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**A spoonful of supersedeas helps the judgment  
go down**

# Texas Supreme Court

- *In re Longview Energy Co.*
- *In re State Bd. for Educator Certification*
- *In re Corral-Lerma*
- *In re Nalle Plastics Family L.P.*

## *In re State Bd. for Educator Certification*

- **Issue**: Does the trial court have discretion to deny suspension of a non-money judgment when the state files a notice of appeal?
- **Holding**: a trial court has discretion to prevent the Board from re-revoking a teacher's professional license while the Board appeals, for however long, the court's rejection of the Board's initial revocation.

## *In re State Bd. for Educator Certification*

- **Board initiates proceedings to revoke Motalvo's teaching certificate due to allegations of improper educator-student contact.**
- **Admin. Law Judge determined no discipline warranted**
- **Board adopts findings but concludes that ALJ failed to appropriately interpret and apply board policies and rules**
- **Board finds Montalvo unworthy to instruct or supervise youth of the state and revokes his educator certificate**

## *In re State Bd. for Educator Certification*

- **Trial court rules that Board acted arbitrarily and capriciously and permanently enjoins the board from revoking Montalvo's certification**
- **Montalvo posted security and the trial court ordered that under TRAP 24.2(a)(3) any appeal by the Board would not supersede the judgment during an appeal**

## *In re State Bd. for Educator Certification*

- **The court of appeals denied relief to Board, and the Board sought mandamus relief from the Texas Supreme Court.**
- **Supreme Court Opinion:**
  - CPRC 6.001 says a governmental entity may not be required to file a bond for an appeal in a civil suit.
  - An appeal automatically suspends enforcement
  - But this doesn't mean governmental entities have an absolute automatic right to supersedeas

## *In re State Bd. for Educator Certification*

- **TRAP 24.2(a)(3) applies where the judgment is for something other than money**
- **Does 24.2(a)(3) trump and give the trial court discretion to deny supersedeas—to “superdupersedeas”**
- **CPRC 6.001 does not confer unfettered power to force suspension of a judgment**

## *In re State Bd. For Educator Certification*

- **Concurrence (Guzman):**
  - Record fails to show the trial court considered the potentially significant harm to schoolchildren before reinstating Montalvo's educator certificate
  - The trial court's findings only address the potential harm to Montalvo
  - State Board did not argue any abuse of discretion, however

# *In re Longview Energy Co.*

- **Three Issues**

- What are “compensatory damages” for purposes of CPRC § 52.006 and TRAP 24?
- What is the scope of post-judgment discovery?
- Is the \$25 million cap imposed *per defendant*, or *per judgment*?

## *In re Longview Energy Co.*

- Longview sued William Huff and Rick D'Angelo for breach for breach of fiduciary duty, and sued Huff Energy, WRH Energy, and Riley-Huff for knowing participation. Longview sought disgorgement damages only
- Following a jury verdict in favor of Longview, judgment rendered against all 5 defendants jointly and severally for \$95.5 million, described as past-production revenues minus credits for purchase price, development costs and other expenses

## *In re Longview Energy Co.*

- **An amended judgment omitted the description of damages and simply rendered judgment jointly and severally for \$95.5 million**
- **The defendants appealed and jointly posted a bond for \$25 million**
- **Longview moved to modify the bond to require each of the 5 defendants to post security equal to the lesser of \$25 million or 50% of the defendant's net worth**

## *In re Longview Energy Co.*

- **The trial court granted Longview's motion as to all defendants but Riley-Huff.**
- **The court also ordered Huff Energy to produce on a monthly basis all documents pertaining to operation of the shale assets held by Riley-Huff**
- **On motion for review in the court of appeals, a divided court held that the defendants only had to post a collective \$25 million**
- **The court rejected Huff Energy's argument that the discovery order was an abuse of discretion**

## *In re Longview Energy Co.*

- **Is the \$25 million cap imposed *per defendant*, or *per judgment*?**
- **What are “compensatory damages”?**
  - “A judgment that makes the ‘defendant liable in excess of net gains[] results in a punitive sanction that the law of restitution normally attempts to avoid.’”
  - “We cannot conclude that the award is compensatory when it cannot be explained.”
  - *Nalle Plastics*: costs and interest are not compensatory otherwise those wouldn’t be listed separately

## *In re Longview Energy Co.*

- Disgorgement is an equitable forfeiture of benefits wrongfully obtained
- It is compensatory in the same sense as attorney's fees, interest, and costs, but it is not ***damages***
- Result: The only amount for which security was required were costs of \$66,645.00
- Because of this holding, the court did not reach the issue of whether the cap is per defendant or per judgment

