

SUSPENDING ENFORCEMENT OF THE JUDGMENT:

**On Crossed T's, Dotted I's,
... and Things That Go Bump in the Night**

**Lori Meghan Gallagher
Andrews & Kurth L.L.P.
Houston, Texas**

**Practicing Law Under The New Rules Of Trial
And Appellate Procedure**

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SUSPENDING ENFORCEMENT OF THE JUDGMENT

I. Supersedeas and the New Appellate Rules

A. Supersedeas by Agreement

1. 1997 Amendments make clear that parties may agree to supersede the judgment¹ though it was proper to do so before the rules specifically allowed it.²
 - a. Subject to Rule 6.6 requiring written agreement signed by parties or their counsel
 - b. To be enforceable, must be filed with the clerk of the *trial* court

B. Judgment against Surety on Bond-The Fictitious “Demand” Requirement³

1. The new language appears to require a demand for performance upon the judgment debtor before the creditor can resort to the surety.
 - a. New language: surety’s liability is triggered if the debtor “does not perform the trial court’s judgment”⁴
 - b. Old language: bond is conditioned that the “debtor . . . shall perform the judgment”⁵
2. Nonetheless, no demand upon the debtor appears necessary because the new rules provide that, in the case of an affirmance, the judgment of the appellate court must be against the sureties on the bond as well as the appealing party.⁶

¹Tex. R. App. P. 24.1(a)(1)

²See William V. Dorsaneo III (ed.), *Suspending Enforcement of the Judgment*, TEXAS LITIGATION GUIDE, §148.04[2][a] (1997). (newly revised).

³See generally Dorsaneo at § 148.04[2][b][v].

⁴Tex. R. App. P. 24.1(d).

⁵Former Tex. R. App. P. 47(a).

⁶Tex. R. App. P. 43.5 & 60.5.

C. Bond or Deposit of a Lesser Amount⁷-Trial Court's Discretion is Greater Than Before

1. Elements⁸
 - a. posting a bond, deposit, or security in the amount normally required (subsection (a) of the rule) will irreparably harm the judgment debtor; and
 - b. posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover the judgment after all appellate remedies are exhausted.
2. What is new and different?
 - a. Old rule⁹ contained distinctions for workers' compensation cases, bond forfeitures, personal injury cases, wrongful death cases, and cases covered by liability insurance, as opposed to general civil cases. The new rule makes no such distinctions.
 - b. Old rule applied only to money judgments. New rule applies to judgments of all types.

[Do we want discussion here concerning Tex. Civ. Prac. & Rem. Code § 52.002? My suggestion: footnote noting that the rule does not conflict with the more restricted remedies code provision.]

⁷See generally Dorsaneo at 148.04[4][g].

⁸Tex. R. App. P. 24.2(b).

⁹Former Tex. R. App. P. 47(b).

D. Superseding Enforcement In Progress

1. Old rule: supersedeas is effective to suspend *execution* “if execution has been issued,” but apparently not if “execution has been levied” (i.e., the officer has already seized the property).¹⁰
2. New rule: “Enforcement begun before the judgment is superseded must cease when the judgement is superseded.”¹¹
3. Result: Some commentators opine that Rule 47 authority concerning inability to halt execution which has already been levied may no longer be good law.¹²
 - a. CAVEAT: Perfecting the appeal and superseding the judgment does not restrict judgment creditor’s right to file an abstract of judgment. To avoid the lien created by filing an abstract of judgment, one must use the procedure set out in Tex. Prop. Code Ann. § 52.0011. *See infra* at _____.

E. Rule 2: The Rule to End All Rules

1. Text:

On a party’s motion or on its own initiative an appellate court may - to expedite a decision or for other good cause - suspend a rule’s operation in a particular case and order a different procedure; but a court must not construe this rule to suspend any provision in the Code of Criminal Procedure or to alter the time for perfecting an appeal in a civil case.¹³
2. The effect that such a broad power might have on supersedeas procedure is unknown.

F. Class Certification Orders

¹⁰See former Tex. R. App. P. 47(j); *Texas Employers’ Ins. Ass’n v. Engelke*, 790 S.W.2d 93, 95 (Tex. App.-Houston [1st Dist.] 1990, orig. proceeding).

¹¹Tex. R. App. P. 24.1(f).

¹²Dorsaneo at § 148.05[2] (discussing *Engelke*).

¹³Tex. R. App. P. 2.

