct. App. 1992).

447. *Trent v. Rhomberg*, 18 S.W. 510, 513 (Tex. 1886).

448. *Harris v. Keoun*, 135 S.W.2d 194, 194 (Tex. Civ. App.—Waco 1940, writ ref'd).

449. *Id.* at 195.

sentence or decree to be performed by the appellant, or award of damages to be paid by him.”⁴⁵⁰

There is a dearth of case law addressing the surety’s liability in the event an appellate court affirms a lower court judgment in part and reverses and remands in part. There is intermediate court authority suggesting that a surety’s obligation on a supersedeas bond is discharged when an appellate court judgment is not final due to remand. For example, when an appellate court affirmed a judgment in favor of the plaintiff but reversed and remanded the defendant’s related counterclaim, the surety was ordered discharged.⁴⁵¹ In that instance, the Dallas Court of Appeals reasoned: “Since in this case [the appellant’s] counterclaim is still pending, the judgment is not final, and we cannot render judgment against the surety on the supersedeas bond. Accordingly, our judgment will reflect that the surety’s obligations on the supersedeas bond are discharged.”⁴⁵²

The court noted that a “supersedeas bond is not intended to secure speculative damages or damages that have not been finally determined.”⁴⁵³ Relying upon the principle that execution cannot issue on a judgment that is not final, the appellee’s motion for entry of judgment against the surety on the appellant’s supersedeas bond was denied. This holding can be simply explained on the basis that there was no adverse judgment final on appeal, as the judgment did not dispose of all parties and all issues. However, an alternate supporting explanation of the court’s holding is that it would be improper to require the defendant’s surety to satisfy the plaintiff on the judgment affirmed, because ultimately the liability of the appellant/defendant is dependent upon its recovery, *vel non*, on its counterclaim to be determined on remand. If the defendant is ultimately victorious on its counterclaim and the damages on the counterclaim exceed those recovered by the plaintiff on its main claim that was affirmed on appeal, the defendant is not liable to pay the plaintiff’s claim, but may rely upon the right of setoff and insist on a net judgment in its favor.⁴⁵⁴ Thus, it would be improper to infer a severance of the plaintiff’s claim from the defendant’s counterclaim, as those matters (a claim and a compulsory counterclaim) are not severable on appeal. Put another way, the liability of an appellant as to the matter partially affirmed is dependent upon the matter reversed and remanded, so there is no adverse

judgment final on appeal and the surety should accordingly be discharged as a matter of law. On the other hand, if the matter that is affirmed in part will not be affected by the retrial of the matter reversed and remanded, arguably the surety is liable to the extent of the affirmation.

The San Antonio Court of Appeals held in *Amwest Surety Insurance Co. v. Graham*,⁴⁵⁵ that when a trial court judgment as to liability is reversed and remanded on appeal for a complete retrial, even for a procedural reason rather than on the merits of the underlying action, the surety is released from its obligations under the supersedeas bond as a matter of law.⁴⁵⁶ The trial court in *Amwest* granted summary judgment and included in its order a “Mother Hubbard” clause. Although the grounds for the summary judgment stated in the motion were supportable, the appellate court reversed because the summary judgment purported to dispose of grounds not raised in the motion and thus granted more relief than requested.⁴⁵⁷ Upon remand, the surety filed a motion requesting that the trial court release the supersedeas bond and discharge it from liability. The motion was overruled with the trial court ordering the surety to apply the proceeds of the bond to the new judgment that was entered on remand. The San Antonio Court of Appeals reversed this trial court order and rendered judgment in the surety’s favor. The court acknowledges: “A supersedeas bond is a contract by which a surety obligates itself to pay a final judgment rendered against its principal under the conditions stated in the bond.”⁴⁵⁸ The surety’s undertaking in *Amwest* was to provide a supersedeas bond that would suspend enforcement of the 1992 judgment pending appeal. The court observed that a “surety on a supersedeas bond does not promise to pay any judgment entered in a particular case; it bonds a ‘particular judgment.’”⁴⁵⁹ Accordingly, “when the mandate issued reversing the 1992 Judgment, [the appellant] prosecuted its appeal ‘with effect,’ and [the surety] was discharged from its obligations under the supersedeas bond as a matter of law.”⁴⁶⁰ The *Amwest* holding discharging a surety upon reversal and remand of liability findings is proper, as there was no adverse judgment following appellate disposition against the appellant.

Another Texas case can be read to support that, absent a judgment on appeal disposing of all issues and claims between an appellant and appellee on a

450. *Rhomberg*, 18 S.W. at 513.

451. *Edlund v. Bounds*, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied).

452. *Id.*

453. *Id.*

454. *City of Port Isabel v. Shiba*, 976 S.W.2d 856, 861 (Tex. App.—Corpus Christi 1998, pet. denied).

455. 949 S.W.2d 724 (Tex. App.—San Antonio 1997, writ denied).

456. *Id.* at 729.

457. *Id.* at 726.

458. *Id.*

459. *Id.* at 729.