# Open questions?

- **What about other remedies based in equity?**
  - Constructive trust
  - Rescission damages
  - Fee forfeiture
- **Are liquidated damages “compensatory damages”?**
- **Are statutory damages or civil penalties “compensatory damages”?**

## *In re Longview Energy Co.*

- **Post-judgment and *post-supersedeas* discovery**
  - TRAP 24.1(e) allows for orders necessary to protect the creditor against loss or damage the appeal might cause

## *In re Longview Energy Co.*

- Huff argued that TRCP 621a limits TRAP 24.1(e) and allows for discovery to aid in ***enforcement***
- TC found that requiring a bond as to a constructive trust portion of the judgment would work a substantial hardship on Riley-Huff, and *instead* give Longview access to information regarding operations on shale assets
- Huff argued that there had to be a threat of dissipation of assets to permit the discovery

## *In re Longview Energy Co.*

- Held: TRCP 621a permits discovery *relevant to Rule 24 motions*
- Proof of dissipation not required when discovery is provided in lieu of security
- Both lower courts found the order reasonable by its terms, and supreme court was unable to find an abuse of discretion

## *In re Nalle Plastics Family L.P.*

- **Issue:** Does the requirement of posting security equaling the sum of compensatory damages awarded, interest for the estimated duration of the appeal, and costs awarded **include attorney's fees incurred in the prosecution or defense of the claim?**
- **Facts:**
  - Law firm sues Nalle for breach of contract to recover legal fees

## *In re Nalle Plastics Family L.P.*

- Jury finds breach and \$132,661 in damages
- Jury also awards \$150,000 as attorney's fees for the breach of contract action
- Judgment awards law firm actual damages of \$132,661 and attorney's fees of \$150,000, plus pre-and post-judgment interest and costs of court
- Nalle files a cash deposit for \$132,661, plus pre- and post-judgment interest and court costs

## *In re Nalle Plastics Family L.P.*

- Law firm challenges the amount because of absence of attorney's fees for suit, asserting that the fees are compensatory damages or costs
- The TC agrees and orders additional supersedeas to cover the fees for bringing suit
- Upon review in the COA, the COA concluded that 2003 amendment did not explicitly exclude attorney's fees, and that attorney's fees are both compensatory damages and costs for purposes of supersedeas

## *In re Nalle Plastics Family L.P.*

- **COAs were in conflict**
  - 1<sup>st</sup>, 8<sup>th</sup>, 13<sup>th</sup>, & 14<sup>th</sup> said fees are either compensatory damages or costs
  - 3<sup>rd</sup> and 5<sup>th</sup> said fees are neither compensatory damages nor costs
- **Held: attorney’s fees are not “compensatory damages”**
  - many opinions hold that fees are not damages—“actual” or “economic”
  - American rule: legislature designates when fees recoverable, distinguishing between fees and damages

## *In re Nalle Plastics Family L.P.*

- To prevail under CPRC § 38.001, a party must prevail and recover damages
- While fees may compensate by making a claimant whole, “they are not, and have never been, damages”
- Costs and interest are not compensatory damages; otherwise there would have been no need to list them separately
- No categorical ruling that fees are never compensatory damages
  - The law firm’s fees for breach of contract are one example

## *In re Nalle Plastics Family L.P.*

- “costs awarded in the judgment” means court costs
- Costs generally do not include attorney’s fees

## *In re Corral-Lerma*

- **Corral-Lerma sued Border Demolition under the Texas Theft Liability Act; Border Demolition counterclaimed for attorney's fees under the same act**
- **TC granted summary judgment for Border Demolition and awarded fees of \$78,001 through trial and conditional fees for appeal as well as court costs and post-judgment interest**

## *In re Corral-Lerma*

- **Corral-Lerma deposited \$3,599.20 for the costs awarded**
- **Border Demolition sought review, and TC agreed that the fees are not compensatory damages**
- **COA held that the fees are compensatory damages that must be superseded**

## *In re Corral-Lerma*

- **Border Demolition distinguished *Nalle* pointing out that a prevailing defendant can get fees without damages**
- **Supreme court says this statutory distinction does not undermine inherent differences between compensatory damages and attorney's fees**
- **Court was unmoved by argument that judgment creditor is unprotected during the appeal**

## *In re Corral-Lerma*

- **Border Demolition also argued that the security must cover interest on fees, as the statute calls for “interest for the estimated duration of the appeal” without distinguishing between types of damages**
- **Held: “It is unreasonable to construe the current supersedeas statute to require interest on categories of a judgment the Legislature specifically sought to exclude from the security amount.”**

# Other burning issues and questions

- **Net worth—how is it calculated?**
  - Book value vs. current fair market value?
  - GAAP vs. other methods of accounting
  - Is insurance an asset to be included?
  - What if the defendant maintains reserves to cover repair and replacement of its product?
  - Are exempt assets such as a homestead or retirement account excluded?
  - Is the judgment itself excluded?
  - What kind of proof will be required?