1. The provision in the former rule that an appeal from an order certifying a class suspends the order is repealed.¹⁴

G. Interlocutory Appeals

1. The Civil Practice & Remedies Code has been amended to provide that an interlocutory appeal under the statute has the effect of staying the commencement of trial pending resolution of the appeal.¹⁵

H. No More Cross-Points

1. Any party seeking to complain must file a notice of appeal.¹⁶
2. Merely filing the notice of appeal will generally *not* suspend enforcement. *See infra* at _____.

- I. Docketing Statements:** This newly required document requires that the appellant indicate whether she has filed or will file a supersedeas bond.¹⁷

II. Supersedeas Procedure Generally

A. Can the judgment or order be superseded?¹⁸

1. General Rule: If the judgment can be appealed, it can be superseded.
 - a. CAVEAT: If proper procedure is followed, supersedeas is a matter of right as to most judgments; however, in some situations, supersedeas is a matter left to the discretion of the court. *See infra* _____.
2. Exceptions: Some appealable orders or judgments *cannot* be superseded. For example:

¹⁴Tex. R. App. P. 29 (comment).

¹⁵Tex. Civ. Prac. & Rem. Code Ann. § 51.014 (Vernon Supp. 1997) (S.B. 453, eff. June 20, 1997).

¹⁶Tex. R. App. P. 25.1(c).

¹⁷Tex. R. App. P. 32.1(l).

¹⁸*See generally* Dorsaneo at § 148.02.

- a. Orders of the Texas Alcoholic Beverage Commissioner refusing, canceling, or suspending a permit or license¹⁹
 - b. Orders appointing receivers in shareholder derivative actions²⁰
 - c. Certain revocation/suspension orders concerning one's license to practice law²¹
 - d. Appeal from decision of trial court in condemnation proceeding²²
 - e. Orders denying interlocutory relief²³
3. Additional exception: Some judgments can only be suspended by specific parties.
 - a. Writ of restitution in forcible entry and detainer suit can be superseded only if premises are used as principal residence of a party.²⁴

B. Who must supersede the Judgment?

1. Note: Only appealing parties may supersede a judgment.²⁵
2. Note: Supersedeas is voluntary,²⁶ not a prerequisite to the right to appeal.

¹⁹Tex. Alco. Bev. Code Ann. § 11.67(b)(4) (Vernon 1995).

²⁰*Providential Investment Corp. v. Dibrell*, 320 S.W.2d 415, 418 (Tex. App.--Houston [1st Dist.] 1959, orig. proceeding).

²¹Tex. R. Disc. P. 3.14; *State Bar of Texas v. Heard*, 603 S.W.2d 829, 831-32 (Tex. 1980).

²²Tex. Prop. Code Ann. § 21.063 (b) (Vernon 1984).

²³Tex. R. App. P. 29 (comment).

²⁴Tex. R. Civ. P. 755.

²⁵*Young v. Kilroy Oil Co. of Texas, Inc.*, 673 S.W.2d 236, 242 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.).

²⁶*Castilleja v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967).

3. General Rule: If you do not want the judgment to operate against your client, you must independently supersede the judgment.
 - a. Example: Your client and a codefendant are jointly and severally liable for the entire judgment amount. Each must independently supersede the judgment or they must jointly supersede the entire judgment.²⁷ One cannot rely upon the supersedeas bond of another.²⁸

4. Exception: Suspending Enforcement by Filing Notice of Appeal²⁹
 - a. Warning: Merely appealing a judgment *does not* generally suspend its enforcement,³⁰ and this procedure is only available to a limited class of litigants. For example:
 - (1) The State of Texas
 - (2) A department of the State of Texas
 - (3) The head of a department of the State of Texas
 - (4) A county of the State of Texas
 - (5) “Local Government” defending claim under Texas Tort Claims Act
 - (6) FHA
 - (7) FNMA
 - (8) GNMA
 - (9) VA
 - (10) Administrator of Veterans Affairs
 - (11) National mortgage S & L Ass’n created by act of Congress as national relief organization that operates on a statewide basis
 - (12) FDIC
 - (13) Home rule municipality

[Do you want to go to the level of detail of including statutory references for each of these?]

[Do you want to go to the level of detail of whether or not other incorporated cities and towns are exempt?]

²⁷*Gullo-Haas Toyota v. Davidson, Eagleson*, 832 S.W.2d 418, 419-20 (Tex. App.-Houston [1st Dist.] 1992, mot. on bond); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.-Austin 1983, mot. on bond).

²⁸*Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. Civ. App.-San Antonio 1957, orig. proceeding).

²⁹*See generally* Dorsaneo at § 148.03.

³⁰*Street v. Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988).