460. *Id.*

complete ground, there is no final judgment that will support execution against the supersedeas bond. *Resolution Trust Corp. v. Chair King, Inc.*⁴⁶¹ involved an appellate judgment that affirmed liability but reversed and remanded as to damages and attorney's fees. In a plurality decision, the court suggested that while such a judgment may serve to discharge the surety from obligation on a supersedeas bond, it does not necessarily discharge an appellant who had posted a cash deposit in lieu of a supersedeas bond from liability upon retrial. This holding has been criticized. A strong argument can be made that there is no adverse judgment final on appeal to warrant holding a surety (or an appellant who chooses to post a cash deposit) liable. A judgment affirming liability and remanding damages is not an adverse judgment with a sum certain that would support execution. A supersedeas bond is not intended to secure speculative damages or damages that have not been finally determined.⁴⁶² Accordingly, the surety should be discharged.

Discharge of a surety upon judgment reversal and remand to determine damages is arguably consistent with suretyship jurisprudence. A surety is a favorite of the law, and its obligations are strictly construed.⁴⁶³

461. 827 S.W.2d 546, 551 (Tex. App.—Houston [14th Dist.] 1992, no writ). Justice Duncan acknowledged in *Amwest*:

We recognize there is no opinion of the court in *Chair King* because each member of the panel filed a separate opinion. See *Chair King*, 827 S.W.2d at 552 (Sears, J., concurring), 554 (Robertson, J., dissenting). The issue upon which the panel members disagreed was whether the appellant's cash deposit in lieu of a supersedeas bond was available to satisfy the judgment on remand "where the appellant [became] insolvent during the appeal, and the appellate court affirm[ed] its liability, with only the amount of damages and certain attorney's fees to be determined on retrial . . ." *Id.* at 551, 553 (Sears, J., concurring), 555 (Robertson, J., dissenting). The panel members agreed, however, on the issue involved here—the surety is not liable on a supersedeas bond issued to secure a judgment that is reversed on appeal. *Id.* at 550, 552–53. (Sears, J., concurring), 554 (Robertson, J., dissenting).

Amwest Sur. Ins. Co., 949 S.W.2d at 727 n.1; see also *Rose v. Dominguez*, 669 S.W.2d 866, 867–68 (Tex. App.—Corpus Christi 1984, orig. proceeding) (holding judgment was not final and subject to execution because a counterclaim was still pending); 34 TEX. JUR. 3D *Enforcement of Judgments* § 12 (2002) (declaring a judgment is not final so as to support execution unless the judgment disposes of all issues and parties to the cause).

462. *Hughes v. Habitat Apartments*, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992), *rev'd on other grounds*, 660 S.W.2d 872 (Tex. 1993).

463. *Crane v. Buckley*, 203 U.S. 441, 447 (1906)

Further, the one final judgment rule precludes enforcement on a supersedeas bond securing a matter that has been remanded for further trial court proceedings which will culminate in a new and different judgment. Contract law dictates that obligations are limited as contractually agreed upon by the parties and as charged by law. As noted above, absent agreement to the contrary, a surety is obligated to satisfy an adverse judgment final on appeal if the judgment debtor does not satisfy it⁴⁶⁴ and the appellate courts, when affirming the lower court judgment or modifying and rendering judgment against the appellant, are to enter judgment against the appellant as well as the surety.⁴⁶⁵

Is it necessary for the appellate court to issue its mandate before judgment satisfaction may be sought? A mandate is the judicial order issued by a higher court to a lower court directing the lower court to take designated action, to make a certain disposition of a case or to enforce the superior court's judgment. Texas Rule of Appellate Procedure 51(b) directs: "When the trial court clerk receives the mandate, the appellate court's judgment must be enforced."⁴⁶⁶ Although an older Texas Supreme Court decision suggests⁴⁶⁷ that issuance of mandate is not necessary to render a judgment final, more recently the court has held that mandate must issue before a judgment is enforceable through contempt.⁴⁶⁸ One intermediate court has held, however, that notwithstanding the posting of a supersedeas bond, and before the issuance of mandate, the successful judgment creditor may proceed directly against the judgment debtor via a turnover proceeding to enforce a judgment affirmed by the Texas Supreme Court on appeal when no timely motion for rehearing had been filed.⁴⁶⁹

(applying doctrine of *strictissimi juris* to surety's obligation on a bond).

464. TEX. R. APP. P. 24.1(d).

465. *Id.* 43.5, 60.5.

466. *Id.* 51.1(b).

467. *Cont'l Gin Co. v. Thorndale Mercantile Co.*, 254 S.W. 939, 941 (Tex. Comm'n App. 1923, judgment adopted).

468. *In re Long*, 984 S.W.2d 623, 626 (Tex. 1998) (refusing to hold in contempt for violating a lower court judgment, the enforcement suspended on appeal, until the issuance of mandate enforcing the lower court judgment).

469. *Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 490 (Tex. App.—Texarkana 1998, pet. denied); see also *Kenseth v. Dallas County*, 126 S.W.3d 584, 598 (Tex. App.—Dallas 2004, pet. denied) (holding a trial court's pre-mandate action is void only if it creates an actual interference with the appellate court's active power and authority over the case); *Harrison v. State*, 843 S.W.2d 157, 159 (Tex. App.—Houston [14th Dist.] 1992, writ ref'd) (stating issuance of mandate is purely a judicial clerical function).