# Calculating net worth

- **Most intermediate courts have concluded that net worth is calculated as total assets minus total liabilities, using GAAP**
- **What is not a measure of net worth?**
  - Tax returns
  - Projected revenues
  - Market value or market capitalization
  - Ability to make payroll

# Calculating net worth

- **Is the judgment itself included as a liability?**
- **No**
  - *Business Staffing Inc. v. Jackson Hot Oil Service* (El Paso)
  - *Montelongo v. Exit Stage Left, Inc.* (El Paso)
  - *Anderton v. Cauley* (Dallas)
  - *McCullough v. Scarbrough, Medlin & Assocs.* (Dallas)
- **But...maybe. See *Montelongo***

# Calculating net worth

- **Are exempt assets included?**
  - No abuse of discretion to include debtor's homestead—*Montelongo v. Exit Stage Left, Inc.* (El Paso)
- **What is a liability?**
  - Distributions owed to shareholders qualify as long as it is a valid obligation—*Texas Custom Pools* (El Paso)

# Calculating net worth

- **At what point in time do you measure net worth?**
  - TRAP 24.2(a)(1)(A) references “current net worth”
  - The Houston First District Court of Appeals has said this means “at the time the bond is set.” *EnviroPower, L.L.C. v. Bear, Stearns & Co.*
  - What if the judgment debtor’s net worth changes during the appeal?

# Discovery of “net worth”

- **Discovery of net worth under CPRC 41.011 (exemplary damages) may be broader than discovery allowed under TRAP 24.**

# Proving net worth

- **Is expert testimony required?**
  - “Testimony from interested witnesses may establish a fact as a matter of law only if the testimony could readily be contradicted if untrue, is clear, direct, and positive, and there are no circumstances tending to discredit it.” *Payson Petro., Inc. v. Wheeler*, (Dallas June 26, 2015)

# Proving net worth

- **Do you need an audited financial statements?**
  - No. *Hunter Buildings & Manufacturing L.P. v. MBI Global LLP* (Houston 1<sup>st</sup>)
- **What if the financial statement is consolidated (for multiple entities)?**
  - *Hunter Buildings & Manufacturing L.P. v. MBI Global LLP* (Houston 1<sup>st</sup>)

# *Hunter Buildings & Manufacturing L.P. v. MBI Global LLP*

- Plaintiff takes a judgment against six entities, including A, B, and C. All defendants are jointly and severally liable.
- A posts a cash deposit of \$1,579.190, claiming a net worth of \$2,864,743
- B posts a cash deposit of \$100, claiming a negative net worth
- C posts a cash deposit of \$100, claiming a negative net worth

## Hunter Bldgs (cont.)

- Plaintiff challenges the net worth affidavits. TC finds B's net worth to be \$9,997,810 and orders additional security. No findings made as to net worth of A or C.
- TC also finds that B is the general partner and in control of all B related subsidiaries (which includes A and C)
- TC finds that GAAP requires B's net worth to be based upon a consolidated financial statement due to its control. A and C are included in the consolidated statement.

## Hunter Bldgs (cont.)

- TC finds that no defendant met its burden by presenting evidence of net worth. But the court finds no need to disturb A's and C's net worth affidavits.
- A, B, & C seek review with the COA.

## Hunter Bldgs (cont.)

- **First issue: consolidated statement**
  - Experts agreed that GAAP requires a consolidated financial statement
  - But applicable authority requires each individual debtor's net worth to be determined separately
  - NOTE: there are no allegations of alter ego
  - Holding: GAAP does not displace the rule requiring separate determinations of net worth. It was error to include non-debtor affiliated companies in calculating B's net worth

## Hunter Bldgs (cont.)

- **Second issue: audited statements?**
  - Does “in compliance with GAAP” mean the statement of net worth must be audited and certified as GAAP compliant by a CPA?
  - Or does it mean calculate net worth using GAAP methodology?
  - Holding: audited net worth evidence is not required. A company bookkeeper can prepare and present a balance sheet using GAAP principles.

## Hunter Bldgs (cont.)

- Applying those rulings, the COA said that B's consolidated statement showed A's and C's separate net worths. That along with other uncontradicted testimony was sufficient to establish the amounts such that the COA set the bond amounts.
- B did not own 100% of all the subsidiaries. TC erred in using a consolidated balance sheet.

## Hunter Bldgs (cont.)

- B's affidavit set out a negative net worth. It was uncontroverted except for the consolidated statement and the TC shouldn't have considered it. COA finds B's net worth to be negative and sets the bond at \$100 for B.
- COA does not address one final issue—propriety of joint and several against all defendants—because it says that is a merits issue