- (14) State water/levee districts
- (15) Executors, administrators, and guardians acting in their fiduciary capacity
- (16) Appellants in election contests
- (17) military persons in certain circumstances

C. What is the effect of superseding the judgment?³¹

1. Generally: Enforcement must be suspended, and enforcement already begun must cease.³²
 - a. Writ of Execution
 - (1) Because of new language requiring cessation of enforcement already begun, the creditor is likely no longer entitled to execute on property levied in advance of the issuance of supersedeas.³³
 - b. Writ of Garnishment
 - (1) New broader language speaking to “enforcement” instead of just execution may apply to all property *in custodia legis* (both property obtained under writ of garnishment and under writ of execution). Therefore, property held under a writ of garnishment issued in advance of supersedeas likely cannot be turned over to the judgment creditor.³⁴
 - c. Turnover Order is itself a final judgment and may be superseded.³⁵
 - d. Permanent Injunction

³¹See generally Dorsaneo at § 148.05.

³²Tex. R. App. P. 24.1(f).

³³See discussion in Dorsaneo, at § 148.05[2] (questioning continuing viability of *Texas Employers' Ins. Ass'n v. Engelke*, 790 S.W.2d 93, 95 (Tex. App.-Houston [1st Dist.] 1990, orig. proceeding)).

³⁴*Id.*

³⁵*Schultz v. Fifth Judicial District Court of Appeals*, 810 S.W.2d 738, 739 n.3 (Tex. 1991).

- (1) If superseded, the enjoined party may proceed as before the injunction.³⁶
 - (2) If not superseded, the appellate court will punish violations pending appeal.
- e. Writ of Possession
- (1) Officer prohibited from executing the writ after supersedeas.³⁷
2. Exception: Judgment creditor can still file abstracts of judgment even though the judgment is superseded.³⁸ In order to prevent the abstract from becoming a lien and potentially accelerating the client's indebtedness to third parties, ask the court for an order under Tex. Prop. Code Ann. § 52.0011. *See infra* at _____.

D. When should supersedeas be accomplished?³⁹

1. Superseding *Merely* to Avoid Execution
 - a. No motion for new trial: supersede 30 days after judgment is signed.
 - b. Motion for new trial filed: supersede 30 days after the motion is overruled by operation of law or signed written order.
2. Note: A judgment *may* be superseded at any time, even after the appeal is in progress, so long as the appeal was timely perfected.⁴⁰
3. If possible, be prepared to supersede the judgment as soon as the judgment is signed. Execution generally cannot begin until the trial court's plenary power expires, but generic execution is not the only problem one will encounter if the judgment is not superseded pending appeal.

³⁶*Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941).

³⁷*Tolbert v. Mobley*, 96 S.W.2d 109, 109 (Tex. Civ. App.-Waco 1936, orig. proceeding).

³⁸*Roman v. Goldberg*, 7 S.W.2d 899, 899-900 (Tex. Civ. App.-Waco 1928, writ ref'd).

³⁹*See generally* Dorsaneo at § 148.04[3].

⁴⁰*Magnolia Petroleum co. v. McClendon*, 65 S.W.2d 484, 484 (Tex. 1933).

- a. Accelerated execution: allowed if the judgment creditor signs an affidavit stating that your client is about to remove or secrete property subject to execution⁴¹
- b. Post-judgment discovery: can begin immediately after *rendition* if the judgment is not superseded⁴²
- c. Abstracts of judgment create liens when recorded and indexed.⁴³
 - (1) Such an encumbrance can literally destroy a client's ongoing business if its financiers are entitled to accelerate obligations upon the creation of such a lien.
 - (2) Supersedeas bond *does not* prohibit a judgment creditor from creating a lien on the property pending appeal.⁴⁴
 - (3) Tex. Prop. Code Ann. § 52.0011: *Always* ask the trial court for an order stating that the filing of an abstract after the judgment is superseded does not operate to place a lien on the property, then record a certified copy of the order in the land records. Elements are:⁴⁵
 - (a) judgment debtor has posted proper security or is legal excused from doing so; and
 - (b) creation of lien would not substantially increase to which creditor's recovery would be secured when balanced against the cost to the defendant.

⁴¹Tex. R. Civ. P. 628.

⁴²Tex. R. Civ. P. 621a.

⁴³See Tex. Prop. Code Ann. § 52.0011 (Vernon supp. 1997); *Tpea No. 5 Credit Union v. Solis*, 605 S.W.2d 381, 383 (Tex. Civ. App.-Waco 1980, no writ); *John F. Grant Lumber Co. v. Hunnicutt*, 143 S.W.2d 976 (Tex. Civ. App.-Waco 1940, no writ).

⁴⁴See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 5 n.3 (1987).

⁴⁵See Tex. Prop. Code Ann. § 52.0011 (Vernon 1984).