Cautious counsel should carefully review the terms of a supersedeas or other appellate security agreement as ultimately the responsibility of the surety on an appellate judgment is defined by the contractual terms of its undertaking.⁴⁷⁰ In the absence of a contrary agreement, the appellate rules impose conditions of liability, including that the surety is liable for all damages and costs that may be awarded against the debtor—up to the amount of the bond, deposit, or security—in the event the debtor does not perform an adverse judgment final on appeal.⁴⁷¹ Ideally, a request should be included in the prayer section of the appellee’s brief for any adverse judgment final on appeal to operate against both the appellant and its surety,⁴⁷² otherwise the appellate court may be unaware that appellate security exists.

Counsel should also scrutinize any appellate court judgment and assess whether further motions should be filed to clarify the surety’s liability thereon. A request that an adverse judgment against the appellant operate against the surety may be warranted and consideration should be given to requesting a severance,⁴⁷³ in the event of a judgment of reversal and remand to avoid any question of whether the judgment, to the extent it is affirmed, is final for purposes of enforcement.⁴⁷⁴

In the event the parties settle on appeal, a condition of settlement should be the release of the surety on a supersedeas bond or return of a cash deposit or alternate security. A motion to dismiss the appeal should include a request that the appellate court release the supersedeas bond or other appellate surety and to expressly order the surety discharged. Similarly, if an appeal is dismissed because a judgment is not final and appealable, sureties on any supersedeas bond should be discharged as well.⁴⁷⁵

May an appellate court change its judgment to operate against the surety after the court has lost plenary power?⁴⁷⁶ A motion to the appellate court to correct or amend its judgment, at least while the court enjoys plenary power, is proper to request inclusion of the surety in the adverse final judgment against the appellant.⁴⁷⁷ After the expiration of plenary power, a court may not modify its judgment.⁴⁷⁸ However, case law supports that an appellate court may modify its judgment, even after expiration of its term, to recite recovery against sureties on a supersedeas bond.⁴⁷⁹ Appellate Rule 19.3 empowers the court of appeals, notwithstanding the loss of plenary power, to “issue and recall its mandate” and “enforce or suspend enforcement of its judgment as these rules or applicable law provide.”⁴⁸⁰

An early Texas Supreme Court decision upheld the granting of a judgment *nunc pro tunc* by the court of appeals, correcting a judgment entered at an earlier term, so as to give a judgment against the sureties on a supersedeas bond.⁴⁸¹ The court reasoned that the modification of the judgment did not involve the exercise of any judicial discretion, as it is mandatory to render judgment against the appellant as well as the sureties upon affirmance of the lower court judgment.⁴⁸²

When not named in the judgment, the surety’s liability will have to be judicially established.⁴⁸³ The trial court must act in conformity with the appellate court mandate, and is without jurisdiction to review or modify the mandate, but must strictly enforce it. Accordingly, the trial court is not free to modify an appellate mandate to include a surety.⁴⁸⁴ However,

470. See *Getters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992) (per curiam); *Howze v. Sur. Corp. of Am.*, 584 S.W.2d 263, 266 (Tex. 1979).

471. TEX. R. APP. P. 24.1(d).

472. *Id.* 43.5, 60.5.

473. See *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 571 (Tex. 1975); *Gen. Elec. Supply Co. v. Gulf Electroquip, Inc.*, 857 S.W.2d 591, 602 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Pelto Oil Co. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583, 588 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (appellate courts ordering severance of attorney’s fee).

474. See TEX. R. APP. P. 44.1, 61.2. An appellate court may affirm in part and reverse and remand in part when there is reversible error that “affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties.” *Id.*

475. *Cudd Pressure Control, Inc. v. Sonat Exploration Co.*, 74 S.W.3d 185, 189 (Tex. App.—Texarkana 2002, pet. denied).

476. Plenary power of the court of appeals over its judgment expires sixty days after judgment if no timely filed motion to extend time or motion for hearing is then pending, or thirty days after the court overrules all timely filed motions for rehearing and motions to extend time to file a motion for rehearing. TEX. R. APP. P. 19.1. Plenary power continues during these timeframes even though a party has filed a petition for review in the supreme court. *Id.* 19.2.

477. See *Edlund v. Bounds*, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied); *Carter Real Estate & Dev., Inc. v. Builder’s Serv. Co.*, 718 S.W.2d 828, 831 (Tex. App.—Austin 1986, no writ).

478. TEX. R. APP. P. 19.3.

479. *Cockburn v. Hightower*, 52 S.W.2d 365, 366 (Tex. 1932).

480. TEX. R. APP. P. 19.3(b)–(c).

481. *Cockburn*, 52 S.W.2d at 366.

482. *Id.*

483. See *Amwest Sur. Ins. Co. v. Graham*, 949 S.W.2d 724, 726 (Tex. App.—San Antonio 1997, writ denied); *Edlund v. Bounds*, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied).