- d. Garnishment: A liquidated or unliquidated judgment is final and subsisting for garnishment purposes after it is signed, unless a supersedeas bond is filed and approved.⁴⁶
 - (1) Creditor must file an affidavit stating that, within the judgment creditor's knowledge, the judgment debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment.⁴⁷
 - (2) In larger counties, clerks and not judges prepare post-judgment writs. Garnishment may therefore occur before execution has returned *nulla bona*.
- e. Turnover Order: Judgment is final for turnover purposes as soon as it is signed.⁴⁸

E. Must the Court Suspend Enforcement if Asked?

- 1. General Rule: The judgment debtor can obtain supersedeas as a matter of right and granting supersedeas is not left to the discretion of the trial court.⁴⁹
- 2. Exceptions: The trial court has discretion to deny supersedeas in some cases.
 - a. Judgment for something other than money or interest in property⁵⁰
 - (1) Trial court *must* set the security required of the judgment debtor, *but*

⁴⁶Tex. R. Civ. P. 657; Tex. Civ. Prac. & Rem. Code Ann. § 63.001(3) (Vernon 1986); *Childre v. Great Southwest Life Ins. Co.*, 700 S.W.2d 284, 287 (Tex. App.-Dallas 1985, no writ).

⁴⁷Tex. Civ. Prac. & Rem. Code Ann. § 63.001(3) (Vernon 1986). See also *Black Coral Investments v. Bank of the Southwest*, 650 S.W.2d 135, 136 (Tex. App.-Houston [14th Dist.] 1983, writ ref'd n.r.e.); *Canyon Lake Bank v. Townsend*, 649 S.W.2d 809, 810 (Tex. App.-Austin 1983, writ ref'd n.r.e.); *Metroplex Factors, Inc. v. First Nat'l Bank*, 610 S.W.2d 862, 866-67 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.).

⁴⁸Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (Vernon 1986 & supp. 1997); *Childre*, 700 S.W.2d 286-87.

⁴⁹*Hawkins v. Twin Mont., Inc.*, 810 S.W.2d 441, 446 (Tex. App.-Fort Worth 1991, no writ); *Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App.-San Antonio 1985, mot. on bond); *Weber v. Walker*, 591 S.W.2d 559, 562 (Tex. Civ. App.-Dallas 1979, orig. proceeding).

⁵⁰Tex. R. App. P. 24.2(a)(3).

- (2) Trial Court *may* decline to permit judgment to be superseded if creditor posts adequate security
- b. Conservatorship or custody of minors or persons under legal disability⁵¹
 - (1) Unless otherwise ordered, judgment will not be superseded with or without security.
 - (2) Upon “proper” showing, appellate court may suspend enforcement with or without security.
- c. Judgment in favor of governmental entity⁵²
 - (1) If governmental entity has no pecuniary interest, trial court must determine whether or not to suspend the judgment with or without security by weighing harm to judgment debtor if no suspension occurs against harm likely to occur to others if suspension occurs.
 - (2) Determination is subject to review by the appellate court
 - (3) Security, if required, is limited to government’s “actual damages” resulting from the suspension

F. How can supersedeas be accomplished?⁵³

1. Supersedeas by Agreement
 - a. In writing and filed with clerk of trial court⁵⁴
 - b. Must be signed by parties or their counsel⁵⁵

⁵¹Tex. R. App. P. 24.2(a)(4).

⁵²Tex. R. App. P. 24.2(a)(5).

⁵³*See generally* Tex. R. App. P. 24.1(a) & Dorsaneo at § 148.04[2].

⁵⁴Tex. R. App. P. 24.1(a)(1).

⁵⁵Tex. R. App. P. 6.6.

2. Supersedeas Bonds⁵⁶

a. Proper Amount⁵⁷

- (1) CAVEAT: Do not forget that the trial court may have discretion to lower the amount initially required by the rule. *See supra* at ___ and *infra* at ___. In cases involving large judgments which are difficult or impossible to secure, one should move quickly for the amount to be reduced.
- (2) Money Judgment—at least the amount of the judgment and costs, plus interest for the estimated duration of appeal.⁵⁸ One cannot “partially” supersede a money judgment.⁵⁹

⁵⁶Tex. R. App. P. 24.1(b).

⁵⁷*See generally* Dorsaneo at § 148.04[4].

⁵⁸Tex. R. App. P. 24.2(a)(1).

⁵⁹*Haney Elec. co. v. Hurst*, 608 S.W.2d 355, 356 (Tex. Civ. App.-Dallas 1980, no writ).

2. Supersedeas Bonds (cont.)

a. Proper amount (cont.)

- (a) Does not include contingent award of appellate attorneys fees.⁶⁰
- (b) Two years estimated interest has been suggested.⁶¹
- (3) Judgment for Recovery of Property⁶²
 - (a) Trial court can determine type of security required.
 - (b) Real property: the amount must be at least value of rent or revenue.
 - (c) Personal property: the amount must be at least value of property interest on date of rendition of judgment.
- (4) Judgment Other Than Money⁶³
 - (a) Trial court may set amount and type of security
 - (b) Security must protect against “loss or damage appeal might cause”
 - (c) Trial court has discretion *not* to suspend the judgment and to require the victor to pay security adequate to protect the debtor from “loss or damage caused by the relief” if it is later determined that the relief was improper

⁶⁰*Hughes v. Habitat Apartments*, 828 S.W.2d 794, 795 (Tex. App.-Dallas 1992, mot. on bond).

⁶¹Julia F. Pendery & Ken W. Good, *Chaining a Rottweiler-Miscellaneous Challenges in Supersedeas Bond Practice*, STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE, P. 2 (1997).

⁶²Tex. R. App. P. 24.2(a)(2).

⁶³Tex. R. App. P. 24.2(a)(3).

- b. Payable to judgment creditor⁶⁴
- c. Signed by judgment debtor or debtor's agent⁶⁵
- d. Signed by "sufficient" surety or sureties⁶⁶ as obligors;
 - (1) A sufficient surety is able to discharge the judgment.⁶⁷
 - (a) Prove sufficiency through financial statements, balance sheets, affidavits, etc.⁶⁸
 - (b) Surety owning only exempt assets is insufficient.⁶⁹
 - (c) Single surety, whether surety company or individual, should be sufficient.⁷⁰
 - (d) Court cannot require corporate surety.⁷¹
 - (2) A party to the suit cannot be a sufficient surety.⁷²
 - (a) Judgment debtor cannot be his own surety because no additional security would be provided.⁷³

⁶⁴Tex. R. App. P. 24.1(b).

⁶⁵*Id.*

⁶⁶*See generally* Dorsaneo at § 148.04[2][b][iv].

⁶⁷*United Employers Cas. Co. v. Daniels*, 133 S.W.2d 599, 600 (Tex. Civ. App.-Beaumont 1939, mot. on bond).

⁶⁸*See, e.g., Ruiz v. Watkins*, 701 S.W.2d 688, 691 (Tex. App.-Amarillo 1985, orig. proceeding).

⁶⁹*Phelan v. Settle*, 431 S.W.2d 376, 377 (Tex. Civ. App.-Austin 1968, mot. on bond).

⁷⁰*See* Tex. Ins. Code Ann. art. 7.19-1 (Vernon 1981); *Argonaut Underwriters Ins. Co. v. Byerly*, 329 S.W.2d 937, 939 (Tex. Civ. App.-Beaumont 1959, writ ref'd n.r.e.); *Ex parte Wrather*, 161 S.W.2d 774, 775 (Tex. 1942).

⁷¹*Hammonds v. Hammonds*, 313 S.W.2d 603, 605 (Tex. 1958); *Man-Gas Transmission Co.*, 693 S.W.2d at 577.

⁷²*TransAmerican Natural Gas v. Finkelstein*, 905 S.W.2d 412, 414-15 (Tex. App.-San Antonio 1995, dism'd as moot).

⁷³*Universal Auto Ins. Co. v. Culberson*, 51 S.W.2d 1071, 1072 (Tex. Civ. App.-Waco 1932, no writ).

- (b) For the same reason, a surety is insufficient if the only asset of the surety is the stock or other assets of the judgment debtor, or if the debtor owns the surety such that no additional security is provided.⁷⁴
- (c) Subsidiary of parent corporation can serve as surety for other subsidiaries of the same parent.⁷⁵
- (d) Defendant's liability insurer can serve as surety.⁷⁶
- (3) Practice point: Check to see if the surety is licensed by and in good standing with State Board of Insurance.⁷⁷
- e. Properly conditioned bond⁷⁸
 - (1) Surety is liable up to amount of bond if
 - (a) the debtor does not perform the judgment after appeal is either unperfected or dismissed;
 - (b) the debtor does not perform the judgment after appeal is final; or
 - (c) debtor does not pay value of the property interest's rent or revenue pending appeal where the judgment is for recovery of interest in property
 - (2) The new language in the rule should not be read to require the creditor demand performance of the judgment debtor. *See supra* at _____.