484. *Schliemann v. Garcia*, 685 S.W.2d 690, 693 (Tex. App.—San Antonio 1984, orig. proceeding).

judicial decisions support that the trial court has the power to entertain a motion to enforce the supersedeas bond or conversely to discharge the surety as a result of the appellate judgment.⁴⁸⁵ Further, appellate courts have exercised jurisdiction to review the trial court ruling pertaining to such motions.⁴⁸⁶

A stay of an appellate court mandate will preclude judgment execution, pending appeal to a higher court.⁴⁸⁷ Similarly, a recall of mandate is warranted if an appellate court vacates, modifies, corrects, or reforms its judgment. A new mandate should issue to reflect the modified appellate court decision, and provides the basis for execution.⁴⁸⁸ After exhaustion of all appellate remedies, or of the time for seeking appellate review, execution on a valid and subsisting judgment cannot be stayed.⁴⁸⁹ Once an appeal is final, a supersedeas bond no longer precludes enforcement of judgment.⁴⁹⁰ Although an older Texas Supreme Court decision suggests that issuance of a mandate is not necessary to render a judgment final,⁴⁹¹ more recently the court has held that mandate must issue before a judgment is enforceable by contempt.⁴⁹² Decisions to the contrary are implicitly overruled by this more recent pronouncement, but in any event, are distinguishable as in those cases trial court action was taken when no further appellate review was pending and no objection was made to the trial court proceeding in the absence of an appellate mandate.⁴⁹³

Should a surety satisfy a judgment final on appeal, the judgment is not discharged as to the surety.⁴⁹⁴ That is, the surety takes an assignment of the judgment and may proceed against the judgment debtor in execution.⁴⁹⁵

485. *Amwest Sur. Ins. Co.*, 949 S.W.2d at 727.

486. *Id.*

487. TEX. R. APP. P. 18.2.

488. *See id.* 18.7; *Swanson Broad., Inc. v. Clear Channel Communications, Inc.*, 762 S.W.2d 360, 361 (Tex. App.—San Antonio 1988, no writ).

489. *Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 490 (Tex. App.—Texarkana 1998, pet. denied).

490. *Id.* at 490–91.

491. *Cont'l Cas. Co. v. Street*, 364 S.W.2d 184, 187 (Tex. 1963).

492. *In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (holding trial court enforcement of a judgment pending appeal is improper “until all appeals relating to the judgment were exhausted and a mandate enforcing the [judgment] was issued”).

493. *Giles*, 982 S.W.2d at 490 (allowing enforcement of turnover order notwithstanding mandate of appellate court had not yet issued, but final judgment had been signed).

494. *First Nat'l Bank. of Bryan v. Roberts*, 286 S.W.2d 462, 464 (Tex. Civ. App.—Austin 1956, no writ).

495. *Id.*

VIII. FEDERAL PRACTICE MODEL

A. Introduction

The current Texas supersedeas procedures are, to some extent, fashioned in principle after the federal scheme. The federal practice in regard to alternate security pending appeal has traditionally been more flexible than Texas procedure. However, amendments to the Texas rules in the last decade indicate an adoption of the philosophy supporting the federal approach.⁴⁹⁶ Accordingly, federal judicial decisions are helpful in assessing and interpreting the extent and meaning of recent changes to Texas practice.

B. Overview of Applicable Rules

Most federal judgments are automatically stayed until the expiration of ten days after entry.⁴⁹⁷ Thereafter, the posting of a supersedeas bond by an appellant is not an indispensable prerequisite to obtaining a stay pending appeal of a money judgment. Federal practice recognizes trial court discretion in allowing alternate security in lieu of a supersedeas bond. This is so even though the governing federal rules of civil procedure are silent as to this discretionary power.⁴⁹⁸ Legal commentators suggest that it is within a court's inherent power to provide alternative security in an amount less than a money judgment. The only requirement is that the judgment creditor be protected as to the full amount of the judgment.⁴⁹⁹ That is, the form of security or amount of the bond “should simply reflect and preserve defendants' current ability to satisfy the judgment” so that the plaintiff will be in nearly the same position at

496. TEX. R. APP. P. 24, 29.

497. FED. R. CIV. P. 62(a).

498. *See id.* 62. (“When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . [and] [t]he stay is effective when the supersedeas bond is approved by the court.”). The predecessor to Rule 62 (former Rule 73(d)) contained language that explicitly set forth the court's discretionary power to vary the amount of a supersedeas bond on a showing of good cause: “The amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount.” 5 ROY W. McDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 30:6 (2d. ed. 1999). Notwithstanding the repeal of Rule 73(d), federal courts continue to have the discretionary power to provide alternate forms and amount of security in granting a stay pending appeal. *See C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520–21 (E.D. Pa. 1973); *see also* Edward Mullins & Annette C. Escobar, *Staying a Money Judgment in Federal Court Without Posting a Supersedeas Bond*, 11 FLA. B.J. 45, 45 (2003).

499. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2905 (2d ed. 1995).

the conclusion of the appeal as they were before the appeal was filed.⁵⁰⁰

C. Supersedeas Bond as Norm

A judgment debtor may, as a matter of right, file a supersedeas bond to stay the money judgment of a federal trial court.⁵⁰¹ The right to post a supersedeas bond is a privilege extended to the judgment debtor as a price of interdicting the validity of an order to pay money. “[T]he bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.”⁵⁰²

In the ordinary case, execution on a money judgment should not be stayed in the absence of the filing of a supersedeas bond by the unsuccessful litigant.⁵⁰³ In cases not involving a money judgment, the court may look beyond the posted security to the four-factor test enunciated in *Hilton v. Braunskill* to determine whether a discretionary stay should issue: To obtain a stay of judgment, the court must determine: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”⁵⁰⁴

D. Alternate Security

1. In General

While posting a full supersedeas bond is the norm under federal practice, circumstances may warrant a federal trial court’s to approval of a different type and amount of security.⁵⁰⁵ This power is derivative from that provided to federal courts of appeals. Federal appellate courts are expressly authorized to stay a trial court’s judgment pending appeal by requiring appropriate security. It would be illogical to deny such power to federal trial courts, thereby requiring “futile

application to the district court for the approval of alternative security arrangements before seeking relief in the court of appeals.”⁵⁰⁶

2. Justification

Only extraordinary circumstances justify a federal district court’s ordering a judgment stayed on security other than a supersedeas bond.⁵⁰⁷ The burden of proof rests on the moving party to objectively demonstrate the reasons for such departure.⁵⁰⁸ It is the duty of the judgment debtor seeking to be excused from filing a full supersedeas bond to propose alternate security that will not “unduly endanger[] the judgment creditor’s interest in ultimate recovery.”⁵⁰⁹

The inflexible requirement of posting a mandatory supersedeas bond to stay a trial court judgment pending appeal may be inappropriate when the appellant’s “ability to pay the judgment is so plain that the cost of the bond would be a waste of money” should relief be granted.⁵¹⁰ Conversely, when the financial situation of the judgment debtor is precarious, so that the posting of a supersedeas bond would not be practicable, orders of alternate security have been upheld.⁵¹¹ In discussing a federal district court’s discretion to provide for alternate security in lieu of a supersedeas bond, the Fifth Circuit summarized:

If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor’s present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment

500. *Alexander v. Chesapeake, Potomac, & Tidewater Books, Inc.*, 190 F.R.D. 190, 193 (E.D. Va. 1999).

501. *See Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theaters, Inc.*, 87 S. Ct. 13 (1966); *see also Herbert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992).

502. *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

503. *See United States v. Kurtz*, 528 F. Supp. 1113, 1114 (E.D. Pa. 1981).

504. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684, 686 (S.D. Fla. 1990).

505. *See Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796–99 (7th Cir. 1986); *Fed. Prescription Serv., Inc. v. Am Pharm. Ass’n*, 636 F.2d 755, 758 (D.C. Cir. 1980); *Poplar Grove Planting & Ref. Co.*, 600 F.2d at 1191.

506. *Kurtz*, 528 F. Supp. at 1115 (E.D. Pa. 1981); *see also Fed. Prescription Serv., Inc.*, 636 F.2d at 760.

507. *Fed. Prescription Serv., Inc.*, 636 F.2d at 758; *see also Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973).

508. *Poplar Grove Planting & Ref. Co.*, 600 F.2d at 1191.

509. *Kurtz*, 528 F. Supp. at 1116.

510. *Olympia Equip. Leasing Co.*, 786 F.2d at 796.

511. *Id.* at 798–99; *see also Trans World Airlines, Inc.*, 314 F.2d at 176–77; *C. Albert Sauter Co.*, 368 F. Supp. at 520.

debtor's financial dealings, which would furnish equal protection to the judgment creditor.⁵¹²

The effect of obtaining a supersedeas bond on the judgment debtor should be balanced against a plan of alternate security to protect the judgment creditor.⁵¹³

Some circuits have expressly considered the effect of requiring a supersedeas bond on the judgment debtor's other creditors. For instance, where a large part of the judgment constituted punitive damages, one federal court observed: "[I]t would be a painful irony for us to impair and perhaps even destroy the other creditors' claims merely to remove every element of hazard [of collection of the judgment] from a claim that may not survive the process of appeal."⁵¹⁴

3. Forms of Security

Orders of alternate security might include escrowing stocks and cash in favor of the judgment creditor⁵¹⁵ or posting a sufficient letter of credit that identifies the judgment debtor's duty to maintain a sufficient net worth to satisfy the judgment should it be upheld on appeal.⁵¹⁶ A pledge of accounts receivable or

512. *Poplar Grove Planting & Ref. Co.*, 600 F.2d at 1191.

513. *Id.* In *Poplar Grove*, the appellant demonstrated that it could not obtain a supersedeas bond due to its financially distressed condition and liquidity. *Id.* Further, the judgment debtor maintained that, were it required to obtain a bond in the amount of the full judgment, it would be forced into bankruptcy and/or it would prejudice its other creditors. *Id.* The appellate court acknowledged the propriety of the alternate security order stating:

[W]e are reluctant to conclude that a district judge commits an abuse of discretion by refusing to allow a plaintiff to execute a judgment in circumstances where the execution may cause a billion-dollar bankruptcy, merely because the alternate security . . . provides a slightly inferior protection of the plaintiff's interest [in judgment].

Olympia Equip. Leasing Co., 786 F.2d at 799.

514. *Olympia Equip. Leasing Co.*, 786 F.2d at 798.