⁷⁴*TransAmerican Natural Gas Co. v. Finkelstein*, 911 S.W.2d 153-155-56 (Tex. App.-San Antonio 1995, orig. proceeding); *TransAmerican*, 905 S.W.2d at 414-15.

⁷⁵*Brown & Root, Inc. v. DeSautell*, 554 S.W.2d 764, 771 (Tex. Civ. App.-Houston [1st Dist.] 1977, writ ref'd n.r.e.).

⁷⁶*Id.*; *Butler v. Spratling*, 237 S.W.2d 793, 795 (Tex. Civ. App.-Fort Worth), *rev'd on other grounds*, 240 S.W.2d 1016 (1951); *Universal Transport & Dist. Co. v. Cantu*, 75 S.W.2d 697, 698 (Tex. Civ. App.-San Antonio 1934, no writ).

⁷⁷*See* Tex. Ins. Code Ann. art. 719-1 (Vernon 1981).

⁷⁸Tex. R. App. P. 24.1(d).

- f. Approved by the trial court clerk: Clerk is vested with discretion of judicial character in determining the sufficiency of a supersedeas bond.⁷⁹ *But see* _____ (discussing mandamus review).
- (1) Disapproval allowed:
- (a) where clerk has actual knowledge that surety's nonexempt assets are insufficient to satisfy the judgment⁸⁰
- (b) where no showing of solvency or financial worth (individual surety) is made⁸¹
- (2) Disapproval improper where:
- (a) parties stipulate to surety's financial ability to pay⁸²
- (b) no evidence supports conclusion surety is unable to pay⁸³
- (c) bond is in proper form and is properly executed⁸⁴
- (3) Any defect in form or content may be cured by amendment.⁸⁵

⁷⁹*Ruiz*, 701 S.W.2d at 690.

⁸⁰*Southern Underwriters v. Cyche*, 141 S.W.2d 674, 675 (Tex. Civ. App.-El Paso 1940, orig. proceeding).

⁸¹*English v. Treaccar*, 153 S.W.2d 539, 541 (Tex. Civ. App.-Galveston 1941, orig. proceeding).

⁸²*Ex parte Wrather*, 161 S.W.2d 774, 775 (Tex. 1942).

⁸³*Ruiz*, 701 S.W.2d at 690; *Groves v. Western Realty Co.*, 84 S.W.2d 835, 836 (Tex. Civ. App.-Dallas 1935, no writ)(evidence of insolvency insufficient to overcome sureties' affidavits).

⁸⁴*Lawyers Surety Co. v. Rankin*, 500 S.W.2d 181, 182 (Tex. Civ. App.-Houston [14th Dist.] 1973, writ ref'd n.r.e.).

⁸⁵*Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989); *Petroleum Casualty Co. v. Garrison*, 174 S.W.2d 74, 76 (Tex. Civ. App.-Beaumont 1943, writ ref'd w.o.m.).

- (4) Note: Failure of clerk to approve bond does not impair its validity as a common law obligation.⁸⁶

3. Deposit In Lieu of Bond⁸⁷

a. Types of Deposits--negotiability required

- (1) cash
- (2) cashier's check
- (a) payable to clerk
- (b) drawn on federally insured bank or savings and loan chartered under state or federal law
- (3) negotiable obligation of federal government or bank/S&L meeting cashier's check requirements [(2)(a) & (2)(b)]
- (a) leave of court required
- (b) CD's can qualify⁸⁸
- (c) Letter of credit does not qualify.⁸⁹
- (d) Non-negotiable receipt showing segregation of funds into account controlled by judgment debtor does not qualify.⁹⁰

b. Amount of Deposit: Same as amount of bond. *See supra* _____.

c. Clerk holds until conditions of liability are extinguished.

⁸⁶*Haun v. Steigleder*, 868 S.W.2d 387, 393 (Tex. App.--San Antonio 1993, no writ).

⁸⁷*See* Tex. R. App. P. 24.1(c) & Dorsaneo at § 148[2][c].

⁸⁸*Bank of East Texas v. Jones*, 758 S.W.2d 293, 296 (Tex. App.-Tyler 1988, orig. proceeding); *Southwestern States Gen. Corp. v. McKenzie*, 658 S.W.2d 850, 851-53 (Tex. App.-Dallas 1983, writ dismissed w.o.j.).

⁸⁹*Heritage Housing Corp. v. Ferguson*, 651 S.W.2d 272, 273 (Tex. App.-Dallas 1983, mot. on bond).

⁹⁰*Mercantile Bank & Trust v. Cunov*, 733 S.W.2d 717, 718 (Tex. App.-San Antonio 1987, mot. on bond).