515. *See C. Albert Sauter Co.*, 368 F. Supp. at 521 (approving the placing of stocks and cash in escrow and posting of \$100,000 security bond to secure a \$1.5 million judgment when judgment debtor demonstrated it was financially unable to post a supersedeas bond in amount of money judgment, as to do so would render it insolvent and eliminate the company as a going concern, but unencumbered assets of company were sufficient to adequately protect appellant if trial court judgment was affirmed on appeal).

516. *Trans World Airlines, Inc.*, 515 F.2d at 175 (posting supersedeas bond to stay execution of \$161 million judgment proved to be "impracticable," therefore district court's order requiring security by way of letter of credit in amount of only seventy-five million dollars, coupled with

the creation of security interests in favor of the judgment creditor may provide adequate protection from dissipation of the judgment debtor's assets during the delay caused by appeal.⁵¹⁷

E. Disposition of Security on Conclusion of Federal Appeal

If the trial court judgment is affirmed or the appeal dismissed, the judgment may be satisfied out of the supersedeas bond or alternate security.⁵¹⁸ However, if the judgment is reversed, the supersedeas or security is to be released.

The judgment debtor, successful in obtaining a reversal, is entitled to have costs taxed against the judgment creditor unless the appellate court otherwise provides.⁵¹⁹ Under these circumstances, recoverable costs include the expense incurred in obtaining a supersedeas bond or alternate security.⁵²⁰

F. Excusing Posting of Security

Although federal jurisprudence recognizes the discretion of the trial court to alter the amount and form of security and to stay execution of a civil judgment, there is a divergence of opinion as to whether this discretion extends to entirely dispensing with any security requirement. One view is that implicit in Rule 8 of the Federal Rules of Appellate Procedure, empowering appellate courts to stay a trial court's judgment without security pending appeal,⁵²¹ is the recognition that a district court has the same discretionary power.⁵²² Circuits that have concluded that a district court has the power to entirely excuse the judgment debtor from posting supersedeas or other security have limited the exercise of this discretion to situations where it will not materially damage the

appellant's assurances that it would maintain net worth treble the balance of judgment was affirmed).

517. *Olympia Equip. Leasing Co.*, 786 F.2d at 796, 799–800 (affirming district court order that appellant, a corporation with total assets nominally worth two billion dollars, post, as alternate security to supersedeas bond on a thirty-six million dollar judgment, ninety million dollars of security comprised of a pledge of cash, accounts receivables, and a security interest in appellant's physical assets).

518. *See* WRIGHT, *supra* note 499, § 2905.

519. FED. R. APP. P. 39(a).

520. *Trans World Airlines, Inc.*, 515 F.2d at 178; *see also* *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 362 F.2d 799, 801 (2d. Cir. 1966).

521. *See* FED. R. APP. P. 8.

522. *Fed. Prescription Serv., Inc. v. Am Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980); *see also* 7 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 62.06 (2d ed. 1996); John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809, 826 (1993).

appellee and its interest in recovery under the judgment.⁵²³

The alternate line of authority maintains that a federal trial court lacks the power to entirely waive a security requirement and grant a stay of a money judgment, because the federal rules do not expressly provide for this practice.⁵²⁴

In any event, when the judgment debtor lacks the assets or credit to pay the judgment in full, and the posting of adequate security is shown to be impracticable, the judge should require that the judgment be at least partially secured. Under these circumstances, waiving security entirely would unduly impair the judgment creditor's interest in ultimate recovery.⁵²⁵

G. Effect of Failure to Post Security

Appealing parties who cannot furnish a supersedeas bond do not lose their right to appeal.⁵²⁶

523. *Fed. Prescription Serv., Inc.*, 636 F.2d at 759; *see also* *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 783 (10th Cir. 1964); *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 816 (6th Cir. 1954); 9 MOORE ET AL., *supra* note 522, ¶ 208.06. In *Federal Prescription Service*, for example, that court of appeals upheld a federal district judge's order staying execution of its judgment without bond or other security when the appellant had demonstrated, by competent evidence, his continuing ability to pay and the appellee had filed a cross-appeal. 636 F.2d at 759–60. The court interpreted Federal Rule 62 as entitling an appellant to stay a money judgment as a matter of right, but held that the rule does not limit the means by which a stay might be obtained. *Id.* The appellate court noted its own power to stay a trial court's judgment without security. *Id.* It held that a trial court is similarly empowered to grant an unsecured stay that does "not unduly endanger the judgment creditor's interest in ultimate recovery." *Id.* at 760–61. The court reasoned to hold otherwise would require appellants to first post security at the trial court level and then seek an unsecured stay on appeal. *Id.*

[S]ince the *Federal Prescription* decision, every federal court that has addressed the issue has found that Rule 62(d) does not preclude the issuance of a stay of a money judgment without the posting of a full bond Thus, at present, the predominant view in federal court is that an appellant's failure or inability to post a bond does not eliminate the appellant's ability to obtain a stay, but instead places the risk on the appellant that the district court will not grant a stay of execution.

Mullins & Escobar, *supra* note 498, at 46.

524. *See* *Marcelletti & Son Constr. Co., Inc. v. Millcreek Township Sewer Auth.*, 313 F. Supp. 920, 928 (W.D. Pa. 1970) (disapproved of by *Fed. Prescription Serv., Inc.*, 636 F.2d at 757 n.3); *Slade v. Dickinson*, 82 F. Supp. 416, 419 (W.D. Mich. 1949) (same).