- (1) Conditions are the same as those for a bond. *See supra* at _____.
- d. Note: Interpleader funds in court registry do not obviate need for bond.⁹¹
4. “Alternate” Security⁹²
 - a. The rules do not specify what property would qualify.
 - b. The rules require that the security be ordered by the court. The debtor must therefore move for approval and obtain a written order.

G. What if I Can’t Secure the Entire Amount of the Judgment?

1. Motion for a Reduction of Bond or for Alternate Security⁹³
 - a. Posting a bond, deposit, or security in the amount normally required (subsection (a) of the rule) will irreparably harm the judgment debtor.
 - (1) Mere inability to fully bond the judgment is not irreparable harm.⁹⁴
 - (2) Having to liquidate at “fire sale” prices can be irreparable harm⁹⁵
 - b. Posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor’s ability to recover the judgment after all appellate remedies are exhausted.
 - (1) i.e., judgment creditor is *no less protected* than he otherwise would have been, *not* that he is fully protected

⁹¹*Crockett v. Logue*, 515 S.W.2d 958, 959 (Tex. Civ. App.-Waco 1974, orig. proceeding).

⁹²Tex. R. App. P. 24.1(a)(4).

⁹³Tex. R. App. P. 24.2(b). *See also* Dorsaneo at § 148.04[4][g].

⁹⁴*Harvey v. Stanley*, 783 S.W.2d 217, 219 (Tex. App.-Fort Worth 1989, mot. on bond).

⁹⁵*Culbertson v. Brodsky*, 775 S.W.2d 451, 452 (Tex. App.-Fort Worth 1989, writ dism’d w.o.j.).

- (2) e.g., absent granting alternate security, the judgment creditor will be left with a bankrupt judgment debtor and no posted security for *any* part of the judgment⁹⁶

2. Debtor's Suggested Order of Proof:⁹⁷

- a. The process and financial requirements for obtaining a full supersedeas bond;
- b. the judgment debtor's diligent efforts to obtain a full supersedeas bond;
- c. the judgment debtor's inability despite these efforts to obtain a full supersedeas bond;
- d. if applicable, the amount of the bond which the judgment debtor *can* obtain;
- e. explanations from the sureties concerning reasons for unwillingness to issue a supersedeas bond in the full amount;
- f. the judgment debtor's inability to obtain a letter of credit to collateralize a bond (even at higher than market interest rates), and explanations from lending institutions concerning their refusal to issue a letter of credit;
- g. the judgment debtor's past, current, and projected financial condition;
- h. the existence of acceleration clauses which will be triggered by a judgment lien, precipitating judgment debtor's insolvency;
- i. the likely realizable liquidation value of the judgment debtor's assets;

⁹⁶*Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996) (orig. proceeding), *cert denied*, ____ U.S. ____, 117 S.Ct. 612 (1996).

⁹⁷See Elaine A. Carlson, *Supersedeas: Stays and Enforcements of Civil Judgments in Texas*, STATE BAR OF TEXAS, PRACTICING UNDER THE NEW TEXAS APPELLATE RULES 14-15 (July 1997) (citing Marie Yeates, *Perfecting the Appeal and Supersedeas*, in UNIV. OF TEXAS 4TH ANNUAL CONFERENCE ON TECHNIQUES FOR HANDLING CIVIL APPEALS IN STATE AND FEDERAL COURTS 27-28 (1994)).

- j. the requirement that the judgment debtor will have to sell assets at fire sale prices to bond the judgment in full or likelihood that judgment debtor will be forced into bankruptcy if alternate security is denied (i.e., irreparable harm);
 - k. the total value of the assets which the judgment creditor could reach if the judgment is not superseded; and
 - l. 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 (i.e., judgment creditor is *no less* protected than he otherwise would be).
3. Injunction or prohibition in lieu of security?
- a. Generally, where supersedeas is available, writ of injunction or writ of prohibition will not lie to suspend enforcement of the judgment;⁹⁸ however, the court of appeals may be able to issue an injunction in aid of its appellate jurisdiction to stay the disposition of property.⁹⁹

H. What if I am dissatisfied with the Trial Court's rulings regarding suspending enforcement of the judgment?¹⁰⁰

- 1. Appellate Review: Appellate Court can require that the amount of security be increased or decreased, that additional or different security be provided and approved by the clerk, or that "other changes" in the trial court's order be made.¹⁰¹
 - a. What Can be Reviewed?¹⁰²

⁹⁸*Burch v. Johnson*, 445 S.W.2d 631, 632 (Tex. Civ. App.-El Paso 1969, no writ); *Dallas Bank & Trust Co. v. Thompson*, 78 S.W.2d 740 (Tex. Civ. App.--Dallas 1935, orig. proceeding). See also Tex. R. App. P. 29.3 ("... the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas. . . .").

⁹⁹*Pace v. McEwen*, 604 S.W.2d 231, 232-33 (Tex. Civ. App.-San Antonio 1980, no writ).

¹⁰⁰See generally Dorsaneo at § 148.07.

¹⁰¹Tex. R. App. P. 24.4(d).

¹⁰²Tex. R. App. P. 24.4(a).

- (1) The amount of security (too much or not enough)
 - (2) The sureties
 - (3) The type of security given
 - (4) The determination of whether to suspend the judgment
 - (5) Trial court's exercise of continuing jurisdiction
 - (6) Note: Motions to determine lien status (*see supra* _____) are apparently for the trial court, not the court of appeals.¹⁰³
- b. At what point in time are conditions measured?¹⁰⁴
- (1) *Both* conditions as they existed at the time the decision was made and changes in those conditions can be considered.
- c. Review can be obtained even if trial court did not first conduct review.¹⁰⁵
- d. Temporary orders are available as necessary.¹⁰⁶
- e. Timing: Motion must be heard at the earliest practicable time.¹⁰⁷
- f. Fact finding: Remand can be used for taking evidence and making findings of fact.¹⁰⁸
- g. Miscellaneous:

¹⁰³*Chrysler First Financial Services Corp. v. Kimbrough, Carson & Woods*, 801 S.W.2d at 213, 213-214 (Tex. App.-Houston [1st Dist.] 1990, mot.).

¹⁰⁴Tex. R. App. P. 24.4(b).

¹⁰⁵*TransAmerican*, 911 S.W.2d at 154-55.

¹⁰⁶Tex. R. App. P. 24.4(c).

¹⁰⁷Tex. R. App. P. 24.4(d).

¹⁰⁸Tex. R. App. P. 24.4(d).

- (1) Where additional or other security is ordered, automatic 20 day stay is granted to allow for compliance, following which, enforcement can proceed.¹⁰⁹
 - (a) Note that the former rule (49(c)) allowed 20 days after the order was *served* to comply.
- (2) Clerk is to notify appellate court when additional security is filed.
- (3) Additional or different security does not release security previously provided *unless otherwise ordered*.¹¹⁰
 - (a) Practice point: draft the order yourself, specifically releasing the prior security, or failing that, inspect the appellate court's order carefully.

2. Mandamus Review

- a. Available against the trial court where discretion is abused.¹¹¹
 - (1) e.g., trial court has no discretion to interfere with debtor's right to supersede the judgment by *refusing* to set the required supersedeas amount.¹¹²
- b. Available against the court of appeals where discretion is abused.¹¹³

¹⁰⁹Tex. R. App. P. 24.4(e).

¹¹⁰Tex. R. App. P. 24.4(e).

¹¹¹*See, e.g., Oldfield*, 188 S.W.2d at 982-83 (trial court does not have discretion to refuse to set amount required to supersede the judgment).

¹¹²*Oldfield v. Lester*, 188 S.W.2d 982, 982-83 (Tex. 1945); *Vineyard v. Irvin*, 855 S.W.2d 208, 211-12 (Tex. App.-Corpus Christi 1993, orig. proceeding); *Continental Oil Co. v. Leshner*, 500 S.W.2d 183, 185-86 (Tex. Civ. App.-Houston [1st Dist.] 1973, orig. proceeding).

¹¹³*See, e.g., Swinney v. Tenth Court of Appeals*, 749 S.W.2d 50 (Tex. 1988)(orig. proceeding)(mandamus granted against appellate court which to increase the amount of the supersedeas bond that had become inadequate to secure the post judgment interest which had accrued over time).

- c. Available against the clerk if he/she improperly refuses to approve the surety bond.¹¹⁴
 - d. Must prove that remedy by appeal is inadequate.
 - (1) “The threat of execution on the judgment is a situation of manifest and urgent necessity which renders any remedy by appeal inadequate.”¹¹⁵
3. Trial court’s continuing jurisdiction after expiration of plenary power¹¹⁶
- a. jurisdiction to order the type of security and decide sufficiency of sureties
 - b. jurisdiction to modify the type or amount of security if circumstances change
 - c. Note: It is the duty of the judgment debtor to notify the appellate court of actions taken by the trial court after appellate jurisdiction attaches.

¹¹⁴*Ruiz*, 701 S.W.2d at 691. *See also Groves*, 84 S.W.2d at 836.

¹¹⁵*Isern*, 925 S.W.2d at 606.

¹¹⁶Tex. R. App. P. 24.3

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