525. *See* *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 797 (7th Cir. 1986).

526. FED. R. APP. P. 3(a)(2).

Further, that the failure to post a supersedeas bond or other security results in execution of a trial court's judgment does not moot the appeal.⁵²⁷ However, an appellant that fails to post security and allows judgment execution "takes the risk of not getting his money back if the judgment is reversed."⁵²⁸

H. Flexibility of Federal Practice

The federal rules have been judicially interpreted to provide a flexible approach to the requirement of a supersedeas bond or other security to stay execution of a money judgment. This comports with the purpose of requiring security to protect the judgment creditor pending appeal. Some circuits have held that security may be waived entirely when the financial strength of the appellant is demonstrated. Waiver continues unless circumstances establish the necessity of security. Similarly, if the posting of a supersedeas bond is impracticable and would threaten the continued viability of the appellant or the position of other creditors, the trial court should grant a motion to post alternative security provided the judgment creditor is protected.

An unsuccessful litigant that cannot post a bond or other security still enjoys an automatic ten-day stay of execution in which it can seek post-judgment relief. However, such a litigant is not entitled to continued suspension of execution of a money judgment, since the rights of a judgment creditor—which has litigated its right of recovery—would not be protected. Thereafter, should the judgment be satisfied by execution, the appealing judgment debtor is free to continue its appeal. If the trial court's judgment is reversed, restitution will lie against the judgment creditor for the fair market value of the property seized through execution. The flexibility of the federal rules in requiring posting of a supersedeas bond to suspend execution on appeal provides for effective judicial review of the underlying judgment while fairly protecting the interest of the litigants.

527. *Thorpe v. Thorpe*, 364 F.2d 692, 693 (D.C. Cir. 1966).

528. *Id.* at 693 n.1; *see also* WRIGHT, *supra* note 499, § 2905.

APPENDIX A

HOUSE BILL 4
Enrolled June 2, 2003

ARTICLE 7. APPEAL BONDS

SECTION 7.01. Section 35.006, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 35.006. STAY. (a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, *that the time for taking an appeal has not expired*, or that a stay of execution has been granted, *has been requested, or will be requested*, and proves that the judgment debtor has furnished *or will furnish* the security for the satisfaction of the judgment required by the state in which it was rendered, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.

(b) If the judgment debtor shows the court a ground on which enforcement of a judgment of the court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period and require the same security for *suspending enforcement* [~~satisfaction~~] of the judgment that is required in this state *in accordance with Section 52.006*.

Chapter 52 of the Civil Practices and Remedies Code, to be amended as follows:

§ 52.001 Definition [no change proposed]

In this chapter, “security” means a bond or deposit posted, as provided by the Texas Rules of Appellate Procedure, by a judgment debtor to suspend execution of the judgment during appeal of the judgment.

§ 52.002 Bond or Deposit for Money Judgment [repealed]

A trial court rendering a judgment that awards recovery of a sum of money, other than a judgment rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance, or a workers’ compensation claim, may set the security in an amount less than the amount of the judgment, interest, and costs if the trial court, after notice to all parties and a hearing, finds that:

(1) setting the security at an amount equal to the amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor; and

(2) setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor’s recovery under the judgment would be secured after the exhaustion of all appellate remedies.

§ 52.003 Review for Sufficiency [repealed]

In a manner similar to appellate review under Rule 49, Texas Rules of Appellate Procedure, of the sufficiency of the amount of security set by a trial court, an appellate court may review the sufficiency of the amount of security set by the trial court under Section 52.002.

§ 52.004 Review for Excessiveness [repealed]

(a) In a manner similar to appellate review under Rule 49, Texas Rules of Appellate Procedure, of the sufficiency of the amount of security set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under:

(1) Section 52.002; or

(2) the Texas Rules of Appellate Procedure if security is not set under Section 52.002.

(b) If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

§ 52.005 Conflict with Texas Rules of Appellate Procedure [no change proposed]

(a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.

(c) The Texas Rules of Appellate Procedure apply to any proceeding, cause of action, or claim to which Section 52.002 does not apply.

HOUSE BILL 4 Enrolled June 2, 2003

ARTICLE 7. APPEAL BONDS

SECTION 7.02. Chapter 52, Civil Practice and Remedies Code, is amended by adding Section 52.006 to read as follows:

Sec. 52.006. AMOUNT OF SECURITY FOR MONEY JUDGMENT. (a) Subject to Subsection (b), when a judgment is for money, the amount of security must equal the sum of:

- (1) the amount of compensatory damages awarded in the judgment;*
- (2) interest for the estimated duration of the appeal; and*
- (3) costs awarded in the judgment.*

(b) Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:

- (1) 50 percent of the judgment debtor's net worth; or*
- (2) \$25 million.*

(c) On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm if required to post security in an amount required under Subsection (a) or (b), the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.

(d) An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section.

(e) Nothing in this section prevents a trial court from enjoining the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

SECTION 7.04. (a) The changes in law made in Section 7.01 of this article apply to any judgment filed in this state under Chapter 35, Civil Practice and Remedies Code, on or after the effective date of this Act.

(b) The changes in law made in Sections 7.02 and 7.03 of this article [to Chapter 52 of the Civil Practices and Remedies Code] apply to any case in which a final judgment is signed on or after the effective date of this Act [Sept. 1, 2003].

Author's Note: Changes to Texas Rule of Appellate Procedure 24 necessitated by H.B. 4, Article 7. These changes apply to "any case in which a final judgment is signed on or after the effective date of this Act." (9/1/03)

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.1 Suspension of Enforcement

(a) *Methods.* Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by:

- (1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;
- (2) filing with the trial court clerk a good and sufficient bond;
- (3) making a deposit with the trial court clerk in lieu of a bond; or
- (4) providing alternate security ordered by the court.

(b) *Bonds.*

- (1) A bond must be:
 - (A) in the amount required by 24.2;
 - (B) payable to the judgment creditor;

- (C) signed by the judgment debtor or the debtor's agent;
 - (D) signed by a sufficient surety or sureties as obligors; and
 - (E) conditioned as required by (d).
- (2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.
- (c) *Deposit in Lieu of Bond.*
- (1) Types of Deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk:
- (A) cash;
 - (B) a cashier's check payable to the clerk, drawn on any federally insured and federally or state-chartered bank or savings-and-loan association; or
 - (C) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state-chartered bank or savings- and-loan association.
- (2) Amount of Deposit. The deposit must be in the amount required by 24.2.
- (3) Clerk's Duties. The clerk must promptly deposit any cash or a cashier's check in accordance with law. The clerk must hold the deposit until the conditions of liability in (d) are extinguished. The clerk must then release any remaining funds in the deposit to the judgment debtor.
- (d) *Conditions of Liability.* The surety or sureties on a bond, any deposit in lieu of a bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the bond, deposit, or security—if:
- (1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment;
 - (2) the debtor does not perform an adverse judgment final on appeal; or
 - (3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.
- (e) *Orders of Trial Court.* The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.
- (f) *Effect of Supersedeas.* Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas.

24.2 Amount of Bond, Deposit or Security

- (a) *Type of Judgment.*
- (1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:
- (A) 50 percent of the judgment debtor's current net worth; or
 - (B) \$25 million dollars.
- (2) For Recovery of Property. When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least:
- (A) the value of the property interest's rent or revenue, if the property interest is real; or
 - (B) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.
- (3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.
- (4) Conservatorship or Custody. When the judgment involves the conservatorship or custody of a minor or other person under legal disability, enforcement of the judgment will not be suspended, with or without security, unless ordered by the trial court. But upon a proper showing, the appellate court may suspend enforcement of the judgment with or without security.

(5) For a Governmental Entity. When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.

(b) *Lesser Amount.* The trial court must lower the amount of the security required by (a) to an amount that will not cause the judgment debtor substantial economic harm, if, after notice to all parties and a hearing, the court finds that posting a bond, deposit, or security in the amount required by (a) is likely to cause the judgment debtor substantial economic harm. The trial court may order a lesser amount than required by (a) if, after notice to all parties and a hearing, the court finds:

(1) ~~that posting a bond, deposit, or security in the amount required by (a) will irreparably harm the judgment debtor; and~~

(2) ~~that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.~~

(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

(d) *Injunction.* The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

24.3 Continuing Trial Court Jurisdiction; Duties of Judgment Debtor

(a) *Continuing Jurisdiction.* Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to do the following:

(1) order the amount and type of security and decide the sufficiency of sureties; and

(2) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution.

(b) *Duties of Judgment Debtor.* If, after jurisdiction attaches in an appellate court, the trial court orders or modifies the security or decides the sufficiency of sureties, the judgment debtor must notify the appellate court of the trial court's action.

24.4 Appellate Review

(a) *Motions; Review.* On a party's motion to the appellate court, that court may review:

(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

(5) the trial court's exercise of discretion under 24.3(a).

(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) *Temporary Orders*. The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) *Action by Appellate Court*. The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(e) *Effect of Ruling*. If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

HOUSE BILL 4 Enrolled June 2, 2003

ARTICLE 6. INTEREST

SECTION 6.01. [and Article 2415] Section 304.003(c), Finance Code, is amended to read as follows:

(c) The postjudgment interest rate is:

- (1) the *prime rate as published by the Federal Reserve Bank of New York on [auction rate quoted on a discount basis for 52-week treasury bills issued by the United States government as most recently published by the Federal Reserve Board before]* the date of computation;
- (2) *five [10] percent a year if the prime rate as published by the Federal Reserve Bank of New York [auction rate] described by Subdivision (1) is less than five [10] percent; or*
- (3) *15 [20] percent a year if the prime rate as published by the Federal Reserve Bank of New York [auction rate] described by Subdivision (1) is more than 15 [20] percent.*

SECTION 6.02. Subchapter B, Chapter 304, Finance Code, is amended by adding Section 304.1045 to read as follows:

Section 304.1045. FUTURE DAMAGES. Prejudgment interest may not be assessed or recovered on an award of future damages.

SECTION 6.03. Section 304.108, Finance Code, is repealed.

SECTION 6.04. The changes in law made by this article apply in any case in which a final judgment is signed or subject to appeal on or after the effective date of this Act [Sept. 1, 2003].